



## **JOINT SUBMISSION**

By the Lawyers' Committee for Human Rights – YUCOM and the Belgrade Centre for Human Rights, concerning Serbia

*For Consideration by the Human Rights Committee at the 119th session (6 – 29 March 2017)*

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## Submitting organizations

[The Lawyers' Committee For Human Rights \(YUCOM\)](#) was founded in 1997 as an expert, voluntary, non-governmental organization whose members are legal experts engaged in promoting and advocating the idea of the rule of law and uphold of human rights, raising public awareness, conceiving, designing and leading civic initiatives, rendering legal assistance to victims of human rights violation, as well as developing co-operation with national and international organizations involved in human rights protection and promotion. Today, YUCOM, as a member of numerous ad-hoc coalitions, has both capacity and long-term experience in successful leading of campaigns for the reform of legislature and legal practices. YUCOM is coordinating the [Coalition for Equality](#), which advocates for human rights on a regional level (Serbia, Montenegro, Kosovo and Macedonia) and focuses on the different areas of discrimination, including LGBT rights, strengthening the role of women in politics and public life and monitoring court procedures for discrimination. In 2011 YUCOM, together with other prominent human rights NGOs founded [Human Rights House Belgrade](#) and became a member of the [Human Rights House Network](#).

[The Belgrade Centre for Human Rights](#) was established in 1995 as a non-partisan, non-political and non-profit association of citizens concerned with the advancement of theory and practice of human rights. It assembles persons of various professions and backgrounds – jurists, attorneys, sociologists, economists, writers, teachers, students and entrepreneurs. They contribute to the mission of the Centre by their knowledge, experience and enthusiasm. The principal goals of the Centre are advancement of knowledge in the field of human rights and humanitarian law, development of democracy, strengthening of the rule of law and the civil society in Serbia and other countries in transition from authoritarianism to democracy. For its services and advancement of human rights, the Centre received in October 2000 the prestigious Bruno Kreisky Award. The Belgrade Centre for Human Rights is also the member of the [Associations of Human Rights Institutes](#) and one of the founding members of the Human Rights House in Belgrade.

## About this Report

This Report is intended for additional information for the Committee's consideration of Serbia's report, submitted under the Article 40 of the International Covenant on Civil and Political Rights. The main focus of this Report is on human rights issues already identified in the List of Issues, the Committee adopted on 29 July 2016.<sup>1</sup> Having in mind that this Report is a Joint Submission of the Lawyers' Committee for Human Rights and the Belgrade Centre for Human Rights, it is drafted on more than 15 pages, as instructed by the Committee in its Information Note for NGOs.

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<sup>1</sup> United Nations, Human Rights Committee, List of Issues in relation to the third periodic report of Serbia, UN Doc No. CCPR/C/SRB/Q/3.

## Torture - Definition, Penalties and Prescriptibility

1. Serbia's law still lacks adequate definitions of torture and other forms of ill-treatment (inhuman and degrading treatment). The definitions of these offences, incriminated in Articles 136 (extortion of confessions) and 137 (ill-treatment and torture) of the Criminal Code, is still inadequate, as CAT noted in its 2015 Concluding observations on the second periodic report of the Republic of Serbia.<sup>2</sup>

2. One of the problems is that Article 137 of the CC incriminates ill-treatment or torture committed by anyone, state and non-state agents alike, which has in practice led to the prosecution of many persons, who do not have the status of a public official.

3. In its 2015 Concluding observations, CAT recommended to the Republic of Serbia to promptly implement the legislative measures necessary to harmonize the provisions of the Criminal Code dealing with torture and align them with the definition contained in article 1 of the Convention, by, among other things, including acts of torture perpetrated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>3</sup>

4. Another problem arises from the overlapping of the criminal offences of torture and ill-treatment (Art. 137) and extortion of confessions (Art. 137). Namely, there is no substantial difference between the qualified form of the crime of torture and ill-treatment committed by a public official (Art. 137, paragraph 2 in conjunction with paragraph 3) and the simple and qualified forms of the crime of extortion of confessions (Article 136, paragraphs 1 and 2). Extortion of confessions per se constitutes torture and the introduction of this act as a separate offence serves no practical purpose. These provisions provide the prosecutors with the discretion to decide whether to charge public officials reasonably suspected of applying threat or force to extort a confession with torture and ill-treatment (Art. 137, paragraph 2 in conjunction with paragraph 3) or with extortion of a confession. Furthermore, the maximum penalty for torture and ill-treatment is eight years' and for extortion of a confession 10 years' imprisonment. Therefore, there is a risk of diverse practices i.e. of charging perpetrators of identical crimes with different offences carrying different penalties.

5. In that respect, the Committee Against Torture stated that it remains concerned that article 136 and article 137, paragraphs 2 and 3, of the Criminal Code, dealing with acts of torture, are not harmonized, and the fact that they are not aligned with all elements of the crime of torture, as defined in article 1 of the Convention.<sup>4</sup>

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<sup>2</sup> CAT, *Concluding observations on the second periodic report of the Republic of Serbia*, adopted on 12 May 2015, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=CAT%2fC%2fSRB%2fCO%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CAT%2fC%2fSRB%2fCO%2f2&Lang=en) CAT/C/SR.1322 and CAT/C/SR.1323. The BCHR, as well as the NGO coalition that submitted a shadow report to CAT in April 2015, have also been alerting to this problem for years.

<sup>3</sup> CAT, *Concluding observations on the second periodic report of the Republic of Serbia*, 12 May 2015, CAT/C/SR.1322 and CAT/C/SR.1323, para. 8.

<sup>4</sup> CAT, *Concluding observations on the second periodic report of the Republic of Serbia*, 12 May 2015, CAT/C/SR.1322 and CAT/C/SR.1323, para. 8.

6. Another problem regarding the substantive provisions of the CC governing torture concerns the inadequacy of the penalties in view of CAT's case law. The maximum penalty for torture and ill-treatment is eight years' and for extortion of confessions 10 years' imprisonment. In CAT's view torture should warrant between 6 and 20 years' imprisonment. The CCPR alerted Serbia to this problem back in 2011 and the CAT issued it an identical recommendation in May 2015.

7. Not only are the penalties for torture and inhuman treatment in Serbian criminal law lenient, as the UN treaty bodies noted. So is the penal policy of the Serbian courts that ruled on torture and ill-treatment cases. Between 2010 and 2015, they delivered only 31 judgments finding (48) public officials guilty of these crimes: 26 public officials were sentenced to conditional sentences, five to imprisonment<sup>5</sup>, two public officials were sentenced to home imprisonment and three to community service. Prosecution was deferred in five cases (against 12 public officials).

8. The statute of limitations still applies to torture and ill-treatment and extortion of confessions despite numerous recommendations by UN and CoE treaty bodies to make them non-prescriptible offences. In 2011, the CCPR expressed concern that torture and ill-treatment were only punishable up to a maximum of eight years of imprisonment and that the statutory limitation period was ten years. The CAT, for its part, in its 2015 Concluding observations urges the State party to repeal the statute of limitations for the crime of torture and to take the action necessary to reinstate those investigations for acts of torture that have been discontinued owing to the statute of limitations.

## **Legal Framework for the Prosecution of Perpetrators of Torture and Ill-Treatment and the Practices of the Judicial Authorities**

9. Prosecutorial investigation was one of the most important changes introduced by the Criminal Procedure Code, in force as of 1 October 2013. Other changes in the CPC directly affecting the fulfilment of criteria regarding efficient and effective investigations of arguable ill-treatment claims include the abolition of the institute of subsidiary prosecutor before the confirmation of the motion to indict and summary proceedings for crimes warranting under eight years' imprisonment. Each of these changes adversely affected trials of defendants charged with torture and ill-treatment (Article 137, CC) and extortion of confessions (Art. 136, CC).

10. The preliminary investigation and investigation stages are now fully within the remit of the public prosecutors. For the prosecutors to efficiently fulfil their new role under the CPC, they must have at their disposal professional, technical and material resources; and their role vis-à-vis the police needs to be defined clearly. Unfortunately, an adequate prosecutorial infrastructure had not been put in place before the CPC came into effect - or since - wherefore the prosecutors have been forced to delegate most of their powers to the police.

11. This has in practice led to situations in which the prosecutors are forced to *rely* on the actions taken by the police, even in cases in which police officers are the suspects/defendants. Consequently only a few criminal proceedings initiated against police officers after 1 October 2013 reached the main hearing (trial) stage; most cases ended with the dismissal of criminal reports against them. A total of 178 criminal reports against 378 regular and communal police officers and prison guards were filed from 1 October 2013 to 31 December 2015. Twelve of the

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<sup>5</sup> Ranging between six months and one year.

mentioned reports concerned extortion of confessions (Art. 136 CC) and were lodged against 24 public officials. Ten of the reports (against 20 public officials) were dismissed, while the other proceedings were still pending at the end of the reporting period (end of 2015).

**12.** A total of 166 criminal reports were filed against 354 public officials for torture and ill-treatment (Art. 137 CC). Of them, 118 reports against 258 persons were dismissed, while proceedings on 33 reports (against 77 officials) were still pending (end of 2015). Three reports ended in deferral of criminal proceedings against five officials. Only nine motions to indict 14 officials were filed.

**13.** In view of the fact that the institute of subsidiary prosecutor before the confirmation of the motion to indict was abolished, it is difficult to expect that many of the criminal reports will reach the main hearing stage. The conclusion that they will most probably be dismissed can be corroborated by the fact that out of the 191 torture, ill-treatment and extortion of confession proceedings initiated from 1 January 2010 to December 2015, 96 (55%) reached the main hearing stage after the injured parties assumed criminal prosecution in the capacity of subsidiary prosecutors (of course, before the 2013 CPC came into effect). The amendments to the CPC resulting in the abolition of the institute of subsidiary prosecutor were also criticised by the CPT after its 2015 visit to Serbia; this body asked the Serbian Government to comment the above-mentioned legal provisions.<sup>6</sup>

**14.** Another problem arising from the lenient penalties for torture, ill-treatment and the simple form of extortion of confessions is that they are reviewed in summary proceedings, in which investigation is not mandatory. The severest form of the crime of torture/ill-treatment (Art. 137(7) CC) carries between one and eight years' imprisonment, while the maximum penalty for the simple form of extortion of a confession carries five years' imprisonment. Summary criminal proceedings are initiated pursuant to the public prosecutors' motions to indict; the prosecutors may undertake specific evidentiary actions before filing their motions to indict or dismissing the criminal reports.<sup>7</sup> The very term "summary" reflects the purpose of such proceedings – that they last as short as possible, i.e. that the speed and efficiency of the criminal process are improved by accelerating or not conducting specific stages (primarily the investigation proceedings). However, the desire to achieve greater speed and efficiency, which should definitely characterise criminal proceedings, must never impinge on the thoroughness of the investigation and other stages in which facts relevant to ascertaining the liability or non-liability of public officials are established. The very fact that these offences fall under summary proceeding provisions indicates that the state does not award them the importance commensurate to their gravity, in terms of the absolute character of the prohibition of torture.

**15.** The BCHR in 2016 also analysed numerous torture, ill-treatment and extortion of a confession cases that made it to the main hearing stage. One of the most alarming problems it identified was the overly long duration of trials of police and prison guards have been charged with these offences. None of the analysed proceedings have lasted less than four or five years; proceedings against police officers charged with graver offences have dragged on much longer, some more than a decade. One of the reasons lies in the defendants' failure to respond to court summons served on them via the police directorates they work in, notably, their superiors, and

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<sup>6</sup> CPT, Report to the Government of the Republic of Serbia on the visit to Serbia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 May to 5 June 2015, CPT/Inf (2016) 21, para. 20, available at: <http://www.cpt.coe.int/documents/srb/2016-21-inf-eng.pdf>.

<sup>7</sup> Art. 499, CPC.

the absence of any court penalty for non-appearance. This problem can be addressed in practice if the judges become more proactive.<sup>8</sup> And, last but not the least, the extremely lenient penalties imposed against public officials found guilty of torture, ill-treatment or extortion of confessions cannot be said to have a deterrent effect.

**16.** Eleven trials of 21 public officials charged with extorting confessions were conducted from 1 January 2010 to 31 December 2015. The courts found only two of them (in two separate cases) guilty. One was sentenced to a conditional sentence and the other to home imprisonment.<sup>9</sup> Four criminal proceedings against eight public officials were still under way at the end of 2016. The courts rendered non-guilty verdicts in five cases (concerning 11 defendants). In the same period, Serbian Basic Courts conducted 180 criminal proceedings against 329 public officials charged with torture and ill-treatment; motions to indict/indictments were filed in 65 cases (against 117 public officials).

**17.** Final decisions were delivered in 115 of these cases (212 defendants). The statute of limitations expired in seven cases (18 defendants) and the proceedings were discontinued; the courts found 48 public officials in 31 cases guilty and sentenced them to: conditional sentences (26), imprisonment (5), home imprisonment (2), and community service (3). Prosecution was deferred in five cases (against 12 public officials); 146 public officials in 77 cases were acquitted.

**18.** The Instructions on the Treatment of People Brought in or Detained by the Police (hereinafter: Instructions),<sup>10</sup> also provide for the obligation of police officers to ensure the medical examinations of people in their custody, whether or not they used means of coercion against them, or the people in their custody who need to see a doctor for another reason: "Ill or injured persons obviously in need of medical assistance and persons exhibiting signs of grave alcohol or other kind of poisoning may not be held in the detention cells". Under Paragraph 26.1 of the Instructions, police officers detaining such persons must immediately organise the provision of the requisite medical assistance to them and their admission to the appropriate health institutions. The provision in the Instructions stipulating that the police officers must attend the medical examinations is problematic as it precludes independent and impartial medical examinations in accordance with the topmost international standards on the prevention of torture, above all, the standard under which doctors carrying out the examinations must include in their reports the explanations given by the patients as to how the injuries occurred.<sup>11</sup> It is very unlikely that a person subjected to (lawful or unlawful) violence on the part of the police officers would be willing or able to relate all the relevant details about the incident in the presence of police officers. Furthermore, Serbian doctors rarely report on whether the injuries are consistent with the explanations in practice despite their obligation to do so under the PSEA. The CAT also noted these deficiencies and made a number of recommendations to Serbia on how to eliminate them.<sup>12</sup>

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<sup>8</sup> E.g. by issuing an order to haul the policeman to court.

<sup>9</sup> Both cases included severe bodily injuries.

<sup>10</sup> Adopted pursuant to the Police Act (*Sl. glasnik RS*, 101/05, 63/09 – Constitutional Court Decision and 92/11), and available in Serbian at: <http://media.ssp.org.rs/2013/03/Uputstvo-o-postupanju-prema-dovedenim-i-zadrzanim-licima-LAT.pdf>.

<sup>11</sup> Paragraph 26.3 of the Instructions.

<sup>12</sup> "Concluding observations on the second periodic report of Serbia", UN doc., CAT/C/SRB/CO/2, (of 3 June 2015), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/112/60/PDF/G1511260.pdf?OpenElement>, para. 9.

19. Work of *ex officio* lawyers still represent a major problem as it was noted by both CAT and CPT (passive attitude), as well as inadequate medical examinations which are not conducted by forensic medical experts, and where medical reports do not include statement of victims, proper injury description and doctors opinion on correlation between these two.

## Observance of the Non-Refoulement Principle and the Prohibition of Collective Expulsion from an aspect of access to asylum procedure

19. A number of issues concerning limited access to the asylum procedure were reported in 2016. These include push-backs from Serbia to the Former Yugoslav Republic of Macedonia (FYROM) and Bulgaria, arbitrary returns to third countries or countries of origin from Belgrade 'Nikola Tesla' Airport, to Bulgaria under the Readmission Agreement with the European Community (without careful examinations of every individual case), refusals to issue the certificate of having expressed the intention to seek asylum to persons whose certificate expired or was stolen, denial of access to the asylum procedure to asylum-seekers returned from Hungary, etc.<sup>13</sup> These issues could, to a significant extent, be ascribed to a general lack of knowledge of international refugee law and international human rights law by national officials, including those engaging directly with refugees and migrants.

20. In July 2016, the Serbian Government adopted a decision to form mixed patrols of the army and police to strengthen the border with FYROM and Bulgaria.<sup>14</sup> The decision came in response to refugees and migrants' facing increasing difficulties in leaving Serbia to Croatia or Hungary.<sup>15</sup> By the end of 2016, more than 7,000 people were residing in Serbia, the vast majority of whom (around 82%) were accommodated in camps along the border where they were waiting for their turn to be admitted into Hungary.<sup>16</sup> The remainder stayed in the streets of Belgrade and border areas with Hungary in inhumane and degrading conditions.<sup>17</sup>

21. The introduction of mixed patrols gives reasons for concern, especially if we take into consideration the fact that state officials frequently make public statements that "migrants" or "illegal migrants" are successfully being repelled from the borders of Serbia. The Ministry of Defence reported in December 2016 that more than 18,000 migrants had been prevented from illegally crossing the border from Bulgaria.<sup>18</sup> It is hard to assume that 18,000 people were

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<sup>13</sup> See BCHR, *Right to Asylum in the Republic of Serbia 2016, 2017*, Forthcoming.

<sup>14</sup> N1, 'The police and army together against illegal migrations', 16 July 2016, available in Serbian at: <http://bit.ly/2kelszH>.

<sup>15</sup> After the closure of the Western Balkan route, Hungary introduced a practice limiting the admittance of refugees to 30 persons a day to its territory (15 persons at the Kelebija border crossing and 15 persons at the one in Horgoš). This number was reduced to 20 by the end of November 2016.

<sup>16</sup> UNHCR, *Serbia update: 26 December 2016 – 1 January 2017*.

<sup>17</sup> International Business Times, 'Sub-zero temperatures and snow deepen the plight of Serbia's refugees', 11 January 2017, available at: <http://bit.ly/2j1DN72>.

<sup>18</sup> Danas, 'Migrants unhappy with conditions of life', 27 December 2016, available in Serbian at: <http://bit.ly/2koDcN7>.



prevented from crossing the border in a manner that was in line with Council of Europe standards i.e. that each of these persons was served with a decision that is rendered in a procedure where individual circumstances of each person were examined; with the assistance of a lawyer and a translator for the language he or she understands; and with the possibility to lodge an appeal that has suspensive effect.

**22.** Serbia still does not have an adequate legal framework providing sufficient procedural guarantees against *refoulement* in forced return procedures, which gives rise to credible fears that the authorities are engaged in practice which violates international law. It is clear that newly introduced practice established suitable ground for collective expulsions. For that reason, it is necessary to introduce a border monitoring mechanism which will include representatives of civil society, as was, *inter alia*, recommended by the UN Committee against Torture (CAT) in its latest concluding observations on the second periodic report of Serbia.<sup>19</sup>

**23.** Between September and December 2016, the Belgrade Centre for Human Rights received 13 complaints concerning collective expulsions or push-backs to FYROM that involved approximately 750 persons. Those removed included people who had predominantly been residing in the reception center in **Preševo**, as well as persons who had been intercepted by patrols of the police or army at the border, or mixed patrols deeper within the territory of Serbia. In addition, the NGO Macedonian Young Lawyers' Association (MYLA) from FYROM reported that more than 400 people had been pushed back from Serbia not far from the camp in **Tabanovce** between 12 and 16 October 2016.<sup>20</sup>

**24.** In December 2016, a family of seven, coming from Syria, was intercepted by a mixed patrol of the army and police along the way to the reception center in **Bosilegrad**. They were duly registered and issued a certificate of having expressed the intention to seek asylum, then referred to Bosilegrad. Twenty kilometers from Bosilegrad, they were forced off the bus and taken deep into the woods close to the Bulgarian border. They were abandoned there at temperatures dropping as far as -11°C.<sup>21</sup>

**25.** The practice of the Border Police Station Belgrade (BPSB) at '**Nikola Tesla**' airport remained unchanged in 2016.<sup>22</sup> Foreigners who, according to the assessment of BPSB, did not meet the requirements to enter Serbia were detained in the transit zone of the airport. They remained in the transit zone as long as the company they had been traveling with did not provide them a seat on the return flight (to their country of origin or a third country). In other words, foreigners may be detained in the transit zone ranging from a few days to several weeks.

**26.** A related issue is the fact that the BPSB does not consider these people as being deprived of liberty. It does not therefore render a decision on deprivation of liberty, preventing these

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<sup>19</sup> CAT, *Concluding observations on the second periodic report of the Republic of Serbia*, CAT/C/SR.1322 i CAT/C/SR.1323, para. 15.

<sup>20</sup> Information was obtained by Macedonian NGO MYLA.

<sup>21</sup> Osservatorio balcani e caucaso, 'Serbia needs to investigate asylum seekers push backs', 11 January 2017, available at: <http://bit.ly/2koHnsj>.

<sup>22</sup> See BCHR, *Right to Asylum in the Republic of Serbia 2015, 2016*, available at: <http://bit.ly/2jmYbhy>, 45-47.

people from enjoying the rights of persons deprived of liberty (including the right to have a lawyer, to inform a third person of their whereabouts and challenge the grounds of their detention); neither are these people informed (in a language they understand) about the returns procedure they face. Persons that are likely in need of international protection are not informed about the possibility of applying for asylum, nor does the BPSB examine the risk of *refoulement* in case of return.<sup>23</sup>

27. In first six months of 2016, 14 persons that were likely in need of international protection (coming Afghanistan, Libya, Syria, Iran and Somalia) were returned to third countries such as Greece, Lebanon, United Arab Emirates (UAE), Turkey etc. Since December 2013, the BCHR has intervened over a hundred times in order to prevent forced removal to countries where *prima facie* refugees could be at risk of torture or other forms of ill-treatment. Three requests that interim measures be indicated in line with Rule 39 of the Rules of Court have been submitted to the ECtHR in order to prevent *refoulement* to Greece,<sup>24</sup> Somalia<sup>25</sup> and Turkey.<sup>26</sup>

## Access to asylum procedure – other aspects

28. Over the course of 2016, the Ministry of Interior issued a total of 12,821 certificates of having expressed the intention to seek asylum in Serbia. However, this data does not adequately reflect the real number of persons who were genuinely interested in seeking asylum in Serbia. Certificates are mainly requested in order to be admitted to the asylum or reception centres, where asylum seekers may enjoy such basic rights as accommodation, food, healthcare, psycho-social support, etc.<sup>27</sup> Under the circumstances, the Ministry of Interior does not adequately assess an individual's aspirations –whether or not they genuinely want to remain in Serbia. Conversely, it is common practice that genuine asylum seekers be referred to reception centres<sup>28</sup> instead of asylum centres, thereby preventing them from entering the asylum procedure, forcing providing legal assistance to asylum seekers to advocate for their transfer to an asylum centre. This process can sometimes last for more than several weeks, which further delays access to the asylum procedure.

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<sup>23</sup> CAT, *Concluding observations on the second periodic report of the Republic of Serbia*, CAT/C/SR.1322 i CAT/C/SR.1323, para. 15.

<sup>24</sup> ECtHR, *P. S. v Serbia*, Application No 90877/13.

<sup>25</sup> ECtHR, *Ahmed Ismail (Shiine Culay) v Serbia*, Application No 53622/14.

<sup>26</sup> ECtHR, *Arons v Serbia*, ApplicationNo 65457/16.

<sup>27</sup> The Government of Serbia attempted to resolve this issue by adopting the Decision on Issuing a Certificate of Having Entered the Territory of Serbia for Migrants Coming from Countries Where Their Lives are in Danger. However, due to the fact that the so-called 'transit certificate' (that had been issued in line with the Decision) was valid for the same amount of time as the certificate for asylum (72 hours), the problem of unregulated status of people who are in need of international protection, but do not perceive Serbia as a country of destination, continued to exist in 2016, since 72 hours was not long enough for an individual to leave Serbia. Besides, the implementation of the aforementioned decision was halted in the first half of 2016, and the authorities continued with the practice of issuing certificates of having expressed the intention to seek asylum to people who did not want to seek protection in Serbia.

<sup>28</sup> E.g. to the reception centre in **Preševo**.

29. Particularly disturbing is the situation of asylum seekers who had been hoping to continue towards Western and Central Europe but got ‘trapped’ in Serbia as a result of neighbouring countries shutting down their borders.<sup>29</sup> Because they had already spent weeks or even months in Serbia by the time they apply for asylum, they are often treated as simple irregular migrants and face action under the Foreigners Act, such as being issued an order to leave the country or face forced return proceedings. If the foreigner had previously applied for asylum but then tried to leave the country, the Ministry of Interior considers it an abuse of the asylum procedure and often denies them the possibility of submitting an application. Under such circumstances, police officers tasked with issuing certificates of having expressed the intention to seek asylum will often refuse to do so, in spite of the fact that they are not entitled to make such a decision under the Asylum Act.

30. Another issue that was present throughout 2016 involved persons who refused to go to particular reception centres, such as the one in **Preševo**, because they were afraid of being deprived of their liberty and informally expelled to FYROM. Reintroducing these people into the asylum procedure after 72 hours have expired since they had been issued a certificate represents real hardship due to a flawed interpretation of Articles 22 and 23 of the Asylum Act.

31. Apart from problems related to the interpretation of Articles 22 and 23 of the Asylum Act, the Belgrade Centre for Human Rights and other NGOs received several complaints of unprofessional and abusive behaviour of police officers in Belgrade’s **Savski Venac** Police Station. This included yelling, threats of deportation to FYROM or Turkey, or imprisonment. One asylum seeker from Syria stated during the asylum procedure interview that one of the police officers offended him on religious grounds and told him to go back to Turkey.<sup>30</sup>

32. As had been the case in previous years, refugees expelled/returned from Hungary are still facing difficulties in accessing the asylum procedure in 2016. It is not clear what the official stance of Serbian authorities vis-à-vis such cases is, but in light of several incidents wherein the Belgrade Centre’s intervention was required, asylum seekers, who possessed case files from accelerated asylum proceedings that had been conducted in transit zones Tompa or Röszke in Hungary or who had been readmitted to Serbia, were denied the possibility of expressing the intention to seek asylum. In a case involving 3 Syrian refugees whose asylum applications had been dismissed in Hungary, persistent advocacy on the part of the Belgrade Centre’s lawyers was required before the Serbian authorities agreed to allow them into the asylum procedure. In one of the cases occurred in 2015 BCHR was forced to submit the Rule 39 request in order to

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<sup>29</sup> In September 2015, Hungary established a fence along its border with Serbia, criminalised damaging it, introduced an accelerated asylum procedure in the detention centres Tompa and Röszke which is based on the automatic application of a safe third country concept in relation to Serbia, etc. Nonetheless, the Belgrade Centre and other NGOs operating in the border areas with Croatia and Hungary received dozens of complaints related to pushback and ill-treatment that had preceded it at the hands of Hungarian and Croatian border police. See more at: AIDA Country Report Hungary: 2016 Update, Forthcoming.

<sup>30</sup> Minutes of the hearing from the case file no. 26-1395/16.

prevent expulsion of Syrian refugee (returned from Hungary and denied access to RSDP) to Montenegro.<sup>31</sup>

## Asylum procedure – first instance

**37.** In 2016, the Asylum Office registered only 830 asylum seekers (more than 12.000 expressed the intention to seek asylum). Registered asylum seekers are issued a personal identity document confirming their status, which is valid for 6 months and is to be extended until the end of the asylum procedure.<sup>32</sup> Although the Asylum Act does not specify the deadline by which the asylum seekers are to be issued these documents, the wording of the relevant provision of this law leads to the conclusion that they are to be issued immediately upon registration. In practice, however, asylum seekers are forced to wait a long time in order to receive them. This is problematic given the fact that, in spite of having the right to freedom of movement, they are at risk of getting into trouble with the authorities should they be required to provide proof of their identity.<sup>33</sup> The Asylum Office issued a mere 177 personal identity documents in 2016, which indicates that many registered asylum seekers were not provided with one.

**38.** The General Administrative Procedure Act, which acts as *lex generalis* to the Asylum Act, an administrative procedure may be initiated *ex officio* or at the motion of a party.<sup>34</sup> The Asylum Act foresees that the asylum procedure shall be initiated by submitting an asylum application to an authorized officer of the Asylum Office on a prescribed form, within 15 days of registration.<sup>35</sup> The Asylum Office received only 574 asylum applications in 2016. The Asylum Office conducted 160 interviews in 2016. In practice, asylum seekers often wait from several weeks to up to a month following the submission of their application for a hearing to be scheduled.

**39.** In 2016, the Asylum Office rendered 28 decisions granting asylum to 42 persons, 17 decisions rejecting the application (40 persons), 53 decisions dismissing the applications (65 persons) and 268 conclusions discontinuing the procedure because the asylum seekers had left the asylum center or another place of residence after they had applied for asylum. Refugee status was granted to citizens of: Libya (5), Cuba (4), Sudan (4), Cameroon (2), Syria (1), Iran (1), Kazakhstan (1) and Afghanistan (1). Subsidiary protection was granted to citizens of: Libya (6), Afghanistan (5), Ukraine (5), Syria (2), Somalia (2) and Iraq (1).

**40.** It can be concluded from the above that the vast majority of asylum seekers abandon the asylum procedure before a first-instance decision is rendered (268). On the other hand, if we analyze procedures where the Asylum Office has actually issued a decision on the asylum

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<sup>31</sup> *Othman v Serbia*, App. No. 27468/15.

<sup>32</sup> Article 7 Rulebook on the Content and Design of the Asylum Application Form and Documents Issued to Asylum Seekers or People Granted Asylum or Temporary Protection, Official Gazette of the Republic of Serbia, no. 53/2008.

<sup>33</sup> Information obtained by providing legal aid to asylum seekers in Serbia.

<sup>34</sup> Article 113 General Administrative Procedure Act.

<sup>35</sup> Article 25 Asylum Act.

application, we can conclude that 54% of all cases (53 decisions) involve the Asylum Office dismissing the application because it had found that procedural requirements for ruling on merits of a claim had not been met.<sup>36</sup>

**41.** In 46% of the cases (45 decisions), the Asylum Office did decide on the merits. Of those cases, 62% ended in a positive decision (28 decisions), while the application was rejected in 38% of cases. If we analyse nationalities of the asylum seekers whose asylum applications had been rejected, it can be concluded that in the vast majority of cases they could not have been considered as *prima facie* refugees: Russia (4), FYROM (3), Pakistan (3), Senegal (1), Montenegro (1), Congo (1), South Africa (1) and Ghana (1). However, in 2016, the Asylum Office – as well as the Asylum Commission and the Administrative Court – likewise rejected the applications of 16 Libyan nationals, claiming that they would not be persecuted and treated contrary to Article 3 ECHR in case of being returned to Libya.<sup>37</sup> In one of these cases BCHR was forced to submit a request for interim measures under Rule 39 of the Rules of Court to the ECtHR in order to prevent the applicants' expulsion to Libya.<sup>38</sup> The case is currently pending before the Constitutional Court of Serbia and the ECtHR, and gives reason for concern since asylum application was rejected due to security reasons which have never been properly substantiated.

### Asylum procedure – second instance

**42.** Since the establishment of the Asylum Commission in 2008, this body has decided in the merits in but a single case. For this reason, an appeal to the Commission only prolongs the asylum procedure since, in the vast majority of cases, the first-instance decision is annulled and returned to the Asylum Office. The same practice is present in case of an appeal lodged against administrative silence, when the Asylum Commission, after adopting the appeal, orders the first-instance body to render the decision in the time-limit of one month, which further prolongs the procedure.

**43.** In September 2016, the mandate of Asylum Commission members expired, and as of the day this report was concluded, new members have not yet been appointed by the Government of Serbia. In other words, second instance body basically does not exist.

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<sup>36</sup> In 95% of all cases, the asylum application was dismissed on the basis of Article 33(1)(6) Asylum Act – safe third country concept in relation to FYROM and Bulgaria. See [Safe Third Country](#) part.

<sup>37</sup> The asylum application of one Somali national was also rejected in 2016. However, since the Belgrade Centre for Human Rights was not the legal representative in this case, we are not able to provide an analysis of the decision-making process.

<sup>38</sup> ECtHR, *Ben Rfad v Serbia*, Application No 37478/16.

## Asylum procedure – third instance

44. In practice, the Administrative Court has not itself held any hearings on asylum claims to date. Its decisions so far have merely confirmed the lawfulness of the asylum authorities' practice of automatically applying the concept of safe third country in spite of the fact that it had not first been established whether the third countries were actually safe for the asylum-seekers *in casu*. Also, to this date, the Administrative Court has never decided on a complaint in the merits.

## The Automatic Application of the Safe Third Country Concept

45. A safe third country "shall be understood to mean a country from a list established by the Government, which observes international principles pertaining to the protection of refugees contained in the 1951 Convention on the Status of Refugees and the 1967 Protocol on the Status of Refugees (...) where an asylum seeker had resided, or through which he/she had passed, immediately before he/she arrived on the territory of the Republic of Serbia and where he/she had an opportunity to submit an asylum application, where he/she would not be subjected to persecution, torture, inhumane or degrading treatment, or sent back to a country where his/her life, safety or freedom would be threatened."<sup>39</sup>

46. Although neither the law itself, nor individual by-laws provide for a more precise interpretation of the manner in which the safe third country principle is to be applied by the authorities, the approach of asylum bodies has generally been to require no greater link between the applicant and a safe third country other than the fact that they had transited through them prior to arriving in Serbia.

47. The notion of "reasonableness" is neither a requirement set by national law nor has it ever been applied in practice. Asylum seekers whose applications have been deemed inadmissible on the basis of the safe third country concept are generally left to their own devices and rarely actually subjected to a formal forced returns procedure.

48. The often automatic application of the safe third country principle by the Asylum Office has been extremely problematic for the functioning of the asylum system of Serbia, especially due to the fact that all bordering countries are considered safe third countries, except for Albania. Countries such as Turkey, Greece and the FYROM are considered 'safe' merely due to the fact that they are parties to the 1951 Geneva Convention (the fact that Turkey has opted to apply geographic limitations to its implementation of the Convention likewise is not taken into consideration) and the list has never been revised in light of well-known case law such as the ECtHR's judgment in *M.S.S. v Belgium and Greece*. This has led to many asylum applications

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<sup>39</sup> *Ibid.*

being dismissed over the years without the Asylum Office ever having entered into the merits of the claim.

49. The automatic application of the safe third country concept is as problematic in the Asylum Commission's practice as it is in that of the Asylum Office. The Asylum Commission is of the opinion that Turkey, Greece and Macedonia are safe third countries in which asylum seekers can apply for asylum, disregarding entirely reports by UNHCR and other relevant international human rights organizations such as Human Rights Watch and Amnesty International, as well as the relevant practice of the ECtHR, the Committee against Torture (CAT) etc.<sup>40</sup>

50. The manner in which the safe third country concept has been applied in Serbia has been criticized by a number of local and international stakeholders, including UNHCR<sup>41</sup> and CAT.<sup>42</sup>

51. The practice of automatic application of the safe third country concept resulted in a situation wherein only 8 persons were granted international protection in the first 5 years of Serbian asylum system (2008 – 2012). All of these persons had arrived in Serbia legally and directly from their country of origin or from a country which has not ratified 1951 Convention; or they were *sur place* refugees. According to UNHCR, from 2008 to 2010 all asylum requests were dismissed on the basis of Article 33(1) (6) of the Asylum Act.<sup>43</sup> This practice has continued in the following years:

Dismissal of asylum applications on inadmissibility grounds: 2010-2016							
	2010	2011	2012	2013	2014	2015	2016
Dismissal decisions	47	53	64	8	12	25	53
Total decisions, excluding technical	48	55	67	17	18	58	98
Percentage	97.9%	96.3%	95.5%	47%	66.6%	43.1%	54.1%

52. In 2011 only two cases were decided in merits (negatively), while all other asylum applications were dismissed.<sup>44</sup> In 2012, the Asylum Office was exclusively rendering decisions on dismissal of asylum application by automatically applying the safe third country concept (64

<sup>40</sup> See, e.g. BCHR, *Right to Asylum in the Republic of Serbia 2014, 2015*, available at: <http://bit.ly/1RxYcZc>, 33-37; BCHR, *Right to Asylum in the Republic of Serbia 2016, 2017*, Forthcoming.

<sup>41</sup> UNHCR, *Serbia as a country of asylum: Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, August 2012, 12.

<sup>42</sup> CAT, *Concluding observations on the second periodic report of Serbia*, 3 June 2015, para. 15.

<sup>43</sup> UNHCR, *Serbia as Country of Asylum*, August 2012, para. 36.

<sup>44</sup> 53 decisions in relation to 83 asylum seekers, UNHCR, *Serbia as Country of Asylum*, August 2012, para. 43.



decisions).<sup>45</sup> In 2013, Asylum Office dismissed on the same ground 8 asylum applications.<sup>46</sup> In 2014, the only negative decisions that were rendered by the Asylum Office were based on the automatic application on a safe third country concept (12 decisions).<sup>47</sup> During 2015, the Asylum Office continued with the same practice and rendered 25 decisions on dismissal of asylum application in relation to citizens of: Russia (8), Ukraine (5), Syria (4), Sudan (3), Somalia (2), Cameroon (1), Ghana (1) and Morocco (1).<sup>48</sup>

**53.** In 2016, this practice of automatic application of safe third country concept in relation to FYROM and Bulgaria continued in the vast majority of cases. The Asylum Office rendered 53 decisions dismissing the asylum applications of 65 asylum seekers. More precisely, in 54% of all cases, the Asylum Office rendered a decision dismissing the asylum application, for persons coming from: Pakistan (14), Iraq (10), Russia (9), Syria (7), Libya (5), Afghanistan (5), Bangladesh (3), FYROM (3), Sudan (2), Cuba (2), Somalia (1), Bosnia and Hercegovina (1), Bulgaria (1), Algeria (1). One application by a stateless person was dismissed (1). In 95% of these cases the safe third country concept was applied. The reasoning in these decisions relied on the Decision Determining the List of Safe Countries of Origin and Safe Third Countries.

**54.** Actually, out of 88 people who gave been granted international protection in Serbia since 1 April 2008, 56 (64%) of them arrived in Serbia directly from their country of origin or a third country which had not ratified the 1951 Convention on Status of Refugees.<sup>49</sup> As for the remaining 32 asylum seekers (36%), one Syrian citizen arrived from Turkey,<sup>50</sup> 7 arrived form FYROM,<sup>51</sup> 2 from Bulgaria,<sup>52</sup> whereas 5 refugees from Afghanistan did not know which country they had entered Serbia from, so the Asylum Office decided on the merits of their application. Regarding the remaining 17 refugees,<sup>53</sup> seeing as how the Belgrade Centre did not represent them in the procedure, where they had entered Serbia from is not known.

**55.** In October 2016, the Belgrade Centre submitted a request for interim measures to be indicated in line with Rule 39 of the Rules of Court of the ECtHR in order to prevent the

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<sup>45</sup> In 2012 Asylum Office decided in merits only in 3 cases, and only in relation to people who arrived in Serbia directly from country of origin. See Belgrade Centre for Human Rights, *Right to asylum in Republic of Serbia 2012, 2013*, 17.

<sup>46</sup> Nine cases were decided in merits (4 positively and 5 negatively). See Belgrade Centre for Human Rights, *Right to Asylum in the Republic of Serbia 2013, 2014*, 24 and 41-43.

<sup>47</sup> Four cases were decided in merits (3 subsidiary protection and 1 refugee status).

<sup>48</sup> In three cases asylum application was rejected in merits in relation to two Cubans and one South African citizen.

<sup>49</sup> In 2009 – Ethiopia (3) and Iraq (1); in 2010 – Somalia (1); in 2012 – Libya (2) and Egypt (1); in 2013 – Turkey (2); in 2014 – Tunis (1); 2015 – Ukraine (9), Libya (8), South Sudan (1), Lebanon (1) i Iraq (1); 2016 – Libya (13), Ukraine (5), Cuba (4), Cameroon (2) and Kazakhstan (1).

<sup>50</sup> The Asylum Office has established through its practice that Turkey cannot be considered as safe third country, see Belgrade Centre for Human Rights, *Right to Asylum in the Republic of Serbia 2015, 2016*, 24 and 54.

<sup>51</sup> 5 Sudanese, 1 Syrian and 1 Iranian.

<sup>52</sup> 1 Afghan and 1 Iraqi.

<sup>53</sup> 12 Syrians, 3 Iraqis and 2 Somalis.



expulsion to FYROM of a Sudanese national whose asylum application had been dismissed on the basis that FYROM is safe country.<sup>54</sup>

**56.** The outlined practices of the Asylum Office and Commission corroborate that UNHCR's conclusion in its 2012 'Serbia as a Country of Asylum' report remain valid. The UNHCR report describes Serbia as a country which is not safe for asylum seekers, *inter alia*, due to the automatic application of the safe third country concept. In particular, UNHCR recommended that Serbia put in place appropriate mechanisms for the designation and review of safe third countries and apply the safe third country concept only when adequate safeguards were in place for every individual, such as ensuring that he or she would be readmitted to the territory of the safe third country and have their asylum claim examined in a fair and efficient procedure. In the Belgrade Centre's opinion, these UNHCR recommendations have not been fulfilled yet.<sup>55</sup>

### Care for the best interest and protection of refugee and migrant children

**57.** Unaccompanied and separated children are subjected to arbitrary age assessment upon entering Serbia and are thus deprived of measures of protection as are required by his status as a minor. Registering of children as being of age of majority leaves them without guardianship and vulnerable to various forms of mistreatment. Furthermore, upon being allotted a guardian, unaccompanied children are seldom aware of who the guardians are, nor are any best interest assessments always carried out in order to determine what would constitute actions in line with their best interests.

**58.** Although the Ministry of Work, Employment, Veteran and Social Affairs drafted an Instruction on Actions for centers for social work and social welfare institutions for accommodating beneficiaries and unaccompanied children migrants wherein it is stated that each child entering Serbia should be provided a guardian, the above-mentioned problem of age assessment impacts their effectiveness.

**59.** Furthermore, cases have been documented wherein children are provided guardians arbitrarily; that is, social workers that investigate cases have been known to allot guardianship to people whom the children met along the way to Serbia without having any real information regarding the background of that individual. The Asylum Act does not specify who can perform the function of a guardian. The Family law however does (Article 126). However, individuals totally or partially deprived of legal capacity, as migrants in the asylum procedure often are, are not deemed fit (Article 128).

**60.** There are many other notable issues pertaining to unaccompanied child refugees and migrants. Namely, there is not a reception or asylum center intended specifically for them; they reside in mixed centers with adults, and in many cases, share not only the space of the center

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<sup>54</sup> ECtHR, *Kandafru v Serbia*, Application No 57188/16.

<sup>55</sup> See the Belgrade Centre for Human Rights, *Right to asylum in the Republic of Serbia – periodic report for July – September 2016*, October 2016, available at: <http://bit.ly/2jtTw8>, 15-20.

itself with them but also rooms. This presents a safety threat. However, there are few institutions in Serbia which are intended for housing unaccompanied and separated refugee and migrant children, in Belgrade, Niš, and Subotica, yet the primary function of these centers is to house children in conflict with the law - in the former two cases - and children with cognitive disabilities - in the latter. They also cannot constitute what can be called appropriate shelter for this special group. Therefore, a separate center should be established so as to provide a safe environment for them. However, even when they reside in these centers they are relocated to Asylum Centers in accordance with Article 22 of the Asylum Act. Also, the Asylum Act does not have any special provisions for special groups such as unaccompanied children, nor are they considered priority cases. The Asylum Act only states that special attention will be awarded to the group (Article 15).

**61.** The nature of the migrations through Serbia has changed with the closing of both the Hungarian and Croatian border; Serbia is no longer a transit country in a manner that it was in 2015. With that development, another outstanding issue arose, and it is related to the education of migrant and refugee children. Although the Asylum Act stipulates that all children granted asylum as well as those in the procedure have the right to free elementary and secondary education, most children residing in reception and asylum centers do not have access to any form of formal education while in the asylum procedure, and seldom have access to informal education as well. Most of the educational activities that do take place are organized through CSOs and consist of language lessons. The Family Act also provides for the education of all children in line with their abilities, wishes and inclinations. Nonetheless, most children remain deprived of education while in the asylum procedure on the territory of Serbia, which is arguably a form of discrimination in regard to Article 26 of the Covenant, as well as Article 2 of the Convention on the Rights of the Child. This is a form of neglect of the child's wellbeing and a disregard for their interest and healthy development.

## Right to Liberty and Security

### Prison overcrowding and penal practice of Serbian judicial authorities

**62.** The Serbian penitentiaries were still overcrowded in 2016, as the CPT found in its latest report on its visit to Serbia. It held that the conditions of detention it observed at the so called "hospital" and "Odmaralište" buildings of Sremska Mitrovica Correctional Institution could well amount to inhuman and degrading treatment.<sup>56</sup> Although the CPT did not visit the Požarevac penitentiary in the reporting period, BCHR's associates found that this institution was still overcrowded and that, in light of the Council of Europe's standards, the conditions in some parts of the establishment could also be qualified as inhuman and degrading. From 2010 to 2015

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<sup>56</sup> Report to the Government of Serbia on the visit to Serbia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 May to 5 June 2015 , p. 38, available at: <http://www.cpt.coe.int/documents/srb/2016-21-inf-eng.pdf>.

Serbian court imposed 57.328 prison sentences,<sup>57</sup> while in the same period Administration for the implementation of criminal sanctions admitted 45.414 convicts to serve their sentence.<sup>58</sup> In other words, on 1 January 2016, almost 12.000 convicts were waiting to serve their prison sentence, which means that overcrowding of Serbian penitentiaries is “booked” for the next several years. On 31 December 2016, Serbian penitentiaries accommodated 10.699 prisoners, out of which almost 6.000 was placed in 4 biggest penitentiaries in Sremska Mitrovica (2.200), Požarevac (1.700), Niš (1.400) and Belgrade (800) where overcrowding is most prominent (around 2 square meters per inmate).<sup>59</sup> If we add to this data the fact that all relevant departments in penitentiaries (security, treatment and medical) are severely understaffed, it is evident that convicts are condemned to the regime of life where there are no adequate treatment activities aimed at their re-socialisation, deprived of possibility to work and to have their medical problems adequately treated. All of these deficiencies were described in the latest CPT report.<sup>60</sup>

**63.** The statistical picture clearly demonstrates the retributive character of the judicial authorities, which preferred imposing short-term prison sentences to alternative penalties in the period from 2010 to 2015. They imposed a total of 57.328 imprisonment sentences in that period: 44.323 (77%) ranging up to three years, 40.233 (70%) lasting up to two years and 32.661 (57%) lasting less than a year. On the other hand, alternatives to imprisonment, such as home imprisonment and community service sentences, were imposed on 5.182 defendants found guilty. In light of the above statistics and the fact that home imprisonment<sup>61</sup> may be imposed for offences warranting up to one year imprisonment<sup>62</sup> and that community service<sup>63</sup> may be imposed for offences warranting up to three years’ imprisonment<sup>64</sup>, it is clear that the judicial authorities have been imposing alternatives to incarceration extremely rarely although they had thousands of opportunities to opt for them.

**64.** Pre-trial detention is still used excessively, and the number of days of unjustified detention that is imposed on annual basis is between 20.000 and 30.000. This has led to a dramatic number of request for compensation, which further led to the fact that from 1 October 2013 to 31 December 2016 more than 4.6 million € was awarded for non-pecuniary damage in the civil

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<sup>57</sup> See the Statistical Office of the Republic of Serbia website:  
<http://webrzs.stat.gov.rs/WebSite/Public/PageView.aspx?pKey=145>.

<sup>58</sup> Data obtained from the Penal Sanctions Enforcement Administration annual reports, available in Serbian at: <http://www.uiks.mpravde.gov.rs/cr/articles/izvestaji-i-statistika/>

<sup>59</sup> See more at Report to the Government of Serbia on the visit to Serbia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 May to 5 June 2015, available at: <http://www.cpt.coe.int/documents/srb/2016-21-inf-eng.pdf>.

<sup>60</sup> *Ibid.*

<sup>61</sup> Imposed 4.755 times from 2011 to 30. June 2016.

<sup>62</sup> Article 45(5), CC.

<sup>63</sup> Imposed 2.154 times from 2007 to 30. June 2016.

<sup>64</sup> Article 52, CC.

proceedings instigate against Serbia.<sup>65</sup> Also, more than 2.2 million € was awarded by the Commission of Ministry of Justice in the period between 2005 and 2016.<sup>66</sup>

## Right of peaceful assembly

**65. The Law on Public Assembly** was finally adopted on January 26<sup>th</sup> 2016, after a 4 month long legal gap, during which the Right of Peaceful Assembly wasn't regulated by any Law. However, the adopted Law does not meet the requirements set by the international standards on Right of peaceful assembly, nor does it conform to the Constitution of Serbia. It fell short of expectations, as the lawmaker failed to take in account the argumentation that Constitutional court made in declaring the former Law unconstitutional.

**66.** The new **Law on Public Assembly** also lacks a deadline for the Administrative court to reach its decision on bans of public assemblies, meaning that such a decision could be made long after the scheduled time of the public gathering has passed, thus leaving the organiser without an effective legal remedy. **YUCOM** already has a constitutional appeal pending in the case of bans of assemblies organised by Falun Gong in June 2016<sup>67</sup>. New Law also imposes very steep penalties that could have a chilling effect on organisers of public assemblies.

**67.** Explicit banning of public assemblies in front of specific places such as schools was rendered meaningless during the election campaign in 2016, when political rallies were often held there by public officials under the auspices of reopening renovated schools.

**68.** Holding of spontaneous gatherings<sup>68</sup> not requiring previous registration was made possible by the Law, but in a very limited manner. Law limited spontaneous gatherings only to those without an invitation by the organisers, which is contrary with the **OSCE Guidelines on Freedom of Peaceful Assembly**<sup>69</sup>, and also defeats the purpose of such gatherings, as an immediate reaction to a specific event.

**69.** However, misdemeanour procedures are also sometimes used as a way for political pressure on opposition parties or activists advocating for human rights protection. At this moment, there are 17 different misdemeanour procedures, mostly related to public assemblies, initiated over the past year against the activists of the popular movement "**Let's not drown**

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<sup>65</sup> This data is incomplete, and the amount of money is much higher

<sup>66</sup> The Commission of Ministry of Justice is a first instance body deciding on request for non-pecuniary damage. However, in vast majority of cases persons who were unjustifiedly detained decide to address Civil Courts which award higher damages, after they refuse Commissions offer.

<sup>67</sup> News article available at : <http://www.balkaninsight.com/en/article/serbia-tightens-security-measures-ahead-of-chinese-president-arrival-06-16-2016>

<sup>68</sup> YUCOM is currently representing two activists accused of a misdemeanour offence of holding an assembly without prior registration. The assembly which was organised through social networks was an immediate reaction to an announced eviction of a family from the last house standing in the way of a controversial urban development project. The activists could each be fined up to 150.000,00 RSD, which is roughly the equivalent of 3 average salaries.

<sup>69</sup> Available at: <https://www.osce.org/odihr/73405?download=true>

**Belgrade**” so named in response to the controversial “**Belgrade Waterfront**” development project. This is a serious setback from the policy of tolerating spontaneous public assemblies practiced by the Ministry of Interior in the past, when such assemblies weren’t regulated by Law.

## Freedom of expression

**70.** The comprehensive media reform<sup>70</sup> carried out in 2014 was intended to provide a basis for the state withdrawal from media ownership, transparency of media ownership, co-financing of projects in the field of public information and the protection of media pluralism. Providing an accurate assessment of all of the effects of the privatisation is difficult at present time. However continued functioning of minority language media has come into serious difficulties after the privatisation as the new **Law on Minority Rights** providing adequate funding hasn’t been adopted yet.

**71.** While the existing **Law on Public Information and Media** and the **Law on Public Media Services** provide for a basis for dissemination of information in minority languages, funds allocated through co-financing of projects of public interest for that purpose are still insufficient, while not all of the media services comply with their obligation to broadcast programs in minority languages. The funds allocated through co-financing of projects for minority language media are slowly and steadily raising and a number of media owned by the National Minority Councils in Vojvodina province is still being financed through the provincial budget as a stopgap measure. However this practise is against the **Law on Public Information and Media** and some representatives of national minorities having voiced concerns that the role of National Minority Councils in managing these media represents a threat to media pluralism<sup>71</sup>.

**72.** The **Law on Public Information and Media** introduced the Media Register to provide public availability of the information on media ownership, amounts of funds granted to the media as state aid, amount of funds received from public authorities etc. The Media Registry is operational and available online since 13 February 2015. However, available information in this Registry is often incomplete and in some cases completely empty. This is consistent with latest EC report<sup>72</sup> on Serbia’s progress which states that the set of media laws is yet to be completely implemented and that the privatisation has not led to more transparency of ownership or sources of advertising and funding, and confirms concerns about Government’s involvement in media ownership and use of these media for political campaigns against opposition parties or other groups considered as being against Government’s policy.

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<sup>70</sup> The Law on Public Information and Media, the Law on Electronic Media and the Law on Public Media Services

<sup>71</sup> Expert report on the state of minority rights in Serbia - Anastasia Crickley and Rainer Hofmann, September 24<sup>th</sup> 2015.

<sup>72</sup> Available at: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2016/20161109\\_report\\_serbia.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_serbia.pdf)

73. While the failure to register disqualifies the media from entering the contest for co-financing projects and receiving advertising or other revenue from the state, the misdemeanour fine<sup>73</sup> for the responsible person in a state institution for enabling such a media to receive funds from the state is set too low to discourage illegal disposition of these funds.

74. The Anti-corruption Council published a comprehensive **Report on the possible impact of public sector institutions on media through the payment of advertising services and marketing** on 23 December 2015. The Council made an estimate that the amount of funds allocated by the state for advertising services and marketing could be as high as 840 million € in the four year period (2011-2014). Some estimates put the worth of the entire advertising market in Serbia at around 180 million € per year, which would suggest a great discrepancy between the market worth and the funds allocated by the state. Unnecessary advertising acts not only as a lever of media control, but also as a way of funneling state funds into hands of connected persons and representatives of political parties.

75. Furthermore, the privatization left more than a 1000 media professionals unemployed<sup>74</sup>, and those still working with meager and overdue wages, setting ideal conditions for the rise of self-censorship. Meanwhile government officials deny the existence of self-censorship and the ruling party even organized a traveling exhibit named “**Uncensored lies**” with news articles portraying negative views on the president (prime minister) and the members of the ruling party.

76. Research<sup>75</sup> conducted by NUNS, a journalist association, released in December 2016 concluded that no significant progress has been made regarding attacks and other serious intimidations of journalist. While the number of physical or verbal attacks on journalist and their property slightly dropped from 39 in 2015 to 36 in 2016, the number of instances of pressures almost doubled compared to 2015. Open vilification of journalist is on the raise and the serious backlog of civil cases (753) relating to published information in the media doesn't inspire confidence in the judiciary.

77. Research<sup>76</sup> conducted by SHARE Foundation regarding the respect of digital rights and freedom in 2016 concluded that the number of cyber-attacks in 2016 is significantly lower than in 2014. SHARE also pointed out that the cases of cyber-attacks from the previous years still remain unresolved, despite the efforts of the competent authorities. The research noted that the time of some of the cyber-attacks is directly correlated to news reports about high state functionaries and their surroundings and that there was a significant number of cases where people were locked out of their social network accounts after raising questions or starting debates on important social issues.

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<sup>73</sup> The misdemeanour fine ranges from 400 up to 1200 €.

<sup>74</sup> More at: <http://www.balkaninsight.com/en/article/privatization-will-not-free-serbian-media-journalists-say-12-08-2015>

<sup>75</sup> Available at:  
[http://www.nuns.rs/sw4i/download/files/box/ id\\_533/WB%20freedom%20of%20media%20and%20journalists%20safety%20Comparative%20report.pdf](http://www.nuns.rs/sw4i/download/files/box/ id_533/WB%20freedom%20of%20media%20and%20journalists%20safety%20Comparative%20report.pdf)

<sup>76</sup> Available in Serbian only at:  
[http://www.shareconference.net/sites/default/files/u742/godisnji\\_monitoring\\_izvestaj\\_2016\\_za\\_sajt.pdf](http://www.shareconference.net/sites/default/files/u742/godisnji_monitoring_izvestaj_2016_za_sajt.pdf)



## Right to Legal Capacity of Persons with Disabilities

**78.** In accordance with the Family Law of the Republic of Serbia, an adult may be deprived of legal capacity, in the statutory procedure, if due to a disease or disorder in physical development he/she is not capable of normal judgment, and therefore is not capable of protecting his/her own rights and interests (full deprivation), or if, for the same reasons, he/she directly endangers his/her or other people's rights and interests (partial deprivation of legal capacity).<sup>77</sup> Full deprivation of legal capacity of an adult is equated with younger minors (persons under 14), while partial deprivation with older juveniles (persons between 14 and 18).

**79.** The position of persons with disabilities in Serbia is regulated by numerous laws and regulations, primarily, the Law on Prevention of Discrimination against Persons with Disabilities<sup>78</sup> and the Law on the Prohibition of Discrimination.<sup>79</sup> Most other laws also contain at least some provisions which refer to a certain right of persons with disabilities. However, a large number of persons with disabilities are still deprived of legal capacity. Despite some reforms of the legislative framework, practice in this area is still rigid and outdated. As a result, these individuals are often at a disadvantage in the enjoyment of their rights. Subsequent efforts to correct mistakes rarely result in success. The Family Law of the RS also prescribes the possibility of reinstating legal capacity, and that is possible if the reasons for which the person was fully or partially deprived of legal capacity cease to exist. According to information available to associations of persons with disabilities and non-governmental organizations dealing with this issue, the number of procedures completed with a positive decision is marginal, amounting to one or two cases per year. Namely, this is not a surprising fact, given that these persons are deprived of legal capacity mostly due to certain types of disabilities, so it is impossible for the "reason to cease existing." This standard is obsolete and unsustainable and needs to be changed in terms of providing adequate support and assistance to these persons, instead of depriving them of legal capacity.

**80.** Recent amendments to the Law on Extra-judicial Proceedings (May 2014) also established the obligation of revising a decision within a period not longer than three years from the date of its adoption. This change is certainly a positive development in domestic legislation, given that earlier there was no obligation to review decisions which led to the deprivation of legal capacity. For now, there is no official data on how many proceedings were initiated, or how many of them were concluded with the adoption of a positive decision. However, as the judicial review procedure requires the same conditions as with the reinstatement of legal capacity, one cannot expect a significant result.

**81.** What is also controversial in these proceedings is the fact that after initiation of the procedure, an individual is assigned a guardian, who usually works in one of the centers for social work. This leads to an absurd situation - the Center for Social Work appears before the court on behalf of the proposer, while an employee of the center appears on behalf of the

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<sup>77</sup> Family Law of the RS, "Official Gazette of the RS", no. 18/2005, 72/2011 - state law and 6/2015

<sup>78</sup> "Official Gazette of the RS", no. 33/06

<sup>79</sup> "Official Gazette of the RS", no. 22/09

opposing party. The dual role of the guardianship authority clearly indicates the inadequate representation of persons against whom the proceedings are conducted. Guardians almost never contest allegations in the proposal, they have no contact with the respective person nor do they have information about his/her life activities and needs; they do not file objections to the findings of experts and generally have only a formal and passive role in these proceedings.

**82.** The problem is that the court often does not even hear out the person against whom the proceedings are conducted, justifying that the expert opinion states that “it is a difficult disease with serious consequences and that it should not be expected to improve or be cured using any therapeutic methods [...] That is why the respondent is not capable of being questioned by the court without negative consequences for his/her health, nor can the information acquired be considered valid for the court.”<sup>80, 81</sup>

**83.** The characteristic of this procedure is mandatory expert examination of persons whose legal capacity is under question, by at least two experts of appropriate specialization, which should be conducted in the presence of a judge. However, it often happens that the review is never held and that instead the findings and opinions are reached only on the basis of medical documentation, which can be dated several years back. Ignoring the fact that an expert witness is an associate of the court, who through his expert findings and opinion assists the court in establishing the truth by presenting expert testimony on the matter impartially, professionally, in a clear and understandable manner, expert witnesses often easily recognize that the “new psychological and psychiatric assessment of the proposer would not give significantly different assessment results regarding the respective person’s personality ...”<sup>82</sup> However, even when the person undergoes examination, the judge is usually not present during this phase of the proceedings.

**84.** During the proceedings before the court, when providing an explanation that a person was diagnosed with a certain type of disability, the expert witnesses rarely provide a response to the question if there is another, cumulatively requested condition for deprivation of legal capacity – whether the actions of the petitioner, or the opposing party directly jeopardize his own rights and interests or rights and interests of other persons, meaning whether he is capable to take care of himself and of his rights and interests.

**85.** Also, in expert witnesses’ findings and opinion it is often stated that “the petitioner is not fully capable of normal judgment and is not able to take care of his rights and interests completely on its own, which means that there is an elevated risk that he might put in jeopardy his rights and interests or rights and interests of other persons, by his actions”. On the other hand, courts fully accept these findings and do not perform further analysis whether the conditions for deprivation of legal capacity prescribed by law exist.

**86.** One of the potential consequences of deprivation of legal capacity is placement in some of the social protection institutions, which is clearly contrary to the relevant provisions of the

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<sup>80</sup> *A case from the practice of YUCOM, review of reasons for deprivation of legal capacity B.T, 2015*

<sup>81</sup> *Contrary to the Case-law of the ECtHR, see, for example Hiro Balani v Spain, December 9, 1994, para 28*

<sup>82</sup> *A case from the practice of YUCOM, procedure for reinstatement of legal capacity Z.N, 2015*



International Covenant on Civil and Political Rights and Article 19 of the Convention on the Rights of Persons with Disabilities.

**87.** Segregation of persons with disabilities to large social care institutions is decreasing their right to education, employment, adequate healthcare, etc. For that reason, great efforts have been invested lately to adopt the policy of living in a community and to carry out reform of the social protection system in the direction of deinstitutionalization. However, current situation is still far from this policy. In his recent statement, Minister of Labor, Employment, Veteran and Social Affairs, Mr. Vulin, stated that in 2016, State would invest 700 million dinars (5.6 million €) in social care institutions, which was the highest amount in the history of this Ministry.<sup>83</sup> This attitude of the competent Ministry, and the State, is contrary to the Covenant, and the principle of deinstitutionalization, social inclusion and equal participation of persons with disabilities.

## Equality before the Court and the Right to a Fair Trial

**88.** Even though the Constitution guarantees everyone the right to equal legal protection, without discrimination (Art. 21), this right is not accessible to everyone in Serbia, predominantly to minorities, Roma community, internally displaced persons, refugees and LGBT population. The Case of *Pfeiffer v Air Serbia* could serve as good illustration of the impediments that victims of discrimination could experience in Serbian judicial system. This case was the first case that has been brought to Serbian Courts under the new Law on Prohibition of Discrimination. Although the applicable Law on Prohibition of Discrimination prescribes that these court proceedings are urgent (which means that the trials should last up to six months), and that there have been over 50 complaints to the judicial institutions of the Republic of Serbia, this case lasts for more than eight years.

**89.** The adoption of the law on free legal aid was still pending at the end of the 2016. Although the text of the 2015 draft had in principle been agreed on, the irreconcilable views of lawyers and CSOs on who was entitled to extend legal aid led to delays in the finalisation of the text to be submitted to the Government.

**90.** Lack of Court Efficiency remains in 2016. According to Anti-Corruption Council' report on the state of the judiciary the establishment of the new court network had not yielded results as it neither improved court efficiency nor cut the costs of justice, both those sustained by the citizens and those sustained by the state. One of the reasons was that no analysis about the optimal number of courts was conducted either before the 2009 or the 2014 court network reforms.

**91.** The amended Court Rules of Procedure in 2016 include provisions aimed at ensuring the efficient implementation of the Backlog Reduction Programme.

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<http://www.blic.rs/vesti/drustvo/vulin-nikad-veca-izdvajanja-za-ustanove-socijalne-zastite/7783dvd>

**92.** Under the Enforcement and Security of Claims Act, enforcement creditors were to declare whether they wished to have their claims enforced by courts or enforcement agents in the 1 May-1 July 2016 period; otherwise the enforcement proceedings would be terminated. The closure of a large number of cases was, in fact, due to the fact that a substantial number of creditors did not state their preference by 1 July.

**93.** Although the Act on the Protection of the Right to a Trial within a Reasonable Time entered into force on 1 January 2016, no data on its enforcement were available at the end of the reporting period, wherefore no assessments could be made of the extent to which it has responded to one of the greatest challenges regarding respect for the right to a fair trial. The High Judicial Council's data for the first nine months of the year show that Serbia paid 141.5 million RSD in damages for violations of the right to a fair trial. The damages were paid pursuant to the provisions of the Act on the Organisation of Courts, which applied until the Act on the Protection of the Right to a Trial within a Reasonable Time came into force.

**94.** Expiry of the statute of limitations has been one of the problems constantly plaguing the Serbian judiciary. The criminal proceedings against Bogoljub Karić became statute-barred in 2016. Ten years after initiating the criminal proceedings in the so-called "Indeks Scandal", not even first-instance judgments have been delivered; proceedings against 44 of the 88 indictees had in the meantime been terminated because the statute of limitations expired. Expiry of the statute of limitations is also reason why no-one will be found guilty of the death of Jelica Radović, who died of sepsis after a bunion operation at the private Decedra Clinic in September 2006. In all these cases the courts are under the obligation to compensate the costs and expenses the defendants suffered during the trial. Given the duration of this trial and the gravity of the crimes the defendants had been charged with, the state will have to pay millions just to cover the costs of their legal counsels.

**95.** The work of the notaries public did not provoke any major polemics in 2016, as opposed to the past few years when the impugned provisions of the Act and related laws resulted in a months-long strike of the attorneys and, consequently, the blockade of the judicial system. Pursuant to the legal provisions, the courts in 2016 started entrusting to notaries public specific non-contentious proceedings, including on inheritance, which should lead to their faster and more efficient completion.

**96.** An electronic case management system is not uniform because three different systems for electronic registration of data and case management are in use.

**97.** In January 2016, the Serbian Government issued a conclusion adopting the Code of Conduct of the members of government regulating the commenting of court decisions and proceedings. The Code provisions were violated virtually on a daily basis by the Prime Minister and members of his cabinet in 2016.

## Hate Crimes

**98.** Hate Crime is regulated in Serbian legislation since 2012 as an obligatory aggravating circumstance in criminal proceedings. However, the application of this article of the Criminal Code is still being very poor. Even though, the YUCOM is representing a dozen of cases for hate crime against LGBT, no final verdict is reached before Serbian Courts. Also, there have been a number of cases in which the investigation was inefficient and not in accordance to human rights standards and the standards of investigation for cases involving hate crimes.<sup>84</sup> Finally, as related to the applicable legislation, article 54a of the Criminal Code, which prescribes hate crimes, does not recognize persons with disabilities as a possible victims of hate crime.

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<sup>84</sup> In some of these cases, YUCOM submitted appeals to the Constitutional Court but these cases are still pending.