FORCIBLE CONSCRIPTION OF REFUGEES – UNLAWFUL MOTIVES AND ACTS AND THEIR LEGAL CONSEQUENCES

Bojan Đurić

SUMMARY

This text was inspired by my need to offer a review of legal mechanisms of legal overcoming of one of the many difficult segments of our recent past: the forcible conscription of refugees in Serbia in 1995. I have presented a summary of the domestic legal institutions and guaranties that had been violated in that action. However, I have paid much more attention to the international legal environment. Thus, I have deliberated the guaranties of protection of fundamental human rights in those international treaties and other legal instruments that bound Serbia/FR Yugoslavia in the moment of the forcible and unlawful conscription. A special attention was paid to the rights that had been most seriously violated by that act: prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right to freedom and security of person and the right to fair trial. "The legal position of the forcibly conscripted refugees" is situated within the frameworks, definitions and limitations of these rights and mechanisms of their realization. I have especially deliberated the question of efficacy and equity of compensatory proceedings in domestic courts, as well as the state responsibility before the European court for human rights in Strasbourg (which is the most efficient international mechanism for human rights protection).

LEGAL AND POLITICAL CONTEXT

All complexity of the conflicts in the former Socialist Federal Republic of Yugoslavia is reflected in the tragic roles and fates of refugees. Big wars, and especially the ones in the Balkans in the 1990s, leave indelible imprints and produce tectonic changes in souls, lives and human and interstate relations. One of the most natural goals of the legal system is establishment of justice and correction of injustice and unlawful behavior. Unfortunately, life is most often more complicated than the legal norm and its basic relation *disposition – sanction.* The problem we deal with here represents a most complicated mixture of law and lawlessness, justice and injustice, criminals and victims, oblivion and everlasting trauma.

The law is not omnipotent, and everyone will agree with that on the basis of his personal experience or the experience of the people he knows. Every honest lawyer will admit it too. Nevertheless, the hope that the law can help the injured and the vulnerable and punish the malefactors is the very heart of the moral inspiration of every good constitution, law, international treaty or custom. A legal overcoming of the forcible conscription of refugees and satisfaction of justice will not be possible without a simultaneous and well-intentioned deliberation and interpretation of the constitution, law and international legal norms that were in vigor in this country in 1995 (when the forcible conscription was carried out), and the same will have to be done with the body of current laws as well.

INTERNATIONAL LEGAL FRAMEWORK AND RATIFIED INTERNATIONAL INSTRUMENTS

The former Yugoslavia was a state party to numerous international legal instruments that regulate specific categories or particular human rights. Although the expression “human rights” was often proscribed and interpreted as a product of the decadent western political order and its value system, it has to be said that, at least formally, the erstwhile Yugoslav state joined those treaties. One of such widely accepted international treaties was the Convention relating to the status of refugees.

The Federal People’s Republic of Yugoslavia had ratified this convention in 1960 and thus became legally bound by it from that moment on. The territory and the name of the state have changed several times, but it is beyond doubt that Serbia (or the Federal Republic of Yugoslavia for that matter) has remained a member of the Convention relating to the status of refugees, even after the breakup of the former SFRY. Therefore, its agencies had to abide by the stipulations of the Convention. This also holds true for one of the key guaranties these treaties offer to refugees: prohibition of return to the territories which they fled and where they

could face grave danger, for particular reasons. Besides, domestic agencies had to feel bound by the International covenant on civil and political rights[1] (CCR) and the Convention against torture and other cruel, inhuman or degrading treatment or punishment.[2] These are international pacts of a specific legal nature - they are treaties on human rights. The specificity of these legal instruments is, among other things, reflected in the fact that they are signed and accepted by states, but the obligations are convened for the benefit of beneficiaries – people who happen to be under jurisdiction of a particular state signatory in a particular moment. Relatedly, the majority of international instruments for protection of human rights have also established special organs – supervisory bodies authorized to follow and control the respect of these treaties by states signatories. It the summer of 1995, the Federal Republic of Yugoslavia (with Serbia as its constituent part), was under jurisdiction of at least two of those bodies.

Namely, articles 17-24 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment stipulate the existence of the Committee against torture and make possible submission of interstate and individual petitions. The Committee consists of ten experts renowned in their scientific fields. They work in personal capacity and do not represent the states the citizens of which they are.

From the point of view of protection of the victims of forcible conscription of refugees and the compensation they deserve, the following articles of the Convention against torture and other cruel, inhuman or degrading treatment or punishment are especially important:

> Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction
>
> (article 12 of the Convention)

> Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given
>
> (article 13 of the Convention)

1 Sl. list SFRJ, br. 7/71.

2 Sl. list SFRJ (međunarodni ugovori), br. 9/91.

It is clear that in the case of the forcible conscription of refugees any serious and impartial investigation was absent. Firstly, investigation has to be carried out in the shortest possible time. In our unfortunate case, no serious and comprehensive investigation has been carried out, even ten years after the unlawful action of governmental agencies and their officials took place. Secondly, investigation has to be impartial. In Serbia, numerous charges have been pressed, stating that – among other things – there had been systematic breaches of the interdiction of torture of forcibly conscripted individuals. However, the charges rarely led to impartial investigation. Most often, it ended (or was "ground to a halt" indefinitely) in the moment when the prosecutor requested the police (the local force or the HQ of the Ministry of interior affairs) to collect necessary information. Moreover, this silence did not provoke a reaction or a genuine wish of the competent authorities to conduct a serious, impartial investigation.

As for the disrespect of article 13, it is clear that the forcibly conscripted formally had legal possibilities to make some kind of complaint of the treatment they had been exposed to, but the actual use of these possibilities was made more difficult and in many cases even rendered impossible. The victims, of course, could not count on protection from the vengeance and mistreatment of those whose behavior they were complaining about. At that moment, and until the end of 2000, the individuals who had been directly involved in conception, planning and execution of the forcible conscription of refugees were still holding top positions within the police and Serbian political system. Besides, the members of (semi)regular military formations who ordered torture in Erdut and other camps were incredibly powerful in the period before Milošević's fall (and even after that). A substantial portion of the public opinion in Serbia considered (and still considers) these men as big national heroes and protectors of Serbian national interests. In those circumstances, and aside from all the other troubles refugees had been (and still are) exposed to, it is not realistic to expect that there will be an efficient use of the possibility to file any entreat that has the character of complaint of unlawful arrest and the ensuing torture.

RELEVANT DOMESTIC LAW (1995-2005)

The organized praxis of deprivation of freedom of refugees from Croatia and Bosnia & Herzegovina and their (also organized) transfer into the Republika Srpska Krajina happened in the summer of 1995. At that moment, Serbia was state member of the Federal Republic of Yugoslavia (FRY). Therefore, all agencies of the state of Serbia were obliged by the FRY Constitution, which was adopted on April 27, 1992. Furthermore, the Republic of Serbia had its own Constitution, adopted in 1991. The Law on refugees[3] could also have been a relevant source of

3 Službeni glasnik RS, br. 18/92

law for the question of treatment of refugees. The questions of conditions and lawfulness of deprivation of freedom were mainly regulated by the FRY Code on criminal procedure and the Law on internal affairs of the Republic of Serbia.

The principle of *non-refoulement*

The principle of *non-refoulement* is presently considered as one of the pillars of the international *refugee law*. State representatives, NGOs and experts in refugee issues all agree on that particular point. What is the essence of this principle? The main idea is to prohibit return of refugees or asylum seekers to a territory where they could be exposed to life threat, torture or other similar treatment. The need to introduce respect of this principle in laws and international treaties, and especially in governmental praxis, appeared by the middle of the 20th century. The terrible experiences of the Second World War and enormous suffering of millions of refugees affected by the war largely provoked that. In fact, the preparation and final adoption of the Convention relating to the status of refugees in the early 1950s is a result of these experiences. This principle is explicitly formulated by the adoption of the Convention:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion
>
> (article 33, paragraph 1).

Interdiction of expulsion or return of refugees to a territory where they could face danger on the accounts enumerated in article 33 of the Convention is absolute and applicable to all refugees. The praxis of the UNHCR and the praxis of states go in favor of this attitude. Although the Convention relating to the status of refugees represents the main international document in the domain of refugee rights, there are also other international instruments for protection of human rights that treat some specific rights guaranteed to this vulnerable group. Thus, the International covenant on civil and political rights (art. 13) guarantees that nobody (the Covenant here says no *"alien"*) could be expelled, except "in pursuance of a decision reached in accordance with law" or for "compelling reasons of national security". Even in these situations, the person in question must be allowed to submit the reasons against his expulsion and has the right to have his case reviewed by the competent authority. The European court for human rights has several times reaffirmed this rule. In the case *HLA versus France*, the Court took position that a state that carries out expulsion or extradition is to be held responsible for the expected treatment in a second state (regardless of whether the risk comes from the state or private individuals and organizations), if the authorities in the host country are neither ready nor capable to ensure adequate protection.

Importance of the problem of treatment and protection of refugees is reflected in the content of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. This document (art. 3, al. 1) directly forbids a signatory state to expel, expulse or extradite a person to a second state if there are serious reasons to believe that the person will be subjected to torture. The state then has to take into account all relevant circumstances and especially the praxis of respect of human rights in the second state. We could put forward many arguments to advocate the thesis that the state of Serbia/FRY had breached article 3 of the Convention against torture during the campaign of forcible conscription. Firstly, the very existence of armed conflict in the territory of the Republic of Croatia (and in the so/called Republic of Srpska Krajina) had to point out to a very high level of danger that the conscripted would be exposed to torture. Secondly, these people were refuges who had escaped to the territory of Serbia in order to save their lives and physical and psychic integrity.[4] Lastly, the governmental agencies that had made and carried out the decision on forcible conscription had to know to what kind of situation they were directing the conscripted. Besides, the 1992 Serbian Law on refugees defined refugees as "Serbs and citizens of other nationalities who, under pressure of Croatian authorities or authorities of other republics, threat of genocide, persecution and discrimination on account of their national or religious belonging or political conviction, have been forced to leave their homes in those republics and flee to the territory of the Republic of Serbia" (art. 1). To return people who had on these accounts fled the territory where this danger threatened them is obviously contrary to the principle of *non-refoulement*. In that sense, the refugees who had been forced to return to war faced double danger: firstly, in the camps of regular and paramilitary formations where they underwent torture and other similar treatments, and secondly, when they were made to participate in military actions, because they run high risks of the loss of life or exposure to torture or other inhuman treatment.

THE RIGHT TO FREEDOM AND SECURITY OF PERSON

The right to freedom and security of person are guaranteed comprehensively by the International covenant on civil and political rights (CCR) and European Convention for the protection of human rights and fundamental freedoms. It is important here to pay special attention to the stipulations of the CCR because this document obliged our state in the moment of the forcible conscription of refugees.

4 Such an attitude and assessment of the situation in the area of conflict had been expressed by all important representatives of Serbian governmental agencies. This was also the official policy of the state; decisions of governmental agencies, declarations of the President of the Republic, government and competent ministries as well as the policy of the official media are convincing proofs for this thesis.

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law
>
> (Article 9, paragraph 1)

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful
>
> (Article 9, paragraph 4)

> Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation
>
> (Article 9, paragraph 5)

Every individual has the right to freedom and security of person. This right refers to every human being, regardless of whether he is a citizen, stranger or stateless person in some country. Therefore, although the vast majority of the conscripted were not citizens of Serbia/FRY, the guarantee contained in this article of the CCR referred to them as well. Nobody can be arbitrarily arrested or deprived of freedom. Also, it is not relevant if an unlawful procedure took place and continuously lasted in only one country. The only relevant condition is that this happened in a territory effectively controlled by a state.[5] Intentional bodies that supervise the respect of signed international treaties have in their praxis interpreted the meaning of the term «arbitrarily». Relying on that praxis, we can in principle say that, at the moment of deprivation of freedom, there must be legal grounds for such an act. In the case of the forcible conscription of refugees, there were no such grounds.

The constitutional documents that are in vigor in the territory of Serbia and Montenegro guarantee the right to personal freedom (art. 15 of the Constitution of Serbia). According to the Convention on human rights, «everyone has the right to liberty and security of person» (art. 9). This stipulation contains a more precise definition than the previous FRY Constitution, which mentioned only the right to

5 That is how the European court for human rights thought in its praxis. In the case Loizidou versus Turkey the Court stated that military action or intervention within another territory establishes state jurisdiction, so that the state then can be accountable. For our discussion, even more relevant are cases where the Court deliberated whether the presence of representatives of governmental agencies of one state in the territory of another (or, more generally, the presence of governmental agencies it the moment of arrest) establishes jurisdiction. For a positive decision in a similar case, see: Reinette versus France (63 DR 189(1989) (decision on acceptability).

personal freedom but not the right to security. That Constitution, actually replaced by the Constitutional convention of Serbia and Montenegro, among other things, also stipulated the following:

> Inviolability of person's physical and psychic integrity, his privacy and his personal rights are guaranteed.
>
> Personal dignity and security are guaranteed
>
> (art. 22 of the FRY Constitution).
>
> Any violence against a person who is arrested, or whose freedom is restricted, as well as any extortion of confession or statement is forbidden and punishable.
>
> Nobody shall be subjected to torture or humiliating punishment and treatment.
>
> (art. 25 of the FRY Constitution).

Although this stipulation of the former federal Constitution was of a narrower scope than the stipulations of the CCR, it nevertheless represented a sufficient protection from unlawful arrest (which, in its legal nature, the forcible conscription of refugees was). Domestic constitutions use terms «deprivation of freedom» and «confinement», where the latter refers exclusively to criminal cases while the former denotes all cases of deprivation of freedom (and not only criminal cases). Anyway, from the standpoint of state responsibility before international bodies, a different naming of particular forms (manifestations) of deprivation or restriction of liberty is irrelevant. As the European court for human rights stressed in some of its verdicts, what matters is not the formal designation of an act in domestic jurisprudence but the intention and goal achieved by some measure.[6] In that sense, the forcible conscription of refugees had the character of deprivation of freedom and that is why all standards relating to the right to personal freedom and security must be applied in situations like these.

The right to complain to a court on the account of deprivation of freedom - The right to appeal to a court on the account of deprivation of freedom relates to the cases where deprivation of freedom resulted through a decision of an agency other than a court (see the decision of the European court for human rights in the case *De Wilde, Ooms and Versyp versus Belgium*, A 12, 1971, al. 76). The use of this right was not made possible for the victims of forcible conscription. This right had to be necessarily provided in such a case because the deprivation of freedom was carried out without a court order or any other role of court in this procedure.

6 See De Wilde, Ooms and Versyp versus Belgium

PROHIBITION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Although a tendency of abolition of death penalty is obvious today, a rule still holds that human physical integrity is absolutely protected (even more than life itself). Therefore, there is absolutely no circumstance or sufficiently good excusing circumstance for torture or other similar treatments and punishments. As with the majority of other human rights, development of human conscience leads in a certain moment to a general condemnation and loathing of heavy breaches of basic rights, and that is how a rule becomes part of the international common law. Thus, prohibition of torture is considered as part of the international common law. According to the CCR, prohibition of torture must not be abolished even in wartime or general emergency situations. Therefore, the argument that war or imminent danger of war are situations that allow for limitation of the right to physical and psychic integrity is absolutely wrong.[7] On the contrary, special guarantees of protection of human rights are created precisely to better protect and shelter vulnerable groups and individuals from malefactors and torturers, when some extraordinary situations set in. Reviews of the development of human rights and mechanisms of their protection, as well as the development of humanitarian and international criminal law perhaps confirm it best.

"Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". This definition of torture is contained in art. 1 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment and is considered as a standard in the definition of the notion of torture and similar treatments.

Torture is also a crime in the international contractual and common law. This creates a universally binding obligation of competence and repression of the perpetrators of torture. Therefore, every state has the right to investigate, pursue, punish and extradite individuals suspected of acts of torture. The Committee against torture deemed that this obligation exists even if a state did not ratify the UN Convention, evoking the principles of the Nuremberg verdict and the Universal declaration of human rights. This point of view was also took by the American

7 Some circles frequently put forward this argument when discussing various aspects of responsibility for heavy legal infractions during the conflicts in the former SFRY.

Supreme Court in the case *Filartig versus Pen-Iral.* In that case, the Court declared itself competent, although torture did not take place within the USA, and the perpetrator and the victim were foreign nationals.

THE RIGHT TO FAIR TRIAL

Respect of the right to fair trial is here analyzed in the context of the right to compensation to the forcibly conscripted refugees. It is important to emphasize that violation of this rights in the current cases at Serbian courts can be made a matter of the European court for human rights (in Strasbourg). Namely, Serbia and Montenegro have ratified the European Convention for the protection of human rights and fundamental freedoms on December 26, 2003. [8] The instruments on ratification were deposited on March 4, 2003. Therefore, from 2004 on, the Convention has been made part of the domestic legislation. Simultaneously, the European court for human rights became competent to deliberate petitions referring to the alleged breaches of human rights (guaranteed by the European Convention) that had been committed by governmental agencies of Serbia and Montenegro. The events that the criminal charges and compensatory claims refer to took place in the period of the forcible conscription of refugees (June-September 1995), when Serbia and Montenegro were not signatories of the European Convention. This, however, does not mean that the proceedings in these cases, sluggishness and inefficiency in their conduct or unjust decisions of courts cannot be placed under scrutiny of the judges from Strasbourg. Namely, many of these proceedings lasted, still last or have been decided upon after our country joined the European convention. Decisions (or the lack of those; passivity of courts and other governmental agencies) that followed subsequently can be made a matter of petitions to this court.

As for the right to fair trial and realization of this right in domestic courts, there are two important articles of the European Convention:

8 The Convention was signed on April 3, 2003, when Serbia and Montenegro were admitted to the Council of Europe.

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice
>
> (Article 6, paragraph 1).

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity
>
> (Article 13)

The guarantee from article 6 refers to all proceedings where individual rights and obligations are being decided upon by courts of a particular country and. In the case of the forcible conscription of refugees, the proceedings (or attempts of proceedings) unfold on two legal levels: the civil one (compensatory proceedings) and the criminal one (criminal proceedings against the perpetrators of unlawful arrest). The right from this article refers to every person regardless of his status or public law relation (citizenship) in the country at the courts of which the proceedings are initiated. However, the most important dilemmas of the respect of this right in proceedings at domestic courts are: 1) the question of fair hearing within a reasonable time, 2) the question of existence of an independent and impartial tribunal.

Article 13 of the European Convention, on the other hand, deals especially with the problem of efficiency of remedies (mechanisms and possibilities to initiate, conduct and end a case). This norm has to make possible that everybody has at his disposal an efficient, realistic and reasonable possibility to protect some of his rights or legitimate interest in competent domestic agencies. The whole concept of the right to efficient remedy is based on the idea that in the internal legal order and praxis (general praxis, as well as proceedings in a particular case) there must be a possibility to use some legal means to remedy infraction of some right. When a state claims, which is the most frequent case, that its legal order disposes of efficient legal means, it is not enough to invoke the formal (legal) possibility of the right to press charges, file a complaint, or submit an objection or some similar entreaty. As for the duration of proceedings, especially, the state has to furnish information and proofs that its legal system functions efficiently, so that longer

proceedings are caused by some particular circumstances of the case in question, its complexity and behavior of the client himself. [9] In the context of the right to fair trial, importance of the right to efficient remedy lies in the request to provide a legal means that could make possible for trials to be completed in a reasonable time and in an independent and impartial court.[10]

At the European court for human rights, the submitters of entreaties have most frequently complained about the breaches of the rule of trial in «a reasonable time». There are many such cases also for the applications coming from the former socialist countries, where the slowness of proceedings was especially pronounced. The duration of proceedings and the question of their efficiency are, in accordance with the general rules of the European convention and its entry into vigor, estimated for each country separately. The criterion for this assessment is the moment of entry in vigor of the Convention for each particular state.[11] In the assessment of the duration of proceedings and the ratio of that time by the standard of «reasonable time», the Court takes into account all circumstances of a case, and especially the behavior of a state and its agencies in the procedure, the complexity of the case, and the behavior of the case parties who complain of breach of rights. The procedure is estimated in its totality. The request of fairness implies numerous guarantees, among which are especially important the right of access to a court, and trial and deciding in a reasonable time. Fair, public and expedite characteristics of court proceedings are of no value if there is no a court case itself.

During the several decades of the functioning of the European court for human rights, some standards for the assessment of these questions have been established. For the assessment of the justification of the duration of cases in domestic courts, the praxis of the Court in relation to the entreaties against Croatia for violations of the right to fair trial could be very significant. In many of these cases, the plaintiffs complained of violations of this right in the processes ensuing from the events related to the armed conflicts in the territory of Croatia. These cases are not identical with the cases of the forcibly conscripted in our country. Nevertheless, the similarity of social contexts, the specificity of the conflict and the role of the states in these events could be taken into account. An additional similarity stems from the fact that the legal systems, organization of courts and procedural aspects between the states created it the territory of the former Yugoslavia are very similar in many aspects.[12] The European court has several

9 See cases Humen versus Poland (1999) and Comingersoll S.A. versus Portugal [GC], no. 35382/97, 2000-IV)

10 See Kudla versus Poland [GC], no. 30210/96, § 156, 2000-XI

11 See Foti and Others versus Italy (1982) and Horvat versus Croatia (Application no. 51585/99)

12 This similarity was especially obvious in the 1990s, with the new laws of the new states being, in fact, taken over from the former SFRY system.

times condemned Croatia for unreasonably long proceedings in charges pressed by citizens.[13]

Could, then, the prescribing of short time limits by the statute of limitations and actual impossibility (or seriously reduced possibility) of their use in internal courts and agencies be understood as violation of article 6 of the European Convention of human rights («efficient tribunal», «trial in a reasonable time»)?

When judging whether the condition of a reasonable time has been violated or satisfied, the European court takes into account all delays that could be ascribed to a state. This means that all delays ensuing from the behavior (acting and non-acting) of governmental and legal agencies are ascribed to the state. That is why domestic courts bear a special and substantial responsibility to influence all case parties to refrain from acts that can threaten the realization of the principle of «trial in a reasonable time».

Courts are just a part of state authority, but the politicians (the executive and legislative branch) bear responsibility for the creation of conditions of efficient and lawful functioning of courts. In the system of checks and balances, every branch of the public authority has relatively defined sphere of competence, affairs and responsibilities. The task of parliament and government (the legislative and executive branch), among other things, is to create a legal, political and factual environment for unhindered and lawful functioning of courts. However, the responsibility for the course of proceedings, cooperation between various agencies and courts, honest and fair trials, respect of various parties in the process, protection of the weaker party and many other parts of dispensing of justice lies with the court itself and the judges who conduct proceedings. This is confirmed by a series of verdicts of the European court for human rights. Thus, for example, in the case *Zimmerman versus Switzerland (1983)*, the Court found that states have the responsibility to *«organize their legal systems in a way to make possible for courts to respect the requests from article 6,paragraph 1, including the one about trial in a reasonable time».* [14]

The convention on human and minority rights and the Constitution of Serbia guarantee to everyone the right to appeal or use other legal means against a decision that decrees on his rights, obligations or lawful interests. However, it is not sufficient to only proclaim the right to access to a court. Thus, the state is obliged to provide assistance of an attorney, if that is necessary to really make

13 In one case, the European court ruled that proceedings that had lasted for more than seven years represented violation of the right to fair trial.

14 In: Pravo na pravično suđenje – vodič za primenu člana 6 Evropske konvencije o ljudskim pravima, Nuala Mole, Catharina Harby (editors in Serbian language Tatjana Papić and Vladan Joksimović), Savet Evrope, Beograd, 2003, p. 53

possible access to a court. Yet another problem is the immunity of some individuals, which sometimes violates the right to access to a court.[15]

Keeping in mind the material situation of refugees, the amount of legal costs could be an aggravating factor for their access to a court. Although in our legal system these costs are not too high, they could still represent a serious problem for this vulnerable group.[16]

Decisions of the European court in the matter of breaches of particular rights (and especially article 6 of the ECHR) can impose an obligation for states signatories to conduct criminal investigations. The absence of investigation (or its sloppiness) can represent a breach of article 13.[17] If there is a serious doubt that there occurred a violation of rights (murder, torture, unlawful arrest…), and if the state responsibility has been established, the request of an efficient legal remedy implies (besides the payment of indemnities) also a detailed and efficient investigation focused on identification, pursuit and punishment of the perpetrators.[18] The absence of an efficient pursuit of the perpetrators (passivity of the prosecutors; silence of the police towards the request for necessary information) who have been notified for legal infraction in the matter of the forcible conscription of refugees in 1995 could be an additional argument for the thesis that the right to efficient remedy in domestic praxis has not been fulfilled in many cases.

One of the biggest problems of the domestic legal order is inexistence of a central court mechanism for protection of human rights. The adoption of the Constitutional convention of Serbia and Montenegro abolished the Federal constitutional court – an institution that, among other means, protected human rights through the institute of constitutional appeal. The actual Court of Serbia and Montenegro has much less competence and leeway than the former Federal constitutional court had. As for protection of human rights, the Court of Serbia and Montenegro is, on virtue of the Constitutional convention and the Law on the Court of Serbia and Montenegro, competent to decide on citizens' complaints when institutions of Serbia and Montenegro (or one of the member states) violate rights

15 See more in: Ljudska prava u Srbiji i Crnoj Gori 2004, Beogradski centar za ljudska prava, Beograd, 2005, p. 119

16 We have an interesting situation in Montenegro, where the stipulations of the Law on administrative costs that condition the submission of entreaties by prior payment of the costs have been declared as unconstitutional by the Constitutional court, in 2004. The Court stated that "legal regulation of relations resulting from the obligation of payment of taxes and dues, cannot be opposed to the realization of basic human rights guaranteed by the European Convention on human rights and freedoms" (quoted according to Ljudska prava u Srbiji i Crnoj Gori 2004, Beogradski centar za ljudska prava, Beograd, 2005, p. 119

17 As happened in the cases Aksoy versus Turkey, Aydin versus Turkey and Kaya versus Tuirkey

18 See Kilic versus Turkey

or liberties guaranteed by the Constitutional convention, if no other procedure of legal protection is provided. This resembles the erstwhile institute of constitutional appeal, especially because the same restrictive formulation is used ("if no other procedure of legal protection is provided" – art. 46 of the Constitutional convention; art. 62 of the Law on the Court of Serbia and Montenegro). It would mean that this mechanism of protection could only be used when there is not any legal (therefore, not only court) protection, regardless of its efficiency. The existence of this formal condition and unwillingness to delve into the judgment of efficiency of some particular remedy will in praxis lead to inefficient control, and the use of citizens' appeal as a remedy will in praxis be probably very rare. This substantially reduces the possibility of use of efficient remedy for correction of violation of some human right. Because of similar institutional defects, international bodies for the control of respect of human rights have condemned other states. [19]

AWAITING JUSTICE

"*The situation in the former Yugoslavia was terrible, and the citizens of Serbia were exposed to many problems and rights violations of which the grand majority has never been punished legally or in courts…"* This is one of the most frequent objections, even among judges, about various attempts to find a mechanism in our domestic legal system that would make possible compensation of the forcibly conscripted refugees.

It is beyond doubt that the last decade of the 20th century (as well as the current decade) represented a great challenge to all those who lived in the former Yugoslavia. In that sense, the statement that could be heard on this occasion is quite correct. However, that could be no excuse for avoiding or even openly refusing to offer a legal possibility, a reasonable and efficient means of compensation of damage, rehabilitation or some other kind of just compensation (financial or moral) of the victims of the forcible conscription of refugees. First of all, the refugees have not willingly left Croatia and Bosnia & Herzegovina – they were forced to do so by war and the most atrocious crimes committed therein. Secondly, the state of Serbia has, through its highest instances, state-run media and creators of the public opinion, strongly promoted the policy of support of "the Serbs outside of Serbia" and thus deceived the public in Serbia and the Serbs in Croatia and Bosnia that it would assist them. Of course, instead of a substantial assistance of the genuinely endangered people in those territories, the real policy came down to conquest of territories and monopoly on commerce and smuggling

19 Thus, a similar situation in Croatia and the impossibility of the Constitutional court of Croatia to offer protection in the last instance in the matter of alleged violations have been judged in the terms of article 13 of the ECHR.

of luxurious and other profitable merchandise. It is a terrible hypocrisy to look away from those people today and say "the times were tough then". Namely, regardless of changes of governments or regimes in a country, *the state remains the same*. The elementary principle of legal security (if we forget for a moment the moral norms that every state and its agencies should be inspired by), ordains that citizens' rights and duties cannot depend on the change of a regime. That is why basic human rights and liberties must be guaranteed and protected. They have to be especially protected and the transgressors punished when an undemocratic regime is deposed. This is a legal, moral and political lesson that is always important. Those horrifying body counts and references to "my case" are regularly an excuse for deprivation of rights and justice and avoidance of one's own responsibility. Avoidance of responsibility, however, cannot last forever.

A solution of the problem of compensation of the victims and prosecution of those who had conceived, organized and carried out the forcible conscription and torture of the conscripted will be found out. It is up to this state, all its agencies *and all its citizens* to choose a way and a formal ground of a solution. Will it be in the form of lawsuits in domestic courts and a humanistic attitude towards those unfortunate individuals? Perhaps will courts, prosecutors, Parliament and the government come to feel one day that they owe something to these people. Will it be done within a serious strategy of confrontation with the past? Perhaps the implementation of the Law on the responsibility for violations of human rights (Law on lustration) will start one day. Finally, and this is the worst solution, it will be done after a judgment of an international court that this country is not able to guarantee and protect human rights.

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