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REGIONAL HUMAN RIGHTS REPORT 2005

Publisher

The Belgrade Centre for Human Rights

(on behalf of the Balkan Human Rights Network)

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Circulation

1000 copies

ISBN 86-7202-086-3

Printed by

Dosije, Belgrade

REGIONAL HUMAN RIGHTS REPORT 2005

Belgrade Centre for Human Rights
Belgrade, 2006

This publication was supported by the Neighbourhood Programme of the Danish Ministry of Foreign Affairs

Views expressed in the publication are those of the individual authors and relevant partner organisations.

The editors gratefully acknowledge the encouragement and advice of the Danish Institute for Human Rights.

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Abbreviations

ADA	Anti-Discrimination Act
AK	Assembly of Kosovo
BCHR	Belgrade Centre for Human Rights
BGRF	Bulgarian Gender Research Foundation
BiH	Bosnia and Herzegovina
BHC	Bulgarian Helsinki Committee
BOC	Bulgarian Orthodox Church
CEC	Central Election Commission
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CHC	Croatian Helsinki Committee for Human Rights
Constitutional Charter	Constitutional Charter of the State Union of Serbia and Montenegro
CPC	Criminal Procedure Code
CPM	Minority Rights Centre
CPT	Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child
CRCA	Children's Human Rights Centre of Albania
DS	Democratic Party
DSS	Democratic Party of Serbia
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
EPH	Europa Press Holding
FIDH	International Federation for Human Rights
FRBA	Foreigners in the Republic of Bulgaria Act
GK	Government of Kosovo
HR Charter	Charter on Human and Minority Rights and Civil Liberties
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDPs	Internally Displaced Person

- ILO International Labour Organisation
- KFOR Kosovo Forces
- LEPS Law on the Execution of Penal Sanctions
- MANS Network for the Affirmation of the Non-Government Sector
- MRF Movement for Rights and Freedoms
- MFRA Marriage and Family Relations Act
- MEC Municipal Election Commission
- NCRT National Council on Radio and Television
- NGO Non-governmental organisation
- NMSS National Movement of Simeon the Second
- OHR Office of the High Representative
- OSCE Organisation for Security and Co-operation in Europe
- PCCK Provisional Criminal Code of Kosovo
- PCPC Provisional Criminal Procedure Code of Kosovo
- PISG Provisional Institutions of Self-Government in Kosovo
- PSS Force of Serbia Movement
- RS Republika Srpska
- SAA Stabilisation and Association Agreement
- SaM Serbia and Montenegro
- SAP Stabilisation and Association Process
- SMMRI Strategic Marketing and Media Research Institute
- SPO Serbian Renewal Movement
- SPS Socialist Party of Serbia
- SRSG Special Representative of the UN Secretary-General
- Torture Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- UDHR Universal Declaration of Human Rights
- UN United Nations
- UNESCO United Nations Educational, Scientific and Cultural Organisation
- UNHCR United Nations High Commissioner for Refugees
- UNICEF United Nations Children's Fund
- UNMIK United Nations Mission in Kosovo
- UOPS Constitutional Framework for Provisional Self-Government in Kosovo
- YIHR Youth Initiative for Human Right

Preface

The Balkan Human Rights Network (BHRN) embarked on preparing and publishing a regional report on human rights in the latter half of 2005. The result of this joint endeavour lies before you after ten months.

The eight texts on human rights in legislation and practice were prepared by BHRN regional partners – *Albanian Helsinki Committee, Children's Human Rights Centre of Albania, Human Rights Centre of the University in Sarajevo* from Bosnia and Herzegovina, *Bulgarian Gender Research Foundation, Croatian Helsinki Committee for Human Rights, Council for the Defense of Human Rights and Freedoms* from Kosovo, *Helsinki Committee for Human Rights of the Republic of Macedonia, Human Rights Action* from Montenegro, *Belgrade Centre for Human Rights and Child Rights Centre* from Serbia.

The authors of the individual reports and Report editors succeeded in partly conforming their methodological approaches to the analysis of human rights in their respective states. Although nearly all the states (apart from Albania and Bulgaria) once shared the same legal system, the fifteen years that have passed since, the various social and political circumstances and development of law resulted in considerable differences in terms of the quality of legal regulation and especially of the state of human rights in practice. The authors and the organisations they work for had decisive influence on the content of their country reports.

Each national report deals with the legislation of human rights and their practical implementation and the protection of human rights. All reports open with a general assessment of the social and political circumstances in each state, thus setting a general framework of conditions for guaranteeing and enjoying human rights and increasing the readers' understanding of the atmosphere in the specific societies the reports refer to.

The Reports in Part II provide an analysis and detailed assessments of the legal provisions regarding human rights. The national legislation in this area is compared with the most relevant ratified international legal instruments, above all the European Convention on Human Rights and Fundamental Freedoms.

Part of each individual report focuses on the quality of enjoyment of human rights and lists the most relevant instances of human rights violations in the individual country. Like in their analyses of the legislation, the authors opted for devoting most attention to the human rights they found to have been the most jeopardised or violated in 2005.

The table at the end of the Report lists the international treaties and other international human rights instruments ratified by Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, Macedonia, Montenegro and Serbia.

Introduction

The readers of this Report will note specific regularities in terms of the state of human rights in the region, which are corroborated by the attention devoted to individual rights. Notwithstanding the above-mentioned differences between the states, specific general (and, of course, generalised) conclusions can be drawn.

All states face problems arising from the lack of comprehensive incorporation of human rights guarantees enshrined in ratified international documents in their national legal systems. The states in the region accepted and ratified all relevant international human rights treaties either by succeeding the legal obligations of the former states or by again accessing international treaties and organisations. Unfortunately, these commendable political moves were not always followed by comprehensive and sincere willingness to consistently incorporate the provisions of the treaties in national laws and implement them in everyday practice.

The authors of the national reports address most of their criticism at the inefficient protection of the right to a fair trial, violations of the prohibition of torture, inhuman or degrading treatment or punishment, disrespect for the right to peaceful enjoyment of property, relatively frequent violations of the prohibition of discrimination and the poor state of economic and social rights.

Albania. – Albania's report focuses on the analysis of political rights, the right to a fair trial, treatment of persons deprived of liberty, freedom of expression and the status of media, rights of minorities, child and women's rights, and trafficking in humans. The legal and constitutional guarantees of the majority of rights are mostly in accord with recognised international standards. The authors, however, note shortcomings in regulations on the right to a fair trial and treatment of persons deprived of liberty (right to defence), media rights (lack of regulations on digital electronic media), freedom of religion (lack of separate state agreements with specific religious communities). Definition of torture in Albanian legislation is defective and not in conformity with Committee against Torture recommendations. Greatest problems are encountered in implementation of laws. The state also lacks strategies and policies on specific areas, that could help improve the status of women and prevent violations of their rights. The fight against human trafficking calls for greater state allocations, especially for witness and victim protection programmes. The authors in general recommend to Albanian state bodies to improve co-operation with national NGOs and international institutions.

Bosnia and Herzegovina. – Bosnia and Herzegovina (BiH) has a specific political order and special rules on the division of powers between its entities. Guarantees of human rights are incorporated in its system via explicit and direct Dayton Peace Accords provisions on the applicability of international instruments.

The BiH report focuses on problems, lacunae and substandard practice in prohibition of discrimination (especially in the realisation of civil and political rights), the right to a fair trial (primarily, inefficient courts and long trials) and the realisation of economic and social rights. Bosnia and Herzegovina, its entities and other levels of authority are unable to ensure the respect of economic and social rights of all citizens, especially due to the unstable political environment, poor economic system, inefficient legal protection and general impoverishment in BiH.

Bulgaria. – Bulgaria invested considerable efforts in improving the state of human rights in 2005, *inter alia*, with the aim of fulfilling EU accession criteria. There are, however, still serious shortcomings in its human rights legislation and practice. The police frequently resort to force and firearms, the living conditions in some jails and detention units are inhuman, full integration of minority groups and persons with disabilities has not been achieved yet. Problems in implementing the judicial reform, widespread corruption and the devastating effects of organised crime still plague Bulgaria. The report focuses on the right to life, prohibition of torture (conditions in detention facilities), right to liberty and security of person, judicial independence, the right to a fair trial and social rights. Right to asylum, rights of migrants and women's rights are analysed in great detail. Different forms of violence against women or violations of their rights, such as domestic violence and human trafficking, are relatively frequent. Although it ratified several international instruments and amended a number of laws (including the Penal Code), Bulgaria is yet to establish efficient legal and other mechanisms to prevent and punish such acts.

Croatia. – NGOs in Croatia have in 2005 received more civil complaints of alleged human rights violations than in the preceding years. The substandard prison conditions, inefficient courts and restrictions of the rights regarding compulsory health insurance contributed to the deterioration of the state of human rights in Croatia. Abolition or restriction of specific social rights is a problem in itself. The 2005 local elections proved the legal regulation of political rights is insufficiently precise and that political institutions have problems in operating. Namely, the political bargaining with won seats that ensued after the local elections resulted in crises in several municipalities, where forming of local governments took several months. The fact that over 50 ethnically motivated incidents were recorded in 2005 also gives rise to concern. Improvement was recorded with respect to enjoyment of pension insurance rights (payments of part of the post-1995 debt to pensioners). Moreover, Croatia has achieved full cooperation with the ICTY in 2005.

Kosovo. – Kosovo's special status arises from its undefined status and legacy of the past. These reasons strongly imbibe the political, legal, economic and media atmosphere of Kosovo today. In addition, the presence of international political institutions and military troops also affects the circumstances in Kosovo. The years marked by conflicts have significantly undermined the prerequisites for the efficient

protection and promotion of human rights. Notwithstanding the indisputable efforts invested by international and local protagonists and some headway, the state of human rights in Kosovo remains dissatisfactory. Authors of the Kosovo report underline the inconsistency of the legal order, unclear division of powers, major problems regarding the enjoyment of the right to a fair trial, liberty and security of person, the right to peaceful enjoyment of property and political rights. Violations of the right to an effective legal remedy come as a result of structural loopholes in the Kosovo legal order and are one of the greatest obstacles to the efficient protection of human rights.

Macedonia. – In 2005, the situation in Macedonia was still affected by the 2001 armed conflict. In general, politics still predominate over law in institutions and the legal system, ethnic criteria still affect decision-making; reforms have halted and international standards and recommendations to promote them are ignored; poverty has been steadily increasing in the country. Widespread corruption is a major obstacle to realising the principle of rule of law in Macedonia. The local elections held in 2005 corroborated the major problems and significant irregularities in the functioning of the electoral and political processes. Discrimination of Roma, Albanians and women in the elections and the failure to provide illiterate, IDP and disabled persons with the right to vote are especially concerning.

Serbia and Montenegro formally constituted the State Union of Serbia and Montenegro in 2005. This status had to an extent affected the quality of the legal regulation of human rights. However, the institutions and legal systems of the former member-states had essentially operated separately within the Union.

Montenegro. – The Montenegrin report on human rights devotes the most space to the lack of will to try and efficiently prosecute perpetrators of human rights violations, long court proceedings, the inadequate training of judges and prosecutors, frequent discrimination of Roma, women, single mothers, sexual minorities and persons with disabilities. The authors note that prosecution of instigators of national, ethnic, racial and religious hatred is inadequate, as is the investigation and prosecution of incidents of torture, especially those representing hate-crime. Montenegro is also yet to address the unresolved crimes (assassinations of the chief editor of the daily Dan and a senior Montenegrin police officer) and some other murders that had disturbed the public. Lack of investigations of war crimes, which had occurred in Montenegro, is a problem in itself. The enjoyment of economic and social rights remained unfavourable in 2005 and the right to work was frequently violated also by private employers.

Serbia. – Serbia failed to adopt a new Constitution although five years had passed since the ouster of Milošević's undemocratic regime. The absence of a modern and comprehensive constitutional guarantee of human rights has rendered their practical protection and application difficult as well. The year 2005 was marked by stagnation and even a mild deterioration of the state of human rights in

specific areas. Serbia suffered primarily from the chronic problems related to the inefficiency of the judiciary, violations of the right to a fair trial, relatively frequent cases of (police) brutality, discrimination and frequent resort to hate speech. The several encouraging laws regulating economic and social rights adopted in 2005 have failed to essentially improve the quality of enjoyment of those rights. Serbia in 2005 also failed to regulate the open issues of opening secret service files and responsibility for violations of human rights (lustration or vetting). Headway was made in some areas of criminal law (libel and defamation no longer warrant prison sentences, the new provisions incriminate torture better). Relatively good laws on the police and enforcement of criminal sanctions were also promulgated in 2005.

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HUMAN RIGHTS IN THE REPUBLIC OF ALBANIA IN 2005

I INTRODUCTION

Political and social situation. – Albania is a parliamentary republic, a unitary state, where the separation of powers as well as the decentralisation are the main principles of state organisation.¹ Governance is based on free, equal, general and periodic elections. The last elections took place on 3 July 2005 and the Democratic Party and its allies won the majority in the Assembly after eight years in the opposition. Albania is considered one of the poorest countries in Europe and remains the country with the highest level of poverty in Eastern Europe. It ranks 72nd out of 177 countries in the 2005 Human Development Report, with a Human Development Index value of 0.780. Officially, unemployment hovered at 14.4 percent in 2004, although it may be as high as 30 percent.²

The country suffers from a high perceived level of corruption, as several studies and reports indicate. According to the Transparency International 2005 annual survey, Albania ranked 126th out of 159 countries with a CPI Score of 2.4,³ a problem also highlighted in the EU Commission Progress Report for 2005.⁴ The DP majority centred its election campaign on corruption which undermines public confidence in state structures and is the main enemy of the rule of law and development of the country. This is one of priorities of the government's program.⁵ Albania initialised the Stabilisation and Association Agreement (SAA) with the European Union.⁶ The country will have to keep up

1 Articles 1, 7 and 13 of the Constitution.

2 Human Development Index, 2005. See http://hdr.undp.org/statistics/data/country_fact_sheets/cty_fs_ALB.html.

3 The 2005 Transparency International Corruption Perceptions Index. See <http://www.infoplease.com/ipa/A0781359.html>.

4 EC, Albania 2005 Progress Report, Brussels, 9 November 2005, SEC (2005) 1421, [COM (2005) 561 final]. See http://europa.eu.int/comm/enlargement/report_2005/pdf/package/sec_1421_final_en_progress_report_al.pdf.

5 Government programme 2005–2009, presented in the Assembly of the Republic of Albania, on 9 September 2005. See <http://www.keshilliministrave.al/english/programi/default.asp>.

6 Negotiations began on January 2003 and lasted until December 2005. The Agreement was officially initialled in February 2006 and signed in June 2006.

with the rhythm of reform needed for its development to achieve the required standards.⁷

II HUMAN RIGHTS IN LEGISLATION

This part of the report gives a summary of the Albanian legislation on human rights and freedoms and provides information on the main constitutional principles, such as that of equality, limitation of rights and freedoms, subjects enjoying such rights.

1. Constitutional Provisions on Human Rights

The Albanian Constitution⁸ dedicates a separate chapter to human rights. These rights are indivisible, inalienable, and inviolable and form the basis of the entire juridical order.⁹ The Constitution further clarifies that agencies with public authority shall during the fulfilment of their duties respect the fundamental rights and freedoms and contribute to their realisation. Rights and freedoms are enjoyed by Albanian citizens and foreigners, as well stateless persons in the territory of the Republic of Albania.¹⁰

The Constitution classifies the rights as 1. personal rights and freedoms, 2. political rights and freedoms and 3. economic, social and cultural rights. It also includes a specific chapter dealing with social objectives, which declares the goals the Albanian state within its constitutional competencies and the means it possesses and aims to be achieved.

1.1. International Agreements Ratified by Albania. – Ratified international agreements on human rights are part of the national legislation and have priority over any national law that conflicts with their provisions.¹¹ A complete list of ratified international conventions is given in Appendix. The European Convention on Human Rights, ratified by law,¹² occupies a special place in the Constitution compared to other ratified international treaties. It is the only convention specifically mentioned in the text of the Constitution: Article 17 of the Constitution provides that the limitations to human rights may not in any case “exceed the limitations provided for in the European Convention on Human Rights”. Law 8137 that ratified the ECHR in Article 5 recognises “the jurisdiction of the European Court on Human

7 The information reflects development in a period which is outside the one targeted by the Report but is relevant to the Report.

8 Law No. 8137, dated 31 July 1996, “On Ratification of the ECHR,” published in the Official Journal No. 20, dated 12 August 1996.

9 Article 15 of the Constitution.

10 Article 16 of the Constitution.

11 Articles 116 and 122 of the Constitution.

12 The Republic of Albania ratified the ECHR by Law No. 8137, dated 31 July 1996, published in the Official Journal No. 20, dated 12 August 1996.

Rights regarding the interpretation and application of the Convention.” The ECHR is considered an integral part of the Albanian Constitution with regard to the limitations of the human rights expressly guaranteed by the Constitution.¹³ The interpretation of the ECHR must be taken into account and respected by every Albanian institution, courts included.

2. Right to Effective Remedy for Human Rights Violations

This part of the report provides a summary of the legal mechanisms adopted by the country to protect human rights and freedoms. Such mechanisms are foreseen in the Constitution and further elaborated in the legislation. Such mechanisms include courts but administrative bodies as well, such as the People's Advocate. In addition, this Part details the powers of the Constitutional Court in protecting human rights and freedoms and reviews international jurisdiction mechanisms and how they can be used to guarantee the protection of human rights and freedoms. The Constitution provides for the judicial protection of the rights and freedoms envisaged by the Constitution. The principle is envisaged in Article 42 of the Constitution, which guarantees both due process for any infringement of rights and a fair and public judgment, within a reasonable time and by an independent and unbiased court as determined by the law, with the aim of protecting constitutional and legal human rights, freedoms and interests. Thus, the Constitution provides for the judicial protection of human rights and freedoms. In fact, Article 42 of the Constitution provides for the protection of not only rights and freedoms guaranteed by the Constitution, but also extends protection to rights guaranteed by laws and even protection of interests of anyone who claims his or her interests were endangered or violated.

2.1. Courts. – Courts hearing appeals to protect rights and freedoms include the High Court, courts of appeal, first-instance courts and other special tribunals¹⁴ such as courts for serious crimes.¹⁵ A few laws regulate the organisation and functioning of these courts, such as the Law on Judicial Powers,¹⁶ Law on the High Court,¹⁷ and separate laws regulating the work of special courts.¹⁸

13 Anastasi A., *E drejta kushtetuese [Constitutional Law]*, “Pegi” Publishing House, Tirana 2003.

14 Articles 135–147 of the Constitution.

15 Established by Law No. 9110, dated 24 July 2003, “on Organisation and Functioning of the Serious Crimes Courts”, published in the Official Journal No. 78, dated 22 September 2003.

16 Law No. 8436, dated 28 December 1996 amended by Law No. 8546, dated 5 November 1999, Law No. 8656, dated 31 July 2000, and Law No. 8811, dated 17 May 2001.

17 Regulated by Law No. 8588, dated 15 March 2000.

18 Several constitutional provisions apply to all the ordinary courts: the terms in office of judges may not be restricted; their pay and benefits may not be reduced; their decisions are to be reasoned and state bodies are obliged to execute them; no judge may be involved in any other state, political or private activity; they have their own budget that they themselves propose and administer; they are independent and subject only to the Constitution and the laws, and interference in their work entails legal accountability; all their decisions are rendered in the name of the Republic and announced publicly.

2.2. *Constitutional Court.* – The Constitutional Court,¹⁹ is a special body that provides for the final interpretation of the Constitution. This Court is not part of the regular judicial system and is not seen as the highest instance national court protecting human rights and freedoms. It is the final adjudicator of individuals' claims of violations of their right to a due process of law upon exhaustion of all legal remedies.

2.3. *Jurisdiction of International Courts.* – The European Court on Human Rights is the court Albanians can address when seeking remedies for violations or infringements of their human rights and freedoms, an avenue Albania accepted by ratifying the ECHR and its Protocols. Also, the country has accepted the jurisdiction of the International Criminal Court,²⁰ but not the compulsory jurisdiction of the International Court of Justice.²¹

2.4. *Other Institutional Protection of Human Rights and Freedoms.* – In addition to court protection of human rights and freedoms, the Albanian Constitution provides for other remedies as well. It specifically foresees a People's Advocate as a defender of human rights and freedoms from infringements by the public administration institutions. The government has anticipated establishing several governmental institutions specifically to protect human rights or freedoms, which will be addressed hereinafter.

2.5. *The People's Advocate.* – The 1998 Albanian Constitution provides for the existence of the People's Advocate Office (Ombudsman) as an independent institutional human rights protection, which is further regulated by law.²² The People's Advocate is to defend the rights, freedoms and legitimate interests of individuals from the public administration bodies' unlawful or improper actions or failure to act.²³ It makes recommendations to public administration institutions with respect to violations of human rights and freedoms and may file with the Constitutional Court claims of unconstitutionality of normative acts it reviews in its daily work.²⁴ The People's Advocate has on several occasions exercised this right.²⁵

19 Articles 124–134 of the Constitution provide for establishment of specialised courts as decided by the Assembly. Law No. 8577, dated 10 February 2000, “On the Organisation and Functioning of the Constitutional Court of the Republic of Albania,” regulates in detail the organisation and functioning of this court.

20 Albania signed the Rome Statute on 18 July 1998 and deposited its instruments of ratification of the Rome Statute on 31 January 2003. See <http://www.icc-cpi.int/asp/statesparties/country&id=54.html>.

21 See <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm>.

22 Law No. 8454, “on the People's Advocate,” dated 4 February 1999, was approved by the Assembly to further regulate the organisation and functioning of this institution.

23 Article 60 of the Constitution.

24 Article 134 of the Constitution provides that the People's Advocate may file a claim with the Constitutional Court only regarding issues related to its purview, i.e. cases related to its constitutional function, which are the consequence of the actions or omissions to act by the public administration implementing laws or other normative acts and violating human rights and freedoms, which the People's Advocate has become aware of whilst reviewing claims, requests or notifications filed with it. See Constitutional Court Decision No. 49, dated 31 July 2000.

25 The People's Advocate has filed a few claims with the Constitutional Court so far and the latter has repealed as unconstitutional the normative acts questioned by the People's Advocate: see

III INDIVIDUAL RIGHTS

Human rights and fundamental freedoms are guaranteed by the Albanian Constitution and elaborated in detail by laws. State institutions generally try to observe human rights, although there have been cases of violations. An overview of the legislation and the situation with regard to several human rights and freedoms is presented herein below.

1. Right to a Fair Trial and Treatment of Persons Deprived of Liberty

1.1. Legislation. – The Constitution provides for the enjoyment of several rights and even regulations in judicial or administrative proceedings. Article 31 envisages rights guaranteed in a criminal proceeding²⁶ such as: the policeman at the time of detention or arrest *in flagranti*, the prosecutor shall during the criminal proceedings and the judge shall during the habeas corpus decision or judgment be obliged to inform the person accused of the right to be protected, to have a defence counsel²⁷ and the right to be provided with a free defence counsel if s/he cannot afford an attorney. Also, the Constitution requires that every one has the right to a fair and public trial within a reasonable time by an impartial court established by law.²⁸ A separate part of the Constitution is dedicated to the court system and provides that judges are independent, that their terms in office cannot be limited or salary and benefits lowered, that they apply the Constitution and the laws and that their decisions shall be public.

Decision No 26, dated 24 April 2001 and Decision No. 4, dated 17 February 2003. In 2004, the Court dismissed the motion deciding that the People's Advocate did not have the grounds to file it, see Decision No. 2 of 3 February 2004. The People's Advocate together with civil society representatives in the country in 2006 filed a motion for the review of the constitutionality of Council of Ministers decisions to combat nepotism in public administration in general and specifically in tax and customs institutions; the motion is currently being reviewed by the Constitutional Court.

- 26 Article 31 of the Constitution includes: the right to be notified immediately and in detail of the charges against him or her, of his or her rights, and to be allowed to notify his or her family or relatives; to have sufficient time and facilities to prepare his or her defence; to have the assistance of a translator free of charge if s/he does not speak or understand the Albanian language; to defend himself or herself or with the assistance of a legal counsel of his or her own choice; to communicate freely and privately with his or her legal counsel, and to be provided free defence if s/he cannot afford a lawyer; to question witnesses who are present and to seek the appearance of witnesses, experts and other persons who can clarify the facts.
- 27 There are certain legal problems as evidenced by criminal law experts as well. Thus, the right to free defence is considered to be limited to a certain extent, as defence is always provided by the prosecutor, the court and not chosen by the person accused. Also, the experts identify that this right is not offered during the whole judicial process, including during the execution of the court decisions.
- 28 Article 42 of the Constitution.

The Albanian legislation in general incorporates elements of the right to a fair trial. The Criminal and Civil Procedure Codes include rules ensuring procedural rights, equality of arms, notification of charges in criminal cases, free assistance in interpretation or even legal assistance in criminal cases, impartiality of judgment, public hearings, a few rules about reasonable time to deliver a judgment although no definite time is included in the legislation in this regard, the right to appeal. Such principles are also reflected in the Administrative Procedure Code, and the laws on the judicial system, on the High Council of Justice, the Constitutional Court, and other legislation.²⁹

The Constitution sets the dignity of a person, rights and freedoms as the basis of the Albanian state.³⁰ Also, it clearly mentions in Article 25 that no one shall be subject to torture, cruel, inhuman and degrading treatment or punishment. Albania ratified both the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment,³¹ and the European Convention for the Prevention of Torture.³²

Both the right to a fair trial and the prohibition of cruel, inhuman, degrading treatment or punishment, are elaborated in the Albanian legislation, based on the mentioned constitutional provisions. The main law to be mentioned in this regard is the Criminal Procedure Code which provides clear rules of procedure to be followed in cases a person is stopped, arrested, detained, and found guilty.³³ The Criminal Code also includes several articles which incriminate torture or any other degrading treatment or punishment,³⁴ although such articles have been found not to be in accordance with the definition of torture in the UN Convention against Torture.³⁵ The Law on the Bar adopted in 2003 provides for the observance of due process, right to be protected by a defence counsel and to be offered free defence.³⁶ In addition, there are specific laws such as the Law on the Rights and Treatment of Prisoners³⁷ and subsidiary legislation such as the Ministry of Public Order

29 Such principles are reflected in other laws, such as the Labour Code, the Law on Civil Servants, the Law on the Execution of Court Decisions.

30 Article 3 of the Constitution.

31 Approved by Law No. 7727, dated 30 June 1993, published in the Official Journal No. 9, dated 30 July 1993.

32 Approved by Law No. 8135, dated 31 July 1996, "On Adherence to the European Convention or the Prevention of Torture and other Cruel, Inhuman and Degrading Treatment or Punishment", published in the Official Journal No. 20, dated 12 August 1996.

33 Examples of such regulations are articles on habeas corpus, on notification of one's right to be assisted by a defence attorney, or to remain silent, or to notify the prosecutor once a person is stopped or arrested; on the right to appeal every decision taken, and so on.

34 Articles 86 and 87 of the Criminal Code.

35 European Commission, Albania 2005 Progress Report, Brussels, 9 November 2005, SEC (2005) 1421, [COM (2005) 561 final]. See http://europa.eu.int/comm/enlargement/report_2005/pdf/package/sec_1421_final_en_progress_report_al.pdf.

36 Law No. 9109, dated 17 July 2003 "on the Bar in the Republic of Albania," published in the Official Journal No. 66, dated 04 August 2003.

37 Law No. 8328, dated 16 April 1998, "On the Rights and Treatment of Persons Sentenced to Imprisonment", published in the Official Journal No. 11, dated 18 May 1998.

Regulation on the Treatment of Detainees³⁸ or the Regulation on The Organisation and Operation of the Pre-Trial Detention System,³⁹ that in general respect the constitutional principles.⁴⁰ However, the applicable 1999 Regulation of the Ministry of Public Order on the treatment of detainees is not in accordance with the law and violates the rights of persons deprived of their liberty although it in general reflects the constitutional principles.⁴¹

1.2. Practice. – Courts and especially the Constitutional Court⁴² have tried to respect the due process elements, *i.e.* the right to a fair trial; in fact, the motions on due process reviewed and decided on by the Constitutional Court have increased over the years.⁴³ Studies indicate that, although the legislation is in general all right, several problems arise with regard to a fair trial and due process. Also, treatment of prisoners needs to be improved. These problems are generally related to the implementation of the legislation. The judicial system is generally considered corrupt and thus unable to ensure a fair trial and due process.⁴⁴ The EU Progress Report for 2005 sets out that judicial independence should be ensured, and that enforcement of judgments and transparency should be improved.⁴⁵ All the elements mentioned in this report are important segments of due process. In fact, the first case decided by the ECtHR against Albania, *Qufaj & Co.*⁴⁶ regarded the enforcement of court decisions, which is considered part of due process. Although the Council of Ministers issued a decision in 2005 to enforce this ECtHR decision, there is no evidence that the decision has been implemented.⁴⁷

Studies and reports indicate that there are problems in respecting due process elements. The Albanian Helsinki Committee notes that the presumption of innocen-

38 Ministry of Public Order Regulation No. 1075, dated 15 September 1999 of the “on Treatment of Detainees”.

39 Regulation No. 3750/2 dated 23 July 2003. Under Article 55 of this Regulation, “The same regulation shall apply in the management of pre-trial detention facilities at police stations. Other regulations on pre-trial detention system shall be null and void”.

40 Such legal acts include rights of prisoners to cultural activities, to develop their capabilities, to have access to information regarding life outside the prison, to have decent living conditions, to submit requests and complaints regarding the implementation of the law.

41 See Albanian Helsinki Committee Press Release of 14 April 2005.

42 The Constitutional Court's jurisprudence increasingly correctly reflects the ECtHR interpretation of rights with regard to due process. In fact, one of the cases against Albania in the ECtHR, *Balliu v. Albania*, regarded violation of Article 6 – right to a fair trial within a reasonable time, although the court did not find any violation in this case.

43 In 2005, 17 out of 41 Constitutional Court decisions had to do with due process.

44 In a study conducted by CAO, an Albanian civil society group, 82% of the respondents considered the judges to be the most corrupt officials in the country. See <http://www.caoalbania.com/CPCsurveyCAO.doc>.

45 European Commission, Albania 2005 Progress Report, Brussels, 9 November 2005, SEC (2005) 1421, [COM (2005) 561 final]. See http://europa.eu.int/comm/enlargement/report_2005/pdf/package/sec_1421_final_en_progress_report_al.pdf.

46 See <http://www.echr.coe.int/eng/Press/2004/Nov/Chamberjudgments181104.htm>.

47 Council of Ministers Decision No. 502, dated 30 June 2005, “on the Execution of the ECtHR Judgment of 18 November 2004 in the *Qufaj & Co v. Albania* Case”, published in the Official Journal No. 57, dated 8 July 2005.

ce must be respected, as illustrated by the recent case of the General Prosecutor.⁴⁸ The Albanian Helsinki Committee Human Rights Report for 2005 indicates that only 50.9 percent of interviewed persons charged with crimes were informed of their right to a defence attorney. Regardless of the fact that the answers of the interviewed persons had differed from the answers of the judges and prosecutors, 93.6% of whom confirmed that they had informed of the right to defence or the right to free legal aid, the report confirms that the not all persons deprived of liberty are informed of their rights.⁴⁹ In its 2005 report, Amnesty International noted that access to a lawyer was often violated.⁵⁰ Also, studies show that the professionalism of legal advisers providing free defence is substandard, probably because the state insufficiently remunerates such attorneys.⁵¹

Improvement is needed with regard to detainees and prisoners as well. Some have alleged they had not been informed of their rights at the time of detention or arrest, or provided with legal assistance until the first session of the court hearing.⁵² Overcrowding is a major problem in almost all pre-trial detention facilities and is exacerbated by substandard hygiene and sanitary conditions and the spread of infections.⁵³ Infrastructure in the majority of the police stations monitored by the Albanian Helsinki Committee was old and damaged and failed to meet the minimal standards required of a pre-trial detention facility. Living and work conditions in the majority of police stations observed by the Albanian Helsinki Committee do not meet even the minimum requirements for a decent life.⁵⁴ The state has been investing efforts to build new detention and prison facilities, but more needs to be done for the situation to improve.⁵⁵ Also, transfer of responsibility for pre-trial detention facilities from the Ministry of Public Order to the Ministry of Justice has been a positive step, but convicted prisoners are still kept in pre-detention facilities, as are juvenile offenders.⁵⁶ Such a situation is often accompanied by riots in these prisons; several riots erupted in 2005.

The last element to be mentioned is related to the training of judges, judicial police, police, and staff in penitentiary facilities. Although NGOs and international

48 Albanian Helsinki Committee press release: Presumption of innocence should not be violated. http://www.ahc.org.al/kshh/te_tjera/18042006.html.

49 Albanian Helsinki Committee Report, *Free legal service and the legal service as decided (problems of theory and practice)*, 2005.

50 Amnesty International Report 2005: *The state of the world's human rights*, Alden Press, Oxford, 2005.

51 Albanian Helsinki Committee Human Rights report, *Free legal service and the legal service as decided (problems of theory and practice)*, 2005.

52 Albania Helsinki Committee, *Observance of prisoners' and pre-trial detainees' rights: conclusions drawn from Albanian Helsinki Committee monitoring missions*, Tirana 2005.

53 *Ibid.*

54 *Ibid.*

55 New prisons are being built in Peqin and Lezha.

56 EC, Albania 2005 Progress Report, Brussels, 9 November 2005, SEC (2005) 1421, [COM (2005) 561 final]. See http://europa.eu.int/comm/enlargement/report_2005/pdf/package/sec_1421_final_en_progress_report_al.pdf.

organisations have been addressing the problem,⁵⁷ the awareness of human rights of these officers needs to be increased.

1.3. Conclusion. – The legal framework is generally in accordance with international standards, and only a few legal improvements are needed. Albania has ratified international agreements referring to or including such rights: due process or the right to a fair trial, as well as rights of persons deprived of liberty. However, due process rights and rights and treatment of detainees or imprisoned persons are not up to world standards. Studies and reports by both national and international organisations indicate violations of rights such as presumption of innocence, free defence, and decent living conditions of persons deprived of liberty, or of their religious freedoms. Problems arise due to the lack of professionalism of institutions and officials in such situations. The judiciary is perceived as corrupt. Implementation of laws remains the key problem in the country. Police, judges and prosecutors need further information and knowledge about human rights issues. Although the Magistrates' School⁵⁸ offers continuous training to judges and prosecutors within its purview and several international organisations also provide training, these efforts have not proven efficient due to frequent and often unjustified removal or transfer of staff because of reforms or political changes. The state lacks general infrastructure: quite a few alleged violations occurred due to the lack of infrastructure. Also, financial support to observe due process rights and rights of persons deprived of liberty is apparently insufficient. However, the state is making efforts to improve both the infrastructure, mainly thanks to donor support, the legislative framework, and the level of professionalism of the institutions, although much remains to be done.

1.4. Recommendations. – Albania needs to raise the level of law implementation and enforcement of court decisions by different measures, both legal and non-legal. A few legal regulations, such as those on free defence, need to be reviewed and reflect the constitutional provisions. Other legislation needs to be reviewed as well, such as the Ministry of Public Order Regulation 1075 of 15 September 1999 “on the Treatment of Detainees” which needs to be repealed. The country needs to have better and closer cooperation with international donors to maximise the effects of foreign aid. Also, Albania needs to change its view on penal measures and look for alternative modes of punishment to imprisonment, the main penalty for crimes. The state may also wish to consider increasing financial support so that due process rights and rights of persons deprived of liberty are better observed. Finally, there is a need to boost the monitoring mechanisms of institutions with regard to due process, notably of the judiciary, without infringing on judicial independence.

57 Organisations such as OSCE Presence in Albania, Pameca, Albanian Helsinki Committee, and others have been offering such training continuously.

58 This school was established to train future Albanian judges and prosecutors.

2. Freedom of Thought, Conscience and Religion

2.1. *Legislation.* – The Albanian Constitution refers to the issue of religion in a few articles. First it declares that there is no official religion in the country and that the state is neutral on issues of belief and conscience and guarantees that all religions are equal.⁵⁹ In addition, religious and philosophical beliefs are listed as grounds in the provision prohibiting discrimination.⁶⁰ It guarantees the freedom of conscience and religion. Everyone is free to choose and manifest a religion or belief, both privately and publicly.⁶¹ The Constitution requires that the state and religious communities regulate their relations through agreements which are signed by the Council of Ministers and ratified by the Assembly.⁶² Under the Constitution, religious communities are juridical persons.⁶³ This means that they legally enjoy all rights of juridical persons, i.e. they enjoy juridical capability and capability to act. This also means that these communities have all financial obligations like other juridical persons.⁶⁴

There is no specific law on religious freedoms or on religious communities.⁶⁵ Religious communities or groups conduct their activities in accordance with the Law on Non-Profit Organisations. The state has not signed specific agreements with all religious communities,⁶⁶ as the Constitution requires,⁶⁶ only with the Holy See by Law 8902 of 2002.⁶⁷

The other legislation referring to religious issues respects the constitutional guarantees of this freedom. The Law on Education provides for the opening of religious schools subject to the prior consent of relevant institutions. The Labour Code specifically prohibits discrimination in employment relations on religious grounds.⁶⁸ The Law on Official Holidays is another such example. Under it, all main religious holidays of all communities in the country are official holidays, including the two Bayrams, Orthodox and Catholic Easters, and Bektashi Nevrus

59 Article 10 of the Constitution.

60 Article 18 of the Constitution.

61 Article 24 of the Constitution.

62 Article 10 of the Constitution.

63 *Ibid.*

64 The Law on Taxes does not make any specific reference to such groups for exemptions and examples of other legislation envisaging exemptions related to religion are few: one example is the exemption of foreign missionaries from payment of residence fees.

65 There have been several discussions on whether such a law was needed, but the argument against adopting one has to date prevailed.

66 Agreements with other religious communities seem to have been drafted but not finalised yet, notwithstanding recommendations by the People's Advocate, see <http://www.avokatipopullit.gov.al/Rekomandime/>.

67 Law No. 8902, of 23 May 2002 "Ratifying the Bilateral Agreement between the Republic of Albania and the Holy See to Regulate Mutual Relations", published in the Official Journal No. 26, dated 18 June 2002.

68 Article 9 of the Labour Code.

Day. The law on the rights and treatment of prisoners and subsidiary legislation state that prisoners, pre-trial detainees and arrestees have the right to practice their religion.⁶⁹ Lastly, the Law on Restitution and Compensation of Property provides for such restitution/compensation to all juridical persons, religious communities included.⁷⁰

The State has established a Committee on Cults to deal with religious issues in the country.⁷¹ This Committee was set up to regulate the relations between the state and all religious communities. The institution is part of the central government and reports to the Prime Minister. The Committee recognises the equality of religious communities and respects their independence.

2.2. Practice. – There are several religious communities in Albania: Moslem, Orthodox, Roman Catholic, and Bektashi. Majority of Albania's population is Moslem. The Orthodox and the Catholics are the other large population groups. No data is available on active participation in formal religious services. Other religious groups, such as Jehovah's Witnesses, Baha'i missionaries, Mormons, and others are operating freely in the country.

The state is secular and it tries to preserve such status. As recognised in other international reports, the government contributes to the generally free practice of religion through its policies.⁷² Religious groups are registered with the Tirana District Court, as stipulated by the Law on Non-Profit Organisations. There are no obstacles to such registration.

In general, the relations among the religious groups are commendable and Albania is always quoted as a good example of religious coexistence.⁷³ There were a few incidents in 2005, such as the desecration of the Muslim mosque in Tirana, and the putting up of a cross in the village of Shkodra mostly populated by Moslems; however, regardless of different connotations, these incidents did not dent the general positive social attitude and perception of relations between religions.⁷⁴ The state, with its equal treatment of religious communities, has contributed to such a situation as well.⁷⁵ There are reports though indicating that, prisoners and even detainees and arrestees are unable to freely exercise their religious rights due to

69 Law No. 8328, of 16 April 1998 "On the Rights and Treatment of Prisoners".

70 Law No. 9235, of 29 July 2004, "On Restitution and Compensation of Property", published in the Official Journal No. 61, dated 31 August 2004.

71 Council of Ministers Decision No. 459 of 23 September 1999 "On the Establishment of the State Committee on Cults".

72 See US State Department Report in <http://www.state.gov/g/drl/rls/irf/2004/35434.htm>.

73 *Ibid.*

74 A recent example is that of the Mother Teresa monument and discussions about where it would be erected: in the centre of Shkodra or near the Shkodra mosque. The local municipal council, a body comprising persons of different religious persuasions, decided to erect it in the centre of the city.

75 The state structures have been ineffective in resolving several cases, probably for justified grounds. For instance, the General Secretary of the Muslim Community, Sali Tivari, was killed in 2003 but no official information on the reasons for his murder has been disclosed yet.

substandard conditions in the remand facilities.⁷⁶ Media have reported on series of juvenile suicides allegedly committed under the influence of Jehovah's Witnesses, but the authorities had been very careful, saying the deaths would be investigated and did not rush to conclusions displaying religious bias.⁷⁷

The public schools are secular and free of ideological and religious indoctrination. There are several private religious schools, including a Catholic University, in the country and the state does not interfere with their activities.⁷⁸ In 2005, the Committee on Cults called on the Minister of Education to close two religious schools, the Catholic Seminar in Shkodra and the Academy of Shën Vlashi in Durrës.⁷⁹ This move, however, was not perceived as state interference in or infringement of religious rights, but a request to bring religious activities in compliance with the laws in force.

Although religious communities are entitled to restitution/compensation of property, the state has not yet restituted or even compensated all the property to these communities. The reason, however, lies in the general lack of state funds for restitution/compensation and not in the fact that religious groups are the claimants.⁸⁰

2.3. Conclusion. – Albania is a positive example of a country respecting religious freedoms. The legislation supports respect for this freedom and its enjoyment. There is no specific law on religious freedoms but the Constitution is clear in this regard. The Constitution requires of the states and religious communities to enter specific agreements; however, only an agreement with the Catholic Church has been signed so far, but none have been concluded with the other big religious groups, such as the Moslems, Bektashi, and the Orthodox. The general tradition of Albania is an element strongly supporting such inter-religious tolerance. As EU the Progress Report highlights, Albania continues to provide a valuable example of religious harmony in the region.⁸¹ In some areas, the state should be more active and more supportive of religious organisations, i.e. afford them tax exemption or even property restitution/compensation, however, in general the enjoyment of religious freedoms is highly respected by the state.

76 Albanian Helsinki Committee, *Observance of the Rights of Prisoners and Pre-Trial Detainees*, Tirana, 2005.

77 Related to this case, the government prohibited the dissemination of religious literature in “public places”, although in practice this prohibition applies only to government facilities.

78 There are 14 religious schools in the country with approximately 2,600 students altogether. There are also 68 vocational training centres administered by religious communities.

79 See <http://www.panorama.com.al/20040126/faq3/1.htm>. Two similar schools, El Hagri, Elbasan and Abuan Lfe, Bulqize, were already closed down because of their unlawful operations.

80 In 2005, the state had at its disposal only 2 million dollars for compensation; the 2006 allocation stands at 3 million dollars.

81 European Commission, *Albania 2005 Progress Report*, Brussels, 9 November 2005, SEC (2005) 1421, [COM (2005) 561 final]. See http://europa.eu.int/comm/enlargement/report_2005/pdf/package/sec_1421_final_en_progress_report_al.pdf.

2.4. *Recommendation.* – Considering that the state has not yet signed agreements regulating relations with all religious communities but one, the Albanian Helsinki Committee recommends it does sign such agreements as soon as possible. Also, the state should be more active and invest greater efforts to solve crimes related to religion, and address property issues, considering that enjoyment of religious rights is a very positive aspect of the Albanian society.

3. *Right to Information*

3.1. *Legislation.* – The right to information is a constitutional right in Albania, entitling everyone to be informed and specifically about the activities of the state bodies and of persons discharging state offices. Furthermore, everyone has the possibility to attend meetings of elected collective bodies.⁸² Thus, the Constitution specifies that the Assembly meetings are in general open to the public.⁸³ The Council of Ministers meetings are, however, closed to the public.⁸⁴ Also, all court decisions have to be made public.⁸⁵ The country has also ratified several international agreements and conventions on the right to information.

The right to information is regulated by a number of Albanian laws. The Administrative Procedure Code, the main law regulating the operations of public administration, regulates in a separate Chapter the procedure to receive information.⁸⁶ Also a special law was adopted by the Assembly on the right to receive information on official documents.⁸⁷ It provides for the right of every person, Albanian or foreign, to ask for information, already considered an official document, without having to explain the reasons for requiring such information and without having a legitimate interest in the sought information. The decision-taking process of the judiciary is also open to the public unless the courts decide otherwise on a case by case basis.⁸⁸ Many specific laws regulating other matter include provisions on the transparency of the administration; the Local Government Law,⁸⁹ for instance, provides that the meetings of the local government councils are open to the public and that any decision taken at that level shall be made public.⁹⁰

82 Article 23 of the Constitution.

83 Article 79 of the Constitution.

84 Article 100 of the Constitution.

85 Article 145 of the Constitution.

86 Articles 51–55 of the Administrative Procedure Code.

87 Law No. 8503, “On the Right to Information in Official Documents”, dated 30 June 1999, published in the Official Journal No. 22, dated 26 July 1999.

88 This rule is stipulated both by the Civil Procedure Code and the Criminal Procedure Code.

89 Law No. 8652, dated 31 July 2000 “on the Organisation and Functioning of Local Government”, published in the Official Journal No. 25, dated 8 August 2000.

90 The law also stipulates the participatory principle in decision-making – the Councils are to organise consultative sessions with the community prior to rendering their decisions. See Articles 32–33 of the Local Government Law.

The right to information is limited by law. The Administrative Procedure Code specifies in its general provisions that the right to information can be limited if the information is considered confidential or a state secret. Such information is further regulated by the Law on State Secrets.⁹¹ That law provides for the limitations of the right to information when the information required is classified as top secret, secret or confidential. The information must be classified as confidential or secret by the Head of the Council of Ministers, CEOs of the institutions authorised by the Head of the Prime Ministers in the State Registry or authorised state officials of the Republic of Albania.

One other example of the limitation to the right to information is the Law on Classified Police Information.⁹² This law sets out rules for collecting, processing and keeping classified police information needed to protect public order and safety and prevent and uncover crimes.

In addition, the Constitution provides for the protection of personal data.⁹³ The Law on Privacy⁹⁴ was adopted to further clarify such protection. It on the one hand guarantees that specific personal information is open to the public, while, on the other, it protects another category of personal data. This law aims to protect citizens from having their personal data and information released to anyone. Another law was recently passed to allow for public disclosure of information on the property of specific categories of civil servants and elected officials.⁹⁵ Finally, there is no law regulating the Internet as a source of information in the country.

3.2. Practice. – The Government has declared its strong commitment to respect the right to information as it understands that the right to information increases the transparency of governance and respect for the freedom of media and expression of opinions. In addition, the right to information is considered as a key element in fighting corruption and of good governance.⁹⁶ Regardless, the situation in practice is different. Thus, not all institutions observe this right; neither have they established the specific bodies as required by the Law on Official Documents. In fact the institutions lack funds to conform their work to provisions on transparency and implement all legal requirements. However, the failure to allow access to documents is partly a mentality issue as well, as staff in institutions obviously still

91 Law No. 8457 “On Information Classified as a State Secret”, dated 11 February 1999, published in the Official Journal No. 7, dated 12 March 1999.

92 Law No. 8839, dated 22 November 2001 “on Collection, Processing and Keeping of Classified Police Information”, published in the Official Journal No. 57, dated 21 December 2001.

93 Article 35 of the Constitution.

94 Law No. 8517, dated 22 July 1999 “on the Protection of Personal Data”, published in the Official Journal No. 23, dated 4 September 1999.

95 Law No. 9049 of 10 April 2003 “on Declaring and Controlling the Property and Financial Obligations of Elected Officials and Certain Civil Servants”, published in the Official Journal No. 31, dated 15 May 2003.

96 See the Albanian Government programme at <http://www.keshilliministrave.al/shqip/programi/default.asp>.

believe information they hold should not to be made available to the public. Public administration employees have not exhibited even an average level of awareness of legislation on transparency or the will to observe it although civil servants are duty-bound by law to provide unrestricted information to third parties requiring it.⁹⁷

The People's Advocate, the institution empowered by law to monitor the guarantee of this right by state institutions, continues reporting that this right is not observed, both in the cases when the government renders decisions affecting citizens' interests, such as on increasing the price of electricity, and in cases when the citizens are not provided with the information they sought.⁹⁸ This institution has continuously been issuing recommendations urging the observance of this right. In addition, it has drafted internal regulations on the right to information which is to be adopted by the state agencies.⁹⁹ This initiative is commendable considering the lack of subsidiary legislation regulating in detail specific issues related to the right to information. The Internet as a source of information is of relatively low importance as access is limited due to weak infrastructure outside major urban areas. The government does not control access to the Internet.¹⁰⁰

Studies conducted by civil society have drawn the same conclusion: this right is not observed. Thus, the Albanian Helsinki Committee has monitored the work of local government bodies in different parts of the country and found disrespect for the right even where special bodies were established to provide information to third parties whenever required. Such bodies issue special bulletins, leaflets and journals informing the citizens about the activities of the institution. A 2005 study conducted by USAID in Albania and the Office for the Protection of Citizens notes that only a few Albanians are informed of their rights by the institutions. In fact, the study indicates that this problem is highly related to corruption, as officials treat provision of information as a way to make money.¹⁰¹

3.3. Conclusion. – The legal framework guaranteeing the right to information is generally in place. However this legislation should be regulated in detail by subsidiary legislation. The practical observance of this right is needed. Although the government has declared its commitment to respect this right, it has not undertaken any structural reforms to that end. In addition, public administration employees lack proper knowledge of the law and consequently do not implement it.

97 This is specifically provided by Law No. 8549, dated 11 November 1999 “on the Status of Civil Servants”.

98 See People's Advocate activities at <http://www.avokatipopullit.gov.al/Aktivitete/Akt1%2012122005.htm>.

99 See <http://www.avokatipopullit.gov.al/>.

100 Freedom House Report: Freedom of the Press 2006: A Global Survey of Media Independence,

101 USAID in Albania and ZMQ: Corruption, 60% of the citizens pay the officials. See <http://www.tan-market.com/php/modules.php?name=News&file=article&sid=846>.

3.4. *Recommendations.* – Considering the current legislative framework and situation, it is recommended that:

- the legal framework be detailed, first by the Council of Ministers and subsequently by every institution duty-bound to observe this right;
- the People's Advocate be more active in urging public administration bodies to be transparent and provide information;
- training is offered to public administration employees on the legal framework with respect to the right to information and its implementation;
- the government undertake structural changes of institutions and allocate funds for maximising the enjoyment of the right to information;
- the state consider drafting legislation to regulate Internet information and to consider it as means of information.

4. *Freedom of Expression and the Media*

4.1. *Legislation.* – Freedom of expression and freedom of the press, radio and television are guaranteed by the Constitution.¹⁰² The state has opted for allowing self-regulation of the print media as there is only one law¹⁰³ which reiterates the constitutional provision guaranteeing the freedom of press: even the one draft prepared in late 2004 was considered problematic and never adopted by the Assembly.¹⁰⁴ Electronic media are regulated by Law No. 8410 of 30 September 1998 “On Public and Private Radio and Television in the Republic of Albania”. Many other laws include articles relevant to free speech and press. The Criminal Code devotes several articles to matters related to the freedom of expression and the media. The Criminal Code incriminates insult and defamation. These provisions are resorted to and can easily be used against journalists and media officials. In addition, the Criminal Code also criminalises acts or actions that prevent the exercise of freedom of speech, incite national, racial or religious hatred or conflict, or instigate national hatred et al.¹⁰⁵ The Civil Code also provides for the protection of persons in case defamatory or inaccurate information was published about them. In addition, works and productions are protected by a separate Law on Copyright.¹⁰⁶

4.2. *Practice.* – In general, everyone may freely exercise his or her freedom of speech.¹⁰⁷ Most radio and television outlets in the country are privately owned.

102 Article 22 of the Constitution.

103 Law No. 7756, dated 11 October 1993 “On the Press”, amended by Law No. 8239, dated 3 September 1997.

104 See OSCE Presence in Albania, Review of draft Albanian print media law, at http://www.osce.org/documents/rfm/2004/10/3762_sq.pdf.

105 Law No. 7895, dated 27 January 1995 “Criminal Code of the Republic of Albania”.

106 Detailed information on such laws is given in the property rights section of this report.

107 Freedom House Report: Freedom of the Press 2006: A Global Survey of Media Independence.

There is quite a large number of independent print and electronic media outlets: 19 dailies, 46 radio stations and 65 television stations inform a small population exceeding 3 million. Regardless, most media seem to be strongly linked and influenced by political and/or economic interests.¹⁰⁸ Funding of media outlets remained mostly non-transparent in 2005.

The only public radio and television is the Albanian Radio and Television which is run by a body comprising several members who are to represent the interests of all political and interested groups impartially. The Albanian RTV, although public on paper, is highly criticised for devoting most of its airtime to the Government. The National Council on Radio and Television (NCRT), composed of seven bi-partisan members elected by the Assembly, issues and revokes radio television licenses to private persons.¹⁰⁹ The government has proposed changes aiming to reduce the number of NCRT members,¹¹⁰ and although such a proposal was perceived merely as a political move by the current government and not as a reformist step in the right direction, the Assembly adopted the changes. Also, the Assembly has a separate Committee on Media Issues, which monitors the work of the NCRT, i.e. of the private electronic media in the country. The NCRT is not very active in reporting on its findings. This is one of the reasons that has led to dwindling trust of the public, including the media outlets, in its work.

The People's Advocate reported an increase in awareness and professionalism of media. This institution noted the need for further media training, as media have often themselves violated other rights, especially those of vulnerable members of the society, even the right to privacy.¹¹¹ There have been instances of media disregarding important human rights and freedoms such as presumption of innocence, right to privacy, especially in relation to children, or even inciting hatred by using hate speech in their programmes. These violations have also been noted in international reports, such as that of the US State Department.

Digital terrestrial broadcasting in the country remains unregulated. The non-adoption of the draft law regulating the matter was considered a positive development by the international community as the draft risked creating a monopoly.

There have been a few instances of state officials violating rights of journalists. Journalists were on several occasions prevented from attending public Assembly sessions and two journalists were attacked in the south of the country during the election campaign. Journalists have also been threatened with prosecution for

108 European Commission, Albania 2005 Progress Report, Brussels, 9 November 2005, SEC (2005) 1421, [COM (2005) 561 final]. See http://europa.eu.int/comm/enlargement/report_2005/pdf/package/sec_1421_final_en_progress_report_al.pdf.

109 See <http://www.kkrt.gov.al/>.

110 See <http://www.keshilliministrave.al/shqip/qeveria/vendimet/RTSH.asp>.

111 The People's Advocate of the Republic of Albania, Annual Report for the period 1 January 2005–31 December 2005. See http://www.avokatipopullit.gov.al/Raporte/Raporti_2005.pdf.

libel or defamation, which are crimes in Albania. Initiatives to decriminalise libel and defamation have not been successful to date.

4.3. Conclusion. – The legal framework guaranteeing the freedom of the press, radio and television is generally in place. Such freedoms are enshrined in the Constitution, while specific laws regulate the matter in detail. Some of their provisions are in need of improvement, like the few articles of the Criminal Code that are in force although they are not in compliance with the Constitution or ECtHR jurisprudence. The observance of these freedoms has in general improved in the country, especially with regard to journalists. Nevertheless, the state has on several occasions infringed on the rights of journalists doing their jobs. Also, media professionalism has improved even though journalists are still in need of training on different topics, including on informing on human rights.

4.4. Recommendations. – The information reported above, indicates the need for several improvements, notably:

- the adoption of a legal framework regulating digital electronic media;
- that the state refrain from legal initiatives which continue to politically regulate broadcasting in the country;
- the public radio-television should begin adopting all-inclusive policies which reflect the interests of all groups of the society;
- the NCRT should become more transparent in its daily work and inform the public of its findings;
- the press should adopt internal regulatory mechanisms;
- provisions criminalising media liability should be repealed.

5. Peaceful Enjoyment of Property

5.1. Legislation. – Article 41 of the Constitution guarantees the right to private property and it provides for several modes of protection, including ways on how property may be acquired and on limitations of the right to property. It specifies that property may be expropriated only in public interest and that it must be fairly remunerated. Under the Constitution, property rights cannot be infringed on without due process of law. It also recognises that the prior communist regime had unjustly taken away people's private property and imposes on the state the obligation to address this issue.¹¹² Albania has ratified a number of international conventions aiming to protect property rights, including the ECHR and its Protocol 1 and a number of agreements on intellectual property rights.¹¹³

¹¹² Article 181 of the Albanian Constitution.

¹¹³ These include the Stockholm Convention Establishing the World Intellectual Property Organisation, the Paris Convention on Protection of Industrial Property, the Bern Convention on Literary and

A number of laws have been passed by the Albanian Assembly to protect property rights. The Civil Code is the main law that regulates the right to property and sets out legal provisions on acquisition, alienation, registration and expropriation of property. The Criminal Code includes several articles aiming to protect property and criminalising destruction of both public and private property.¹¹⁴ In addition, the Code defines as a crime occupation of land by third parties.¹¹⁵ Albania has since 1991 undergone a large-scale reform to privatise property; privatisation was necessary as all property had been owned by the state under the 1976 Constitution. A number of laws have been passed in the meantime such as the Law on Protection of Free Initiative and Private Property,¹¹⁶ the Law on Land (distributing farmland, i.e. the former cooperative and state farms, on the principle of equality to families in rural areas, or granting free ownership of agricultural land),¹¹⁷ Law on Privatisation of State Housing,¹¹⁸ and the Law on Buying and Selling Building Sites.¹¹⁹ The country also adopted laws to restitute and compensate property to its former owners¹²⁰ but the former owners of nationalised land are dissatisfied with the solutions offered by the state. The country has since 1994 adopted a property registration system which includes the ownership title and the location of the property to improve the protection of property rights.¹²¹ The law on registration of immovable property requires that all immovable property be registered which means that the ownership title can be freely used. The 2005 law legalising informal zones, i.e. illegally occupied zones and zones on which buildings have been unlawfully erected, was recently substituted by another law aiming not only to legalise, but also urbanise and integrate these zones. This law aims to establish property rights in highly contested zones where persons have unlawfully acquired property. Intellectual property rights are recognised and guaranteed by law. Laws protecting copyrights, patents, trademarks, stamps, mark of origin, and industrial designs have been adopted. Also, an Anti-Piracy Law was adopted to protect property rights in the field of electronic media.

5.2. Practice. – Notwithstanding the adoption of a number of laws related to property, protection of property rights needs to be improved in practice. Property

Artistic Works, the Patent Cooperation Treaty and the European Patent Convention, and the Budapest Treaty on Biodiversity.

114 Articles 15–163 of the Albanian Criminal Code.

115 Articles 199 and 200 of the Criminal Code.

116 Law No. 7512, dated 10 August 1991 “on Sanctioning and Protecting Private Property and Free Initiative, Private Independent Activities and Privatisation”.

117 Law No. 7501, dated 13 July 1991, “on Land”, published in the Official Journal No. 5, dated 25 August 1991 and Law No. 8053, dated 21 December 1995 “on Granting Ownership of Agricultural Land without Compensation”.

118 Law No. 7652, dated 23 December 1992 “on Privatisation of State Housing”.

119 Law No. 7980, dated 27 July 1995 “on Buying and Selling Building Sites”.

120 Law No. 7698, dated 15 April 1993 “on Restitution and Compensation of Property to Former Owners”.

121 ARD Final Report, USAID, Tirana, November 2004.

rights are *inter alia* violated by the courts' failure to effectively enforce the law.¹²² The country faces a huge problem arising from individual and large-scale illegal occupation of property and construction. In view of the scope of these violations of property rights, the state in 2005 passed a legalisation law and replaced it by a new one in 2006. The law is contested by private owners, especially in view of the fact that occupation of property is a crime under the law; it is, however, justified by public interest. Its implementation has been very problematic so far and it remains to be seen whether the new law will improve the situation.

The restitution/compensation process, regardless of the new law of 2004, has been slow. So far, only 10% of the former owners have submitted restitution/compensation claims,¹²³ although the law sets September 2006 as the deadline for submitting these claims is September 2006, *i.e.* it expires in a few months. Unless this process is completed, enjoyment of property rights will continue to be problematic.¹²⁴ Moreover, the law has been violated as the National Privatisation Agency has continued privatising property although privatisation is not allowed until the completion of the restitution and compensation process.

Property rights are seriously infringed by the system for registering immovable property; either the property was not registered at all¹²⁵ or the manner of registration was problematic.¹²⁶ Several employees of the Registration Office have been criminally prosecuted for violating property rights by abusing the registration of property.¹²⁷

The situation with regard to copyright, trademark, stamps, mark of origin, and other intellectual property is still unsatisfactory. Violations of such rights are frequent.¹²⁸

5.3. Conclusions. – Albania has a legal framework protecting property rights. Such protection reflects international principles, as the country has already ratified a number of international documents on property rights. This protection is both

122 US Heritage Foundation: 2006 Index of Economic Freedom. See <http://www.heritage.org/research/features/index/country.cfm?id=Albania>.

123 Annual Report of the State Committee on Restitution and Compensation of Property submitted to the Assembly in January 2006.

124 See USAID Albania: [http://www.usaidalbania.org/\(k1j4ho552on41j45ejugptbv\)/en/page.albania.aspx](http://www.usaidalbania.org/(k1j4ho552on41j45ejugptbv)/en/page.albania.aspx).

125 Only 80% of land in the country has been registered in the system so far, which still is not 100 percent correct or completed. See US State Department: 2005 investment climate statement – Albania, in <http://www.state.gov/e/eb/ifd/2005/41944.htm>.

126 European Commission, Albania 2005 Progress Report, Brussels, 9 November 2005, SEC (2005) 1421, [COM (2005) 561 final]. See http://europa.eu.int/comm/enlargement/report_2005/pdf/package/sec_1421_final_en_progress_report_al.pdf.

127 Such cases became more frequent after the new government took over after 2005 elections. Examples are the arrest of a lawyer of a Tirana and Durrës Offices and a specialist of the Durrës Office.

128 US State Department: 2005 investment climate statement – Albania. See <http://www.state.gov/e/eb/ifd/2005/41944.htm>.

administrative and judicial, and Albania's citizens may turn to international courts for protection. Most of the legislation regulates property rights comprehensively; a few laws are in need of improvement. This situation on the ground, however, gives rise to concern, mostly because legislation is either not implemented or violated, both by private parties and the state authorities. The registration of immovable property remains problematic and Albania is yet to face the restitution/compensation process and the legalisation of informal zones. Also, copyright and intellectual property protection needs to be improved.

5.4. Recommendations. – The implementation of the legislation remains the outstanding issue. The country needs to improve the implementation of the valid laws. Albanian state institutions established to deal with the protection of property rights should exercise their authority more efficiently. Also, correct application of property-related legislation should be a concern also of other institutions, including the police and judiciary. The country ought to improve its legislation in specific areas, especially legislation on legalisation of informal zones and restitution/compensation of property so that these processes respect property rights and are completed by offering property rights guarantees. Competencies of relevant state institutions should be enhanced to that aim.

6. Minority Rights

6.1. Legislation. – Several articles of the Albanian 1998 Constitution refer to minority rights. Article 3 considers “pluralism, national identity and heritage, religious coexistence and the coexistence with, and understanding of the Albanians for minorities” as the basis of the Albanian state. Minority groups in the country do enjoy equality and are not exposed to any discrimination, everyone in the country may exercise all rights. Moreover, separate laws have been passed to address minority issues. The Constitution specifically prohibits discrimination, *inter alia* on grounds of race, ethnicity or language.¹²⁹ Article 9 of the Constitution prohibits creation of political parties inciting and supporting racial, religious, regional or ethnic hatred, while another constitutional provision is devoted to rights of national minorities, considering them an indivisible part of the Albanian society. This constitutional obligation is also included in the Law on Political Parties. Article 20 of the Constitution guarantees national minorities full equality before the law and in the exercise of their freedoms and rights, and acknowledges them the right “to freely express, without prohibition or compulsion, their ethnic, cultural, religious and linguistic belonging” and the right “to preserve and develop them, to study and be taught in their mother tongue, and to associate in organisations and associations protecting their interests and identity”. Finally, the Constitution lays the grounds for

129 Article 18 of the Albanian Constitution.

the decentralisation of power, which does not only bring governance as close to the people as possible, but allows for better observance of minority rights as well.¹³⁰

Albania ratified the CoE Framework Convention for the Protection of National Minorities by Law No. 8496 of 03 June 1999, which came into force on 01 January 2000.¹³¹ This Convention is part of the national legal system, *i.e.* must be respected in the country.¹³²

Specific Albanian laws also provide legal protection of minorities. Under the Law on the Pre-University Education System, the state is to enable schooling in minority languages and learning of minority history within the school curricula.¹³³ The Law on Private and Public Electronic Media allows for the establishing of radio and TV stations broadcasting in minority languages and prohibits establishment or broadcasts of radio and television programmes that are disrespectful of minority rights, languages and cultures.¹³⁴ In 2003, the Assembly passed an amendment to the Civil Registry Law which foresees the inclusion of the citizens' nationality in the Civil Registry and identification documents.¹³⁵ This amendment will hopefully alleviate difficulties in proving ethnicity for future requests for minority language schools.¹³⁶ Finally, the Criminal Code incriminates incitement of hatred against minorities in Article 265 and advocacy of ethnic hate in Article 266.¹³⁷ Departing from such legal framework and its political priorities, the government in 2003 approved a specific strategy on the Roma community. Strategies on improving the status of other minorities have not been adopted yet.¹³⁸

130 In fact, reforms entailing respect of minority rights in Albania are part of the National Decentralisation Strategy, adopted in January 2000.

131 The instruments of ratification were deposited on 28 September 2000. The law was published in the Official Journal No. 21, dated 22 July 1999.

132 The country submitted the initial State Report on 26 July 2001, but has failed to submit its second report as required by the Advisory Committee. See [http://www.coe.int/t/e/human_rights/minorities/2_framework_convention_\(monitoring\)/2_monitoring_mechanism/2_outlines_for_state_reports/2_Second_cycle/index.asp#TopOfPage](http://www.coe.int/t/e/human_rights/minorities/2_framework_convention_(monitoring)/2_monitoring_mechanism/2_outlines_for_state_reports/2_Second_cycle/index.asp#TopOfPage).

133 Article 10 of Law No. 7952, dated 21 June 1995, "on the Pre-University Education System". Published in the Official Journal No. 15, dated 17 July 1995.

134 Law 8410, dated 30 September 1998 "on Public and Private Radio and Television in the Republic of Albania", published in the Official Journal No. 24, dated 20 October 1998.

135 Law No. 9029, dated 13 March 2003, "Amending Law No. 8950 dated 10 October 2002 "on the Civil Registry", published in the official Journal No. 23, dated 3 April 2003.

136 US Bureau of Democracy, Human Rights, and Labour: Country Reports on Human Rights Practices – 2004. See <http://www.state.gov/g/drl/rls/hrrpt/2004/>.

137 However, ECRI recommended Albania explicitly provide in criminal law that racist motivation constitutes a specific aggravating circumstance for all offences and carry out the necessary measures so that criminal provisions relating to racism, discrimination and intolerance may be effectively implemented. ECRI: Third Report on Albania, Adopted on 17 December 2004. See http://www.coe.int/t/e/human_rights/ecri/1-ecri/2-country-by-country_approach/albania/Albania_CBC_3.asp#TopOfPage.

138 Council of Ministers Decision No. 633 of 18 September 2003 "Endorsing the Strategy to Improve the Living Conditions of the Roma Community", published in the Official Journal No. 85, dated 8 October 2003.

Several institutions were established to deal with minority issues. Thus, a State Committee on Minorities was created in 2004 by a Council of Ministers decision.¹³⁹ The Committee is composed of representatives of various national and ethnic-linguistic minorities and its aim is to promote participation of persons belonging to minorities in public life, as well as to suggest measures to be taken with regard to the respect and protection of minority rights. However, this Committee is not entitled to take decisions. Moreover, the Committee does not include any representatives of the Roma and Egyptian minorities as it does not consider them ethnic minorities.¹⁴⁰

In addition, a special Sub-Commission for Minority Issues and Gender Equality was established within the standing Assembly Commission for Labour, Social Issues and Health to address minority rights.¹⁴¹ The Ministry of Foreign Affairs also has a special office on minority issues; special inspectors of the Ministry of Education and Science and the Ministry of Interior deal with minority education and minority participation in decision-making at the local government level.¹⁴²

6.2. Practice. – The Albanian state has invested efforts in protecting minorities, especially at the legislative level. It has also taken steps to render the guaranteed legal protection effective. Co-existence of minority and majority groups is generally based on tolerance, understanding and emancipation and there have been no instances of discrimination or inequality of recognised minorities.¹⁴³ However there is discrimination against the Roma and Egyptian minorities.¹⁴⁴ The country recognises three national minorities (Greek, ethnic Macedonian and Montenegrin) and two ethno-linguistic minorities (Vlach and Roma). There are no accurate statistical data on the size of the minorities.¹⁴⁵ Albania has failed to recognise the Egyptian minority, regardless of international concern expressed with respect to this issue ever since 2004.¹⁴⁶

The right to education in minority languages is observed in general, even though minorities claim that the state has not focused on opening schools for minorities. In many cases it seems that the state does not conduct adequate studies wherefore it sometimes does not provide proper protection to minorities, an allegation frequently voiced by minorities, especially with regard to the education of the Roma and Vlach

139 Decision No. 127, dated 11 March 2004, “on the Establishment of the State Committee on Minorities” published in the Official Journal No. 13, dated 16 March 2004.

140 See <http://www.parlament.al/>.

141 Parliament Decision No. 12, dated 15 December 2005, published in the Official Journal No. 97, dated 21 December 2005.

142 The information is taken from the Ministry of Foreign Affairs and Ministry of Interior.

143 Albanian Helsinki Committee spot reports. See <http://www.ahc.org.al/kshh/minoriteti/vezhgim.html>.

144 Albanian Helsinki Committee spot reports. See <http://www.ahc.org.al/kshh/minoriteti/26tryeza.html>.

145 European commission, Albania 2005 Progress Report, Brussels, 9 November 2005, SEC (2005) 1421, [COM (2005) 561 final].

146 ECRI: Third Report on Albania, adopted on 17 December 2004.

communities. The situation seems to be positive with regard to the Greek minority.¹⁴⁷ Minority groups enjoy basic health care. However, rural areas lack the adequate health facilities and medical staff, existing in urban centres.¹⁴⁸

Although a special national strategy was approved in 2003, the Roma community continues to suffer from discrimination.¹⁴⁹ This group is exposed to many prejudices both of the society in general and state authorities.¹⁵⁰ There have been instances of police beating up or evicting Roma and Egyptian communities.¹⁵¹ The education of children, professional training and the employment of persons belonging to these minorities remains unsatisfactory.¹⁵² Participation of such groups in the decision-making processes is still very low.¹⁵³ The Greek minority has claimed their members' right to vote has been infringed by the division of the country into electoral districts. This group alleges it faces various problems, including the lack of government will to recognise the possible existence of ethnic Greek towns outside communist-era "minority zones". Minorities are allowed public use of their traditional names, however there are calls on the government to further improve these rights. Also, although national and international reports note that the Greek minority's rights to education in their language is respected, ethnic Greeks underline that the observance of this right needs to be improved.¹⁵⁴

Finally, even though this part of the report is focused more on national, racial minorities, there have been reports that sexual minority groups, *i.e.* homosexuals are mistreated, abused physically and verbally by state authorities, *i.e.* police in Albania. Such allegations are however dismissed by the police, which claim they arrested the homosexuals because they were disturbing public peace, not because of their sexual orientation.

6.3. Conclusion. – The Albanian legislation guaranteeing minority rights, especially national, ethnic or linguistic minorities, is satisfactory. However, additional subsidiary legislation needs to be adopted. The Albanian government has

147 Albanian Helsinki Committee spot reports: See <http://www.ahc.org.al/kshh/minoriteti/GJIROKAS-TER.html>.

148 See <http://www.ahc.org.al/kshh/minoriteti/vezhgim.html>.

149 European commission, Albania 2005 Progress Report, Brussels, 9 November 2005, SEC (2005) 1421, [COM (2005) 561 final].

150 Albanian Helsinki Committee report: on the Roma minority situation in Albania as compared with the Framework Convention on the Protection of National Minorities. Tirana, September 2003.

151 US Bureau of Democracy, Human Rights, and Labour: Country Reports on Human Rights Practices – 2004. See <http://www.state.gov/g/drl/rls/hrrpt/2004/>.

152 European commission, Albania 2005 Progress Report, Brussels, 9 November 2005, SEC (2005) 1421, [COM (2005) 561 final].

153 ECRI: Third Report on Albania, Adopted on 17 December 2004.

154 *Ibid.* The US 2004 Country Reports on Human Rights Practices says: "Greek-language public elementary schools were common in much of the southern part of the country, where most ethnic Greeks lived. Every village in this zone had its own elementary-middle (9-year) school in the Greek language, regardless of the number of students, and Gjirokastra had two Greek language high schools."

endorsed special strategies, e.g. the strategy to improve the status of Roma. However, there is no other special strategy on other minority groups. Implementation of the legislation is substandard, especially with respect to discrimination, particularly against Roma.¹⁵⁵

There is a lack of cooperation between bodies established to promote minority rights. Minorities are represented in some of these bodies, such as the National Minority Committee, but not in others, e.g. the Sector Monitoring the Roma National Strategy. The country lacks official data on the size of recognised minorities, although this is prerequisite for understanding what status each minority group must enjoy and for greater respect of minority rights. Finally, there is a great need to improve the efficiency of the established bodies. Regardless of many positive moves, all state institutions have to show greater respect for these rights.

6.4. Recommendations. – The country in general observes minority rights. However further efforts need to be invested to improve the minority situation. Such efforts should include:

- completing the legal and administrative framework regulating in detail issues of concern to minorities and implementing such legislation, especially the provisions of the Criminal Code;
- expanding the powers of the Committee on National Minorities, as a specialised institution on minority issues, both to make recommendations and render decisions wherefore it would address minority issues more effectively;¹⁵⁶
- allocating government funds for the implementation of its legal obligations concerning minorities, notably, the strategy on the Roma minority;
- increasing the participation of minorities, especially of Roma and Egyptians, in the decision-making process;
- taking measures so that school curricula include materials focusing on issues of tolerance and respect for diversity.

7. Political Rights; Right to Elect and to be Elected

7.1. Legislation. – The Constitution provides for a free, equal, general and periodic election system and allows people to exercise sovereignty through elected representatives and directly through referenda.¹⁵⁷ The Constitution foresees that

155 This assessment was confirmed at the roundtable “The development and integration of the Roma community, a priority of the government” organised by the Ministry of Labour, Social Affairs and Equal Opportunities, held in Tirana on 9 February 2006.

156 Bezhani K., Standards for minorities, a key element to enter EU. See http://www.accessdemocracy.org/library/1892_al_politikani_060105_alb.pdf.

157 Articles 1 and 2 of the Constitution. Also, the Constitution includes rules on the referenda in Part 11.

every Albanian citizen over 18 has the right to elect and to be elected.¹⁵⁸ Assembly elections are held every four years and local elections every three years. The last elections were held in July 2005 and local elections are to be held either this year or in 2007. A Central Electoral Commission has been established to deal with elections and referenda.¹⁵⁹ The Constitution provides for political freedom. Political parties can be created freely: their programs and activities cannot be based on totalitarian methods, incite and support racial, religious, regional or ethnic hatred, use of violence to assume power or influence state policies or have secret programmes and activities.¹⁶⁰ The Constitutional Court rules on the constitutionality of parties and other political organisations. It also decides on the constitutionality of the referenda and verification of their results and the results of parliamentary elections.¹⁶¹

The Electoral Code¹⁶² regulates in detail elections and referenda. The law has undergone several amendments that indirectly influenced the right to elect and to be elected.¹⁶³ Further changes of election regulations can be expected.¹⁶⁴ In 2005, Albania adopted a Law on Electoral Districts, which divides the territory of the country into 100 electoral districts.¹⁶⁵ The Law on Political Parties regulates the establishment and operation of political organisations.¹⁶⁶ The state offers financial support to political parties: a 2006 amendment to the Law on Political Parties provides for a formula to distribute this financial support between political parties.¹⁶⁷ Political parties are subject to control by the High State Audit and the

158 Article 45 of the Constitution sets certain limitations on the exercise of this right upon persons declared mentally ill by a court decision, and upon persons serving prison sentences who only have the right to vote.

159 Article 153 of the Constitution.

160 Article 9 of the Constitution.

161 Article 131 of the Constitution.

162 Law No. 9087, dated 19 June 2003, "The Electoral Code of the Republic of Albania," published in the Official Journal No. 52 of 1 July 2003.

163 Albanian legislation on elections has undergone several intensive changes, which influenced the right to elect and to be elected. Such changes include: Law No. 8609, dated 8 May 2000, "Electoral Code of the Republic of Albania", amended by Law No. 8780, of 3 May 2001, Law No. 9341, dated 10 January 2005. Thus, over 180 Articles of the Electoral Code and regulations on the right to appoint observers, on the electoral lists, the presentation of coalitions and multi-name lists of the parties running in the elections and even registration of parties running in the elections have been amended; these changes in fact allow for the so-called Dushk phenomenon which in essence distorts the electorate's will and allows for representation of parties which had not received the number of votes needed for such representation.

164 Parties are discussing initiating an electoral reform, that will imply changes in the electoral process rules as well.

165 Law No. 9354, dated 3 March 2005, "on Electoral Districts", published in the Official Journal No. 12, dated 18 March 2005, Law No. 8746, dated 28 February 2001 "on Establishing Electoral Districts".

166 Law No. 8580, dated 17 February 2000, "on Political Parties", published in the Official Journal No. 6, of 5 April 2000, amended by Law No. 9452, dated 2 February 2006.

167 The state budget financial support to political parties is allocated in the following manner: 70% is allocated based on the number of deputies of each party in the Assembly; 20% is divided equally

Constitutional Court in this regard.¹⁶⁸ Also, the Law on Private and Public Electronic Media includes rules on media coverage of election campaigns.¹⁶⁹ This Law stipulates equality of political groups or candidates in their appearances in the media.

7.2. Practice. – Although the right to elect and to be elected is guaranteed by law, the situation on the ground is different. In certain cases, problems derive from legal regulations: in some cases the legislation allows for differences in treatment of political parties.¹⁷⁰ The state tries not to interfere with the right to elect and to be elected; however, there are cases of direct or indirect infringement of such rights. This includes frequent legislation changes. Such changes generated the Dushk phenomenon,¹⁷¹ a vote distortion phenomenon, where big political parties instruct their members and electorate to vote for their candidates in the majority system and for allied parties in the proportional system. Initiatives to amend the provisions of the law allowing the Dushk phenomenon have gone unheeded. Also, the current legislation allows for members of one party to be fielded on the multi—name list of another party. This is another clear example of voting distortion evident especially in the 2005 elections.

Persons are free to establish political parties. Regardless of Albania's small population, 57 political parties vied against each other at the last elections.¹⁷² Only few of the parties have heeded the requirement to make public their funds.

Albania in general respects the right to elect and to be elected and has been improving its legislation continuously, especially with international support. The 2005 elections, however, brought to the fore several problematic issues. The country did not have updated election rolls.¹⁷³ The Albanian Helsinki Committee reported the same problem, adding that the existing rolls had not been made public on time.¹⁷⁴ There were problems with the administration of the election process: it ran late, incidents broke out, the lack of training of persons running the election process

amongst all parliamentary parties, 10% is divided among parties that won more than 1% of the votes at the previous parliamentary elections and the remainder of the 10% is added to the 70% allocation.

168 The Constitution requires that political parties make public their expenses, and this can be subject to Constitutional court control. Article 131 of the Constitution provides that the Constitutional Court decides on the constitutionality of the political parties and their activities. Also, political parties are subject to High State Audit control of how they spend the money received from the state budget.

169 Law 8410 of 30 September 1998 “on Private and Public Radio and Television in the Republic of Albania”, published in the Official Journal No. 24, dated 20 October 1998.

170 OSCE/ODIHR final report on 2005 parliamentary elections in Albania. See <http://www.osce.org/albania/>.

171 Dushk is an area in Albania where the phenomenon occurred for the first time.

172 See <http://www.cec.org.al/2004/Zgjedhjekuvendfiles/partite%20e%20regjistruara/partit2005.pdf>.

173 OSCE/ODIHR final report on 2005 parliamentary elections in Albania. See <http://www.osce.org/albania/>.

174 See Albanian Helsinki Committee: Report on the progress of the general elections process of July 3, 2005 in Albania, in http://www.ahc.org.al/kshh/te_tjera/raport%20perfundimtar%20zgjedhjet.pdf.

became evident, the administrative violations of the law went unpunished.¹⁷⁵ In a few cases, polling stations did not open at all. The grass root level state institutions dealing with elections did not function properly in several instances, both as the result of their political appointment, *i.e.* lack of accountability for running the process, and due to lack of professionalism. Also, there have been reports of influencing voters on how to exercise their right to vote, including both family pressure and promises, even financial support.¹⁷⁶ Family voting took place especially in the underdeveloped parts of the country. Although all are aware of this phenomenon, the measures taken so far have not been effective.¹⁷⁷

Finally, the legislative framework allows both international and national organisations to monitor the electoral process. Organisations such as the Albanian Helsinki Committee, Mjaft, Association for Democratic Culture, Albanian Group on Human Rights, Albanian Youth Council, have been involved in observing elections.

7.3. Conclusion. – The country has undergone continuous legislative changes especially with regard to the electoral process. Although the right to elect, to be elected, and to establish political parties are included in the Constitution, the enjoyment of these rights is still affected by different issues, both legislative and practical. Infringements or distortions of the right to vote are in some cases caused by the organisation of the process and partly by tradition. There are also instances of unequal treatment of political parties. However, the country in general respects the right to establish a political party or organisation.

7.4. Recommendations. – Considering the above-mentioned report, the following is recommended with regard to political rights, the right to elect and to be elected:

- the country should seriously engage in careful and timely improvement of the legislation so that the right to elect and to be elected is not distorted;
- the legislation should be implemented so that the public has access to information on funding of political parties;
- laws should provide for punishment of all violations during the election process;
- state institutions dealing with the electoral process should take relevant measures to handle the electoral process correctly and professionally; commissions established to run the elections should not be politically appointed; relevant staff should be trained on time, carefully monitored, and held accountable for their actions or failure to act;

175 OSCE/ODIHR final report on 2005 parliamentary elections in Albania. See <http://www.osce.org/albania/>.

176 *Ibid.*

177 *Ibid.*

- registration of political parties and candidates running in elections should be conducted in accordance with the Constitution: all valid regulations, such as the ones allowing for representation of candidates in two different manners, composed multi-name list, members of one party running as candidates of another party, should be repealed; registration should be completed on time so that the state institutions can conduct the required verification procedures;
- measures should be taken so that the election rolls, a major hindrance in the election process, are as precise as possible and updated on time;
- the whole electoral process, not only election day and vote counting, should be monitored;
- the country should take measures to have vote counting completed on time, without delays;
- the appeals process should stipulate that bodies reviewing appeals take into consideration all evidence they consider necessary to conduct a fair and reasoned review/judgment;
- the country should seriously work to remove any social, traditional barriers to the right to elect and be elected; measures in this respect should focus on family voting, and participation of women and minorities, especially Roma, in the process.

8. Rights of the Child

8.1. Situation. – Regardless of the fact that the Albanian legislation provides for positive regulation of child rights, their enjoyment in practice is not as good and child rights are often disregarded. The Albanian Constitution and laws prohibit torture and cruel, inhuman and degrading treatment and punishment. In reality, torture and other cruel, inhuman or degrading treatment or punishment of children in police stations and custodial detention centres is an everyday occurrence. All juveniles who were interviewed by the Children's Human Rights Centre of Albania (CRCA) said that they had been subjected to torture and other cruel, inhuman or degrading treatment or punishment during arrest. Fewer juveniles said that they were subjected to torture or other ill treatment while in custodial detention centres.

*8.2. Cases of Torture.*¹⁷⁸ – M. C., a 16 year-old boy, was arrested in Vlora during the summer of 2002 and later charged with murder. M. C. never confessed to committing the murder and insisted during the interview that there were no legal grounds for the indictment.

¹⁷⁸ Report 'No one to Care', prepared and published by the Children's Human Rights Centre of Albania (CRCA) 2005.

M. C. told the CRCA team his story:

They put me in the police van and didn't tell me where we were going. After some 20 minutes of driving we stopped in this place and they took me out. Then they kept asking me whether that was the place where I committed the murder. I kept saying that I hadn't committed any murder and they kept slapping and punching me. I started to cry. Then they told me to take my clothes off. One of the police officers came from behind and started beating me on my backside with a baton. Then another policeman ordered me to bend over and he put the baton inside me...

Throughout the interview with M. C., CRCA observed that he showed clear signs of post-traumatic stress disorder. No psychosocial help was provided to M. C. during his stay in the custodial detention centre in Vlora.

S. T., a 17 year-old boy, and his younger brother E. T., 15 years old, were arrested for armed robbery in 2004. They were kept in the custodial detention centre of Gjirokastra for three months without trial. S. T. has been sharing a room with a 52 year-old man, and two young people who are 19 and 26 years old respectively.

The police arrested us at home and brought us to the police station. They took us to the office of one of the investigating police officers. Four guys with uniforms were present. They kept me and my brother separated. The police kept asking where we were hiding the gun and the money. First, one of them slapped me, and then the second one kept punching my face and chest. Then the third pulled out his baton and kept beating me on my legs and back. The fourth punched me, too, when the other ones were tired. This situation went on for some four hours. I told them at the beginning where I had put the gun and the money, but they didn't believe me. Then a few hours later, at night time as I remember it, they sent me to the office of the Head of Public Order Police, where I met their boss. They punched and beat me again. There was blood on my face but they didn't care. They did the same to my younger brother as well...

8.3. Cases of Rape and Sexual Abuse of Juvenile Offenders. – A. SH. and G. M. were both 17 years old when they were sexually abused in the Saranda Custodial Detention Centre in June 2002. They shared their cell with seven other male detainees: one juvenile, who was 16 years old, and six adults between 20 and 27 years of age. Both victims were 18 years old when the CRCA team interviewed them. A. SH. told the team that he was raped continuously over a 3–4 month period, while G. M. denied the fact that he had been sexually abused. The abuse was also confirmed by F. S., who was in the same cell during the time of the abuse.

F. S. told his story to the CRCA Team:

I was never sexually harassed or abused during my six-month stay in custody. However, two other guys, A. SH. and G. M., were raped in my presence. I remember that we had these two new guys in the cell, one 20 and the other 27.

There was nine of us in the cell. One night they got both boys, took their clothes off and had sex with them. Although both of them were crying, no one came to help them. The older guys asked me whether I wanted to have sex with them, but I never did. All the other guys (6 adults) in the cell had sex with them. This continued for some two or three months. The police officers knew about this, but they did nothing. The police moved A. SH. and G. M. to another cell only after the new Head of Police Station came.

Meanwhile A. SH. told CRCA:

There were these two guys one 20 and the other one 27. One night, maybe around one or two o'clock in the morning they forced me to have sex with them. I told them to stop, but none of them did. They will see what happens to them when I get out of here... I never made a complaint to the police, because that would have been shameful for me.

CRCA presented this case to the police authorities in Saranda, including the Custodial Detention Centre police officers. There are no records of juveniles complaining about sexual abuse or rape to the police officers. Asked whether they had received any information that juveniles were having sex with adults, they answered "No". When the team asked the police officers why they had moved A. SH and G. M. to another cell, they replied that both juveniles had complained that they could no longer stay in that cell. The removal of the juveniles from the cell did not take place until three months after the sexual abuse had started. There was no action taken against the offenders either by the juveniles or the police authorities, until the CRCA lodged a complaint. In 2005, the Ministry of Interior launched an internal investigation after CRCA had made the case public, but neither the statements nor the outcome of this inquiry were published.

It can be concluded that the problem of child abuse has acquired alarming proportions although there are hardly any data or records on child abuse. It puts at risk many children and young people.¹⁷⁹ Resort to physical abuse by parents at almost all levels of society is considered a method of disciplining a child, a method fostered by tradition and sanctioned by customs. Gender related differences are present. Male children are punished less and are offered more violence models, while girls easily become the object of abuse by parents and other family members. Often, punishment is associated with the idea that "it is for the child's benefit", that it ensures obedience to parental authority. Violence is considered a means of bringing up children and the children themselves perceive it as a justified method and come to see beating, physical punishment, use of force etc. as '*normal*' methods employed by parents to bring up their children.

¹⁷⁹ Child Abuse in the Albanian Family' – a Children's Human Rights Centre of Albania Report, Tirana 2005.

Regarding children deprived of their liberty, Albania does not have a separate prison for juveniles or correctional facilities for children. Male and female juvenile offenders are sent to two prisons for adults in Tirana (the capital of Albania).¹⁸⁰ Both prisons recently renovated their facilities, but neither has separate wards for juveniles. Both prisons are overcrowded; due to the shortage of jails in the country, juvenile offenders share the prison cells with adults, wherefore they are subjected to different types of torture, including sexual abuse.¹⁸¹ Leisure activities are very limited, and although there are facilities for sports activities, there are no funds for them. The rigid rules applied by the police in prison are a major problem juvenile offenders face. Few members of staff in both prisons are trained and have good knowledge of the Convention on the Rights of the Child.¹⁸²

Child labour is a major child rights violation in the country and is closely related to the economic difficulties that Albanian economy is facing. Large migrations of the population from rural to urban areas, poverty and the transition period, have placed the Albanian family under great pressure, which escalates when it comes to children. A survey conducted by the CRCA questionnaire on the reasons contributing to school drop out rates in Albania, concluded that 17 % of the drop-outs needed to work to support their families. Approximately 50,000 children work at least part-time if not full-time.¹⁸³ Street children are the least protected and often most exposed to abuse, uncertainty, illiteracy, malnutrition and hard labour. In Tirana, alone, over 800 children live as beggars, street vendors, shoe-polishers etc.¹⁸⁴

The Anti-Trafficking Directorate at the Ministry of Public Order estimates that about 4,000 children under 18 years of age were trafficked in the 1992–2005 period.¹⁸⁵ These children were trafficked to neighbouring countries, such as Italy and Greece, mainly for sexual exploitation, begging, slave labour, and involvement in criminal networks abroad.¹⁸⁶ Trafficking of children for exploitation and prostitution flourished in the 1992–1998 period,¹⁸⁷ and very little was done to prevent

180 The female prison is known as Prison 325; male juvenile offenders serve their sentences at the Prison of Vaqar, 10 km from Tirana.

181 Albania: alternative report on the state of child rights and the implementation of the Convention on the Rights of the Child in Albania, Tirana, September 2004, prepared by the Children's Human Rights Centre of Albania (CRCA) and Albanian Children's Rights Network (ACRN). see <http://www.crca.org.al>.

182 *Ibid.*

183 Child Labour and Street Children in Albania' – a Report by the Children's Human Rights Centre of Albania, Tirana 2005.

184 Albania: alternative report on the state of child rights and the implementation of the Convention on the Rights of the Child in Albania, Tirana, September 2004, prepared by the Children's Human Rights Centre of Albania (CRCA) and Albanian Children's Rights Network (ACRN).

185 *Ibid.*

186 In February 2006, Albania entered into a special agreement with Greece to combat child trafficking across the borders of the two countries. See <http://www.keshilliministrave.al/shqip/qeveria/vendimet/femijet%20e%20trafikuar.asp>.

187 The National Strategy to Combat Trafficking in Human Beings, 2001.

the trafficking on the pretext that the victims had left the country voluntarily looking for a better life in the Western countries. Child trafficking is not an isolated social phenomenon and exists mainly because of poverty; families do not have opportunity for development, communities lack social services, minorities are stigmatised, women are persistently discriminated against and the educational system's response to present-day challenges is inadequate.¹⁸⁸

8.4. Conclusion. – The Republic of Albania guarantees child rights by law. The country has ratified the Convention on the Rights of the Child and adopted several laws providing protection, care and guarantees of child rights. However, in certain cases such rights are not guaranteed and are often violated. There is no national authority for the rights of the child and governmental initiatives are not coordinated. The Albanian government has resisted the establishment of such a body regardless of NGO pressures. The state and local government budgets envisage no specific budget lines for children.

The lack of a government-funded system to protect children has contributed to the increase in child violence and abuse. Child labour and child trafficking, street children, children in conflict with the law and child abuse are the most striking phenomena in Albania. NGO pressures on the central and local authorities have not been effective enough and the implementation of the Convention on the Rights of the Child has been limited and incomplete. Though various forms of training have been carried out in many towns of Albania, both government and NGO members lack knowledge of the Convention on the Rights of the Child. The Government's failure to grant funds weakened the work of NGOs on the protection of the rights of the child and the implementation of the Convention.

8.5. Recommendations. –

- The Albanian Government needs to improve the definition of torture, based on the recommendations of the Committee Against Torture and in line with the Convention Against Torture;
- the Albanian Government needs to take appropriate measures to place all pre-trial detention centres under the management of the Ministry of Justice;
- the Ministry of Interior needs to improve its data collection system and data analysis regarding juvenile crimes and crimes against children in Albania. The data need to be disaggregated by age, sex, ethnicity, rural / urban, offences etc;
- the Ministry of Interior needs to take immediate and appropriate steps to prepare and approve Standards of Care and Protection of Juveniles in

¹⁸⁸ Press statement by Special Rapporteur on the sale of children, child prostitution and child pornography on his visit to Albania. See <http://www.crin.org/violence/search/closeup.asp?infoID=6547>.

- Police Stations and pre-trial detention centres, in partnership with the Ministry of Justice;
- the Ministry of Interior needs to ensure schooling for juveniles in pre-trial detention centres;
 - the Ministry of Justice needs to establish a juvenile prison in Albania, and take appropriate measures to facilitate the implementation of alternative and educational measures for children and juveniles in conflict with the law;
 - the Albanian authorities ought to prepare policies supporting abused children, and stimulate improvement of legislation to prohibit any form of abuse or violence against children in Albania;
 - the Government needs to plan necessary financial resources to support specialised services for abused children;
 - the Government ought to take measures to establish a free of charge National Hotline for Children;
 - the Albanian authorities need to take appropriate legal and practical measures to eliminate all forms of child labour involving children under 14;
 - the Albanian authorities are to issue Guidelines for Protection of Child Workers between 14 and 18 years of age;
 - the Albanian authorities need to improve the Labour Code and regulate domestic child labour in accordance with ILO definitions;
 - the Albanian Government ought to increase the social benefits for all the families on the bread line in order to discourage them from putting their children to work;
 - the Albanian Government should strengthen the capacity of law enforcement agencies charged with combating child trafficking by providing them with training, expertise and financial resources;
 - the Albanian Government should improve legislation concerning sale of children.

9. Women's Rights

9.1. Legislation. – Under the Constitution, all are equal before the law.¹⁸⁹ Thus, all rights and freedoms are guaranteed equally to both men and women. The Constitution includes a provision prohibiting discrimination, although it does not define prohibition. Gender is the first on the list of grounds on which discrimination

¹⁸⁹ Article 18 of the Constitution.

is prohibited.¹⁹⁰ In provisions guaranteeing human rights, the Constitution mostly uses gender-neutral terms, such as 'everyone', 'all' or 'no-one'.¹⁹¹ In addition, the Constitution awards special protection to young mothers and pregnant women.¹⁹² Albania has ratified several international agreements regarding women's rights: Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁹³ and its Optional Protocol;¹⁹⁴ the Revised European Social Charter;¹⁹⁵ the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Protocol 1 to the ECHR specifically guaranteeing political rights for women; UNESCO Convention against Discrimination in Education; and a number of ILO conventions protecting women.¹⁹⁶

The Gender Equality Law was adopted in 2004¹⁹⁷ to realise equal rights of man and women as guaranteed by the Constitution, promote equal opportunities and eliminate direct and indirect discrimination on grounds of gender in public life. It also aims to define the political responsibilities of central and local governments with regard to promotion of policies for women. Main laws, such as laws on education, the Election Code, Civil Code, Criminal Code, Labour Code and Family Code¹⁹⁸ include provisions on gender equality. The Civil Code, for example, foresees equality between men and women with regard to inheritance. The Criminal Code includes several articles on women, but does not specifically criminalise domestic violence. The Labour Code specifically prohibits discrimination on grounds of gender¹⁹⁹ and has a separate chapter on protection of women.²⁰⁰ The Election Code reiterates the Constitutional guarantee equal enjoyment of the rights to elect and to be elected by men and women. The Family Code adopted in 2003 includes several articles on motherhood and family relations and legally recognises co-habitation. Under the Family Code, a spouse who has been subjected to domestic violence may ask the court to ban the perpetrator from home. As opposed to the

190 *Ibid.*, paragraph 2.

191 Almost all provisions on human rights in the Constitution include gender neutral terms. Where general or gender neutral terms were not used, the authors were careful to use words that are not gender biased.

192 Article 54 of the Constitution.

193 Ratified by Law No. 7767 of 9 November 1993 "On Adherence to the Convention on the Elimination of All Forms of Discrimination against Women", published in the Official Journal No. 13, dated 14 February 1993.

194 Albania ratified Optional Protocol by Law No. 9052, dated 17 April 2003.

195 Law No. 8960, dated 24 October 2002, on the Ratification of the Revised European Social Charter.

196 For instance, Law No. 8829 of 5 November 2001 Ratifying ILO Convention No. 183 on Protection of Motherhood or Convention No. 111 on Discrimination in Employment 1958, ratified on 27 February 1997.

197 Law No. 9198, dated 1 July 2004, "on General Equality in Society". Published in the Official Journal No. 61, dated 31 August 2004.

198 Law no. 9062 of 8 May 2003 "Family Code", published in the Official Journal No. 49, dated 20 June 2003.

199 Article 3 of the Labour Code.

200 Articles 104–107 of the Labour Code.

previous Family Law, the 2003 Family Code allows both men and women to choose their surnames when concluding a marriage but no longer allows men or women to choose to take both surnames, keep his/her own or that of the spouse. This is an issue especially affecting women in a patriarchal society like Albania's.

There is no law on domestic violence and Albanian non profit organisations initiated drafting of legislation against domestic violence. The Assembly has adopted other laws regulating matter specific to women, such as the laws on the promotion of the breast-feeding”,²⁰¹ on the termination of pregnancy,²⁰² or on reproductive health.²⁰³ Such laws provide protection to women especially with regard to a healthy pregnancy and reproduction.

9.2. Practice. – The state has been investing continuous efforts since 1992 to establish institutions to address women's rights and set up the Department on Woman and Family within the Ministry of Labour. The Ministry itself was afterwards renamed into Ministry of Labour, Social Issues and Women and subsequently into the Ministry of Labour, Social Affairs and Equal Opportunities. A specific body – the State Committee on Woman and Family – was established in 1998²⁰⁴ and was in 2001 renamed into the State Committee on Equal Opportunities. Such bodies are part of the executive authorities and similar ones have been set up within the legislative branch as well. The responsibilities of this Committee include implementation of governmental policies on women, the co-ordination of programmes for the promotion of equality of men and women at the central and local levels, evaluation of governmental programmes on women and family, proposing of new legislation, support to and coordination of NGO activities in the field of women's and family rights.

Women enjoy the same rights as men under the law, but they are not fully equal in practice. Amnesty International reports that violence against women is common,²⁰⁵ while the US State Department qualifies violence and discrimination against women as a serious problem in Albania.²⁰⁶ The EU Progress Report highlights that the society is a traditionally male dominated one. Although only a few cases of violence against women were reported, the EU Report notes that the

201 Law No. 8528 dated 23 September 1999 “on Promotion of Breast-Feeding”, published in the Official Journal No. 27, dated 22 October 1999.

202 Law No. 8045, dated 7 December 1995, “on Termination of Pregnancy”, published in the Official Journal No. 26, dated 28 December 1995.

203 Law No. 8876, dated 4 April 2002, “on Reproductive Health”, published in the Official Journal No. 15, dated 13 May 2002.

204 Decision No. 415, dated 01 July 1998, “on the Establishment of the Equal Opportunities Committee”.

205 AI report 2005: Albania. <http://www.amnestyusa.org/countries/albania/index.do>.

206 Supporting Democracy and Human Rights: The U.S. Record 2004–2005 March 28, 2005 <http://www.usemb-tirana.rpo.at/pg1news/0328%20supporting%20democracy%20and%20human%20rights%20Eng1.pdf>.

number of cases reported and prosecuted is much lower than those existing in reality.²⁰⁷

Although women seem to enjoy equal political rights, there have been reports of family voting, where the man of the house instructs women how to vote, especially in rural communities. Although women enjoy the right to be elected, only a few actually avail themselves of the privilege of running and being elected, considering that political parties themselves rarely field women as their candidates. It should be noted, however, that several parties have adopted a quota system allocating a certain percentage of candidacies to women. Women have established many non profit organisations which have been active in social life; unfortunately, their campaigns have only slightly changed the status of women in the country. Domestic violence, in all its forms, remains a huge problem for the country and women are its greatest victims. State institutions do not always react to domestic violence which is considered a private affair. Also, women enjoy equal labour-related rights and can establish a business of their own just like men. Notwithstanding, more women than men are unemployed and only a few women hold senior offices.

Notwithstanding several laws with gender equality clauses, Albania has failed to include any quota systems in the legislation to actively support women's participation in the country's public life. Although the Gender Equality Law includes a provision requiring that between two equal candidates for a job, priority should be given to the female candidate, this clause is not strong enough to promote women's participation in society and the decision-making process.

9.3. Conclusions. – The country has adopted several laws referring to equality of man and women. *De jure*, women enjoy all rights as men. A specific gender equality law has also been adopted. Specific state bodies on women's rights have been operating since 1992. A Committee on Equal Opportunities recently substituted the Committee on Women and Family. The civil society has also been actively promoting women's rights. Women have set up many non-profit organisations advocating women's issues. Regardless, the status of women needs to improve. They are not economically empowered, are frequently victims of trafficking and abuse, and rarely participate in decision-making. Finally, there is no national strategy for women.

9.4. Recommendation. – Considering the situation of women in the country and in view of their importance in society and its development, the state should adopt a national strategy for women. Also, the state should allocate considerable funds for concrete programmes and projects. Albania must pass a domestic violence law considering the level of violence against women. Finally, the legislators ought

207 EC, Albania 2005 Progress Report, Brussels, 9 November 2005, SEC(2005)1421,[COM (2005)561 final].

to consider the adoption of a quota system to promote women's participation in public life and decision-making processes.

10. Trafficking in Human Beings

10.1. Legislation. – Trafficking in human beings encroaches on a number of constitutional rights, including the right to life, deportation of both nationals and foreigners, torture and freedom of movement. A national strategy was approved in February 2005 to fight trafficking of children and protect children – victims of trafficking.²⁰⁸ The country has ratified a number of international conventions related to trafficking. The Government in December 2005 signed in principle the Council of Europe Convention on Action against Trafficking in Human Beings.²⁰⁹ It has also signed bilateral agreements on combating trafficking with neighbouring countries, such as Macedonia²¹⁰ and recently with Greece.²¹¹ Trafficking in humans is regulated by the Criminal Code, which incriminates trafficking in human beings in general and specifically trafficking of women and children.²¹² It envisages penalties for criminal offences related directly or indirectly to trafficking in human beings and stricter punishment for trafficking of women or children.²¹³ Also, it envisages the confiscation of all means used during trafficking and proceeds from trafficking.²¹⁴ Moreover, with the aim of clarifying provisions on trafficking, the Criminal Code includes a number of other related articles, incriminating kidnapping of adults

208 Council of Ministers Decision No. 171, dated 11 February 2005 on the Approval of the National Strategy against Trafficking and Protection of Children – Victims of Trafficking and to amend Decision No. 8, dated 5 January 2002 on the Establishment of the State Committee for Combating Trafficking in Human Beings, published in the Official Journal No. 21, dated 13 April 2005.

209 Decision of 6 December 2005. See <http://www.keshilliministrave.al/shqip/qeveria/mbledhjet/vendime%20%20dhjetor.asp>.

210 Law No. 9307 dated 4 November 2004.

211 See <http://www.keshilliministrave.al/shqip/qeveria/vendimet/trafikimi%20i%20femiojeve.asp>.

212 Criminal Code: Article 110/a – Trafficking in human beings, Article 114/b – Trafficking in women for prostitution, Article 128/a – Intentional hiding or substituting of a child, Article 128/b – Trafficking of children.

213 These include trafficking of human beings, trafficking of women for prostitution, trafficking of children, illegal border crossing; assistance in illegal border crossing; exploitation of prostitution, including incitement, mediation in or profit from prostitution; prostitution; exploitation of prostitution in aggravated circumstances of minors or people incited or forced to prostitution outside of Albania by criminal organisations; maintenance, exploitation, financing and renting out of premises for prostitution; kidnapping of an adult or child under the age of 14; intentional hiding or substituting of a child; unlawful deprivation of liberty and endangering a person's life or causing physical disability; physical assault; sexual assault; confiscation of identification papers; forgery of identification papers; threat; commission of criminal offences in collusion by armed or criminal organisations.

214 In fact, there is an inconsistency between two articles of the Criminal Code, Article 30 (1), and Article 36. Under Article 36, confiscation of means used to commit the criminal offence and of proceeds from crime is mandatory and applied by the court, while Article 30 (1) states that this penalty (among other punishments) can be applied together with the principal penalty.

and children, exploitation of prostitution, illegal crossing of borders, sexual and physical assaults. Other Criminal Code provisions are also related to trafficking in human beings, such as the ones on marriage, especially forced marriage, and forgery of documents. The Code also stipulates the confiscation of all objects serving or used to commit the crime and all material and financial proceeds from crime following the conviction for the crime. This also complies with the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ratified by Law No. 8646 on 20 July 2000.

Under Albanian law, citizens of foreign countries may be deported if they have illegally entered Albania. Law No. 8492 of 27 May 1999, “on Foreigners” thus regulates situations related to trafficking. Foreigners, who illegally entered or stayed in Albania, may be deported, at the special order of the Ministry of Public Order. Consequently, persons involved in trafficking, who had illegally entered Albania, may be subject to this Article.²¹⁵

It is worth mentioning that a victim of trafficking is entitled to all rights of due process, including the right to be represented by a legal counsel, an interpreter, etc. In addition, the Albanian Assembly adopted a Witness Protection Law in 2004 and relevant by-laws in 2005.²¹⁶

There are specific laws aiming to suppress trafficking, such as Law No. 8663 of 5 August 2002 “on the Registration, Manner of Use and Control of Motor-Powered Navigational Conveyances under 20 Tons Net”. To fight trafficking, the government early this year proposed a draft law banning the use of such speedboats for a period of three years. Notwithstanding outcries that the draft violates human rights guaranteed by the Constitution,²¹⁷ the Assembly passed the law on 3 April 2006.²¹⁸

10.2. Practice. – Albania has in place quite an elaborate legislative framework to fight trafficking. Also, the country has established several bodies to combat trafficking, such as the Anti-Trafficking State Committee set up in 2002.²¹⁹ The Committee comprises representatives of all relevant institutions fighting trafficking. Also, an Anti-Trafficking Unit was established in 2005 under the supervision of the

215 However, if there are reasonable grounds to believe that the foreigner's life would be threatened in the country which he is to be deported to, she or he will be exempted from deportation and may apply for asylum.

216 Law No. 9205, dated 15 March 2004 “on the Protection of Witnesses and Co-operators of Justice. Published in the Official Journal No. 22, dated 16 April 2004.

217 This is a case when the aim cannot justify the means, as the means are in violation of the highest law in the country and human rights of citizens. Stricter measures ensuring the functioning of the state structures and their respect of human rights would have been the best avenue.

218 Seventy two members of the Assembly voted for the law. See <http://www.parlament.al/dokumenti.asp?id=897&kujam=Si>.

219 Decision No. 8, dated 5 January 2002, “on the Establishment of the State Committee for Combating Trafficking in Human Beings”.

Ministry of Interior.²²⁰ A National Reception Centre has also been set up. The situation is also tackled by NGOs that have established additional shelters for trafficked persons. International organisations operating in Albania, including UNHCR, OSCE, IOM, USAID,²²¹ are also dedicated to the fight against trafficking. They have helped set up shelters for trafficked women and children and are conducting specific anti-trafficking programmes. The government lacks mechanisms to streamline and coordinate international programmes and support.

Albania is still a source country primarily for women and children trafficked for sexual exploitation, begging and labour.²²² Persons are mostly trafficked to Greece and Italy and further on to the United Kingdom, France and the Netherlands.²²³ The magnitude of trafficking is related to the fact that Albania remains the poorest country in the region. The phenomenon affects both females and males. Europol's 2005 Report found Albania, among other Balkan countries, to be the primary source of trafficking of women in Eastern Europe.²²⁴ The U.S. State Department's 2005 Trafficking in Persons Report categorised Albania as a Tier 2 country for the fourth year running. However, it should be noted that the country has become less of a trafficking source compared to the preceding years due to the measures taken to fight trafficking; the ministry of Interior report states that Albania does not represent a transit country for trafficking victims arriving from other countries and whose destination is the EU.²²⁵

The justice system is an important element in the fight against trafficking. Courts have passed a number of sentences convicting kidnappers of children or women, whom they had usually forced to work.²²⁶ The Serious Crimes Court recently convicted three child traffickers to 59 years of imprisonment.²²⁷ The witness protection mechanisms have mainly not been applied for lack of funds.

220 Prime Minister's Order No. 203 of 19 December 2005.

221 The anti-trafficking program is one of USAID's largest and most comprehensive bilateral programs in Albania. Its key components of prevention, reintegration, and coordination are focused on addressing the issue of trafficking from a victim's and child's rights perspective.

222 AI Report 2005: Albania. See <http://web.amnesty.org/report2005/alb-summary-eng>.

223 U.S. State Department's 2005 Trafficking in Persons Report, June 3, 2005. See <http://www.state.gov/g/tip/rls/tiprpt/2005/46613.htm>.

224 On 24 January, South Eastern European Times quoted a 2004. Europol report on organised crime in Europe as saying Albania, Bulgaria and Romania, along with Ukraine, were primary sources of the trafficking of women in Eastern Europe and that organised groups of ethnic Albanians were active in many EU member states and involved in various criminal activities such as drug smuggling, illegal immigration and human trafficking. See <http://www.legislationline.org/?tid=178&jid=2>.

225 Republic of Albania, Ministry of Interior, Anti-trafficking Unit: Report on the Realisation of the Albanian National Strategy to Combat Trafficking in Human Beings, January – December 2005.

226 On 6 June, a court in Tirana convicted Baftar Gjana to 18 years in prison and Xhevair Lusha to 15 years for kidnapping a 20-year-old woman, smuggling her across the Adriatic, and selling her in Italy in December 2001. The woman had been forced into prostitution and subsequently escaped, returned to Albania, and testified against the kidnappers.

227 Tema Newspaper, Thursday, 6 April 2006.

Although the Albanian authorities have reported that several witnesses have been offered protection,²²⁸ the implementation of laws and by-laws remains weak and the bodies that are to implement them have not been set up yet.

10.3. Conclusion. – The law empowers Albanian authorities to fight trafficking. Witness protection legislation is now in force and detailed by subsidiary legislation. Trafficking has not been eradicated yet, despite the national and international efforts invested in the endeavour. Suppression and elimination of trafficking prompted the adoption of drastic regulations, which in certain cases restrict other human rights. Considering that trafficking is related to poverty and given the current state of the Albanian economy, the Albanian authorities cannot combat it alone and calls for support from other countries, both NGOs and governments. Regardless of the fact that the country is investing significant efforts in fighting trafficking, implementation of anti-trafficking tools remains inadequate and a critical area of concern.²²⁹

10.4. Recommendations. – *In view of the situation and based on the conclusions, it is recommended that:*

- the country allocate more money to combating trafficking;
- witness protection mechanisms are applied and budget funds allocated specifically for witness protection and the remuneration of witnesses and persons co-operating with the justice system;
- more active co-operation between the NGOs and international governments on anti-trafficking programmes to achieve better results;
- cooperation with neighbouring countries is expanded and stepped up;
- the government try to find the best way to fight trafficking, not by violating other rights like it has done with the moratorium on speedboats;
- specific areas of legislation are implemented more effectively and with greater willingness;
- more funds are allocated for implementation of legislation.

228 Eleven witnesses were provided with special protection measures including relocation in 2005. In addition, provisional (one-month) protection measures were ordered for 15 witnesses. As per human trafficking, one protected witness was relocated. See Report on Realisation of the Albanian National Strategy to Combat Trafficking in Human Beings, January – December 2005 of the Anti-Trafficking Unit, Ministry of the Interior, Republic of Albania.

229 U.S. State Department's 2005 Trafficking in Persons Report, June 3, 2005. See <http://www.state.gov/g/tip/rls/tiprpt/2005/46613.htm>.

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HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA IN 2005

I INTRODUCTION

The Bosnia and Herzegovina (BiH) Constitution laid down the foundations of the human rights system in BiH. The Constitution was adopted as Annex IV to the Dayton Peace Accords signed in Paris on 14 December 1995. Human rights have a specific status in the Constitution, notably in Article II(2) which says: “The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law”.² Under the Constitution, “To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement”.³ Annex 1 to the Constitution lists 15 additional human rights agreements that will be applied in BiH.⁴ The following provision in Article II (6) is especially relevant with respect to the implementation of these standards:

Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.⁵

However, the general conclusion that can be drawn after ten years of implementing the human rights protection system is that there is an enormous gap between human rights theory and practice in BiH.

Amending the BiH constitutional framework has been the main topic of BiH public and political debates. Nearly all relevant protagonists have views on how the Constitution ought to be amended; these are so diverse that it is quite unlikely

1 The author is Head of the Library and Documentation Department of the Human Rights Centre of the University in Sarajevo.

2 Constitution of Bosnia and Herzegovina, p. 16.

3 *Ibid.*, p. 16.

4 *Ibid.*, p. 23.

5 *Ibid.*, p. 17.

minimum agreement on a common platform will be reached. There is only consensus on the fact that BiH needs a new constitutional framework and on human rights issues. All participants in the talks on constitutional amendments agree that human rights must retain a prominent position in the future constitutional provisions. The popularly called 'first stage' of constitutional changes ended in May 2006, when eight political parties, which had proposed constitutional amendments, failed to muster the necessary majority in the BiH Parliamentary Assembly.

However, even had the constitutional amendments been adopted, it remains uncertain that their adoption would have affected human rights practice in BiH to a greater degree. Namely, the valid constitutional provisions already provide for the protection of a broad spectrum of human rights. Since the Dayton Accords were signed, the BiH legislative bodies (state, entity and cantonal parliaments) have adopted a number of progressive and modern laws in conformity with international human rights standards and on the basis of the constitutional provisions on human rights. The key problem is their implementation, which is in specific cases so poor that it may even be said that specific legal provisions are not implemented at all (e.g. laws on gender equality, labour, access to information, etc.).

Many factors lie at the cause of the difficult implementation of human rights regulations: a history marked by the rule of authoritarian regimes; armed conflicts, the main feature of which included crimes against civilians, ethnic cleansing and even genocide; the non-existence of a human rights culture, an undeveloped civil society, etc. The situation is additionally complicated by the nature of the international community's involvement in BiH. Some maintain that the international community, spearheaded by the Office of the High Representative (OHR),⁶ has a mission of authoritarian "state-building", turning BiH into a form of international protectorate,⁷ and frequently lay responsibility for the state of human rights on the IC representatives, not on national authorities.

This report aims to highlight the problem of the discrepancy between human rights theory and practice in BiH. It will thus give a general overview of all international human rights treaties binding on BiH, its complex and unique human rights protection system and its recent changes. However, to illustrate the real state of human rights in BiH, the report will also cite several examples of large-scale human rights violations, notably violations of political rights and the prohibition of discrimination, of the right to a fair trial, the right to work, the right to pension and disability insurance and health insurance and of national minority rights.

6 More on the mandate of the Office of the High Representative in BiH available at www.ohr.int.

7 Gerald Knaus and Marcus Cox, "The "Helsinki Moment" in Southeastern Europe", *Journal of Democracy*, Vol. 16, No. 1 (2005), p. 40.

II HUMAN RIGHTS IN LEGISLATION

The human rights system in BiH came to be on 21 November 1995, the day the Dayton Peace Accords were initialled.⁸ It is defined by Annex 4 to the Accords i.e. the Constitution of BiH. Apart from the Constitution, Annex 6, entitled Human Rights, also defines the human rights system. In addition to the Preamble of the Constitution, which expresses the highest level of commitment to democratic principles and the respect of human rights, paragraphs 1–8 of Article II of the Constitution directly treat the field of human rights.

Article II

Human Rights and Fundamental Freedoms

1. Human Rights. Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

2. International Standards. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

3. Enumeration of Rights. All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

- (a) The right to life.
- (b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment.
- (c) The right not to be held in slavery or servitude or to perform forced or compulsory labor.
- (d) The rights to liberty and security of person.
- (e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.
- (f) The right to private and family life, home, and correspondence.
- (g) Freedom of thought, conscience, and religion.
- (h) Freedom of expression.
- (i) Freedom of peaceful assembly and freedom of association with others.
- (j) The right to marry and to found a family.

⁸ The Accords were ratified in Paris on 14 December 1995.

- (k) The right to property.
- (l) The right to education.
- (m) The right to liberty of movement and residence.

4. Non-Discrimination. The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

5. Refugees and Displaced Persons. All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.

6. Implementation. Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.

7. International Agreements. Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution.

8. Cooperation. All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.⁹

The international agreements in Article II (paras. 4 and 7) are listed in Annex 1 to the Constitution:

- 1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide

9 BiH Constitution <http://www.ustavnisud.ba/?lang=hr&page=texts/constitution/article02>.

2. 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto
3. 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto
4. 1957 Convention on the Nationality of Married Women
5. 1961 Convention on the Reduction of Statelessness
6. 1965 International Convention on the Elimination of All Forms of Racial Discrimination
7. 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto
8. 1966 Covenant on Economic, Social and Cultural Rights
9. 1979 Convention on the Elimination of All Forms of Discrimination against Women
10. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
11. 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
12. 1989 Convention on the Rights of the Child
13. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
14. 1992 European Charter for Regional or Minority Languages
15. 1994 Framework Convention for the Protection of National Minorities¹⁰

The BiH Constitution is a unique example of constitutional practice in the world owing to the fact that the listed international human rights standards constitute an integral part of it.

Pursuant to the BiH Constitution, human rights are also enshrined in the Constitutions of the two entities (the Federation of BiH and the Republika Srpska (RS)), the Constitution of the Brčko District and the constitutions of all BiH Federation cantons. The RS Constitution, however, differs from the others as it makes no mention of international human rights standards or the institution of Ombudsman. When one takes into account the presented constitutional framework, one can assert that citizens of BiH enjoy the highest degree of human rights protection, at least theoretically.

The human rights protection system in BiH also has an institutional framework in which the following institutions hold the most prominent positions:

- Human Rights Ombudsman of Bosnia and Herzegovina

¹⁰ *Ibid.*

- Institution of the Ombudsman of the Federation of Bosnia and Herzegovina
- Ombudsman of Republika Srpska
- Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina
- Constitutional Court of Bosnia and Herzegovina
- Court of Bosnia and Herzegovina

These national human rights institutions can be divided into two sub-groups: (1) institutions reaching legally binding decisions (the courts and the Human Rights Commission within the Constitutional Court of BiH), and (2) institutions whose decisions are not legally binding and are issued in the form of recommendations (all ombudsman institutions). The list of national institutions for the protection of human rights is not exhausted by the above institutions when one takes into account Article II (6) of the BiH Constitution under which all state and entity judicial, legislative and executive authorities are responsible for the respect and protection of human rights.

Since the Dayton Accords came into effect ten years ago, the national human rights protection system has undergone significant changes regarding all listed main national institutions for the protection of human rights, especially those established under Annex 6 to the Dayton Accords. Annex 6, or the “Agreement on Human Rights”, establishes a Human Rights Commission comprising two bodies: the Ombudsman Office and the Human Rights Chamber. The Commission was to an extent modelled after the European system for the implementation of the ECHR, while the Ombudsman Office played a role similar to that of the European Commission of Human Rights. The Ombudsman initially operated as an independent public institution with jurisdiction over civil complaints about violations of human rights guaranteed by the BiH Constitution. After investigating the allegations, the Ombudsman publishes his or her findings and conclusions. The Ombudsman forwards his or her recommendations to the competent government bodies which are to take measures to rectify the established human rights violations. Initially, the Ombudsman referred specific cases to the Human Rights Chamber.

While it operated,¹¹ the Chamber had the mandate “to consider alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the Convention and 15 other international agreements listed in the Appendix to Annex 6. Particular priority was given to allegations of especially grave or systematic violations, as well as those founded on alleged discrimination on prohibited grounds”.¹²

11 The mandate of the Human Rights Chamber expired on 31 December 2003.

12 Human Rights Chamber, available at <http://www.hrc.ba/bosnian/home.htm>.

The procedure applied by the Human Rights Chamber procedure was modelled after that of the ECtHR. The Chamber was allowed to receive applications “concerning such human rights violations directly from any Party to Annex 6 or from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing”.¹³ Moreover, it had jurisdiction only over applications “concerning matters which are within the responsibility of one of the Parties to Annex 6 (the State of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska), and which occurred or continued after entry into force of the General Framework Agreement on 14 December 1995.”¹⁴

All decisions of the Chamber were final and binding. The respondent Parties were obligated to implement them fully and the OSCE and OHR, to which the decisions were forwarded, played an important role in monitoring their implementation. In practice, citizens would bypass the Ombudsman Office because its procedures were long and decisions not legally binding, and would file their complaints directly with the Human Rights Chamber. The Human Rights Commission thus found itself operating as two separate institutions, not as one single national human rights institution. This *de facto* division was legalised in late 2000 when the OHR imposed the Law on the Human Rights Ombudsman of Bosnia and Herzegovina and transformed the former Ombudsman Office into a national institution at the state level and extended the Chamber's mandate until the end of 2003.¹⁵ The Human Rights Chamber's mandate expired on 31 December 2003. The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina¹⁶ was set up with the mandate to adjudicate applications received by the Chamber by 31 December 2003 under the Agreement between the parties pursuant to Article XIV of Annex 6 signed on 22 and 25 September 2003 and January 2005. The Commission applies the same legislation as the Human Rights Chamber and its decisions are also final and binding and the respondent parties are obliged to implement them fully. Commission decisions in meritum are still forwarded to the OSCE and OHR which monitor compliance with them.

The decision on the gradual dissolution of the Human Rights Chamber and its integration in the BiH Constitutional Court was the topic of many discussions, public and expert debates. According to former Chamber Judge Manfred Nowak, the decision was rash and taken under pressure from the CoE and Venice Commission and BiH politicians. The main arguments for the dissolution of the Chamber

13 *Ibid.*

14 *Ibid.*

15 Nowak, Manfred. “Introduction”, “Human Rights Chamber for Bosnia and Herzegovina: Digest: Decisions on Admissibility and Merits 1996–2002. Kehl; Strasbourg; Arlington: N. P. Engel, 2003. p. 3.

16 More information on the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina is available at <http://www.hrc.ba/commission/bos/default.htm>.

were based on its partial overlap with the jurisdiction of the Constitutional Court and its alleged transitional nature, Nowak claims.¹⁷ On the other hand, the decision to dissolve the Human Rights Chamber came at the time this institution had finally begun to operate as a modern national human rights protection institution, having successfully suppressed political influence on the process of judicial adjudication and built a positive public image. The Chamber ceased work precisely at the time it achieved the highest level of statistical efficiency, when its performance considerably improved in terms of quality, at the time it was reaching decisions like the one on the so-called Algerian Group or on the establishment of a Commission for Investigation of Genocide in Srebrenica. The question remains to what extent the Chamber's successful performance motivated the extremely strong coalition of the IC and BiH politicians that was working on abolishing it.

Judicial authority in BiH is exercised by the Constitutional Court and the Court of Bosnia and Herzegovina. In the context of the valid specific constitutional framework for human rights protection (inclusion of international human rights agreements in the Constitution), this report focuses on the Constitutional Court of Bosnia and Herzegovina,¹⁸ which may be qualified as the "strongest protector of human rights".¹⁹ Its activities are guided by the BiH Constitution, the Court Rules of Procedure and the ECHR.

Under the BiH Constitution, the ECHR enjoys the effectiveness of a constitutional law.²⁰ In Article 2, it speaks of the direct applicability of the ECHR, i.e. application of ECHR norms to specific cases. ECHR provisions are actually applied by the regular BiH courts and the Constitutional Court and Court of Bosnia and Herzegovina. The Constitutional Court of Bosnia and Herzegovina has exclusive jurisdiction to decide any dispute that arises under the BiH Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities or between institutions of Bosnia and Herzegovina. It also has appellate jurisdiction over issues under the BiH Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. In practice, this key institution within the human rights protection system is operating in extremely disadvantageous circumstances. First of all, the 'direct application' of the ECHR is brought into question within the existing legislative system as most valid laws are not in conformity with ECHR provisions, wherefore it is extremely difficult to directly apply the general norms of the ECHR.

17 Nowak, Manfred. "Introduction", "Human Rights Chamber for Bosnia and Herzegovina: Digest: Decisions on Admissibility and Merits 1996–2002. Kehl; Strasbourg; Arlington: N. P. Engel, 2003. p. 15.

18 More information on the organisation and procedures of the Constitutional Court of Bosnia and Herzegovina is available at www.ustavisud.ba

19 Simović, Miodrag N. "Role of the Constitutional Court of Bosnia and Herzegovina in the Protection of Constitutionality in Bosnia and Herzegovina". *Kriminalističke teme*. Vol. 3, No. 3–4 (2004). p. 240.

20 Pobrić, Nurko. "Application of the ECHR in Court Practice – Review and Prospects". *Ljudska prava: revija za ustavno i međunarodno pravo*. Vol. 1, No. 2 (2000), p. 102.

The BiH Constitution, with its ambiguous and mutually contradictory provisions,²¹ additionally aggravates human rights protection.²²

The human rights protection system in BiH is complemented by the two entity ombudsman institutions: the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina and the Ombudsman of Republika Srpska – Human Rights Protector.

The Institution of the Ombudsman of the BiH Federation was established under the Federation of BiH Constitution “as an independent institution to protect human dignity, rights and freedoms of natural persons as guaranteed by the BiH Constitution and the BiH Federation Constitution and in the instruments listed in the Annex thereto”.²³ The Institution of the Ombudsman comprises three persons, representatives of each of the three constituent nations (Bosniac, Serb, Croat). The RS Ombudsman – Human Rights Protector has the same mandate and composition. Like the state ombudsman, the entity ombudsmen cannot issue legally binding decisions. If they find a human right has been violated, they issue relevant recommendations to the state bodies charged with human rights violations.

Every year, the entity Ombudsmen register thousands of complaints of BiH citizens. To illustrate, the Institution of the Ombudsman of the Federation of BiH in 2004 registered 11,400 complaints encompassing 25,058 citizens who complained about the actions by executive, legislative and judicial authorities. Of the complaints, 68.09% were found to be grounded.²⁴ The Institution of the Ombudsman of the Federation of BiH in 2004 undertook 12,041 activities with regards to the complaints (written and verbal representations and exhortations, decisions establishing human rights violations, and recommendations), and registered a 65.5% compliance with its recommendations, a drop over the preceding years.²⁵

In 2004 and the first quarter of 2005, the Institution of the Ombudsman of the Federation of BiH issued also 23 special reports on large-scale violations of social and health-related rights, property rights, the right to privacy, enforcement of security measures in court proceedings, freedom of the media, etc. Cooperation with the authorities in this area has plunged, as only 34% of its recommendations were complied with.²⁶

21 All ambiguities and contradictory provisions in the Constitution of Bosnia and Herzegovina are apparently the consequence of the fact that the Constitution is a document which is an integral part of a peace agreement between parties to an armed conflict.

22 Pobrić, Nurko. “Application of the ECHR in Court Practice – Review and Prospects “. *Ljudska prava: revija za ustavno i medunarodno pravo*. Vol. 1, No. 2 (2000), p. 102.

23 *Citizen's Guide to the Government of the Federation of Bosnia and Herzegovina*. Sarajevo: International Foundation for Election Systems, 2002, p. 67.

24 Ombudsmen note that the percentage ranges between 10% and 15% in traditional democracies.

25 Ombudsmen note that the percentage always exceeds 90% in traditional democracies.

26 All data and statistical indicators were taken from the 2004 Annual Report of the Institution of Ombudsman of the Federation of Bosnia and Herzegovina available at <http://www.bihfedomb.org/bos/reports/annual.htm>.

In the same period, the Ombudsman of RS – Human Rights Protector received 4,517 written complaints, while some 20,000 citizens verbally asked the Ombudsman to help them protect their rights. With the 553 complaints carried over from the previous year, the Ombudsman processed a total of 5,070 written complaints, 3,624 of which successfully (by opening investigation, mediation or issuance of recommendations); 3595 were resolved by mediation, while written recommendations were issued regarding 41 cases (0.6%). Of the 41 written recommendations, 29 were complied with; the fate of the rest remained unknown as they were issued at the end of the reporting period.²⁷

Entity Ombudsmen have for years been issuing extremely troubling assessments of the state of human rights in BiH, having registered human rights violations at all levels and in nearly all walks of life. Moreover, the Ombudsmen have registered lesser respect for human rights in 2004 and 2005 mostly by the legislative and executive authorities at all levels. Part of the responsibility rests also with IC agencies which have been showing less and less interest in constructively contributing to the qualitative functioning of the human rights system in BiH. This is manifested by the fact that the IC has in the recent period failed to provide real support to the numerous reports and recommendations issued by the entity Ombudsmen. The Ombudsmen continue alerting to the numerous discriminatory laws dating from the communist era and the fatal legal lacunae created by the non-adoption of adequate legislation.

In addition to the Ombudsmen, the BiH human rights protection system comprises the other courts, state agencies, authorities and bodies at all state levels, which are obligated to apply and respect human rights and fundamental freedoms under the BiH Constitution. Precisely these institutions are the most main cause of the unsatisfactory state of human rights in the country. Their attitude towards human rights stems from their ignorance and alarming lack of awareness of the main principles and legal provisions pertaining to the broad scope of human rights and their lack of will and desire to take on this burning issue.

III INDIVIDUAL RIGHTS

1. Prohibition of Discrimination and Political Rights

Bosnia and Herzegovina is suffering from one of the most severe forms of discrimination in the field of realisation of political and civil rights. The strongest legal guarantor of human rights and freedoms in BiH – its Constitution – is

²⁷ All data and statistical indicators were taken from the 2004 Annual Report of the Ombudsman of Republika Srpska – Human Rights Protector, available at <http://www.ombudsmen.rs.ba/izvjestaji/godisnji.html>.

paradoxically the source of such discrimination. Prof. Dr. Omer Ibrahimagić gives a legally founded explanation of the paradox: he claims that the BiH Constitution gives precedence to the entities at the expense of the state, citizens and peoples and that this is the key reason why the state of BiH does not function.

Under Article IX (3) in the General Provisions of the BiH Constitution, “Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina.” Articles IV and V, regulating the composition and election of the BiH Parliamentary Assembly and Presidency, are, however, in contravention of Article IX. The borders of the BiH electoral districts coincide with the borders of the entities; thus, Bosniacs and Croats living in Republika Srpska cannot run for the seats in the House of Peoples or the BiH Presidency reserved for Bosniacs and Croats, and vice versa, the Serbs living in the Federation of BiH are deprived of the right to run for the seats in the Parliamentary Assembly House of Peoples and the BiH Presidency reserved for Serbs.²⁸

Articles IV and V of the BiH Constitution are obviously in contravention of Article 25 of the ICCPR which emphasises the principle of equality in the conduct of public affairs and election.

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.

Prof. Ibrahimagić bases his assertion on the violation of human rights on para. 7 of the Document of the Copenhagen Meeting of the CSCE 1990 Conference on

²⁸ Ibrahimagić, Omer. “State of Bosnia and Herzegovina according to European Democratic Standards”, *Pregled: časopis za društvena pitanja*. No. 1–2/2005. pp. 37–38.

the Human Dimension, according to which, “to ensure that the will of the people serves as the basis of the authority of government, the participating States will permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote (7.2); guarantee universal and equal suffrage to adult citizens (7.3); respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations without discrimination (7.5).²⁹

The situation is additionally aggravated by the fact that similar discriminatory provisions have already been recognised and penalised by the BiH Constitutional Court Decision U/58 on Entity Constitutions. Prof. Ibrahimagić notes that this will result in the “the entities being multiethnic but Bosnia and Herzegovina not being a multiethnic community of citizens. Its multiethnicity will be mediated by the multi-ethnicity of the entities”.³⁰

With the adoption of the Decision, the Entity Constitutions achieved a higher level of conformity with the BiH Constitution, higher than the level of its own self-conformity. In other words, the BiH Constitution is unconstitutional as it contains totally contradictory provisions on the respect of human rights of BiH citizens. The discriminatory effect of the BiH Constitution does not end with the above provisions. The 'error in construction' of the Constitution, as Prof. Ibrahimagić qualifies it, lies in Article IV (3d) regulating the decision making procedure in both BiH Parliamentary Assembly chambers: the House of Representatives and the House of Peoples.

Entities are given precedence at the expense of the citizens and peoples in both chambers. As the House of Peoples comprises Delegates of the three constituent peoples delegated by the Entity parliaments and the House of Representatives is composed of representatives of citizens elected by voters in both entities, it seems illogical to condition a decision by a majority including at least one-third of the votes of the Delegates or Members from the territory of each entity. In parliamentary democracies with houses of representatives, such chambers represent citizens as political actors, they are the houses of the citizens, of the voters in the broadest sense of the word. In houses of representatives, decisions are taken by the majority of those present and voting. The political capacity of the citizens is lost by conditioning the adoption of a decision by a one-third vote of delegates or members from the territory of each entity. The House of Representatives as the house of citizens is thus transformed into the house of entities, while the House of Peoples, although a house of peoples, is also transformed into a house of entities.³¹

29 Ibrahimagić, Omer. “State of Bosnia and Herzegovina according to European Democratic Standards”, *Pregled: časopis za društvena pitanja*. No. 1–2/2005, p. 38.

30 *Ibid.*, p. 38.

31 *Ibid.*, p. 39.

Therefore, citizens of BiH are discriminated against by the provisions of the BiH Constitution and to the benefit of the entities of the Federation of Bosnia and Herzegovina and Republika Srpska.

2. Right to a Fair Trial and the State of the Judiciary

Key international human rights documents, such as the ECHR and the ICCPR, deal with the right to a fair trial. In view of the constitutional status of these treaties in BiH, the importance of this right is thus indisputable when assessing the state of human rights in BiH. Its relevance is all the greater in view of the history of the judiciary in BiH, which never enjoyed a high degree of freedom, independence or autonomy. Institutions charged with human rights and international agencies active in BiH have to date exhibited satisfactory awareness of the importance of the right to a fair trial and nearly all relevant reports on the state of human rights in BiH have dealt with the realisation of this right.

Relevant data on the realisation of the right to a fair trial evidence large-scale violations of the human rights of BiH citizens in this area as well. Violations extend to nearly all essential elements of the right, such as judicial independence and impartiality, fair trial, trial within a reasonable time, efficient judicial protection, etc. The numerous reports by national and international government and non-government institutions thus highlight the problem of the “non-functioning of the judiciary”, which is a direct consequence of exceptional political pressures on the judiciary. Political pressures are apparently exerted on nearly all segments of the judiciary, which also suffers from lack of qualified staff, large backlogs and, of course, lack of funds, which is further aggravated by misspending of the available funds. The judiciary of Bosnia and Herzegovina was not improved by the many-year reform of the judiciary that involved the establishment of new judicial institutions, such as the High Council for Courts and Prosecution et al, reappointment of judges and prosecutors, restructuring of courts and prosecution offices, adoption of new criminal and civil laws. Furthermore, human rights institutions have been receiving increasing numbers of civil complaints about the work of the judiciary.

Large-scale violations of the right to a fair trial are mostly perpetrated with respect to trial within a reasonable time. To illustrate, the courts in the BiH Federation had 493,536 pending cases at the end of 2004.³² Justification for such alarming backlogs is mostly found in the lack of judges and inadequate legislation unnecessarily expanding the jurisdiction of the courts to include matter that could be decided by other government agencies.³³ It seems that the judicial reform has

32 The 2004 Annual Report of the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina is available at: <http://www.bihfedomb.org/bos/reports/2004/rpt2004sudska.htm>.

33 *Ibid.*

failed to address these 'bottlenecks' of the judicial system. Human rights reports identify the municipal courts as the institutions violating the right to a fair trial the most.

Civil complaints about violations of the right to a fair trial have increased steadily over the years and the violations of this right are expected to feature as the predominant human rights problem in Bosnia and Herzegovina in the future as well.

3. Minority Rights

Bosnia and Herzegovina is a signatory of a large number of universal and regional international treaties directly or indirectly guaranteeing the rights and freedoms of persons belonging to national minorities. One of the most important such documents is doubtlessly the Framework Convention for the Protection of National Minorities ratified by BiH. The state's stance on national minorities may be best illustrated by its attitude to its commitments deriving from the Framework Convention and its reporting obligations. Although BiH was to have submitted its initial report on the state of national minority rights by 1 June 2001, it did so only on 20 February 2004. The second report, due on 1 June 2004, has not been submitted yet. Moreover, BiH still has not ratified the European Charter for Regional or Minority Languages.

The BiH Constitution is the main guarantor of the protection of human rights of national minorities. The Constitution comprises additional human rights agreements applicable in BiH, including the Framework Convention for the Protection of National Minorities. Therefore, the provisions of the Framework Convention have constitutional effectiveness in BiH. Although the Constitution on the one hand guarantees an international level of national minority rights protection, it also comprises provisions violating the main principles of the rights of national minorities the protection of which it allegedly guarantees. Apart from listing the Framework Convention in the provisions on international agreements applicable in BiH, the BiH Constitution makes no mention of national minorities in any other provision. Instead, alongside the constituent peoples (Bosniacs, Serbs and Croats), it merely mentions "Others" in the part of the Preamble on constitutionality in organising post-Dayton statehood of Bosnia and Herzegovina. "Others" is generally interpreted to include also the national minorities living in BiH. The rights of national minorities are directly violated by the above mentioned Articles IV and V of the BiH Constitution regulating the constitution of the BiH Parliamentary Assembly House of Peoples (comprising 5 Bosniacs and 5 Croats from the BiH Federation and 5 Serbs from the RS) and the BiH Presidency (comprising one Croat and Bosniac elected in the territory of the Federation of BiH and one Serb elected in the territory of the RS). Therefore members of national minorities are deprived of the fundamen-

tal human right to be elected to offices at the highest legislative and executive levels of government.

The BiH Constitution and the Framework Convention on the Protection of National Minorities were the basis for the adoption of the Act on Rights of Ethnic and National Communities and Minorities in Bosnia and Herzegovina (*Official Gazzete*, 12/03) that came into force on 14 May 2003.

This Act promotes the right of national minorities (17 are enumerated in Article 3) to be represented in authorities and other public services at all levels, proportionately to their representation according to last census. The term “proportionately” in the application of the law should be regarded as minimum participation, while the number of representatives can be even higher, as BiH in principle accepted the “positive discrimination” system in its minority rights protection policy.³⁴

Under the Act, the criteria and manner of election of national minority members to parliaments are to be elaborated by the election laws of BiH, the entities, and the statutes and other laws and subsidiary legislation of cantons, cities and municipalities. So will the participation i.e. representation of national minority members in the executive and judiciary and the public services. A very important provision of the Act is the one regarding the establishment of a BiH Council of National Minorities within the BiH Parliamentary Assembly, which is to comprise representatives of every recognised national minority in BiH. The Council is to delegate experts to work in the Constitutional Legal Commission and the Human Rights Commission, standing bodies in both chambers of the BiH Parliamentary Assembly. The Act also obliges the entity parliaments to form national minority councils. In its final provisions, the Act sets deadlines for the implementation of specific provisions. The entities were given six months from the date of entry into force of the Act (14 May 2003) to harmonise their regulations on national minority rights and other laws and regulations relating to national minority rights with the Act. The legal deadline expired on 14 November 2003, but most of the provisions of the Act have not been implemented yet. Nor have serious preparations for their implementation begun. This fact is commented also in the annual report of the Helsinki Committee for Human Rights in Bosnia and Herzegovina:

Although the Law on Rights of Ethnic and National Communities and Minorities in Bosnia and Herzegovina was adopted more than two years ago, it is not being applied both because the necessary by-laws have not been passed and because of lack of political will.³⁵

34 Bosnia and Herzegovina Council of Ministers Report on legal and other measures on implementation of principles determined in the Framework Convention for the Protection of National Minorities, p. 32.

35 Helsinki Committee for Human Rights in BiH. Report on the State of Human Rights in Bosnia and Herzegovina (analysis for the period January-December 2005), Sarajevo, Helsinki Committee for Human Rights in BiH, 2006. Available at: <http://www.bh-hchr.org/Izvjestaji/izvj2005.htm>. 06 February 2006.

Right to information in minority languages is also violated at a large scale in Bosnia and Herzegovina. This right is regulated by relevant legal provisions.

The Law on Rights of Ethnic and National Communities and Minorities in Bosnia and Herzegovina devotes adequate attention to the right to information of minorities in Articles 15 and 16. Persons belonging to national minorities in BiH have the right to found radio and television stations, publish newspaper and other print media in the language of the minority they belong to. Radio and television stations founded by BiH, the entities, cantons, cities and municipalities with the role of public service are obliged to envisage special shows in their programmes for members of national minorities and may also provide other content in minority languages.

Radio and television stations as BiH public services are obliged to at least once a week provide a special news programme for members of national minorities in their languages. Entities and Cantons will regulate in their provisions the rights in paragraph 1 of this Article, departing from the share of a national minority in the population of the entity, canton, city and municipality.

Also the Law on Basic Public Radio-TV Service and Public Radio-TV Service of Bosnia and Herzegovina (*Official Gazette of BiH*, 13/02) in its provisions concerning the programme principles sets forth that "Public Broadcasters' programmes will recognise national, regional, tradition, religious, cultural, linguistic and other features of constituent peoples and all citizens of BiH. The Public Broadcasters' programming will also affirm cultural and other needs of national minorities in B-H".³⁶

These provisions have not been implemented either. The Helsinki Committee for Human Rights in BiH reports that there are only two stations occasionally broadcasting programmes in the Roma language.³⁷

The national minorities' right to education, the part pertaining to learning their native languages, and additional tuition in literature, history and culture in their minority languages, are also violated. As a census of the population has not been conducted, it is nearly impossible to ascertain in which parts of Bosnia and Herzegovina must schooling in a minority language be organised. Moreover, the entity and cantonal legislation is insufficiently developed and does not create a favourable legal environment for the realisation of this right.

36 Bosnia and Herzegovina Council of Ministers Report on legal and other measures on implementation of principles determined in the Framework Convention for the Protection of National Minorities, 2003, p 47.

37 Helsinki Committee for Human Rights in BiH. Report on the State of Human Rights in Bosnia and Herzegovina (analysis for the period January-December 2005), Sarajevo, Helsinki Committee for Human Rights in BiH, 2006. Available at: <http://www.bh-hchr.org/Izvjestaji/izvj2005.htm>. 06 February 2006.

Of all recognised minorities in BiH, the Roma minority definitely faces the greatest problems. Despite the lack of precise indicators, it is doubtlessly the biggest and poorest minority in Bosnia and Herzegovina.³⁸ Roma are exposed to drastic violations of a broad range of civil and political, economic, social and cultural rights, especially to ethnic discrimination, violations of their right to work, to social and health insurance, to education, to adequate housing, etc.

4. Economic, Social and Cultural Rights

The state of Bosnia and Herzegovina and its entities and other levels of authority are unable to ensure the respect of economic, social and cultural rights of citizens due to the extremely unstable and insecure social and political environment, deficient economic order, inefficient legal protection system, underdeveloped economy and the material and cultural poverty of the country. To make things worse, even the existing resources are manipulated with and abused, all at the expense of BiH citizens.

The field of economic, social and cultural rights comprises the right to work and labour-related rights, such as the right to fair and adequate work conditions, protection at work, unionist rights and freedoms, etc; the right to social insurance and security i.e. the right to social protection and aid; the right to an adequate living standard, including the right to housing; the right to health; the right to education; the rights of persons with disabilities, etc. Providing for the realisation of these rights requires major financial outlays and investments by the state. It is quite clear that the state of BiH's economic (im)potency cannot adequately satisfy any international standards on the realisation of economic, social and cultural rights.

BiH is a signatory of a whole set, albeit not all, international documents regulating economic, social and cultural rights. However, it has not yet signed the European Social Charter, a key regional document in this area of human rights. This report cannot go into a detailed analysis of the national legislation regulating economic, social and cultural rights, but will merely voice the conclusion that the national legislation generally satisfies international standards. The problem however lies in its implementation. On the one hand, the state lacks both the capacity and ability to implement the adopted laws; on the other, the citizens are unable to exert adequate pressure on the state to overcome the standstill in the respect of economic, social and cultural rights. The following examples best illustrate the real state of economic, social and cultural rights of BiH citizens.

38 In its 2005 Annual Report, the Helsinki Committee for Human Rights in BiH estimates that between 80 and 100 thousand Roma live in Bosnia and Herzegovina..

4.1. Right to Work

BiH has suffered from an extremely high unemployment rate for years, which on occasion exceeds 43% of the working-age population. In terms of numbers, BiH has 499,074 unemployed citizens (344,025 in the Federation of BiH and 155,050 in RS). Unemployment is on the rise and the number of unemployed rose by 10,000 in 2005 alone. When those working in the grey economy are excluded, the number of unemployed is actually much smaller. Assessments are that some 20% of the people are really unemployed. In any case, hundreds of thousands of BiH citizens are not realising the fundamental human right to work as defined by relevant international standards³⁹ and national legislation. The state of BiH and its entities are incapable of developing and implementing social programmes that would adequately address the vital needs of this vulnerable category of the population.

At the same time, the right to work of employed BiH citizens is violated at a large scale. The greatest problem regards the so-called 'workers on hold'. The Labour Act of the Federation of Bosnia and Herzegovina (*Official Gazette*, 43/99) addresses the problem in Article 143, which had at the time of adoption caused many a debate in the BiH Federation Parliament.

An employee, who is found to be on hold on the day of the entry into force of this Law, shall retain that status not longer than six months from the date of entry into force of this Law, unless the employer calls the employee back to work before the deadline expires.

An employee, who was employed on 31 December 1991 and who has addressed her/his employer in writing or personally within 3 months from the date of entry into force of this Law, in order to establish his or her employment status and has not entered employment with another employer in this period, shall also be considered an employee on hold.

An employee shall be entitled to compensation of salary fixed by the employer for the duration of her/his on hold status.

If the employee on hold as described in paragraph 1 and 2, is not called back to work within the deadline set in paragraph 1 of this Article, his or her employment shall be terminated, and s/he shall be entitled to a severance allowance not lower than triple the average monthly salary paid at the Federation level in the previous three months, as published by the Federation Statistics Bureau, if s/he has up to five years of insured service, and to minimum half the average monthly salary for each additional year of insured service.

Exceptionally, in lieu of the severance allowance, the employer and the employee may come to an agreement on an alternative form of compensation.

39 Bosnia and Herzegovina ratified 68 ILO instruments.

The manner, terms and deadlines for payment of the severance allowance referred to in paragraphs 4 and 5 of this Article shall be defined in a written contract concluded between the employer and the employee.

If a person's employment terminates pursuant to paragraph 4 of this Article, the employer may not hire a person with the same qualifications or education other than the person referred to in paragraphs 1 or 2, if the latter is unemployed, within the following year.⁴⁰

The amendments to the Labour Act (*Official Gazzete*, 32/00) delegate employment status cases to cantonal commissions for the implementation of Article 143 of the Labour Act. The commissions reach first-instance decisions on the cases; appeals of their decisions are decided by the relevant Federal Commission. Although the above provisions provide legal grounds for resolving the issue of workers on hold, their practical application is wholly dissatisfactory. First of all, the work of the cantonal commissions is slow, inefficient, non-transparent and susceptible to political influence and manipulation. The Commission in the Una-Sana Canton, for instance, has practically stopped operating because its members were not being paid; thousands of claims remain pending. Other commissions also face large backlogs. Employers also obstruct the realisation of the right to severance pay; many refuse to pay the guaranteed severance allowances, others simply do not have enough money in their accounts to fulfil the obligation. In such cases, the citizens are forced to go to court and enter lengthy judicial proceedings.

The BiH Federation Ombudsman has established numerous irregularities and illegal actions in its analysis of the work of the cantonal commissions.

The FBIH Ombudsmen also note that a large number of employed citizens complained to the cantonal commissions about the implementation of Article 143 of the Labour Act, usually after having failed to resolve the issue in the company they had worked for. They were unable to attach all the relevant documentation to the complaint to the commission as they had previously submitted it to the company. The employers, as a rule, failed to return the documents to the employees or forward them to the commission for the implementation of Article 143 of the Labour Act. The commissions in most such cases resorted to unlawful steps i.e. instead of requiring of the complainant to attach all the necessary documents or themselves asking the employers for the documents, as Article 143 envisages, they issued general public requests to the complainants to submit the 'relevant documents' within a specified deadline. Such calls mostly went unheard, as most employees are IDPs or refugees and living outside the BiH Federation. Instead of acting in accordance with the law and their legal purview, the commissions tended to dismiss the employees' complaints and grounded their illegal decisions on the fact that complainants had not submitted the required documents.

40 *Official Gazzete*, 43/99, p. 1783.

The Ombudsmen recall that none of the provisions envisage such form of communication between the commissions and the complainants, especially when their vital issues are at stake. The only exception is envisaged by Article 92 of the Act on Administrative Procedures on the service of documents via public notification. The Act allows such service exceptionally, when an administrative authority does not know or cannot identify the person. In practice, such form of service is resorted to in urgent matters of public interest. Under Article 92, apart from posting the statement on the notice board of the authority, it can also be published in newspapers and other media or in other customary ways.

None of the prerequisites for the application of this provision by the commissions for the implementation of Article 143 have obviously been fulfilled. Moreover, the procedure conducted by the commissions is not an administrative procedure, wherefore the provisions of the Act on Administrative Procedures cannot be applied.

BiH Federation Ombudsmen have also found the commissions in breach of the law with respect to appeals of their decisions; they unlawfully hold on to the appellants' documents for a long time, instead of forwarding them to the Federal Commission for prompt review. This constitutes a gross violation of the employees' rights and such practice *inter alia* impedes the realisation of Annex VII. Such conduct has been observed particularly in the work of the Cantonal Commission in Sarajevo.⁴¹

Although the above observations by the FBiH Ombudsman were made in 2004, the situation in this area did not improve in 2005. The problem of workers on hold also plagues Republika Srpska,⁴² which regulates the right to severance pay in an identical manner, in Article 152 of the RS Labour Act. Other provisions of the Entity labour laws also leave ample room for manipulations that may result in large-scale violations of human rights of BiH citizens.

*4.2. Right to pension, disability and health insurance*⁴³

The dreary state of human rights protection in Bosnia and Herzegovina especially dramatically affects its elderly population. Many of the elderly live below the general poverty line and are extremely susceptible to all economic changes. They experience numerous problems in accessing health care, social insurance and special aid. A considerable share of the elderly, mostly in rural areas, does not have health

41 Institution of the Ombudsman of the BiH Federation. The 2004 Report on the State of Human Rights in the BiH Federation is available at: http://www.bihfedomb.org/bos/reports/2004/rpt2004_sudska.htm.

42 Assessments are that some 60,000 applications for employment status resolution in accordance with Article 152 have been filed in RS. Only a few percent have apparently been processed.

43 The right to pension and disability insurance will be elaborated mostly from the viewpoint of the human rights of the elderly, one of the most vulnerable categories of BiH's population.

insurance. Numerous violations of the right to a pension have also been registered. These problems have for years especially beleaguered the elderly with the status of returnees to their pre-war homes. Moreover, the elderly are insufficiently informed of their rights and obligations vis-à-vis the state. The elderly, especially those living alone in rural areas, frequently fall victim to crime.

Bosnia and Herzegovina's social policy is mostly regulated by legislation on health, pension and disability insurance. Under the Constitution of Bosnia and Herzegovina, the entities have jurisdiction over pension and disability insurance i.e. each entity has its own laws regulating this area. The situation in the RS is simpler, as "only" three levels of authority – BiH, the RS, and municipal levels – deal with social policy. In the Federation of Bosnia and Herzegovina, four levels of authority – BiH, the Federation of BiH, cantons and municipalities – are charged with social policy.

In the former Socialist Federal Republic of Yugoslavia (hereinafter SFRY), civilian pensions were administered by the six Socialist Republics under their own respective laws and institutions. In addition, the state-level Law on Basic Rights of Pension and Disability Insurance at the Level of the State (*Official Gazette*, 23/82, 77/82, 75/85, 8/87, 65/87, 87/89, 44/90 and 84/90) granted equal minimum rights to every SFRY citizen and regulated the rights of persons who moved from one Republic to another.⁴⁴

The system was based on the "pay as you go" system, whereby contributions from salaries of currently employed citizens were used to sustain current pensions. The current BiH pension insurance system also goes by that principle. The pension system is defined by the following legislation:

Federation of Bosnia and Herzegovina Level:

1. Pension and Disability Insurance Act (*Official Gazette*, 29/98), amended by the House of Representatives Decision to Amend the Federal Pension and Disability Insurance Act (*Official Gazette*, 49/00)
2. Pension and Disability Insurance Organisation Act (*Official Gazette*, 49/00)

Republika Srpska Level:

1. Pension and Disability Insurance Act (*Official Gazette*, 32/00, 40/00 and 37/01).

Under the Constitution of the BiH Federation, social policy is within the joint jurisdiction of the federal and cantonal authorities. However, a separate constituti-

⁴⁴ BiH Human Rights Chamber: Decision on Admissibility and Merits (delivered on 10 January 2003): Case Nos. CH/02/8923, CH/02/8924, and CH/02/9364: Đoko Kličković, Anka Pašalić and Duško Karanović v. Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska <http://www.hrc.ba/database/decisions/CH02-8923%20et%20al%20Klickovic%20Admissibility%20and%20Merits%20E.pdf>. (15 December 2003)

onal provision sets out that the federal authorities may formulate policies and adopt laws on any issue related to social policy. Cantons, too, may formulate policy and implement laws but they cannot adopt laws.

At the fourth, municipal level, social policy is legislated by the Act on Self-Government. Under the Act, the municipalities shall primarily address local needs with respect to child care, education, work, employment and social protection.

The goal of social protection is to provide social well-being to all citizens with social needs; under BiH laws, these include the elderly, especially those without family care. Pension and disability insurance constitutes one of the most important and simultaneously most efficient forms of organised protection of the elderly.

BiH, and especially the Federation, spend less on social protection of the vulnerable population (including the elderly) than any other country in the region. It is extremely difficult to justify that, as BiH is a country with a high level of social needs. Moreover, the inadequate laws additionally aggravate the situation as they prescribe a much greater volume of social protection than the state coffers can afford.

However, a pension is a right a beneficiary has acquired by length of service, wherefore the right to a pension is closely linked to one of the fundamental civil rights – the right to work. The main problem in the functioning of the pension system is the disproportion between the outlays and income and most pensioners risk falling into the category of the poor. Also, the pensioner/worker ratio is quite unfavourable so that even the extremely high contributions employees have to pay are insufficient to cover the cost of pensions and the average pension does not exceed 30% of the average income per capita. Moreover, the “absence of harmonised legislation between the two Entities and the lack of state-level legislation regulating pension and other social benefits causes problems for displaced pensioners and returnees. Specifically, these problems arise from the different pension calculation schemes and different pension amounts in each Entity”.⁴⁵

As a practical matter, a person who retired in Sarajevo and held a pension there before the armed conflict, but later began receiving pension payments from the RS Fund after displacement to the Republika Srpska, would continue, after returning to Sarajevo, to receive the lower pension payment from the RS Fund. Such a returnee, while receiving the smaller RS Fund pension, would also face a higher cost of living in Sarajevo than in Republika Srpska. Moreover, such a returnee would receive a pension much lower than a person who had made

45 BiH Human Rights Chamber: Decision on Admissibility and Merits (delivered on 10 January 2003): Case Nos. CH/02/8923, CH/02/8924, and CH/02/9364: Đoko Kličković, Anka Pašalić and Duško Karanović v. Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska. URL: <http://www.hrc.ba/database/decisions/CH02-8923%20et%20al%20Klickovic%20Admissibility%20and%20Merits%20E.pdf>. (15.12.2003).

similar pension contributions during their working life but remained in the Federation throughout the armed conflict.⁴⁶

Three pensioners with the status of returnees to the BiH Federation submitted an application to the Human Rights Chamber with regard to this matter. In the Decision on Admissibility and Merits (delivered on 20 January 2003), the Chamber concluded:

...3. by 10 votes to 2, that the Federation of Bosnia and Herzegovina has discriminated against the applicants in the enjoyment of their right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

...7. by 10 votes to 2, to order the Federation of Bosnia and Herzegovina to take all necessary legislative and administrative actions by 10 July 2003 to ensure that the applicants are no longer discriminated against in their enjoyment of pension rights guaranteed by Article 9 of the International Covenant on Economic, Social and Cultural Rights, particularly in comparison to those pensioners who remained in the Federation during the armed conflict;

...8. by 10 votes to 2, to order the Federation of Bosnia and Herzegovina to compensate each applicant for the difference between the pension that he or she would be due under the Pension Agreement between the pension funds and the amount the applicant would have received from the Federation Fund, from the date of his or her application to the Human Rights Chamber until the date of the Federation's compliance with the remedy ordered in conclusion no. 7 above.⁴⁷

The Human Rights Chamber upheld the RS Association of Pensioners interpretation that the Decision applies to all pensioners in FBiH with the status of returnee to the Federation. However, the Federation of BiH acknowledges the Decision only with respect to the above three cases.⁴⁸

In conclusion, one can only reiterate the above statement that absence of harmonised legislation and inefficient mechanisms for implementing the decisions of the Human Rights Chamber and other human rights institutions gives ample room for large-scale violations of the human rights of the elderly.

Health care is another important area in which the elderly suffer extensive human rights violations. Health insurance is a single system based on the principles of solidarity and reciprocity and, by investing funds, the citizens can ensure the realisation of their right to health care and other forms of (compulsory or voluntary) insurance in the manner prescribed by the law. Health insurance of citizens com-

⁴⁶ *Ibid.*, p. 4.

⁴⁷ *Ibid.*, p. 15.

⁴⁸ *Nezavisne novine*, 19 December 2003.

prises a set of measures, activities and procedures for the promotion of fundamental human rights, such as the right to life, preservation and promotion of health, undertaken by the state, entities, cantons, municipalities, health care institutions, health staff, companies and other legal persons and citizens. Health protection and insurance in BiH is regulated by the following laws:

Bosnia and Herzegovina Level:

1. BiH Public Health Fund Act (*Official Gazzete*, 26/96)

Federation of Bosnia and Herzegovina Level:

1. Health Care Act (*Official Gazzete*, 29/97 and 7/02)
2. Health Insurance Act (*Official Gazzete*, 30/97)

Republika Srpska Level:

1. Health Care Act (*Official Gazzete*, 18/99, 23/99 and 58/01)
2. Health Insurance Act (*Official Gazzete*, 18/99 and 70/01)

Brčko District Level:

1. Health Care Act of the Brčko District of Bosnia and Herzegovina (*Official Gazzete*, 2/01)
2. Health Insurance Act of the Brčko District of Bosnia and Herzegovina (*Official Gazzete*, 1/02 and 7/02)

BiH citizens have the right to following forms of health insurance: 1) compulsory health insurance, 2) voluntary health insurance, 3) supplementary health insurance.

The law envisages the establishing of cantonal health funds via which the citizens can realise their rights to compulsory health insurance. At the Federation of Bosnia and Herzegovina level, the Federal Insurance and Re-Insurance Fund was established to conduct activities and realise rights arising from compulsory insurance of interest to all cantons, specific rights deriving from conventions, other international treaties or laws and to conduct obligatory health insurance affairs. Health protection provided by the Health Insurance Act *inter alia* includes health care of citizens over 65 but only if the *per capita* incomes of their household members do not exceed the average salary in the Federation in the preceding month. The Cantonal Insurance Funds and the Federal Insurance and Re-Insurance Fund are autonomous organisations and their rights and obligations are laid down in the Health Insurance Act and their statutes.

There are three forms of health insurance in the RS as well: 1) compulsory health insurance, 2) voluntary health insurance, and 3) supplementary health insurance.

The RS Health Insurance Fund provides conditions for the realisation of compulsory health insurance and is legally authorised to introduce supplementary health insurance. However, even citizens covered by health insurance must additionally pay for health care services in case of serious illnesses. High health care costs expose uninsured citizens (36% of the poor do not have health insurance) to even greater risks of impoverishment.

Health care of the elderly is clearly additionally aggravated in view of the situation in the country, especially the financial difficulties and the deficiencies of the public health system.

According to the Medium-Term Development Strategy (PRSp), the chief cause of the poor state of the health care system in BiH lies in unequal access to health care, especially of returnees, most of whom are either unemployed or pensioners. This remains to be a problem notwithstanding the written agreement between the health insurance funds of the FBiH, the RS and the Brčko District. The Human Rights Chamber has also presented some interesting facts regarding health care in BiH in its Decisions.

Facts relating to health care:

17. In addition to the problem of disparate pension amounts, pensioners living in one Entity but receiving payments from the other Entity's pension fund reported being unable to realise secondary social benefits related to their pension, the most important of these benefits being health care. Until recently, health insurance for pensioners within Bosnia and Herzegovina was geographically fixed to the Entity of their pension registration. If a person moved from one Entity to the other, their health insurance did not move with them. Thus, insured treatment would only be provided where the person was registered, and they would incur personal liability for the full costs of treatment at other locations. Under this scheme, elderly pensioner returnees, a category of persons with relatively high health care needs, were required to travel to the other Entity to receive health care or otherwise pay the full cost of health care services.

18. On 5 December 2001, health care officials of the Federation, Republika Srpska and the Brčko District entered into the Agreement on the Manner and Procedure of Using Health Care Services of Insureds in the Territory of Bosnia and Herzegovina Outside the Territory of the Entity, Including Brčko District, in Which they are not Insured (Hereinafter Health Care Agreement) (*Official Gazette*, 30/01, *Official Gazette*, 8/02, *Official Gazette*, 9/02) to secure access to health care for returnees. Under this Agreement, effective 1 January 2002, persons who return or have returned from one Entity to the other, including pensioners, are entitled, under certain conditions, to insured health care services pursuant to legislation in their place of return. The pension fund to which the returnee is attached is required to certify a form in order for the pensioner to be registered for insured health care in the place of return.

19. Under the Health Care Agreement, a Special Commission for co-ordination and monitoring was established. This Commission issued instructions concerning registration of beneficiaries, issuance of health care documents and other relevant procedures..

20. According to UNHCR, implementation of the Agreement was problematic and it was not fully implemented until May 2002. This was primarily due to the fact that the RS Fund was not providing the required certification for pensioners returning to the Federation, which prevented those returnees from registering for and receiving insured health care in the Federation.

21. According to a report of the Human Rights and Rule of Law Sarajevo Field Office of the Office of the High Representative (hereinafter OHR), however, procedural problems with the Health Care Agreement were nearly non-existent in May and June 2002, and complaints from the main returnee association in Sarajevo Canton have ceased to exist. The report indicates that in late May, the RS Fund began to verify the required documents, and the major obstacle to implementation was removed. Thus, the Serb returnees observed in the study had no trouble accessing medical facilities in Sarajevo Canton. The report generally concludes that, after a six-month delay, the Health Care Agreement has come into effect throughout Bosnia and Herzegovina and there are no major or legal procedural obstacles to health care access.⁴⁹

Pension and disability insurance and health care are of vital importance to the survival of BiH's elderly population. However, the list of areas in which human rights are violated is not exhausted here. Due to the extensiveness of the human rights agenda in BiH, the other areas in which the human rights of the elderly are violated are not even registered officially. In essence, the whole spectrum of violated civil, political, economic, social and cultural rights of the elderly has remained unrevealed for years now. Only civil society protagonists directly involved in the vital needs of the elderly are aware of the true scope of violations.

IV CONCLUSION

The functioning of the human rights protection system hinges on the functioning of the state as a whole. In the case of Bosnia and Herzegovina, the complex organisation of the legal system,⁵⁰ fragmentary procedures for adopting and appl-

49 BiH Human Rights Chamber: Decision on Admissibility and Merits (delivered on 10 January 2003): Case Nos. CH/02/8923, CH/02/8924, and CH/02/9364: Đoko Kličković, Anka Pašalić and Duško Karanović v. Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska. URL: <http://www.hrc.ba/database/decisions/CH02-8923%20et%20al%20Klickovic%20Admissibility%20and%20Merits%20E.pdf>. (15 December 2003).

50 Five legal systems are in effect in BiH: the legal systems of the state of BiH, of the Federation of BiH, of the RS, of the Brčko District, and at the level of Federation of BiH Cantons.

ying laws and the state's limited accountability afforded by the BiH Constitution are insufficient to ensure the functioning of a modern state and, therefore, the realisation of the full protection of a broad range of human rights.⁵¹ Public administration is unable to fulfil the requirement to harmonise legal regulations at all administrative levels, thus leaving room for various manipulations which ultimately result in extensive human rights violations. It can be concluded on the basis of illustrated examples of large-scale human rights violations that the authorities in BiH lack the understanding, capacity and often political will to establish a functional human rights protection system.

The deep gap between the theory and practice of human rights is a problem BiH public policies have failed to address adequately. The basic developmental documents, such the European Integrations Strategy and the Medium-Term Development Strategy, include blanket recommendations on the need to respect international standards and harmonise national legislation. Bosnia and Herzegovina is obviously in need of a national strategy for the protection of human rights that will include an action plan and precise timeframes for the implementation of the envisaged activities. If such a strategy is not formulated, the public perception of the concept of human rights, which is already negative, will suffer irreparable damage and, in the long-term, hinder the process of human rights culture development.

51 *Democracy Assessment in BiH*, Sarajevo, Fund for an Open Society, Bosnia and Herzegovina, p. 42.

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HUMAN RIGHTS IN BULGARIA IN 2005

I INTRODUCTION

Bulgaria is a parliamentary democracy of approximately 7.7 million persons. Regular parliamentary elections were held on 25 June 2005. They were generally recognised as free and fair by international observers despite some reported irregularities. The Bulgarian Socialist Party won the elections and after long negotiations formed a Government in coalition with the National Movement of Simeon the Second (NMSS) and the Movement for Rights and Freedoms (MRF). The main priority of this three-member coalition is Bulgaria's accession to the European Union. The new government has continued the neo-liberal policy of the previous governments.

In October 2005, the European Commission published its *Monitoring Report on Bulgaria's Progress towards Accession to the European Union*. As in its prior reports, the Commission expressed serious concerns about the human rights situation in a number of areas, such as the excessive use of force and firearms by law enforcement officials, inhuman conditions in several of the country's prisons and detention facilities, and the integration of minority groups and people with mental disabilities. However, as in previous years, the report concluded that Bulgaria fulfilled the European Council 1993 Copenhagen Criteria. Its main criticisms regarded judicial reforms, corruption and problems related to organised crime. The European Commission reiterated its concerns again in May 2006 and conditioned its final decision on Bulgaria's full EU membership in January 2007 on the resolution of these problems.

In 2005, there was some progress in safeguarding rights and freedoms in certain spheres, e.g. the legislative framework on access to legal aid and protection from domestic violence was improved. In other areas, however, like the excessive use of force and firearms by law enforcement officials and the protection of the right to life, the situation marked a regress.

Bulgaria has ratified all major international documents – both universal and regional – and adopted new legislation related to human rights protection. However, the lack of proper implementation of this legislation is the most serious obstacle to the realisation of human rights.

Despite the positive changes, Bulgaria has not yet ratified and/or promulgated in the State Gazette the following international documents on non-discrimination and women's rights: the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962; Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms, 2005; Council of Europe Convention for Action against Trafficking in Human Beings No. 197, 2005; The following international documents were ratified but not promulgated in the State Gazette, wherefore they cannot be fully considered part of the Bulgarian legislation: ILO Convention 156 concerning workers with family obligations, 1981; UN Convention on the Political Rights of Women, 1952; UN Convention on the Elimination of All Forms of Discrimination against Women, 1979, Convention against Discrimination in Education, 1960.

This report is based on the human rights research reports and analyses of the Bulgarian Gender Research Foundation and the Bulgarian Helsinki Committee for 2005.

II INDIVIDUAL RIGHTS

1. Right to Life

According to the *Bulgarian Helsinki Committee Annual Report*, the legal and practical guarantees for state protection of the right to life in Bulgaria in 2005 were still below international standards. Art. 80 of the Law on the Ministry of the Interior allows for the use of firearms during arrest of persons who are committing or have committed even a minor crime or to prevent the escape of a person arrested for committing even a minor crime. This Article contravenes Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Nevertheless, the amendments adopted in late 2005 and early 2006 did not address this provision.

As in previous years, in 2005 the excessive use of firearms by law enforcement authorities resulted in deaths and injuries. The Bulgarian Helsinki Committee has information pertaining to four deaths in which there is reason to believe that police officers had overstepped their authority. In some cases, force was used during the investigation and remanding the guilty parties to structures within the justice system, while in others the actions of investigating officials were inappropriate and led to violations on the part of police officers.

On July 6, the Great Chamber of the European Court of Human Rights in Strasbourg issued a decision in the case of *Nachova et al. v. Bulgaria*. The case concerned the 1996 killing by military police of two deserting soldiers from a

disciplinary battalion, to which they had been sentenced as punishment. Both the victims were ethnic Roma. Just as the first-instance court in Strasbourg had found in February 2004, the Great Chamber found a violation of Article 2 (right to life) of the *European Convention on Human Rights*. The Court also found a violation of Article 14, discrimination on the basis of ethnic origin. The court determined that the use of lethal weapons against the two fugitives had not been necessary, and that the investigation of their killing had been inadequate. The court found discrimination due to the lack of investigation as to whether or to what extent racism played any role in motivating the use of firearms by one of the policemen.

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

No serious legislative or law-enforcement changes were made in 2005 in response to domestic and international concerns regarding protection from torture, inhuman and degrading treatment and punishment. The amendments that need to be made to the Penal Code in order to criminalise torture, as recommended in June 2004 by the UN Committee against Torture, have not been introduced so far. No initiatives were undertaken to change the inhuman conditions in some of the country's preliminary detention facilities, prisons, and psychiatric institutions.

The Bulgarian Helsinki Committee continued to receive credible complaints of torture and abuse of people detained by the police. At the end of 2005, BHC monitors carried out a survey of inmates in three prisons (Plovdiv, Pleven and Belene) about the conditions of their detention and preliminary investigation. The survey used a representative sample of respondents from the three prisons, but is not representative of the penal system as a whole. It included prisoners serving sentences on convictions that had already taken effect, whose pre-trial proceedings had begun after September 1, 2004. In comparison with a similar survey conducted in the same three prisons in 2004, the new survey revealed a slight increase in complaints of unlawful use of force in police stations following arrest (17% of respondents, compared to 11% in 2004), but no increase in complaints of unlawful use of force at the time of arrest (which remained steady, at 17%). The rising trend and the high percentage of those complaining of unlawful use of force in general are a cause of serious concern. Some respondents described cruel acts of torture and abuse. As in the previous survey, the results showed that such practices vary significantly from region to region.

2.1. Conditions in Detention Facilities

2.1.1. Prisons. – In 2005, the number of inmates in Bulgarian prisons and prison hostels continued to rise. As of December 31, 2005, they numbered 11,436 – an increase of 565 since December 31, 2004. The number of convicted persons

awaiting sentencing also showed a slight increase in 2005, reaching 389 as of December 31, 2005. The number of indicted individuals awaiting the outcome of their trials has also risen to 1,691 by the end of the year. As in the preceding year, the average increase of about 5% in the inmate population of Bulgaria's prisons was mainly caused by the greater number of inmates whose sentences had come into effect. These trends were played out against a background in which the authorities declared more than once that the crime rates were falling, as evidenced by the number of registered crimes and surveys of crime victims.

The broadening of the legislative possibilities allowing for the placement of convicted prisoners in open or transitory dormitory facilities resulted in a noticeable, albeit insignificant, increase in the number of inmates placed in them.

The number of inmates held in open dormitory facilities increased over the previous year, from 632 to 696. There was a greater increase during that same period in the number of inmates held in transitory dormitory facilities: from 1,273 to 1,439, as of December 31, 2005. However, the rise in the number of inmates held in open or transitory dormitory facilities did not solve the main problem of the penal system in 2005: ongoing severe overpopulation in most prison facilities for repeat offenders, as well as in two of the country's closed dormitory facilities, the Kremikovtsi, near Sofia, and the Atlant, in the town of Troyan. This made the system as a whole one of the most inhumane penal systems in the region, as established at the time by a joint NGO mission that visited prisons and detention facilities in 2004 and 2005. There are no standards imposed by Bulgarian legislation with regard to the area of living space per inmate in the country's penitentiaries, and they are obliged to accept all inmates sent to them by the criminal justice system. In most jails, each prisoner gets less than two square meters; the amount of open space is even less than one square meter. In the most severely overpopulated prisons, there are double and even triple bunk-beds.

The buildings that make up the country's prison system are extremely old. The Sofia prison was built 100 years ago, while the buildings of the prisons in Lovech, Pazardzhik, Vratsa, Stara Zagora, Varna and Burgas were built in the 1920s and 1930s. The living areas, toilet facilities and common areas are extremely dilapidated, and the floors, walls, ceilings and windowpanes are in exceptionally poor condition. The cells in the Sofia, Vratsa, Pleven, Stara Zagora, Plovdiv, Sliven, Varna and Burgas jails, as well as those in the Troyan dormitory facility, do not have their own toilets. During the night-time lock-ups, the inmates share buckets for the relief of their physiological needs. Serious hygiene problems arise from the use of common washrooms, which lack hot water, washing and drying facilities.

The lack of adequate penitentiary facilities and centralised prison administration, have forced the General Directorate of Penal Institutions to impose a system of districting, under which a significant proportion of the country's inmates serve their sentences hundreds of kilometres away from their places of residence. Thus,

for example, convicted juveniles from all over the country are placed in the correctional home in the town of Boychinovtsi. Similarly, the prison in Sliven is the only one in the entire country where women are sent. This severely limits inmates' possibilities for family visits and other social contacts.

The restructuring of the medical centres in some of the country's prisons failed to significantly improve the medical services provided to inmates. The relative proportion of complaints about the quality or quantity of medical services in prisons even increased slightly in 2005. The healthcare problems in the prisons pertain to the procurement of medications and specialised examinations for uninsured inmates. One of the most serious problems the penitentiary system now faces is the ever-increasing number of inmates with drug addictions. The number of inmates needing specialised psychiatric treatment has also been constantly on the rise. The medical personnel working in the prisons are not trained in detail as to how to document the consequences of self-inflicted injuries, rapes and beatings, thus hindering the efforts of the appropriate authorities to conduct investigations on complaints filed by victims.

Representatives of several registered religious denominations were allowed to conduct religious services for prison inmates. The relatively high proportion of illiterate and semi-literate inmates, on the other hand, calls for a methodical, comprehensive program of literacy and professional courses, but such courses are only offered on a very limited scale.

In late April and early May, 37 foreign citizens serving sentences in the Sofia city prison went on a hunger strike. They were protesting their unequal treatment in comparison with Bulgarian inmates, with regard to the possibilities for early release on parole, interruption of their sentences, passes for annual holiday leave, and transfer to open or transitory dormitory facilities, as well as the slowness of the procedures for carrying out transfers to their home countries.

Disciplinary practices are not consistent among the various individual prisons. Despite the precise regulations, inmates have complained about the practices in reporting violations, the imposition of punishment or solitary confinement, and appeal procedures. The living conditions and recreational facilities in some high-security zones need to be improved. With the exception of the Burgas prison, where the use of physical force and the supervisory guard staff's attitude towards the inmates remained a problem that is yet to be resolved, inmates in the other prisons did not increasingly complain about the use of physical violence and corporal punishment (using implements such as batons).

2.1.2. Investigative Detention Facilities. – Fifty-one investigative detention facilities were in use across the country in 2005. The total number of suspects held in them varied from 850 to 900, on any given day of the year. These facilities, too, were occasionally overcrowded in 2005.

The material conditions in Bulgaria's investigative detention facilities do not meet international standards for the treatment of inmates. Despite the repair work and lighting, ventilation and hygiene improvements carried out at many of the detention facilities, overall conditions in the cells are far worse than in the country's prisons. Many of the facilities lack adequate open air areas and facilities in which the inmates can spend time with their visiting families and legal counsellors. The medical services in the investigative detention facilities are not integrated within the national health care system, wherefore the suspects held in them have not received adequate specialised medical and dental care.

3. Right to Liberty and Security of Person

The European Court of Human Rights issued nine judgements against Bulgaria in 2005 for violations of the right to liberty and security of person. Most cases predated the criminal procedure reforms which came into force at the beginning of 2000 and pertained to the powers of the prosecution and the investigative services amended by the reforms, as well as the excessive length of pre-trial proceedings. In several cases, the Court found that the applicants had been unlawfully arrested under Bulgarian law.

A new Health Act came into force at the beginning of 2005. Its aim was to bring the procedure for involuntary commitment and treatment in psychiatric institutions into conformity with international standards for protection of the right to liberty and inviolability of the person. The new law stipulates that all forms of commitment for psychiatric hospital treatment must be ordered by court, except in emergency cases when a person may be committed at the discretion of a physician. It distinguishes between the order to commit a patient and the order for treatment, and requires that the court determine whether the person being committed is capable of providing informed consent to treatment. The law also forbids treatment during the period of expert evaluation and restricts the use of physical restraints on patients. A special regulation requires the personal presence of the person being committed at the hearing on involuntary commitment and treatment, as well as mandatory legal representation.

The Bulgarian Helsinki Committee published a separate report after monitoring the implementation of the new law in 2005. It identified serious problems in the implementation of the law, resulting in the arbitrary commitment of people to psychiatric hospitals.

Throughout the year, the placement of people in social care homes for people with mental disabilities also continued to be a serious problem, with regard to the right to liberty and security of person. These placements are made in an administrative procedure, with no court oversight.

Another problem monitored by the BHC throughout the year was the placement of children in reform schools, pursuant to the amended Juvenile Delinquency Act. The BHC monitors discovered some positive effects of the new legislative regulations. However, they also found quite a few cases of arbitrary and unlawful placement in such institutions.

In addition, although a new Health Act was adopted, it needs to be noted that, the right to health is not sufficiently guaranteed due to inadequate implementation and serious deficiencies in the health care reform.

4. Right to a Fair Trial and Independence of the Judiciary

The judicial reform was one of the leading political issues of 2005, both in the country's domestic political life and with respect to Bulgaria's accession to the European Union. Some of the main criticism levelled at Bulgaria by the European Commission and by the representatives of a number of EU member countries had to do with the effectiveness of the country's judicial system. These criticisms concerned the preliminary proceedings in the criminal justice system and the lack of any effective measures to counter corruption in the judicial system. The Bulgarian government's main response to the criticisms came with the adoption of a new Criminal Procedure Code in June 2005 and the drafting of amendments to the section of the Constitution relating to the judiciary prepared at the end of the year. In 2005 the National Assembly also passed new laws regarding the provision of free legal assistance and the introduction of private court executorships, as well as several fairly insignificant amendments to the Judicial Branch Act.

However, the main problems regarding the administration of justice in Bulgaria remained unchanged. They concerned the lack of sufficient guarantees of court independence from institutional or private interests; the inefficiency of preliminary proceedings in criminal cases; the excessive length of certain court procedures; the excessive duration of preliminary investigations in criminal cases and the poor enforcement of court decisions in civil cases. The year 2005 was also marked by fervent discussions on structural changes in the judicial system to address the numerous management problems that have accumulated over the years.

Thus, although the parliamentary parties admitted the necessity for structural reform, they limited themselves to proposing only constitutional amendments with regard to some of the powers of the justice minister and prescribing a 2/3 parliamentary majority for decisions of removal from office of the prosecutor general and the chief justices of the country's supreme courts. The proposed amendment that would have allowed for the dismissal of the chief justices of any of the supreme courts provoked justified criticism; had it been passed, it would have allowed for unacceptable parliamentary interference in the work of the courts.

There was no significant change over the past year in the work of the leadership of the judicial system, the Supreme Judicial Council. Although at the beginning of their term, the members of the Council appointed in 2004 failed to implement a more effective model for the management of the judicial system. In a number of cases, the Council was held hostage to institutional conflicts between the courts and the prosecutors. One positive change came after the Supreme Administrative Court decided that, under the Judicial Branch Act, Council sessions are to be open to the public. However, there were no serious positive changes in most main areas within the Council's purview. The procedure for appointing and promoting magistrates is still not based on rules that allow only for appointments or promotions exclusively based on the qualifications, professionalism and ethics of the candidates.

The two positive steps taken in 2005 towards guaranteeing an accessible and fair court procedure comprised the changes in the free legal aid system and the introduction of private court executorships. The free legal aid system was changed by the adoption of the new Legal Aid Act that was passed in September 2005 and came into force on 1 January 2006. The newly-adopted law significantly broadens access to free legal representation in civil cases, as it is the first time the nation's legislation provides for free legal assistance in all sorts of civil disputes, except for commercial or tax cases. The main advantages of the new legislation are the allocation of a separate budget for legal aid and the establishment of an independent agency to manage it. However, there are still a number of unresolved issues regarding the way in which the new system will function and the scope of its applicability in criminal cases. Legislation was also passed with regard to another significant problem in ensuring effective access to the courts – the execution of court judgements. In May 2005, the Bulgarian Parliament passed the Private Court Executorships Act allowing the establishment of private court executorships; this is expected to improve efficiency in the execution of court decisions. However, a number of additional steps need to be taken in order to ensure the effective implementation of this law.

Once again in 2005, the European Court of Human Rights in Strasbourg issued a large number of judgements against Bulgaria, in cases in which it found violations of the right to a fair trial. In all of the 10 decisions it handed down in such cases in 2005, the court found violations of Article 6 of the *European Convention on Human Rights* (ECHR); the grounds for finding the country in violation were the requirement that criminal or civil proceedings and the appeal of administrative decisions related to the disbursement of social welfare or disability funds be concluded within a reasonable period of time. In several of its judgements, the European Court of Human Rights also determined that the lack of a separate procedure for filing complaints about the excessive length of court proceedings in Bulgarian legislation constituted a separate violation of the right to effective means of protection, pursuant to Article 13 of the ECHR.

5. Freedom of Thought, Conscience, Religion and Belief

There were no legislative changes in the sphere of citizens' rights to freedom of thought, conscience and religion in 2005. The government did not change its policy with regard to the chief violation of citizens' religious rights since 1989 – the forced “unification” of the two branches of the Orthodox Church via the police takeover of about 100 churches used by the so-called “alternative Synod”. No steps were taken to restore the *status quo* prior to the events of July 20, 2004, i.e. reinstatement of the priests who had been thrown out of their positions, returning the churches and other facilities taken away to those who had administered them before the police raid in the summer of 2004, repealing provisions of the Religious Denominations Act discriminating against non-Orthodox Christian religious organisations; furthermore, no steps were taken to substantially overhaul that law or replace it by a new one and peacefully restore the unity of the Bulgarian Orthodox Church (BOC). There are no indications that the Bulgarian courts have undertaken any action whatsoever to hold accountable the instigators or the perpetrators of the police raids of more than 100 Orthodox churches. For over a year and a half now, priests of the so-called “alternative Synod” have been holding services in an “open-air church” – under an awning erected on the site where Georgi Dimitrov's mausoleum used to stand.

On 11 May, the Sofia City Court registered Mustafa Alish Hadji as chief mufti of Muslims in Bulgaria. This decision was appealed by his opponent Nedim Gendjev, and in December, the Court of Appeal issued a judgement ordering the Denominations Directorate at the Council of Ministers to register Gendjev as chief mufti. In spite of this, the Directorate later issued a document naming Hadji as chief mufti. Some observers saw this as yet another attempt to politically interfere in the internal organisation of the Muslim denomination.

The year was also characterised by the emergence and parliamentary success of a new extremist nationalist party, Ataka ŠAttackĈ, which openly proselytises not only against minorities, but also against the so-called “sects.” This political force considers the types of religious groups usually referred to as “new religious movements” to be “dangerous sects,” and wants the government “to take decisive measures against them.”

More than 80 applications were filed with the ECtHR in 2005 regarding the police actions of 20 July 2004. They were filed directly with the Strasbourg Court, because the takeover of the churches occurred on prosecutors' orders; under Art. 118(3) of the Judiciary Act, such orders cannot be appealed in Bulgarian courts. According to Luchezar Popov, chair of the board of directors of the Institute for Legal Principles and the attorney representing the applicants, 800 people are represented by the applications (36 of them priests, 8 church employees, 35 parish wardens and 721 laypersons). The applications claim violation of Art. 9 of the

ECHR and the First Protocol to the Convention. This is without a doubt the largest case ever filed with the ECtHR by Bulgarian citizens. On 17 January 2006, Mr. Popov told a representative of the BHC in an interview that he has been assured by the ECtHR that the case would be handled as expediently as possible.

Several media outlets continued their discriminatory and hate-instigating conduct on religious grounds. The Skat television station, known to be a mouthpiece of the Attack party, conducted a systematic propaganda campaign against so-called "sects", as did the aforementioned newspaper, *Attack*. Instigated by Skat TV, and especially by the show Parallax, hosted by the known die-hard "sect" opponent, TV journalist Valentin Kassabov, residents of the Burgas neighbourhood Meden Rudnik protested against the 2 October inauguration of a building belonging to Jehovah's Witnesses on the pretext that it was "a danger" to their children and that the religious organisation had lied to them, by failing to inform the population of the building's purpose. On 18 and 19 October, rocks were thrown at the building, and on 23 October, the BSP MP from Burgas Stoyko Tankov announced in parliament that he would "file a complaint with the prosecutor about the unlawful house of worship of Jehovah's Witnesses" in his city. There were also other instances of media fanning religious hatred: articles in *24 Chassa*, shows on Nova Television, etc.

Administrative penalties continued being imposed for the distribution of religious information on the streets throughout 2005. Minority religions do not enjoy equal media treatment; as a rule, the major nationwide TV networks only broadcast programmes relating to Orthodox Christians.

The practice of obstructing the work of foreign missionaries in Bulgaria continued in 2005. Jehovah's Witnesses, along with other minority religious groups, have complained that their missionaries have to wait much longer than others to obtain Bulgarian visas.

6. Freedom of Expression

No significant progress was made with respect to the freedom of expression in the country in 2005. Bulgaria was still plagued by the same problems, such as inadequate and discriminatory media regulations, the use of criminal procedures to intimidate journalists, and corruption, resulting in a narrowing of the scope of public debate in many media outlets. Anti-minority hate speech increased significantly in several media outlets over the course of the year; not only did these media continue routinely mentioning the ethnic origin of perpetrators of crimes if they were members of minority groups but they also openly incited ethnic hatred and discrimination. The official regulatory mechanisms, as well as those established by the media outlets themselves, failed to respond to this problem in an adequate manner.

Throughout 2005 the Council on Electronic Media (CEM) continued to respond inadequately to the increasingly strong expressions of xenophobic and racist speech in several electronic media outlets. Quite a few cable TV networks, and especially the Skat cable TV station, broadcast daily or weekly shows that frequently committed serious violations of the *Radio and Television Act* (RTA), which forbids such broadcasts.

The Bulgarian National Television (BNT), on the other hand, is still far from being a truly public TV network as the broad-based study “Television Across Europe: Regulation, Policy and Independence,” conducted with the support of the Open Society Institute by the European Monitoring and Advocacy Program, indicates. It makes clear that not only in Bulgaria, but in the broader European context, market-driven mechanisms in and of themselves cannot and should not determine the future of public electronic media. To this end, media regulatory bodies should be fully independent and have sufficient funding and authority to monitor stations' performance and their compliance with applicable laws. Alongside this, expectations towards public electronic media continue to progress in the direction of establishing mechanisms for guaranteeing the transparency of their budgets – especially in terms of the ways in which public funding is expended.

The report's most important points regarding the public character of BNT turned out to be the weak presence of investigative journalism, as well as particularly poor presentation of issues pertaining to certain ethnic minorities. The report's conclusions clearly indicate that electronic media outlets owe a debt to the public, since they present a picture that is too spare, one-sided and not particularly interesting to its audience, giving far too much space to traditional stereotypes, negative attitudes and speculation. The electronic media outlets in Bulgaria still demonstrate limited understanding of the diversity of ethnic communities in the country, members of which are as a rule not represented on their editorial staff. As for the widespread idea of organising specialised programming for those groups, that would doom to failure the entire idea of reflecting diversity. Instead of being present as an integral part of the overall programming, specialised programming would consign them directly to low viewership. At the same time, such programmes are often alien to the members of minority ethnic groups, both in terms of subject matter and means of expression.

Resort to criminal charges against journalists continued in 2005. At the initiation of the prosecutor's office, the criminal case against journalist George Buhnici (who filmed illegal cigarette sales in the Russe-Giurgiu border zone in 2004) dragged on the entire year. Finally, on December 27, he was acquitted by the Russe Regional Court. During the year, the BHC was also involved in the criminal libel case against Kalina Gruncharova, a journalist from the newspaper Voice of Tutrakan. In the autumn, the district court sentenced her to pay a fine of 500 leva

(250 Euro). The decision was later appealed, but the case had not been concluded by the end of the year.

During the second half of 2005, the BHC conducted a study of the interrelationships between Bulgaria's print and electronic media and its PR agencies. The study uncovered widespread corruption practices at several of the examined media outlets, including direct payments to journalists for articles written or stories broadcast which were not labelled as commissioned. It also revealed the direct but not explicit financial dependence of some media editorial offices on certain economic and political groups. Such practices, according to the conclusions drawn by the researchers, limit the scope of public debate quite severely, excluding from it those groups within Bulgarian society who have no access to power and money.

The situation regarding access to information did not change significantly in 2005. The Access to Information Program (AIP), a non-governmental organisation working in the public interest, assisted 408 citizens and corporate entities in their attempts to obtain information from government institutions.

In some cases, state officials refused to release information and based the refusals on formal rather than legal arguments. In other cases, state officials refused to release information from public registers, invoking protection of personal data. It subsequently transpired that the disclosure of such information could have led to revelation of possible malfeasance or corruption (for example, the impact that the construction of a new nuclear energy plant may have on the environment, on hunting of wild animals, etc.). Another issue that came to light while working on such cases was the understanding that the personal information recorded in public registers is not subject to protection.

7. Freedom of Association and Peaceful Assembly

Freedom of association and peaceful assembly in Bulgaria were subject of three decisions handed down by the ECtHR in 2005. All three concerned Macedonians in Bulgaria, and in all three cases the Court found violation of Article 11 of the ECHR.

As in previous years, the reactions on the part of the authorities to public gatherings of Macedonians were mixed. On July 31, UMO Ilinden activists held a demonstration at the Samuil Fortress near Petrich, despite having been denied permission by the mayor of the municipality. Three individuals who had been attending such an event for the first time were subsequently called to appear at the police station and intimidated.

On September 12, Blagoevgrad police prevented UMO Ilinden from placing a wreath on the city's monument to Gotse Delchev. Officers confiscated four flags and one poster from them, and later also took a wreath with a banner on it, which

they demonstratively crushed on the square where the monument is located. The police cited an order from the city mayor forbidding the gathering; however, the participants were not given any such document. They had to submit a formal request in order to receive a copy of it afterwards.

There were also several other violations of the right to peaceful assembly in Bulgaria during the year. On 22 August, the mayor of Varna refused to grant permission to hold a gay parade, under pressure from the social committee of the Orthodox Christian metropolitanate of Varna and Velikopreslav, which had threatened to hold an anti-gay parade. There were also several incidents during the mass protests during the garbage-collection crisis in Sofia and there are grounds to believe that the authorities and private security personnel used illegal force and threats in order to break them up. On July 8, in a nighttime raid on protesters in the Suhodol district, several individuals were injured by being beaten with batons and kicked. On November 23, private security guards beat protestors who were trying to prevent the storage of garbage in the Chukurovo mine shaft, near the village of Gabra, in the Sofia region.

8. Minority Protection, Protection from Discrimination, Aggressive Nationalism and Xenophobia

The extremist nationalist coalition *Ataka* (Attack) won seats in the Bulgarian Parliament at the June 2005 parliamentary elections. In its election campaign, Attack used aggressive racist and xenophobic propaganda, mainly targeting Bulgaria's Roma population. More than once, the coalition's leader and other representatives described the Roma as a criminal community and a threat to ethnic Bulgarians, due to their high birth rates. To a lesser degree, they also targeted Bulgarian Muslims and representatives of smaller religious minorities.

After the formation of a new government following the June parliamentary elections, nationalistically motivated protests were held in several Bulgarian cities against the appointment of district governors from the Movement for Rights and Freedoms (MRF), one of the three partners in the new ruling coalition which traditionally wins the ethnic minority votes.

Discrimination against and the social exclusion of Roma continued to be seen in the spheres of education, housing policy, employment, health care, and the administration of justice. On August 31, more than 20 homes were demolished in one of Sofia's Roma neighbourhoods, on orders from the regional mayor's administration. No housing was provided for the people left homeless by that action. In September, the administration in another region of Sofia attempted to tear down an entire Roma neighbourhood, in existence since the start of the 20th century, without securing any shelter for the people who would be left with no roof over their heads.

That attempt was temporarily halted by the prosecutor's office and the court, until the legal and factual situation could be clarified. However, the threat of demolition remained hanging over those Roma families.

In 2005, court enforcement of the Anti-Discrimination Act (ADA) continued. Several significant decisions were handed down in first-instance courts in cases involving the protection of Roma from racial discrimination. For the first time – not only in Bulgaria, but in Europe as a whole – a court found that there was segregation of Roma children in a school. The Sofia District Court ruled that School No. 103 in the Roma neighbourhood of Filipovtsi in Sofia, the pupils of which are exclusively Roma, was racially segregated in violation of the law, and that the parties responsible were the minister of education and the municipal authorities. The anti-discrimination suit had been filed on behalf of the European Roma Rights Centre, an international organisation working in the public interest.

In January 2006, the Office of the Chief Prosecutor was sued for the first time for discrimination against ethnic Roma. The Sofia District Court's decision finding discrimination set a precedent; it ruled that statements made by a magistrate expressing a negative, disparaging attitude towards the Roma as an ethnic group constituted a violation of the Constitution and international law. The prosecutor's racist statements had been made in the text of an official prosecutor order ending the investigation into the death of a Romani man. The country's courts also ruled against a number of commercial enterprises that own public facilities such as cafés, restaurants and hotels, for their ethnically-motivated refusals to serve Roma, as well as private employers who had refused to hire Roma.

Another important public institution, St. Kliment Ohridski University of Sofia, was sued for discrimination against persons of homosexual orientation. In the country's first decision finding homophobic discrimination, the Sofia District Court found that university officials had unlawfully refused homosexual men access to the university's sauna, explicitly indicating the victims' sexual orientation as the reason for the refusal. This case was also filed in the public interest by a human rights organisation, as were quite a few others.

On year after the legal deadline for its constitution, in mid-2005, the Anti-Discrimination Commission was finally established and began reviewing complaints and reports of discrimination. However, the Commission did not render any decisions over the course of the year.

Despite the positive developments in the sphere of court protection from discrimination, as a practice discrimination in this country did not decrease in 2005. On the contrary, the situation of xenophobic propaganda and incitement to racial hatred worsened considerably during the election campaign of the Attack coalition, and its subsequent entry into parliament. Civil society was the only one to mobilise against this aggression. Dozens of organisations active in different areas joined forces in a grass-roots coalition called Citizens Against Hatred, which filed a

harassment and discrimination suit against Volen Siderov, pursuant to the ADA. The separate anti-discrimination cases are due to be heard and decided by the Sofia District Court in 2006.

9. Discrimination of People with Mental Disorders in Institutions

In 2005 the BHC conducted its second large-scale investigation of the psychiatric hospitals and clinics to which persons with mental disabilities are committed for mandatory treatment, pursuant to the Health Act, and for involuntary treatment, pursuant to the Criminal Procedure Code. The BHC monitoring was prompted by the entry into force on 1 January 2005 of the new Health Act, which contains statutory guarantees against arbitrary commitment.

The BHC monitors visited 11 state psychiatric hospitals and eight mental health dispensaries in Bulgaria. The BHC discovered various practices in the psychiatric hospitals' and courts' implementation of the new involuntary treatment procedure, which to a lesser or greater extent violated the rights of mentally ill patients. Still, a much smaller number of patients were held unlawfully and subjected to involuntary treatment than in the past. The hospitals continued the practice of holding patients, who had initially volunteered for treatment, against their will, and continued disregarding legal provisions on obtaining informed consent for treatment from involuntarily committed patients. The disturbing practice of immobilising and isolating patients in psychiatric hospitals continued, in direct contravention of international standards and a 2005 regulation drafted explicitly to counter such actions. During their visits, the BHC investigators also found out about several death cases in psychiatric hospitals that had not been properly investigated by law enforcement officials.

In material terms, the mental health dispensaries are in a much better condition than the state psychiatric hospitals, which are still in a miserable state – especially the wards for severely psychotic patients. The hospitals in Byala, Lovech, Patalenitsa and Karlukovo are in the most urgent need of refurbishment. The rooms, dining halls and toilet facilities in them have crumbling plaster, are sparsely furnished, do not have running hot water, and have very poor hygiene.

Throughout 2005, the BHC also continued to take an active interest in the conditions in social care homes for people with mental disabilities. Unfortunately, the two institutions regarding which the Council of Europe's Committee for the Prevention of Torture made critical recommendations after visiting them in 2003 – the home for women with mental disabilities in the village of Razdol and the home for men with mental disabilities in the village of Pastra – have not been closed down yet. Besides a few material improvements, no progress was observed with respect

to patient care and quality of life in the other homes which the BHC periodically visited in 2005.

The mentally disabled people in social care homes are not provided with any opportunities for effective reintegration into society. They continue to be treated inhumanely and degradingly both in psychiatric institutions, which fall under the authority of the Ministry of Health Care, and in social care homes for people with mental disabilities, which are under the authority of the Ministry of Labour and Social Policy. Patients are subjected to forced treatment without the institutions duly obtaining their informed consent and their treatment is usually limited to drug therapy. There are no effective rehabilitation or social integration programmes that could help the deinstitutionalisation of persons with mental disabilities, or incentives to attract highly qualified medical and other personnel into the mental health care system. All this leads to the low quality of life and exclusion from society of these individuals.

10. Right to Asylum and Migrant Rights

Freedom of movement is enshrined in Article 13 of the *Universal Declaration of Human Rights* and Article 12 of the *International Covenant on Civil and Political Rights*, which proclaim the right of every person to move about freely and choose his or her place of residence within the borders of any country, as well as the right to leave the territory of his or her own country and return thereto. However, the trend seen over the past few years of increasing government control of immigration and borders on the international and regional scale has shifted the balance between such control and every individual's right to freedom of movement and choice of residence, entirely in favour of the state, thus leading to an imbalance in national policy and practice that is harmful to the human rights of migrants.

In 2005 the number of individuals seeking asylum in Bulgaria continued to fall. Over the course of the year, asylum applications were filed on behalf of 822 individuals from 38 countries, a 27% decrease compared to the 1,127 applicants from 42 countries who applied in 2004, and a decline of over 53% in comparison with the 1,549 persons from 38 countries who applied in 2003. The main reason for this decrease is the increased government control of legal and illegal immigration across the country's borders, with efforts coordinated at both the local and regional levels, in line with the process of Bulgaria's accession to the EU.

The influence of the EU, via its institutional and direct financial support, was one of the main factors in the formulation of national policy and practices in this sphere. However, that influence was not always consistent in terms of institutional development. In certain areas it had positive effects, leading to legislative amendments that set higher standards for the protection of the rights of asylum seekers and refugees. Thus, the changes made in April to Articles 13, 15, 16, 34,

70 and 71 of the Asylum and Refugees Act (ARA) were indisputably positive. Article 13 eliminated the possibility of the grounds for determining an asylum application to be “manifestly unfounded” to be used as resolute or exclusionary clauses, although Art. 17 (2) of the ARA still allows this in certain circumstances. To a considerable extent, this brought the country's national legislation into conformity with the 1951 Convention on the Status of Refugees. Article 16 of the ARA was amended to the same effect. Article 34 of the ARA was changed with a view to limiting the possibility of refusal to reunite a family solely on the basis of the assumption of an exclusionary clause according to Article 12 of the ARA. Articles 70 and 71 of the ARA introduced the practice of taking into account the applicant's age after, rather than before, the registration of the asylum application.

However, there were other aspects in which the country retreated from standards previously established in its legislation and practices. Art. 8 (2) of the ARA narrowed the definition of “family member,” excluding a refugee's elderly or infirm parents, unable to care for themselves. Art. 8 (3) of the ARA rescinded the right of the spouses of refugees to receive residence status as refugees, if the marriage was concluded after the granting of asylum. This leads to the unequal treatment of marriages concluded within and outside the country, which constitutes a violation of Article 8 of the ECHR. Article 25 of the ARA allows the replacement of a child's guardian/custodian with a municipal social welfare service official, thus lowering the standard of protection for unaccompanied children seeking asylum. Article 73 of the ARA made it lawful to conduct just one interview during the process of evaluating an asylum application, retreating from the standard previously imposed by the law and the established precedent of a minimum of two interviews in the examination and resolution of individual cases.

There are still no guarantees of refugees' access to entry into the country's territory and the associated protection by prohibition of return (non-refoulement). There was no progress in the establishment of the planned regional offices of the State Refugee Agency at the country's main points of entry: the Kapitan Andreevo Border Station at Svilengrad and Sofia airport. For this reason, there are no procedures for conducting accelerated processing of asylum seekers, guaranteeing them entry into the country's territory.

Thanks to an agreement between the BHC and the National Border Police Service (NBPS), in 2005 the BHC renewed its observation of the detention facilities at the country's borders, including the ones for those arrested by the border police. As a result of this observation, it was concluded that due to a lack of functional transit centres for accelerated processing by the State Refugee Agency (SRA), or at least reception facilities for the detention of foreigners who are unlawfully present, the Migration Directorate of the Interior Ministry does not exercise any oversight over the persons submitting asylum applications at the border, nor over the entry of those applicants into Bulgarian territory.

As a result of the ongoing monitoring that was conducted, the NBPS undertook the obligation, totally inappropriate for that service, of detaining foreigners entering the country unlawfully for over 24 hours – even though this violates Article 71 of the Interior Ministry Act – when the persons seek asylum after arrest by the border police, preferring that to the worse alternative of being returned to the country they fled, in violation of Art. 33 (1) of the Convention on Refugees. The SRA's systematic refusal to secure the transportation of such persons from the border to its existing facilities in Sofia and the village of Banya, in the Nova Zagora region, which is in violation of Art. 61 (2) of the ARA, pursuant to Art. 58 (2) and Art. 68 (2), has led to delays in the registration, placement, and exercise of other rights by asylum seekers.

The Agency's administration continued to maintain its passive stance in this respect throughout 2005. It continued to review only those cases of persons seeking asylum at the border in which transportation was provided by the NBPS. Thus, in 2005 the SRA accepted for review only the 63 cases sent to it from the border by the border police, in which access to processing was only guaranteed thanks to BHC's intervention. In comparison, 59 cases were forwarded by the border police in 2004, 95 in 2003 and 151 in 2002. This decreasing trend is explained by the fact that the border police try to avoid registering asylum seeker cases since, due to the above-mentioned lack of cooperation on the part of the SRA, they then have to undertake duties exceeding those assigned to them by law and without the budgetary resources for the expenses associated thereto.

Despite the significant reduction in the number of new asylum applications submitted in 2005 (for 822 individuals from a total of 38 countries), only 86 of the registered applicants were granted asylum, 78 of whom were granted humanitarian status and eight were granted refugee status. The relative proportion of those given refugee status was thus extremely low: barely 10% of the registered asylum applications.

In 2005 Bulgaria's immigration legislation, policy and practices were also characterised by a lack of a national migration policy, especially in terms of economic emigration and immigration. The country completely followed the legislative trends and administrative measures adopted in countries with experience and tradition in the establishment of mechanisms for the administrative oversight of foreigners, with the strongest influence coming from EU legislation. This led to the introduction of a regulatory structure and practice of a number of restrictive administrative oversight mechanisms, limiting the right of foreign immigrants to enter and reside in the country and the right of Bulgarian citizens, economic emigrants who had violated the administrative regime of residence abroad, to leave the country freely.

The entry and residence of foreigners were restricted by a series of conditions and prohibitions that were enforced in practice for the first time in 2005. Thus, for example, began the enforcement of the prohibition introduced by Art. 27 (1) of the Foreigners in the Republic of Bulgaria Act (FRBA), to change the grounds for one's stay and a requirement to hold a "D" class visa in order to obtain a long-term residence permit, regardless of the reason for relocation. However, the enforcement of this regulation was conducted in violation of the law itself, since the immigration authorities required a "D" visa even in cases where the law provided for exceptions: for spouses of Bulgarian citizens or foreigners with refugee status. However, the courts overturned this administrative practice and protected the right to family life, in accordance with Article 8 of the ECHR.

The BHC also found violations of the rights of foreign immigrants in the following areas: t lack of legal assistance to foreigners under administrative detention for deportation; failure to recognise the rights as family members of all foreigners in factual cohabitation, no access to active and passive vote at local elections or participation in local government for long-term and permanent resident foreigners; the requirements in Article 71 of the Employment Promotion Act with regard to unchangeability, inadmissibility, qualification, vacancy and fixed term as conditions for hiring foreigners under the legal terms of labour or civil contracts; the requirement in Art. 24 (1,2) of the FRBA on the creation of 10 jobs for Bulgarian citizens as a condition for granting a residence permit on the basis of commercial activity and entrepreneurship, etc.

One of the main human rights issues in Bulgaria in 2005 was the treatment of foreigners unlawfully present in the country, especially those subject to involuntary removal from the country (deportation). The involuntary detention of foreigners undergoing deportation proceedings lasts between five and eight months, and there are recorded cases of detention lasting over 12 months. Once again in 2005, the government was unable to reduce these lengthy detention periods by carrying out timely deportations; notwithstanding, it continued ordering involuntary detention rather than pronouncing the less restrictive measure of daily signing-in. Detained foreigners are not given a copy of their deportation orders, either in Bulgarian or in translation, which prevents them from appealing within the stipulated deadline and hinders the preparation of their defence. There were several cases of fundamental significance regarding violations of these rights in 2005, where Bulgarian courts determined that an excessive passage of time without effective measures taken for an individual's "deportation" had a bearing on the lawfulness of the very fact of his or her detention, and that it was the obligation of the interior ministry officials to ensure compliance with the provisions of the ECHR, notably Art. 5 (1), Section F.

11. Women's Rights, Violence against Women and Gender Discrimination

11.1. *Domestic violence.* – The greatest achievement with regard to women's rights in 2005 was without doubt the passing and entry into force of the Protection from Domestic Violence Act (PDVA). In this regard, we must acknowledge the key role played by the non-governmental organisations that have been working on this issue for years, especially that of the Bulgarian Gender Research Foundation (BGRF) in drafting the law, lobbying for its adoption and training police officers and judges to enforcement it. According to organisations providing social and psychological services to women victims of violence, the law, as evident from the problems associated with its adoption, is significantly more advanced than the traditional societal and institutional attitudes regarding non-intervention in “the private sphere.” It constitutes an open, public admission of the fact that domestic violence is a serious social problem, not just a family or household one. As a number of studies have revealed, not only are patterns of violent behaviour within a family replicated by the children who suffer or witness domestic violence, those children are also at risk from violence in the “public sphere”, such as trafficking in women for the purpose of sexual exploitation.

According to 2005 data of the Animus Association, 73% of cases where its help was sought regarded domestic violence, wherefore it can be concluded that domestic violence is the most prevalent form of violence against women in Bulgaria. NGOs working on domestic violence issues have noted an increase in the number of people seeking consultations with them in such cases; many of the organisations see this as an indicator that the new law has provided a certain amount of publicity and also encouraged victims to seek assistance.

It is indicative that protection against domestic violence is contained in a special piece of legislation – the Act on Protection against Domestic Violence. By this law, the State has recognised the importance of combating domestic violence in the Bulgarian society. The fact that a separate law was adopted alongside the Family Code means that the relations regulated by this law go beyond family relations. As a matter of fact, the law protects a much broader category of persons. The Act provides for special urgent civil proceedings by the court administration in cases of domestic violence. It is a *sui generis* procedure although similar to the urgent civil proceedings in Bulgaria. The law contains also elements of criminal procedure but remains within the framework of civil proceedings and allows the shift of the burden of proof in favour of the victim of domestic violence. The essence of the law is that it allows special courts to issue special orders for protection of victims of violence, which contain measures restraining the offenders. The new regulation is a modern law in compliance with international standards on violence against women (VAW).

Domestic violence is defined in Art. 2 as any act of physical, psychological and sexual violence, and the attempts to commit such violence, restraining of the personal freedom and the private life of persons who are or have been in family relations or are related, who live in factual cohabitation or in the same dwelling. Such a definition encompasses violence committed by: a spouse or former spouse, a person who has cohabited with the victim, a person who has a common child with the victim, by a relative in the ascending or descending line, siblings, a person who is connected by marriage with the victim twice removed, a guardian, a tutor or a foster parent (Art. 3). The law should also include the category of persons who have had a serious intimate relationship with the victim in order to cover all forms of violence between intimate partners and also between homosexual partners, as the draft proposed by NGO representatives initially envisaged.

Courts may issue decisions – protection orders, comprising one or more of the following measures: constraining the offender not to commit further acts of domestic violence, separating the offender from the victim and from the common dwelling, restraining the rights of the offender to approach the dwelling, the workplace and venues where the victim has social contacts, ordering provisional measures on contacts with the child when they are in the best interest of the child. Protection orders may also comprise the following measures: directing the victims to join rehabilitation programmes and obliging the offender to attend special treatment programmes. Protection orders can be valid a maximum of 12 months. All perpetrators of domestic violence are fined by court – from 200 to 1000 leva /100 up to 500 EURO/. However, other measures, not explicitly mentioned in the law and specified by the court, ought to be provided to give the court greater flexibility in each individual case.

The procedure for protection against domestic violence may be initiated by an application filed by the victim or upon request of the executive director of the Agency for Social Assistance. In case urgent protection is needed, an application may be filed by the victim's close relatives. This last opportunity should be seriously reconsidered in view of the negative experiences in other countries, where the intervention by other people in a violent relationship often results in escalation of violence.

The law commendably allows for the issuance of protection orders on grounds of the victim's allegations and in the absence of other evidence. To ensure speedy proceedings, the law stipulates immediate registration of the applications and request and issuance of the decision within one month. In case of serious threat to the health and life of the victim, an urgent procedure is applied and the protection order is issued within 24 hours in an *ex parte* procedure which is then followed by the normal procedure for issuing protection orders.

Police play an important role in the urgent protection of victims of domestic violence when they are obliged to react, in the procedure for notification of the

offender about the court procedure and court order and especially in the implementation of the restraining orders, which are part of the court decision – limiting the possibility of the offender to continue the violence, removing him/her from the common dwelling and the places allowing contact with the victim. Furthermore, in case the offender fails to comply with the court decision, the police arrest him/her and notify the prosecutor.

A special role is given to NGOs addressing domestic violence. Those registered according to the Law on Social Assistance can issue documents to be presented in court, their representatives can participate as witnesses on how the violence has affected the victim and are also included in the network of social programmes for rehabilitation of victims. In addition, the law envisages cooperation of NGOs with state institutions in preventing domestic violence, victim support, selection and education of persons who will deal with the implementation of the law.

In addition to the above suggested improvements of civil law, the following amendments to the criminal law ought to be made to ensure full protection of the rights of victims: a special provision criminalising domestic violence should be introduced in the Penal Code with stricter sanctions for injuries with the same effects; the Penal Code should also include a new crime – violation of the court protection order. Art. 161 should be changed to stipulate public prosecution in cases of medium injury inflicted by spouses or close relatives.

The penalties for debauchery and rape in the family and especially with a descending relative should be much higher. In Cyprus, for example, rape of a child in the family warrants life imprisonment, but only between three and ten years of jail in Bulgaria. The cases of severe domestic violence should be explicitly included as grounds for intervention by the public prosecutor in case the prosecution of such violence remains subject to individual action. Police powers should be broadened to allow the police to separate the victim from the offender for a certain period of time prior to the issuance of a court protection order, and, if these measures do not yield the expected results, the victim ought to be entitled to initiate court proceedings; police powers provided by the law should be translated into concrete provisions in the Act on the Interior Ministry.

A clear and speedy procedure for compensation of victims of domestic violence should be adopted. Furthermore, special provisions limiting the rights of the offender to own, carry and use firearms should be adopted. A separate law or at least by-law should be adopted to specify more clearly the state's obligations to provide social support and rehabilitation to the victims and support the existing services. Special attention should be paid to: the initial social assistance of the victims in order to facilitate their rehabilitation and integration in society, specific incentives for employers and special programmes for employment of victims of violence should be adopted based on the Employment Promotion Act. Supporting

legal aid to victims of violence who cannot afford a lawyer should be another priority of the Ministry of Justice and the Ministry of Labour and Social Policy.

Court practice with regard to the Protection from Domestic Violence Act has already gathered some momentum. According to the BGRF of Sofia and Plovdiv, the total number of cases filed with the Sofia City Court under the PDVA till the end of the year stood at about 100; court decisions on 38 had become effective by end of 2005; 40 cases were filed with the Plovdiv District Court; in two, the charges had been pressed by men against male defendants. The Demetra Association assisted in the filing of 23 cases under the PDVA with the Burgas District Court seeking urgent hearings; decisions rendered on 14 of them have already become legally binding. It is absolutely necessary to maintain this positive trend and that the government make a clear, long-term commitment to fund programmes for the prevention of and protection from domestic violence and the establishment of a system for legal and social assistance to its victims. Unfortunately, however, there is a real danger that the competent state institutions will once again rely on the NGO sector to fulfil their obligations; up to now, NGOs have been the only source of free legal and social rehabilitation assistance to victims of domestic violence.

11.2. Trafficking in women. – Trafficking of women for sexual exploitation is the most widespread form of trafficking in Bulgaria. The problem was recognised as such in the EC 2005 Progress Report, in the Human Rights Report of the US State Department and by the Bulgarian government itself. It constitutes one of the most severe forms of violence against women, a serious violation of a range of human rights: the right to freedom from torture, the right to freedom from slavery and forced labour, the right to bodily integrity, the right to freedom from discrimination, the right to respect of privacy, the right to personal security, the right to freedom of expression, the right to work, the right to free choice of profession, etc. This type of violence against women is closely related to other forms of violence. According to Animus Association data, 44% of their clients – victims of trafficking – grew up in families where domestic violence was common, while 26% of the clients were victims of incest or sexual abuse when they were children.

On April 12, 2001 Bulgaria ratified the Palermo Protocol for preventing, suppressing and punishing trafficking in persons, especially women and children,¹ as part of the UN Convention against Transnational Organized Crime. The Protocol is without doubt the most important international document which influenced Bulgarian legislation. Prior to that, Bulgaria had ratified or joined a number of other international instruments related to trafficking in persons, especially women and children.

The development of international standards was followed by the development of national legislation on trafficking in Bulgaria in the last few years. Although it

1 The Protocol has entered into force in September 2003.

can be assessed as a positive process, it came with a big delay and could not prevent the “boom” of trafficking in Eastern Europe from the mid-1990s until 2003. Especially in Bulgaria, these new measures came very late, after the development of the phenomenon. Furthermore, the poor implementation of the law in 2005 rendered the protection of the rights of the victims ineffective.

The ratification of the Palermo Protocol was followed by amendments to the Penal Code in 2002² and by the adoption in 2003 of the Act on Combating Trafficking in Human Beings. In addition to the amended definition of “organised criminal group” – Article 93 (item 20) of the Penal Code, other amendments were introduced in order to criminalise the different forms of trafficking and acts facilitating trafficking. Such acts are more severely punished and they comprise: rape with the intent of inducement to subsequent acts of vice or prostitution (Art. 152, para. 3, new item 4), inducement to commit an act of prostitution (amended Art. 155 PC) and abduction with the purpose of subjecting the person to acts of vice or prostitution (Art. 156 – not amended).

New articles 159a, 159b and 159c apply when the crime has the attributes of an international crime of trafficking. The main text of Art. 159a encompasses all the elements of trafficking according to the Palermo Protocol. The very act of trafficking, notwithstanding the consent of the victim, is punished. The qualified form of the crime entails use of special means – use of force or misleading the person, abduction, abuse of power, etc. The most severe sanction of five to fifteen years of imprisonment is applied in cases of dangerous recidivism or when the crime was committed following an order or a decision of an organised criminal group. We note, however, that the punishments provided for trafficking are not strict enough to discourage or deter organised crime. They are low compared to the pain and harm suffered by the victims of trafficking.

In addition, the criminal procedure does not allow the victims to defend their rights at the respective stages of the legal procedures against the perpetrators, as required by the Protocol. According to the Criminal Procedure Code, the victim and its legal representative are not a party in the investigation phase of the case and the victim can appear as a private prosecutor and file a compensation claim only in the judicial stage. These limitations deprive the victim, most often the woman, of her right to participate in the legal proceedings and claim her interests and damages. Furthermore, there is no reliable protection for the woman and both factors have a dissuasive effect. Thus the majority of women refuse to appear in court and assume the role of private prosecutor.

All this facilitates the task of the defendant/s/ and not many cases for trafficking in women end with punishment corresponding to the severity of the crime committed. According to the Act on Combating Trafficking in Human Beings,

2 SG No. 92/ 2002.

the victims who collaborate with the investigation are placed under special protection. Under the conditions set by the criminal procedure, it is difficult to collaborate since there is no effective protection of women's rights during the procedure.

The Act on Combating Trafficking in Human Beings³ has been in force since 1 January 2004. It regulates: 1. the powers, competencies and relations between the state institutions on trafficking.; 2. the status and objectives of shelters, centres and commissions established accordingly; 3. prevention measures; 4. measures to protect women and children specifically. One of the main principles of the law is placing the victims collaborating with the investigation under special protection. In addition, a National Commission is established at the level of the Council of Ministers and is chaired by a Deputy Prime Minister. One of its main tasks is to prepare annual programmes for preventing and combating trafficking in human beings and for the protection of its victims; these are submitted for approval by the Council of Ministers.

Although it generally follows the Protocol requirements, the Act has several shortcomings. There is no special section on the rights of the victims. The Chapter "Protection and Support of Victims of Trafficking" is focused on administrative measures and measures for protection only of the victims who decide to collaborate with the investigation. There is no separate right to legal aid which would ensure the fair representation of the victim's interests during the criminal proceeding.

In the chapter on prevention, the Act provides that the National Commission will take measures for creating equal social and economic opportunities for the vulnerable groups including through programmes inciting employers to hire individuals from vulnerable groups. As a measure of rehabilitation and inclusion, there should be a provision in the Employment Promotion Act explicitly placing victims of trafficking in the category of vulnerable groups. The National Commission has a broad range of powers but is not functioning properly. More specifically, no special budget was allocated for the shelters, centres and commissions, and also for the prevention of trafficking in 2005.

Unfortunately, the law is not being implemented in practice, although one year has passed since its enforcement. The special protection and support of victims of trafficking is afforded only to those who collaborate with the investigation. This is overemphasised in the law which places the majority of the victims in a less favourable position during the criminal proceedings. The guarantees for protection of witnesses provided by Art. 97a of the Criminal Procedure Code are not sufficient for victims of trafficking. In addition, the period of one month within which the victim has to decide whether to collaborate or not is insufficient for women who had suffered such a severe trauma after trafficking. Protection of victims must not be conditioned by any agreement to give evidence to or co-operate with the criminal

3 SG No. 46/2003

justice system and other authorities. Another gap in the law is the lack of mechanisms guaranteeing the right to compensation of the victims of trafficking. It has to be provided in collateral legislation.

And finally, no gender approach has been identified in the law. There are no provisions on the explicit protection of women victims of trafficking. The very title of the Act does not contain the expression “especially women and children” although the protection of trafficked women and children is mentioned in Art. 1 as part of the subject of the law. Women are not mentioned as a specific group in the chapter on the shelters or in the prevention strategies. Such strategies should be long-term and must be reflected in poverty reduction and social development strategies with specific reference to economic opportunities for women.

Based on the new Act, the following two Regulations were passed in 2004: the Regulation on the Organisation and Activities of the National Commission for Combating Trafficking in Human Beings and the Regulation on the Shelters and Centres for Protection and Support of Victims of Trafficking in Persons. The centres are created within the local commissions for combating trafficking in human beings and the shelters are established by the National Commission at the proposal of the local commissions or by physical and juridical persons which are registered in the special National Commission's Registry. Neither Regulation was enacted in 2005.

Some law enforcement officers or other government authorities, including local authorities and customs officials, allegedly facilitated human trafficking, although there was no evidence of a pattern of official complicity. Officials often accepted bribes to ignore trafficking,

In January the national anti-trafficking commission, the primary coordination and policy-making body for trafficking issues, held its second meeting and formally adopted a national anti-trafficking strategy. By the end of the year, however, the commission had failed to meet regularly, appoint a functioning secretariat, or establish the regional anti-trafficking commissions foreseen by the national strategy. The witness protection legislation adopted in November 2004 had not been implemented fully by the year's end, due to insufficient funding. Courts pronounced 34 verdicts for trafficking in persons in 2005.

The implementation of anti-trafficking legislation in 2005 can be assessed as poor, in spite of its abundance and the very high government position of the mechanisms for combating trafficking. The new structures introduced by the law give NGOs broad opportunities to participate in the prevention of trafficking, in the process of combating it and in the support and rehabilitation of the victims of trafficking. Thus, NGOs can bring a stronger human rights approach to the fight against trafficking in women in Bulgaria. Unfortunately, no consistent support has been proposed by the government to date.

11.3. Gender discrimination. – The selection and appointment of the members and establishing the headquarters of the Anti-Discrimination Commission took much too long; the Commission finally took its first steps at the end of last year, nearly two years after the Anti-Discrimination Act had come into effect. This inevitably raised legitimate concerns about neglect of the issue and necessitated the speedy and effective implementation of a mechanism for the submission of complaints to the Commission. There are now indications of a significant lack of court practice in cases of gender-based discrimination and victims of such discrimination are expected to take advantage of the accelerated procedure for complaining to the Anti-Discrimination Commission, as provided by the law.

The first Gender Equality Action Plan was enacted in 2005 and it sets out the concrete obligations of the ministries in this area. The Plan is implemented within the framework of the National Council on Equal Opportunities for Women and Men – a consultative body within the Council of Ministers. The work of the Council is coordinated by the Ministry of Labour and Social Policy. Despite these efforts, no substantial progress was made in establishing *de facto* gender equality in Bulgaria. Therefore, the creation of an institutional mechanism to that effect is crucial for ensuring protection of women's rights in all spheres of social life. At the end of 2005, the government initiated the drafting of a new law on equal opportunities; one of its key elements will be the establishment of such an institutional mechanism for ensuring gender equality.

12. Social Rights

Bulgaria has ratified the main international instruments related to socio-economic rights, including the International Covenant on Economic, Social and Cultural Rights and the Revised European Social Charter. Notwithstanding, the many governments that ruled Bulgaria over the past 16 years have made considerable sacrifices in the sphere of citizens' social and economic rights, in violation of the international human rights commitments undertaken by Bulgaria.

The great majority of Bulgarian citizens have faced in fact a rather painful transition. The state of social rights in Bulgaria in 2005 reflects the shortcomings in the realisation of these rights that have accumulated over the years. The often poorly implemented neo-liberal policies have led to substantial deterioration of the social safety nets, have entrenched the impoverishment of large sections of the population and for the most part, have failed to foster civil and social dialogue. Despite the forthcoming accession, the government concluded another agreement with the IMF /International Monetary Fund/, foreshadowing the macroeconomic restrictions on a number of social and economic rights in Bulgaria for yet another year. Less than a year before its full membership in the European Union (EU),

Bulgaria needs stronger and more balanced economic and social policies, elaborated and implemented in the framework of genuine civil participation.

12.1. Restructuring and Unemployment. – Though inevitable, the large-scale economic restructuring and liberalisation of key sectors of the economy, such as transportation, telecommunications, and the energy industry launched in the past 10 years have had a high social cost. At present, only half of the population is active on the labour market (49.7 %) and economic effectiveness has decreased by seven points over the last 10 years. Other negative trends include the unprecedented expansion of the grey economy, and the relatively low investment rate in new technologies. GDP growth in 2005 stood at 5.5%, far from the 8%–10% target.

12.2. Income Erosion. – Poverty cannot be measured only in terms of income: it tends to express itself in inadequate standard of living, difficulty to satisfy basic needs and limitations to living in dignity. Seventy percent of the population are still unable to come to grips with the income erosion, which has had a negative effect on work motivation and incentives to professional development. The insidious entrenchment of poverty generates anxiety, aggression and negativism, which could have particularly adverse effects on younger generations. Real income in Bulgaria has continuously eroded as a result of the restrictive policies of all transition governments.

In the 2001–2004 period, the average salary increased by 25.6%, while prices increased as follows: telephone 40%, electricity 95%, heating 40%, medications 70%. According to the Confederation of Labour, in order to survive, one person needs BGL 465 (USD 310) a month, yet at the end of 2004, the income of 447,000 Bulgarians ranged between BGL 120 and 150 (USD 80–100) per month. Data from the National Statistical Institute of November 2005 shows that the total average income per household was 431 BGN, while the total average expenses were 427 BGN. Compared to the end of 2004 the price levels rose by 6.45% and the average annual inflation reached 5%.⁴

In 2005, the government decided to increase the minimum salary to up to 160 leva/ 80 EURO/, which is the only level of income guaranteed by the Constitution. However, the International Covenant of Economic, Social and Cultural Rights requires of the state to progressively guarantee a decent living standard for its citizens, which a succession of Bulgarian governments have so far failed to achieve.

12.3. Labour Market Insecurity. – By resorting to procedural tricks and ineffective and unimplemented programmes, like the social scheme known as “From Social Assistance to Employment”, the previous government managed to lower the level of unemployment from 17.46% in January 2003 to 11.88% in November 2004.

4 See Early Warning System Bulgaria: Beyond the Facts <http://www.earlywarning.bg/content.php?issue=24&con=2471&PHPSESSID=e341744c37a18e3b8ebe65aacf9a6b8e> (Accessed 16 August 2006).

Employment created through such programmes, however, is rarely sustainable and usually does not constitute “real” employment. Another employment deficit in Bulgaria is often referred to as the syndrome of the “working poor”: workers who do not receive their salaries on a regular basis and are insufficiently protected by actual mechanisms for guaranteeing prompt payment of their wages. The remuneration that more than half of the employed population receives is clearly insufficient to ensure a decent living. For example, in 2004, 57% of all employed workers paid social security on a gross remuneration equal to BGL 240 (USD 160). This in turn once again resulted in the phenomenon of the “working poor”, which was not tackled by the previous government and so far has not been addressed by the present government, despite its election campaign policy pledges. Another indicator of increased insecurity in the labour market is the broadening of the age categories of men and women at risk of not finding work. In 2001, women between 45 and 59 years of age and men between 55 and 63 were at risk of not finding employment, in the last few years, the age range for both women and men has expanded even further.

12.4. Deteriorating Social Safety Nets. – The deterioration of social standards has resulted in the deterioration of demographic trends. The population of Bulgaria is progressively decreasing. In the ten years following 1992, it decreased by 600,000 people. An additional drop in population of 700,000 inhabitants (9%) is expected by 2010. According to the National Statistical Institute (NIS), in the course of 2005, the population has declined by 42 299 persons or 0.5 % of the total population. The decline was due to the consistently negative natural increase in the country, i.e. a significantly greater number of deaths, compared to that of live births.⁵ The average life expectancy has also been decreasing: from 75.1 years in 1990 to 72.55 in 2005, arguably a symptom of an ailing health care system. The main risk factors for the deterioration of the health status of a considerable portion of the population are poverty and marginalisation, unemployment, low average income levels, unhealthy way of life, including unbalanced diet and/or unhealthy working conditions.

12.5. The Gender Dimensions of Poverty. – Poverty also has serious gender implications. It tends to affect women to a greater extent and in a different way for several reasons: working women are more affected by liberalisation, privatisation and the greater flexibility of labour. It impacts on their job conditions and especially on their salaries. There is an evident trend towards feminisation of certain sectors of the economy, such as sections of the textile industry, often notorious for reproducing the phenomenon of the “working poor” by systematically and flagrantly violating women's labour rights.

The liberalisation of public services has affected both employed and unemployed women, in particular women heading households. The increase in the num-

5 See National Statistical Institute: Population and Demographic Processes in 2005, Total population http://www.nsi.bg/Population_e/Population_e.htm (Accessed 16 August 2006).

ber of women-headed households, 65% of whom live in absolute poverty, is a gender issue. Despite the Government's poverty alleviation strategies, poverty continues to affect women, more and more as they grow older. Poverty also affects the large ethnic minorities of Turks, Bulgarian Muslims and Roma, once again women even more so than men, where unemployment exceeds 50%. According to the Women's Alliance for Development and the Agency for Social Analysis research report, women over 50 are the group most at risk of poverty. About half of women who live alone are poor. Psychological aspects of poverty, as well as its material base, are important. In this regard, 45% of women above 50 perceive themselves as poor, while two thirds of Roma women and 47% of Turkish women perceive themselves as poor. At an individual level, this is expressed by feelings of marginalisation and dependency.

12.6. Civil and Social Dialogue. – In this context, there has been a deficit of civil and social dialogue, and a dose of political will to improve institutional capacity is needed for this dialogue to take place. The Government seems to use the concept of civil and social dialogue as a way to impose its policies unhindered, rather than to develop a system for respecting trade unions and NGOs and take into account the diverging opinions in civil society. Despite the Government's policy pledges, the institutions for social dialogue and real negotiations under the format of tripartite cooperation, which are regulated in the Labour Code, are still largely disregarded. The National Council on Tripartite Cooperation, for instance, was turned into a mere tool in the hands of the Ministry of Labour and Social Policy.

In this framework, issues such as income policy and remuneration are rarely subjected to public discussion and debate, as they are generally perceived as subject to negotiation with international financial institutions. Other issues that were taken out of the tripartite dialogue were electricity and heating prices, communication services and health care. Even institutions for social and civil dialogue like the Social-Economic Council, which are more or less in place, do not function properly.

The recent national elections clearly demonstrated a will for change on the part of voters, yet, the Bulgarian Parliament is dominated by the same political forces that defined the development of the country during the past decade. Bulgaria clearly needs stronger and more balanced economic and social policies, elaborated and implemented in the framework of genuine civil and social dialogue. Given the trends registered during the last years of transition, it seems unlikely that this balance would be swiftly achieved.

HUMAN RIGHTS IN THE REPUBLIC OF CROATIA IN 2005

I INTRODUCTION

Although a number of international organisations, such as the OSCE Mission in Croatia in its Status Report 17 on Croatia's progress in meeting international commitments of 10 November 2005 and the Human Rights Watch in its 2005 Annual Report, assessed that the state of human rights has improved in Croatia in 2005, such positive assessment cannot be made on the basis of the complaints addressed to NGOs dealing with the protection of human rights, notably the Croatian Helsinki Committee for Human Rights (CHC).

Human rights NGOs received more complaints over human rights violations in 2005 than in 2004. The Croatian Helsinki Committee, for instance, received 20% more complaints than in the previous year and after investigating them, established that most were grounded.

Apart from the complaints, CHC draws its conclusion that the realisation of human rights has deteriorated over 2004 also on the basis of the reviews of official records and statistics on the situation in prisons and correctional facilities, court backlogs, progress in addressing the housing needs of returnees – former holders of tenancy rights they had lost because they had not resided in the apartments, restrictions of rights pertaining to obligatory health insurance, threatening announcements by the police minister regarding police conduct, et al.

Especially concerning were the increasing threats to social rights, especially those pertaining to labour and to pension insurance. Unregistered labour is not countered by efficient inspectorial supervision; on the contrary, tolerance of black market labour actually encourages such labour. Moreover, the authorities are not taking efficient measures against employers violating the Labour Act by preventing their employees from taking their obligatory weekly days of rest (especially shop owners) and not paying them for overtime and work on Sundays and holidays.

Apart from these human rights violations, the local elections in mid-2005 were followed by political trade-offs in mandates that resulted in a crisis in a number of self-government units, wherefore the forming of some municipal and city councils and county assemblies took months. Some elected councillors joined other parties as soon the political balance changed, thereby betraying the political will of

the electorate. There was public talk of the threats and blackmails some councillors were allegedly exposed to and the sums of money that had allegedly changed hands in exchange for allegiance to a different party. Councillors from amongst the ranks of national minorities were also involved in the alleged manipulations; they resigned and the procedure of their replacement prescribed by the Local Election Act was interpreted in different ways with the aim of altering the election results.

Moreover, data on representation of national minority members in specific local self-government units were manipulated with either to avoid proportional representation of a specific national minority in the local representative body or to have fewer minority representatives in local government than there should be.

As many as 50 ethnically motivated crimes were recorded in 2005 although official statistics show the police reported a much smaller number of such crimes. Concern arises over the fact that the official instructions and procedures for resolving such crimes after they are perpetrated are insufficient and superficially implemented. Data published by media, especially the press, corroborate the need to combat such crimes more robustly.

We cannot be satisfied with the state of media freedoms in 2005 either. Attempts to exert stronger political pressure on print and electronic media in the last quarter of 2005 warrant concern. Namely, the appointment of five Croatian TV (HRT) Programme Council members, whose terms in office expired on 17 October, considerably raised tensions in the Parliament and the media. Sharp criticism of both the HRT Management Board and the Programme Council were voiced at the Parliament plenary session in late October.

The MPs' criticism of the HRT Management Board and Programme Council probably resulted in the restriction of editorial freedom on HRT. The management punished two journalists, one by reducing his monthly salary by 10% and the other by permanently suspending him from the position of co-editor of a political talk show. Media experts maintain that these moves have undermined the balance between freedom of information and media professionalism and responsibility.

Concentration of print media in the hands of one owner continued in 2005. After the privatisation of the state newspaper *Slobodna Dalmacija*, the largest share of the Croatian print media market is now owned by *Europa Press Holding* (EPH) i.e. its partner WAZ, which can now restrict media freedoms and exert the greatest influence on forming public opinion in the country.

Positive headway was also recorded in 2005. Pensioners finally got the chance to collect the pension debt incurred by the implementation of the anti-Constitutional Government Decree passed in 1993. Full cooperation with the ICTY was achieved and the case of Mirko Norac and Rahim Ademi was ceded to Croatia. The ICTY ceded the cases to Croatia after assessing that prerequisites for a fair trial in Croatian courts had prevailed. Monitors of war crime and crimes against humanity trials noted headway in the application of the principle of fair trial in the Croatian judiciary.

II HUMAN RIGHTS IN LEGISLATION

1. Constitutional Provisions on Human Rights

The Constitution of the Republic of Croatia regulates human rights in detail in a separate chapter (Protection of Human Rights and Fundamental Freedoms) comprising 55 articles. Human rights guaranteed by the Constitution are systematised in two groups: 1) individual and political rights and freedoms, and 2) economic, social and cultural rights. They comprise all classical rights and freedoms and most second generation rights, including the right to a healthy life. The Republic of Croatia is obliged to ensure conditions for a healthy environment, wherefore everyone is bound within their powers and activity to devote special attention to the protection of human health, nature and the environment. These provisions allow for the protection of third generation rights.

Some of the fundamental human rights are listed in the general provisions of the Constitution. These provisions (Arts. 14–20 of the Constitution) guarantee rights and freedoms regulated by international instruments, notably the ICCPR, ICESCR and the ECHR. Some of the rights are defined more broadly than in international documents and the Constitution also guarantees the protection of specific rights not protected by international conventions. Article 14, for instance, specifies that everyone (i.e. not only citizens of Croatia) shall enjoy all rights and freedoms in the Republic of Croatia regardless of race, colour, gender, language, religion, political or other belief, national or social origin, property, birth, education, social status or other characteristics. This Article also specifies that everyone is equal before the law. Article 35 guarantees to both citizens of Croatia and foreigners respect for and legal protection of their private and family life, dignity, reputation and honour.

To prevent excessive restrictions of fundamental rights and freedoms or their abuse by authorities in specific circumstances, the Constitution sets out that they may be restricted only by law and to ensure the protection of rights and freedoms of other people, the legal order, public morals and health, and only to the extent required by the exigencies of the situation (Art. 17). A decision to restrict the scope of specific rights, even during a state of war or immediate threat to Croatia's independence and unity or severe natural disasters, must be taken in a specific legal procedure (two-thirds majority of all votes) in the Croatian Parliament, or, if the Parliament cannot meet, such a decision may be reached only by the President of the Republic. The restrictions must be proportionate to the exigencies of the situation and cannot result in inequality of citizens on grounds of race, colour, gender, language, religion, national or social origin.

Constitutional provisions on the right to life, prohibition of torture, inhuman or degrading treatment or punishment, legal definitions of penal offences and

punishments, freedom of thought, conscience and religion cannot be suspended even in case of immediate threat to the existence of the state.

Right of appeal of individual first-instance administrative and judicial decisions is a constitutional right which may be excluded only exceptionally, in cases envisaged by the law but only if other legal remedies are ensured. Individual administrative decisions must be based on the law and the Constitution guarantees judicial review of the lawfulness of such decisions.

The principle in Article 20 of the Constitution, under which anyone who violates the Constitution's provisions on human rights and fundamental freedoms shall be held personally responsible and may not be exculpated by invoking a superior order, is of special relevance to the protection of human rights.

Constitutional provisions on individual and political rights comprise classical rights and freedoms – right to life, inviolability of personal liberty and personality, right to a fair trial, inviolability of home, freedom of thought and expression, freedom of association, suffrage, and one obligation – military service. Abolition of capital punishment arises from the guaranteed right to life in the Republic of Croatia and death sentences cannot be imposed even in wartime.

The inviolability of man's personal liberty and personality is guaranteed by the provision prohibiting the restriction or deprivation of anyone's freedom except in cases provided by the law. Only the court may decide to restrict someone's freedom or deprive him or her with liberty. i.e. deprive someone of his/her freedom; anyone detained or accused of a crime has the right to be brought before a court in the shortest possible term specified by the law and acquitted or convicted within the statutory deadline.

Human integrity and dignity are protected by the prohibition of all forms of maltreatment and medical or scientific experimentation without consent. The right to a fair trial comprises adjudication in criminal and civil proceedings in independent and impartial courts founded in accordance with the law and conducted within a reasonable time. In Article 29, the Constitution guarantees that a suspect, accused i.e. defendant will be informed of the nature of and reasons for the charges against him or her and the evidence incriminating him/her within the shortest possible time in detail and in a language s/he understands. The Constitution also guarantees they will have adequate time and opportunity to prepare their defence, the right to a defence counsel and free communication with the counsel, and that they shall be informed thereof. A suspect, an accused i.e. defendant is entitled to defend himself or with the assistance of a counsel of his own choice and has the right to free counsel under legally prescribed conditions. If s/he is accessible to the court, s/he has the right to be present at his trial and interrogate or have the prosecution witnesses interrogated and to demand the presence and interrogation of the defence witnesses under the same circumstances as the witnesses for the prosecution, and the right to the free assistance of an interpreter if s/he does not understand the language used

in court. The suspect, accused i.e. defendant may not be forced to confess his or her guilt. Evidence obtained in an unlawful manner is inadmissible in court. Criminal proceedings may be launched only before a court of law and on the motion of an authorised prosecutor. The provisions in Articles 29 and 31 of the Constitution are in conformity with the ECHR and its Protocols 1, 2, 6, 7 and 11.

Article 31 of the Constitution sets out that no one shall be punished for an act which had not been a punishable offence under national or international law at the time of its commission. It also prohibits imposition of a heavier penalty than was applicable at the time the act was committed and stipulates that if a law passed after the commission of the offence envisages a milder penalty, a milder penalty shall be imposed. No one may be tried anew or punished for an act which s/he had already been finally acquitted of or convicted of in accordance with the law. Circumstances and reasons allowing retrials are provided by the law, in accordance with the Constitution and international agreements.

Provisions on the rights of suspects, accused and defendants are based on the fundamental Constitutional principle in Article 28 that everyone is presumed innocent and that no one may be presumed guilty of a crime until such guilt is established by a final court verdict. The Constitution also prescribes in Article 25 that every detainee and prisoner must be treated humanely and his or her dignity must be respected and that anyone unlawfully deprived of liberty or convicted has the right to compensation and public apology in keeping with the law.

The inviolability of the home is a classical constitutional human right also guaranteed by the Constitution of the Republic of Croatia. Article 34 of the Constitution sets out that a home is inviolable and that the search of a home or other premises may be ordered only by court, by a duly reasoned written warrant issued in conformity with the law. The tenant or his representative shall have the right to be present during the search, which must be conducted in the presence of two witnesses. The Constitution also envisages an exception to the rule: in the event a search is necessary to enforce an arrest warrant, apprehend the perpetrator of a crime or prevent serious danger to the lives and health of people or property at a larger scale. In such cases, the police may in keeping with the law enter a home or other premises without a court warrant or the consent of the tenant and search the premises in the absence of witnesses. However, the presence of two witnesses is required during a warrantless search conducted if there are reasonable grounds to believe that the search will produce evidence in the home of the perpetrator.

Privacy of written correspondence and other forms of communication is guaranteed by the Constitution, except in cases specified by the law and pertaining to the protection of the security of the Republic or the conduct of criminal proceedings. In Article 32, the Constitution guarantees the freedom of movement and choice of residence to all persons lawfully present in the territory of the Republic of Croatia. Every citizen of the Republic of Croatia has the right to leave Croatia

at any time, settle temporarily or permanently abroad and return to Croatia at any time. The right to free movement may be restricted by law only exceptionally, when necessary to protect the legal order or health or the rights and freedoms of others.

The Constitution guarantees asylum to aliens and stateless persons unless they are prosecuted for non-political crimes and activities in contravention of fundamental principles of international law. An alien legally staying in Croatia may be expelled or extradited to another state only if a decision adopted in keeping with an international treaty or law must be enforced.

The Constitution guarantees the freedom of thought and expression, which comprises the freedom of the public information, freedom of speech and public appearance and free establishment of all media institutions. The Constitution prohibits censorship and guarantees journalists the right to freedom of reporting and access to information. The Constitution grants the right of correction to those whose constitutional or other legal rights were violated by public information.

The Constitution guarantees everyone the respect and legal protection of their individual and family life, dignity, reputation and honour and the security and confidentiality of personal data which may be collected, processed and used without the consent of the individual only in circumstances specified by the law.

The Constitution also guarantees classical freedoms of conscience and religion and the free public manifesting of religion or other beliefs. The Constitution departs from the principle that the church is separated from the state and specifies that all religious communities are equal before the law and free to perform religious rites, found and manage schools, educational and other institutions, social and charity institutions in keeping with the law and stipulates that they shall enjoy the protection and assistance of the state in their activity. In Article 42, the Constitution guarantees everyone the right to free assembly and peaceful protest. Everyone is guaranteed the right to free association to protect his or her interests or promote his/her social, economic, political, national, cultural or other convictions and goals. Citizens can for these purposes freely set up political parties, trade unions and other organisations, join them and leave them. This right is restricted by the prohibition of any violent threat to the democratic constitutional order, independence, unity and territorial integrity of the Republic of Croatia.

Suffrage is defined as universal and equal and the Constitution prescribes that all Croatian citizens over 18 are entitled to vote in keeping with the law. Voting is secret and exercised at direct elections. Croatian citizens abroad at the time of parliamentary and presidential elections may vote in the states they are currently in or in another manner specified by the law.

The Constitution stipulates military service and that all able-bodied citizens are duty bound to defend the Republic of Croatia. It does, however, allow those not willing to perform military duties in armed forces for religious or moral reasons to

invoke conscientious objection and obliges them to perform other duties specified by the law.

The Croatian Constitution guarantees a relatively large number of economic and social rights. Right to ownership and inheritance is guaranteed to all citizens of Croatia, while foreigners may acquire the right to ownership under conditions prescribed by the law. Property may be restricted or seized only under the law and in the interest of the Republic of Croatia and the owner must be recompensed the market value of the property. The Constitution defines entrepreneurial and market freedom as the foundations of Croatia's economic order, wherefore the state ensures all entrepreneurs equal legal status and prohibits abuse of monopolistic status. The Constitution sets out that rights acquired through investment of capital may not be restricted by law or another legal enactment. Entrepreneurial freedom and ownership rights may be restricted in the interest of Croatia only by law and to protect the interests and security of the Republic of Croatia, nature, environment and human health. Foreign investors are guaranteed the free transfer of their profits and invested capital out of the country.

Under the Constitution, everyone has the right to work and to enjoy the freedom of work. The Constitution guarantees everyone free choice of profession and work and stipulates equal access to all jobs and duties to everyone. Every employee has the right to fair remuneration ensuring him/her and his/her family a free and decent life. In keeping with the law, an employee may participate in decision making in the company s/he works for. The Constitution also prescribes that employees and their family members have the right to social security and insurance and specifies that these rights and rights relating to pregnancy, maternity leave and child care shall be regulated by law. The Republic ensures the right to aid to vulnerable and other citizens who are unemployed or unable to work and cannot meet their vital needs. Special care is envisaged for the protection of persons with disabilities and their integration in society. Everyone is guaranteed the right to health care in keeping with the law.

In order to protect their economic and social interests, all employees have the right to set up trade unions and are free to join and leave them. Trade unions may establish their federations and join international trade union organisations. The Constitution, however, allows for lawful restrictions on the exercise of these rights by members of the armed forces or of the police. Employers have the right to found their own associations and are free to join and leave them. The Constitution guarantees the right to strike but allows for lawful restriction on the exercise of this right by the staff of the army, police, state administration and public services.

The family enjoys special protection of the Republic and marriage and legal relations in marital and extramarital unions and the family are regulated by law. The state protects motherhood, children and youth and creates social, cultural, educational, material and other conditions to promote the realisation of the right to a life

of dignity. The Constitution specifies also the main duties of parents to their children, of children to their old and feeble parents and obliges the state to take special care of underage orphans and neglected children and youth. To protect the rights of children, the Constitution prohibits child labour i.e. specifies that children may not be hired before statutory age or forced to perform jobs adversely affecting their health or morality or allowed to perform such jobs. Minors, mothers and persons with disabilities have the right to special protection at work.

Primary education is compulsory and free of charge. Secondary and higher education shall be accessible under equal conditions to everyone according to their abilities. The Constitution allows natural and legal persons to found private schools and educational institutions in keeping with the law and guarantees the autonomy of university by allowing it to independently decide on how it will be organised and operate in keeping with the law. The Constitution also guarantees the freedom of scientific, cultural and artistic creativity which the Republic shall assist and encourage; the state shall also protect scientific, cultural and artistic goods as spiritual national values. The Constitution guarantees the protection of moral and economic rights relating to scientific, cultural, artistic and intellectual creativity and work and stipulates that the state will also assist physical education.

Everyone has the right to a healthy life and the Republic shall provide conditions for a healthy environment, wherefore everyone is duty-bound to devote special attention to the protection of health, nature and the environment within their powers and activities.

2. Right to an Effective Legal Remedy

In keeping with the UN Charter, the ICCPR, ECHR, the Constitution of Croatia in Article 18 guarantees the right of appeal of individual first-degree administrative and judicial decisions which may be restricted only exceptionally, in cases specified by the law, but only if another form of legal protection is provided. Individual administrative decisions must be based on the law and the Court guarantees also judicial legality of such decisions. Therefore, legal remedy against every individual administrative or judicial decision and court protection against administrative decisions are guaranteed.

2.1. Ordinary Legal Remedies. – In case of a violation of an individual human right, protection may be realised in criminal, civil or administrative proceedings. Procedural legislation (Criminal Procedure Code, Civil Procedure Code, General Administrative Procedure Act) regulate ordinary and extraordinary legal remedies and when they can be resorted to. Resort to ordinary legal remedies in court – criminal and civil – and administrative proceedings prevents the finality of the decision of the adjudicating body. In criminal proceedings, ordinary legal remedies comprise appeals of first-instance and second-instance court verdicts and decisions.

In civil proceedings, ordinary legal remedies comprise appeals of verdicts and decisions and appeals of payment orders. In administrative proceedings, ordinary legal remedies comprise appeals of decisions and conclusions. However, first-instance decisions of ministries and other central state administration bodies may be appealed only in legally prescribed cases, while Croatian Parliament and Government decisions may not be appealed against at all. Where appeals are not allowed, a party may initiate an administrative dispute before the Administrative Court of the Republic of Croatia.

2.2. *Constitutional Complaints.* – The Croatian legal system comprises the instrument of constitutional complaint for the protection of constitutionally guaranteed human rights and fundamental freedoms violated by a final individual court or administrative decision. Under the Constitutional Act on the Constitutional Court of the Republic of Croatia (Art. 62), a constitutional complaint may be filed with the Constitutional Court by anyone who maintains his/her human right or fundamental freedom guaranteed by the Constitution or constitutionally guaranteed right to local and regional self-government had been violated by an individual act of a state, local or regional government body or a legal person with public authority, that had decided on his rights and obligations or criminal suspicions or accusations levelled against him or her. All other available legal remedies must be exhausted before resort to a constitutional complaint. In administrative matters allowing administrative dispute i.e. revision in litigation or extrajudicial proceedings, a legal remedy shall be deemed exhausted following a decision on that legal remedy.

Exceptionally, the Constitutional Court shall launch the proceedings on a constitutional complaint prior to the exhaustion of the legal remedies if the court failed to adjudicate the complainant's rights and obligations or criminal suspicions and accusations levelled against him/her within a reasonable time or if the contested act grossly violates constitutional rights and it is fully clear that the complainant would suffer grave and irreparable consequences if the Constitutional Court does not launch the proceedings. In decisions upholding a constitutional complaint filed over a court's failure to adopt a decision within a reasonable time, the Constitutional Court sets the competent court a deadline within which it is to render its decision and orders payment of adequate redress to the complainant for the violation of his/her constitutional rights.

A constitutional complaint may be filed within thirty days from the day the decision was served. The Constitutional Court shall grant a complainant, who had for justified reasons missed the filing deadline, condonation if the complainant applies for condonation with the constitutional complaint within 15 days from the day the cause for missing the filing deadline has passed but not if more than three months have passed since the expiry of the initial 30-day filing deadline (the so-called objective deadline).

A constitutional complaint as a rule does not prevent the application of the contested act; however, on the complainant's motion, the Constitutional Court may postpone its enforcement pending its decision if execution would cause the complainant damage that would be difficult to reverse and postponement is not in contravention of public interest or would not incur anyone larger-scale damage.

If a constitutional complaint is not dismissed for legal procedural reasons, the Constitutional Court takes a decision to dismiss the complaint as ungrounded or uphold it. If it establishes that the complainant's constitutional rights have been violated not only by the contested act but by another act adopted in the case as well, the Constitutional Court shall fully or partly repeal the latter act as well. The contested act is repealed by the Constitutional Court decision upholding the complaint; the body that adopted the repealed act i.e. its legal successor is obliged to adopt another act in lieu of the repealed act. If the contested act violating the complainant's constitutional right is no longer legally effective, the Constitutional Court shall in its decision establish its unconstitutionality and specify which constitutional right of the complainant had been violated by the act. When repealing the contested act, the Constitutional Court shall in its explanation specify which constitutional right is violated and what the violation comprises. When adopting a new act in place of the repealed one, the competent body is obliged to respect the legal positions of the Constitutional Court expressed in the decision repealing the act. Proceedings initiated by a constitutional complaint shall be suspended if the complainant has died i.e. a legal person has ceased to exist or has withdrawn the complaint.

2.3. Ombudsman (Ombudsman, Ombudsman for Children, Gender Equality Ombudsman). – There are three ombudsman institutions in Croatia: the Ombudsman, the Ombudsman for Children and the Gender Equality Ombudsman.

The Ombudsman investigates individual violations of civil rights by the state administration bodies, bodies with public authority or their staff during the performance of the duties within their purview, as well as other issues relevant to the protection of legal and constitutional rights s/he had learned about through other sources of information (mass media, et al) and regarding the irregularities in the work of administrative bodies or bodies with public authority.

Anyone may file a grievance with the Ombudsman. The Ombudsman will undertake actions to investigate the allegations of a violation of a constitutional or legal right on the basis of a written or oral grievance. After the inquiry, the Ombudsman shall decide whether to review the grievance and to what extent; the decision will take into account the importance i.e. value of the protected good that has been or could have been violated, whether the legal or constitutional rights of a greater number of people were or could have been violated, the manner in and circumstances under which legal or constitutional rights were or could have been violated and other legal ways to protect the jeopardised legal or constitutional rights.

If the Ombudsman decides to review the grievance, s/he will establish whether someone's legal or constitutional right was violated or seriously jeopardised by the work or actions of state administration bodies or bodies with public authority.

If the Ombudsman finds that a specific right has been violated or jeopardised, s/he shall warn the head of the state administrative body or body with public authority thereof and propose or recommend measures that will exclude the possibility of the body violating the constitutional or legal rights of the citizen(s) or reverse the harmful consequences of the violation. If the Ombudsman finds the violation of a right has elements of a crime, misdemeanour or breach of work discipline, s/he may recommend the launching of a criminal, misdemeanour or disciplinary proceedings.

Upon completion of the proceedings, the Ombudsman shall notify the party that filed the grievance of the actions s/he had undertaken. The Ombudsman forwards his or her stands on the violation of legal and constitutional rights and a warning, proposal and recommendation to the state administration bodies and bodies with public authority the stands regard. State administrative bodies and bodies with public authority must notify the Ombudsman of the measures taken with regard to his/her warning, proposal or recommendation forthwith, within a maximum of 30 days.

The Act also entitles the Ombudsman to perform *ad hoc* checks of correctional homes and other institutions restricting freedom of movement and access and inspect all premises in those institutions. If necessary, the Ombudsman shall subsequently draft a report which s/he will forward to the body supervising those institutions.

The Ombudsman is obliged to submit reports on his/her work to the Croatian Parliament at least once a year. The Ombudsman may submit other reports to the Parliament, Government and relevant ministries if s/he has established that the constitutional or legal rights of a larger number of citizens have been violated i.e. significantly jeopardised. The Ombudsman may propose to the Croatian Parliament the adoption of amendments to valid laws or of new laws regarding the protection of legal or constitutional rights of citizens. Under the Constitutional Act on the Constitutional Court of the Republic of Croatia, the Ombudsman may be authorised by the Parliament to submit a motion to the Constitutional Court to review the conformity of a law with the Constitution and the conformity of other regulations with the Constitution and the law.

Three persons have to date held the post of Ombudsman; none of them were appointed in a transparent procedure. None of the three national ombudsmen fulfilled the constitutional or legal appointment requirements for the post at the time of appointment (not one of them was renown for promoting and protecting human rights).

Hitherto experience has shows Croatian law does allow for the Ombudsman to act as a 'defender of human rights'. The political structures have, however, failed to reach consensus on the Ombudsman's role of independent protector of human rights in the thirteen years this institution has existed. The CHC modestly cooperated with the Ombudsman for the first time in 2005. In 2005 it received several complaints of citizens about the work of the Ombudsman i.e. his deputies for the first time since 1996.

An Ombudsman for Children is a specialised ombudsman institution monitoring whether the Croatian laws and other regulations regarding the protection of rights and interests of children are in conformity with the provisions of the Croatian Constitution, the Convention on the Rights of the Child and other international documents pertaining to the protection of rights and interests of children; fulfilment of Croatia's commitments arising from the Convention on the Rights of the Child and international documents; application of all regulations pertaining to the protection of rights and interest of the child. It monitors violations of individual child rights and investigates the general occurrences and manners of violation of the right and interests of children; advocates the protection and promotion of the rights and interests of children with special needs; proposes measures to build a coherent system for protecting and promoting rights of children and preventing harmful actions jeopardising their interests; informs the public of the state of children's rights, informs and advises children of ways in which they can realise and protect their rights and interests; cooperates with children, encourages them to present their views and respects their opinions; initiates and participates in public activities geared to improve the status of children and proposes measures to enhance their influence in society; participates in procedures preceding the adoption of regulations regarding the rights of the child and regulating issues of relevance to children and encourages adoption and amendments of laws and other regulations regarding the rights and protection of children.

The Ombudsman for Children is authorised to issue warnings, proposals and recommendations. State administration bodies, local and regional self-government bodies and legal persons are obliged to cooperate with the Ombudsman for Children and submit reports at his/her request and respond to his/her queries immediately, within 15 days at the latest, notify the Ombudsman for Children of measures taken with regard to the latter's warning, proposal or recommendation. If bodies and legal persons fail to act within the prescribed deadline as instructed, the Ombudsman for Children shall inform the body supervising their work thereof. If the supervising body fails to report to the Ombudsman on the established facts and undertaken measures, the Ombudsman for Children shall notify the Government of Croatia thereof.

The Ombudsman for Children has access to and insight in all data, information and acts regarding the rights and protection of children, notwithstanding the

degree of confidentiality, and shall have the right of access and examination of all institutions, state administration bodies, legal and natural persons charged with caring for children under separate regulations and religious communities in which children spend time or are temporarily or permanently residing. If an Ombudsman for Children learns that a child has been subjected to physical or mental violence, sexual abuse, harassment or exploitation, negligence or careless treatment, s/he is obliged to immediately file a report to the competent state prosecutor, alert the competent social welfare centre and propose measures for the protection of the child's rights and interests.

Everyone has the right to propose to the Ombudsman for Children to review an issue of relevance to the protection of rights and interests of children and the Ombudsman shall inform that party of activities undertaken with respect to his/her proposal. The Ombudsman for Children shall submit a report on his/her work to the Croatian Parliament once a year; in the event the rights or interests of children are jeopardised to a greater degree, s/he may submit separate reports thereof to the Croatian Parliament.

The Ombudsman for Children submitted the first annual report for the period 25 September 2003 – 31 December 2003 to the Croatian Parliament in March 2004. The report was adopted. In October 2005, the Ombudsman for Children and her two deputies resigned. The Croatian Government nominated a new Children's Ombudsman candidate after a non-transparent nomination procedure, but she withdrew her candidacy during the procedure because of the debate that ensued over her disputed retirement at the early age of 37. On 2 December 2005, the Croatian Government issued a public invitation for the post and nominated a candidate only on 24 January 2006.

The General Equality Act, adopted in 2003, introduced the Gender Equality Ombudsman as a specialised institution that will operate independently and autonomously, monitor the implementation of the Act and other regulations regarding gender equality and report to the Croatian Parliament at least once a year. This Ombudsman reviews violations of gender equality, discrimination against individuals or groups of individuals by state administration, local and regional self-government bodies and other bodies with public authority, their staff and other legal and natural persons.

Everyone is entitled to address the Gender Equality Ombudsman with respect to violations of the Act committed against anyone, unless the injured party expressly objects. The Ombudsman is authorised to issue warnings, proposals and recommendations and require reports from administrative bodies and bodies with public authority. If a body fails to comply, the Ombudsman may require its inspection by the body charged with its supervision. If the Ombudsman in the course of his/her work finds a violation of the Gender Equality Act comprises elements of a crime, s/he shall file a report with the competent state prosecutor. The Ombudsman is

authorised to file a motion for the assessment of the constitutionality of a law, i.e. constitutionality and legality of other regulations if s/he assesses that the principle of gender equality has been violated. State bodies and legal persons with public authority, companies with majority state, local or regional self-government stake and legal and natural persons are obliged to provide the Ombudsman with all necessary information and access to documentation notwithstanding the degree of confidentiality within 15 days from the day of receipt of the request. As the Croatian Helsinki Committee did not receive any complaints about a violation of the right to gender equality in 2005, it has not cooperated at all with this Ombudsman institution.

III INDIVIDUAL RIGHTS

1. Prohibition of Discrimination

1.1. Legislation. – The Croatian Constitution does not comprise provisions explicitly prohibiting discrimination (the provision in Article 39 that prohibits and defines as punishable any call or incitement to war, or resort to violence, national, racial or religious hatred or any form of intolerance cannot be considered an anti-discriminatory provision). Chapter III – Protection of Human Rights and Fundamental Freedoms – however, contains provisions on the equality of all before the law and bodies of authority and equal enjoyment of all rights and freedoms guaranteed by the Constitution and other regulations. Article 14 of the Constitution specifies that everyone in the Republic of Croatia shall have rights and freedoms regardless of their race, colour, gender, language, religion, political or other conviction, national or social origin, property, birth, education, social status or other characteristics and that all are equal before the law. In Article 15, the Constitution establishes the equality of members of all minorities, who are guaranteed freedom to express their nationality, use their language and script and to cultural autonomy. Article 26 of the Constitution specifies that all citizens of the Republic of Croatia and aliens are equal before the courts, state bodies and other bodies with public authority. The Constitutional Act on the Rights of National Minorities in Article 2 sets out that apart from the human rights and freedoms enshrined in the Constitution, the Republic of Croatia acknowledges and protects all other rights envisaged by international documents, pursuant to the exceptions and restrictions foreseen by these documents, without discrimination on grounds of gender, race, colour, language, religion, political or other conviction, national and social origin, belonging to a national minority, ownership, status inherited by birth or on other grounds in accordance with Articles 14 and 17 (3) of the Croatian Constitution. Article 4 (4) of the Act prohibits any discrimination on grounds of belonging to a national minority. Persons belonging to a national minority are guaranteed equality before the law and equal legal protection.

One would expect systematic elaboration of the constitutional principles in laws regulating specific human rights and actions of state and other entities in view of the importance of the equality of all before the law i.e. before the state bodies and bodies vested with public authority and the importance of the equality of all in the enjoyment and protection of all guaranteed rights and freedoms and consequently the general prohibition of any form of discrimination. That is, however, not the case with Croatia's legislation. Regulations prohibiting discrimination, even the laws regulating activities in which discriminatory conduct has fatal consequences, in principle do not envisage sanctions. For example, there are no provisions prohibiting discrimination in laws regulating health care (apart from the general provision prescribing the accessibility of the protection of patients' rights in the Act on Patients' Protection which implies the equal protection of the rights of all patients in the Republic of Croatia), welfare, upbringing and education, et al.

General regulations prohibit specific forms of discrimination – on grounds of nationality, gender or sex. The Constitutional Act on Rights of National Minorities in Article 4 (4) prohibits any discrimination on grounds of belonging to a national minority. Members of national minorities are guaranteed equality before the law and equal legal protection.

Gender discrimination is prohibited by the Act on Gender Equality which established the general grounds for the protection and promotion of gender equality as one of the fundamental values of Croatia's constitutional order and defines and regulates the manner of protection from discrimination on grounds of gender and the creation of equal opportunities for men and women. Article 2 specifies that no one may suffer adverse consequences for making a statement before a competent body in the capacity of witness or victim of gender-based discrimination or alerting the public to discrimination. The Act establishes the obligation of state bodies, legal persons with public authority and legal persons with majority state, local or regional government capital to assess and evaluate the effects of their decisions or actions on the status of women i.e. men with a view to achieving genuine equality of men and women in all stages of planning, adopting and implementing their decisions or actions. The Act is to be commended for comprising full legal definitions of the concepts of equality, discrimination on grounds of gender and direct and indirect discrimination.

Article 13 of the Gender Equality Act also prohibits gender discrimination in the areas of employment and labour, both in the private and public sectors, including state bodies, with respect to:

1. conditions for employment, self-employment and performance of professional activities, including recruitment terms and criteria in any branch of activity at all levels of professional hierarchy;
2. promotion;

3. access to all types and degrees of schooling, career counselling, vocational training, requalification and additional training;
4. employment and labour conditions, all labour and employment related rights, including equal remuneration; and,
5. membership and participation in workers' or employers' associations or any other professional organisation, including privileges arising from such membership.

The Act also prescribes that job vacancy announcements must clearly highlight that persons of either sex may apply for the job.

The Act on Same-Sex Unions in Article 21 prohibits discrimination on grounds of sexual orientation. It prohibits all discrimination, both direct and indirect, on grounds of same-sex unions and against homosexuals. Incitement of another person to discriminate against homosexuals and same-sex unions is deemed discrimination.

Prohibition of discrimination against persons with disabilities can be found only in the Labour Act. The Croatian Parliament passed only a Declaration on the Rights of Persons with Disabilities in which it proclaimed that a person with disabilities had all the rights and freedoms arising from the Constitution, the law and the Declaration notwithstanding his or her race, colour, gender, language, religion, political or other conviction, national or social origin, property, birth, education, social status or other features, without any discrimination. The Declaration also specifies that discrimination against persons with disabilities comprises any separation, exclusion or restriction of a person because of his/her disability, the effects of a prior disability or the perception of a prior or current disability, which jeopardises or violates the recognition, enjoyment or exercise of human rights and fundamental freedoms of persons with disabilities.

Prohibition of discrimination has been implemented the most consistently in the field of labour and employment. Discrimination at work comprises any differentiation on grounds of race, colour, gender, language, religion, political or other convictions, national or social origin, property, birth, education, social status or other features, or of belonging to an ethnic or national community or minority whereby a person is deprived of or does not enjoy equal opportunity and equal treatment in terms of choice of occupation or employment. Article 2 of the Labour Act bans direct or indirect discrimination against a job applicant or an employee (worker, clerk, civil servant or another worker) on grounds of race, colour, gender, sexual affiliation, marital status, family obligations, age, political or other convictions, national or social origin, financial status, birth, social status, membership or non-membership in a political party, trade union or physical or mental difficulties. Discrimination is prohibited with regard to:

1. employment conditions, including recruitment terms and criteria in any branch of activity at all levels of professional hierarchy;
2. promotion;

3. access to all types and degrees of vocational training, requalification and additional qualification;
4. employment and work conditions, all labour and employment related rights, including equal remuneration;
5. termination of job contracts;
6. rights of members and participation in workers' or employers' associations or any other professional organisations, including privileges arising from such membership.

Discriminatory provisions in collective agreements, labour statutes and job contracts on any of the above grounds shall be deemed null and void.

Article 5 of the Labour Act provides that the applicant for a job may in case of discrimination demand compensation of damages in accordance with the general provisions of the Act of Obligations, while employees may invoke provisions in Article 109 of the Labour Act. Article 6 of the Labour Act regulates the burden of proof in disputes: if a job applicant or employee presents facts justifying suspicion that an employer acted in contravention of provisions prohibiting discrimination, the burden of proof that there was no discrimination i.e. that s/he acted in keeping with provisions in Article 3 of the Labour Act shall rest on the employer.

The Act on Civil Servants and Employees in Article 5 prohibits favouring or depriving a civil servant or civil service employee of his rights, especially on grounds of political, national, racial or religious affiliation, gender on any other grounds in contravention of the Constitution or other lawful rights and freedoms. The Act however does not envisage a penalty for a perpetrator who discriminated against a civil servant and the injured party may seek protection by invoking the relevant provisions of the Labour Act and Criminal Code. Moreover, provisions on grave violations of work obligations do not expressly envisage discrimination against citizens as a grave violation of the work obligation.

Collective agreements also prohibit discrimination as do codes of conduct for specific professions, e.g. the Code of Conduct for psychologists and the Medical Ethics and Deontology Code.

Laws regulating education, notably the Primary Education Act, Secondary Education Act, the Scientific Activity and Higher Education Act and the Act on Higher Education Institutions do not contain provisions prohibiting discrimination in education. However, as the Republic of Croatia is a signatory of the UNESCO Convention against Discrimination in Education, this international document should apply to education. Nonetheless, the Act on Primary and Secondary School Textbooks in Article 3 prescribes that a textbook must fulfil scientific, pedagogical, psychological, didactic-methodical, ethical, linguistic, artistic-graphic and technical requirements set forth in the textbook standards adopted on grounds of this Act and that a textbook the content of which is in contravention of the Constitution, inap-

appropriate, notably in terms of human and minority rights, fundamental freedoms and gender equality and education for a democratic society, shall not be approved.

Media-related laws contain provisions prohibiting discrimination and incitement of discrimination in articles pertaining to programme content. The Act on Media prohibits dissemination of programme content that incites or extols national, racial, religious, gender or other inequality or inequality on grounds of sexual orientation or ideological and state entities created on such grounds, incites national, racial, religious, sexual or other hostility or intolerance, hostility or intolerance on grounds of sexual orientation or incites violence and war. The Croatian Radio Television Act prohibits incitement or promotion of incitement to and spreading of national, racial or religious hatred, anti-Semitism and xenophobia and incitement to discrimination against or hostility to individuals or groups because of their origin, colour, political conviction, views, state of health, gender, sexual or other orientation or other characteristics. A nearly identical provision can be found in Article 15 of the Act on Electronic Media, which prohibits incitement, promotion of incitement and spreading of national, racial or religious hatred and intolerance, anti-Semitism or xenophobia, ideas of Fascist, Nazi or other totalitarian regimes, incitement to discrimination against or hostility to individuals or groups on grounds of their origin, colour, political convictions, views, health, gender, sexual or other orientation, or features by programme content. Penal provisions of neither law define conduct in contravention of provisions prohibiting discrimination as an offence.

Other laws also contain provisions prohibiting discrimination. The Access to Information Act in Article 6 specifies that all beneficiaries of the right to information have the right of access to information in an equal manner and under equal conditions and are equal in terms of the exercise of this right. The bodies of public authority may not place any one beneficiary in a more favourable position by providing that beneficiary with information before others. In Article 39, the Act on Civilian Service prescribes that a conscientious objector serving substitute service may complain to his supervising officer if he maintains he is treated in a discriminatory or humiliating manner while serving substitute service. The Act on the Execution of Prison Sentences prohibits discrimination in Article 10 by specifying that prisoners serving their sentences may not be treated unequally on grounds of their race, colour, language, religion, political or other convictions, national or social origin, property, birth, education, social status or other characteristics.

Discrimination on grounds of race, colour, gender, language, religion, political or other convictions, national or social origin, property, birth, education, social status or other features or of belonging to an ethnic or national community or minority is a crime under Article 106 (1) of the Criminal Code. Discrimination comprises depriving or restricting the freedoms or rights of man and citizen set forth in the Constitution, law or other regulations i.e. favouring or privileging someone on grounds of the listed distinctions. The Code criminalises also deprivation i.e.

restriction of the freedom of expression of national affiliation or cultural autonomy (para. 2), as well as deprivation or restriction of the right to use one's own language or script (para. 3). These crimes can be committed by action or omission to act. The crimes in paras. 1 and 2 can be committed only with *dolus* – the perpetrator must be aware that his conduct had deprived a citizen of a right or restricted it or had favoured and privileged citizens, the perpetrator had wanted to or had agreed to do that. The crimes in paras. 1 or 3 can be committed by any person in a (responsible or official) position to deprive a citizen of a right to use his own language or script or restrict it. Crimes in paras. 1 and 2 carry between 6 months and 5 years in jail while the crime in para. 3 carries a fine or a prison sentence up to one year.

The crime of racial or other discrimination in Article 174 of the Criminal Code is perpetrated by a person who had on grounds of racial, religion, language, political or other convictions, property, birth, education, social status or other features, sex, colour, nationality or ethnic origin violated fundamental human rights and freedoms recognised by the international community. The Code also incriminates the persecution of organisations or individuals advocating equality of people. The crime in Article 174 (3) is committed by a person who publicly expresses or spreads ideas about the superiority or inferiority of a race, ethnic or religious community, gender, nation or ideas about superiority or inferiority on grounds of colour or sexual orientation or other features with the aim of spreading racial, religious, sexual, national and ethnic hatred or hatred on grounds of colour, sexual orientation or other characteristics or with the aim of denigration. Paragraph 4 prohibits and penalises dissemination of and making publicly accessible material denying, considerably diminishing, approving of or justifying the crime of genocide or crime against humanity by electronic or other means with the goal of spreading hatred. The perpetrator of a crime in paras. 1 or 2 shall be convicted to a prison sentence ranging from 6 months to five years; crimes in para. 3 carry between three months and three years of imprisonment, while crimes in para. 4 carry a fine or imprisonment ranging between 3 months and 3 years.

The presented legal provisions clearly show that, with the exception of labour legislation, the Croatian legislator failed to consistently ensure the protection of individuals and specific groups from possible discrimination. Especially concerning is the lack of anti-discriminatory regulations regarding health and education, areas in which discrimination can fatally affect social cohesion. Also, the general provisions prohibiting discrimination i.e. stipulating equal treatment cannot be deemed as appropriate as the legislation, with the exception of the Penal Code, lacks penalties for perpetrators. Although the Penal Code envisages penalties for perpetrators of discrimination, these provisions are insufficient to counter the everyday discrimination of individuals or group of individuals on various grounds. Introducing penal sanctions in norms on prohibition of discrimination and transferring the burden of proof from the victim to the alleged perpetrator would ensure more

efficient protection from discrimination that anyone may be subjected to at any time – on grounds of gender, sexual orientation, age, health, ethnic affiliation, social status or another irrelevant criterion.

1.2. Practice. – Although prohibition of discrimination is stipulated by the Croatian Constitution and laws and the human rights NGOs and the Ombudsman received a relatively small number of individual complaints, discrimination on grounds of gender or ethnic affiliation and age is quite frequent in Croatia. Such discrimination appears the most during job recruitment both in the private and state sectors, notably against members of ethnic minorities (Roma and Serbian), women and applicants over 40 of age.

Although there were relatively few complaints about direct gender-based discrimination, it has been noted that employers during job interviews ask female applicants discriminatory questions regarding pregnancy and their family and marital status, warning them they prefer not hiring women because they fear they will frequently take sick leave, thus incurring the employer high costs. It has also been noted that employers in practice do not implement preventive measures to protect the dignity of the female and male employees prescribed by the Labour Act. Many companies and even central and local government bodies lack any or decent staff personal hygiene facilities; their statutes do not regulate conduct and measures to protect the dignity of workers; many have failed to appoint confidential counsellors to implement the procedure; harassment and sexual harassment is not seen or interpreted as discrimination. Allegations of discrimination by the employers responsible persons are as a rule denied and protection measures are not undertaken. Pregnant women and mothers were the most frequent victims of discrimination in the area of employment and recruitment in 2005 – the employers tended to conclude fixed-term work contracts which they would extend until the female employer got pregnant; the pregnant employee's contract would not be extended and she would be jobless. Although the termination of such work contracts is formally legal, this widespread discriminatory practice must be addressed by the legislator, because the employers are abusing the institute of such contracts by applying a neutral legal norm (which is not discriminatory in itself) and thus discriminating against a woman because she is pregnant. It was also noted in 2005 that such contracts were also concluded for the performance of jobs, the nature of which warrants the conclusion of unlimited contracts; this constitutes a violation of the provision that a fixed-term contract is concluded only for jobs the termination of which is set beforehand by objective reasons, justified by a deadline, the completion of a specific job or the occurrence of a specific event. Thus, for instance, such fixed-term contracts are illegally extended even as many as seven times. It is also not unusual to give women back from maternity leave totally inadequate and, as a rule, lower paid jobs and put them in inadequate working conditions.

Gender-based discrimination in the field of employment and job recruitment was relatively frequent in both the private and state sectors and evident in the job advertisements and announcements (with respect to recruitment criteria) in all branches and at all professional hierarchy levels.

Discrimination on grounds of age was also frequent during job recruitment. As over the previous years, middle-aged women (over 40) were the most frequent victims of such discrimination.

2. Right to Liberty and Security of Person and Treatment of Persons Deprived of Liberty

2.1. Legislation. – Article 22 of the Constitution of the Republic of Croatia specifies that man's liberty and personality is inviolable and that no one may deprive a person of liberty or restrict it except by court decisions in cases specified by the law. Under the Constitution, no one may be arrested or detained without a written lawful court order. The order must be read out and served on the person at the time of apprehension. The police may arrest a person reasonably suspected of having committed a grave crime as defined by the law without a court warrant but must in such cases immediately bring that person before the court. The arrested person must be immediately notified of the reasons for the arrest and his/her legal rights in understandable terms. Every arrested or detained person has the right to appeal to court, which shall forthwith decide on the lawfulness of the deprivation of liberty (Art. 24). Under Article 25 of the Constitution, every detainee or arrestee must be treated humanely and with dignity. Anyone who is detained and charged with a crime is entitled to be brought before a court within the shortest possible time and to be acquitted or convicted within the statutory deadline. A detainee may be released on bail pending trial with legal guarantee. Everyone unlawfully deprived of liberty or convicted is entitled to compensation of damages and public apology in keeping with the law. These constitutional guarantees are elaborated in laws regulating police conduct and the Criminal Procedure Code.

The rights of prisoners serving sentences are regulated by the Act on the Execution of Prison Sentences. Prison sentences are served by adults found guilty and sentenced to prison in a criminal or misdemeanour trial and adults whose pecuniary penalties were replaced by imprisonment in criminal or misdemeanour proceedings. The Act sets forth the fundamental principles of the execution of prison sentences: 1) prohibition of all unlawful conduct, 2) prohibition of discrimination, 3) classification of inmates serving prison sentences in accordance with criminological and other features and special needs of prison sentence execution programmes, 4) regulation of prison sentence execution and design of individual prison sentence execution programmes and 5) preparations for release and post-release assistance. Every inmate is entitled to: accommodation respecting human dignity and health

standards; protection of personality and confidentiality of personal data; regular meals and water in accordance with medical standards; work; training; expert legal assistance and legal remedies to protect his/her rights; medical care and maternity protection; contacts with the outside world; minimum two hours a day outdoors within the prison or jail compound; correspondence and conversation with his/her counsel; exercise his/her religion and conversation with authorised religious representatives; get married in prison or jail; vote at general elections; and some other rights. The prisons are supervised by the ministry charged with justice while health care supervision is conducted by the ministry charged with health. Prison sentences are served in jails and prisons. Convicted adult men and women and young adult males and females serve their sentences in prisons. Separate prisons are established for recurrent offenders. Ill prisoners are as a rule treated in prison hospitals. In terms of degree of security and restriction of the freedom of movement of the inmates, prisons can be high-security, semi-security and open. Inmates convicted to up to one year imprisonment for a crime or misdemeanour serve their sentences in jail. Both prisons and jails may have high-security, semi-security and open wards. Bodies charged with the execution of prison sentences comprise the Penitentiary System Directorate and the executing judge. The executing judge protects the rights of convicts, supervises the legality of the prison sentence execution procedure and ensures the equality of convicts before the law. The executing judge refers the convict to serve the prison sentence and at least once a year reviews the course of prison sentence execution of inmates convicted to more than five years of imprisonment.

2.2. Practice. – The rights of persons serving prison sentences were seriously endangered in 2005, primarily because the jails and prisons are overcrowded. Data showing that the problem of overcrowded jails and prisons is not improving but deteriorating give rise to serious concern. It is thus not surprising the Croatian Helsinki Committee received numerous complaints from prisoners, mostly from the Lepoglava and Glina prisons and the Zagreb District Jail.

Croatia has six prisons (in Glina, Lepoglava, Lipovica-Popovača, Požega, Turopolje, Valtura), a prison hospital in Zagreb, 14 jails (in Bjelovar, Gospić, Osijek, Pula, Sisak, Šibenik, Zadar, Dubrovnik, Karlovac, Požega, Rijeka, Split, Varaždin and Zagreb) and two juvenile correction homes (in Turopolje and Požega).

According to Justice Ministry data, a total of 3721 persons were serving sentence in these institutions on 30 November 2005, a rise of 39% over 2004; 2276 (61%) of them were finally convicted, 1181 (32%) were detainees, 164 (4%) were serving misdemeanour or suppletory sentences. The jails and prisons can accommodate 2994 persons, wherefore they were overcrowded by 22%. The situation was the direst in maximum security prisons, where overcrowdedness stood at 28%.

The Government of Croatia submitted to the Parliament a separate report highlighting the problem of overcrowdedness of all correctional facilities, especially

maximum security institutions and noting its effects on legally envisaged standards of accommodation and life of prisoners; the report also highlights the problems of lack of qualified staff in these institutions, lack of adequate space and equipment for authorised officers, etc.

Lack of appropriate accommodation for the so-called “risk groups of prisoners” (prisoners with a diagnosed post-traumatic stress disorder, rehabilitated drug addicts and former members of an aggressor army convicted of war crimes during Croatia’s war for independence) is a problem in itself.

One such “risk” group of prisoners asked the Croatian Helsinki Committee for help: all 28 prisoners convicted of war crimes and serving time in the Lepoglava Prison filed had requests for transfer to their country of origin, Serbia and Montenegro, but their requests were addressed with dilatoriness and they faced various restrictions imposed by the prison management in Lepoglava e.g. they were not allowed to work in the Prison workshops or leave the facility for the weekends. ‘Security reasons’ were always quoted to justify the restrictions. The authorities began reviewing the transfer requests after an intervention by the Croatian Helsinki Committee. However, the issue of inadequate accommodation of other prisoners in the Lepoglava Prison remains unresolved.

The trend to cover-up violations of rights of prisoners and detainees is concerning. The Justice Ministry Penitentiary System Directorate has regularly denied allegations of violations of rights of prisoners who had complained to the CHC, even the notorious violations of the rights of detainees and prisoners arising from the overcrowdedness of the jails and prisons, a problem the Directorate itself had warned (sic!) the topmost authorities of.

Serious concern also arises over the Ombudsman’s inadequate and occasionally unprofessional reaction to violations of minimal rights of detainees and prisoners guaranteed by the Croatian Constitution, the UN Standard Minimum Rules for the Treatment of Prisoners and the Act on Execution of Prison Sentences. Namely, although the Ombudsman Act entitles the Ombudsman to inspect correctional and other institutions restricting freedom of movement, to access and inspect all facilities in these institutions and obliges the Ombudsman to draft a report after the inspection if necessary and submit it to the body supervising these institutions, no such report has to date been composed or forwarded to the supervising body. The Ombudsman annual reports have as a rule expressed a moderate view of the situation in the jails and prisons, merely noting that they were overcrowded.

An example testifying of the lack of will to seriously alert to the unacceptable circumstances in Croatian jails and prisons is a complaint CHC received from a prisoner serving his sentence in Šibenik. He claimed that the Deputy Ombudsman had refused to hear him out during his tour of the prison. In his written complaint to the Croatian Helsinki Committee, the prisoner explicated why he believed the minimal rights of the convicts were being violated in the Šibenik prison. Instead of

taking measures and seriously investigating the situation in the prison after receiving the complaint forwarded by the CHC, the Ombudsman accepted and defended the unprofessional views of his deputy.

3. Right to a Fair Trial and the State of the Judiciary

3.1. Legislation. – Although the right to a fair trial, guaranteed by the Constitution (Arts. 26–31, 117–124), international conventions binding on Croatia and organisational and procedural laws in Croatia, is regulated well, problems arise in practice, especially in terms of realising the right to a trial within a reasonable time in civil (litigation and extrajudicial) proceedings and administrative court proceedings.

- The Croatian Constitution guarantees: equality of all, citizens and aliens, before courts and other state and other bodies with public authority (Art. 26), independence and autonomy of the Bar (Art. 27), presumption of innocence of the accused (Art. 28), right of everyone to a fair trial within a reasonable time by a lawful independent and impartial court which shall decide upon his/her rights and obligations or criminal suspicions or accusations levelled against him/her (Art. 29 (1)), the rights of the suspect, accused or defendant to:
 - be informed as soon as possible in detail and in a language s/he understands of the nature and reasons for the charges against him/her and evidence incriminating him/her;
 - adequate time and opportunity to prepare his/her defence;
 - an attorney and free communication with an attorney and to be informed of the right;
 - defend himself/herself in person or with the assistance of an attorney of his/her own choice and, if s/he cannot afford an attorney, the right to free legal aid under conditions prescribed by the law;
 - to be tried in his/her own presence if s/he is accessible to the court;
 - to interrogate or have interrogated the witnesses for the prosecution and demand ensurance of the presence and interrogation of the witnesses for the defence under identical conditions as that of the witnesses for the prosecution;
 - to free interpretation if s/he does not understand or speak the language used in court (Art. 29 (2)).

In Article 29 (paras. 3–5), the Constitution specifies that a suspect, accused or defendant may not be forced to confess to a crime, that evidence collected in an

unlawful manner is inadmissible in court and that criminal proceedings may be launched before a court only on the motion of an authorised prosecutor.

No one shall be punished for an act which had not been defined as a punishable offence under national or international law prior to its commission, nor sentenced to a penalty that had not been envisaged by the law. If a law passed after the commission of the offence envisages a milder penalty, such penalty shall be imposed (Art. 31 (1)).

The rights of suspects, the accused and defendants are adequately elaborated in the Criminal Procedure Code (CPC). Juvenile justice proceedings are regulated by a separate law (Act on Juvenile Courts) and the CPC is applied merely as subsidiary legislation in such proceedings.

Article 119 of the Constitution guarantees that court hearings and sentencing will be public. The public may be barred from the whole trial or part of it for reasons necessary in a democratic society and in the interest of morals, public order or state security, especially if minors are on trial, or to protect the privacy of the parties, or in marital disputes and proceedings regarding custody and adoption, or to protect military, official or business secrets or the security and defence of the Republic of Croatia, but only to the extent the court deems absolutely necessary in the specific circumstances in which the presence of the public may be detrimental to the interests of justice.

Under Article 31 (2) of the Constitution, no one may be tried anew or punished for an offence s/he has already been lawfully acquitted of or convicted of by a final court decision.

In its provisions on the judiciary and state prosecution (Arts. 117–124), the Constitution defines the judicial authority as autonomous and independent. According to the Constitution, courts adjudicate on the basis of the Constitution and the law, and the State Prosecution is an autonomous and independent judicial body authorised and obliged to act against perpetrators of criminal and other punishable offences, undertake legal actions to protect the property of the Republic of Croatia and file legal remedies for the protection of the Constitution and the law.

In Article 121, the Constitution awards judges and lay judges immunity, wherefore judges and lay judges participating in a trial may not be taken to task for an opinion they expressed or the way they voted during adjudication unless a judge has violated the law, which constitutes a crime. In proceedings initiated over a crime committed during the performance of judicial duty, a judge may not be detained without the consent of the State Judicial Council.

The permanence of judgeship is also guaranteed by the Constitution (Art. 122) with the exception that a judge shall first be appointed to a five-year term in office and permanently only after reappointment. A judge shall be relieved of judgeship: at his/her own request, if s/he permanently loses the ability to perform

his/her duties, if s/he is convicted of a crime rendering him/her unworthy of judgeship, if the State Judicial Council decides to dismiss him/her because of a serious breach of discipline, when s/he turns seventy. A judge may appeal relief from duty with the Constitutional Court of the Republic of Croatia and appeal the State Judicial Council's decision on disciplinary responsibility with the Constitutional Court of Croatia.

Judicial independence is also guaranteed by the constitutional provision under which a judge may not be transferred against his/her will except if his/her court has been abolished or reorganised in keeping with the law, and by the provision prohibiting a judge from performing a service or job legally defined as incompatible with judgeship.

In keeping with the Constitution and the law, the State Judicial Council, the members of which are appointed by the Croatian Parliament, is charged with judicial appointments and relief from duty and review of the disciplinary responsibilities of judges (Art. 123 of the Constitution). The Croatian Parliament appoints the Chief State Prosecutor to a four-year term in office; the candidate is nominated by the Government of Croatia and needs the prior approval of the competent committee of the Croatian Parliament.

Although many of the procedural regulations aim to protect the right to a trial within a reasonable time and prevent the abuse of procedural powers, the right to a fair trial is one of the most often violated rights in the Republic of Croatia. Many citizens have addressed the Croatian Constitutional Court and the ECtHR with respect to the violation of this right in the recent past. Articles 27 and 28 of the new Act on Courts now regulate the protection of the right to a trial within a reasonable time. A party to a proceeding maintaining that the competent court has not adjudicated his/her rights or obligations or criminal suspicions or accusations levelled against him or her within a reasonable time may file a motion with the immediately higher court for the protection of the right to a trial within a reasonable time. If the motion regards proceedings under way in the High Court of Commerce of Croatia, the High Misdemeanour Court or the Administrative Court of Croatia, it will be considered by the Supreme Court of the Republic of Croatia. Such proceedings are urgent. If the competent court establishes the party's motion is grounded, it shall set a deadline within which the court conducting the proceedings must decide on the rights or obligations or criminal suspicions or accusations levelled against the party and order payment of adequate compensation to the party because its right to a trial within a reasonable time was violated. Compensation is paid from the state budget within three months from the day the party filed a payment request. A decision on the motion for the protection of the right to a trial within a reasonable time may be appealed with the Supreme Court of Croatia within 15 days. Appeal of the Supreme Court decision is not allowed, but the party may file a constitutional complaint against it. It should be noted that the Constitutional

Act on the Constitutional Court of the Republic of Croatia has not be amended, wherefore a party that maintains its right to a trial within reasonable time has been violated can still file a constitutional complaint with the Constitutional Court, without filing a motion with the immediately superior court requesting the protection of its right to a trial within a reasonable time and prior exhaustion of ordinary regular legal remedies. The Constitutional Court has, however, informally indicated it would dismiss such constitutional complaints.

3.2. Practice. – Citizens most often complain to NGOs about the work of courts, i.e. the unreasonable length of proceedings, mostly of litigations and extra-judicial proceedings. The complaints the Croatian Helsinki Committee received in 2005 are both in number and degree of violation dominated by allegations of violations of the right to a fair trial that includes the right to a trial within a reasonable time, complaints about the dilatoriness of courts, unprofessionalism and negligence of municipal and commercial court judges, duration of the enforcement procedure which frequently results in the failure to execute the final court judgment requiring the payment of a claim i.e. the failure to enforce a court decision on rehiring unlawfully dismissed staff because the debtor party is totally insolvent or no longer exists. Most complaints regarding court performance are grounded.

According to data on court efficiency collected by the Justice Ministry over a number of years, municipal and commercial courts have the greatest backlogs. It is disquieting that nearly one-third of cases pending in municipal courts are simple cases i.e. cases not requiring complex expertise, questioning of numerous witnesses or other time-consuming actions (payment orders, land registry cases, extrajudicial cases and retrials).

The four largest municipal courts – in Zagreb, Rijeka, Split and Osijek – had the biggest backlogs in 2005 again – over one half of all pending cases. The above-average, nearly fifteen-year-long inefficiency of these four courts is evidenced also by the fact that only somewhat over one-third of all cases filed in Croatian courts are filed in these four courts.

Commercial courts also have large backlogs; four-fifths of all pending cases in Croatian courts were filed with the commercial courts in Zagreb, Osijek, Rijeka and Split. Almost one-third are pending because they have not been executed.

Apart from the large backlogs, the Croatian judiciary also faces the following problem: the second-degree civil law trials uphold only slightly more than 50% of the municipal court decisions.

First instance (municipal and county) courts are more efficient in criminal trials, although the courts in Zagreb, Split, Rijeka and Osijek have recorded above-average inefficiency. Court performance in criminal matter is better than in civil matter because some three quarters of first-instance court verdicts remain in force after the appeal proceedings.

The efficiency of the Croatian Administrative Court has been slowly improving, but the proceedings last more than 6 months in over 90% of the cases (sometimes even up to three years). Data on this court's performance are a good indicator of the low quality performance of second-instance administrative bodies and bodies with public authority – over one-fifth of the appeals against their decisions are upheld, most often due to the non-application or misapplication of the law.

Many citizens filed constitutional complaints with the Croatian Constitutional Court over violations of the right to a trial within a reasonable time. In the first nine months of 2005, the Constitutional Court received over 1000 constitutional complaints of unreasonably long court proceedings and established that the human right to trial within a reasonable time was violated in over 60% of the cases it reviewed, awarding nearly 3,000,000 kuna (more than 400,000 Euros) in compensation to the injured parties.

The ECtHR in 2005 continued finding Croatia in violation of the right to a fair trial within a reasonable time, right of access to a court and right to an effective legal remedy. The ECtHR was obliged to review most of these cases because the Croatian Constitutional Court has only recently begun reviewing violations of the right of access to a court. In early October, the ECtHR passed its fifth judgment in 2005 establishing excessive court delay in a case regarding the Supreme Court's failure to complete a case for nearly four years.

Headway has, however, been observed in 2005 in the trials of perpetrators of war crimes and crimes against humanity.

According to county court data, 16 trials for war crimes, genocide and unlawful killing and wounding of the enemy were conducted in eight county courts: Bjelovar (1), Karlovac (2), Osijek (4), Slavonski Brod (1), Split (1), Vukovar (3) Varaždin (1), Zadar (2) and Zagreb (1). Twelve of the 16 were retrials ordered by the Croatian Supreme Court. A total of 79 people were on trial. Twelve of the trials regarded sixty-two defendants, members of the Serb para-military formations; 7 of them are in detention, 16 are on provisional release and 39 are at large. Four of the trials regarded 17 persons, members of the Croatian military and police units; four are in detention, 9 on provisional release and 4 at large. Four sentences have been passed: two trials ended in the acquittal of five and 2 in convictions of 3 people. The state prosecution abandoned the criminal prosecution of 8 defendants who had died and the prosecution of 2 persons for lack of evidence.

These criminal trials are especially important also in terms of the need to confront the past and to provide moral satisfaction to the victims of crimes and their families (268 victims). These trials were monitored by the representatives of NGOs (the Split Altruist Centre, Osijek-based Centre for Peace, Non-Violence and Human Rights, Zagreb-based Civic Human Rights Board and the Croatian Helsinki Committee). They found that the principle of holding public trial was formally respected

at all the trials, but that those of former members of Serb para-military formations were mostly attended by journalists, monitors and a few family members and friends, but not by the general public and sometimes even the injured parties. Trials of accused members of Croatian military and police units are always attended by members of Croatian war veteran associations, friends and relatives. At some trials, their presence and *sotto voce* or loud comments created a climate of pressure on the judicial panel, monitors and the friends and relatives of the injured parties and witnesses. Although the judicial panels' partiality with regard to the ethnic affiliation of the defendants or victims is still evident on occasion, the objectivity of these trials too has been ensured because the Croatian Supreme Court overturned sentences of first-instance county courts where such bias was apparent. The partiality was evident during the presentation of evidence – the judicial panels would allow the defence attorneys to incriminate the witnesses or the prosecuting witnesses and allow the defence to voice their political views and assessments.

Despite the instructions of the Supreme Court and the Chief State Prosecutor of Croatia to separately try present and *in absentia* defendants, this rule was not observed in three proceedings tried under single indictments in 2005.

Monitors of these trials noted that the witnesses, especially the prosecuting witnesses, in trials of Serbian para-military formation members, often do not see the purpose of the trial and state they will not testify any more because the trials are long or are retrials of cases in which most defendants are at large (trials *in absentia*). The monitors also noted that the witnesses, especially the prosecuting witnesses, have been under pressure of the public, the defendants or their supporters in some trials for crimes committed by members of Croatian military and police units.

Despite the noted deficiencies of the monitored trials, Croatian courts have made headway in processing war crimes and harmonising their work with the ICTY Statute, consolidating legal and institutional prerequisites for witness protection and support and in establishing cooperation between the Croatian State Prosecution, the war crimes prosecutors of Serbia and Montenegro and Bosnia on war crime cases.

4. Minority Rights

4.1. Legislation. – The legal status and protection of national and ethnic minorities are regulated by the Constitution, the Constitutional Act on the Rights of National Minorities, international conventions, bilateral agreements, the Act on the Use of Languages and Scripts of National Minorities in the Republic of Croatia and the Act on Education in the Languages and Scripts of National Minorities.

Under the Constitutional Act, a national minority is a group of Croatian citizens whose members are traditionally settled in the territory of Croatia and its

members have ethnic, linguistic, cultural and/or religious characteristics differing from those of other citizens and are guided by the desire to preserve these characteristics. The Constitutional Court guarantees minorities all rights set out in international instruments and some other rights and freedoms, wherefore Croatia ensures national minorities a broader scope of rights and freedoms than most other European countries. National minority members are guaranteed 1) private, public and official use of their languages and scripts; 2) education in their languages and scripts; 3) use of their insignia and symbols; 4) cultural autonomy through the preservation, development and expression of their own culture, preservation and protection of their cultural goods and tradition; 5) right to practice their religion and found religious communities together with other believers of that faith; 6) access to media and performance of public information activities (reception and dissemination of information) in the languages and scripts they use; 7) self-organisation and association with the purpose of realising common interests; 8) representation in representative bodies at the state and local levels, administrative and judicial bodies; 9) participation in public life and management of local affairs via national minority councils and representatives; 10) protection from any activity that jeopardises or may jeopardise their survival, realisation of rights or freedoms.

The Constitutional Act specifies that equal official use of national minority languages and scripts is realised in the local self-government units in which national minority members account for at least one-third of the population; in instances envisaged by international agreements and statutes of local or regional self-government units in keeping with a separate law. A separate law regulates the other conditions and manner of official use of minority languages and scripts in representative and executive bodies; procedures before local and regional self-government administrative bodies; proceedings before first-instance courts; proceedings conducted by the State Prosecution and notaries public and legal persons with public authority.

The Republic of Croatia guarantees national minority members the right to representation in the Croatian Parliament. Under the Constitutional Act, national minority members elect minimum 5 and maximum 8 of their own representatives in separate election units. Members of national minorities accounting for over 1.5% of Croatia's total population are guaranteed at least one and maximum three seats in the Parliament, while members of national minorities accounting for less than 1.5% of Croatia's overall population are entitled to elect at least 4 representatives in keeping with a separate law.

National minority members are guaranteed right to representation in local and regional self-government representative bodies. If not even one member of a national minority, accounting for over 5% and less than 15% of the local self-government unit's population, had not been elected to the local self-government unit representative body at elections, the number of members of the local self-govern-

ment unit representative body shall be increased by one and the national minority candidate, who had won the most votes but was not elected, shall be deemed elected unless otherwise specified by a separate law. If the proportional representation of members of a national minority accounting for at least 15% of the unit's population is not ensured, the number of members of the unit's representative body shall be increased to the number needed to achieve such representation and those minority candidates, who had won the most votes on their election lists, shall be deemed elected unless otherwise provided by a separate law. If proportional representation of a national minority accounting for over 5% of a regional self-government unit is not ensured in elections for the regional self-government representative bodies, minority candidates, who had not been elected but won the most votes, shall be deemed elected unless otherwise specified by a separate law. Additional elections will be called if the proportional representation of national minorities in the representative body of a local or regional self-government unit is not achieved in the above way. Local and regional self-government units may in their statutes prescribe the representation of national minorities in their representative bodies even if the latter account for a smaller percentage of the population and they may also envisage greater minority representation in the representative bodies.

The Constitutional Act envisages that small national minorities set up national minority councils in local self-government units to promote, preserve and protect the status of national minorities. Members of a national minority may set up a national minority council in local self government units in which that national minority accounts for at least 1.5% of the total unit population, in units with more than 200 members of a national minority and in regional self-government units inhabited by over 500 members of a national minority. Local self-government national minority councils comprise 10 members, city national minority councils comprise 15 and county national minority councils comprise 25 members of a national minority. In units where a national minority council is not appointed and which are inhabited by at least 100 members of a national minority, a minority representative shall be elected to the unit. National minority council members are elected by secret ballot to 4-year terms in office. National minority councils in self-government units are entitled to: 1) propose to self-government units measures to promote the status of the national minority in the state or a part of the state and to propose draft general enactments regulating issues of relevance to the national minority to bodies charged with adopting such enactments; 2) nominate candidates for duties in state administration and self-government unit bodies, 3) be notified of every issue regarding the status of the national minority to be discussed by the working bodies of the representative body of the self-government unit, and 4) render opinions and proposals on programmes for national minorities or relating to minority issues on radio and television stations at the local and regional levels. Two or more national minority councils established in the same local self-government unit, two or more national minority councils established in the same regional self govern-

ment unit or two or more national minority councils established in different regional self-government units may establish coordination of national minority councils to harmonise or promote common interests and harmonise stands on issues within their purview.

A National Minority Council is set up at the state level to ensure participation of national minorities in the public life of the Republic of Croatia and, notably, to review and propose the resolution of issues regarding the realisation and protection of rights and freedoms of national minorities. The most important role of the Council is to allocate state budget funds earmarked for national minorities. National Minority Council members are appointed to four-year terms in office by the Government. Seven members are appointed from the ranks national minority council nominees and 5 from amongst the ranks of eminent cultural, scientific, expert and religious figures nominated by minority associations and organisations, religious communities, legal persons and citizens – members of national minorities. Representatives of national minorities in the Croatian Parliament are also members of the Council.

The Act on Civil Servants and the amendments to the Act on Local and Regional Self-Government oblige state bodies to implement guarantees on national minority representation enshrined in the Constitutional Act. Local and regional self government units are to elaborate employment strategies that will ensure future employment of an adequate number of national minority members on the basis of the present degree of minority staff share. These two laws oblige the members of national minorities to invoke the Constitutional Act when applying for a job in the civil service but do not specify how state bodies ought to enable invocation of these rights.

4.2. Practice. – No serious violations of or threats to collective rights of national minorities were recorded in 2005. However, the minority rights guaranteed by the Constitution and Constitutional Act were not realised or protected consistently both due to insufficient measures by state bodies and the minorities' insufficient exercise of their rights. National minority members have to date exercised nearly exclusively their political rights, neglecting their other rights guaranteed by the Constitutional Act on the Rights of National Minorities and other laws. Violence against individuals, members of national minorities, was on the increase in 2005. Most such crimes were perpetrated against Serbs.

As collectivities, national minorities have exercised their right to representation in local and regional self-government unit representative bodies in a satisfactory manner after the May 2005 elections. Due to imprecisions in the Act on the Election of Members of Representative Bodies of Local and Regional Self-Government Units, however, the manner in which the proportional representation of national minorities in representative bodies is determined and ensured was, however, brought into question during and after the elections.

Article 20 (7) of the Constitutional Act on the Rights of National Minorities prescribes that the determination of the number of members of a national minority is based on the official census results. Prior to each election, the official census results on the number of members of national minorities in a local or regional self-government unit are conformed to any changes registered in the most recent unit election rolls. As local and regional self-government units failed to conform data on the number of national minority members before the elections, they were obliged to conform them within 60 days from the day the representative bodies were constituted in accordance with Article 9 (3) of the Act on Election of Members of Representative Bodies of Local and Regional Self-Government Units. However, the election rolls that should have constituted the basis for the updating were not updated regularly and the changes were not entered (e.g. deletion of voters who had died or moved away), so that the Central State Administration Office took the stand that “the census conducted in 2001 shall be applicable for determining the number of national minority members for the implementation of the Constitutional Act” and explained that “the election rolls were not updated because the records on residence have not been updated and the election rolls include the names of persons who had moved out of the local self-government units or had falsely registered as residents”. This Office charged with administrative and other professional affairs regarding election rolls and respect of legal deadlines and obligations at election time, took the stand that the regulations on conforming the number of national minority members would apply “after the records on residents and election rolls have been updated”. The stand was upheld by the Government which adopted (but did not publish) a conclusion on 22 July, over two months after the local elections, in which it confirmed that the calculation of minority quotas ought to be based on the 2001 census because the most recent election rolls, including election rolls used at the 2005 local elections, were “incomplete”. The Government subsequently explained that the election rolls included names of people no longer living in a specific unit but who had failed to unregister, wherefore the rolls could not serve as the criterion for determining the make-up of the population. The Government, however, said it would compare the turnout of national minorities at local elections in May 2005 with the results of the 2001 census and would take measures to ensure appropriate minority representation in case the data did not correspond. The National Minority Council dismissed the conclusion, qualifying it as in contravention of the Constitutional Act on the Rights of National Minorities requiring the conforming of census results and the May 2005 election rolls. Some MPs from the ranks of national minorities claimed that the election rolls used in the May 2005 elections included a greater number of national minority members than the 2001 census and that the Government conclusion discriminated against national minorities. GONG, the leading NGO on election issues, in October filed a complaint with the Constitutional Court. It should be emphasised that the conforming of data had not been completed by the end of 2005.

Although some headway has been recorded in 2005 in terms of minority representation in state administration, the judiciary, executive bodies and local self-government bodies, representation of national minority members in government bodies cannot be qualified as satisfactory yet. It is concerning that the Central State Administration Office claims that the Constitutional Act cannot be implemented in the case of state administration due to lack of statistical data on the level of minority representation and that its implementation will be possible once the register of civil servants, which includes data on the nationality of the civil servants, is completed. The following fact should, however, be underlined: despite the existence of statistical data on the composition of courts and state prosecution offices, the Constitutional Act provision on representation of national minorities in the judiciary has not been implemented yet.

The implementation of legal regulations regarding education of minorities cannot be qualified as satisfactory as no measures have been undertaken to prevent education in national minority languages from becoming a factor of segregation. Nor have adequate measures been taken to ensure continuous professional training of the teachers and provide textbooks in national minority languages. Physical separation of Croatian and Serb pupils into separate kindergartens and schools in some schools in Eastern Slavonia, conducted in accordance with the law and the wishes of both the Serb and Croatian parents, is especially concerning.

Roma children have continued attending ethnically pure Roma classes in some primary schools in the Medjumurje County in 2005 and the Constitutional Court of the Republic of Croatia has not yet ruled on the constitutional complaint filed by the Roma parents over racial discrimination back on 19 December 2002. However, pressures by international organisations, some human rights NGOs and the public resulted in the opening of the first kindergarten in a Roma settlement and the minimum pre-school six-month programme (so-called small school) is regularly conducted in most Roma settlements in the Medjumurje County within the implementation of the National Programme for the Roma.

Use of national minority languages in communication with state administration and local self-government bodies has not been consistently ensured, with the exception of the Istria County where members of the Italian national minority can fully realise their rights to communicate in Italian and to bilingual official documents (e.g. ID cards).

As many as 50 attacks on Serb citizens and their property were recorded in 2005, notably, two deaths and two murders; four involved explosions, three resulted in severe injuries and five were grave thefts; six involved destruction of property, one use of firearms; one involved the blowing up of a car, three assault and battery, while the victims of four sustained light injuries; one incident was qualified as robbery, and a number of incidents involved the disruption of law and order. The police uncovered the perpetrators of only one-third of these crimes and filed

criminal or misdemeanour reports against 44 persons. The fact that the light has not been shed on the gravest incidents (murder of Dušan Vidić at Karin, two deaths at Pakrač, a number of explosions in Eastern Slavonia and infliction of grave injuries in the Dalmatian Zagora area) gives rise to concern.

Apart from attacks on individual members of the Serb national minority, 2005 also saw attacks on Serbian Orthodox Church facilities (a house of an Orthodox priest in Gračac was broken into, the courtyard of the Šibenik Orthodox Diocese was damaged, the Drniš Orthodox church was stoned); 30 monks of the Krka Monastery were provoked and the premises of Prosvjeta in Split were broken into.

5. Economic, Social and Cultural Rights

5.1. Legislation. – The Croatian Constitution devotes special attention to economic, social and cultural rights, regulating them by 22 provisions. In Article 48, it guarantees the rights of ownership and inheritance, entrepreneurial and market freedom and prohibits abuse of monopolistic status. Restriction or deprivation of ownership the market value of which shall be compensated is possible only in keeping with the law if it is in the interest of the Republic of Croatia. Entrepreneurial freedom and ownership rights may be only exceptionally restricted by law to protect the interests and security of the Republic of Croatia, nature, human environment and health.

The Constitution guarantees the right to work and enjoy the freedom of work, free choice of profession and job and specifies that employees have the right to remuneration ensuring them and their families a life of freedom and dignity. The Constitution also comprises a provision on the right to aid to vulnerable and other citizens who are unemployed or unable to work and cannot meet their vital needs. Under the Constitution, primary education is compulsory and free. The Constitution also guarantees the freedom of scientific, cultural and artistic creativity. Under the Constitution, everyone has the right to a healthy life and the state provides prerequisites for a healthy environment.

The constitutionally guaranteed economic, social and cultural rights are regulated by laws (Act on Ownership and Other Real Rights, Act on Employment, Labour Act, Primary Education Act, Pension Insurance Act, Health Care Act, Health Insurance Act, Social Aid Act, etc).

It should be noted that all amendments of the relevant laws adopted since 2000 have lowered the level of social rights and cut financial benefits. Health insurance rights were struck the hardest by the 2005 amendments (costs of transfer to a medical institution can now be claimed only if the closest health institution is more than 100 km away from the patient's home; the insured pay a 10 kuna tax every time they visit a general practitioner – but a maximum of 30 kuna a month).

Rights pertaining to pension and disability insurance were considerably reduced with the pension insurance reform launched in 1999, which has gradually raised the age of retirement and requirements for entitlement to even relatively low pensions. In Croatia, the pension system reform began by changing two pension requirements: the duration of insurance (minimum 15 years of insurance coverage) and age of retirement (60 for women, 65 for men). It introduced three pension insurance pillars: 1) compulsory old age pension insurance based on generation solidarity, 2) compulsory old age pension insurance based on individual capitalised savings, and 3) voluntary pension insurance based on individual capitalised savings. Pension insurance based on generation solidarity replaced the previous system of pension and disability insurance. This (so-called first pillar) pension insurance is general; it is enjoyed by all main groups of insured (employees, craftsmen, farmers and persons of equal status) and covers all main pension insurance risks (old age, disability, death and physical injury). Such insurance is compulsory, because all persons with a specific status must be insured while they hold the status (employment, registered business, farming or other forms of self-employment). It is also public because it is established by a law regulating the rights, obligations and responsibilities arising from compulsory insurance. The second pension insurance pillar operates in accordance with fund principles with compulsory and voluntary pension funds. The compulsory pension fund is obligatory for those insured on grounds of individual capitalised savings and simultaneously insured within the compulsory pension insurance on grounds of generation solidarity. All persons may also join the voluntary pension fund based on individual capitalised savings in accordance with the law and the statute of the fund. The pension insurance system comprises three sub-systems: the public system of compulsory pension insurance, the mixed system of old-age pension insurance based on individual capitalised savings and the private system of voluntary pension insurance based on individual capitalised savings. Compulsory pension insurance on grounds of generation solidarity ensures the rights to 1) old age pension, 2) early retirement pension, 3) disability pension, 4) survivor pension, 5) minimum pension, 6) basic pension, 7) occupational rehabilitation, 8) compensation allowance for physical injury, and 9) compensation of travel costs incurred during the realisation of insured rights.

Depending on the grounds on which they are acquired, pensions comprise old age, disability or survivor pensions. Old age pensions comprise regular old age or early retirement pensions. The general conditions for acquiring an old age pension comprise: age and duration of insurance (men: 65 years of age and 15 years of insurance; women: 60 years of age and 15 years of insurance); general conditions for early retirement comprise 60 years of age and 35 years of insurance for men and 55 years of age and 30 years of insurance for women. Croatia no longer allows the insured the right to a pension if s/he has full duration of insurance notwithstanding his/her age. Survivor pensions are available to widowed men and women at the same age: 50 at the time of death of the spouse, i.e. at least 45 years of age at

the time of spouse's death, in which case the payment of pensions begins when the widow(er) turns 50. The right to a survivor pension is also awarded to a child under 26 if s/he is in school or university and a child notwithstanding his/her age who had been dependent on the insured or beneficiary of the right due to general incapacity for work that occurred before the parent died or while the child was a beneficiary of the survivor pension (e.g. on grounds of regular schooling). The right to a survivor pension may under specific conditions also be realised by a parent who had been dependent on his/her dead child, who had been insured or a beneficiary of the right, if the parent is of a specific age i.e. suffers general incapacity for work. Disability pensions are acquired on grounds of incapacity for work by the insured whose disability was caused by an illness or injury outside of work prior to attainment of the old age pension age requirement if the duration of insurance covers at least one-third of the working life. If the disability was caused by injuries at work or an occupational disease, the right to a disability pension is acquired notwithstanding the duration of pension insurance.

5.2. Practice. – Economic and social rights of Croatia's citizens were the most frequently violated rights in Croatia in 2005. These violations notably concerned constitutional and legal rights of employees to remuneration affording them and their families a life of freedom and dignity, maximum working hours, weekly rest, social security of the unemployed. These violations are attributed to Croatia's underdeveloped economy, the lack of social sensitivity on part of the government and inadequate involvement of the competent administrative bodies.

The effects of violations of economic (ownership) and social rights (of pensioners) committed in the nineties were partly reversed in 2005. Little was done on the housing of returnees, Croatian citizens who had fled or left Croatia during the War for Independence and thus lost the tenancy rights in socially-owned apartments.

According to the data of the Association of Autonomous Trade Unions of Croatia, the lowest salary in Croatia in January 05 stood at 1951.25 kn (some 253.72 Euros) The share of lowest salaries in average salaries stood at 33.56%, wherefore it is evident that one-third of the job holders do not earn enough money to meet their vital needs by their work.

In March 2005, 329,020 people, 189,964 of whom women, were unemployed in Croatia. The 15–29 age category accounted for 111,632 of the unemployed. The Split Dalmatia County has the greatest share of unemployed – 12.8% and is followed by the City of Zagreb – 12.5%. The number of unemployed grew by 1.2% over March 2004.

The high unemployment rate, standing at 19,2%, has affected the salary policy in both the public and private sectors, resulting in the widespread phenomenon of unregistered labour, the so-called black market labour (workers' health and pension insurance contributions are not paid). The rights to social security and social

insurance guaranteed by the Constitution, international instruments and laws are violated in the case of all workers forced to work on the black market. The situation is further aggravated by the notorious ineffectiveness of the labour inspection and misdemeanour courts. Four TU offices had within a two-month campaign established that the State Inspectorate had processed only 27 of the 185 reports of unregistered labour, non-payment of overtime or salaries and excessive working hours and filed merely 20 misdemeanour reports. The inefficiency of the misdemeanour courts and nearly regular discontinuation of misdemeanour proceedings against employers on grounds of the expiry of the statute of limitations prompted the TUs to seek amendments of the State Inspectorate and Misdemeanours Acts and proposed the conclusion of a National Collective Agreement which would ensure minimum rights to all employees. The initiatives proved unsuccessful.

The Croatian Parliament in 2004 passed an Act on the Implementation of the Decision of the Constitutional Court of the Republic of Croatia of 12 May 1998. In 2005, it passed the Act on the Pension Fund regulating the redress of pension beneficiaries established to have been unlawfully paid lower pensions by the 1998 Decision. The Acts aim to reverse the effects of the large-scale violations of the pensioners' rights by recompensing them. This has been partly achieved. However, the implementation of these Acts threatens the rights of specific groups of pensioners, because:

- the provisions do not calculate the debt i.e. they exclude all beneficiaries of survivor pensions who began receiving them after 1998 and before 5 August 2004, regardless of whether they had themselves previously been pensioners;
- redress of beneficiaries of survivor pensions, who began receiving the pensions in the 1993–1998 period, does not include compensation for the whole period unless the pensions were received from the onset of the period;
- pensioners receiving limited pensions (maximum amounts that can be paid out) received notices that they were not owed anything instead of notices specifying how much they were owed.

Proceedings for the protection of these rights initiated by motions for redress calculation or recalculation of debt are under way. Whether the rights of the above-mentioned categories of pensioners will be violated depends on the outcomes of these proceedings.

Violation of property rights in Croatia in 2005 primarily regarded the issue of restitution of temporarily taken property to absent owners, the reconstruction of property destroyed or damaged during the war or due to terrorist activities and accommodation of returnees who had lost tenancy rights.

During the war and the three ensuing years, some 19,500 housing units that had belonged to Croatian Serbs were allocated for use to temporary beneficiaries (60% of them Bosnian Croats) in accordance with a 1995 law. Return of that property began in 1999 and continued throughout 2005. Six hundred and fifty housing units remained occupied on 1 July 2005 (claims for the restitution of 486 have been filed, while 174 housing units remain unclaimed). Most property has been returned on paper only, but not in real life as only half the owners regained physical possession of their property. Some 8,000 property units, which were thought to have been returned, had actually been sold to the state while they were still occupied. Over 3,000 formally returned housing units remain empty and many of them have been devastated and plundered because their owners have not returned to Croatia. A large number of houses physically repossessed by their owners were damaged and looted, mostly by their temporary users as they were leaving them, wherefore they are uninhabitable. By July 2005, only a small number of owners received some form of state aid in construction material they are entitled to under the law. Two-thirds of the remaining occupied property units are in Dalmatia (mostly in Knin, Benkovac and Obrovac).

Courts had divested around 24,000 holders of their tenancy rights because they had not used the socially owned apartments for more than six months for unjustifiable reasons. Some 6,000 former holders of the right (mostly in the Danube River Valley) became protected leaseholders because they had lost the right to buy the socially-owned apartments they had had tenancy rights in after the expiry of the preclusive deadline. Under international community pressure, the Croatian Government adopted programmes for accommodating the former holders of tenancy rights who had lost the right because they had not resided in the apartments, one programme for special state concern areas (areas which had been occupied) and one programme for other areas of Croatia. Under the programmes, the Government committed itself to building or buying some 500 apartments and earmarked 44,000,000 kn for them. The Government has to date received 11,275 applications for the two housing programmes encompassing the area directly affected by war (so-called areas of special state concern) and the urban centres in Croatia. Over 1,000 applications for the housing accommodation programme in urban parts of Croatia were submitted within the deadline that expired in 2005. Although the competent minister pledged he would by end October address the first group of 41 urgent applications he had received through the international community, only some 10 applications were processed by early November.

The courts have in 2005 also conducted (around 100) proceedings regarding the termination of tenancy rights of persons, who had never abandoned the apartments they had tenancy rights in and who should have been granted the status of protected leaseholder. Eviction orders executed in contravention of Constitutional Court positions were halted in July 2005, when the Chief State Prosecutor instructed the local state prosecutors to put off evictions of former holders of tenancy rights who had applied for accommodation until they are really provided with housing.

IV CONCLUSION

The overview of constitutional and legal provisions corroborates that human rights are regulated relatively well in the Republic of Croatia.

However, some laws contain only programmatic provisions but lack implementation and penal provisions. This especially applies to regulations prohibiting discrimination in principle but not envisaging sanctions against those violating them, notably laws regulating activities where discriminatory conduct can have fatal effects (in the areas of health and education). The lack of norms envisaging appropriate sanctions for perpetrators of discrimination also aggravates the status of the persons discriminated against who may wish to file a suit.

The inclusion of misdemeanour sanctions in provisions prohibiting discrimination and transferring the burden of proof from the victim to the perpetrator would ensure more efficient protection of victims of discrimination.

Adequate amendments to the Labour Act need to be made to prevent discriminatory implementation of the provisions on fixed-term contracts, which are not discriminatory *per se* but are applied to discriminate against pregnant women.

The new Act on Courts lays out the procedure for protecting the right to a trial within a reasonable time conducted by immediately higher courts and via appeals. However, as the Constitutional Act on the Constitutional Court of the Republic of Croatia has not been amended, a party that believes its right to a trial within a reasonable time has been violated need not first resort to the new institute and exhaust ordinary legal remedies, but can still directly file a constitutional complaint with the Constitutional Court. It is therefore necessary to amend the Constitutional Act on the Constitutional Court of the Republic of Croatia to avoid situations in which the Constitutional Court dismisses constitutional complaints without clear legal ground.

Due to the grave political effects of manipulation with data on representation of national minority members in local and regional self-government units, it is necessary to amend the Act on the Election of Members of the Representative Bodies of Local and Regional Self-Government Units and clearly and unambiguously define the way of establishing i.e. ensuring proportional representation of national minorities in the local and regional representative bodies.

Disciplinary proceedings before the State Judicial Council ought to be launched against judges whose underperformance has resulted in violations of the right to a fair trial i.e. a trial within reasonable time.

In view of the chronic overcrowdedness of the jails and prisons, the state should as soon as possible build new correctional institutions the capacity of which will ensure the convicts and detainees humane accommodation. The Penitentiary System Directorate and the Ombudsman need to review each complaint by a

detainee or convict over violations of rights guaranteed to jail and prison inmates by the law more conscientiously and undertake authorised measures to improve the situation.

The Ombudsman for Children ought to review the instances of ethnically-based segregation of pupils, assess the effects of such practice and propose effective measures to reverse them.

The Central State Administration Office ought to take measures to ensure regular periodic harmonisation of official census data on the number of national minority members in each local and regional self-government unit with the changes registered in the last certified election rolls. It also needs to establish on the basis of registers of civil servants in which state bodies national minority members are not appropriately represented. On the basis of existing data on the ethnic affiliation of judges, the Justice Ministry ought to notify the State Judicial Council about which courts do not have adequate representation of national minority judicial staff so that it also take that criterion into consideration during the appointment of judges.

Unregistered labour, unpaid overtime and work on Sundays and holidays can be countered only by regular inspectorial supervision and sanctioning of employers. This is why the protection of workers will be enhanced by strengthening the labour inspection and improving the efficiency of misdemeanour courts.

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HUMAN RIGHTS IN KOSOVO IN 2005

I INTRODUCTION

The protection of human rights is the essential and existential issue of all citizens of Kosovo notwithstanding their religious, ethnic, political or other affiliation. This conclusion is inevitably drawn in view of the long-standing situation in, position and status of Kosovo.

The state of human rights and efforts to improve and promote them and harmonise them both formally and practically with the generally recognised international standards have remained one of the main pre-occupations of the local and international institutions in 2005, six years after the war in Kosovo. In terms of human rights protection and promotion, the international community set the local institutions as their primary task the fulfilment of eight strict standards, the majority of which directly or indirectly pertains to human rights protection (rule of law, freedom of movement, sustainable returns, right to property, et al).

In general, despite unquestionable efforts of both relevant international and local agents involved in the protection and promotion of human rights and indisputable positive results in this area, the state of human rights remained below par in Kosovo at the end of 2005.

There are many reasons for the substandard state of human rights. They have prevented or considerably slowed down the speed of human rights development and promotion in Kosovo. One such hindering factor is no doubt the relations between the Albanian majority and some minority groups, primarily the Serbs and Roma, the consequence of the armed conflict that ended in 1999. Although these relations have improved in 2005, they are still far from satisfactory. It is extremely difficult to expect major improvements in the relations until the fate of the many missing persons, mostly Albanians, is clarified or until the institutions of both parties prove they are ready to address this important problem. Unfortunately, despite undeniable efforts, the fate of most missing persons still remained unknown in 2005.

Numerous perpetrators of grave crimes committed during the 1999 war, people who are also responsible for the problem of missing persons, were not brought to justice in 2005. Moreover, one gains the impression that they enjoy institutional protection and that some levels of authority are doing their best to

protect them and prevent the determination of their liability and legal punishment, which would definitely help improve inter-ethnic relations in Kosovo.

The other reasons can be identified as the side effects of war. One of the primary causes of the substandard realisation of human rights in Kosovo lies in the absence of organised and strong judicial and executive authorities. The judicial appointment procedure (unclear appointment criteria and lack of transparency in that respect, lack of judges, occasional appointments of judges and other judicial staff of dubious quality) and other reasons have contributed to the exceptionally poor performance of the judicial bodies and their inadequate responses to events that have negatively affected the state of human rights in Kosovo.¹

Moreover, the parallel judicial and administrative systems in northern Kosovo and the enclaves that are administered and funded by the Serbian Government have continued operating without hindrance. Their judgments and decisions are not recognised by UNMIK bodies or the Kosovo courts and administrative bodies; likewise, the decisions and judgments of the latter are not recognised by the parallel Serbian courts and administrative offices. Citizens of Kosovo, especially members of the Kosovo Serb community, are the victims of this chaos. The division of powers between international and national authorities in Kosovo, which frequently overlap, also constitute an objective reason for the substandard human rights record.

The organisation of local government institutions, i.e. appointments on grounds of party affiliation notwithstanding the applicants' education, experience or knowledge, has resulted in ineffective promotion of human rights in Kosovo.

The reconstruction of the Kosovo Police Service has essentially led to a comprehensive vacuum, which the members of international police forces failed to fill and which allowed for the development of specific social phenomena that have negatively affected the state of human rights. Insufficient professional and expert training of new policemen in Kosovo has led to the failure to solve a large number of crimes, above all crimes of deprivation of life, to identify the perpetrators and to efficiently tackle organised crime. In some cases, insufficient expert and professional training was the reason why human rights were violated by the very policemen tasked with protecting them.

Despite the indisputable fact that Kosovo has the youngest population in Europe at an average, the youth's prospects are dismal due to the dire economic situation. Kosovo is plagued by an army of unemployed people with an uncertain future. The high unemployment rate and widespread poverty without doubt also affect the state of human rights in Kosovo.²

1 The Response of the Justice System to the March 2004 Riots, OSCE, Mission to Kosovo, Department of Human Rights and Rule of Law.

2 According to a World Bank report, around 40% of Kosovo's population is poor, 15% is extremely poor.

Questionable procedures and criteria applied in privatisation, the unclear status of socially-owned companies employing tens of thousands of citizens, lack of measures to revitalise production in these companies, the stagnant economy and other factors have contributed to the enormous rise in unemployment and dire poverty in Kosovo. In such an economic situation, illegal phenomena directly or indirectly violating human rights come as no surprise.

The responsibility of the international civilian and military authorities and their influence on the state of human rights should also be factored in. Notwithstanding their intentions, obvious efforts and some headway, the international authorities have not achieved as much as they could have in the area of human rights especially when one takes into account their powers in Kosovo. This conclusion is based on the following observations: huge bureaucratic apparatus, lack of a clear and well-grounded concept for the development of Kosovo's society, influence of various IC interests, insufficient familiarity with the local mentality and interethnic relations in the past, happenstance approach to addressing numerous issues of vital interest, et al.

As the state of human rights in a society is naturally linked to the general situation, human rights in Kosovo should be viewed within the social and political context of Kosovo today, especially its specific and undefined status, unprecedented in contemporary political and social theory and practice. This is why this Report shall focus on the human rights that were the most jeopardised and violated in everyday life and which the citizens have complained about the most to the Priština-based Council for the Defense of Human Rights and Freedoms.

II HUMAN RIGHTS IN LEGISLATION

The establishment and improvement of the legal system is a 'right reserved' to the international community in Kosovo. The lack of a clear and well-grounded concept of Kosovo's general development is the most explicit in the establishment of the post-war legal system, which the Kosovo Ombudsperson qualified as 'legal chaos'.³ Under UNMIK decisions, the following sources of laws shall apply in Kosovo:⁴

- Laws in force in Kosovo on 22 March 1989;
- UNMIK Regulations;
- If a subject matter or situation is not covered by laws applicable on 22 March 1989 or UNMIK Regulations, laws adopted in Kosovo after 22 March 1989 shall apply if they are not discriminatory and are in keeping with international human rights instruments;

3 Kosovo Ombudsperson's 2005 Annual Report, Priština, 2005.

4 UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo and UNMIK Regulation No. 2000/59 amending Regulation No. 1999/24 on the Law Applicable in Kosovo.

The following seven international legal documents shall directly apply in Kosovo:

1. The Universal Declaration of Human Rights;
2. European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto;
3. The International Covenant on Civil and Political Rights and Protocols thereto;
4. The International Covenant on Economic, Social and Cultural Rights;
5. The Convention on Elimination of All Forms of Racial Discrimination;
6. The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; and
7. The International Convention on the Rights of the Child.⁵

In addition, two other sources of law are very frequently applied in Kosovo:

- Laws passed by the Assembly of Kosovo, and
- Laws today applicable in the territory of the Republic of Serbia and applied by parallel judicial bodies in northern Kosovo and the enclaves, which are supervised and funded by the Justice Ministry of Serbia.

The latter has caused major confusion amongst Kosovo Serbs as they consider the Serbian parallel system and not the one established by UNMIK as valid.

It should be noted that the SRSB on 12 May 2005 signed the Law on the Official Gazette of Kosovo adopted by the Assembly of Kosovo on 27 September 2004. The Assembly of Kosovo simultaneously began publishing the adopted laws on its website in all three official languages in Kosovo (Albanian, Serbian and English).⁶

Despite all the legal anomalies the Kosovo system is fraught with and the large number of illogical and unclear legal situations causing major confusion, it can nevertheless be concluded that the protection of human rights in some areas is

5 Several questions that arise during the analysis of this Regulation remain unanswered: Are all the laws in force on 22 March 1989 and still in force compatible with the social developments and new reality in Kosovo and do they stymie the protection and promotion of human rights in Kosovo? As Kosovo does not have an independent judicial body (Constitutional Court) that would *inter alia* assess whether laws passed after 22 March 1989 are discriminatory, the question arises as to who is charged with establishing the list of such laws? Does empowering judges to interpret and establish the discriminatory character of a law adopted after 22 March 1989 *ad hoc* and at their own discretion open doors to arbitrariness and selective application of legal regulations? Does a Regulation as a legal enactment existing simultaneously with a legal system have legal effect and on the basis of which principle? How can international documents be directly applied when Kosovo does not fulfil even the minimum formal prerequisites which the other parties to the documents must meet and lacks a comprehensive human rights protection system in accordance with standards established by those international documents?

6 www.kuvendiikosoves.org or www.unmikonline.org.

formally well regulated, mostly because of the obligation to directly apply main international human rights documents and the fact that the field of human rights is regulated by the Constitutional Framework of Kosovo. This is corroborated by the fact that the laws passed by the Assembly of Kosovo, including the relatively small number of laws adopted in the field of human rights protection, are in conformity with European standards in all respects.⁷

However, the implementation of these regulations and laws in practice is not satisfactory. Selective and inadequate application of the valid regulations is an additional reason why the state of human rights in Kosovo is substandard.

What are the reasons for such disharmony and disproportion between the satisfactory level of formal human rights protection and inadequate protection of such rights in practice? A sustainable and efficient human rights protection system is impossible in Kosovo, an entity resembling a state, as long as it is ruled by the international civilian and military community whose members enjoy absolute immunity before local and international judicial bodies for their actions.⁸ Procedures for establishing any kind of liability, including criminal, of international staff cannot be instituted before any national or international judicial body. The only bodies that can respond to filed complaints are no other than UNMIK and KFOR.

Problems arising over the immunities of UNMIK and KFOR and international staff in Kosovo in general prompted the Parliamentary Assembly of the Council of Europe to call on UNMIK in Resolution 1417 to review the state of immunities to ensure that all international officials are always subject to an effective criminal and civil jurisdiction, either local or in the country of origin.⁹ The recommendation has, unfortunately, not been heeded.

Despite indisputable efforts, above all by KFOR, to address compensation of damage claims, many such cases have not been processed or have left the claimants dissatisfied. The latter, demanding the protection of their rights at all costs, have without prior consultation and without legal grounds turned to the ECtHR in Strasbourg (most Kosovo citizens are unfamiliar with the jurisdiction and procedures of the ECtHR).

The second reason for this state is the lack of capacity and funds of the Provisional Institutions of Self-Government (local governments) to ensure effective application of human rights protection measures. A blatant example is the implementation of the Law on Execution of Penal Sanctions (LEPS), i.e. impossibility to implement specific provisions of that Law.¹⁰ The Law fulfils all envisaged standards

7 The Kosovo Assembly has to date adopted 121 laws, 95 of which were promulgated (signed by the SRSG). Thirty-three other draft laws are in parliament procedure.

8 UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo.

9 CoE Resolution 1417.

10 LEPS, Articles 77, 78, 86 and 94.

in terms of form and essence, but the lack of funds and capacity render implementation of some provisions impossible (payment of wages to prisoners, community service work, weekend and holiday visits to family and relations, et al.). The failure and impossibility to implement these provisions are essentially the reasons for the rise in incidents in prison and detention centres in Kosovo recorded in 2005.

The extremely low awareness of the local population, especially in rural areas, of their guaranteed rights and widespread ignorance and misinterpretations of human rights provisions by the ruling structures have additionally contributed to the unsatisfactory exercise of human rights in Kosovo. UNMIK and the Council of Europe have recently signed two agreements with regard to the Framework Convention for the Protection of National Minorities and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. The initial report on the Framework Convention was submitted in 2005. There are serious hindrances with respect to the Convention against Torture. Under the Convention, the CoE Committee for the Prevention of Torture is entitled to visit any prison or detention centre at any time. However, KFOR has not allowed free access to a number of detention centres set up within specific KFOR military contingents. This problem has not been resolved to date.

Kosovo's legal system is not fully in accordance with valid international standards and principles. For example, none of the Assembly Laws or UNMIK regulations include *vacatio legis*.¹¹ In its Resolution 1147, the CoE Parliamentary Assembly also recognised the importance of *vacatio legis* and called on UNMIK to allow for an appropriate *vacatio legis* following the promulgation of all legal instruments.¹²

1. Human Rights in the Constitutional Framework for Provisional Self-Government in Kosovo

The Constitutional Framework for Provisional Self-Government in Kosovo (hereinafter Constitutional Framework) clearly and simply regulates the area of human rights in Kosovo in Chapter 3.¹³

The Constitutional Framework guarantees that “all persons in Kosovo shall enjoy without discrimination on any ground and in full equality human rights and fundamental freedoms”. The Constitutional Framework also obliges the Provisional Institutions of Self-Government to observe and ensure internationally recognised human rights and fundamental freedoms, including the rights and freedoms set forth

11 *Vacatio legis* is the period between the promulgation of a law and its entry into force, which is to give the public and institutions implementing the law time to prepare for the new legal situation.

12 See Footnote 8.

13 Constitutional Framework for Provisional Self-Government in Kosovo, 15 May 2001.

in the UDHR, the ECHR and its Protocols, the ICCPR and Protocols thereto, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Racial Discrimination, the European Charter for Regional or Minority Languages and the CoE Framework Convention for the Protection of National Minorities.

The laws passed by the Assembly of Kosovo are, *inter alia* thanks to the help of the UNMIK Legal Office, in conformity with international standards and provide for their protection and realisation. In addition, the Government of Kosovo set up special groups for the protection and promotion of human rights; work on the national strategy for the protection of human rights is under way. In light of these efforts, the adoption of the following four laws needs to be noted: Suppression of Corruption Law, Law on Access to Official Documents, Anti-Discrimination Law and Law on Gender Equality, which include established mechanisms for protection from discrimination and achievement of gender equality.

The Constitutional Framework is not in conformity with UNMIK Regulation No. 1999/24 listing the international documents to be directly applied in Kosovo inasmuch as it does not mention the ICESCR and the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. It instead mentions two new international documents: the European Charter for Regional or Minority Languages and the CoE Framework Convention for the Protection of National Minorities. Thus, nine international documents are directly applied in Kosovo in practice and not seven as specified in UNMIK Regulation No. 1999/24 or the Constitutional Framework.

2. Internationally Guaranteed Human Rights in Kosovo

Several international legal documents are directly applied in Kosovo.¹⁴ The texts of these documents are not only a composite part of the national legislation, but also have primacy in case they conflict with national legal provisions.

The manner in which they have been incorporated in national legislation is interesting and reflects the undefined and specific status of Kosovo vis-à-vis the international community. Kosovo was unable to follow the strictly established procedural actions (signing and ratification of these documents) as it does not have the prerogatives of a state, is not a member of the UN, CoE or any other international organisation.

¹⁴ UDHR, ECHR and its Protocols, ICCPR and Protocols thereto, ICESCR, Convention on the Elimination of All Forms of Racial Discrimination, Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment, International Convention on the Rights of the Child, European Charter for Regional or Minority Languages and the CoE Framework Convention for the Protection of National Minorities.

A compromise was found although Kosovo has not fulfilled even the minimum formal prerequisites for signing and ratifying the documents in view of the striving of both the IC and Kosovo's society to join European integration processes as soon as possible. Time will probably show what the effects of such a compromise, which is essentially not legally grounded, will be once Kosovo's status is resolved.

Notwithstanding, all most relevant international legal documents on the protection and promotion of human rights are formally applied in Kosovo.

3. Right to an Effective Legal Remedy for Human Rights Violations

3.1. General. – The protection of human rights in Kosovo is achieved by resort to effective legal remedies over potential, alleged and real violations of human rights. Human rights in Kosovo are in general protected in criminal, civil and administrative proceedings and administrative disputes.

*3.2. Ordinary Legal Remedies.*¹⁵ – The right to an effective legal remedy against human rights violations before a national authority is enshrined in Article 13 of the ECHR. Article 13 empowers the competent authorities to adjudicate complaints and provide for adequate compensation.

In addition to Article 13 of the ECHR, the right to an effective legal remedy is also protected by Article 174 of the Provisional Criminal Code of Kosovo that envisages the punishment of anyone who prevents another person from exercising this right:

Whoever by use of force or grave threat prevents another person from using his or her right to lodge a complaint or any other legal remedy shall be punished by a fine or by imprisonment of up to one year.

When the offence in paragraph 1 of this Article is committed by an official by abuse of post or authority, the perpetrator shall be punished by imprisonment of between three months and three years.

Kosovo's citizens can initiate proceedings by taking action before the competent judicial and administrative bodies. These actions vary depending on the type of proceedings being launched. Criminal proceedings are mostly launched *ex officio*. Only in specific cases may criminal proceedings be initiated on private charges. Civil proceedings are launched by a suit or a motion. Administrative proceedings are instituted by claims and administrative disputes by lawsuits.

¹⁵ OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, Remedies Catalogue, Priština, 2005.

The right to have one's conviction and sentence reviewed by a higher court is prescribed by international conventions directly applicable in Kosovo, notably, ICCPR (Art. 14 (5)) and the ECHR (Protocol 7, Art. 2). This right is guaranteed also by national legislation.

In criminal law, the right of appeal is guaranteed by Article 398 of the Provisional Criminal Procedure Code of Kosovo (PCPCK), under which an appeal of a verdict may be filed with a higher court within 15 days from the day the verdict was delivered. Article 399 details which parties may lodge appeals.

In civil law, the right of appeal is guaranteed by Article 348 of the Civil Procedure Act and Article 19 (1) of the Act on Non Contested Procedures.

In administrative proceedings, the right is guaranteed by Article 223 (paras. 1 and 2) of the General Administrative Proceedings Act. Upon the completion of administrative proceedings, the unsatisfied party may initiate an administrative dispute before the Supreme Court of Kosovo within 30 days.

Extraordinary legal remedies may be resorted to against final criminal and civil court decisions. They are adjudicated by the Supreme Court of Kosovo.

It should be noted that the General Administrative Proceedings Act (*Sl. list SFRJ*, 1986/47) still applies in Kosovo but only in so far as it does not conflict with Section 35 of UNMIK Regulation No. 2000/45 on Self-Government of Municipalities in Kosovo in relation to administrative decisions adopted by municipal bodies. In such cases, the complainant may file a complaint about an administrative decision with the Chief Executive Officer within one month. If the complainant is dissatisfied with the CEO's response, s/he may refer the matter to the Central Authority which is duty-bound to consider the complaint and decide upon the legality of the decision. The decision must be issued within two months from the day of submission of the complaint. Only once this procedure is exhausted can an administrative dispute be launched.

3.3. *Rights of Kosovo's Citizens before the European Court of Human Rights.*

– Citizens of Kosovo are in a clearly less favourable position than citizens of other European countries in one particular area. Although the ECHR and all its Protocols are directly applicable in Kosovo, its citizens cannot file applications with the ECtHR after exhausting all national legal remedies in the event they are dissatisfied with the decision or believe a right they are guaranteed has been violated. There is a number of reasons for this:

- Kosovo is not a state, wherefore it cannot be considered a “High Contracting Party”;
- Kosovo has not signed or ratified the ECHR and its Protocols, but has merely unilaterally incorporated them in its legal system.

Due to this paradoxical situation, the Council of Europe proposed the opening of a 'field office' of the ECtHR in Priština, which is to review applications by Kosovo citizens on behalf of the Court in specific situations.

Citizens of Kosovo may file applications with the ECtHR against other CoE members – signatories of the ECHR – but may not file applications against decisions of local judicial authorities. It is these applications filed by citizens of Kosovo against other states, CoE member states, over illegal actions of their (civilian or military) bodies in Kosovo that caused confusion before the ECtHR. This is corroborated by the fact that the ECtHR still has not decided on the admissibility of an application the Priština-based Council for the Defense of Human Rights and Freedoms filed over four years ago, despite extensive correspondence.¹⁶

3.4. Constitutional Appeal. – Citizens of Kosovo are deprived of the right to file constitutional appeals because a Constitutional Court has not been established in Kosovo. Under UNMIK Regulation 1999/24, *laws in force in Kosovo on 22 March 1989 shall be applicable*. Although Kosovo had a Constitutional Court on 22 March 1989, which was subsequently dissolved, this institution has not been established yet.¹⁷

These legal illogicalities, selective application of provisions et al. contribute to the less favourable status of citizens of Kosovo compared to that of other European countries when it comes to the right to an effective legal remedy to protect one's rights.

3.5. Kosovo Ombudsperson. – The role of the institute of Ombudsperson in Kosovo warrants mention although the ECtHR is of the view that an Ombudsperson does not constitute an effective legal remedy in terms of Article 13 of the ECHR because ombudsmen do not have powers to amend or repeal legal enactments violating human rights.

The Ombudsperson institution was established in Kosovo by UNMIK Regulation No. 2000/38 and it officially began operating on 21 November 2000. Until the end of 2005, it was headed by international Ombudsperson Mr. Marek Antoni Nowicki, who was supported by two local deputies and administrative staff.

The Ombudsperson is an independent institution charged with addressing issues relating to allegations of human rights violations or abuse of post by staff of the civilian international administration or any central or local public authority in Kosovo.

Ombudsperson's powers in Kosovo are limited. S/he may not launch investigations or take other steps regarding the actions of public authorities in Kosovo. In case of complaints by Kosovo's citizens about the work of any public authority outside Kosovo, the Ombudsperson may offer his/her services or refer the case to

¹⁶ Application No. 71412/01, *Behrami v. France*.

¹⁷ Act on Regular Courts (*Sl. list SAP Kosovo*, No. 21/78).

the competent Ombudsperson or similar institution of the state the complaint regards.

The Kosovo Ombudsperson has no powers over KFOR. It refers recommendations on how to protect jeopardised human rights in Kosovo to the Special Representative of the UN Secretary General (SRSG), which is the topmost civilian authority in Kosovo, or to the representatives of the Provisional Institutions of Self-Government (PISG) in Kosovo.

Kosovo Ombudsperson's decisions and recommendations are not binding. The term in office of the international Ombudsperson in Kosovo expired in late 2005 and the international community and PISG decided that the Ombudsperson would from then on be recruited from the ranks of national experts and appointed by the Kosovo Assembly.

III INDIVIDUAL RIGHTS

1. Right to Life

The right to life, as a fundamental human right, is guaranteed by all international legal documents directly applicable in Kosovo.

Article 2, ECHR:

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

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

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Protocol No. 6 to the ECHR (Arts. 1–3):

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

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.

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

Protocol No. 13 to the ECHR (Arts. 1–3):

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

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

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

Article 3, UDHR:

Everyone has the right to life, liberty and security of person.

In addition to the above articles of the ECHR and the Universal Declaration of Human Rights, the right to life is in Kosovo protected also by national laws. Chapter XV of the Criminal Code entitled Criminal Offences against Life and Body comprises 12 articles (Arts. 146–157). Articles 146–152 of the Provisional CC address murder and protection of the right to life, while Articles 153–157 deal with bodily injury, participation in a brawl, non-provision of help and abandoning of incapacitated persons. All forms of the crime of murder are prosecuted solely *ex officio*.

Protection of the right to life is also guaranteed in Chapter XIV of the Provisional Criminal Code (Criminal Offences against International Law) which penalises crimes of genocide, crimes against humanity, war crimes in grave breach of the Geneva Conventions, war crimes in serious violation of the laws and customs applicable in international armed conflicts and war crimes in serious violation of laws and customs applicable in armed conflicts not international in character.

Although the right to life as a fundamental human right is formally well protected in Kosovo by positive legal regulations, it is still in practice violated and jeopardised. What is especially concerning is the fact that the crimes of deprivation of life in Kosovo are extremely difficult to solve.

Although some 17,000 KFOR, 3,000 UNMIK police and 8,000 Kosovo Police Service members are deployed in Kosovo, the uncovering of these crimes, especially murders with an apparent political background and murders of national minority members, is unsatisfactory.

1.1. Capital Punishment. – Pursuant to obligations assumed under UNMIK Regulation No. 1999/24 of 12 December 1999 on the direct applicability of international legal documents, capital punishment was abolished by UNMIK Regulation No. 2000/59 amending Decree 1999/24.

Article 1 (5) expressly stipulates: “capital punishment is abolished”. The following provision in the Regulation states that: “For each offence punishable by the death penalty under the law in force in Kosovo on 22 March 1989, the penalty will be a term of imprisonment between the minimum as provided for by the law for that offence and a maximum of forty (40) years.” This means that the death penalty has been replaced by the maximum penalty of imprisonment lasting 40 years.

This Regulation is specific in as much as it is retroactive in character. Article 3 sets out that it is applied retroactively, from 10 June 1999, i.e. that capital punishment was abolished in Kosovo on the day the international forces entered it.

1.2. Arbitrary Deprivation of Life. – Although both the ICCPR and the ECHR, which are a composite part of Kosovo legislation, stipulate protection from arbitrary deprivation of life, not every use of force by security bodies with lethal consequences is deemed a violation of the right to life.

The ECHR lists instances in Article 2 (2) when the use of force by security forces with lethal consequences does not constitute a violation of the right to life. These comprise use of force: in defence of any person from unlawful violence, in order to effect a lawful arrest or prevent escape of a person lawfully detained, in a lawful action undertaken to quell riot or insurrection, as long as use of force fulfils the criteria of proportionality and absolute necessity. However, the ECtHR took the stand that unintentional deprivation of life by security forces can be interpreted as a violation of the right to life if the use of force was unjustified or in contravention of conduct envisaged by national legislation. This is why a separate independent analysis of the excessive use of force or its correlation with national legislation cannot be made as no official legal enactment, which would strictly regulate use of force by the security forces, notably the UNMIK police and KPS, was adopted in Kosovo by the end 2005.

UNMIK Regulation No. 2005/54 on the Framework and Guiding Principles of the Kosovo Police Service was passed on 20 December 2005. In Article 5 (3), it qualifies excessive use of force as a “serious disciplinary offence”. The Ministry of Internal Affairs, established within the Kosovo Government in late December 2005, will be charged with the Kosovo Police Service. Penalties for serious disciplinary offences will be pronounced by the Police Commissioner after consultations with the Minister of the Interior. Dismissals require the special approval of the SRSG. In any case, the Regulation, which should have been adopted five years ago when the Kosovo Police Service was established, practically sets out the principles of work, organisation and operations of the Police Service, which the Ministry of Interior must strictly abide by.

In practice, the international Police Commissioner has to date been charged with the whole procedure regarding arbitrary deprivation of life, which boiled down to establishing the intensity of the force used by the police, whether the use of force constituted a breach of discipline and pronouncing penalties. This is merely one of

the reasons why at the very start of 2006, a KPS member drastically violated the right to life by arbitrarily depriving of life a citizen brought into the Peć police station for questioning for illegally carrying a weapon.¹⁸

1.3. Abortion. – Abortion as a potential violation of the right to life is not regulated by law in Kosovo. True, pursuant to UNMIK Regulation No. 1999/24 on law applicable in Kosovo, the Act on Abortions that was in effect in Kosovo on 22 March 1989 ought to be applied. However, this law is not applied in practice. Moreover, as international provisions directly applicable in Kosovo are quite confusing with respect to abortion, one may draw the conclusion that this matter remains legally unregulated in Kosovo. The draft Act on Conditions and Procedures for Abortion was publicly debated in 2005, but was not included in the agenda of the Kosovo Assembly by the end of 2005.

Of positive Kosovo legislation, only Article 152 of the Provisional Criminal Code sanctions “impermissible termination of pregnancy”. According to the Article 152:

Whoever, in contravention of legal provisions on the termination of pregnancy and with the consent of the pregnant woman, terminates her pregnancy, commences to terminate her pregnancy or assists her in terminating her pregnancy shall be punished by imprisonment of three months to three years.

Whoever terminates or commences to terminate a pregnancy without the consent of the pregnant woman shall be punished by imprisonment of one to eight years.

When the offence in paragraph 1 or 2 of this Article results in grave bodily injury, serious impairment to health or the death of the pregnant woman, the perpetrator shall be punished by imprisonment of between six months and five years for the offence in paragraph 1 and to imprisonment of minimum three years for the offence in paragraph 2.

There is absolutely no supervision of or records on abortions in Kosovo, nor data on whether any perpetrators of illegal abortions have been criminally investigated in 2005.

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

2.1. General. – Prohibition of torture, inhuman or degrading treatment or punishment is formally guaranteed in Kosovo by international and national legal regulations. This right is guaranteed by the following international documents:

¹⁸ Kosovo Police Service member deprived of life a member of the Kastrati family in blood revenge, Peć, January 2006.

Convention against Torture, the ICCPR (Art. 7), the ECHR (Art. 3), the Universal Declaration of Human Rights (Art. 5) and the Convention on the Rights of the Child (Art. 37a).

The right is also enshrined in the following national laws: the Constitutional Framework (Chapter 3), the Anti-Discrimination Act, the Provisional Criminal Code of Kosovo (Chapter XVI, Articles 160–165) and the Penal Sanctions Enforcement Act. As far as national legal provisions guaranteeing this right are concerned, it must be underlined that the Constitutional Framework regulates the issue quite superficially. This highest national legislation merely indirectly mentions the issue in Chapter 3, when listing the international documents in accordance with which the PISG are to act. The Constitutional Framework does not elaborate the right at all. The authors obviously believed it was sufficient to merely mention the Convention against Torture and other international documents and formally bind the competent bodies to strictly implement them, which is essentially a qualitative shortcoming.

Other above-mentioned national laws partly fill the lacunae left behind by the Constitutional Framework. In that respect, Chapter XVI of the Provisional Criminal Code (Criminal Offences against Liberties and Rights of Persons) ought to be highlighted.

Article 160:

Whoever compels another person, by force or serious threat, to act or refrain from acting or to acquiesce to an act shall be punished by a fine or by imprisonment of up to six months.

Whoever commits the criminal offence in paragraph 1 against a child or a person with whom the perpetrator has a domestic relationship shall be punished by imprisonment of three months to five years.

When the offence in paragraph 1 is committed by a perpetrator acting as a member of a group, the perpetrator shall be punished by imprisonment for three months to five years.

Criminal proceedings for the offence in paragraphs 1 or 2 shall be initiated by a motion.

Article 163:

An official who in the exercise of his or her duties uses force, threat or other prohibited means or manner to compel a suspect, defendant, witness, expert or another person to give a statement or another declaration shall be punished by imprisonment of three months to five years.

When the offence in paragraph 1 of this Article is committed by use of grave violence or if the suspect or defendant has suffered grave consequences in criminal proceedings as a result of the statement obtained by

coercion, the perpetrator shall be punished by imprisonment of one to ten years.

Article 163 of the Provisional Criminal Code obviously pertains only to officials. However, the formulation of the provisions may lead to ambiguity in practice. Paragraph 1 *inter alia* mentions “force, threat or other prohibited means or manner to compel...”. What are other prohibited means or manner and who is competent to define them? Moreover, how does one interpret 'grave violence' in Paragraph 2? On what scale of intensity is violence classified as 'grave' and where does one draw a line between 'grave' and 'permissible' violence?

Such formulations obviously lead to confusion and ambiguity. As the above provision sanctions only the crimes of coercion involving the use of so-called 'grave violence', it may be read as either allowing or not penalising crimes involving resort to so-called 'permissible violence'.

In addition to these two articles, the Provisional Criminal Code also penalises crimes committed by individuals, such as genocide (Art. 116), crimes against humanity (Art. 177), war crimes in grave breach of the Geneva Conventions (Art. 118), war crimes in serious violation of Article 3 common to the Geneva Conventions (Art. 120), organisation of groups to commit genocide, crimes against humanity and war crimes (Art. 128), human trafficking (Art. 139), light bodily injury (Art. 153), grievous bodily injury (Art. 154), insult (Art. 187), defamation (Art. 188), rape (Art. 193), et al.

2.2. Criminal Proceedings and Execution of Penalties. – Pursuant to provisions of the Convention against Torture and other Inhuman and Degrading Treatment or Punishment and the provisions in the Provisional CPC, everyone may file a motion for criminal prosecution (criminal report) to establish criminal responsibility for the violation of the prohibition of torture, inhuman or degrading punishment or treatment. With the exception of crimes against honour and reputation, Kosovo criminal law stipulates that all other crimes in this field are prosecuted *ex officio*. Criminal prosecution of crimes against honour and reputation is initiated by private charges (Art. 190 (1), Provisional CC of Kosovo).

Under the valid laws, the injured party is deprived of the right to initiate criminal proceedings if the statute of limitations for criminal prosecution of the crime in question has expired. After the filing of a criminal report by the injured party and the investigation, the public prosecutor may file an indictment against a person with the competent first-instance court (Art. 304, Provisional CPC). If the prosecutor establishes that there are no grounds for launching an investigation or prosecution for a crime prosecuted *ex officio*, s/he will notify the injured party thereof within eight days and instruct the party that s/he may undertake prosecution as a subsidiary prosecutor (Art. 62, Provisional CPC).

If the injured party has not been notified by the prosecutor that the latter has not initiated or has abandoned prosecution, s/he may make his or her statement that proceedings are being continued before the competent court within three months of the date on which the public prosecutor dismissed the report or decided to discontinue the proceedings (Art. 62 (4), Provisional CPC).

Articles 229–236 pertain to the respect and protection of the personality of the suspect and treatment of the suspect during investigation. They guarantee the right to prohibition of torture and inhuman or degrading treatment of suspects.

Chapter XXI of the Provisional CC of Kosovo deals with the protection of injured parties and witnesses. It sets out protective measures for the injured parties or witnesses (Art. 170) and additional protective measures if those in Article 170 do not guarantee sufficient witness protection (Arts. 171 and 172) regarding the protection of anonymity.

It should be underlined that UNMIK had passed several Regulations on the protection of injured parties and witnesses before the Provisional CC of Kosovo was adopted.¹⁹ All provisions in the Regulations were incorporated in the Provisional Criminal Code.

Treatment of convicts is also regulated by the Law on the Execution of Penal Sanctions (LEPS). Article 4 (paras. 1 and 2) guarantee the enforcement of penal sanctions in a manner ensuring human treatment and respect of dignity of every individual. A convicted person may not be exposed to torture or inhuman and degrading treatment or punishment. The Law guarantees enforcement of penal sanctions without discrimination on any grounds.

Chapter VIII (Arts. 123–127) regulates use of force against convicts. Under Article 123, force may be used against a convict only to prevent his/her escape, physical assault on another person, self-injury, infliction of material damage or active or passive resistance during the execution of legal orders by a prison official. Use of force must be minimal and proportionate to its objective goal. Use of force is authorised by the Prison Director. If force was used without the authorisation of the Director, the prison official must report the use of force to the Director as soon as possible. The Director is obliged to notify the competent public body charged with the judiciary of the use of force (Art. 126).

The LEPS, however, does not envisage a procedure in which the officer who used force is taken to task for using excessive force or force which is not proportionate to its objective. It also fails to lay down a system of judicial control of

¹⁹ Regulation No. 2001/20 on the Protection of Injured Parties and Witnesses in Criminal Proceedings, Regulation No. 2001/21 on Co-operative Witnesses, Regulation No. 2002/1 amending Regulation No. 2002/1 on the Protection of Injured Parties and Witnesses in Criminal Proceedings, Regulation No. 2002/2 amending Regulation No. 2001/21 on Co-operative Witnesses.

violations of rights of convicts. However, even if it did envisage judicial control, that control would be inapplicable as correctional centres are within the exclusive jurisdiction of the UNMIK Department of Justice, whose staff enjoys full immunity before all local courts.²⁰ The recent incidents in Kosovo remand facilities, some of them with lethal consequences, were reportedly caused by the dissatisfaction of the inmates by staff treatment, violations of their rights et al. Social circumstances in Kosovo still do not provide for the full respect and application of legal provisions on rights of convicts.

Due to the specific situation in Kosovo and the fact that the organisation of detention and correctional centres in Kosovo is within the sole competence of the UNMIK Department of Justice headed by international officials, local organisations and bodies focussing on human rights have had great difficulty accessing the centres to see for themselves how the inmates' rights are respected. Access to the centres is allowed only to specific international bodies, such as the ICRC in Kosovo.

3. Right to Liberty and Security of Person and Treatment of Persons Deprived of Liberty

3.1. General. – The right to liberty and security of person and treatment of persons deprived of liberty is regulated both by international legal instruments, such as the ICCPR (Art. 9) and the ECHR (Art. 5), which are an integral part of Kosovo legislation, and by national law. The Provisional Criminal Code and the Provisional Criminal Procedure Code of Kosovo elaborate mechanisms for the protection of this right in detail.

3.2. Prohibition of Arbitrary Arrest and Deprivation of Liberty. – Article 279 of the Provisional CPC sets out the general rules on detention on remand:

(1) Detention on remand may only be ordered on the grounds and in accordance with the procedures provided for by the present Code.

(2) Detention on remand shall last the shortest possible time. All agencies participating in criminal proceedings and agencies that provide legal assistance to them have a duty to proceed with special urgency if the defendant is being held in detention on remand.

(3) Detention on remand shall, at any stage of the proceedings, be terminated and the detainee released as soon as the reasons for it cease to exist.

²⁰ UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo.

Article 281 sets out conditions that must be met for detention on remand:

(1) The court may order detention on remand against a person if:

- 1) There is a grounded suspicion that such person has committed a criminal offence;
- 2) One of the following conditions is met:
 - i) He or she is in hiding, his or her identity cannot be established or other circumstances indicate that there is a danger of flight;
 - ii) There are grounds to believe that he or she will destroy, hide, change or forge evidence of a criminal offence or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, injured parties or accomplices; or
 - iii) The seriousness of the criminal offence, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted criminal offence or commit a criminal offence which he or she has threatened to commit; and
- 3) The other measures listed in Article 268 paragraph 1 of the present Code would be insufficient to ensure the presence of such person, to prevent re-offending and to ensure the successful conduct of the criminal proceedings.

(2) When detention on remand is ordered pursuant to paragraph 1 subparagraph 2 point

(i) of the present article solely because a person's identity cannot be established, it shall be terminated as soon as identity is established. When detention on remand is ordered pursuant to paragraph 1 subparagraph 2 point (ii) of the present article, it shall be terminated as soon as the evidence on account of which detention on remand was ordered has been taken or secured.

(3) If the defendant has violated one of the measures under Articles 271, 272, 273, 274 or 278 of the present Code, this shall be taken into particular consideration by the court when establishing the existence of circumstances under paragraph 1 subparagraphs 2 and 3 of the present article.

Under Article 281 of the Provisional CPC, remanding a suspect in custody depends both on the gravity of the offence and other circumstances. The court issues

a written warrant on detention (Art. 283 (1), Provisional CPC). The warrant is served on the person concerned, his/her counsel and the public prosecutor. The time when the warrant was served is entered in the case file (Art. 283 (2), Provisional CPC). Either party may appeal against detention within 24 hours from the time the warrant was served. The appeal, which must be reviewed within 48 hours, does not stay the enforcement of the warrant (Art. 283 (3), Provisional CPC).

The Provisional CPC details the powers of the police in investigation proceedings in Articles 200–207 and in Chapter XXIV on provisional arrest and police detention. Article 210 authorises the police to arrest a person “caught in the commission of a crime prosecuted *ex officio* or being pursued” without a court warrant.

Article 210 is specific inasmuch as its first sentence envisages that the police or “any other person” is authorised to provisionally arrest a person caught in the commission of a crime *ex officio* or being pursued. The second sentence in the Article however causes major legal and practical confusion by stipulating that “a person deprived of liberty by persons other than the police shall be immediately turned over to the police, or, where that proves impossible, the police or the public prosecutor shall be notified of the arrest immediately.”

The Code does not define “any other person authorised to arrest” or “persons other than the police”. This leaves room for various interpretations and different conduct in the field which may prove extremely disputable in terms of violation of the prohibition of arbitrary arrest and deprivation of liberty.

3.3. Right to be informed about the reasons for arrest and the charges. – The right to be informed about the reasons for arrest and the charges are included in national legislation, notably in the Provisional CPC, which are fully in conformity with international standards.

Rights of persons provisionally arrested and placed in police detention are detailed in Article 214 of the Provisional CPC of Kosovo. They include the rights:

- To be informed about the reasons for the arrest in a language s/he understands;
- To remain silent and not to answer any questions except to give information about his or her identity;
- To be given the free assistance of an interpreter if s/he cannot understand or speak the language of the police;
- To receive the assistance of defence counsel and to have defence counsel provided if s/he cannot afford legal assistance.
- To notify or have the police notify a family member or other persons of his/her choice of the arrest; and
- To a medical examination and treatment, including psychiatric treatment.

Under Article 212 (6), “an arrested person shall have the right to appeal a decision in Paragraph 5 of this Article to the pre-trial judge. The police and the public prosecutor are obliged to ensure that the appeal is delivered to the pre-trial judge. The appeal shall not stay the execution of the decision. The pre-trial judge shall decide on the appeal within 48 hours of the arrest.”

The above rights are also applicable to detention on remand, and the above mentioned Article 288 then applies. Only restrictions serving to prevent escape or communication that may jeopardise the efficient conduct of proceedings may be applied against a person detained on remand.

3.4. Right to be brought promptly before a judge. – Article 14 (2) of the Provisional CPC envisages that “a person deprived of liberty on suspicion of having committed a crime shall be brought before a judge promptly and within 72 hours of arrest at the latest, and shall be entitled to a trial within a reasonable time or to release pending trial”. It is extremely difficult to establish what 'reasonable time' implies. In practice, it ranges from several months to over one year. In civil cases, however, the situation is even more alarming, as 'reasonable time' sometimes lasts several years.

Article 279 (2) envisages that detention on remand, as the most drastic security measure, is of minimum duration and stipulates that “all agencies participating in criminal proceedings and agencies providing them legal assistance are obliged to proceed with special urgency if the accused is held in detention on remand.”

Detention on remand is ordered by a pre-trial judge on the written motion of the public prosecutor and after a hearing (Art. 282 (1)). The Provisional CPC in Article 284 envisages that a person may be detained on remand for a maximum of 30 days since the day of arrest by the initial order. Detention on remand cannot exceed three months if the detainee is suspected of having committed a crime carrying less than five-year imprisonment or six months if the crime carries minimum five-year imprisonment. In addition to these deadlines, detention on remand can be extended to 6 and maximum to 9 months if the detainee is suspected of having committed a crime warranting less than 5-year imprisonment and to 12 months in event of a crime carrying minimum five-year imprisonment. If an indictment is not raised before the expiry of these deadlines, the detained person shall be released.

3.5. Right to Compensation of Damages for Illegal Deprivation of Liberty. – Chapter XLIX of the Provisional CPC sets out the procedure for compensation, rehabilitation and exercise of other rights by unlawfully convicted or arrested persons. These rights may be exercised by a person on whom an unjust criminal penalty has been imposed by a final judgment and by a person found guilty whose penalty was later waived, and the retrial following resort to an extraordinary legal

remedy was discontinued by a final decision or s/he was acquitted by a final judgment or if the charges against him/her were dismissed, except in the following instances:

- When the proceedings were terminated or a judgment rejecting the charges was rendered because the subsidiary i.e. private prosecutor abandoned criminal prosecution during the retrial or the injured party withdrew the motion and the act of abandoning or withdrawal was effected in agreement with the defendant; or,
- When a judgment is rendered dismissing the charges because the court was declared incompetent at the retrial and the authorised prosecutor instituted prosecution before the competent court.

The right to compensation shall expire three years from the entry into force of the first-instance judgment acquitting the defendant or rejecting the charges. If the defendant was acquitted following an appeal decided by a higher court, the right to seek compensation shall expire three years from the day of receipt of the decision of that court.

Administrative and judicial proceedings must be formally conducted prior to realising the right to compensation. In administrative proceedings, a person seeking compensation of damages files a petition with the competent public judicial body with the aim of achieving agreement on the existence of damages and the form and amount of compensation (Art. 535 (2)).

If the petition is dismissed or partly upheld or an agreement is not reached within three months, the person seeking compensation files a compensation claim against the competent public judicial body before a regular court (Art. 536 (1–3)).

These legal provisions are formal in nature and in conformity with international standards. It is however nearly impossible to implement them in practice in Kosovo. Only the administrative proceedings envisaged by Article 535 (2) of the Provisional CPC can actually be conducted in Kosovo. The petition is filed with the UNMIK Department of Justice whose Commission for Compensation decides on the petition, albeit not always within the 3-month deadline.²¹ The compensation procedure in practice ends with the Department of Justice decision i.e. assessment of sustained damage and offer of compensation.

A petitioner dissatisfied with the offered compensation cannot file a compensation claim with a regular court because of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo which protects the Department of Justice and grants it and its staff full immunity before local judicial bodies.

21 Case of Afrim Zeqiri. Although Zeqiri filed a petition over two years ago, he has not yet been compensated for unlawful deprivation of liberty that lasted over 700 days.

When such suits are filed, the courts as a rule declare themselves incompetent to adjudicate the legal matter. On the other hand, if the Department of Justice upholds the petition for compensation, the awarded compensation is in practice minimal (15 Euros per day of illegal deprivation of liberty).

Institutional violations of human rights in Kosovo will probably be rectified by the establishment of the Justice Ministry which will operate within the Kosovo Government.

The right to rehabilitation is envisaged by Articles 539–541 of the Provisional CPC: “If a case of an unjustified penalty or groundless arrest of a person was publicised by the media and the reputation of the person was thereby damaged, the court shall upon the request of the person publish in the newspaper or another public media a report on the decision clarifying that the penalty was unjustified or the arrest was groundless ...”.²² The request must be filed with the court that conducted the trial in the first instance within six months.

Article 542 of the Provisional CPC envisages the realisation of other rights pertaining to employment and social insurance rights of persons unlawfully deprived of liberty. The length of service i.e. social insurance during the illegal deprivation of liberty shall be counted as if the person illegally deprived of liberty were employed i.e. insured during that period.

4. Right to a Fair Trial and the State of the Judiciary

4.1. Independence and impartiality of courts. – The independence and impartiality of courts is mentioned in Chapter 9 (Art. 4 (3)) of the Provisional Constitutional Framework, which envisages that “Each person shall be entitled to have all issues relating to his rights and obligations and to have any criminal charges laid against him decided within a reasonable time by an independent and impartial court.” How is this independence and impartiality achieved in Kosovo i.e. what mechanisms are in place to ensure that Kosovo courts have those attributes?

Some provisions in the Constitutional Framework relating to the judiciary give rise to dilemmas. Chapter 5 lists the responsibilities of the Provisional Institutions in Kosovo in many areas of life. Article 5 (3a) says that the Assembly of Kosovo will make “decisions regarding the appointment of judges and prosecutors”, whereas Chapter 8 (Art. (1j)) says that “exercising authority over law enforcement institutions and the correctional service, both of which include and are supported by local staff” is a power reserved to the SRGS. Hitherto practice has shown that

²² Case of Ejup Makolli. The footage of Makolli’s arrest in his home was publicly broadcast on RTK-TV UNMIK. Investigation of Makolli was discontinued for lack of evidence. Although a request for rehabilitation was filed, the court did not act in accordance with the provisions of the Provisional CPC.

Article 5 (3.a) was merely formally included in the Constitutional Framework and that the SRGS alone appoints judges and prosecutors nominated and recommended by the Judicial and Prosecutorial Council set up under Regulation No. 2001/8 of 6 April 2001.

Under UNMIK Regulation No. 2005/52 of 25 December 2005, the Judicial and Prosecutorial Council was replaced by the recently established Kosovo Judicial Council, comprising 11 members – 7 judges and 4 persons of other professions. However, despite the “delegation of powers”, the SRGS again has the final say on the appointment of judges (Art. 1 (1.5)).

Assignment of judges is also a “reserved power” and Judicial and Prosecutorial Council need not heed court staffing requirements. This has resulted in paradoxical situations. For instance, the Priština Municipal Court, covering an area populated by over 500,000 citizens, has the same number of judges as the other municipal courts (Prizren, Peć, Mitrovica) with half the population.

One of the consequences of the lack of judges in certain courts is the fact that when a District Court remits a case for reconsideration to a Municipal Court, the case is often still reconsidered by the same panel of judges that issued the disputed decision in the first place. This raises problems of objective partiality of the judges and often leads to a constant back and forth of cases between the two instances, as the Municipal Court judges will then not see why they should decide differently than the first.

Judges mostly complain about the lack of adequate working conditions.²³ It is extremely difficult to abide by international standards, such as independence and impartiality, if the court lacks enough courtrooms for the professional conduct of hearings. In many cases, the judges are forced to conduct the hearings and the whole proceedings in their offices.

Another factor undermining court independence and impartiality is the low remuneration of local judges and prosecutors, leaving them more susceptible to various forms of pressure exerted by the parties to the proceedings. International judges and prosecutors do not have this problem. But there are no mechanisms to control their work. UNMIK Regulation No. 2000/6 on Appointment and Removal of International Judges and Prosecutors, supplemented by UNMIK Regulation No. 2000/34, regulates the issue of removal of international judges and prosecutors in case of serious misconduct, failure in the due execution of office or placement by personal conduct or otherwise in a position incompatible with the due execution of

23 “We know that we are constantly violating the fair trial principles contained in Article 6 of the European Convention on Human Rights” (statement of a District Court President given to the Ombudsperson in Kosovo). But it is impossible to adhere to international human rights standards if, for example, there are simply not enough hearing rooms to conduct proper hearings in all cases before the courts. Often, judges are obliged to hold hearings in their offices. Fifth Annual Report of the Ombudsperson, Pristina, 2005.

office. In practice, however, there is no body that would investigate allegations of abuse or other above-mentioned cases.

4.2. *Fair trial.* – A fair trial entails several stages in the proceeding that may be grouped into: access to a court, public hearing, adversariness and trial within a reasonable time.

Access to a court is in a sense guaranteed by Chapter 9 (Art 4.3) of the Constitutional Framework, under which “Each person shall be entitled to have all issues relating to his rights and obligations and to have any criminal charges laid against him decided within a reasonable time by an independent and impartial court.” Right of access to a court can be indirectly concluded from the use of the word “every”. In practice, however, access to a court, as one of the main prerequisites of a fair trial, was on several occasions violated in Kosovo for various reasons.

The immunity of UNMIK and KFOR and their staff, proclaimed by UNMIK Regulation No. 2000/47, is the first example of violation of the principle of access to a court. As has already been explained, proceedings against UNMIK, KFOR or their staff cannot be initiated before local or international courts.

Also, a large number of initiated proceedings, mostly civil cases, have been ground to a halt by the court taxes which are extremely high *vis-à-vis* the low economic power of the Kosovo population.

Kosovo is probably the only part of Europe where access to a court is rendered difficult for physical reasons, because it is impossible or difficult to physically access a court. This is evident in Mitrovica, where all legal judicial bodies (the Municipal, District and Misdemeanour Courts) are headquartered in the northern part of town, and are for well-known reasons nearly inaccessible to the residents of the southern part of Mitrovica, i.e. Albanians. Serbs trying to access legal courts in areas mostly populated by Albanians encounter the same difficulties.

Adversariness, as one of the most important element of a fair trial, is guaranteed by the Provisional CPC. Article 10 of the Provisional CPC envisages that “the defendant has the right and shall be allowed to make a statement on all the facts and evidence which incriminate him or her and to state all facts and evidence favourable to him or her. He or she has the right to examine or to have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.” In that sense, Article 142 (1) stipulates that “At no stage in the proceedings may the defence be refused inspection of records of the examination of the defendant, material obtained from or belonging to the defendant, material concerning such investigative actions to which defence counsel has been or should have been admitted or expert analyses.” Paragraph 2 of the Article enables the defence counsel to inspect, copy or photograph all records and physical evidence upon completion of the investigation.

The principle of adversariness is the most evident at the oral main hearing. The principle set out in Article 10 (1) of the Provisional CPC of Kosovo, under which the defendant and the prosecutor have the status of equal parties, is elaborated in provisions on both first-instance and second-instance court proceedings. Article 410 of the Provisional CPC of Kosovo prescribes that notice of a second-instance judicial panel session shall be served both upon the competent public prosecutor and the accused and his or her defence counsel. If the second-instance proceedings comprise a hearing, both the prosecutor and accused i.e. his defence counsel shall be summoned to court (Art. 412 (1)).

4.3. Trial within a reasonable time. – In terms of international legal documents, this principle is guaranteed in Kosovo by Article 6 of the ECHR and Article 14 (3c) of the ICCPR. In terms of national legislation, it is enshrined in Article 5 (2) of the Provisional CPC, under which “The court shall be bound to carry out proceedings without delay and to prevent any abuse of the rights of the participants in proceedings.” Paragraph 1 of Article 392 is also relevant in that respect, as it prescribes that “The judgment shall be announced by the presiding judge immediately after the court has rendered it. If the court is unable to render judgment on the day the main hearing is completed, it shall postpone the announcement by a maximum of three days and shall determine the time and place for the announcement of the judgment.”

The principle of rendering a judgment within the legal deadline applies to all types of disputes. However, reasonable time or length of proceedings is especially important in criminal trials, lawsuits relating to labour issues, usurpation of property, issuance of decisions on temporary measures – i.e. in all “urgent proceedings”.

Kosovo courts cannot, however, pride themselves in strict abidance by the principle of holding trials within a reasonable time. Large backlogs, small numbers of judges, insufficient financial stimulation of judges and judicial staff (low salaries), lack of professional court experts, these are merely some of the reasons why court adjudication, especially of civil cases, lasts for years. The courts in Kosovo also have large backlogs of labour-related disputes. Although these disputes warrant 'urgent proceedings', several years usually pass from the filing of a lawsuit until the rendering of a final decision.²⁴

Difficulties in execution, especially of legally binding decisions on compensation of material and non-material damages, is another major problem the parties whose claims were upheld face once the long proceedings are finally completed.

4.4. Public hearing and public judgment. – Hearings in criminal and civil trials in Kosovo are in principle public. Under the Provisional CPC, the main

²⁴ Muharem Osmani case. A final decision on the labour dispute against RTK initiated in 2001 was rendered and executed in 2005. The procedure for obtaining compensation of personal income during illegal termination of employment is under way.

hearing is as a rule public, except in specific cases, either *ex officio* or at the request of a party to the proceedings. Public hearings are envisaged by Article 328 of the CPC under which:

The main hearing shall be held in open court.

The main hearing may be attended by adult persons.

Persons attending the main hearing may not carry arms or dangerous instruments, except the guards of the accused who may be armed.

Articles 329–331 lay down when the trials are not open to the public. Article 329 lists the reasons for barring the public from the trial and they include: protecting official secrets, maintaining the confidentiality of information which would be jeopardised by a public hearing, maintaining law and order, protecting the personal or family life of the accused, the injured party or of the other participants in the proceedings, protection of the interests of children, or protecting injured parties and witnesses as provided for in Chapter XXI of the CPC. (NB Chapter XXI pertains to the protection of injured parties and witnesses)

The decision on barring the public from a trial is rendered by a separate decision of the judicial panel. It can be appealed only within the appeal of judgment. All of Chapter XXI of the CPC regulates the protection of injured parties and witnesses. Under provisions in Articles 168–174, each participant in the proceedings may at any stage file a written petition with a judge for a protective measure or order for anonymity if there is serious risk to the injured party, witness or his or her family member. The judge shall order such a measure if s/he determines there exists a serious risk to the injured party, witness or his or her family member and the protective measure is necessary to prevent serious risk to the injured party, witness or his or her family member.²⁵

In civil lawsuits, the Civil Procedure Act that was valid on 22 March 1989 still applies in Kosovo as the Assembly of Kosovo still has not adopted a new Civil Procedure Code. The CPA envisages public trial in Article 306. The same Article envisages that only adults, who may not be armed, unless they are officially

25 The judge has at his or her disposal the following protective measures: omitting or expunging names, addresses, place of work, profession or other data or information that could be used to identify the injured party or witness; non-disclosure of any records identifying the injured party or witness; efforts to conceal the features or physical description of the injured party or witness giving testimony, including testifying behind an opaque shield or through image or voice-altering devices; contemporaneous examination in another place communicated to the courtroom by means of closed-circuit television or video-taped examination prior to the hearing with the defence counsel present; assignment of a pseudonym; closed sessions to the public in accordance with Article 336 of the CPC, orders to the defence counsel not to disclose the identity of the injured party or witness or not to disclose any materials or information that may lead to disclosure of identity; temporary removal of the defendant from the courtroom if a witness refuses to give testimony in the presence of the defendant or if circumstances indicate to the court that the witness will not speak the truth in the presence of the defendant; or any combination of the above methods to prevent disclosure of the identity of the injured party or witness.

guarding the participants in the proceedings, may attend the trials. It also envisages in Article 307 excluding the public from the trial for the reason of keeping an official secret. A decision on barring the public from a trial is reached by the judicial panel and may not be appealed.

Public pronouncement of court judgments is in conformity with Article 6 of the ECHR. Under Article 392 (2) of the Provisional CPC, “The presiding judge shall read the enacting clause of the judgment in open court and in the presence of the parties, their legal representatives and authorised representatives and the defence counsel after which he or she will give a brief account of the grounds for the judgment.” Paragraphs 3 and 4 of Article 392 allow for public pronouncement of the judgment when a participant in a proceeding is absent or when the public was excluded from the trial.

Article 335 of the CPA envisages the pronouncement of judgment in the name of the people. When the trial is heard by a judicial panel, the judgment is rendered by the presiding judge and members of the panel immediately after the trial. In complex cases, the judicial panel may pass a judgment 8 days from the day of the trial. In such cases, the judgment is not pronounced and transcripts of the judgment are served upon the parties.

The courts in Kosovo absolutely do not abide by the principle of pronouncement of a judgment, i.e. the deadlines by which they are to pronounce or serve judgments. In practice, the deadline is usually exceeded by minimum several weeks.

The principles of public hearing and pronouncement of judgment are formally fully in conformity with international principles. They are mostly applied in practice as well, but sometimes the judges do not respect them for objective reasons, mostly because of lack of courtrooms, especially in civil law cases. These two principles are drastically violated in administrative disputes before the Supreme Court of Kosovo.

4.5. Prompt informing of accusations in a language the accused understands.

– Under the Provisional CC, the accused must be informed of the criminal accusations levelled against him or her and all material evidence in a language s/he understands.

Chapter I “Fundamental Principles” of the Provisional CPC ensures this right by stipulating that every person deprived of liberty shall be informed promptly, in a language she or he understands, of the reasons for the arrest, the right to legal assistance of his or her choosing and to the right to notify or to have notified a family member or another person of his or her choosing of the arrest.

The Provisional CPC sets out that Albanian, Serbian and English languages and scripts shall be used in criminal proceedings in Kosovo (Art. 15 (1)).

Any person participating in criminal proceedings, who does not speak the language of the proceedings, shall have the right to speak his or her own language

and the right to be informed through interpretation, free of charge, of the evidence, the facts and the proceedings. Interpretation shall be provided by an independent interpreter (Art. 15 (2)).

In view of the specific situation in Kosovo, this right sometimes impedes or excessively prolongs the proceedings. This is the most evident in criminal trials adjudicated by an international judge in English, with an e.g. Albanian prosecutor speaking Albanian and a Serb defendant speaking Serbian or a member of another ethnic community speaking his or her language (Roma, Turkish, Gorani et al.).

True chaos and even comical situations can ensue in such cases, also because the interpreters frequently lack the adequate professional and interpreting skills. In essence, such situations greatly slow down and render the conducting of the trial difficult.

4.6. Reasonable time to prepare one's defence and right to a defence counsel.

– The Provisional CPC envisages 8 days as enough time to prepare one's defence; moreover, it allows for shortening but not for extending the deadline. Under Article 321 (3), “The accused shall be served with the summons no less than eight days before the main hearing so as to have sufficient time between the service of the summons and the day of the main hearing to prepare his or her defence. At the request of the accused, or at the request of the prosecutor and with the agreement of the accused, this prescribed period of time may be shortened.”

Time needed to prepare one's defence is even shorter in summary proceedings (Chapter XL). Under Article 469 (3), “The summons shall be served on the accused so that between the service of the summons and the day of the main hearing there remains sufficient time for the preparation of a defence, and at least three days. This period of time may be shortened subject to the consent of the accused.”

The right to contact a defence counsel is guaranteed by the Provisional CPC and is in full conformity with international principles. Article 214 (1.4) envisages that a person deprived of liberty is entitled to a defence counsel or shall have one provided if s/he is unable to afford legal assistance. “During all examinations by the police, an arrested person has the right to the presence of his or her defence counsel. If the defence counsel does not appear within two hours of notification of the arrest, the police shall arrange alternative defence counsel for him or her. Thereafter, if the alternative defence counsel does not appear within one hour of contact by the police, the arrested person may be examined only if the public prosecutor or the police determine that further delay would seriously impair the conduct of the investigation.” Under Article 282 (4), “If the arrested person fails to engage his or her own defence counsel within twenty four hours of being informed of the right or declares that he or she will not engage a defence counsel, the court shall appoint him or her a defence counsel *ex officio*.”

The court is obliged to provide an accused with defence counsel in two instances: if an accused must have a defence counsel and has not engaged one and if the accused cannot afford to pay legal assistance (institute of indigence).

In general, every person deprived of liberty has the right to a defence counsel from the moment of arrest until the final judgment is rendered. This is fully in keeping with international principles and standards.

4.7. Right to summon and examine witnesses. – As the accused and prosecutor have equal status in criminal proceedings under Article 10 (1) of the Provisional Code, they are equally entitled to propose and examine witnesses. Under Article 10 (2) of the CPC, the accused is entitled to examine or have examined the witnesses against him or her and the right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as the witnesses against him or her. Witnesses are summoned in writing; in addition to the basic elements, the summons *inter alia* includes a warning about the consequences of unjustifiable non-compliance with the summons. A witness under 16 years of age is summoned via his or her parents or legal guardian.

The witness examination procedure is set out in Article 165 (paras. 1 and 2) under which first the prosecutor examines the witnesses s/he summoned and then the defence counsel examines the witnesses s/he summoned. Each party is provided with the opportunity to cross-examine the witnesses of the adversary party. After the examination, the presiding judge and panel members may direct questions to the witnesses. If the witness was summoned by the court, s/he shall first be examined by the presiding judge. Testimonies may be heard outside the court only in specific circumstances, such as serious illness, old age or severe disability (Art. 163 (3)). The Provisional CPC sets out which categories of privileged witnesses may not be questioned in capacity of witness (Art. 159) and which are relieved of the obligation to testify (Art. 160). This categorisation is in keeping with international standards.

4.8. Right of appeal. – The right of appeal is guaranteed both by criminal and civil law in Kosovo. Two-instance proceedings are guaranteed without exception and the law allows for three-instance proceedings in specific cases.

Apart from appeal as an ordinary legal remedy, the parties to the proceedings are also entitled to resort to extraordinary legal remedies, which, as a rule, do not stay the enforcement of legally binding decisions. This principle, which is fully in conformity with international principles, does not apply only in cases heard before the Special Chamber of the Kosovo Supreme Court which settles disputes challenging Kosovo Trust Agency privatisation decisions. A person, who believes his or her right has been violated during the privatisation procedure, is obliged to file an appeal in a language s/he speaks but also in a language s/he does not speak (eight copies of the appeal in English and 8 copies in Albanian or Serbian).

A decision reached by the five-member Chamber judicial panel comprising 3 international and 2 national judges is reached by a simple majority. It is final and

cannot be challenged before any national or international court of law. Appeals to the Chamber are allowed only in cases envisaged in Article 4 (paras. 2 and 3) of UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters:

Article 4.2:

Notwithstanding section 4.1, the Special Chamber may refer specific claims, categories of claims or parts thereof, to any court having the required subject matter jurisdiction under applicable law. No court in Kosovo shall exercise jurisdiction over a claim involving the subject matter described in section 4.1 unless such claim has been referred to it in accordance with this section.

Article 4.3:

A decision of a court to which a matter has been referred by the Special Chamber pursuant to section 4.2 may be appealed only to the Special Chamber, unless the Special Chamber decides otherwise in accordance with the procedural rules to be promulgated under section 7.

Despite UNMIK's attempt to temper the violation of the right of appeal by this Article, the decision-making procedure in the Special Chamber is the most glaring example of institutional violation of the right to appeal and the right to a fair trial in general.

4.9. Treatment of juveniles in criminal proceedings. – The whole juvenile justice system, including treatment of minors in Kosovo, is regulated by the Juvenile Justice Code of Kosovo that entered into force on 20 April 2004. Under the Code, “Every child deprived of liberty shall be treated with humanity and the inherent respect for the dignity of the human person and in a manner which takes into consideration the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances as defined by the law. Provisions of the Kosovo Provisional Criminal Code, Criminal Procedure Code and Law on the Execution of Penal Sanctions shall apply to juveniles unless otherwise envisaged by this Law.” (Art. 4). All rights guaranteed to accused adults are guaranteed also to juveniles; juvenile offenders in specific situations enjoy special protection, such as obligatory exclusion of the public from their trials (Art. 47 (paras. 1 and 4)).

4.10. Treatment of perpetrators with mental disorders. – UNMIK Regulation No. 2004/34 regulates Criminal Proceedings Involving Perpetrators with a Mental Disorder. Under the Regulation, mental disorder entails any disability or disorder of mind or brain, either permanent or temporary, which results in an impairment or

disturbance of mental functioning. A perpetrator with a mental disorder or a person, who is being treated as such, shall be treated with humanity and respect for the inherent dignity of the human person (Art. 2 (1)). The measures that may be imposed on a perpetrator who has committed a criminal offence while in a state of mental incompetence or in a state of diminished mental capacity include mandatory psychiatric treatment and custody in a health care institution or mandatory psychiatric treatment at liberty. A criminal sanction in accordance with the Provisional Criminal Code may also be imposed on a perpetrator who has committed a criminal offence in a state of diminished mental capacity if the grounds for imposing such a criminal sanction exist.

Criminal proceedings are instituted against such perpetrators *ex officio*. They may be detained on remand only on the motion of the public prosecutor. Such persons are held in custody in a health care institution and it may last as long as the defendant is dangerous but shall not exceed prescribed periods of time for detention on remand set forth in Article 284 of the Provisional CPC.

If the court rules that a defendant is incompetent to stand trial during the course of the proceedings due to a permanent mental disorder, it shall issue a decision to dismiss the proceedings. If the court rules that a defendant is incompetent to stand trial during the course of the proceedings because he or she has become afflicted by a temporary mental disorder after committing the criminal offence, the investigation shall be suspended or the main hearing shall be adjourned in accordance with the Provisional CPC (Arts. 223 and 344). Prior to the opening of the main hearing, the public prosecutor shall file a motion that the court impose a measure of mandatory psychiatric treatment, if the defendant has committed a criminal offence in a state of mental incompetence and the grounds for imposing such a measure exist, as provided in Sections 4 and 5 of the present Regulation.

5. Right to Peaceful Enjoyment of Property

5.1. General. – The right to peaceful enjoyment of property has been the most frequently violated fundamental human right in Kosovo. Although its protection was incomparably better in 2005 than in the previous years, the situation still cannot be qualified as satisfactory.

5.2. Legislation. – The right to peaceful enjoyment of property is formally regulated both by international legal instruments and a number of national laws.

Article 17, UDHR:

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his 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.

National legislation regulating the right to property comprises a number of laws that were in force in Kosovo on 22 March 1989 and are applicable now and laws adopted by the Kosovo Assembly.²⁶ Since its constitution in December 2001, the Assembly of Kosovo has passed the following laws: Law on Mortgages, Law Establishing the Immovable Property Rights Register, Law Establishing Taxes on Immovable Property, the Law amending the Law Establishing the Immovable Property Rights Register, Law on Spatial Planning, Law on Cadastre, Law on Construction and Law on Inheritance.

5.3. *Role of International Institutions.* – UNMIK Regulation No. 1999/10 on the Repeal of Discriminatory Legislation Affecting Housing and Rights in Property abolished the following laws that were not in conformity with international standards: Law amending the Law on the Limitation of Real Estate Transactions (*Sl. glasnik RS*, No. 22/91) and the Law on the Conditions, Ways and Procedures of Granting Farming Land to Citizens Who Wish to Work and Live in the Territory of the Autonomous Province of Kosovo and Metohija (*Sl. glasnik RS*, No. 43/91).

The following UNMIK regulations constitute a separate chapter regulating protection of property in Kosovo: Regulation No. 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission, Regulation No. 2000/60 on Residential Property Claims and The Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, Regulation No. 2002/12 on the Establishment of the Kosovo Trust Agency and Regulation No. 2002/13 on the Establishment of a

26 The laws that were valid in Kosovo on 22 March 1989 and are now applicable comprise: Law on Basic Property Relations (*Sl. list SFRJ*, 6/80), Law on Real Estate Sale (*Sl. list SAPK*, 45/81, 29/86 and 28/88), Law on Registration of Socially-Owned Real Estate (*Sl. list SAPK*, 37/71), Law on Expropriation (*Sl. list SAPK*, 21/78 and 42/86), Law on Land for Construction (*Sl. list SAPK*, 14/80 and 42/86), Law on Construction of Facilities for Investment/Commercial Purposes (*Sl. list SAPK*, 5/86), Law on Forests (*Sl. list SAPK*, 10/87), Law on Measurement and Land Cadastre (*Sl. list SAPK*, 12/80), Law on Housing Relations (*Sl. list SAPK*, 11/83, 29/86 and 42/86), Law on Co-ownership of Apartments (*Sl. list SAPK*, 43/80 and 42/87) and Law on Construction of Annexes to Buildings and Conversion of Common Premises into Apartments (*Sl. list SAPK*, 14/88).

Special Chamber of the Kosovo Supreme Court on Kosovo Trust Agency Related Matters.

HPD has exclusive jurisdiction to address most property-related claims, which fall into three categories:

- Claims by persons deprived of property rights on the basis of discriminatory legislation (Category A);
- Claims by persons who wish to legalise informal transactions of real property made in the past (Category B);
- Claims by persons who do not enjoy the possession of the property as a consequence of the war in Kosovo (Category C).

The Kosovo Trust Agency has sole jurisdiction over the management of all socially-owned and public enterprises in Kosovo and exclusive jurisdiction over the privatisation of socially owned property. The Kosovo Supreme Court's Special Chamber is charged with adjudicating all disputes against the Kosovo Trust Agency and its management and privatisation actions.

The above overview of international and local property-related legislation shows this area is formally well regulated. However, the practical exercise of property rights in Kosovo cannot be qualified as satisfactory.

5.4. Realisation of Property-Related Rights in Practice. – The vast majority of illegally occupied property belongs to the Serbs who had fled Kosovo in 1999 after the deployment of international troops in Kosovo. Property owned by members of other minorities, primarily Roma, but also of Albanians in northern Kosovo, is also illegally occupied.

Tenancy rights in socially-owned apartments are the most jeopardised property-related right in Kosovo. HPD has to date received a total of 29,133 claims, 28,153 of which it processed by November 2005; 11,209 of its decisions have been enforced. HPD was to have processed all claims by end 2005, when its mandate expires.²⁷ These claims regard only violations of tenancy rights in socially-owned apartments. Indicators of other violations of property-related rights, notably illegal occupation of business premises and privately owned farmland, remain unknown.

Data on illegally occupied collective (socially-owned) property are unavailable. The Priština municipal public solicitor, alone, filed over 200 claims for restitution of illegally occupied socially-owned property with the competent court; the claims regard only the illegally occupied land which the Priština Municipality is entitled to use.

²⁷ HPD Report, Priština 2005.

5.5. *Reasons for the Unsatisfactory Situation.* – There are a number of reasons why the right to peaceful enjoyment of property is violated to such a degree in Kosovo. The institutional vacuum created in Kosovo after the war was conducive to such violations. The major destruction of property during the war also inevitably resulted in illegal occupation of property. Furthermore, the 11 laws that were in effect in Kosovo on 22 March 1989 and are thus still applicable are implemented selectively; some of the laws are applied by the competent bodies,²⁸ others are not.²⁹

Court proceedings involving protection of property are extremely slow. For instance, it usually takes the court several years to reach a final decision on an ownership claim. Execution of final judgments faces major subjective and objective difficulties. The situation is additionally aggravated by the dissatisfactory security situation and safety afforded national minority members, especially Serbs and Roma, who are unable to access their property vacated by the persons who had illegally occupied it, as well as by the dire economic situation in Kosovo, preventing persons who can and wish to return to their property from earning a living, et al.

5.6. *Flaws Observed in the Work of International Bodies.* – Despite their unquestionable results, the competent international bodies have continued with their happenstance approach to addressing the numerous property-related problems in Kosovo.

The work of HPD suffers from several shortcomings, some of which constitute glaring violations of fundamental human rights. The processing of claims is extremely slow, the work of the HPD is totally non-transparent. The HPD has applied double standards in processing the claims by giving precedence to non-Albanian claimants. No data are available on the claims filed by Albanians seeking restitution of their property illegally occupied by Serbs and other members of minority communities in northern Kosovo. The first decision on restitution of illegally occupied property in this part of Kosovo was reached only in November 2005.

The procedure conducted before the HPD constitutes a violation of the fundamental human right to an effective legal remedy. A first-instance HPD decision may be appealed with the HPD Commission as the second-instance body. The Commission's decision is final and enforceable and the unsatisfied party is not entitled to initiate judicial or administrative proceedings against it. Therefore, the whole procedure is conducted within the walls of the HPD.

As per the Special Chamber of the Supreme Court of Kosovo, UNMIK Regulation No. 2002/13 (Art. 9 (7)) establishes that “A decision adjudicating a claim under section 4.1 or deciding an appeal pursuant to section 4.3 is final and binding

28 Law on Basic Property Relations, Law on Real Estate Sale.

29 Law on Housing Relations, Law on Construction of Annexes to Buildings and Conversion of Common Premises into Apartments.

on the parties and shall be executed by the appropriate executive authorities in accordance with the Applicable Law.” This obviously also constitutes a violation of the right to an effective legal remedy.

Appeal is allowed only by “a decision of a court to which a matter has been referred by the Special Chamber pursuant to section 4.2”. An appeal may be filed “only to the Special Chamber unless the Special Chamber decides otherwise in accordance with the procedural rules to be promulgated under Section 7.” There is no doubt that such competences of a judicial body are a novelty in contemporary theory and practice.

As mentioned above, UNMIK Regulation No. 1999/10 repealed two laws, including the Law Amending the Law on the Limitation of Real Estate Transactions. The latter law and its provisions were qualified as discriminatory. Only a year later, UNMIK passed Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo which is nearly identical to the repealed law. The only difference is that approval for the sale and purchase of property is now issued by the international Municipal Administrator and not the Justice Ministry (Property Affairs Department), as the repealed Law envisaged.

The right of access to a court is also violated. Members of the Serbian national entity have filed between 17 and 20 thousand compensation claims for destroyed property with nearly all municipal courts in Kosovo. Almost all claims hold UNMIK, KFOR and the Kosovo Government responsible. The filed claims have been lying in the court clerks' offices for several years now but no proceedings have been initiated with regard to them because the UNMIK Department of Justice had passed an internal decision prohibiting such proceedings for undisclosed reasons.

5.7. Other Violations of the Right to Peaceful Enjoyment of Property. – This report gives priority to violations of the right to peaceful enjoyment of immovable property which is the predominant form of violation of property rights in Kosovo. However, other property-related rights are also violated in Kosovo.

More than 90,000 pensioners in 2005 remained deprived of the right to a lawfully acquired pension earned by decades of work and payment of contributions after the Republic of Serbia Pension and Disability Fund reached a unilateral decision to halt the payment of their pensions in 1999. All these people had acquired the status of pensioner before the armed conflicts in Kosovo.

To ease the situation and alleviate the financial difficulties of pensioners in Kosovo, the Kosovo Assembly in July 2002 passed the Basic Law on Pensions, which came into effect on 26 July 2002. Under the Law, all citizens of Kosovo over 65 years of age are entitled to a pension. The pensions are symbolic, standing at a mere 40 Euros.

The fact that the described violations of the right to peaceful enjoyment of property are perpetrated solely on ethnic grounds causes the greatest concern. While the former violations are perpetrated mostly against non-Albanian citizens, primarily Serbs, the latter are perpetrated exclusively against Albanian citizens, because non-Albanian pensioners have been receiving their pensions regularly.

6. Minority Rights

6.1. General. – The definition of a minority community in Kosovo sometimes depends on the area referred to. In most municipalities, Albanians are in the majority, while all other non-Albanian communities are in the minority.

Minorities account for the majority population in a few municipalities, notably, all the municipalities in northern Kosovo (Leposavić, Zubin Potok, Zvečan and the northern part of Mitrovica which does not have the status of a municipality), and the municipality of Štrpce in Central Kosovo. In them, members of the Serbian community are in the majority and all other non-Serbian communities, including the Albanians, constitute the minority population.

In addition to the Albanian and Serbian communities, Kosovo is also home to other ethnic communities, such as the Ashkali, Bosniaks, Egyptians, Gorani, Turks, Roma and others, who account for the minority population in all Kosovo municipalities.

Defining a specific ethnic group as a minority in Kosovo is quite a problem because most Kosovo Serbs still consider Kosovo an integral part of Serbia, albeit currently occupied, wherefore they do not see themselves as a minority and thus often act from the position of a majority living in areas in which they constitute the minority population.

A totally opposite view is held by the Albanians, who believe Kosovo has not been an integral part of the Republic of Serbia since 10 June 1999 and that the majority/minority ratio should be viewed only within the currently administrative borders of Kosovo. Not much changed in this respect in 2005.

However, not only the PISG should be held responsible for the situation. Chapter 8 of the Constitutional Framework for the Provisional Self-Government in Kosovo (CFPS) (Powers and Duties Reserved to the SRSG) envisage that the SRSG has: full authority to ensure that the rights and interests of Communities are fully protected (8.1). The SRSG will closely coordinate with International Security Presence (KFOR) in conducting border monitoring duties; regulating possession of fire arms; enforcing public safety and order; and, exercising functions that may be attributed to the domain of defence, civil emergency and security preparedness (8.2). It transpires from such constitutional powers that security and safety are a right

'reserved' to the international community in Kosovo. These provisions clearly show UNMIK is also responsible for the security and safety of minority groups.

The protection of minority rights, primarily of the Serbian ethnic group, may precisely be the reason why the international community in Kosovo has allowed the existence of specific legal loopholes which are essentially not conducive to the resolution of the problem and may have far-reaching consequences not only on the protection of human rights, but more broadly as well.

By allowing such loopholes, the international community seems to have allowed for the preservation of the perturbing gap between the majority Albanian and minority Serbian population and has practically 'cocooned' the Serbian population in the enclaves, thus supporting their evident repulsion towards and boycott of local government institutions. These loopholes comprise:

- Allowing the functioning of a parallel Serbian judicial system in Kosovo i.e. in northern Kosovo and the Serbian enclaves;
- Allowing the functioning of parallel administrative bodies of the Republic of Serbia in Kosovo, i.e. in northern Kosovo and the Serbian enclaves;
- Allowing the undisturbed operation of the postal institutions of the Republic of Serbia in the territory of Kosovo, i.e. in northern Kosovo and the Serbian enclaves;
- Allowing the undisturbed operation of the banking system of the Republic of Serbia in the territory of Kosovo, i.e. in northern Kosovo and the Serbian enclaves;
- Allowing the functioning of the parallel education system of the Republic of Serbia in Kosovo, i.e. in northern Kosovo and the Serbian enclaves;
- Payment of monthly wages to Serbian community members by UNMIK notwithstanding the fact that they work in parallel Serbian government bodies and receive double the salaries of their colleagues in Serbia, while simultaneously boycotting the very institutions established by UNMIK;
- Allowing many Serbian mobile phone operators to operate illegally in the whole territory of Kosovo;
- Allowing the use of services of the Kosovo Electricity Corporation free of charge i.e. consumption of electricity by those not paying electricity bills;
- Allowing movement of unregistered motor vehicles, et al.

All these measures considerably affect the lack of interest and reluctance of members of minority communities, primarily of Serbs, to actively join in the social processes in Kosovo.

In terms of the legal protection of minority rights in Kosovo, Chapter 4 of the Constitutional Framework comprises a number of international and regional

mechanisms for the protection and promotion of the human rights of minority communities.

Under Chapter 4, the catalogue of collective rights of minority communities, practically transcribed from international legal documents and directly applicable in the legal system of Kosovo, comprise the rights to: free use of language and script, before courts, government agencies and other public bodies; education in their own language; access to information in their own language; equal employment opportunities in public bodies at all levels and equal access to public services at all levels; unhindered contacts among themselves and with members of their respective communities within and outside of Kosovo; use and display community symbols subject to the law; establish associations to promote the interests of their ethnic community; promote respect for community traditions; operate religious institutions; guaranteed access to and representation in public broadcast media and programming in relevant languages; disseminate information in their own languages and scripts, including by establishing and maintaining their own media, et al.

6.2. Practice. – The UNMIK report submitted to the UN Security Council in February 2005 highlights that the improvement of minority rights has become the priority of the Government of Kosovo. The UN Secretary-General assessed that security of minority communities has improved in 2005 over 2004 but that the freedom of movement remained extremely unstable.

The report also emphasises that the fears of some minority communities had increased because of isolated incidents which were not always adequately condemned and resolved by local leaders. Due to this and other factors, the trust of minority communities, primarily members of the Serbian and Roma communities, in the Kosovo political, administrative and judicial systems has remained low and their involvement in all social processes marginal.

The situation is considerably aggravated by the institutions of the Republic of Serbia, which has for its political reasons tried to discourage the members of the Serbian ethnic group from participating in political and other processes in Kosovo at all costs.

There is no doubt that the situation in which minority communities live cannot be qualified as satisfactory. Full freedom of movement still has not been achieved, especially for Serbs. Although the situation in this area has improved over 2004 and the March 17 events, it is still far from normal, especially in the municipalities in which Albanians make up the majority population. As opposed to Serbs and partly the Roma, members of other minority communities do not have particular problems with regard to the freedom of movement.

Conditions for the return of national minority members who had fled Kosovo in 1999 have improved in 2005. With the help of the international community, the Government of Kosovo has within its programme built a number of settlements allowing for the return of persons who had fled Kosovo.

Notwithstanding the efforts, potential returnees rarely opt for return for a number of objective and subjective reasons. It has been noted that a number of individuals, who had returned to their rebuilt homes, soon sold them and left Kosovo again. To halt the practice, the Government of Kosovo reached a decision under which returnees do not have the right to alienate their property for a specific period of time. The decision constitutes a violation of ownership rights but the Government of Kosovo concluded that it was at present the only mechanism to prevent such occurrences.

Other aspects of life of minority communities, primarily Serbs, have also continued improving slowly. They still have difficulty accessing health, educational and other public institutions in Kosovo. However, despite the PISG's insufficient measures in that respect, one cannot ignore the impact of the Serbs' classical boycott of all institutions in Kosovo, which benefits them the least.

The number of inter-ethnic incidents in Kosovo has decreased in 2005, but the isolated inter-ethnic incidents must on no account be minimised.

The lack of a general employment strategy has also placed the members of national minorities in an unequal position *vis-à-vis* the Albanian majority. Minority staff in the judiciary account for 10.5% of the total staff; 5.2% of the judges and 2.3% of the prosecutors are Serbs.³⁰

The right to property is definitely the most endangered human right of members of minority communities in Kosovo. Since the war ended in 1999, tens of thousands of property units owned by members of minority communities in Kosovo, primarily the property of Serbs, remain illegally occupied.

7. Political Rights

7.1. Legislation. – As opposed to the constitutions of all the countries in the region, the Constitutional Framework does not declare Kosovo's national sovereignty. The objective reasons for this lie in the presence of international forces in Kosovo and Kosovo's undefined status. The Constitutional Framework defines Kosovo as “an entity under interim administration which, with its people, has unique historical, legal, cultural and linguistic attributes”. Political rights in Kosovo are also guaranteed by Article 25 of the ICCPR.

The Constitutional Framework however does not define or elaborate political rights in any of its provisions. In Chapter 3, it merely lists the international documents that must be applied by the Provisional Institutions of Self-Government, wherefore it is presumed that the Chapter encompasses and elaborates political

³⁰ UNMIK Report submitted to the CoE, part 2 on measures adopted to give effect to the principles set out in the European Framework Convention on the Protection of National Minorities.

rights as well, in view of the fact that political rights are enshrined both in Article 25 of the ICCPR and Article 3 of Protocol 1 to the ECHR. This presumption is corroborated also by Article 3.3 in Chapter 3 of the Constitutional Framework under which “the provisions on rights and freedoms set forth in these instruments (international documents) shall be directly applicable in Kosovo as a part of this Constitutional Framework.”

7.2. Participation in Conduct of Public Affairs and Restrictions. – The right to take part in the conduct of public affairs directly or through freely chosen representatives is formally guaranteed by Article 25 (1a) of the ICCPR but restricted in practice as not one form of direct conduct of public affairs is envisaged in Kosovo.

All democratic countries envisage the institution of referendum as the main form of direct conduct of public affairs. That institution, however, has not been accepted or regulated by any legal documents passed by UNMIK or the Provisional Institutions of Self-Government in Kosovo. Such conduct by the international community and local government institutions constitutes a gross violation of the right to direct conduct of public affairs.

Restrictions on exercise of public office are envisaged by legal enactments regulating the registration and work of political parties in Kosovo. This area, which falls within the 'reserved rights' of the international community, is regulated by the following three UNMIK Regulations: Regulation No. 2000/16 on Registration and Operation of Political Parties in Kosovo, Regulation No. 2001/16 amending Regulation 2000/16 and Regulation 2002/8 amending Regulation 2001/16. All three Regulations contain the following provision restricting the exercise of a public office: “No individual who has been indicted by the International Criminal Tribunal for the Former Yugoslavia or any war-crimes tribunal as may be established by the Special Representative of the Secretary-General may hold any appointive, elective or other function within or representing the political party” (Art. 4 (3)). Fulfilment of either of the two requirements is evidently sufficient to activate this provision. The Special Representative has not set up a war-crimes tribunal yet.

The first requirement in the provision, an ICTY indictment, was activated in March 2005, when ICTY issued an indictment against the then PM of Kosovo Ramus Haradinaj, who was also the president of a political party in Kosovo at the time. The provision had also been earlier activated when the ICTY issued an indictment against Fatmir Limaj, who was at the time of indictment an MP and member of the topmost leadership of a Kosovo political party.

7.3. Election Procedure. – The election procedure in Kosovo is regulated by the Constitutional Framework, UNMIK Regulations, Central Election Commission rulebooks and administrative orders. Kosovo has a proportional election system with closed lists, which means that the electorate votes for a party list and not for

individual candidates. A large number of initiatives to change the voting system, both in writing and in the form of peaceful protests, have proved unsuccessful.

The Constitutional Framework defines Kosovo as one electoral district (Chapter 9, Art. 9.1.3). The Assembly has 120 MPs; 20 seats are reserved for non-Albanian representatives in Kosovo. Of them, 10 are reserved for the representatives of the Kosovo Serb community, 4 for the representatives of the Roma, Ashkali and Egyptian communities, 3 for the Bosniak representatives, 2 for the Turkish community and one for the Gorani community. Everyone having attained the age of 18 on the day of election and satisfying other criteria of eligibility to vote is entitled to vote.

7.4. Central Election Commission. – The Central Election Commission (CEC) was set up in accordance with UNMIK Regulation No. 2004/9. It manages the whole election process: regulates the election procedure by electoral rules and by monitoring the election process to ensure it fulfils international standards. The CEC comprises a total of 12 members: 9 national and 3 international commissioners. The international commissioners are appointed by the SRSG and seven national commissioners by the strongest political parties and the minority communities (Serbs, Roma, Ashkali, Turks, Bosniaks and Gorani). The CEC is headed by the Head of the OSCE Mission in Kosovo, who is simultaneously a deputy to the SRSG. Two of the nine national commissioners are recruited from the ranks of NGOs with expertise in relation to persons with disabilities and in human rights or electoral matters or gender issues. Decisions are reached by consensus. If consensus cannot be reached, the final decision is made by the CEC Chairperson.

7.5. Municipal Election Commissions. – The election and appointment of the Municipal Election Commissions (MECs) is regulated by Electoral Rule No. 2004/7 which sets out the principles, procedure and composition of MECs. MECs have between 3 and 5 members, depending on the size of the municipality's electorate, the number of polling stations and its geographical size. The MECs are charged with providing information to voters of all nationalities, accurate and impartial information on political parties, civil initiatives, coalitions and independent candidates with regard to the rights and obligations pertaining to the election procedure, technical assistance in the organisation of polling stations and other duties laid down by the CEC.

The Election Complaints and Appeals Commission, chaired by the Chief Commissioner appointed from the ranks of international staff and four national commissioners appointed by the SRSG, is charged with imposing penalties for violations of the election procedure.

As opposed to the other countries in the region, judicial proceedings may not be initiated against decisions on complaints and appeals in Kosovo as the Commission's decisions are final. After the votes are counted, the election results are determined and announced by the CEC which are then final. The CEC also deter-

mines the number of seats each party gets after the elections. NGOs may monitor elections.³¹

Elections have been held four times in Kosovo to date (2 were local and 2 general elections). The vast majority of the Kosovo Serbs boycotted 2 local and 1 general elections.

8. Special Protection of the Family and the Child

8.1. Family protection. – The Law on Marriage and Family Relations (LMFR) defines family in Article 2 as a “vital community of parents and children and other kin”. The community is obliged to protect the family, especially the mother and child. Parents have the right and duty to care for and bring up their children.

In addition to the LMFR, protection of the family is also guaranteed by UNMIK Regulation No. 2003/12 of 9 May 2003 on Protection from Domestic Violence. The Regulation is based on international documents such as the ICCPR, ECHR, the Convention on the Rights of the Child and the Convention on Elimination of All Forms of Discrimination against Women. The adoption of the Regulation was prompted by the frequent incidents of domestic violence and the necessity to promptly and efficiently react to suppress such violence. The Regulation uses the expression “domestic relationship” which denotes a relationship between two persons “who are engaged or married to each other or are co-habiting with each other without marriage; who share a primary household in common and who are related by blood, marriage or adoption or are in a guardian relationship, including parents, grandparents, children, grandchildren, siblings, aunts, uncles, nieces, nephews or cousins; or who are the parents of a common child.” The Regulation establishes three protective measures that may be pronounced: protection order, emergency protection order and the interim protection order.

The speed of the municipal court proceedings depends on the degree of protection sought. If a party seeks the rendering of a protection order, the competent municipal court is obliged to reach its decision within 15 days from the day of receipt of the petition (Art. 7 (1)). The court is obliged to serve a copy of its protection order upon the protected party, the petitioner, the local police station and centre for social work within 24 hours of issuing the protection order. The protection order becomes enforceable immediately upon pronouncement and must be implemented against the respondent upon personal service upon the respondent in accordance with the Law on Contested Procedure.

31 The Council for the Defense of Human Rights and Freedoms has monitored all elections held in Kosovo to date.

Petitions for emergency protection orders must be adjudicated within 24 hours of receipt. The procedure of service is identical to the one applying to the protection order. Both orders may be appealed within eight days; appeals do not have suspensive effect. The types of orders for protection, emergency protection and interim emergency protection are listed in Article 2 of the Regulation.

The provisions on interim emergency protection orders are quite specific. Requests for interim emergency protection may be submitted to the law enforcement authorities outside of court hours. The UNMIK Police Regional Domestic Violence Commander is entitled to issue an interim emergency protection order (Art. 13 (2)). In such circumstances, the order remains effective only until the end of the following workday of the court; once this deadline expires, the protected party may file a petition with the court for an emergency protection or protection order.

Although some provisions of the Regulation are legally disputable, in view of the increasing incidence of domestic violence and court inefficiency in regular proceedings, the Regulation was necessary to tackle domestic violence. The Regulation has doubtlessly justified its existence in practice.

Chapter XX of the Provisional CC guarantees criminal legal protection of families in Kosovo. Chapter XX consists of 10 articles (Arts. 205–214) and sanctions crimes against marriage, family and children. Violation of family obligations is regulated by Article 212, under which “whoever seriously violates his or her legal family obligations leaving a family member who is incapable of taking care of himself or herself in a situation of distress shall be punished by imprisonment of three months to three 3 years.” When the offence results in the death of the family member or serious impairment to his or her health, the perpetrator shall be punished by imprisonment of one to eight years. If the court imposes a suspended sentence, it may order, as a condition, that the perpetrator regularly fulfil his or her obligation of care, education and child support. Crimes against the family are prosecuted *ex officio*.

8.2. *Marriage.* – Marriage, conditions for marriage, status of spouses in a marriage and their property, termination of marriage et al. are regulated by the LFMR which was applicable in Kosovo on 22 March 1989.

A marriage may be concluded in Kosovo under conditions for concluding a marriage and marriage validity envisaged by Articles 24–34 of the LFMR. As a rule, a person over 18 may enter a marriage. The valid provisions of the Law prescribe when persons under 18 can enter a marriage with the consent of the court.

Divorce is allowed on two grounds: by mutual consent of the spouses or at the request of one of the spouses (Arts. 67–72).³² If the wife is pregnant or the child

32 There has been a steep increase in divorces in Kosovo in the recent years. Over 200 divorce actions were filed with the Priština District Court in 2005 alone.

has not turned one yet, divorce is allowed only if both spouses consent to it (Art. 69). If divorce is not in the interest of underage children, the court may dismiss the action for divorce (Art. 70 (2)).

The property of spouses acquired during marriage can be their joint property, while the property of one spouse that she or he owned prior to marriage can be his or her own personal and separate property (Art. 54).

The Provisional CC of Kosovo punishes bigamy (Art. 205), unlawful marriages (Art. 206), forced marriages (Art. 207), extramarital unions with persons under 16 (Art. 208). These crimes warrant between three months and three years of prison.

The Provisional CC does not incriminate spousal rape. That means that Kosovo legislation does not recognise and thus penalise this crime sanctioned by many countries.

8.3. Protection of children. – UNMIK Regulation No. 1999/24 *inter alia* stipulates the direct application of the Convention on the Rights of the Child and its two Optional Protocols. Protection of children is also guaranteed by the LMFR. As the LMFR does not strictly define a child, it is not in conformity with the Convention on the Rights of the Child with respect to the age when a person acquires specific rights and obligations. While the LMFR sets 18 as the age of entering adulthood, the Provisional CC establishes that a person who committed a crime at the time she or he had not yet turned 14 shall not be held criminally liable.

In view of the direct application of the Convention on the Rights of the Child and its Protocols, Kosovo's criminal legislation sanctions crimes envisaged by the Protocol on the sale of children, child prostitution and child pornography. Article 198 of the Provisional CC prescribes between one and ten years of imprisonment for the crime of sexual abuse of children under 16; if the crime results in the death of the victim, the perpetrator shall be punished to minimum 10-year imprisonment. Article 196 sanctions the crime of sexual exploitation. Under Article 196 (4), the perpetrator of this crime against a person under 16 shall be punished to between 1 and 5 years in prison. Article 199 of the Provisional CC sanctions promoting sexual acts or sexual touching of persons under 16. This crime warrants between 6 months and 5 years in jail. Article 201 (4) incriminates facilitating prostitution. When recruitment, organisation or assistance for the purpose of prostitution involves persons between 16 and 18 years of age and when force, threat or coercion are used against a person of that age to force him or her to prostitution, the perpetrator is punished to between 1 and 12 years of imprisonment. Article 202 incriminates use of children in pornography and the crime warrants a sentence ranging from a fine to five-year imprisonment, depending on the circumstances in which it was committed. Article 203 envisages punishment ranging from a fine to maximum one-year imprisonment for the crime of showing pornographic material to persons under 16.

Kosovo criminal legislation does not explicitly mention the crime of selling children. However, it is deemed the crime is sanctioned by Article 209 of the

Provisional CC under which “Whoever unlawfully substitutes one child for another or otherwise alters his or her family status shall be punished by imprisonment of three months to three years.” The attempt to commit this crime shall also be punishable. Also, Article 139 (2) envisages between three and 15 years of imprisonment for the crime of trafficking a person under 18 years of age.

Article 210 (unlawful abduction of a child), Article 211 (mistreating or abandoning a child), Article 212 (violations of family obligations), Article 213 (avoiding payment of child support) and Article 214 (prevention and non-execution of measures for protecting children) also directly sanction violations of the rights of the child.

Kosovo crime law also penalises violations of the Optional Protocol on the involvement of children in armed conflicts in Article 121 (para. 2, item 7) and Article 123 of the CC of Kosovo. Article 121 (para. 2, item 7) envisages minimum five-year imprisonment for the crime of “conscripting or enlisting children under 15 into armed forces or groups or using them to participate actively in hostilities”. Article 123 prescribes between 6 months and five years in jail for a person who conscripts or enlists persons between 15 and 18 years of age into the armed forces or groups or uses them to participate actively in hostilities in an armed conflict international in character or an armed conflict not international in character.

Under the LMFR, parents have the right and duty to care for the personality, rights and interests of their children. The parents fulfil their rights and obligations together, and if they disagree, the final decision shall be reached by the competent guardianship authority. In family disputes, courts *ex officio* decide on which parent will be awarded custody of underage children. Personal contacts with underage children can be restricted or temporarily prohibited only to protect their health and other interests. The rights and duties of children born in wedlock and those born out of wedlock are identical.

In addition to the above laws, UNMIK adopted Regulation No. 2004/29 on Protection against International Child Abductions. Proceedings in such cases are conducted by the district court which has jurisdiction over the territory where the abducted child was discovered (Art. 4 (1)). The proceedings are urgent and the district court is obliged to render a judgment within six weeks from the day the proceedings were instituted by an application. Under Article 5.3, in case the 6-week deadline is not met, the president of the court conducting the proceedings is obliged to state in writing the reasons why the application was not determined within the given period.

8.4. Protection of minors in criminal proceedings. – The Juvenile Justice Code of Kosovo elaborates in detail the protection of minors in criminal proceedings. Persons under 14 years of age cannot be held criminally liable for their actions (Art 38). Measures or punishments can be pronounced against juvenile perpetrators of crimes. Measures entail diversion and educational measures, while

punishments comprise fines, community service work orders and juvenile imprisonment. In addition to these measures and punishments, Article 35 envisages the right to pronounce the measure of mandatory treatment.

The Law lists the diversion measures that may be pronounced against a juvenile: mediation between the juvenile offender and the injured party, including apology; mediation between the juvenile and his or her family; compensation for damage to the injured party through mutual agreement between the victim, the minor and his or her legal representative in accordance with the minor's financial situation; regular school attendance; acceptance of employment or training for a profession appropriate to his or her abilities and skills, performance of unpaid community service work in accordance with the juvenile's ability to perform such work; education in traffic regulations and psychological counselling (Art. 15).

Educational measures that can be pronounced against a juvenile include: disciplinary measures (judicial admonition and committal to a disciplinary centre), intensive supervision measures (intensive supervision by parents, adoptive parents or guardians of the minor, intensive supervision in another family and intensive supervision by the guardianship authority), and institutional measures (committal to an educational, educational-correctional or special care facility institution) (Art. 17).

A juvenile may not be tried *in absentia* (Art. 39 (1)). A juvenile must have a defence counsel when defence is mandatory, specifically: from the first examination; from the ruling on the commencement of preparatory proceedings if they are conducted for a crime punishable by minimum 3-year imprisonment; and, from the ruling on the commencement of preparatory proceedings for other crimes carrying milder penalties if the juvenile judge considers that the juvenile needs a defence counsel. Parents, adoptive parents and guardians are entitled to accompany the minor to all proceedings and may be required to participate if it is in the best interest of the minor (Art. 41 (1)). A juvenile must undergo a medical examination prior to any detention on remand (Art. 42).

A juvenile, who committed a crime together with an adult, shall be tried separately. They will be tried together only in exceptional circumstances, if necessary for the comprehensive clarification of the case (Art. 44 (paras. 1 and 2)). In first and second instance courts (with the exception of the Supreme Court of Kosovo), juveniles are tried by a juvenile panel comprising a juvenile judge as the presiding judge, and two lay judges. When a juvenile case is adjudicated at the main trial, the panel comprises two juvenile judges and three lay judges. The Kosovo Supreme Court juvenile panel comprises three judges, at least one of whom is a juvenile judge.

Provisional arrest and police detention of a minor may not last more than 24 hours. On the expiry of that deadline, the juvenile shall be released unless the

juvenile judge has ordered detention on remand (Art. 63 (2)). A juvenile held in detention on remand must be separated from adult detainees. During detention on remand, the juvenile is entitled to social, educational, psychological, medical and physical assistance (Art. 65 (paras. 1 and 2)). The public shall always be barred from trials of juveniles (Art. 69 (1)).

Minors in juvenile imprisonment shall be provided with vocational training possible in view of restrictions in correctional institutions. Treatment of imprisoned juveniles is based on educationally beneficial work which is adequately remunerated. Juvenile prisoners may correspond with the outside world via letters, phones, visits, sports activities, time-limited visits home and shall have the opportunity to exercise their religion.

Staff working with juvenile offenders must have adequate psychological and pedagogical knowledge.

IV CONCLUSION

Kosovo was the most jeopardised part of Europe in the 20th century in terms of violations of human rights and fundamental freedoms. With the deployment of international civilian and military troops in 1999 and the subsequent establishment of democratically elected local government institutions, Kosovo devoted special attention to the protection and promotion of human rights and fundamental freedoms laid down in numerous international instruments incorporated in its legal system, with the aim of fulfilling prerequisites for Euro-Atlantic integrations as soon as possible.

Creation of strong legal foundations and sustainable mechanisms for protecting and promoting human rights is doubtlessly extremely difficult, especially due to the long-lasting isolation of Kosovo from all contemporary European and international trends. Moreover, the lack of tradition and experience in human rights protection remains an obstacle to Kosovo's fulfilment of international standards regarding the protection of human rights and fundamental freedoms.

The situation Kosovo has been in for the past 6 years, unprecedented in contemporary theory and practice, is essentially conducive to positive headway in this endeavour. However, numerous expected and unexpected events and phenomena have considerably arrested the fulfilment of its commitments. The influence of various spheres of interests, the existing substantial ethnic divisions, the desire to achieve 'overnight' everything that had been missed out in the decades and centuries behind us, misinterpretation of the concepts of human rights, numerous illogical legal circumstances in all areas of social life, are just some such phenomena. The issue of Kosovo's status has recently sidelined not only the protection of human rights and fundamental freedoms, but other launched social processes as well.

Nevertheless, visible headway has been made in this field thanks to the assistance of the international community. The positive trend must continue at a faster pace. For that to happen, all relevant institutions in Kosovo must realise that the set international standards on the protection of human rights and fundamental freedoms cannot be fulfilled by merely adopting laws, that concrete, qualitative and practical work and advocacy of implementation of the laws is necessary. That is what Kosovo lacks the most and that warrants special attention in the near future.

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HUMAN RIGHTS IN THE REPUBLIC OF MACEDONIA IN 2005

I INTRODUCTION

The Constitution of the Republic of Macedonia (Art. 8) first refers to fundamental human rights and freedoms in the context of the fundamental values of the constitutional order: “The fundamental values of the constitutional order of the Republic of Macedonia are: – the fundamental rights and freedoms of the individual and citizen, recognised in international law and enshrined in the Constitution ...”. The corpus of fundamental human rights and freedoms is elaborated in Chapter II of the Constitution and their protection is *inter alia* defined by provisions on the position and mandate of the Constitutional Court, the People's Attorney (Ombudsman), the Human Rights Standing Inquiry Committee of the Assembly of the Republic of Macedonia. The 2001 and 2005 amendments to the Constitution were predominantly aimed at enhancing some of the human rights and protection mechanisms.

Activities related to the country's European Union membership candidate status prominently marked the general political and social situation in the Republic of Macedonia in 2005. A large number of the remarks contained in the EU Report (with reference to the Answers to the EC Questionnaire) pertain to the area of human rights and freedoms and changes in this field. The document outlining the principles, priorities and conditions to be fulfilled by the Republic of Macedonia in the process of harmonisation with/achieving EU standards, defines a continuous period for transformation and reforms of the legislation and its implementation in practice.

Notwithstanding, the general political and social situation in the Republic of Macedonia in 2005 remained greatly affected by the consequences of the 2001 armed conflict. The conflict was still present in the people's memories, and in the evident changes it had directly prompted. The expression “implementation of the Ohrid Framework Agreement” (signed on 13 August 2001) was still used in 2005 to explain the legal implementation of the constitutional amendments (initiated under the Ohrid Agreement), which entered into force after their adoption (16 November 2001). The continuous persistence in explaining the adoption of laws and

legislative changes as part of the implementation of the Ohrid Framework Agreement (instead of explaining them as the implementation of constitutional amendments) is one of the drastic examples of derogation from the principle of rule of law.

Persistent reference to the Ohrid Framework Agreement with respect to all decisions, structural changes and the overall activities in the country was a result of direct party bargaining at the topmost levels, that evidently bypassed the legislation and relegated the rule of law. The majority Macedonian community thus perceived the changes as excessive, inappropriate and beyond the law, while, on the other hand, the ethnic Albanians perceived them as insufficient, in terms of utilisation of all available human resources. Such a climate was especially conducive to personnel changes at all levels of the state administration in the recent years. Just as easily and under the guise of “implementing the Ohrid Framework Agreement” personnel changes were made in the so-called “democratic control mechanisms” i.e. the fundamental human rights and freedoms protection bodies. Hence, these bodies became party affiliated, thus utterly undermining the established criteria for job recruitment and promotion (and the protection of human rights and freedoms was the first to suffer the consequences). The deficiencies and problems that may threaten the global direction of changes geared towards the promotion of human rights and freedoms can be identified in:

1. Continued domination of the political *modus operandi* at the expense of the legal one (political parties – signatories to the Agreement and the representatives of the international community resort to the Ohrid Agreement as a legal source instead of resorting to the adopted constitutional amendments stemming from the Agreement as legal grounds for specific political actions; that enables them to operate in the realm of “political” instead of in the framework of legal responsibility).
2. Establishment of the ethnic criterion as the exclusive criterion for undertaking changes (which could in the long run jeopardise human rights protection of all citizens of the Republic of Macedonia and which again constitutes an attack on the legal *modus operandi* embodied in rules and procedures).
3. Abandoning the multicultural approach to democratic processes and slowing down the process of developing the individual approach at the expense of the collectivistic and group approach.
4. Neglecting the international standards and recommendations, especially in the context of the integration processes.

To overcome the stage of “direct” implementation of the Ohrid Agreement and focus on the already established legal framework is of paramount importance in establishing the rule of law, in building a positive public attitude towards laws

and legal protection, and in promoting human rights protection through the institutions.

In 2005, the overall social situation in the country was characterised by an increasing level of poverty and unemployment; reduction of health care and social protection rights; limitation of labour rights and protection mechanisms ensuring exercise of these rights; and reduction of all benefits and protective mechanisms afforded specific vulnerable groups. Poverty increasingly became the essential obstacle to the enjoyment and realisation of fundamental rights and freedoms by Macedonia's citizens. What is really concerning is that poverty was not identified as a top priority issue in the protection of human rights and freedoms.

Corruption necessarily undermines the rule of law. Macedonia had 91 points on the Worldaudit 1–100 scale (one being the best rating). In 2005, corruption was not a privilege only of those in power, but it became the carcinogenic state of affairs, metastasing in the entire society, i.e. in each and every pore of society. Certain non-governmental organisations and specialised state bodies (such as Transparency, the Helsinki Committee, the Anti-Corruption Commission) have registered corruption at all levels of education, in the judiciary, police, health care sector, administration. Corruption determines the entire life of citizens to such an extent and it is so widespread that one starts losing the ability to even recognise it. Despite its momentous efforts, the Anti-Corruption Commission did not manage to break through the bulwark surrounding the authorities and had not brought to an end even a single case. The lack of responsibility and sanctioning of high profile corruption scandals (especially enhanced by the intentional blockage of the Anti-Corruption Commission's work by the Government and the Public Prosecutor's Office) raises the question as to whether there is any point in dealing with “petty” everyday corruption.

The local elections were a significant event in 2005. After 15 years of democratic development and exercise of voting rights, the same deficiencies identified in the previous election cycles were again registered at these elections. Here are some of the recurring problems that again remained unsanctioned, leaving entire categories and groups of people in an underprivileged (discriminated) position in terms of exercising their voting rights or the right to make a choice:

5. Persons belonging to the Roma and Albanian communities were the most discriminated against in the elections. They exercised their right in much worse circumstances than persons belonging to other ethnic communities, in an atmosphere of threats and abuse of office, use of force and increased number of cases of bribery;
6. Albanian women were the second most discriminated group at these elections. A very small number of Albanian women (especially in rural areas) had the opportunity to vote (at all or properly); they were not

- involved in the work of election boards and commissions and were not fielded as candidates for the posts of councillor or mayor;
7. Illiterate and semiliterate persons were unable to exercise their right to vote due to the lack of elaborated procedures for impartial assistance during voting;
 8. A significant number of internally displaced persons (especially those outside the collective accommodation centres) *de facto* did not have opportunity to vote;
 9. At these elections too, citizens of the Republic of Macedonia temporarily abroad could not vote;
 10. Disabled persons were not in an equal position in terms of exercising the right to vote (both because of the inaccessibility of a large number of polling stations and the lack of adequate impartial assistance in voting to persons with impaired vision).

The principles of fair elections and campaigning and exercise of the right to vote in a fair and free atmosphere were threatened by the direct and indirect involvement of the representatives of the authorities in the election campaign. The conflict of interests in such cases is not moral, but legal in character (this issue is regulated by relevant provisions of the Law on the Organisation and Work of State Administration Bodies, the Law on Election of Members of Assembly, the Law on the Voters' List) and may give rise to serious doubts about the validity of the conducted elections.

No referenda were held in 2005. However, there were significant changes of the legislation, which essentially led to the limitation of the right to referendum and undermined the pillars of liberal democracy. After their experience with the 2004 referendum, which became obligatory after 150,000 signatures of citizens were collected at the citizens' initiative, the ruling parties in the Assembly adopted a new Law on the Referendum and Citizens' Initiatives to avoid a similar situation in the future. This Law eliminates the necessity to hold referenda in accordance with the constitutional provisions if the referendum question is related to an issue of interest to ethnic communities (decided on in the Assembly by a so called double majority – of the total number of MPs and of ethnic minority MPs). This move again confirmed precedence of collectives and collective rights over individual rights.

A number of laws were amended in 2005.

1. Law amending and supplementing the Law on Employment and Insurance in Case of Unemployment (*Official Gazette*, No. 4/2005, 17.01.2005)

2. Law supplementing the Law on Pension and Disability Insurance (*Official Gazette*, No. 4/2005, 17.01.2005)
3. Law amending and supplementing the Law on Copyright and Related Rights (*Official Gazette*, No. 4/2005, 17.01.2005)
4. Law on Privatization and Lease of State Owned Construction Land (*Official Gazette*, No. 4/2005, 17.01.2005)
5. Law on Protection of Personal Data (*Official Gazette*, No. 7/2005, 01.02.2005)
6. Law on Arms (*Official Gazette*, No. 7/2005, 01.02.2005)
7. Law amending and supplementing the Law on the Territorial Organization of the Local Self-Government of the Republic of Macedonia (*Official Gazette*, No. 12/2005, 22.02.2005)
8. Law amending the Law on Personal Identification Card (*Official Gazette*, No. 12/2005, 22.02.2005)
9. Law on Electronic Communications (*Official Gazette*, No. 13/2005, 25.03.2005)
10. Law on Criminal Procedure – Consolidated text (*Official Gazette*, No. 15/2005, 07.03.2005)
11. Law on Crisis Management (*Official Gazette*, No. 29/2005, 04.05.2005)
12. Law on Enforcement (*Official Gazette*, No. 35/2005, 18.05.2005)
13. Law amending the Law on Protection from Smoking (*Official Gazette*, No. 37/2005, 24.05.2005)
14. Law on General Administrative Procedure (*Official Gazette*, No. 38/-2005, 26.05.2005)
15. Law amending and supplementing the Law on Excise (*Official Gazette*, No. 38/2005, 26.05.2005)
16. Law on Witness Protection (*Official Gazette*, No. 38/2005, 26.05.2005)
17. Law on Spatial and Urban Planning (*Official Gazette*, No. 51/2005, 30.06.2005)
18. Law amending and supplementing the Law on Internal Affairs (*Official Gazette*, No. 51/2005, 30.06.2005)
19. Law on Pupils' Standard (*Official Gazette*, No. 52/2005, 04.07.2005)
20. Law on Education Inspection (*Official Gazette*, No. 52/2005, 04.07.2005)
21. Law on Environment (*Official Gazette*, No. 53/2005, 05.07.2005)
22. Law amending and supplementing the Law on Primary Education (*Official Gazette*, No. 55/2005, 11.07.2005)

23. Law amending and supplementing the Law on Secondary Education (*Official Gazette*, No. 55/2005,11.07.2005)
24. Law on Use of Flags of Communities in the Republic of Macedonia (*Official Gazette*, No. 58/2005,19.07.2005)
25. Law supplementing the Law on Witness Protection (*Official Gazette*, No. 58/2005, 19.07.2005)
26. Law amending and supplementing the Law on rights of persons persecuted and imprisoned because of ideas for independence of the Macedonian nation and its statehood and of members of their families (*Official Gazette*, No. 58/2005, 19.07.2005)
27. Law on Labor Relations (*Official Gazette*, No. 62/2005, 28.07.2005)
28. Law amending and supplementing the Law on Social Protection (*Official Gazette*, No. 62/2005, 28.07.2005)
29. Law amending and supplementing the Law on Employment of Disabled Persons (*Official Gazette*, No. 62/2005, 28.07.2005)
30. Law amending the Law on Voters' List (*Official Gazette*, No. 74/-2005, 05.09.2005)
31. Law on Litigation Procedure (*Official Gazette*, No. 79/2005, 21.09.2005)
32. Law supplementing the Criminal Code (*Official Gazette*, No. 81/2005, 27.09.2005)
33. Law supplementing the Law on Primary Education (*Official Gazette*, No. 81/2005, 27.09.2005)
34. Law on Referendum and other Forms of Direct Decision Making by Citizens (*Official Gazette*, No. 81/2005, 27.09.2005)
35. Law amending and supplementing the Law on the Environment (*Official Gazette*, No. 81/2005, 27.09.2005)
36. Law on Control of Dual Use Goods and Technologies (*Official Gazette*, No. 82/2005, 28.09.2005)
37. Law amending the Law on Technical Inspection (*Official Gazette*, No. 82/2005, 28.09.2005)
38. Law amending the Law on Culture (*Official Gazette*, No. 82/2005, 28.09.2005)
39. Law on Members of the Assembly (*Official Gazette*, No. 84/2005, 03.10.2005)
40. Law amending the Law on salaries and other remuneration of members of the Assembly of the Republic of Macedonia and other state elected or appointed officials (*Official Gazette*, No. 84/2005, 03.10.2005)

41. Law amending and supplementing the Law on health Protection (*Official Gazette*, No. 84/2005, 03.10.2005)
42. Law amending and supplementing the Law on Health Insurance (*Official Gazette*, No. 84/2005, 03.10.2005)
43. Law supplementing the Law on Pension and Disability Insurance (*Official Gazette*, No. 84/2005, 03.10.2005)
44. Law on Employment of Disabled Persons (*Official Gazette*, No. 87/-2005, 17.10.2005)
45. Law on Broadcasting (*Official Gazette*, No. 100/2005, 21.11.2005)
46. Law amending the Law on Pension and Disability Insurance (*Official Gazette*, No. 101/2005, 24.11.2005)
47. Law on Copyright and Related Rights – Consolidated text *Official Gazette*, No. 23/2005, 12.04.2005)

Initiating the adoption of several laws directly linked to the protection and promotion of human rights and freedoms was a positive step in the legislative process. The trend of citizens or NGOs specialising in a specific field initiating the adoption of laws and legal amendments is, indeed, commendable. Thus, the following can be underlined as a positive step in the development of democracy: the initiative to adopt the Law on the Protection of Rights and Dignity of Disabled Persons (initiated by the Polio+ NGO), the Law on Same Sex Unions (initiated by the MASSO NGO) and the Law on Non-Discrimination (initiated by the Helsinki Committee). The year 2005 also saw the opening of public debates on the Law on Equal Opportunities for Women and Men, the Law on the Police and the Law on Religious Communities and Religious Groups (initiated by the relevant ministries i.e. by the Commission for Relations with Religious Communities and Religious Groups). The very fact that public debates on these laws areas have been launched is indeed positive, despite the fact that the latter two (on the police and religious communities) contain serious deficiencies, which directly affect human rights and freedoms and are either *per se* a threat to these rights or will allow for endangering human rights and freedoms when they are implemented. Therefore, the Helsinki Committee believes that the legislators should pay special attention to all remarks presented by various non-governmental organisations, expert and professional institutions and independent experts when debating the two draft laws. If the drafts are not amended, their adoption may be an open attack on the rule of law and on the protection of human rights and freedoms.

The Government's commitment to ensure the efficient implementation of the ECHR through various constitutional amendments was another positive step made in the protection of human rights and freedoms in 2005. This is an obligation of the Republic of Macedonia as a party to the Convention. The primary objection of the Helsinki Committee regards the selective approach both

in terms of the commitments of those who proposed the amendments and in terms of the protection of *all* human rights. Thus, instead of full achieving full compliance of all constitutional provisions with those of the ECHR, the draft amendments focused only on specific rights, such as the presumption of innocence and the right to fair trial, but they, too, were elaborated only partially. The constitutional amendments did not resolve the dilemma in the Macedonian Constitution about the respect of civil and human rights regarding Article 50 (3) which specifies that “A citizen has the right to be informed of human rights and fundamental freedoms”. The Republic of Macedonia remains a state in which human rights are not vested in all people, and “the fundamental rights and freedoms” are guaranteed only to citizens. Consequently, one cannot talk about the protection of human rights in the Republic of Macedonia, but only about the protection of “human rights of citizens”. Under the Constitution, in terms of protection, not every person, but “Every citizen may invoke the protection of freedoms and rights enshrined in the Constitution before regular courts, as well as before the Constitutional Court of the Republic of Macedonia” (Art. 50 (1)).

II INDIVIDUAL RIGHTS

1. The Right to an Effective Legal Remedy and the Right to a Fair Trial

1.1. Legislation. – According to Article 50 of the Constitution of the Republic of Macedonia, “Every citizen may invoke the protection of freedoms and rights enshrined in the Constitution before regular courts, as well as before the Constitutional Court of Macedonia, through a procedure based upon the principles of priority and urgency. Judicial protection of the legality of individual acts of the state administration, as well as of other institutions with public authority, shall be guaranteed. A citizen has the right to be informed of human rights and fundamental freedoms as well as to actively contribute, individually or jointly with others, to their promotion and protection.” The principles of organisation and work of the judiciary are defined in Articles 98–107 of the Constitution, while the work of the Constitutional Court is elaborated in Articles 108–113. Effective legal remedies and the right to a fair trial are regulated by provisions contained in several laws and by laws.¹

1 Law on Courts, Law on the Supreme Court, Law on the Constitutional Court, Criminal Procedure Code, Criminal Code, Law on the Public Prosecutor's Office, Law on the Ombudsman, Law on Misdemeanors.

Many laws have been amended or are to be amended in the attempt to implement the EU standards. However, regardless of the changes made and the demonstrated will to make the changes, the judiciary continued playing a significant role in the disrespect for the law in 2005. This can be attributed to: a) the influence of the executive and ruling political parties on the judiciary, or to b) lack of knowledge of the international standards deriving from the ECHR and other ratified conventions and international documents, most often to a combination of these two reasons.

1.2. Practice. – According to the cases brought to the attention of non-governmental organisations media reports, the regular courts have very often failed to protect human rights and freedoms due to lack of knowledge disguised by the declared free conviction of the judge. This often leads to different rulings on same or similar cases. For instance: *the case of Kuzman Cilkov, Skopje and the case of Kire Sotirovski, Krusevo.*² Or, *the case of Getro, Gostivar*, regarding compensation for annual holiday leave in 1995 – the parties were divided in two groups and their cases were adjudicated by two different judges. The verdict in the case of one group of plaintiffs was delivered in 1999, but the same verdict was not rendered in the case of the other group with identical claims. This furthermore leads to blocking the execution of court decisions (*the case of Gjorgje Arsov from Skopje*); to violation

2 Cases regarding assigning i.e. reassigning workers to jobs. In the case of Mr. Cilkov, he filed a lawsuit against the Public Enterprise for Management of Housing and Business Premises challenging the decision to transfer him. The claims of Mr. Cilkov were upheld by the Skopje I First-Instance Court (III No. P 612/03, dated 26 January 2004) and the General Manager of the Public Enterprise was obliged to reassign Cilkov to his previous job. Furthermore, the reasoning of the verdict by the Skopje Court of Appeals (No. Gz 4833/04 dated 28 October 2004) states that the: *the decision to transfer the plaintiff (Cilkov) to another job is not grounded on any of the reasons allowing transfer of a worker to another job, i.e. the decision does not take into consideration any of the reasons referred to in Article 14 of the Collective Agreement, on the grounds of which the plaintiff could be transferred. The decision signed by the General Manager of the Public Enterprise is thus unlawful and shall be annulled and he is obliged to reassign the worker to the previous job.*"

On the other hand, the Krusevo First Instance Court and the Bitola Court of Appeals decided differently in the case of Kire Sotirovski. Mr. Sotirovski filed a lawsuit against the Health Insurance Fund over a decision on his transfer, because the decision did not state the reasons for transfer as envisaged by Articles 14 and 17 of the Collective Agreement for Employees in State, Justice and Local Self-Government Bodies. The situation was further complicated by the fact that Mr. Sotirovski was transferred to a position, which did not suit his schooling and professional qualifications. However, the Krusevo First Instance Court rendered a verdict (No. P 36/03, dated 18 February 2004) dismissing the claims of the plaintiff despite the fact that the decision on the plaintiff's transfer did not include reference to the grounds for the transfer, envisaged in Article 14 of the Collective Agreement. The said verdict was later upheld by the Bitola Court of Appeals (No. Gz 1988/2004, 7 July 2004).

Thus, according to one interpretation of the court, the decision does not contain the reasons set forth in the Collective Agreement and hence the decision is declared unlawful and null and void, while in the second case, the court dismissed the claims of the plaintiff and awarded validity only to the discretionary rights of the employer.

of rights contained in international conventions (the *case of Adnan Saini*);³ to absolute impossibility to enforce decisions (*the case of Tomislav Spasovski, village of Aracinovo*, the court upheld the plaintiff's right to compensation but was unable to declare who was guilty).

Partiality or lenience towards the state and state bodies, especially the Ministry of the Interior, as opposed to the protection of individuals and their rights. – Such is, for example, the case of Saso Kostadinovski, Kumanovo: despite indications of torture, the case was pending from 2003 to the end of 2005 first because the judge adjudicating the case did not schedule a hearing, then the hearings were adjourned because the accused police officers did not appear in court, and, finally, because the judge herself failed to appear in court.. Also, the case of Julia Gavazova and Makedonka Lozanovska, Skopje – the hearings were adjourned 7 or 8 times because the witnesses – employees of the Ministry of the Interior – had not appeared in court, while the Court did not have the courage to issue a warrant to have the witnesses brought in, i.e. did not apply the legal provisions on the Ministry of the Interior as a state body.

Non-execution of court orders, rendering pointless the right to a fair trial within a reasonable time, especially in view of the fact that the state's legal system allows the non-enforcement of final and legally binding verdicts to the detriment of one of the parties; or execution is delayed until the verdict itself becomes pointless (such is, for example, the case of unlawful dismissal – 1996 case of Pavlina and Nikola Kamcev; the Zanat Gradba Company compensation claim over an unlawful dismissal, the case of Efto Eftovski, Gostivar in a 1999 civil lawsuit over a debt, the 1992 case of Blagoja Drobov regarding the non-enforcement of a temporary measure).

The performance of the Supreme Court was especially concerning in 2005. The Court failed to establish a uniform and consistent practice that would substantiate its position of one of the basic guarantors of human rights and freedoms:

The Supreme Court as a rule acts diligently and adopts decisions on the merits of cases if they are in the favour of the State. Maybe the best example is the case of a Dimitar Arsov (laid off due to restructuring) vs. the Electric Power

3 Apart from the problematic nature of the procedural decision of the Gostivar First Instance Court (a minor was tried together with an adult charged with complicity and the judicial panel did not include a judge with experience in juvenile related matters), it seems that the most problematic decisions of the Court are those to keep Adnan in detention in the Tetovo prison from 6 May 2004 to this date, i.e. *more than a year and five months*.

Under Article 492 of the Criminal Procedure Code, the detention of a juvenile may last maximum 90 days and such a measure is prescribed as an exceptional measure. The Court obviously decided to “take advantage” of the fact that in the meantime Adnan attained 18 years of age and ignored the legal deadline, keeping Adnan in prison for one sole reason – fear of absconding. Regardless, at the time of detention the person was a minor, and the Court placed him in prison together with adult persons. Hence, the Court violated both Macedonian and international norms.

Company of Macedonia. This decision of the Supreme Court dealt a serious “blow” to the protection of workers from arbitrary and voluntarist decisions by employers, who can thus declare anything as restructuring. The court thus retrograded to collectivism instead of persisting on the reformist course, i.e. assessing each case on its individual merits;

Private lawsuits (very often submitted by people in an unenviable social and economic position, relating to pensions, welfare or some other right or status, vulnerable categories of the population in terms of economy or age) last more than two years, and the Court most often orders retrial (which in practice implies a vicious circle). For example the case of Sande Trajcevski, Bitola Region (who has been in court for 17 years in the attempt to acquire the right to an old age pension); Tomislav Docevski (1996); the case of Zlate Angelovski, Bitola (dating from 2002 regarding an old age pension); Zivko Vrencovski, (2003); Miroslav Georgievski (2002); Remzi Limanovski (2003), etc. In none of these cases did the court use decide on the merits of the case, despite the obvious abuse of procedure by lower instance courts.

In certain cases, the decisions of the Supreme Court evade reason. Such is the case of establishing fatherhood in which the sterility of the “father” had not been accepted as sufficient grounds to allow the institution of a paternity procedure.

The selective functioning of the Constitutional Court has become even more concerning. Since the change in its composition (almost all its staff are now party cadres), the Constitutional Court has been increasingly declaring itself incompetent to review cases on issues involving a political position of the executive authorities, which has impacted on the adoption or non-adoption of a specific law. This was the reason why it dismissed the applications of the Helsinki Committee regarding:

Violation of Article 97 of the Constitution of the Republic of Macedonia stipulating that state administration bodies in the fields of defence and the police are to be headed by persons who have been civilians for at least three years before their election to these offices. This Article was not respected during the appointment of Siljan Avramovski to the post of Minister of the Interior. The Constitutional Court proclaimed itself incompetent with the explanation that the appointment to a ministerial position is an individual act. This allows for electing the next Minister of the Interior in contravention of Article 97 of the Constitution;

Furthermore, the Constitutional Court proclaimed itself incompetent in respect of the Law on the Ratification of the Agreement between Macedonia and the USA on Non-Extradition of USA Citizens. The Court refused to consider the violations of the right to non-discrimination in respect of this Law. The Constitutional Court took a retrograde position on application of international standards in adopting decisions relating to the protection of human rights and freedoms. The Constitutional Court was especially insensitive regarding matters related to rights of sexual minorities and freedom of conviction:

The motion filed by the Centre for Civil and Human Rights regarding discrimination on grounds of sexual orientation in the Law on Military Service, (where “sexual abuse” and “homosexuality” are equated by penalising both as disciplinary violations) was dismissed. It should be noted that despite such a decision of the Constitutional Court, the Government instituted a procedure to amend this Article of the Law on Military Service and eliminated discrimination on grounds of homosexuality from the Law in December 2005.

The Court adopted a Decision dismissing the motion to review Articles 5 and 8 of the Law on Religious Communities and Religious Groups (according to which only one religious community may be established under a single religion). In its decision, the Constitutional Court refers to Article 28 of the Rules of Procedure (according to which the Court shall dismiss a motion if it has already ruled on the same matter and there are no grounds for adopting a different decision). The Court did not take the opportunity to re-examine its decision; instead, it explained the dismissal by the correctness of this provision of the Law on Religious Communities. According to the Court, “the citizens are protected from manipulation by the division of followers of the same religion into several religious communities which leads to the legalisation of church schism”. Hence, instead of protecting the freedom of religion and the right to “change of religion and conviction”, the Constitutional Court protects the monopoly of a specific religious community commands over its followers.

In certain cases, the Constitutional Court has shown disquieting lack of knowledge of international law. Such is the case of the so-called “forced apprehension”. The Court established that “it does not constitute deprivation of freedom but bringing persons in by force”. This is contrary to the explanation of the ECtHR which found that deprivation of freedom was the most obvious when a person was kept in the police by force. Article 5 applies also “when the person cannot leave a certain place or is obliged to go to another place accompanied by an official person, i.e. when the person is not free to leave...”.

The Office of the People's Attorney (Ombudsman) has made some positive headway and exercised powers vested in it by the Law on the People's Attorney to a greater extent. However, this institution still has not assumed the position it should have in the promotion and protection of human rights and freedoms. The fears that the appointment of party cadres to the job may affect the work of the institution have proven largely justified.

The analysis of the 2004 Annual Report of the Ombudsman (published in March 2005; reviewed by the Assembly at its 18 May 2005 session) shows that this key for the protection of human rights had not shown any interest in women's rights and failed to take a single concrete step for the recognition, promotion and protection of *women's* rights. The only exception is a single sentence incidentally mentioning the threat of gender-based discrimination. The rest of the Report makes no

mention of women's rights and provides no data on the activities of this institution regarding gender-based discrimination, gender equality, violence against women, etc.

The Ombudsman did not find it necessary to react to cases of large-scale violations of voting rights during the local elections. In respect of elections, the issue of ethnic Albanian women's right to vote again arose as an issue of extraordinary importance (but again failed to prompt any reaction on the part of the Ombudsman).

According to insight in cases referred to the Helsinki Committee and other non-governmental organisations, the Ombudsman Office on several occasions failed to fulfil its lawful duties. For example: a) the Ombudsman considers that the non-existence of a Government Commission, which was to have been established to address specific requests by citizens – is sufficient reason for the non-enforcement of a court decision in the Durtanovski case; b) the Assistant to the Ombudsman in charge of children's rights did not react to the obvious violation of children's rights in the Ljubanci Dormitory (registered and reported by the NGO Rubicon, that had worked for a while in this institution); c) In several cases related to the initiative for the establishment of a separate Ohrid Orthodox Archbishopric (in parallel with the Macedonian Orthodox Church) the Office of the Ombudsman did not find the strength to oppose the obvious violations of human rights by various state bodies.⁴

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

2.1. Legislation. – Torture is identified as a crime in Article 142 of the Criminal Code of the Republic of Macedonia according to which: “(1) Imprisonment of one to five years shall be imposed upon a person who, while performing his duty, or a person instructed by an authorised official or with the consent of the authorised official, applies force, threats or another illicit instrument or illicit manner with the intention of forcing a confession or another statement from a defendant, a witness, an expert witness or from another person, or inflicts on another person severe bodily or mental suffering in order to punish him or her for a crime s/he committed or is suspected of, or to intimidate him/her or to force him/her to forfeit some of his/her rights, or causes such suffering due to any kind of discrimination.

4 In this context, the following cases can serve as an illustration: the case of Jovan Vraniskovski, (who was sentenced to 2.5 years imprisonment for inciting religious and national hatred and intolerance); the case of Riste Risteovski from Prilep who has been exposed to continuous pressures by the police; the nun Paulina Zajac who was deported from the country and was not entitled to enter the country for a long time; d) the impossibility of Monk Sofronie to change the address of his place of residence in his ID. In the two latter cases (where the Ombudsman found no violations of rights and did not want to intervene), the state bodies themselves took positive steps after the representations by the Helsinki Committee.

(2) If the injured party has sustained severe bodily harm or other especially grave consequences due to the activities stipulated in paragraph 1, the perpetrator shall be punished by imprisonment of one to ten years.”

Under Article 143 of the Criminal Code: “A person who while performing his duty mistreats another, frightens, insults him or her, or in general, behaves towards him or her in a manner degrading his or her human dignity or personality, shall be punished by imprisonment of six months to five years.”

2.2. *Situation in Prisons.* – Serving a prison sentence is regulated by the new Law on Execution of Sanctions (*Official Gazette*, No. 02/06). Supervision of the execution of sanctions is elaborated in Articles 14 and 17 of the Law (that regulates the work of the Directorate for Execution of Sanctions)⁵.

The large number of inmate deaths over the last two years is a telling indicator of the concerning situation in the Macedonian penitentiaries.⁶ In 2005, five deaths were registered in the largest prison in Macedonia, Idrizovo, alone. According to the prison authorities, three were suicides, one was murder and one death remained “unexplained” – there were no signs of violent death, the inmate was

5 PART ONE – BODIES COMPETENT FOR EXECUTION OF SANCTIONS

A. DIRECTORATE FOR EXECUTION OF SANCTIONS, CHAPTER II

1. Powers of the Directorate for Execution of Sanctions – Article 14

(1) The Directorate shall organise, implement and supervise the serving of sentences, juvenile prisons, alternative measures of community service and house arrest and enhanced supervision prescribed by a decision on suspended sentence or conditional release, and educational measures of referral to an education – correctional facility.

(2) The Directorate shall be a body within the Ministry of Justice with a legal capacity.

(3) The Directorate shall ensure continuous training and advancement of employees.

(4) The Directorate shall cooperate with institutions, associations and organisations dealing with issues related to execution of sanctions.

2. Directorate Administration – Article 15

(1) The Directorate shall be managed by a Director.

(2) The Director shall be appointed and dismissed by the Government of the Republic of Macedonia, at the proposal of the Minister of Justice.

(3) The Director shall be appointed to a five-year term in office and may be reappointed.

(4) A person with a higher education VII-I degree and professional experience of at least five years in the area of execution of sanctions and related areas may be appointed a Director of the Directorate.

Article 16

(1) The Director shall represent the Directorate, and be responsible for the lawful and proper performance of activities regarding the execution of sanctions in the country and shall account to the Government of the Republic of Macedonia and Minister of Justice for his/her work.

(2) The Director of the Directorate may assign an employee to deputise for him or her if s/he is absent or unable to discharge his/her duties.

3. Organisation of the Directorate – Article 17

(1) The organisational units performing the activities of the Directorate shall be specified in the general enactments on the organisation and systematisation of activities and duties.

(2) Employees of the Directorate shall have the status of civil servants.

(3) General enactments referred to paragraph 1 of this Article shall be adopted by the Minister of Justice.

6 Fifteen deaths, most of which were declared suicides, were registered in 2005 and early 2006.

found dead in his bed. In the same period, there were three suicides in the Skopje Remand Prison Sutka, and one suicide in the Tetovo Prison (where one attempted suicide was also registered). Nine deaths in total marks a serious increase over the preceding two years (3 in 2003 and 1 in 2004). Two more suicides (in the Sutka prison) and one unexplained death (in the Idrizovo prison) were reported in early 2006.

The “explanation” by the Idrizovo Prison Director that “naturally, people die in prisons” is obviously unacceptable, or even worse – such an “explanation” came in lieu of a proper and successful investigation (which was not conducted), prompting several brief public statements that disguised the essence of the problem. In result, two prison guards were fined and the “regular remedy” was applied – dismissal of the Prison Director. Unfortunately, there were indications of other deaths or at least murder attempts, but the authorities, on the one hand, fully denied such claims and, on the other hand, did not allow efficient investigations of such claims. Loss of human lives did not motivate the authorities to analyse the health care conditions in prisons (total absence of specialist medical services, quite insufficient general medical aid and sporadic presence of a psychiatrist, i.e. psychologist in the prison). The latter was especially drastically manifested in the case of a minor in the Remand Ward of the Tetovo Prison who was given only one therapy of strong tranquilisers after attempting suicide, but not provided with any care or assistance.

Allegations of corruption among prison officers (registered in several cases of assigning prisoners to various wards, granting or depriving them of their privileges and benefits, and unimpeded drug trafficking) did not attract the interest of the supervisory bodies and did not lead to proceedings against the prison employees (responsible officers).

The deterioration of the state of affairs, especially in the Idrizovo Prison, was to have been expected. Back in 2004, during the visit to the so-called closed institutions – a project realised in cooperation with several European Helsinki Committees – it was, *inter alia*, pointed out that the situation was “explosive” (about 1200 prisoners incarcerated in one place, with serious problems in terms of their segregation, without stratified access and without the genuine opportunity to work in the context of their re-socialisation) and that it was necessary to “break down” the Idrizovo Prison into several smaller prisons. Instead, the Prison and the executive authorities opted for the realisation of a project of modernising the prison facilities, without dislocating at least part of the prison population – they simply transferred them to prison wings that would be renovated later. In this manner and perhaps despite good intentions, a new, even more complex situation emerged – the old, inappropriate and badly maintained facilities became overcrowded, with 20 to 25 prisoners per cell, which can accommodate 4–5 inmates under prison standards. This practically rendered impossible the supervision of and work with the prison population, especially in view of the fact that special cases – some 11 mentally ill and

40 registered (and most probably about 90 unregistered) drug users were not separated from the other inmates. The deficiencies in the “promotion” system i.e. transfer from a stricter to a more lenient prison regime were not overcome. Instead, they culminated in the total loss of trust amongst prisoners in the legality of and grounds for the decisions by prison authorities in this respect. Such loss of trust was evidenced by several individual protests and in several attempts to strike, even small-scale riots.

Unfortunately, none of the signals were sufficient to prompt the authorities into decisive action. Moreover, even the criticism voiced with the best of intentions was dismissed and those imparting it were discredited. However, it should be underlined that even in such conditions the prison authorities, especially at the working level, accept contacts and even talks both behind closed doors and in public.

2.3. *Torture.* – After long delays and announcements, the legal obligation to establish a State Commission for the Supervision of the Prison System, composed of judges, criminal law experts, sociologists and educational personnel was fulfilled in early summer 2005 in accordance with Article 79 of the Law on Execution of Penal Sanctions. The Commission has to date evinced no effort to address the current problems that the prison population faces, albeit it is not empowered to conduct investigations. This inevitably leads to the conclusion that this Commission is nothing but the authorities' attempt to “dampen” the effects of increasingly frequent and argued public criticism, and to avoid an obligation deriving from ratified documents, i.e. to establish an independent commission with powers to investigate cases of alleged torture.

On the other hand, prosecutors and judges continue the practice of tolerating and even conducting proceedings despite numerous and even manifest indications that the indictments are based on extorted confessions, especially from detained persons, which constitutes a violation of the Constitution (prohibition of extorting a confession). Furthermore, extortion of a confession is defined as a criminal offence. Under the Criminal Procedure Code, evidence obtained in such manner is inadmissible. This is coupled with the complex, but very successful “system” of impeding efficient investigations of alleged cases of torture. Macedonia has only one institution whose medical reports of torture are acceptable to the court – the Forensics Institute. The Institute uses its procedure for establishing the so-called “mechanisms of incurring injuries” and draws up a medical report that may be used in trials as grounds to consider that the injuries of a person are consistent, i.e. correspond to the person's allegations that public servants have inflicted those injuries in the course of an official procedure either to extort a confession or to illegally punish the person (i.e. substantive elements of the crime of torture). The procedure is possible also owing to the fact that the right of the person deprived of freedom to call a doctor of his/her choosing is not respected.

Only a judge may ask the Forensics Institute to establish the veracity of torture allegations. Individuals, even the ones who were willing to pay a very high price for such examinations, may not request of the Institute to conduct such an examination. Only the Public Prosecutor can propose to the (investigative) judge such an examination, but the courts quote the chronic lack of funds as the reason why they do not seek such examinations from the Institute. Medical findings of other institutions are grudgingly accepted but must be subject to “further examination”. The circle thus closes. Hence, not a single processed case of torture has been “proven” by findings of the Forensics Institute, at least not to public knowledge.

2.4. *Police.* – The work of the police is defined by the Law on Internal Affairs (*Official Gazette*, 19/95, 6 April 1995) and its amendments;⁷ the Rules of Procedure on performance of tasks by the Ministry of the Interior (*Official Gazette*, 12/98, 10 March 1998) and its amendments;⁸ the Regulation on the Use of Means of Coercion and Fire Arms (*Official Gazette*, 22/98, 15 May 1998) and its amendments;⁹ and the Police Code of Conduct – the Basics (*Official Gazette*, 3/04, 26 January 2004). Police supervision is conducted by the Internal Control Sector (Rules on the Performance of Tasks by the Internal Control and Professional Standards Sector at the Ministry of the Interior – September 2003).

Despite the provisions of the above laws and the work of supervisory institutions, the police know that they will go unpunished for torture and that judicial bodies will accept evidence obtained by extortion of confessions (regardless of the veracity of such confessions), wherefore it is not surprising that the police continue the practice of apprehending allegedly suspicious persons, on the basis of orders issued by the police chiefs rather than the courts. Moreover, they claim they are not 'depriving suspects of liberty' but performing their 'regular' police duties. However, in face of the growing awareness of citizens of their rights in this context, and ever stronger reactions to such police conduct, instances of arbitrary or unlawful deprivation of freedom have been decreasing in general terms. There was a period in 2005 marked by a high concentration of such cases, when the newly established police unit called Alphas just began operating.

Namely after a longer delay, this special unit was established in 2005 to counter so-called “street crime”. Bearing in mind that they started from scratch, the Alphas showed “excellent” results in a relatively short period. However, a drastic turnabout occurred after an unfortunate episode when two Alpha officers were brutally beaten up by several armed persons (belonging to the Albanian community) on the road leading to the village of Kondovo in the Skopje area. After this episode, instead of the Alpha officers positively influencing the other police officers and

7 *Official Gazette*, 55/97, 29 October 1997; *Official Gazette*, 38/02, 5 June 2002; *Official Gazette*, 33/03, 14 May 2003; *Official Gazette*, 19/04, 30 March 2004; *Official Gazette*, 51/05, 30 June 2005.

8 *Official Gazette*, 15/03 12 March 2003.

9 *Official Gazette*, 17/04, 24 March 2004.

instead of demonstrating their strength vis-à-vis the criminals, like police officers in TV series do, the Alpha officers launched a “crusade” against the citizens. Fortunately, this time the citizens responded with timely and numerous reports of such cases. Regardless of the fact that none of these reports has been processed or at least duly examined, there is no doubt that such pressure resulted in the relatively prompt “stifling” of excessive conduct primarily of the Alpha officers.

Compared to 2004, certain public prosecutors and judges have started duly considering the duration of the pronounced measure of detention, whereby they have set an excellent example, proving in the best possible way that the problem does not lie in the regulations (the excuse the authorities resort to the most) but in the quality of the judges and the conduct of court proceedings. Unfortunately, such practice has not become widespread yet.

The Interior Ministry has in some of its latest statements on the work of the Office of the Ombudsman resorted to political discreditation, rather than dialogue and counterarguments. The Minister of the Interior accused the Ombudsman of selective approach to cases of police brutality and overstepping authority, which the Ombudsman had shown interest in. The Minister of the Interior did not elaborate the cases or dispute the relevance of the interest of the Ombudsman in such cases, but implied the Ombudsman's interest in them was ethnically-based. In his statement, the Minister did not offer an explanation of his allegations or cite data that would show the number and types of individual applications the Ombudsman took on or dismissed, i.e. whether there was abuse of power by the Ombudsman that would indicate discriminatory conduct against persons belonging to any ethnic community. Furthermore, the Ministry of the Interior qualified the statements of the Ombudsman as “an intentional attack on the Ministry of the Interior” i.e. that “a political dimension is intentionally attributed to the initiated cases and to the alleged lack of cooperation on the part of the Ministry”. Finally, the Interior Ministry Spokesperson said the Ministry was in possession of documents of such character that they were inaccessible to the Ombudsman (this is in contravention of Article 27 of the Law on the Ombudsman, under which the Ombudsman must be granted insight into all requested information, regardless of the degree of confidentiality, and shall have the obligation to keep the state or official secret”).

3. Freedom of Thought, Conviction and Religion

3.1. Legislation. – The Macedonian Constitution elaborates the freedom of conviction in: a) Article 9: “Citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status. All citizens are equal before the Constitution and the law.” b) Article 16: “The freedom of personal conviction, conscience, thought and public expression of thought is guaranteed”, c)

Article 19: “The freedom of religious confession is guaranteed. The right to express one's faith freely and publicly, individually or with others, is guaranteed. The Macedonian Orthodox Church, as well as the Islamic Religious Community, the Catholic Church, the Evangelist – Methodist Church, the Jewish Community and other religious communities and religious groups, are separate from the state and equal before the law. The Macedonian Orthodox Church, as well as the Islamic Religious Community, the Catholic Church, the Evangelist-Methodist Church, the Jewish Community and other religious communities and religious groups, are free to establish schools and other social and charitable institutions, in keeping with the law.”

Issues relating to the exercise of the freedom of conviction and religion are elaborated in the Law on Religious Communities and Religious Groups of 1998. Some of the articles of this Law were repealed by the Constitutional Court in 1998. However, other problematic and publicly disputed articles of this Law continue to be persistently applied.

The Constitution of the Republic of Macedonia ensures special protection of the freedom of conviction. Article 110 of the Constitution empowers the Constitutional Court to “protect the freedoms and rights of the individual and citizen relating to the freedom of communication, conscience, thought and public expression of thought and the prohibition of discrimination against citizens on grounds of sex, race, religion or national, social or political affiliation”.

The authorities have lately failed to equally protect the freedom of conviction of all citizens of the Republic of Macedonia, showing evident preferences for one religious community (the Macedonian Orthodox Church) whose interests and problems they have raised to the level of state interests and problems.

What causes the greatest concern is that, despite the numerous attempts to raise the issue of the problematic character of Article 8 of the Law on Religious Communities and Religious Groups,¹⁰ under which there can be only one religious community for one religion, even the Constitutional Court did not muster the strength to oppose the evident limitation of the freedom of conviction of citizens by this article. This prohibition constitutes a threat to the secular character of the state (it gives the state a role to assess religious canons and represent a certain religion) and a direct violation of the provisions of the Universal Declaration of Human Rights, the ICCPR and ECHR (according to which everyone has the right to religion or conviction, the right to manifest, practice and change religion). The authorities have applied Article 8 (one religion–one religious community) to directly interfere in the attempts to formally register a new religious community – the Orthodox Ohrid Archbishopric (which was largely interpreted as the establishment of a parallel Orthodox church in the Republic of Macedonia), thus violating a

10 *Official Gazette*, No. 35/97.

number of fundamental human rights (the right to religion, the right to expression, the right to privacy, the right to freedom of movement and the right to a fair trial).

The non-secular character of the state has been demonstrated on several occasions in different manners and at all levels of authority:

- Partly through the Declaration in support of the Macedonian Orthodox Church adopted by the Assembly of the Republic of Macedonia (NB in January 2004, the Helsinki Committee proposed that the Assembly adopt a totally different approach (see Draft Resolution, in www.mhc.org.mk);
- The decision of the Commission for Relations with Religious Communities and Religious Groups not to allow the registration of the new Orthodox church in order to protect the Macedonian Orthodox Church and the decision of the Second Instance Commission on the appeal of the applicants;¹¹
- Police passivity or engagement depending on whose rights were to be protected in resolving the inter-church dispute; and,
- The Vraniskovski case that marked 2005 in terms of the respect and protection of the freedom of conviction and religion. The state and all its institutions in this case acted as advocates of only one religious community (the Macedonian Orthodox Church), raising its interests and problems to the level of national and state interests.¹²

11 Both Commissions overstepped their authority because: a) they acted as if they still had authorisation under Article 13 of the Law on Religious Communities (which was repealed by a Decision of the Constitutional Court) and adopted decisions rejecting the registration of the Orthodox Ohrid Archbishopric; b) they failed to fulfil their legal obligations to abide by the decision of the Constitutional Court, i.e. to set procedures that will harmonise their practice with the Decision of the Constitutional Court. Instead they continued acting as if the provision had not been repealed and only paid attention to the wording (in no part of the text was there reference that application for registration was at issue); c) However, although repealed, the Register and the registration were used as facts in their decisions; namely, they referred to the registration of the Macedonian Orthodox Church under Reg. No. 1 in the repealed Registry; d) Although acting on behalf of the state, they even went as far as accepting the assertion in the Macedonian Orthodox Church Constitution (that the Macedonian Orthodox Church is the successor of the Ohrid Archbishopric) as grounds for the rejection of the application. Does that mean that the Macedonian Orthodox Church assertion is considered a “fact”, and that the Commission is protecting a fact from intruders? e) The gravest violation of the ECHR was made by basing the rejection on the phrase that the Orthodox Ohrid Archbishopric “derives from the Macedonian Orthodox Church” and the most tragic development is that the Commission invoked Article 9 of the ECHR, allows for the change of religion or conviction. Therefore, these state bodies in fact prohibited change of conviction and expressly said so in the decisions rejecting the application, obviously not understanding that “the derived ones” have simply changed their conviction and that this right of theirs is protected by no other than the ECHR.

12 The Bitola First Instance Court found Jovan Vraniskovski guilty of inciting religious hatred and intolerance in its verdict of 26 January 2004 (the verdict was upheld by the Bitola Court of Appeals on 22 June 2005). According to the Court, he intentionally incited religious hatred and intolerance by: 1. Making false allegations; 2. Initiating the establishment of a parallel Orthodox church in the territory of the Republic of Macedonia; 3. Attending the anointment of two priests in Belgrade; and 4) practicing his religion in community with other persons in his apartment.

It should be pointed out that such actions by the authorities were neither condemned nor flagged by any human rights NGO or institution charged with protecting human rights, such as the Ombudsman, in Macedonia.

As opposed to its active (and unconstitutional) actions on the Vraniskovski case, the state was passive and did not undertake any relevant lawful measures with respect to the incidents within the Islamic Religious Community. The disagreements in the Islamic Religious Community, sparked before the month of Ramadan in 2004, escalated in 2005. The pressures started in the Skopje Mufti Office, when a group of imams called on the Head of the Islamic Religious Community, reis-ulema Emini, to dismiss the Skopje Mufti – Zenun Effendi Redzeqi. The tensions escalated to physical clashes, forcing the Head of the Islamic Religious Community to resign. His replacement was appointed to discharge the duty until the end of 2005. In this case, the state did not take steps which would have prevented the violence and did not identify the assailants on several imams.

The state also failed to protect the freedom of conviction in respect of the problems faced by the Behteshi Religious Community, and a number of other minor religious communities in the Republic of Macedonia (which cannot obtain construction licenses to build their religious facilities, are subject to unequal treatment by the state media – the Macedonian Television, and are openly attacked by the Macedonian Orthodox Church priests and believers). Furthermore, as opposed to its actions in the Vraniskovski case, the state remained completely passive when it came to open incitement of religious hatred, as in the Sekirnik case. Physical attacks, threats and open prohibition of the construction of a Catholic church (greatly encouraged by Orthodox Church priests in the region) did not represent sufficient grounds for the state to apply the well-known article of the Criminal Code. Such developments also failed to catch the eye of the Commission for Relations with Religious Communities.

The basic problem of the adopted verdict (as well as the Public Prosecutor's indictment and prior investigation) lies in the crime Vraniskovski was convicted for (inciting religious hatred, dissent and intolerance). According to the Court, the defendant Jovan Vraniskovski did not manifest in his activities hatred towards persons belonging to other religious communities nor did he incite his own followers to hatred; instead he had caused religious hatred against him and his followers. "With such texts in this calendar, the defendant did not manage to convince the people; on the contrary, he caused the people to hate him and his followers, hatred and intolerance of those individual priests and individual citizens who had accepted his teachings." Accordingly, one could conclude that Jovan Vraniskovski was found guilty and sentenced to prison for causing hatred against himself and his followers. The Court, however, found that the citizens who have demonstrated hatred and intolerance are victims of the actions of Jovan Vraniskovski, and the priests and other persons inciting the outbursts of religious hatred and intolerance merely reacted to the provocations (they were "irritated") by Vraniskovski. The Bitola Court of Appeals dismissed the appeal filed by Jovan Vraniskovski and fully upheld the first instance decision.

For more on the court verdict in the case of Jovan Vraniskovski see www.mhc.org.mk, the special analyses section.

The Draft Law on Religious Communities completed in 2005 merely legalises such a state policy on various religious communities and legitimises the special status of the Macedonian Orthodox Church *vis-à-vis* other religious communities. The Draft preserves the disputed provision in Article 8; it provides the Commission for Relations with Religious Communities with identical powers despite its open advocacy of interests of the Macedonian Orthodox Church over the last few years (evidenced again in 2005 by the statements of the new President of the Commission). The Draft Law does not address any of the many problems faced by smaller religious communities and religious groups in Macedonia (in obtaining construction licenses, denationalisation of property, construction of new facilities, procurement of literature, organisation of lectures and inviting lecturers.)

4. Freedom of Expression

4.1. *Legislation.* – The most important laws in the Republic of Macedonia regulating issues related to freedom of expression comprise: the Law on Broadcasting (*Official Gazette*, No. 100/05), and the Law on Electronic Communications (*Official Gazette*, No. 13/05).

4.2. *Practice.* – There were no significant changes in the area of freedom of the media compared to 2004. At the beginning of the year, several media outlets in Albanian temporarily ceased operating (the daily newspapers *Fakti* and *Koha Ditore*), while the *Lobi* weekly is not published yet. The oldest newspaper in Albanian, called *Flaka* went under in November 2004. At one time, this newspaper was considered to be very close to one of the ruling parties (as it was owned by people close to DUI) and despite announcements that it would again be published, it did not reappear until the end 2005. This largely depleted Albanian-language media brings into question the independence of the media (which can easily find themselves in economic difficulties by the activities of political party leaderships). It is evident that newspapers, headquartered in Kosovo, dominate among the Albanian-language print media in the Republic of Macedonia.

The Macedonian Radio and Television remained the tool of the ruling parties. This was most evidently manifested by the time allocated to certain political parties, their statements, conventions and other events on TV and radio; by the lack of reaction and failure to report events organised on the Day of the Albanian Flag; and by the refusal to equally treat the religious communities and religious groups (refusal to broadcast the Easter message of a registered religious group (Pre-Christian Community)); on the other hand, the Macedonian Orthodox Church activities and statements on religious holidays were extensively reported on.

The media failed to profile themselves as independent from political influence, and to offer substantive analyses and objective information. Some of the print media continue nurturing their “weakness” towards certain columnists. The selecti-

veness in this approach is especially evident. This can be illustrated by the example (by no means the only one) of the *Dnevnik* daily newspaper: its editorial staff did not react to obvious hate speech and open and extremely vulgar insults made by certain “privileged” columnists, but it did oppose open argued criticism in op-eds if it regarded some of the politicians, who continually usurp the page intended for readers' views.

Transparency in the work of state bodies or the so-called public authorities, including the Government and its bodies at the central and local levels, although one of the basic (declarative) postulates of their work, is not translated into practice. The Law on Access to Information of Public Character still was not adopted in 2005; this, of course, gives the authorities room to manipulate with information. In January 2006, in the daily newspapers, several non-governmental organisations, including Article 19, Open Society Institute, Pro Media and Transparency Macedonia, published in the dailies their open letter to Macedonian President Branko Crvenkovski, Parliament Speaker Ljupčo Jordanovski, and Macedonian Prime Minister Vladimir Bučkovski, expressing concern over the deficiencies of the new Draft Law on Free Access to Information. The attempt to adopt a Law that is evidently criticised by the journalists, NGOs and experts only confirms the above conclusion. On the other hand, adoption of the Law on Broadcasting was a step forward in the area of information.

The Criminal Code adopted two years ago was debated on several occasions in 2005 *inter alia* because journalists called for the decriminalisation of libel and defamation, as recommended by the Council of Europe. The requested amendments were not adopted; furthermore, the courts heard several cases on libel and defamation in 2005. Freedom of information and independence and objectivity of the media are brought into question by the speedy and smooth rendering of verdicts (even prison sentences) against journalists because they published (even true) information. The open threats against and pressures on journalists by the authorities and the ruling parties provoked no reaction. The latest such example is the case of the open and covert threats which the *Focus* weekly has been exposed to (after publishing an article questioning the truthfulness of the reports President Crvenkovski and former Prime Minister Hari Kostov submitted on their property). The initial lawsuits over forgery were replaced by libel lawsuits; hitherto experience has shown that the court usually adjudicates in favour of the politicians – plaintiffs. A somewhat confusing element of this case is that President Crvenkovski had not proceeded with the private lawsuit over forgery when the Public Prosecutor's Office did not institute *ex officio* prosecution.

Not once did the Association of Journalists act as a body that takes due account of the freedom of information and protects journalists from restrictions of such freedom. The most drastic example of such lack of interest is the silence of

the Association regarding the case of “Malecka”. The first instance court and of the Court of Appeals found a journalist from Albania and her father guilty of preparing terrorist activities by: filming trenches, bunkers, dugouts, and filming armed persons dressed in military uniforms and demonstrating use of arms and range shooting. The Court of Appeals ordered a retrial with the explanation “the description of the activities does not indicate a preparatory action for perpetration of the crime of preparation of a terrorist attack”. According to the Court, the verdict is “unclear and incomprehensible” and no connection has been established between the activities and the offence for which the persons were indicted. At the retrial, the judges rendered the same verdict, which was then upheld by the Court of Appeals. Journalists and human rights NGOs either reacted mildly or not at all to all of this; the case failed to draw any public interest.

The Helsinki Committee could not find at the Association of Journalists (or at any other institution) records on the number of court cases instituted against journalists in 2005. However, from its contacts with editors in chief, the Committee gained the impression that there was virtually no media outlet that was not involved in court proceedings (most often libel cases). The following cases the Committee heard about in its contacts with the editors in chief and the journalists can serve as an illustration:

MP Stojan Andov won the case against a journalist of the newspaper *Utrinski Vesnik*, Sonja Kamarska. The Court of Appeals confirmed the journalist should pay the 24,000 denar fine and the courts expenses, while the journalist submitted a motion to the Public Prosecutor's Office for annulment of the verdict.

Jadranka Kostova – a journalist at the *Focus* weekly – lost the court case instituted against her by Vanko Muratovski, the leader of the Trade Unions of Macedonia. The Court decided in favour of Muratovski and the journalist Kostova paid the 20,000-denar fine for the offence. In her column in the daily *Dnevnik*, she wrote a satirical comment about the general strike announced by Muratovski but never held. Kostova says that she did not have a fair trial, since she was not allowed to call witnesses, and the judge explained this by saying that “witnesses are unnecessary since it is obvious that Muratovski feels offended”. Kostova announced that she would file an application with the ECtHR in Strasbourg.

Lile Gorgieva – journalist at the *Sitel TV* station – was charged with libel by Kratovo paediatrician Dusko Pavlovski MD. Georgieva's four stories on deaths of children treated by MD Pavlovski were broadcast in July and August 2003. They included statements of the children's parents. The lawyer of the plaintiff, Ratko Gorgievski claimed during the trial that the parents had been given the statements when they were drunk. The judge, Aneta Arnaudova (Skopje I First Instance Court), did not allow any witness proposed by the defendant Gorgieva to take the stand. On 4 July 2005, the court punished the journalist with the maximum penalty for the crime of libel – a fine of 63,500 denars. Gorgieva's defence lawyer filed an appeal.

Gorgieva alleges that MD Pavlovski, also the chairman of the Kratovo SDSM board, had taken advantage of his political position and that his lawyer, Ratko Gorgievski – husband of Justice the Minister of Justice Meri Mladenovska Gorgievska – had behaved outrageously during the trial.

Ida Protuger – a journalist at the *Kanal 5* TV station – was found guilty of libel in the case of Eurostandard Bank. In 2005, this journalist was convicted to a three-month prison sentence or 1 year suspended sentence. The verdict is appealed with the Court of Appeals. In her report on the intention of the Bank to take over another Bank (the Postal Bank), the journalist used information published in the daily *Vecer* and on the Eurostandard webpage. The Court did not take into consideration the material contained in the newspaper articles and said that Internet data could not be used as evidence since they were not certified. The Court did not accept as evidence the documents confirming ownership, i.e. Trifun Kostovski's share in the Bank. This libel suit was launched because the report of the journalist was broadcast with the words “Kostovski's Bank” in the background. Ida Protuger qualified the trial as “serious pressure on the freedom of journalism. The Court requires of us to have all information certified by the Notary Public. What type of journalism is that?” she wonders.

In this respect, the Helsinki Committee would like to draw attention to Article 176 of the Criminal Code according to which: (1) No sanction shall be applied against a person who has expressed himself or herself disparagingly about another person in a scientific, literary or artistic work or in serious critique, in discharge of an official duty, journalism, political or another social activity, in defence of the freedom of public expression of thought or other justified interests, if it can be concluded from the manner of expression or other circumstances that such expression was not intended as disparagement or that it had not caused significant damage to the honour and reputation of the person. (2) In the cases in Item 1, a person shall not be punished for expressing or spreading about another person information that he has committed a crime prosecuted ex officio on which a final decision has not been rendered (Art 172 (5)), if s/he proves that s/he had reasonable grounds to believe in the truthfulness of the information s/he had expressed or spread.

5. Economic, Social and Cultural Rights

In 2005, a vast number of citizens of the Republic of Macedonia could not exercise fundamental economic and social rights, while many have has been reduced to a degree of poverty jeopardising their very dignity and their fundamental freedom from fear of poverty as the basis for enjoying and exercising civil and political rights and freedoms.

The trend of restrictions upon the enjoyment and protection of economic and social rights has continued. The restrictions and limitations increased with every

new amendment of laws relating to labour, social protection and health care, in contravention of the values declared in the Preamble and the provisions of the ICESCR, notably Article 5 (2) of the Covenant, under which “2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.”

Furthermore, contrary to the ICESCR and the European Social Charter, the attainment and exercise of the rights proclaimed in these two international documents (continuous economic, social and cultural development and full productive employment; income that ensures decent life, safety at work, right to the best physical and mental health; right to education; right to special protection of children and youth; special protection for women-workers; social and health assistance; professional and social rehabilitation) has not been set by the authorities as a strategic goal and basic priority on which they are to concentrate most of their activities. In this context, it needs to be noted that the Republic of Macedonia has not yet signed the Revised European Charter (despite the confusions that occurred regarding the ratification of the European Social Charter).

In the recent years, every amendment of Macedonia's Law on Labour Relations, Law on Employment and on Insurance in Case of Unemployment, the Law on Pension and Disability Insurance, the Law on Social Protection and Law on Health Insurance violated Article 5 of the ICESCR, undermining the rights of citizens, diminishing the protective mechanisms and limiting the activities of the institutions charged with protecting these rights. The right to work and the right to appropriate steps to safeguard this right, as guaranteed in Article 6 of the Covenant, were especially subjected to continuous limitations and were threatened by each amendment made to the Law on Labour Relations, giving employers more freedom to unilaterally terminate employment. This can most evidently be seen in the changes to provisions on the conditions and procedures for dismissals, i.e. termination of employment.

The process of limiting workers' rights (that started with the amendments to laws in 1993) was logically crowned by the conclusion the Minister of Labour and Social Policy made in 2005, that “the excessive rights of workers, the large number of falsely employed persons taking advantage of numerous benefits granted by the state (in the form of assistance for unemployment or elementary health insurance) and pregnant women burdening the Health Insurance Fund, are the major obstacle to our country's development and to foreign capital investments”.

The latest amendments to the Law on Labour Relations (adopted after the ratification of the European Social Charter) do not make any reference to the right to work, right to fair wages, right to vocational guidance, and the right to vocational guidance of young people (under 18 years of age) which is calculated as part of the

workday. On the contrary, the new legislation strengthens provisions which eliminate a special procedure for dismissal of a person with more than 25 years of service and at least 20 years of service with the same employer; extends grounds for dismissal without notice (and allowing further extension); there are no provisions envisaging limitations on the decision of the employers to dismiss workers on grounds of restructuring; the deadline in which the employer is to issue notice to workers proclaimed redundant by restructuring is limited; the employers' obligation to alleviate the negative consequences of dismissal has been eliminated; the employer is no longer obliged to determine the structure of redundant workers on the basis of prior criteria; the law no longer obliges but merely allows provision of assistance for new employment; the employer is granted the right to dismiss women-workers who fulfil the conditions for old age pension (according to the Constitutional Court, this constitutes a privilege and right of women and has the purpose of protecting gender equality).

Actually, the latest amendments to the Law on Labour Relations do not envisage the employers' obligation to give reasons for dismissal prompted by structural changes. The employer simply declares the changes and dismisses workers at his/her own discretion. After a year, the employer is no longer under the obligation to rehire the dismissed workers, even if s/he is opening identical jobs. The possibility of abuse of dismissal has thus become enormous. This is especially concerning if one takes into consideration that the changes themselves are not subject to any serious consideration by any entity that would *de facto* establish their existence (in other words a simple change of the name of the job can be proclaimed a structural change and the worker will be dismissed (i.e. replaced by another worker); the cases of the employees at the Macedonian Railways and at the Macedonian Bank are good examples of such abuse. This is especially concerning with regard to the state administration, since it enables unimpeded replacement of personnel on grounds of their party affiliation.

The Minister of Labour and Social Policy in 2005, however, did not present a single analysis of the: working conditions and problems related to the non-application of safety at work measures (although work-related injuries were registered); the problems of overtime (disrespect for the legal provision on maximum hours of work and rest); the autocratic salary and dismissal policies of employers; and lack of criteria in ranking candidates for jobs in state bodies (the Minister was here greatly helped by the Constitutional Court decision that such criteria are unnecessary). The Minister also failed to publicly present an analysis of the situation in the textile industry, which employs primarily women (that is especially surprising in view of the fact that this Ministry has had a Gender Equality Department since 1997).

In 2005, the exercise of labour rights was *inter alia* threatened by the inappropriate positions and work of the Federation of Trade Unions of the Republic

of Macedonia (one of the largest organisations charged with protecting workers' rights). The inertia of the Federation leadership and their open ties with the authorities (best exemplified by the receipt of major financial assistance provided by the state),¹³ turned the Trade Unions into a tool in the hands of certain political parties, rather than a structure that represents the interests of workers.

Poverty in the Republic of Macedonia continues to be the cause of large-scale violations of human rights and freedoms and to prevent a large number of citizens from exercising their rights and freedoms. Never have the authorities given priority to the fight against poverty, limiting themselves to expressing declarative concern (but failing to envisage any activities to combat poverty in their Strategy). With a 38% unemployment rate; around 30% of the households (55% of the population) below the poverty line; unpaid pension and health care contributions for more than 50,000 workers; grey economy estimated at 45% of the national GDP; average salary in the country standing at 190 Euros (the minimum at 30 Euros); the basic consumer basket for a four-member family (food and beverages) costing 150 Euros and maximum welfare to a family of four not exceeding 50 Euros; and a huge number of workers expecting and awaiting transition (without regular salaries), the Republic of Macedonia is firmly entrenched at the bottom of the list in Europe in terms of the enjoyment and protection of social and economic rights.

In 2005, smaller welfare payments and benefits were paid out to disabled persons, child benefits were reduced, while the lists of prescription medicines (for which participation had to be paid) were shortened. Due to the financial problems of the Health Insurance Fund, cancer patients (notably children) were on several occasions left without appropriate therapy wherefore their parents, many of whom face serious financial difficulties, had to pay the necessary medicines themselves). The conditions for medical treatment are already below minimum standards (even directly threatening the lives of patients). The rights of patients are not at all a priority of the relevant state bodies, and are not even mentioned in the 2006 development strategies. The amendments to the Law on Health Insurance follow this restrictive trend: health insurance may not be used before 6 months elapse from employment (this also applies to maternity leave); the amount of salary compensation in case of sick or maternity leave has been reduced, but the basis for calculating allocations for health insurance has not.

Especially economically vulnerable groups include: the elderly (who cannot provide for their subsistence with the pensions they receive, while those in senior

13 The Macedonian Government passed a Decision awarding the Federation of Trade Unions 2.5 million denars of financial aid (which is one half of the total funds allocated to NGOs). These funds were given to the Trade Unions as a non-governmental organisation (despite the fact that the Federation of Trade Unions is not registered as an NGO) and in contravention of the Law on Labour Relations under which the employer (in this case the Government) is not allowed to financially support any trade unions.

citizens' homes live in conditions which are below the standards of the worst prisons in the country); a large number of children living and growing up in inadequate conditions (and a huge number of primary schools, schooling 7–14 year-olds, does not fulfil even the minimum prison standards, which is especially concerning); ill persons who do not receive elementary care (there was an increase in the number of deaths caused by inappropriate health care, negligence or use of inappropriate medicines), and in several cases, the lives of patients were endangered by the dire hospital conditions (collapse of the roof in the dialysis ward, damp in the children's ward in the Skopje Clinic et al). Despite the alarming situation in 2005, none of the relevant bodies addressed the public with an explanation of the activities undertaken to overcome such a situation.

The further impoverishment of the population prevents its enjoyment of civil and political rights. A person who cannot provide minimum subsistence for himself/herself and the members of his or her family cannot be free, independent and can hardly be expected to fight for his/her rights and freedoms.

HUMAN RIGHTS IN THE REPUBLIC OF MONTENEGRO IN 2005

I INTRODUCTION

The Republic of Montenegro was part of the State Union of Serbia and Montenegro in 2005. The Western Balkans Thessaloniki Summit held in June 2003 confirmed that Serbia and Montenegro is a potential candidate country for EU accession. Formal contractual relations between the EU and Serbia and Montenegro will be established through the Stabilisation and Association Agreement (SAA) in the context of the Stabilisation and Association Process (SAP). In line with the “twin-track” approach, in October 2005, the EU Commission has launched negotiations with the State Union of Serbia and Montenegro and the two Republics in their respective fields of competence. The pace of SAA negotiations will depend on progress by Serbia and Montenegro in addressing the issues highlighted by the European Commission as key priorities: Reform of the public administration; Reform of the judiciary; Ensuring effective democratic control over the military; Respect Human rights and rights of the minorities; Fight against organised crime and corruption.¹

The Parliament of the Republic of Montenegro on 8 June 2005 endorsed the Declaration on EU Accession, expressing its readiness to fully cooperate and fulfil obligations and standards of the CoE and the OSCE, as well as other international obligations and to efficiently comply with the EU standards and regulations, acting on principles of the rule of law and promotion of human rights.

The year 2005 in Montenegro was marked by the decision of the authorities to call a referendum on Montenegro's independence in 2006. In 2005, the referendum remained the most frequently and most eagerly debated political issue, deepening the division between the “unionists”, i.e. political parties arguing for the continuance of the state union with Serbia, and the “sovereignists”, i.e. the ruling parties and others advocating the independence of Montenegro. By the end of the year the Venice Commission, a body established by the Council of Europe to discuss

¹ Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolutions 1244 of 10 June 1999 and repealing Decision 2004/520/EC [2006/56/EC], Official Journal of the European Union, 7.2.2006.

issues of comparative constitutional law and democracy, found that the valid Montenegrin law on referendum could be applied at the coming referendum, but that the two conflicting sides still had to agree on some major procedural issues. The EU has undertaken to facilitate negotiations among political parties in Montenegro regarding the definition of the modalities of the referendum.

Human Rights in Practice. – The failure of the police and state prosecutor to investigate, prosecute and punish perpetrators of human rights violations remains the most significant problem Montenegro faces in the protection and enjoyment of human rights. This is evidenced by the lack of investigations or inefficient investigations of murders, war crimes committed in the 1990s, of alleged discrimination and torture, inhuman and degrading treatment motivated by hatred based on gender, ethnic or sexual discrimination.

The performance of the judiciary remains extremely inefficient, the provisions of the new Civil Procedure Act allowing for faster proceedings are not adequately implemented and the backlog of almost all Montenegrin courts is alarming. The judges lack training in human rights and avoid reference to international legal standards, which are directly applicable in Montenegro.

Discrimination of Roma, women and especially single mothers, sexual minorities and persons with disabilities is not adequately recognised, prevented, prosecuted or sanctioned by the authorities.

In 2005, minority rights were still not regulated by a special law and the general constitutional standards were not adequately implemented. For example, education was not provided in all minority languages, use of minority languages in media and in contact with administrative bodies was inadequate, etc;

The prosecution of instigators of national, ethnic, racial and religious hatred was inadequate, as was the investigation and prosecution of incidents of torture, especially those constituting hate-crime; police torture was still reported only anonymously, by NGOs, and was generally not investigated. The most remarkable incident of maltreatment of detainees by special police officers who had violently entered the Spuž prison detention unit remained uninvestigated by the end of the year;

The authorities failed to efficiently investigate murders of the editor-in-chief of the opposition daily *Dan*, and the Assistant Chief of Crime Police, as well as killings of mobsters and state security officers which had occurred in the previous decade. In addition, Montenegro has failed to fulfil its positive obligation to protect the right to life with regard to serious risk to health in the region of Pljevlja.

Moreover, the authorities did nothing to shed light on the war crimes committed in the territory of Montenegro; some of them, notably the deportation of Moslem refugees and attack on Dubrovnik, were executed by no other than the officers of the Republic of Montenegro.

The numerous libel cases in Montenegro substantiate the non-acceptance of ECtHR standards giving the media freedom to criticise by publicising shocking and disturbing ideas, even exaggerations and provocations, on matters of public interest and especially the politicians.

The economic and social rights are still infringed on a large scale. Apart from numerous violations of the right to work with regard to unpaid salaries by state owned enterprises, a new form of violation of the right to favourable conditions of work by private employers – unpaid overtime – has been on the rise but has mostly not been investigated and has hence gone unpunished.

The lack of efficient and professional performance and lack of coordination between the police, social service centres, state prosecutors and courts has resulted in the inadequate protection of women and children from domestic violence, which often results in injuries, and even murders.

II HUMAN RIGHTS IN LEGISLATION

1. Right to Effective Remedy for Human Rights Violations

1.1. Access to Justice. – In addition to the institute of mandatory representation of a defendant by a court appointed defence counsel in criminal proceedings, the new Montenegrin Civil Procedure Act introduced free legal aid (court appointed defence counsel) in civil cases as well, when a party cannot afford a lawyer “when necessary for the protection of the party's justified interest”. This institute, however, still has not been sufficiently proven in practice.

The institute of halting civil lawsuits for compensation of damages incurred by commission of a crime still exists in the Montenegrin Civil Procedure Act. It has been causing significant delays in processing civil cases, especially when judges abuse it to reduce their workloads or wish to avoid handling politically sensitive cases, such as claims for damages filed against the state for war crimes.

The court taxes have been raised significantly, although a party may seek exemption from payment alleging indigence. The Constitutional Court had ruled that a party's failure to pay court taxes may not serve as justification for not processing the case. The Court held that a tax should be enforced in an enforcement procedure, which is not in breach of the right of access to a court.²

1.2. Legal Remedies. – In cases of human rights violations, protection can be sought in both civil and criminal proceedings. Though criminal proceedings may in some cases be initiated by private citizens, most require action by the public

2 For more details, see the chapter below on the Right to a Fair Trial and the State of the Judiciary.

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 the case, within a three-month deadline. The public prosecutor has no duty to inform the injured party of the start of investigations, but is to serve upon the injured party the decision to dismiss their criminal complaint or discontinue investigation within 8 days. However, in practice, the prosecutors sometimes fail to serve such decisions on the complainants, who in turn remain precluded from their right to continue pursuing the case as private prosecutors.

In some instances of deprivation of liberty by a non-judicial body, there is only a right to complain to an administrative authority and not to the court, contrary to the requirements of Article 9 (4) of the ICCPR and Article 5 (4) of the ECHR.³

There is no special legal remedy for breaches of the right to a civil or criminal trial within a reasonable time. The only remedies available are administrative and do not fulfil the requirements in the *Kudla v. Poland* judgment of the ECtHR. In theory, one can file an appeal with the Constitutional Court of Montenegro, which is the ultimate legal remedy in cases when no other judicial protection is available, but there has not yet been a single case to test the efficiency of such a remedy.

Under the Montenegrin Constitution, a constitutional appeal may be lodged only “when no other judicial protection is available” (Art. 113). The Constitutional Court has interpreted it as meaning that it shall consider a constitutional appeal only when no judicial protection is afforded, and not when all other remedies have been exhausted or when a remedy proved ineffective. If the Republic of Montenegro is to become an independent state, such narrow competences of the Constitutional Court will lead to a significant influx of applications against Montenegro in the ECtHR.

1.3. Ombudsman. – The Protector of Human Rights and Freedoms of Montenegro (Ombudsman) “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”. The Protector has special powers regarding judicial procedure, which is rare in comparative law. He can react to complaints regarding ongoing judicial proceedings if they are unnecessarily prolonged, if there is obvious misuse of procedural powers or failure to execute court decisions. Generally, the Protector can receive complaints from any person who considers his/her rights and freedoms have been violated by an act or omission of official bodies within one year of the date of the alleged violation or knowledge of violation, and exceptionally beyond this deadline if the case is considered especially significant. The Protector can also act on his/her own initiative with the mandatory consent of the injured

3 See the chapter below on the Liberty and Security of Person.

party. A good solution is that persons deprived of liberty can submit their complaints in a sealed envelope and such communication is “immediately forwarded to the Protector unopened and unread and every response of the Protector is treated in the same manner”. The party need not exhaust all legal remedies prior to addressing the Protector, who may request that the complainant do so, should he consider such remedy more effective. All state bodies are duty bound to provide adequate assistance to the Protector and respond to his request for access to data and records, regardless of the level of confidentiality, and allow free access to all premises. Persons must respond to the Protector's summons for questioning. The Protector's final opinion on the case is a recommendation to the state body which the complaint regards and the body is bound to report to the Protector on the action taken to comply with the recommendation. If the body does not comply, the Protector can inform the public, the immediately superior body or publish a written report about the case. The Protector is also empowered to submit initiatives for legal reform, issue opinions on draft laws and other general acts and “give suggestions on initiating proceedings before the Montenegrin Constitutional Court for reviewing the constitutionality and legality of general acts pertaining to human rights”.

1.4. Enforcement of International Legal Decisions. – Montenegrin procedural laws still do not contain particular provisions allowing enforcement of judgements of international bodies, for example of the European Court for Human Rights.

III INDIVIDUAL RIGHTS

1. Prohibition of Discrimination

1.1 General. – The Montenegrin Constitution prohibits discrimination based on “any distinction or personal characteristics”, which is a broad enough formulation to include new forms of discrimination. For example, in 2005, the Constitutional Court declared unconstitutional the decision of the Health Fund depriving women over 38 the right to free medications treating sterility. Also, it annulled provisions of the Act on Securities and the Act on the Central Bank prescribing that members and staff of the Securities Commission and the staff of the Central Bank were not personally liable for any actions or failures to act while performing their regular duties in good faith. The Court found that the provisions violated the constitutional principles of equality of all citizens and the respect of law and that only courts had the right to relieve someone of criminal and civil accountability. The Constitution, however, guarantees such protection only to citizens not to all persons.

The Montenegrin Criminal Code incriminates all forms of discrimination, including incitement of national, racial and religious hatred and intolerance. Hate crime (violence motivated by hostility for illegal, discriminatory reasons) is also

prohibited by the provision entitled “Maltreatment and Torture” and to a more moderate degree by a provision punishing for “violent conduct” a person who significantly endangers civil tranquillity or grossly disrupts public law and order by gross insults and maltreatment of another person, infliction of violence against another, by causing a fight or by insolent and ruthless conduct. The inclusion of these criminal offences provides adequate instruments for punishing members of extremist groups inflicting violence against members of another religion, race, nationality, political conviction, sexual orientation et al. However, these norms are rarely implemented in practice and many incidents of inciting hatred and even infliction of violence motivated by illegal discrimination remain unprocessed.⁴

The Montenegrin Family Act as well as the draft of the new Family Act acknowledge extramarital unions only of people of different sexes and therefore do not provide for the enjoyment of certain marital rights such as the rights of alimony or joint ownership for same sex partners in an extramarital union. This is in contravention of the stand of the ECtHR in the judgement *Karner v. Austria* (2003) that partners of the same sex must be enabled enjoyment of specific marital rights.

Although various laws regulating employment, health care etc. contain non-discrimination clauses, Montenegro still does not have a specific anti-discriminatory law regulating various forms of discrimination or providing efficient legal protection mechanisms, against the recommendations of the UN Committee on Economic, Social and Cultural Rights.⁵ The Government's draft Act on the Protection of the Equality of Citizens has not yet entered parliament procedure. This draft improves the constitutional protection inasmuch as it guarantees protection against discrimination to every person on the territory of Montenegro notwithstanding his/her citizenship. The draft defines discrimination in even greater detail than the relevant international agreements as, “any differentiation or unequal treatment i.e. exemption (exclusion, restriction or preference) of a person or group and members of their families or persons close to them in an explicit or implicit manner, and on the grounds of race, colour of skin, ancestors, national or ethnic origin, language, religious conviction, political opinion, gender, sexual orientation, property, birth, genetic peculiarities, health, disability, marital status or other personal attributes”. The draft Act prohibits direct and indirect discrimination, advocacy of and inducement to discrimination, abetting discriminatory conduct and violation of the principles of equal rights and duties. The ECHR standards of “necessity in a democratic society” and of “proportionality” are introduced for the purpose of interpreting permitted derogation from the general prohibition of discrimination.

The draft provides for protection before the Constitutional Court in an administrative procedure and administrative dispute, as well as direct access to

4 For more details see the chapter on Minority Rights.

5 Concluding Observations by the Committee on Economic, Social and Cultural Rights: Serbia and Montenegro, E/C.12/1/Add. 108, 13 May 2005.

international organisations and bodies in keeping with international agreements. One may also file a claim for compensation of damages and seek adoption of a provisional measure banning discriminatory treatment. If discrimination is proved probable by the claimant, then the burden of proof that the law was not violated rests with the defendant. If direct discrimination is undisputable or if the court establishes discrimination, the defendant may not try to exculpate himself by claiming the act had been committed unintentionally. Apart from compensation claims, claims demanding the prohibition of a discriminatory act, the execution of an act that will reverse the harm, for establishing discriminatory conduct and for publication of the sentence can also be submitted by human rights organisations and 'voluntary examiners of discrimination' i.e. activists personally examining the implementation of the law in specific cases. The only exception regards cases in which one specific person was discriminated against – his/her consent is required for lodging a claim. Fines are envisaged for misdemeanours ranging from 600 to 20,000 Euros, the prohibition for holding specific jobs and conducting work in a specific area, temporary suspension from one's job, refund of costs of reversal (e.g. paying for the repainting of the building on which messages or symbols were written) and restraining orders. The draft does provide for an independent expert body to monitor the implementation of the Act, as was recommended by the international organisations.

1.2. Discrimination of Persons with Disabilities. – The Montenegrin Labour and Social Care Ministry in 2004 drafted an Act on Professional Training and Employment of Persons with Disabilities, envisaging obligations of the employers with regard to employment of persons with disabilities, but the Government failed to approve it by end of 2005. The Montenegrin Employment Bureau provides specific subsidies to employers of persons with disabilities in accordance with the Montenegrin Employment Act; these measures, however, have not achieved their goal in practice. The Montenegrin Government still has not approved the draft of a separate law regulating benefits and obligations of employers employing persons with disabilities. The survey conducted by the Montenegrin Paraplegic Association showed over two-thirds of companies did not employ any disabled persons and did not even envisage hiring any in their job classifications. Nearly 70% of the polled private and public company employers maintain these persons do not enjoy the same treatment as others during recruitment and that their chances of finding a job are “minimal”.

The survey conducted for the ILO project on promotion of employment of disabled persons shows Montenegro lacks adequate laws protecting persons with disabilities and preventing their discrimination in employment. Only 9 persons with disabilities were hired in Montenegro in the past 11 years while a negligible number of them receive symbolic welfare, with a 12-month delay.⁶ Over 80% of the citizens

6 Daily *Dan*, 30 July, p. 11.

think persons with disabilities are not equal to other citizens in Montenegro, while 94% think a special law on their employment needs to be passed, shows a Montenegrin Paraplegic Association survey. On the other hand, 88% of persons with disabilities feel they do not have a chance to find a job in Montenegro and that “legislation and architectonic barriers” are the greatest obstacles to their employment.⁷ Additionally, according to the same NGO, 97% of the residential facilities in Montenegro are either not adjusted to the needs of persons with physical disabilities or have various architectonic barriers. As opposed to some other European countries, disabled persons in Montenegro are not exempted from VAT when buying basic orthopaedic aides.

1.3. Discrimination of Sexual Minorities. – Montenegro's patriarchal society has little tolerance of sexual minorities. The incidents of abuse of homosexuals in general remain unreported and hence not investigated. However, the most publicised incident occurred in late 2004, when the fans of one soccer club stoned Atila Kovac from Serbia, Novi Sad, because of his homosexual orientation, in front of the TV as he was to appear as guest in its show. Although the police did intervene to protect Mr. Kovac, there was no criminal prosecution of the perpetrators in 2005.⁸

1.4. Gender discrimination. – A Gender Equality Office, set up within the Government of Montenegro in 2003, together with ten women's NGOs in 2005 drafted the National Plan for Achieving Gender Equality. The Plan aims to address the problem of discrimination of women in Montenegro in the following key areas: education, health, violence against women, economy, government and decision-making, media and culture.⁹ The NGOs Montenegrin Female Lobby and Stela called on the Montenegrin President, PM and Speaker to set up a Ministry for Women that would monitor the status of women at work, during employment and professional promotions. The Ministry would also take care of single mothers, ensure regular alimony payments and help eradicate all forms of discrimination against mother and child in Montenegro.¹⁰

For more details on discrimination of Roma and other minority groups, see the chapter on Minority Rights.

2. Right to Life and War Crimes Investigations

2.1. Capital punishment. – Capital punishment was completely abolished in the penal legislation of Montenegro in 2002. Also, a person can be extradited to another state in which the death sentence still exists only on the condition that the

7 Montenegrin Paraplegic Association Survey, also published in *Vijesti*, 8 July, p. 7.

8 Human Rights Action's report for 2005, p. 353.

9 www.gom.cg.yu/gender/vijesti.php?akcija=vijesti&id=7914

10 For more information please see the chapter on Family and Child Protection.

death penalty cannot be imposed. However, the Montenegrin Constitution still allows for capital punishment, contrary to the Serbia and Montenegro's international obligations.

2.2. *Lack of efficient investigations of murders.* – Twenty-eight murders committed in Montenegro in the past 12 years remain unresolved according to police records.¹¹ Among those are murders of a senior police official and Montenegrin president's security advisor who were killed several years ago; no criminal charges had ever been raised nor have the motives of the murders been disclosed to the public.¹² After two years of investigation, it has not yet been revealed who ordered and why the murder of editor-in-chief of a daily *Dan*, Duško Jovanović, who used to be one of the loudest critics of the regime. Only one indictment was issued against a person charged with complicity in murder. Jovanović's family asserts that a number of omissions have been made during the investigation and that the investigation deliberately avoided those who had ordered the assassination in the first place. The investigation into the killing of the assistant chief of Montenegrin crime police Slavoljub Šćekić, which occurred in August 2005, identified several alleged perpetrators. However, the family of the deceased claims the ones who ordered the assassination are not among the suspects.

2.3. *War crime investigations.* – Several serious war crimes occurred in Montenegro in the 1990s; the gravest ones involved illegal actions by the civil servants and officers of the Republic of Montenegro: deportation of around 80 Muslim refugees from Herceg Novi to Bosnian Serb Army in 1992, killing and maltreatment of the Moslem population in Bukovica, as well as the war efforts against Dubrovnik. Of the three, only one criminal investigation has been opened on the deportation of Moslem refugees: six low-ranking officials are suspected of war crimes against the civilian population, but there are serious concerns regarding the seriousness and efficiency of this investigation.¹³ As for other crimes, involving maltreatment of civilians and prisoners of war, for which the Yugoslav Army had been primarily responsible, the alleged torture of war prisoners in Meljine in the early '90s and the 1999 killing of Kosovo refugees in Kaludjerski laz have not been investigated yet. Only one of the many perpetrators, members of a Republika Srpska paramilitary unit, involved in the abduction and killing of Moslem passengers from the train in Štrpce railway station was prosecuted. The leader of the group was arrested in Argentine for crimes against humanity under an ICTY indictment.

The Bijelo Polje Higher Court passed several second-instance sentences in 2005 regarding the claims for compensation of non-material damages of the families

11 *Dan*, 4 September, p. 11.

12 *Weekly Monitor*, 14 October, p. 7.

13 Human Rights Watch World Report 2006: Serbia and Montenegro, January 18, 2006: <http://hrw.org/english/docs/2006/01/18/serbia12242.htm>.

of the abducted and killed passengers from the train at the station in Štrpce. The families' attorney complained about the Court awarding compensation in dinars, rendering it incomprehensible or devalued by inflation. He also criticised the court for awarding miserable several-thousand Euros compensations to these families while Montenegrin officials got as much as 15,000 Euros when they sued newspapers for defamation.¹⁴

It took one year for the courts to act on the civil compensation suit filed by the first of a total of 32 families of Bosnian Muslim refugees, who were in May 1992 arrested in Montenegro and handed over to the Republika Srpska military formations. The defendant, the State, asked for the discontinuation of all proceedings until the completion of the criminal proceedings against the perpetrators. The motion was upheld in three cases, dismissed in four, while the court postponed decision in other cases. In early 2005, the Montenegrin Parliament Secretary confirmed the Montenegrin State Archives had allowed the Parliament to destroy "worthless registry material" from the 1992–1998 period, which included some of the most relevant original evidence on deportation.¹⁵

Despite representations forwarded to the Interior Minister and PM, the case of Malik Meholjić, pre-war mayor of Srebrenica, who disappeared while in the hands of the Bar police on 15 May 1992, has not been resolved by the end of 2005. His family filed a petition to the UN Working Group on Enforced or Involuntary Disappearances.¹⁶

2.4. Obligation of the state to protect lives from health risks and other risks to life. – The Montenegrin Environment Act obliges the competent state bodies to objectively and timely inform the public of the state of the environment and the pollution that may endanger the lives and health of people and the environment. The Criminal Code devotes a separate chapter to crimes against the environment such as: failure to take environmental protection measures, damaging the environment, illegal construction and operation of facilities and installations polluting the environment, etc. In February 2005, northern Montenegro was declared an "environmental bomb" when the story broke of the secret and inadequate shipping of waste from a mine in Montenegro to the lead and zinc mine in Gornji Milanovac in late 2004. Ecologists have over the past years been alerting to the high pollution levels in Pljevlja, where such material has been improperly stored for years¹⁷. Pljevlja health clinic data show the health of the town's citizens has been deteriorating and note a significant rise in the incidence of respiratory diseases among children. Mortality from respiratory infections stood at 23% two decades ago and

14 *Vijesti*, 27 February.

15 *Vijesti*, 15 January; Human Rights Action archive.

16 Human Rights Action archive.

17 *Večernje novosti*, 7 Feb, p. 7.

at as much as 50.3% in 2001. The town's environmental problems are mostly related to the work of the local coal mine and power plant, which burns around 1.5 million tons of coal every year. Another 100,000 tons of coal are annually burnt by the town heating facilities. Around 58.4% tons of sulphur dioxide, 37 tons of dust and 84,780 cubic meters of smoke are released into the air every day. The local river is also polluted by unprocessed waste released into it. Criminal complaints have been filed against some of the polluters but they have never been processed.¹⁸

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

The Montenegrin Constitution prescribes the prohibition of torture, degrading punishment or treatment. However, as opposed to international standards and the Human Rights Charter of Serbia and Montenegro, it omits brutal or inhuman treatment or punishment and does not prescribe that “freely” given consent of a person is needed for subjecting that person to medical or scientific experiments. In SaM, the direct application of the HR Charter surmounted these inconsistencies. The content of constitutional provisions safeguarding human rights will need to be improved now that Montenegro has regained its independence.

The Criminal Code of Montenegro incriminates maltreatment and torture as a specific criminal offence. Under the Code, it can be committed both by a private person and an official. The provision further omits an important objective of torture mentioned in the Convention – to punish a person for an act he or a third person has committed or is suspected of having committed.

Problems arise in the investigation of maltreatment or torture in practice, especially when perpetrated by police officers. The European Commission has acknowledged reports of NGOs complaining about such incidents which remain unprocessed for fear of punishment and lack of reliability of the procedure.¹⁹ The most remarkable incident occurred on 1 September when around 80–100 police officers entered the Spuž prison detention unit with search warrants and beat up 31 of the present detainees, apparently angry at some of the detainees informally accused of participating in the above mentioned assassination of the assistant chief of crime police. No criminal procedure was instigated against the perpetrators by the end of the year, although the Montenegrin Ombudsman and the European Commission emphasised the need for a full and transparent investigation of the incident.²⁰

18 *Vijesti*, 14 November.

19 Serbia and Montenegro, 2005 Progress Report, European Commission, Brussels, 9 November 2005.

20 *Vijesti*, 2 September; *Monitor* 9 September; *Dan*, *Vijesti*, 10 November; *Vijesti*, 10 December.

4. Trafficking in Human Beings

According to the Montenegrin Criminal Code, the perpetrator of trafficking in human beings will be sentenced to between one and 10 years of imprisonment and to a minimum three-year prison sentence in the event the crime was committed against a minor.

However, the Code deviates from Article 3 (1) of the First Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of the Convention against Transnational Organized Crime (hereinafter: First Protocol) as it does not stipulate that the victim's consent to exploitation shall be considered irrelevant in the event of a crime committed in any of the listed ways.

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

The penalties for mediation in prostitution range from fines to one-year imprisonment, while the old FRY Criminal Code, previously in force in Montenegro, prescribed between three-month and five-year imprisonment. Reduction of the minimum sentences is totally in contravention of initiatives to exonerate persons forced to prostitution (i.e. victims of human trafficking) and to calls for criminal prosecution of and strict convictions for those who mediate in or force others to prostitution. The sentence of minimum 3-year imprisonment was similarly reduced to between one to 10 years of imprisonment for the crime of enslaving (Art. 446). In addition, the Code stipulates transport of enslaved persons "from one country to another" as a precondition for a criminal offence. Transport of enslaved persons should be prescribed as a crime notwithstanding whether the enslaved are being transferred across borders or internally. However, the formulation of the provisions indicates that the transport of slaves is not a crime if it is committed within the borders of a country.

Local legislation does not incriminate the purchase of services provided by human trafficking victims in contravention of Recommendation 1545 (2002) of the CoE Parliamentary Assembly, which insists on punishing those who *knowingly* purchased sexual services from a woman who is the victim of trafficking in human beings.²¹ Penal policy would thus be directed not only against human traffickers, but against those availing themselves of those services as well.

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

With the aim of improving the legal status of victims, the Ministry of Interior in November 2005 passed an Instruction on Conditions and Procedure for Approving Temporary Residence to Victims of Trafficking, which in effect abolishes the victims' criminal liability for illegal residence in Montenegro.

Trafficking in human organs is not explicitly prohibited in Montenegro.

According to the Government Coordinator for Combating Trafficking in Humans, human trafficking was an exception and not a rule in Montenegro, which was the scene of crimes of mediation in and coercion to prostitution rather than organised trafficking of women and girls.²²

The Podgorica Higher Court in January found guilty Ukrainian women and three Montenegrin men, accused in 2004 of human trafficking for the purpose of labour exploitation, and sentenced them to a total of 14 years in jail. The Bijelo Polje Higher Court increased to one-year imprisonment the initial five-month prison sentence imposed on the first person in Montenegro to be convicted for trafficking in humans in November 2003.

As of January 2006, the Montenegrin Government will cover all the costs of the shelter for human trafficking victims in Podgorica managed by the NGO Montenegrin Women's Lobby. The Government has to date covered the rent for the house that had sheltered 37 human trafficking victims, including boys, since March 2004. However, another NGO, Shelter for Women and Children Victims of Violence that has also been providing refuge to numerous victims of trafficking has not received any governmental support.

The case of Moldovan citizen S. Č., which had caused a political crisis in Montenegro and drawn international attention in 2002, still remains in the limelight, although it had officially been closed with no indictments. In its letter to the Montenegrin Interior Ministry in early February, *Amnesty International* (AI) recalled the Montenegrin government had to reopen and reinvestigate the case allegedly involving numerous Montenegrin politicians, judges, policemen and other state officials. AI expressed particular concern at the findings of the independent Commission appointed by the Montenegrin Government, recalling it portrayed S. Č. as a criminal rather than as a victim of serious human rights violations, made derogatory references to her character and gave rise once again to suspicions of an attempt to cover up apparent official complicity in the trafficking of women and girls for forced prostitution. AI underlines in its letter that Montenegrin authorities are duty bound by domestic and international law to bring the perpetrators to justice and ensure that S. Č. is offered the possibility for compensation for damage suffered. However, to AI's knowledge, nobody has been brought to justice for the trafficking for forced prostitution and torture of S. Č., and she has not received any compen-

²² *Dan*, 19 January, p. 7.

sation.²³ In response to the AI's concerns, as well as those expressed earlier by the OSCE, PM Đukanović in May 2005 said the human trafficking scandal was fabricated by an intelligence service "that has been hostile towards Montenegro since the time of King Nikola".²⁴

The Former Deputy State Prosecutor of Montenegro, who had been arrested on suspicion of involvement in the scandal and subsequently released for lack of evidence, sued the state and received 13,400 Euros in compensation of damages for the violation of his liberty, honour and personal integrity.

Trials for libel and insults against activists of the NGO Shelter for Women and Children Victims of Violence, which had provided shelter to S. Č., and her lawyer continued in 2005. The NGO members were sued by the brother of the Montenegrin President and the head of the Montenegrin Bar Association, because they said that he had been present when S. Č. was abused in an open letter to the President in which they called for the respect of the law in the sex trafficking proceedings. The lawyer of S.Č. was sued by the three lawyers of the suspects of human trafficking for the statements to the media in which he noted the irregularities in the proceedings and qualified their criminal report against the victim S. Č. as "moral ruin".

The judge, who had conducted the investigation against the four men charged with human trafficking in the S. Č. case, was interrogated by the Danilovgrad Basic Court judge on charges of abuse of post filed against her by one of the suspects in the case, former deputy state prosecutor. After it was made public that the interrogation had been ordered and performed without the judge's judicial immunity being officially removed by the Montenegrin parliament, the investigation was closed. The case of S. Č. was not re-opened by the end of 2005.

5. Right to Liberty and Security of Person

5.1. General. – The Constitution of Montenegro guarantees the right to personal liberty and "security of person". The Montenegrin CPC does not envisage the possibility of ordering mandatory detention in the proceedings before the pronouncement of the judgment, with one sole exception: for an accused facing minimum five years in jail if detention is justified by the manner in which the crime was committed or by other especially grievous circumstances of the crime.

23 Amnesty International Press Release, AI Index: EUR 70/001/2005 (Public), News Service No: 024, 1 February; AI reiterated the allegations in its subsequent report *Serbia and Montenegro – A Wasted Year: The continuing failure to fulfil key human rights commitments made to the Council of Europe*, AI Index: EUR 70/005/2005, 22 March.

24 *TVCG*, 19 May.

The Montenegrin Constitution prescribes that detention can last for maximum three months on the basis of a decision by a 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. Under the Montenegrin Code of Criminal Procedure, detention may last a maximum of two years from the day the charges were raised and a maximum of one year upon receipt of a first-instance judgement. In the event the accused is served a second-instance decision reversing the first-instance decision within that period, detention may continue one more year.

5.2. *Right to appeal to court against deprivation of liberty.* – The new Montenegrin Police Act foresees that a person deprived of liberty in accordance with provisions of this law may file a complaint to the Minister of Interior, but does not mention the right to appeal to the competent court, which is not in accordance with international standards.

The new Montenegrin Act on the Protection of Rights of Mentally Ill Persons, implemented as of 1 January 2006, explicitly envisages the right of a mentally ill person in a psychiatric institution to “submit complaints to the authorised person in the psychiatric institution and an independent multidisciplinary body regarding his/her treatment, diagnosing, release from the institution and violation of his/her rights and freedoms”, and to “without supervision or restriction, submit requests and lodge complaints, appeals and other legal remedies to competent judicial and other state bodies”. These rights may be exercised on the person's behalf also by the members of his/her family or legal representative.

The new 2005 Montenegrin Act on Protection of the Population from Infectious Diseases, allows for *de facto* deprivation of liberty in the form of quarantine and obligatory or strict isolation of persons suffering from an infectious disease, of persons who were or are suspected of having been in contact with a person suffering from an infectious disease or with those suspected of suffering from quarantine diseases. However, as the measure is set by an administrative body, it is possible to initiate an administrative dispute only in appeal against a second instance administrative decision, which does not fulfil international standards.

A person unlawfully deprived of liberty has the right to rehabilitation, compensation of damages from the state, as well as other rights prescribed by the law.

5.3. *Right to security of person.* – Although the Montenegrin Criminal Code envisages the criminal offence of endangerment of security and incriminates domestic violence, the police often do not process domestic violence threats or other threats to life and security which had not resulted in concrete violence or injury.

With regard to the protection of witnesses, Montenegro adopted a Witness Protection Act in October 2004. The Montenegrin Act sets an additional condition

– that other protection measures are insufficient, which means that protection envisaged by this law is subsidiary in character. Protection is prescribed only for witnesses, whose statements are used to prove the gravest crimes. Protection measures include physical protection of person and property, relocation, concealment of identity and ownership data, and change of identity. According to the Montenegrin Police Minister, witness protection cannot be conducted successfully in Montenegro due to its “size, geographic and other features and well-developed social network (where everyone knows everyone)” wherefore international, especially regional cooperation will be necessary if the programme is to succeed.

6. Right to a Fair Trial and the State of the Judiciary

Professional and lay judges in Montenegro are appointed and dismissed by the Montenegrin Parliament. The Judicial Council has the central role in the recruitment process, as it puts forward nominations and proposes the dismissal of judges and lay judges. It also determines the number of judges in courts, conducts the proceedings to establish the responsibility for inadequate performance of duty and upholding the reputation of the judicial function and proposes special lines of expenditures in the court operation budgets. The Council has a president and ten members. The Parliament nominates ten members, of whom six are judges, two are law professors and two are prominent legal experts. The Council is chaired by the Montenegrin Supreme Court President. In practice, the Parliament on several occasions did not accept the proposal of the Judicial Council without reasonable justification.

The prosecutors in Montenegro are appointed and dismissed by the Parliament and nominated by the Prosecution Council comprising the Supreme State Prosecutor and ten members appointed by the Parliament. Six of the Prosecution Council members are nominated from amongst the ranks of state prosecutors and deputy state prosecutors, one must be a Podgorica Law Faculty professor, one a lawyer, one an eminent legal expert (nominated by the Protector of Human Rights and Freedoms) and one a Justice Ministry representative.

The Montenegrin 2002 Act on Courts introduced as one of its main principles that everyone has the right to have his case tried by a randomly selected judge. Illustration of how deeply rooted the practice of court presidents assigning cases was is the fact that the Montenegrin courts waited two years for the Court Rules of Procedure to be passed in 2004 to introduce random case assignment although the Act on Courts, passed in 2002, adequately regulated the procedure.

The Montenegrin Constitutional Court in 2004 declared unconstitutional the provisions in the Act on Administrative Taxes conditioning the filing of petitions by prior payment of court taxes. The Court emphasised that “legal regulation of tax collection may not infringe on the exercise of fundamental human rights guaranteed

also by the ECHR”. This Court also abolished the provision of the Criminal Procedure Code prescribing that it will be deemed that a plaintiff has abandoned the suit if he failed to pay the lawsuit court taxes even after a court warning. The Court found that, although the legislator has the freedom to determine at which stage of the proceedings are the court taxes to be paid, “the legislator cannot condition the manner of fulfilment of this obligation by setting the presumption of lawsuit withdrawal as the consequence of non-payment of the court tax”, because that constituted a violation of Article 6 of the ECHR guaranteeing everyone the right of access to a court, and the constitutional provisions entitling everyone to the equal protection of rights and freedoms in a procedure prescribed by law and the right of appeal or to another legal remedy against a decision on his right or lawful interest. The Court was correct to take the stand that citizens must be enabled access to court; if they fail to pay the set court tax, the Act on Court Taxes envisages a collection procedure allowing the state to settle its claim without limiting the right of access to a court.²⁵

Unlike the new Serbian Civil Procedure Act, the Montenegrin Civil Procedure Code still allows the court to order the discontinuance of the proceedings if the ruling on the claim depends on whether a commercial offence or a criminal offence prosecuted *ex officio* was committed, on who the perpetrator is and whether he is responsible. Such a solution often prevents efficient completion of the civil proceedings and realisation and exercise of the right to access a court, mostly regarding compensation of damages.

Montenegro still needs to reform its small offence processing system, for the manner of election of the bodies deciding on penalties, which may amount to maximum six-month imprisonment, does not fulfil the requirements of independence and impartiality set by ECtHR standards.

With regard to the right to a trial within reasonable time, the new Civil Procedure Act in Montenegro introduced a number of new provisions needed to rationalise the procedure and improve its efficiency. They, *inter alia*, reduce the number of hearings, specify deadlines for filing counterclaims, replies to claims, scheduling pre-trial hearings and a one-month deadline for the production of judgment; they prescribe submission of all evidence with the claim i.e. until the end of the pre-trial hearing. The Code adopts the principle of formal truth, which also cuts down the duration of trials. The second-instance court schedules a hearing and decides on the appeal and parties' claims if the first-instance judgment has already been revoked twice in Montenegro and the refuted judgment was based on a violation of civil procedure rules or an incomplete or incorrect finding of fact. The parties may no longer include new facts or propose new evidence in the appeal,

25 Constitutional Court of Montenegro Decision, *Sl. list RCG*, 28/05.

unless the appellant satisfies the court that he could not have presented them until the end of the main hearing through no fault of his own.

However, in practice, most of the provisions are not applied in accordance with the spirit of the law, and the prescribed deadlines, which are not mandatory, are most often not obeyed by the judges. However, the Act on Mediation was passed in 2005 and came into force in 2006 with the aim of reducing the number of cases taken to court and increasing judicial efficiency. The idea is to enable parties to resolve their disputes in an informal procedure, without going to court, saving money and time. The parties themselves agree on the settlement in negotiations mediated by a third, neutral person.

In the report on the work of Montenegrin courts, the Supreme State Prosecutor warned of the inexplicably long investigations and long indictment procedures and said that some Montenegrin courts have failed to complete certain investigations from 1987, which best testifies of the quality and inefficiency of the criminal procedure. The Bar and Podgorica courts 'have forgotten' about some 20 investigations opened before 1990. Montenegrin courts failed to complete over 600 investigations between 1990 and 2000. The Podgorica court failed to close 584 investigations in 2003 and 436 investigations in 2004. The Prosecutor warned that some courts are still grappling with indictments dating back to 1986. Montenegrin courts were inefficient in 2004: the investigation bodies did not process reports filed against 4,352 people. The courts completed only 42.63% of the total investigations against 7,586 people under way in 2004, according to the report.²⁶

The Montenegrin Supreme Court on 1 November 2005 opened an office to which citizens can complain about the work of courts. Most complaints regarded the duration of the proceedings. The Montenegrin Ombudsman received by 1 December 521 complaints, over 1,000 citizens complained to the Office directly; most complaints (40%) regarded the work of courts, said the Montenegrin Ombudsman. Citizens were mostly dissatisfied with the continuous prolongations of the trials and non-enforcement of final court decisions.²⁷

7. Right to Protection of Privacy, Family, Home and Correspondence

Apart from the protection of personal data provided by the Montenegrin Constitution (Art. 31),²⁸ there is no particular law governing the issue. Various provisions relevant to the use of personal data collected by the official bodies are

²⁶ *Dan, Vijesti*, 10 October; *Monitor*, 21 October, p. 7.

²⁷ *Vijesti*, 10 December.

²⁸ Everyone shall be entitled to be informed of the data collected about his person and to court protection in case the data are abused (Art. 31 (3)).

contained in several laws, which often do not provide for complaints in case of suspected abuse.

The Montenegrin Police Act envisages that the police may collect data by using the existing records or in immediate contact with the persons the data refer to or with others (Art. 19), and prohibits collection of personal data immaterial for the purpose (Art. 22), also stating that data gathered in contravention of the law will be deleted from the records (Art. 23 (1)). The Montenegrin Act allows everyone to access records “upon termination of the reasons for keeping them” (Art. 20 (1)). However, it does not envisage how the records will be accessed or the possibility to request amendments of incorrect data, especially in case of suspicion that the data are incorrect and the police believe there are still “reasons for keeping them”. A citizen may file a complaint on the work of the police, which the police are obliged to reply to; if the citizen finds the reply dissatisfactory, s/he may complain to the minister (Art. 96), or, according to the Criminal Procedure Act, to the competent state prosecutor about the discharge of police powers (Art. 230 (4)). Neither Act envisages the right of appeal to court against police actions, which is not in accordance with international standards.

The Montenegrin Labour Act envisages the employer's obligation to respect the privacy of the employee. The Act also prohibits the employer from disqualifying an applicant on grounds of pregnancy, but does not prohibit the employer from requiring of the applicant to take a pregnancy test or asking the applicant about his/her marital status and family plans. The Act on Labour and Employment Records states that the collection, disposal and protection of personal data shall be conducted in accordance with a separate law on protection of the person, which has not been adopted yet.

Regarding the opening of state security files, the Montenegrin Parliament failed to pass a separate law on state security files by the end of 2005, but it did adopt a National Security Agency Act in 2005, obliging the Agency to “inform a citizen at his written request whether the measures of collecting data about him have been undertaken and whether the Agency is keeping a record of his personal data and to give him access to a document on the collected data at his written request”. The documents a citizen is given insight in may not include data on the Agency staff that had collected the data, the source of the data, or personal data of third persons. The Agency is obliged to respond to the request of the citizen or allow him access to the document within 30 days from the day of receipt of the request, unless the information would endanger the discharge of Agency duties or could result in endangering the security of another person; the citizen who submitted the request shall be informed thereof within 15 days. When the danger, i.e. threat to security ceases, the Agency is obliged to meet the request of the citizen. It, however, does not entitle the citizen to complain or appeal an Agency decision not to disclose the information to him or her.

The Agency may collect, analyse, register and keep data of relevance to national security and to protect the collected data from unauthorised disclosure, communication, change, use or destruction. Data registers constitute a “state, official or business secret” and cannot contain personal data the gathering of which is not in the Agency's jurisdiction i.e. personal data not of relevance to state security. The National Security Agency Act obliges the Agency to “destroy without delay” such data in case it obtains them.

As for the protection of privacy by criminal law, the Montenegrin Criminal Code envisages punishment for the invasion of privacy. Thus, unauthorised photographing, publication of another's personal papers, as well as of portraits, photographs, film or audio recordings of a personal nature, unauthorised wiretapping and audio recording, violation of the privacy of correspondence, and disclosure of privileged information, are criminal offences. Electronic surveillance and recording of another's conversations or statements without the consent of the individual involved is also punishable, and aggravated forms of the offences 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 photographing”.

National legislation does not, generally, provide special protection of public figures in terms of privacy in line with a distinction between the level of protection of public figures and other citizens made for example by the European Court for Human Rights. However, the Act on conditions under which private diaries, letters, portraits, photographs, films and phonograms can be published passed in 1980 and still in force stipulates that the above forms not intended for the public may be published only with the consent of the persons that created them or appear in them, i.e. and with the consent of the persons the letters were written to or, after their death, with the consent of their heirs, with the exception from the rule in case of, *inter alia*, portraits, photographs, films or phonograms showing or transmitting the voice of a person in contemporary life and of public interest.

With regard to the right to receive correspondence, the Montenegrin Penal Sanctions Enforcement Act is restrictive – a prisoner has the right to communicate with the members of his immediate family, while communication with others is subject to approval. A convict may also be deprived of receiving and sending specific mail if “it is assessed the correspondence negatively affects the treatment programme”. The discretionary power provided by the Act, which allows prohibition of correspondence of a convict with everyone except his next of kin, but does not require that the prohibition be duly reasoned or that it be necessary and proportionate, is not in conformity with the ECHR.

The Montenegrin police are during the pre-trial proceedings authorised to request of a legal person providing telecommunication services to provide records of telecommunications of a suspect “over a specific period of time”. The police need not seek court approval to exercise this power, which is not regulated in greater

detail. In practice, the question arises whether it is justified to seek phone records for broad periods of time, as the police usually do.

Apart from the regular police, the Montenegrin National Security Agency may also intercept post and other means of communication when necessary and with the prior consent of the court. However, such authorisation has not been regulated in greater detail. If there are grounds to suspect that national security is especially endangered in one of the six envisaged ways, the Supreme Court President is to authorise the application of the listed measures within 24 hours from the receipt of motion in each individual case. The Supreme Court President also has exclusive power to decide to extend surveillance measures every three months.

8. Freedom of Thought, Conscience and Religion

The Montenegrin Constitution guarantees the freedom of thought and conscience, as well as freedom of belief. The Constitution additionally proclaims 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. According to the 1977 Act on the Legal Status of Religious Communities, exercise of faith is a private affair of each individual and freedom of exercising a religion is guaranteed. Citizens may freely form religious communities, and need merely to notify the competent municipal body of the Ministry of Interior thereof. The Act does not name any of the existing religious communities, but states that all religious communities have an equal legal status of a legal person.

There is no religious instruction within the regular education system in Montenegro. According to the above Act, religious instruction may only be performed within the premises of religious communities, which may found religious schools for the training of their priests. However, religious schools may only be attended by persons who have first completed mandatory regular elementary schooling. Pupils attending regular schools may not attend religious education during time reserved for the regular school classes and out – of – class activities. Consent of both minors and their parents is required under the law for minors who wish to attend religious education. Supervision of religious training is performed by the municipal administrative body charged with education.

Conscientious objection is recognised in the State Union of Serbia and Montenegro. The 2005 Act on Changes and Amendments of the Yugoslav Army Act envisages reduction of civilian service from 13 to 9 months, i.e. that it lasts three months longer than military service served in Army units under arms (civilian service was four months longer than military service in the previous provision). Recruits can invoke this right only at the time of drafting. The draft board decides on the possibility of performing military service without bearing arms. If the board

renders a negative decision, the recruit can lodge an appeal within 15 days to the respective army body of the second instance. 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 Yugoslav Army Act, civilian service is performed in the units and institutions of the Army and the Federal Ministry of Defence. Civilian service entails the possibility of serving in civilian institutions (humanitarian organisations, old people's homes...) and not in the institutions of the army. Legislators have failed to establish the difference between performing military service without arms (which can be done in the institutions of the army) and civilian service. This is a very unusual omission, given that the previous legal provision had correctly interpreted the issue of the civilian service. An average of 32% of conscripts in Serbia and Montenegro apply for civilian service. Due to loss of trust in the Army, merely one-third of the recruits in Montenegro respond to the draft summons.²⁹

Montenegrin MPs adopted in 2005 an Act on Pardons, which will halt prosecution and enforcement of prison sentences or fining of young men who had committed crimes against the SaM Army after 10 August 2004. These crimes comprise avoidance of military conscription, drafting and check-ups, non-fulfilment of financial obligations, avoidance of military service by incapacitation or deceit, illegal exemption from military service and arbitrary absence or escape from the SaM Army. Following the adoption of the Act, some 3,000 young men have been freed of criminal liability but are still obliged to perform their military service.

In practice, tensions between the Serbian and Montenegrin Orthodox Churches are primarily political in character and arise from the Montenegrin desire for independence, said the US State Department in the part of its annual report regarding Montenegro. It also assessed that the tensions continued and increased as the referendum on independence was drawing nearer. The Serbian Orthodox Church does not recognise the recently re-established Montenegrin Orthodox Church, and its representatives have continuously expressed their intolerance towards it.

In late March 2005, the Montenegrin Helsinki Committee for Human Rights filed a motion with the Montenegrin Constitutional Court to review the constitutionality of the Herceg Novi municipal decision on celebrating its saint day, claiming it violated fundamental human rights of the citizens and was not in conformity with the Montenegrin Constitution and provisions of a number of ratified international documents. The Constitutional Court ruled that the decision violated the constitutional principle guaranteeing the freedom of belief, conscience and thought and that the municipality had "introduced religious rites in state and other institutions and thus violated the constitutional principle that the church and state are separate". The Court found that the municipality had thus awarded the members of the Orthodox

²⁹ *Vijesti*, 3 February, p. 6.

Church “a privileged status vis-à-vis other citizens – members of other churches, religious communities, including atheists and thus violated the principle of equality of the citizens”.³⁰

A makeshift small metal church was on 18 June 2005 set on the top of Mt. Rumija by the Serbian Orthodox Church in Montenegro with the help of a SaM Army helicopter. This caused an outrage in the Montenegrin public, because members of the Orthodox, Islamic and Catholic faiths had for years traditionally carried a cross together to the top of the mountain on a religious holiday. Montenegrin Parliament Deputy Speaker blamed the Army Commander for the political tensions in Montenegro after the Army helped put the church up.³¹ The church had not been dismantled by the end of 2005 notwithstanding the order by the competent administrative body to remove the illegally erected contraption.

9. Freedom of Expression

The right to freedom of expression and of opinion is guaranteed by the Montenegrin Constitution, which additionally guarantees that “No one shall be forced to express his/her opinion”. Freedom of the press is guaranteed; publication of newspapers is possible without prior authorisation and subject to registration. Television and radio stations can be established in accordance with law. Censorship of the press and other media is prohibited. No one may 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. When listing the grounds for prevention of distribution of the press and other information, the Constitution adds that “no one shall prevent the distribution of press and dissemination of other information ... unless they *provoke* ethnic, racial or religious intolerance and hatred”. The right to correction and the right to reply are also guaranteed by the Constitution.

For the first time, the law forbids the state to establish media. Print media are now established by application and permission is no longer acquired, with the exception of electronic media regulated by a separate law. Particularly important are the provisions of the Media Act 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. The Act obliges the media to protect the integrity of minors and introduces the obligation to publish information on the effective dismissal of criminal proceedings, dropping of

30 *Vijesti*, 8 October, p. 6.

31 *Vijesti*, 1 August, p. 4, 4 August, p. 2, 10 August, p. 7.

the indictment against or acquittal of a person the criminal proceedings against whom were reported by the media. Operations of foreign media in Montenegro are also regulated on the basis of an application and can be banned only by a court decision.

The Broadcasting Act introduces an independent regulatory body, the Broadcasting Agency, which is governed by a Council whose members are nominated from among eminent experts by the Government, University, associations of broadcasters, NGOs focusing on human rights protection, NGOs working with media; the Montenegro Assembly only ratifies these nominations. The Broadcasting Agency is financially independent. Its jurisdiction encompasses, among other things, the adoption of the strategy and plan for allocating broadcasting frequencies, issuing frequency licences, fining violators and enacting specific regulations. The frequency licence issuance procedure envisages the calling of a public tender that must contain non-discriminatory, objective and measurable decision-making criteria.

Amendments to the Act specify that every household and legal person with a seat in Montenegro, which is in possession of technical requirements allowing the reception of at least one radio or TV program and in possession of a radio or TV set, shall be obliged to pay the subscription (licence) fee (Art. 1).

The Act on Public Broadcasting Services Radio Montenegro and Television Montenegro defines 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. Members of the Council – who cannot be MPs, state officials or 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 civil society institutions: NGOs, professional associations, artistic and sports organisations, University, etc; their terms in office are ratified by the Montenegro Assembly without the right to decline.

The Montenegrin Assembly in November 2005 adopted the Act on Free Access to Information proposed by the Government, two years after the Act was drafted by a working group comprising also NGO experts. The initial governmental text had considerably differed from the working group draft and had been sharply criticised both by the NGOs and international organisations. The adopted Act is a considerable improvement over the criticised draft, although the broadly set restrictions of principally free access to information possessed by the authorities justify the apprehension that they may be abused in practice and to the detriment of freedom of information.

Criminal law was amended to scrap prison sentence for crimes against honour and reputation. However, the Criminal Code still includes crimes against the honour and reputation of the state, and does not discriminate between the injured parties, i.e. between a private citizen, public servant and a politician. Unlike ECtHR juris-

prudence, the courts in Montenegro have still not found that the politicians have to withstand a lot more criticism than ordinary citizens and even insults. Exclusion of responsibility for acts against honour and reputation is provided for in the case of serious criticism, scientific or literary work and works of art, in journalism, etc., *if it can be determined from the manner of expression that it had not been done with the intent of contempt*, contrary to the views of the ECtHR 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. Regarding defamation, the law also excludes responsibility if the accused *proved the authenticity of his claims* or if there had been sufficient grounds for him/her to believe in their authenticity. However, the burden of proof set in such a manner deviates from the guaranteed presumption of innocence and is not in accordance with European standards. The punishment is prescribed both for “stating” and “spreading false rumours”, although the ECtHR found that a journalist must not be held responsible for quoting or conveying the text of a colleague journalist. The Montenegrin Criminal Code also holds liable a person found to have deprived or limited another person's freedom of speech or public appearance. In the event the perpetrator committed the offence during the discharge of his/her office, s/he may be sentenced to a maximum of three years in jail.

The US State Department report on human rights regarding media in Montenegro states that there were no publicized cases of direct government censorship of the media but that officials continued to bring libel suits against some media outlets that involved high fines. It highlighted as the main attack on the freedom of the press and security of journalists the murder of opposition daily *Dan* chief editor Duško Jovanović and the failure to establish the motives of the crime and reveal the perpetrators.³² The International Federation of Journalists report says that the general media situation is worse than two years ago and that journalism in Montenegro remains subjected to unreasonable government restrictions and manipulations. In the meantime, low standards prevail and journalists mostly remain untrained and unaware of their own professional responsibilities. There is a high degree of unemployment amongst journalists; private owners do not abide either by the national salary agreement nor the basic employment laws. The Labour Act is seriously violated in private TV stations, while the privatisation of state media and transformation of the state *RTVCG* are being put off.³³

Both international and domestic organisations of journalists expressed their concern and outrage at the *Analysis of the Montenegrin Media Situation* sent by the Montenegrin Foreign Ministry to the Montenegrin Parliament Speaker and Prime Minister, which had advised how the 'media should be disciplined and placed in the

32 *Dan*, 2 March, p. 2.

33 *Vijesti*, 13 November, p. 7.

service of the ruling policy'. The Montenegrin Parliament dismissed the motion filed by the opposition parties that a session be called to debate the Analysis and vote confidence in the Government and the Foreign Minister Miodrag Vlahović.³⁴

Unidentified persons allegedly tried to kill the director and chief editor of an opposition *Radio Free Montenegro* Miško Đukić, who claims he started receiving threats after interviewing an unnamed former inmate who openly criticised politicians and public figures. No criminal investigation into the allegations had been conducted by end of 2005.³⁵

The Montenegrin Media Institute survey 'Libel-Media' had no electronic media on its list, while the opposition daily *Dan* accounted for most of the entries. The courts were conducting 31 libel trials launched before the Criminal Code was adopted, 21 of them against *Dan* and its journalists. *Dan* was fined 6,000 Euros on charges filed by the head of the secret service, who also won a trial against the defunct daily *Publika* and a 7,000 Euros redress. Two trials against the *Dan* editors on charges filed by Montenegrin PM Milo Đukanović were completed in 2005 with one guilty and one non-guilty verdict.³⁶ Journalist Andrej Nikolaidis was found guilty at a trial that opened and closed in accordance with the new Code after film director Emir Kusturica sued him because of the article entitled "Henchman's Apprentice" published in *Monitor (Vijesti, 31 January; Dan, 31 January)*.³⁷ The Basic Court in Podgorica found Nikolaidis guilty of libel and fined him 5,000 Euros. The decision was heavily criticised by the Montenegrin civil society. The Higher Court in Podgorica overturned the sentence and ordered a retrial. Kusturica sued the Montenegrin independent weekly *Monitor*, too, seeking 100,000 Euros in compensation of damages. Kusturica filed for the exemption of the judge but not one hearing was held by the end of the year.³⁸

Minister Councillor at the SaM Embassy in Sarajevo Novak Kilibarda, former president of the Peoples' Party advocating Serbian nationalist policies in the 90s, filed charges with the Cantonal Court in Sarajevo against publicist Šeki Radončić, seeking 5,000 KM for the mental pains he sustained due to Radončić's assessment of him as the "main inspirer of the war in Bosnia and a pyromaniac who sent to death tens of thousands of innocent people by his mongering and incitement to crime".³⁹

34 *Vijesti*, 27 April, p. 3.

35 *Dan*, 22 July, p. 7.

36 Of the 13 trials for libel in the past nine months, four were initiated by politicians. One was initiated by Montenegrin Central Bank Council President Ljubiša Krgović and two by Emir Kusturica, while the remaining five were initiated by ordinary citizens.

37 The article says "Kusturica had by his public intellectual involvement and movies relativised the war in Bosnia, by siding with the Serbs, i.e. the henchmen, claiming that the Serb victims killed in Sarajevo were the same to him as the Moslems killed by Serbs in Srebrenica".

38 *Vijesti, Dan*, 15 December.

39 *Vijesti*, 16 November, p. 11.

A Declaration was adopted at a round table on professional standards in journalism in Montenegro, calling on judicial and prosecutorial representatives to efficiently penalise hate speech, take special care in trials against media regarding articles on the direst social anomalies and apply a milder penal policy on defamation and libel until they are decriminalised.

A three-month analysis of media reports conducted by the Youth Journalist Association with the help of OSCE and CoE, showed that most mistakes in Montenegrin press occurred in imprecise reports on court proceedings and committed crimes; they are followed by mistakes in articles on accidents and violence that exaggerate the events, while the fewest mistakes have been noticed in articles on the rights of the child and minorities. Journalists argue they are frequently unable to obtain information from judges and prosecutors. Dailies tend to treat specific human rights violations as sensationalist. When writing about violations of rights of minors, although they give only the child's initials, they simultaneously provide other data and descriptions of the event which enable the identification of the child. For example, *Dan* published the full name of a victim in an article on human trafficking.⁴⁰ In addition to the lack of journalistic ethics, the absence of intervention by the judiciary, bound by the law to protect the victim and the court proceedings, gives special rise to concern (Shelter for Women and Children Victims of Violence report).

10. Freedom of Peaceful Assembly and Association

The Montenegrin police used force on 24 December 2003 to illegally prevent the workers of the *Radoje Dakić* plant to hold a peaceful one-hour protest at a crossroads they had reported several days in advance (*Vijesti*, 8 April, p. 6). The Podgorica Basic Court judge in 2005 dismissed the claim for compensation of damages for the sustained fear and mental pains caused by the violation of the right to freedom of association that had been filed by 700 workers of the plant, although it had found the police action had been illegal. The Higher Court of Podgorica upheld this decision and the workers said they would file an application with the European Court for Human Rights.

The new 2005 Act on Public Assembly provides the police with certain discretionary powers with regard to prohibition of public gathering, which may call for concern. The Act also does not resolve the dilemma whether the already customary protest walks will be allowed at all in Montenegro and whether such walks can be interpreted as “serious endangerment of the movement of a greater number of citizens”, calling for prohibition of the protest. The organisers of public meetings are bound to notify the police at least 5 days in advance, which is a

⁴⁰ *Dan*, 16 December, p. 8.

solution significantly hindering spontaneous protests. A peaceful gathering shall be banned if notification of it was not made in due time and in the regular procedure, if it is planned to be held at a venue where the Act prohibits a gathering, if its goals are directed at violating guaranteed human rights and freedoms or instigating violence, national, racial, religious and other hatred or intolerance, if there is real risk that the holding of the peaceful gathering would endanger the security of people and property or disrupt public law and order to a greater extent; if necessary to prevent risks to human health. A gathering shall also be prohibited if there is “real danger that the holding of a peaceful gathering would endanger the safety of people and property or result in larger scale disruption of public law and order”. The question arises on which criteria will such danger be assessed, whether, for instance, will a gathering be allowed if it is held to promote human rights e.g. protests against instances of discrimination prohibited on specific grounds, although it can be expected that such a gathering will provoke reactions of rightist, extremist organisations, and thus possibly result in larger scale disruption of public law and order. All the more as the Act obliges the police to prevent the obstruction or prevention of a gathering held in keeping with the provisions of the Act, if, of course, such assembly had been approved by the police i.e. court in an administrative proceeding against the police decision in an administrative procedure (Art. 14).

The organisers of the gathering may appeal the decision banning the gathering, albeit not in court but before the Ministry of Internal Affairs.

The greatest achievement of this Act lies in its prohibition of violence, incitement to violence, hate and intolerance. It prohibits carrying of arms or objects that can incur injuries and alcoholic drinks. It also bans and incriminates wearing of uniforms, parts of uniforms, clothing and other insignia calling for or inciting armed conflicts or violence, national, racial or religious hatred or other forms of intolerance.

Police officers are authorised to interrupt and ban a peaceful gathering that the police were not notified of, that is banned, held not at the venue that was specified in the notification or if they assess that the participants are urged or incited to armed clashes, national, racial, religious or other hate or intolerance; that the monitors cannot maintain law and order; or there is real or direct danger of violence or other forms of disrupting public law and order to a greater extent.

The opposition in Parliament criticised the police powers as “excessive”, especially the provision allowing them to “weigh the speakers' words”. The Act in general restricts the freedom of speech and appearance at (any) public gathering by banning all calls for and incitement to violence, national, racial, religious or other hatred and intolerance. These police powers fall within the framework of the state's international obligation to prohibit propaganda of war and incitement to national, racial or religious hatred as long as they are not abused in practice and excessively restrict the freedom of speech which is unnecessary in a democratic society.

11. Peaceful Enjoyment of Property

The Montenegrin Assembly passed a new Act on Restitution of Ownership Rights and Indemnification in 2004, which replaced the 2002 Act on Just Restitution. The Act regulates the conditions, mode and procedure for restituting rights to property and other ownership rights and indemnifying the former owners for their property that became national, state, social or cooperative property. The 2004 Act prescribes the right to restitution to fewer categories than the previous law. In addition to natural persons, this right may be also invoked by certain non-profit organisations, but not by religious organisations. Under the Act, a separate law will regulate the manner in which religious organisations will be restituted.

The Act prescribes that real and other property and ownership rights restituted or indemnified under the Act will not be taxed. However, as opposed to the previous Act, it does not contain provisions exempting real property obtained in keeping with the Act from taxation within the first year from the day of acquisition i.e. the day the holder of the right to restitution acquires it.⁴¹

The right to restitution is realised in an administrative procedure. To that end, the municipal governments will form commissions to implement the procedure. The claimant may appeal a decision by the first-instance authority with the Montenegrin Finance Ministry. Court proceedings may be initiated in the event of disputed facts (Art. 39). Article 47 prescribes deviation from the rule on *res iudicata*. A claim may be filed and a decision taken on an issue regulated by the Act even if a court or another state authority had before the Act came into force reached a final decision on the claim for restitution or indemnification that the claimant was dissatisfied with.

The enforcement of the 2004 Restitution Act was off to a slow start in 2005. According to surveys of owners and heirs of appropriated property, its value in Montenegro stands at around 1.5 billion Euros.⁴² Municipal Restitution and Indemnification Commissions were formed in keeping with the Act although not within the envisaged 60-day deadline. The restitution and indemnification claims were to be filed at the latest by the end 2005 and the restitution or indemnification was to ensue as of 2006. The Government set up an Indemnification Fund to settle with former landowners who cannot exercise the right to restitution. The citizens have complained to the Ombudsman that the municipal commissions had not been set up on time and about the work of the municipal bodies and the real estate departments.⁴³ This prompted the Ombudsman to state that the Restitution Act was not fully implemented in Montenegro despite the clear legal provisions and precise

41 Compare Article 9 of the Act on Just Restitution and Article 5 of the Act on Restitution of Ownership Rights and Indemnification.

42 *Pregled*, 18 August, p. 11.

43 *Vijesti*, 11 October.

deadlines. Citizens also alerted the Ombudsman to the intention of some municipalities to alienate the land before a final decision on its restitution to its the former owners; in that way, the municipalities are trying to pump more money into their budgets, transfer the burden of restitution to other parties and obstruct the realisation of the right to restitution or indemnification. The Ombudsman's Office looked into the issue and established the citizens' complaints were founded.⁴⁴

12. Minority Rights

Representatives of all minority communities called for the particular law on the rights of national minorities as soon as possible, for apart from generally phrased constitutional provisions, Montenegro has no particular legislation on minority rights. For example, the Montenegrin Constitution guarantees the right to persons belonging to national and ethnic groups to establish educational, cultural and religious associations, *with material assistance of the state*, the right to use of a minority language in contacts with administrative authorities, the right to be instructed in minority language, the right to public informing in minority languages, and even to proportional representation in public services, state and municipal authorities and bodies. However, also the CoE Advisory Committee was of the opinion that those constitutional provisions need to be complemented with further guarantees and legal clarity needed for their proper implementation.⁴⁵

Some 92,000 Bosniaks live in Montenegro, according to the last census. Their representatives are advocating the rights to official use of language and script, schooling and information in the Bosniak language, as well as proportional representation in state administration and public companies.

The Montenegrin Democratic Alliance of Albanians leader said in January 2005 that the Albanians in Montenegro needed autonomy, new territorial organisation, establishment of administration in Albanian and the right of veto in the Parliament. He said the authorities had promised the ethnic Albanians that Malesija would become a municipality back in 1997 but still had not fulfilled their promise. The Montenegrin Parliament in October passed the Act on the Capital City, under which Zeta and Tuzi became new municipalities, but not Malesija. This prompted the protest of ethnic Albanian representatives, especially the majority ethnic Albanian population of Malesija (broader area round Tuzi), rallied round the NGO Ilirikum. The two main ethnic Albanian parliamentary parties disagreed on the Act; the Democratic Alliance of Albanians was against it, like the opposition parties, while the Democratic Union of Albanians voted for the draft. The adoption of the law did not cause public demonstrations in Montenegro, but it did prompt protests

⁴⁴ *Ibid.*

⁴⁵ Opinion on SaM, SCFC/OP/I(2003)008, adopted at the 18th session on 27 November 2003.

abroad, in Detroit, USA. A Movement for Independent Montenegro meeting had to be cancelled when over 400 Albanians protested because Malesija had not become an independent municipality and against the “Montenegrin authorities' discrimination of ethnic Albanian citizens”.

The Montenegrin Ombudsman recommended to the Podgorica and Ulcinj municipalities to allow ethnic Albanian citizens to exercise their constitutional right to enter their names in the municipal registries in their native language, i.e. script.⁴⁶

An increase in incidents against Roma was recorded in Montenegro in 2005. In addition to discrimination at work, Roma are discriminated against in nearly all other walks of life, in city transport or when trying to exercise the right to health protection. Nine Roma in the refugee settlement at Konik sued the Republic of Montenegro and demanded compensation of damages for the physical and mental pain they suffered and violations of their freedoms and rights when tear gas was thrown at their settlement in 2002. The first hearing was held in the Basic Court in Podgorica; the Roma argued that the camp was a public place and that the state was accountable for not preventing the harmful consequences.

The Nikšić-based Roma Initiative Centre NGO May poll shows that three-fourths of the polled Roma women in Nikšić felt partly or fully discriminated against when applying for jobs, at the doctor's, in school or during everyday communication. Half of the pollees are the most insulted when Roma are called Tsigans, one-third when people say they are dirty, while 15% of Roma women are bothered when Roma are qualified as illiterate, stupid and uneducated, traditional and prone to stealing. Nearly 80% think their status would improve if they went to school and that the majority population should provide them with the opportunity to get an education and find jobs. Early in 2005, the Montenegrin Government adopted the Roma Decade Action Plan focussing on four priority areas: education, housing, health and employment. It envisages respect of international documents guaranteeing Roma human rights and eliminating discrimination.

The Podgorica-based NGO Democratic Roma Centre in October presented its poll to mark the international day against discrimination and indicating a prominent social, ethnic and racial distance, which is one of the causes of discrimination and segregation. It shows 24% of Montenegrins, 20% of Moslems, 26% of Albanians would not choose a Roma for a friend. One-third of the Montenegrins, 59% of the Moslems and 17% of the Albanians would not like to have a Roma neighbour. Fifteen percent of the Montenegrins, 14% of the Moslems and 30% of Albanians would not agree to live in the same state with Roma. Half of the Montenegrins, 65% of the Moslems and 82% of the Albanians would not have sexual intercourse with a Roma, while 33% of the Montenegrins would agree to a direct blood transfusion from a Roma only if their life was in danger. That Roma live in

46 *Vijesti*, 14 December.

difficulties because they are lazy and irresponsible is a view shared by 68% of the Montenegrins, 84% of the Moslems and 35% of the Albanians, while over half of the pollees think Roma cannot be trusted or counted on.

13. Political Rights

13.1. Referendum on Montenegro's independence. – The 2003 Constitutional Charter of Serbia and Montenegro envisaged that the member states could initiate a procedure to secede from the state union upon the expiry of a three-year period. The Constitutional Charter was complemented by the 2005 Amendment II to the Charter prescribing that regulations on a referendum must be based on internationally recognised democratic standards and that the member-state organising a referendum will cooperate with the EU in the process.

According to the Montenegrin Constitution, a referendum must be called on decisions on changing the status of the state, the form of government and changing of borders. A new Referendum Act was adopted in 2001, at the moment when the independence of Montenegro and the survival of the joint state was a burning political issue. The Venice Commission gave its opinion on the conformity of this Act with international standards.⁴⁷ The Commission reviewed the issue of majority required to give the referendum legitimacy. Under the Montenegrin Referendum Act, the decision in a referendum is taken by a majority of vote of citizens who have voted providing that the majority of the citizens with voting rights have voted. The Commission concluded that in other states, decisions on such significant issues such as independence commonly required a specific minimum turnout and that decisions on such issues have in practice been commonly accepted by more than 50% of the registered voters. However, despite this conclusion, the Commission was of the opinion that the Montenegrin Act was in that respect not inconsistent with international standards. It did, however, underline that in order that the result of a referendum should command more respect, the political forces in Montenegro may wish to agree to change the present rules, either by adopting a higher percentage rate or by requiring support for the decision by a percentage of the electorate to be defined.

Another disputed issue discussed by the Commission regarded the question on who is eligible to vote. Under Montenegrin legislation, citizens with at least two-year residence in Montenegro are eligible to vote at elections (and referenda), which means that Montenegrin citizens with residence in Serbia cannot vote at the referendum. This solution is not inconsistent with international standards, although

47 Venice Commission, *Opinion on the Compatibility of the Existing Legislation in Montenegro Concerning the Organisation of Referendums with Applicable International Standards*, Opinion No. 343/2005, CDL-AD(2005)041.

the two-year residency requirement may be considered excessive. According to the Commission, there would be arguments to allow Montenegrin citizens with residence in Serbia to vote⁴⁸ but the Commission was of the opinion that it was too late at this moment because introduction of new rules on the eve of the referendum would compromise its legitimacy. At its plenary session on 3 December, the Supreme Court of Montenegro took the stand in principle that all adult citizens of Serbia with residence in Montenegro exceeding 24 months had to be allowed registration in the election rolls and thus the right to vote.⁴⁹

The pro and anti-referendum debates between the pro-independence ruling coalition advocating a referendum in the spring of 2006 and the pro-SaM opposition parties urging the preservation of the state union were in 2005 joined by the Movement for Independent Montenegro and the Movement for a European State Union, NGOs set up almost at the same time. A Movement for a Common European State of Serbia and Montenegro was also set up in Serbia in 2005. Montenegrin organisations have fiercely debated the referendum date and conditions. The pro-Union Movement vociferously advocated the right of Montenegrin citizens residing in Serbia to vote at the referendum. The Movement leader even said that Montenegrin citizens in Serbia “will not need to respect the referendum results” if they are not acknowledged the right to vote at it.⁵⁰ The leaders of the Movement for a European State Union have especially highlighted the danger of clashes within Montenegro in case of a “war referendum” as the Movement Management Board Chairman called it. Representatives of the Movement for Independent Montenegro, on the other hand, said the ideas of the pro-Union movement were “on trial in The Hague and they do not have any moral rights to talk about it”, that unrest in Montenegro can only be initiated from outside of Montenegro and that such threats only served to upset the public ahead of the referendum.⁵¹ Both movements accused each other of hate speech; the topics their representatives dwelt on often went beyond the referendum, focussing on the character of the current regime and future state, privatisation, the Serbian Orthodox Church, discrimination against Serbs or Montenegrins in Montenegro, etc. The Movement for a European State Union had not taken up the invitations to a debate forwarded by the Movement for Independent Montenegro by the end of the year. The Montenegrin opposition parties, which were for the preservation of the state union, have persistently refused to discuss the

48 The Commission underlines that Serbia adopted the Citizenship Act in 2004 granting citizens of another member-state equal rights in Serbia with the exception of the right to vote, which could in the future prevent Montenegrin citizens in Serbia from voting either in Serbia or in Montenegro. The Commission, however, highlights that such disenfranchising would be viewed by many as a violation of the Serbian Constitution and election legislation and expresses doubt that the Serbian authorities would actually decide to deprive so many citizens of their right to vote (*Ibid.*, para. 55).

49 *Vijesti*, 6 December, p. 3.

50 *Vijesti*, 14 October.

51 *Vijesti*, 8 July.

referendum and referendum conditions with “Milo Đukanović and his regime”, which they perceive as “autocratic”. The two camps interpreted differently even the Venice Commission recommendations. Montenegrin PM Đukanović said 40% +1 was the maximum qualified majority for a referendum decision on Montenegrin independence, because that was the highest percentage in European practice and that the Government was willing to allow international observers control the work of the secret police to the degree that was “in accordance with international democratic practice”.⁵²

The Montenegrin President scheduled an Assembly session for 7 February 2006 to call a referendum on Montenegro's independence.

Immediately after the Venice Commission recommendations were published, EU's High Representative for the Common Foreign and Security Policy Javier Solana appointed Slovak diplomat Miroslav Lajčák EU's envoy for talks on the referendum conditions in Montenegro. Lajčák paid his first visit to Podgorica on 20 December and talked to the government and opposition representatives on opening a dialogue and the referendum issues.

13.2. Conflict of Interests. – The Montenegrin 2004 Conflict of Interests Act prescribes that a public official is obliged to transfer managerial rights to another person, but retains the right to participate in shareholder assemblies. It is unclear whether this right pertains only to joint stock companies, which are the only ones with shareholder assemblies or to other types of companies as well. The Act had initially allowed a public official to exceptionally also be a member of the board of directors of a state or municipally owned company before the Constitutional Court in 2005 concluded that this provision was not in accordance with the Constitution, because public officials also entail government members, judges, state prosecutors, the Constitutional Court president and judges, who may hold only one office under the Constitution. The provision in the Act was amended pursuant to the Court decision and now does not allow Government members, Constitutional Court president and judges, judges, state prosecutors and their deputies to be members of boards of directors even if the state or a local self-government own the company; other public officials are, however, allowed to hold such offices. In its annual report on SaM, the European Commission criticised the provision and called for the harmonisation of the Act with international standards, under which public officials cannot be members of public company management boards.

The Conflict of Interests Commission recorded that 1,368 (81%) of Montenegro's 1,692 public officials had reported their property in 2005. At the republican level, 10 Montenegrin MPs, six deputies in the SaM Assembly, 5 newly-elected government officials and two judges had not reported their property. Councillors accounted for most officials in the municipal authorities who had not reported their

52 *Vijesti*, 27 December.

assets.⁵³ At the end of the year, the Commission named the 16 public officials who had persistently avoided submitting reports on their assets for 2004 although the legal deadline expired back on 1 March; the deadline for 2005 expires at the end of February 2006.⁵⁴ Most of these officials are members of opposition parties who say they have not reported their assets to the Commission because it is not serious and accepts as valid the reports submitted to it. They believe the topmost state officials have not reported all their property so they will not do so either.⁵⁵ Although the Commission Chairman said he would initiate the dismissals of officials who had not reported their assets, the media did not report by the end of the year whether anyone had been dismissed for failing to submit a report.

The Montenegrin Constitutional Court dismissed the motion by the Network for the Affirmation of the Non-Government Sector (MANS) to review the constitutionality of the Government Decision appointing PM Milo Đukanović Chairman of the Privatisation Council and three ministers the Council members. It said it was not in its jurisdiction to review the constitutionality of individual enactments such as the Decision. MANS claims the appointment is a classical example of a conflict of interests because “Đukanović alone proposes privatisation plans and submits reports, which renders senseless the supervisory role of the Government” and that this was in contravention of the Montenegrin Constitution under which Government members may not hold deputy or other posts or professionally perform other activities. In its reply, the Government said the Privatisation Council was not a legal person, had no powers to guarantee obligations or borrow money and that the Council Chairman and members were not public officials.⁵⁶

13.3. Funding of Political Parties. – Pursuant to the Act amending the Act on Financing of Political Parties, the Montenegrin state shall allocate one and a half million Euros more to political parties in the election year than otherwise. The amendments also significantly increase regular funds for parties and allocations for covering the costs of election campaigns. Ten percent of the funds for election campaigns are allocated to the submitters of proclaimed election tickets, 70% are allocated to submitters of election tickets that won mandates and 20% to parties with representatives in parliament. They also entitle parties with at least one deputy or councillor to state funding on condition they were registered before the last elections were held. The NGOs warned that it would allow for the funding of parties

53 Montenegrin Conflict of Interests Commission website: www.konfliktinteresa.cg.yu/funkcioneri/-funkcioneri.htm.

54 *Dan*, 28 December.

55 According to data on the Commission's website, Montenegrin PM Milo Đukanović reported a monthly salary of 456 Euros and an apartment of circa 200 m², which he co-owns with his brother, his wife's monthly salary of 500 Euros and her Peugeot 306 from 1996: www.konfliktinteresa.cg.yu/funkcioneri/EvidFunPrijavePrikaz.php?ID=1502962210251&Godina=2005&Rbr=1.

56 *Vijesti*, 2 December.

which did not win mandates at the last elections but had acquired parliamentary seats by 'buying off deputies'.⁵⁷

In addition, the Montenegrin Constitutional Court ruled that mandates belong to the parliamentary deputies i.e. municipal councillors and not the political parties on whose election tickets they ran.⁵⁸ The decision was criticised in Montenegro, the public claimed it would enable horse trading and that it was not in keeping with the proportional election system applied in both local and parliamentary elections. Bearing in mind that this Constitutional Court decision is in contravention of the previous decision on the same issue, some experts suggested the Assembly amend the Acts on Election of Parliamentary Deputies and Councillors and specify that the mandate belonged to the parties on whose election tickets the deputies ran.

14. Special Protection of the Family and the Child

By the end of the year the government of Montenegro, in cooperation with UNICEF has finalised the draft new Family Act, which ought to be in accordance with international standards of child protection. One of the most important issues regarding protection of family involves domestic violence, which had been brought to the Montenegrin public's attention mostly by the NGOs. Although the Family Act was originally to have included comprehensive procedures on prevention, prosecution and remedies against domestic violence, the decision was passed to adopt a separate law regulating those issues.

The NGO Shelter for Women and Children Victims of Violence data show one-third of women is exposed to some form of family violence (physical, psychological or economic). Women are mostly abused by their husbands, less frequently by their sons or fathers in law. Cases of abuse committed by a brother or son are the most difficult to resolve because of the specific mentality of the Montenegrin society. The Shelters Director says most abuse arises due to alcoholism, poverty or drug addiction. Most victims of family violence were dissatisfied with the work of the institutions, especially the police, Social Care Centre and the judiciary. They mostly complain about the staff's lack of understanding for their problems, lack of coordination between the institutions and implementation of the existing laws. The police are mostly criticised for their inefficient protection of victims and prejudices about the woman's place in a family. Although domestic violence has been qualified as a criminal offence under Criminal Code, the Shelter warns there are still police-

57 Under the previous Act, proposed by the Centre for Monitoring (CEMI), between 1,475,290 and 2,458,818 Euros were allocated for funding of parties. Now, a minimum of 1,967,054 Euros is allocated for the purpose and the amount is not limited like before. CEMI claims that the amendments "undermine the concept of limited, transparent and fair funding of political parties", that they are detrimental to Montenegro and in contravention of international standards.

58 Montenegrin Constitutional Court (*Sl. list RCG*, 45/04).

men who advise victims of domestic violence to “be patient a bit”. In rural communities, the policemen are persuading the victims not to file reports against the offender because “there will be a scandal”. Although the law stipulates that the offender, not the woman and children, is to leave the house automatically, Raičević says the courts have not issued any order to that effect yet.⁵⁹

Podgorica hotline for women and children victims of violence and its partner hotline organisations in Bar and Berane monitored the implementation of Article 220 of the Montenegrin Criminal Code (qualifying domestic violence as a crime) by the police and courts in nine Montenegrin municipalities. They came to the following conclusions: 30% of the women claimed most of their complaints have never been processed or reached court; 85% said they experienced the attempt to reconcile them with their husbands as pressure, that they had agreed to it unwillingly and because they were led to feel they were the ones who 'didn't care' about their families if they disagreed; 63% said they were beaten up by their husbands immediately after the 'reconciliation' or 'warning' the police issued their violent husbands, but that they did not report the fresh beatings because they had lost faith that the institutions could help them; 83% 'believe' their husbands have connections in the institutions; 89.5% complained about the slow and inefficient court proceedings or the court staff's lack of empathy in domestic violence cases. All complained about the excessively high legal costs and 87% said they were unable to pay the court taxes, legal counselling, etc.

One out of ten children in Montenegro is born out of wedlock. Most of the single mothers are under age; their number has been gradually increasing over the past few years, as data provided by the Podgorica NGO Home of Hope show.⁶⁰ Most children of divorced parents in Montenegro do not receive child support. Parents themselves rarely opt to go to court. Montenegro has no institutions looking after single mothers. Some social centres have organised accommodation of single mothers and their children in foster homes, which are paid 250 Euros a month, but these women still encounter many problems, from community condemnation to adverse employment opportunities. NGO Home of Hope offers psycho-social assistance to single mothers and helps them collect the necessary documents needed for the low financial aid. The children however are growing up in a community condemning them, in a form of social isolation. The 43 single mothers and their newborns who found shelter with the Shelter NGO mostly stayed longer than usual there, between 12 and 18 months, due to the adverse social and economic circumstances.

The status of single parents, especially of women, is aggravated by the long divorce proceedings on division of property; women are mostly forced to leave the

⁵⁹ *Dan*, 19 August, p. 10.

⁶⁰ *Dan*, 9 November, p. 11.

family home (taking the children with them even if they are unemployed) while the offenders remain in the houses. Many of the women complain about the work of the social centres mediating in divorces and advising on which parent should be granted custody of the children. They often decide the wife should return to the offender or grant the offender custody.

15. Economic, Social and Cultural Rights

The UN Committee on Economic, Social and Cultural Rights in 2005 undeline the following problems plaguing Serbia and Montenegro: lack of case law on the application of ICESCR and of anti-discrimination laws, widespread discrimination of Roma in realising their social and economic rights, difficulties refugees and IDPs faced in realising their social and economic rights, high unemployment rate and grey economy, restricted right to strike, low unemployment benefits, deprivation of pensions to the IDPs, a high poverty rate and deprivation of education to some national minorities, notably Roma.⁶¹

15.1. Right to work and to just and favourable conditions of work. – Although according to the Montenegrin Labour Act a working week comprises 40 working hours, the NGOs have warned of the established practice of some private employers, mostly taxi companies and mini-markets to make their employees regularly work 12 hour shifts, including nightshifts, without extra pay.⁶²

The Montenegrin Employment Bureau recorded 49,509 unemployed, a 16.5% decrease over 2004. The unemployment rate in Montenegro stood at 18.8%; 23,682 people found jobs last year.⁶³ Unemployment decreased in all age categories except the over-40 age category. Analysis shows the unemployment rate has been continuously dropping in the past four years and that it is greater amongst women (25.8%), than amongst men (15.2%).⁶⁴

Numerous strikes occurred in Montenegro in 2005. All were staged by employees of state owned companies due to unpaid salaries and other benefits guaranteed by law.

15.2. The right to an adequate standard of living. – Montenegrin Network for the Affirmation of the NGO Sector data show 12% of Montenegro's population live below the poverty line. The consumer basket of 65 foodstuffs for a family of four in Montenegro cost 263 Euros in November, while the average net salary

61 Concluding observations, UN doc. E/C.12/1/Add.108, 23 June 2005.

62 Information communicated by the employees to NGOs Shelter for Women and Children Victims of Violence and Human Rights Action.

63 *Pregled*, 14 December, p. 4. Other data indicate the unemployment rate stood at 22.6%, a 3.2% drop over 2003.

64 *Vijesti*, 31 March, p. 19.

remained lower, standing at 223.63 Euros, according to MONSTAT data of December 2005.

The laws of Montenegro do not mention the right of citizens to quality and adequate nutrition. There are no special food subsidies designed to improve the diets of the poorest and most vulnerable groups and no state funded soup kitchens that would provide free meals to the indigent.

The right to housing of vulnerable groups, especially refugees, IDPs and Roma, living in unhygienic and unsuitable housing, is a burning issue. Minimum housing standards have not been fixed in either Serbia or Montenegro. This creates insurmountable problems in statistically determining the number of substandard dwellings.

15.3. Health care. – According to the Marten Board International agency Social and Political Barometer poll of 800 citizens in 17 Montenegrin municipalities conducted on 7–14 November, the greatest number of pollees (14.4%) thinks that there is corruption in the health sector; the health sector simultaneously ranks second on the list of trusted institutions (8.7%). Nearly one-third of the pollees do not trust any institution.⁶⁵ A survey commissioned for the National Gender Equality Action Plan (in health) and conducted by NGOs showed there was corruption in most health institutions in Montenegro, but that few people were willing to talk about it publicly, fearing unpleasant situations.⁶⁶

15.4. Education. – Although the Montenegrin Constitution stipulates that primary education is free of charge and compulsory, Roma children still mostly do not attend elementary school, and the supervision of the social workers over families who do not send their children to school is inadequate. Although in principle education is available and free for all, the problem of “hidden” costs that parents have to bear, such as the cost of books, equipment, recreational activities and field trips is persistent. There is a particular problem of inclusion of children with disabilities in the education system. Special schools for disabled children, and separate classes within regular schools are insufficient in number and unevenly dispersed.

⁶⁵ *Dan, Vijesti*, 8 December, p. 14.

⁶⁶ *Dan*, 21 May, p. 14.

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HUMAN RIGHTS IN THE REPUBLIC OF SERBIA IN 2005

I INTRODUCTION

Serbia was in 2005 a member-state of the State Union of Serbia and Montenegro, which accounted for a series of specific legal and political features that inevitably affected the quality of its legislation, the pace at which the laws were conformed with international human rights protection standards and the practical enjoyment of guaranteed rights and freedoms.

This situation to an extent influenced the structure of this Report. Serbia is legally bound by all international instruments the State Union of Serbia and Montenegro has ratified, the Constitutional Charter, Charter on Human and Minority Rights and Civil Liberties, the SaM laws and the republican legislation, comprising the Constitution of Serbia, Serbian laws and subsidiary legislation. It is therefore clear that every attempt to seriously examine the conformity of Serbia's legal order with ratified international standards must comprise a parallel analysis of SaM legislation and the Serbian Constitution and laws, which is what this Report does.

The Report analyses the valid legislation and realisation of human rights in Serbia. Most attention is, of course, devoted to problems in the practical enjoyment of human rights. That is why the deliberation of various human rights is viewed above all with respect to the degree in which they are respected.

The Report also includes a section on how Serbia's citizens perceive human rights. The findings are part of a survey the Belgrade Centre for Human Rights has been conducting every year to measure the degree and quality of civil awareness of guaranteed human rights in national legislation and their respect in practice. The Report closes with consideration of two extremely important challenges Serbia faces in its democratic transition: confrontation with the past and cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY).

General Situation. – Serbia's present political framework was defined by the results of the last parliamentary elections, held in late 2003, and the outcome of the presidential elections that ensued six months later.

¹ Chapter on Special Protection of the Family and Child was drafted by CRC's experts Marija Petrović, Dr. Nevena Vučković Šahović and Ivana Stevanović LL. M.

The Serbian Government comprises ministers from the DSS, G17+, New Serbia and SPO. The Government hinges on the support of the SPS. The latter has in return won various concessions; the most important political one was the promise that Serbia would avoid full co-operation with the International Tribunal for the Former Yugoslavia in The Hague (ICTY). Co-operation with the ICTY is also opposed by the strongest opposition party in parliament, the SRS, whose leader Vojislav Šešelj awaits trial for war crimes in Scheveningen. For a long time, the DSS did not oppose slowing co-operation with the ICTY down; its senior officials think the ICTY is unfair and humiliates the Serbs and Serbia. This is why soon after it came into power, the Government proposed and the National Assembly supported the Act on Rights of Hague Indictees and Their Families, granting them privileges persons indicted and tried by national courts do not enjoy. The adoption of the Act was met with opposition of part of the public. Several organisations submitted motions challenging its constitutionality.² The Constitutional Court of Serbia suspended its application, but had failed to pass a final decision on its conformity with the Serbian Constitution by the end of 2005.

However, under persistent foreign pressure, both PM Koštunica and his Government began looking for ways to co-operate with the ICTY without openly abandoning their principled stand against the Tribunal. The extradition of a number of ICTY indictees, whose surrender was always presented as voluntary, began in early 2005. The trend halted in mid-2005 although six people on the ICTY list of indictees are still at large and presumed to be hiding in SaM, notably Bosnian Serb General Ratko Mladić, charged with genocide in Srebrenica. International pressure again started growing when it transpired Mladić had for a long time enjoyed the support of some state bodies and services in Serbia and that he had indirectly been receiving the benefits awarded to retired generals until November 2005. This issue threatened to undermine the greatest foreign policy success of Koštunica's Government in 2005 – opening of talks on the Stabilisation and Association Agreement with the European Union. After several postponements, the EU in early May 2006 decided to suspend talks on the SAA until Serbia fulfils its obligations to the ICTY.

The comeback of the nationalist right and parties of the old regime to the highest Serbian institutions and at the helm of many municipal bodies has been accompanied by vengeful rhetoric of the politicians and media, that has gained such proportions that the democratic changes on 5 October 2000 are now qualified as a putsch and the reforms that ensued as a period of national downfall and treason. This wave of revanchism was not halted by the victory of DS President Boris Tadić at the presidential elections in 2004.

NGOs in Serbia, which have been commended for the democratisation of the country (a view not shared by all members of the ruling political elite) operated in

2 Including the Belgrade Centre for Human Rights, see: www.bgcentar.org.yu/index.php?&p=116-&nid.

2005 in much better (factual but not legal) circumstances than the ones before 5 October 2000. A law on NGOs, although drafted since 2001 (now in co-operation with the representatives of the associations concerned), was not adopted by the end of 2005. The rising influence of the nationalist right resulted in the revival of the media campaign against NGOs, especially against those advocating human rights and co-operation with the ICTY. Just like before 5 October 2000, these NGOs are again accused of betraying their nation and co-operating with “anti-Serbian” foreign governments and organisations.

Summary. – The adoption of the Constitutional Charter and the Charter on Human and Minority Rights and Civil Liberties (hereinafter: HR Charter) in 2003 contributed to a more comprehensive legal regulation of human rights. However, the incompatibility of the Constitution and laws with the constitutional provisions at the level of the State Union continue to pose a major obstacle to the enjoyment of the rights guaranteed by the HR Charter. Although the HR Charter envisages its direct applicability and thus partly addresses the problem of incompatibility of the other regulations, the delays in the adoption of new Constitutions (especially in Serbia) have resulted in slower and inefficient harmonisation of the member states' legislation with international and European standards. Although it can be concluded that Serbia's legislation has been further improved in 2005 and that the new laws incorporate some of the fundamental international and European standards, it needs to be highlighted that quite a few laws had been drafted by the previous Government, i.e. it took more than a year for them to arrive in parliament, which testifies that the legislators and government are not fully committed to rapid, efficient and comprehensive reforms. Implementation of the laws remains the key problem in Serbia and lack of it impedes the enjoyment of the guaranteed rights.

Although the laws adopted by the Serbian Assembly in 2005 mark an improvement over the previous ones, their implementation is difficult and requires faster and more efficient reforms of the legislation and public administration. The courts and administration still only sporadically apply international norms mostly because they have for years applied only national legislation and partly because they are not versed in the international treaties.

Judicial reforms have been ongoing for a number of years now but have failed to produce satisfactory results. Changes in the organisation of the judiciary are delayed because enforcement of the laws is continuously put off; the judiciary obviously is not technically or professionally ready for speedy and efficient reforms. Amendments to the Serbian Act on Organisation of Courts moved the deadline for establishing the appellate and misdemeanour courts and the Administrative Court to 1 January 2007.

The abolition of military courts and transfer of their cases to civilian courts eliminated one of the shortcomings in the legal system with respect to the independence and impartiality of the judiciary. In terms of the right to a fair trial, first-in-

stance and second-instance misdemeanour courts were established under the 2005 amendments to the Serbian Act on Judges, but will begin operating in 2007.

Legislation does not envisage effective legal remedies against unreasonably long trials, i.e. violations of the right to a trial within reasonable time guaranteed by Article 6 (para. 1) of the European Convention on Human Rights. The Supervisory Board within the Supreme Court of Serbia is authorised insight in cases not resolved within reasonable time, but it is not empowered to award compensation of damages.

Serbia in 2005 adopted new criminal, civil and enforcement procedure codes although some were not to come into force until 2006. The Serbian Criminal Code and Witness Protection Act are in conformity with international standards, although they deviate from international standards in provisions dealing with human trafficking and smuggling and forced labour. The Code has also reduced some penalties and lowered the minimum sanctions for serious crimes, which is all the more inauspicious in view of the burgeoning modern-day slavery and data classifying SaM amongst states with high incidence of human trafficking and smuggling. The Criminal Code also lowers penal sanctions for some other crimes, notably the illegal deprivation of liberty and extortion of a confession, which is especially concerning in view of the fact that the judicial penal policy is as a rule milder than the legislation and that courts frequently pass lower or suspended sentences.

New criminal legislation commendably incriminates ill treatment and torture as separate crimes. The status of convicts is improved by the new Penal Sanctions Enforcement Act allowing victims of torture or ill treatment to exercise the right to redress.

In terms of freedom of association, certain provisions on banning organisations are in contravention of international standards; so are the provisions prohibiting persons convicted for crimes from founding political and trade union organisations. Serbia failed to pass a law on associations of citizens in 2005 and legal insecurity still characterises the work of national and international NGOs.

Legal regulation of the responsibility of people who had violated human rights in the past is closely linked to insight in state security files. The Serbian law on lustration (Act on the Responsibility for Violations of Human Rights) passed in 2003 has not been implemented at all. Lustration has never been conducted in the judiciary, administration bodies or public services.

Serbia passed a law on the police in 2005, which marks an improvement over the previous legislation on police from the viewpoint of the respect and protection of human rights. It, however, has specific shortcomings, wherefore it can be concluded that it still is not in full compliance with international standards. The Serbian Act on Police now obliges police officers to respect international standards when exercising their powers.

The Serbian Assembly in 2005 adopted a new Family Act, the authors of which strove to regulate the matter in keeping with international treaties binding on SaM, above all the Convention on the Rights of the Child. Although the law does not fully embrace the contemporary concept of regulating family and family relationships, it considerably improves the protection of the mother and child.

Protection of minors is also achieved by the provisions stipulating that judges adjudicating cases involving minors must have specialised knowledge of law relating to the rights of the child. The new Serbian Misdemeanour Act includes special provisions on juvenile offenders. The Serbian Family Act also provides for civil law protection from domestic violence, shorter deadlines and mediation in marital disputes in the reconciliation and settlement procedures.

The Serbian Assembly in 2005 passed several laws regulating economic and social rights and marking an improvement over the previous laws. This area has not, however, been comprehensively regulated and quite a few laws with obsolete and contradictory provisions are still in force.

The SaM Assembly in 2005 passed a new Asylum Act. This framework law defines the main principles of international law on asylum and the status of refugees, the rights and obligations of asylum seekers and refugees, the basic minimum guarantees for implementing the asylum granting procedure in each member state and reasons for the termination of the refugee status. The Act is practically unimplementable because it does not regulate the procedure for granting asylum or specify which bodies will conduct it. For a comprehensive asylum system to be in place, each member state must pass its own laws regulating the matter as soon as possible.

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

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

The failure to try perpetrators of human rights violations committed in the past and the lack of willingness amongst state bodies to investigate and shed light on grave human rights breaches during Milošević's regime and the wars in the former Yugoslavia are the greatest obstacles to instilling democratic values in the society and establishing rule of law. Apart from the Special Prosecutor for War

Crimes, other Serbian state bodies appear totally disinterested in addressing these issues and punishing all perpetrators of these grave crimes.

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

Torture is often applied to obtain information in investigations; investigations and criminal proceedings against police officers reasonably suspected of torture are rare. Those found guilty of torture usually receive extremely mild sentences. The authorities' attitude to torture and humiliating treatment has not changed much; internal control and inspectorial supervision in the Ministry of Internal Affairs have not yielded satisfactory results.

Tolerance of discrimination is above all reflected in inefficient prosecution and punishment of the perpetrators. Investigations of indications of discrimination are rare. Roma were in 2005 again the most discriminated against on grounds of ethnic affiliation. The rising number of youths prone to discriminatory conduct, frequently accompanied by violence, gives rise to concern.

The Government of Serbia has been rocked by numerous scandals testifying of the lack of political will in the executive branch to address the serious problem of corruption. Media reports on the scandals and revelation of data compromising some political figures resulted in a greater number of attacks by politicians on journalists.

Like in other countries undergoing political and economic transition, economic and social rights remained endangered the most. The situation is somewhat specific because most attention had been devoted to the violations of civil and political rights, which had been systematically threatened for years; in result, economic, social and cultural rights have been sidelined. Trade unions and professional associations thus remain underdeveloped and untrained to efficiently alert to breaches of these rights and so pressure the executive and legislative authorities.

Citizens' Perceptions of Human Rights Law and Practice. – 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, so that the survey carried out in 2005 was the seventh successive one. The survey was conducted by *Strategic Marketing and Media Research Institute* (SMMRI).

The period between the last two surveys was marked by the greatest pessimism since October 2005. The rise in pessimism halted briefly in April 2005, when the European Commission adopted a positive Feasibility Study.

Many more citizens than in 2004 believed human rights were an obligation protected by international documents. Their familiarity with the specific documents, however, remained low.

Concern at economic issues, especially fear of unemployment, has grown. Citizens see corruption as one of the three main problems society faces. Nearly one out of four citizens (24%) listed corruption as one of the country's greatest problems. At the time of the survey, in September, only one out of five citizens listed Kosovo's final status amongst the three greatest problems. The percentage of those, who listed co-operation with the ICTY amongst the greatest problems, remained low.

Like in the previous years, the rights to life, to security and liberty of person and equality before the law were perceived as the most important rights. The right to work was again perceived in Serbia as the most endangered right; the number of citizens who thought their other economic and social rights were imperilled (right to health care, social insurance, et al) has also increased.

Citizens are aware that there is discrimination, above all against homosexuals and women; they think national minorities are discriminated against the least.

The rising mistrust in the courts and judges is concerning. Over half of the respondents thought judges were bad and dependant on politicians and, if their rights were violated, they would turn for help to influential people or people in power rather than to courts.

Conclusion. – Unsystematic variations in the trend of changes in the public legal awareness indicate the changes are dependent on connate rather than cognitive factors. Changes in the overall social climate, especially in the degrees of trust in state institutions and of public pessimism, obviously also reflect on the overall understanding of human rights. This dependence of the understanding of human rights on changes in the political climate indicates that the awareness of SaM's citizens of human rights enjoyment and protection is at a relatively low level.

As over the previous years, belief that one's rights are protected in practice in 2005 considerably lagged behind awareness of the formal protection of rights. There are still great disparities between the awareness of the right to a fair trial and the mistrust of courts; the awareness of the right to the freedom of thought and expression and the conviction that the press is censored; the awareness of political rights and the belief that the elected representatives are not acting in the interest of the citizens; the awareness of the existence of a law punishing violence against women and children, forbidding slavery and forced labour and the conviction that the competent institutions are hardly addressing the issues.

Egocentricity in understanding human rights, i.e. the inability to generalise human rights protection to include the rights of people of different nationality, gender or sexual affiliation, without making biased exceptions, remained prominent in 2005 as well. For instance, citizens on the one hand reproached the state for endangering fundamental human rights, while, on the other hand, they criticised it for giving too many of such rights, at least where national minorities are at issue: there are more citizens who believe that persons belonging to national minorities in

SaM have unrestricted rights to publish books and attend schools in their native languages than those who agree with such state policy on national minority languages. Almost one-third of the citizens was against giving ethnic Albanians the right to SaM citizenship and one out of five would deny that right to Moslems/Bosniaks; 45% of the citizens would dislike having an Albanian boss, while 34% would dislike having a Moslem or Croatian boss.

The citizens' concern with the economic situation has continued growing, as has their preoccupation with the *right to work* and *choice of employment*. This right consistently predominates the legal awareness of the citizens: it was the first right that came to mind of half the citizens, 53% perceived it as the most endangered right in the state. The number of citizens who think that low living standards have threatened the lives of SaM's citizens has continued growing.

The ranking of rights by their importance remained the same; *the right to life* remains the most important one; it is followed by the rights to *security and liberty* and *equality before the law*.

The percentage of citizens aware of the fact that human rights are protected by international documents has gone back up to the 2003 level. Half of the citizens are aware of this fact. On the other hand, however, the percentage of citizens who assess that human rights are not respected in Serbia and Montenegro has at an average remained at the level of 2004, which was higher than in 2003.

Most citizens believe that political rights are not respected. Even belief that political rights exist formally has dropped considerably over 2004.

Mistrust of judges continued growing: 56% of the citizens believe the judges are bad and dependant on politicians, a 10% rise over 2003. It is therefore not unusual that 37% of the citizens would turn to influential people (people with connections, in power), or those settling matters for a fee than to courts if they were denied their human right. Only one out of four (25%) would turn to a national court and 12% would turn to an international court.

II HUMAN RIGHTS IN LEGISLATION

1. Constitutional Provisions on Human Rights

According to the Constitutional Charter of the State Union of Serbia and Montenegro (*Sl. list SCG*, 1/03, 26/05 – hereinafter: Constitutional Charter) of 4 February 2003, the goals of Serbia and Montenegro 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). As an integral part of the Charter, the Charter on Human and Minority Rights and Civil Liberties (*Sl. list SCG*, 6/03 –

hereinafter: HR Charter) was adopted on 28 February 2003.³ The Serbian Constitution devotes a separate chapter to human rights and fundamental freedoms (Chapter II of the Serbian Constitution, *Sl. glasnik RS*, 1/90). In addition to civil and political rights, the HR Charter and the Constitution of Serbia also guarantee economic, social and cultural rights.

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 their protection if such protection is not provided by the member states (Art. 9 (3), Constitutional Charter). The Constitutional Charter prescribes that the attained level of protection of human and minority rights cannot be reduced (Art. 9 (2)).

The HR Charter represented great progress in the field of normative regulation of human rights. The final draft of the Charter was evaluated as “excellent” by the CoE European Commission for Democracy through Law (the Venice Commission).⁴

The Implementation of the Constitutional Charter Act (*Sl. list SCG*, 1/03, 26/05) provided that the Constitutional Charter be applied from the day of its adoption and promulgation in the Federal Assembly (4 February 2003), unless the Act itself determined otherwise (Art. 1). The Constitutional Charter contains the obligation to harmonise all laws of the State Union and the member states (Art. 51); the Act deals with the application of former federal laws, as well as with the deadlines for the harmonisation of all legislation with the Constitutional Charter and international treaties binding on SaM. The member states were due to harmonise their Constitutions within six months from the entry into force of the Constitutional Charter and their legislation by 31 December 2003. Neither member state adopted new Constitutions by the end of 2005.

However, the presence of contradictory norms on human rights, which can otherwise have serious consequences, can be circumvented by the correct application of the Constitutional Charter and the Implementation Act providing that norms which are contrary to the Charter shall not be applied (Art. 20 (1), Act on Implementation). The Constitutional Charter envisages the direct applicability of the HR Charter (Art. 2 (2)) and ratified international human rights treaties (Art. 10). The HR Charter also provides that generally accepted rules of international law shall be directly applied (Art. 7). This makes it possible to overcome the consequences arising from the lack of conformity of legal norms, at least in terms of impermissible restrictions of human rights. However, provisions enabling this have rarely been applied.

3 The HR Charter was based on a Draft Constitution of Serbia created by the Belgrade Centre for Human Rights expert group. See www.bgcentar.org.yu.

4 See Venice Commission for Democracy Through Law, “Comments on the Draft Charter on Human and Minority Rights and Civil Liberties” (Opinion No. 234/03), by Mr Jan E. Helgesen of 2 April 2003 on [www.venice.coe.int/docs/2003/CDL\(2003\)010fin-e.html](http://www.venice.coe.int/docs/2003/CDL(2003)010fin-e.html).

On 26 December 2003, SaM ratified the ECHR and the 13 Protocols thereto. The ECHR came into force on 4 March 2004. Protocols No. 1 and 4 to the ECHR came into force the same day. Protocol No. 6 came into force on 1 April 2004 and Protocol No. 7 on 1 June 2004, while Protocol No. 13 came into force on 1 July 2004. Protocol No. 12 came into force on 1 April 2005. Serbia and Montenegro also ratified Protocol No. 14 (*Sl. list SCG*, 5/05), but it will come into force only upon ratification by all the ECHR Contracting Parties. Serbia and Montenegro made three reservations to ECHR relating to mandatory detention (envisaged by Art. 142 (1) of the Serbian CPC), public hearings of administrative disputes in Serbia and certain provisions of the member-states' laws on misdemeanours.⁵ In late June, the SaM Assembly passed an Act permitting the withdrawal of reservation to Article 13 of the ECHR made upon deposit of the ratification of the ECHR and its Protocols.⁶ The reservation on Article 13 of the ECHR had been made on considerations related to the legal remedies within the jurisdiction of the Court of Serbia and Montenegro until the Court began operating.

The SaM Parliament on 26 December 2003 also ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.⁷ This Convention came into force on 1 July 2004. The Committee for the Prevention of Torture visited Serbia and Montenegro in September 2004 and submitted its report to the authorities. The Assembly of Serbia and Montenegro ratified the European Charter for Regional and Minority Languages on 21 December 2005.⁸

2. Right to Effective Remedy for Human Rights Violations

2.1. Ordinary legal remedies. – The HR Charter guarantees the right to judicial protection in Article 9. The decisions by international bodies are enforced and the costs covered by the State Union, i.e. the member states, depending on whether a state union or member state institution or organisation exercising public powers violated or deprived the injured party of a right guaranteed by an international treaty valid in Serbia and Montenegro. Article 18 guarantees the right to a legal remedy.

The relevant provisions of the Serbian Constitution are similar (Art. 12 (4)). In cases of human rights violations, protection can be sought in both civil and criminal proceedings. The legal system of SaM now lacks a special remedy for the violations of the right to trial within a reasonable time, as is defined by Article 6.1 of the European Convention, and pursuant to the judgment of the European Court in the case of *Kudla v. Poland* (judgement of 26 October 2000, App. No. 30210/96),

⁵ *Sl. list SCG (Medunarodni ugovori)*, 9/03.

⁶ The Act Amending the Act on the Ratification of the European Convention on the Protection of Human Rights and Fundamental Freedoms, *Sl. list SCG (Medunarodni ugovori)*, 5/05.

⁷ *Sl. list SCG (Medunarodni ugovori)*, 9/03.

⁸ *Sl. list SCG (Medunarodni ugovori)*, 18/05.

which is not dependant on the discretion of the president of the court or any other judicial administrative body.

2.2. *The Court of Serbia and Montenegro.* – With regard to human rights protection the SaM Court, according to the Constitutional Charter and the Act on the SaM Court, hears appeals 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 (Art. 46 Constitutional Charter; Art. 62 Act on the Court of Serbia and Montenegro). Consequently, this protection mechanism can be used only when there is no other legal (judicial or other) protection or remedy, regardless of its effectiveness.

The Court of Serbia and Montenegro began working in 2005. The offices did not resolve the problem of the functioning of the Court however: it faced serious administrative problems, such as lack of equipment and qualified professional staff in 2005. The problem of its funding remained unresolved as well, especially the funds allocated by Montenegro. The huge backlog inherited from the former Federal Constitutional Court and the Federal Courts was an additional problem.

2.3. *Ombudsman.* – Ombudspersons have been introduced in Serbia (national level), the Autonomous Province of Vojvodina and at the local level. The National Assembly of the Republic of Serbia on 14 September 2005 passed the Act on Protector of Citizens (*Sl. glasnik RS*, 79/05). The Protector of Citizens is established as an independent state body protecting the rights of citizens and controlling the work of state administration bodies, the body charged with the legal protection of property rights and interests of the Republic of Serbia, as well as other bodies and organisations, companies and institutions entrusted with public powers. The Protector also ensures the protection and promotion of human rights and freedoms (Art. 1).⁹ The Protector is appointed by the National Assembly of the Republic of Serbia at the proposal of the Assembly Committee charged with constitutional issues. The Protector is appointed to a term in office of five years and may be re-appointed once.

The Act sets guarantees for preserving the impartiality and independence of the Protector. The Protector is authorised to control the respect of civil rights, the legality and regularity of work of administrative bodies (the National Assembly, the President of the Republic, the Government, the Constitutional Court, the judiciary and public prosecutors do not fall under the Protector's jurisdiction) (Art. 17). However, the Protector ought to supervise not only violations of rights caused by

9 The legislator accepted the proposal of the Vojvodina Ombudsman and NGOs to set the rules of co-operation between Ombudspersons at different levels so as to avoid positive i.e. negative conflict of jurisdiction (see Arts. 34–35), although their further co-operation could improve if a form of memorandum on co-operation between Ombudspersons at different levels were concluded.

the formal misapplication of the law and other regulations, but also violations caused by inappropriate or inefficient conduct. This provision does not clarify whether the Protector has powers over violations of civil rights caused by conduct such as inaction, procastration, discrimination and chicanery, unfair conduct incompatible with the standard of 'good governance', which are just as important as the control of the formal legality of its work. The Government and Assembly are obliged to review initiatives for amending or modifying laws and other regulations and/or the adoption of new regulations submitted by the Protector (Art. 18). The Protector can also file a motion with the Constitutional Court to review the legality and constitutionality of laws and other general acts (Art. 20). The Protector may propose the dismissal of public officials, initiate the opening of disciplinary proceedings or request the launching of criminal, misdemeanour or other appropriate proceedings (Art. 20). Administration bodies are obliged to co-operate with the Protector.

2.4. Local government ombudsman. – The Act on Local Self-Government introduces the institute of municipal Ombudsman. Every municipality is entitled to pass a Decision establishing a municipal Ombudsman. No relevant data on the number of municipalities that have introduced Ombudsmen have yet been published.

2.5. The enforcement of international legal decisions. – One of the most important novelties pertaining to the enforcement of ECtHR decisions is found in Article 422 (item 10) of the Civil Procedure Act which specifies that the extraordinary legal remedy of retrial may be applied also in the event the ECtHR has ruled against Serbia and Montenegro on an identical or similar legal issue. This provision should serve as the model for amending also Article 51 of the Act on the Judicial Review of Administrative Proceedings (*Sl. list SRJ*, 46/96) and Article 239 of the Act on General Administrative Proceedings (*Sl. list SRJ*, 33/97, 31/01). That would ensure the enforcement of ECtHR decisions in view of the fact that the ECtHR cannot repeal local laws or order any other form of indemnification apart from pecuniary compensation.¹⁰

III INDIVIDUAL RIGHTS

1. Prohibition of Discrimination and Minority Rights

1.1. Legislation. – Apart from the ICCPR, ECHR and ICESCR, the provisions of 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 also bind SaM with respect to the

¹⁰ In that respect, see Resolution of the CoE Parliamentary Assembly 1226 (2000), notably item 10.

prohibition of discrimination. The HR Charter significantly improved the regulation of the prohibition of discrimination in SaM¹¹. The right to equality in SaM is now accordance with international standards and contains two kinds of obligations: the prohibition of discrimination by law or another normative act and the obligation to guarantee by law an effective remedy against any discrimination.

1.2. Practice. – There were more violations of the prohibition of discrimination in Serbia in 2005 than in 2004, notably on grounds of ethnic intolerance, gender, sexual orientation and of discrimination of disabled persons. Although fewer ethnic conflicts were recorded in Vojvodina than in autumn 2004, their incidence was still greater than in 2003 (*Danas*, 24 June, p. 5). Police were more energetic and SaM, Serbian and Vojvodina authorities worked in concert to promote inter-ethnic tolerance and respect of national minority rights.¹²

1.3. Discrimination against Roma. – An increase in the number of incidents against Roma, especially in their realisation of economic and social rights, has been recorded in 2005. ERRC and Minority Rights Centre (CPM) reported that Obrenovac authorities on several occasions early in 2005 refused to pay social aid to Roma who were in 2004 granted compensation for their forced labour in Nazi camps.¹³

Residents of a Belgrade suburb blocked traffic for days in July, protesting against the city government decision to put up in their neighbourhood makeshift homes to temporarily accommodate Roma. Youth Initiative for Human Right (YIHR) researchers recorded racist slogans at one of the protests, openly calling for the lynch of Chinese and Roma, intolerance and hate speech against the deputy Belgrade Mayor Radmila Hrustanović; the protesters were chanting “She should go back to Sarajevo where she comes from” “She came from Sarajevo to order our city about”.

2. Right to Life

2.1. Deprivation of life by police bodies and deaths in custody. – As opposed to 2004, 2005 registered lethal use of force by police, deaths in custody or allegedly caused by state agency officers. Investigations of such cases still have not been conducted in accordance with international standards.

2.2. Suicides in SaM Army. – Although recruit suicides were frequently reported and discussed in 2005, army statistics show the number of suicides was not on the rise. The Defence Ministry claims the suicide rate in the SaM Army is

11 More on previous provisions in *Report 2004*, I.4.1.

12 A conclusion of the monitoring mission organised by the Zrenjanin-based Civil Society Development Sector, “Restoration of Lost Trust –Ethnic Relations in Vojvodina”, p. 2.

13 ERRC: Serbian Authorities Revoke Welfare for Romani Recipients of Compensation from Germany for the Romani Holocaust, www.errc.org/cikk.php?cikk=2335&archiv=1

at a world average and that suicides amongst its members are much smaller than amongst civilians. General Ninoslav Krstić claims that there are at an average more suicides amongst officers than amongst recruits but that the press has focussed on the latter, giving the army a bad image (*NIN*, 27 October, p. 28).

2.3. *Environmental protection and public alerts to health risks.* – No one in Serbia has ever been punished for “violating the environmental protection, preservation and promotion regulations”, a crime included in the Criminal Code. The question arises whether there is no pollution in Serbia or whether its judiciary is not acting efficiently on such matters.

2.4. *Negligent or unprofessional medical treatment.* – As in 2004, cases of obvious and alleged negligent or unprofessional medical treatment resulting in the deaths or risks to the lives of patients were recorded in 2005. Although the Belgrade Medical School Forensic Board receives between 30 and 50 complaints about negligent and unprofessional treatment every year (*Politika*, 2 April, p. A1), the Health Ministry received 139 such complaints in the first half of 2005. An additional problem is the estimated 13,500 unregistered private practices in which doctors and dentists are working illegally. No one controls their work.

3. Prohibition of Torture

3.1. *Legislation.* – In addition to the obligation to prohibit torture in accordance with Article 7 of the ICCPR and Article 3 of the ECHR, SaM is also bound by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: Convention against Torture (CaT)). By ratifying the Convention, the former SFRY also recognised the competence of the Committee against Torture to receive and consider communications from state parties (Art. 21 (1)) and from or on behalf of individuals (Art. 22 (1)).¹⁴ In December 2002, the UN General Assembly adopted an Optional Protocol to the Convention against Torture, which established an efficient system of supervising prison and detention units. SaM ratified the Protocol in December 2005 (*Sl. list SCG (Medunarodni ugovori)*, 16/05).

3.2. *Practice.* – A number of complaints over torture and police brutality and inadequate reactions by competent bodies to the accusations were recorded in 2005. The courts were mostly mild in their treatment of the offending policemen. Even in face of evidence that a crime warranting imprisonment was at issue, the courts

14 The Committee against Torture found SaM (FRY) to have violated the Convention twice: when it reviewed the case of *Ristić v. Yugoslavia* Com. No. 113/98 in 2001 and when it reviewed the case *Hajrizi et al v. Yugoslavia* Com No. 161/00 in 2002. In both cases, the Committee established that the FRY violated the provisions of the Convention against Torture prescribing rapid, comprehensive and impartial investigation of torture allegations and the prosecution and punishment of perpetrators. Four other claims of alleged SaM violations of the Convention remained pending.

mostly pronounced suspended sentences against them. Techniques used in torture have become more brutal and one of the problems is how to prove almost unprovable forms of torture. Head of the police law and order department Dejan Živaljević stated police were registered to have used force in 1,277 cases in 2005, or 147 more times than in 2004. These were reported cases, wherefore there were probably many more cases in which policemen exceeded their powers (*Politika*, 14 November, p. A1). Serbian Interior MIA Inspector General Vladimir Božović said his inspectorate had received around 6,000 complaints on police work from citizens since he took office. His inspectorate filed 8 criminal reports against 10 policemen suspected in 9 cases of torture. Six regarded torture on duty and two inflicting of severe injuries. One report regarded torture resulting in light injuries (*Večernje novosti*, 26 October, p. 7).

The CoE Committee for the Prevention of Torture (CPT) assessed in the report adopted on 18 April 2005 in Strasbourg that the Serbian and Montenegrin police applied the methods of slapping, kicking, hitting arrested persons with baseball bats, handcuffing them to radiators and other 'achievements' in the area of physical and psychological torture. Evidence confirms that a group of policemen beat up an arrested person to coerce him into confession in a Belgrade police station and that they hit another detainee's hands with rubber nightsticks during questioning. The CPT delegation found baseball bats, metal bars, wooden sticks and similar objects in the rooms used for questioning in nearly all police stations in Belgrade it visited. In a police station in Bar, a detainee's feet were hit by a blunt object, while he was handcuffed and his head covered (*Večernje novosti*, 28 November, p. 7).

4. Right to Liberty and Security of Person

The HR Charter and Constitution of Serbia guarantee the right to personal liberty (Art. 14, HR Charter; Art. 15, Serbian Constitution). According to the HR Charter “everyone shall have the right to personal liberty and security” (Art. 14). The Criminal Code of Serbia comprises the criminal offences of illegal deprivation of liberty, abduction and trafficking in humans. The HR Charter prescribes that “no one may be arbitrarily 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)). 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 s/he 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 placing an individual in custody if “necessary to ensure public safety.” The CPC in Article 142 states reasons for assigning custody. The CPC allows the police to detain

a suspect but only in exceptional cases (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 custody. Duration of custody 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) CPC). The detained person can lodge a complaint against the decision on custody. The complaint does not stay enforcement of custody. The investigating judge must decide on this appeal within 6 hours

A new Act on Misdemeanours was adopted in Serbia in November 2005 (*Sl. glasnik RS*, 101/05).¹⁵ The law introduces significant changes in the whole system of misdemeanours and the powers and character of bodies deciding in a misdemeanour procedure. As per the right to liberty and security of person, the provision in Article 166 of the Act on Misdemeanours is of special relevance. The Article prescribes that an accused may be detained by a court order in a misdemeanour procedure in specific cases.

The new Act, however, has provisions on detention that are not in keeping with international standards. Article 168 prescribes “compulsory detention of inebriated persons, drivers of motor vehicles with minimum 1.2 g/kg of alcohol in the blood or under the influence of opiates, as well as of persons who refuse to undergo alcohol or drug tests.” The general standard is that deprivation of liberty must always be justified as necessary and the justification needs to be assessed by the court in each specific case.

5. Right to a Fair Trial and the State of the Judiciary

5.1. *Judicial reform.* – Judicial reforms have been ongoing for a number of years now but have failed to produce satisfactory results. Changes in the organisation of the judiciary are delayed because enforcement of the laws is continuously put off; the judiciary obviously is not technically or professionally ready for speedy and efficient reforms. Amendments to the Serbian Act on Organisation of Courts moved the deadline for establishing the appellate and misdemeanour courts and the Administrative Court to 1 January 2007.

The judicial system underwent specific changes in 2005. Military judiciary was abolished and its cases were transferred to courts of general jurisdiction. Special military departments were set up in the Belgrade, Niš and Novi Sad District Court and the Supreme Court. The Supreme Court set 31 January as the date by which the military cases were to be transferred to the civilian courts but the deadline was

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

exceeded. A problem appeared with the delegation of jurisdiction of the Supreme Military Court: the SaM Council of Ministers initially decided the cases were to be transferred to the SaM Court, then revoked its decision, but failed to decide which court would take over the 3,000 administrative cases of the former Military Supreme Court.

5.2. *Judicial system in Serbia.* – Tensions between the judicial authorities and the executive and legislative authorities again came to the fore in 2005. The obvious need of the executive and legislative authorities to control judicial appointments and to run the judicial personnel policy, surfaced during the appointment of the court presidents. Terms in office of most municipal and district court and commercial court presidents expired in 2005. A number of candidates nominated unanimously by the High Judicial Council members were not appointed by the Assembly, mostly because the ruling coalition refrained from voting for them. Other candidates were appointed in the repeat vote because a person may be nominated for a judicial post only once in the same legislative period. The question arises which criteria the National Assembly applied especially to the appointment of court presidents when it rejected the unanimous nominations of the High Judicial Council, which takes into account only the expertise and worthiness of the candidates under the law (Art. 45 of the Judges' Act) (*Večernje novosti*, 12 and 16 February, pp. 7 and 5; *Danas*, 22 and 28 July, pp. 7 and 3; *Vreme*, 6 October, p. 14).

Decisions in proceedings against the members of the Milošević family caused many fierce reactions amongst the public. The Belgrade District Court first withdrew the arrest warrant for Mirjana Marković, giving rise to suspicion that the decision was politically motivated (*B92*, 2 June; *Danas*, 2 June, p. 5, 4 August, p. 1; *NIN*, 2 June, p. 20). The indictment against Marko Milošević for the crime of coercion of Zoran Milovanović, former member of the Otpor movement in Požarevac, was withdrawn in August. Contrary to his previous statements, Milovanović said he “did not remember” Milošević had used a motor saw and that, on the contrary, he had protected him from the other defendants; the Požarevac District Court cited this statement as reason to withdraw the indictment against Milošević. However, the first sentence (which was overturned and the case was referred for retrial) was based on a lot of evidence and Milovanović's statement was only one small piece of it. Public suspicion was fuelled by the fact that the indictment had been withdrawn by the District Prosecution although the proceedings were conducted by the Municipal Prosecution. Finally, the doubts that the decision was politically motivated were substantiated by Capital Investments Minister Velimir Ilić, who said he had “advised and pleaded with Zoran Milovanović to drop the charges against Marko Milošević” (*Blic*, 13 August, p. 4). Although Milovanović alone could not himself withdraw the indictment against Milošević because not he but the Municipal Prosecution raised the charges, the change in Milovanović's statement was crucial for the District Prosecution to withdraw the charges. Ilić's influence in

the proceedings was obvious. The whole event was exhaustively reported on by the media (*Politika*, 6, 9, 10 and 11 August, pp. A11, A1, A8 and A8, 14 October, p. A8; *Blic*, 6, 7, 8, 9, 13 and 16 August, pp. 4, 3, 3, 4, 4 and 5; *Večernje novosti*, 6, 9, 12, 13 and 17 August, pp. 13, 6, 24, 12 and 12; *Danas*, 6, 8, 9, 11, 12, 16, 23 and 31 August, pp. 1, 1, 1, 3, 6, 3, 7 and 7; *NIN*, 11 August, p. 10; *B92*, 13 August).

5.3. *Damage awards for illegal deprivation of liberty.* – In early April, the Belgrade First Municipal Court ruled 730,000 dinars (around 9,000 Euros) were to be paid in compensation of damages to Dejan Kuzmanović, military orchestra musician, arrested by mistake during the *Saber* action after the assassination of PM Đinđić. The Interior Ministry admitted it had made a mistake when it arrested Kuzmanović (*Večernje novosti*, 7 April, p. 17).

In early August, the Požarevac Municipal Court ordered the state and MIA to pay the journalist of the Belgrade daily *Danas* Bojan Tončić 300,000 dinars (around 3600 Euros) in compensation of non-material damages. Tončić was illegally deprived of his freedom by the Požarevac police on 8 May 2000 and questioned together with his colleague Nataša Bogović (*Večernje novosti*, 6 August, p. 6).

6. *Right to Protection of Privacy, Family, Home and Correspondence*

6.1. *Secret files.* – None of the several draft laws on opening state security files have been adopted yet. The law drafted by SPO was submitted to the Serbian Assembly in 2005. This draft did not get the backing of either the Serbian Government, because, as it said, “it was not in keeping with regulations on keeping, protection, use and access to archived material” and because it does not “include provisions that would alleviate potential and probable political, security, ethical and other consequences” (*B92*, 29 March), or subsequently of the Assembly. SPO had *inter alia* proposed the publication of the names of secret service moles but the experts assessed that such publication would result in a “gross violation of human rights” (Vladimir Vodinelić, panel discussion “*Are the Secret Services Being Reformed?*” held in the Centre for Cultural Decontamination, – *B92*, 30 March). Rather than approving SPO's draft, the Serbian MIA embarked on drafting its own law on opening of secret service files. Centre for Anti-War Action associate and co-author of a law on files Bogoljub Milosavljević told *B92* he had had insight in the draft and that it contained many disputable provisions. “The idea advocated by the Ministry since 2001 is that either the files remain in possession of the secret service or be turned over to the Serbian Archives, which I and other people focussing on this area think would be wrong. Of course, the key question is which files will be open and both the Ministry and BIA think only specific files ought be opened.” (*B92*, 30 March).

7. Freedom of Thought, Conscience and Religion

7.1. Attacks on religious communities and instigation of religious and ethnic hatred. – According to a report by the international NGO Forum 18, over 25 attacks on religious communities were recorded in Serbia in the first five months of 2005¹⁶. Another 18 grave incidents, including infliction of grievous bodily injuries to a Hara Krishna member Života Milanović from Jagodina and injuring of conscripts Šemso Mašović and Mevludin Kujević because of their religious affiliation in the Požarevac army barracks, were recorded in the May-September period. A number of places of worship were vandalised as well.¹⁷

7.2. Church tax. – The Serbian Government on 26 December passed a Decree on the issuance of an additional postal stamp to help the “construction of the memorial temple St. Sava” (*Sl. glasnik RS*, 114/05). The stamp will cost 8 dinars and will have to be bought for all in-country postal consignments. All citizens of Serbia have been thus obliged to fund the Serbian Orthodox Church and the construction of its temple notwithstanding their religious belief.

7.3. Court proceedings. – The Niš District Court in July sentenced one person to 5 months and seven other people to 3 months in jail for torching the Islam Agha Mosque in Niš during the March 04 unrest (*B92 TV*, 26 July). TV cameras taped the accused singing a song ending with 'death to Moslems!' as they left the courthouse (*B92*, 26 July).

7.4. State-church relations and conflicts between religious communities. – Representatives of the Serbian authorities have continuously expressed their intolerance of canonically unrecognised churches, especially the Macedonian Orthodox Church and the Montenegrin Orthodox Church. The Serbian Religion Minister, for instance, said that their temples, which are to be built in Novi Sad and Lovćenac at Mali Idoš, cannot be built without the consent of the Serbian Orthodox Church which is the only canonically organised church in that area (*Danas*, 15 August, p. 7).

The Serbian Government sharply reacted to the arrest of Serbian Orthodox Church Bishop in Macedonia Jovan, blocking the release of two planes *JAT Airways* had rented out to the Macedonian airlines (*Dnevnik*, 2 August, p. 3).

8. Freedom of Expression

8.1. Legislation. – Serbian law guarantees the right to hold opinions and freedom of expression. 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. 45, Serbian Constitution). The HR Charter goes into greater detail regarding the

16 The assaults are enumerated on www.forum18.org/Archive.php?article_id=581.

17 See Forum 18's website www.forum18.org/Archive.php?article_id=647.

means used (speech, writing, images or another manner), and regarding the rights constituting the freedom of expression (seeking, obtaining and imparting information and ideas).

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)).

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). Television and radio stations can be established in accordance with law (Art. 46 (4), Serbian Constitution).

8.2. *Practice.* – Violations of various rights pertaining to the freedom of expression and media freedoms did not increase considerably in number over the previous years. However, media and public speech were in 2005 mostly fraught with frequent attacks by politicians and sometimes state officials on journalists and media. The year was also marked by the unresolved media ownership and licensing and disrespect of fundamental ethical norms by journalists.

8.3. *Threats to media and attacks on journalists.* – Journalists in Serbia were frequently threatened or attacked in 2005 as well. The threats were most often made by certain politicians and other power-wielders. *B92* was exposed to direct threats the most. The station reported Siniša Vučinić, the president of the Serbian Party of Socialists, entered the TV headquarters together with his four bodyguards on 18 April. Dissatisfied with the show *Insider* broadcast that evening, he threatened to “surround the *B92* building with his people during the night” (*Politika*, 20 April, p. A12). In mid-July, a person who would not identify himself called the station saying a bomb was planted in its offices (*Danas*, 16 July, p. 7). Although special police units established the threat was a hoax, the investigation failed to identify the caller by the end of the year. *B92* also received a threat letter addressed to its Chief Editor and Director, his family and associates. The letter was signed by the Serbian Liberation Regiment. Otpor coordinator in Požarevac Momčilo Veljković received a similar threat several days earlier. *B92* received another hoax bomb threat by telephone on 16 October (*Beta Media Week*, 16–23 October). Although the police said it would be easy to identify the caller, they did not issue any information by the end of the year.

A whole chapter can be written on verbal assaults by Capital Investments Minister Velimir Ilić on *B92*. In August, he insulted and threatened both the journalist who asked him about his alleged role in the withdrawal of the indictment against Marko Milošević and the company management.¹⁸ Ilić did not apologise

18 At the press conference, Ilić said: “You’re sick, you should be in a psychiatric clinic, you should all be treated collectively. You are in need of treatment on Mt. Kopaonik, we’ll build a centre for you, to put you away. I promise you that, I’ll help you bring your great expert Veran Matić so that people can watch idiots in Serbia” (*Danas*, 16 August, p. 1).

publicly for his conduct, but his Cabinet colleagues told the media he had expressed regret at a Government session for the insults he had voiced (*Danas*, 19 August, p. 1). In late December, Ilić apologised to 'everyone he may have insulted'.

In early January, journalists of several Serbian dailies were threatened while they were on the job. The Association of Journalists of Serbia issued a statement voicing its suspicion that the journalists, who were trying to find out more about the robbery of a house in the elite Belgrade suburb of Dedinje, were threatened by the owner (*Beta – Media Week*, 2–9 January).

8.4. *Trials of journalists.* – In mid-February, a Belgrade Court ordered the weekly *Vreme* and its journalist Dejan Anastasijević to pay 200,000 dinars (around 2,400 Euros) to compensate for the defamation they incurred. In the article “Killers and Witnesses”, Anastasijević wrote “the notorious Slobodan Jovanović was paid by Milorad Ulemek Legija and Dušan Spasojević to work for the Zemun Clan while he was deputy chief editor of the paper *Identitet*”. Anastasijević said he had quoted an official statement issued by the Serbian Government Communications Bureau (*Beta – Media Week*, 13–20 February).

Šabac newspaper *Podrinski telegraf* editor Milan Milinković was sentenced to a one year suspended jail sentence and a fine of 8,000 dinars (100 Euros) for using the phrase 'in collusion' instead of 'in cooperation' in an article on the business activities of a local private company.¹⁹

The Kikinda Municipal Court in January found Željko Bodrožić, the chief editor of the paper *Kikindske*, and former editor of the paper Vladislav Vujin guilty of libel in several articles in which the court found them to have insulted the local lawyer Slavko Kolarski²⁰ (*Danas*, 15 February, p. 5).

Convictions against Bodrožić for the articles published in *Kikindske* were also debated by the UN HR Committee. With regard to the 2002 Kikinda Municipal Court decision convicting Bodrožić of alleged insult of former SPS MP and director of the Toza Marković plant Dmtar Šegrt, the Committee in late November passed a decision obliging SaM to provide the author with an effective remedy, including quashing of the conviction, restitution of the fine and court expenses. It found that the court had violated the freedom of expression guaranteed by Article 19 of the ICCPR.

19 The Šabac Municipal Court explained that 'in collusion' had negative connotation and constituted an insult in the article. The journalists had used the phrase in the context of the company's cooperation with the Socialist Party of Serbia and the Yugoslav Left (*Beta – Media Week*, 13–20 February).

20 A number of convictions have been passed against *Kikindske*. Some of them deserve to be included in annals of pressures on independent media. For instance, Kolarski sued Bodrožić for publishing an anagram and the court found him guilty.

8.5. *Media codes of conduct.* – BCHR has in its past Reports alerted to the low level of professionalism and frequent violations of professional and ethical standards by some Serbian and Montenegrin media. Instead of disappearing with the development of democracy in Serbia and Montenegro, the problems were exacerbated in 2005. Especially concerning is the fact that some of the media prone to such conduct enjoy the greatest popularity. Despite the undisputed principle of freedom of expression and special protection of media, these guarantees of human rights *inter alia* and above all serve to help societal development and building and consolidation of society's democratic foundations. This is why violations of some of the fundamental human rights and conditions for their enjoyment by the media warrant special attention in human rights reports.

Several attempts were made in 2005 to draft a comprehensive code of conduct for Serbian journalists and media. One such attempt was the Declaration of a New System of Ethical Journalism in Serbia drafted by the Belgrade Media Centre Press Council, which called on all media and journalist associations and the authorities to re-examine their commitment to democratic values and respect of ethical standards and norms in journalism. The Declaration was preceded by a several-month analysis of the press, and the Council concluded that “Serbia today has unrestricted freedom of expression but this right does not imply any responsibility. Dailies and weeklies overwhelm the public with hundreds of fabricated scandals, crimes, sensationalism and other allegedly spectacular events. Politicians and rich businessmen abuse the freedom of the press using that worthy institution of democracy to accuse each other of various crimes, including the assassination of Serbian PM Zoran Đinđić.” According to the September results of the Council, the greatest number of articles not in conformity with journalist rules were published by *Kurir*, followed by *Večernje novosti* and *Glas javnosti* (*Beta – Media Week*, 2–9 October).

9. Political Rights

9.1. *General.* – Although there were no regular elections in Serbia (only early local elections in several small municipalities), 2005 was marked by political instability, shady trading in deputy mandates in the Serbian Assembly and financial malversation by some MPs. The trial of Đinđić's assassins was again abused in attacks on political opponents.

9.2. *Seats in the Assembly of Serbia.* – The issue of whether the parliament seats belonged to the deputies or the political parties (coalitions) on whose election tickets they ran and what was considered a valid resignation of a deputy were a topic of heated debates throughout 2005. Deputies crossed from one party caucus to another, set up new caucuses or joined parties which had not existed at the time of the last parliamentary elections, in 2003. Political parties tried to find a mechanism to control the deputies elected on their tickets (i.e. to retain the number of

mandates they had won at the elections) without formally violating the 2003 decision of the Serbian Constitutional Court. The vast majority of the parliamentary parties have in its possession signed resignations of their deputies that they activate if a deputy is disloyal or opposes its political decisions. However, the Serbian Assembly Administrative Committee has differently ruled on the resignations from one case to another.

Representatives of the opposition DS and ruling SPO have on a number of occasions claimed they were “robbed” of their mandates. Nine deputies elected on the SPO-NS coalition ticket left the party, joined the NS caucus and set up a new political party – the Serbian Democratic Renewal Movement (SDPO). SPO's demands to get back its seats went unanswered by the end of the year.

In mid-May, the Force of Serbia Movement (PSS) became a parliamentary party when SRS deputy Živadin Lekić left the SRS and joined Karić's party. The ruling coalition parties accused Karić of buying deputies and announced they would draft amendments to the electoral legislation which would prevent changes in the Assembly party breakdown in this manner.

The Democratic Party (DS) lost two mandates in mid-September, when Sandžak List deputies Bajram Omeragić and Esad Džudžević, who had been elected on the DS-Boris Tadić election ticket, joined the ruling coalition. This political transfer was marked by another legally doubtful move by the ruling coalition. After Omeragić and Džudžević politically supported the ruling coalition, the Government appointed them deputy ministers by a Decision. However, under Serbian law, republican deputies cannot simultaneously be deputy ministers. Several days later, the two said they would remain parliamentary deputies and would not accept the executive offices. The ruling coalition representatives explained the two had “not assumed duty” and that the law was not violated. The fact, however, remains that the decision on their appointment was published in the Official Gazette and thus came into force. The decision of the parliamentary majority prompted the Democratic Party to boycott Assembly sessions.

G17+ banished from its party deputies Sovranije Čonjagić and Vesna Lalić ahead of the debate on the 2006 budget in late November by activating their blank resignations. The two deputies and the opposition parties claimed that they were stripped of their mandates illegally and that they had withdrawn their blank resignations on time. The Administrative Committee ruled they were no longer parliamentary deputies and G17+ delegated two other persons in their stead.

9.3. Political scandals. – The political stage was in 2005 rocked by numerous scandals which mostly remained unresolved by the end of the year. As a rule, the scandals were used in political showdowns and hardly any were addressed in an appropriate manner.

10. Special Protection of the Family and the Child

The milieu in which children have been born and growing up in Serbia did not essentially change in 2005.

10.1. New Family Act. – The new Family Act adopted in 2005 marks a major breakthrough in the field of child rights in Serbia as it is the first law to introduce the concept of the rights of the child and a set of specific principles and rights in national legislation. The Act, unfortunately, does not define the concept of family, explicitly prohibit corporal punishment of children or clearly regulate the realisation of child rights. Notwithstanding its shortcomings, the Family Act is a good basis for further developing child rights within the family and care for children without parental guardianship.

10.2. Juvenile Justice Act. – The first Juvenile Justice Act (Act on Juvenile Perpetrators of Criminal Offences and Criminal Legal Protection of Minors) in Serbia was adopted in September 2005. Its adoption was preceded by a long and broad participative drafting process involving judges, police, social welfare centres, prosecutors, misdemeanour authorities, law professors, international governmental and non-governmental organisations such as UNICEF, Council of Europe, the Danish Institute for Human Rights, international and national experts and the children themselves. It is much too early to qualify the effects of the law, which, although in effect, will be enforceable only upon the adoption of numerous by-laws. The adoption of the Juvenile Justice Act marks an important step towards harmonising national legislation and practice with international standards, above all the Convention on the Rights of the Child.

10.3. Other activities of systemic relevance. – The only co-ordination body on child rights in Serbia – the Council for the Rights of the Child – continued operating in 2005, but failed to achieve institutional and systemic consolidation. However, the very fact that the body “survived” the change in government gives rise to hope that it will be sustainable and develop further. The Serbian Assembly established a Sub-Committee for the Protection of Children within the Gender Equality Committee. The general public has to date remained unaware of the Sub-Committee's activities, with the exception of several initiatives and invitations to CPD to join in discussion. The Child Ombudsman in Vojvodina, operating within the Office of the province's Ombudsman, continued operating and developing. Finally, the Serbian Strategy for the Development of the Social Protection System was also adopted in 2005.

10.4. Unachieved objectives. – The following extremely important objectives in the field of child rights protection remained unachieved in 2005:

- The Anti-Discrimination Act and Act on Children (Rights of the Child) have not been adopted;

- Allocations of state budget funds for children were neither increased nor specified;
- Political interest in, awareness of and regard for children have not increased; the number of politicians showing a higher or at least superficial level of interest in their welfare remains negligible;
- The education system has not been substantially reformed and falls short of international standards;
- A special strategy on adolescents (accompanied by institutional, professional support) has been neither formulated nor implemented;
- The status of NGOs remains legally unregulated;
- The level of education and dissemination of information on the rights of the child amongst as many beneficiaries as possible, including above all children, parents, teachers and health workers, have not been promoted;
- There is still no efficient system in place to protect children (and intervene in urgent situations) from all forms of abuse and exploitation, including those occurring in the context of trafficking, the media and accessibility of harmful information on the Internet.

10.5. Factors that could have positively impacted on the realisation of child rights. – Economic, political and social improvements were unfortunately minimal in Serbia in 2005. The chief event in the year behind us was the headway SaM made towards the EU. The positive Feasibility Study was followed by opening talks on the SAA. However, insufficient co-operation with the ICTY constantly loomed, threatening to result in the suspension of negotiations with the EU.

10.6. Factors that inhibited the realisation of child rights. – A large number of factor still hinders the realisation of child rights and slows down the implementation of the Convention on the Rights of the Child, other international agreements and national regulations and strategies. These factors can be divided into several categories:

10.6.1. Organisational, economic and political problems. – Serbia still lacks sufficient political will, awareness, knowledge and human and financial resources needed to establish effective and functional systems. The high unemployment and the 15.6% inflation rates presented the greatest economic challenges in 2005. Due to the real increase in living costs, many families have been unable to provide their children with a healthy childhood and quality education. The political challenges are above all reflected in the crisis of the value system. The society as a whole is suffering from an identity crisis, absence of clear civilisational and ethical objectives. It lacks a general social and political consensus on its goals and, thus, a clear and relatively united vision of any appropriate activities.

10.6.2. Social factors. – The adoption of the Family Act demonstrated readiness to introduce a new and more contemporary attitude towards the family and family relations. What is missing is support to current and future parents, and especially to single parents. The family members' preoccupation with making ends meet frequently leads to neglect and abuse of children.

Diversity is not sufficiently nurtured in Serbia. The 2001–2003 education reform built on the vision of multiculturalism and cohabitation of diversity was drastically interrupted. Attempts to make some headway via pilot projects in 2005 unfortunately targeted small groups and had weak effects.

Political (lack of) culture, which is above all manifested directly – in speech, dialogue, attitude towards others (children, for instance), is setting a bad example. Politicians are public figures and often serve as a model to children and youth. Thanks to the media in Serbia, the public often has the opportunity to witness the politicians' crass and vicious vocabulary and conduct.

Media attitudes to children were inconsistent and mostly inspired by sensationalism in 2005. They consequently tended to rapidly “desert” stories of wrongdoings against children. Such cases inspired media to focus on the adult rather than on the child. Media did, however, respect the children's right to privacy to a greater extent.

The CPD in 2005 concentrated on the professional code of conduct of health workers, teachers, counsellors, social welfare centre staff and others dealing with children. The absence or low level of professional code of conduct is a problem not limited only to children although children are undoubtedly its greatest victims. Some efforts have been made in Serbia's social protection system to shed light on the problem and draft a reform plan entailing raising professional and ethical levels of all those in the system in contact with children.

Violence in society, especially against children, remains a problem in Serbia. It is present in four contexts – the school, the family, institutions and local communities. It is mostly perpetrated by adults against children but also by children against adults. The increase and change in quality of peer violence gives rise to concern. Serbia lacks a quality plan or strategy to address the problem. The current activities are directed at repression, i.e. safety, and do not take into account the causes, do not promote non-violent resolution of conflicts.

The attitudes towards civil society i.e. civic associations have to an extent deteriorated in 2005. Political discourse and conduct reflect deep mistrust of NGO activities; some figures go as far as accusing them of being uncooperative and obstructive, frequently qualifying them as traitors. Less of a pressure was put on organisations focusing on child rights or other less politically controversial areas. In practice, many state bodies co-operate with NGOs on implementation of projects.

10.7. Conclusion. – Despite criticisms of the quality of child rights realisation in Serbia in 2005, there is still hope that the positive steps made to date will lead to headway in the years to come. Realisation of child rights is a process, as is the increase in awareness of political decision-makers of the need to ensure successful future of Serbia and all people living in it, above all by developing awareness, respect of human rights, promoting the education and health of children.

11. Economic, Social and Cultural Rights

Economic, social and cultural rights are guaranteed by the HR Charter and the Constitution of Serbia and regulated in detail by laws and subsidiary legislation. Although formally constitutional, these rights are regulated in detail by laws, not only in terms of their realisation but content as well, which gives legislative bodies ample room to restrict or expand them.

11.1. Right to Work

11.1.1. Legislation. – All constitutional documents contain provisions on the right to work (Art. 40, HR Charter, Art. 35, Serbian Constitution). The Serbian Constitution is the only one also envisaging the prohibition of arbitrary dismissals (Art. 35 (3)). In addition, only the Serbian Constitution obliges the state to organise special and vocational training programmes, but the obligation pertains only to partially disabled persons (Art. 39) and recognise the right to financial relief in the event of temporary unemployment (Art. 36, Serbian Constitution).

Labour-related rights are predominantly regulated by the Labour Act of Serbia (*Sl. glasnik RS*, 24/05), which is in principle consistent with international standards. Employment in Serbia is regulated in detail by the Employment and Unemployment Insurance Act (*Sl. glasnik RS*, 71/03). Article 93 of the Act is problematic because of its inadequate interpretation of “appropriate employment”. Under the Article, an unemployed person may insist on seeking a job corresponding to his/her degree and profession during the first three months of registration on the labour market. Over the next nine months, s/he may insist on seeking a job only in the profession, notwithstanding his/her degree. In the event s/he does not find a suitable job in the nine months, she/he has to accept any job on offer. If s/he does not accept it, s/he will be deleted from the register and will be eligible for re registration after three months. Although the state is not obliged to ensure a job which would fully correspond to a person's degree, profession and place of residence, it nevertheless cannot force an unemployed person to accept a job that obviously does not suit him/her by its regulations, either directly or indirectly.

11.1.2. Practice. – The unemployment rate rose to 30% in 2005. The National Employment Bureau data show 994,000 people in Serbia were looking for a job (*Večernje novosti*, 29 December, p. 3), an increase of 48,000 over 2004. The Serbian

Labour Minister assesses round 550,000 people, or 55,000 more than in 2004, were really unemployed. Forty-nine percent of them were women. A high unemployment rate was also recorded amongst the under-27 age category (*Večernje novosti*, 7 June, p. 6). Eighteen thousand workers are to be dismissed from the public companies if Serbia is to meet the obligation to reduce public spending. The Employment Agency estimates companies are dismissing more staff than they are hiring (*Blic*, 28 November, p. 8).

Some groups are discriminated against when they apply for jobs. Ninety-five percent of Roma in Serbia are unemployed; the ones who are, mostly perform cleaning jobs (*Blic*, 8 April 2005, p. 11). Persons with disabilities are also obviously discriminated against. A Centre for Policy Studies analysis shows as many as 87% of persons with disabilities are unemployed, while the remaining 13% are mostly employed in NGOs or self-employed.

11.2. Right to Just and Favourable Conditions of Work

11.2.1. Legislation. – The HR Charter and Serbian Constitution guarantee the right of an employee to adequate income (Art. 40 (3) HR Charter; Art. 36, Serbian Constitution). Adequate wages are protected by the laws of member states. The Labour Act contains the provisions guaranteeing equal wage for the same work or work of the same value. The system is based on a trilateral principle.

The HR Charter and Serbian Constitution do not explicitly mention the principle of equal promotion opportunity. Only the Serbian Constitution comprises a provision which, if interpreted broadly, may reaffirm equality in promotion; in Article 35 (2) it prescribes that everyone shall have access to a job and a position under equal conditions.

The Constitution of Serbia guarantees the safety of employees at work, envisaging special protection for women, the disabled and youth (Art. 38 (2 and 3) of the Serbian Constitution). A new Act on Health and Safety at Work was passed in Serbia 2005 (*Sl. glasnik RS*, 101/05). The main feature of the new Act is that it adjusts the safety at work regulations to the new business conditions marked by an increasing number of small and medium sized enterprises, which are unable to set up large services to manage safety at work. Inspectorial supervision of the implementation of the laws and other safety regulations, measures, norms and technical measures, company enactments and collective agreements shall be performed by the labour inspectors in the Ministry of Labour.

The Serbian legal system guarantees the employees the right to limited working hours and paid annual leave and absences. It also envisages the right to daily and weekly rests (Art. 38 (1) of the Serbian Constitution). The Serbian Labour Act stipulates a five-day working week (Art. 55) and a 40-hour full-time working week (Art. 50).

11.2.2. Practice. – The Serbian Statistics Bureau data show salaries nominally rose 22.8% and 5.7% in real terms in 2005 over 2004. Living expenses increased by 16.2% over the previous year.²¹ The average salary in Serbia stood at 18,697 dinars in November.²² Women are on average paid 2% less than men.²³ Niš Safety at Work College data show work-related injuries occur every twenty minutes and that more than 90 staff are killed at work every year. Most work-related injuries occur in the construction business; five times as many injuries result in death in this branch than in others (*Večernje novosti*, 7 May, p. 6). The Serbian Labour Inspectorate recorded 31 work-related injuries with lethal consequences by October 2005 (*Danas*, 29 October, p. 7).

11.3. Trade Union Freedoms

11.3.1. Legislation. – The HR Charter and the Constitution of Serbia guarantee the freedom of organisation in trade unions as an element of freedom of association. Under Article 7 of the Serbian Rules on Entry of Trade Union Organisations in the Register, a trade union organisation shall be deleted from the register, *inter alia*, pursuant to a legally binding decision prohibiting the work of the trade union (Art. 7 (2) of the Rules). Under Article 67 of the Serbian Act on Social Organisations and Citizens' Associations (*Sl. glasnik SRS*, 24/82, 39/83, amended in 17/84, 50/84, 45/85, 12/89; *Sl. glasnik RS*, 53/93, 67/93, 48/94), the decision to ban the work of a trade union is reached by a municipal administration body charged with internal affairs, which is in contravention of international obligations. A decision prohibiting the work of a trade union need not be reasoned and an appeal of the decision does not stay its enforcement. There is no court protection against the final decision in an administrative dispute, i.e. there is no effective legal remedy. This is inconsistent with the international standards set by the UN Committee on Economic, Social and Cultural Rights and by the International Labour Organisation (ILO).

The HR Charter and Serbian Constitution guarantee the right to strike. Pursuant to the HR Charter and Serbian Constitution, “employees shall have the right to strike, in accordance with law” (Art. 41, HR Charter; Art. 37, Serbian Constitution).

Under the Act on Strike, the right to strike is limited by the obligation of the strikers' committee and workers participating in a strike to organise and conduct a strike in a manner which does not jeopardise the safety of people and property and people's health, which prevents causing of direct material damage and enables the continuation of work upon the termination of strike. Besides that general restriction, a special strike regime is also established: “in public services

21 Republican Statistics Bureau, Statement. 323, 28 December.

22 Republican Statistics Bureau, Statement 315 of 21 December.

23 Republican Statistics Bureau, Statement 129 of 16 December.

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, water supply, 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 to the defence and security of the SaM and affairs necessary for the implementation of the SaM's international obligations. The list is much too extensive and does not conform with international standards. The same view was taken by the Committee on Economic, Social and Cultural Rights in its Concluding Observations on the realisation of social, economic and cultural rights in Serbia and Montenegro.²⁴ The Act on Strike in Article 18 stipulates termination of employment of an Army, state and police employee if it is established that s/he organised a strike or took part in one. The Act on the Implementation of the Constitutional Charter provides that former federal laws will apply except for provisions in contravention of the 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, Article 18 of the Strike Act should not be applied.

11.3.2. Practice. – Several violations of the right to strike were recorded in 2005. During a strike in the national airline *JAT Airways*, the management tried to suspend the workers on strike for three months (*Politika*, 23 March, p. A1) and then threatened to activate their signed resignations (*Kurir*, 22 March; p. 6), and the Government introduced temporary measures (*Glas javnosti*, 19 March, p. 9). The strike of the Serbian Railways engine drivers was first declared illegal (*Glas javnosti*, 14 March 2005, p. 9) and the management even prepared 74 warning letters despite the Labour Inspectorate findings that the strike was lawful (*Politika*, 18 March, p. A15). Eight of the workers were suspended and later dismissed, including the local TU chairman under whose auspices the strike was conducted (*Pregled*, 16 September, p. 12). The dismissed workers sued the company but the court had not entered its ruling by the end of 2005. The most unusual strike in 2005 was the one staged by the staff of the Association of Trade Unions of Serbia (*Danas*, 17 June, p. 9).

11.4. Right to Social Security

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

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

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. Social security comprises pension, disability, health and unemployment insurance. The issues are regulated by a number of laws.

Serbian law also allows voluntary insurance for persons who are not covered by the compulsory insurance schemes, in the manner prescribed by a separate law (Art. 16, Pension and Disability Insurance Act). Voluntary insurance provides the insured persons with a wider scope or other form of rights for themselves and their families, outside those prescribed by the Act. The September 2005 Act on Voluntary Pension Funds and Pension Plans (*Sl. glasnik RS, 85/05*) largely clarifies the Pension and Disability Insurance Act provisions related to voluntary insurance.

11.5. Right to Adequate Standard of Living

11.5.1. Legislation. – There is no mention of the right to housing in either the HR Charter or the Serbian Constitution. Minimum housing standards are not fixed. This creates insurmountable problems in statistically determining the number of substandard dwellings.

The right to housing of vulnerable groups, especially refugees, IDPs and Roma, living in unhygienic and unsuitable housing, is a burning issue. Retired persons are the only vulnerable category of the population for which Special Regulations on Housing Requirements have been adopted (*Sl. glasnik RS, 38/97, 46/97*).

The Constitutional Charter and the Constitution of Serbia do not mention the right of citizens to quality and adequate nutrition. The provision is also absent from the laws and bylaws. There are no special food subsidies designed to improve the diets of the poorest and most vulnerable groups. The prices of some basic foods are “protected” to keep them at a relatively low level.

11.5.2. Practice. – The Labour, Employment and Social Policy Ministry survey shows 20% of Serbia's population is below the poverty line, i.e. has a monthly income of less than 6,000 dinars per household member (*Politika, 17 October, p. A2*). According to a Strategic Marketing poll, South-East Serbia is the most affected by poverty (*Politika, 28 February, p. A1*). A Group 484 survey shows 12.7% of the youth are extremely poor, while 400,000 children live below the EU poverty line of 2.9 USD (*Večernje novosti, 24 December, p. 24*). The second most vulnerable category comprises persons over 65, i.e. pensioners; 350,000 of them receive less than 4,500 dinars a month (*Večernje novosti, 19 January, p. 6*).

11.6. Right to Highest Attainable Standard of Physical and Mental Health

11.6.1. *Legislation.* – The HR Charter and Constitution 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). Besides these constitutional rights to health care, employed persons and their families are also entitled to health care under compulsory health care. Health care is in the purview of the member states. A new Medical Insurance Act (*Sl. glasnik RS*, 17/05) and a new Health Protection Act (*Sl. glasnik RS*, 107/05) were passed in Serbia in 2005.

11.6.2. *Practice.* – The International Federation for Human Rights (FIDH), in May 2005 submitted its alternative report to the UN Committee on Economic, Social and Cultural Rights on corruption in health. According to a Medium Gallup International poll, 11% of all beneficiaries of state health services were under pressure to pay a bribe for the aid.

The media paid the most attention to the corruption scandal at the Sremska Kamenica Cardiovascular Institute, where over 30 people claimed they were forced to offer bribes between 200 and 6,000 Euros in exchange for medical treatment (*Blic*, 23 November, p. 4). The Health Ministry set up a committee for the professional supervision of the Institute tasked *inter alia* with investigating allegations that 20 patients had died waiting for operation, while the operating hall was used to treat 500 patients who paid between 3,500 and 9,000 Euros per operation (*Blic*, 8 October, p. 8).

According to some estimates, a total of 10% of all hospitalised patients contract some hospital infection; experts, however, suspect the percentage is higher (*Blic*, 26 April 2005, p. 4). Several scarlet fever infections were recorded in Serbian maternity wards in 2005 (*Večernje novosti*, 13 August, p. 20), and several women contracted sepsis (*Blic*, 28 April, p. 9).

The Serbian prosecution received its first criminal report on intentional exposure to HIV on 18 August. A woman filed the report against her former spouse, claiming he had known he was infected before he married her five years earlier (*Vreme*, 1 September, p. 58). Serbia's application for a 5.5 million dollar grant to the Global Fund for Anti-HIV/AIDS Programme Development was dismissed because of technical omissions and its failure to adequately spend the previous grant (Serbia spent only 0.8 of the initial 3.5 million dollar grant). Moreover, the Serbian budget funded the treatment of only 501 of the 1143 registered HIV/AIDS patients (*Vreme*, 27 October, p. 52, 3 November, p. 26).

11.7. Education

11.7.1. *Legislation.* – The HR Charter stipulates that primary education is free of charge and compulsory (Art. 43, HR Charter). The Article 32 of the Serbian Constitution states that “tuition is not paid for regular education financed from

public funds”. This provision leads to the conclusion that primary, secondary and regular higher 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 primary that would be free of charge. Compulsory education lasts eight years and is organised in primary schools.

The right to education, defined in the current constitutional provisions as the right to schooling, is guaranteed to all under equal conditions. The Serbian Primary Education Act (*Sl. glasnik RS*, 62/03, 64/03, 58/04) allow private persons to found primary schools. A private school curriculum shall be approved when the competent council establishes it is recognised by an appropriate international association and provides minimal knowledge enabling successful completion of schooling (Art. 24).

11.7.2. Practice. – Although in principle education is available and free for all, the schools network is relatively well developed, teaching staff has university education and legislation is generally positive, the situation in practice is not overwhelming. According to the Child Rights Centre from Belgrade, there are many “hidden” costs that parents have to bear, such as the cost of books, equipment, recreational activities and excursions. As a consequence of inadequate school curricula and methods, parents often pay for extra classes as well. The skills taught by high schools are not in compliance with market and local community demands. Serbian schools are in a poor state: almost one third of the schools do not have appropriate sanitary conditions; equipment and didactic materials are out of date, while modern technological equipment, such as computers, is scarce. The reform of the system of high education, regarding training of teaching staff, is not in compliance with contemporary and advanced concepts. There is no mechanism that enables continual training of teachers. Activities addressing this problem, which were launched before 2004, were halted.

More than 85% of children with disabilities are not included in the education system. Special schools for disabled children, and separate classes within regular schools, are insufficient in number and unevenly dispersed. Children in hospitals, especially at the high-school level, do not get a suitable education, although there are some programmes for hospitalised children at pre-school and elementary school levels.

The percentages of children of minority groups, especially of Roma, in the education system is lower than that of the rest of the population. There is a shortage of adequate textbooks in minority languages. There are no accurate data on schooling of refugee and IDP children. However, according to some available information, their school attendance is lower than the general population and no special measures are taken to improve the situation. Children living in juvenile homes formally get an education but the number of those who actually graduate, especially from high school, is very low.

12. Confrontation with the Past – Attitudes of Authorities and Citizens in Serbia to War Crimes

12.1. War Crime Trials in National Courts

The work of the judiciary in the field of war crimes, especially the work of the War Crimes Prosecution and the Belgrade District Court War Crimes Department in Belgrade, was intensive in 2005 – it may have marked a turnabout in the hitherto practice of impunity for international crimes in Serbia. However, 2005 was also marked by numerous threats and obstruction of work on disclosing war crimes, which, according to witnesses and the Humanitarian Law Centre, mostly came from active and retired police and state security officers.²⁵

Exchange of apologies between the officials of Croatia, Serbia and Montenegro and Bosnia-Herzegovina for the crimes committed during the wars in the former Yugoslavia ensued with the normalisation of relations amongst Western Balkan countries after the changes in Serbia in 2000. In July 2005, Serbia's President Boris Tadić attended the commemoration of the victims of the Srebrenica genocide. Part of Serbia's public applauded the act; the other, nationalist part interpreted it as an act of treason.

The apology by Serbian Orthodox Church priest Sava Janjić to the Albanians in Kosovo for all their suffering in the past deserves to be highlighted amongst the events related to apologies for and forgiveness of crimes in the past.²⁶

Non-governmental organisations remained active in advocacy of confrontation with the past in 2005. They organised numerous activities and submitted a large number of motions and demands to the state bodies, such as the draft Declaration on Srebrenica, asking them to disclose the crimes committed in the past.²⁷ Attacks on NGOs also remained intensive and numerous, prompting Amnesty International to devote a separate report to attacks on human rights defenders in Serbia.²⁸

12.2. Situation and Prospects

Truth about war crimes had never been closer to Serbia's citizens than in 2005. Topics dealing with confrontation with the past were brought up in the public much more frequently than in 2004, which may have impacted on public opinion. Confrontation with the past was however still thwarted by several elements, the most important of which were political in nature and directly dependant on political events. The policy of the Government of Serbia on the issue was unclear and indecisive in 2005. Police and security service reforms, that would entail punishment of police and security officers involved in human rights violations, have not been implemented. Blurring the

25 Security Information Agency Threatening People”, *Glas javnosti*, 17 January 2005, p. 2.

26 Fr Sava Janjić Apologises to Albanians”, *Danas*, 18 June 2005, p. 4.

27 Draft Declaration on Srebrenica is accessible at www.harizma.com/fajloteka/politika/30/deklaracija270505genocid.pdf.

28 Serbia and Montenegro, Writing on the Wall: Serbian Human Rights Defenders at Risk”, Amnesty International, 29 November 2005, AI Index: EUR/70/016/2005, www.amnesty.org.

truth, denial of responsibility and conspiracy theories with hate speech undertones were the main features of tabloids that have flooded the news-stands in Serbia.

The prosecution and courts in Serbia have made headway in identifying and prosecuting perpetrators of war crimes and human rights violations, especially in the latter half of 2005. The ICTY, its work, trials, judgements and evidence presented at trials have in no way influenced the process of establishing the truth about and responsibility for war crimes in Serbia. It can be concluded on the basis of surveys of public opinion on the ICTY that not one event, not even arrests of Hague indictees Ratko Mladić or Radovan Karadžić, will sway the citizens to accept the truths established in the Tribunal courtrooms. Only outcomes of the future war crime trials in the national courts and a policy of confronting the past launched by a new political elite may effect a change in public attitude to war crimes committed by compatriots.

13. Cooperation with ICTY

13.1. Cooperation in Practice

Throughout 2004, the Government of Serbia persistently avoided any cooperation with the ICTY that involved arrests and transfer of all ICTY indictees in keeping with national and international law. In 2005 the Government began fulfilling its obligations under strong international pressure and rather ambiguous circumstances. Not one indictee was officially arrested in 2005, but quite a few of them turned themselves in to the Serbian authorities and were subsequently transferred to The Hague. General Vladimir Lazarević was the first to turn himself in, in January 2005; he was followed by Bosnian Serb Army officers Milan Gvero, Radivoj Miletić, Vinko Pandurević, Vujadin Popović, Milorad Trbić, all indicted for the Srebrenica crime; former Bosnian Serb Interior Minister Mićo Stanišić, paramilitary commander in Foča Gojko Janković and Serbian police and army generals Sreten Lukić and Nebojša Pavković.

The public suspected not only that the indictees had been pressured or even coerced to turn themselves in, but that the Government gave them financial incentives to surrender as well. Mayor Smiljko Kostić of Niš, for instance, made a gift of a new car to the family of General Lazarević.²⁹ Moreover, many of the indictees were accompanied to The Hague by Serbia's Justice Minister, while senior officials qualified their surrender as honourable and patriotic acts, not as something all citizens are obliged to do under the law.

SaM still needs to fulfil its main obligation: to arrest and extradite former Bosnian Serb Army Commander-in-Chief General Ratko Mladić, as both the ICTY President and Prosecutor underlined in their reports to the UNSC on 15 December 2005.³⁰ Six indictees, the most important being Radovan Karadžić and Ratko

29 See www.b92.net/info/vesti/index.php?yyyy=2005&mm=03&dd=13&nav_id=164167.

30 See www.un.org/icty/pressreal/2005/speech/pocar-sc-051215.htm i www.un.org/icty/pressreal/2005/speech/delponte-sc-051215.htm.

Mladić, were still at large at the end of the reporting period. The ICTY will continue to work until they are brought to justice. ICTY Chief Prosecutor Del Ponte noted that Serbia's cooperation with ICTY had deteriorated in the last few months of 2005, especially with respect to the extradition of Ratko Mladić and other indictees and access to specific Yugoslav Army documents.

13.2. Referral of ICTY Cases to the Serbian Justice System

In 2005 the Assembly of Serbia passed amendments to the Act on the Organisation and Jurisdiction of Government Authorities in War Crime Proceedings to allow Serbian courts to use evidence gathered by or presented in ICTY in their trials. Article 14a of the Act details the procedure the Serbian War Crimes Prosecutor will follow in cases referred by the ICTY. The Act also prescribes that the witness protection measures ordered by the ICTY will remain in effect and allows ICTY representatives to attend all stages of trials before the national court and be kept informed of their course. To encourage witnesses from abroad to testify in the Serbian court, the Act prescribes that they may not be deprived of liberty, remanded in custody or criminally prosecuted for a previously committed crime while they are in Serbia to give statements in the capacity of injured party, witness or forensic expert in war crime trials.

A new Criminal Code codifying and improving substantive criminal law was also passed in Serbia in 2005. Its provisions are in conformity, *inter alia*, with the Rome Statute of the International Criminal Court (Arts. 370–385). The Code introduces the category of crime against humanity and the new crime of failure to prevent the commission of crimes against humanity and property protected by international law, which includes the basic elements of command responsibility (Art. 384). In 2005, the Assembly of Serbia also passed the Act on the Programme for the Protection of Participants in Criminal Proceedings, the provisions of which will also be applied in war crime trials. The ICTY will refer the greatest number of cases to courts in Bosnia-Herzegovina. To date, cases referred to the Serbian judiciary include prosecution for the mass deportation of Zvornik Moslems in 1992 and for torture and murders in the Čelopek Culture Hall. The Serbian War Crimes Prosecutor issued an indictment against seven people for war crimes against civilians; the Serbian MIA arrested five of the suspects, one had already been in custody while the seventh suspect turned himself in. Their trial before the War Crime Panel of the Belgrade District Court began in November 2005.

Meanwhile, both the Serbian (and Croatian) authorities applied to the ICTY for referral of the case of the so-called Vukovar Three: former JNA officers Mile Mrkšić, Veselin Šljivančanin and Miroslav Radić. The Prosecutor was initially in favour of this referral, but soon changed her position. A special ICTY Trial Chamber concluded that the case was much too sensitive and that the indictees should be tried in The Hague in the interest of justice. The trial of the Vukovar Three began in the Hague in October 2005; the perpetrators of the crime in Ovčara are on trial in Belgrade.

APPENDIX

	Albania	Bih	Bulgaria	Croatia	Kosovo	Macedonia	Montenegro	Serbia
International Bill of Human Rights								
International Covenant on Economic, Social and Cultural Rights	+	+	+	+	+	+	+	+
International Covenant on Civil and Political Rights	+	+	+	+	+	+	+	+
Optional Protocol to the International Covenant on Civil and Political Rights	-	+	+	+	+	+	+	+
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	-	+	+	+	+	+	+	+
Prevention of Discrimination on the Basis of Race, Religion, or Belief and Protection of Minorities								
International Convention on the Elimination of All Forms of Racial Discrimination	+	+	+	+	+	+	+	+
Women's Human Rights								
Convention on the Elimination of All Forms of Discrimination against Women	+	+	+	+	-	+	+	+
Optional Protocol to the Convention on the Elimination of Discrimination against Women	+	+	+	+	-	+	+	+
United Nations Convention against Transnational Organized Crime	+	+	+	+	-	+	+	+

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime Preamble	+	+	+	+	+	+	+	+	+	+	+	+
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime	+	+	+	+	+	+	+	+	+	+	+	+
Slavery and Slavery – Like Practices												
Slavery Convention	+	+	+	+	+	+	+	+	+	+	+	+
Protocol amending the Slavery Convention	-	-	-	-	-	-	-	-	-	-	-	-
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery	+	+	+	+	+	+	+	+	+	+	+	+
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	+	+	+	+	+	+	+	+	+	+	+	+
Protection from Torture, Ill – Treatment and Disappearance												
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	+	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	+	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 2 to the European Convention for the Prevention of Torture and inhuman or Degrading Treatment of Punishment	+	+	+	+	+	+	+	+	+	+	+	+
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	+	+	+	+	+	+	+	+	+	+	+	+

Geneva Convention relative to the Treatment of Prisoners of War	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Geneva Convention relative to the Protection of Civilian Persons in Time of War	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II)	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Terrorism and Human Rights																			
International Convention Against the Taking of Hostages	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
International Convention for the Suppression of Terrorist Bombing	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
International Convention for the Suppression of the Financing of Terrorism	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
International Convention for the Suppression of Unlawful Seizure of Aircraft	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
International Convention on the Prevention and Punishment of Crimes Against International Protected Persons	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
UN Activities and Employees																			
Convention on the Privileges and Immunities of the United Nations	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Convention on the Safety of United Nations and Associated Personnel	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Regional Conventions																			
[European] Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 2 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 3 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 4 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 5 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 8 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 9 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	-	-	-	-	-	-	-	-	-	-	-
Protocol No. 10 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	-	-	-	-	-	-	-	-	-	-	-
Protocol No. 11 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+

Protocol No. 12 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 13 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 14 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	+	+	+	+	+	+	+	+	+	+	+	+
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	+	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	+	+	+	+	+	+	+	+	+	+	+	+
Protocol No. 2 to the European Convention for the Prevention of Torture and inhuman or Degrading Treatment of Punishment	+	+	+	+	+	+	+	+	+	+	+	+
European Social Charter	+	+	+	+	+	+	+	+	+	+	+	+
Framework Convention for the Protection of National Minorities	+	+	+	+	+	+	+	+	+	+	+	+
European Charter for Regional or Minority Languages	+	+	+	+	+	+	+	+	+	+	+	+

CIP – Каталогизација у публикацији
Народна библиотека Србије, Београд
341.231.14(4-12)"2005"

REGIONAL human rights report 2005 / [editor Bojan Đurić ;
translation Duška Tomanović]. – Belgrade : The Belgrade
Centre for Human Rights, 2006 (Belgrade : Dosije). – 329 str. :
tabele ; 23 cm. – (Series Reports ; knj. 10)

Tiraž 1.000. – Napomene i bibliografske reference uz tekst.
ISBN 86-7202-086-3

а) Права човека – Југоисточна Европа – 2005
COBISS.SR-ID 132619020