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Introduction

The project "Legal Status and Protection of Internationally Displaced Persons, Refugees, Asylum Seekers and 'Invisible' Persons without IDs" is a project of the South East European Law School Network implemented by the Faculty of Law of the University of Niš (Serbia), as the project lead, and Faculty of Law, University of Zenica (Bosnia and Herzegovina), Iustinianus Primus Faculty of Law, Ss. Cyril and Methodius University of Skopje (North Macedonia) and Faculty of Law, Josip Juraj Strossmayer University of Osijek (Croatia) as project partners.

Within the project the national experts involved developed a A Guide to Good Practice where the national reports explain the legal position of these persons as regulated by different branches of law (e.g. Public International Law, Private International Law, Social Protection and Labour Law, Human Rights, European Law and related asylum policy, etc).

Having in mind the scientific approach to the development of the national reports the Editorial Board of the SEE Law Journal decided the guide to good practices in the English language to be published as a special issue of the journal. The Guide to Good Practice will also be published in a version of the language of the authors by the project consortium.

We strongly believe that by publishing the Guide to Good Practice in the SEE Law Journal we will contribute to better understanding of the position of the Internationally Displaced Persons, Refugees, Asylum Seekers and 'Invisible' Persons without IDs and improving the national policies.

Prof. Dr. Neda Zdraveva

Editor-in-chief

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DEFINITION OF REFUGEE IN INTERNATIONAL LAW[1]

1. Introduction

A considerable portion of the negotiations on the occasion of drafting the text of the Convention Relating to the Status of Refugees 1951[2] (hereinafter: The Convention) was committed to consensus-seeking between the states regarding the definition of refugee. Understandably, since the states were aware that the scope of their consequent obligations will very much depend on the circle of people to be encompassed by the definition.

The Convention provides the definition in art. 1A(2) saying that the term refugee shall imply any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

A similar definition is also contained in art. 2 of the Serbian Law on Asylum and Temporary Protection 2018[3], prescribing that a refugee is "an alien who, owing to well-founded fear of being persecuted for reasons of race, sex, language, religion, nationality, or membership of a particular social group, or political opinion, is outside the country of his origin, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, as well as a stateless person who is outside the country of his habitual residence, and who is unable or, owing to such fear, unwilling to return to that country". Noticeably, the Serbian law states sex and language as the grounds of persecution in particular. This does not represent, however, any essential difference in relation to the definition in the Convention, as these grounds of persecution are classified under persecution due to "membership of a particular social group".

In the definition of refugee, it is the state where danger of persecution threatens a person. Most frequently, it is the state the nationality of which the person possesses, which is designated as the state of origin or the home state. Speaking about a stateless person, since he does not possess the nationality of any country, the danger of persecution is assessed in relation to the state where that person de facto lives (the state of habitual residence). As opposed to the state where the danger of persecution threatens the person, the state that provides refugee protection to the persecuted person occurs and it is called the state of refuge (state of admission, asylum state).

The definition of refugee contained in art. 1A(2) of the Convention has five relevant elements, as follows: 1) the person must be outside the country of his origin, i.e the country of his habitual residence; 2) well-founded fear of being persecuted; 3) persecution; 4) relevant reasons for persecution; and 5) lack of protection by the state of his origin, i.e the country of his habitual residence. These elements represent the inclusive criteria that must be cumulatively met in order to acquire refugee status (the so-called inclusive clauses). All these inclusive requirements must be fulfilled by the person at the moment of decision making on determining his refugee status.

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[1]This paper represents a shortened version of Chapter 1 of the first part of the monograph by N. Raičević, Zaštita izbeglica u međunarodnom pravu (Protection of refugees in international law), Niš: Faculty of Law of the University of Niš, 2018, p. 238.

[2]Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, Vol. 189, p. 137; Službeni list FNRJ – Međunarodni ugovori , no. 7, 1960.

[3]Law on Asylum and Temporary Protection, Službeni glasnik RS, no. 24, 2018.

2. Stay outside the country of origin or habitual residence

Art. 1A (2) of the Convention provides for that refugee status may only be acquired by a person who is "outside the country of his nationality", i.e. "outside the country of his former habitual residence", if the person in question is a stateless person. Observably, only those persons that are no longer in their own country, i.e. in the country of their habitual residence, fall within the reach of the Convention. As far as he is in his own state, the person may not acquire the refugee status. It is essential that the refugee must be an alien for the country of refuge (a foreign national or a stateless person) since international law does not recognise a possibility of being a refugee in one's own country.

Persons who stayed in their own county may eventually acquire the status of "internally displaced persons", but they are not entitled to refugee protection. Internally displaced persons are not included in the protection established by the Refugee Convention, since, otherwise, the sovereignty of the state where they are situated would be violated[4], and actually it would also be difficult to be protected by other states while not being under their jurisdiction. The primary responsibility for the protection of internally displaced persons lies with the country of origin, but other countries are expected to provide "timely and speedy humanitarian assistance and support"[5].

To acquire refugee status, a person must cross international borders of his country. Therefore, refugee protection may not be provided to persons exposed to persecution and who are prevented to leave their country.[6] This requirement prevents filing an application for acquiring refugee protection in diplomatic and consular missions located in the territory of the country of persecution because foreign missions do not form a part of the territory of the sending state, but a part of the territory of the receiving state. A person shall not be deemed to have left his country even in the event of boarding into a foreign aircraft or a foreign ship as long as such means of transport are in the airspace/coastal sea of the concerned country. Finally, this condition shall not be met either in the event of an eventual entry into foreign military bases in the state of origin or its other areas under an eventual control by foreign states. Persons found in foreign diplomatic and consular missions, foreign aircraft or ships or in other areas controlled by foreign states cannot obtain protection against refoulement referred to in art. 33 (1) of the Refugee Convention.

As said, a person has to be in the foreign state territory for acquiring refugee status. Whereby, it is irrelevant whether the person arrived in this country legally or illegally. As soon as he finds himself in the territory of the receiving country, irrespective of the manner of entry, it shall be considered that the condition of staying outside the country of origin is met. Art. 31 of the Refugee Convention even prohibits the Member States to impose penalties on refugees who have entered their territory illegally.

Leaving their home country does not even have to be the consequence of an actual persecution, or their fear of persecution. Possibly, such person had left his country voluntarily (for the purpose of employment or studying abroad), and that fear of persecution occurred afterwards. It may be a consequence of some political changes in the country of origin or some activities of the person himself, and here we speak about sur place refugees[7].

It is generally recognised that the nationality of a person is to be determined solely by the national regulations of the country involved[8]. Unless it can be reliably established that the person has a nationality, it will be proceeded as in the case of a stateless person.

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[4]J. C. Hathaway, M. Foster, The Law of Refugee Status, Cambridge, 2014, p. 18.

[5]Executive Committee of the Programme of the United Nations High Commissioner for Refugees, Conclusion No. 75 (XLV), Internally Displaced Persons, 1994, paras. d and f.

[6]In this situation, protection of a person may be achieved by other international law mechanisms or by political pressure on his country.

[7]More on this category of refugees, see: N. Raičević, Specifični slučajevi utvrđivanja izbegličkog statusa (Specific cases of determining refugee status), In: R. Lukić (Prir.), Zbornik radova sa naučnog skupa Pravo i vrijednosti (Collection of works of the Law and Values scholarly gathering) (p. 125-143). East Sarajevo: Faculty of Law of the University of East Sarajevo, 2019, p. 126-131.

[8]A.T. Fragomen, The Refugee: A Problem of Definition, Case Western Reserve Journal of International Law. 1(III), 1970, p. 55.

Regarding stateless persons, for the needs of art. 1A 2) of the Convention, the state where the person has his habitual residence must be identified. If this is, however, a person having two or more nationalities, he may acquire refugee status if he suffers persecution in every country the nationality of which he has. Thus, a dual/multiple nationality holder may not achieve refugee status in the event of losing the protection of one of the countries whose nationality he has, and he can receive protection of some of the remaining countries that he is in citizenship relationship with.

3. Well-founded (credible) fear of persecution

For the person to acquire refugee status, he must have "a well-founded fear of persecution". The term "well-founded fear of persecution" means "a person who has either been actually a victim of persecution or can show good reasons why he fears persecution"[9]. Fear of persecution is assessed in relation to the moment of decision making on the application for acquiring refugee status, and not in relation to the moment when the applicant left his country or filed the application thereof. If the person cannot prove that there is an actual well-founded (reasonable) fear of current or future persecution, he may not fall within the reach of art. 1A (2) of the Refugee Conventions.[10] UNHCR and many states share the stand that a well-founded fear of persecution has two components: subjective and objective. For the existence of a well-founded fear of persecution, there must be subjective fear - in terms of trepidation that the person will experience something unpleasant, and objective danger - which it is actually going to happen. The UNHCR asserts that "To the element of fear – a state of mind and a subjective condition – the qualification 'well‑founded' is added. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well‑founded fear" therefore contains a subjective and an objective element, and in determining whether a well‑founded fear exists, both elements must be taken into consideration."[11]

The Anglo-Saxon states opted for such bipartite (two-part) approach, demanding the existence of subjective and objective elements of a well-founded fear of persecution. On the contrary, the EU Directive on standards for the qualification eliminates the need for any assessment of subjective perception of refugee since art. 9 only lists the objective elements on which the decision on determining refugee status should be based.[12] And the continental law tradition states, generally, do not support the two-part approach in determining a well-founded fear of persecution.[13]

The doctrine is divided in this regard. The majority of authors believe that a well-founded fear of persecution implies the existence of both components- subjective and objective. Both must be taken into consideration since fear is a very personal response to a specific situation, but it must also be justified within the given circumstances for the needs of art. 1A (2) of the Convention[14]. The term "well-founded fear of persecution" implies the mental state of the applicant expressing his trepidation

[9]Report of the Ad Hoc Committee on Statelessness and Related Persons, 17 February 1950, E/1618; E/AC.32/5, http://www.refworld.org/docid/40aa15374.html [Accessed on 08. 03. 2018].

[10]The House of Lords expressed such an attitude in a case concerning the application of a few Albanians from Kosovo and Metohija. In the beginning of the 2000's, several Albanians from Kosovo and Metohija did not want to return to Kosovo and Metohija from Great Britain, referring to their fear of continuous consequences of persecution that they had experienced in the past. They alleged that during 1997 and 1998 Serbian police and military forces committed a number of crimes (severe bodily injuries with cold and firearms inflicted even on children, rape of a woman in front of her family and neighbours, robbery of a house). They, actually, invoked the derogation of art. 1C (5) of the Refugee Convention, wishing to remain in Great Britain due to "convincing reasons arising from earlier persecution", i.e. because they will be exposed to ostracism by their community after returning to Kosovo and Metohija. As the application of the mentioned exception was not accepted, the Court dealt with the eventual possibility of a direct recognition of their refugee status on the grounds of the definition referred to in art. 1A(2) of the Convention, but it concluded that was impossible since at the moment of decision making there was no fear of present or prospective persecution; In re B (FC) (Appellant) (2002). Regina v. Special Adjudicator, Ex parte Hoxha (FC), [2005] UKHL 19, United Kingdom: House of Lords, 10 March 2005, paras. 12, 49.

[11]UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva: UNHCR, 2011, para. 38.

[12]F. Cherubini, Asylum Law in the European Union, London/New York: Routledge, 2015, p. 195.

[13]J.C. Hathaway, W.S. Hicks, Is There a Subjective Element in the Refugee Convention's Requirement of Well-Founded Fear, Michigan Journal of International Law, 2 (XXVI), 2005, p. 511. For the practice of the Netherlands, see: K. Bem, Defining the Refugee – American and Dutch asylum case-law 1975–2005, VU Migration Law Series No. 6. Amsterdam: Faculty of Law of the University of Amsterdam, 2007, pp. 119-122.

[14]A.T. Fragomen, op. cit., p. 53.

and fear that he will be exposed to persecution, but also requires the existence of an objective assessment.[15] On the contrary, the other part of doctrine criticises such two-part approach, pointing out that the subjective element has no grounds in the text of art. 1A (2) of the Convention, neither in travaux préparatoires. Insisting on the subjective element imposes an additional obligation to the applicant to prove the existence of subjective fear, narrowing down the definition of refugee thereby. According to these authors, the concept of a well-founded fear is essentially an objective concept and its purpose is deprivation of protection to persons unable to prove the existence of a real chance to be exposed to present or prospective persecution, and not to condition the obtaining of refugee status with proving any subjective fear[16]. The state of mind of the applicants cannot be a good indicator of any real danger threatening them in the country of origin since they, because of their character or the lack of information, do not feel fear of returning although there is an objective danger for them there[17]. The diversity of applicants in relation to culture, language, temperament makes it difficult to the decision makers, and sometimes prevents them, to reliably establish the existence of subjective fear, i.e. whether the applicant is truly afraid or not.[18] If the existence of such fear is not established, the applicant will be deprived of refugee protection despite a conclusion that he faces a chance of being persecuted if returned to the country of origin, and it is unacceptable.[19]

3.1. Subjective element

Subjective element implies the existence of fear of persecution in the mind of the applicant. Fear is an emotion that appears as a consequence of perceiving or expecting danger or due to a serious threat and represents a personal response to such a situation. Fear, actually, represents a perception of danger or awareness of danger.[20] Subjective fear of the applicant must exist at the moment of decision making upon his application. This fear, however, does not have to originate from the previous persecution of the applicant, but it may represent a fear of future conduct of the state of origin. The applicant will fulfil the subjective requirement if he proves the existence of fear of persecution in the event of his return to the country of origin.

The UNHCR clarifies that when subjective fear is determined, the applicant's personal characteristics must be taken into consideration because "psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, any disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure."[21] Additionally, it will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences.[22]

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[15]J.H.F. Andrade, On the Development of the Concept of 'Persecution' in International Refugee Law, Anuário Brasileiro de Direito Internacional, 2(III), 2008, p. 123. Such a stand is also advocated by: International Commission of Jurists, Migration and International Human Rights Law, Practitioners Guide No. 6, Geneva, 2014, p. 57; P. Sinha, Asylum and International Law, The Hague: Martinus Nijhoff, 1971, p. 102; R. Thomas, Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined, European Journal of Migration and Law, 1(VIII), 2006, p. 79; N. Nathwani, Rethinking Refugee Law, The Hague/London/New York: Martinus Nijhoff Publishers, 2003, p. 107; T.N. Cox, Well-Founded Fear of Being Persecuted: The Sources and Application of a Criterion of Refugee Status, Brooklyn Journal of International Law, 2(X), 1984, pp. 333–379; R.C. Chhangani, P.K. Chhangani, Refugee Definition and The Law in Nigeria, Journal of the Indian Law Institute, 1(LIII) 2011, p. 52; D. Lapaš, Međunarodnopravna zaštita izbjeglica (International Legal Protection of Refugees), Zagreb: Hrvatski pravni centar, 2008, p. 5; I. Krstić, M. Davinić, Pravo na azil – međunarodni i domaći standardi (The Right to Asylum - International and Domestic Standards), Beograd: Faculty of Law of the University of Belgrade, 2013, p. 97.

[16]J. C. Hathaway, M. Foster, op. cit., p. 92.

[17]F. Cherubini, op. cit., p. 13.

[18]Determining fear is also made difficult by the fact that illiterate persons or persons having problems in communication are not able to express their fear in words, and such fear is frequently not identified when a translator is used; J. C. Hathaway, M. Foster, op. cit., p. 96.

[19]On these and other arguments, see in more detail: J.C. Hathaway, W.S. Hicks, op. cit., pp. 511, 514.

[20]Matter of Acosta, A–24159781, 19 I.& N. Dec. 211 (1985), 1 March 1985.

[21]UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva: UNHCR, 2011, para. 40.

[22]Ibid., para. 41.

Eventual mental disorder of the applicant cannot be taken as an argument that he does not feel any subjective fear of persecution and that he cannot be granted refugee protection on such grounds. Likewise, this element may not be insisted upon in relation to children either, particularly the younger ones. Most courts in the states that accept the bipartite test, exempt mentally disabled persons and children from the duty to demonstrate subjective fear as a precondition for acquiring refugee status.[23]

3.2. Objective element

In addition to fear as a subjective element, the definition of refugee also contains an objective qualification, requiring such fear to be reasonable (well-founded). It is not enough that the applicant feels fear, but such fear must be well-founded, i.e. reasonable under the given circumstances.[24] The applicant's state of mind must be supported with the objective situation in his country.[25]

The Convention requires fear to be justified, thus also to be determined with the objective element, meaning that actually such circumstances exist in the country of origin where an average person, if he were in the place of the concerned applicant, would fear persecution for any of the reasons set out in art. 1A(2) of the Convention.[26] The receiving state authorities that decide on the refugee application must answer the question whether the applicant's fear is grounded upon the criteria of a neutral observer. Therefore, for the fear of persecution to be well-founded (reasonable), a real, i.e. actual danger of persecution must exist.

When establishing the existence of a well-founded fear, the applicant's emotional characteristics are not considered, such as emotional instability, temperament, personnel level of courage and boldness.[27] However, certain personal characteristics such as age, sex and physical weakness should be given an appropriate significance when assessing the fulfilment of an objective requirement.[28]

The objective requirement is necessary as otherwise for acquiring refugee status it would be enough that the applicant believes the danger of being persecuted is serious and there is no other way to avoid persecution, save for fleeing abroad. The states were not ready to accept such a liberal concept as it would significantly crumble their sovereignty in the immigration plan.

Without such an objective test, many mentally unbalanced persons would be entitled to refugee status, although objectively there is no need for it.[29]

The fulfilment of the objective element, i.e. the existence of a well-founded fear is evidenced on the basis of data possessed by the receiving country about the situation of the country of origin, as well as on the basis of statements of relevant witnesses. The applicant's own testimony without corroborative evidence "may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear.[30]

4. Persecution

Although persecution (being persecuted) represents the essence of the definition referred to in art. 1A (2) and the basic parameter for determining refugee status, it is not defined by the Convention. Some authors hold that the drafters of the Convention deliberately left it undefined so that newly emerging forms of persecution would be encompassed by the term, as not all the possible forms of

[23]J.C. Hathaway, W.S. Hicks, op. cit., p. 512.

[24]As said by an Australian court, "Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear". Chan v. Minister for Immigration and Ethnic Affairs, [1989] HCA 62; (1989) 169 CLR 379, Australia: High Court, 9 December, para. 16.

[25]UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva: UNHCR, 2011, para. 38.

[26]D. Lapaš, op. cit.,p. 5. When determining that fear is well-founded, a comparison must be made between the applicant's reaction and "an average person's" reaction in the same or similar situations. If found out that an average person would react in the same manner as the applicant, then the objective test is satisfied and the applicant may acquire refugee status; N. Nathwani, op. cit., p. 109.

[27]Ibid., para. 111.

[28]Ibid., para.

[29]A. Fragomen, op. cit., p. 54.

[30]Matter of Mogharrabi, Interim Decision #3028, 19 I. & N. Dec. 439, 445 (BIA 1987), 12 June 1987.

persecution could have been foreseen in advance[31], which is also supported by the UNHCR[32]. There is no definition of persecution in any other international treaties safeguarding human rights.[33] Thus, persecution must be considered "a living thing, adopted by civilised countries for a humanitarian end, which is constant in motive but mutable in form"[34].

Pursuant to art. 33(1) of the Convention, it can be concluded indirectly that endangering life or freedom of a person indisputably represents persecution within the meaning of art. 1A(2).[35] Persecution, however, cannot be reduced only to the activities stated in art. 33(1) of the Convention. The practice of countries, the UNHCR's publications, and doctrinary stands show that some other activities can represent acts of persecution as well. They are also linked to violations of human rights[36] and exactly those ones contained in the most important international documents on human rights.

For a violation of human rights to have a character of persecution, it must be serious and based on any of the five foundations contained in art. 1A (2) of the Convention (race, religion, nationality, membership of a particular social group or political opinion). Minor human rights violations are not considered to be persecution. Even each serious human rights violation will not represent an act of persecution. The drafters of the Refugee Convention restricted the protection of refugees only to serious human rights violations in a situation where the state does not comply with the obligation of protecting their own population.[37] Starting from there, persecution is defined as a "continuous or systematic violation of fundamental human rights that shows the state's failure to safeguard some of the fundamental rights recognised by the international community".[38]

The Convention drafters' intention was not to "respond to some human rights violations per se, but to intervene only there where such violations are an indicator for a breakdown of national protection".[39] For the existence of persecution, it is not enough to violate human rights, or that there is any danger that it will happen, but it is also necessary that the victim in such a situation cannot achieve protection before the domestic authorities. Therefore, to have persecution, there must be a serious human rights violation and that the country is not capable of or does not want to provide efficient protection. As one may see, two requirements must be met for the existence of persecution: serious human rights violation and absence of protection by the state authorities. It is presented in a picturesque way with the following formula: persecution = serious harm + the failure of state protection,[40] which is also accepted in the case law.[41]

Finally, it should be noted that, unlike the Convention, the EU Qualification Directive[42]contains a description of persecution and its manifestations. Art. 9(1) of the Directive provides for that an act will be regarded as an act of persecution if it is: (a) sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights

[31]J. C. Hathaway, M. Foster, op. cit., p. 182.
[32]UNHCR, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, 2001, Retrieved 10 March 2021, https://www.refworld.org/docid/3b20a3914.html, para. 16.
[33]Only in the Roma Statute, the definition of persecution as a potential crime against humanity can be found. Article 7(2)g defines persecution as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".
[34]R v. Immigration Appeal Tribunal and Another; Ex parte Shah, [1997] Imm AR 145 (Eng. HC, Oct. 25, 1996); as quoted by J. C. Hathaway, M. Foster, op. cit., p. 182. The interpretation of the term "persecution" by doctrine and case-law will contribute to a dynamic, progressive and yet harmonious interpretation of the refugee definition; J.H.F. Andrade, op. cit., p. 136.
[35]A.T. Fragomen, op. cit., p. 54.
[36]K. Hausler, Refugees and asylum seekers from conflict-affected States, In: A. Bellal (Ed.), The War Report: Armed Conflict in 2014, Oxford: Oxford University Press, 2015, p. 428.
[37]J. C. Hathaway, M. Foster, op. cit., p. 184.
[38]J.C. Hathaway, The Law of Refugee Status, Toronto: Butterworths, 1991, pp. 104–105, 112.
[39]J. C. Hathaway, M. Foster, op. cit., p. 184.
[40]Refugee Women's Legal Group, Gender Guidelines for the Determination of Asylum Claims in the UK, London: Refugee Women's Legal Group, 1998, p. 10.
[41]Islam (A.P.) v. Secretary of State for the Home Department & R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.), United Kingdom: House of Lords, 25 March 1999, p. 17.
[42]Directive 2011/95/EU.

and Fundamental Freedoms; (b) an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a). Article 9(2) of the Directive prescribes that acts of persecution can take the form of acts of physical or mental violence, including acts of sexual violence; legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; prosecution or punishment which is disproportionate or discriminatory; denial of judicial redress resulting in a disproportionate or discriminatory punishment; prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion from being a refugee; acts of a gender-specific or child-specific nature.

The Law on Asylum and Temporary Protection also follows the approach of Directive EU 2011/95. Article 28 lists the forms of persecution that are almost identical to those stated in the Directive.

The list of concrete acts of persecution is set out in art. 9(2) of EU Directive and the one in Serbian law are not final, but only indicative. The listed acts can be a very good direction to the acting authority in determining whether there is persecution in a given situation.

The agent of persecution can be the state of origin. It can be a direct agent of persecution through its organs or a person whose acts can be assigned to the state (de jure and de facto organs). In practice, persecution is usually linked to the activities of state organs. They can be central organs, but also regional and local. Besides the state, agents of persecution, however, can also be non-state (private) entities as the Convention in art. 1A (2) did not prescribe (although it could have) that there had to be "a fear of persecution by the national state", but it only prescribed that there had to be "a fear of persecution".[43]

Agents of persecution can be various non-state entities, such as organisations, groups, or individuals. In principle, anyone can commit an act of persecution in terms of art. 1A (2) of the Refugee Convention.[44]

In order for human rights violations by non-state entities to constitute persecution, it is essential that the state in which these violations occur is unwilling to or incapable of providing protection to victims. The UNHCR in its Handbook says that any discriminatory or other violent acts of the local populace will be considered as persecution if they are tolerated by the authorities or if the state organs refuse, or prove unable, to offer effective protection.[45]

5. Relevant reasons of persecution

No fear of just any persecution in the country of origin is eligible to result in acquiring refugee status. In order to acquire refugee status, a fear of persecution must be based on any of the five reasons (grounds) set out in art. 1A (2) of the Convention: race, religion, nationality, membership of a particular social group[46] or political opinion.[47] If a decision to violate the rights of a person had nothing to do with any of these five reasons, then there is no persecution in terms of the Refugee Convention.

Five reasons for persecution, set out in art. 1A(2) of the Convention, "reflect characteristics or statuses which either the individual cannot change or cannot be expected to change because they are so closely

[43]Minister for Immigration and Multicultural Affairs v. Khawar, [2002] HCA 14, Australia: High Court, 11 April 2002, para. 112.

[44]C.W. Wouters, International Legal Standards for the Protection from Refoulement (PhD thesis), Leiden: Leiden University, 2009, p. 81.

[45]UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva: UNHCR, 2011, p. 15, para. 65.

[46]In the UNHCR Statute, "a particular social group" is not foreseen as a relevant reason for persecution. The Statute of this Agency contains only four reasons for persecution (race, religion, nationality, and political opinion).

[47]These reasons can be divided into two groups. The first one includes the reasons that are not under the refugee's control (race, religion, membership of a particular social group), and the other one includes those under his control (religion and political opinion); A. Grahl-Madsen, The Status of Refugees in International Law, Vol. 1, Leyden: A.W. Sijthoff, 1966, pp. 57–58. Observably, contrary to the contemporary treaties on human rights, sex is not explicitly stated as a reason for persecution. Protection against persecution in such situations is, however, provided on the basis of the generic reason of "a particular social group".

linked to his identity or are an expression of the fundamental human rights."[48] All the stated reasons have equal significance, so there is no hierarchy between them.[49]

Any fear of being persecuted because of some other reason that is not set out in art. 1A(2) is irrelevant from the standpoint of the Convention and cannot result in acquiring refugee status. The reasons for persecution listed in art. 1A(2) of the Convention serve as limiting factors when determining the term refugee. By entering it into the definition, the Convention drafters wanted to make their future obligations "foreseeable".[50]

To get qualified as a refugee, it suffices that a person is threatened by persecution at least under one of the stated reasons. The person may be threatened by persecution under two or more reasons, which is very often in practice. For instance, the person may be exposed to persecution because of his nationality and/or religion, and because of voicing his opposition to such an action of the authorities, he is also exposed to persecution for his political opinion.

It should be pointed out that it is not important whether the applicant actually has any of the five characteristics embodied in the reasons for persecution, but what is important is whether the actor of persecution assigns (attributes) this characteristic to him.[51] When determining the existence of these characteristics "it should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution."[52] The EU Directive on standards for the qualification explicitly ascertains it in art. 10(2), which reads as follows: "When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution."[53]

6. Lack of protection in the country of origin

The lack of national protection is the last among the constituent elements of the refugee definition contained in art. 1A (2) of the Convention. The definition defines that the protection of refugees is granted to a person having a well-founded fear of being persecuted in the country of origin, i.e. of his habitual residence if he is "unable or, owing to such fear [...] is unwilling to avail himself of the protection of that country, or if the person in question does not have a nationality and "is unable or, owing to such fear [...] is unwilling to return to the country of his habitual residence.

The Refugee Convention recognises refugee status only to persons not having the protection of their own state and only until such protection (or the protection of any other state) is not regained. Refugee status will not be recognised even though such persons are exposed to serious violations of human rights if their country can protect them. As far as there is a possibility of being protected by one's own state, even the most serious human rights violations may not be considered as persecution, and consequently, refugee protection may not be granted either. Refugee protection can only be obtained when the state of origin does not want to or cannot provide protection to its nationals.

There is no consent in the doctrine and practice in relation to the term "protection" used in the last part of the definition of refugee; therefore, it is necessary to explain these different understandings. Also, there is a need to clarify "possibility of internal protection" as an institute the application of which results in the deprivation of refugee protection.

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[48]RT (Zimbabwe) and others v. Secretary of State for the Home Department, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012, para. 25.

[49]HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, para. 10.

[50]N. Nathwani, op. cit., pp. 79–80, 114.

[51]"For example, a person may not in fact hold any political opinion, or adhere to any particular religion, but may be perceived by the persecutor as holding such an opinion or being a member of a certain religion. In such cases, the imputation or perception which is enough to make the person liable to a risk of persecution is likewise, for that reason, enough to fulfil the Convention ground requirement, because it is the perspective of the persecutor which is determinative in this respect"; UNHCR, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees. Retrieved on 10 March 2021, https://www.refworld.org/docid/3b20a3914.html, 2001, para. 25.

[52]Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993.

[53]Directive 2011/95/EU.

Refugee protection is a substitute for national protection and is provided when the home country does not protect its nationals. As far as national protection is available, the persecuted person may not acquire refugee status. Inasmuch as such prosecution is serious, the person is not entitled to refugee protection if he avails himself of the protection of his own country. The receiving country authorities will not recognise refugee status as long as the existing possibilities for the realisation of protection by the country of origin are exercised.[54]

When fear of being persecuted is only limited to a specific part of territory, because the state cannot provide protection in that territory, and in other regions there is no threat of persecution[55], the person will not be provided refugee protection abroad. He is expected to relocate to a region where there is no threat of persecution, and thus to obtain the protection of the state of origin. Being relocated to another part of the country, such a person will live safely, so there is no need to activate the mechanism of refugee protection.

This institute, linked to potential protection in other regions of one's own state is called differently: "internal protection alternative", "internal flight alternative", "internal relocation alternative".[56] Internal protection alternative is an institute on the basis of which a person who is exposed to risk of persecution in one part of his country of origin, but not in the entire territory of that country.[57] The existence of protection in another part of the country of origin eliminates the need to apply refugee protection. Refugee protection is not necessary as long as the "home state can afford what has variously been described as "a safe haven", "relocation", "internal protection", or "an internal flight alternative" where the claimant would not have a well-founded fear of persecution for a Convention reason"[58].

7. Summary

The Convention Relating to the Status of Refugees 1951 in art. 1A(2)defines a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." A similar definition is also contained in art. 2 of the Serbian Law on Asylum and Temporary Protection.

The stated definition of refugees has five relevant elements. To be able to acquire refugee status, he must be outside the country of his origin, i.e. outside of his habitual residence, if a stateless person is in question. Therefore, only those persons that are no longer in their own country, i.e. in the country of their habitual residence, fall within the reach of the Convention. As long as the person is in his own state, he may not acquire refugee status as the international law does not recognise the possibility of being a refugee in one's own country.

The second element is that the person has a well-founded fear of being persecuted, meaning that he is a victim of actual persecution or can show a good reason why he fears persecution. Fear of being persecuted is assessed in relation to the moment of deciding upon the application for acquiring refugee status, and not to the moment when the applicant left his country or when filed the application.

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[54]"If the victim has the possibility of escaping persecution within the boundaries of the state, it is difficult to maintain the necessity of flight abroad "; N. Nathwani, op. cit., p. 101.

[55]"The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus, in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country."; UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva: UNHCR, 2011, para. 91.

[56]N. Kelley, Internal Flight/Relocation/Protection Alternative: Is It Reasonable, International Journal of Refugee Law, 1(XIV) 2002, p. 5.

[57]Here, what we actually have is only a repatriation of "internally displaced persons" in the regions where they are not threatened by persecution. More about it in: F. Cherubini, op. cit., p. 28.

[58]R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthonypillai Francis Robinson, Case No: FC3 96/7394/D, United Kingdom: Court of Appeal (England and Wales), 11 July 1997.

Persecution, which represents the central element of the definition referred to in art. 1A(2), is not defined by the Refugee Convention. Some authors believe that the drafters of the Convention intentionally omitted its definition so that some other new forms of persecutions could be included by that term. In the broadest sense, persecution is a serious human rights violation when the victim cannot achieve protection before domestic authorities. Persecution is usually linked to the state's acts, but it can stem from the non-state agents.

However, not any persecution in the country of origin will result in acquiring refugee status. The person will only qualify for refugee status if he fears persecution for any of the reasons set out in article 1A (2) of the Convention. Persecution must be enforced according to one or more of the following grounds: race, religion, nationality, membership of a particular social group, or political opinion.

The last element of the definition of refugee is the lack of national protection of the state of origin, i.e. of habitual residence, since refugee status will not be recognised even though the persons have been exposed to serious human rights violations

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LEGAL STATUS AND THE PROTECTION OF INTERNATIONALLY DISPLACED PERSONS/MIGRANTS/ASYLUM SEEKERS/REFUGEES AND LEGALLY "INVISIBLE" I.E. STATELESS PERSONS IN THE EU

This report is focused on the international and European legislation regulating the legal status and protection of internationally displaced persons /migrants/asylum seekers/refugees and legally "invisible", i.e. stateless persons. The legal status and protection of internationally displaced persons /migrants /asylum seekers/ refugees and legally "invisible", i.e. stateless persons are regulated in the EU in the Area of Freedom, Security and Justice, i.e. Title V of the TFEU, and this in articles 67 to 89 of the TFEU. In addition to the General Provisions, Title V contains the following Chapters: Policies on Border Checks, Asylum and Immigration (art. 77 to 80 of the TFEU); Judicial Cooperation in Civil Matters (art. 81 of the TFEU); Judicial Cooperation in Criminal Matters (art. 82 to 86 of the TFEU); Police Cooperation (art. 87 to 89 of the TFEU). It is necessary in terms of the EU law, to primarily define the terms of migration, asylum, alien and refugee and point out the fact that the Treaty does not know the term "migration". The Treaty of Lisbon uses the terms: immigration or asylum.

1. International documents

In the international law, the most important article that directly defines what asylum is, is art. 14 of the Universal Declaration of Human Rights.[59] Although, according to the Universal Declaration of Human Rights, asylum is not a human right by itself, but the human right is "to seek and to enjoy [...] asylum".[60] On the other hand, the Charter of Fundamental Rights of the European Union (hereinafter: The Charter) in art. 18 guarantees the right to asylum.[61] We can conclude that the Charter as a modern document intended to protect human rights, makes significant progress and explicitly recognises asylum as a fundamental human right. Article 18 of the Charter recalls the Convention on the status of refugees (Geneva Convention)[62] and the Protocol of 31 January 1967 relating to the status of refugees that do not define the term asylum; however, they are crucial for defining the terms aliens and refugees.[63] At this point, it should also be mentioned that the most important document for the protection of human rights in Europe - the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: The ECHR) explicitly does not mention asylum. However, asylum seekers, on the basis of other provisions on the protection of human rights referred to in the ECHR, instigate proceedings before the European Court of Human Rights.[64]

[59] Article 14 of the General Declaration of Human Rights, *UNGA Res 217 A(III) (UDHR)*, 10 December 1948.

[60] R. Khanna, Asylum, *Texas International Law Journal*, 2006, p. 474.

[61] Article 18 of the Charter of Fundamental Rights of the EU, *OJ EU C303/01*. The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as: The Treaties).

[62] Convention relating to the status of refugees, *UNTS*, vol. 189, p. 137, 28 July 1951; OG SFRY: MU 15, 1960. Protocol on the status of refugees, *UNTS*, vol. 606, p. 267, 31 July 1951; OG SFRY:MU 15/1967.

[63] Definition of the term refugee, see art. 1 of the Convention relating to the status of refugees, *UNTS*, vol. 189, p. 137, 28 July 1951; OG SFRY: MU 15/1960.

[64] E.g., art. 3 (freedom of movement), art. 5 (Right to liberty and security) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Official Gazette, International treaties*, no. 6, 1999; no. 9, 1999, 4 November 1950.

Respecting international legal documents, the EU directives and Croatian legislation in the area of asylum, we bring three definitions of the following terms: asylum, alien and refugee, that we find the most suitable ones for the needs of this book.

Alien is a third-country national who has no nationality of any EU state and is a stateless person.[65]

Refugee is a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to that country.[66]

Asylum is included in the catalogue of fundamental human rights that will be granted to applicants who are outside the country of their nationality or habitual residence and have a well-founded fear of persecution owing to their race, religion, nationality, affiliation to a certain social group or political opinion, as a result of which they are not able or unwilling to accept the protection of that country.[67]

The stated definitions are originally in the book *Cross-border Movement of the Child in the EU*, by editor Mirela Župan.[68]

2. EU primary and secondary law

The policy on border checks, asylum and immigration regulated in art. 77 to 80 of the TFEU applies to the legal status and protection of internationally displaced persons/ migrants/ asylum seekers/ refugees and legally "invisible", i.e. stateless persons in the EU. Article 78 of the TFEU should be singled out as the most important one.

Article 78 of the TFEU represents the legal basis for a common policy on asylum, subsidiary protection and temporary protection. In its first paragraph, it brings the goals of the common policy on asylum and defines the accordance with the international legal instruments. Most importantly, this article prescribes that the policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967, meaning that any secondary legislation that is in contravention of the Geneva Convention and the Protocol represents the violation of obligations referred to in the Treaty and may be terminated.[69] In accordance with the principle of supremacy, the European law has the primacy over the national law of the member states; therefore, national courts are obliged, pursuant to Article 267 of the TFEU, to file an application for the previous decision to the EU Court, where doubt arises of a breach of Geneva Convention.[70]The second paragraph of art. 78 of the TFEU prescribes the area of competence of the EU in the area of common European asylum system.[71]

The scope of the EU competence in the area of the common European asylum system comprises: a uniform status of asylum for nationals of third countries, valid throughout the Union; a uniform status

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[65] Definition taken from the Law on Asylum, *Official Gazette*, no. 79, 2007; no. 88, 2010; no. 143, 2013. (This Law had been in force by 1 May 2015, after which the area of asylum in the Republic of Croatia was regulated by the Law on International and Temporary Protection, *Official Gazette*, no. 70, 2015; 127, 2017).

[66] Definition taken from Directive 2011/95/EU of the European Parliament and the Council dated 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, *OJ EU L337/9.*

[67] Article 20 (requirements for international protection approval). Law on International and Temporary Protection, *Official Gazette*, no. 70, 2015; no. 127, 2017.

[68] Duić, Dunja, Migracijsko pravo EU-a i prava djeteta, *Prekograničnо kretanje djece u Europskoj uniji* (EU Migration Law and Children's Rights, *Cross-border Movement of the child in the European Union)*, Župan, Mirela (ed.). Osijek: Faculty of Law of Osijek, 2019, p. 131-155

[69] S. Peers, Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon, *European Journal of Migration and Law*, 10 (p. 219–247), 2008, p. 233; K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union*, The Hague: Kluwer Law International, 2000, p. 40.

[70] E. Drywood, Who's in and who's out? The Court's emerging case law on the definition of a refugee, *Common Market Law Review* (p. 1093-1124). 51(4), 2014, p. 1113–1117.

[71] G. Lalić, Razvoj zajedničkog europskog sustava azila (Development of Common European Asylum System), *Hrvatska javna uprava 7(4)* (p. 845-846). Zagreb, 2007.

of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; a common system of temporary protection for displaced persons in the event of a massive inflow; common procedures for the granting and withdrawing the status of uniform asylum or subsidiary protection; criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; standards concerning the conditions for the reception of applicants for asylum or subsidiary protection and partnership, and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. Certainly, it should be pointed out that in comparison to the previous competence in this area[72], with the amendment to the Lisbon Treaty, the European Union was vested the powers for an almost complete harmonisation of the common European asylum system. However, within this scope of competence, the European Parliament and the Council adopt the legislative measures in accordance with the principle of subsidiarity.[73]

The legislation singled out as the most important in this area is:

- Directive on temporary protection 2001/55/EC[74]
- Directive on qualification 2011/95/EU
- Directive on procedure 2013/32/EU[75]
- Directive on reception 2013/33/EU[76]
- Regulation no. 604/2013 Dublin III[77].

Directive on temporary protection 2001/55/EC regulates situations of a mass influx of displaced persons. The Directive is acted upon only by a decision of the EU Council, where temporary protection is determined for a period of one year, with the possibility of extension for another year. Although the EU experienced a mass influx of displaced persons in 2015, the effects of the Directive, by operations of the EU Council's decision, were not activated. Thereafter we cannot consider the effectiveness of its application in this chapter. The question why there was no political will within the EU Council for the activation of temporary protection mechanism remains an open question.
*Directive on qualification 2011/95/EU, Directive on procedure 2013/32/E*U, *Directive on reception 2013/33/EU* are the most important legislation regulating entry and stay of third country nationals or stateless persons seeking to achieve international protection or they are in refugee status or in the status of obtaining the right to subsidiary protection.[78] The preamble of the Directive on qualification 2011/95/EU, besides asylum seekers, also defines persons meeting the requirements for subsidiary protection as third-country nationals or stateless persons not meeting the requirements for acquiring refugee status, but for whom it is reasonably believed that if the concerned person returned to his country of origin, if a stateless person is in question, to the state of former habitual residence, he

[72] See art. 63(1)(2) UEC (Nice). 10 Duić, Dunja, Migracijsko pravo EU-a i prava djeteta , Župan Mirela (ed.), *Prekogranično kretanje djece u Europskoj uniji* (EU Migration Law and Children's Rights, *Cross border movement of a child in the European Union)* Osijek: Faculty of Law of Osijek, 2019, p. 131-155
[73] See more about the scope of competence within the framework of the common European asylum system: K. Hailbronner, D. Thym, *EU Immigration and Asylum Law - A commentary* (2nd. ed.), Portland: C.H.BECK-Hart Nomos, 2016, p. 1030–1041.
[74] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ EU L 212/12.
[75] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ EU L180/60.
[76] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ EU L180/96.
[77] Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ EU L 180/31.
[78] Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, OJ EU L337/9.

would face a real risk of serious harm.[79] The Directive on procedure regulates minimum standards in the procedure for granting and withdrawing refugee status in Member States and refers to third country nationals who have lodged an application for asylum. This Directive determines the procedural guarantees for asylum seekers: access to the procedure and provision of information on the procedure; right to remain in a Member State until the procedure ends; interpretation of the personal interview regarding the application; right to an interpreter; right to legal assistance and representation; and right to be informed on the decision of the determining authority. The Directive prescribes that the decision on application should be taken as soon as possible; however, no deadline is set.[80] The Directive on reception lays down the minimum standards for the reception of asylum seekers in the Member States. It also prescribes the following rights of asylum seekers: asylum seekers should be informed of any established benefits and of the obligations relating to reception; asylum seekers should be provided with the right to information in a language they understand, medical care and other benefits and should be entitled to the right to work. The Member States are obliged to implement the Directive into their national legislation.[81] Regulation no. *604/2013 Dublin III* establishes the criteria and mechanisms for determining the Member State responsible for acting upon an application for asylum. The idea behind the Regulation is to create an equal access to asylum and protection in each Member State. However, there are huge differences among the Member States in asylum systems, which refer to the quality of protection provided to asylum seekers, and discrepancies in the reception standards.[82]

The current legal framework crashed down in the midst of the refugee crisis 2015–2016, which revealed major shortcomings.[83] The right to first entry appeared to be particularly problematic, on the basis of which the Member State where an asylum seeker registered first, is responsible for the entire procedure[84], which was asserted by the EU Court in its case law[85]; and the failure to observe the principle of solidarity by some Member States whenever non-performing the decision on a two-year relocation programme for 22,000 refugees.[86] The Commission already in 2016 presented proposals for the reform of the Common European Asylum System, which included the reform of the Dublin Regulation aimed at a better distribution of applications for asylum between the EU states.[87] The Member States, however, failed to achieve an agreement on responsibility-sharing.

3. New Pact on Migrations and Asylum

The new Pact on Migration and Asylum was presented by the European Commission on 23 September 2020. As the goal, it sets the creation of a common framework for responsibility-sharing and solidarity along with the recognition that no Member State should shoulder a disproportionate responsibility.[88] The key element of this legislative package, which contains even nine new proposals, is a broader use of border procedures, i.e. the Pact does not repeal, but reaffirms the right to first entry referred to in the Dublin

Regulation. Such procedures allow for asylum applications that are lodged by persons who arrive without a valid visa to be processed directly at the border or in transit zones. The rationale is that by

[79] G. Lalić, op. cit., p. 845-846

[80] Directive 2013/32/EU, op. cit.

[81] Directive 2013/33/EU, op. cit.

[82] G. Lalić, op. cit., p. 850–851.

[83] V. Metcalfe-Hough, *The migration crisis? Facts, challenges and possible solutions*, London: ODI Briefing, 2015

[84] I. Goldner Lang, Towards 'Judicial Passivism' in EU Migration and Asylum Law? in: T. Ćapeta, I. Goldner Lang, T. Perišin (Prir.), *The Changing European Union: A Critical View on the Role of Law and Courts*, Hart Publishing, 2020

[85] Case C–490/16 A.S. v Slovenia, 26 July 2017, ECLI:EU:C:2017:585; Case C–646/16 Jafari, 26 July 2017, ECLI:EU:C:2017:586.

[86] S. Šelo Šabić, *The Relocation of Refugees in the European Union – Implementation of Solidarity and Fear*, Zagreb: Friedrich Ebert Stiftung, 2017, p. 5–6.

[87] European Commission – Press release, Completing the reform of the Common European Asylum System: towards an efficient, fair and humane asylum policy, http://europa.eu/rapid/ press-release_IP-16-2433_en.htm, 13 April 2016, 3 may 2019.

[88] Communication from the Commission on a New Pact on Migration and Asylum, European Commission, Brussels, 23. 9. 2020. COM (2020) 609 final

keeping asylum seekers at the borders or in transit zones, the return policy would become more effective.[89] The Pact puts the focus, i.e. pressure, on third countries to facilitate return; it proposes a mechanism of monitoring asylum procedures at the EU external borders; proposes the ways how the Member States can act in solidarity and provides for that 10% of the EU assistance budget will be allocated to migrations, e.g. providing resources for third countries hosting refugees and other migrants. The most important changes proposed by the Pact can be classified into those regulating external dimension of the EU migration policy, i.e. the EU relationship with transit countries and countries of origin,[90] the changes focused on management of external borders[91], and the changes proposing a new system of responsibilities-sharing between the EU Member States.[92]

The more concrete changes in legislation that are proposed, are the following:

Regulation of the European Parliament and of the Council on asylum and migration management (the so-called *Asylum and Migration Management Regulation (*AMR))[93]

Regulation of the European Parliament and of the Council on introducing a screening of third country nationals at the external borders and amending Regulations (EC) No. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (the so-called *Screening Regulation)*[94]

Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (the so-called *Asylum Procedures Regulation (APR))*[95]

Regulation of the European Parliament and of the Council on the establishment of 'Eurodac'[96]

Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum[97].

With the Regulation of the European Parliament and of the Council on asylum and migration management, the Commission proposes restructuring of the access to asylum procedures and establishing the border procedure for applicants seen as unlikely to receive international protection. An additional novelty is the introduction of medical screening at the border. With the Regulation of the European Parliament and of the Council on asylum and migration management, the Commission endeavours to solve the lack of responsibilities-sharing between the Member States by introducing a new solidarity mechanism. If established that a Member State is under migration pressure, the Commission can set measures adequate for solving such situation, which may include assistance from

[89] Wessels, J. *The New Pact on Migration and Asylum: Human Rights challenges to border procedures. Refugee Law Initiative*, 2021, Retrieved March 15, 2021, from https://rli.blogs. sas.ac.uk/2021/01/05/the-new-pact-on-migration-and-asylum-human-rights-challenges- to-border-procedures/

[90] Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM/2020/610

[91] Regulation of the European Parliament and of the Council on introducing a screening of third country nationals at the external borders and amending Regulations (EC) No. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (the so-called Screening Regulation)

[92] L. Rasche, M. Walter-Franke, *Clear, fair and fast? Border procedures in the Pact on Asylum and Migration*; Policy Paper, 2020, p. 3

[93] Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM/2020/610 final

[94] Proposal for a Regulation of the European Parliament and of the Council on introducing a screening of third country nationals at the external borders and amending Regulations (EC) No. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 final

[95] Amended Proposal of the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final

[96] Amended Proposal of the Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No XXX/XXX [Asylum and Migration Management Regulation] and Regulation (EU) No XXX/XXX [Relocation Regulation] for identification of a third-country national or a stateless person with illegal stay, and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and on amending regulations (EU) 2018/1240 and (EU) 2019/818, COM(2020) 614 final

[97] Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum COM(2020) 613 final

other EU countries.[98] In such a case, the Member States submit a plan of solidarity response, where the type of contribution they intend to make is stated and they can choose between three options: they may ask for relocation of asylum seekers (who are not subject to the border procedure), provide an operational support, or make a contribution with the so-called return sponsorship.[99]

With the new Pact on asylum and migrations, the border procedure is not an exception any more, but it becomes the basic procedure for approaching asylum seekers. Regulation of the European Parliament and of the Council on introducing the screening of third country nationals at the external borders binds the Member States to conduct the mandatory border procedure for a maximum 12-week period from the first registration of application.[100]

Additionally, article 41 introduces an automatic enforcement of return in the border procedure. More exactly, the border procedure for the enforcement of return is applied to applicants, third-country nationals or stateless persons whose applications have been rejected within the framework of the border procedure for asylum. The goal set through the Pact by the Union is to solve claims for asylum in the border procedure, and if the claim is not positively solved, to activate the return procedure automatically afterwards; more precisely, to keep applicants, third-country nationals or stateless persons in the border zones in the largest possible number. The Pact mainly relies for the implementation of this goal on international instruments, the so-called "Partnership Framework with third countries". More precisely, the Regulation sets the framework involving migration management along the entire route and based on partnerships with third countries, thus contributing to the goal of the EU's ambitious and extensive foreign policy, based on partnerships with third countries.[101] These instruments should be considered as legally non-binding as they do not meet the requirements for international treaties; however, they should certainly stay in focus in future since they introduce issues of foreign relationships into the area of migration policy.

Yet, on the basis of legislative proposals brought by the Pact, the Member States can still initiate a standard procedure on decision making on applications for asylum; however, then they will not be able to use the automatic return procedure. Moreover, the proposal for the Regulation contradictorily prescribes the application of the border procedure in a situation at the border or in transit,[102] whereas art. 41 sets out that the border procedure can be implemented provided the applicant is still not allowed to enter the state territory of the Member States, that the Member State can examine the application in a procedure at the border. *De facto* it leads to a conclusion that the Member States will probably conduct the border procedure.

The amendments brought by the Pact, theoretically represent clearer criteria for determining to whom the border procedure is applied. It can, however, be expected that, if the amendments are adopted, they will probably result in legal uncertainty for asylum applicants, which could decrease the quality of procedures where asylum is decided about.[103]

4. Conclusion

The EU migration policy, i.e. the whole legislative framework showed its shortcomings amidst the refugee crisis 2015–2016. The first entry rule and the failure to observe the solidarity principle that was especially visible in non-performance of the decision on two-year relocation programme by some Member States, appeared to be particularly problematic. The Commission already in 2016 presented

[98] Art. 50 of the Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (the so-called Asylum and Migration Management Regulation (AMR)).

[99] Art. 55 of the Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109/EC, op.cit.

[100] Art. 41 of the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (the so-called Asylum Procedures Regulation (APR))

[101] S. Carrera, Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum, *CEPS Policy Insight*, no. 2020-22, 2020, p. 10.

[102] Art. 43 of the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (the so-called Asylum Procedures Regulation (APR))

[103] L. Rasche, M. Walter-Franke, op. cit., p. 3.

its proposals for a reform of the Common European Asylum System, which included a reform of the Dublin Regulation for the purpose of a better distribution of applications for asylum between the EU states. The Member States, however, did not succeed in achieving an agreement on responsibilities-sharing.

The European Commission's new Pact on Migrations and Asylum endeavours to overcome political problems and to reform the EU migration policy for the purpose of a better management and for achieving efficiency. The Pact proposes such nine instruments, out of which five are legislative and four are soft law documents laid out in a detailed plan of activities. The envisaged measures indicate the European Commission’s wish to establish a balance between responsibility and solidarity and keeping people in their countries. However, it can be expected that the measures, if become adopted at all, will probably result in a legal uncertainty for asylum applicants. The Pact actually complements and expands the former legislative proposals in an attempt to reconcile conflicting interests of various Member States; however, till today, half a year after the adoption of the Pact, the EU has not taken any concrete acts for achieving the goals from the Pact or for adopting the reformed legislation yet.

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INTERNATIONAL LAW PRINCIPLES FOR THE PROTECTION OF IRREGULAR MIGRANTS AND BOSNIA AND HERZEGOVINA'S SOCIAL CHARACTERISTICS

1. Introductory determination

Such is the geographical and international legal position of Bosnia and Herzegovina (BH) that it is currently lying on the international route of the movement of refugees, asylum seekers, i.e. forced migrants, but also of voluntary migrants of own kind, who enter the state territory of BH aspiring to reach the territories of the Member States of the European Union (EU). In this context, it would be beneficial to separate and distinguish the categories of persons and/or groups of people entering the territory of BH. The report includes the status relating to irregular migrations, where persons illegally, very often without any identification documents, cross the state border and enter the territory of this state.

To preclude the occurrence of refugees, asylum seekers, migrants, internally displaced persons and stateless persons in the world, the best way is to prevent the occurrence of such categories of persons, which is best accomplished by observing the individual and collective human rights and fundamental freedoms, as well as by "the strengthening joint international efforts to deal with the causes" leading to their influx, aimed at preventing new forced migrations and facilitating voluntary repatriation of refugees.[104] Yet, the international community is far from an adequate and efficient prevention thereof. Globally, there have commonly been internal and international armed conflicts, internal unrest and tensions, but also planned, systemic and organised violations of the human rights and fundamental freedoms of individuals, and also of certain ethnic, national, racial, religious, linguistic and other groups in certain countries, and also political persecutions and, in general, unequal treatment in the enjoyment of human rights and freedoms under the jurisdiction of certain countries, which very often leads to discriminatory persecution of persons by central and/or local government regimes. Individuals in such circumstances, when there is a real risk or strong likelihood of danger or endangering the life, body or freedom of individuals or members of their families, opt for fleeing the country of their nationality, seeking salvation in crossing state borders and arriving in the territory of other states where they are unwilling to have any legal connection with their own country in terms of their protection in the foreign country and to make contacts with a diplomatic and consular mission of their own country in the receiving country. Upon their arrival in the territory of the foreign country, such individuals are subjected to the sovereignty and jurisdiction of the states where they temporarily reside.

Since these are vulnerable categories of civil society, the states recognised the necessity to create an international mode for their protection long ago. As a reasonable consequence of such concern for the respective categories of individuals, the states adopted, whether under the auspice of international organisations, such as the United Nations (UN) or outside institutional international organisations, some international mechanisms and instrumentarium that should provide an expedient, quality and, conditionally said, comprehensive protection of refugees, asylum seekers in the territories of those states in which they are aliens. However, lately in the international community, probably due to an awareness that such international mechanisms did not satisfy their primary purpose, some international legal non-binding acts have been adopted, which through political declarations and compacts (agreements), present their wishes on the commitments of states, on their

[104] Thus, the Conclusion of the Executive Board of UNHCR no. 56 (XL) on permanent solutions and protection of refugees, 13 October 1989, especially points (b)(i) and (b)(ii).

orientation to a holistic approach in treating the aforementioned categories of people.
"Therefore, the question arises why it is needed at all to build *by soft law* a more rigid global protection system and more efficient international response to the relevant, emergency movement of people."[105] Does it represent "a new trend or tendency in the world today - particularly when the states' practice is such that due to a huge influx of economic immigrants from the poorer world stating that they are political fugitives (the states (European) as of 2015 interpret their regulations on granting asylum in a more restrictive way) – that the states exactly with their political declarations and gentlemanly agreements want to work on strengthening or creating a completely new protection system at the global level"[106]? Subsequently, this is followed by a logical question about the efficiency of the current international mechanisms and international organisations and their special programmes that, probably, do not provide enough to the vulnerable categories of people, which again, somehow, depends on the states themselves, their political will, but also on their economic power and capacities. Under such conditions of an evidently non-coordinated action at the international level, reflected in an additional fragmentation and creation of overlapping mechanisms and instrumentarium, such a system can hardly lead to a complete, coordinated efficiency of the entire system of action eventually, particularly in the form of seeking the international responsibility of states and international organisations under the conditions and circumstances of violations of their international duties, or, even, their international "commitment" and "determination".[107] Such absence of international guarantees and effectiveness necessarily results in social complexity and in concrete problems in the field, i.e. in the states' territories.
In the social perspective description, we will present how the irregular migrations affect the BH social reality, but we will also analyse the BH state's response to such migrations and the protection provided by the authorities of the relevant state to the categories of persons included in the *Report*. This part of the national *Report* uses data, both of the BH state authorities and the reports and other acts of international governmental and non-governmental organisations operating in this country, but also other documents of various provenances.

2. Social perspective

Since the beginning of 2018, BH has experienced a drastic increase of the number of migrants and refugees entering the country.[108] Such an increase in the number of the stated categories of persons is generally caused by the illegal crossing of the state border, mainly the one on the east of the country, where BH borders with the Republic of Serbia and the Republic of Montenegro. The BH borderline with these two neighbouring states, both of which being successor states of the predecessor state - Socialist Federative Republic of Yugoslavia, is a natural state border constituted of hilly and mountainous massif and the international, bordering river Drina (borderline with the Republic of Serbia). Such irregular migrations and entries of such individuals into the BH territory have brought about the presence of such persons in the public places in cities, along the public roads, fields and other areas. Consequently, BH had to proceed with a formulation of a specific response aimed at providing protection to refugees, asylum seekers, migrants, since we are talking about the assumed international obligations. On the side of BH, the following entities took part in this response, and still being engaged: BH Ministry of Security, BH Border Police (BP), Service for Foreigners' Affairs (SFA), BH Ministry for Human Rights and Refugees, other ministries and administrative organs, healthcare institutions, social welfare centres, non-governmental organisations, local administrations, local law enforcement agencies (police forces), prosecutor's offices and courts, informal groups of volunteers, religious communities.

[105] Grubešić, I., Omerović, E. (2020). Međunarodne i europske perspektive prava na socijalnu zaštitu izbjeglica kao ljudskog prava (International and European perspectives of the right to social protection of refugees as a human right), *Godišnjak Pravnog fakulteta* (Mostar). 4(IV), p. 193.
[106] Ibid.
[107] Ibid, p. 194.
[108] Assessment of the situation regarding migrants and refugees in Bosnia and Herzegovina. An overview of the activities of key actors in the field. OSCE. Dost. at: https://www.osce.org/files/f/documents/3/b/397322.pdf (4 May 2021).

According to the reports of the International Organisation for Migrations (IOM)[109], the states in the region face an increased number of irregular migrants originating from countries outside the region, who pass through the Western Balkans, and the main countries of their origin are: Afghanistan, Pakistan, Palestine, Syria and Algeria.[110] The data, thus, show that BH is a transit route of irregular migrants from the countries outside of the region that are generally in transit via the Western Balkans; including also an increased number of irregular migrants who are entering or are trying to enter the European Union (EU) in transit through BH, mostly without success, at the border with the Republic of Croatia.[111] This creates a big fluctuation pressure of these categories of persons that is particularly felt in the BH territory, and especially in the Una-Sana canton, which is a critical point in terms of a large number of migrants in that area; bearing in mind that the state borderline between BH and the Republic of Croatia represents the main land borderline with the EU - over 1000 km long.

It is necessary to divide this situation in the area of migration in BH in two parts: the period until the end of 2017 and the period from the beginning of 2018. The former period was marked with a sporadic, i.e. controlled entry and movement of aliens, when BH was generally recognised as a transit country for aliens coming from other countries and when the institutional capacities in this period were probably sufficient for performing all the obligations laid down by the international law and the internal regulations.[112]

The latter period is marked with a dramatic increase in the number of aliens, the largest number of which are the so-called irregular migrants, who entered BH (and keep entering on a daily basis) and who mostly use this country as a transit towards the EU countries.[113] It is estimated that the majority of migrants in BH are economic, although in BH, the process of the so-called mixed migrations where the motives of migrations are currently overlapping, so there are aliens looking for better living conditions (so-called economic migrants) and aliens seeking refuge (persons under international legal protection.[114] In 2019 SFA BH were reported in total irregular migrants 29,302, representing an increase by 22.59% comparing to 2018.[115] Also, visibly the maximum number of irregular migrants was recorded in the April-October period, as this period is characterised by the most favourable weather conditions for movement.[116] Even arrivals of entire families with children were noticeable in BH.[117]

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[109] The IOM is established as an international organisation in the area of migrations in 1951. The IOM has 155 member states plus 11 states holding the Observer status and offices in over 100 countries. This international organisation provides assistance in ensuring a more regular and humane management of migrations; in promoting international cooperation relating to the issues of migrations for the purpose of finding practical solutions for migration problems; and in providing humanitarian aid to migrants in need, including refugees and internally displaced persons. (Source: https://bih.iom. int/bs/o-iom-u (3. 5. 2021)). The IOM office in BH has been in Sarajevo since 1992. The IOM also issues periodical reports on the status of migrants in BH. See the latest Report: IOM, Bosnia and Herzegovina Migration Response. Situation Report. 30 April–7 May 2021.

https://bih.iom.int/sites/bih/files/2021/Sitrep/IOM%20BiH%20External%20Sitrep_30%20April%20-7%20 may%20final.pdf (7.5.2021). For the previous reports, see https://bih.iom.int/iom-migration-response (7. 5. 2021).

[110] Bosnia and Herzegovina, International Organisation for Migration, *Irregular migrations*: https://bih.iom.int/bs/neregularne-migracije (4. 5. 2021).

[111] Lučka, D., Čekrlija, S. (2020). *Demokratija i ljudska prava. Izbjeglice i migranti u trouglu Bosne i Hercegovine, Hrvatske i Srbije (pravni okvir i analiza stanja u određenim područjima) (Democracy and human rights. Refugees and migrants in the triangle of Bosnia and Herzegovina, Croatia and Serbia (legal framework and situational analysis in specific areas)*. Sarajevo: Friedrich Ebert Stiftung. http://library.fes.de/pdf-files/bueros/sarajevo/16598. pdf (7. 5. 2021).

[112] Institucija Ombudsmana za ljudska prava BiH (Institution of Human Rights Ombudsman) (2018). *Specijalni izvještaj o stanju u oblasti migracija u Bosni i Hercegovini* (*Special report on situation in the area of migrations in Bosnia and Herzegovina*), p. 58.

[113] Ibid. For instance, in October, a record number of arrivals in BH was registered: the BH Ministry of Security identified 5,057 refugees and migrants during October, comparing to 3,710 in September. Source: UNHCR (2018) Updated intra-agency operating data Bosnia and Herzegovina 1–31 October 2018. 1.

[114] Institution of Human Rights Ombudsman (2018). *Special report on situation in the area of migrations in Bosnia and Herzegovina*, p. 58.

[115] BH, Ministry of Security, Immigration Sector (2020). *Migration profile of Bosnia and Herzegovina for 2019*, Sarajevo, p. 80.

[116] Ibid.

[117] Children represent the most vulnerable group of persons, particularly with refugees, asylum seekers, stateless persons, migrants. For more details in the field of their rights and the use of access to education, see: Ušanović, M.,

Moreover, almost 20 per cent of the people on the move in Bosnia and Herzegovina are children, more than one third of whom are unaccompanied minors."[118]

Analysing the data for years 2018 and 2019, it was perceived that the largest number of irregular migrants comes from Pakistan, Afghanistan, Iraq, Morocco, Syria, Bangladesh, Algeria and Iran, making up 87% of the total number of irregular migrants in 2018 and 2019. In 2019, a significant increase in the number of nationals of Egypt, Morocco, Bangladesh, Algeria, Eritrea, Tunisia, Turkey, Nepal, Albania, Afghanistan and Pakistan was also perceived, but also a decrease in the number of nationals of Iran, Libya, Palestine, Syria and Yemen. The above stated indicates that the majority of persons illegally entering the BH territory are mostly the so-called economic migrants, as well as that the economic migrations trend has

A separate problem is illegal crossing of borderline "implying persons caught in the attempt to cross illegally the BH state border when entering or leaving BH at the border crossing or outside the border crossing, and the mentioned persons can be BH nationals, aliens or stateless persons."[119] Within the context of international protection of vulnerable categories of people, application for asylum were received and solved by the UN High Commissioner for Refugees (UNHCR) till 30 June 2004, in accordance with his mandate, while the BH institutions took over handling the procedures according to applications for international protection (asylum) in BH on 1 July 2004, which is conducted in compliance with BH legislation.[120]

The Mission of the Organisation for Security and Co-operation in Europe (OSCE) states that migrants and refugees entering BH in an irregular way use two main routes used to enter from the territories of the Republic of Serbia and the Republic of Montenegro into the territory of BH. So the international route of movement of migrants and refugees in this part of the region (through the Republic of Serbia) changed after the Republic of Hungary closed its state border in 2015, while the other main route starts in the Republic of Greece and runs through Albania and the Republic of Montenegro to BH.[121] Actually, there are three main directions of migrant movements: 1) from the Republic of Serbia to Bijeljina; 2) from the Republic of Serbia to Višegrad and Zvornik; and 3) from the Republic of Montenegro to Trebinje, Bileća, Gacko, and Foča.[122] During the first months of 2018, migrants and refugees moved quickly from border areas toward Sarajevo, receiving an attestation from local Service for Foreigners' Affairs Offices on the way; while as of July 2018, a new trend was observed with migrants and refugees increasingly avoiding Sarajevo and heading directly to the Una-Sana Canton of the BH Federation[123]; probably because an irregular crossing of the state border is easier to carry out through land territory than through internal waters of the states, i.e. the international rivers like the Sava and the Una, i.e. through international (border) lakes.

"The arrival of this many asylum seekers and migrants has put the tolerance, openness and humanity of states and their citizens to the test. Above all else, it has tested the institutional readiness of states to cope with the various challenges linked to migration."[124] Following the increased influx of migrants

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Pavlović, B. (2018). *Brza procjena obrazovnih potreba djece izbjeglica/migranata u Bosni i Hercegovini (A quick assessment of the educational needs of children refugees/migrants in Bosnia and Herzegovina)*. Sarajevo: Save the Children. https://www.unicef.org/bih/sites/unicef.org.bih/files/2018-12/Brza%20procjena%20obrazovnih%20potreba%20djece%20izbjeglica%20i%20migranata%20u%20BiH%20-%20oktobar%202018.pdf (7. 5. 2021).

[118] Special Rapporteur on the human rights of migrants Felipe González Morales (2019). *Report.*

[119] Bosnia and Herzegovina, Ministry of Security (2017). *Migration profile of Bosnia and Herzegovina 2016* Sarajevo, p. 21.

[120] Ibid, p. 50.

[121] *OSCE. Procjena situacije u vezi sa migrantima i izbjeglicama u Bosni i Hercegovini. Pregled djelovanja ključnih aktera na terenu (Assessment: Migrant and Refugee Situation in Bosnia and Herzegovina. Overview of the intervention of key actors in the field)*, p. 13.

[122] Institution of Human Rights Ombudsman) (2018). *Specijalni izvještaj o stanju u oblasti migracija u Bosni i Hercegovini*, (*Special report on situation in the area of migrations in Bosnia and Herzegovina*), p. 40.

[123] OSCE. *Assessment: Migrant and Refugee Situation in Bosnia and Herzegovina. Overview of the intervention of key actors in the field*, p. 13.

[124] UNICEF. *Priručnik za uključivanje djece izbjeglica, tražitelja azila i migranata u odgojno-obrazovni proces. (Manual for the Inclusion of Refugee, Asylum Seeker and Migrant Children in the Education process in Bosnia and Herzegovina). First institutional response by the competent education authorities to the needs of children caught up in the huge influx of asylum seekers and migrants.* https://www.unicef.org/bih/izvje%C5%A1taji/priru%C4%8Dnik-za-klju%C4%8 Divanje-

and refugees in the territory of BH, some discriminatory statements by government officials and biased media coverage of refugees were noticeable. The Coalition for fight against hate speech and hate crime in BH addressed the public on the Victory over Fascism Day on 9 May 2018, with a press release titled: "Media help institutions to spread xenophobia toward refugees and migrants."[125] In 2018, there were some media articles that continued xenophobic and racist media reporting, as well as a biased presentation of refugees and migrants as a "security risk" for BH citizens.[126] The Coalition warned about sensationalistic media texts, which only contributed to creating a hostile environment for refugees and migrants, and which proceeded with a goal to develop violence motivated by xenophobia and racism.[127]

One of the big problems is the issue of accommodating refugees, asylum seekers and migrants, quality of which depends on many factors including also "many *ad hoc* and informal solutions".[128] According to media reports, refugees in BH are still accommodated in exceptionally poor conditions, and mostly, they are accommodated in improvised camps.[129] The COVID-19 pandemic affected very adversely the quality of accommodation conditions in the BH territory. Besides the registered cases of Covid-19 among migrants in BH[130], "during the winter season, medical teams registered cases of seasonal influenza, respiratory and skin (scabies) diseases, as well as frostbite among people who sleep outdoors and who are exposed to severe weather conditions."[131] These are data of the DRC, an international non-governmental organisation that provides assistance in BH to vulnerable refugees and migrants in the regions of the Una-Sana Canton, Mostar, Sarajevo and Tuzla. Since the beginning of 2019, the DRC is responsible for providing primary health care and a limited quantity of secondary health care in numerous reception centres in BH. In the Una-Sana Canton, those are PPC Bira, PPC Miral, PPC Sedra, and PPC Borići, while in their area of operations, PPC Ušivak is included in the area of Sarajevo, and PPC Salakovac in the Mostar area.[132]

Equally, a great challenge for this state is the fact that migrants and refugees are accommodated in reception centres located only in one part of the state, in the BH Federation, whereas the authorities

djece-izbjeglica- tra%C5%BEitelja-azila-i-migranata-u-odgojno (4. 5. 2021). (More about it in: UNICEF, Ministry of Civil Affairs of Bosnia and Herzegovina (2021*). Manual for the Inclusion of Refugee, Asylum Seeker and Migrant Children in the Education process in Bosnia and Herzegovina*.

[125] See more in: https:/ www.media.ba/bs/vijesti-i-dogadaji-vijesti/mediji-pomazu-institucijama- siritiksenofobiju-prema-izbjeglicama-i (3. 2. 2020).

[126] Ibid.

[127] Ibid. Tako, Omerović, E., Hrustić, A. (2020), Sloboda izražavanja i govor mržnje: odgovor države Bosne i Hercegovine (Freedom of speech and hate speech: Response of the state of Bosnia and Herzegovina), *Anali, Faculty of Law of the University of Zenica* 25(13). 38. Cf. Adilagić, R. (2019). *Od viktimizacije do demonizacije: gdje je istina?* (*From victimisation to demonisation: where is the truth*?) Research on the way of reporting of media on migrants and refugees. Sarajevo: Udruženje/Udruga BH novinari. https://bhnovinari.ba/wp-content/uploads/2019/09/od_viktimizacije_do_demonizacije_gdje_je_istina_BHN_feb_ 2019.pdf (7. 5. 2021).

[128] OSCE. *Assessment: Migrant and Refugee Situation in Bosnia and Herzegovina. Overview of the intervention of key actors in the field*, p. 13.

[129] DW. *Migranti u BiH: život u blatu, na kiši i hladnoći* (*Migrants in BH: life in mud, rain and cold*) 14 January 2021. https://www.dw.com/ hr/migranti-u-bih-%C5%BEivot-u-blatu-na-ki%C5%A1i-i-hladno%C4%87i/av-56213166 (4. 5. 2021); DW. *Zaboravljene izbjeglice u BiH* (*Forgotten refugees in BH*) 5 March 2021. https://www.dw.com/bs/zaboravljene-izbjeglice -u-bih/av-56778055 (4. 5. 2021);

[130] Danish Refugee Council (DRC) and teams of local health centres, since the COVID-19 pandemic outbreak have conducted over 67,000 medical examinations related to COVID-19. Radio Free Europe *Korone u migrantskim kampovima ništa više nego inače u BiH* (*Corona in migrant camps no more than usual in BH*) 11. April 2021.

https://www.slobodnaevropa.org/a/korone-u-migrantskim-kampovima-ni%C5%A1ta-vi%C5%A1e-nego-ina%C4%8De-u-bih/31171094.html (4 5. 2021).

[131] AA. Danish Refugee Council in BH: Migrants 265 were Covid-19 positive in Bosnia and Herzegovina 6 April 2021. https://www.aa.com.tr/ba/balkan/dansko-vije%C4%87e-za-iz bjeglice-u-bih-u-bosni-i-hercegovini-265-migranata-bilo-pozitivno-na-covid-19/2199933 (4. 5. 2021).

[132] UNHCR. The UN Refugee Agency. Help. Bosnia and Herzegovina. https://help.unhcr.org/ bosniaandherzegovina/bs/where-to-seek-help/the-danish-refugee-council/ (4. 5. 2021).

of Republika Srpska so far have refused to approve setting up camps on the territory of this entity.[133] Media testify that these individuals are "stuck" in BH and live in uncertainty that is additionally complicated by the corona virus pandemic.[134] The situation is getting more complex to such an extent that in the public discourse, i.e. in the statements of certain officials and certain texts, expressions such as "migrant crisis" or "humanitarian crisis" can be found.[135]

The *Human Rights Watch* has been right on this track, in the context of a difficult situation of migrant's stay in the north-western BH in the recent period.[136]

2.1 Fundamental principles of international law protection

The international law protection system for refugees and asylum seekers was established in the 20th century, in particular within the UN.[137] This system will be, during the second decade of the 21st century, through political acts, the UN General Assembly resolutions, and the global legally binding treaties, upgraded through a holistic, integral and comprehensive global protection system for refugees and other migrants.

To preclude the occurrence of refugees and asylum seekers in the world, the best way is to prevent the occurrence of these categories of people, which is best accomplished by observing individual and collective human rights and fundamental freedoms, as well as by "the strengthening of joint international efforts to deal with the causes" resulting in their influx, aimed at preventing new forced migrations and facilitating voluntary repatriation of refugees.[138]

There are several key international law provisions for the purpose of the concerned protection. First, there is article 14 of the Universal Declaration of Human Rights 1948, relating to the right of any person to seek and to enjoy other countries asylum from persecution. Everyone has the right to seek asylum (asylum seeker)[139], but not the right to be allowed always to asylum by the state in its territory. So, the right of a person is not always matched by the respective international obligation of the state.[140] Generally, it is accepted that asylum in another country may not be sought by perpetrators of criminal offences, international crimes, i.e. acts contrary to the purposes and principles of the UN.[141] Article 12 of the International International Covenant on Civil and Political Rights (ICCPR) 1966[142], prescribes that

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[133] Osservatorio Balcani e Caucaso Transeuropa (OBCT). *Migranti i izbjeglice na nesigurnoj ruti kroz Bosnu i Hercegovinu* (*Migrants and refugees on an uncertain route through Bosnia and Herzegovina*). 8 April 2021. https://www.balcanicaucaso.org/extension/resp/design /resp_www/images/nav-logo.png (4. 5. 2021).

[134] Ibid.

[135] Delegation of the European Union to Bosnia and Herzegovina & European Union Special Representative in Bosnia and Herzegovina, Blog by the High Representative/Vice President Delegation of the European Union to Bosnia and Herzegovina & European Union Special Representative in Bosnia and Herzegovina, Blog by the High Representative/Vice President Josep Borrell: Bosnia and Herzegovina migrant crisis is still not near its end. 5 January 2021. https://europa.ba/?p=71281 (4. 5. 2021). Likewise, see: Amnesty International. Bosnia and Herzegovina: Long-term solutions needed to end recurring humanitarian crisis. 12 January 2021. https://www.amnesty.org/en/latest/news/2021/01/bosnia-and-herzegovina-long-term-solutions-needed-to-end-recurring-humanitarian-crisis/ (2. 5. 2021).

[136] Human Rights Watch. Bosnia and Herzegovina: *Migranti ostavljeni na hladnoći* (*Migrants left in the cold*) 25 January 2021. https://www.hrw.org/bs/news/2021/01/25/377629 (5. 5. 2021).

[137] Here, one should refer to the UNHCR. It is a UN agency for refugees, committed to saving lives, protection of the rights, and building a better future for refugees, forcedly displaced community and stateless persons. In 1950, with a decision of the UN General Assembly, the UNHCR is charged with running and coordinating activities of the protection of and support to refugees world-wide. The primary responsibility for the protection of refugees, however, always lies with the government of the state where refugees are staying. (https://help.unhcr.org/bosniaandherzegovina/bs/about-unhcr-in-bosnia-and-herzegovina / (5. 5. 2021)). The UNHCR has been present in BH since 1992, at the request by the then UN Secretary General, while the international agreement on cooperation with BH was concluded in 1994.

[138] So, the *UNHCR Executive Committee Conclusion, no. 56 (XL) on Durable Solutions and Refugee Protection*, 13. 10. 1989, particularly items (b)(i) and (b)(ii).

[139] Asylum-seeker is an alien who has filed the asylum application, upon which no enforceable decision has been made in accordance with the Law on Asylum of BH.

[140] Grubešić, I., Omerović, E. (2020), op. cit., p. 176.

[141] Pursuant to article 14 (2) of the Universal Declaration on Human Rights 1948.

[142] Entered into force in 1976. United Nations, *Treaty Series*, vol. 999, p. 171 and vol. 1057, p. 407. BH became its party on 1 September 1993 by the notification of succession. By ratifying the International Covenant on Economic, Social and Cultural Rights 1966, the states undertake to "take steps, individually and through international assistance and co-operation,

"everyone shall be free to leave any country, including his own." Pursuant to article 7 of the ICCPR, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Likewise, pursuant to article 3 of the Convention against Torture 1984[143], no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.[144]

It seems that exactly on the basis of article 14 of the Universal Declaration of Human Rights, the Convention Relating to the Status of Refugees representing today the major international instrument for the protection of this category of people and the most comprehensive codification of their rights at the international level.[145] It was amended only once, which was in the form of a new international treaty, i.e. Protocol, which eliminated geographical and time restrictions regarding the Convention's definition of refugees.[146] According to the context of the provisions of the Refugee Convention 1951[147], i.e. the Protocol relating to the Status of Refugees 1967[148], it is derived that a refugee is "an alien who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group, or political opinion, is outside the country of his origin, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".[149] On the basis of the concerned determination of refugee we understand several components. First of all, this is about a well-founded fear; therefore, not about any quality or intensity of fear. Thus, the person is qualified by a substantial likelihood

of being politically persecuted, if he has defected to a foreign country territory, to be able to get under the protection of the Refugee Convention and its Protocol, in terms of acquiring refugee status.[150] This person, then, must be located outside the border of his own country; therefore, persons who are inside the borders of their country of nationality cannot be considered to be refugees pursuant to the international regulation, but displaced persons.[151] This distinction should always be made. A refugee in a foreign country does not want to be under diplomatic protection of his own country, since this person considers it to be "hostile" in terms of violations of his human rights and freedoms.[152]

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especially economic and technical, to the maximum of their available resources" (Article 2 paragraph 1 of the Covenant). The Covenant entered into force also in 1976. United Nations, *Treaty Series*, vol. 993, p. 3. BH became a party on the same date: on 1 September 1993 by the notification of succession. "This Covenant recognises limitations in ensuring the rights since their implementation necessitates significant financial and technical means." The Institution of Human Rights Ombudsman of Bosnia and Herzegovina (2018) *Special report on situation in the area of migrations in Bosnia and Herzegovina*, p. 9.

[143] The full title of this multilateral international treaty is actually the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force in 1987. United Nations, *Treaty Series*, vol. 1465, p. 85. BH became the member party on 1 September 1993 by the notification of succession.

[144] In this regard, see decisions in the leading cases filed before the Committee against Torture, and refer to the principle of non-refoulement or non-expulsion as reflected in article 3 of the Convention against Torture. It refers to the cases *Mutombo v Switzerland* (1994), *Khan v Canada* (1994), *Ismail Alan v Switzerland* (1996).

[145] Grubešić, I., Omerović, E. (2020), op. cit., p. 177.

[146] Article I of the Protocol

[147] Adopted in Geneva (therefore very often Geneva Convention), on 28 July 1951, entered into force on 22 April 1954. United Nations, *Treaty Series*, vol. 189, p. 137. BH became the party to this Convention, as well as the Protocol, on 1 September 1993 by the notification of succession; so, this country is responsible for processing asylum applications and taking decisions on whether a person may acquire a refugee status in BH.

[148] Adopted on 31 January 1967, entered into force on 4 October the same year. United Nations, *Treaty Series*, vol. 606, p. 267.

[149] Degan, V. Dj. (2011), *Međunarodno pravo* (*International Law*) Zagreb. Školska knjiga. 478. See, article 1A(2) Convention 1951, as well as the Protocol provisions. A refugee is an alien or a stateless person who was granted a refugee status by the Ministry of Security of BH in accordance with the Convention Relating to the Status of Refugees 1951, Protocol Relating to the Status of Refugees 1967, and the Law on Asylum of BH. In the subsequent research, attention might be paid to the fact whether the state law may prescribe more rigorous or additional requirements to be met by a person in order to be granted refugee status in the state territory. Would such a procedure of the state represent a breach of international law and the undertaken obligations of a state?

[150] Klabbers, J. (2017). *International Law*. 2. ed. Cambridge: Cambridge University Press. 132.

[151] Grubešić, I., Omerović, E. (2020), op. cit., p. 177.

[152] Can '*environmental refugees'* be classified by such a conceptual definition under contemporary circumstances? (More about it in: Sahinkuye, M. G. (2019). A Theoretical Framework for the Protection of Environmental Refugees in

One of the prevailing international obligations of any Party to the Convention and its Protocol is the prohibition of expulsion and return of refugees (fr. *non-refoulement*), stipulating that no state should return a refugee to the country where his life or freedom would be threatened seriously.[153] Today this is an international law principle, it has the power of general customary legal regulation, but also as *jus cogens*.[154] Meaning that the mentioned prohibition refers to all the states, irrespective of whether they ratified, acceded, or undertook the Convention and its Protocol. Actually, the basic task of the international law framework for the protection of refugees and asylum seekers lies in non-discrimination, non-punishment and non-expulsion (non-refoulement) of these categories of people.[155] The latter principle implies that a national of BH who would defect through the Republic of Serbia to the Republic of North Macedonia, this country will not be able to return him to the BH state border, but exclusively to the territory of the Republic of Serbia.

While the mentioned Convention's mechanism within the UN represents indeed a great humanitarian achievement, where through the Protocol the protection of refugees from the European continent spread out to the entire world, the question arises whether individual provisions of these treaties represent an expression of a general or a majority compromise between the states. Namely, here we would include the provisions of article 2 of the Convention, in terms of refugees having certain duties to the country that accepted them, as well as the provisions of article 9 of the Convention, that authorises suspension of refugee rights in times of emergency.[156] On the other hand, the Convention provides for a whole set of rights to these persons, as the provision referred to in article 16 (Access to courts), as well as other rights and freedoms. "Personal refugee status is regulated with the law of the country of domicile, i.e. the country of residence."[157]

An international multilateral treaty that represents a subsidiary agreement/mechanism of its own kind, in relation to the Convention and its Protocol Relating to Refugee Status is the Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989[158], "and this exactly thirty years after the Declaration"[159], while it entered into force on 2 September 1990, following a certain number of ratifications.[160]

It still remains the most ratified treaty on human rights, and provides for an exceptional catalogue of the rights of children,[161] also including nationals and aliens, i.e. children aliens, children asylum seekers (through their guardian (legal representative)) and internally displaced children. Actually, it is the first's comprehensive international law instrument dedicated to children and their rights, ensuring the

International Law. 6 *Transnational Human Rights Review* 1. 1-25. Cf. Constalain, M. C., Prince, D. P. (2017). Reconsider Refugees Status in the Eyes of International Law. 63 *Journal of Law, Policy and Globalisation* 156. 156–164.

[153] Pursuant to article 33 of the Convention 1951.

[154] Parker, K. (1989). Jus Cogens: Compelling the Law of Human Rights. 12 *Hastings International & Comparative Law Review* 411. 435-436. The UNHCR Executive Committee "acknowledges that the fundamental principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels, and is generally accepted by States". (UNHCR Executive Committee Conclusion no. *6 (XXVIII)on non-refoulement*, 12. 10. 1977).

[155] Grubešić, I., Omerović, E. (2020), op. cit., pp. 177–178.

[156] Klabbers, J. (2017), op. cit., p. 133.

[157] Etinski, R., Đajić, S., Tubić, B. (2017). *Međunarodno javno pravo* (*Private International Law*) 7th ed. Novi Sad: Faculty of Law of Novi Sad, p. 480.

[158] Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25. Published in the United Nations, *Treaty Series*, vol. 1577, p. 3.

[159] Andrassy, J., Bakotić, B., Seršić, M., Vukas B. (2010). *International law 1* Zagreb. Školska knjiga, p. 399.

[160] Pursuant to art. 49 of the Convention on the Rights of the Child, twenty ratifications were needed for its coming into force, i.e., instruments of ratification deposited with the UN Secretary General. This number was achieved, as we see, very fast. Today it represents one of rare international law legislative conventions having universal ratification. Interestingly, all the UN member states are the parties to the Convention, save for the United States of America, which signed this treaty in 1995, but they have refused to ratify it until today, and to finally and formally express their readiness to be bound by the Convention. Today this international instrument, the most important one in international protection of the rights and freedoms of the child, numbers 196 state parties. BH became a party to the Convention by notification of succession on 1 September 1993.

[161] Tobin, J. (ed.) (2019). *The UN Convention on the Rights of the Child: A Commentary*, Oxford: Oxford University Press. 1.

highest level of international standards for its implementation at the national level,[162] in the absence of discrimination on any grounds. Its influence is very visible if we look at the constitution of countries, judicial case law, and work of international and national institutions, reforms of legal systems, development of policies and further actions of advocates of the rights of children.[163]

Before proceeding to make an overview of the international status of asylum seeker, we will briefly address the correct interpretation of the essential difference between a refugee and a migrant. Migrants can leave the country of their nationality out of many reasons not related to persecution, mainly out of employment reasons[164], family reunion, or studies, guided by their wish to generally ensure better living conditions for themselves. Here, there are also reasons such as avoiding or solving poverty, undernourishment, famine, drought, or floods. These persons, if they found themselves in the territory of a foreign country out of the respective reasons, will not be considered to be refugees and qualified for the protection provided by the Convention mechanism.[165] When they are outside the border of their own country, they are aliens in another country where they enjoy the protection of their own government. Therefore, from a general perspective, refugee is always migrant, but migrant is not always refugee or asylum seeker.[166]

Actually, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, sets out the rights of migrant workers and members of their families, and equal treatment and equal conditions of work of migrant workers and nationals of the state parties to the Convention.[167] The Convention therefore "*shall be applied during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence*."[168] Pursuant to the provision of article 5 of the Convention, worker migrants and members of their families are exclusively those who "*are considered as documented or in a regular situation if they are authorised to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party*".[169] Accordingly, the enjoyment of the rights of migrant workers and members of their families is in full correlation with their status, since only migrants with regular status can enjoy these rights.[170] At the end of dealing with this Convention, let us quote the provision that no migrant worker or member of his family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[171]

The country on the grounds of its territorial sovereignty in its area or in its diplomatic and consular mission in the receiving state, depending on if it is territorial[172] or diplomatic (consular) asylum[173],

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[162] Lee, Y. (2010). Communications Procedure under the Convention on the Rights of the Child: 3rd Optional Protocol. *International Journal of Children's Rights*. 4(18). 567–568.

[163] Tobin, J. (ed.) (2019), op. cit., p. 1–2. In more details in: Omerović, E., Sadrija, J. (2020), Djeca vojnici u oružanim sukobima (Child soldiers in armed conflicts), *Collection of Works, 8th International academic conference. Dani porodičnog prava: Porodično pravo u eri globalizacije* (*Family law days: Family law in globalisation era*) 8(VII), Mostar, 176 *et seq.*

[164] Cf. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Adopted with the Resolution of the General Assembly 45/158 dated 18 December 1990. Entered into force on 1 July 2003. United Nations, *Treaty Series*, vol. 2220, p. 3. BH became the party to it by accession on 13 December 1996.

[165] Klabbers, J. (2017), op. cit., pp. 132–133.

[166] Grubešić, I., Omerović, E. (2020), op. cit., p. 178.

[167] But, it seems that some countries with the largest number of migrant workers did not commit to this Convention. Cf. Chetail, V. (2013), The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights, 28 *Georgetown Immigration Law Journal*. 225–255.

[168] Article 1 paragraph 2 of the Convention.

[169] Article 5 paragraph 2 of the Convention.

[170] Institution of Human Rights Ombudsman (2018) *Special report on situation in the area of migrations in Bosnia and Herzegovina*, p. 11.

[171] Pursuant to article 10 of the Convention. For more, see Shaw, M. N. (2014) *International Law*. 7. ed. Cambridge: Cambridge University Press. 239–240; Etinski, R., Đajić, S., Tubić, B. (2017), op. cit., pp. 494–495.

[172] This is an institute of general international law and is required within the borders of the state from which asylum is sought.

[173] This is an institute of particular international law (for Latin America states) and is required within the diplomatic mission of the sending state to the receiving state. Cf. The Convention from Caracas on diplomatic asylum 1954, as well as the

according to its discretion power, provides protection to persons who because of political persecution, systematic unequal treatment or violence, i.e. serious violation of their human rights or freedoms[174], do not want to return to the country of their nationality. It is not only the protection against extradition, but also protection of a much broader scope.[175] Namely, a person who has been granted asylum must be provided with at least minimum conditions for normal life worthy of human dignity, such as accommodation, employment opportunities, health care, general education for minors.[176] Otherwise, asylum would not fulfil its humanitarian purpose.[177] Exactly the Declaration of the UN General Assembly on territorial asylum 1967, which represents a non-binding legal act, proclaims that asylum "is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State".[178] Therefore, humanitarian purpose and humanitarian causes really lie in the essence of this international law institute for the protection of individuals.[179] Bearing in mind the international law framework, it should be established that there is no any multinational international agreement of the protection of asylum seekers; therefore, we generally refer to the Convention 1961 in our determinations. But this international agreement also does not contain any special provisions on asylum seekers and treatment thereof. Other agreements in the domain of international law protection of human rights and fundamental freedoms are to be applied in such situations since minimum human rights are applied without restrictions and discrimination to all in all situations.[180] In this sense, the states do have international obligations to enable, in the area of their jurisdiction, an undisturbed enjoyment and observance of the fundamental human rights and freedoms not only to their own nationals but also to aliens residing or being in transit in its territory, as well as to stateless persons.[181]

The regulations of the Convention 1951, however, will not be applied if "there are serious reasons for doubt"[182] that the person committed any of international crimes *stricto sensu* (aggression, genocide, crimes against humanity, war crimes); that the person had committed non-political criminal offence outside the state of asylum before having been accepted in that country as a refugee; and if the person is responsible for the acts opposite to the goals and purpose of the UN Charter 1945.

In regard to challenges faced by the states nowadays, there are financial expenditures, but also there is emergence of false asylum seekers.[183] Likewise, one of major challenges nowadays is to achieve international solidarity and have an equal burden-sharing of refugees and asylum seekers among states, since there are states having weaker economic power with a mass influx[184] (because they generally are situated on the transit route, i.e. their geographical position is interesting).[185] There is also a violation of humanitarian obligations of the majority of coastal states not allowing access to

judgement in the case of the International Court in Den Haag, *Colombian-Peruvian asylum case*, *Judgement of November 20th, 1950*: I.C.J. Reports 1950, p. 266. Cf. with the institute of asylum sought on a foreign war ship.

[174] More on the causes for asylum, see in: Alshreifat, M. A. S. (2016). The Causes for Asylum, the Rights and Obligations of Refugees in International Law. 52 *Journal of Law, Policy and Globalization* 126, pp. 126–132.

[175] Asylum includes refugee status and subsidiary protection status, in accordance with the Law on Asylum of BH.

[176] Krivokapić, B. (2010). *Enciklopedijski rečnik međunarodnog prava i međunarodnih odnosa (Encyclopedia dictionary of international law and international relationships)* Belgrade: *Official Gazette, p*, 84.

[177] Ibid.

[178] Preamble to the Declaration.

[179] Grubešić, I., Omerović, E. (2020), op. cit., p. 178.

[180] Ibid.

[181] The respective obligation of the contracting parties to the international instrumentarium in the field of human rights and fundamental freedoms has become an expression of general customary international law

[182] Etinski, R., Đajić, S., Tubić, B. (2017), op. cit., p. 479.

[183] These are persons alleging they flee from persecution or violence, but in reality, they want to immigrate out of economic or other related reasons to developed countries, mainly to the countries of West and North Europe, United States of America, Canada, Australia, New Zealand.

[184] V. *UNHCR Executive Committee Conclusion, no. 22 (XXXII) Protection of asylum seekers in situations of* large-scale influx. 21. 10. 1981.

[185] UNHCR. *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems. 4 September 2001*. EC/GC/01/17.

vessels in distress to their territorial waters and grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum.[186] Likewise, large numbers of refugees and asylum-seekers in different areas of the world are currently being detained by the states unlawfully, by reason of their illegal crossing the state border and entry or presence in the state where they lodged asylum application, pending resolution on their application.[187] There are situations where asylum-seekers have encountered the states not willing to grant them temporary or permanent refuge[188], through the states that very restrictively interpret provisions on asylum[189], to those that sometimes return person from their borderlines to the area where such persons have reasons to have a well-founded fear of persecution.[190]

Persons without nationality (stateless persons, contrary to mono-nationals, bi-nationals, and multi-nationals), i.e. "legally invisible" persons are those persons that no country considers to be their nationals according to their national law.[191] Such persons are deprived of many rights arising from that kind of legal relation between the person and the state. If a stateless person would find himself abroad by chance (such person could never cross the state border legally since he holds no travel documents), that person would not enjoy the protection of any state, even not the one in the territory of which he previously stayed.[192] Actually, for a stateless person, each state is abroad[193], so they are not formal members of any social and political community. "Unlike exile where political elements dominate, statelessness is, basically, caused by legal elements"[194], when new cases of stateless persons can occur as a consequence of territorial changes (e.g., succession) or release from citizenship, and that the person meanwhile has not managed to obtain citizenship of the new state in the procedure of naturalisation.

For the states in the international community, such a phenomenon is a legal anomaly and they learnt long time ago that statelessness should be fought against, in sense that the reduction of number of stateless persons should be dealt with in a continuous and constructive manner, bearing in mind the provision of the Universal Declaration of Human Rights, which in article 15(1) asserts that everyone has the right to a nationality. Within this spirit and with this goal, the states concluded international agreements such as, in chronological order[195], Convention Relating to the Status of Stateless Persons 1954[196], Convention on the Nationality of Married Women 1957[197], and Convention on the Reduction of Statelessness 1961[198]. The concerned multilateral international agreements endeavour, on one hand, to reduce the number of stateless persons, whereas, on the other hand, endeavour to improve

[186] For instance, see the *UNHCR Executive Committee Conclusion, no. 15 (XXX) On refugees without an asylum country*, 16. 10. 1979.

[187] UNHCR. Detention of Refugees and Asylum-Seekers. 13 October 1986. No. 44 (XXXVII)– 1986 Executive Committee 37th session.

[188] *UNHCR Executive Committee Conclusion, no. 5 (XXVIII)* On Asylum 12. 10. 1977.

[189] Cf. *UNHCR Executive Committee Conclusion, no. 82 (XLVIII)* On safeguarding asylum. 17. 10. 1997.

[190] V. *UNHCR Executive Committee Conclusion, no. 57 (XL) Implementation of the 1951 Convention and the Protocol relating to the status of refugees (1989)*. 13. 10. 1989. For recent data and indicators, see UNHCR. *Global Report 2019*. https://www.unhcr.org/ globalreport2019/ (23. 11. 2020); UNHCR. *Global trends: Forced displacement in 2018*. https://www.unhcr.org/5d08d7ee7.pdf (23. 11. 2020). Cf. with the Report 2019; UNHCR. *Global trends: Forced displacement in 2019*. https://www.unhcr. org/5ee200e37.pdf (23. 11. 2020).

[191] Pursuant to definition of the Law on Aliens and the Law on Asylum of BH, a stateless person is an alien who is not considered as a national by any country, in accordance with its legislation.

[192] Krivokapić, B. (2010), op. cit., p. 58.

[193] Ibid.

[194] Kreća, M. (2018), *Međunarodno javno pravo* (*Private International Law)* 10th ed. Belgrade: University of Belgrade – Faculty of Law, p. 583.

[195] See, former international agreement, The Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930.

[196] Entered into force in 1960. United Nations, *Treaty Series*, vol. 360, p. 117. BH became its party on 1 September 1993 by the notification of succession to the UN Secretary General.

[197] Entered into force in 1958. United Nations, *Treaty Series*, vol. 309, p. 65. BH became its party on the same day - on 1 September 1993 - in the identical way, by the notification of succession to the UN Secretary General.

[198] Entered into force in 1975. United Nations, *Treaty Series*, vol. 989, p. 175. BH is a member party to the Convention as of 13 December 1996 by accession, as the majority of its member states.

their status, in terms of specific guaranteed rights that stateless persons should have in the territory of countries, such as freedom of movement or employment opportunities.
Anyway, the status of "legally invisible" persons is very similar to the status and qualification of refugees and asylum seekers. Moreover, stateless persons are often found among refugees in a country.[199] The so-called *de facto* stateless persons represent a specific form of statelessness. These are persons who are nationals of a certain country, but, in reality, they do not enjoy or do not want to enjoy its protection, which, is again, very often the case with refugees and asylum seekers.
Besides dealing with stateless persons, the UN High Commissioner is also in charge of the status of displaced persons. According to the general definition, these are persons who were dislocated against their own will (forcibly) from one territory where they lived to the territory of another state (forcibly displaced persons) or within their own country (special category of *internally* displaced persons), what distinguishes them from refugees, since people from the latter category left their own country by their own decision and sought refuge in another country.[200] If displaced persons refuse to return to the country of their own nationality, due to fear for their own life, health or freedom, then they will change their status and become refugees in the territory of a foreign country. The Refugee Convention and its Protocol are only applied to persons who find themselves in the territory of foreign countries, outside of the country of their nationality. Therefore, this convention mechanism will not be applied to internally displaced persons.

2.2 Future sequence of development of the principles of international law protection of refugees and migrants

Within this context, we had an opportunity to notice a holistic approach to this issue at the international level on 19 September 2016, when the UN General Assembly adopted with the Resolution 71/1 the New York Declaration for Refugees and Migrants. It is a political document where the UN member states emphasise the need for further development of international law system for the protection of refugees and asylum seekers, through a stronger instrumentarium and mutual cooperation at the global level. The Declaration represents the commitment of the states relating to refugees and the commitment of the states relating to other migrants, but also their common commitment to both large categories of people. Annex I to the Resolution (Declaration) establishes the mechanism for a *Comprehensive refugee response framework* through a global agreement on refugees. Annex I to the Declaration represents establishing a global agreement for a safe, orderly and regular migration, which is adopted at the international diplomatic conference in the Kingdom of Morocco, on 10 and 11 December 2018, and which was beforehand finalised by the UN Member States in July 2018. This document literally represents the list of 23 goals intended to be achieved through the common action of all international participants, and they are based on the grounds of sovereignty of states, shared responsibilities, non-discrimination and observance of human rights. The system that in a distinctive way upgrades the already existing international framework for the protection of refugees, does it, seemingly, through political declarations and through compacts and agreements that are not legally binding.[201] Therefore, it is necessary to build a more rigid global protection system by means of *soft law* and a more efficient international response to the concerned, irregular movement of people.
Following the scope and effects of the current international law framework, the question is why it is necessary to form new, parallel international bodies and new frameworks or agreements, under the circumstances where a set up system of protection and operation already exists thereof. Wasn't that more meaningful and reasonable, in relation to objectives and duties, to recast, i.e. to amend the

[199] Krivokapić, B. (2010), op. cit., p. 58.

[200] Here, a very often used term is that persons "defected" to another country. Ibid, p. 896.

[201] For more, see: https://refugeesmigrants.un.org/ (24. 4. 2021); https://www.unhcr.org /new-york-declaration-for-refugees-and-migrants.html#compactonrefugees (24. 4. 2021); https://globalcompactrefugees.org/article/global-compact-refugees (24. 4. 2021).

Geneva Convention 1951 and its Protocol 1967 or opt for a new international convention?[202]

3. Regional (European) mechanisms of protection

In this section of the Report, we will briefly review the European legal norms for the protection of the mentioned categories of persons. We will review some individual aspects of the system of the Council of Europe, i.e. the EU.

At the level of a regional international organisation of the Council of Europe, the prohibition of torture or inhumane or degrading treatment or punishment is also provided for by article 3[203] of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950.[204] It is reasonable to specify that in the respective article of the Convention the principle of *non-refoulement* is reflected. Also, it should be stated that the ECHR together with its Protocols, does not provide for specific provisions with specific protection of refugees and asylum seekers.

Regarding the territorial application of this Convention, article 1 (duty to observe human rights) sets forth that "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*". This provision should understand that the state is obliged to ensure enjoyment and observance of human rights and freedoms not only to their own citizens but also to aliens and stateless persons who reside or are in transit through their territory.[205]

Today's work and operations of the Council of Europe in regard to the regional protection of refugees and asylum seekers is characteristic for the Special Representative of the Secretary General on Migration and Refugees.[206] This function was established as the consequence of the challenge encountered by the Member States of the Council of Europe since 2011, when the Republic of Turkey testified about the arrival of first people fleeing from the armed conflict in Syria.[207] Already in 2015, the influx of these people reached the peak in the rest of Europe; therefore, in 2016 the Secretary General of the Council of Europe will nominate and appoint the first Special Representative on Migration and Refugees.[208] It is worth pointing out that so far in his office the Special Representative identified the protection of children in this context as a special field of concern requiring a thorough and well-organised operation.[209]

Regarding the case law of the European Court of Human Rights (ECtHR), the one concerning extradition and ill treatment of a person stands out.[210] Namely, ill treatment is an event that is hard to prove. The ECtHR, however, does not require any certainty of ill treatment, but only the well-founded grounds for believing that the person is faced with a real risk of ill treatment.[211]

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[202] Grubešić, I., Omerović, E. (2020), op. cit., p. 194.

[203] This refers to absolute prohibition. Derogation of this provision is not allowed.

[204] The Convention adopted on 4 November 1950 in Rome, entered into force on 3 September 1953, ETS No. 005. Likewise, see: European Convention on the Prohibition of torture, inhumane and degrading treatment or punishment, 1987, ETS no. 126. Entered into force in 1989. The text of the Convention was amended with Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152), which entered into force on 1 March 2002.

[205] Grubešić, I., Omerović, E. (2020), op. cit., p. 184.

[206] See Council of Europe, Ambassador Tomáš Boček. *First report on the activities of the Secretary General's Special Representative on Migration and Refugees*. 1 February 2016 to 31 January 2018. Presented to the Secretary General and the Committee of Ministers, 2018.

[207] Grubešić, I., Omerović, E. (2020), op. cit., p. 184.

[208] Ibid.

[209] For recent data and indicators relating to the status of children in this context, see Council of Europe, Information Documents SG/Inf(2020)4 *"Refugee and migrant children in Europe" – Final report on the implementation of the Action Plan (2017-2019)*. 14 February 2020. See also Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe (2017-2019). 2017.

[210] For a broader case law of the Court of Strasbourg in regard to the protection of human rights of asylum seekers, see Omerović, E. *et al*. (2019). Human Rights of Asylum Seekers in Jurisprudence of the European Court of Human Rights. *Ročenka Uprchlického a Cizineckého Práva 2018*. Praha: Kancelář veřejného ochránce práv. 295–331.

[211] European Court of Human Rights, *Soering v. The United Kingdom*, Application No. 14038/88, 7 July 1989, par. 88. See also article 3 of the Convention against Torture, 1984 It is one of the more renown decisions of the European Court of Human Rights that found that the extradition of the young German national to the United States of America, where he was faced with accusations for offences for which death penalty may be pronounced, represents the violation of article 3 of the ECtHR. Cf. European Court of Human Rights, *Vilvarajah and Others v. The United Kingdom*, Application Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991; European Court of Human Rights, *H.L.R. v. France*, Application No. 24573/94, 29 April 1997. Likewise, cf. the decision in the case of the European Court of Human Rights, *T. I. v. The United Kingdom*, Application No. 43844/98, 7 March 2000,

It seems that the EU has the most comprehensive and most efficient system for the protection of refugees and asylum seekers. This system was developed for years, from the Maastricht Treaty 1992 (article K), Treaty of Amsterdam 1997 (articles 61–69), Tampere European Council Conclusions 999 (13–17).[212] Its Member States have been oriented for long to the development of the *Common European Asylum System* (CEAS).[213] The legal grounds should be found in article 67(2), and articles 78 and 80 of the Treaty on the Functioning of the European Union (TFEU), and article 18 of the EU Charter of Fundamental Human Rights 2000[214]. This common system, including the single status and procedures, was formed by the Treaty of Lisbon.

4. The status of refugees and migrants in the Bosnia and Herzegovina order and reality: International law aspect

This state, following the fulfilment of international obligations and standards[215], adopted a number of laws at the state level in this part.[216] First this country adopted the Law on Immigration and Asylum of BH 1999. Afterwards, a significant progress was achieved in this field with the state Law on Movement and Stay of Aliens and Asylum 2008, i.e., 2012, which was after that completely separated under conditions of specific subject-matters of regulations into two new general legal acts at the state level. "Bearing in mind the constant changes in the legal order [EU], and the obligation to harmonise the national legislation in this field with the Article 29 of the BH Law on the Border Control prescribes the obligation of subjecting to border controls, the provision of which stipulates that "any person intending to cross or has already crossed the borderline shall be obliged to stop and present a valid travel document. The person shall be obliged to clarify all the circumstances related to meeting the requirements for crossing the state border to the police officer of the BH Border Police and to act according to the warnings and orders of the police officer." "Border control shall be conducted at 83 border crossings, out of which 55 are for international and 28 for local border traffic."

If an alien "has crossed or attempted to cross the state border outside a border crossing post open for international traffic, or outside a border crossing post designated for the traffic between BH and neighbouring countries, it shall mean that he attempted to make an illegal crossing of the state border." The greatest number of irregular migrants in BH is in this status exactly because of the manner of their entry into BH, i.e. their crossing of the state border outside a border crossing post.

The BH Law on Asylum stipulates the authorities competent for its enforcement, principles, requirements and procedure for granting refugee status, subsidiary protection status, termination and cancellation of refugee status and subsidiary protection status, temporary protection, identification documents, rights and duties of asylum seekers, refugees and aliens under subsidiary protection status, as well as other issues in the field of asylum in BH. Well, here the issue of effect when the BH state authority grants refugee status to an individual is interesting. Does such an approval of the BH administration authorities have any constitutional or declarative effect? It would be interesting to explore in some of the coming research, whether there are such situations when a person fulfils refugee status according to the international law, and the internal state authority does not recognise such a status or for the purpose of recognition, meeting additional requirements is required.

The issue of access of the mentioned categories of people to the national mechanisms of international

where the Court took the stand that it was clearly recognised that extradition into the country where there was a risk of ill treatment by the non-state agents represent the violation of ECtHR. See also the decision in the case of the European Court for Human Rights, *Ahmed v. Austria*, Application No. 71/1995/577/663, 17 December 1996.

[212] Grubešić, I., Omerović, E. (2020), op. cit., p. 188.

[213] Ibid, pp. 188–189.

[214] EU Charter of Fundamental Rights, *OJ EU*, 2016/C 202/02, 7 June 2016.

[215] In addition to the previously herein listed multilateral international treaties in this area of the protection of individuals (generally under the auspices of the UN) to which BH is a party, for the international regional framework, including the EU acts, see: BH, Ministry of Security (2016). *The Strategy in the Area of Migration and the Action Plan for period 2016–2020*, Sarajevo, pp. 24–26. Special sources of obligations in this part are bilateral international agreements with BH and other states on readmission. They will be reviewed further in the *Report*.

[216] Constitutional law framework of BH, also see: BH, Ministry of Security (2016). *The Strategy in the Area of Migration and the Action Plan for period 2016–2020*, Sarajevo, p. 23.

protection is a separate one. In this sense, BH has a handful of institutions sharing the competence thereof. Besides the BH Border Police, there is the BH Service for Foreigners' Affairs (SFA), BH Ministry of Security (Asylum Sector and Immigration Sector), BH Ministry of Foreign Affairs, BH Ministry of Human Rights and Refugees (Sector for refugees, displaced persons and housing policy, and Immigration Sector), BH Ministry of Civil Affairs, BH Ministry of Justice (Free Legal Aid Department), BH Presidency, BH Council of Ministers, other police bodies in BH, including the State Investigation and Protection Agency (SIPA), Intelligence-Security Agency (OSA), Directorate for European Integration, BH Court, BH Constitutional Court, BH Agency for Labour and Employment, healthcare institutions, social welfare centres. Also, there are administration bodies at the lower levels, such as of the Ministry of Interior of Republika Srpska and the BH Federation, including also the cantonal departments of internal affairs, and the police of BH Brčko District, as well as the Ministry of Administration and Local Self-Government Republika Srpska. Particularly, the BH Migration Coordination Body should be singled out, which was established with the Decision on the Formation of the Migration Coordination Body in BH 2013, as a permanent body responsible for the coordination of activities between the competent institutions dealing with the problematics of migrations and asylum. Among other bodies in BH, the IOM, UNHCR, as well as a number of international and national non-governmental organisations are active in this field. In 2018, the UNHCR had some active partnership agreements with the BH Ministry of Security, BH Ministry of Human Rights and Refugees, as well as with a number of non-governmental organisations.

The first step for aliens in the process of exercising the rights to asylum is one's declaration of the intention to seek asylum in BH, and such intention to file an asylum application may be declared either to the BH Border Police (BP) at a border crossing post or to the BH SFA organisational units. If, however, an alien declares his intention to file an asylum application at any of the border crossing posts, the BH BP immediately informs the SFA local competent organisational unit, which is obliged to take over the alien. The BH BP or the SFA organisational unit to which the alien has declared his intention to file an asylum application, will inform the alien on the procedure for seeking asylum and his rights and duties. The alien who declares his intention for asylum will be issued a certificate on their intention declared by the SFA organisational unit, wherein the direction of movement is determined, being necessary for getting to the BH Ministry of Security to file the asylum application in person. It is unclear why an asylum seeker is required to come personally to the BH Ministry of Security. Could not this entire procedure be conducted at the BH border crossing posts open for international traffic in order to facilitate and accelerate the entire procedure?

In this sense, we come to the dilemma of how to help refugees who express their intention to apply for asylum in BH. As we have seen, currently in BH, refugees are being issued a certificate for expressing their intention to lodge an asylum application, but they are often left to travel long distances unsupervised and unsupported in order to file the asylum application in person. This is a highly problematic procedure, which should be revised to minimise security risks, minimise the risk of migrants falling prey to human traffickers, and to improve migration control generally.

The number of persons declaring to the BH BP officers at the state border about their intention to file an asylum application is higher than the number of persons who has actually filed the application. According to the BH BP data, the country of origin of most migrants and refugees is generally self-declared since most lack personal identification documents. The Police and other institutions for the implementation of laws in BH (here the BH BP is not enlisted), most frequently refer migrants, refugees and asylum seekers to the BH SFA ; whereas, the scope of cooperation on these issues between the police forces and the BH BP is a bit lower in intensity. The OSCE Mission in its Report also notes that the BH BP lack appropriate human resources such as interpreters and cultural mediators. The problem of a different nature is the non-existence of clear operating instructions of the BH Ministry of Security, particularly in relation to treating and screening migrants, and particularly potential victims of trafficking; consequently, the BH BP officers use various practices in registering and collecting data on migrants and refugees in the area along the borderline, i.e. at the border crossing. The OSCE Mission issued a recommendation to the BH Ministry of Security to "Take steps to co-ordinate the work of the

Border Police with that of other law enforcement agencies, including cantonal and entity level ministries of interior, in order to ensure stronger co-operation [...]“ .
When the evaluation of work of the BH SFA is in question, which operates as an administrative organisation within the system of the BH Ministry of Security, responsible for operational and inspection administration and legal affairs on the movement and stay of aliens, and asylum the OSCE Mission evaluation established that, although the BH SFA had 16 field offices, the capacities and resources for addressing the challenges posed by the migrant and refugee influx should be developed. Additionally, the importance of strengthening the cooperation between the BH BP and the BH SFA was acknowledged.
With regard to the registration of the asylum-seekers there are issues related to updating the data due to organisational problems, i.e. the human resources available to the Ministry of Security of BH, primarily the Asylum Sector.
This difficulty specifically has emerged since the time when Bosnia and Herzegovina faced intensified migration, i.e. when it became part of the current migration routes. In June 2018, the BH SFA established the online system for registration of the stay of aliens in
BH “e-stranac.ba”, which has significantly speeded up the aliens registration process, on the basis of which the number of registered aliens could be determined, as well as of those persons who filed asylum application.
There is a relatively low number of stateless persons in BH comparing to the entire situation and movement in the world. According to the UNHCR, currently less than 100 persons are at risk of statelessness in BH. Actually, since 2014, when the UNHCR started #Ibelong campaign, BH has made an important step forward in solving the statelessness issue, cutting down the number of stateless persons. Individuals at risk of being stateless persons are mainly children who were not entered into the Birth Registry Book after their birth within the stipulated time limit. Members of Roma people make up the majority of stateless persons or unregistered persons. Statelessness, likewise, affects also migrants entering the BH territory, but their number is unknown. The state and entity institutions are obliged to take care of stateless persons and they are assisted in it by the UN agencies, like the UNHCR, UNICEF, IOM, and a non-governmental organisation “Vaša prava” (Your Rights).
Speaking about the international cooperation between BH with other countries, a major problem for BH “represents the fact that there are no readmission agreements with the MAGREB countries”, which are “the countries of origin of a large number of foreign citizens being present in the current migration flows in the territory of Bosnia and Herzegovina”. Otherwise, international readmission agreements “facilitate and expedite the return of nationals having illegal stay in one of the countries signatories to the readmission agreement. This also applies to the return of third country nationals or stateless persons who illegally left the territory of one signatory to directly enter the territory of the other signatory.” Therefore, this institution “means return and receipt of domestic citizens who do not meet or ceased to meet the requirements for entry and stay in the territory of another state.”
In regard to the countries in the region, it is necessary to take measures to ensure an efficient implementation of the readmission agreement existing between these countries (Republic of Serbia (2004) and the Republic of Montenegro (2008)) from the territories of which the foreign citizens enter the territory of BH in order to return them to the countries from which they entered to the territory of this country. Likewise, BH concluded such agreements also with the Republic of North Macedonia (2008), Republic of Albania (2009) and the Republic of Croatia (2000). The Readmission Agreement on the basis of which BH continuously admits the greatest number of people is the agreement with the Republic of Croatia, related to third-country nationals or stateless persons who left the territory of BH to illegally enter the Republic of Croatia. An analysis of data shows that in 2019, there is “a significant increase in the admission of nationals of Pakistan, Iraq, Afghanistan and Iran, to Bosnia and Herzegovina, and decrease in the number of admissions of nationals of Turkey and Syria”. The data on readmission and transfer of aliens indicate that BH is still a transit area for persons arriving from the territory of the Republic of Serbia and the Republic of Montenegro on their way towards the Republic of Croatia.

Regarding the voluntary return of aliens from BH to the countries of their origin with the assistance of IOM and BH SFA, from 2010 to 2019; with the assistance of the IOM, in total persons 1,277 were returned; and in the same period, with the BH SFA assistance, in total persons 2,268 were returned. When the return in 2019 is analysed, a significant return of nationals of Iraq, Iran, Tunisia, Algeria and Pakistan in the organisation of the IOM is observed.

5. Conclusion

We notice that BH has taken the obligations from all the multilateral international agreements in the area of the protection of refugees, asylum seekers, displaced persons and migrants, either through accession or notification of succession. So, BH classified itself among the states that undertook a great scope and content of the most different international obligations in regard to the fullness in safeguarding the rights and freedoms of the mentioned people, as well as the improvement of their situation in the country in which they are aliens. Regarding the normative framework, BH adopted the Law on Aliens and the Law on Asylum at the state level, which replaced the BH Law on Movement and Stay of Aliens and Asylum that had been in force by then. Besides these two, which greatly cover the mentioned matter, there is also a general development of legal framework in the country serving as a very important achievement in the field of the management of migration and asylum in BH. Along with relatively adequate legal framework, which follows international principles and standards, the institutional building in the country is also noticeable, in the sense that there are various institutions having various competences in the management of these processes. But sometimes, institutional building can result in institutional fragmentation, leading to an institutional infirmity and an infirmity "in regard to coordination of the relevant bodies of authorities at the various levels of BH." All of that can give rise to an international responsibility of the country due to the fact that the state has taken some international responsibilities which it has not performed, meaning that the state - in acting so - commits an international illegal act.

The challenges that BH faces with on a daily basis are of various natures though. The first challenge is of financial character. Indeed, it is hard to draw a parallel between rich and poor countries nowadays, i.e. between developed, developing and underdeveloped ones. Sometimes it seems that there is an unequal distribution of refugees and asylum seekers on the stage, between countries of one region or sub-region, i.e. that economically and functionally poorer countries feel a greater burden in sense that there is much higher number of categories of people protected by international law who are in need of every form of protection. In addition to a poorer financial picture, BH is very often characterised by a lack of communication, coordination and efficient operating of the state authorities, which is a consequence of the complex state structure, responsibility-sharing, and often of overlapping state services. Although BH has the strategies of operations with action plans in the sphere of managing migrations and asylum for successive time periods, it seems that the coordination mechanisms lag behind the problems taking place in the field. All of this makes the BH response insufficient. The decentralised organisation of authorities in BH contributes to a decrease in effective instrumentarium, capacity and readiness of the authorities to cope with the protection of the respective categories of people in an adequate and holistic manner. On the other hand, there is no fair distribution of refugees, asylum seekers and migrants inside BH either. In Republika Srpska there is not one receiving centre. Also, there is no proportionality in the territory of the BH Federation.

These categories of people mostly stay in certain cantons, with emphasis on the Una-Sana Canton, i.e. north-west part of the country. Consequently, certain political subjects lack the will for having a comprehensive protection provided by the State of BH to people who need it.

The social context and relationship of the domicile population, the BH nationals to all of these categories of aliens, is also affected by media, who often report on migration movements in BH in a non-critical and sensationalistic way. It is all followed by a varying use of expressions in public discourse that are inadequate, which does not represent a reflection of the actual situation and actual categories of people, the use of which results in new victimisation of such people, in their stigmatisation, dehumanisation, and discrimination, such as unclear and persistent use of the term "illegal" migrant or ignorance of the difference between refugees and asylum seekers, stateless

persons, internally displaced persons and migrants who found themselves in the territory of BH due to economic and not due to the reasons of political persecution or consequences of armed conflict in the state of their nationality or their last stay.

All the stated reasons and factors make the position of BH very ungrateful in the context of forced migration movements through the European continent. Moreover, a question arises whether the bilateral international agreements on readmission really helped in cutting down the number of the so-called economic migrants who, additionally, belong to the group of irregular migrants, since they have not crossed the BH border in the manner prescribed by the Law. Moreover, the state border, particularly the one to the east of BH, with the Republic of Serbia and the Republic of Montenegro, is monitored in an insufficient and non-quality way, which is probably a consequence of the lack of number of police officers, the BH BP members.

At the international level, a further development of the international law protection system takes place in two directions. The states wish to create an integral, holistic approach in the improvement of status of aliens in their territories; however, concurrently it is an approach of a lawfully non-binding character. The consequence of such tendencies is a stricter interpretation of national regulations on providing asylum and protection to aliens, and "closing" their state borders for such groups of people. Such national treatment cannot represent a basis for common international action and quality cooperation between the countries and international governmental and non-governmental organisations.

Finally, general recommendations for the purpose of improving the conditions, status and protection of these respective categories of people in the BH territory range from the need to improve the control system of aliens' entry and stay in BH, through strengthening capacities in the area of asylum, increasing the efficiency of the BH state border control, to a planned, systematic, and organised work on further improvement of the state's institutional capacities aimed at achieving a clear, fast and coordinated response of BH in this complex segment.

II LABOUR LAW AND SOCIAL INSURANCE

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NATIONAL REPORT

1. Introduction

The Republic of Croatia (RC) belongs to the European countries which have not profiled as attractive and desirable destinations for labour migrations and which, consequently, have not fully made use of the labour potential of migrants, including also persons under international protection, mostly because of the restrictive employment policies for foreign workers and the so-called "over-normativity" of legislation in the area of regulations of residential and labour rights of migrant workers (an exceptionally complex legal regulation of the procedures for regulating such status).[217] In the previous two decades of labour migrations towards the RC, they were individualised, fewer in number, sector-and linguistic-wise determined (with the greatest share of migrant workers from the neighbouring countries), and the previous migration polices and action plans for the integration of foreigners generally focused to asylum seekers and victims of human traffickers, not in the segment of facilitating their employment, but in the segment of the integration of persons under international protection and the members of their families.[218] A further issue is an insufficient focus on the effectiveness of the integration of foreigners. Namely, the legal framework for integrations is in non-conformity with the implementing regulations and integration procedures that are insufficiently developed and, for example, result in an impossibility of having a rapid integration into the labour market due to insufficient availability of language courses or inability to exercise the foreigners' right to access to health care.

The previous migration policies recognised that one of the main problems is the problem of insufficient integration of foreigner in the Croatian society, but they only focused on solving the longstanding (and still unresolved) issue with Croatian language courses.[219] At the same period, two action plans were adopted for the integration of foreigner. The first focused on the integration of all categories of foreigners,[220] and the second one is the only national strategic document on integration of persons under international protection that emphasized the importance of their active participation in society, along with exercising the right to work and employment, and providing employment opportunities in line with qualifications, work experience and interests.[221] The Action Plan put special emphasis on the

[217] See more about in: Špadina, H., Croatian Migration Law: Over-normativity in Search of a Balance between Migration Control and Migrant Rights, in: Foblets, M. C., Carlier, J.Y (ed.), *Law and Migration in A Changing World*, Springer, date of edition: 27. 06. 2021. Accessed on 10. 3. 2021, at the web page: https://www.springer.com/gp/book/9783319995069

[218] See more about in: Špadina, H., Pristup hrvatskom tržištu rada za radnike migrante (Access to the Croatian Labour Market for Migrant Workers) in: *Položaj migranata u međunarodnom i europskom pravu (Status of Migrants in International and European Law)*, Croatian Academy of Sciences and Arts, Zagreb, 2020, pp. 93–129.

[219] *Migration Policy of the Republic of Croatia for Period 2013–2015* Accessed on 10. 3. 2021 at the web page: https://narodne-novine.nn.hr/clanci/sluzbeni/2013_03_27_456.html

[220] *Action plan for eliminating obstacles in achieving individual rights in the area of integration of foreigners for period 2013-2015*, accessed on 10. 03. 2021, at the web page: https://ljudskaprava.gov.hr/integracija-stranaca-u-hrvatsko-drustvo/643.

[221] *Action plan for integration of persons granted international protection for period 2017-2019* Accessed on 10. 3. 2021, at the web page: https://ljudskaprava.gov. hr/integracija-stranaca-u-hrvatsko-drustvo/643.

importance of determining the level of knowledge of Croatian language, which an unemployed person needs in order to perform the job for which he is applying for, so it focused on language learning programmes.[222] Likewise, it emphasises the necessity to encourage their orientation to those competencies that will lead to employment most rapidly, which includes compiling a work profile through interviews and counselling, and developing a job search plan, with the professional help of employment counsellors and activating the mediation process.[223] In addition to increasing the knowledge and skills of unemployed persons under the international protection and implementing the measures of active employment policy, the Action Plan's activities also included strengthening the capacities of employees in the employment system for work with persons granted international protection.[224]

According to the data of non-governmental organisations, refugees and asylum seekers in Croatia are in average younger than the domicile population, they have lower employment rate, they are paid less, they have more children, so they are poorer, and they get jobs of a lower qualification structure and lose jobs faster. Therefore, education has a key role in achieving a more longstanding and secure employment.[225]

2. Legal Framework of Labour and Social Rights of Persons under International Protection

In the analysis of the legal framework for the access of persons under international protection and asylum seekers to the Croatian labour market, there are several key laws the provisions of which we have to take into consideration.[226] First of all, the provisions of article 64 of the Law on International and Temporary Protection should be considered, according to which persons under international protection in the RC have the right to work and the right to assistance for integration into society, as well as certain social rights, as well as the right to health care, education, social welfare, and accommodation. Pursuant to art. 68 and art. 86 of the same Law, person granted refugee status, foreigner under subsidiary protection, and foreigner under temporary protection may work in the RC without a residence permit or a certificate of registration of work. Further on, the provision of article 68 paragraph 2 sets out that refugee and person under subsidiary protection exercise the right to adult education in relation to employment, vocational training and acquisition of practical work experience, under the same conditions as a Croatian citizen, while persons under temporary protection exercise this right without equalisation of these rights with the nationals.

Another important provision of this Law is contained in art. 61, determining that an applicant for international protection acquires the right to work after 9 months from the day of lodging an application upon which the Ministry has not yet rendered any decision if the applicant, through his conduct, has not caused the reasons for the failure to render a decision. Non-governmental organisations advocate for shortening of this nine-month period to a two-month period, following the example of other countries that enable asylum seekers to look for a job much earlier than Croatia.[227]

According to the provision of article 14 of the Law on the Labour Market, an asylum seeker and a foreigner under subsidiary/ temporary protection in the Republic of Croatia may register with the Employment Office, as well as the members of their families, who are equalised with Croatian nationals

[222] Ibid.

[223] Ibid.

[224] Objective no. 14 of the Action Plan, ibid., p. 20.

[225] According to the data of Mrs Dijana Đapić, advisor for integration of the Jesuit Refugee Service.

[226] Law on International and Temporary Protection, *Official Gazette*, no. 70, 2015; 127, 2017; Law on the Labour Market, *Official Gazette*, *no.* 118, 2018; 32, 2020; Law on Labour, *Official Gazette*, *no.* 93, 2014; 127, 2017; 98, 2019; Law on Foreigners, *Official Gazette*, *no.* 133, 2020; Regulation on records of the Croatian Employment Service, *Official Gazette*, *no.* 28, 2019; 59, 2020; Regulation on active search for job and availability for work, *Official Gazette*, *no.* 28, 2019.

[227] According to the data on the Centre for Peace Studies.

in the rights and duties laid under the Law. Exceptionally, an applicant for international protection may also register with the Employment Office if the Ministry of the Interior has not rendered a decision on the application for international protection within a nine-month period from the date of lodging a regular application, and the applicant has not caused the reasons for the failure to render a decision. The Employment Office provides the same services to persons under international protection as to the nationals of the Republic of Croatia.

3. Access to the Croatian Labour Market and the Use of Employment Matching Services when Employing Persons under International Protection and Asylum Seekers

Persons under international protection have the legal right to use employment matching services when being employed by the Croatian Employment Office that are identical to the services to which Croatian nationals are entitled to (registering in the unemployed records, individual counselling, provision of basic information on the rights and duties of unemployed persons, collection of data on the professional, work-related and personal capabilities aimed at defining work profile, identification of obstacles and employment assessment, individual consultations, workshop for writing CV, group information, and defining a plan for job search).[228] In regard to defining a plan for job search by a professional counsellor and an unemployed person, the Employment Office has also designed promotional materials in Arabic, English, French, Farsi and Somali, aimed at facilitating understanding the performance of duties, as well as the obligation of monthly report, job search, participation at individual and group counselling, etc. Regarding the specificities of looking for a job by foreigners under international protection, each Regional Office of the Croatian Employment Office has a specialised counsellor for unemployed persons under international protection, whose search for job is facilitated to some extent as their position at the labour market is considered to be more difficult because of the language barrier; therefore, professional counsellors are more flexible in case of non-performance of the duty to register with the Employment Office , they are more helpful and endeavour to take a more pro-active role due to cultural reasons and a higher level of stress that unemployed refugees are exposed to.

If we try to analyse the access to labour market for persons under international protection through a prism of their participation in matching services when being employed, we have to consider statistical data that clearly suggest that the highest number of persons under international protection was deregistered from the Employment Service during 2017, 2018 and 2019. These years, which were years of increased needs for employment in the Croatian labour market, meaning that only the demand on labour market facilitated and speeded up employment of persons under international protection and that, in this regard, employers found out how to employ such persons irrespective of the legal framework, poor knowledge of the country-of-origin language, and social prejudices and discrimination of these persons at the labour market and generally in Croatian society.[229]

[228] Data used in this chapter were presented at the National seminar of the SEELS project "Forcible Migrations", held online in the organisation of the Faculty of Law of Osijek on 10 December 2020 and attended by the representative of the Croatian Employment Service Mrs Patricija Kezele

[229] See more about it: Benčić, S., Bosanac, G., Miletić, G., Parić, A., Župarić-Iljić, D., Asylum in Croatia: Integration policies. Zagreb, Croatia: Centre for Peace Studies, 2006 Čačić-Kumpes, J., Gregurović, S., Kumpes, J., Migracija, integracija i stavovi prema imigrantima u Hrvatskoj (Migration, integration and attitudes towards immigrants in Croatia) (Review of Sociology, 42 (3), 2012, pp. 305–336. Gregurović, M., Kuti, S., Župarić-Iljić, D., Attitudes towards immigrant workers and asylum seekers in Eastern Croatia: Dimensions, determinants and differences, Migrations and Ethnic Themes, 32(1), pp. 91–122. Petrović, N., Otpori izgradnji prihvatilišta za tražitelje azila: studija slučaja Stubičke Slatine (Resistance to the construction of shelters for asylum seekers: Case study of Stubička Slatina), in: Župarić-Iljić, D. (ed), Prvih deset godina razvoja sustava azila u Hrvatskoj (s osvrtom na sustave azila u regiji) (First ten years of the Croatian asylum system development (incl. review of the regional asylum system) (pp. 185-200). Zagreb. Institute for migrations and nationalities, Centre for Peace Studies, House of Human Rights

Year	Records CES (orig.HZZ)	Women number	Deregistration due to employment	Data of the Ministry of Interior (granted asylum and subsidiary protection)[230]
2014	33	9	11	25
2015	92	15	10	43
2016	55	20	30	100
2017	126	42	73	211
2018	144	41	157	265
2019	172	79	127	158
2020	151 (up to 31.10.)	69	82	42 (up to 31.12.)
2021				8 (up to 31.3.)

Sources: Croatian Employment Service, Ministry of Interior of the RC, 2021

Persons under international protection also exercise the right to use the measures for active employment policy regulated by the provisions of the Law on the Labour Market (art. 34–45) where they are informally recognised by the Service as a particularly vulnerable group, and consequently they exercise the right to more favourable conditions for using these measures and they are not obliged to meet formally-legally the requirement referring to the length of recorded unemployment, but the employers can receive incentives for employment irrespective of the previous employment length or the recorded unemployment period. Lack of knowledge of Croatian language and insufficient availability of language learning courses significantly affect the possibility of inclusion of unemployed refugees in group activities of the Employment Office conducted in Croatian language and, because of their small number, it is very difficult to gather a group of refugees from the same speaking area that can be form a group.

Data that are interesting for consideration regarding the access to labour market are the data on using active employment policy measures, according to which a conclusion can be drawn that the active employment policy measures in which persons under international protection participate are still being implemented in a very limited scope. Considering that in the eight-year period, only two incentives for self-employment of that category were used, the question arises if there are obstacles in accessing the self-employment programmes in Croatia and if more should be done in regard to approximation of such and similar programmes for persons under international protection when we know that exactly these persons are significantly more interested in sole trade activities in other countries than the domicile population.[231] The non-governmental sector in Croatia is advocating for a development of programme incentives for starting up cooperatives and sole trade activities by refugees, along with the introduction of counselling service on running private activities and trade.[232]

[230] According to data of the Ministry of interior of the Republic of Croatia, 13. 5 2021, at the web page: https://mup.gov.hr/UserDocsImages/statistika/2021/Medjunarodna_zastita/Statisticki%20pokazatelji%20trazitelja%20medunarodne%20zastite%20do%2031.3.2021.pdf

[231] Kone L Z., Ruiz, I., Vargas-Silva, C., Self-employment and reason for migration: are those who migrate for asylum different from other migrants? *Small Business Economics*, volume 56, 2021, pp. 947–962. Accessed on 10. 5 2021, at the web page: https://link.springer.com/ article/10.1007/s11187-019-00311-0

[232] According to the data on the Centre for Peace Studies.

Intervention	2012	2013	2015	2016	2017	2018	2019	2020*	Total
Support	0	0	0	1	7	8	6	3	**25**
Public work	1	1	0	1	0	3	0	1	**7**
Training at workplace	0	0	0	0	0	11	11	9	**31**
Education	0	1	0	1	0	0	0	0	**2**
SOR	0	0	1	0	0	0	0	0	**2**
Self-employment	0	0	1	0	0	0	1	0	**2**
Keeping workplace	0	0	0	0	0	0	0	13	**13**
Total	**1**	**2**	**2**	**3**	**7**	**22**	**18**	**26**	**81**

Source: Croatian Employment Service, 2021

There is also an encouraging piece of information that in 2020, 13 refugees used the support for keeping workplaces, which were activated in order to reduce some negative influences of the healthcare epidemiology crisis to workplaces. The measure of training at workplace proved to be particularly useful for refugees as the non-governmental organisations organised Croatian language courses so that refugees would be included in using this measure in an easier way, which may last from 2 to 6 months, and it can be used by an unemployed person or an unemployed person without relevant work experience, and who are enabled training with employer or a combination of practical work and attending theory classes in an educational institution, which issues a public document of completed education programme afterwards. The employer is entitled to compensation for mentorship, costs paid for theory classes and examinations, and paid medical examination costs. The job-seekers entitled to net minimum wages, transportation costs, and compulsory healthcare insurance. Previous trainings generally resulted in an offer for employment to job seekers by the employer with whom the training was conducted, and the use of this measure also significantly increases employment opportunities with other employers, so this measure is often given as a good example of cooperation between the public, private and non-governmental sectors.[233]

4. Recognising Qualifications of Persons under International Protection and Asylum Seekers in the Republic of Croatia

The issue of recognising qualifications of refugees and asylum seekers is regulated by laws[234] that delineate competences of various institutions having legal powers for recognising qualifications in Croatia depending on the level and purpose of recognition.[235] Currently, there are a few obstacles in the

[233] According to the data of the Croatian Employment Service.

[234] The Convention on the Recognition of Qualifications concerning Higher Education in the European Region 1997 (Convention of the Council of Europe no. 165) – Lisbon Recognition Convention; Law on the Ratification of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region, *Official Gazette*, no. 9,2002; 15, 2002; Law on the Recognition of Foreign Higher Education Qualifications, *Official Gazette*, no. 158, 2003; 198, 2003; 138, 2006 and 45, 2011; Law on Scientific Activity and Higher Education, *Official Gazette*, no. 123, 2003; 198, 2003; 105, 2004; 174, 2004; 02, 2007; 46, 2007; 45, 2009; 63, 2011; 94, 2013; 139, 2013; 101. 2014; 60, 2015; 131, 2017; Directive 2005/36/EC; Directive 2013/55/EU; Law on Regulated Professions and the Recognition of Professional Qualifications, *Official Gazette*, no. 124, 2009; 45, 2011; 82, 2015; 70, 2019 and 47, 2020; and the Regulation on evaluation IVK and Criteria for evaluation in the procedure for professional recognition IVK dated 24 April 2011.

[235] According to data presented at the SEELS national seminar by the representative of the ENIC NARIC office of the Agency for Science and Higher Education Mrs Lidija Lamza, the Agency for Upbringing and Education is responsible for the recognition

procedure for recognising qualifications, out of which the primary one is that the law does not recognise refugees as a separate group and does not provide for a possibility for recognising international higher education qualifications to persons who do not have complete documentation, which is attempted to be solved with innovative programmes such as the UNESCO Qualifications Passport, i.e. the European Qualifications Passport for Refugees (Council of Europe).[236]

A further obstacle is the legal provision according to which the recognition procedure is an administrative procedure that, in compliance with the provision of the Law on Administrative Procedure, prescribes the obligation of rendering such a decision and does not provide the necessary flexibility when the complete documentation of the previously attained qualifications is not available out of justifiable reasons. The Agency for Higher Education advocates for resolving this problem through amendments to the law and by regulating the possibility of issuing a non-administrative document that would be at a professional opinion level, and would be based on information available at the ENRIC-office network, which has the needed capacities, native speakers, and they are ready to provide the needed support, and the national bodies could render their opinions on what higher education level the qualification is comparable to the one in Croatia. The further obstacle in the recognition of qualifications is a lack of available funding for translating documentation needed for the recognition of qualifications.

Finally, there is a problem of the recognition of qualifications by professional chambers, as the chambers refuse to recognise qualifications from third countries even when the applicants have complete documentation.[237] Persons under international protection are substantially unprotected regarding the recognition of qualifications for regulated professions as decisions on such recognition exclusively depend on chambers.[238]

5. Integration Challenges of Persons under International Protection and Asylum Seekers in the Republic of Croatia

Integration policies of all categories of foreigners in Croatia have been evaluated for years as below the average comparing to the European average and they are semi favourable, along with the assessment that Croatia implements "integration on paper" only.[239] According to data presented at the National SEELS seminar, the major integration challenges could be classified in six categories.

The first category includes social preconditions for receiving foreigners in the country of asylum, which include widespread stereotypes and discrimination, widespread negative attitudes about persons under international protection and asylum seekers, and attitudes that they should not be employed. Public opinion to this category of foreigners from the initially positive one in 2015, later turned into intolerance

of foreign school qualifications on completed elementary and secondary education in general, gymnasium and art programmes; the Agency for Vocational Education and Training for adults is responsible for the recognition of foreign school qualifications on completed secondary vocational education; a school institution where the applicant intends to continue education is responsible for the recognition for the purpose of continuing elementary school education, i.e. secondary school education level; higher education institutions are competent for the academic recognition for the purpose of continuing education; the Agency for Science and Higher Education is competent for vocational recognition for the purpose of employment, while the recognition of vocational qualifications, specialisation and professional examinations are within the responsibility of line ministries and vocational organisations, i.e. chambers.

[236] See more about in: Špadina, H., European Qualifications Passport for Refugees, *Collection of Works of the Faculty of Law of Niš,* 2008, pp. 231–241 Retrieved on 01. 3. 2021, at the web page: http://www.prafak.ni.ac.rs/izdavastvo/zbornik-radova/index.php?option =com_content&view=article &id=3915&broj_zbornika =79&godina=2018

[237] See more on accessing Croatian labour market for regulated profession in: Špadina, H.,Špadina, H., Pristup hrvatskom tržištu rada za radnike migrante, (Access to the Croatian Labour Market for Migrant Workers), in: *Status of refugees in international* and *European Law*, Croatian Academy of Science and Art, Zagreb, 2020, pp. 93–129.

[238] According to data of the ENIC/NARIC office of the Agency for Science and Higher Education.

[239] According to data presented at the National Seminar by docent Snježana Gregurović, LL. D., from the Institute for Migration and Nationalities, who coordinates collection and an analysis of national Croatian indicators for integrations for the Migrant Integration Policy Index (MIPEX). Retrieved on 01. 5. 2021, at the web page: https://www.mipex.eu/.

and xenophobia, which is a clear indication of the necessity to conduct public campaigns on the values brought to society by migrants and the introduction of civic education about inclusive societies.[240]
The second category includes integration challenges in exercising labour and social rights in relation to language learning. Namely, access to Croatian language courses is limited due to insufficient number of courses, the length of which is too short for refugees to be able to learn the language, and currently there is a lack of an adequate number of translators at all levels of integration - starting from the Employment Service, Welfare Centres, physicians, and all other actors who enable the realisation of social rights in the country of asylum.[241] Non-governmental organisations in Croatia are attempting to solve this problem by using the so-called cultural mediators, who have personal refuge experience often passed through refugee experience and therefore, are aware of challenges current refugees are faces with. They assist not only in translating but also with counselling on the functioning of the system, the available public services, and the access to institutions.[242] So far, the most successful model has proved to be Croatian language learning jointly with learning specific professional skills, which increases employability of refugees and asylum seekers.[243]
The third category of integration challenges is the access to health care, regarding which, according to MIPEX data, Croatia is in health care policies the third worst positioned country out of 38 countries covered by MIPEX research, as the access to health care is mainly favourable for migrants with regulated residential status, while it is limited to emergency services and much-needed medical treatment for asylum seekers and migrants with unregulated residential status.[244] MIPEX points out that translators are needed for accessing health care, the number of whom is insufficient, but it, likewise, emphasizes on the absence of standards of inter-cultural communication between healthcare professionals and refugee patients. The healthcare system does not recognise migrants as a category of socially insured persons, and the registration procedures in this system last too long and are too complicated, so it often happens that physicians do not have sufficient support to carry out the procedure, to provide services, and register refugees in all the necessary registries of the health care system. A further issue is that, by the agreement between the Ministry of Health and health centres, urgent and medical justified specialist-consultants' medical examinations of asylum seekers are regulated in special healthcare centres, and persons under international protection do not have any possibility of accessing other healthcare institutions. A particular issue is a high level of traumatisation because of refugee experience; therefore, the necessity of introducing a systemic support to mental health, particularly to children, is pointed out.[245]
The fourth category covers integration challenges regarding specific categories of persons who are less employable such as women who are often not motivated to enter the labour market if it requires additional education; however, there is also the need for increasing the employment offers for part-time jobs, which can be balanced with family obligations, as well as for increasing availability of kindergartens that would allow mothers to enter the labour market.[246]
The fifth category includes social rights in the field of access to education, where the possibility of continuing education is not regulated in a systematic way, after its discontinuation due to refugee

[240] According to data of the Ombudsman Office, which conducted public opinion polls many times, and their research was presented at the National Seminary by Mrs Dijana Kesonja and Mrs Monika Čavlović, who are legal advisors of the Ombudsman.

[241] Ibid, and data of a non-governmental organisations; the Jesuit Refugee Service and the Centre for Peace Studies, whose representatives Mrs Dijana Đapić and Mrs Lucija Mulalić participated at the National Seminar and did a presentation on the topic of integration challenges for refugees and asylum seekers in Croatia.

[242] According to the Jesuit Refugee Service and the Centre for Peace Studies.
[243] Such a model in Croatia is conducted by the Jesuit Refugee Service.
[244] According to the data presented by the Institute for Migrations and Nationalities.
[245] According to the data presented by the Jesuit Refugee Service
[246] Ibid.

status.[247] Another problem is the present f discrimination in school environment, language barriers (between refugee children and other children and refugee children and teachers) and insufficient quality of classes for refugee children, as there is no formal professional training to work with this group in Croatia. Children over 15 of age, who have not completed elementary education do not enter the regular education system, but enter the programmes for adults; however, the education centres for adult education require basic knowledge of Croatian language as precondition for enrolment. During Covid-19, the schools did not have enough resources to provide all children with mobile technology, because of which refugee children could not follow online classes.[248] The sixth category includes integration challenges of social housing, which is legally subsidised in Croatia for a two-year period only, and the rental market of apartments is unfavourable for refugees and asylum seekers, because they are exposed to prejudice and discrimination.[249] During the epidemic and after the earthquake that hit some parts of Croatia, the coordination of non-governmental associations addressed the ministries with a request to extend the two-year period for subsidised housing to persons under international protection, since homelessness also threatened them due to increased loss of employment.[250]

6. Influence of the Covid-19 Epidemic to Accessing the Croatian Labour Market

According to the non-governmental sector representatives, the public health epidemic had a major impact on the dismissal of refugees in Croatia who were employed in service activities, most often in the lowest paid jobs, with precarious working conditions and on the basis of employment contracts for a definite period, which facilitated dismissals of these workers due to the epidemic.[251]

During 2020, the Croatian Government - because of the Covid-19 epidemic - took a decision on the urgent procedure for amending art. 140 of the Law on Foreigners previously in force, with a provision that a third-country national who had been granted residence permit at the time of duration of the COVID-19 disease epidemic caused by SARS-CoV-2 virus, did not have to submit an application for obtaining a new residence permit, and maximum up to 30 days from the date of declaring an end to the epidemic because the previously issued permit was considered to be valid. This amendment regulated that, after the expiry of the time limit, the third-country national was obliged to file a new application for issuing a new residence permit without delay.[252] Unfortunately, when the new Law on Foreigners was adopted in January 2021, the stated provision was not included into the new Law; therefore, despite the ongoing epidemic, foreigners were still obliged to extend their residence permits as they had done before the epidemic was declared.

The new Law on Foreigners 2021 abolished the former quota system for the employment of foreigners and replaced it with a labour market testing system (art. 98). Considering the labour market got disrupted due to Covid-19 and the need for mass employment ceased in seasonal employment sectors in
Croatia, it can be assumed that employers only retained migrant workers at the existing jobs and did not employ new workers.

Despite the growing demand for employing health workers during Covid-19, no initiative was initiated to speed up the recognition of professional qualifications of persons under international protection who had the needed healthcare qualifications, nor any initiative was instigated for a facilitated employment of other categories of migrants, in the so-called Covid-19 essential jobs (like healthcare).

7. Conclusion

In the concluding remarks, it should be emphasised that the access to the Croatian labour market is still

[247] Ibid.
[248] Ibid.
[249] The Ombudsman's office.
[250] According to the data presented by the Jesuit Refugee Service
[251] Ibid.
[252] *Final proposal of the Law on Amending the Law on Foreigners*, retrieved on 10. 5. 2021, at the web page: https://www.sabor.hr/sites/default/files/uploads/sabor/2020-04-16/130303/ PZ_926.pdf.

hindered, and this primarily because of many obstacles that these persons encounter when they are granted asylum in Croatia and attempt to integrate into the labour market. The most important obstacle is the lack of Croatian language courses, the lack of translators or cultural mediators who would help refugees in integration and translation, and many other obstacles in the procedures for recognising professional qualifications. The national labour market has not recognised entrepreneurial potential of persons under international protection yet, and it has not accepted the specificities of employing persons who would prefer to work part time to balance their family and work duties. Considering the negative attitudes towards persons under international protection and asylum seekers, it is necessary to work on raising the public awareness on a positive contribution of foreigners to the national labour market, and this should be done taking into the account good practices of other migrant work destination countries. . This report, on the basis of the presentations of the National SEELS seminar's participants, has identified six areas of integration challenges for refugees and asylum seekers in Croatia, and these are: receiving foreigners in the country of asylum, language learning, and access to health care, special challenges of the less employable persons, access to education, and access to social housing. The former Croatian integration policies have partially and insufficiently designed integration measures for persons under international protection, and, considering that the drafting of a new national Action Plan for the integration of persons under international protection is currently on the way, Croatia has a chance to design a new framework of integration similar to other EU Member States and in accordance with the most progressive integration standards in the countries providing high standards of international protection.

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NATIONAL REPORT - THE RIGHT TO HEALTH AND HEALTH CARE OF MIGRANTS[254]

1. Introduction

International law protection of migrants is directly linked with the reasons for leaving one's own and arrival in another (foreign) country. Economic, social, educational reasons, fear of persecution, war conflicts, civil unrest, endangering life and bodily integrity are the most frequent recorded causes of migrations.[255] According to the reasons for leaving the country of origin, migrants are classified in specific groups, labelled with a specific name (refugees, asylum seekers, asylees, internally displaced persons, regular migrants, irregular or migrants without documents), and are granted international law protection - special (enhanced), regulated under international and national regulations valid only for the category of migrants to which they belong[256], or general, in compliance with international law on human rights.[257]
Special guarantees and legal protection of migrants[258] are necessary and they are also in accordance with the risks to which they are exposed in all the stages of their journey, from the country of origin to the final destination. Indisputably, migrants also enjoy the fundamental human rights, guaranteed to every human being, regardless of their source - international law on human rights or adequate national regulations - because these rights protect the dignity and integrity of personality of any person, irrespective of any personal property. The right to life, freedom and security of personality, freedom of movement, protection against discrimination, ill-treatment, exploitation, torture, slavery and forced labour, voluntary arrest and deprivation of freedom - undeniably belong to every person, so their consistent application must not depend on the territory where the person is located, or the fact whether he/she is a domestic citizen or an alien. Neither the enjoyment of specific socio-economic rights should depend on these factors, particularly not the right to health and health care. The conditions of such journey, work and life of migrants crucially affect their health, because of which migrations are considered to be a social determinant of migrant's health.
The right to health and the right to health care should not be equated, but observed in the relation of general and specific, of a part and a whole: the right to health care (which is most frequently legally guaranteed) is a part of the right to health and is its minimum. Health care availability must be an

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[254] The paper was presented at the Forced Migration Project conference, held at the Faculty of Law of Niš, 28 April 2021.

[255] On migratory reasons and classification of migrants, see in: N. Raičević, *Zaštita izbeglica u međunarodnom pravu (Protection of refugees in international law)*, Niš, Faculty of Law of the University of Niš, 2018; Y. Ktistakis, *Protecting migrants under the European Convention on Human Rights and the European Social Charter*, A handbook for legal practitioners, Council of Europe, Beograd, 2016, p. 9, and I. Krstić, *Priručnik o zaštiti migranata u Republici Srbiji* (*A handbook on Protecting the Rights of Migrants in the Republic of Serbia*), International Organisation for Migrations, Beograd, 2018, pp. 11–13.

[256] For instance, the Convention Relating to the Status of Refugees, 28 July 1951, *United Nations, Treaty Series*, Vol. 189 137; *Official Gazette of the FNRY* – International treaties, no. 7, 1960) or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN General Assembly, 18 December 1990, A/RES/45/158. The Republic of Serbia has not ratified this Convention, although signed it in 2004).

[257] Universal Declaration of Human Rights (adopted and declared by the UN General Assembly resolution 217/III dated 10 December 1948, the European Convention for the Protection of Human Rights and Fundamental Freedoms (see the law on its ratification: *Official Gazette of the RS - International Treaties*, no. 12, 2010 and 10, 2015).

[258] In this paper, the term "migrant" is used as a common name for refugees, internally displaced persons, asylum seekers and migrants (regular and irregular).

indisputable right of any person, which should be followed by healthy living and work conditions, access to healthy drinking water and safe food, healthy environment, appropriate education and informedness, as well as with other health related social and economic factors. These socio-economic factors are determinants of the right to health). Namely, human health is affected by various factors outside human organism and this particular interrelation provides a basis to the holistic and comprehensive understanding of the right to health - a concept advocated by us in the paper before you.

Health is affected by various factors - internal, inside the human organism (determined by genetic inheritance), and external, outside the human organism. Consequently, in order for a person to be considered healthy, it is not enough that he is not ill and that all physiological, mental, emotional and mental processes in his body take place normally. Also, the conditions in which a person lives and works, availability of healthy drinking water and food, education, and acquiring information on the importance of a healthy lifestyle, easy access to healthcare services, economically acceptable prices of those healthcare services excluded from the compulsory healthcare insurance, and social and economic factors similar to these, are also relevant. This coherence between health and the mentioned factors also makes the right to health a complex right: the scope and quality of its enjoyment is not only affected by the conduct of its holder (one's concern or unconcern of his/her own health), but also by the state measures in the area of healthcare policy, health care, concern for marginalised and vulnerable groups etc. The state is expected to improve standards in a permanent manner, at least within the framework of available possibilities and resources, for the purpose of realising the best possible health of the population, and every person is expected to take care of his own health, which gives a feature of progressiveness to the right to health.

The complexity of the term 'health' is also respected by the international organisations committed both to its protection and improvement of other socio-economic rights that the right to health belongs to. We single out the World Health Organisation and the Committee on Economic, Social and Cultural Rights, in the foundations acts of which the right to health is guaranteed as the fundamental human right, and the Signatory States are obliged to, besides health care, provide life and work to everyone in the conditions contributing to good health.

The right to health is a fundamental human right, which should be enjoyed without discrimination on any personal ground, including one's immigration status. A state is obliged to provide to everyone in its territory, either a domestic citizen, an alien or a migrant, the enjoyment of the right to health without discrimination. The protection of migrants' health, which must not be reduced to urgent medical care, is very important, both for migrants themselves and for the health of national population.

In this paper, we analyse the protection of health provided to migrants in the territory of Serbia. Bearing in mind that health (of migrants) is the key term to which our attention is focused, in the first two parts, we analyse the term health and the right to health, and their guarantees provided by the international law. Afterwards, we focus to studying the legal framework for health care in the Republic of Serbia - general health care, valid for the entire population, and specific - provided for various categories of aliens, *inter alia* for migrants. Theoretical analysis of the current regulations is followed by a presentation of their practical application and a corresponding criticism thereof. In the conclusion, the research results of the subject-matter determined by the titled topic - health care of migrants in Serbia, are summarised.

2. Right to health

The right to health should first be determined as a subjective right, a personal right, which provides its holder with a sequence of powers and interests, directly exercisable upon the object of the right or on account of it.[259] The object of this right is health - like life, it is the first order value and the most significant

[259] More on personal rights (rights of personality): V. Vodinelić, *Građansko pravo, Uvod u građansko pravo i opšti deo građanskog prava* (*Civil Law*, *Introduction to Civil Law*, *and the General Part of Civil Law)*, Faculty of Law of the Union University and the Official Gazette, Beograd 2012, p. 253–264; I. Simonović, M. Lazić, Građanskopravni aspekt zaštite prava

good that a person can possess. The significance of these two goods and the rights to them (right to life and to health) is understandable *per se*: they are a precondition for the enjoyment of all other rights, both civil and subjective rights and those regulated by public law norms.

The right to health authorises its holder to demand certain actions and activities from another [entity] for the purpose of preserving and improving one's own healthcare status, also to exercise by himself/herself, directly, the powers recognised to him/her. Since this right is absolute and personal, it is characterised by some general characteristics of this group of rights: absoluteness of action - the *erga omnes* effect (it can be opposed to everyone), inalienability and non-patrimonial nature. The right to health is not subject to prescription; therefore it ends with the death of its holder.

The powers stemming from the right to health are more closely determined with the regulations on health care and healthcare insurance, which define these terms and their contents, i.e. acts, measures and activities they consist of, and the subjects - health care providers and their beneficiaries.

The right to health is concretised in a new legal relationship, established between the right holders - patient and physician, in relation to the provision of a concrete healthcare service. This newly established relationship is the one of obligations, a contractual one (contract on medical service), having a relative effect, with the precisely determined powers and duties of both contracting parties. The basic content of this relationship is determined with the actual healthcare need of the patient,[260] who is entitled to demand medical care, provided according to the the best medical practice, established professional standards and generally accepted rules in particular field of medicine (*lege artis* principle). A physician as a medical expert, determines and undertakes necessary diagnostic and therapeutic measures for the purpose of treating, and, by providing medical aid, provides a healthcare service and is responsible for its careful and professional implementation.

Being relative (contractual), the right to health is exercised in a form of the right to health care, which is a narrower conception of this personal right. In a broader sense, the right to health also acts towards the state, which by fulfilling its obligations (negative and positive) creates the conditions for its enjoyment. Negative obligation is common to all the subjective rights, which are as well the fundamental human rights. It is about the obligation of refraining from, in this case, disturbing mental and physical integrity and health of the right holder. Positive obligations of the state are the prevention of others in doing such acts and the fulfilment of various requirements (mainly social and economic) necessary for the enjoyment of the right to health.

Considering the right to health in relation to the state gives this right an epithet of a fundamental human right. This is a human right of the second generation, social and complex right, for the enjoyment of which, besides health care, it is necessary to provide conditions outside the healthcare system, in the areas of economy, environmental protection, housing, education, information. Say in a simplified way, the right to health relies to a concurrent enjoyment of other social and economic rights[261], as they affect health and can be considered to be their determinants.

Understanding the right to health as the fundamental human right occurs in the fifties of the last century, by adopting international documents guaranteeing human rights and laying down the obligations of states to improve, safeguard, and permanently provide conditions for a quality realisation thereof. Adding these

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ličnosti (Civil law aspect of the protection of the right to personality), *Collection of Papers of the Faculty of Law of Niš*, no. 68, 2014, pp. 269–290.

[260] A doyen of medical law in Serbia, professor Radišić, observes that it is difficult to provide unique definition of medical service contract, applicable to all its variations and to all medical cases. Here. law must be helped with the rules of medical science and profession, as they specify the standard of medicine at a given moment, i.e., measures and actions usual and needed for treating patients. See: J. Radišić, *Medicinsko pravo*, (*Medical law)*, Faculty of Law of the University Union, Beograd, 2008, p. 81.

[261] Like the right to potable water, food of controlled quality, housing and basic sanitary and hygienic housing conditions, safe work conditions, education, availability of information significant for health, accessibility of important infrastructural facilities, equal access to healthcare institutions, per acceptable prices (for services excluded from compulsory healthcare insurance).

positive obligations of the state to its basic duty of refraining from the violation of human rights, highlights the significance of measures and activities, which the state should undertake in order to provide conditions for a true enjoyment of the guaranteed rights, particularly social and economic rights, to which the right to health as a human right belongs.[262]

Diversity of factors affecting health contributed to an opinion in the theory of medical law that the right to health is an illogical notion and is not exercisable.[263] None of state authorities can guarantee a normal functioning of the bodily functions to any person, nor the right to be and stay healthy; it can only be the question of the right to accessibility to an adequate medical aid and healthcare treatment in the event of disease or an accident.[264] This attitude highlights such objective possibility and eligibility of the guarantee and protection of the *subjective right to health care*: the right to require from another [entity], for the purpose of the protection and improvement of one's own health, certain acts that it is obliged to undertake.[265] This another [entity] is the state, which organises the health care system and prescribes to whom, under what conditions, and to what scope it is to be provided.[266] We believe that the role of the state in the organisation of its health care system is significant, but it must not end here, and the right of individuals to demand from the state: permanent care about the conditions in which citizens live and work, continuous investment in the environmental protection, and taking care of all other exogenous health-relevant factors, must not be challenged.[267][268]

3. International law guarantees of the right to health

The guarantees of the right to health can be found primarily in the Preamble to the Constitution of the World Health Organisation 1946.[269] "*The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition*." By virtue of guaranteeing the right to the highest attainable standard of health and defining the term health itself as a condition of complete physical, mental and social well-being, and not just an absence of disease or infirmity, the right to health is elevated above the right to

[262] "The right to health is a human right of the second-generation, a social right, which rests on the principles of equality and solidarity." D. Petković, "Pravo na zdravlje – pravna regulativa i primena u Republici Srbiji, *Pravo i multidisciplinarnost* (*Right to health - legal regulations and application in the Republic of Serbia*, *Law and Multidisciplinarity*), A Thematic Collection of Papers, Faculty of Law of Niš, 2020, p. 297.

[263] J. Radišić, *Medicinsko pravo (Medical law)*, *op.cit.*, p. 57.

[264] Eberhard Jung, *Das Recht auf Gesundheit*, München, 1982, str. 1 and 89. Quoted acc.to: J. Radišić, *op.cit.*, p. 57.

[265] Radišić, *op.cit.*, p. 57.

[266] In the wording of the law on human rights, the right to health protection is a positive status right. Besides a negative obligation or an obligation of refraining from injuring bodily and mental integrity of a holder of rights, the state has an obligation, perhaps the most important one, to create favourable socio-economic conditions for healthcare benefit, such which improve human health. Analysing the right to health from constitutional law angle overcomes the given topic, thus we refer to: Lj. Stošić, Pravo na zdravlje - skromni dometi Ustava Srbije, *Pravo – teorija i praksa*, (Right to health - modest achievements of the Serbian Constitution, *Law - Theory and Practice*), no. 1-3, 2013, p. 30 et seq.

[267] In Serbia, so far, it is not realistic to expect for a right, structured in this way, to be actionable, like other subjective rights; as favourable exogenous factors, on which it much depends, are also determined by economic capacities of the state. Such status of the right to health does not, however, release the state from the duty to provide its citizens with optimum conditions for life and work and to improve them permanently.

[268] Conditionality of health by factors of different nature is also recognised in the most significant act of the World Health Organisation - in its Constitution - in the Preamble of which it is stated that: Health is a state of complete physical, mental and social well-being (emphasised by the author), and not merely the absence of disease or infirmity. Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures (emphasised by the author). The right to health is linked to other human rights and freedoms: right to food and drinking water, hygienically proper housing conditions, work, education, access to information, non-discrimination, privacy. Their realisation contributes to good health of individuals in a quality way, which makes them elements of the right to health.

[269] The WHO Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, and entered into force in 1948. (Off. Rec. Wld, Hlth. Org, 2, 100), while the amendments adopted later, entered into force in 1977, 1984, 1994 and 2005. Available at: https://www.who.int/governance/eb/who_constitution_en.pdf. Accessed: July 03, 2021

health care (which it certainly includes), and linked with other rights, mostly socio-economic, even conditioned with their complete implementation.[270]

The causal relationship between good health and the factors outside human organism and treatment in the event of disease is highlighted most in art. 12 of the International Covenant on Economic, Social and Cultural Rights[271] and the General Comment no. 14, which clarifies the meaning and content of the right to health and the role of state in the realisation thereof.[272] Article 12 of the International Covenant on Economic, Social and Cultural Rights guarantees to each person *the right to the highest attainable standard of physical and mental health*, and the Signatories States are obliged to take measures for achieving this important social goal, by using the maximum available resources.

According to the interpretation of the Committee for Economic, Social and Cultural Rights, the essence of the right to health is *a right to be healthy*.[273] In item 1 of the General Comment no. 14, it is laid down that "*Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity*." This direct link between dignity and good health and adequate protection resulted in the Committee's stand on the right to health's close relation to and dependence upon the realisation of other human rights and freedoms, such as the right to potable water, food, housing, work and safe work conditions, education, privacy, equality and non-discrimination, access to information, particularly those significant for health.[274]

The exercise of the mentioned rights and freedoms in a quality way contributes to good health; therefore, they can also be looked upon as the parts of the right to health and the right itself as a complex right, which imposes negative and positive obligations to the state and grants concrete powers and duties to the title holder. The right includes that everyone avails health care conducive to attaining the highest possible standard of health, while the freedoms enable having control over one's own body and self-determination in relation to any medical research intervention that is also undertaken for scientific purposes. The enjoyment of the right to health requires a quality, economically acceptable and accessible healthcare system, such as the state is obliged to create. The Committee does not disregard the fact that health depends on biologic, genetic and hereditary characteristics of an individual, which the state cannot affect, neither can it force anyone to take care of his own health and avoid any risky conduct. But, what the state can and is obliged to do is to provide various forms of care, products and services conducive to attaining the highest possible health standard, to everyone.[275]

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[270] In the Universal Declaration of Human Rights, health is put within the framework of the right to a standard of living: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family"(art. 25 para. 1). Although the right to health is not guaranteed directly, but only the right to a standard of living, the health of population is the measure of attained level of enjoyment of this - explicitly guaranteed by the Declaration - right.

[271] The UN General Assembly adopted this Covenant on 16 December 1966. The Covenant entered into force in 1976, and it became binding for Serbia in 1971 with the adoption of the Law on Ratification of the International Covenant on Economic, Social and Cultural Rights (Official Gazette of the SFRY, no. 7, 1971). The text of the Law is available at: https://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/viewdoc?uuid=d8d1460d-90a4-4288-82bc-74761d5cdcd3. Accessed on 11 July 2021. (CESCR General Comment No. 14: The Right to the highest attainable standard of Health (Art.12); E/C.12/2000/4).

[272] At the second session in 1988, the Committee on Economic, Social and Cultural Rights decided, beginning from the next session, to explain the contents of the guaranteed rights and obligations undertaken by a state acceding to the Covenant, with the general comments of the members of the International Covenant. General Comment no. 14 was adopted in 2000, at the twenty-second session of the Committee.

[273] See: item 8 of the General Comment no. 14.

[274] See: item 3 of the General Comment no. 14.

[275] See: items 9, 35 and 36. The states' obligations are classified in three groups: respect of the right to health (on a non-discriminatory basis for all persons irrespective of their personal characteristics, including also immigration status), protection of health (implementation of healthcare policy for the purpose of enabling an equal access to health care, facilities and other services significant for health) and obligation to fulfil - by way of legislative implementation and a detailed strategy and plan for realising the right to health.

4. Protection of health of migrants

The postulates on which the access to organised health care and the right to enjoyment of the results of measures taken by the state and the local community are based, and which, indirectly or directly, affect health, are fairness and equality of rights (prohibition of discrimination). In the European Social Charter (Revised), it is enshrined that "*Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable*"[276], and in the mentioned General Comment no. 14 - *States are under obligation referred to in art. 12 of the International Covenant on Economic, Social and Cultural Rights to fulfil equally to their nationals and aliens, asylum seekers and illegal immigrant* (item 34 of the General Comment no. 14).[277]

The principle of non-discrimination in the fulfilment of obligations by which the state, on its own or in cooperation with public and private organisations and services, protects human health should provide everyone with equal opportunity and equal access to the healthcare system. Healthcare status of migrants, thus, must not represent a reason for denying entry into the country (save for the protection of public health, if there is no alternative, by using reasonable measures proportionate to public health risk[278]) or, after entering a country, unfavourable treatment, various prohibitions and deprivation of the rights they are entitled to, according to international or national regulations.

Various measures contribute to a successful integration of migrants into a new environment, among them also the provision of adequate health care, without discrimination in relation to the domicile population. Health care of migrants contributes to socio-economic development of the state, equally as well as a good healthcare status of the domicile population. Hence, it is not enough to treat infectious diseases and take measures to suppress them: health care of migrants must be comprehensive - preventive, curative in the event of a disease (infectious equally as non-infectious) and palliative. Most frequently, such protection is provided to migrant workers and members of their families, as they stay longer in the country of destination and contribute with their earnings to the healthcare budget; however, other migrant population must not be neglected if we aspire to the realisation of all the aspects of the right to health laid down in the relevant international documents.

Migrants' health is affected by various factors: socio-economic and cultural environment of the country of origin; access to the health care system in that country; the circumstances they were prompted by to leave, or contributed thereof (war, conflicts, poverty, fear of persecution, etc.), journey conditions, policy towards migrants in the country of destination (acceptance or non-acceptance, various programmes and measures of inclusion of migrants in the new community, attitude of domicile population towards migrants, stigmatisation).[279]

Migrants' health status must not be the reason for depriving their entry in the country, transit or stay. The

[276] 11 European Social Charter (Revised), (Strasbourg, 3 May 1996). Law on the Ratification of the European Social Charter (Revised), *Official Gazette - International Treaties*, no. 42, 2009. Available at: http://ravnopravnost.gov.rs/wp-content/uploads/2012/11/images_files_ Revidirana%20Evropska%20socijalna%20povelja%20SE. pdf. Accessed on 23 September 2021.

[277] Interpretation of the General Comment no. 14 exceeds the scope of the given topic, so we refer to: M. Marković, "Pravo na najviši dostižni standard zdravlja prema Opštem komentaru br. 14 Komiteta za ekonomska, socijalna i kulturna prava" (Right to the highest attainable standard of health according to the General Comment, no. 14 of the Committee for Economic, Social and Cultural Rights), *Pravni život*, no. 9, 2009, p. 871–887.

[278] The protection of public health is a justifiable reason for the limitation of some basic rights and freedoms, especially movement and assembly, if the entire population or one part of it is threatened by a serious health threat (the best example is the current COVID-19 virus pandemic). Restrictive measures must be aimed at protecting public health, preventing disease or injury, providing necessary care and treatment of the sick, and be proportionate and have no alternative way to combat the public health threat. See: Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/ CN.4/1984/4 (1984). Available at the web-address: http://graduateinstitute.ch/faculty/ clapham/hrdoc/docs/siracusa.html. Accessed on 11 July 2021

[279] *Migration and Right to Health, A Review of International Law*, compiled and edited by P. Pace, IOM – International Organisation for Migration, Geneva, 2009, p. 16.

non-discrimination principle prohibits different treatment of migrants for reasons of their health status. Although the state has the sovereign right to set the requirements for entry and stay of aliens, healthcare status only exceptionally may justify the prohibition thereof. Most frequently, the states call on danger for public health, load of healthcare system and impossibility of budgetary financing of migrants' health care; it is, however, justifiable to call into question the legitimacy of these reasons. From the aspect of epidemiology, a spread of disease is not affected by the stay of an infected person at a certain area, but their risky behaviour, which is equally right both for domicile population and migrants. Therefore, before the decision on denying or permitting entry, it is necessary to assess individually the actual influence of migrants' healthcare status on public health, health care system and the budget.[280]

A migrating person's legal status may determine his right to access and possibility of accessing a health care system. Irregular migrants are in the most ungrateful situation, being often deprived of any preventive, palliative and treatment surpassing the provision of urgent medical care. The use of healthcare services is also affected by awareness of physicians and migrants on their healthcare rights and how to exercise them in the host country. Care of migrants' health is greatly affected by their healthcare habits, different cultural, social and life habits, and stereotypes. Unfamiliarity with language, distrusting employees at the institutions they are referred to, prejudice that they are not welcome, fear of being stigmatised because of disease, mental and physical disorders and deficiencies have a negative effect and discourage migrants from seeking health care and also using those rights to medical treatment they are indisputably entitled to (e.g., provision of emergency medical care, protection against infectious diseases, admission to the hospital for childbirth). If we remind ourselves that health of any person contributes to a better or a poorer healthcare image of the community he belongs to, then it becomes clear that no one's healthcare needs must be neglected, whether he is a national or an alien/migrant.

5. Legal framework of health care in Serbia

5.1. Constitutional guarantees

The Constitution of the Republic of Serbia guarantees the right to protection of mental and physical health: *"Everyone shall have the right to protection of their mental and physical health. Health care for children, pregnant women, mothers on maternity leave, single parents with children under seven years of age and elderly persons shall be provided from public revenues unless it is provided in some other manner in accordance with the law*."[281]

The constitution-maker opted for guarantees of the right to health care instead of the right to health, which, as it is more complex and more substantial, exceeds medical treatment in the event of disease, prevention of becoming ill, and prophylaxis.

We observe that the constitutional right to health care is classified in the catalogue of fundamental human and minorities' rights, so any person, regardless of his/her personal characteristics, shall be regarded a holder of the right. We find confirmation of it in the constitutional prohibition of discrimination in the enjoyment of any human right and freedom - thus, of the right to health care - either on the basis of national origin, race, sex, birth, etc.[282] But, the scope and requirements for the realisation of health care can also depend on the nationality of the person in need of healthcare: national citizens and aliens, as beneficiaries of healthcare services, are not fully in the same situation, which is not a characteristic of the

[280] For the suppression of the COVID-19 pandemic, which is at the moment the world's and national healthcare priority, regular healthcare needs are put in the background in the majority of countries; more or less, dangers of other infectious or non-infectious diseases are neglected, as well as mental health care, special health care of elderly, persons with disabilities, children, pregnant women and parents with little children. Success in suppressing the current pandemic is changeable and uncertain and, in such circumstances, it is unrealistic to expect any near future progress in the field of health care of migrants, whose healthcare needs are also often neglected or inadequately treated under normal circumstances. See: WHO, *Refugees and Migrants in Times of COVID-19: mapping trends of public health and migration policies and practices*, 2021.

[281] Article 68of the Constitution of the Republic of Serbia, *Off. Gazette of the RS*, no. 98, 2006.

[282] Article 21 of the Constitution of the Republic of Serbia.

Serbian healthcare system solely. This is a matter of special legal regulation.[283]

5.2. Statutory regulation of health care in Serbia

The Law on Health Care[284] defines the health care as an *organized and comprehensive activity of the society with the underlying goal to achieve the highest possible level of preservation of health* (art. 2 para. 1). It includes measures and activities for preservation and improvement of the health of citizens of the Republic of Serbia, prevention, control, and early detection of diseases, injuries, and other health disorders and timely and efficient treatment, health care and rehabilitation (art. 2 para. 1 of the Law.) According to this provision, health care of domestic nationals (thereinafter, they are designated with the term *citizen*) is comprehensive: besides treatment, it includes health care and rehabilitation for the completion of treatment process, but also preventive measures for the preservation of good health of healthy citizens. They are healthcare measures, mostly diagnostic ones for early detection of disease (screenings, systematic medical examinations, etc.) and are conducted within the health care system (art. 5 and 6 of this Law). The necessary measures for enjoyment the mentioned social and economic rights relevant for good health are not taken within the framework of the healthcare system; their enforcement is the obligation of other state authorities and institutions responsible for them, e.g., environmental protection, care of occupational safety requirements and other social and economic factors of good health and healthcare welfare. In the Law on Health Care, they are specified as participants of health care.

In addition to healthcare institutions and organisations of healthcare insurance which are directly involved in the protection of population's health, participants in health care are also: citizens, family, employers, educational and other facilities, humanitarian, religious, sports and other organisations and associations, local self-government units, autonomous provinces, and the Republic of Serbia (art. 4 of the Law.) The multitude and diversity of the listed participants confirms a manifold conditionality of good health by factors external to human organism.

The right to health care in Serbia, besides domicile population (citizens, art. 2 of the Law), is also enjoyed by aliens, stateless persons, permanently domiciled or with a temporary residence at the country, and persons in transit over the Serbian territory (art. 3 of the Law.) Health care is also provided to migrants, but in compliance with specific laws, above all, the Law on Aliens[285] and the Law on Asylum and Temporary Protection[286]. Certainly, other systemic laws in the area of health protection are applied to them as well (public health protection, protection of population against infectious diseases, healthcare insurance), including the Law on Patients' Rights[287], even in a broader scope than provided therein. Although article 4 of the Law on Patients' Rights prescribes that it also applies to foreign citizens entitled to health care in Serbia in compliance with the law and the ratified international treaties, we opine that enjoyment of an array of patients' rights generally must not depend on their nationality and the fact whether they have/have not a status of a healthcare/social insuree in Serbia. The right to information, informed consent, privacy and confidentiality, quality healthcare service, even the right not to be discriminated against in an equal access to healthcare service, must apply - within the same scope and under the same conditions - to every person in need of medical aid. Moral foundation of these rights lies in the first duty of a physician to consider the preservation of patient's life and health as their fundamental duty (*primum nil nocere*), then to perform his/her job in a professionally and ethically correct way (*lege artis*), not discriminating patients by any of their personal characteristics.[288] All the principles in performing the physician's professional duty are equally applied to any person in need of medical aid or care, and this

[283] Law on Health Care, Law on Healthcare Insurance, Law on Public Health, etc.

[284] *Off. Gazette of the RS, no.* 25, 2019.

[285] . *Gazette of the RS, no.* 24, 2018 and 3, 2019.

[286] *Off. Gazette of the RS, no.* 24, 2018.

[287] *Off. Gazette of the RS, no.* 45, 2013 and 25, 2019.

[288] See: Code of Medical Ethics of the Serbian Medical Chamber, Off.Gazette of the RS, no. 104, 2016).

does not have to be legally prescribed to bind the physician and to entitle the patient thereof. The mentioned and other guaranteed patient's rights are also a reflection of the civil law principle of autonomy of will (right to information, informed consent, privacy, confidentiality, etc.) or they are, well known, personality rights that protect physical, mental and spiritual integrity in one specific situation - the provision of healthcare service.[289]

6. Health care of foreigners in Serbia

6.1. Legal basis for health care

An alien means any person who is not a national of the country where he has permanent domicile or temporary residence. Such a person is a citizen of another country or is a stateless person.

Their status, conditions for entering Serbia, and staying in its territory are regulated by the Law on Aliens. This law does not apply to aliens who lodged an application for asylum; who are granted asylum or temporary protection; who, according to international law, enjoy privileges and immunity; and aliens granted a refugee status under the Law on Refugees (art. 3 of the Law on Aliens). Their status is the subject-matter of other regulations.

An alien may enter Serbia and stay with a valid travel document where a visa is endorsed or a permit to stay, unless otherwise defined by the law or international treaty (art. 6 of the Law.) Apart from a valid travel document, an alien is also obliged to have travel medical insurance, which covers the costs related to emergency medical care, emergency hospital treatment, and return to the country of origin for health-related reasons or in the event of death (art. 28 of the Law.) Entry and stay in the country of applicants for airport transit visa and holders of diplomatic travel documents, are not conditioned by having travel medical insurance. In the former case, because an alien who has been granted a transit airport visa has no right to enter the territory of Serbia (art. 20 para. 4 of the Law); and in the latter case - as a person of diplomatic and consular missions enjoys special diplomatic privileges that release him/her from specific duties required by law for other people. Privileges that they enjoy, among which is also the exemption from the application of the statutory provisions on social and health insurance, are necessary for a successful performance of their diplomatic mission.

The Law on Aliens is the parent law governing the legal status of aliens, but not their health care. The parent law in the area of health care - both for domestic citizens and for aliens - is the Law on Health Care, which prescribes what categories of aliens and what healthcare services are provided, and who is obliged to pay thereof.

We have already mentioned that the right to health care of aliens is already in the first provisions of the Law on Health Care, together with the same such right of domestic citizens.[290] The provision is directly based on the constitutional guarantee of the protection of physical and mental integrity of every person and the prohibition of discrimination in realisation of the human rights and freedoms on any ground (also for other race or nationality)[291], and this is fully in agreement with the characteristic of inalienability of human rights: their enjoyment and protection must not depend on the territory where the holder of such right is situated. By this, we do not deny the state's right to define precisely the type, scope and conditions for the provision of healthcare services to an alien, but we emphasise that the protection of health must unconditionally be a part of life standard to which everyone is entitled regardless of his/her whereabouts.[292]

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[289] I. Simonović, Pravo na samoodređenje, autonomija volje i pravo pacijenta na informisani pristanak (Right to self-determination, autonomy of will, and the right of patients to informed consent), *Zaštita ljudskih i manjinskih prava u evropskom pravnom prostoru* (*Protection of human and minorities rights in the European legal space*), Thematic Collection of Papers, book I, Centre for Publications of the Faculty of Law of Niš, Niš, 2011, p. 455–472.

[290] See: art. 3 the Law on Health Care.

[291] See: art. 68 and 21 of the Constitution of the RS.

[292] The same also goes for the aforementioned social and economic rights, which contribute to the highest attainable health standards.

6.2. Subjects of health care

According to the Law on Asylum and Temporary Protection, asylum seekers and persons who have been granted asylum or temporary protection have equal rights to health care and exercise it under the conditions and in the manner prescribed by laws regulating health care of aliens.[293] Hereinafter, we will analyse the provisions of the Law on Health Care as a relevant legal source for the mentioned categories of aliens.

Article 236 of the Law on Health Care provides for that health care is provided to: 1) a foreign national, 2) a stateless person, 3) a person granted refugee status, 4) an asylum seeker, 5) a registered alien who declared his/her intention to seek asylum, 6) a person granted asylum, 7) a person permanently domiciled or with a temporary residence in Serbia, and 8) a person who is in transit through the territory of Serbia.

Health care is provided in the way in which it is provided to domestic citizens (art. 237 of the LHC), so all the services of public healthcare service should be available to an alien, at all its levels (primary, secondary, and tertiary). Persons in transit through the territory of Serbia are exempted from the full scope of health care; they are only entitled to emergency medical care (art. 3 para. 2 of the LHC).

Private healthcare institutions are certainly not exempted from the provision of health care to an alien, as he/she is free to opt for private practice. The costs of provided healthcare services (in public and private healthcare institution) are paid by the alien himself, unless otherwise provided by the Law on Health Care or an international treaty on social insurance. The costs of healthcare services included in the compulsory medical insurance will be compensated from the budget, if they are provided to: asylum seekers; registered aliens who declared their intention to seek asylum; aliens who stay in the Republic of Serbia at the invitation by the government authorities and who do not fulfil the requirements for eligibility to become a compulsory insured person in the course of their stay in Serbia in accordance with the reciprocity principle; aliens granted asylum in Serbia who have no earnings; aliens who are - for the reason of infectious diseases - placed under medical supervision, in line with the regulations governing the protection of population against infectious diseases, and aliens who are victims of human trafficking (art. 239 of the LHC).

Provision of emergency medical care to an alien is a duty of every medical professional, employed in a public healthcare institution or private practice (art. 238 of the LHC). Refusal to provide such aid is not allowed, regardless of whether the fee can be collected from the alien (which is the rule) or not - in the latter case, the fee is paid from the republic budget, at the request of a public health institution or private practice where the alien has been provided with medical care (art. 240 para. 1 of the LHC). The Ministry of Health decides on such request, which may inspect the medical and other documentation about the treatment of the alien, as well as to seek professional opinion from the referential healthcare institution (art. 240 para. 2 and 3 of the LHC). Such exemption of an alien from the payment of this healthcare fee is not final: upon the effected payment of such fee, the Ministry undertakes measures to collect such expenses from the alien in favour of the republic budget (art. 240 para. 5 of the LHC).

6.3. Health care procedure provided to migrants

The provision of health care to migrants commences already at their crossing of the state border and accommodation at receiving centres. Such medical examination is regulated with the Rulebook on Medical Examinations of Asylum Seekers upon Admission to Asylum Centre or Other Facility for Accommodation of Asylum Seekers[294] and is applied to all the categories of migrants.

Medical examination is carried out by a doctor of medicine at a Primary Health Care Centre or another healthcare facility for the examinations and analyses that cannot be performed at the Primary Health Care Centre (art. 2 of the Rulebook). First medical examination must include anamnesis and objective and diagnostic examinations of a migrant. The priority must be given to severely ill migrants, victims of torture,

[293] See: art. 54 para. 2, art. 63 and 76 para. 1 item 3 of the Law on Asylum and Temporary Protection.

[294] *Off. Gazette of the RS, no.* 57, 2018. Hereinafter: The Rulebook.

rape or other serious forms of psychological, physical or sexual violence, as well as the migrants with mental disorders.[295] In an interview with the migrant, the physician learns about the history of the disease, previous and current infectious and non-infectious diseases, and vaccination status. The interview is followed by objective health and diagnostic examinations. It is compulsory to do chest radiograph and laboratory blood test, laboratory stool analysis for causative agents: abdominal typhus and paratyphoid, salmonellosis of animal origin, shigellosis, and intestinal protozoa. If there are any epidemiological indications, the laboratory analyses for other infectious diseases will be conducted as well (art. 4 of the Rulebook). The Rulebook provides for a compulsory health surveillance of migrants coming from the countries affected by cholera, malaria and/or other diseases that pose a threat to public health or where there is an epidemic or a risk of becoming infected with infectious diseases that can be brought into the country. Such health surveillance lasts during the maximum incubation period for the suspected disease (art. 4 para. 2 of the Rulebook). The medical doctor informs the migrant about the need and possibilities for protection against and treatment of infectious diseases in Serbia, as well as about the importance and the manner of implementation of the compulsory vaccination programme (art. 5 of the Rulebook).

The health institution issues a certificate of the medical examination of migrant in a specified form (art. 8 of the Rulebook). This form should be a migrant's medical record where all further medical examinations and performed medical interventions will be recorded. It would also serve for entering migrants into a unique information healthcare system[296], already existing for domicile population, and for having a complete insight into their health status. The employees at the facilities for the accommodation of migrants are obliged to follow up their health status and report to the medical doctor if it impairs (high temperature, rash, fever, diarrhoea, etc.), as stipulated by art. 7 of the Rulebook.

7. Health care of migrants in practice

We learn from reports of non-governmental organisations which are responsible for migrants and provide necessary protection to them[297], that compulsory medical examinations of migrants are not performed right after they have crossed the border and have been accommodated at a receiving centre, but a few days - up to a week later and, and what raises a concern it is not performed in the full scope, as provided for by the Rulebook on Medical Examinations of Asylum Seekers. Persons at alternative accommodation or outdoors instead at the centres, cannot be provided such medical examination either, as they are not registered or they have left the receiving centre voluntarily, before being examined by the physician. Their health care is most frequently reduced to emergency medical care or sporadic care provided by mobile clinics of some non-governmental organisations.[298]

Further examinations, regular and extraordinary, should be continued at Primary Health Care Centres, which, since 2017 according to available reports of non-governmental organisations, have become increasingly rare, because physicians are overloaded. Physicians at Primary Health Care Centres refuse to receive migrants, because, as they claim, migrants are provided with health care at receiving centres. Interestingly, these reports state that the same physicians are privately engaged for work at migrants' centres, and that for the medical aid provided, they are afterwards paid from the project budgets of non-governmental organisations.[299] In this way, health care of migrants is performed outside the official health

[295] Article 54 para 3 of the Law on Asylum and Temporary Protection.

[296] On the significance of organised collection and exchange of information in the health care system of migrants: M. Kovač and B. Andjelković, *Zdravstvena zaštita migranata u Srbiji: značaj informacija i njihove razmene (Health care of migrants in Serbia: significance of information and their exchange)*, Public Policy Research Centre, Beograd, 2018.

[297] Asilum Protection Centre APC/CZA, Beta News Agency and Public Policy Research Centre, *Zdravstvena zaštita migranata, tražilaca azila i lica koja su dobila azil u Republici Srbiji* (*Health care of migrants, asylum seekers and persons granted asylum in the Republic of Serbia*). The report originated within the project LOVE - Law, Order, Values for migrants/ asylees/ persons granted asylum in the exercise of their rights, supported by the European Union. Hereinafter: The Report.

[298] See: pp. 4 and 5 of the Report.

[299] See: pp. 4 and 8 of the Report.

care system and not charged to the budget of the Republic of Serbia, as it should be under the current regulations. Such acting makes almost any systematic recording and storing of migrants' health status and healthcare needs into a single healthcare information database system impossible, which are otherwise significant for improving their healthcare protection.

It seems that there are major problems in the provision of health care at secondary and tertiary level. Physicians hesitate to refer migrants to specialist's examinations because they are not sure about their right to such forms of health care, and who should pay for it, or because it is difficult to follow up regular taking of prescribed therapy and recovery of migrants who are not hospitalised.[300]

To overcome the observed problems, it is necessary to first inform physicians on the scope and content of the rights of migrants to health care, and about when such healthcare services are paid by migrants, and when not.

8. Health care of migrants during the COVID-19 pandemic

Health care of migrants takes place according to imperative rules of the country of transit and the end destination, with the emphasis on diseases and conditions that might pose a danger for public health and public security or be a burden for healthcare and social institutions of the system. In the Republic of Serbia, the protection of population against infectious diseases, having epidemic[301] and pandemic[302] character, is implemented under the rules of the Law on the Protection of Population against Infectious Diseases[303]. The epidemiological measures according to this Law, taken to control the infection with COVID-19 virus were equally applied to the entire population in the territory of Serbia.

On the date of declaring the state of emergency on 15 March 2020[304], 5912 migrants were accommodated at the asylum and receiving centres in the Republic of Serbia. In only two days, the number of accommodated persons at the centres was increased by more than 2,000 and amounted to 7,960 persons. On the basis of the decision of the Government of the Republic of Serbia, by the end of the state of emergency[305], movement of asylum seekers and irregular migrants accommodated at the asylum and receiving centres had been restricted, with their number constantly increasing and, at one point, exceeding 9,100 accommodated persons.[306]

In the course of the emergency state, the access to health care was provided to all accommodated

[300] See: p. 5 of the Report. It is recorded, however, that persons accommodated at a receiving centre have sporadically been provided necessary emergency medical care at the secondary level, thanks to the readiness of physicians to provide aid regardless of the patient's status. It is certainly good to praise such professional conduct, but also to point out that it should be a rule not an exception.

[301] An epidemic means an outbreak of a contagious disease unusual in number of cases, time, place and population affected, or an unusual increase in the number of patients with complications or fatal outcome, as well as the occurrence of two or more interrelated cases of a contagious disease that has never occurred or has not occurred for a number of years in one area or an outbreak of a number of diseases whose cause is unknown, and which are followed by a febrile condition (art. 2 para. 1 item 7 of the Law on the Protection of Population against Infectious Diseases).

[302] Pandemic of an infectious disease means that an infectious disease transcends national borders and spreads to the most of the world or to the world as a whole, endangering people in the affected areas (art. 2 para. 1 item 9 of the Law on the Protection of Population against Infectious Diseases).

[303] *Official Gazette of the RS, no.* 15, 2016; 68, 2020 and 136, 2020.

[304] President of the Republic, President of the National Assembly, and the President of the Government adopted the Decision on declaring the state of emergency on March 15 (Official Gazette of RS, no. 29, 2020).

[305] The National Assembly's Decision on the Abolition of the State of Emergency (Official Gazette of RS, no. 65, 2020) the state of emergency was abolished on 6 May 6, 2020.

[306] Government of the Republic of Serbia, Migration profile of the Republic of Serbia 2020, p. 89); https://kirs.gov.rs/media/uploads/Migracioni%20profil%20Republike%20Srbije % 202020%20FINAL%20(1).pdf. Accessed on 23 August 2021. The Commissioner for Refugees was forced to take care of 3,000 people more in the emergency situation, which is 50% more than the regularly available capacities.

persons, and it was also adapted to the new health care situation.[307] The primary health care in the centres for receiving migrants was provided by a medical team consisting of a physician, a medical technician, and, most frequently, a psychologist. The necessary health care was provided in specialist clinics at the secondary and tertiary levels, as to the domicile population. In case of any suspicion of coronavirus infection, a special protocol prepared by the Republic Expert Commission for the Protection of Population against Infectious Diseases was followed[308], whereby it was prescribed that every migrant with virus symptoms must be tested, and, as applicable, subjected to public health restrictions and measures to combat the epidemic, which otherwise apply to the local population as well.[309]

In order to preserve psychological and social health, various activities were organised to occupy the time of people accommodated at the centres (sports activities, planting trees at the centres' area, film screenings, etc.), while respecting the recommended physical distance, as much as possible in this form of accommodation. At the centres with adequate conditions, migrants were engaged in sewing masks, for themselves and employees, which they also distributed to volunteers in the local community.[310]

In cooperation with the Office of the World Health Organisation in Serbia and the UN High Commissioner for Refugees, relevant materials were prepared with information on access to health care centres, psychological support, movement restrictions, and health prevention measures and were distributed in centres, through mobile applications and social networks. Asylum seekers and refugees are equipped with personal protective equipment (masks and gloves) and prescribed hygiene means.[311] Besides the competent republic and local institutions, non-governmental organisations also continued to provide health care to migrants, while adapting to the actual epidemic situation.[312]

According to the UNHCR report of March 2021, thirty-two cases positive on COVID-19 were registered in the migrant population, out of which two persons died (both with comorbidities).[313] On March 26, in Serbia the vaccination campaign started for asylum seekers, refugees and migrants accommodated at 19 governmental centres across the country, making Serbia one of the first countries in Europe that started vaccination of refugees and asylees, both in centres and in private accommodation. Five hundred fifty

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[307] Necessary adaptations, not only in the provision of health care, have been undertaken world-wide, since the spread of SARS-CoV-2 virus was declared a pandemic disease. About the measures undertaken world-wide as an answer to the pandemic, with an emphasis on its influence on migrants population, see: WHO, *Refugees and Migrants in Times of COVID-19: mapping trends of public health and migration policies and practices*, Geneva, 2021. Available at: https:/ www.who.int/publications/i/item/9789240028906. Retrieved: 23 August 2021.

[308] Protocol for dealing with suspected SARS-CoV-2 in asylum and receiving centres.

[309] Government of the Republic of Serbia, Migration profile of the Republic of Serbia 2020, p.89. O. Mitrović, *Procena socioekonomskog uticaja*, *Uticaj COVID-19 na migracije i mobilnost u Srbiji (Assessment of the socio-economic effect, COVID-19 effect on migrations and mobility in Serbia)*, *International Organisation for Migrations*, p. 9. Available at: http://serbia.iom.int /site/ serbia/files/publications/documents/SEIA nacrt na srpskom.pdf. Retrieved: 29 June 2021

[310] Government of the Republic of Serbia, Migration profile of the Republic of Serbia 2020, p. https://kirs.gov.rs/media/uploads/Migracioni%20profil%20Republike%20Srbije%20 2020%20FINAL%20(1).pdf. Accessed: 29 June 2021

[311] O. Mitrović, *(Assessment of the socio-economic effect, COVID-19 effect on migrations and mobility in Serbia), International Organisation for Migrations*, op.cit., p. 9. Available at: http://serbia.iom.int/site/serbia/files/publications/ documents/SEIA nacrt na srpskom.pdf. Retrieved: 29 June 2021

[312] Organisation for Security and Cooperation in Europe (OSCE) – Mission in Serbia provided first assistance to victims of trafficking of human beings (see: OSCE, 6 May 2020). *OSCE – Mission in Serbia adapts its support to Serbia's changing needs during COVID-19 pandemic*, *available at:*http://www.osce.org/mission-to-serbia/451597 ASTRA's Victim Support team provided support through SOS hot line, and provided accommodation, food, clothes, medical aid and hygiene items to newly discovered victims (see: ASTRA. *OSCE Mission to Serbia:* Assistance and support to victims of trafficking of human beings during the pandemic. Available at: http://www.astra.rs/oebs-srbija-pomoc-i-podrska-zrtvama- trgovine-ljudima-tokom-pandemije- More about it in: *Ibid*, p. 9 et seq.

[313] The UN Refugee Agency, *Srbija - mesečni pregled* (Serbia - Monthly Update), March 2021, p. 1, available at https://www.unhcr.org/rs/wp-content/uploads/sites/40/2021/05/ SERBIA-UPDATE-MARCH-2021- SRB-1.pdf. Retrieved, 23 August 2021.

refugees and migrants in official centres expressed their interestedness in vaccination, and by the end of March, 309 persons were vaccinated. Refugees accommodated in private accommodation, thirty-two of them, were also vaccinated against COVID.[314]

9. Conclusion

The right to health is a fundamental human right, the enjoyment of which strengthens human dignity and creates the base for the enjoyment of other rights and freedoms. Conceived in this way, the right to health is characterised by universality, innateness and inalienability: it is enjoyed by everyone just by being a human being, without discrimination and regardless of where he/she is in his/her own or another country (principle of equality and prohibition of discrimination). Viewed from the angle of civil law theory and practice, the right to health is a personal right (right to personality), having absolute effect, the title holder of which is entitled to directly enjoy personal good being the object of this right (health) or to actually dispose of it.

Diversity of factors affecting health has changed the interpretation of this term. Health, as a personal good, on which and in relation to which certain powers and obligations are constituted, is most frequently determined according to the definition referred to in the Preamble of the Constitution of the World Health Organisation: Health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity. The right itself is defined identically: not only the right to health is guaranteed, but the right to the highest attainable standard of health as one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

The status of the right to health as a fundamental human right is confirmed with two, for these rights, rather significant documents: the Universal Declaration of Human Rights 1946 designating health as a part of the special human right of everyone to a standard of living (art. 25), while the International Covenant on Economic, Social and Cultural Rights 1966 defines this - already particular social right as the right to the highest attainable standard of physical and mental health. International documents adopted later, also guarantee the right to health or some of its elements, such as the right to health care.

Attainment of the highest possible standard of health (physical, mental and social) is not only a programmatic goal that should be aspired to continuously. The World Health Organisation's Constitution defining the right to health in this way, also sets out concrete obligations of the state, which should immediately realise them and keep realising them within available resources and economic possibilities.[315]

To understand these obligations, first it should be said that the right to health does not guarantee the right to perfect health, neither has it connoted such an obligation of the state. Health depends on person's biological and physiological profile (endogenous healthcare factors) and socio-economic conditions of his/her life and work (exogenous healthcare factors). It is more correct to consider the right to health as a set of powers (directly and indirectly implementable) to the possession of certain goods, availability of concrete services (not exclusively healthcare) and an easy access to the institutions obliged to provide them.[316] Since all these powers are permanent (non-exhaustible through the provision of the necessary medical care), directed both to goods and services outside the healthcare system, the definition of the right to health as the right to the highest attainable health standards in conditions befitting of man, seems to be quite acceptable.

Health care, as a minimum of the realisation of the right to health, does not represent a privilege, but the

[314] Ibid, p. 1. The significance of protection against infection with COVID-vaccination has been also promoted among the migrant population with joint activities of the "Dr Milan Jovanović Batut" Public Health Institute, the Commissioner for Refugees of the Republic of Serbia (CfRS), WHO and UNHCR.

[315] *The Right to Health*, Fact Sheet, no. 31, 2008, Office of the UN, High Commissioner on Human Rights, WHO, New York, Geneva, June, 2008, p. 5. Although differences are not respected between the states, a lack of available resources is not accepted as an excuse or delay in the fulfilment of obligations. Any state, rich or poor, is obliged to enable an effective enjoyment of the right to health, even if that, at the beginning, is just reduced to an organised, accessible to everyone health care.

[316] Ibid, p. 5.

fundamental right of any person, either a national or an alien (in the broadest term of the word). The state is obliged to take care of a good healthcare status of any person in its territory and to provide equal opportunities in the satisfaction of his/her healthcare needs.

A consistent application of the principle of non-discrimination is particularly important for migrants, whose health is adversely affected by the entire migratory process through which they pass, impairing the existing diseases or causing some new ones.

According to the legal regulations of the Republic of Serbia, migrants are entitled to health care, in priority to the basic one (primary), and, if needed, the specialist one, at secondary and tertiary levels. The primary health care of migrants includes those healthcare services to which domestic citizens are entitled to, which is praiseworthy if we bear in mind that in some richer European states, migrants are only provided emergency medical care while a comprehensive one is conditioned by meeting various administrative preconditions. The access to the secondary and tertiary health care levels, unfortunately, is difficult to be realised - obstacles are double, but can be overcome in a simple manner. First, migrants are not informed on their right to be provided medical care also in specialist healthcare institutions, if their healthcare status requires so. On the other hand, physicians in Primary Health Centres also do not know or they are not sure about the possibility of referring migrants to indicated specialist examinations. Better awareness of both parties, migrants and physicians, would eliminate this obstacle enabling migrants a full enjoyment of their recognised right to health care.

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NATIONAL REPORT - LABOUR LAW AND SOCIAL INSURANCE

1. Introduction

In the course of the last three decades, the Republic of Serbia has been faced with various types of migrations, and, consequently, with very different categories of people who temporarily or permanently reside in its territory. In this process, until recently, the largest percentage of external migratory movement had been made up of immigration from Serbia to some of the developed countries (Germany, Austria, Switzerland, France, Italy, the United States, Canada, Australia, etc.) and immigration of Serbian and other nationalities to Serbia, in the context of the conflict during the break-up of the former Yugoslavia.[318] By the end of 2014 and during 2015, however, an increased number of forced migrants started to arrive in Serbia from the war-torn territories on the so-called "Balkan route", mainly intending to continue their journey to any of the Member States of the European Union.[319] These persons generally stay in the territory of Serbia for less than a year, and fewer number decide to remain there.[320] Therefore, the issue of exercising their right to work, as one of the fundamental human rights, again becomes actualised, both from the aspect of the overall legal status of migrants in Serbia and from the aspect of implications it has on the social and economic development of the Republic of Serbia.[321] By ratifying the Convention of the International Labour Organisation no. 97 Migration for Employment of the International Labour Organisation,[322] as well as numerous other international legal acts directly and indirectly dedicated to this issue, many world states, including Serbia, have taken certain obligations with a view to achieving an easier access to the labour market, so those migrant workers would be protected against exploitation and abuse, but also to increase the socio-economic contributions of migrants and provide them with dignified work.

In the Republic of Serbia, the right to work is guaranteed by the Constitution.[323] The essence of this right lies in human dignity, as a universal human value, which is reflected in the freedom of choice of occupation, equal availability of all workplaces (jobs) under equal conditions, as well as the state's obligation to create conditions for full employment, i.e. effective employment of the right to work.[324] Within the framework of the institute of establishing employment relationship, the right to work is transformed, in the course of employment process, into an entire set of subjective rights and obligations on the side of the employment candidate and on the side of the employer, as well as into such appropriate

[317] marijad@prafak.ni.ac.rs
[318] Commissioner for Refugees and Migrations of the Republic of Serbia, *O migracijama (On migrations).* [Electronic version]. Retrieved 15. 4. 2021; https://kirs.gov.rs/cir/migracije/o-migracijama
[319] S. Tošković, *Ljudska prava migranata i izbeglica u Republici Srbiji uz poseban osvrt na pravo na rad i pravo na obrazovanje (Human rights of migrants and refugees in the Republic of Serbia with specific reference to the right to work and the right to education)*, Beograd: Belgrade Centre for Human Rights, 2017, p. 33.
[320] S. Milojević, *Pristup migranata pravu na rad u Republici Srbiji (Access of Migrants to the right to work in the Republic of Serbia)*, Beograd: Belgrade Centre for Human Rights, 2019, p.9
[321] Ibid.
[322] Ordinance of Ratification of the International Labour Organisation Convention no. 97 on Migration for Employment *(Off. Gazette of SFRY - International Treaties, no.* 5, 1968).
[323] Art. 60 of the Constitution of the Republic of Serbia, *Off. Gazette of the RS*, no. 98, 2006.
[324] B. Lubarda, *Radno pravo - rasprava o dostojanstvu na radu i socijalnom dijalogu (Labour law - Discussion on dignity at work and social dialogue)*, Beograd: Faculty of Law of the University of Belgrade, 2013, p. 277.

conditions under which the employment may be achieved.[325] So, the universality of the content of the right to work, guaranteed by the Constitution, is further elaborated under labour legislation and relativized pursuant to the needs of socio-economic environment.[326] In regard to exercising the right to work of persons under international protection[327] and their labour law status, a number of statutory regulations are relevant thereof. These are predominantly:

Law on Labour[328], as the parent law for the area of employment relationships, since its provisions are also applied to foreign citizens and stateless persons who work with an employer in the territory of Serbia, unless otherwise laid down by law.[329] Thus regulating, the Labour Law made foreign citizen and stateless persons, in regard to conditions and ways of establishing employment relationship, as well as regarding the rights, duties and responsibilities relating to employment relationship, equal to domestic citizens. In 2014, however, the Law on Employment of Foreign Citizens[330] was adopted, representing a *lex specialis* in this field. It sets some additional requirements for establishing employment relationship for foreign citizens and for solving issues in a comprehensive way, including refugees and persons from a special category of aliens (asylum seekers, persons under international protection, victims of human trafficking, i.e. persons approved subsidiary protection)[331]. According to the provisions of this law, employing a person with refugee status and a person belonging to a special category of aliens is exercised provided the concerned person holds a personal work permit that is not linked to a particular employer[332]. Exercising the right to personal work permit, refugees and persons from a special category of aliens get a possibility to find an adequate job and establish employment relationship legally. Other types of work permits[333] are

[325] P. Jovanović, *Radno pravo (Labour law)*, Novi Sad: Faculty of Law of the University of Novi Sad, 2015, p. 65.

[326] Ibid.

[327] In legal documents and literature, various terms are encountered - migrants, forced migrants, refugees, asylees, asylum seekers, internationally displaced persons, persons under international protection, etc., necessitating to precisely determine them and delimit their use. According to the most universal definition, "Migrants are people who move from their country of usual residence or nationality to another country" (J. Ktistakis, *Protecting migrants under the European Convention on Human Rights and the European Social Charter - A handbook for legal practitioners*, Beograd: Council of Europe, Belgrade Office, 2016, p. 9). The reason for their movement is directly linked to international law protection. If they flee their country to avoid persecution within the meaning of article 1A of the Geneva Convention Relating to the Status of Refugees 1951, they are called asylees or refugees and entitled to a special - enhanced protection, guaranteed by the mentioned international Convention (so far ratified by 145 states). If, however, they leave their country out of other reasons (economic, educational, endeavouring to flee from natural disasters caused by climate changes, etc.), they are defined as migrants, and do not enjoy special, only general, protection under international human rights law (J. Ktistakis, *op. cit*., p. 9). In this paper, the term "persons under international protection" is used to designate the first type of migrants - internationally displaced persons, refugees, asylees, asylum seekers and legally invisible persons.

[328] Law on Labour, *Off. Gazette of the RS*, no. 24, 2005; 61, 2005; 54, 2009; 32, 2013; 75, 2014; 13, 2017 – Constitutional Court decision, 113, 2017 and 95, 2018 – authentic interpretation.

[329] Art. 2 of the Law on Labour

[330] Law on Employment of Foreign Citizens, *Off. Gazette of the RS*, no. 128, 2014; 113, 2017; 50, 2018 and 31, 2019

[331] Art. 2 para. 1 item 9 the Law on Employment of Foreign Citizens.

[332] A personal work permit allows employment, self-employment, and exercising the rights in the event of unemployment. An application for the issuance of personal work permit may be filed by a person who is approved the right to asylum or granted subsidiary protection right after the finality of decision. Additionally, such application may also be lodged by a person whose asylum proceedings are pending (asylum seeker), if nine months have elapsed since the submission of the asylum application, and that, without his fault, the final decision on the asylum application has not been rendered. The stated restriction to asylum seekers to access the labour market is criticised as superfluous and unjustified, thus it should be abolished. Otherwise, the Law prescribes different validity periods for work permits, which are related to the duration of temporary residence in the Republic of Serbia. So, a personal work permit is issued to a refugee for the duration of his identity card for a person granted asylum; an asylum seeker - for a six-month period with a possibility for extension, for the duration of such person's status as a person having temporary protection, and to a victim of human trafficking - for the duration of their residence permit, respectively. (Art. 11 and 13 of the Law on Employment of Foreign Citizens)

[333] Besides a personal work permit, there is a type of work permit which is issued as: 1) work permit for employment; 2) work permit for special cases of employment; 3) work permit for self-employment. Work permit for employment is issued for employing

issued in line with the labour market conditions, most frequently to highly skilled or deficient workforce[334]. Therefore, an effective exercise of their right to work can substantially depend on how the procedure for the recognition of qualifications attained in the country of origin is regulated. Since the rules on the recognition of diplomas, certificates and other qualifications significantly affect migrants' qualifications degree, on the basis of which they access the labour market, consequently, they can significantly affect the degree of their economic and social contribution to the Republic of Serbia. Bearing in mind the aforementioned, further on we are going to speak about the legal regulation for the procedure for recognising foreign qualifications in the Republic of Serbia, its good sides, as well as any eventual shortcomings, the elimination of which would improve the labour law status of persons under international protection.

2. Meaning of the term "recognition of qualifications"

The terminology in the area of work and education is generally not standardised, so various organisations and various scientific disciplines have their own ingrained terms (competence, learning outcome, qualification, profile, descriptors, formal education, etc.), the inconsistent or insufficiently precise use of which commonly results in confusion.[335] Apart from it, translation of foreign terms into Serbian is often very problematic, since the users are frequently forced to use foreign words or translate them in a descriptive way. Thus, it is highly important to define precisely the mentioned terms in order to prevent various labour law and practical issues. In accordance with official documents related to the Bologna process and, to a bit less extent - to the Copenhagen process, the Centre for Educational Policies in its publication *The National Framework of Qualifications* defines the term qualification as "any official document certifying that the holder of qualification attained specific competences, and this most frequently through a formal educational programme."[336] Accordingly, this term refers to the education cycles existing in the given educational system (elementary, secondary, secondary vocational, higher-basic studies, higher-master studies, specialist, doctoral studies, etc.), while they rarely imply certificates attained through informal education, and which, for instance, are awarded after a successful completion of shorter trainings and courses.[337]

On the other hand, in professional literature the term "recognition" means "a formal confirmation of the value of a foreign educational qualification issued by a competent body, for enabling the access to education and/or employment.[338]" Recognition does not include any elements of equivalence, i.e. it is not based on any congruence of the foreign qualification or diploma with the relevant national qualifications in all aspects, but only those aspects relevant for the right that the qualification holder attempts to realise

an alien who has a visa for longer stay based on employment, permit for temporary residence, and meets all the requirements set out in the employer's request relating to adequate knowledge and skills, qualifications, previous work experience, etc. Exceptionally, when it is in the interest of the Republic of Serbia or it is required by the internationally accepted obligations, a temporary work permit for employment may be issued to an alien who meets all the requirements set out in the employer's request referring to relevant knowledge and skills, qualifications, previous work experience, etc., with the previously obtained consent of the minister competent for internal affairs, provided that the alien has applied for a temporary residence permit. (Art. 11 -13, art. 16 paras. 2 and 3 of the Law on Employment).

[334] The Government may, with a decision, limit the number of foreign citizens to be issued work permits in the event of disturbance on the labour market, in accordance with migration policy and the situation and trends in the labour market. The quota shall not apply to an alien, i.e. to an employer employing an alien, and who submits application for a personal work permit, except for a personal work permit issued at the request of special categories of foreign citizens - asylum seekers, persons granted temporary protection, victims of human trafficking, i.e. person granted subsidiary protection. (Art. 24 of the Law on Employment)

[335] B. Komnenović, P. Lažetić, M. Vuksanović, *Nacionalni okvir kvalifikacija* (*National Framework of Qualifications*), Beograd: Centre for Educational Policies, 2010. p. 15.

[336] Ibid, p. 17.

[337] Ibid.

[338] E. Blagdan, I. Maksimović, *Priznavanje stranih visokoškolskih isprava u Srbiji i Hrvatskoj – Naučene lekcije i predlog za unapređenje postojeće prakse u Srbiji (Recognition of foreign higher education documents in Serbia and Croatia - Lessons learnt and proposal for the enhancement of the current practice in Serbia)*, Beograd: Group 484, 2012, p. 62.

should be compared. Also, the recognition of foreign (higher) school documents does not imply awarding national professional or academic titles.[339] In the Republic of Serbia with the adoption of the Law on National Framework of Qualifications of the Republic of Serbia (hereinafter: The NQFS Law)[340] in the domestic legal framework, for the first time the following terms were introduced: "learning outcomes" and "European qualification framework), whereas the terms "competence", "qualification" and "qualification standards" are regulated in a different way, in relation to the Law on Adult Education[341]. According to the provisions of the NQFS Law, the term "qualification" means a formal recognition of the attained competences. An individual obtains the qualification when the competent body establishes that he has attained the learning outcomes within a specified level and according to the given standard of qualification, which is confirmed with a public document (diploma or certificate).[342] A qualification standard is a document determined in compliance with this Law and contains the description of goals and outcomes of learning, as well as the data on qualification, on the basis of which a level, its classification and evaluation are determined.[343] In the law itself, the term "recognition of qualification" is not defined; however, in the part of the law where the recognition of foreign school documents is regulated, it is prescribed that through the recognition "foreign school documents is equalled to an appropriate public document obtained in the Republic of Serbia".[344] Apart from it, the mentioned law prescribes the criteria taken into consideration in the recognition procedure, as follows: foreign country's education system, education duration, curriculum, the rights vested by the foreign school document to the holder thereof, and other circumstances significant for decision making.[345] Despite the aforementioned, the recognition procedure is reduced to a nostrification procedure in practice, i.e. acknowledging equivalency of a foreign qualification with the domestic one, where if there is a significant discrepancy of the foreign curriculum comparing to the domestic one, it is required to sit for additional examinations.[346] More about it, further on hereinafter.

3. Legal regulation of the qualification recognition procedure in the Republic of Serbia

Questions referring to the recognition of foreign qualifications arise, most frequently, when education is to be continued, as well as in the procedure of establishing employment relation of migrants. In the Republic of Serbia, the mentioned questions are regulated by the Law on Higher Education[347] and the NQFS Law, which introduced some significant novelties in the legal system of the Republic of Serbia. In priority, it establishes the National Qualifications Framework of the Republic of Serbia (hereinafter: the NQFS) as an instrument regulating the field of qualifications and its relation to the labour market, and, which represents a basis for the application of the lifelong learning concept at the same time. The NQFS Law also regulates the levels and types of qualifications, as well as the competent bodies and procedures related to setting up the qualifications system. On the basis of the provisions of this Law, the Government of the Republic of Serbia established the Agency for Qualifications,[348] in the composition of which is the ENIC/NARIC centre, which implements the procedure for recognising a foreign (higher) school document.

[339] Ibid.
[340] Law on the National Framework of Qualifications of the Republic of Serbia, *Off. Gazette of the RS*, no. 27, 2018 and 6, 2020 – hereinafter in footers: The NQFS Law.
[341] Law on Employment of Foreign Citizens, *Off. Gazette of the RS*, no. 55, 2013; 88, 2017 - other law, 27, 2018 - other law, and 6,2020 - other law
[342] Art. 2 para. 1 item of the NQFS Law.
[343] Art. 2 para. 1 item 5 of the NQFS Law.
[344] Art. 34 para. 4 of the NQFS Law.
[345] Art. 35 para. 2 of the NQFS Law.
[346] Art. 35 item 3 of the NQFS Law.
[347] Law on Higher Education, *Off. Gazette of the RS,* no. 88, 2017; 73, 2018; 27, 2018 – other law; 67,2019 and 6, 2020 – other law.

[348] Decision of the Government of the Republic of Serbia on establishing the Agency for Qualifications dated 7 September 2018, *Off. Gazette of the RS*, 68, 2018.

It is also important to point out that the legislator's intention was to regulate the issues relating to qualifications and education with this legal regulation in a comprehensive way - including frameworks, types, levels, and recognition of obtained qualifications. So, it also regulates the issues relating to preconditioned admission to school, which was the subject matter of the law regulating elementary and secondary education, as well as recognising a foreign higher education document for the purpose of employment, which was the subject matter regulating higher education. The NQFS Law, however, does not contain any special provisions dedicated to the issue of recognising qualifications of refugees and other persons under international protection, who come to Serbia due to a well-founded fear of persecution for reasons of race, sex, language, religion, nationality or membership of a particular social group, or political opinion. Thus, the same recognition procedure is also applied to persons under international protection as well as to all other stakeholders, not taking into consideration certain difficulties in the phase of instigating a procedure for recognising qualifications (due to language barrier), as well as in the phase of proving the existence of certain qualifications due to a lack of necessary documentation.

3.1. Procedure for recognising foreign school documents

The right to education represents a necessary condition for the enjoyment of other human rights and significantly contributes to a general improvement of the life quality of people.[349] In its General Comment no. 1, the Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, sets out that "States parties shall ensure that all migrant children, independently of their migration status, have access to free and compulsory primary education as well as to secondary education on the basis of equality of treatment with nationals of the State concerned […]".[350] The UN Committee on the Rights of the Child, in its General Commentary no. 6, calls the States parties to ensure that access to education is maintained during all the phases and procedures of migrations.[351]

In the Republic of Serbia, the recognition procedure for a foreign school document of elementary and secondary education is, following the adoption of the NQFS Law, within the competence of the Agency for Qualifications. The procedure itself is not significantly changed comparing to how it was regulated by the Law on Elementary Education and Upbringing[352] and the Law on Secondary Education and Upbringing[353], save for stipulating that the decision on recognising foreign school documents must contain data on the NQFS level to which the recognised qualification corresponds. A national of the Republic of Serbia, who completed elementary or secondary school or any year thereof abroad, i.e. who completed a foreign elementary of secondary school or any year thereof in the Republic of Serbia, is, in priority, entitled to lodge an application for recognising a foreign school document. Additionally, in accordance with the principle of equality and availability of the realisation of the right to education and upbringing, a foreign citizen and a stateless person are also entitled to lodge such an application, if they have a legal interest thereof.[354] The recognition procedure is performed by the ENIC/NARIC centre, as an organisational unit of the Agency for Qualifications.[355] Along with the application for recognising a foreign school diploma, the original i.e. a certified copy of that document and a translation of certified translator must be

[349] S. Tošković, op. cit., p. 25.
[350] Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No. 1 (*General comment No. 1 on migrant domestic workers*), CMW/C/GC/1, 23 February 2011, paragraph 57
[351] Cited according to: S. Tošković, op. cit., p. 25.
[352] Law on Elementary Education and Upbringing, *Off. Gazette of the RS*, no. 55, 2013; 101, 2017; 10, 2019 and 27, 2018 – other law.
[353] Law on Secondary Education and Upbringing, *Off. Gazette of the RS*, no. 55, 2013; 101, 2017; 27, 2018 – other law and 6, 2020.
[354] Art. 34 item 2 of the NQFS Law.
[355] Agency for qualifications in its composition, besides the ENIC/NARIC centre for recognising foreign school document, also has the RKiPSV centre – Centre for developing qualifications and support to sector councils of NQFS, PROA centre – Centre for accreditation of publicly recognised organisers for adult education activities, General and Legal Affairs, and Accounting and Finances.

submitted. Since among forced migrants who residing in the territory of the Republic of Serbia, non-qualified workforce or persons without a possibility of obtaining necessary documentation prevail (because they left war torn territories),[356] it is highly important that there is also a possibility for the recognition of foreign documents to persons who do not hold necessary document. However, according to the provisions of the NQFS Law, such a possibility is foreseen for the recognition of a foreign document of elementary education, but not for secondary school documents though. The Law provides for that, if a foreign citizen and a stateless person are not holders of an adequate foreign school document needed for the recognition procedure, they may enrol the corresponding year of elementary school on the basis of a prior test of knowledge.[357] The mentioned test is performed before the same team consisting of a teacher of lower grades/ higher grades, a pedagogue and a school psychologist, taking into account the standards of achievements and the best interest of students. Otherwise, the goal of such recognition procedure is that foreign school documents obtained abroad are recognised as equivalent to the corresponding public document obtained in the Republic of Serbia. Whereby, the entire education or specific years completed abroad or in a foreign school in the Republic of Serbia, may be recognised; while for shorter schooling periods (half a year or a shorter classification period), it is not possible to perform the recognition of a foreign school document through this procedure. In the procedure for recognising a foreign school document, the foreign country's education system, curriculum and other circumstances significant for decision making are taken into consideration.[358] Accordingly, the Agency can require sitting for specific examinations as a requirement for the recognition of a foreign school document. Namely, if it is found in the course of such process that the curriculum substantially deviates from the domestic one, to which it is compared, the recognition is conditioned by sitting for specific examinations, writing specific papers or a different test of knowledge. The Agency for Qualifications performs this part of procedure in cooperation with the Institute for the Improvement of Education and Upbringing and in line with professional guidelines. Examinations determined as the requirement for the recognition of a foreign school document are to be sit for in the corresponding school by the date set by the Agency at the latest. After the examinations have been passed, the Agency issues a decision on the recognition of a foreign school document, bearing in mind all the mentioned circumstances.[359] The decision on the recognition of a foreign school document on completed secondary education compulsory contains the NQFS level to which the recognised diploma corresponds. Noteworthy, in the procedure for the recognition of a foreign school document, the provisions of the law regulating general administrative procedure are applied, because of which the mentioned procedure is insufficiently "sensible" for persons under international protection, who are faced with great difficulties when getting specific qualifications recognised as they do not have adequate documents. The mentioned legal solutions are particularly criticised for the impossibility to end the procedure with a kind of expert opinion in situations where persons coming from war-affected territories have no possibility to obtain the necessary documents. Additionally, it seems desirable to introduce the provisions which would precisely define the method of implementing the prior

[356] S. Milojević, op. cit., p. 14.
[357] Art. 34 para 3 of the NQFS Law.
[358] Art. 35 para 2 of the NQFS Law.
[359] Diplomas and certificates obtained in Montenegro during the existence of the State Union of Serbia and Montenegro are not subject to the recognition procedure (up to and including school year 2005/2006); diplomas and certificates obtained during the existence of the SFRY (up to and including 27. 4. 1992) in the former republics; diplomas and certificates obtained in Republika Srpska (bearing in mind that elementary education in Republika Srpska lasts nine years, a student who moves to school in the territory of the Republic of Serbia for the continuation of schooling, continues schooling in the corresponding year in line with the elementary education system of the Republic of Serbia) on the basis of the Agreement on Mutual Recognition of Documents in Education and Regulating Status Issues of Pupils and Students. (*Official Gazette of the RS*, no. 79, 2005).

testing of knowledge in terms of assistance in overcoming language barriers, as well as educational and cultural differences.

3.1.1. Conditional admission

The issues relating to conditional admission of students to the corresponding/next grade of elementary or secondary school were previously regulated with laws in the area of elementary or secondary education, while now it is the subject matter of the NQFS Law. If by the start of school year, i.e., by the expiry of admission period for students to secondary school, the procedure for the recognition of a foreign school document has not been completed, the rules related to conditional admission are applied (article 36 of the NQFS Law). Namely, if the application for the recognition of a foreign school document of elementary education has been lodged, and the procedure is not completed, the student may be conditionally admitted to the next grade. In such a case, the school is obliged to include the student in the corresponding grade without delay. Hence, the school will admit the student conditionally to the grade where they may be enrolled after the completed procedure for the recognition of a foreign school document; where the student is obliged to deliver the evidence that the procedure for the recognition of a foreign school document has been initiated.[360] When it is a person who lodged the application for the recognition of a foreign school document of secondary education, they may be conditionally admitted to the next grade if the procedure has not been completed by the expiry of such admission period. Also, they may be conditionally admitted to the first year of studies at a higher education institution if the procedure has not been completed by the expiry of the period for admission of students.[361]

3.2 Procedure for the recognition of foreign school documents

The recognition of a foreign school document is a procedure in which the holder of such document is granted the right to continue education, i.e. the right to employment. Before the NQFS Law was passed, the procedure for the recognition of a foreign school document had completely been regulated by the Law on Higher Education. The absence and non-regulation of the national NQF, non-existence of a regulated qualifications system, as well as non-compliance of the NQF for higher education with other education levels, created great problems and difficulties in practice. The additional complicatedness of the procedure for the recognition of foreign school documents was created by a lack of coordination between universities and faculties, and practically there were as many procedures for the recognition of higher education institutions as there are universities in Serbia. Apart from it, the list of titles established by the National Council for Higher Education was created only for the study programmes accredited in Serbia; consequently, some compromise solutions had to be sought for those applicants who had not completed any of the stated programmes. The passing of the NQFS Law significantly improved this situation since the provisions of this Law established a single NQFS, the prescribed procedure for the recognition of foreign school documents, the competent bodies for its implementation, as well as the criteria for the evaluation of qualifications. According to the solutions of the new Law, the recognition of foreign qualifications for the purpose of continuing education remained within the competence of autonomous higher education institutions, while the recognition of a foreign school document for the purpose of employment (professional recognition) is dislocated from higher education institutions and put under the jurisdiction of the Agency for Qualifications, i.e. the ENIC/NARIC centre for the recognition of foreign (higher) school documents.

3.2.1 Recognition of a foreign higher school document for the purpose of the continuation of education

The procedure for the recognition of foreign higher school documents for the purpose of the continuation of education (academic recognition) is only principally regulated by the provisions of the Law on Higher Education, while autonomous higher education institutions regulated the procedure for the recognition of foreign higher school documents for the purpose of the continuation of education at those institutions

[360] Art. 36 para 1 and 2 of the NQFS Law.
[361] Art. 36 paras. 3 and 4 of the NQFS Law.

with their general acts. According to the provisions of the Law on Higher Education, the recognition of a foreign higher school document for the purpose of the continuation of education at such autonomous higher education institution is conducted by the institution itself, following a previously performed evaluation of the foreign study programme, i.e. a part of study programme.[362] The evaluation is performed by a professional body of the autonomous higher education institution to which the application for academic recognition has been lodged on the basis of type and level of achieved competences attained by completing a study programme, taking into consideration the educational system in the country where the higher education document has been acquired, and other relevant facts, not considering formal characteristics and structures of the study programme.[363] The continuation of education and the admission to higher education level may be conditioned with the obligation of attaining additional learning outcomes or rejected - if it is established that there is an essential difference between the types and levels of achieved knowledge and skills and the admission requirements for a specific study programme. The criteria for determining the existence of an essential difference between the types and levels of achieved knowledge and skills and the admission requirements for a specific study programme, and the procedure for academic recognition shall be prescribed by the autonomous higher education institution by means of its general act.[364] Past a general praise for the new statutory solutions (particularly for the newly introduced criteria for the evaluation of foreign higher education documents), it is worth mentioning that the legal framework set in this way often turns into a lengthy and complicated procedure in practice, different at various universities. Namely, since the Law on Higher Education left to autonomous higher education institutions to regulate more closely the procedure for the recognition of foreign higher education documents for the purpose of continuing education at those institutions, they prescribe the type and number of professional bodies that will perform checking, necessary documentation, costs amount, procedure duration etc., in a significantly different way by their general acts. Hence, although the recognition procedure for continuing education had to remain indisputably within the competences of autonomous higher education institutions, it seems that it has been necessary to set the basic principles of the recognition procedure with a statutory text in a unique manner, as well as the type and number of bodies that implement the procedure, in order to prevent big differences in the procedures, duration and costs of recognition procedures, and consequently the complications in mobility of holders of qualifications and diplomas on a higher education degree.

3.2.2. Procedure for the recognition of a higher education document for employment purposes

The procedure for the recognition of a higher education document for the purpose of employment (professional recognition) is performed by the ENIC/NARIC centre, following a previously performed evaluation of a foreign study programme, in compliance with the NQFS Law and the Law on Higher Education. In compliance with the provisions of the NQFS Law, the evaluation of a foreign study programme, unless provided for otherwise by an international treaty, is performed on the basis of the type and level of achieved competences obtained by completing a study programme, taking into consideration the educational system, i.e. the qualifications system in the country where such higher education document has been obtained, the admission requirements, the rights arising from the foreign school document in the country where it has been obtained, and other relevant facts, excluding any consideration of the formal characteristics and the study programme structure, in line with the principles of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region.[365, 366] Exceptionally, if the higher school document has been obtained at one of the first 500 universities ranked at one of the latest published international lists ranking universities in the world such

[362] Art. 132 para. 1 of the Law on Higher Education.
[363] Art. 131 paras. 1 and 2 of the Law on Higher Education.
[364] Art. 132 paras. 2 and 3 of the Law on Higher Education.
[365] *Off. Gazette of Serbia and Montenegro - International Treaties*, no. 7, 2003.
[366] Art. 38 para. 3 of the NQFS Law.

as the Shanghai ranking consultancy, the US News and World Report Ranking , or the Times Higher Education World University Rankings, the decision on professional recognition is issued without conducting the procedure for evaluation of a foreign study programme.[367] The Agency's director issues the decision on professional recognition within a 60-day period from the date of receiving a regular application and it is final.[368] This decision bears the significance of a public document and it specifically contains, as follows: name, type, degree and duration (scope) of the study programme (qualification) set out in the foreign school document (in original and in translation in Serbian), and science, art, i.e. professional field within the framework of which the study programme has been achieved, that is to say, the type and level of qualifications in the Republic of Serbia at the NQFS level that the qualification corresponds to.[369]

Although the stated legal solutions facilitate an easier access to the labour market of the Republic of Serbia to the persons who obtained their high school document abroad in relation to the period when professional recognition was performed by autonomous higher education institutions, certain problems appeared in their practical application resulting in slowing down the procedure itself and thus disabling efficient provision of this public service to stakeholders.[370] Concretely, it was recorded that a certain number of reviewers did not respond to electronic requests of the ENIC/NARIC centre for doing reviews, as well as there were multi-month and sometimes multiannual delays in providing reviews. Some reviewers acted in contravention of the Convention and reduced the procedure for the recognition of foreign higher school documents to a nostrification of foreign higher school document, which resulted in a number of complaints of persons dissatisfied with the manner in which their applications were solved. Also, there were problems in engaging reviewers for certain foreign languages because they are not included in the National Council's reviewers list, which made it practically impossible to carry out the recognition procedure for certain public documents at all.[371] Due to the aforementioned, the Law on Amendments of the Law on the National Framework of the Republic of Serbia[372] provides for a special power of the Agency for Qualifications to form special professional commissions and teams for conducting external evaluation of the quality of work of the publicly recognised organisers of adult education activities (hereinafter: PROA), check the fulfilment of requirements regarding curriculum of adult education activities in accordance with the qualification standard in the procedure of acquiring a PROA status and other jobs within the competences of the Agency.[373] Additionally, the circle and manner of selection (based on a call for proposals) of persons in special professional commissions, as well as their right to compensation in the amount set by the Government. And finally, as an important novelty that may contribute to an effective implementation of the right to work of migrants, it is worth mentioning that, within the framework of competences of the Agency for Qualifications, there is now an obligation of providing information to persons, who had such professional recognition of a foreign higher school document conducted, on the possibilities of accessing professions regulated by special regulations.[374] However, the problem still remains with the procedure for the recognition of qualifications to persons from special category of aliens, in priority, asylum seekers.[375] Namely, according to the provisions of the

[367] Art. 38 para. 8 of the NQFS Law.
[368] Art. 38 para. 5 of the NQFS Law.
[369] Art. 38 paras. 4 and 10 of the NQFS Law.
[370] Ministry of Education, Science and Technological Development. *Rationale of the draft Law on the National Qualifications Framework of the Republic of Serbia*.
[371] Ibid.
[372] Law on the Amendments of the Law on the National Qualifications Framework of the Republic of Serbia, *Off. Gazette of the RS*, no. 6, 2020.
[373] Art. 15a of the NQFS Law.
[374] Art. 15 para 1 item 16a The NFQ Law.
[375] Pursuant to art. 2 para. 1 item 4 of the Law on Asylum and Temporary Protection, asylum seeker is an alien who has filed an application for asylum in the territory of the Republic of Serbia, and where no final decision has been taken yet. (*Off. Gazette of the RS*, no. 24,2018).

Law on Asylum and Temporary Protection, asylum seekers have, *inter alia,* the right to reside and freedom of movement in the Republic of Serbia, social assistance, healthcare, primary and secondary education, as well as the labour market access, but not the right to assistance in integration, which, in line with the statutory provisions, belong only to persons granted asylum.[376] Since the right to assistance in one's integration, in line with the provisions of the Ordinance on the manner of inclusion in social, cultural and economic life of a person granted asylum[377], means, *inter alia,* assistance in learning Serbian, as well as assistance in one's inclusion in employment market in a form of assistance in initiating the procedure for the recognition of foreign school document, asylum seekers will, without the mentioned rights, practically be prevented in initiating and successfully completing the procedure for the recognition of foreign school document, consequently to effectively exercise their right to work.[378] Without assistance in their integration, the right to access to labour market remains a bare right, so asylum seekers (and they make the majority among forced migrants in Serbia), despite their declared intention to file an asylum application, they will not do it if they are aware that they will not be assisted in their inclusion in social, cultural and economic life of the Republic of Serbia, and, consequently, in initiating the procedure for the recognition of qualifications, which is the basic precondition for their employment and further integration.

4. Recognition of professional qualifications

A significant novelty in the system of recognising foreign documents and qualifications in the Republic of Serbia represents the adoption of the Law on Regulated Professions and Professional Qualifications[379], which regulates the minimum requirements for qualifications in the Republic of Serbia for accessing and performing professions of a medical doctor, specialist medical doctor, dental medicine doctor, specialist dental medicine doctor, general care nurses, mid-wives, master in pharmaceutical sciences, veterinary medicine doctor, architects, as well as the recognition of professional qualifications, including also a system for recognising professional qualifications for performing regulated professions in the Republic of Serbia for the purpose of realising the right of establishment, freedom to provide services at temporary and occasional bases in the Republic of Serbia on the basis of professional qualifications, as well as the procedure for recognising professional qualifications themselves.[380] Namely, within the framework of the accession process to the European Union and Chapter III relating to the right of establishment and the freedom to provide services, the Republic of Serbia was obliged to implement the European standards[381] relating to mutual recognition of professional qualifications between the EU Member States' citizens, including also the measures facilitating the right of establishment and the freedom to provide services. Serbia committed itself to adopt, in the period prior to its accession to the European Union, the Law on

[376] Art. 48 of the Law on Asylum and Temporary Protection.

[377] Ordinance on the manner of inclusion in social, cultural and economic life of a person granted asylum, *Off. Gazette of the RS*, no. 101, 2016; 56, 2018.

[378] According to the Ordinance on the manner of inclusion in social, cultural and economic life of a person granted asylum, "the inclusion in social, cultural and economic life of persons granted the right to asylum, is provided through: 1) full and timely information on the rights, opportunities and obligations; 2) learning Serbian language; 3) familiarising with Serbian history, culture and constitutional order; 4) assistance in the inclusion into educational system; 5) assistance in exercising the right to health care and social welfare; 6) assistance in the inclusion in the employment market." Where, "a person granted the right to asylum is provided assistance on the occasion of his inclusion in the labour market in a form of: 1) assistance in obtaining necessary documents needed for registering to the National Employment Service and the Employment Agency; 2) assistance in initiating the procedure for the recognition of foreign school documents; 3) providing his inclusion in additional education and training in line with the labour market needs; 4) assistance in his inclusion in active employment policy measures". Art. 2 and 7 of the Ordinance on the manner of inclusion in social, cultural and economic life of a person granted asylum

[379] Law on Regulated Professions and Professional Qualifications, *Off. Gazette of the RS*, *no.* 66, 2019. This law entered into force on the eighth day from the date of its publication in the Official Gazette of the Republic of Serbia, and its application will start on the day of the accession of the Republic of Serbia to the European Union.

[380] Art. 1 of the Law on Regulated Professions and Professional Qualifications.

[381] These are Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the Recognition of Professional qualifications; Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013, amending Directive 2005/36/EC on the recognition of professional qualifications, as well as the Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').

Regulated Professions and Professional Qualifications and the recognition of professional qualifications that will have a postponed effect, that is to say - it will be applied from the moment of its accession to the EU, for which the creation of administrative conditions for its application is also necessary. This Law should grant a person who acquired specific professional qualification in any of the EEA (European Economic Area) member states, access to the profession for which he was qualified in his parental member state, as well as to exercise the profession in the territory of Serbia under conditions valid for its nationals. The competent body[382] may allow for access to the regulated profession and to exercise this profession under the conditions applied to the nationals of the Republic of Serbia and to persons who acquired such professional qualification in a third country provided they have three years of professional experience in the specific profession in the territory of the EEA member state, and who had their professional qualification obtained in the third country recognised, in accordance with minimum qualifications requirements, and which is proved with the certificate issued in the EEA member state.[383] In the procedure for the recognition of qualifications obtained in third countries, the competent body is obliged to seek opinion of a relevant educational institution in the Republic of Serbia on the applicant's acquired education and learning outcomes, where an adequate educational institution will compare the curriculum of the institution in which the applicant obtained his formal qualifications in a third country with the curriculum attended for the same profession at the same level of education in the Republic of Serbia. The opinion of a corresponding educational institution on the applicant's acquired education and learning outcomes is not binding for the competent body in the procedure for the recognition of professional qualifications. If, in the course of comparing such curricula, a substantially different content is found according to the provisions of this law, the applicant is entitled to opt for an additional measure, unless not entitled to it in the cases prescribed by this Law. In the event that the applicant opted for a test of qualifications and shows no successful result in the second round in the given time period, the next additional measure that might be set for him, is the period of adaptation of a maximum five-year duration, starting from the date of issuing the temporary decision. In case the competent body finds substantial differences in the applicant's professional qualifications that cannot be compensated by implementing the additional measures, it will reject the application for the recognition of professional qualifications.[384]

5. Conclusion

Passing the NQFS Law created the legal framework for regulating the system where qualifications are established, levels and types of qualifications are described, competent bodies and processes that are linked to establishing the qualifications system are set up, thereby respecting the specificities of the national educational system, the European educational practice principles, particularly the European qualifications system. Since the passing of the NQFS Law, the activities aimed at setting up all the competent bodies and centres have been implemented, and the procedures for the recognition of foreign school/higher school documents, *inter alia*, were transferred to the competence of the Agency for Qualifications, which are implemented by the ENIC/NARIC centre, being an organisational unit of the Agency. Besides that, the method of evaluating a foreign study programme was upgraded; since, according to the new solutions, in addition to the type and levels of achieved knowledge and skills, the education system of the country where a higher education document is obtained, the admission requirements, the competences acquired with the completion of the study programme, the rights arising

[382] Competent authority within the meaning of this Law is a "body competent for implementing the procedure and setting the requirements for the recognition of professional qualifications, issuing decision on the recognition of professional qualifications, providing information on the procedure and the requirements for the recognition of professional qualifications, and for taking the other actions in compliance with this Law, and they are: competent professional organisations or other bodies or organisations that are authorised for implementing the procedure and setting the requirements for the recognition of professional qualifications by special regulations, i.e. the ministries competent for the specific regulated professions." (Art. 4 para. 1 item 22 of the Law on Regulated Professions and Professional Qualifications.)

[383] Art. 92 of the Law on Regulated Professions and Professional Qualifications.

[384] Art. 93 of the Law on Regulated Professions and Professional Qualifications.

from the foreign higher school document in that country, and other relevant facts are also evaluated, not taking into consideration the formal characteristics and structure of the study programme. The stated legal solutions enable an easier exercising of the right to work to persons who acquired (higher) school documents abroad. Practically, they are given free access to the labour market and it is left to the employer to assess whether the competences acquired by that person are appropriate for the needs thereof. For attaining the full performance of the new legal solutions, however, it is important that the competent authorities apply, in the procedure for the recognition of foreign documents, the principles for the recognition set by the Convention on the Recognition of Qualifications concerning Higher Education in the European Region and the NQFS Law, while not reducing the recognition procedure to a nostrification of foreign qualification. Also, for the purpose of a harmonised system for the recognition of foreign degrees and qualifications and effective exercising the right to work, both of foreign citizens and Serbian citizens, it is necessary to implement better coordination of all the involved stakeholders, starting from educational institutions, through the Agency for Qualifications to the National Employment Service, and cut down the waiting period for delivery of necessary information. Regarding persons under international protection, a successful implementation of the procedure for the recognition of foreign qualifications requires the inclusion of all the stated persons, regardless of the type of legal status (asylum seeker, asylee, or person under temporary protection) in an organised provision of assistance in their integration, including also assistance in initiating the procedure for recognising qualifications. And, finally, in the field of the recognition of foreign higher education documents for the purpose of continuing education, it is necessary to establish some uniform standards in legal regulations in order to decrease the differences in such recognition procedures conducted by autonomous higher education institutions.

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NATIONAL REPORT

For more than 30 years since the independence of North Macedonia, the legal framework for the protection of refugees has been constantly the subject matter of its shaping, regulating and harmonising with the international instruments adopted by the OUN and the Council of Europe, as well as with the EU law.[385]

The basic law that, *inter alia,* regulates the legal status and duties of asylum seekers and persons granted the right to asylum in North Macedonia is the Law on International and Temporary Protection.[386] This law also governs the labour and social security law status of three categories of persons, who are the subject matter of analysis in this report, and they are: asylum seekers, persons with recognised refugee status and persons with recognised status under subsidiary protection. The status of these persons, from the aspect of labour and social rights, is further regulated by several special laws (Law on Employment Relationships[387], Law on Employment and Work of Aliens[388], Law on Employment and Insurance in the event of Unemployment[389], Law on Healthcare insurance[390], Law on Social Welfare[391], Law on the Protection of the Rights of the Child[392], etc.), and also of the by-laws (Strategy on Integration of Refugees 2008–2015[393], Resolution on the Migration Policy in the Republic of Macedonia 2015–2020 with the Action Plan for the Migration Policy of the Republic of Macedonia 2015–2020[394]).

The fundamental rights in the area of labour law and social law that belong to asylum seekers up to the moment of issuing the final decision in the procedure for the recognition of the right to asylum are the *right to basic healthcare services*, according to the regulations on healthcare insurance; *social welfare*, in accordance with the regulations on social welfare, and the *right to work within accommodation centre*s, as well as the *right to free access to labour market* no longer than nine months from lodging an application for the recognition of asylum.[395]

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[385] In the entire past period, Macedonia has faced challenges related to coping with several refugee crises. These are: crisis 1991 after the events in Albania, resulting in taking care of 1,200 people; crisis 1992 in military activities in Bosnia and Herzegovina; Kosovo and Metohija crisis 1999, after which North Macedonia took care of over 360,000 people; civil armed conflict in 2001, where 86,954 internally displaced persons were registered, and the migrant crisis 2015, where over 400,000 refugees passed through North Macedonia on their way to west European countries.

[386] See: 3 Law on Asylum and Temporary Protection, *Off. Gazette of the RM*, no. 64 of 11.4.2018). The Law on Asylum and Temporary Protection (hereinafter: LATP) replaces the previous Law on Asylum and Temporary Protection, which had been applied by entering into force of the Law on Asylum and Temporary Protection 2018.

[387] *Official Gazette of the Republic of Macedonia*, no. 62, 2005.

[388] *Official Gazette of the Republic of Macedonia*, *no*. 217, 2015.

[389] *Official Gazette of the Republic of Macedonia*, *no*. 37, 1997.

[390] *Official Gazette of the Republic of Macedonia*, *no*. 25, 2000.

[391] *Official Gazette of the Republic of Macedonia*, *no*. 104, 2019.

[392] *Official Gazette of the Republic of Macedonia*, *no*. 23, 2001.

[393] About that, see: Government of the RM, Ministry for Labour and Social Policy, *Strategy for the integration of refugees and aliens in the Republic of Macedonia 2008–2015*, December 2008.

[394] *Official Gazette of the Republic of Macedonia*, *no*. 8, 2016.

[395] About that, see: The LATP, art. 61 para 1

Persons with recognised refugee status generally have the same rights and duties as the nationals of North Macedonia in the domain of labour and social rights. Within the framework of labour law, refugees may perform activities and establish employment relationship in the same way as the nationals of North Macedonia. The only exception from this general right occurs in a case provided for by this law, and whereby, as a condition, the person is required to have the North Macedonia nationality.[396] It refers to the workplaces in the public sector, which is regulated by a special law providing for the RNM nationality as a general requirement for establishing employment relationship.[397]

Besides the equal right to work, refugees, comparing to the RNM nationals, have the same right to employment relationship (regulated by the Law on Employment Relationship and Collective Labour Agreements).

In the domain of social rights, refugees have the same access to the right to healthcare, pension and disability insurance in case of unemployment as well as the RNM nationals, according to the special laws (Law on Pension and Healthcare Insurance, Law on Healthcare Insurance, and Law on Employment and Insurance in case of Unemployment). Before acquiring the capacity of an insured person, in compliance with the Law on Healthcare Insurance, a person with refugee status has the right to health care under the same conditions as the RNM nationals.[398] From the date of delivery the decision on the recognition of refugee status, the person with refugee status is made equal with the RNM nationals, as well as in relation to exercising the rights to social welfare, laid down by the Law on Social Welfare.[399]

The status of persons under subsidiary protection is formally made equal to the status of aliens granted temporary residence in the territory of the RNM.[400] Persons under subsidiary protection enjoy the rights in the domain of labour law (right to work, and access to labour market), identical to persons with the recognised refugee status, but the difference is that the former obtain a work permit issued for a period of one year and it is renewed, while the latter can obtain a work permit valid for an indefinite period.[401] Persons under subsidiary protection also exercise their rights in the domain of social rights (social security, including also health care and social welfare).

The actual access to the labour market, i.e. employment of persons under subsidiary protection and temporary protection also depends on the concrete measures that are an integral part of the integration process of these persons in North Macedonia. The integration process of refugees in North Macedonia is realised in accordance with the Strategy on Refugees and Aliens 2008–2015 and the National Action Plan (NAP) 2009. In 2017, the Draft Strategy for the Integration of Refugees and Aliens 2017–2027 was drafted, which has not been adopted by the RNM Assembly even after five years of its drafting. The reasons for the non-adoption of the proposed Strategy are political by nature.[402] In any case, just as the previous, so the new Strategy points out the context of local integration as one of the most significant permanent solutions in relation to the refugees in North Macedonia. One of the most significant sectors for

[396] About that, see: The LATP, art. 68 para 1

[397] For example, the general requirement for applying for a job of an administrative servant is that the applicant is the national of the RN Macedonia (Law on Administrative Servants).

[398] About that, see: The LATP, art. 72.

[399] About that, see: The LATP, art. 71.

[400] The LATP, art.77 para 2

[401] About that, see: The Law on Employment and Work of Aliens, art. 10 paras. 1 and 9.

[402] By the end of July 2017, the Parliamentary Commission for Labour and Social Policy included in its agenda the discussion on the proposed Strategy for the Integration of Refugees and Aliens. At several sessions, the Commission discussed the "issues" announced by the Strategy proposal, *inter alia*, the proposal to build social apartments for thousands of refugees that would settle down in the Republic of Macedonia. Then, some "facts" were also presented that refugees were detrimental to the state, that the state put refugees and migrants before its citizens, reminding about detrimental consequences that would be caused by refugees during their transit through the country, that they represented danger for the citizens and that they would contribute to the rise of crime rate. (See: Helsinki Committee, *Godišen izveštaj za 2017. za pravata na begalcite, migrantite i baratelite na azil vo Republika (Annual report 2017: Rights of refugees, migrants and asylum seekers in the Republic of Macedonia)*, https://mhc.org.mk/wp-content/uploads/2019/05/Help_On_Route_-_MK__3_. pdf. Accessed 20. 6. 2021).

supporting the integration of refugees in North Macedonia is to provide free access to employment to these persons.

Even though persons under international and temporary protection formally have the right to free access to the labour market, in reality asylum seekers are faced with restrictions in exercising these rights during the process of recognising the right to asylum. The procedure for realising the right to asylum can take longer that the legally stipulated nine months (e.g., if the asylum seekers asylum application is rejected and the procedure for exercising the right has been initiated before the competent court, which may take for more than two years).[403] In that case, the asylum seeker can be faced with real problems at the labour market and with a legal vacuum, arising from the restrictions laid down by the Law on Employment and Work of Aliens. Namely, according to the Law on the Employment and Work of Aliens, ID card number and personal identification number for aliens are listed among other data collected by the RNM Employment Agency for issuing a work permit (necessary for registering at the Agency).[404] If such persons do not have a personal identification number, the Agency ascertains that there is no legal basis and possibility to issue a work permit to such alien, including an asylum seeker as well. The Ministry of Internal Affairs (Asylum Sector), however, does not issue a personal identification number to a person whose asylum application has been rejected, no matter if the procedure has been initiated for that person before the competent Court[405]. All that makes integration of such persons into Macedonian society difficult. The Draft Strategy for the Integration of Refugees and Aliens 2017–2027 provides for making refugees equal to Macedonian nationals and their inclusion as a group into the active measures within the National Employment Programme.[406] The Strategy foresees several action points to facilitate employment of refugees.

The goal of the **first action point** is to develop cooperation with the local self-government, the Employment Agency, and other key factors for the purpose of finding solutions for sustainable employment and concrete actions for the provision of professional trainings. The functionality of cooperation depends on its decentralisation (e.g. if housing solutions for refugees are transferred to the local level, then the employment initiatives must be placed within the framework of the same municipality.)

The **second action point** refers to the enhancement of the current employment programmes, which in order to include concrete measures for the whole target group. In 2009, the Ministry for Labour and Social Policy and the Employment Agency, in cooperation with the UNHCR, started to apply special programmes for the employment of refugees. The programme is focused to three models as the most suitable ones for providing sustainable opportunities for employment: self-employment model, measures for subsidised employment, and acquiring professional skills through professional trainings and courses.

The self-employment model provides financial support to refugees who want to start up as sole traders. In the starting period, the programme supports opening ten small and medium enterprises in the area of crafts, such as carpentry, welding, etc. Besides the wide scope of support for sole traders, none of the projects has been a success. A significant number of this target group were self-employed in the country of origin, but the majority of them were part of grey economy, which does not employ formal skills in business management. Henceforth, the main causes why these programmes have failed are the lack of skills for business operations, advanced knowledge for work, and capacities in coping with administrative procedures, as well as uncertainties related to the issuance of a new identity card by the Ministry of Internal Affairs.

[403] About that, see: Cvetanovska. A, *Tekovni predizvici za integracijata na begalcite, migrantitei baratelite na azil prosledena so diskriminacija, ksenofobija i krivični dela od omraza*, Makedonsko združenie na mladi pravnici, septembra 2020, p. 13.
[404] About that, see: Law on the Employment and Work of Foreigners, art. 21 paragraph 2 item 4.
[405] Cvetanovska. A, op. cit., p.15.
[406] Stamenkovski. A and Sofijanov. B, *Kvartalen monitoring izveštaj za politikite i uslugite za migrantite na teritorija na Opština Gevgelija (oktomvri 2017–oktomvri 2018)*, p. 11.

The model of subsidised employment proved more successful than the self-employment model, particularly in the combination with the model of acquiring professional skills. The measures consist of the provision of financial support for covering the gross salaries to persons of the target group in the duration of six months, with the employer's obligation to extend an employment agreement for a two-year period. Before starting a subsidised employment, the refugees go through a professional training at the workplace with the same employers.

Professional trainings are essentially significant in the implementation of a sustainable basis for future employment opportunities. Most trainings are implemented according to the "Professional development programme with a known employer" model, and then the same "known employer" offers employment agreements to those who attend such trainings.

The purpose of the third action point is to facilitate a full approach to the current measures and programmes by the Employment Agency to the target group. In that way, primarily, a method for providing a work permit to the persons with recognised refugee status and persons under subsidised protection is created.

The fourth action point refers to the recognition of the model for a facilitated access to labour market to certain members of the target group and vulnerable categories (e.g. women with juvenile children, older persons, persons with disabilities). For the purpose of providing support to the employment of women, the measures for enrolling refugee children in kindergartens and pre-school education are taken. The other vulnerable groups are not included in the special measures.

The fifth action point is focused to the proposal of alternative models intended to providing trainings and creating formal workplaces, thereby integrating the target group into the local community. An example of such model is development of social entrepreneurship.

The Draft Strategy for the Integration of Refugees and Aliens 2017–2027 also foresees several action points referring to the mechanisms for the **recognition of their qualifications**. Such is, for instance, the mechanism for evaluating professional skills of adults, which results in an official recognition and official certification of qualifications. This mechanism is, above all, intended for persons who attained some form of qualification or education in the country of origin, and aimed at their adequate registration with the Employment Agency. In this direction, the Workers University in Skopje offered special methods of testing and acquiring appropriate certificates for crafts, e.g. carpentry, masonry, welding, hairdressing and the like. Certificates issued by the Workers University are recognised at the national level and officially by the Employment Agency, thus facilitating the access to labour market and employment programmes.

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NATIONAL REPORT

1. Access of persons under international protection to the labour market

Exercising the right to work and the work-related rights is significantly made complex by the fact that the issue of labour legislation is within the jurisdiction of the entities of the FBiH, RS and the Brčko District BiH, meaning that many issues in this field are legally regulated in different ways. Yet, it is worth mentioning that BiH as a signatory state to relevant international instruments, guarantees the right to work and the prohibition of forced labour as a significant aspect of the right to work, which also refers to migrants. The right to work and the prohibition of forced work are found as the human rights guaranteed by the constitutions in force in BiH.[407]

The right to work is exercised primarily according to the basic labour law regulations in the area of:

- Labour laws: Labour Law of the FBiH[408], Labour Law of the RS[409], Labour Law of the BDBiH[410]
- Laws on mediation in employment: Law on Mediation in Employment and Social Security of Unemployed Persons of the FBiH[411], Law on Mediation in Employment and the Rights during Unemployment of the RS[412], Law on Employment and the Rights during Unemployment of BDBiH[413].
- Law on the Prohibition of Discrimination[414].

The right to work of regular migrants is exercised on the basis of the Rulebook on the manner of the realisation of the right to work of persons under international protection in Bosnia and Herzegovina, adopted by the Ministry for Human Rights and Refugees 2017.[415] The personal scope of application of the Rulebook is limited to persons with the regular migrant status (persons granted refugees status by the final decision of the Ministry of Security of BiH and persons granted subsidiary protection by the final decision of the Ministry of Security of BiH) and to their family members.[416] Such approach was also taken by the UN Convention Relating to the Status of Refugees 1951, where the right to work is also guaranteed to persons with legal status, and for the purpose of making their access to work equal at least with aliens being given the same right.[417] The access to labour market is limited in regard to workplaces in the executive, legislative and judicial authorities, where one of the preconditions is the nationality of BiH.

[407] The BiH Constitution does not provide for the explicit right to work, but the prohibition of forced and compulsory labour (article II(3)(c) of the BiH Constitution); the FBiH Constitution provides for the freedom to work (Part II, article 2(l)); the RS Constitution regulates various aspects of the right to work in more detail (right to work, prohibition of forced labour, free choice of occupation and employment, possibility of the employment relationship termination only under conditions laid down by the law, and the right to remuneration – article 39 of the RS Constitution).
[408] *Official Gazette of the FBiH, no.* 26, 2016; 89, 2018 and23, 2020 – decision of the Constitutional Court.
[409] *Official Gazette of RS, no.* 1, 2016 and 66, 2018.
[410] *Official Gazette of BDBiH, no.* 34, 2019 and 2, 2021.
[411] *Official Gazette of the FBiH, no.* 41, 2001; 22, 2005; 9, 2008.
[412] *Official Gazette of RS, no.* 30, 2010; 102, 2012; 94, 2019.
[413] *Official Gazette of BDBiH, no.* 33, 2004; 19, 2007; 25, 2008.
[414] *Off. Gazette of BiH, no.* 59, 2009; 66, 2016.
[415] *Off. Gazette of BiH, no.* 52, 2017.
[416] Article 3 of the Rulebook.
[417] Article 17 of the Rulebook.

The Rulebook stipulates an equal position of regular migrants and domestic citizens on the issue of registration at a competent employment institution. Therefore, under equal conditions, regular migrants exercise their right to the access to labour market as well as domestic citizens, and they are excluded from the work permits system[418], thus finding themselves into a more favourable position comparing to foreign persons who get employed in the BiH territory according to the entity laws on employing aliens, and for whom work permit is a precondition to establish employment relationship. Certainly, regular migrants are not obliged to register at a competent institution for mediation in employment, but they may directly approach potential employers. By excluding regular migrants from the work permits system, it is endeavoured to simplify the complex employment procedure for employing regular migrants and to motivate domestic employers to employ them. Such equal status of regular migrants and domestic citizens is also provided for in the case of self-employment, i.e. in case of performing free professions, where equal requirements must be met for performing a specific profession, and in compliance with the current regulations.[419]

After terminating an employment relationship, regular migrants have the same rights as domestic citizens in the status of unemployed persons, under the same conditions.[420]

According to the report of the Ministry for Human Rights and Refugees of BiH, during 2019, six persons entered into employment relationship in private and non-governmental sectors.[421] Such a demanding procedure for the recognition of legal status, a high level of unemployment of the population, complex procedures for the recognition of professional qualifications, prejudices of potential employers, language barriers, and many other reasons make the access to labour market in BiH difficult to regular migrants, consequently resulting in a low number of employed migrants.

2. Prevention of exploitation of migrants

Exploitation of work force with an emphasis on exploitation of migrants is in close connection to the issue of trafficking people, i.e., in the concrete situation of migrants (in priority those with irregular status). The issue of migrants' exploitation as work force is closely linked to labour, criminal and migration law. Migrants are particularly susceptible to a possible violation of human rights in the form of labour exploitation due to vulnerability of their status (lack of information on the country where they migrate to, workplace, language, administration organisation, etc.). In this chapter, the legal framework for the prohibition of work force exploitation will be presented within the framework of labour law regulations.

Forced labour is the most frequent form of exploitation of work force[422], while slavery and servitude are identified in practice a bit less often. BiH is a signatory to international instruments prohibiting any form of forced labour, slavery and servitude, starting from the following ILO conventions, the Convention 29 on Forced Labour (1930) and the Convention 105 on the Abolition of Forced Labour (1957), and it is relevant also to mention other ratified conventions in this context -the Convention 97 on Migration for Employment (1949), and the Convention 143 on migrations in the conditions of abuse and enhancement of equal opportunities and treatment of migrant workers (Supplementary Provisions) (1975). Besides the aforementioned, BiH also ratified the European Convention on Human Rights and Fundamental Freedoms of the Council of Europe, where article 4 prohibits slavery and forced labour, and this Convention has a special status within the framework of the BiH Constitution. Significantly, the aforementioned conventions regulate the prohibition of forced labour of all persons performing work, meaning also the

[418] Article 13 of the Rulebook.
[419] Article 18 of the Rulebook.
[420] Article 17 of the Rulebook.
[421] Ministry of Human Rights and Refugees. *Izvještaj o zbrinjavanju izbjeglica i stranaca pod supsidijarnom zaštitom u Bosni i Hercegovini za 2019. (prijedlog)* (*Report on care of refugees and aliens under subsidiary protection in BiH 2019 (Proposal*), April 2020, https://www.parlament.ba/act/DownloadDocument?actDocumentId=43a01fc1-1575-4e92-94d2ccc675eebf9d&langTag=bs (01. 4. 2021), p. 9.
[422] OSCE, *Trgovinaljudima u svrhu radne eksploatacije – Referentni materijal s osvrtom na Bosnu I Hercegovinu* (*Trafficking in Human Beings for the Purpose of Labour Exploitation - A reference paper for Bosnia and Herzegovina*), 2011, p. 18.

protection of all migrants who are victims of labour exploitation regardless of the legality of their status. The entity laws on labour define legal employment status in their provisions, including also the entire occupational safety legislation (provisions on occupational safety, working hours, breaks, leaves, remunerations, special protection of specific categories of persons, etc.). For migrant workers, the provisions on the prohibition of discrimination in the framework of employment and on exercising their rights during the term of employment relationship are particularly significant[423], and they stipulate the prohibition of discrimination on the basis of: *"sex, sexual orientation, marital status, family obligations, age, disability, pregnancy, language, religion, political and other opinions, nationality, social origin, wealth, birth, race, skin colour, membership or non-membership in political parties and trade unions, health status or some other personal characteristic"*[424]. The stated definition is in accordance with the definition on prohibition of discrimination, provided for by article 2 of the BiH Law on the Prohibition of Discrimination.

A significant actor in the suppression of exploitation of workers (migrants) in terms of institutions that are directly involved in the implementation of labour law regulations is labour inspection. BiH ratified the relevant ILO conventions that regulate the competence and organisation of the labour inspection, the Convention 81 of Labour Inspection in Industry and Trade (1947) and the Convention 150 on Labour Administration (1978). The Convention 150 recommends that the labour inspection should provide assistance to their workers, including those who do not have legal labour law status[425]. The labour inspections in BiH are organised at the entity level, that is the labour inspections in the FBiH have competence at the cantonal level, and they are committed to examine the legality of employment status and conditions for work and at work of all workers, including those who do not have a regulated employment status, as victims of labour exploitation, within the framework of their daily duties.[426]

Significantly, sanctioning the exploitation of migrant workers is carried out through criminal justice in the context of human trafficking to the greatest extent, although labour inspection's role, in terms of a facilitated access to labour environment and their powers, is highly important for a full insight into all the aspects of labour exploitation and efficient sanctioning thereof.

3. Access to health care

The implementation of social rights of internationally displaced persons in Bosnia and Herzegovina is made more complicated by the fact that the right to social protectionis not within the competence of BiH, but of its entities: the FBiH, RS, and Brčko District; while in the FBiH, since it consists of 10 cantons, the right to social protectionis in the common competence of the FBiH and the cantons.[427] Since the issue of refugees and asylum is in the competence of the BiH state[428], while the social rights are realised through the entity regulations, the question arises where the social rights will be exercised - in the territory of an entity or in Brčko District. In the context of the social rights implementation, the attention will be directed to the implementing of the right to health care and the right to social protectionand aid.

The right to health care is regulated at the entity level, where both entities and BD BiH adopted the following:

[423] Article 8 of the FBiH Labour Law, article 18 of the RS Labour Law, article 7 of the Labour BDBiH Law.
[424] Retrieved from art. 7 of the BDBiH Labour Law
[425] Article 7 of the Convention 150.
[426] On the role of labour inspection in the context of the suppression of exploitation of workers (migrants), see more in: 16 OSCE, *Trafficking in Human Beings for the Purpose of Labour Exploitation- A reference paper for Bosnia and Herzegovina*, *2011*
[427] Article 2 of the FBiH Constitution, *FBiH Off. Gazette*, no. 1, 1994; 1994 – Amendment I; 13, 1997 – AmendmentsII–XXIV,;13, 1997 – Amendments XXV and XXVI; 16, 2002 – Amendments XXVII–LIV; 22, 2002 –Amendments LVI–LXIII; 52, 2002 – Amendments LXIV–LXXXVII; 60, 2002 – corr. of AmendmentLXXXI; 18, 2003 – Amendment LXXXVIII; 63, 2003 – Amendments LXXXIX–XCIV; 9, 2004 –Amendments XCV–CII; 20, 2004 – Amendments CIII and CIV; 33, 2004 – Amendment CV; 71, 2005Amendments CVI–CVIII; 72, 2005 – Amendment CVI and 88, 2008 – Amendment CIX.
[428] Article III(1) of the BiH Constitution.

-regulations on health insurance[429], which regulate the issue of the circle of insured persons, the basic rights in the area of healthcare insurance (right to health care, remuneration of salary during medical leave, and remuneration of accommodation and transport), the method of financing the rights and organisation and competence of the healthcare insurance institute responsible for the implementation of healthcare policy;
-regulations on health care[430], which regulate organisation of healthcare institutions (public and private sector), rights, duties and responsibilities of patients, the scope of the right to health care.
Laws on health care provide that health care is implemented at the primary, secondary and tertiary levels, i.e., what healthcare institutions are responsible for the provision of healthcare services at each of the mentioned levels.[431]
Bosnia and Herzegovina guarantees the application of international standards on exercising the right to health care of internationally displaced persons by ratifying a number of international instruments. The UN Convention Relating to the Status of Refugees 1951, within the framework of article 23 (Right to social welfare), also includes health care in terms of hospitalisation, emergency medical care, assistance to blind and purblind persons[432], but only to persons having a legal refugee/asylum seeker status. The European Social Charter (Revised) and its Appendix 1996 take the same approach, which extends the personal area of application of article 13 (Right to social and medical assistance) to migrants with legal status[433]. In this context, the guarantees of Bosnia and Herzegovina in relation to the issue of international obligations referred to in the stated international instruments are limited to persons granted legal migrant status and asylum seekers. Therefore, the very analysis of the right to health care will follow this categorisation in the context of the rights of migrants with/without legal status (the so-called regular and irregular migrants).
Although health care is regulated at the entity level, the ground for exercising the right to health care of regular migrants is found in the acts of the Ministry for Human Rights and Refugees of BiH. Currently, the Rulebook on the Mode of Exercising Healthcare Insurance of Persons Granted International Protection in Bosnia and Herzegovina 2017[434] is in force, which establishes the right to healthcare insurance and thus provides the access to healthcare services in one of the entities or in the territory of BDBiH. The personal area of the Rulebook's application is limited to persons granted refugee status, subsidiary protection status, and their family members whose family reunion was made possible.[435] Regular migrants acquire health care according to their place of domicile/residence, where they are also reported by the ministry to the competent tax administration (that is an obligation according to the regulations on paying contributions), and, on the basis of lodging an application to the competent healthcare insurance

[429] Law on Health Care of the FBIH, *FBiH Off. Gazette*, no. 30, 1997; 7, 2002; 70, 2008;48, 2011; Law on Health Care of the RS, *RS Off. Gazette*, no. 18, 1999; 51, 2001; 70, 2001;

51, 2003; 57, 2003 – corr., 17, 2008; 1, 2009; 106, 2009; 39, 2016 – decision of the Constitutional Court; 110, 2016; 94,2019; 44, 2020 – other Ordinance; Law on Health Care of BD, *BD BiHOff. Gazette*, no. 19, 2020 – consolidated text.

[430] Law on Health Care of the FBIH, *FBiH Off. Gazette*, no. 46, 2010; 75, 2013; Law on Health Care of the RS, *RS Off. Gazette*, *no*. 106, 2009; 44, 2015; Law on Health Care of BD, *BD BiH,Off. Gazette*, no. 52, 2018 – consolidated text; 34, 2019; 16, 2020.
[431] For a more detailed review of the healthcare institutions, see: Grubešić Ivana, Mulalić Aida, *Social security law – Bosnia and Herzegovina*, International Encyclopedia of Laws, Wolters Kluwer, 2020, p. 43–46.
[432] UN High Commissioner for Refugees (UNHCR), *The Refugee Convention (1951) – The Travaux Preparatoires Analysed with a Commentary by Dr Paul Weis*, available at: https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires- analysed-commentary-dr-paul.html (01. 4. 2021), p. 117.
[433] On international standards regarding the rights to social welfare of refugees, see more in: Grubešić Ivana, Omerović Enis, Međunarodne i evropske perspektive prava na socijalnu zaštitu izbjeglica kao ljudskog prava (International and European perspectives of the right to social welfare of refugees as a human right), *Godišnjak Pravnog fakulteta*, University "Džemal Bijedić", Mostar, year IV no. 4, 2020, pp. 174–200.
[434] *Off. Gazette of BiH*, *no.* 16, 2017.
[435] Article 3 of the Rulebook.

institution(of an entity/canton), they are given a healthcare card. Family members of regular migrants are insured through their head of the household, and this rule refers to persons with refugee status. Persons under subsidiary protection status are insured individually, and not through the head of the household.[436] Healthcare insurance is financed by the Ministry for Human Rights and Refugees of BiH, which pays healthcare insurance premiums of healthcare insurance to the competent healthcare insurance institutions annually, and in line with the place of domicile/residence of a regular migrant.[437] Having obtained a status of insured person according to the competent laws on healthcare insurance, regular migrants are exempt from co-payment for health services.[438] Regular migrants are fully equalled with domestic citizens in regard to exercising primary, secondary and tertiary health care.[439]

That way, in 2019, according to the mentioned Rulebook, 121 persons were insured in various legally recognised statuses; in 2018, 111 refugees were insured; and in 2017 – 117 persons, and in 2016 - in total, 112 persons.[440]

Considering the right to healthcare services of irregular migrants, it can be concluded that there are no international acts stipulating the provision of healthcare services to them as a legal standard. Yet, in the context of fundamental human rights such as the right to life and the right to health, a specific scope of healthcare services is also provided to persons with irregular status; however, there is a lack of systematic solution of the problem of irregular migrations and in exercising health care in case of irregular migrants. Namely, there is no way of providing healthcare insurance to persons with irregular status, and most health care services are provided within the framework of the receiving centres for migrants. In such way, in the Salakovac receiving centre, primary health care is provided by support of the Ministry of Security of BiH within the Healthcare Centre in Mostar, and the secondary health care costs are borne by the UNHCR through the BiH Women's Initiative Foundation.[441] In this regard, the representative offices of international organisations play a significant role, which provide specific healthcare services to all migrants inside such centres, but also outside. So, since 2019, the Danish Refugee Council has provided primary and some secondary health care services in the receiving centres[442]; Save the Children organisation has also provided both primary and specialist-consultation health care services in the receiving centres and through their mobile field teams.[443] The lack of institutional support to international organisations members is particularly aggravating, which operate in this way in some cantons where there are no receiving centres and such aid is carried out through their mobile teams.

4. Access to social protection

As previously highlighted, the area of social protection right is within the competence of the entities and

[436] Ministry of Human Rights and Refugees. *Izvještaj o zbrinjavanju izbjeglica i stranaca pod supsidijarnom zaštitom u Bosni i Hercegovini za 2019. (prijedlog) (Report on care for refugees and aliens under subsidiary protection in BiH 2019 (Proposal), April 2020*, https:// www.parlament.ba/act/DownloadDocument?actDocumentId=43a01fc1-1575-4e92-94d2-ccc675eebf9d&langTag=bs (02. 4. 2021), p. 9.

[437] Article 9 of the Rulebook.

[438] Article 5 of the Decision on maximum amounts of direct participation of insured persons in the costs of using individual aspects of health care in the basic package of health care rights, *Off. Gazette of the FBiH*, no. 21, 2009. The identical decisions of Republika Srpska. and Brčko District provide for the same.

[439] The scope of each of the aforementioned, see in art. 33–42 of the FBiH Law on Health Care, the Decision on establishing the basic package of healthcare rights (*Off. Gazette of the FBiH*, no. 21, 2009), the Rulebook on the content, scope and method of exercising the right to health care (*Off. Gazette of RS*, no. 102, 2011; 117, 2011; 128, 2011; 101, 2012; 28, 2016; 83, 2016; 109, 2017; 115, 2017;17, 2018; 53, 2018; 59, 2018; 112, 2018; 17, 2019; 98, 2019; 21, 2020; 19, 2021).

[440] Consult annual report of the Ministry for Human Rights and Refugees, available at: http://www.mhrr.gov.ba/izbjeglice/default.aspx?id=6&langTag=bs-BA (02. 4. 2021)

[441] Information taken from the Special report on situation in the area of migrations in Bosnia and Herzegovina, created by the Ombudsman Institution of BiH (November 2018), p. 32.

[442] On a more detailed review of the provided services by the Danish Refugee Council, see: Ministry of Security of BiH, *Information on the situation in the area of migrations in Bosnia and Herzegovina, 2020*, p. 17.

[443] Information collected during the National seminar held within the framework of the regional project "Legal status and protection of internationally displaced persons /migrants/asylum seekers/ refugees and legally invisible persons, i.e. stateless persons", at the Faculty of Law on 18. 02. 2021.

BDBiH; thus, as in case of health care, social protection is in the competence of the entities and BDBiH; while the FBiH entities and cantons share the competence in the FBiH. The common competence of the FBiH entities and cantons implies that the federal authority is entitled to determine (social) policy and pass laws within its competence, while the cantonal authorities are entitled to their(social) policy and enforce laws (federal and cantonal).[444] Therefore, we are talking about a complex legal system of social protection in BiH, where the field of social protection is primarily regulated by the following laws:
-In the FBiH: Law on social protection, the protection of civilian victims of war and the protection of families with children[445], and besides the federal law, cantonal regulations are in force in this field[446];
-In RS: Law on Social Protection[447], Law on the protection of children[448];
-In BDBiH: Law on Social Protection of Brčko District[449], Law on the protection of children of BDBiH[450];
Just as in the case of legal regulation of the right to health care, social assistance to regular migrants is also regulated with the act adopted by the Ministry for Human Rights and Refugees of BiH, Rulebook on the mode of exercising the right to exercising the right to social protection to persons granted international protection in Bosnia and Herzegovina.[451] The Rulebook restricts personal application only to persons granted refugee status, and persons granted subsidiary protection status with final decision of the Ministry of Security.[452]
With regard to the rights covered by the Rulebook, as well as in the case of social protection provided by entity regulations, two groups of rights have been identified:

[444] Dedić Sead, Hadžić Mehmed, *Social law*, Faculty of Law, University of Sarajevo, 2018, p. 51.
[445] *Official Gazette of the FBiH, no.* 36, 1999; 54, 2004; 39, 2006; 14, 2009; 1, /2013 – decision of the ConstitutionalCourt, 45, 2016; 40, 2018.

[446] 1. Law on Social Protection, on the Protection of Civilian Victims of War and the Protection of Families with Children of KS,*Official Gazette of KS*, no. 38/2014, 38/2016, 44/2017, 28/2018.

2. Law on Social Protection, on the Protection of Civilian Victims of War and the Protection of Families with Children of ZDK,*Off. Gazette of ZDK*, no. 13/2007, 13/2011, 3/2015, 2/2016.

3. Law on Social Protection, on the Protection of Civilian Victims of War and the Protection of Families with Children of SBK,*Off. Gazette of SBK*, no. 10, 2005; 2, 2006; 3, 2018.

4. Law on Social Protection, on the Protection of Civilian Victims of War and the Protection of Families with Children of TK, *Off. Gazette of* TK, no. 5, 2012; 7, 2014; 11, 2015.

5. Law on Social Protection, on the Protection of Civilian Victims of War and the Protection of Families with Children of USK,*Off. Gazette of USK*, no. 5, 2000; 7, 2001; 11, 2014;

6. Law on Social Protection, on the Protection of Civilian Victims of War and the Protection of Families with Children of BPK,*Off. Gazette of BPK*, no. 7, 2008; 2, 2013; 12, 2013;

7. Law on Social Protection, on the Protection of Civilian Victims of War and the Protection of Families with Children of ZHK,*Off. Gazette of ZHK*, no. 16/2001, 11/2002, 4/2004, 9/2005.

8. Law on Social Protection HNK, Off. Gazette of HNK, no. 3, 2005; 1, 2016; 3,2020; Law on Health Care of Families with Children of HNK, *HNK Off. Gazette, no.* 7, 2017, 7, 2019.

9. Law on Social Protection PK, *Off. Gazette of PK*, no. 5, 2004; Law on Child Care Allowance *Off. Gazette of PK*, no. 3, 2017.

10. Law on Social Protection of Canton 10, *Off. Gazette of K 10*, no. 5, 1998.

[447] *Off. Gazette of RS, no.* 37, 2012; 90, 2016; 94, 2019. And 42, 2020 – other regulation.
[448] *Off. Gazette of RS, no.* 114, 2017; 122, 2018; 107, 2019.

[449] *Off. Gazette of BDBiH, no.* 01, 2003; 04, 2004; 19, 2007; 02, 2008; 21, 2018, 23, 2019.
[450] *Off. Gazette of BDBiH, no.* 18, 2020 – consolidated text; 29, 2020 and 41, 2020.
[451] *Off. Gazette of BiH, no.* 43, 2017.
[452] Article 4 of the Rulebook.

- Rights within the framework of general social protection,
- Rights within the framework of the protection of families with children.

In this regard, the rights to general social protection are, as follows:[453]

- Cash assistance (permanent) - in the amount of 20% of the subsistence base of one household member, which is increased by 10% of the base for each subsequent member of the household.

The amount of this cash compensation cannot exceed the total amount of 50 % of the base;

-Cash compensation (allowance) for providing assistance and care to another person - in the amount of 20% of the base;

-One-off cash assistance - in the amount of 30% of the base and can be paid maximum three times a year;

-training assistance for independent living and work (children and youth)

-it is determined in the amount of the determined economic price of living and accommodation costs;

-accommodation in social protection institutions and pocket money – in the amount of 100% of the price determined in accordance with the current regulations according to the place of domicile/residence,

-home care and assistance at home**;**

-other material assistance.

The base taken into consideration while calculating the aforementioned rights is an average annual net salary in BiH, and according to the latest published data of the Agency for Statistics of BiH[454]. With regard to the rights within the framework of social protection of families with children, the following rights are provided for[455]:

-child allowance in the amount of 2% of the base and it cannot exceed 10% of the base;

-compensation instead of salary to a woman-mother in employment relationship, for the time of maternity leave, childbirth and care for the baby/compensation for the salary during the maternity leave is determined in the amount of 20% of the base;

-cash assistance to unemployed mother-woman in labour who is unemployed /maternal allowance is determined in the amount of 10% of the base;

-one-off assistance for new-born baby accessories/support for new-born baby accessories is determined in the amount of 20% of the base.

Hence, setting the scope of the rights has not been left to the entity and cantonal regulations that mutually differ to a significant extent in relation to each of the mentioned rights, so the scope of the rights is unified for all persons covered by the Rulebook regardless of their domicile/residence. On the other hand, the purpose of the Rulebook is not to ensure an equal treatment of regular migrants and domestic citizens regarding the scope of rights, since the scope of rights provided for by the Rulebook deviates from those provided for by the entity and cantonal regulations.

The implementation of the rights is left to the social work centres as the first instance institutions, i.e. to the social welfare services that are responsible materially for the issues related to implementing the rights in the area of social welfare, according to the place of domicile/residence of a regular migrant. Following the completed procedure, the competent authority (centre/service) renders the decision on established rights, and delivers it to the Ministry for the Human Rights and Refugees, and transfers the funds to the centres/services on the basis of the delivered final decision at the monthly level.[456]

According to the official reports of the Ministry for the Human Rights and Refugees, during 2019, mainly limited financial support, funds for the accommodation in social welfare institutions, child allowances, and one-off cash assistance are approved for; and an identical situation is also recorded in official reports for years 2018 and 2017.[457]

[453] Articles 7 and 10 of the Rulebook.
[454] Article 9 of the Rulebook.
[455] Articles 8 and 12 of the Rulebook.
[456] Article 21 of the Rulebook.
[457] Reports are available at the official internet page of the Ministry for Human Rights and Refugees of BiH.

Access to social assistance is far more limited in relation to irregular migrants. The very Convention Relating to the Status of Refugees stipulates the obligation of states to provide material goods in form of food, hygiene necessities to migrants without legal status according to article 20[458]; similar attitude was also taken by the International Covenant on Economic, Social and Cultural Rights that guarantees in article 3 "*an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions*."

In this regard, social assistance in form of material non-cash goods is provided to irregular migrants within the framework of the BiH receiving centres. Material non-cash assistance is granted in form of regular meals in the receiving centres, hygiene necessities, clothes, and the accommodation itself in a receiving centre, and support in this regard also comes from the international organisations, such as the UNHCR.[459]

5. Recognition of qualifications

In 2003, Bosnia and Herzegovina signed the Lisbon Convention[460] committing itself to acceding the Bologna process aimed at facilitating the process of recognising professional and scientific qualifications attained in various signatory states. The procedure for the recognition of secondary schools and higher schools professional and scientific qualifications is the precondition for accessing the labour market, and for the purpose of exercising labour law status in accordance with professional knowledge and skills.

Considering that the issue of education is in the jurisdiction of the entities of the FBiH, RS and BDBiH, whereas the administrative procedure for the recognition of professional and scientific qualifications becomes more complicated in the divided competence between the entities and cantons in the FBiH entity. The legal framework on the recognition of higher school qualifications is set in the following way:

- Framework Law on Higher Education in BiH[461];
- Law on the Validity of Public Documents in BiH[462];
- RS: Law on Higher Education[463]; Rulebook on the composition and mode of work of the Commission for Information and Recognition of Documents in the field of Higher Education[464];
- FBiH: Cantonal laws on higher education and rulebooks on the recognition, nostrification or equivalence of foreign educational qualifications/certificates (different approach).

Namely, the Bologna process provided for the recognition of professional and scientific qualifications[465] depending on whether the access to labour market/continuation of education of a person at a higher education institution was considered, unlike the nostrification system as a more complex system which had been valid by then. However, considering the current situation in regard to the question of recognising qualifications in BiH - an unequal approach in regard to the competent institutions that perform the recognition of qualifications (in some cantons, the recognition is performed by higher education institutions, and in some others, the competent cantonal institutions), in some cantons, nostrification is still conducted and not the recognition of qualifications, and the duration of procedure is different - all the foregoing is highlighted as the basic remarks that prevent full integration of regular migrants.[466]

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[458] UN High Commissioner for Refugees (UNHCR), *The Refugee Convention (1951) – The Travaux Preparatoires Analysed with a Commentary by Dr Paul Weis*, available at: https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires- analysed-commentary-dr-paul.html (03. 4. 2021), p. 115.

[459] Ministry of Security of BiH, *Information on the Situation in the Area of Migrations in Bosnia and Herzegovina 2020*, p. 17.

[460] *Off. Gazette of BiH*, *no.* 13, 2008– International treaties.

[461] *Off. Gazette of BiH*, *no.* 59, 2007; 59, 2009.

[462] *Off. Gazette of BiH*, *no.* 23, 2004.

[463] *Off. Gazette of RS*, *no.* 73, 2010; 104, 2011; 84, 2012, 108, 2013; 44, 2015.

[464] *Off. Gazette of RS*, *no.* 15, 2014.

[465] It is a formal confirmation of the value of a foreign higher school qualification issued by the competent authority, and for the purpose of accessing the labour market or the continuation of education (definition taken from: Centre for Information and Recognition and Documents in the area of Higher Education, *Recognition of higher school qualifications in Bosnia and Herzegovina: Situation in 2018*, available at: https://euinfo.ba/assets/upload/factsheet_BiH_final_final.pdf (07. 4. 2021).

[466] A comparative analysis between cantons and entities, see in: ibid.

Due to the frequency of a situation where regular migrants do not possess all the documents regarding their attained qualifications at a given moment, the Recommendation on the recognition of foreign higher school qualifications in BiH to persons with insufficient documentation or without documentation was adopted[467], relating to refugees, displaced persons and/or persons in the situation similar to refugees, as well as to other persons who cannot document the qualifications they invoke to out of justifiable reasons. The purpose is the recognition of educational qualifications on the basis of the so-called biographic document (based on various documents of a person, reconstruction of data, etc.). Going in that direction, on 16. 3. 2020, BiH also joins the *European Qualifications Passport for Refugees – EPQR* project[468], the purpose of which is to establish a procedure for the assessment of higher school qualifications on the basis of available documentation, and an interview aimed at a simpler and faster integration of refugees at the labour market.

Information on recognised qualifications to regular migrants are not available.

6. Effect of the epidemic to accessing the labour market for all categories of aliens

The emergency health situation caused by the Covid-19 virus pandemic has led to significant changes in the labour market in BiH. The already high unemployment rate in the labour market has been additionally impaired by the market destabilisation and insecurity in economic flows. There has also been an increase in the unemployment rate in the world market, as well as in the EU Member States.[469]

In regard to health care of migrants in the territory of BiH, the necessary measures were taken, which primarily mean isolating the cases of infection in the receiving centres in accordance with the recommendations of the Public Health Institute[470]. In the last year, primarily curative measures were undertaken in the context of treating infectious cases, and also preventive measures in regard to isolating persons who were infected and who were suspected to be infected; however, accommodation capacities for persons who should be isolated were restricted and insufficient in the receiving centres.

In regard to regular migrants who were employed on the basis of the Rulebook on the method of exercising the right to work of persons granted international protection in Bosnia and Herzegovina, no data were available for year 2020 while this report was being written. In regard to the labour market destabilisation in BiH during 2020/2021, assumingly, there were no new employment relationships entered into with persons with regular migrants' status.

Employment of migrant workers (foreign workers) in BiH is performed on the basis of the entity laws on employment of aliens.[471] In this regard, every year, a decision is adopted to determine the annual quota of work permits for the employment of aliens in Bosnia and Herzegovina, in terms of the quota for issuing new work permits and the quota for issuing extended work permits. Besides the mentioned quotas, in certain cases work permits are also granted (new and extended) outside the determined quotas, and in compliance with the Law on Movement and Stay of Aliens and Asylum.[472]

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[467] *Off. Gazette of BiH*, *no.* 81, 2014.

[468] Retrieved from: https://www.coe.int/bs/web/sarajevo/pocetna/-/asset_publisher/ BkSfoQH5q7o4/content/bosnia-and-herzegovina-joins-the-european-qualifications-passport-for-refugees?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fsarajevo%2Fpocetna%3Fp_p_id%3D101_INSTANCE_BkSfoQH5q7o4%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn- 1%26p_p_col_count%3D3 (10. 4. 20201).

[469] A more detailed review of the effect of Covid-19 pandemic in the labour market world-wide and in BiH see in: Kahrović Ajdin, *Ekonomija u postpandemijskom vremenu* (*Economy in post-pandemic times*), Friedrich-Ebert-Stiftung, September 2020, pp. 12–15.

[470] On the number of isolated cases during 2020, see more in: Ministry of Security of BiH, *Information on the situation in the area of migrations in Bosnia and Herzegovina*, *2020*, p. 18.

[471] Law on Employment of Aliens of the FBIH, *FBiH Off. Gazette*, no. 111, 2012; Law on Employment of Aliens of the RS, *RS Off. Gazette*, no. 128, 2014; 113, 2017; 50, 2018 and 31, 2019), Employment of Aliens of BDBiH (*Off. Gazette of BDBiH*, *no.* 15,2009; 19, 2009; 20, 2010).

[472] *Off. Gazette of BiH*, *no.* 36, 2008.

The table below provides a review of the total number of planned and granted work permits under quotas, or outside of quotas, for the last six years:

Proposal for work permits quotas	Issued work permits				
Situation in BiH	New work permits	Extended work permits	New work permits	Extended work permits	Work permits issued outside the quotas
2020	595	965	465	419	1702
2019	595	975	791	552	1840
2018	620	970	508	536	1778
2017	608	1083	455	478	1660
2016	611	970	659	527	1576
2015	726	1160	536	593	1336

Numeric indicators show a decreased number of issued work permits (new and extended) in 2020 in relation to the proposal of work permit quotas anticipated for 2020, as well as compared to the preceding years. Such equal trend is noticed in regard to the number of work permits issued outside the anticipated quotas, the number of which continually grew in the period 2015-2019, followed by a certain fall during 2020. However, we cannot talk about a drastic fall in the number of issued work permits, implying a conclusion that there is still the need to employ migrant workers in the territory of BiH.

7. Conclusion

The current situation in the labour market of Bosnia and Herzegovina, according to the recent indicators presented also in the Report on Progress of BiH 2020, is not positively assessed in the context of the employment policy implementation.[473] Namely, high unemployment rates and low employment rates of domicile population were recorded, and a discriminatory treatment of socially vulnerable population groups (women, persons with disabilities, etc.) make the further harmonisation of the labour market with the EU standards more difficult. The decentralisation of the social protection system in BiH in the context of different types of social assistance and different levels of social protection in the country, and the still high degree of non-coverage with healthcare insurance of the population also contribute to this.

In such unfavourable market environment, it is difficult to talk about integrating regular and irregular migrants in the labour market and generally in the Bosnia and Herzegovina society. The issue of social rights of regular migrants and their integration in the labour market has an adequate legal framework enabling adequate social protection; however, because of the unfavourable situation in the labour market, it is hardly possible to talk about some actual implementation of the right to work, which was previously discussed. The situation in regard to irregular migrants' status is far more unfavourable since they are not included in the legal framework that enables the social rights of regular migrants and gaining access to the labour market, so covering basic living needs takes place, in priority, in the receiving centres, with the financial support of international organisations and institutions. In this regard, different approach is also applied in the context of providing healthcare services (problem of financing and providing services of secondary and tertiary health care), and because of the limited accommodation capacities in the receiving centres, the provision of minimum material life necessities is made difficult. There is an evident

[473] European Commission, *Report on Bosnia and Herzegovina 2020*, available at: https:/ europa.ba/wp-content/uploads/2020/10/Izvjestaj_za_BiH_za_2020_godinu.pdf (15. 3. 2021), p. 85.

lack of strategic and comprehensive solution of the issue of irregular migrant influx in the territory of BiH, which makes, because of decentralised organisation of the state itself, the provision of minimum social needs difficult.

III HUMAN RIGHTS AND ANTIDISCRIMINATION LAW

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RIGHT OF ACCESS TO JUSTICE OF MIGRANTS, ASYLUM SEEKERS, ASYLEES AND STATELESS PERSONS IN THE REPUBLIC OF CROATIA – FROM THE ASPECT OF CIVIL PROCEDURE LAW

1. Introduction

Guarantees for freedom of movement inside the country, traveling abroad, immigrations and repatriations are provided for by the Constitution of the Republic of Croatia[474] (hereinafter: the RC), the national laws, as well as the relevant legislative framework at the EU level. According to the *Croatia 2018 Human Rights Report*[475] *(hereinafter: the Report 2018), the situation is assessed as satisfactory as there has been an adequate cooperation with the Office of the UN High Commissioner for Refugees (UNHCR) and other humanitarian organisations in providing protection and aid to displaced persons, refugees, returnees, asylum seekers, stateless persons and other persons having similar status.*[476] *Granting refugee status and subsidiary protection have been ensured for asylum seekers. During 2019, the Croatian Government accepted 98 refugees and asylum seekers within the EU Resettlement Scheme, i.e. in total 250 refugees and asylum seekers since the start of the programme in 2015.*[477] *It was foreseen for stateless persons to file an application for obtaining the right to residence and eventual citizenship to the Ministry of the Interior.*[478] *According to the data of the Ministry of the Interior, since 11 January 2019 the Croatian Government has provided asylum to 153 refugees who had a well-founded fear of persecution in the event of returning to their home country. Pursuant to the mechanism of subsidiary protection for persons who do not meet the requirements for asylum, one person was granted protection during that year.*[479]

International and domestic non-governmental organisations, and foreign international organisations, such as the Office of the UN High Commissioner for Refugees (UNHCR) published data about pushbacks of refugees, including asylum seekers, who attempted to enter the country illegally, as well as about alleged mistreatment of migrants by the border police. The Ministry of the Interior received over 200 complaints on alleged illegal and violent pushbacks of migrants; however, following the conducted investigations, no evidence was found in support of such allegations. Yet, at the end of 2019, the Council of Europe Commissioner for Human Rights invited the Government to instigate independent investigations on alleged police violence and thefts to the detriment of refugees and migrants, as well as on group pushbacks.[480]

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[474] Constitution of the Republic of Croatia, *Official Gazette*, no. 56, 1990; 135, 1997; 08/98, 113, 2000; 124, 2000; 28/01, 41, 2001; 55, 2001; 76, 2010; 85, 2010; 05, 2014.

[475] *Croatia 2018 Human Rights Report*, available at: https://hr.usembassy.gov/wp-content/uploads/sites/233/CROATIA_2018_HUMAN_RIGHTS_REPORT_HR.pdf (Accessed on: 6. 12. 2020).

[476] Report 2018, p. 9.

[477] *Croatia 2019 Human Rights Report* (hereinafter: the Report 2019), available at: https://hr.usembassy.gov/wp-content/uploads/sites/233/CROATIA_2019_HUMAN_RIGHTS_REPORT_HR.pdf (Accessed on: 6.12.2020), p. 10.

[478] Report 2018, p. 11.

[479] Report 2019, p. 10. See also: Migranti i izbjeglice u Hrvatskoj: teško do škole i posla (Migrants and refugees in Croatia: Difficult access to school and work), available at: **h**ttps://www.dw.com/hr/migranti-i-izbjeglice-u-hrvatskoj-te%C5%A1ko-do-%C5%A1kole-i-posla/a-52558232 (Accessed on: 9.12.2020); Besplatna pravna pomoć u području migracija i azila (Free legal aid in the field of migrations and asylum), available at the Hrvatski pravni centar (Croatian Law Centre) official web page: http://www.hpc.hr/azil/ (Accessed on: 6.12.2020).

[480] See Report 2019, p. 9.

At the end of 2019, the EC confirmed that the RC had fulfilled the conditions and fully implemented the *Schengen aquis*, but it's still insufficient access to the international protection mechanisms was pointed out, as well as the application of force at the Croatian border, which Croatia was invited to investigate[481]
In the light of the foregoing, it is important to study the availability of the protection mechanisms for migrants, asylum seekers, refugees and stateless persons, and particularly the barriers to exercising their right of access to justice, which the specific status of vulnerable groups of persons puts before them, in which they find themselves against the Croatian legal system.

2. Access to justice for migrants, asylees, refugees and stateless persons

2.1. Definition of the term[482]

Generally, the term '**access to justice**' in the international and European law is considered as the state's obligation to guarantee the right of access to justice to individuals, whether it is through a court-of-law or any other body[483] before which it is possible to solve a dispute in extrajudicial proceedings and to exercise a legal protection of violated or endangered rights.
The access to justice integrates the fundamental human (procedural) rights, such as the right to access to court guaranteed under the international and European law, under the provision of art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[484] (hereinafter: the ECHR) and art. 47 of the Charter of Fundamental Rights of the European Union[485] (hereinafter: the EU Charter on Fundamental Rights), and the right to an effective remedy in terms of the provision of art. 13 of the ECHR and art. 47 of the EU Charter of Fundamental Rights.[486] A significant role in understanding the meaning, scope and reach of the right of access to justice in the national legal systems is also played by the judicature of the European Court for Human Rights (hereinafter: the ECtHR), i.e. the Court of Justice of the European Union (hereinafter: the CJEU), in relation to the interpretation of the provision of art. 6 of the ECHR, i.e. art. 47 of the EU Charter of Fundamental Rights.[487]
At the international level, the *Committee for Human Rights of the United Nations* is responsible for interpreting, promoting and preserving the right of access to justice[488]

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[481] *Communication from the Commission to the European Parliament and the Council on the verification of the full application of the Schengen acquis by Croatia*, available at: https://ec.europa.eu/homeaffairs/sites/homeaffairs/files /what-we-do/policies/european-agenda-migration/20191022 com-2019- 497-communication en.pdf (Accessed on 7.12.2020).

[482] Subsection "2.1 The definition of the term" is taken from the paper by Poretti, Paula, Pristup pravosuđu za djecu (Access to Justice for Children), in: Župan, Mirela (ed.), *Prekogranično kretanje djece u Europskoj uniji (Cross border movement of a child in the European Union)*, Osijek: Faculty of Law of the University of J.J. Strossmayer of Osijek, 2019, pp. 61-93.

[483] Whereby, it is possible to solve a dispute by conciliation, arbitration or otherwise before the bodies for alternative dispute resolution.

[484] European Convention for the Protection of Human Rights and Fundamental Freedoms, *Official Gazette - International treaties*, no. 18, 1997; 6, 1999; 14, 2002;13, 2003; 9, 2005; 1, 2006; 2, 2010).

[485] Charter of Fundamental Rights of the European Union, *Official Journal of the EU* C 202/389, 7. 6. 2016.

[486] These rights are provided for by the international instruments, such as art. 2(3) and 14 of the International Covenant on Civil and Political Rights and art. 8 and 10 of the Universal Declaration of Human Rights. The fundamental aspects of these rights include an effective access to a dispute resolution body, the right to fair proceedings and the timely resolution of disputes, the right to adequate redress, as well as the general application of the postulates of efficiency and effectiveness to the delivery of justice. So, handbook on access to justice, pp. 16-17.

[487] Insofar as the EU Charter of Fundamental Rights contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of these rights shall be the same as those laid down by the ECHR (arg. *ex* art. 52(3) of the EU Charter of Fundamental Rights). The same is also confirmed in the CJEU practice (Case–400/10 PPU MCB [2010] ECR I–8965, para 53; also, Case C–279/09 DEB (n 45), para 35. However, the latest research from the period following the Lisbon Treaty shows that there are certain discrepancies and derogations of the EU Court from the interpretation formerly given by the ECtHR. On possible reasons, see more in T. Petrašević and P. Poretti, Pravo na suđenje u razumnom roku – postoji li (nova) praksa Suda Europske unije? (Right to fair trial - Is there a (new) practice of the Court of European Union?), *VII Journal of Legal and Social Studies in South East Europe (Harmonius)*, 2018, pp. 187-201.

[488] Committee for Human Rights of the United Nations (UN) has been the leading UN body in interpreting the concepts of the right of access to justice since its establishment. The right of access to justice is protected with the UN instruments as the Aarhus Convention 1998, as well as the Convention on the Rights of Persons with Disabilities 2006.

At the EU level, the EU Justice Scoreboard presents integrated results of following up the situation in justice, particularly in regard to the access to justice, and the quality and efficiency of justice systems of the EU Member States.[489]

An efficient exercise of the right of access to justice in civil matters presupposes the possibility of exercising legal protection of endangered and violated rights. The specific situation of migrants, asylees and stateless persons, often marked with their changing place of residence, and in relation to the RC, most frequently, just with temporality of residence i.e., "with passing through the territories", causes a narrowing down of the categories of procedures in which such a guarantee can and should be provided.

2.2. Access to justice in the Croatian legislation and practice

In terms of procedural categories, the most common procedures are administrative, which will be discussed more in some other parts of this publication; whereas, in terms of civil administration of justice, it would be relevant to study to study in detail the realisation of fundamental procedural legal standards of the right to fair trial. According to the available research of case law and legal literature, within the context of the protection of migrants, asylees, refugees and stateless persons, the availability of judicial civil law protection against discrimination is spoken about most frequently.

Research, such as EU-MIDIS 2008, indicated that there is a need for strengthening the protection against discrimination and for empowering migrants, asylum seekers and refugees as vulnerable groups[490], in the access to justice.[491]

However, exactly the trust in the bodies and institutions responsible for the realisation of legal protection and the enforcement of laws has proved to be very low[492] These trends were confirmed by research published in 2017, according to which only one of eight (12%) persons reported/ filed a complaint on the basis of discrimination based on ethnic or immigration origins, which is even less than in 2008, when there were 18%.[493]

Despite the results, which include data collected for the RC, the Croatian National Plan for Combating Discrimination for period 2017- 2022 [494] (hereinafter: the National Plan 2017–2019), does not recognise any need for developing a strategy for eliminating this type of discrimination. Among cases relating to

[489] Predominantly, the data are taken from the CEPEJ, an expert body of the Council of Europe.

[490] The vulnerability of aliens, according to Croatian legal theory understanding, is caused by a number of factors, most commonly by situations because of which they leave their countries of origin (wars, persecution, extreme poverty, natural disasters, climate changes, gender inequality, separation from family, unavailability of education and medical treatment, food or water etc.), situations they are exposed to on the way to the country of destination (use of smugglers, who can be traffickers; lack of water and food during the journey, exposure to violence based on sex and gender, inhuman treatment and even exposure to torture, poor reception conditions, non-availability of humanitarian aid, etc.), and situations they are exposed to as a result of a person's identity, condition or circumstances (pregnant women, suckler women, people of poor health, elderly, children, unaccompanied children, persons with disabilities, etc.). Giljević, Lalić Novak, Vergaš, *Pravo na pristup sustavu azila i zaštita temeljnih prava migranata* (*Right of access to asylum system and the protection of fundamental rights of migrants*), Zagreb: Croatian Law Centre, 2019, pp. 37-38.

[491] See *European Union Agency for Fundamental Rights, EU-MIDIS European Union Minorities and Discrimination Survey, Main Results Report*, Luxembourg, 2010, available at: am011864Int_E1.indd (europa.eu) (12. 12. 2020). See also: *Promoting respect and diversity Combating intolerance and hate, Contribution to the Annual Colloquium on Fundamental Rights*, p.3; available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-paper-colloquium_en-0.pdf.

[492] See *European Union Agency for Fundamental Rights, EU-MIDIS European Union Minorities and Discrimination Survey, Main Results Report*, Luxembourg, 2010, available at: am011864Int_E1.indd (europa.eu) (12. 12. 2020). See also: *Promoting respect and diversity Combating intolerance and hate Contribution to the Annual Colloquium on Fundamental Rights*, p.3; available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-paper-colloquium_en-0.pdf.

[493] See European Union Agency for Fundamental Rights, EU-MIDIS European Union Minorities and Discrimination Survey, Main Results Report, Luxembourg, 2017, available at: https://fra.europa.eu/sites/default/files/ fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf (12. 12. 2020).

[494] *National Plan for Combating Discrimination for period 2017- 2022*, available at: https://vlada.gov.hr/UserDocsImages//2016/Sjednice/2017/11%20studeni/69%20sjednica%20Vlade%20Republike%20Hrvatske//69%20-%2011.pdf (15. 01. 2021).

discrimination, in the Report of the Ombudsman for year 2018[495] (hereinafter: the Ombudsman's Report 2018), there is no mention on any civil cases referring to migrants, refugees or asylees.

In 2018, there was a progress in facilitating the access to institutions and in the assistance in obtaining legal protection by adopting the Ordinance on stay in the Reception Centre for Foreigners[496] (hereinafter: the Ordinance 2018), which, *inter alia*, provides for equality (in terms of positive obligation of ensuring equal conditions) of all third-country nationals, independently of their race, skin colour, sex, language, religion, political or other beliefs, national or social origin, property, education, or other personal attributes (arg. *ex* art. 3). Also, the Ordinance 2018 provided for the right to file a complaint to the Centre manager if believed that one's rights were violated, and no other legal protection was guaranteed (art. *ex* art. 26 para 1), and the right to communication with lawyer, and the competent national or international institutions or organisations in the field of the protection of human rights and fundamental freedoms, such as ombudsman, competent national or international courts, other state or international supervisory bodies with which the Ministry has concluded a cooperation agreement. For the purpose of exercising the aforementioned communication, lawyers and representatives of humanitarian and other human rights organisations are allowed such access, pursuant to the provision of art. 22 of the Ordinance 2018, with a corresponding authorisation on access (art. ex. art. 26 para 3). Nevertheless, the Ombudsman's Report 2018**[497]** warns about a series of problems that migrants encountered in exercising the right to access legal protection mechanisms. Practice according to which lawyers cannot visit a person accommodated at a reception centre unless they have the power of attorney is in a direct contradiction to the purpose of requested visit, which actually is to obtain (sign) the power of attorney by a third-country national. Additionally, insisting to announce such a visit two days in advance in order to set a precise visitation hour, may result in missing the time limits for filing a remedy.[498] With intervention in the provision of art. 26 para 3 of the Ordinance 2018 made in 2019[499], the request for having a power of attorney for access was eliminated, and the exemplary listing of the circle of national and international organisations in the field of the protection of human rights and fundamental freedoms (s*uch as ombudsman, competent national or international courts, other state or international supervisory bodies*) was removed. While the latter change is only cosmetic, the elimination of the request to have a power attorney for access is aimed at eliminating any barrier in accessing to lawyers or bodies and organisations through which a person accommodated at a reception centre may exercise legal aid.[500] Namely, some serious criticism was previously expressed in regard to the solution foreseen by the Ordinance 2018, since deprivation of the right to access to a lawyer restricts the exercise of the right of access to justice in compliance with art. 6 para 1 of the ECHR and art. 29 para 1 of the RC Constitution. So, a warning has been made that in comparison to the provisions of the Croatian Criminal Code, which foresees the right to prisoners to have unsupervised visits by lawyers, except in case of abuse, apparently, the visitation mode envisaged for the communication with lawyer for third-country nationals at reception centres, was substantially stricter. It was doubtful whether an equivalent restriction was set for the access of representatives of humanitarian and other human rights organisations, and for the Ombudsman, i.e., NPM.[501]

Seemingly, the amendments have not (at least not fast enough) resulted in some more significant changes in practice. At the reception centres, more difficult access of migrants to lawyers was repeatedly observed in 2019. Migrants at reception centres were not allowed for an unobstructed and unsupervised interview

[495] Ombudsman, *Report of the Ombudsman 2018*, Zagreb, 2019; available at: https://www.ombudsman.hr.en/ download /izvjesce-pucke-pravobraniteljice-za-2018-godinu/?wpdmdl=4747&refresh=609cef731e5a31620897651.

[496] Pravilnik o boravku u prihvatnom centru za strance (Ordinance on stay in the Reception Centre for Foreigners), *Official Gazette*, no. 101, 2018.

[497] Ombudsman's Report 2018, pp. 263-264.

[498] Ombudsman's Report 2018, pp. 263-264.

[499] Decision on the amendments to the Ordinance on stay in the Reception Centre for Foreigners, *Official Gazette*, no. 57, 2019.

[500] Cf. CLC (Croatian Law Centre), p. 7.

[501] Ombudsman's Report 2018, pp. 269.

to lawyers. Also, in some individual cases the lawyers were not timely notified on their release from the reception centre, their departure or change of address, which also made lawyers' acting in representing migrants more difficult.[502]

The lack of adequate, complete and timely information on the right to legal protection and available mechanisms, which include the right to file a complaint, also constitutes a serious failure in ensuring the access to justice Additionally, the regulation of a complaint as a mechanism for exercising legal protection, and considering the performance requirements and its application while respecting the principles of independence, impartiality and confidentiality, is not appropriate.[503]

In the context of exercising the standard of the right to efficiency in the provision of legal protection, including also acting within reasonable time, the speed of action of competent courts is also problematic. In the analysis of case practice of administrative courts conducting judicial supervision of the legality of decisions on the limitation of movement, it is visible that in some cases the hearing were not held in time, and the courts did not act expeditiously in the majority of movement limitation cases, i.e., after the expiry of measures.[504]

The manner of conducting proceedings for the approval of international protection, in which no evidence was being taken by expertise despite the allegations of some seekers that they were victims of torture of inhuman and inhumane treatment, also prejudices the exercise of the right to adequate legal protection and the access to court of applicants for international protection. The ombudsman, as in the previous years, also in 2019, implemented the Protection of Torture Victims among Vulnerable Groups of Migrants project, within which the recognised victims of torture were provided individual psychological aid and support, and expert opinions of some psychologists were used as evidence in the procedure for approving international protection in some cases[505].

2.3. External and internal barriers in the access to justice

Notwithstanding the fact that the sample of civil proceedings where it is possible to address the protection of migrants, asylum seekers, refugees and stateless persons in the Croatian legal system is relatively small, apparently, on the basis of all the foregoing, it is reasonable to speak about the need to inquire whether and to what extent the specific objective and subjective barriers that are regularly present in relation to the access to justice for vulnerable individuals, are generally present here as well.

In this process, along with such external - objective (costs, representation, free legal aid) and internal - subjective (procedural capacity, age, language, education) barriers, which are usually taken into consideration, it is also possible to consider the effect of the global Covid-19 pandemic, which affected the RC, Europe and the entire world in the previous two years.

The costs for proceedings and legal representation are some of more significant external barriers to the access to justice. In order to improve the situation of vulnerable individuals, one of the measures is the provision of free legal aid, which is ensured according to the requirements of the Law on Free Legal Aid[506] (hereinafter: the LFLA). All the mentioned groups, i.e., migrants, asylees, refugees and stateless persons, meet the requirements to be counted among vulnerable individuals who need a facilitated access to legal protection pursuant to this Law. But Croatian law failed to regulate such possibility initially and it seems that even the opportunity to fill the gap subsequently, when amending the LFLA in 2019, was not used. The articulation of the amendments to the LFLA makes it clear that they have no (positive) effect in any

[502] Data received by lawyers on 3 December 2019. *Hrvatski sustav azila u 2019. godini - Nacionalni izvještaj* (*Croatian asylum system in 2019 - National report*), Zagreb, Croatian Law Centre, 2019 (hereinafter: the CLC Report 2019), pp. 14-15.

[503] Ombudsman. Report of the Ombudsman for year 2019, Zagreb 2020 (hereinafter: the Ombudsman's Report 2019, p. 164.

[504] At the Administrative Court of Zagreb, the average duration of these proceedings took 43 days (21 days in cases of seekers who are nationals of Syria, Afghanistan and Iraq). The majority of lodged complaints received by the Administrative Court of Zagreb in 2019 was rejected (51 of them), and adopted 6 complaints, one case was returned to MUP for reconsideration, and two cases were dismissed as impermissible. The Ombudsman's Report 2019, p. 13.

[505] Ombudsman's Report 2019 p. 16.

[506] Law on Free Legal Aid, *Official Gazette*, no. 143, 2013; 98, 2019.

way on persons who file an application for international protection.[507] The Strategic Plan for period 2019–2021 also emphasises the necessity to ensure the conditions for exercising the right to mechanisms available to all the vulnerable groups[508], from which it may be inferred that migrants, asylees, refugees and stateless persons are included thereto.

The Ombudsman's Report 2018 warns about the inadequacy of the Croatian system for the provision of free legal aid and its dysfunctionality, resulting in difficulties faced by seekers of free legal aid, considering the lack of information, and impossibility of orienting whom to address in order to receive free legal aid or assistance in administrative or judicial proceedings, because of which they are often exposed to increased costs, which may additionally jeopardise their existence. Working on a quality system of free legal aid, and particularly the primary one, which would enable a timely protection of rights, avoidance of costs, and often also (unnecessary) judicial proceedings for which the Ombudsman advocated for in the Ombudsman's Report 2018[509], was not started even in 2019.[510]

An example of the significance of and the need for a careful modelling of the system of free legal aid provision, which will, in addition to being directed to removing external barriers, also take care of internal barriers (such as language, letter, age, cultural and other specificities), is the procedure for limiting freedom of movement conducted in one of police stations, carried out in English, although the migrant woman did not speak and understand English. The information on free legal aid was given to the migrant woman pursuant to the Law on Aliens[511] (hereinafter: the LOA), and not on the Law on International and Temporary Protection[512] (hereinafter: the LITP). Namely, the provision of free legal aid according to the LOA and the LITP differs in a situation with limitation of freedom movement. The application for free legal aid, after the applicant selects a provider, is decided upon by the competent administrative court and not by the Ministry of the Interior (hereinafter: the MOI), and the requirements upon which it is granted to irregular migrants are stricter. According to the Ombudsman's Report 2019, the MOI was warned that no legal aid, or court protection, was made available to the applicant and her children, which is in contradiction with art. 29 of the RC Constitution, art. 5 and 13 of the ECHR and art. 9 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection[513], but the MOI characterised such acting as a formal omission, despite the fact that, due to the omission to provide timely legal aid to the applicant, the eight-day period for complaint to administrative court expired.[514]

Exactly because of the absence of an adequate institutional acting, pursuant to the existing legislative framework (which is by itself faulty at certain points), the efforts provided by the non-governmental sector in the provision of free legal aid and in counselling migrants, asylees, refugees and stateless persons are significant. Legal counselling provided by the Croatian Law Centre (CLC) at the reception centres, as well

[507] CLC Report 2019 p. 5.

[508] *Strategic plan of the Ministry of Demographics, Family, Youth and Social Policy*; available at: https://mdomsp.gov.hr/UserDocsImages/Planovi%20Izvjestaji%20Strategije/Strate%C5%A1ki%20plan%20za%20razdoblje%202019-2021.pdf. See also: The CLC Report 2019, p. 6.

[509] Ombudsman's Report 2018, pp.

[510] In their complaints, citizens also point out the issue of appointing a lawyer in the secondary FLA system, because of disparities in acting of regional administrative departments. Namely, some offices require citizens to deliver the consent of a lawyer who will represent them, while some other appoint a lawyer with the decision on approving FLA. Often lawyers refuse clients directed through the FLA system, particularly in cases conducted in the areas outside the seat of their office, because they are not paid travel costs. The number of lawyers willing to be enlisted by the CBA (Croatian Bar Association) for the provision of free legal aid is dwindling. One of the reasons for that is the low point value on the basis of which the fee for provided LFA services is determined, so although it was increased from five to seven kuna in 2019, it is still lower than the amount of regular lawyer tariff, which is 10 kuna. Ombudsman's Report 2019, p. 13.

[511] Law on Aliens, *Official Gazette*, no. 133, 2020.

[512] Law on International and Temporary Protection, *Official Gazette*, no. 70, 2015; 127, 2017.

[513] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection OJ EU L180/29. 6. 2013, pp. 96-116.

[514] Ombudsman's Report 2019, p. 265.

as by phone, mail or in their own office during 2019 and 2020 in compliance with the LITP, is one of such examples.[515]

2.4. Access to justice for vulnerable groups - children migrants, asylees, refugees and stateless persons

In the treatment of migrants, asylees, refugees and stateless persons, who can be classified as vulnerable individuals themselves, efforts should be made to provide particular protection to the most vulnerable among them, i.e., the rights of children (who are unaccompanied most frequently), elderly, pregnant women and single parent families (arg. *ex* art. 4 of the LMIP; art. 101 para 2 of the LOA). The procedure following the identification of an unaccompanied child consists of notifying the competent social welfare centre and applying for the appointment of guardian. In the police station, the child is provided information on approving international protection, and if the child does not express an intention to seek it, its special guardian is given the decision on return with a 90-day period for a voluntary departure and the prohibition of leaving the place of accommodation. The guardian is responsible for preparing a voluntary return, as well as for taking over the child from parents, legal guardian, or competent social welfare services to the country of return. Police officers can provide assistance to the guardian in accompanying the child. Forced refoulement is extreme measure, as well as the limitation of movement by accommodating in the detention centre for aliens.[516]

The Protocol on treating children separated from their parents - foreign citizens[517], adopted in 2018 (hereinafter: the Protocol 2018), foresees how to treat unaccompanied children in regard to exercising their legal protection, which is harmonised with the standards at the international, European and national levels; and it concerns children of foreign citizens as a particularly vulnerable group of migrants, asylees, refugees and stateless persons.[518] The Protocol 2018 thus regulates the obligations of a special guardian referring to:

1) Establishing contact with an unaccompanied child, informing the child on all the facts and circumstances in the manner appropriate to the child's age, maturity and understanding;

2) His availability to the child, and counselling with the child before undertaking any measures for its protection;

3) His care about taking all decision in the best interest of the unaccompanied child; that the unaccompanied child has adequate care, accommodation, food, clothes and footwear, and health care pursuant to the regulations on health care of aliens;

4) Working to achieve a more permanent decision in the interest of the unaccompanied child, advising the child in regard to exercising certain rights;

5) Assisting the unaccompanied child in establishing contacts with the civil society organisations that implement activities directed to support aliens;

6) Representing the unaccompanied child in administrative and judicial proceedings (arg. *ex* art. 14 of the Protocol 2018). Particular attention is paid to the protection of the child's best interest, which is also visible in other instruments in the Croatian legal order regulating this field (arg. *ex* art. 101 para 1 of the LOA).

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[515]Since 1 April 2019. The CLC started the implementation of the Free Legal Aid Provision in a Procedure for Approving International Protection project, supported by the Fund for Asylum, Migrations and Integrations (AMIF). Within the project, legal counselling is provided to seekers in compliance with the provisions of the LMIP during the procedure for granting international protection. The CLC lawyers are available at the Zagreb Detention Centre every day, and when needed in Kutina and the Detention Centre for aliens. The project implementation lasted until 31 March 2020. The Ombudsman's Report 2019, p. 18.

[516] Giljević, Lalić Novak, Vergaš, 2019, pp. 43-44.

[517]*The Protocol on treating children separated from their parents – foreign citizens*, available at: https://mzo.gov.hr/UserDocsImages/dokumenti/DokumentiZakonskiPodzakonskiAkti/Osnovnoskolski/Protokol%20o%20postupanju%20prema%20djeci%20odvojenoj%20od%20roditelja%20%E2%80%93%20stranim%20dr%C5%BEavljanima%20-%20Vlada%20RH%202013..pdf (13. 01. 2021).

[518]See more about it: *Children rights on the occasion of the 30th anniversary of the Convention on the Rights of the Child: European Parliament resolution of 26 November 2019 on children's rights on the occasion of the 30th anniversary of the UN Convention on the Rights of the Child* (2019/2876(RSP)) 11. 2019).

Considering the difficulties in the initial application of the Protocol 2018, additional education for practitioners were organised on the identification of unaccompanied children and the actions to be taken in relation to their accommodation in 2019.[519] Additionally, the new Law on Foster Care[520] (hereinafter: LFC) provides for accommodation of unaccompanied children into foster families (arg. *ex* art. 14 para 5). In the beginning of 2019, the Interdepartmental Commission for the Protection of Unaccompanied Children was established, which is in accordance with the recommendations of the Member States for an interdepartmental approach in the fight against all the forms of discrimination of children, taking into consideration their vulnerability, particularly children with disability, migrants' children, children of migrant origin.[521] During 2019, 70 unaccompanied children sought international protection in the RC. Averagely, one guardian is appointed per 2.15 unaccompanied children; therefore, all the appointed special guardians were employees of social welfare centres, replacing the previous practice of appointing persons who travelled with the child.[522] During 2019, the CLC lawyers provided support and free legal aid to unaccompanied children most frequently at social welfare centres, so they equally advised the special guardians in relation to the difficulties they had encountered in the provision of legal aid to unaccompanied children.[523]

In that way, they actively worked on the elimination of deficiencies in the manner of providing legal protection to vulnerable groups, including unaccompanied children in the Croatian legal system, concerning mostly the identification of unaccompanied children and other vulnerable groups during 2019.[524] But, considering the difficulties in accessing and viewing the cases, no exact data are available on the measures taken pursuant to the LOA, treatment of vulnerable groups of migrants, the method of determining their vulnerability, or the application of the Protocol 2018.[525]

2.5 Effect of the pandemic caused by SARS-CoV-2 virus to the right of access to justice

The Law on the Amendments to the Law on Aliens (hereinafter: the Law on the LOA Amendments) 2020, foresees that third-country nationals issued residence permits in the RC (including also those granted permanent stay on the basis of asylum or subsidiary protection) referred to in art. 140 para and 2 of the LOA, during the epidemic caused by SARS-CoV-2 virus, do not have to file an application for obtaining a new residence permit, and this maximum up to 30 days from the date of declaring an end to the epidemic. It is prescribed that the actions in an administrative procedure, which third-country nationals are obliged to initiate within the periods prescribed by the provisions of the previous Law on Aliens[526] (hereinafter: the LOA 2011), and the dead line to initiate it started to run on 11 March 2020, or it will be during the epidemic of COVID-19 disease caused by the SARS-CoV-2 virus, may be initiated by third-country nationals within a 30-day period from the date of declaring an end to the epidemic.

In the event of a short-term and prolonged impediment to enforce a decision regarding return, the institutes of extending the deadline for return, up to one year and temporary postponement of forced

[519] The topics of the workshops were agreed within the Working Group for education on the Protocol on procedures for UASC composed of (besides the above-listed organisations and bodies): the Office of the Children's Ombudsperson, the Ministry of Health, the Ministry of Science and Education, and UNICEF.

[520] Law on Foster Care, *Official Gazette*, no. 115, 2018.

[521] *Children rights in occasion of the 30th anniversary of the Convention on the Rights of the Child, European Parliament resolution of 26 November 2019 on children's rights on the occasion of the 30th anniversary of the UN Convention on the Rights of the Child* (2019/2876(RSP))

[522] CLC's Report 2019, p. 19.

[523] Furthermore, the CLC implemented the Let's Realise the Rights of Unaccompanied Children project, in cooperation with the social welfare centres in Ivanac, Zagreb and Rijeka, financed by the Ministry of Demographics, Family, Youth and Social Policy. The project's goal was to improve the legal protection of unaccompanied children by providing professional legal assistance and support to unaccompanied children, and through work with professionals. http://www.hpc.hr/2019/10/29/zakljucci-na-temelju-aktivnosti-provedenih-poprojektu ostvarimoprava - djece-bez-pratnje/, the CLC Report 2019, p. 21.

[524] Ombudsman's Report 2019, p. 164.

[525] Ombudsman's Report 2019, p. 165.

[526] Law on Aliens, *Official Gazette*, no. 130/2011, 74/2013, 69/2017, 46/2018.

refoulement for an indefinite period are provided for. The European Commission issued the Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement in the context of COVID-19 in on April 16, instructing to ensure the continuity of procedures as much as possible while fully ensuring the protection of people's health and fundamental rights. In relation to the procedure envisaged by the RC towards migrants who are suspected to be infected with the COVID-19 virus, in the police procedures towards illegal migrants and aliens expressing an intention for international protection, it is checked whether aliens have COVID-19 symptoms, and, if such aliens have COVID-19 symptoms, the competent epidemiologist is informed, who takes further action afterwards.[527] If an applicant for international protection should go into isolation, the purpose of self-isolation shall be explained, assisted by a translator, as well as the obligations during the prescribed duration thereof.[528] If the aliens have no symptoms, the police continue the procedure, i.e., take decisions regarding their return in accordance with the LOA or accept their intentions for international protection[529]

3. Conclusion

Despite the efforts made by the RC in building an adequate system for providing legal aid to migrants, asylees, refugees and stateless persons, the end result is obviously not satisfactory. As a vulnerable group in the society, they still encounter significant barriers in the access to justice, which have been even more emphasised with the pandemic requirements and the closure of national borders and societies. Hence, it is necessary to reconsider the current legislative framework in the RC. Particular attention must be paid to strengthening the protection of those most vulnerable among these groups, such as children, elderly, persons with disabilities, and pregnant women. Finding alternatives for detaining and limitation of movement and for providing additional protection to unaccompanied children, ensuring free legal aid, unobstructed access to legal representation, and an adequate system of judicial remedy against decisions on return are only some of the measures that should be considered in this regard.

[527] *Utjecaj širenja bolesti Covid-19 na migracijsku politiku – Izvještaj o praćenju (Effect of spreading Covid-19 disease on migration policy - Follow up report*, Croatian Law Centre, StudentWatch project, 2020, p. 9 See also: Gregurović, Gregurović, Klempić Bogadi, Kumpes, Kuti, Lazanin, Mlinarić, Podgorelec, *Pandemija i migracije (Pandemic and migrations)*, 2020, doi:10.11567/zomdi.2020.1 (expertise).

[528] Croatian Law Centre, StudentWatch project, 2020, p. 9

[529] Croatian Law Centre, StudentWatch project, 2020, p. 9

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NATIONAL REPORT

1. Introduction

Economic inequality is a 'trigger' for legal migrations, but also for illegal/unlawful migrations (human trafficking and human/migrant smuggling).

Human trafficking (*trafficking in human beings*) is one of the most serious breaches of human rights and a threat to vulnerable groups of all age groups in all countries, whether within the state itself (the so-called 'internal' trafficking) or outside its borders. It is an exceptionally profitable crime which brings enormous material gain to the perpetrators, and generates huge costs to the society.

As estimated, the yearly profits of trafficking in human beings in the world exceed EUR 29.4 billion.[530] It is a criminal activity that depends on a very complex interplay of supply and demand, and a complex chain of actors is knowingly or unknowingly involved therein.[531]

Human smuggling (migrant smuggling), as a criminal offence of illegal transportation of people across a state border, is a criminal activity, criminal offence and an illegal form of migration. With very little amount of time and money, the perpetrators generate huge profits for a short while. Along with the similarities of these criminal offences, indisputably there are significant differences, which are not always easily determined in practice. There are a number of issues and challenges deriving from differences regarding these criminal offences, in particular regarding prosecution, identification of persons/illegal migrant, identification of victims, inability to establish communication with migrants, cultural and language barriers and inconsistency of case-law. This is exactly why a quality and even stronger communication between the competent bodies and all the actors is of the paramount importance in the field of concerned criminal offences. There is also a need for stepped up international co-operation aimed at as better as possible suppression of and as successful as possible combating these types of criminal activities as the most common forms of organised crime.

This report will provide an overview of the legal framework and content of the criminal offences in the context of human trafficking and smuggling, with an emphasis on the particularly vulnerable group of trafficking in human beings – women and children It will also provide insight into essential differences between these criminal offences, as well as a review and analysis of the situation *de lege lata* in case law

[530] The EUROPOL's Report on Trafficking in Human Beings Financial Business Model (2015), see: Communication from the Commission to the European Parliament and the Council *Reporting on the follow-up to the EU Strategy towards the Eradication of trafficking in human beings and identifying further concrete actions* https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:52017DC0728&from=en, p. 1, Accessed on 4 March 2021

[531] Perpetrators and abusers exploit people's vulnerabilities, exacerbated by factors such as poverty, discrimination, gender inequality, male violence against women, lack of access to education, conflict, war, climate change, environmental degradation, and natural disasters, for the purposes of sexual or labour exploitation, begging, criminal activities and more. Ibid.

in relation to adult perpetrators, reports, charges and convictions for the concerned criminal offences, In the context of perpetrators and victims of the concerned criminal offences, a brief overview will be provided of conventional and constitutional aspects of access to criminal justice from the aspect of an individual, as the suspect/defendant/accused and from the aspect of a victim, and conclusively - an overview of the effect of the COVID-19 pandemic upon the concerned criminal offences. The contents of this report also include a presentation of conclusions from the held criminal session at the national seminar.[532]

2. Security aspects of migrations

Security is one of the phenomena of human society in all the stages of its development[533] which has been experienced as one of the bases of success and sustainability, and the condition of survival of individuals, groups and wider social community since the earliest days.[534] Illegal, i.e. unlawful migrations can be considered as one of security threats both for national and international security. While legal migrations take place according to state's regulations, illegal ones are contrary to the regulations of the states of origin, transit and destination.[535] Illegal migrants are persons:

1. Who cross the state borders at places not envisaged for it, i.e. avoid legal state border crossing points;
2. Who stay inside a country despite the fact that their asylum application has been rejected?
3. Like students and tourists who reside legally in a country, and this mainly within a three-months period, but after the legal period expiry, they do not leave that country;
4. Who when arriving at a state border, cross the border with fraudulent documents or documents belonging to other persons;
5. Who despite the competent body's decision on leaving the country, do not leave that specific country within the specified period;
6. Who may lose their current status through the adoption of a political decision.[536]

In the context of security aspects of migrations, the state police surveillance plays a significant role. So, the Law on State Border Surveillance governs the state police surveillance, border police affairs inside the country, international police co-operation and co-operation of services at the state border.[537] As one of the duties of the Republic of Croatia in its accession to the European Union (hereinafter: the EU), was also the harmonisation of the national legislation with the EU acquis, a series of regulations and directives of the European Parliament and of the Council have been implemented into the Croatian legislation[538].

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[532] The criminal law session titled Human Trafficking and Human Smuggling within the National Seminar was held on 11 December 2020, via Zoom platform. The session was moderated by Lana Kovačić Markić, LL.M. and a Ph.D. student of the Law Faculty of Osijek and a Constitutional Law Adviser at The Constitutional Court of the Republic of Croatia, with participation of Assistant Professor Mirjana Kondor-Langer, LL.D., , Head of the Centre for Police Research, Zagreb Police College, Ministry of the Interior of the Republic of Croatia, where selected participants took part (academicians, practitioners, jurists, students, and members of civil society organisations). Presentations were given by Krešimir Kamber, LL.D., Lawyer, Registry of the European Court of Human Rights, Strasbourg, France and Ronald Tomaković, deputy municipal state attorney, Municipal State Attorney's Office in Osijek

[533] Tatalović, S., Bilandžić, M., *Osnove nacionalne sigurnosti (Bases of national security),* Zagreb: Ministry of the Interior, 2005, p. 4.

[534] Anderson, M., Apap, J., *Striking a balance between freedom, security and justice in an enlarged European Union*, CEPS, 2002, p. 6.

[535] Vurnek, D., Bengez, A., Perkov, M., Sigurnosni aspekti migracija (Security aspects of migrations), *Acta Economica Et Turistica*, vol. 4, no. 2, 2018, 121-214, p. 161.

[536] Tatalović, S., *Nacionalna i medjunarodna sigurnost (National and international security)*, Zagreb: Politička kultura, 2006, p. 128.

[537] See art. 1 of the Law on State Border Surveillance, *Official Gazette*, nos. 83/13 and 27/16.

[538] For instance, Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention (AL L 405, 30 December 2006), Directive of the Council 2004/82/EC of 29 April 2004. On the obligation of carriers to communicate passenger data (SL L 261, 6 August 2004).

However, although Croatia became a full member of the EU, the border checks have not been abolished with the EU Member States (Slovenia and Hungary) yet. After the Schengen Borders Code[539] came into force on 7 April 2017, the procedure for conducting border checks changed. At the border, a systematic check is conducted of all persons crossing the state border of the Republic of Croatia, both at the entrance and the exit at its internal (land border towards Slovenia and Hungary) and external borders (land borders towards Serbia, Bosnia and Herzegovina, and Montenegro, airports and maritime ports).

Persons enjoying the right of movement, under the Union acquis, when entering or exiting, will have their identity and nationality checked, and authenticity and validity of their travel document for crossing the border will also be verified; whereas, third-country nationals when entering and leaving the country will be subjected to thorough checks[540].

3. Human trafficking and human smuggling

3.1. Legal framework

Among many international and European sources governing the criminal offence of trafficking in human beings, the following ones stand out: United Nations Convention against Transnational Organised Crime and the two Protocols[541], Brussels Declaration on Preventing and Combating Trafficking in Human Beings[542], Council of Europe Convention on Action against Trafficking in Human Beings[543], Directive 2011/36/EU of the European Parliament and of the Council of on preventing and combating trafficking in human beings and protecting its victims[544], Directive 2012/29/EU of the European Parliament and of the Council on establishing minimum standards on the rights, support and protection of victims of crime[545].

Concerning human trafficking and human smuggling in relation to the applicable national legislation, the Criminal Code of the Republic of Croatia (hereinafter: the CC)[546] and the Criminal Procedure Code (hereinafter: the CPC) stand out [547]. Title IX of the CC, stipulating crimes against humanity and human dignity, standardises the crime of *Trafficking in Human Beings* (Article 106 of the CC).[548] It is a blanket

[539] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)

[540] See furher: https://mup.gov.hr/gradjani-281562/savjeti-281567/prelazak-granice-282210/sto-je-granicna-kontrola-osoba-282222/282222, Accessed on 8 February 2021.

[541] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and the Protocol against the Smuggling of Migrants by Land, Sea and Air, *Official Gazette*– International Treaties, no. 14, 2002, the so-called Palermo Protocol.

[542] Brussels Declaration on Preventing and Combating Trafficking in Human Beings (2002), available at: http://transcrim.pravo.unizg.hr/wp-content/uploads/2015/legislation/Brussels-Declaration-on-Preventing-and-Combating-Trafficking.pdf, Accessed on 8 February 2021.

[543] Law on the Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings, *Official Gazette* – International Treaties, no. 7/07.

[544] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (*Official Journal,* no. 101, 5 April 2011). Trafficking in human beings is a priority area relating to the threat of crime in the EU Policy Cycle for organised and serious international crime for the period 2018–2021, Council Conclusions on the continuation of the EU Policy Cycle for organised and serious international crime for the period 2018–2021, https://www.consilium.europa.eu/hr/policies/eu-fight-against-organised-crime-2018-2021/, Accessed on 4 March 2021.

[545] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (*Official Journal,* no. 315/57, 25 October 2012).

[546] Criminal Code of the Republic of Croatia*, Official Gazette*, nos. 125/11, 144/12, 56/15, 61/15 – correction; 101/17, 118/18 and 126/19.

[547] Criminal Procedure Code, *Official Gazette*, nos. 152/08, 76/09, 80/11, 121/11 – consolidated text; 91/12 – decision of the RC Constitutional Court, no: U-I-448/2009 and other; nos. 143/12, 56/13, 145/13, 152/14, 70/17 and 126/19.

[548] Article 106 of the CC (1) Whoever, by the use of force or threat, of deception, of fraud, of abduction, of abuse of authority or of a situation of hardship or dependence, or of the giving or receiving of payments or other benefits to achieve the consent of a person having control over another person or by any other means recruits, transports, transfers, harbours or receives a person, or exchanges or transfers control over a person for the purpose of exploiting his or her labour by means of forced labour or services, slavery or a relationship similar thereto, or for the purpose of exploitation for prostitution of the person

criminal offence since it necessitates the perpetrator to violate the blanket norm of the international law invoked by the CC. The criminal offence can only be committed with a direct intention, while the consent of a person to exploitation or trafficking does not affect the existence of crime.[549] Thus the criminal offence protects victims of human trafficking, and the victim is not punishable accordingly.[550] For the completion of human trafficking crime, it is not required that any exploitation has taken place, but it is necessary that the perpetrator using any of the means described (force, threat, fraud, abduction) has performed any of the operations (buy, hand over, transport, transfers, encourage or mediates in purchase).[551]

In the Republic of Croatia, Title XXX of the CC, among criminal offences against public order, standardises the criminal offence of *Unlawful Entry into, Movement or Residence in the Republic of Croatia, another EU Member State or signatory to the Schengen Agreement* (Article 326 of the CC). The mentioned criminal offence is harmonised with Article 1 of the European Union Directive 2002/90/EC of 28 November 2002.

In the conception of the criminal offence described in Article 236 of the CC, the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organised Crime, was used.[552] Such criminal offence can be committed by any person when, out of self-interest, enables or aids one or more persons who are not nationals of the Republic of Croatia to illegally enter, leave, move or stay in the Republic of Croatia, or any other EU Member State, i.e. signatory of the Schengen Agreement. The act of this criminal offence consists of all the forms of aiding any specific person or persons out of self-interest to illegally enter, move or stay in the territory of the Republic of Croatia, another EU Member State, or Schengen Agreement signatory state. For committing the offence, it bears no significance whether such interest is obtained in money or in a form of any other form of material gain, or whether it has been physically received, what matters is that it has been agreed upon, even in an

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or of other forms of sexual exploitation, including pornography, or of contracting an illicit or forced marriage, or of taking parts of the person's body or of using the person in armed conflicts or of committing an unlawful act, shall be punished by imprisonment from one to ten years. (2) The same punishment as referred to in paragraph 1 of this Article shall be inflicted on whoever recruits, transports, transfers, harbours or receives a child, or exchanges or transfers control over a child for the purpose of exploiting his or her labour by means of forced labour or services, slavery or a relationship similar thereto, or for the purpose of exploitation for prostitution of the child or of other forms of sexual exploitation, including pornography, or of contracting an illicit or forced marriage, or of illegal adoption, or of taking parts of a child's body, or of using the child in armed conflicts. (3) If the criminal offence referred to in paragraph 1 of this Article was committed against a child or the criminal offence referred to in paragraphs 1 or 2 of this Article was committed by a public official in the performance of his or her duties, or the said offence was committed against a large number of persons or the life of one or more persons as consciously endangered, the perpetrator shall be punished by imprisonment from three to fifteen years. (4) The same punishment as referred to in paragraph 1 of this Article shall be inflicted on whoever, knowing that a person is a victim of trafficking in persons, uses the services of that person which are the result of one of the forms of exploitation set forth in paragraphs 1 and 2 of this Article. (5) Whoever, with the aim of enabling the commission of offences set forth in paragraphs 1, 2 and 3 of this Article retains, seizes of possession, conceals, defaces or destroys another person's travel document or identification document, shall be punished by imprisonment not exceeding three years. (6) The attempt of the criminal offence referred to in paragraph 5 of this Article shall be punishable. (7) The consent of a victim of trafficking in human beings to the exploitation shall be irrelevant to the existence of this criminal offence. op. cit. (note 17).

[549] Božić, V. (2015), Krijumčarenje ljudima i trgovanje ljudima u Hrvatskom kaznenom zakonodavstvu i sudskoj praksi (analiza stanja *de lege lata* uz prijedloge *de lege ferenda*) (Human smuggling and human trafficking in Croatian criminal legislation and case-law /analysis of situation *de lege lata* with proposals *lege ferenda/*), Collection of Works of the Faculty of Law of the University of Rijeka, vol. 36, no. 2, 845-874, p. 854.

[550] See more about the so-called *non-punishment clause*, Munivrana Vajda, M., Dragičević Prtenjača, M., Maršavelski A., *Žrtve trgovanja ljudima kao počinitelji kaznenih djela – poredbeni pristupi klauzuli o nekažnjavanju*, Radna verzija (*Victims of human trafficking as perpetrators of criminal offences - comparative approaches to the non-punishment clause,* Draft Version), Zagreb, December 2015, http://transcrim.pravo.unizg.hr/wp-content/uploads/2016/01/Analiza-odredbe-o-neka%C5%BEnjavanju-%C5% BErtava-trgovanja-ljudima.pdf; Accessed on 4 March 2021.

[551] Božić, V., op. cit. (note 20), p. 856.

[552] Pavlović, Š., *Kazneni zakon, Drugo, izmijenjeno, dopunjeno i prošireno izdanje (Criminal Code, Second amended, supplemented and expanded edition)*, Rijeka, Libertin naklada, d.o.o., 2013, p. 839.

unspecified amount. What is required from the perpetrator is that he was aware of and had to be aware of (intention) that the concerned persons were not Croatian nationals and that their final goal was directed to their own benefit. It will not be considered a criminal offence, unless there is the third person (perpetrator) enabling or aiding one or more persons to illegally enter, stay or move in the territory of the Republic of Croatia, the EU Member State, or a Schengen Agreement signatory state. Hence, when a person himself illegally enters, moves or stays in an area stated in an exhaustive list, he does not commit this crime in this situation.[553]

Sometimes in practice, it is very difficult to distinguish between these two offences, given the circumstances and the manner in which such an offence has been committed. There are many cases where the victims of human trafficking were first smuggled persons, and, in a short while, their relationship would turn into the other form of crime, in human trafficking. Therefore, it is highly important to notice in the very investigation of the committed criminal offence, i.e., in the first contact with these persons, whether human/migrant smuggling or human trafficking is in question. Primarily, here, the victim of the criminal part of human trafficking should be thought of, who, as such, enjoys a quite different approach.[554] Due to the complexity of problematics, and specifically with regard to differentiating these criminal offences, the expertise of and a greater co-operation with other competent authorities is required.

3.2 Difference between human trafficking and human smuggling

Table 1 Difference between criminal offences of human trafficking and human/migrant smuggling[555]

	SMUGGLING (Article 326 of the CC),	**TRAFFICKING (Article 106 of the CC),**
CRIMINAL OFFENCE	Criminal offence against state - illegal (unlawful) crossing of the state border; a simple criminal offence that can be considered an independent criminal offence or just a step in committing the criminal offence of human trafficking	Criminal offence against a person - violation of the person's rights, a complex criminal offence with a myriad of modalities of perpetration and qualificatory characteristics
PROTECTED GOOD	The EU / Schengen area territory	Human rights protection of victims of trafficking, indirectly the protection of economic and social interests of the states where the crimes have been committed

[553] Božić, V., op. cit. (note 20), pp. 849-851.
[554] Ibid, p. 857.
[555] *Pomoć i zaštita žrtava trgovanja ljudima, Vodič za pomagače* (*Assistance to and protection of victims of human trafficking, Guide for Assistants*), available at: https://www.hck.hr/UserDocsImages/publikacije/Priru%C4%8Dnici/Prirucnik%20-%20Pomoc%20i%20zastita%20zrtava%20trgovanja%20ljudima.pdf, p. 9, Accessed on 2 March 2021.

PURPOSE/GOAL	Procurement, in order to obtain, directly or indirectly, any financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident. (Article 3 of the UN Protocol) Smuggling ends with the crossing of the border and with the payment for the service of transfer	Recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, of the abuse of power or the position of vulnerability or giving or receiving payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Human trafficking includes exploitation of the victim: relationship between the victim and the trafficker continues after the recruitment, transportation, transfer, harbouring or receipt of that person
INTERNATIONAL CHARACTER	Smuggling always has international character: illegal border crossing is the key element of this criminal offence	Border crossing is not the key element of this criminal offence; the international element is not necessary as it can be committed within the borders of a country, the so-called *internal trafficking*
CONSENT	Despite dangerous and degrading conditions are commonly implied, migrants give their consent for transfer across the border	Person's consent is irrelevant if obtained by using any of these means; as far as children are concerned, no such means should be applied: every exploited child is a victim and should be treated as such

3.3. Trafficking in women and children

In most cases, victims of trafficking are women and children. Besides the aforementioned international documents, in the context of trafficking in children, it is also necessary to mention the Convention on the Right of the Child[556], and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.[557]

Providing adequate assistance to and protection of victims of human trafficking is the central part of the system of combating human trafficking. In the Republic of Croatia, a system is set up, which is primarily concerned with the interest of victims of human trafficking. For the reason outlined above, all the activities of competent institutions, from the moment of identification, are directed to providing adequate assistance and protection to victims of human trafficking, which involves work of two national shelters, health care insurance, psychological, social and legal aid and protection, as well as ensuring a safe and

[556] Convention on the Rights of the Child [1989] UNTS, Vol. 1577, p. 66/3, *Official Gazette of the SFRY*, nos. 15/90; *Official Gazette – International Treaties*, nos. 12/93 and 20/97.

[557] Decision on the Promulgation of the Law on Ratification of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, *Official Gazette – International Treaties*, no. 5/02.

voluntary return to the country of origin. Civil society organisations have the most important role exactly in the area of providing aid and protection to victims. Due to the complexity of the issue, but also due to the traumatic experience of victims, preparation of individual programmes requires a high level of expertise and co-operation of competent bodies with civil society organisations in working on this sensitive part of the national system in combating human trafficking.[558]

Also, the CPC prescribes that children and woman - victims of human trafficking have certain specific rights. So, the police, investigator, state attorney's offices and the court treat the victim of criminal offence very carefully and they are obliged to inform him about his rights in the proceedings, and, when undertaking any actions, they are obliged to take care of his rights in an adequate manner.[559] Article 43a of the CPC prescribes that an individual assessment of victims is to be conducted, particularly if they are victims of human trafficking, which also includes determining the existence of a need for the application of special protection measures. The CPC prescribes the right of victims in Articles 43, 46, ad 47, and, in Article 44, some additional rights of a child victim of a crime, i.e., a victim of the criminal offence of human trafficking. Also, the Law on Police Affairs and Powers[560], and the Rulebook on the manner of conduct of police officers[561] contains the provisions relating to the protection of victims of criminal offences.

3.4. Practical aspects (review and analysis of situation in the criminal law system of the Republic of Croatia)

According to the data of the Croatian Bureau of Statistics on adult perpetrators of criminal offences who were reported, charged and convicted in the period from 2015 to 2019, in total, there were perpetrators 61 reported for the criminal offence of human trafficking described in Article 106 of the CC. Out of the total number of perpetrators, an indictment is raised against perpetrators in 59%. In the analysed period, in total, adults 10 were convicted for the criminal offence described in Article 106 of the CC.

[558] Government of the Republic of Croatia, Office for Human Rights and Rights of National Minorities, *Izvješće o provedbi mjera iz Nacionalnog plana za suzbijanje trgovanja ljudima za razdoblje od 2018. do 2021, za 2018* (*Report on the implementation of measures from the National plan for combating trafficking in human beings for the period from 2018 to 2021, for 2018)*, Zagreb, January 2020; https://pravamanjina.gov.hr/UserDocsImages//dokumenti//Izvje%C5%A1%C4%87e%20o%20provedbi%20Nacionalnog%20plana%20za%20suzbijanje%20trgovanja%20ljudima%20za%20razdoblje%20od%202018.%20do%202021.,%20za%202018.pdf, p. 17, Accessed on 9 February 2021.

[559] Article 16 para 2 and 3 of the CPC.

[560] Article 99 of the Law on Police Affairs and Authorities, *Official Gazette*, nos. 76/09, 92/14 and 70/19.

[561] Articles 155a and 156 of the Rulebook on the manner of conduct of police officers, *Official Gazette*, nos. 89/10, 76/15.

Table 2. Adult perpetrators of criminal offences, reports, charges, and convictions for the criminal offence described in article 106 of the CC in the period from 2015 to 2019[562]

Human Trafficking (Article 106 of the CC)		Total	Unknown perpetrators	Rejected crime report	Interupted investigation	Terminated investigation	Indicement - immediate	Indicement – following investigation	Indicement – against mentally incompetend defendant	Convicted
2019	paragraph 1 of the CC	10		1		3	2	4		
	paragraph 3 of the CC	3		2				1		2
	paragraph 4 in conjunction to paragraph 1 of the CC	4		4						
2018	paragraph 1 of the CC	3				1		2		2
	paragraph 3 of the CC	6		2				4		2
2017	paragraph 1 of the CC	11	2			2		7		
	paragraph 3 of the CC	3						3		
2016	paragraph 1 of the CC	3	1					2		2
	paragraph 3 of the CC	4		2				2		
2015	paragraph 1 of the CC.	6		3		2		1		1
	paragraph 2 of the CC									1
	paragraph 3 of the CC	8						8		
Total		**61**	**3**	**14**		**8**	**2**	**34**		**10**

Contrary to the data for the criminal offence described in Article 106 of the CC, on the basis of the data for the criminal offence described in Article 326 of the CC, it is obvious that far more adult persons were reported for the criminal offence described in that article of the CC. In the previously stated five-year period, a total of adults 2,008 were reported, and an indictment was raised against offenders in 90.8% of cases. In the analysed period, in total, adults 1,037 were convicted for the criminal offence described in Article 326 of the CC.

[562] Croatian Bureau for Statistics, Punoljetni počinitelji kaznenih djela, prijave, optužbe i osude za razdoblje od 2016. do 2019 (*Adult Perpetrators of Criminal Offences, Reports, Accusations, and Convictions for the period from 2016 to 2019*), *Statistical Reports*, no. 1671, pp. 18, 19 and 112; no. 1650, pp. 18, 19 and 112; no. 1627, pp. 18 and 19; no. 1665, pp. 18, 19 and 124; no. 1576, pp. 18, 19 and 126, /https://www.dzs.hr., Accessed on 2 March 2021.

Table 3. Adult perpetrators of criminal offences, reports, charges, and convictions for the criminal offence described in article 326 of the CC in the period from 2015 to 2019[563]

Unlawful entrance, movement and stay in the Republic of Croatia, another European Union member state or the Schengen Agreement signatory (Article 326 of the CC)		Total	Unknown perpetrators	Rejected crime report	Interupted investigation	Terminated investigation	Indicement - immediate	Indicement – following investigation	Indicement – against mentally incompetend defendant	Convicted
2019	para 1 of the CC	767	28	34		15	373	316	1	435
	para 2 of the CC	156	1	5		2	86	61	1	48
2018	para 1 of the CC	454	13	27		13	227	174		191
	para 2 of the CC	121	4	1		1	47	68		18
2017	para 1 of the CC	270	4	17			185	64		181
	para 2 of the CC	33	2	1			8	22		16
2016	para 1 of the CC	119	2	8	1	2	84	22		91
	para 2 of the CC	16					6	10		3
2015	para 1 of the CC	71	3				39	29		36
	para 2 of the CC	1					1			18
Total		**2008**	**57**	**93**	**1**	**33**	**1056**	**766**	**2**	**1037**

In the context of human trafficking problematics, there is an increase in the number of identified victims in the Republic of Croatia (victims 11 identified in 2012, victims 31 in 2013, victims 37 in 2014, victims 38 in 2015, victims 30 in 2016, victims 29 in 2017, in 2018 - victims 76, and in 2019 - victims 27, i.e., a total of 200 victims for the period from 2012 to 2019). Croatia is recognised as a transit country, but more and more also as a country of origin, and the final destination of victims of human trafficking. In the last couple of years, a change in trend has been observed in regard to the total number of identified victims of human trafficking, showing that, in addition to the previous cases, where women and girls exploited for sexual

[563] Croatian Bureau of Statistics , Punoljetni počinitelji kaznenih djela, prijave, optužbe i osude za razdoblje od 2016. do 2019 (*Adult Perpetrators of Criminal Offences, Reports, Accusations, and Convictions for the period from 2016 to 2019*), *Statistical Reports*, no. 1671, pp. 34, 35 and 136; no. 1650, pp. 34, 35 and 134; no. 1627, pp. 36, 37 and 140; no. 1665, pp. 36, 37 and 150; no. 1576, pp. 36, 37 and 154, /https://www.dzs.hr., Accessed on 3 March 2021.

purposes were the majority, adult males exploited for forced labour are the majority.[564] In the last four years, 90% of the identified victims were the male/female nationals of the Republic of Croatia who were exploited within the borders of the Republic of Croatia (the so-called *"internal trafficking").* In relation to foreign victims of human trafficking, almost all foreign victims are male/female nationals of the neighbouring countries, and it suggests that the Republic of Croatia is the country of destination for victims from the region.[565]

It is a fact that the Republic of Croatia, along with Serbia, Bosnia and Herzegovina, and Slovenia, but also Hungary, is still an important transit route, used by smugglers and human traffickers, i.e., it is situated on the shortest route, the so-called "Balkan Route".

4. The Conventional (and Constitutional) aspects of access to criminal justice from the aspect of the individual with reference on human trafficking and human smuggling

Most rights guaranteed by the European Convention on Human Rights (hereinafter: the ECHR or the Convention)[566] entail three types of obligations of the State: 1) the negative obligation to refrain from unduly encroaching on a guaranteed right; 2) the positive obligation to take appropriate steps to safeguard a guaranteed right; and 3) a procedural obligation, which is a form of positive obligation, under which it is required to conduct an effective investigation into the alleged breach of the guaranteed right.. The stated obligations particularly come to the fore in regard to the approach to criminal justice from the aspect of safeguarding the individuals' rights.

There are two functions of criminal justice from the aspect of an individual:

1. Threat or interfering with the rights of an individual as an accused, who has the right to be protected against the state's interference into his right. It is the state's obligation towards the individual (suspect), i.e., the perpetrator of criminal offence, to ensure the guarantee to a fair trial[567] and ensure safeguarding of other related rights.[568]

2. Protecting or exercising the right of an individual as the victim of a criminal offence who has the right to request the taking of the criminal law mechanisms to protect his or her individual rights. It should be pointed out that a victim is considered to be "a member of a particularly underprivileged and vulnerable population group in need of special protection"[569]; therefore, the state bodies must act cautiously in their activities and show an additional effort, in every situation in which they encounter them, which will enable them to exercise their rights. The State's obligations towards an individual as a (potential) victim[570] of a criminal offence are to set up positive measures for their protection, to put in place a legislative and regulatory framework for protection, and to ensure its effective functioning (implementation, supervision and enforcement), undertake active measures for their protection, conduct effective investigation of the

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564 *Third report on Croatia from the Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA)*, (https://www.coe.int/en/web/anti-human-trafficking/news/-/asset_publisher/fX6ZWufj34JY/content/greta-publishes-its-third-report-on-croatia?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fanti-human-trafficking%2Fnews%3Fp_p_id%3D101_INSTANCE_fX6ZWufj34JY%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1., Accessed on 5 March 2021.

565 Op. cit. (note 29), p. 85.

566 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5..

567 Article 6 of the Convention (Right to a fair trial).

568 E.g. Article 5 (Right to liberty and security), Article 7 (No punishment without law), Article 8 (Right to respect for private and family life), Article 13 (Right to an effective remedy), and Article 14 (Prohibition of discrimination) of the Convention; Article 1 of the Protocol no. 1 (Protection of property); Article 2 of the Protocol no. 4 (Freedom of movement), Articles 2-4 of the Protocol no. 7 (Right of appeal in criminal matters, Compensation for wrongful conviction, and Right not to be tried or punished twice - *ne bis in idem*).

569 *Khlaifia and Others v. Italy* VV] (2016) § 161; *M. S. S. v. Belgium and Greece* [VV] (2011), § 251.

570 *Söderman v. Sweden* [VV] (2013), §§ 78–85; *Nicolae Virgiliu Tănase v. Romania* [VV] (2019), §§ 135–138; *S. M. v. Croatia* [VV] (2020), § 306.

allegations on human rights violations,[571] and criminal proceedings whenever the outcome of investigation orders it, pronounce corresponding sanctions when the human rights violation is established, and enforce the pronounced sanctions.

In regard to carrying out an effective investigation[572], it should be pointed out that there is a primary implementation of investigation with criminal offences of violence (any form of violence),[573] no matter whether the persons allegedly responsible thereof were State agents (representatives of the state authorities) or individuals (private individuals or unknown individuals), which specifically relates to the issue of human trafficking and human smuggling.[574]

The obligation of criminal prosecution exists if the victim makes a credible assertion[575], raises an arguable claim[576] or if there are other indications on the committed criminal offence[577]. Procedural obligation will also occur in the event of existence of a credible assertion or an arguable claim, i.e., if there are other clear indications on the violation of the rights of an individual guaranteed under Article 4 of the Convention[578], which prohibits slavery and forced labour, human trafficking for sexual exploitation[579] or sexual abuse and forced labour[580].

Criminal prosecution must be conducted *ex officio*,[581] no investigation or prosecution actions have to be undertaken or proposed by the victim, neither obstructed. The national bodies must take into consideration the vulnerability of victims, the existence of language- and culture-related barriers[582], the obligation of international co-operation, which could be distinctively complex depending on the circumstances of the case[583]. The victims should be able to participate effectively in the investigation,

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[571] ECtHR developed an autonomous understanding of the concept of an efficient investigation, which does not refer only to the procedural phase, but also to the entire criminal procedure.

[572] Obligation of conducting an effective investigation is not expressly prescribed by the Convention, but it is read from its provisions; in the beginning, it was interpreted very restrictively and considered that the states had a broad freedom in assessing the scope of its application, see: Chevalier–Watts, J., Effective Investigation under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State, *European Journal of International Law*, 21(3), 2010, 701-721, pp. 703-705.

[573] In terms of Articles 2 and 3 of the Convention; the ECtHR laid down that the procedural obligation of the state under Article 2 of the Convention occurred when an individual died a violent death, see: *Nachova and Others v. Bulgaria* (2005) § 110; sustained life-threatening injuries under suspicious circumstances, see: *Sašo Gorgiev v. the former Yugoslav Republic of Macedonia* (2012), § 37; reported missing under violent or suspicious circumstances, see: *Tahsin Acar v. Turkey* [VV] (2004), § 226; cases of violence among prisoners, see: *Paul and Audrey Edwards v. United Kingdom* (2002), §§ 69 and 74; family violence, see: Opuz v. Turkey (2009), §§ 150–151, etc., no matter whether the responsible individuals were representatives of state authorities (State agents), private individuals, unknown individuals or it was a suicide. The procedural obligation under Article 3 of the Convention, for instance, in case of acting of State agents (excessive use of force during arrest), see: Tadić v. Croatia (2017), § 68 – see further: Jelić I., Kamber K., Odgovornost države za policijsko nasilje u konvencijskom pravu (State Liability for Police Violence In Convention Law), *Hrvatski ljetopis za kaznene znanosti i praksu*, Vol. 26 No. 2, 2019, pp. 291–317; also in the event of acting of private individuals (raping, see: *M. C. v. Bulgaria* (2003), §§ 151–53; and *D. J. v. Croatia* (2012), §§ 70 and 83–85; an act of violence, v. *Beganović* v. Croatia (2009), §§ 69–71 and 75); etc.

[574] *Sarwari and Others v. Greece* (2019); see: communication *M. H. and Others v. Croatia (no. 2)* (2020).

[575] *Nicolae Virgiliu Tănase v. Romania* [VV] (2019), § 115.

[576] *Gäfgen v*. Germany [VV] (2010), § 117; *Djurdjević* v. Croatia (2011), § 62.

[577] *S.M.*, op. cit. (note 41), § 324.

[578] Trafficking in human beings is not mentioned in Article 4 of the Convention; see *Rantsev v. Cyprus and Russia* (2010), § 272; however, the ECtHR considers that trafficking in human beings is by itself, in terms of Article 3a) of the Palermo Protocol and article 4a) of the Convention against human trafficking, falling within the scope of Article 4 of the Convention; see *M. and Others v. Italy and Bulgaria* (2012) § 151. See also cases dealt with by the ECtHR on the basis of Article 4 of the Convention in context of human trafficking, *Siliadin* v. France (2005); *C. N. and V. v. France* (2012); *C. N. v. United Kingdom* (2012), *T. I. and Others v. Greece* (2019).

[579] *Rantsev,* op. cit. (note 49), § 288.

[580] *M. and Others v. Italy and Bulgaria*, § 167; *Chowdury and Others v. Greece*, (2017); *S. M. v. Croatia*, § 324.

[581] *S. M. v. Croatia*, § 336.

[582] *M. and Others, op. cit.* (note 49).

[583] *L.E. v. Greece* (2016).

implying the right to protection against secondary victimisation[584], the right to access to case file and transparency of actions,[585] the right to interpreter, a possibility of filing objections and complaints about the efficiency of acting of prosecuting authorities[586] and other rights.

In relation to the approach to criminal justice from the perspective of the accused, the right of access to court must be ensured, implying the right that the 'criminal charge' is decided by the court,[587] and any other restriction of the access to court must have a legitimate aim and be proportionate to this aim,[588] the right of an accused to participate effectively in a criminal trial,[589] which is additionally complicated by the situation caused by the COVID-19 pandemic,[590] which indisputably affects exercising the procedural rights of the suspect/an accused, but also of the victim of such criminal offence. During the time of the COVID-19 pandemic, the procedural rights of the suspect/an accused must be observed in order to guarantee of the right to a fair trial - they are entitled to participate the proceedings via video- ink,[591] the right to freedom and corresponding conditions when being deprived of freedom,[592] the right to a lawyer,[593] the right to efficient defence,[594] the right to an interpreter[595], and other related rights under Article 6 ECHR; Article 29 of the Croatia Constitution). Access to justice, assistance, support and protection must be ensured to victims of crime during the COVID-19 pandemic.[596]

In the context of access to criminal justice, the complexity of international responsibility of the state is indisputable, and the problem that occurs is that the national authorities do not recognise the special vulnerability of victims. It is important that the national bodies, particularly the police, State Attorney's Offices, and courts are familiar with this practice and act accordingly. In order to uphold the public trust in the rule of law and enable an efficient application of the law safeguarding individual rights, and ensure that those guilty of an offence answer for their actions, the judicial mechanism must be efficiently implemented into practice, the states must establish effective mechanisms and procedures for conducting investigations and the procedure as a whole and enable an efficient approach to these mechanisms, ensure rendering proportionate sanctions, and their efficient enforcement.[597] Protection of an individual both as a victim and as the defendant or accused is realised from the perspective of international law by

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584 *Y. v. Slovenia* (2015).
585 *V. D. v. Croatia (no.* 2018), § 66.
586 *Armani Da Silva v. United Kingdom* [VV] (2016).
587 *Flisar v. Slovenia* (2011).
588 *Maresti v. Croatia* (2009).
589 *Stanford v. United Kingdom* (1994).
590 World Health Organisation declared a global health emergency on 30 January 2020; the Government of the Republic of Croatia adopted on 11 March 2020, the Decision on declaring the COVID-19 disease epidemic caused by the SARS-CoV-2 virus, see:
/https://zdravstvo.gov.hr/UserDocsImages/2020%20CORONAVIRUS/ODLUKA%20O%20PROGLA%C5%A0ENJU%20EPIDEMIJE%20BOLESTI%20COVID-19.pdf. Accesed on 3 March 2021.
591 *Marcello Viola v. Italy* (2006).
592 *Azimov v. Rus*sia (2013).
593 *Beuze v. Belg*um [VV] (2018).
594 *Prežec v. Croatia* (2009).
595 *Vizgirda v. Slovenia* (2018).
596 In compliance with Directive on the rights of victims, the Member States are obliged to ensure that all victims of crime have access to general and specialist victim support services which observe the principle of confidentiality, provide free service and respond to individual needs of victims; access to support and protection corresponding to special needs of victims should be available in all circumstances, and this also includes a special situation during the COVID-19 disease pandemic. See further:
https://e-justice.europa.eu/content_impact_of_covid19_on_the_justice_field-37147-hr.do. Accessed on 3 March 2021.
597 ECtHR established the criteria for the assessment of efficiency of fulfilling these requirements: independence and impartiality of persons and bodies conducting investigations, groundedness of undertaken actions, speed, involvement of the victim, and the control of the public. The undertaken actions are assessed with regard to the specificity of every individual case, see. Turković K., Viljac Herceg F., Učinkovita istraga povreda prava zajamčenih Europskom konvencijom (Effective Investigation of Violations of Rights Guaranteed by the European Convention), *Hrvatski ljetopis za kaznene znanosti i praksu*, Zagreb, vol. 26 number 2, 2019, 265-290, p. 265.

the ECtHR, but also from the perspective of national and constitutional law, in the Republic of Croatia by the Constitutional Court of the Republic of Croatia(hereinafter: the Constitutional Court.)[598] This refers to the so-called 'quasi-criminal jurisdiction'[599] of the international and national supervisory bodies, which can order measures to remedy certain omissions within the framework of their jurisdictions and from the aspect of approach to the protection of an individual. The Republic of Croatia made substantial efforts, through the execution of judgments, to improve its system,[600] considering the total number of cases where a violation was established, and a significant part refers to the cases of inefficient investigations.[601]

5. COVID-19 effect on human smuggling and human trafficking

The crisis caused by the SARS-CoV-2 virus (SARS-coronavirus-2), causing the COVID-19 disease, made everyone vulnerable, without making a difference between people; however, refugees, migrants, forcedly displaced persons and stateless persons have been exposed to increased risk. The pandemic will indisputably affect the society and its economy permanently, as well as organised crime, where, *inter alia*, the dynamic of the concerned crimes has been changing. Criminals are finding new ways to abuse the vulnerability of illegal/irregular migrants wishing to enter or travel across EU. EUROPOL states that the attempts of migrant smuggling and human trafficking have decreased due to stricter borders checks; nevertheless, the perpetrators have been adapting and finding new ways of operations, so this type of criminal activities are ongoing.[602]

Countries all over the world, including Croatia, take measures to prevent the spread of COVID-19 virus, declaring emergency, prescribing urgent and other restrictive measures, including compulsory quarantine, border closure, which indisputably also affects migrant movement.[603]

[598] Constitutional complaint in the Republic of Croatia is considered to be an efficient domestic remedy that has to be exhausted before lodging an application to the ECtHR, see *Kušić v. Croatia* (2019).

[599] See Jelić I., Kamber K., op. cit. (note 44), pp. 291–293; see also: Kamber, K., *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* (Brill 2017), 367-375.

[600] The importance of creating quality procedural protocols should be highlighted, particularly regarding the violations that make victims especially vulnerable, such as, *inter alia*, human trafficking, exploitation through forced labour, including also prostitution.

[601] From 1998 to the end of 2018, out of 436 violations in total, which were found before the ECtHR for the Republic of Croatia, 22 referred to the violation of the efficiency of investigation under Articles 2 and 3 of the Convention; Turković,Viljevac Herceg, op. cit. (note 68), p. 286.

[602] According to the EUROPOL's reports, the pandemic has led to new ways of smuggling acitvities; smugglers are shifting the ways of bringing migrants to land, so due to very poor, almost none air routes, they have returned to land and sea routes. Perpetrators are taking advantage of restrictions of sexual labour related to the pandemic, and due to the closure of borders, they are finding new ways to abuse the vulnerability of illegal migrants wishing to enter or travel across Europe and those financially struggling, and those victimised in labour or sexual exploitation. EUROPOL Press Release, 15 May 2020, *Migrant smugglers and human traffickers to become more ruthless and clandestine*, see: https://www.europol.europa.eu/newsroom/news/migrant-smugglers-and-human-traffickers-to-become-more-ruthless-and-clandestine-says-new-europol-report. Accessed on 3 March 2021.

[603] UNHCR states that the pandemic of SARS-CoV-2 virus affected migrant movements so that in April 2020, new arrivals in South East Europe decreased by 85%, compared to in April 2019, and by 83% compared to March 2020, see: https://www.hpc.hr/wp-content/uploads/2020/07/UTJECAJ-%C5%A0IRENJA-BOLESTI-COVID-19-NA-MIGRACIJSKU-POLITIKU-izvje%C5%A1taj-o-pra%C4%87enju.pdf, p. 6. Accessed on 14 March 2021.

Additionally, participants[604] of a meeting of the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA)[605] emphasised that the COVID-19 pandemic created more favourable conditions for traffickers by exacerbating pre-existing vulnerabilities (particularly of the most vulnerable groups - women and children), and creating new ones.[606] Isolation, as well as violence by exploiters of victims during the pandemic resulted in a diminished scope of access to assistance, including medical services, psychological services and legal aid. The situation of victims has particularly been exacerbated in court proceedings (delays and postponements in administrative, criminal and civil cases due to emergency measures), all affecting negatively the victims' access to justice and legal aid.[607] High risk exploitation sectors were specifically warned about, and this included areas of agriculture and food-processing industries, where opaque recruitment procedures, low-qualification requirements and low-wages created favourable conditions for traffickers, while lockdown measures and movement restrictions contributed to a surge in some forms of exploitation, particularly online child exploitation.[608]

The COVID-19 pandemic represents a huge challenge and tests the ability of all the states[609], including the Republic of Croatia, to protect victims of human trafficking and human smuggling, and to be able to counter that threat, all the advantages have to be used, which is certainly even stronger international co-operation.[610]

The pandemic also created significant challenges in the area of justice, in priority in the work of courts. Additionally, in the Republic of Croatia, the work of courts was significantly affected by the situation caused by the earthquakes in Zagreb, Petrinja and the surroundings.[611] The work and activities in the Republic of Croatia at the beginning of the pandemic, particularly during the lockdown, took place according to the recommendations and decisions of the Ministry of Justice[612], the President of the Supreme Court of the Republic of Croatia[613], and decisions of presidents of other courts. By introducing

[604] National Anti-Trafficking Co-ordinators and Rapporteurs for combating human trafficking from over 50 countries of Europe, North America and Central Asia met online on 3 and 4 November 2020 for the largest annual meeting of its kind focused on human trafficking at the international level. The event, jointly organised by the Council of Europe and the Organisation for European Safety and Cooperation (OESC), focused on challenges posed by the pandemic to anti-trafficking responses; see:
https://www.coe.int/en/web/anti-human-trafficking/-/covid-19-creating-risks-for-human-trafficking-crisis-say-anti-trafficking-leaders-from-over-50-countries-in-joint-osce-council-of-europe-meeting. Accessed on 3 March 2021.

[605] Group of Experts on Action against Trafficking in Human Beings – GRETA is responsible for monitoring the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings. See further: https://www.coe.int/en/web/anti-human-trafficking/greta. Accessed on 3 March 2021.

[606] GRETA President Davor Derenčinović highlighted that the leaders of state parties to the Council of Europe Anti-trafficking Convention on combating trafficking in human beings, have a legal and moral obligation not to give secondary importance to the rights and protection of the most vulnerable people, including victims of human trafficking during the pandemic, op.cit. (Note 75).

[607] Civil society organisations, international organisations and the EU agencies expressed their concern about delays in identifying victims, making their access to justice, aid and support more difficult.

[608] Op. cit. (note 75).

[609] See further about the protection of human trafficking in emergency circumstances: *GRETA Report*, Group of Experts on Action against Trafficking in Human Beings, Strasbourg, 2 April 2020. In time of emergency the rights and safety of trafficking victims must be respected and protected,
/https://rm.coe.int/greta-statement-covid19-en/16809e126a. Accessed on 3 March 2021.

[610] In priority, joint intelligence agencies to target successfully this type of international organised crime, where EUROPOL plays the key role, *EUROPOL Report*, op.cit. (Note 73).

[611] See further about the earthquakes, https://www.pmf.unizg.hr.

[612] See the recommendations of the Ministry of Justice:
/https://mpu.gov.hr/UserDocsImages/MURH-%20arhiva/vijesti/2020/13%20o%C5%BEujak%202020/Preporuka.pdf,;
/http://www.hok-cba.hr/sites/default/files/dopuna_preporuke_ministarstva_pravosuda.pdf;/https://mpu.gov.hr/UserDocsImages/dokumenti/Dopis%20ministra%20pravosu%C4%91a%20i%20uprave%20tijelima%20dr%C5%BEavne%20uprave,%2027.11.2020.pdf. Accessed on 6 March 2021.

[613] See further about the recommendations, communications and decision of the Supreme Court President, http://www.vsrh.hr/EasyWeb.asp?pcpid=579; Accessed on 6 March 2021.

the lockdown in mid-March 2020, the majority of hearings was stopped in the Republic of Croatia and the security measures were changed in order to prevent the further spread of the virus, and the recommendations[614] were given for a temporary postponement of everything that could have been postponed, and the continuation of solving only urgent cases (detention cases and some criminal and civil cases, e.g., cases concerning persons with mental disorders, family violence, etc..).[615] Alternative methods were also introduced, holding hearings via video-links[616]. According to the decision of the President of the Supreme Court, most of the courts in Croatia conducted hearings remotely, especially in urgent cases – detention cases and some criminal and civil cases. A number of judges, state attorneys and other servants worked from home. Since May 2020[617] the courts in Croatia started to function in accordance with the recommendation of the President of the Supreme Court. At present, the work of courts has almost completely normalised, and presidents of the courts had in the meantime issued decisions to continue to work in full capacity with further adherence to the general preventive measures (maintaining social distance, hand disinfection, wearing masks, etc.). At the time of writing this report, in Croatia, the courts currently regularly hold trials in all cases, but in so-called "new" conditions, which reflect the recommendations issued by the President of the Supreme Court[618], for the prevention of the spread of the virus. In particular, there are two models of organisation of the work of courts during the pandemic: model A and model [619]

[614] Measures for the prevention of transmission and suppression of the epidemic caused by the new coronavirus (SARS-CoV-2) disease (COVID-19), http://www.hok-cba.hr/hr/preporuke-ministarstva-pravosuda-i-vrhovnog-suda-rh-u-vezi-rada-pravosuda-i-epidemije-koronavirusa.

[615] On the influence of the pandemic to individuals as offenders of crimes from the aspect of victims, see title 4 of this report.

[616] See, for instance, the decisions of the Constitutional Court of the Republic of Croatia, numbers: U-III-2173/2020 of 24 April 2020; U–III–2186/2020 of 28 may 2020; U–III-3217/2020 of 23 July 2020, etc., all available at www.usud.hr, Accessed on 14 March 2021.

[617] *See the Decision on the organisation of work of the Supreme Court of 15 May 2020*, /http://www.vsrh.hr/custompages/static/HRV/files/2020dok/Priopcenja/Odluka%20VSRH%2015.5.2020.%20-%20normalizacija%20rada%20u%20sudu%20od%2011.5.2020.pdf. Accessed on 6 March 2021.

[618] See *Instruction of the Supreme Court President on the measures to prevent the spread of the COVID-19 disease epidemic and the organisation of work of first-instance and second-instance courts during the epidemic*, number: Su–IV–315/2020–1, dated 2 November 2020:
http://www.vsrh.hr/CustomPages/Static/HRV/Files/2020dok/Priopcenja/Upute%20o%20mjerama%20za%20sprje%C4%8Davanje%20%C5%A1irenja%20epidemije%20bolesti%20COVID-19%20od%202.11.pdf. Accessed on 14 March 2021.

[619] Since 3 November 2020, the presidents of all the courts in the Republic of Croatia have organised work according to the Model A; and, according to the Model B only if the epidemiological situation develops adversely. For the shift to the Model B, the presidents of the courts will ask for permission the President of the Supreme Court, see futher on the administration of justice during the COVID-19, Kamber, K. and Kovačić Markić, L. 2021. Administration Of Justice During The Covid-19 Pandemic And The Right To A Fair Trial, EU and comparative law issues and challenges series (ECLIC), 5, (Jul. 2021), 1049–1083. DOI:https://doi.org/10.25234/eclic/18363.

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NATIONAL REPORT

1. Introduction

In this paper, first the constitutional legal framework of the right to international protection (asylum (refuge)) in Croatian law is briefly pointed out, highlighting a significant decision of the Croatian Constitutional Court from 2018. Then, in order to present a special administrative procedure for international protection approval, by applying the normative method, the current legal framework established in the Law on International and Temporary protection is analysed. Based on the analysis of significant procedural provisions of the mentioned special law (*lex specialis)*, specifics and eventual derogations from the provisions of the General Administrative Procedure Act (*lex generalis*) stand out. Furthermore, the aim of the paper is to underline the legal mechanisms for ensuring the legal protection of applicants for international protection (asylum) in administrative proceedings and administrative disputes before the competent public law authorities (Ministry of the Interior) and first instance administrative courts and the High Administrative Court of the RC. A special part of this paper is dedicated to an analysis of statistical data being available and made available by the Ministry of the Interior (International Protection Service, Department for International Protection Procedure) and the Administrative Court of Zagreb through a tabular presentation of administrative and administrative legal practice in the observed period.In the final part of the paper, the conclusive considerations are outlined in relation to the set goal of the paper.

2. Briefly on the constitutional law framework of international protection (asylum (refuge)) in Croatian law

The right to asylum (refuge) is, in Croatian legal order, one of the fundamental constitutional human rights, guaranteed by the provision of art. 33 para. 1 of the Constitution of the Republic of Croatia (hereinafter: the RC Constitution).[620] According to the mentioned constitutional provision, foreign citizens and stateless persons may obtain asylum in the Republic of Croatia (hereinafter: the RC), unless they are prosecuted for non-political crimes and activities contrary to the basic principles of international law. Everyone fleeing from persecution or threat to life, also serious harm and injuries in his country is entitled to request international protection. The principle of equality incorporated in art. 26 of the RC Constitution, according to which all citizens of the RC and aliens shall be equal before the courts, government bodies and other bodies vested with public authorities, presupposes minimum requirement in the form of the right to fair procedure on the side of applicants for international protection (asylum seekers). Likewise, among the provisions of constitutional importance for asylum seekers, article 14 of the RC Constitution stands out (legal principle of equality for all, prohibition of discrimination), which guarantees the rights and freedoms to everyone, regardless of race, colour, gender, language, religion, political or other belief, national or social origin, property, birth, education, social status or other characteristics.

Regarding the issue of limitation of freedom of movement of applicants for international protection (asylum seekers), article 32 of the RC Constitution is significant, guaranteeing the freedom of movement to all persons who are legally in the RC territory, which can be limited by the law only exceptionally. The

[620] *Official Gazette*, no. 56, 1990; 135, 1997; 08, 1998; 113, 2000; 124, 2000; 28, 2001; 41, 2001; 55, 2001; 76, 2010; 85, 2010; 05, 2014.

limitation conditions are stipulated with art. 16 of the RC Constitution, and they refer to the following: a) freedoms and rights may only be limited by law; b) if it is necessary in order to protect legal order or health, rights and freedoms of others; c) limitation must be done for the purpose of exercising a legitimate aim prescribed by the RC Constitution; d) limitation of rights and freedoms must be proportional to the goal wanted to be achieved with such limitation. So, the principle of proportionality is applied.

On the basis of the provision of art. 62 para. 1 of the Constitutional Law on the Constitutional Court of the Republic of Croatia (hereinafter: the Constitutional Law),[621] everyone (also an asylum seeker) who believes that his human right or fundamental freedom guaranteed by the Constitution is violated by an individual act of any body of the state authorities, deciding upon his rights and obligations or upon the suspicion on charges for criminal offence, may lodge a constitutional appeal to the RC Constitutional Court.

The issue of returning a person to the country where torture or inhuman or degrading treatment or punishment is threatening him, falls within the scope of protection guaranteed by art. 23 of the RC Constitution, according to which no one may be subjected to any form of maltreatment.

The RC Constitutional Court, pursuant to the provision of art. 63 para. 1 of the Constitutional Law, is also competent for the protection of the rights of applicant, in:

a) Proceedings in response to a constitutional complaint even before all legal remedies have been exhausted, in cases when the disputed individual act grossly violates constitutional rights Constitutional Court proceedings are not initiated, and in:

b) Proceedings in response to a constitutional complaint even before all legal remedies have been exhausted, for failing to conduct an investigation (ineffective investigation) of criminal offences in conjunction to art. 2 (Right to life) and art. 3 (Prohibition of torture) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[622].

It is important to highlight the Decision of the Constitutional Court of the RC, no. U–IIIBi–1385/2018 from 18 December 2018, when the said Court, for the first time in its practice, decided on the constitutional rights of migrants in relation to their accommodation in reception centres in the RC, pending the decision on their application for international protection (asylum). Blagojević reminds that this decision of the Constitutional Court of the RC represents a significant contribution and a kind of waymark, primarily, to case law of administrative courts in cases on deciding upon the legality of the measure of accommodating migrants at reception centres.[623] The said decision also represents a contribution to the administrative courts' case law in deciding upon the legality of the measure of accommodating migrants at transit-reception centres[624] of closed type (which they cannot leave freely). At the same time, it shows that the RC has been undertaking substantial measures for adequate accommodation of migrants, providing aid in accommodation, food and other needs, and it also shows that free legal aid is ensured, so that accommodation in such centres can be validly reviewed in administrative disputes.[625]Likewise, there is a significant decision of the Constitutional Court of the RC no. U–III–557/2019 from 11 September 2019 on

[621]*Official Gazette*, no. 99, 1999; 29, 2002; 49, 2002.

[622]*Official Gazette– International Treaties*, no. 18, 1997; 6, 1999; 8, 1999; 14, 2002; 1, 2006.

[623] A. Blagojević, Pravni i institucionalni okvir integracije migranata u hrvatsko društvo (Legal and institutional framework for the integration of migrants in Croatian society), Collection of Works of the Faculty of Law of Split, 57 (3), 2020, p. 727.

[624] In more detail about the administrative judicial case law related to the limitation of freedom of movement at reception centres, see: A. Đanić Čeko; M. Held, Judicial control of administrative acts and measures regarding unlawful residence of foreigners in Croatia in the European context, In: D. Duić and T. Petrašević (eds.). *TheEU and the Member States – Legal and Economic Issues: the EU and Comparative Law Issues and Challenges Series* (pp. 175-196). Osijek: Faculty of Law Osijek, 2019, pp. 188–190; A. Đanić Čeko, Ograničenje slobode kretanja i obveza usmene rasprave u sudskim predmetima maloljetnika državljana treće zemlje (Limitation of freedom of movement and the obligation of oral hearings in judicial cases of minor third-country nationals), *Hrvatska i komparativna javna uprava* (*Croatian and comparative public administration*), 20 (2), (Special Addendum), 2020, pp. 25-37.

[625]Reporting byindependent court advisor Marijana Majnarić (the RC Constitutional Court), who participated the Forced Migrations seminar on 11 December 2020 (held online, Faculty of Law of Osijek, Session IV), titled: Review of decision of the Constitutional Court of the RC and its role in international protection (asylum) procedures.

the basis of which the Constitutional Court of the RC quashed the disputed judgements (of the High Administrative Court of the Republic of Croatia and the Administrative Court of Zagreb) due to the failure to observe procedural guarantees of international and subsidiary procedure protection which could have affected the final decision on the asylum application (family violence as a reason for granting asylum), thereby opening the door to change the then case law.

The RC Constitutional Court decided in 25 cases in international protection (asylum) procedures from 2008 to 2019, whereby it conducted a single constitutional judicial procedure for some applicants, deciding on several constitutional appeals with one decision (most commonly, with a rejecting decision). However, although a neglectable number of constitutional appeals have been lodged before the RC Constitutional Court, which refer to the right to asylum or other rights of asylum seekers, the RC Constitutional Court has contributed in certain degree to the development of standards for the protection of asylum seekers, as well as the development of case law, with its recent decisions.[626]

3. The procedural aspects of a special administrative procedure in compliance with the Law on International and Temporary Protection

In the Croatian legal system, we distinguish asylum[627] and subsidiary protection[628] as forms of providing international protection to aliens. A special administrative procedure for granting international protection and obtaining the status of asylum seeker, and the application of the Law on International and Temporary Protection[629] (hereinafter: the LITP) is exercised by declaring or expressing an intention[630] and submitting an application for international protection. Subsidiary, the Law on Aliens [631] (hereinafter: the LA), and the General Administrative Procedure Act[632] (hereinafter: the GAPA) are also applied. An application for international protection is lodged directly, orally on the record, at a Reception Centre for Applicants for International Protection, with which the procedure commences formally and legally. Exceptionally, depending on the applicant's personal characteristics, the application may also be lodged taking his declaration directly on the record outside the Reception Centre.[633] The intention to lodge an application for international protection may also be lodged by an alien before the following competent authorities:

1) during border control at a border crossing (art. 33 para. 1 of the LITP);
2) at every police administration, i.e., a police station or a reception centre for aliens, if it is in the territory of the RC (art. 33 para. 2 of the LITP).

In a special administrative procedure for rendering a decision on an application for international protection[634], the decision is rendered by the public law authority[635], i.e., the competent ministry - Ministry of the Interior (hereinafter: the MoI),[636] Directorate for Immigration, Citizenship and Administrative Affairs, Sector for Foreigners and International Protection,[637] Service for International Protection, Department for International Protection Procedure[638]. An officer of the MoI conducts an inquiry procedure without delay and as soon as possible, in order to allow the applicant, the principle to

626 Ibid.
627 Art. 20 of the Law on International and Temporary Protection, *Official Gazette*, no. 70, 2015; 127, 2017.
628 Art. 21 of the Law on International and Temporary Protection, *Official Gazette*, no. 70, 2015; 127, 2017.
629 *Official Gazette*, no. 70, 2015; 127, 2017 (hereinafter: the LITP).
630 Art. 33 of the LITP.
631 *Official gazette*, no. 133, 2020.
632 *Official Gazette*, no. 47, 2009, 110, 2021(hereinafter: the GAPA).
633 Art. 34 para. 3 of the LITP.
634 See Table no. 1.
635 Defined with art. 1 of the General Administrative Procedure Act (GAPA).
636 The MoI competences are prescribed in article 6 of the Law on the Structure and Scope of the State Administration Bodies, *Official Gazette*, no. 85, 2020.
637 For performing the work within the scope of operations of the Sector for Aliens and International Protection, the following services are established:11.2.1. Service for Aliens; 11.2.2 Service for International Protection; 11.2.3 Service for Reception and Accommodation of Applicants for International Protection.
638 https://mup.gov.hr/uprava-za-imigraciju-drzavljanstvo-i-upravne-poslove/281617 Accessed on 8 May 2021.

be heard and to declare all relevant facts and circumstances significant for deciding upon the application lodged, and granting international protection.

Regarding the names and types of administrative acts rendered by the MoI in the procedure for solving an administrative matter for granting international protection, the following can be listed: decision on the merits of application, decision on termination and decision on annulment of international protection, decision on the measure of return. Here, we see that, comparing to the LAP, which prescribes the types of administrative decisions in an administrative procedure: decisions (art. 96) and conclusion (art. 77), an administrative act bears the name of decisions. There are two types of procedures: 1) regular (art. 38-40 of the LITP), 2) accelerated (art. 41-48 of the LITP). Also, this distinction differs in terminology from the LAP, which prescribes that an administrative matter is solved in a direct procedure (art. 48–50) or by conducting an inquiry procedure (art. 51-54). As regards the time limits for the rendering of decision, it amounts to 6 months (exceptionally it can be extended for 9 months more) in a regular procedure and 2 months in an accelerated procedure.

Art. 42 of the LITP specifically prescribes the procedure and time periods for rendering a decision (28 days) if the procedure for granting international protection takes place at a border crossing or in the transit zone of an airport, sea port or inland water port. We deem that with the teleological interpretation of the statutory provision of art. 42 para. 5 of the LITP, it can be concluded that the foregoing represents a positive presumption of adopting a party's application (a case of the so-called administrative silence), which is an exception.[639]

The importance of legality of the conduct and role of police officers (border police) is worth mentioning, as they are the first to come into contact with third-country nationals[640] asylum seekers, particularly in cases of irregular migrations. Significantly, the civil control over the police work was established in 2011 as a new independent institutional body in the form of the Commission for Complaints in the Ministry of Interior.[641] Franulović and Staničić emphasise that an additional step forward was made with the establishment of the said Commission, which is aimed at improving the control of the police work.[642] Furthermore, cooperative relationship between the MoI and the administrative courts with regard to collecting, processing and exchange of data relating to applicants for international protection is important. While pending the procedure, a trend of leaving the reception centres takes place (approx. 80%), thus the system and procedure are circumvented. The problems that arise are manifested in the difficulties in determining the identity and age (fingerprinting, taking photograph, etc.), additionally impeding and delaying the procedures. Furthermore, the limitation of resources regarding translators[643] for specific languages (e.g., Farsi and Pashto), their availability, and access to reports on countries of origin, and many others.

[639] About it, see also in art. 102 of the LAP.

[640] See Table no. 2

[641] One of participants at the Forced Migrations seminar, 11 December 2020 (held online, Faculty of Law of Osijek, Session IV) Assistant professor Teo Giljević, Ph.D., Department for Administrative Science of the Faculty of Law of Zagreb, is president of the aforementioned Commission, appointed by the Croatian Parliament. See Decision on the appointment of members of the Commission for Complaints in the Ministry of Interior, *Official Gazette*, no. 24, 2020.

[642] For more detail, see D. Franulović, F. Staničić, Commission for Complaints in the Ministry of Interior – From a bright example of civil control over the work of police to disappearance?, Collection of Works of the Faculty of Law of Rijeka, 39 (2), 2018, p. 1014.

[643] See art. 13–14 of the LITP concerning the right to translator and procedural guarantees of the official use of language and script in the procedure.

Table 1 Applicants for international protection in the Republic of Croatia (from 2015 to 2020)[*]

Year	Number of applicants
2015	152
2016	2234
2017	1887
2018	1068
2019	1986
2020	1797
TOTAL	9124

Source: *Processed by the author of work according to the data made available by the Ministry of the Interior*

Table 2 Commonest countries and number of applicants for international protection in the Republic of Croatia

Country	Number of applicants for international protection[*]
Afghanistan	829
Iraq	428
Iran	96
Syria	95
Turkey	85

Source: *Processed by the author of work according to the data made available by the Ministry of the Interio*

Table 3 Statistical indicators for applicants for international protection according to nationality and sex for the period 01.01.-31.12.2019

Country of origin	M	F	TOTAL
AFGHANISTAN	196	99	295
ALBANIA	1		1
ALGERIA	108	9	117
BANGLADESH	8		8
NO NATIONALITY	9	9	18
BOSNIA AND HERZEGOVINA	3		3

[*] Situation on 24. 11. 2020 for Tables no. 1 and 2.

[*] See in more detail at https://mup.gov.hr/pristup-informacijama-16/statistika-228/statistika-trazitelji-medjunarodne-zastite/283234.Accessed on 11 May 2021.

BURUNDI	1		1
DR CONGO		3	3
EGYPT	16		16
ERITREA		2	2
PHILIPPINES		1	1
GHANA	1		1
INDIA	13	6	19
IRAQ	327	250	577
IRAN	119	99	218
YEMEN	2	2	4
JORDAN		1	1
CAMEROON	1		1
KAZAKHSTAN	4	3	7
CHINA	7	1	8
KOSOVO AND METOHIJA	5		5
CUBA	11	10	21
LATVIA	1		1
LEBANON	4	3	7
LIBYA	29	6	35
MACEDONIA	1		1
MOROCCO	34	4	38
NEPAL	2	2	4
NIGERIA	5		5
GERMANY		2	2
IVORY COAST		1	1
PAKISTAN	30	3	33
PALESTINE	29	15	44
RUSSIAN FEDERATION	3	2	5
SIERRA LEONE	3	2	5
SYRIA	180	108	288

SOMALIA	4	5	9
SERBIA	1		1
SUDAN	2	1	3
SRI LANKA	1		1
TUNISIA	22	11	33
TURKEY	98	34	132
UKRAINE	1	1	2
VIETNAM	4	4	8
WESTERN SAHARA	1		1
TOTAL	**1,287**	**699**	**1,986**

Source: Ministry of the Interior, https://mup.gov.hr/pristup-informacijama-16/statistika-228/statistika-trazitelji-medjunarodne-zastite/283234.Accessed on 11 May 2021[644]

4. Exercising administrative judicial protection of applicants for the international protection in an administrative dispute

Appeal is excluded in the majority of legal regulations governing the power of the MoI in an administrative procedure. Thus, the only legal mechanism is provided through an administrative dispute, i.e., a judicial review by the administrative judiciary. After a negative decision of the MoI, i.e. a decision dismissing the application for international protection, a further method of legal protection in this special administrative area is provided by instigating an administrative dispute before a locally competent administrative court.[645] Administrative judicial control is exercised through filing a complaint[646] for the assessment of legality of an individual decision of a public law body, in this case of the competent ministry (MoI), by which the right of a party in administrative matter, specifically, the right of an applicant for international protection on recognising the right to asylum or subsidiary protection (decision on application) or a procedure for granting international protection has been decided.

A complaint is filed within a 30-day[647] period from the date of delivery of the MoI's decision. The derogations from the 30-day time limit prescribed by the Law on Administrative Disputes are provided for in art. 39 para. 5, art. 41 para. 5, art. 43 para. 3, art. 49 para. 5, art. 50 para. 4 of the LITP, and the statutory time period is 8 days from the date of delivery of the MoI's decision. Even a shorter time period is prescribed, which is 5 days from the date of the delivery of the decision (art. 42 para. 6 of the LITP). Another specificity prescribed with the same statutory article, is manifested in prescribing an 8-day time limit from the date of delivery of the case file, in which the competent administrative court should render its decision. The LITP in art. 51 contains some specific provisions on the remedy (Section V of the Law) in a procedure before an administrative court, for which it can be concluded that they largely implicate many specificities and certain derogations, as follows: a) the action of administrative court is prescribed with a special procedural law; b) shorter time periods are prescribed for filing a complaint in relation to the ADA;

[644] Data for every year are available at the web pages of the MoI https://mup.gov.hr/pristup-informacijama-16/statistika-228/statistika-trazitelji-medjunarodne-zastite/283234. Accessed on 11 May 2021

[645] See art. 12 para. 2 item 1 of theAdministrative Dispute Act, *Official Gazette*, no. 20, 2010; 143, 2012; 152, 2014; 94, 2016; 29, 2017; further: the Administrative Disputes Act (the ADA). Also, see art. 14 para. 3, art. of the Law on Courts, *Official Gazette*, no. 28, 2013; 33, 2015; 82, 2015; 82, 2016; 67, 2018; 126, 2019; 130, 2020. See art. 38 para. 3 of the LITP.

[646]See art. 3 para. 1 p. 1 of the ADA.

[647] Art. 24 para. 1 of the ADA.

c) the suspensive effect of complaint is standardised, which is a derogation, and not a rule in an administrative dispute (art. 26 para 1 of the ADA, unless stated otherwise by law, which is the case here); d) the MoI's decisions against which the complaint has a delaying effect, are listed; e) although the ADA in art. 23 regulates the contents of complaint, this statutory article of the LITP, in para 2 stipulates that a complaint may contain a request for a delaying effect (not prescribed with art. 23 of the ADA, yet art. 26 para 2 of the ADA prescribes how the court may decide that the complaint is delayed and on what grounds, assuming that the complainant also states this in the application); f) the MoI's obligation for a very fast delivery of the case file (within an 8-day time period) in order to decide on such request for a delaying effect; g) the administrative court is ordered with this article in paragraph 2 through an imperative statutory norm that such an application should be decided upon within an 8-day period from the date of delivery of the case file, and finally, h) it is stipulated in para 3 of the same article that an appeal against the administrative court judgement does not stay the execution of the decision, which also represents a derogation, as art. 66 para. 5 of the ADA prescribes how the complaint stays the execution of the appealed judgement (only an appeal against a decision does not stay the execution thereof - art. 67 para. 2 of the ADA).

4.1. An overview of the selected administrative judicial case law in procedures for providing international protection - an analysis of the case law of the Administrative Court of Zagreb

Hereinafter, we will analyse and present in tables the case law of the Administrative Court of Zagreb[648], which in relation to the other three administrative courts (Osijek, Rijeka and Split)[649] in the Republic of Croatia, has the largest number of court cases in administrative disputes of assessing the legality of negative decisions of the MoI.[650] Likewise, the Court's statistical date were provided to us for the requested period per years (2017, 2018, 2019) set in the questionnaire for National Reports.

Table 4 Number of received and solved cases at the Administrative Court of Zagreb (from 2018 to 1.12.2020)

Year	Cases	
	received	solved
2018	205	184
2019	128	160
2020	94	117*

Source: *Processed by the author of work according to the data made available by the Administrative Court of Zagreb*

** The difference in the number of cases from the previous year that remained unsolved (received and solved ratio 94:117).*

[648] The jurisdiction of the Administrative Court of Zagreb covers the following areas of: Bjelovar–Bilogor, Koprivnica–Križevci, Krapina–Zagora, Međimurje, Sisak–Moslavina, Varaždin, Zagreb County and the City of Zagreb. Also, see art. 8 para. 1 item 4 of the Law on Territories and Seats of Court, *Official Gazette*, no. 67, 2018.

[649] Art. 8 para. 1 item 1, 2 and 3 of of the Law on Territories and Seats of Court, *Official Gazette*, no. 67, 2018.

[650] Deputy President of the Administrative Court of Zagreb, judge Mirjana Harapin, participated at the Forced Migrations seminar, 11 December 2020 (held online, Faculty of Law of Osijek, Session IV), and provided us with the statistical data of that Court in cases referring to received and solved cases on the basis of a complaint on the legality of the MoI decisions, as well as the data on appeal cases before the High Administrative Court of the Republic of Croatia for the requested period.

Based on having an insight into the statistical data of the Administrative Court of Zagreb in relation to the number of received and solved cases presented in the Table no. 4, the following results:
In 2018, in total, complaints 205 were received for the assessment of legality of decisions of complainants (MoI), and court decisions 184 were rendered. Out of them, the complaint was rejected[651] with a judgement in 151 cases; and in 30 cases, the complaint was upheld[652] with a judgement. In these 30 cases, the dispute was solved as follows: the defendant's decision was reversed in 10 cases and remanded (to supplement the facts and present the new evidence); and in 20 cases, the complaint was upheld with a judgement and a meritorious court decision was rendered in a dispute of full jurisdiction, and international and subsidiary protection or asylum was approved accordingly. The other 3 cases were solved as follows: in 1 - a decision was rendered, by which the complaint was rejected; in 1 case, the dispute was cancelled; and in 1 case, the case was assigned to another locally competent administrative court.
In **2019**, out of 16 solved cases, the complaint was rejected with the judgement in 129 disputes; in 21 cases, the complaint was upheld with the judgement and the cases remanded and returned to the defendant (MoI); in 3 cases, the complaint was upheld with the judgement; and in 2 cases, the complaint was partially upheld. The dispute was cancelled[653]in 3 cases with a decision; and in 2 cases, assigned to another locally competent administrative court.
In **2020**, out of 117 solved cases, the complaint was rejected with a judgement in 98 cases; in 11 cases, the complaint was upheld and remanded to the defendant (MoI). In 8 cases, the complaint was upheld with a judgement and international protection granted.
Out of total 451 complaints, the complaint was upheld with a judgement and international or subsidiary protection or asylum granted in 31 cases, without being remanded and returned to the defendant (MoI). In high %, the decisions of the defendant (MoI) were confirmed as legal and correct, implying that the complaint was rejected in the highest number of court cases in the reviewed period with a judgement. Complaints 34 remained unsolved.
After negative court decisions [654] (decisions or judgements) rendered in a first-instance administrative dispute per a single judge[655]before the competent administrative court, and with which the pleading was rejected or the complaint was dismissed,[656] the remedy was provided to the parties to the dispute through lodging the appeal against the judgement[657] or decision[658] to the High Administrative Court[659] of the Republic of Croatia (hereinafter: the HAC)[660]. The appeal procedure is regulated from art. 66 to art. 75 of the ADA.[661]

[651] Art. 57 of the ADA.
[652] Art. 58 para. 1 of the ADA.
[653]The reasons for the cancellation of dispute are prescribed in art. 46 para 1 of the LAD. Against the decision on dispute cancellation, an appeal may be lodged to the Higher Administrative Court of the Republic of Croatia.
[654] Art. 55 (judgement) and art. 65 (decision) of the ADA.
[655]The composition of thecourt in an administrative court is regulated with art. 14 of the ADA.
[656]The reasons for rendering a decision to reject the complaint is provided for with art. 29 para. 2, art. 30 of the ADA.
[657]An appeal on the judgement of an administrative court is allowed in all cases except in those prescribed with art. 66a of the ADA.
[658]When the ADA prescribes that the appeal on the decision of administrative case is allowed.See art. 67 para. 1 of the ADA.
[659]Administrative courts and the HAC are specialised courts. The organisation of administrative judiciary in two instances has existed in the RC since 2012, when the reform of judiciary was carried out and the new Administrative Disputes Act entered into force. See art. 14 para. of the Law on Courts, *Official Gazette*, no. 28, 2013; 33, 2015; 82, 2015; 82, 2016; 67, 2018; 126, 2019; 130, 2020. See in more detail on the web pages of the Court https://sudovi.hr/hr/vusrh. Accessed on 9 May 2021.
[660]The HAC competence is prescribed in article 12 para. 3 of the ADA, and in art. 25 of the Law on Courts, *Official Gazette*, no. 28, 2013; 33, 2015; 82, 2015; 82, 2016; 67, 2018; 126, 2019; 130, 2020.
[661] On the appeal in an administrative court, see in more detail: A. Đanić Čeko, *Žalba u upravnom sporu u hrvatskom i poredbenom prav*u (*Appeal in administrative dispute in Croatian and in comparative law*), Zagreb: Faculty of Law of the University of Zagreb, 2016; A.,Đanić,; L. Ofak, Djelotvornost žalbe u upravnom sporu kao jedno od temeljnih instituta zaštite

A review of appeal cases of the HAC against the decisions of the Administrative Court of Zagreb follows hereunder (with the situation up to 1.12.2020).

In **2018**, there were in total 35 appeal cases, which were solved in the following ways: appeals 32 were rejected with a judgement as ungrounded[662] and the first instance decisions of the administrative court were confirmed; in 1 case, the procedure per appeal was cancelled; in 2 cases, the appeal was upheld with a judgement and the case remanded,[663]the decision of the MoI was reversed.

In **2019**, there were in total 25 appeal cases, which were solved in the following ways: appeals 22 were rejected with a judgement as ungrounded; in 1 case, the appeal was rejected with a decision,[664] whereas in 2 cases, the appeal was upheld with a judgement and the case remanded to be renewed.

Concerning **2020**, in total 23 decisions of the HAC were rendered, and in all the appeal cases, the appeal was rejected with a judgement as ungrounded (the situation of the cases up to 01.12. 2020).

It can be concluded on the basis of the foregoing that in the majority of appeal cases in the reviewed period (2018–2020), the HAC rendered judgements rejecting the appeals as ungrounded, and the court decisions which were appealed (in cases of international protection) were confirmed as legal, so the administrative dispute was conducted regularly and according to legal provisions.

5. Conclusion

By comparing the provisions of the LITP (*lex specialis*) and the GAPA (*lex generalis*), it can be concluded, in relation to the analysed procedural elements (decisions rendered, prescribed time limits for conducting procedure and rendering decisions in the procedure of deciding on applications for granting international protection), that numerous specificities and discrepancies were observed, but also derogations were prescribed. The foregoing is reflected in instigating a procedure by declaring an intention, hearing applicants, particularity in inquiry procedures, name of administrative decision rendered by the MoI in the procedure for granting international protection, prescribed time limits for rendering decision, type of procedures. The provisions of the LITP contains a derogation on positive presumption of upholding the application of a party. Particularly, the LITP provisions prescribing generally the procedure of administrative court (which is not the case to regulate certain issues in administrative judiciary with the law that statutory regulates a specific administrative procedure), and then also regarding standardising shorter time limits for lodging a complaint to an administrative court, time limits in which an administrative court should decide in individual situations (like suspensive effect of complaint), parts of complaint, etc. We can point out that superiority, i.e., authority (or subordination) as one of the fundamental features of the administrative law relationship can particularly be observed with regard to the issue of procedural law position of the party (applicant for international protection) in relation to the MoI, as the competent public law body (state administration body, second instance body) which acts in this specific administrative procedure.

Certain problems occurring in administrative procedures, as well as in administrative disputes, refer to the trend of leaving reception centres while pending the procedure, to difficulties in establishing identity and age, additionally hindering and delaying procedures. Furthermore, the limitation of resources regarding translators for specific languages (e.g., Farsi and Pashto), their availability, and access to reports on countries of origin, and many others.

In relation to the review and analysis of the administrative judiciary case law of the Administration Court of Zagreb (in the period from 2018 to 2020), and in relation to cases in disputes in response to complaints for the purpose of assessing the legality of individual decisions of administrative law

ljudskih prava (Effectiveness of an appeal in an administrative dispute as one of the fundamental institutes for the protection of human rights) (E, *Pravni vjesnik*, 30 (2), 2014, pp. 167–183; D. Đerđa, A. Galić, Žalba u upravnom sporu (Appeal in administrative dispute), *Collection of works of the Faculty of Law of Split*, 51 (2), 2014, pp. 339-362.

662 See art. 74 para. 1 of the ADA.

663 Art. 74 para. 2 of the ADA.

664 Art. 72 para. 1 of the ADA.

authority, i.e. of the MoI, in cases linked to international protection (asylum), we can state that the decisions were made with judgements rejecting the complaint as ungrounded in the majority of cases. Against the court decisions (negative) of the Administrative Court of Zagreb, appeals were declared to the HAC, therefore the court of appeals also rendered decisions rejecting the complaint as ungrounded and upheld the decision of the first instance court the decision of which was appealed, in the majority of cases, in the same reviewed period.

Taking into consideration the selected and available decisions in the constitutional judicial case law, the conclusion must be drawn that the Constitutional Court of the RC should significantly affect the development of national standards for the protection of applicants for international protection (asylum) in future, and consequently the case law as a whole. With the latest decisions, the Constitutional Court of the RC has gone beyond the common framework for the assessment of this type of procedures, in regard to the violation of the right to fair proceedings and made a step forward to ensuring international protection to applicants of international protection (asylum) in accordance with the development of international and European standards.

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NATIONAL REPORT

1. Right to legal aid in the context of the right of access to justice

The contemporary concept of the access to justice, based on human rights and non-discrimination, is an inherent aspect of the rule of law and a fundamental postulate of any democratic society. An effective access to justice is important to everyone, but it bears a special significance for vulnerable groups, including various categories of migrants[667]. Due to poor language skills, poor awareness of regulations and procedures, fear of deportation, as well as social and cultural barriers that they encounter, migrants are at a far greater risk of human rights violations. Thereafter, the access to free legal aid services is the only way to overcome the said barriers, both in the procedures for solving the legal status of migrants before competent authorities and on the occasion of exercising and safeguarding the rights in the event of violations thereof. The availability of quality free legal aid implies the provision of free legal information and advices, drawing up motions, and representation before competent authorities.

In the Republic of Serbia, the right to legal aid is guaranteed with the Constitution of the Republic of Serbia 2006[668], regulating that the legal aid is provided by the legal profession, as an autonomous and independent service, and by the free legal services established in local self-government units, as well as that the conditions for providing free legal assistance are regulated by the law (art. 67 of the RS Constitution).

The Law on Free Legal Assistance 2018 (LFLA)[669] regulates free legal aid and free legal support, as well as the conditions and methods of realisation and provision thereof. The law is applied to the beneficiaries of free legal assistance that have not realised their right to free legal assistance under other laws. The LFLA recognises asylum seekers, refugees, persons under subsidiary protection or internally displaced persons, whether they are stateless persons or foreign citizens or not, as vulnerable groups whose privileged status retarding the right to free legal assistance is acknowledged since they are entitled to free legal assistance irrespective of the general conditions under which it is provided to other persons.[670] The right to free legal aid is also recognised to persons obtaining legal protection from torture, inhuman or degrading treatment or punishment or human trafficking, irrespective of their nationality and status.[671] Free legal aid is provided by the legal profession and by the legal aid services in local self-government units, where free legal aid in legal matters concerning asylum and non-discrimination can also be provided

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[667] In this text, the term 'migrant' is used as a common name for refugees, internally displaced persons, asylum seekers and migrants.
[668] Official Gazette of RS, no. 98, 2006.
[669] *Official Gazette of RS*, no. 87, 2018. The application of the law commenced on 1. 10. 2019.
[670] Article 4 para. 3 items 6 and 7 of the LFLA.
[671] Article 4 para. 3 item 5 of the LFLA.

by civil associations.[672] Legal support, comprising of general legal information, filling out forms, drawing up notarial instruments and mediation, are provided by public notaries, mediators and faculties of law.[673] The rules on providing free legal aid are contained in the Law on Asylum and Temporary Protection 2018 (LATP)[674], prescribing that a foreigner who has expressed his intention to seek asylum in the Republic of Serbia, just like an asylum seeker, is entitled to free legal aid and representation before the competent authorities provided by the organisations whose objectives and activities are aimed at providing legal aid to the Applicants and persons who have been granted asylum, as well as free legal aid provided by the UNHCR.[675] The law also guarantees the asylum seekers the right to be informed about their rights and obligations relating to material reception conditions, as well as about the citizens associations or other organisations providing assistance and information to the Applicants.[676]

In the context of the right of access to justice, the legally guaranteed right of a person who has expressed the intention to seek asylum to be advised about his rights and obligations is significant, particularly about the right to residence, the right to be provided an interpreter free of charge during the procedure, the right to legal aid, and the right of access to the UNHCR[677].

Concerning the procedure for granting asylum, conducted by the Asylum Office, which is the organisational unit of the Ministry of the Interior competent for the asylum issues,[678] one of the issues concerns the very access to the asylum procedure, since the application form is[679] not translated in the languages of asylum seekers, neither it is available. In practice, asylum seekers are accommodated in reception centres and such asylum centres are provided a printed asylum application form in English, and rarely in Farsi or Arabic, by the Commissioner for Refugees and Migrations[680].

In the procedure for granting asylum, the person is entitled to be interviewed by a person of the same sex, or that he is interviewed through a translator or an interpreter of the same sex, unless that is not possible, or is associated with disproportionate difficulties for the authority conducting the asylum procedure.[681] However, in practice, the cases of violation of the right to translation are not rare.[682]

One of the guaranteed rights is the right to appeal the decision rejecting the application for granting asylum. The complaint is decided on by the Asylum Commission appointed by the Government of the Republic of Serbia,[683]and an administrative dispute may be instigated against the final decisions of the Asylum Commission[684].

[672] Article 9 para. 1 and 2 of the LFLA.
[673]Articles 11 and 12 of the LFLA.
[674]Official Gazette of RS, no. 24, 2018.
[675] Article 56 of the LATP.
[676] Article 56 para 3 of the LATP.
[677] Article 36 para ZAPZ 5.
[678] Article 20 of the LATP.
[679] The asylum application form is prescribed by the Rulebook on the content and appearance of the asylum application and the content and appearance of the forms of documents issued to the asylum seeker and a person granted asylum or temporary protection, *Official Gazette of RS*, no. 42, 2018.
[680]See: https://www.azilsrbija.rs/zahtev-za-azil-nedostupan-izbeglicama/
[681] Article 16 para 2 of the LATP.
[682] So, for example, the Administrative court, in the case no. 16 U 9284/2020, adopted the complaint of the Centre for the Protection and Assistance to asylum seekers, and stated that the right to use and conduct an administrative procedure in the language that the client, an asylee S. A. from Afghanistan, understood, was violated, as well as that the officers of the acting Administration for Aliens violated the principle of assistance to the client, considering that in the procedure of cancellation of stay to the person who had expressed his intention for asylum, English language was used, and the procedure was conducted without a translator, so the asylee S. A. was subsequently handed the decision on cancellation of stay in Serbian language, which he did not understand. https://www.azilsrbija.rs/upravni-sud-potvrdio-povredu-prava-na-prevodjenje/
[683] Article 21 of the LATP.
[684] Article 22 of the LATP.

The Asylum Office is obliged to inform a person who has been granted the right to asylum at the earliest possible time about the rights and obligations related to such status, in a language he can understand[685] Persons who have been granted the right to asylum have the equal rights as the nationals of the Republic of Serbia in terms of the right of free access to courts, legal aid, exemptions from payment of legal fees and other costs payable to the state authorities,[686] while internally displaced persons granted temporary protection are entitled to legal aid, under the conditions prescribed for the Applicants[687].

The rules on providing assistance in exercising and safeguarding the rights are contained in the Law on Aliens[688], which regulates the provision of legal aid and support to persons who are suspected to be or identified as the victims of human trafficking in all the procedures related to human trafficking, including also the procedure for compensation.

The free legal aid system is still not fully functional in the Republic of Serbia.[689] Among registered providers of free legal aid and support, there are currently 3304 lawyers; 24 municipalities have not registered free legal aid providers, and among the registered legal aid providers, only 31 of them are NGOs, out of which 11 are in Belgrade[690]. There are substantial regional differences in the provision of free legal aid[691], so that persons, including migrants, are not equal in regard to the access to quality free legal aid and support. Free legal aid to migrants, asylum seekers and persons granted the right to asylum is generally provided by several civil society organisations,[692] making the scope of legal aid larger. However, there is no an adequate coordination between the legal aid providers, and the funds are generally provided from donor sources. The situation is also similar in regard to the provision of legal aid to persons who are suspected to be or identified as the victims of human trafficking.[693] In accordance with the universal standards for safeguarding human rights, as well as the international standards in the area of asylum and human trafficking, the provision of legal aid is the state's obligation, implying the duty to make it available to all the mentioned groups under the same conditions, as well as to set up a transparent mechanism for following-up the quality of services provided to legal aid beneficiaries.[694]

2. Civil and legal protection against discrimination

2.1. Social context

One of the key obstacles in integration and access to human rights is discrimination. The causes of discrimination are widespread stereotypes and prejudices, negative perception and anti-migrant attitudes

[685] Article 59 para. 6 of the LATP.
[686] Article 66 of the LATP.
[687] Article 76 para. 1 item 6 of the LATP.
[688] *Official Gazette of RS*, no. 24, 2018 and 31, 2019.
[689] N, Petrušić. *Pristup pravdi i smanjenje siromaštva: naučne lekcije i izazovi u periodu post-korone*. (*Access to justice and poverty reduction: Scholarly lessons and challenges in the post-Corona era*). Available at: http://socijalnoukljucivanje.gov.rs/rs/pristup-pravdi-i-smanjenje-siromastva-naucene-lekcije-i-izazovi-u-periodu-post-korone/ (29. 3. 2021).
[690] Available at: https://www.drzavnauprava.gov.rs/tekst/26350/registar-pruzalaca-besplatne-pravne-pomoci-i-besplatne-pravne-podrske.php. 29. 3. 2021)
[691] M. Filipović, *Zakon o besplatnoj pravnoj pomoći – Prvih šest meseci primene (Law on Free Legal Assistance - First six months of application).* YUCOM – Lawyers' Committee for Human Rights, Beograd, 2020.
[692] Centar za zaštitu i pomoć tražiocima azila (Centre for the protection and assistance to asylum seekers) (https://www.azilsrbija.rs), Beogradski centar za ljudska prava (Belgrade Centre for Human Rights), within the Asylum and Migrations programme (http://azil.rs), Group 484 (https://www.grupa484.org.rs). etc.
[693] Legal aid and support to women victims of human trafficking provided by non-governmental organisations Astra(https://www.astra.rs) and Atina (http://www.atina.org.rs/).
[694] To this end, the Commissioner for Refugees and Migrations developed the guidelines for providers of free legal aid - Services and standards in the area of providing free legal aid to asylum seekers, migrants and persons granted the right to asylum accommodated at asylum centres and other facilities intended for accommodation in the Republic of Serbia, Commissioner for Refugees and Migrations. Available at: https://kirs.gov.rs/media/uploads.

of local population. The economic crisis and increase of unemployment additionally deepened the social distance.

According to the findings of the research in 2020[695], 39.3% of citizens have negative feelings towards refugees and migrants from the Middle East and Africa. The relation towards migrants and refugees is closely connected with negative attitudes linked to migrations.[696] Almost half of the citizens observes migrants as health risk; a bit more than one third, see migrants as a threat to Serbian culture, values and customs; 40% of the citizens harbour prejudices that migrants and refugees are members of terrorist organisations, and over one third of respondents believe in conspiracy theories about secret plans to settle migrants and coordinated plans to spread Islam in Serbia. A fourth of the citizens fears that migrants will "usurp" Serbia.[697] The findings of other research are similar, confirming a great social distance of citizens towards migrants, as well as a high degree of distrust in the idea that migrants who stay in Serbia could fit in the local communities successfully.[698]

The report of the Commissioner for the Protection of Equality states that refugees, internally displaced persons, migrants and asylum seekers represent an exceptionally sensitive category, frequently exposed to racist attacks, hate speech, labour exploitation and discrimination; therefore, they need to be better aware of their rights and possibilities that are available to them, and also of the notion of discrimination, and obviously there is a need to educate local population, and have a responsible approach of media to the issues of migrants.[699]

2.2. Legal and institutional framework of the protection against discrimination

Serbia ratified almost all international conventions on human rights, save for the Convention on the Protection of Migrant Workers, which was signed in 2004 and the reports on its application are regularly delivered to international bodies. Serbia established an integral antidiscrimination legal framework, which is generally harmonised with international standards in this area.

The Constitution of the Republic of Serbia 2006 defines Serbia as the state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values.[700] The Constitution prescribes that the generally accepted rules of international law and ratified international treaties constitute an integral part of the legal system in the Republic of Serbia and are applied directly.[701] Citizens are guaranteed equality in the access to justice, as well as the right to expedient remedy. Constitutional judiciary protection of human and minority rights is provided and the Civic Defender is established, who protects the rights of citizens and monitors the work of public administration bodies.[702]

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[695] *Stavovi prema migrantima i izbeglicama u Srbiji* (*Attitudes towards migrants and refugees in Serbia*), Psychosocial Innovation Network. Open Fund Society, 2020 Available at: https://psychosocialinnovation.net/wp-content/uploads/2020/08/Stavovi-prema-izbeglicama-i-migrantima_2020.pdf

[696] 18% of the citizens believe that Serbia should adopt the 'close borders' policy; a bit more than a half of the citizen believe that the open borders policy should be continued but the detention of refugees and migrants should be restricted to just a few days or weeks; 19% of the citizens believe that only a restricted number of people should be granted permanent residence in Serbia, not encouraging or providing support for such decision; and only 12% of the citizen in Serbia believe that the state should be open for migrations, and enable everyone who wants that to come and get all the rights that Serbian citizens have. *Ibid.*

[697] Ibid.

[698] J. Bjekić, M. Vukčević Marković, N. Todorović, M. Vračević, *Socijalna inkluzija migranata. Istraživanje stavova prema migracijama i preporuke za smanjenje diskriminacije* (*Social inclusion of migrants. Researching attitudes towards migrations and recommendations for decreasing discrimination*). Beograd: Red Cross, 2020. Available at: https://www.redcross.org.rs/media/6505/socijalna-inkluzija-migranata-e-knjiga-srb.pdf

[699] Regular annual report of the Commissioner for the Protection of Equality for year 2020 Beograd: Gender Equality Commissioner, p. 165. Available at: http://ravnopravnost.gov.rs/wp-content/uploads/2021/04/Poverenik-za-zastitu-ravnopravnosti-Godisnji-izvestaj-za-2020.pdf

[700] Article 1 of the Constitution.

[701] Article 16 of the Constitution.

[702] See: art. 36, 138, 170 and 194.

The Constitution proclaims the principle of equality and prohibits any form of discrimination on any grounds, and particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability, prescribing that special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals that are in a substantially unequal position compared to other citizens, are not deemed discrimination[703]. The constitutional prohibition of discrimination is universal: all persons are obliged thereof, and its protection are enjoyed by all physical and legal entities, as well as groups of people, and covers all the areas of social life.

The basic source of anti-discrimination law in Serbia is the Law on the Prohibition of Discrimination 2009 (LPD)[704], prescribing the prohibition of discrimination, regulating the forms and cases of discrimination,[705] as well as the legal protection against discrimination, and also the Commissioner for Equality Protection is established and his competence and method of operating are regulated. In addition to general, there are also special anti-discrimination laws: Law on the Protection of the Rights and Freedoms of the National Minorities 2020[706], Law on the Prevention of Discrimination against Persons with Disabilities 2006[707], and Law on Gender Equality 2009[708]. Anti-discrimination clauses contained in an entire set of laws regulating individual areas of social relationships are a part of Serbian anti-discrimination law.

The institutional framework for the protection of human and minority rights and exercising the principle of equality is comprised of the following bodies: Committee on Human and Minority Rights and Gender Equality of the National Assembly, Government's bodies for enhancement and protection of human rights (Office for human and minority rights, Commissioner for refugees and migrations, Coordination body for gender equality, Team for social inclusion and reduction of poverty, as well as the competent ministries), Government's advisory bodies (Council for the rights of the child, Council for persons with disabilities, Government's Council on action against trafficking, Council for national minorities, Coordination body for following up the implementation of the strategy for inclusion of Roma men and women, Council for following up the recommendations of the UN mechanisms for human rights). At the province levels, the following bodies operate: Provincial Secretariat for education, law, administration and national minorities - national communities, as well as the competent provincial secretariats.

Independent state authorities for the protection and enhancement of human rights are established: Ombudsman, Commissioner for the protection of equality, Commissioner for information of public significance and personal data protection, Provincial Ombudsman, and local ombudsmen operate in a large number of local self-governments. In the area of media, the following self-regulatory bodies are competent: Press Council and Regulatory body for electronic media.

Protection of human and minority rights, including the right to non-discrimination, are provided by regular courts and the Serbian Constitutional Court. Regarding the violation of the right to non-discrimination, citizens may address the Commissioner for Equality - an autonomous and independent body with a wide range of powers making it the central national institution for the suppression of discrimination.[709]

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[703] Article 21 of the Constitution.

[704] *Official Gazette of the RS*, no. 22, 2009.

[705] The law also prescribes and prohibits direct and indirect discrimination, violation of the principle of equal rights and obligations, calling to account, association for the purpose of exercising discrimination, hate speech, harassment and humiliating treatment, and severe forms of discrimination, as well as special cases of discrimination. In more detail: K. Becker, Cases of Discrimination, in; *Sudska građanskopravna zaštita od diskriminacije* (*Judicial civil law protection against discrimination*) (Nevena Petrušić, ed.), Pravosudna akademija, Commissioner for Gender Equality, Beograd, 2012, pp. 197-216.

[706] *Official Gazette of the FRY*, no. 11, 2002; *Official Gazette of Serbia and Montenegro*, no. 1, 2003 - Constitutional Charter and *Official Gazette of the RS*, no. 72, 2009 - other law and 97, 2013 – decision of the Constitutional Court.

[707] *Official Gazette of the RS*, no. 33, 2006.

[708] *Official Gazette of the RS*, no. 104, 2009.

[709] In more detail: N. Petrušić, Pravni status, uloga i nadležnost Poverenika za zaštitu ravnopravnosti (*Legal status, role and competence of the Commissioner for the protection of equality*), *Temida*, br. 2, 2014, pp. 27-44.

Legal regulations have put in place the mechanisms for civil legal, misdemeanour legal, and criminal legal protection against discrimination, thus a complete system of legal protection against discrimination is instituted.

2.3. Civil and legal protection against discrimination

Civil and legal protection against discrimination represents a form of direct protection of the right to non-discrimination, which is implemented through raising various claims.

The LPD provisions prescribe the requests for legal protection that the claimant may raise: 1) a claim requiring the discriminator to refrain from doing acts of discrimination; 2) a claim requiring the discriminator to refrain from proceeding with, i.e. repeating an act of discrimination (a claim for prohibitory injunction); 3) a claim requiring the discriminator to perform a specific act to redress the consequences of discriminatory treatment; 4) a claim for establishing a discriminatory treatment against the claimant or another party; 5) a claim for the compensation of material and non-material damage; and 6) a claim for publishing the final decision by which the claim for the protection against discrimination has been adopted.[710] Such claims may be exercised in an extrajudicial manner or in a litigation for the protection against discrimination, by raising adequate pleadings.

Protection against discrimination is exercised in a litigation for the protection against discrimination, where the court decides on one or more claims for the protection of rights of the claimant. A special type of such litigations are the so-called strategic litigations used as a method to realise a broader social change, make influence on legal practice and public policies and improve the situation of discriminated social groups through court verdicts.

The procedure in litigations for the protection of discrimination[711] is a special litigation procedure regulated by the LPD, where several special rules prescribed by the LPD and rules of general litigation procedure contained in the Civil Procedure Code are applied[712].

Active procedural legitimacy is recognised to persons affected by discriminatory treatment,[713] to the Commissioner for the Protection of Equality[714], to an organisation dealing with the protection of human rights, i.e. the rights of a specific group of people, as well as to a voluntary discrimination examiner - a person who voluntarily subjected himself or herself to the discrimination in order to directly examine the application of the legislation regarding the prohibition of discrimination in a concrete case[715]. To instigate a lawsuit concerning discrimination against a concrete person by the Commissioner for the Protection of Equality and the organisation for the protection of human rights, a written consent of the discriminated person is necessary. The Commissioner and the organisation for the protection of human rights may raise all the claims prescribed by article 43 of the LPD, except a claim for compensation of material and non-material damage.

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[710] Article 43 of the LPD. See in more detail: N. Petrušić, I. Krstić, T. Marinković, Komentar Zakona o zabranidiskriminacije (Commentary on the Law on the Prohibition of Discrimination (*Official Gazette of the RS*, 2014; N. Petrušić (ed.), G. Obradović, N. Raičević, D. Miladinović Stefanović, A, Tasić. *Antidiskriminaciono pravo: propisi, praksa i stvarnost* (*Antidiscrimination law: regulations, case law and reality*), Niš: Faculty of Law, 2007, pp. 125-129.

[711] In detail: A. Tasić, *Postupak u parnicama za zaštitu od diskriminacije (Procedure in litigations for the protection against discrimination)*, doctoral dissertation, Niš: Faculty of Law, 2016

[712] Civil Procedure Code, *Official Gazette of RS, no.* 72, 2011; 49, 2013 – decision of the Constitutional Court; 74, 2013 – decision of the Constitutional Court; 55, 2014; 87, 2018, and 18, 2020, hereinafter: the CvPC.

[713] Article 41 of the LPD.

[714] On the powers of the Commissioner for the Protection of Equality in anti discrimination proceedings, in detail: Petrušić, N. Procesni položaj poverenika za zaštitu ravnopravnosti u antidiskriminacionim parnicama (Procedural position of the Commissioner for the Protection of Equality in anti discrimination proceedings) (2012). *Pravni život*, thematic number: Pravo i moral (Law and Morality), no.11, vol. 3, Beograd, Udruženje pravnika Srbije, 2012. 2012, pp. 905-922.

[715] Article 46 of the LPD. Pursuant to article 42 on the Law on the Prevention of Discrimination against Persons with Disabilities, the procedure can be instigated by a person accompanying the person with disabilities, in the event of he was discriminated in relation to employment and employment relationship, and according to art. 43 of the LGE, it may be done by the union or the association whose goals are related for the enhancement of gender equality.

In proceedings initiated for the purpose of protection against discrimination, the higher courts have the subject matter jurisdiction; while besides the local court of general jurisdiction, a court situated in the area where the complainant's residence or registered seat is located, is also locally competent court. The procedure is based on the principle of urgency.

The complainant may, during the proceedings, as well as upon its completion, until the enforcement has been conducted thereof, raise a claim requiring the court to grant injunctive relief for preventing discriminatory treatment aimed at eliminating the danger of violence or other major irreparable damage. (Art. 44 of the LPD).

For proving disputable legally relevant facts on the basis of which the conclusion will be drawn whether discrimination has been done in the concrete case, standard means of evidence are used, as well as specific means of evidence: statistical data and hearing voluntary discrimination examiners (testers). In Serbian anti-discrimination law, there are no exclusive rules on proving discrimination through statistical data, they may be used both for proving direct, and for proving indirect discrimination of certain social groups.[716] With the aim of proving discrimination, voluntary discrimination examiner (tester) may also be heard.[717]

In order to overcome difficulties in proving discrimination, special rules on shifting the burden of evidence are applied in proceedings for the protection against discrimination. If the complainant proves the likelihood that the defendant has committed the act of discrimination, the burden of providing evidence that no violation of the principle of equality or the principle of equal rights and obligations has occurred falls on the defendant.[718]

The law prescribes that the defendant cannot be relieved from accountability by providing evidence that he is not guilty if the court has found that he committed an act of direct discrimination or it is undisputed by the parties.[719] The intention and motives on which the act of discrimination is grounded are irrelevant. Prevention of discriminatory acting, elimination of danger from violence or any major irreparable damage is effectuated with a claim for granting injunctive relief, which may be raised along with the lawsuit, during the proceedings, as well as after its completion, until the enforcement has been conducted.[720] The claimant must prove the likelihood of the necessity of such injunction in order to eliminate the danger of violence due to discriminatory treatment, prevent the use of force or occurrence of irreparable damage.

In proceedings for the protection against discrimination, a review is always allowed (art. 41 para 4 of the LPD). With regard to the previous and final relief from the previous payment of procedural costs and appointing free representative, the relevant provisions of the Civil Procedure Code apply in all. Research[721] shows that judicial anti-discrimination case law is still not sufficiently developed and there are substantial

[716] In more detail: N. Petrušić, Zamke u upotrebi statističkih podataka u antidiskriminacionim parnicama (*Pitfalls in using statistical data in anti discrimination proceedings*) *Pravni život*, no. 12 vol. 4, 2014, pp. 33-50.

[717] A person who had deliberately exposed himself to discriminatory treatment aiming to directly test whether the person for whom there are indications that he behaves in a discriminatory manner, actually does so, is obliged to inform the Commissioner for the Protection of Equality about the intended testing, and only exceptionally, if the circumstances do not allow it, he may proceed to testing without any notification thereof. (Article 46 para 3 of the LPD).

[718] Article 45 para 2 of the LPD.

[719] Article 45 para 1 of the LPD.

[720] Article 44 of the LPD.

[721] M. Reljanović, *Studija o primeni Zakona o zabrani diskriminacije u Srbiji (Study on the application of the Law on the Prohibition of Discrimination in Serbia)*, YUCOM – Committee of Lawyers for Human Rights, Beograd, 2017, Beograd, 2017; *Ravnopravnost u praksi, primena antidiskriminacionih zakona u Srbiji* (*Equality in case law, application of anti discrimination laws in Serbia*), London, Equal Rights Trust, 2019.

difficulties regarding the recognition of direct and indirect discrimination[722], the application of the rules concerning the burden of evidence[723], weighing the compensation for non-material damage, etc.

3. Procedure for determining the time and place of birth

3.1. Legal significance for determining the time and place of birth

The fact of birth is crucially important for determining legal subjectivity of one person. Apart from proving one's existence with it, the age is also determined on the basis of date of birth. Age is, primarily, important for determining business competence, since a person becomes of age after turning 18 according to the Constitution of the Republic of Serbia. Upon becoming of age, a person becomes capable of deciding independently about his rights and obligations A contemporary concept of the rights of the child, however, recognises that children, before turning 18, may be capable to undertake certain legal actions. Hence, irrespective of not turning 18, the child is recognised various rights in various areas, in line with his age and/or the assessed mental and physical maturity[724].

Testamentary capacity acquires a child who has turned 15 and is capable of reasoning.[725] Work capability is attained by a child of at least 15 years of age and meets other requirements for work at specific jobs, determined with adequate regulations (by law or rulebook on organisation and systematisation of jobs).[726] A child who has reached the age of 15 may undertake legal operations whereby he manages and disposes of his income or property acquired through his own work.[727] A man who has reached 16 years of age and who is able to reason may acknowledge paternity, and mother has to give consent to the acknowledgement of paternity if she has reached 16 years of age and is able to reason.[728] A girl who has reached 16 years of age and is not fully deprived of work capability may file an application for abortion without parents' consent, i.e. guardian's consent.[729] A child who has reached 15 years of age and is capable of reasoning may independently give consent to the proposed medical care, following prior adequate notification.[730]

There is a rule applying to persons who are not nationals of the Republic of Serbia, if they lack litigation competence pursuant to the law of the country of their citizenship, yet they have competence pursuant to the national law, they may independently undertake actions in the proceedings.[731]

The Law on Registry Books[732] regulates registration of the fact of birth. If a child is born in a healthcare institution, his birth must be reported by the institution itself, and this in an electronic form and via mail, thus ensuring that reporting the birth is certainly recorded, and at the same time, bureaucratic procedure is unnecessarily complicated.[733] The birth of a child outside a healthcare institution should be reported by

[722] N. Šolić, K. Golubović, *Analiza slučajeva apelacionih sudova – sudska zaštita od diskriminacije u Srbiji* (*Analysis of cases of appelate courts - Judicial protection against discrimination in Serbia*), 2015, Pravosudna akademija, Beograd.

[723]See: A. Tasić, Teret dokazivanja u antidiskriminacionim parnicama na primeru odluke Vrhovnog kasacionog suda (Burden of proof in anti discrimination proceedings on an example of decision of the Supreme Court of Cassation), *Collection of Works of the Faculty of Law of Niš*, Niš: Faculty of Law, 2018 78, 2018, pp. 323-334.

[724] In more detail: N. Petrušić, Granice poslovne sposobnosti deteta (*Limits of business capability of the child*), in: *Aktuelna pitanja građanske kodifikacije (Actual issues of civil codification)*, Niš, 2008, pp. 35-56.

[725] Art. 79 of the Law on Inheritance, *Off. Gazette of the RS*, no. 46, 1995; 101, 2003 – decision of the Constitutional Court of the RS and 6, 2015.

[726] Law on Labour, *Official Gazette of the RS*, no. 24, 2005; 61, 2005; 54, 2009; 32, 2013; 75, 2014; 13, 2017 Decision of the Constitutional Court, 113/2017 and 95/2018 - authentic interpretation).

[727] Art. 64 para. 3 of the Family Law, *Official Gazette of the RS*, no. 18/2005, 72/2011-other law, and 6/2015, hereinafter also: the FL.

[728] Art. 47–48 of the FL.

[729] Art. 2 of the Law on Abortion in Health Institutions, *Official Gazette of the RS*, no. 16,1995 and 101,2005– other law.

[730] If, however, this same child (having reached 15 years of age and being capable of reasoning) refuses the proposed medical measure, the medical professional is obliged to request consent from the legal representative (art. 19 para. 4 and 5 of the Law on the Rights of Patients, *Off. Gazette of the RS*, no. 45,2013 and 25,2019– other law).

[731] Art. 84 para. 1 of the CPC.

[732] Law on Registry Books, *Official Gazette of RS, no.* 20, 2009; 145, 2014 and 47, 2018, hereinafter also: the LRB.

[733] Art. 47 of the LRB.

father, and, if he is not able to, by another family member, i.e. a person in whose apartment the child has been born, or mother, as soon as she is able to, or the mid-wife, i.e. the physician who attended the childbirth, and, if there are no such persons or they are not able to report the birth - a person who has learnt about the birth. The childbirth is reported to the competent registrar within a 15-day period from the date of birth.

A number of persons, however, is not entered into the Civil Registration Births Book, and they represent the so-called legally invisible persons[734]. Bearing in mind the seriousness of the issue that they have been faced with, endeavouring to achieve some of their fundamental rights, the Ombudsman formally launched an initiative in 2012 to standardise a judicial procedure that would represent a response to their multi-decade issues.[735]

3.2. Normative framework for determining the time and place of birth

The Law on Amendments of the Law on Non-Contentious Proceedings[736] 2012, introduced the procedure for determining the time and place of birth into Serbian legal system. Although comprehensive research on the frequency of this procedure has not been conducted in practice, the available data show that today, almost ten years after introducing this procedure, we may assert that it was necessary.[737]

An actively procedurally legitimised subject for instigating a procedure for determining the time and place of birth is a person not registered in the Birth Records Book, and he cannot prove the time and place of his birth in the manner provided for with the regulations regulating keeping registration books, guardianship authority or any person having a legal interest thereof. Although the person who is not entered in the registration books does not have any legal, and consequently any business or procedural (non-contentious) capacity, he is allowed to participate in this procedure pursuant art. 7 of the LNCP, according to which the court may allow a participant without legal capacity to institute other actions in the proceedings in addition to the actions for which he is authorised under the law, for the purposes of exercising his rights and legal interests, if the court believes that he is capable of understanding the meaning and legal consequences of such actions. The circle of people who may be engaged in representation stipulated under art. 85 of the CvPC, and the manner of exercising the right to free legal aid is explained in the first part of the *Report*.

Every court having jurisdiction as to the substance of the matter is locally competent.[738]

In compliance with art. 71v, a regular proposal should contain data on the forename and surname of person whose birth is to be proven, sex, time and place of birth (if known), as well as the evidence[739] with which such facts can be proven or made probable[740]. In addition to these, it is also necessary to state other

[734] According to the data provided in the *Report on the status of legally invisible persons in the Republic of Serbia*, 2012, p. 7, the data on legally invisible persons are contradictory and their number vary between 2.500 and 20,000 people. The *Report* is significant as it exactly dates back to the year in which there was a change in the actual regulations.

[735] Op. cit., p. 9.

[736] Law on Non-Contentious Proceedings, *Off. Gazette of the SRS, no.* 25, 1982 and 48, 1988 and *Off. Gazette of RS, no.* 46, 1995– other law; 18, 2015 – other law and 85, 2012; 45, 2013 – other law; 55, 2014; 6, 2015 and 106, 2015 – other law, hereinafter also: the LNCP.

[737] According to the allegations of the Basic Court of K., stated in the proposal for solving a disputable statutory issue, at that moment, over 50 non-contentious proceedings were being conducted for determining the time and place of birth of persons of Albanian nationality born on the territory of Kosovo and Metohija. (Decision of the Supreme Cassation Court, 4/2019 dated 1.10.2019, Paragraf Lex legal data base).

[738] Art. 71b of the LNCP.

[739] In the aforementioned application for solving the disputed statutory issue, it is stated that "according to the findings of the Basic Court of K., the accompanying written documentation, which is the report of the child's birth, does not represent a valid evidence on the basis of which the fact of time and place of birth could be established, particularly because in the majority of situations, the same person is proposed as the witness; therefore, the submitted proposals should be dismissed as ungrounded, as the requirements prescribed by article 71đ of the Law on Non-Contentious Proceedings." (The Decision of the Supreme Cassation Court, Spp 4/2019, dated 1.10.2019, op. cit, Paragraf Lex data base)

[740] Before the Supreme Cassation Court, the verdict was rendered following the review, Rev 181/2015, dated 2.12.2015, in the procedure for determining the time and place of birth. Namely, the first-instance court decided, and the second-instance

facts facilitating the establishment of place and time of birth, such as data on parents and close persons, spouse, employment, change of residence. Third person requiring the establishment of time and place of birth must also state the facts that prove his legal interest.[741]

The solution of the legislator according to which the proponent is free of paying duty stamps and other procedural costs, ant the expertise costs paid out of the court's funds, should be commended. Namely, the results of the stated research show that the applicants are mainly persons coming from minority groups, who are often also marginalised social groups (Roma people, refugees), so paying the costs of such procedure may also affect their own or their family members existence, and it would also dissuade them from initiating proceedings.

The primary assistance in establishing the time and place of birth of a person is provided to the court by the Ministry of Interior and the registrar, whose task is to check whether there are data on the time and place of birth of the person that the proceedings are being conducted about, are in the records (art. 71g). The last paragraph is particularly important for the subject matter of this report, according to which, if there is a hint that the person whose birth is being proven, was a resident of a foreign country, the court renders the decision on the stay of proceedings until the needed information are obtained from the competent authorities of the foreign country, in line with the rules on the international legal assistance. Since this report deals exactly with the persons who are located in the territory of the Republic of Serbia, and they are not its nationals, expectedly, this rule is going to have major application. Yet, its reach seems to be limited - persons located in the territory of the RS mainly come from arm conflict affected territories, so the question arises to what extent the competent authorities will be able to deliver information on the person whose birth is being established, as well as how long it will take. Hypothetically, it could also be persons who fled their country of origin due to some kind of persecution, and on one hand, they do not wish their new residence to be known, and on the other hand, their parent country does not wish to "support" them in their search for new residence, and will not hurry in delivering documents.

In this procedure, holding a hearing is mandatory pursuant to art. 71d para 1 of the LNCP. The literature justifiably highlights the mutatis mutand application of the provisions of the LNCP on the rule of use of language and script in the proceedings, as well as the engagement of translator, since persons whose time and place of birth is being established, most frequently cannot speak the official language of the court.[742]. For persons who are not nationals of the Republic of Serbia, art. 71d describing the procedure of presenting evidence is significant. In order to prove the time and place of birth of a person, at least two adult witnesses must be heard, whose identity is established by presenting their public document with photo. Again, persons located in the territory of the Republic of Serbia, often do not have family or acquaintances who set off with them, but they are a part of a smaller/larger organised group interconnected only by their wish or need to start to live somewhere else. Using the imperative 'must', the legislator does not provide them with any alternative in the selection of means of evidence.[743]

court confirmed the decision that the applicant's proposal should be dismissed. The applicant, in his proposal, stated an exact date and place of birth, data on parents, and that he was entered in the Birth Records Book and the Citizenship Records Book of the country in which he was born, but during the war events he fled to Bosnia and Herzegovina, where he was registered as a refugee. The first-instance court stated that "'the proponent himself stated in the proposal when he was born and registered in the Births Records Book'; therefore, the requirements for rendering a decision that replaces the public document referred to in art. 71 of the Law on Non-Contentious Proceedings are not met". However, the Supreme Cassation Court found that the proposal was regular, and it should have been decided on meritoriously. (Paragraf Lex legal data base).

[741] When the birth registration book is destroyed due to war events, the person who was registered therein has a direct legal interest to file a proposal for establishing the time and place of birth, for rendering a decision replacing a public document, for the purpose of proving birth. (Ibid)

[742] G. Stanković, M. Trgovčević Prokić, *Komentar Zakona o vanparničnom postupku* (*Commentary of the Law on Non-Contentious Proceedings*), 2019, p. 373.

[743] In literature, it is implicated that the principle of free assessment of evidence is also affected in that way. (V. Boranijašević, Postupak za utvrđivanje vremena i mesta rođenja (Procedure for determining the time and place of birth), *Collection of Works of the Faculty of Law of Priština with temporary seat in Kosovska Mitrovica*, 2014, p. 18).

The enactment of terms of the Decision contains the forename and surname of the person whose birth is being proven, sex, day, month and year and hour of birth, place of birth, as well as the data on his parents, if they are known.

If the court cannot establish the exact date of birth, "it is considered that the person was born on 1 January at 00:01 hours in the year, based on the presented evidence", which might be assumed to be the year of his birth.[744] The court acts in a similar way if it cannot establish the place in which the person whose birth is being proven, was born. "[…] The place of birth is considered to be the seat of town, i.e., municipality, which is taken as the probable place of birth based on the presented evidence, and if the place of birth cannot be established in such a way, it is considered that the person whose birth is being proven was born in the place where he was found, i.e., where he resided at the time of filing the proposal for establishing the time and place of birth."[745]

For persons who are not nationals of the Republic of Serbia, art. 71z of the LNCP is significant, according to which the time period for deciding on the proposal, which equals 90 days in the regular flow of the matter, may be extended for 60 days more if the decision on the stay of proceedings was rendered because there were hints that the person whose birth is being proven resided in a foreign country.

The time period for stating an appeal against the decision on establishing the time and place of birth is eight days from the date of delivery, and the court must decide on the appeal within the instruction period of 30 days[746]

Also, the provision of art. 71k para 2. of the LNCP is interesting, according to which, the authority in charge of conducting the procedure for obtaining nationality of the Republic of Serbia is not linked with the final decision on the time and place of birth. Such a decision is, *inter alia*, problematic also from the aspect of constitutionality, since the Constitution of the RS in art. 145 para. 3 prohibits the non-contentious control of court decisions.[747]

Considering the entire procedure, it may be concluded that, although its introduction was necessary, there are still certain shortcomings in redacting the rules, the elimination of which would be fully applicable to migrants, stateless persons and asylum seekers.

[744] Art. 71e of the LNCP.
[745] Art. 71ž of the LNCP.
[746] Art. 71z of the LNCP.
[747] In more detail: V. Boranijašević, op. cit, p. 21.

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NATIONAL REPORT

Introduction

Trafficking in human beings represents a problem of global proportions affecting equally all countries - countries in political and economic transitions, undeveloped countries and developing countries, countries at war and post-conflict countries (occurring as countries of origin and transit of victims), but also economically developed countries (as countries of destination). The terms 'country of origin', 'country of transit' and 'country of destination' are not absolute categories - one country may, in concrete cases, have various roles. Women, children and men are subjected to various forms of maltreatment and abuse violating their fundamental human rights. In search for a job and better life, victims fall in an enchanted circle out of which there is no exit most frequently. They are forced, deceived or lured into prostitution, as well as any other form of work or services, held in houses, or in farms forced to work against their own will. Common factors in all the situations of contemporary slavery are the elements of force, deception or coercion, which are used for the purpose of controlling people in a very perfidious, and very often, subtle manner.

As a form of organised crime, human trafficking is also performed with the aim of rapid and enormous enrichment of criminal groups and individuals. Human traffickers generate billion of dollars every year, exploiting million of people worldwide (approximately 150 billion of dollars a year, out of which 99 billion comes from commercial sexual exploitation). According to the report of the International Labour Organisation (ILO) of September 2017, 24.9 million people are victims of modern slavery. Out of which, 16 million (64%) were exploited as manpower, 4.8 million (19%) - exploited sexually, and 4.1 million (17%) - exploited in forced labour imposed by the state. Despite ever increasing awareness of this crime, human trafficking is still insufficiently reported - due to its covert nature, misconceptions of its definition and a lack of awareness on its indicators.

1. Term 'trafficking in persons'

The *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the United Nations Convention against Transnational Organised Crime 2000, defined the term trafficking in persons comprehensively for the first time.

Article 3 of the *Palermo Protocol* provides for that trafficking in persons means: (a) the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position ofvulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes, at a minimum: (a) the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation

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shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article; (g) "child" shall mean any person under eighteen years of age.[749]

The most important element of trafficking in persons -exploitation, i.e., enslavement, differs from smuggling from migrants, implying the procurement of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident, in order to obtain, directly or indirectly, a financial or other material benefit.[750] Smuggling of migrants is a narrower term than the term smuggling of people, and it may represent a phase in the process of human trafficking, but it can easily grow into trafficking of persons, bearing in mind the vulnerability of illegal migrants and that they must turn to illegal markets for documents and employment, as well as the interconnectedness of smugglers with various agencies mediating in finding a job at the illegal labour market. Also, smuggling people always implies border crossing, whereas human trafficking may have a character of transnational crime, but it may also be committed within the borders of a country.[751]

2. Factors of trafficking in persons

Human trafficking is a dynamic phenomenon the roots of which go a long way back in history, and it has only changed and supplemented its cruel and unscrupulous content and character over time. It is not possible to view the issue of human trafficking isolated from the causes prompting its occurrence - macro-socio-economic, as well as micro social ones. Some of obvious causes of human trafficking are poverty, unemployment, economic and social differences between countries, migration factors, level of human development, rule of law, gender inequalities, discrimination at labour market, regional militarisation, organised crime, corruption, family violence, lack of adequate education and information, family milieu, etc.[752]

The most important macro factors of human trafficking are: political destabilisation, war, economic sanctions and militarisation (local context); economic liberalisation, political transition followed by opening borders, but also by restrictive immigrant policy (regional context); market globalisation, communication, technology, deepening the gap between rich and poor countries, expansion of migration and marginalisation of migrants, expansion of sex industry and the commodification of sexuality, as well as a general growth of illegal markets and incorporation of informal commercial forms into formal ones.

Micro factors of human trafficking are classified into those affecting crime and those causing victimisation. Micro factors of crime are unemployment, reduction of opportunities to earn legally, profit, supply of "work" within illegal market, demand for "products" that can be illegally offered, differences in legal regulations, differences in risk, as well as one's own victimisation. Micro factors of victimisation can be classified into pushing factors and pulling factors. Pushing factors exist in the victims' countries of origin. They respond to those factors affecting migrations and women becoming prostitutes (poverty, unemployment, war victimisation, refugeeism, as well as gender discrimination, family violence and sexual violence). Pulling factors exist in the countries of destination. They lower down inhibition and alertness of already vulnerable persons (employment opportunities, myths of good life and easy employment and earning in the countries of destination, presence of military and international organisations, i.e., the supply of jobs in sex industry, etc.).[753]

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[749] The Law on the Ratification of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto, *Off. Gazette of the FRY - International treaties*, no. 6, 2001.

[750] *Protocol against the Smuggling of Migrants by Land, Sea and Air*, article 3 paragraph (a), Palermo, 2000

[751] Slobodanka Konstantinović Vilić, Vesna Nikolić Ristanović, Miomira Kostić. *Kriminologija (Criminology),* Niš, 2012, p. 206.

[752] Žarko Bjelajac, *Трговина људима – Злочин против човечности (Trafficking in Persons - Crime against Humanity*), Faculty of Law for Commerce and Judiciary of Novi Sad, Novi Sad, 2014, p. 140.

[753] Slobodanka Konstantinović Vilić, Vesna Nikolić Ristanović, Miomira Kostić. *Kriminologija (Criminology),* Niš, 2012, pp. 207-208.

3. Phases in committing human trafficking

Human trafficking takes place in phases. The first phase is luring (enticing, recruitment); the second phase is transportation (transfer, selling) of the victim; the third - final phase is exploitation.

In the recruitment phase, the victim is drawn into a human trafficking chain. This most frequently happens through the abuse of trust, internet, love, friendly and family ties, and the misuse of information, but also through abduction. Victims are most frequently recruited through false business and other offers, usually by a person known to the victim, simulating a love relation - when a man (lover boy), once he has gained trust, invites the girl to go together to another country or another city to start a life together. Common methods of recruitment are also deceiving ads for job in media (news, internet, social networks), alleging these jobs are better paid and offer better conditions for work than in the country where the potential victim lives. Sometimes it happens that the victim's family, due to hard life circumstances, poverty, or "customs", sell their child.

Transfer represents the transportation to the place of exploitation, either inside the country, or outside the borders of the victim's country of origin. When transferring the victim to the final destination often false (forged) documents are used, but the use of original personal documents is not excluded.

The final exploitation phase implies the abuse of victims. Children are involved in begging chains, forced to commit criminal offences, and can also be exposed to sexual exploitation. Female persons are most frequently exploited sexually and for labour, while adult men are most frequently abused for labour under the cruellest conditions. In order to exercise full control and prevent disobedience and escape by the victim, the traffickers apply various methods including: taking away personal documents, causing fear and using force, blackmail, also threats and applying force to the victim's family members are not rare.

For each of these phases, there may be a special criminal network, and victimisation can have various forms. Countries, with regard to the scope of presence of different phases of human trafficking can be classified in the countries of origin, countries of transit and countries of destination.[754] Most commonly, countries in development and undeveloped countries, poor, the so-called "third-world" countries, countries at war and politically unstable countries appear as the countries of origin/transit; while economically developed and rich countries are most commonly countries of destination. However, this does not have to be the rule, because every country may appear as the country of origin/transit/destination at any moment.

4. Victims of trafficking in persons

Although some groups most frequently appear as victims of trafficking in persons, the fact is that the victim can also be anyone - both men and women, both boys and girls, regardless of their origin, age, nationality, education, social status or other characteristics

According to data and previous experience, there is no a profile of victim, i.e., specific characteristics on the basis of which victims of trafficking in persons are recognised.[755] Although these are usually persons from marginalised and deprived social and economic surroundings that does not mean that others cannot be victims. There are also prejudices that trafficking in children is increasingly present, and according to some interpretations - even traditional in Roma community; however, the collected data refute this prejudice. Previous experience of family violence often appears as a common characteristic of human trafficking victims. Even 75.48% human trafficking victims were previously exposed to some form of violence (most frequently, to family violence).

Human trafficking can be international/cross-border and internal/local. Thus, the victims are not always aliens or illegal migrants. Human trafficking can also happen within the borders of a country, and people

754 Roger Britton, Almir Maljević, *Trafficking in Persons and Smuggling of Migrants*, Beograd 2010, p. 8.

755 ASTRA is a non-governmental organisation committed to the eradication of all the forms of exploitation and trafficking in human beings, particularly in women and children, as well as to the provision of support in search for missing children.

can be recruited and exploited in one's own country. In the recent years, Serbian nationals has made up the majority of victims of human trafficking identified in Serbia.

Most commonly, victims of trafficking in persons are young girls and women, poor and unemployed persons, persons with little life experience, children, juvenile girls/boys who ran away from home, homeless people, blue-collar and other workers. One becomes a victim of trafficking in persons most frequently through ads for attractive jobs abroad, and new acquaintances promising jobs, marriage and careless future.

5. Human traffickers

There are as many types of human traffickers as there are ways of exploiting people. They lure and catch people in the trap of forced labour and prostitution by using different methods, from brutal, such as abduction and use of physical and psychological violence to control them, to coercion to labour, or commercial sexual exploitation, to subtle methods of blackmail or even seduction of the victim.

The most diverse men and women have their role in a human trafficking chain - from recruitment to exploitation, and very often these are confidants, relatives, even close family members, as well as the people who the victim has known for a long time (partners, neighbours, of different age, marital and socio-economic status, sometimes related to the victim). On the other hand, exploitation may also be done by an unknown person whom the person met looking for a job, education opportunities in another country, or another city, or marriage.

A broad range of criminals, including pimps, family organisations, small companies, criminal networks and international criminal organisations - are possible human traffickers. Human traffickers and their victims are often of the same nationality, ethnicity and cultural affiliation, enabling traffickers to better understand and use the vulnerability of victims.

6. Forms of trafficking in persons

Human trafficking is manifested in different ways; therefore, it is hard to provide a universal classification of the forms of its manifestations. There are numerous criteria on the basis of which the forms of trafficking in persons can be classified.[756] According to the degree of danger they carry with them, we distinguish between common and criminal trafficking. Common (traditional, 'false') human trafficking includes all those types of human trafficking that are an element and part of customs, culture, tradition and beliefs of people and social groups, where the aim is not to exploit another person and there is no serious and real intention to gain any unlawful benefit, so that they do not have a criminal character and they are not criminal offences. For example, the purchase of a bride belongs to a customary trade in human beings in Serbia. Criminal trafficking in persons represent all those manifestations of human trafficking characterised by unlawfulness and prohibited by the Constitution, law and international acts. Considering the danger they represent for the protected social values, customary-criminal, and individual (non-organised) and organised forms of human trafficking can be distinguished.

The next classification of human trafficking is according to the aspects of exploitation. First, there is labour exploitation, where victims are forced to unpaid or insufficiently paid labour. This type of exploitation is one of the most represented in practice as labour force and abilities of victims are used, and the opportunities of using labour force are very wide. It occurs in several individual aspects, such as agricultural exploitation, industrial exploitation, exploitation in service sector, exploitation in households, and combined exploitation.

The next type is sexual exploitation. That is in fact exploitationon the basis of coercion to prostitution, then involuntary participation in the production of pornographic materials, as well as sexual servitude.[757]

[756] Saša Mijalković, Trgovina ljudima kao oblik organizovanog kriminala - osnovna fenomenološka obeležja (*Trafficking in persons as a type of organised crime - basic phenomenological characteristics)*, Nauka, bezbednost, policija (Science, security, police), no. 1, Vol. 11, pp. 113-114.

[757]*Biljana Lajović* Danijela Barjaktarović Biljana Radosavljević, Priručnik za obrazovni sistem - zaštita učenika od trgovine ljudima (*Manual for the educational system - Protection of students against human trafficking)*, Beograd, 2016, p. 16.

This exploitation appears in several various types and, depending on it, victims can be women, men and children. It manifests as *non-commercial* (a situation is implied where the victim is purchased for the satisfaction of personal needs, or the need of close people, without a direct gain of financial benefit), *commercial* (designates the exposure of victims to mass exploitation by the known or unknown persons aimed at gaining income: prostitution, pornography, and the so-called "sex-tourism"), and *combined* sexual slavery.

Illegal adoption of children represents an aspect of exploitation that is established over a child and can be manifested in two ways. "False" exploitation occurs where a parental relationship is established between illegal adoptive parents and children, but the preliminary procedure is omitted, which guarantees the protection of the rights of the child, and, since the care of illegal adoptive parents about the child corresponds to usual parental care in everything, it is very hard to suspect it to be an illegally adopted child. Three is "true" exploitation where, in addition to illegal adoption, the child is also exposed to various forms of maltreatment and exploitation (sexual and labour abuse, begging, etc.). Illegal adoptive parents reach an agreement with the members of organised groups regarding the purchase of child and its price, where they can also state the preferred physical characteristics of the child (sex, age, etc.). Human traffickers procure children stealing them from maternity wards, kindergartens, schools, or purchasing them from parents.

Forced marriage is such a type of human trafficking where the victim is exploited for a role of a spouse/partner in a marriage entered into forcedly, no matter if it be a formal marriage or an informal life community. Such exploitation is interrelated with the commitment of other criminal offences under duress (rape, coercion to begging, perpetration of crimes, etc).[758]

Trade in organs and parts of body represent a type of slavery where the victim is exploited by removing his organ from the organism, or a part of body. Depending on whether there is the consent of a donor of organ/a part of body, there is a voluntary human organ/ parts of body donation, and forced removal of human organs, or parts of body. Considering the aim, i.e., the purpose of removing an organ/a part of body, there is a difference in removing organs or parts of body for the satisfaction of healthcare needs of a person or removing organs or parts of body for scientific and research purposes.[759] Organ or tissues are sold for transplantation, or to medical institutions for laboratory research and other purposes.

Forced participation in armed conflicts is an aspect of human trafficking within the framework of which victims are exploited by forcing to participate in armed fight: directly (direct fight) and indirectly (medical corps, performing construction work, transport of equipment, etc.).

Coercion to perform certain criminal activities implies forcing the victim to execute specific unlawful acts. Here, there is also an economic component highlighted, since the unlawful material gain acquired by committing a criminal offence benefits the perpetrator of coercion. According to the degree of social danger, inherent in crime carried out by victims of trafficking in persons, we distinguish coercion to committing offences and coercion to commiting crimes.

Human trafficking in a narrow sense is a form of exploitation where the victim does not remain in the possession of the person who recruited and transported him and there is no any other form of exploitation of the victim by the current "owner", apart from selling the person and making illegal profits. The victim is sold to another person, or an organised criminal group, and is exposed to further exploitation by the new "owner".

[758] Biljana Lajović et al., op. cit., p. 17.

[759] Saša Mijalković, *Vidovi i tipovi trgovine ljudima, Temida (Aspects and forms of trafficking in human beings),* 8(1), 2005, p. 41.

7. Trafficking in persons in Serbia legislation

Several laws and numerous by-laws, several state strategies and action plans constitute the basis for the institutional coping with the issue of human trafficking and, therewith, setting up and operating the National Mechanism for Identification, Assistance and Protection of Victims in the Republic of Serbia.

First, the Constitution of the Republic of Serbia 2006 touches the issue of human trafficking with the provisions of article 26, prescribing that "No person may be kept in slavery or servitude. All forms of human trafficking are prohibited. Forced labour is prohibited. Sexual or financial exploitation of person in unfavourable position shall be deemed forced labour".

The Criminal Code of the Republic of Serbia, in the Chapter Thirty-Four - Criminal Offences against Humanity and other Right Guaranteed by International Law, incriminates the crime of human trafficking. The act of committing the basic form of this criminal offence is recruiting, transportation, transfer, handing over, purchase, intermediary in sale, hiding or holding another person, by force or threat, deception or maintaining deception, abuse of authority, trust, dependency relationship, difficult circumstances of another, retaining identity papers, or by giving or accepting money or other benefit, with intent to exploit such person's labour, forced labour, commission of offences, prostitution or other type of sexual exploitation, begging, use for pornographic purposes, establishing slavery or other similar relationship, for the purpose of removing organs or body parts, or for service in armed conflicts. For this criminal offence, the punishment of imprisonment of three to twelve years is provided for.[760] In addition to the basic form, this criminal offence has numerous qualified forms: if it is committed against a minor; if it resulted in severe bodily harm, or in death of a person; if it is committed by a group, in the form of profession, or by an organised crime group. Abusing position of a victims of trafficking in persons is also incriminated in article 388 of the CC.

If this form of criminal offence is committed to a minor, the perpetrator will be punished by the penalty prescribed for that offence even if there was no use of force, threat or any of the other mentioned methods of perpetration. A special form of committing this criminal offence occurs if the offence specified in para 1 and 3 of art. 388 resulted in death of a person. In that case, punishment of the perpetrator with imprisonment from five to fifteen years is provided for; and in case it resulted in death of one or more persons, a special minimum of ten years is provided for.

Engagement in human trafficking or committing this criminal offence by a group is also considered a serious form, and is specially incriminated. The foreseen penalty for this offence is minimum five years. Additionally, the legislator foresees the perpetration of this criminal offence by an organised crime group, where the penalty of minimum 10 years is threatened.

The law clearly describes and itemise the acts to be considered a criminal offence of human trafficking, and then it also states the goals that they are performed for, i.e., the type of exploitation emanating from the mentioned offences. The Criminal Code also specifies the penalty for persons who have known or could have known about committing acts from this criminal offence, and its incrimination is also not affected by the eventual the victim's consent to be exploited.

Besides the criminal offence of human trafficking, the criminal law framework also implies related criminal offences: Trafficking in minors for adoption (article 389 of the CC), Holding in slavery and transportation of enslaved children (article 390 of the CC). Smuggling people is provided for as a special criminal offence in article 350 of the CC - Illegal crossing of state border and smuggling of people.

In a separate part of the CC, the criminal offence of trafficking in children for adoption. This criminal offence is prescribed in compliance with a special protection of children by the UN Convention on the Rights of the Child. According to the legal definition, this criminal offence occurs when the perpetrator abducts a child under sixteen years of age for the purpose of adoption contrary to laws in force or adopts

[760] Article 388 of the Criminal Code of the Republic of Serbia, *Official Gazette of the RS*, no. 85, 2005; 88,2005-corr.; 107, 2005 – corr.; 72, 2009; 111, 2009; 121, 2012; 104,2013; 108, 2014; 94, 2016 and 35, 2019.

such a child or mediates in such adoption or for that purpose buys, sells or hands over another person under sixteen years of age or transports such a person, provides accommodation or conceals such a person. For this criminal offence, the punishment of imprisonment of one to five years is provided for. Its more serious form occurs when anyone engages in such activities, or, if the offence was committed by a group - where imprisonment is minimum three years; or by an organised crime group - imprisonment of minimum five years.

Prescribing the criminal offence of holding in slavery and transportation of enslaved people also contributes to the prevention of one form of human trafficking. This criminal offence occurs when the perpetrator, violating the rules of international law, places a person in similar position, or holds a person in slavery or similar position, or buys, sells, hands over to another or mediates in buying, selling and handing over of such person or incites another to sell his own freedom or freedom of persons under his support or care. For this form of the offence, imprisonment from one to ten years is prescribed. In the event that the offence is committed in the transportation of a person being hold in slavery or a similar relationship from one country to another, the perpetrator will be punished with imprisonment from six to five years, and, if one or the other offence is committed to a minor, the perpetrator will be punished with imprisonment from five to fifteen years.

Criminal offence of human trafficking is set forth among other criminal offences in art. 4 item 17 of the Law on the Prevention of Domestic Violence[761], bearing in mind that the criminal offence of human trafficking is classified in the competence of higher court before which the public lawsuit is represented by the higher public prosecutor's office, art. 26 paragraph 4 of the Law on the Prevention of Domestic Violence foresees that: “In case the higher public prosecutor’s office is competent for the prosecution of the perpetrators of the criminal acts set forth in this Law, the higher public prosecutor shall appoint his deputy, who has undergone specialised training, to participate in the operation of the group and to preside there over”.

Besides cooperation aimed at the prevention of family violence, it is foreseen that the Law on the Prevention of Domestic Violence is also applied to the cooperation of the state authorities and institutions in criminal proceedings for other crimes contained in art. 4 of this Law, representing its great significance, since it promotes multi-sector cooperation between all the authorities obliged to assist the victim.

Viewed through the prism of the Law on the Prevention of Domestic Violence, the criminal offence of human trafficking referred to in art. 388 of the CC implying that first liaison person will be designated (art. 24 of the Law on the Prevention of Domestic Violence), and this in any higher public prosecutor’s office, police administration, higher court and welfare centre. These persons exchange information and data important for detection, prosecution and trial for the criminal offence of human trafficking every day, as well as for the provision of protection and support to victims of human trafficking.

The law on juvenile perpetrators of criminal offences and criminal law protection of juvenile persons[762], *inter alia*, it also contains the provisions on the protection of juvenile persons harmed in the criminal procedure. These provisions also relate to the protection in judicial proceedings when a juvenile person has been the victim of trafficking in persons, and this protection is mirrored in special rules during the conduct of judicial proceedings. Therewith, the authorities conducting the proceedings where the victim is a juvenile person must possess necessary knowledge in the area of the rights of the child and criminal law protection of juvenile persons, and the same provision also refers the Plenipotentiary of the Claimant.

Pursuant to the Law on Aliens[763], on the basis of the status of an assumed victim of human trafficking, foreign citizens may be granted temporary stay in the territory of the Republic of Serbia (longer than 90 days, and up to one year the longest possible), and if needed - funds for subsistence. However, this aspect

[761] *Official Gazette of the RS,* no. 94, 2016.
[762] *Official Gazette of the RS,* no. 85, 2005.
[763] *Official Gazette of the RS,* no. 24, 2018 and 31, 2019.

of protection is conditional, since the law presupposes eligible interests for conducting criminal proceedings against perpetrators of human trafficking, and enabling such protection only afterwards, i.e., such protection is deprived to victims if the interest of public order preservation requires it.

Certain provisions oft he Law on Asylum and Temporary Protection[764] are also referring and applied to human trafficking cases. This law provides protection against revictimisation and, consequently, provides for that "No person shall be refouled to a territory against his will where his life or freedom would be threatened for reasons of race, sex, language, religion, nationality, membership of a particular social group, or political opinions"[765], thus in that sense, this law also provides protection against re-trafficking. The provisions on the prohibition of refouling does not refer to persons suspected to pose danger for the country's security on reasonable grounds.

Among by-laws, it is necessary to mention the *Guidelines for the Implementation of the Law on Foreigners*, which, *inter alia*, defines precisely the grounds and duration of stay of foreign citizens out of humanitarian reasons, and it contains a particularly significant clause on non-sanctioning illegal entry of persons who are victims of human trafficking into the territory of the Republic of Serbia. The *Operation Manual for the Agency for Coordination of Protection of Victims of Human Trafficking*[766] is also very important, which specifies the tasks and responsibilities of the Agency; as well as the *Cooperation Agreement between the ministries of interior, finances, justice, health, education, labour and social policy in the area of combating human trafficking*, which presupposes setting up a National mechanism for a joint and permanent combating human trafficking by these ministries, as well as the protection of its victims.

It is necessary to highlight the significance of several strategies and associated action plans. The *Strategy for the prevention and combating human trafficking 2017–2022*[767] lists several levels that must be acted upon for the realisation of the goals set: institutional framework, prevention, assistance, protection and reintegration of victims, international cooperation, and follow up and evaluation of results. The *National Action Plan for Combating Human Trafficking for period 2019 to 2020*[768] states and analyses various objectives - raising awareness on the issue of human trafficking, risk factor reduction, improving victim identification.

8. Statistical data

In 2019, an investigation was initiated for 23 cases related to the criminal offence of human trafficking against 47 defendants - against thirty-three for human trafficking aimed at sexual exploitation, against fourteen suspected for forced labour. Comparing to 2018, this number is almost identical, as investigation was initiated against 22 cases but with significantly less defendants (20). It was about sexual exploitation in 18 cases, and about forced labour in the remaining ones. In 2019, criminal proceedings were also continued from the previous years, against 49 defendants. In total, 15 defendants were convicted for trafficking in human beings aimed at sexual exploitation. In 2018, 18 defendants were convicted for trafficking in human beings aimed at forced labour; and in 2019, there were no convictions. During 2019, prison sentence was pronounced against 14 defendants and one defendant was sentenced to pay a fine. The imposition of mild prison sentences was observed. During criminal proceedings, for these crimes, there is a tendency towards prejudice against the victims, as well as bias in favour of the defendants.[769]

During 2019, 36 victims of human trafficking were identified. This number represents a noticeable fall comparing to 76 identified victims during 2018. There were mostly victims of sexual exploitation (23).

[764] *Official Gazette of the RS,* no. 24, 2018.
[765] Article 6 of the Law on Asylum and Temporary Protection, *Official Gazette of the RS*, no. 24, 2018.
[766] Text is available at: https://www.astra.rs/wp-content/uploads/2017/11/Uputstvo-o-radu-Sluzbe-koordinaciju-zastite-zrtava-trgovine-ljudima.pdf; accessed on 15. 11. 2021.
[767] *Official Gazette of the RS,* no. 111, 2006.
[768] Text is available at: http://atina.org.rs/sites/default/files/NPA_2009-2011_srp.pdf; accessed on 15. 11. 2021.
[769] https://rs.usembassy.gov/wp-content/uploads/sites/235/Izvestaj-o-stanju-ljudskih-prava-u-Srbiji-za-2020.pdf; accessed 15. 11. 2021.

There were five victims of various victims of exploitation, four were victims of forced begging; there were also three victims of forced labour identified and one victim of coercion to committing a criminal offence. Out of total number of victims, 24 were children. According to sex structure, 29 were women and seven men. Two victims were foreign nationals.

9. Conclusion

Trafficking in human beings represents the most extreme form of human rights violation. Victims of trafficking in persons are deprived their constitutional right to life, work and education, dignity, safety, equality, freedom of movement, health, etc. Primary and secondary consequences arising from the human trafficking act itself have a broad range of negative effects. At the individual plan, consequences occur in a form of development disturbances, diseases, physical injuries, death, and mental anguish and escape from society; and at the family plan - through the phenomenon of a cycle of violence, because, when they grow up, children victims of human trafficking can also become bullies and organisers of trafficking. Secondary consequences arise from non-solving or poor solving this serious social issue. Human trafficking is a criminal industry that, as well as drug and arms trafficking, is based on the principles of supply and demand. It is prompted by the demand for cheap labour, services and commercial sex. Human traffickers are those who apply force, fraud or coercion to coerce victims in a desire to profit from the existing demand.

Two strategies must be implemented to act against organised criminal groups engaged in human trafficking, and for the purpose of breaking down their structure. The first one concerns the policy of sanctioning and imposing tougher penalties and the other - confiscation and attachment of property. The result of both strategies should be demotivation and disincentive for engaging in this type of criminal activity.

It is a fact that a significant part of human trafficking cases has a transnational character, and victims, perpetrators and evidences are situated in two or more countries; consequently, criminal proceedings take place within different jurisdictions. This imposes the necessity of international cooperation in combating this phenomenon. Human trafficking is one of criminal offences that is very difficult to prove in the majority of cases. Insufficient preliminary investigation procedure eliminates the chance of success in combating this form of crime. In this case, the role of witnesses and victim witnesses is particularly expressed in the procedure of providing evidence.

Raising the level of collective awareness on human trafficking, as an anti-civilisation phenomenon, is one of the ways to suppress this criminal offence. Permanent education of the young on human trafficking is also very significant as it enables to detect warnings about the potential danger of human traffickers in a timely manner. Therefore, children in primary and secondary schools should acquire necessary knowledge on all relevant aspects of human trafficking.

Regarding the situation in the Republic of Serbia, reportedly the regulatory framework is adequate, and the number of criminal proceedings for human trafficking has increased. Additionally, reception centres for victims of trafficking in persons have been set up. But the fact that less victims were identified comparing to the previous period is interpreted as making insufficient efforts in view of proactivity. Inadequate protection of victims during and outside criminal proceedings was highlighted as a particularly pronounced problem. Therefore, it is necessary to make concrete steps in providing better conditions for identification and protection of victims. Besides, it is necessary to make efforts aimed at further reduction of such a dark number of criminal offences, and in terms of prevention - to tighten the criminal policy and change the practice of rendering mild criminal sanctions.

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NATIONAL REPORT

1 Introduction

The issue of administrative legal regulation of the status of forced migrants is very complex. In order to piece together a full "picture", the authors often had to exit the framework of the Law on Asylum and Temporary Protection, the application of which was at the primary focus of the project assignment, and to sail into the waters of general (primarily procedural) status of foreigners in the Republic of Serbia. Also, it is necessary to "fit together" all these norms into the context of the General Administrative Procedure Law, as well as the general principles and tenets of the domestic legal order.

The project "assignment" also affected the structure of the paper itself. At the beginning, the issues that were in the focus of administrative lawyers and researchers from all the faculties participating the project were processed; and these are, primarily, the issues of participants in the procedure of seeking asylum, their specific procedural legal status and a detailed analysis of various types of parties, with special emphasis on particularly vulnerable categories of persons. Then, the procedural specifics of asylum seeking procedure itself and the specifics of decisions made at the end thereof. A special part is dedicated to administrative and judicial protection of the rights of parties in such procedures, and to the basic problems arising therein. The part that should be in the beginning of the paper in some other circumstances, took up its last part. This part has a more general character dealing with issues arising from the specifics of the relationship between the General Administrative Procedure Law, as a *lex generalis*, and the provisions of a *lex specialis* in the area of the stay of foreigners in the field of regulating the stay of foreigners in the Republic of Serbia. This part of the paper was written by Miloš Prica, while the rest of this paper is, mainly, the result of an analysis by Dejan Vučetić. In the first part of this paper, generally, the classical normative and legal method is applied, with its inherent methods of lingual and logical interpretation. The author of this part, however, wanted to take a step further and to investigate how these norms are actually applied in practice, in real life. Reaching such a conclusion was only possible by applying some of the empirical methods in law, and here the interview method was applied accordingly. In the second part, the philosophical and legal method and a teleological and systemic analysis were applied in order to answer the question of the relationship between systemic, general and special laws in this area. The research results were provided further in the text, and the most important ones, in their summarised from, are presented in its conclusion.

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2 Procedural aspects of regulating the stay of migrants in the territory of the Republic of Serbia

2.1 Participants in the procedure, specifics of their position, and special procedural and receiving guarantees for these categories of particularly vulnerable persons

2.1.1 Procedural position of the party, categories of particularly vulnerable persons, and special procedural and receiving guarantees for these categories of persons.

Generally speaking, all persons who have sought asylum, the so-called asylum seekers, have the procedural position of a party in a procedure pursuant to the provisions of the Law on Asylum and Temporary Protection[772]. The same Law also sets the term of refugee, as a special category of foreigners "who, owing to well-founded fear of being persecuted for reasons of race, sex, language, religion, nationality, or membership of a particular social group, or political opinion, is outside the country of his origin, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, as well as a stateless person who is outside the country of his habitual residence, and who is unable or, owing to such fear, unwilling to return to that country" (the provision of article 2 paragraph 6). However, all the key laws in the area of treatment of foreigners, on border and asylum, provide for, at the level of principle, the principle of a special care on special categories of persons. The Law on Asylum sets out only individual types of minor persons as special categories (the provision of article 2 paragraphs 13- 5) and the members of families of asylum seekers (the provision of article 2 paragraph 12). Therefore, for determining the term of particularly vulnerable persons, the Law on Foreigners[773] should also be taken into consideration, which provides for special categories of persons and explicitly states these categories in article 3 (paragraph 1 item 24). According to this norm, particularly vulnerable persons are: "persons with disabilities, elderly, pregnant women, single parents with minor children, victims of torture, rape or other severe forms of violence (including domestic violence, intimate partner violence that can be caused by sex, gender, sexual orientation and gender identity), victims of trafficking in human beings, persons faced with threat of torture, inhumane and degrading treatment or punishment in their country of origin because of their sexual orientation or gender identity, minors and unaccompanied minors". Also, in the provision of article 41, it is set out that the criteria for setting these categories are established by the Government in its act. As the authority competent for determining whether a person can be considered to be a particularly vulnerable one, first of all, the Commissioner for Refugees and Migrations should be distinguished, as the one also providing everything concerning the receiving conditions at the same time. Since these persons are defined at the level of principles, this definition is binding for all the participants in an administrative procedure, particularly for the Asylum Office (first instance authority) and for representatives of the Ministry of Interior (who are the first to come into contact with migrants and persons declaring their intention to seek asylum). What is a significant - factually, and consequently - legal issue, is how these categories of persons are determined; and what is not prescribed by the law itself, but is left to the assessment of the acting authorised officer and to the decision of the Government. In that sense, some different, although non-binding, guidelines for work in practice, developed by the Commissioner for Refugees and Migrations, assisted by foreign experts and following the example of the European Asylum Support Office (EASO), in order to establish what the category in question is.[774]

Minors - who are, as we have stated, a special category of party, are additionally protected by regulations according to which there are authorised officers with the Ministry of Interior, specially certified for work

[772] Law on Asylum and Temporary Protection, *Official Gazette of the RS*, no. 24, 2018.

[773] Law on Foreigners, *Official Gazette of the RS*, no. 24, 2018 and 31, 2019.

[774] The major part of data related to acting of administrative authorities in practice was obtained by applying the method of interview. An interview was conducted with Mrs MiroslavaJelačićKojić, a legal analyst and programme manager of the Centre for Migration of the Group 484 on 17 May 2021. According to the allegations from this interview, trainings were conducted on the subject of particularly vulnerable categories of persons, in order to train such acting officers to differentiate the categories of particularly vulnerable persons, but no data have been available yet on how effective these trainings were.

with minors. Within the framework of the internal organisation of this Ministry, there must be at least one officer specially certified for work with minors in each organisational unit of the Ministry.[775] The major challenge lies with persons who have been victims of violence, maltreatment, negligence, as in these situations, the process of establishing their vulnerability is far more complex than in some obvious situations when parties are, say, single mothers, persons with disabilities and persons having relevant health issues. The very procedure of determining and the moment when such knowledge can be acquired are very complex issues. What has to be done is to identify such status of theirs within the shortest possible period.

2.1.2 Representatives of collective interests as possible participants in these procedures.

Although the General Administrative Procedure Law in the provision of article 44 paragraph 3 provides for that "representatives of collective interests and representatives of broader public interests, organised pursuant to regulations, can have the capacity of a party to administrative procedure if the outcome of administrative procedure can affect the interests they are advocating for", they do not participate in these procedures as the right to asylum is an individual right.

2.1.3 Specifics in regard to representatives and attorneys

Although the Law on Free Legal Assistance[776] provides for, by the provision of article 9, that free legal assistance is provided by the legal profession and by the legal assistance services in local self-government units, the same article makes an exception in regard to asylum and discrimination, so paragraph 2 says that "Associations may provide free legal assistance only based on the provisions of the laws regulating the right to asylum and non-discrimination." According to the data obtained in the interview, the organisations that most frequently provide this type of assistance in the asylum seeking procedures are Belgrade Centre for Human Rights, Centre for the Protection and Assistance to Asylum Seekers, Humanitarian Centre for Integration and Tolerance (for the territory of the AP Vojvodina) and the Balkan Centre for Migrations. One broader spectre of organisation deals with the so-called legal information (on basic rights of forced migrants etc.), but these organisations rarely get involved in the procedure itself. There are also very rare situations in which the role of attorney is taken over by lawyers, and these are mainly the so-called more visible cases". The strictness of the requirements for representation is further weakened in practice by meeting parties halfway, so certified powers of attorney are not always insisted upon.

2.1.4 Seeking asylum at a border crossing as an exception from the rule

In practice, it rarely happens that persons seeking asylum in the Republic of Serbia or those trying to enter the territory of the Republic of Serbia, come to a border crossing. At a border crossing, asylum is generally sought for at airports, i.e. border crossings for exercising air traffic (in priority Nikola Tesla Airport Belgrade), when persons express their intention to seek asylum at these crossings. According to the data obtained in the interview, there is no information about the possibility to seek asylum at the Nikola Tesla Airport Belgrade, nor there is any organisation of civil society that is permanently present there, but the person is given a possibility, if he wants to seek asylum or assesses that he needs certain legal information, to contact some of the civil society organisations, or his legal attorney (lawyer). In certain situations, a translator is also provided, but it, also, is not a continuous practice, it rather depends on the circumstances of the case and, very often, the authorised officers (of the Ministry of Interior) themselves insist on the presence of a translator, in priority, for information to be collected thereof. The Ombudsman of the Republic of Serbia pays a great deal of attention to the situation at Belgrade Nikola Tesla Airport, within

[775] According to the data from the web page of the Ministry of Interior (http://arhiva.mup.goversusrs/cms_lat/decaipolicija.nsf/index.html?OpenFrameSet&Frame=Centar&Src=%2Fcms_lat%2Fdecaipolicija.nsf%2Fo%2520nama%3FOpenPage%26AutoFramed), there were such persons 1800 in 2011. Their powers are regulated in accordance with the Law on Police and the Law on Juvenile Criminal Offenders, and the special Rulebook on the manner and conditions of applying police powers to minor persons (*Off. Gazette of the RS, no.* 83, 2019).

[776] Law on Free Legal Assistance, *Off.Gazette of the RS*, no. 87, 2018.

the framework of the national mechanism for the prevention of torture (NPM). The Ombudsman's officers regularly visit Belgrade Nikola Tesla Airport and publish reports dedicated to such proceedings at the airport, which is a significant improvement comparing to an earlier period when the civil society organisations were not allowed to approach the airport at all.[777]

With regard to entering the country in the border zone, the question arises how long an average duration of staying there is. The answer is - very short, particularly because, according to the Law on Border Control[778], the freedom of movement of forced migrants is restricted. There is no explicit provision about which persons must not stay in the border zone. There is an exception within the possibilities of conducting a border procedure, as the category of unaccompanied minors is explicitly excluded. It is not possible to initiate an asylum procedure against them at the border itself, as a specific asylum procedure.

2.1.5. Establishing identity of a party.

Establishing identity is performed on the occasion of undertaking the procedural act of registration of a foreigner who expressed his intention to seek asylum, conducted by the authorised officers of the Ministry of Interior.[779] The Law on Police[780] determines the term of establishing one's identity within the national frameworks. Pursuant to the provision of article 77 of this Law (paragraphs 1 and 2): "A person's identity shall be established if the person does not have a prescribed identity document on him or if there are doubts regarding the authenticity of such document, or if the identity cannot be established in any other manner, or based on a special request of the competent authority. Identity shall be established by using the data from forensic records, by applying the methods and using the crime police techniques, tactics and forensics, medical or other appropriate expertise." In practice, it is done by taking fingerprints - establishing the "national identity, but the problem is that not all police stations have adequate equipment, which would also be networked.

Referring to the issue of establishing one's identity, the question arises whether to contact the diplomatic and consular mission of the country of origin when establishing identity. By default, if the person seeking international law protection, i.e. asylum in the Republic of Serbia, there is a ***general prohibition of contacting the diplomatic and consular mission of the country of origin*** and checking any facts or circumstances concerning the person seeking asylum in the Republic of Serbia, including the information that the person has sought asylum. The only contact with the diplomatic and consular mission can take place when the person is in the detention centre for foreigners and if the return procedure is to be enforced or any specific criminal offences are committed. According to the data obtained in the interview, the situation in relation to this issue is also not resolved to the end, i.e. it is black and white. According to the international standards, there is a possibility to contact parent countries regarding specific questions, exclusively and only with the consent of the person seeking asylum, provided it is in his interest.

2.1.6 Professional translators and interpreters?

The next important question is whether the translation to the language of the party is performed by professionals or not. According to the information obtained during the interview, essentially, there is no "service" of a professional court translator, i.e., interpreter. According to the data obtained in the interview, regarding this question, there is a serious deficit. A significant number of persons who perform such activities in the procedure, have refugee experience/status themselves, i.e., they received some form

[777]See e.g., National Mechanism for the Prevention of Torture, Report on the visit to the Belgrade Border Police Station at Nikola Tesla Airport -Follow up of proceedings according to the NPM recommendations, Belgrade, 2018 (available at: https://npm.rs/attachments/article/796/Izvestaj%20Aerodrom.pdf, last time accessed on 21.5.2021). Their approach to an airport is approved through permits that must be constantly renewed, including approaching in an individual case. Also,a similar practice should be introduced with other airports with international traffic, such as e.g., Constantine the Great Airport in Niš.

[778]Law on Border Control, *Official Gazette of the RS*, no. 24, 2018.

[779] M. Petrović, M. Prica, *Posebn oupravno pravo sa međunarodnim upravnim pravom (Special administrative law with international administrative law*), Publishing Centre of the Faculty of Law, Niš, 2020, p. 186.

[780]Law on Police, *Off. Gazette of the RS*, no. 6, 2016; 24, 2018 and 87, 2018.

of protection, and they are spending a certain period of time in Serbia. The majority of them do not have a status of a national, significantly restricting the possibility to be engaged as interpreters/translators on a permanent basis. These persons attend constant trainings, but formally and legally they are not court interpreters/translators. In the asylum procedure itself, the lack of professional translation is not a major issue, but in procedures related to smuggling of migrants and generally in criminal proceedings, providing "adequate" translation in the context of the very representation and "sustainability" of these procedures is a big problem.

2.2 Specifics in the asylum seeking procedure

2.2.1 Instigating a procedure: by application or ex officio?

An asylum procedure is instigated by application, and the circumstances relating to subsidiary protection are examined *ex officio* (article 25 of the Law on Asylum). In the former situation, a corpus of information is collected, then the competent authority (Asylum Office) determines whether the requirements for granting refuge/asylum are met; if the requirements for granting asylum are not met, the competent officers inquire the circumstances relating to granting subsidiary protection *ex officio*.[781] This all makes one procedure, within which two types of facts can be established. Regarding the issue of treating foreigners, everything concerning the regulation of the ground of stay is at a personal request. The circumstances referring to, say, rendering a decision on postponing refoulment, rendering a decision on return, and procedures characterised by element of coercion, are determined *ex officio*.

When seeking asylum, it is important to express one's intention first, and then (according to the new Law on Asylum) to file an application. It can be done in two ways. First, the Asylum Office enables the party to file an asylum application personally on records; and the second option is, if within a 15-day period from the date of accommodation in an asylum centre, the Asylum Office does not make it possible to the party to file an asylum application, that the party does it in writing, delivering his asylum application to the Office in a written form, from which moment the time limits for rendering a first-instance decision start to run. This second option eliminates the danger that, due to the overload of officers of the Asylum Office, some individuals lose the opportunity to file an application. Civil society organisations provide support in filing an application. A major downside of the entire system is reflected in the fact that organisations providing legal aid are vitally focused on asylum centres - where persons expected to file an asylum application are accommodated, while such assistance is rarely provided in detention centres. When filing an application, the party is informed on the rights available to him. Civil society organisations and competent state authorities also provide information on the very occasion of filing an asylum application, when the Asylum Office is obliged to inform the person on certain rights and obligations connected to the asylum procedure itself. In all asylum centres[782], specific information leaflets are available, which speak about the asylum procedure itself, on the consequences of withdrawing from the application, and what happens if the right to protection is exercised. There are also leaflets and organisations dealing with information in detention centres, but there is no specialised legal aid. The Commissioner for Refugees and Migrations also has this obligation, and an explicit obligation to provide information to these people in the context of available rights.

2.2.2 *Specifics of a withdrawal from the application (restitutio in integrum).*

Pursuant to the provision of article 47 of the Law on Asylum, the asylum seeker may file a proposal for *restitutio in integrum*, in compliance with the law governing general administrative procedure, when the decision on the cancellation of procedure is rendered to withdrawal for the following reasons: "if, despite having received a duly served summons, he fails to appear for the interview, without providing a valid reason for his absence, or declines to make a statement; if, without providing a valid reason, he fails to notify the Asylum Office of any change of address at which he resides within three days of the said change,

[781] See more in M. Petrović, M. Prica, op.cit. pp. 185 and further on.

[782] Traditional asylum centres are Krnjača, Banja KoviljačaiBogovodja.

or if he otherwise prevents the service of a summons or another written official communication, not justifying the reasons for failing to do so; if he leaves the Republic of Serbia without the Asylum Office being aware of it, without providing a valid reason." Furthermore, if the person withdraws his application with a written statement, the Asylum Office, as a first-instance authority, assesses whether the person has any other grounds for his legal residence in the Republic of Serbia, and, ifhe does not have it, renders a decision ordering the person to leave the territory of the Republic of Serbia within a specified time period, in compliance with the Law on Foreigners.[783] If he fails to do so within the specified time period, other institutional measures are applied, which will be more discussed hereinafter.

2.2.3 *Specifics related to providing information to the party.*

In relation to the question whether there are and what the specifics are related for the provision of information to the parties, the answer is that the ***principle of personal delivery*** is applied. Pursuant to the provision of article 15 of the Law on Asylum, any writ in the asylum procedure is served personally to the applicant or his legal representative or attorney, and it is considered served when any of the mentioned persons has received it. Therefore, any notification on the board of an asylum centre where the applicant is accommodated, could not be considered legal in the context of exercising the right to asylum.

2.2.4 *Accelerated procedure.*

An accelerated procedure, i.e., an accelerated asylum procedure is provided for by article 40 of the Law on Asylum and can be implemented under special conditions. The accelerated procedure is a standard emanating from the EU framework, of soft law, but its acceleration does not affect its quality in any way, since it must be conducted in a just and fair way. The basic postulates of a good administrative acting must be respected (right to legal aid, examining the application on its merits, right to efficient remedy, etc.). According to the data obtained in the interview, the practice of conducting accelerated procedures has not come to life in practice yet, i.e., these procedures are not that frequent. The Asylum Office is obliged to inform the applicant that his asylum application is being decided on in an accelerated procedure. An accelerated procedure cannot be conducted if it has been filed by an unaccompanied minor. The decision of the Asylum Office rendered in the accelerated procedure, within 30 days, may be appealed to the Asylum Commission within 8 days after the date of the decision served.[784]

2.2.5 *Specifics of a joinder of proceedings.*

The institute of joining proceedings is only used in the case of families, and this in first-instance proceedings, at the time of filing an asylum application, when it is determined that it is a case of family members, so all the actions of the first-instance proceedings are conducted jointly. According to the data obtained in the interview, the joinder of proceedings often harms individual interests of some family members in practice, since the emphasis is put on the circumstance relating to an adult family member, not taking into consideration enough the circumstances referring to other family members (minor children, spouses, etc.), so the rendered decision may be "detrimental" to those particularly vulnerable categories of persons. The fact that civil society organisations dealing with legal representation are not focused enough on such cases and they have not tried, by using appeals, to move the limits of such practice, also contributes to it. Additionally, when filing the application, the focus must immediately be put on the situation of the child, and that the family members, on the ground of its status, may exercise the right to residence in the Republic of Serbia. There is a good practice if the acting officers observe that there are elements of violence in the family, and then carry out an isolated interview with the woman.[785]

[783] M. Petrović, M. Prica, op.cit. p. 190.

[784] M. Petrović, M. Prica, op.cit. pp. 187-188.

[785]Complexity of this situation M. Jelačić Kojić explains with a plastic example: "But if you have father and mother nationals of Afghanistan, and a child born "on the road", a corpus of facts related to the right to asylum is connected tothe country of origin, and the situations in which father or mother were. However, the circumstances established in relation to the child must be completely different. All that also opens a series of legal issues. Is that child a national of Afghanistan? In relation

2.2.6 *Taking evidence.*
The basic question asked in relation to taking evidence is who bears the burden of evidence. The Law on Asylum has a special part on the assessment of evidence, i.e., the assessment of facts and circumstances, and the responsibility for taking evidence is divided. A clear system of evaluation of concrete information is established. Objective and subjective elements of persecution are determined.
2.2.7 *Time limits for rendering a decision upon an asylum application.*
According to the provisions of article 39 of the Law on Asylum, the decision is rendered in a regular procedure at the latest within three months after the date of filing the asylum application or the date of a subsequent admissible asylum application. The time limit may be extended if the application is comprised of complex factual or legal issues, or a large number of foreigners files asylum applications at the same time. The dead line to render a decision is 12 months. The binding time limit for the party runs from the moment of registration, when the person has a 72-hour time limit to register in an asylum centre where he is referred to. From the moment of registration in the asylum centre, the time limit (15 days) starts to run for filing an asylum application, which is binding for the officers of the Asylum Office. By expiry of this time limit, the 3-day time limit starts to run within which the person has to file an asylum application on his own, which is most frequently done with the assistance of attorney. According to the data obtained in the interview, the Asylum Office interprets the law progressively and liberally, in terms of considering an application filed in a timely manner also in those situations when the person files it after the 8-day time limit, and acts upon it.

2.3 Specifics of decisions rendered in an asylum procedure and their forms

2.3.1. *Decision on the admission to the state territory, as conditio sine qua non for granting refuge.*
Granting a decision on the admission to the state territory to a foreigner is a discretionary assessment of any country. There is no difference in regard to whether it is a foreigner who tries to enter it legally, or they are forced migrants and future asylum seekers, who often use the so-called green zones, border zones, and not official border crossings to enter the country. Very often such persons are found inside the state territory, after their smuggling has been discovered. According to the data obtained in the interview, it happens even more than in the border zone, i.e., crossing. According to the provision of paragraph 2 of article 15 of the Law on Foreigners, the entry maybe denied through a ***decision on denial of entry*** issued in a prescribed form stating the reasons for denial of entry referred to in paragraph 1 of the same article. Denial of entry is entered into the travelling document of the foreigner. The decision itself is a form resulting from the Schengen Action Plan and it can be appealed. According to the provisions of article 124 of the Law on Foreigners, the Government should have passed an ordinance, within a six-month period following its entry into force, regulating more closely the requirements for denial of entry to foreigners in the Republic of Serbia when it is required by security reasons of the Republic of Serbia and its citizens.
Furthermore, when it is about an attempt to cross within the border zone, outside an official border crossing, there is absolutely no control, nor procedural guarantees. Facts are obtained indirectly, through reports on the work of border patrols, which were also mixed patrols in some situations. According to the data from the interview, there were different situations on the "border", so sometimes people were let in the country, sometimes the so-called pushbacks were applied, and, reportedly, sometimes persons "gave up" crossing the border, which may be interpreted in various ways. This is about the "grey" zone, for which it can hardly be said what happens in it. What is important to mention is that in each type of this decision, implying that access to territory to a specific person is prevented regardless of its migrant status, it should be borne in mind that the state is obliged to observe the *non-refoulement* principle, i.e., the ***prohibition of expulsion***.[786] This is an obligation referring to all foreigners, irrespective of their

to which last country are his circumstances assessed? It would be in the case of the child, e.g., Greece, where forced migrants have stayed most frequently, and under very poor conditions."
[786]As stated by Davinić and Krstić: "In all the circumstances where the right to stay of a foreigner in the territory of the Republic of Serbia, denial of its reception in the territory of the Republic of Serbia, as well as his potential refoulement are

migration status. According to the data obtained in the interview, there are also situations in which various civil society organisations learnt that some persons were prevented to access the state territory, so they raised the question of the state's responsibility in preventing the access to its territory, which is stated in the reports.

2.3.2. *Decision on the recognition of the right to refuge and decision on the right to subsidiary protection.*
The basic decisions that can be rendered if the asylum application is adopted, according to the Law on Asylum, are: decision on the right to refuge, i.e. refugee status and decision recognising the right to subsidiary protection. Pursuant to the provisions of article 24 of the Law on Asylum, the right to refuge, or refugee status, is granted to the applicant who is outside his country of origin or habitual residence, and who has a well-founded fear of being persecuted for reasons of race, sex, language, religion, nationality, membership to a specific social group or political opinion, and who is unable or unwilling to avail himself of the protection of that country. Pursuant to the provisions of article 25 of the Law on Asylum, subsidiary protection shall be granted to the applicant who fails to meet the requirements for granting the right to refuge referred to in article 24 of this Law if there are justified reasons indicating that if he is returned to his country of origin or habitual residence he would face a real risk of suffering serious injustice, and who is unable, or, owing to such risk, unwilling to avail himself of the protection of that country. Serious injustice shall consist of threat of death by penalty or execution, torture, inhuman or degrading treatment or punishment, as well as serious and individual threat to life by reason of indiscriminate violence in situations of international or internal armed conflict.
2.3.3. *Dismissing, denying an application and suspension of procedure.*[787]
If the application is not adopted, a decision on its dismissal may be rendered, i.e., on the suspension of the procedure of decision making upon an asylum application. The Decision of the Government determining the list of safe third countries has an important relation with these decisions. All the countries in the surroundings of the Republic of Serbia are considered to be safe third countries. The safe third country institute, however, has ***objective and subjective elements***. The situation in which the acting authority may prove that the person in the territory of the Republic of Serbia came from a safe third country made it possible to the authorised officers of the Office to dismiss the asylum application not examining it on the merits, i.e., not assessing whether it is a refugee in the concrete case. The amendments of the Law on Asylum changed the concept of a safe third country and the subjective element is more emphasised, which exists within the concept. ***Rebuttable presumption*** to consider a country as safe was introduced, and which country must be brought into relation with a concrete person in question.[788] Hence, higher standards were introduced in regard to the presumption of safety of a specific country. This also excludes rendering a type of decision/certificate for the concerned state notifying it that the asylum application of the party has not been examined on the merits, since the party passed through a safe third country, where he could have sought granting of asylum.
2.3.4. *Specifics in the rendered decisions' forms and their constituent elements.*
The rendered decisions must contain all the elements provided for by the Law on Administrative Procedure. The specifics of the form of administrative acts issued in the procedure upon an asylum application concerns, in priority, the rationale of the issued decisions. The rationales, and consequently the entire decisions, are quite extensive containing all the previously conducted actions set out (content

considered, so the well-established rule of the international law that a person cannot be returned tothe country where his life and physical and mental integrity are endangered must be taken into account." M. Davinić, I. Krstić, *Vodič za primenurelevantnihpropisa u oblastyazilaimigracija (Guide to the Implementation of Relevant Asylum and Migration Regulations)*,Group 484, Belgrade, 2019, p. 22.
[787]See more inM. Petrović, M. Prica, op.cit. pp. 187-190.
[788]There are standards how these circumstances are established, and what must be examined by the state. According to the data from the interview: "For instance, Germany is a safe third countryaccording to all standards, but in the concrete case of the person NN, bearing in mind the circumstances he is in, it cannot be considered to be safe."

of the filed application, facts determined while the interview was conducted, etc.).A special specific is an extensive using and referring to international sources of law, and the case law of the Council of Europe, the supervisory bodies of the United Nations, etc. The circumstances referring to determining the situation in the country of origin, are also a compulsory element of the rationale, where, as credible sources, documents of international civil society organisations and the United Nation's supervisory bodies are very often used. The Office itself takes into account the previously rendered decisions, so the principle of legality and predictability (legitimate expectations), referred to in the provisions of article 5 of the General Administrative Procedure Law are observed to some extent.

2.3.5. *Granting temporary residence.*

Granting temporary residence for humanitarian reasons is carried out under the Law on Foreigners. This decision is a good upgrading of the system of international protection for persons for whom it is not possible to determine existence of reasons for granting protection, and again there are other factors for which such a person should be allowed to stay in the territory of the Republic of Serbia. The provision of paragraph 2 of article 124 of the Law on Foreigners is closely connected therewith, according to which the Government will adopt an ordinance regulating such ***tolerated presence*** in the territory of the Republic of Serbia, with a limited time period of application, of foreign citizens in the territory of the Republic of Serbia, and who may not be returned to the country of origin due to the application of the principle of prohibition of return, or who cannot leave the Republic of Serbia due to circumstances not depending on them. This ordinance has not been adopted yet. The humanitarian reasons themselves concerning the prohibition of return are the participation of a certain person acting in the capacity of a witness in an investigation or proceedings for grave crimes, as well as being an unaccompanied minor.[789]

2.3.6. *Decision on temporary protection.*

According to article 74 of the Law on Asylum, the Government may render a decision on temporary protection. Temporary protection is "protection that is provided in the extraordinary procedure, in the case of a mass influx of displaced persons who cannot be returned to their country of origin or habitual residence if there is a risk that, due to such mass influx, it will not be possible to carryout effectively individual asylum procedures, in order to protect the interests of displaced persons and other persons seeking protection." It particularly refers to persons who have left a territory of armed conflict or localised violence; persons who have been victims of violations of human rights, or they face a serious threat of mass violations of human rights. In compliance with the decision of the Government on temporary protection, personsgranted temporary protection are registered in accordance with the provisions of the Law on Asylum and the decision on granting temporary protection is rendered for each person individually. In practice, such a decision has not been rendered so far.

2.3.7. *Decision on the postponement of refoulement.*

A ruling, i.e. decision on the postponement of refoulement may be rendered according to the Agreement on Readmission, which is ratified with an adequate law, such as e.g. the Law on the Ratification of the Agreement between the Republic of Serbia and the European Community on the readmission of persons

[789]Pursuant to the provision of article 61 of the Law on Foreigners, a foreigner may be granted a temporary residence if meeting the general requirements referred to in article 43 of that Law and for whom other circumstances occur that impose a special consideration in relation to: 1) his family, cultural or social relations with the Republic of Serbia; the degree of integration of the foreigner into the social life of the Republic of Serbia in the preceding period, particularly regarding his education, work activities, or language skills; 2) postponement of the forced expulsion of such foreigner referred to in article 84 of the Law within a year period or more; 3) a foreigner who is the victim of a grave crime, including also persons involved in the activity of facilitating irregular migration and who cooperate with the police and judicial authorities, and his presence is necessary in the criminal proceedings or takes part in the investigation as a witness or the aggrieved claimant; 4) a minor foreigner who is abandoned; who is a victim of organised crime or has been deprived of parental care or is unaccompanied; 5) serious or reasonable personal reasons of humanitarian nature; there are interests of the Republic of Serbia or there are international obligations undertaken.

residing without authorisation[790] As stated by Davinić and Krstić: "With regard to determining a legal entry or stay of foreigners who were returned to the Republic of Serbia on the grounds of the Readmission Agreement, it is important to highlight that a foreigner did not cross the state border illegally, but was taken over from the authorised authority of another state at an official border crossing of the Republic of Serbia, after the procedure of readmission of third-country nationals had been conducted. In accordance with it, a person returned to the Republic of Serbia on the grounds of the Readmission Agreement, must not be sanctioned for his illegal entry in its territory. In such a situation, such a person should not betaken before a misdemeanour judge, as it cannot be considered that he entered the territory of the Republic of Serbia illegally, and may not be sanctioned for crossing the border illegally."[791]

3. Administrative and judicial protection of asylum seekers

Pursuant to the provision of article 22 of the Law on Asylum, the final decisions of the Asylum Commission may be challenged in an administrative dispute. The provisions of article 96 of the same Law, the application stays the enforcement of the decision. According to the Law on Foreigners, a direct jurisdiction of administrative court is introduced (no appeal) in relation to the issue of determining the measure of compulsory stay in a detention centre for foreigners. Pursuant to the provision of article 90 of the Law on Foreigners, a decision of the competent authority or the border police on accommodation in a detention centre and a decision on the extension of accommodation may not be appealed. An administrative dispute may be initiated against such a decision within an 8-day period from the date of serving the decision. The application shall not stay the enforcement of this Decision. The court is obliged to issue a decision on the application within a 15-day period from the day of filing the complaint. The Law on Administrative Disputes applies to all the other elements of judicial protection in this area.[792]

The only relevant data on judicial protection in the field of asylum obtained by the authors were those collected by the Belgrade Centre for Human Rights. According to the reports from the last couple of years, the case-law of the Court has been the same since 2008 - asylum applications have not been adopted in a dispute of full jurisdiction, nor have oral hearings been held.[793]

According to the Report 2019: "In the period from 1 January to 30 September 2019, the Administrative Court received 17applications against the decisions of the Asylum Commission. Out of the stated number of cases referring to the applications filed in 2019, by the moment of creating this report, the Administrative Court had solved 5 administrative disputes, and this by dismissing the applications. Additionally, the Court in the stated period solved 12 more administrative disputes initiated in the previous years. Out of this number, only two applications were adopted."[794] According to the Report 2020: "In the period from 1 January to 31 October 2020, the Administrative Court received in total 32 initial acts the basis of which is asylum dispute. Out of that number, by the moment of creating this report, the Administrative Court had solved three cases, and this by dismissing two applications and one challenge. Additionally, the Court in 2020, solved 11 more administrative disputes initiated in the previous years. Applications 9 were dismissed, one was rejected, while one case was cancelled. In 2020, the Court did not decide in a dispute of full jurisdiction."[795]

What is marked as contrary to the conclusions of the Committee against Torture in these reports, is that the Administrative Court in some of the decisions designated an automatic application of the safe third

[790]Law on the Ratification of the Agreement between the Republic of Serbia and the European Community on on the readmission of persons residing without authorisation, *Off. Gazette of the RS - International Treaties*, no. 103, 2007.
[791] M. Davinić, I. Krstić, op.cit., p. 55.
[792]Law on Administrative Disputes, *Off.Gazette of the RS*, no. 111, 2009.
[793] Belgrade Centre for Human Rights,*Pravonaazil u RepubliciSrbiji (The right to asylum in the Republic of Serbia) 2019.* Belgrade Centre for Human Rights, Beograd, 2019, p. 62.
[794]Ibid.
[795]Belgrade Centre for Human Rights, *The right to asylum in the Republic of Serbia 2020, p* 66.

country concept as legal.[796] As far as administrative and judicial protection is concerned, it is necessary to specialise judges in this field and eventually form a special department for this matter (on the occasion of a future reform of administrative courts); otherwise - no better familiarity with these cases can be expected. The case law showed that judges of administrative courts decide very fast, so that is a positive aspect of administrative and judicial protection of the right to asylum.

4. Relationship between the Law on General Administrative Procedure and other laws in the matter of legal regulation of stay of foreigners in the territory of the Republic of Serbia

In the area of internal affairs, there are many laws in force that regulate legal cases with foreign elements or without them. These are laws of mixed character, with material legal and procedural legal provisions. In the procedural legal part, the concerned laws only regulate certain separate legal issues, and regarding all the remaining issues of a legal procedure, these laws refer to the application of the General Administrative Procedure Law, which is applicable as a systemic and general procedural law in the matter of internal affairs. Thereafter, the relationship between the General Administrative Procedure Law and other laws is a very important question in the matter of internal affairs, with regard to all legal issues and in all legal cases the solving of which implies regulating stay and status of foreigners in the territory of the Republic of Serbia.

There are systemic and special laws in the legal order of the Republic of Serbia. **Systemic laws** are those that regulate one area of legal order in a comprehensive manner, while **special laws** do not. From a positive legal viewpoint, the doctrine differentiating systemic and special laws is credited to the Constitutional Court of the Republic of Serbia (hereinafter: the Constitutional Court), which established its legal stand, referring to the unity of the legal order, in the Decision IUz-231/2009 dated 22 July 2010 (*Official Gazette of RS,* number 89, 2010).[797] This legal stand of the Constitutional Court reads as follows: "Starting from the provision of article 4 paragraph 1 of the Constitution, which lays down the principle of the unity of the legal order as one of the fundamental principles underlying the constitutional legal system of the Republic of Serbia, the Constitutional Court points out that, although the current legal system of the Republic does not differentiate the so-called organic, basic or other laws that have stronger legal power than the other, "common" laws, whereby the Constitutional Court is not competent to assess the mutual compliance of laws pursuant to the provision of article 167 of the Constitution, the constitutional principle of the legal order unity orders that fundamental principles and legal institutes provided for bylaws governing one area of social relationships in a systemic way should also be observed in special laws, unless an option of a different regulation of the same issues has been explicitly prescribed by that systemic law."[798]

Here from arises the legal stand of the Constitutional Court that "the constitutional principle of the unity of the legal order implies a mutual compliance of all the legal regulations within the legal system of the Republic of Serbia, which principally excludes the option that the law governing one legal area can alter, i.e. amend individual legal solutions contained in the law governing another legal area" (IUz – 225/2005 dated 19.4.2012). In the meaning presented, the legal order unity in the procedure of assessing constitutionality can imply a systematic and teleological examining of two (systemic) laws in various areas

[796] Belgrade Centre for Human Rights, *The right to asylum in the Republic of Serbia 2019,*2019, p. 63M Belgrade Centre for Human Rights, *The right to asylum in the Republic of Serbia 2020,* 2020, pp. 71-72.

[797] It refers to the legal case in which the Constitutional Court found that, with the amendments to the Law on Public Information (*Off. Gazette of the RS*, no. 71, 2019), the unity of the legal order was violated to the detriment of the system of legal regulation of economic offences, which is regulated by the Law on Economic Offences (*Off. Gazette of the RS*, no. 101, 2005). IUZ-231/2009, dated 22. 7. 2010.

[798]IUZ-225/2005, dated 19. 4. 2012. M. Prica, *Jedinstvopravnogporetkakaoustavnonačeloizakonskouređivanjeoblastipravnogporetka – Ujedno izlaganje o unutrašnjem pravnom sistemu (The unity of the legal order as a constitutional principle and the legal regulation of an area of the legalorder - Including a presentation on the internal legal system*), *Collection of Works of the Faculty of Law of Niš*, no. 78, 2018, pp. 113-123.

of the legal order, which is one situation; while the second situation implies examining the relationships between a systemic (basic) law, which has regulated the area of the legal order in a comprehensive manner, and a law that compared to a systemic law has a relationship of special versus general. A special law can stand in the regime of legal subordination against the **general law**, but also in the regime of legal referencing, resulting in the difference between subsidiary and congruent applications of the general law. One systemic law can stand versus another systemic law in the relationship of a special law against the general law, but only in terms of legal referencing and certainly not in the regime of legal subordination. The stated facts make the use of the following three terms reasonable for designating the legal character of a law: **(1) systemic (basic) law, (2) general law, and (3) special law**.

Regarding the relationship among laws in various areas of the legal order, the Constitutional Court, guided by the constitutional principle of the legal order unity laid down by the provisions of article 4 paragraph 1 and article 194 paragraph 1 of the Constitution, examined the relationship between the provisions of article 38a of the Law on Property Tax (*Official Gazette of the RS*, no. 26, 2001; 45, 2002, 80, 2002 and 135, 2004) and the statutory rules of the Law on the Bases of Ownership and Proprietary Relations (*Off. Gazette of the SFRY*, no. 6, 1980 and 36, 1990; *Off. Gazette of the FRY,* no. 29, 1996*,* and *Off. Gazette of the RS*, number 115, 2005).In this legal case, the question arose on the relation between the two legal systems, bearing in mind that determining and collecting property tax in a comprehensive manner are regulated completely separately by the concerned Law on Property Tax, pursuant to the authorisation referred to in art. 97 item 6 of the Constitution, according to which the tax system is regulated and provided by the Republic of Serbia, while the conditions for obtaining the right to property and the other rules on transfer of the right to property over real estate are regulated in a systemic manner - by the Law on the Bases of Ownership and Proprietary Relations, pursuant to the authorisation referred to in article 97 item 7 of the Constitution. In this legal matter, the Constitutional Court found a violation of the legal order unity - through the provisions of one systemic law to the detriment of the fundamental legal principles and legal rules of another systemic law, with the following rationale:

"Based on the results of the entire procedure conducted before the Constitutional Court, it has been established that the disputed provision of article 38a of the Law on Property Tax, prescribing that the right of ownership in relation to real estate may not be entered in the land, cadastral and other public books without evidence that the tax on the transfer of absolute rights or on inheritance and gift has been paid, prescribes, in addition to the requirements prescribed by the Law on the Bases of Ownership and Proprietary Relations, an additional requirement for obtaining the right of ownership in relation to real estate and thereby restricts the right of ownership guaranteed by the Constitution, laid down by the provisions of article 58 of the Constitution. [...] Since one more requirement has been prescribed with the provision of article 38a of the Law on Property Tax, which should be realised within the time period between concluding a valid contract and the registration in the public books - and it is the payment of tax on the transfer of absolute rights, the Constitutional Court assesses that, through such regulation, the buyer is deprived of the right to carry out the registration of the right of ownership in the public booksand to become the owner of the concerned real estate in such manner.[799]

Regarding the relationship of the special law versus the general law, the Constitutional Court has considered the regime of legal subordination of a special law versus a general (systemic) law on a number of occasions. The basic standpoint of the Constitutional Court in this regard reads as follows:

"[...] For a specific law to contain all the special rules and legal exceptions in relation to systemic laws in a certain area, the legislator must, from the standpoint of the Constitution and the legal order of the Republic of Serbia, review the fulfilment of specific preconditions in the procedure of prescribing such

[799] I Uz-225/2005, dated 8. 6. 2012. The rationale of the Constitutional Court in the case of assessment of the relation of the Law on Broadcasting and the Law on the Protection of National Minorities deserves attention, I Uz-27/2011, dated 6. 11. 2013.

special rules and legal exceptions. In priority, it is the existence of a reasonable need and a legitimate goal constituting the basis for derogation from general, systemic legal rules in certain established social relationships in a concrete area. Furthermore, it must be precisely considered whether special rules and legal exceptions fully rely upon systemic rules, so that, viewed as a whole, the general rules of the systemic law may be unobstructed applied to all the issues not included and separately regulated in an exceptional, special manner. Finally, it has to be taken into consideration whether special rules and legal exceptions are in compliance with the Constitution and the entire legal system of the Republic of Serbia. Only in this way, the relationship of the so-called systemic laws and the so-called special laws, which govern specific rules and exceptions in a manner that does not undermine the legal order unity, legal certainty, and the exercise of the rights and freedoms guaranteed by the Constitution, can be established."[800]

As something very important in examining the legal order unity, as the constitutional principle, the Constitutional Court takes the provisions of general (systemic) law allowing for an option to regulate certain issues with a special law by the nature of the matter in a different way. This, however, does not prevent the Constitutional Court to subject the provisions of a special law to a systemic and teleological assessment versus the legal principles and the building legal rules of the general law. Taking the foregoing into consideration, here is an illustrative excerpt from the rationale of a decision of the Constitutional Court:

"The Constitutional Court took the stand that, although article 1 paragraph 2 of the Law on Civil Servants prescribes that certain rights and duties of civil servants of some state bodies can also be regulated in a different way by a special law if it arises from the nature of their job, the disputed solution referred to in art. 38 of the Law cannot represent such a legally allowed derogation from the systemic solutions, since, in the concrete case, it is not about certain rights and duties of civil servants arising from the specific nature of the work of the state body with which they are employed, but about regulating the way of termination of employment at the position of civil servants in the ministries and special organisations in a specific time period, irrespective of the nature of jobs that they perform."[801]

In this respect, the Constitutional Court disclosed a highly important legal stand connected to examining the legal grounds for adopting a special law in one decision: "[...] bearing in mind that the constitutional principle of the legal order unity orders that the fundamental principles and the legal institutes provided for by the laws regulating the area of social relationships in a systemic manner are also observed in special laws, **even in the case where the option of a different regulation of the same issues is explicitly prescribed under the systemic law" (highlighted by M.P.)**; (I Uz-17/2011 dated 25 June 2013).

Herefrom arises that the Constitutional Court while examining the unity of the legal order, as the constitutional principle, does not only follow a linguistic interpretation, but it primarily uses a systematic and teleological analysis of the effect of legal rules of a special law versus the legal principles and building rules of a general law. The legal order unity, as the constitutional principle, draws its own meaning from the need of securing that the various systems of legal rights do not jeopardise the constitutionality, equality before the law, and the legal principles governing in various areas of the legal order, what should secure the preservation of the legal order.

The **General Administrative Procedure Law** is a systemic law in the legal order, bearing in mind that the area of administrative and procedural legislation is regulated in a comprehensive way. It means that the General Administrative Procedure Law is a systemic law in administrative matter, just as there are systemic procedural laws in other legal matters (Criminal Procedure Code - in criminal matters, Civil Procedure Code - in civil matters, etc.). The General Administrative Procedure Law is a procedural law applied with respect to legal regulation of concretised legal cases. As a procedural law, the General

[800] IUz-27/2011, dated 6. 11. 2013. M. Prica, *Jedinstvopravnogporetkakaoustavnonačeloizakonskouređivanjeoblastipravnogporetka - Ujednoizlaganje o unutrašnjempravnomsistemu„*,op.cit., pp. 113–123.

[801] IUz-920/2012 dated 27. 3. 2014.

Administrative Procedure Law contains legal principles as teleological legal stands, legal norms as systemic legal stands; whereas legal norms as regulatory legal stands - on the basis of which the subject matter of an administrative procedure is legally solved - are contained in the governing substantive legal law.[802]
There is no law in the legal order that might be compared to the General Administrative Procedure Law in regard to its correlation with other laws, bearing in mind that the expansion of legal legislative regulation and the multiplication of legal norms in the legal order of the Republic of Serbia have led to the existence of over two hundred (substantive and procedural) laws wherein the application of the General Administrative Procedure Law is referred to. The trouble with it is that no clear criteria for regulating relationships between the General Administrative Procedure Law and other laws referring to the application of the General Administrative Procedure Law have been set in Serbian judicature and legal science.
In other areas of the legal order, the presented problem - as we have already highlighted - is solved as a relationship between systemic, general and special laws under the auspice of the unity of the legal order, as the constitutional principle. The application of the legal order unity, as the constitutional principle, however, is not sufficient for regulating the relationship between the General Administrative Procedure Law and other laws, bearing in mind that the General Administrative Procedure Law stands in various regimes of a direct application of and an application by reference of its provisions versus the application of the provisions of other laws that it is correlated with.[803] In our opinion, special laws can stand in the regime of legal subordination versus the General Administrative Procedure Law, but also in the regime of legal reference, resulting in the difference between subsidiary and congruent applications of the general law. The legal literature does not present any difference between subsidiary and congruent applications of the general law, thus the attitude on differentiating congruent and subsidiary applications of the general law does not abide in the legislation and the consciousness of Serbian legal professionals. It is our stand that a congruent application and a subsidiary application of the general law are not the same; since, a congruent application indicates the general law application in compliance with the nature of relationship between the rules of a legal procedure and the matter of legal regulation; whereas, a subsidiary application would imply the general law application in its entirety upon all the questions not regulated by a special law. It means that the general law subsidiary application surpasses the scope of application of the legal order unity, as the constitutional principle; whereas a congruent application of the general law does not necessarily imply the application of the legal order unity, as the constitutional principle.[804]
A general law does not include the application of the legal order unity, as the constitutional principle, when it is the matter of referring of one systemic law to the application of another one, whereby a relationship between one systemic law as the special law and another systemic law as the general law is established. One systemic law can stand versus another systemic law in the legal order in a relationship of a special law versus a general law - only in the regime of legal referral, i.e., a congruent application. This means that legal principles established by a systemic law in one area of the legal order cannot be superior to legal principles established by a systemic law in another area of the legal order, consequently the possibility of occurrence of legal subordination and subsidiary application of a systemic law versus another systemic law is excluded. Such an example is offered exactly by the General Administrative Procedure Law

[802] M. Prica, Pravniprincipi u poretkupravnedržave:kanonipravnogporetkai "unutrašnjegpravnogsistema" (Legal Principles in the Order of a Law-governed State: Cannons of a Legal Order and of an "Internal Legal System"), *Collection of Works of the Faculty of Law of Niš*, no. 80, 2018, pp. 135-180.
[803] M. Prica, *Jedinstvopravnogporetkakaoustavnonačeloizakonskouređivanjeoblastipravnogporetka - Ujednoizlaganje o unutrašnjempravnomsistemu,* op.cit., pp. 113–123.
[804] The standpoint on the forms of a possible application of the general law is presented in the article: M. Prica, SupsidijarnaishodnaprimentaZakona o opštem upravnompostupku (Subsidiary and congruent application of the Law on General Administrative Procedure), *Collection of Works of the Faculty of Law of Niš*, no. 91/2021, pp. 97-116. Starting from the stands presented in the mentioned article, it was our endeavour to examine the forms of a possible application of the Law on General Administrative Procedure in the area of internal affairs herein.

(*Off. Gazette of the RS*, no. 18, 2016), which can exclusively provide for a congruent application of the provisions of the Law on Obligations in relation to the legal regime of administrative contracts, and the reason for referring to the systemic law on obligations is to fulfil legal gaps - pursuant to the matter of legal regulation - in regulating an administrative contract, as a special legal institute.[805] Whereas judicial protection in administrative dispute is epitomised with the General Administrative Procedure Law, *ratio legis* is that an administrative contract is developed as an autonomous legal institute, under the auspice of imperative legal norms in different areas of the legal order and with a congruent application of the Law on Obligations. Understandably, it is the task of administrative and civil judiciary to define an administrative contract directly and doctrinary as a legal institute - by discovering and defining typical legal subjects matters (legal matters) and legal situations - at the tripoint of legal regulation of administrative contracts between (1) substantive law legal provisions on administrative contracts in different legal order areas, (2) the provisions of the General Administrative Procedure Law, and (3) the provisions of the Law on Obligations. Other laws also refer to the application of the Law on Obligations in administrative matter. So, the general regime of civil law liability in damage in the Serbian legal order is established by the Law on Obligations[806], whereby the Law on Obligations is not considered to be the basic (systemic) law in regard to the state's liability in damage. Namely, the Law on Obligations does not regulate the state's liability in damage in a general way, save for, within special cases of liabilities, it includes liability in damage caused by terrorist acts, public protests and manifestations, where the liability to compensate for damages lies with the state.[807] Hence, the legal regimes of the state's liability in damage in the Serbian current legal order have special legal grounds, which stand versus the general regime of civil law liability in damage in a relation of special versus general. Whereby, the legal regime of liability in damage is congruently applied to the issues not regulated in special legal regimes of the state's liability in damage. As an example of a congruent application, referring in the Law on Administrative Disputes to a congruent application of the Civil Procedure Code in administrative judicial proceedings (administrative dispute) can also be presented.[808] In the described examples, a congruent application denotes an application of general law in compliance with the nature of relationship between the rules of legal procedure and the matter of legal regulation; and the option of subsidiary application of the general law that would imply the application of the general law as a whole - in all the issues not regulated by other systemic law, is excluded.

On the other hand, the General Administrative Procedure Law, as a general law stands in the regime of direct, subsidiary and congruent applications of its own provisions versus numerous special laws. First, the General Administrative Procedure Law is applied directly and entirely as a procedural law, the application of which was referred to by a substantive law that does not contain procedural provisions.[809] In this example, the General Administrative Procedure Law is the only procedural law applied in solving a legal case, which is one situation, while the other situation implies that the application of the General

[805]Article 26 of the current Law on General Administrative Procedure in regard to administrative contracts provides for a subsidiary application of the law governing relations in obligations. We cannot know what meaning of the term "subsidiary application" the legislator had in mind, but according to the meaning of "subsidiary application" presented in this paper, we can conclude that the provisions of the Law on Obligations cannot be entirely applied to the regime of administrative contracts referred to in the General Administrative Procedure Law; consequently, it is not subsidiary application that can be valid, but congruent application governing the relations in obligations.

[806]Law on Obligations (*Off.Gazette of the SFRY,* no. 29, 1978; *Off. Gazette of the RS*, no. 18,2020), art. 154-209.

[807] Ibidem, art. 180-184.

[808] A party in an administrative dispute is not authorised to file an application for the protection of legalityagainst a final decision of the Supreme Court of Serbia with a congruent application of article 418 of the Civil Procedure Code, Judgement of the Supreme Court of Serbia, Uzz. 34/07, dated 22. 11. 2007, *Bulletin of Case Law of the Supreme Court*, no. 1, 2010, pp. 126-127.

[809]An example of a substantive legal law not containing procedural provisions and referring to theapplication of the General Administrative ProcedureLaw is the Law on Cultural Property (*Off. Gazette of the RS*, no. 71, 1994; 52, 2011, 99, 2011, and 6, 2020).

Administrative Procedure Law is referred to by a special law, which, apart from substantive law norms, also contains procedural norms. In this latter situation, it is necessary to set a criterion for regulating relationships between procedural provisions of special laws and the provisions of the General Administrative Procedure Law, as the general law. The current General Administrative Procedure Law (*Off. Gazette of the RS*, no. 18, 2016) has a character of a general procedural law having a direct application in administrative matters, whereby this law specifies the ground for passing special laws:

"(1)This law is applied in proceedings in all administrative matters. (2) Individual issues of an administrative procedure can be regulated by a special law only if it is necessary in individual administrative areas, if it is in accordance with the basic principles laid down under this law, and does not reduce the level of protection of rights and legal interests of the parties guaranteed under this law." (art. 3 of the General Administrative Procedure Law).

It means that the current General Administrative Procedure Law prescribes the regime of legal superiority of a general law over special laws. On one hand, herefrom it arises that the current General Administrative Procedure Law provides for the application of its own provisions regarding all administrative matters, meaning that the way of application of the General Administrative Procedure Law, as the general law, is conditioned by setting the concept of administrative matter versus legal cases that are legally regulated by issuing individual legal acts. Second, the current General Administrative Procedure Law obviously takes into account the direct application of its own provisions in the portion of general administrative principles and the guaranteed degree of legal protection and the subsidiary application of its own provisions to all the issues not regulated by a special law, which does not correspond to the legal reality of a myriad of diverse matters regulated by legal imperative norms in the legal order of the Republic of Serbia.

It is highly important to emphasise that such a broad application of the General Administrative Procedure Law does not represent a result of the expansion of intervention of the state administration bodies, quite the contrary - it represents a consequence of the expansion of legal imperative regulating in the legal order. It means that the General Administrative Procedure Law is also applied in legal matters differentiating from administrative matters with respect to legal goods and legal interests, where the primacy of general good and general interest is valid. Hence our question arises: Is a direct and subsidiary application of the General Administrative Procedure Law versus all of over two hundred laws referring to the application of the General Administrative Procedure Law, as the general law, correct legally?

Our standpoint is that a direct application of the General Administrative Procedure Law is eligible in administrative matters only. Under the administrative matter, we consider the area of nucleus (the narrowest area) of general good governed by the superiority of general legal interests, as a dynamic expression of general good. In the area of a nucleus of general good, the existence of administrative authorities and state administration is necessary, as an institutional order of public authority, and the activity of the state administration bodies is primarily directed to the protection of general good, legal order and public order, being the basic goal of administrative activity. For determining and understanding the form and causa of administrative activity, it is necessary to start from the characteristics of administrative matter and the goal of the state administration authorities' activities. The basic characteristics of administrative matter is contained in the primacy of general interest in the nucleus of general good of the state, as a legal and political community, where the general interest should not be identified with public interest: the general interests represent dynamic expressions of general good, private interests are dynamic expressions of individual legal goods of citizens as the holders of freedom and the subjects of legal order, while the public interest represents a regulatory determinant of legal order and a static expression of the general good. The public interest is anchored in the state's legal order between: general and private interests, publicity and privacy, interventionism of the state administration and civil society, institutional order of public authorities and institutional order of a territorial community, aimed at establishing the balance between various legal goods, legal interests and goals of the legal

order.[810]

In administrative matter, in determining relationships between the general good and other legal goods and private interests, there is the superiority of general interest, where the static relationship between different legal goods and legal interests in the narrowest area of general good is determined with imperative legal norms; and it is up to the state administration authority to regulate the legal subject with a reasonable interpretation of legal imperative norms. Additionally, to fully regulate the expression of general interests in the narrowest area of general good is not possible with statutory imperative norms in a static (law-related) sense because the sphere of irrational and unforeseeable in the life of a legal and political community denotes a latent presence of general interests and makes the existence of special powers of the state administration authorities necessary; consequently, the administrative and legal regime in the legal order is represented by special powers of the state administration authorities with regard to the protection of general good, public order and legal order. From the statistical standpoint, the areas of legal order in the narrowest area of general good belong to administrative matter, as follows: internal affairs, defence, foreign affairs, public finances, public and cultural goods, etc. Apart from it, an expression of general interests in a dynamic sense is also represented in relation to other activities in the legal order, through the need of providing public services and activities in the general interest (e.g., constructing buildings in general interests, execution of works in general interest, etc.). Moreover, a permanent possibility of expressing general interests in the nucleus of general good are expressed through general clauses of general good (public order, public order and peace, public security, etc.), implying that such referral to the mentioned clauses, actually, means expressing general good, as a dynamic expression of general good, before which all other legal goods and legal interests have to recede (e.g., recognising a subjective right or the need for its limitation). Therefore, in the nucleus area of general good, which we call an administrative matter, an administrative legal regime must exist, and the activity of the state administration authority directed to the protection of general good, public order and legal order, is expressed threefold, as follows: (1) administrative and regulatory activity, (2) administration and control activity, and (3) guardianship and administrative activity.[811]

The basic characteristic of legal regulation of legal cases in administrative matter is that there is a primacy of general interest in the entity of legal regulation, as a dynamic expression of general good (causa of substantive law regulation), while the method of legal regulation implies the concretisation of general

[810] M. Prica, *Eksproprijacijakaopravniinstitut(Expropriation as a Legal Institute*), doctoral paper, Niš, 2016, pp. 211-229, 269-281.

[811] Guardianship and administrative activity is manifested in the legal order as a material (physical) activity of the police directed to maintaining public order(public order and peace, public security, etc.); whereby, such guardianship and administrative activity, as regular and primary activity in the legal order, stands out of the principle of legality in a substantive sense. As we have already highlighted, legal norms, as systemic legal stands, determine the flow and limits of physical activities of the police (guardianship and administrative activity), but the concerned flow of activity cannot be stopped with legal norms, because this is about a physical activity strengthened with the assumption of legality and the assessment of expediency, with a possibility of direct execution. It means that physical activity of the police - being regular and primary activity in the legal order - cannot be regulated content-wise with legal norms, asregulative legal stands, but the conditions and limitsof propagating the concerned activity are legally regulated, as well as the consequences of undertaking the activity, and all of that should secure the preservation of legal order. The administration and control administrative activity consists in the control of the state administration authorities over specific subjects in regard to performing legal duties determined with imperative legal norms, with the aim of preserving and protecting the legal order (inspection monitoring, monitoring over the work of local self-government). Moreover, viewed according to the law, the subject of inspection procedure are legal norms, as regulative legal stands, which represent completed and specified legal entities, from which legal duties directly arise; therefore, in an inspection procedure, the observance of legal duties is examined with the power of a direct delivery of sanction or with the power of initiating criminal proceedings. Thereupon, by the nature of things, the inspection procedure is conducted as physical activity of the state administration authorities or another authority; and only after the violation of legal norms, as regulatory legal stands, has beenestablished, the corresponding legal matter occurs (misdemeanour, criminal, etc.).

legal norms (regulative legal stands), as unfinished and unspecified legal entities in the administrative and legal regime.[812]

In administrative matter, individual legal goods and private interests are represented very much, as their dynamic expressions, where exercising private interests in administrative matter stands under the rule of general good and general interests, as a dynamic expression of general good. For instance, recognition of subjective right in administrative matter is by default exercised by adopting an administrative act at the request of a party, from which it follows that constitutionality of individual legal goods and private interests exists in the concerned cases as their dynamic expression. However, recognition of subjective right, is achieved through a unilateral legal regulation, by rendering an administrative act by the competent authority of the state administration, and free will (the party's request for granting subjective right) represents a legal fact, not a law formation source. Rendering a decision without a party's request would lead to nullity of the administrative act, where constitutionality of private interests is put into practice, as a dynamic expression of individual legal goods. The fact that free will has no character of a law formation source on the occasion of decision making upon the recognition of subjective right, is the consequence of the validity of legal imperative norms and administrative and legal regime, as the basic legal regime in administrative matter.

Contrary to administrative matter, in some legal matters (e.g., higher education, social welfare), administrative legal regime cannot be applied as a whole, which is provided for by the General Administrative Procedure Law; consequently, congruent and not subsidiary application of general procedure law should be provided for. Above all, there are areas of the legal order that also differ from administrative matter by the method of legal regulation (e.g. procedures of establishing disciplinary responsibility), which is an additional proof of the eligibility of validity of a congruent application of the General Administrative Procedure Law, as a general procedural law.[813] Outside administrative matters today, there are many areas of legal order where legal cases are solved unilaterally - by applying imperative legal norms by the holders of public powers. The mentioned areas belong to the institutional order of territorial community[814] and they are governed by the systemic (substantive and procedural) laws, and the General Administrative Procedure Law is applied as a general procedural law. This is about the areas of the legal order where the matter of legal regulation differs from administrative matter, and the difference is in the nature of legal goods and legal interests constituting the matter of legal regulation, as well as in regard to substantive law principles governing matters of legal regulating that we are talking about. In procedural sense, the application of the General Administrative Procedure Law is justifiable due to the method of legal regulation - specifying general legal norms, as unfinished legal entities, by rendering an individual legal act - since the legal subjects in these matters are regulated by issuing legal acts without

[812] D. Milkov, Upravnastvar (Administrative matter), *Annals of the Faculty of Law of Belgrade,* no. 5, 1986, pp. 490-504.

[813]About the relationship between the matter and methods of legal regulating: M. Prica, Upravnastvariupravnosudskastvar (Administrative matter and administrative and judicial matter), *Collection of Works*: *Pravo u funkcijirazvojadruštva (Law in the function ofsocietal development*), Kosovska Mitrovica, Niš, 2019, pp. 597-639.

[814] Unlike nation and population, a territorial (spatial) community, apart from physical persons includes legal persons and other subjects of the legal order, but also moral subjects that are the holders ofobjective spirit (e.g. nation, family, civil society, etc.). Moral subjects do not have legal subjectivity, but they represent important subject territorial community and country, as legal and political community. State is a trinity of its territorial community, the basic institutional order of public authorities, and the territory belonging to it. Looking outwards, territoriality is an important feature of a country, bearing in mind that only one state as the basic institution (a sovereign state) appears as a basic spatial order, which is personified in the supreme authority in the given territory. But looking inwards, the level of identity between a state as an institution and a spatial community is even more important, and such relationship is primarily recognised through a spiritual and teleological content of the public order, expressed in the unity of and a transcendental power of objective spirit. Therefore, in order to understand and correctly set the doctrine on a legal state, the existence of three institutional orders must be implied. These are: 1) a spatial community as an institutional order, 2) an institutional order of the state administration, as the entity of the state authority, and 3) an institutional order of the public authorities (institutional public order as the embodiment of the idea of legal state in a material sense). A state as an institution (a political and legal community) is a trinity of the aforementioned institutional orders. M. Prica, *Eksproprijacijakaopravniinstitut*, Niš, 2016, pp. 23-40.

an option of contracting and applying free will as a law formation source. On the other hand, the form of possible application of the General Administrative Procedure Law is determined by the matter of legal regulation, consequently the nature of legal cases regulated by individual legal acts is determined by the matter of legal regulating (relationship between legal goods and legal interests), a characteristic of governing substantive law and methods of legal regulating.[815] Administrative matter and matters of legal regulation that we are talking about, have the same method of legal regulating, but they mutually differ by the causa of legal regulation - due to the difference between legal goods and legal interests, which constitute the matter of legal regulation, and due to different substantive law principles, which constitute the entity of legal regulation.

The term of administrative matter in the current General Administrative Procedure Law[816] is specified exclusively according to the method of legal regulations, which is quite wrong, bearing in mind that the legal matter as a legal term is predominantly determined by the matter of legal regulation and the substantive law principles, constituting the entity of legal regulations. The method of legal regulating is determined according to the entity of legal regulating, and not the other way round. Revealing an administrative matter implies a congruence of legal cases in the material sense with the method of legal regulating (administrative and legal regime), as an expression of conforming the entity of legal regulating in administrative matter to the method of legal regulation. The administrative and legal regime is a product of the aforementioned conformity. Legal cases being solved in administrative matter by issuing administrative acts in the administrative and legal regime represent administrative matters. We opine that only those legal subject matters regulated with an administrative and regulatory activity can be called an administrative matter, as a spiritual activity in the legal order (by issuing administrative acts and concluding administrative contracts); whereas, guardianship and administrative activity and administrative and controlling activity (administrative actions and public services), as aspects of physical activity in the legal order, cannot have the character of a legal matter, as a legal form. The physical activity that we are talking about, belongs to administrative matter and administrative and legal regime, but it has no character of administrative matter, considering that legal objects cannot be regulated with a physical activity, and legal matters occur on the occasion of undertaking certain forms of physical activity: (1) misdemeanour matters (imposing a sanction by the state administration authority), (2) civil matters (e.g. an application for the compensation for damage caused by an illegal administrative act), and (3) administrative affairs (regarding an act or omission of administrative action and conducting public

[815]**Legal goods** are parts of the reality; as objects of legal protection, they represent **legal objects**, but they are also material sources of legal regulation (**law formation sources**). Although they belong to the factual entity, legal goods are still different from legal facts: legal goods are parts of the reality that represent the object of legal protection or a material source of subjective rights and legal duties, while legal facts are parts of the reality significant for the flow of legal regulating. Individual freedom, private property, dignity of human personality, that belong to a man - citizen, as a subject of legal order, have the characteristic of legal good in the legal order, whereas the general good, bearing in mind the state as a community, also has a characteristic of legal good. Legal interests are dynamic expressions of legal goods in the legal order. In connection with the foregoing, it is important to bear in mind the difference between public interest, general interest and private interest. In our opinion, general interests represent the dynamic expressions of common good, while, under private interests, we understand the dynamic expressions of individual legal goods of citizens as subjects of the legal order. The public interest represent a regulatory determinant of the legal order and a statical expression of general good, meaning that - unlike general and private interests, as substantial categories –the public interest has relational and regulatory character. The public interest, as a regulatory determinant, is anchored in the order of legal state between: general and private interests, the public and the private, interventionism of the state authority and the civil society, the institutional order of public authority and the institutional order of a spatial community, aimed at regulating the relationships between different legal goods and legal interests in the order of a legal state.

[816]Article 2 of the Law on General Administrative Procedure: (1) An administrative matter, in terms of this Law, is an individual situation in which the authority, directly applying laws, other regulations and general acts, legally or factually affects the party's position by issuing administrative acts, guarantee acts, by concluding administrative contracts, undertaking administrative actions and providing public services. (2) An administrative matter is also any other situation that is specified as an administrative matter by the law.

services).[817] Failure to take into account the differences between administrative matter, administrative affair and administrative activity, also comes to light in regard to a complaint, which is provided for as the remedy in an administrative procedure, although the complaint cannot have that characteristic, since "a complaint represents an application for the provision of legal protection, an act of initial character by which an administrative procedure is just being initiated. Legal remedies in an administrative procedure, regular and extraordinary, can only be used by parties when, following a declared objection, the administrative procedure has been conducted and when the administrative act has been rendered."

Herefrom arises that it is not that the term of administrative matter has not been broadened, but the space for the emergence of administrative matter, implicating a conclusion that the definition of administrative matter in the current General Administrative Procedure Law is a matter of wrong theoretical experimenting. First, the definition of administrative matter is scientifically ungrounded as it does not start from the difference between a legal matter and a legal situation, public and general interests, administrative substance, administrative matter and administrative activity, whereby the concerned definition does not take into account the difference between spiritual activity (legal regulation of legal cases) and physical activity (undertaking administrative activities and providing public services), which is unacceptable from the scientific and the positive and legal standpoints. Second, the definition of administrative matter only starts from the method of legal regulating, and it is only correct that the conception of administrative matter encompasses the substance of legal regulation (legal goods and legal interests) and the legal regime of regulating legal cases as a whole composed of legal principles as teleological legal stands and legal norms, as regulatory and systemic legal stands. Finally, it is not clear at all what the practical significance of the concerned definition is, particularly that the definition in question also contains the formulation that any legal case being named an administrative matter by a special law will have the character of administrative matter.

Article 214 of the current General Administrative Procedure Law establishes the obligation of harmonising special laws with the General Administrative Procedure Law, and a Coordination Body for the Harmonisation of Special Laws with the General Administrative Procedure Law was formed with a decision of the Government of the Republic of Serbia (*Official Gazette of RS*, no. 119 dated 29 December 2017). This harmonisation of special laws with the General Administrative Procedure Law has not been implemented until this very day!

It is our opinion that the harmonisation of special laws is not possible without amending the General Administrative Procedure Law, in such a manner that the text of the General Administrative Procedure Law will: (1) embody the difference between subsidiary and congruent application of the general procedural law, and (2) strengthen the immediate application of the General Administrative Procedure Law in an administrative matter.[818]

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[817]D.Milkov, R. Radošević, Prigovor u upravnompostupku (Objection in administrative procedure), *Collection of Works of the Faculty of Law of Novi Sad*, no. 4, 2018, p. 1468.

[818]Differentiation of subsidiary and congruent application of the general law is our original standpoint which represents a contribution to the relationship between special laws and the General Administrative Procedure Law, as the general law. Our viewpoint on the difference between congruent and subsidiary applications of the general law is published in our article on administrative and administrative and judicial matter for the first time in 2109 (M. Prica, Upravna stvar I upravnosudska stvar, Collection of Works: *Pravo u funkciji razvoja društva*, Kosovska Mitrovica, Niš, 2019, pp. 627-630). It is interesting to note that when the Law on Alterations and Amendments of the Law on the Registration Procedure in the Business Registers Agency was passed (*Official Gazette of the RS*, no. 31/2019), art. 4 altered the application of this law, by stating: the word "congruent" is replaced by the word "subsidiary", which gives us reason to believe that the standpoint on differentiating congruent and subsidiary applications will be taken as the basic criterion on the occasion of harmonising special laws with the General Administrative Procedure Law. Being bound by the volume of discussion, we cannot tackle a detailed analysis of the current special laws in relation to subsidiary and congruent applications of the General Administrative Procedure Law. In this regard, we will present our own conclusions in the article "Harmonisation of Special Laws with the Law on General Administrative Procedure", that will be written in 2021, and hopefully published by the end of that year. Regarding typical discrepancies of procedural provisions in special laws in relation to the General Administrative Procedure Law -

Since the General Administrative Procedure Law is a systemic (basic) procedural law in administrative matter, it is not enough that special laws are only bound with legal principles and the degree of legal protection contained in the General Administrative Procedure Law, meaning that it is necessary to ensure in administrative matter that the General Administrative Procedure Law is entirely valid as a systemic and general procedural law. A special law in administrative matter should represent a concretisation of legal principles and legal norms of the systemic procedural law, as the general law, by standardising special cases of manifesting legal institutes contained in the general procedural law with a special law. In the stated meaning, the provisions of the Law on Citizenship can serve as an example (*Off. Gazette of RS*, no. 135, 2004, 90, 2007, and 24, 2018), which standardise the withdrawal of application[819] and the annulment of the decision in administrative procedure[820], by applying the provisions of the General Administrative Procedure Law in the manner that represents their concretisation, but not any violation thereof. On the other hand, derogations from legal norms in the provisions of special laws must have legal ground in the General Administrative Procedure Law, which corresponds to the characteristic of a procedural law with a direct application. The General Administrative Procedure Law, as the systemic law, regulates legal institutes by setting the basic legal norms as systemic legal stands that will ensure that legal institutes are valid in a general manner in all the branches of administrative matter, which does not mean that the possibility of derogation from the general regime of legal institutes in the provisions of special laws should be excluded. But for allowing such derogations, there must be legal ground in the general procedural law, implying that any possible derogations and their limits will be explicitly established under the General Administrative Procedure Law. For instance, article 98 paragraph 1 of the General Administrative Procedure Law provides for that the party may withdraw the application pending the notification on the finality of the second-instance decision, while article 36 of the Law on Expropriation (*Off. Gazette of the RS*, no. 53, 1995), standardises that the beneficiary of expropriation may withdraw from the motion for expropriation pending the finality of the decision of expropriation. The beneficiary of expropriation may also withdraw from expropriation later, by concluding an agreement with the former owner of expropriation, implying a withdrawal from expropriation even after the finality of decision. Thereupon, it arises that in the matter of expropriation, by its nature, as a part of administrative matter, the exception of general regime of withdrawal from application is valid, consequently it would be legally valid to amend the cited article 98 paragraph 1 of the General Administrative Procedure Law with a provision allowing for

see: Z. Lončar, Posebniupravnipostupci (Special administrative procedures), *Collection of Works of the Faculty of Law of Novi Sad*, no. 4, 2016, pp. 1231-1249.

[819]Article 40 of the Law on Citizenship: "If the procedure for acquisition or termination of citizenship of the Republic of Serbia, initiated at the request of an applicant, cannot be continued or completed without certain action undertaken by the applicant, the application will be considered to be withdrawn, if the applicant - despite the warning of the Ministry competent for internal affairs - does not carry out the action necessary for continuation or completion of the procedure within the given deadline or if for failing to carry out such actions it can be concluded that he is not interested in the continuation of procedure." For the reasons stated in para 1 of this article a procedure can be suspended upon expiry of a three-month period from the date of warning, i.e., a six-month period for an applicant residing abroad.

[820]Article 45 of the Law on Citizenship: "If the Ministry competent for internal affairs in the course of procedure, finds out that a certain person has acquired citizenship of the Republic of Serbia or his citizenship of the Republic of Serbia has been terminated contrary to the regulations on citizenship, valid at the time of acquisition or termination citizenship, especially pursuant to a false or forged document or statement, based on inaccurate facts or other abuse in the conducted procedure, i.e. that such a person is recorded in the Register of Citizens of the Republic of Serbia, it will take a decision on cancellation of acquisition or termination of citizenship of the Republic of Serbia of that person, i.e. on cancellation of recording of such a person in the Register of citizens of the Republic of Serbia. Decision on acquisition and termination of citizenship of the Republic of Serbia cannot be cancelled if the person defined by the para 1 of this Article would be left without citizenship. The Ministry competent for internal affairs is obliged to deliver the decision on cancellation of acquisition and termination of citizenship of the Republic of Serbia, i.e., on cancellation of recording in the Register of citizens of the Republic of Serbia, to the authority competent for keeping records for the purpose of cancellation, i.e., recording in the Register of citizens of the Republic of Serbia."

an option to provide for an exception form the general rule on the withdrawal from application by a special law.

We shall give another example exactly from the matter of legal regulation of the stay of foreigners in the territory of the Republic of Serbia. According to the wording of article145 of the General Administrative Procedure Law, a decision on administrative procedure must be issued within a 60-day period from the date of initiating the administrative procedure, at the latest. Regarding the legal regulation of a foreigner's status in the territory of the Republic of Serbia, which is a part of administrative matter, there are legal cases for which it is not possible to issue the decision within a 60-day period. This is evidenced by the provisions of art. 69 of the current Law on Foreigners (*Off. Gazette of the RS*, no. 24, 2018 and 31, 2019:

"[...] (2) An application for permanent residence of a foreigner in the Republic of Serbia shall be decided by the Ministry of Interior within a 60-day period from the date of submitting the application. (3) When deciding upon the submitted application for approval of permanent residence, besides the assessment whether the requirements referred to in art. 67, 68 and 70 of this Law are met, the Ministry of Interior shall obtain the assessment of the state authority responsible for the protection of security of the Republic of Serbia whether such permanent stay of the foreigner in the territory of the Republic of Serbia represents an unacceptable security risk. (4) The time limit for delivering the assessment is 55 days from the date of submitting the application for consideration."

Hence the necessity to provide for an exception from the basic rule referred to in art. 145 of the General Administrative Procedure Law, as well as other cases in the administrative matter where it is established that the exception arises from the nature of things Anyway, the possibility of derogating from the basic rule is also contained in the current General Administrative Procedure Law. For example, derogation is provided for in regard to the basic rule on a suspensive effect of appeal, on the basis of which the decision is not enforced until the appeal time limit expires. The derogation reads, as follows:

"(1) An oral decision is also enforced prior the expiry of the appeal time limit and after filing the appeal; (2) The decision is, exceptionally, enforced prior to the expiry of the appeal time limit, as well as after filing the appeal, if the suspension of enforcement would cause irreparable damage to the party or jeopardise public interest more seriously" (art. 155).

Legal grounds for derogation of the provision of a special law from the basic rule is also contained in article 48 paragraph 4 of the General Administrative Procedure Law: "A temporary attorney may only refuse representation for reasons determined by special regulations", as well as article 66 paragraph 2 of the General Administrative Procedure Law: "The provisions of this law on notifying a party are applied to notifying other participants in the procedure, unless stipulated otherwise by the law"; etc.

In the way described, it will be achieved that all the procedural provisions of special laws have legal grounds in the general procedural law, whereby the General Administrative Procedure Law will indeed obtain the characteristic of a systemic and general law in administrative matter. It will certainly mean that in come branches of administrative matter, the procedural provisions of a special law harmonised with the General Administrative Procedure Law are primarily applied, and the General Administrative Procedure Law will be subsidiary (in whole) applied to all the issues not regulated by a special law.

In other matters of legal regulations, the direct application of the General Administrative Procedure Law would only be valid in the part of general legal principles, as teleological legal stands, and the congruent application of the provisions of the General Administrative Procedure Law would be valid in the remaining part. Thereby, since legal principles are general teleological legal stands requiring concretisation, a valid application of the General Administrative Procedure Law, there can be no valid application of the General Administrative Procedure Law, as the general procedural law, without determining all the legal norms (systemic legal stands) of the General Administrative Procedure Law that directly express general legal

principles (teleological legal stands) of an administrative procedure.[821] The General Administrative Procedure Law - outside administrative matters - primarily serves the implementation of the legal order unity, as a constitutional principle. The reason for it is the need for preventing the "federalisation" of the state authority to lead, by way of public powers, to feudalisation of the regime of legal regulation of legal cases, whereby the disintegration of the legal order would occur.

Taking into account the aforementioned, **in the matter of a legal regulation of a foreigner's stay** in the territory of the Republic of Serbia, a **regime of direct and subsidiary application of the General Administrative Procedure Law should be valid**. In relation to the regime of direct and subsidiary application of the general procedural law, it is necessary to tackle the harmonisation of procedural provisions of special laws with the General Administrative Procedure Law, and this in the manner that is presented and explained herein. The harmonisation, we are speaking about, includes three situations. First, procedural provisions of the law in the matter of legal regulation of a foreigner's stay can contain solutions that will represent a concretisation of legal institutes regulated by the General Administrative Procedure Law, where the general law is actually concretised with the provisions of a special law. Apart from the examples of the Law on Citizenship that we highlighted earlier; other examples can also be stated. So, according to the provisions of article 26 of the Law on Border Control (*Off. Gazette of RS*, no. 24, 2018), a permit and a temporary permit for staying at the border zone will be revoked (annulled) if any of the reasons for which the permit would not have been issued has occurred, which is, actually, the concretisation of the legal institute of the annulment of decision, regulated by the General Administrative Procedure Law. An example of the concretisation of the legal institute of general law can be presented by art. 47 of the Law on Asylum and Temporary Protection (*Off. Gazette of the RS*, no. 24, 2018), the provisions of which regulate the withdrawal from an asylum application and *restitutio in integrum.*[822] The provisions on the withdrawal from an asylum application are the concretisation of paragraph 2 of article 98 of the General Administrative Procedure Law: "It is considered that the party withdrew from an application if his behaviour obviously implicates that he has no interest to take part in the procedure any more", since the right of an asylum seeker to requires *restitutio in integrum*appears as a form of concretisation of the general procedural law, in compliance with art. 82 of the General Administrative Procedure Law, and according to the reasons referred to in art. 47 of the Law on Asylum and Temporary

[821] An example of a legal principle as a teleological legal stand is the tenet of assisting a party referred to in art. 8 of the Law on General Administrative Procedure: "(1) The authority conducting the procedure *ex officio* shall ensure that the ignorance and illiteracy of a party and other participants in the procedure do not prejudice the rights they enjoy under the law. (2) When the authority, considering the factual state, learns about or assesses that the party and another participant in the procedure is entitled to exercising any right or legal interest, it warns them about it. (3) If any amendment to the regulations occurs during the procedure, which is significant for acting in an administrative matter, the authority will inform the party thereof." An example of a legal norm as the systemic legal stand that directly expresses the presented tenet on assistance to the party is the provision of art. 59 of the Law on General Administrative Procedure: "(1) The authority conducting the procedure *ex officio* shall ensure that the ignorance and illiteracy of a party and other participants in the procedure do not prejudice the rights they enjoy under the law. (2) When the authority, considering the factual state, learns about or assesses that the party and another participant in the procedure is entitled to exercising any right or legal interest, it warns them about it. (3) If any amendment to the regulations occurs during the procedure, which is significant for acting in an administrative matter, the authority will inform the party thereof. "It stems from here that, if the procedural provision of the special law is not in compliance with art. 55 of the Law on General Administrative Procedure, it certainly means that there has been a violation of the tenet of assistance to a party referred to in article 8 of the Law on General Administrative Procedure. An example of the violation of the tenet of assistance to a party in a special law, see in the work of Cucić: V. Cucić, *Sprovođenjeikontrolapostupkajavnihnabavka (Implementation and control of public procurement procedure)*, Beograd, 2020, p. 32.

[822]It is considered that the asylum seeker has withdrawn from his application if: 1) he withdraws his application in a written statement; 2) he, despite having received a duly served summons, fails to appear for the interview, without providing a valid reason for his absence, or declines to make a statement; 3) he, without providing a valid reason, fails to notify the Asylum Office of any change of address at which he resides within three days of the said change, or if he otherwise prevents the service of a summons or another written official communication; 4) leaves the Republic of Serbia without the Asylum Office being aware of it, without providing a valid reason.

Protection.[823] The latter situation implies a possibility to provide for different solutions in relation to the solutions from the general law, with special laws provided that the solutions in question are in conformity with the provisions of the general law. Here, this is not about a concretisation of legal institutes of the general law, but about different provisions of a special law that are language-wise and systematically and teleologically completely in compliance with the general law. For instance, a visa application is decided about within a 15-day time limit from the date of submitting the application, and, if there are eligible reasons, this time limit can be extended by 30 days (art. 3 of the Law on Foreigners). Herefrom arises that the Law on Foreigners provides for the deadline for decision making which differs from the general time limit provided for by the General Administrative Procedure Law, whereby it is a shorter time limit and consequently such derogation from the provisions of the general procedural law is allowed. Additionally, in some legal cases, the effect of individual provisions of the General Administrative Procedure Law is bound by certain legal facts. Also, pursuant to art. 91 of the General Administrative Procedure Law, the administrative procedure is initiated by the request of the party when the authority receives the party's application, and by nature of things, the submission of application is not bound by the time limit or by the existence of any specific legal fact. There are, however, legal cases where the submission of application is conditioned by the time limit running from the prescribed legal fact. So, an asylum procedure is initiated by the submission of an asylum application - but within a 15-day time limit from the date of registration, which is a provision that does not contradict, in a systematic and teleological sense, the provisions referred to in art. 91 of the General Administrative Procedure Law. Finally, the third situation represents, by nature of things, the necessary derogation from individual provisions of a special law from the general law, whereby in such situations, it would be correct to provide for it the legal ground in the general law. Here, the formerly cited provisions of art. 45 of the Law on Foreigners, which give rise to the justification for establishing the legal ground in the general law that - when necessary - the possibility of providing, with a special law, an option of first-instance procedure lasting 60 days longer, which is the time limit prescribed with the General Administrative Procedure Law, can serve as an example. The duration of first-instance procedure longer than 60 days is prescribed by the provision of the Law on Asylum and Temporary Protection (art. 39), so that the decision of asylum is taken within a three-month time limit from the date of filing an asylum application, whereby this time limit can be extended for three months more[824]

Finally, apart from harmonising special laws with the provisions of the General Administrative Procedure Law, it is necessary to proceed to the harmonisation of special laws of the regime of administrative and judicial protection with the provisions of the Law on Administrative Disputes which in regard to the administrative and judicial protection is valid as a systemic (basic) law; consequently, it would be correct to apply the regime of direct and subsidiary application of the general law in the part of administrative and judicial protection.

5. Conclusion

At the beginning of the paper, the term of a party, an asylum seeker, is specified and brought into connection with the statutory determination of the term of a refugee. The legislator, particularly in the procedural sense, protects the so-called vulnerable persons for the determination of which it is also necessary to call for help the adequate provisions of the Law on Foreigners. In relation to particularly endangered categories of persons, an even higher degree of procedural legal protection is provided to minors. It is essential for acting authorised officers to determine such special status of these categories of parties as soon as possible. Since the right to asylum is an individual right, there are no advocates of

[823]The asylum seeker may file a motion for *restitutio in integrum* in compliance with the law regulating general administrative procedure when the decision on the cancellation of procedure is taken out of the reasons set out in paragraph 2 items 2), 3) and 4) of this article (see the reasons referred to in the previous footnote).

[824]The time limit may be extended for three months if: 1) the application includes complex factual or legal issues; 2) a large number of foreigners have submitted their asylum applications at the same time.

collective interests in these procedures. However, there are specifics when advocates and attorneys are in question, and legal aid is provided by civil society organisations through the application of the provisions of the Law on Free Legal Assistance to a great extent. Further in the text, the situation of seeking an asylum at the very border crossing is processed, which is an exception to the rule most frequently occurring at airport border crossings. Closely connected to the term of a party in such type of procedures is the question of determining the party's identity, for which the provisions of the Law on Police and the accompanying by-law sources of law are used to a great extent. While determining one's identity, but also during the entire asylum procedure, any contacting the diplomatic and consular missions of the country of origin is not allowed. Translators and interpreters are the next category of participants in the procedure whose specifics are specifically processed. The basic conclusion drawn is that those "services" are not rendered by true interpreters/translators in a formal and legal sense. Only, the asylum procedure is initiated at the request of a party, but the circumstances referring to subsidiary protection are examined *ex officio*. The party may state his request orally on records, or in writing within a 15-day time period from the date of his accommodation in an asylum centre. Regarding the issue of notifying a party, the tenet of personal delivery is predominant in an asylum procedure. According to the provisions of article 40 of the Law on Asylum, the procedure may be accelerated observing all the postulates of good administrative acting, but these acts are not that often in practice. The institute of joinder of procedures is only resorted to in the event of families, when all the actions in a first-instance procedure are conducted jointly. A regular procedure has to be completed within a 3-month time period, with a possibility of extension for additional 3 months, and exceptionally, the entire procedure may last 12 months maximum. Herein, a special attention is paid to decision that may be rendered in this procedure and their characteristics. They are, primarily, as follows: decision on permission to enter the state territory, decision on rejecting entry (both are rendered in accordance with the Law on Foreigners, with the explicit application of the principle of non-refoulement), decision on the recognition of the right to refuge and decision on the right to subsidiary protection. If a decision rejecting the application is rendered, it is highlighted that, with the amendments to the Law, a rebuttable presumption of the safe third country concept is introduced, which now has both objective and subjective elements, upgrading the standards of administrative procedural legal protection to a higher level therewith. With regard to the issue of a form of rendered decisions, their rationales are characterised by an extensive use and citation of international sources of law. A specific "upgrading" of the regime of asylum is the possibility of approving a temporary stay, pursuant to the Law on Foreigners, and according to the Law on Asylum, the Government may adopt a decision on temporary protection in the event of a mass influx of displaced persons, due to which any individual asylum procedure could not be implemented. It has not been adopted in practice yet. In the event of a judicial control of legality of these decisions performed by the Administrative Court, the stand of the Administrative Court that an automatic application of the concept of a safe third country is legal, has proved to be a problem. Therefore, it is necessary to specialise judges in this area and, in some future reform, to form a special department of the Administrative Court to deal with this matter exclusively.

If the doctrine of the Constitutional Court of the Republic of Serbia on the legal order unity is applied to the matter of foreigners' status, then the General Administrative Procedure Law would be a systemic and general law, and all the laws analysed in the first part of this text - special laws. Systemic laws are considered to be all those laws regulating entirely a whole area of a unique legal order. These laws may stand in the relationship of legal subordination or legal referral. The basic content of the General Administrative Procedure Law is constituted by legal principles and legal norms. The former ones, as teleological legal stands, and the latter ones, as systemic legal stands. Regulatory legal stands are contained in the provisions of the governing substantive laws. The principle of the legal order unity is not sufficient for regulating relationships between the General Administrative Procedure Law and the special laws in this matter, considering the possibility of their congruent or subsidiary applications. Herein, the thesis that a direct application of the General Administrative Procedure Law is only justified in the so-

called administrative matter is highlighted, which is understood in terms of the nucleus of the general good. Activity of the state administration authorities is manifested in such a situation as administrative and regulatory, administrative and control, or guardianship and administrative activities. Also, the stand has been taken that, for the purpose of preserving the legal order unity, in the matter of legal regulation of foreigners' residence in the territory of the Republic of Serbia, a "regime of direct and subsidiary application of the General Administrative Procedure Law" should be applied. The need for harmonising procedural provisions of special laws with the General Administrative Procedure Law arises from such a regime of application through concretisation, providing for different solutions (under the condition of compliance with the provisions of the General Administrative Procedure Law) and, third, by derogating from the provisions of the general law being the consequence of the nature of the matter (along with providing for the legal ground for something like that in the General Administrative Procedure Law).

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NATIONAL REPORT

1. Introductory Notes

In the contemporary society, the ideal of freedom and equality in dignity and rights is the key moral and legal value, and the principle of equality is considered to be a universal imperative. Exactly because of that, the rule on the prohibition of discrimination is proclaimed in all international documents on human rights, as well as in the constitutions of all the countries of the world. In the context of providing the principle of equality and non-discrimination, every democratic state is obliged to standardise the corpus of rules that will regulate anti-discrimination matter in a precise and comprehensive manner, in order to create solid mechanisms for efficient and effective legal protection.

In the last years, Macedonian national law has created a solid normative framework which provided effective legal protection to potential victims. One of the most significant steps forward in this direction was the adoption of the Law on the Prevention and Protection against Discrimination 2010, as the general law regulating the concerned matter.[826] In 2012, the

Law on Equal Opportunities of Women and Men entered into force, which is also significant for the creation of a solid base for adequate anti-discrimination protection.[827]

Although the Law on the Prevention and Protection against Discrimination 2010 met the minimum standards to some extent, its practical application showed that the law could not have offered a full harmonisation with the European Convention on Human Rights, neither with the established standards of the European Court of Human Right. Some essential shortcomings were detected, which referred to, above all, personal scope, institutional placement, and certain issues related to exercising protection in court proceedings. For the purpose of a full harmonisation of the national law with the European Union law, in May 2019, the new Law on the Prevention and Protection against Discrimination was passed[828],

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[826] *Official Gazette of the Republic of Macedonia*, no. 50, 2010. The passing of the Law on the Prevention and Protection against Discrimination was brought about out of several reasons. In priority, we would mention here the obligation to observe international standards referred to the guarantees with respect to human rights and freedoms. Then, to the obligation of fulfilling standards in relation to the association of Macedonia to the European Union and the harmonisation of Macedonian legislation with the legislation of the European Union. The third and, it seems, the most significant reason was the need to regulate domestic anti-discrimination law, bearing in mind that there had been no integral system for the protection against discrimination beforehand, which would standardise general conditions, measures and instruments to enable efficient protection thereof.

[827] *Official Gazette of the Republic of Macedonia*, no. 6, 2012; 166, 2014. Besides the aforementioned regulations, which regulate anti-discrimination matter directly and comprehensively, there is a series of laws in the Republic of North Macedonian law that contain anti-discrimination provisions and appear to be significant and key sources of anti-discrimination legislation in the specific areas regulated by them. In this context, we would mention on this occasion the following: Law on Employment Relations, Law on Social Protection, Criminal Code, Law on the Protection of Children, Law on the Protection of Patients' Rights, Law on Volunteering, Law on Courts, Law on Elementary Education, Law on Secondary Education, and Law on Higher Education.

[828] *Official Gazette of the Republic of Macedonia*, no. 101, 2019.

which was repealed by the Constitutional Court since it was not voted for with the majority of voices.[829] In October 2020, the Parliament of the Republic of North Macedonia voted in favour of the new Law on the Prevention and Protection against Discrimination[830], which is in compliance with the legal framework of the European Union with respect to equality and non-discrimination. In the national law, this law represents an overarching corpus of legal regulations of anti-discrimination legislation.

2. Anti-Discrimination Judicial Civil and Legal Protection

In case of prohibited discrimination, besides the possibility of effectuating extrajudicial mechanisms for the protection against discrimination, a victim of discrimination, by operation of law, is entitled to exercise the protection of his right in a procedure before the court. Judicial civil-and- legal protection against discrimination is exercised through initiating litigation proceedings. The Law on the Prevention and Protection against Discrimination provides for certain procedural specifics linked to general rules of litigation proceedings aimed at strengthening procedural status of a victim of discrimination.[831]

In litigation proceedings, the protection against discrimination can be exercised in two ways: 1) by initiating proceedings upon an application seeking protection against discrimination by the potential victim of discrimination, believing that his rights have been violated because of discrimination (individual anti-discrimination judicial protection)[832], and 2) by initiating proceedings in response to an application of the public interest (*actio popularis*) for the protection against discrimination, by persons and organisations from the civil social sector who do not claim to be victims of discrimination themselves, but conduct proceedings on behalf of the protection of the rights of a number of people (collective anti-discrimination judicial protection)[833].

The procedure in response to an anti-discrimination application is urgent.[834]

3. Certain Anti-Discrimination Legal Protection Claims

The system of judicial civil-and-legal protection against discrimination offers a possibility of raising law protection claims of different nature to a discriminated person. Some of them have preventive character and their aim is to exercise preventive protection, i.e., to prevent discrimination. Others have the so-called reactive nature, the aim of which is to establish the violation of the right to equal treatment and to

[829] Decision of the Constitutional Court of the Republic of North Macedonia, no. U. 115/2019 of 14. 5. 2020.

[830] *Official Gazette of the Republic of North Macedonia*, no. 258, 2020, abbreviated LPPD.

[831] Even before the special anti-discrimination regulations were introduced, the possibility to exercise the protection of the right to equal treatment through court had existed under the general regulations on litigation proceedings. According to art. 1 of the Law on Litigation Procedure (*Official Gazette of the Republic of Macedonia*, no. 79, 2005; 110, 2008; 83, 2009; 116, 2010, and 124, 2015, abbreviated LLP), the court contends and decides upon the basic rights and obligations of a person and citizens in the disputes within the field of personal and family relations, labour relations, as well as property and other civil relations of natural persons and legal entities, unless it is envisaged, by a special law, that the court decides upon some of the listed disputes according to the rules of another procedure. Today, the special regulations regulating anti-discrimination problematics, in an explicit manner, provide for that the procedure of judicial civil-and-legal protection is conducted according to the rules of the Law on Litigation Procedure. In the procedure, the provisions of the Law on Litigation Procedure are applied in an appropriate manner, unless regulated otherwise by the LLP (art. 32 para 2 of the LPPD).

[832] According to the LPPD, any person believing to be discriminated may file an application before the competent civil court (art. 32 para 1). In anti-discrimination proceedings, by default, courts having subject matter jurisdiction are basic courts with basic jurisdiction. However, bearing in mind that in certain litigation proceedings, the value of dispute may exceed the amount of EUR 50,000 (e.g., if damage compensation is claimed), basic courts with extended jurisdiction may also be competent. With regard to the issue of territorial jurisdiction, the LPPD prescribes elective (mixed) jurisdiction. Namely, in the procedure for protection against discrimination, besides the court of territorial jurisdiction, the court in whose area the claimant's residence or registered office is located shall also have territorial jurisdiction in the procedure for protection against discrimination (art. 33 of the LPPD). It refers to privileged territorial jurisdiction. By prescribing this type of territorial jurisdiction, the legislator puts the claimant in a more favourable position with an aim to facilitate the access to judicial protection.

[833] Art. 35 of the LPPD.

[834] Anti-discrimination regulations of procedural nature standardise the principle of urgency in an explicit manner, as one of the guiding maxims when conducting the procedure in anti-discrimination proceedings (art. 32 para 3 of the LPPD and art. 33 para 3 of the Law on Equal Opportunities of Women and Men).

rehabilitate the consequences of discrimination. Certain claims have autonomous character, while others have accessory nature. In anti-discrimination litigations, main, final and autonomous protection of the right to equal treatment are exercised. Anti-discrimination legislation offers a possibility to provide protection in this type of disputes to a vulnerable person through raising a separate claim, which may contain a number of anti-discrimination legal protection claims:

Declaratory anti-discrimination claim

As the first one of several possible legal protection claims in anti-discrimination litigations, the LPPD sets out the claim of declaratory nature, through which, the vulnerable, i.e. the damaged person may seek establishing that the discriminator violated the claimant's right, i.e. establishing that the action he has taken or failed to take represents an act of discrimination.[835] This type of lawsuit provides legal protection in cases of the violation of the right to equal treatment and in cases where an action or the omission of action did not cause any violation of the right to equal treatment, but there is the imminent danger of this happening.[836] This type of protection refers to protection of preventive character. The need to provide this type of protection occurs when the discriminator does not accept, that is to say, when denies that the action he has taken or has omitted to take is illicit, i.e., in the event when the discriminator believes that he is entitled to commit such discriminatory action or to create or keep the state of discrimination.[837] The effect of a meritorious decision with this type of anti-discrimination protection is binding in all future relations between the parties.

Prohibitive anti-discrimination claim

Raising the so-called prohibitive claim, i.e., the claim for omission is directed to exercising, primarily, preventive protection. The manner in which the legislator regulated this type of protection[838] implicates that the action with a prohibitive anti-discrimination claim may be used in order to: 1) prohibit taking of actions that are violating the complainant's right[839], 2) prohibit taking of actions that may violate the complainant's right[840]. The latter situation has a more specific nature since the imposition of a ban to commit the action may be sought and when such an action has not been committed by the defendant so far.[841] These are claims of condemnatory nature, which, if adopted, order passivity, that is to say, refraining from further action.

Restitutional anti-discrimination claim

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[835] Art. 34 para 1 item 1 of the LPPD.

[836] The standardisation of declaratory legal protection in anti-discrimination litigation proceedings is justified by enabling a vulnerable or damaged person to opt for it when this type of protection is sufficient, and he is not interested in seeking other type of protection. On the other hand, sometimes it represents the only possible form of protection against illicit discrimination. Such situations occur when the necessary conditions for legal protection requirements of other nature are not fulfilled. So, V. Vodinelić, Sadržina građanskopravne zaštite od diskriminiacije (Content of Civil Law Protection against Discrimination), *Sudska građanskopravna zaštita od diskriminacije (Judicial civil legal protection against discrimination),* Beograd, 2012, p. 227.

[837] In this sense, N. Petrušić, Građanskopravna zaštita od diskriminiacije na prostoru Zapadnog Balkana (Civil Law Protection against Discrimination in the Area of the Western Balkans), *Aktuelne tendencije u razvoju i primeni evropskog kontinentalnog prava (Actuel tendencies in the development and application of the European continental law)* Thematic Collection of Works, Volume II, Niš, 2010, p. 167 and V. Vodinelić, Sudska zaštita po tužbi zbog diskriminacije (Judicial Protection upon Lawsuit for Discrimination), in: A. Gajin, V. Vodinelić, T. Drobnjak, V. Kočić Mitaček, P. Vukasović, *Antidiskriminacioni zakoni (Anti-discrimination Laws), Vodič*, Beograd 2010, p. 71.

[838] See art. 34 para 1 items 2 and 3 of the LPPD.

[839] It implies ordering the discriminator to refrain from further committing the actions that he has committed before, as committing them represents an act of discrimination.

[840] In this case, it implies that certain actions are banned to the discriminator, the commission of which would represent a discriminatory act and the violation of the ban on discrimination.

[841] It refers to a preventive action for omission, which would be filed in situations in which any danger of future violation would exist, i.e., in which the status of the claimant would be endangered by the possibility that the claimant takes certain discriminatory actions. So, M. Dika, Sudska zaštita u diskriminacijskim stvarima (Court protection in discrimination matters), in: I. Crnić, M. Dika, A. Grgić, R. Marijan, D. Palić, J. Pavković, Ž. Potočnjak, *Primjena antidiskriminacijskog zakonodavstva u praksi* (*Application of anti-discrimination legislation in practice*), Zagreb, 2011, p. 94.

If there is a state of discrimination that is still ongoing or if the action of discrimination caused certain consequences that are still present, the law provides the claimant with a possibility to seek execution of actions that eliminate the discrimination or its results.[842] It refers to the so-called reactive[843], i.e., restitutional[844] type of protection, aimed at eliminating the already generated situation that is contrary to the prohibition of discrimination. The claim for elimination is directed to the discriminator to carry out one or more actions that will eliminate (remove) the pendent state of discrimination. It refers to condemnatory action, which is filed after the committed discrimination, and aimed at restituting the situation to the condition where it had been before the violation of the right took place. The discriminator may be charged to carry out any action that is suitable, i.e., proper for the elimination of the condition contrary to the prohibition of discrimination.[845], [846] Since it is about a claim of condemnatory nature, if the discriminator voluntarily fails to execute the ordered action, the victim of discrimination may request a forced execution thereof.

Reparational anti-discrimination claim

Per se, discrimination does not represent damage, and the occurrence of damage is not necessary for the existence of discrimination either.[847] If, however, it occurs, the discriminated person is entitled to seek to be compensated for the suffered damage, both tangible and intangible, by the discriminator.[848] The law provides a possibility to a person who believes that any of his rights has been violated as the consequence of discrimination, to seek compensation, both tangible and intangible, done through the violation of the rights protected under the LPPD.[849] Reparational claim is condemnatory by nature. The law does not speak about the term of damage, types of damage, causative relation between the action of discrimination and the damage. In the absence of special rules, the general rules of the domestic tort law, i.e., regarding the decision-making in response to a reparational claim, the provisions of the Law on Obligations will be applied.

Publicational anti-discrimination claim

[842] Art. 34 para 1 item 3 of the LPPD. The same possibility is contained in the Law on Equal Possibilities of Women and Men (art. 35 item 2).

[843] So, V. Vodinelić, Sadržina građanskopravne zaštite [...] (Content of civil law protection), op.cit. p. 230.

[844] So, A. Uzelac, Postupak pred sudom (Procedure before the court) in: A. Grgić, Ž. Potočnjak, S. Rodin, G. Selanec, T. Šimonović Einwalter, A. Uzelac, *Vodič uz Zakon o suzbijanju diskriminacije* (*Guide to the Law on the Suppression of Discrimination)*, Zagreb, 2009, p. 97.

[845] The action can be factual or legal in character, and it means that it can consists of committing some bodily acts or in taking some legal acts. So, N. Petrušić, Građanskopravne zaštite [...] (Civil law protection), op.cit. p. 167.

[846] So, e.g., one may seek that the discriminator removes a discriminatory label prohibiting access to persons with specific personal characteristic, to remove billboards with discriminatory content, to remove an architectonic barrier preventing access to people with specific personal characteristic, etc. The first final verdict establishing discrimination in the Republic of Macedonia refers to the adoption of anti-discrimination legal protection claim of restitutional nature. The Basic Court of Delčevo adopted the claimant's statement of claim and found discrimination on the ground of mental and physical disorders caused by not taking, i.e., failing to take actions to adapt infrastructure and space and to provide access to the goods and services to the claimant, as a person with mental and physical disorder. The Basic Court of Delčevo charged the defendant to eliminate the violation of the right and to adapt the infrastructure and space and to take all the necessary measures for the adaptation of the street - through constructing pavements and curbs, in accordance with the technical standards for ensuring access to the claimant being a person with special needs. See the Judgement of the Basic Court of Delčevo, P-4, no. 14/2014 dated 05. 3. 2015.

[847] So, V. Vodinelić, Sudska zaštita po tužbi [..] (Judicial protection upon a lawsuit), op.cit. p. 71.

[848] In relation to tangible (property) damage, it exists if the property situation of the discriminated person would be more favourable unless there was a discriminatory action. In such a case, the tangible damage can also be viewed both as direct loss and ceased profits. So, e.g., the claimant suffers damage referring to the lost profit, medical bills, moving costs, caused by the discriminatory action. With intangible damage, the grounds of claim for its compensation would depend on whether the victim suffered mental anguish, fear or suffered serious consequences causing impairment of health as the consequences of the discriminatory action. In the previously quoted judgement, besides adopting the restitutional claim, the Basic Court of Delčevo partly adopted the claimant's claim for compensating intangible damages for the suffered fear and mental anguish.

[849] Art. 34 para 1 item 4.

As one of legal protection claims that can be the subject-matter of contending in anti-discrimination litigation proceedings is the so-called publicational claim, i.e., the claim to publish the enactment of terms of the judgement establishing the violation of the right in the media.[850] This is about a dependent, accessory claim, implying that the action containing the claim of such nature will only be allowed if it is cumulated with another anti-discrimination action. The reason for it is that the concerned legal protection claim can only be adopted by the court if the existence of discrimination has been established in the concrete procedure. If the court adopts the claim for publication of the enactment of terms of the judgement, the publication costs are borne by the discriminator (defendant party). What should be especially distinguished with this type of anti-discrimination legal protection claim is that the decision in response to the concerned claim takes effect not only between the parties (*inter partes*) but also binds third persons (*ultra partes*). Namely, according to the explicit provision of the law, the decision ordering publishing in the media is binding for the publisher of the medium where the enactment of terms of the judgement is to be published, no matter if it was the party to the proceedings.[851]

4. Objective Cumulation

Bearing in mind the nature of legal protection claims that can be contended about in the proceedings in response to anti-discrimination action, the option that the claimant may raise several claims against the discriminator in his action is not excluded.[852] Considering the subsidiary application of the provisions of the LLP (Law on Litigation Procedure), the claimant may, in accordance with the procedural rules contained in the LLP, cumulate a number of statements of claims in one action. What claims will be placed in the concrete anti-discrimination litigation proceedings and whether there will be cumulation of many legal protection claims depend exclusively on the claimant's disposition.[853] Besides the possible cumulation of a number of anti-discrimination claims, the Law contains the special rule on the admissibility of cumulation of anti-discrimination claims with the claims concerning the protection of other rights that are decided about in the litigation proceedings. Whereby, in order to allow for joint deliberation, several conditions should be met: 1) all claims are to be interconnected, 2) the same court is to have actual and local jurisdiction for each raised claim.[854]

5. Temporary Measures

In the context of providing a more effective legal protection, the LPPD contains special provisions concerning the determination of security measures. The law provides for that the court may determine the security measures upon a proposal of the party before the beginning of or during the procedure related to the anti-discrimination claim even without hearing the other party, and this in order to eliminate immediate unlawful damage threat or prevent violence or eliminate irreparable damage.[855]

6. Participation of Third Parties in Proceedings

Speaking about the specific procedural institutions, such as the participation of third parties in the procedure, the LPPD standardises the institution of intervention in the other party's proceedings, which

[850] Art. 34 para 1 item 5 of the LPPD.
[851] Art. 34 para 3 of the LPPD.
[852] Because of discrimination, being the legal ground, and the actions of discrimination, being the factual ground, several claims can be raised in the action; and another one, or several new claims, in addition to the existing one, can also be raised later.
[853] The claimant decides whether to raise only one claim, or more claims, or all of them, and he will combine them depending on the goal he wishes to achieve. If the claimant decides to place several claims, several combinations are possible depending on the life event and circumstances related thereof. So, the claimant may only seek to determine that there is discrimination; however, besides establishing discrimination, prohibition of future discrimination, elimination of consequences of discriminatory action, to compensate damages or to publish the enactment of terms of the judgement may also be claimed.
[854] Art. 34 para 2 of the LPPD.
[855] Art. 36 of the LPPD.

enables third parties to take part in anti-discrimination litigation proceedings.[856] Whereby, the Law provides for that the court decides on the participation of intervenors by applying the Law on Litigation Procedure.[857] It means that the admissibility of intervening in the concrete litigation proceedings, in relation to the assumptions to be fulfilled and in relation to the procedural status of intervenors, the general regime regulated by the procedural provisions of the LLP applies.[858]

What draws attention, speaking about the participation of third persons in the procedure, is the broad possibility for the participation of third persons in the procedure relating to individual anti-discrimination protection. Namely, any authority, organisation, institutions, association or trade union or any other entity dealing with the protection of the rights to equality and non-discrimination within their activities, the rights of which are decided upon in the procedure, may join it as an intervenor.[859]

Bearing in mind the subsidiary application of the provisions of the LLP, it should be highlighted that the *litis denuntiatio* institute may be applied in this type of disputes.

7. Burden of Proof

In relation to establishing factual state in this type of procedure, it is important to emphasise the specifics of the rule on the burden of proof. As is known, according to the general rules on the burden of proof, the party that is to prove a fact in his favour, bears the burden of proof. If the party fails to prove the verity of these facts, the court will, by applying the rules on the burden of proof, conclude that the fact that has not been proven does not exist. It implies that the party bears the risk of improvability, which may also result in the loss of the litigation proceedings.

As the result of difficulties in proving discrimination[860], the general rules on the burden of proof are derogated from in anti-discrimination litigations. Namely, in these proceedings, the shift of the burden of proof from the claimant to the defendant occurs with respect to proving (non)existence of discrimination. On one hand, the party alleging that his right has been violated is obliged to present the evidence justifying his allegation in the judicial proceedings. On the other hand, proving that there has been no discrimination is borne by the opposite party (i.e., the alleged discriminator). Such conception of the rule on the burden

856 Speaking about the participation of third persons in the litigation proceedings, the procedural theory and legislation differ several procedural forms of participation. Third parties, by default, are not interested in the outcome of other party's litigation proceedings. The litigation proceedings only concern the interests of litigation parties in the majority of cases, bearing in mind that exactly the parties are, by default, the only interested ones for the outcome of the proceedings. Yet, in some cases, the outcome of one procedure may have a specific indirect or direct effect upon the legal sphere the legal status of third persons. Thereafter, the legislator permits third persons to take part in other party's litigation proceedings. The interconnectedness of third parties to other party's litigation is not always identical. The reasons for it can be of different nature, affecting that the procedural legal status of third party is not identical in each individual case. Thereafter, the procedural law standardises three types of participation: participation of intervenor, notifying a third party on the litigation, and appointing an antecedent. See Chapter 15 of the LLP.

857 art. 40 para 2 of the LPPD.

858 In that sense, the intervenor can enter the litigation in the course of the whole procedure pending the decision on the statement of claim becomes final, as well as in the time periods stipulated for filing an extraordinary legal remedy. The statement on entering the litigation can be given by the intervenor on the hearing or in a written submission. The intervenor has to receive the litigation in such condition as it has been at the moment he intervenes in the litigation. In the further course of the litigation, he is authorised to submit proposals and undertake all other litigation activities in the time periods when such activities could have been undertaken by the party he has acceded to. The litigation activities of the intervenor on behalf of the party he has acceded shall have legal effect, unless against its activities. Bearing in mind that the intervenor can intervene only on the side of the claimant, he has legal interest only for undertaking activities in favour of the person invoking the existence of discrimination.

859 Art. 40 para 1 of the LPPD.

860 Discrimination is rarely manifested in a clearly and easily recognisable manner. Even with direct discrimination, underlined by unfavourable treatment, differentiation, exclusion or restriction between individuals only for the purpose of discrimination ground of one of the persons, it is hard to prove that the highlighted difference is motivated with some of illicit grounds of discrimination. So, Ž. Poposka, Z. Mihajlovski, A. Georgievski, *Водич за улогата на Комисијата за заштита од дискриминација во судска постапка и преминување на товарот на докажување*, Skopje, 2013, p. 27.

of proof arises from European directives[861], which has also been taken over by Macedonian anti-discrimination legislation. The reasons for shifting the burden of proof to the defendant party are two-fold: a) protection of the weaker party in the legal relation, and b) providing access to information as an expression of the principle of procedural equality of the parties.[862]

Pursuant to article 37 of the LPPD, the claimant who claims that, in accordance with the provisions of the LPPD, discrimination has been committed, is obliged to present only those facts making the claim probable, and then the burden of proof is shifted to the defendant - to prove that there has been no discrimination.

In the context of shifting the burden of proof from the victim (claimant) to the assumed discriminator (defendant), the claimant must present to the court enough facts to bring his allegation to a level of probability degree. What should be pointed out is that the essence of the rule on shifting the burden of proof is observed in the fact that the party invoking discrimination is obliged to make it probable that the discrimination has been committed, and if succeeds in doing it, the assumed discriminator is obliged to prove, to a degree of certainty, that there has been no discrimination in the concrete case. If the defendant fails to do so, it shall be considered that the right has been violated, i.e., that discrimination is proved.[863]

The defendant can fight against the proof of probability in two ways: using counter-evidence, by eliminating probability, i.e., if he succeeds in bringing prejudice to the probability of what the claimant had to prove; and using evidence on the contrary, proving with a higher degree of probability that there is no discrimination although the discrimination ground has been made probable, i.e., to prove that exactly the opposite is more probable.[864]

The rule on shifting the burden of proof is not applied in misdemeanour and criminal proceedings.[865] The reasons for such normative solution lies in the fact that the principle of presumption of innocence applies in these proceedings.

8. Action for Protection Against Discrimination of Public Interest (*Actio Popularis*)

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[861] The original directive that codified the case law of the European Court on the burden of proof is Directive 97/80/EC (Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, Official Journal L 014, 20/01/1998 P. 0006-0008). The same normative concept is also repeated in directives adopted afterwards, and referring to: setting the principle framework for the equal relationship in employment and occupation (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303 , 02/12/2000 P. 0016–0022, art. 10); equal treatment between persons irrespective of racial or ethnic origin (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin Official Journal L 180 , 19/07/2000 P. 0022–0026, art. 8, para. 1); equal treatment between men and women in the access to and supply of goods and services (Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Official Journal of the European Union L 373, 21/12/2004 P. 294–300, art. 9, para. 1); equal opportunities and equal treatment of men and women in matters of employment and occupation (Directive 2006/54/ec of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Official Journal of the European Union L 204, 26/07/2006 P. 0023–0036, art. 19, para. 1).

[862] First, shifting of the burden of proof to the defendant party is in a function of providing an effective legal protection to victims of unequal treatment. Second, a victim of discrimination, by default, has no access to important information that have affected discrimination actions. This is exactly why such an approach has exclusive importance in order to enable assistance and protection to discriminated persons. Also S. Rodim, Dokazivanje diskriminacije i teret dokazivanja u pravu Evropske unije (Proving discrimination and burden of proof in the European Union law), in: A. Grgić, Ž. Potočnjak, S. Rodin, G. Selanec, T. Šimonović Einwalter, A. Uzelac, *Vodič uz Zakon o suzbijanju diskriminacije* (*Guide to the Law on the Suppression of Discrimination)*, Zagreb, 2009, p. 109.

[863] So, N. Petrušić, Teret dokazivanja (Burden of proof), Sudska građanskopravna zaštita od diskriminacije (Judicial civil-and-legal protection against discrimination), Beograd, 2012, p. 268.

[864] So, M. Dika, Sudska zaštita [...] (Judicial protection [...]), op.cit. p. 87.

[865] Art. 37 para 2 of the LPPD.

For the purpose of a more efficient suppression of discrimination, in addition to the mechanism of individual protection, available to direct victims of discrimination, the LPPD enables the protection of the right to equal treatment through conducting the procedure of collective protection of the right, i.e., through the so-called abstract protection of rights. The specific of such collective action is reflected in the possibility of initiating the judicial procedure by any entities not being a victim of discrimination *per se*.
The model of individual justice is often deemed an inefficient instrument for proving structural and institutional discrimination. Therefore, the institution *actio popularis* represents an effective mechanism for the protection of rights in discrimination cases.
According to the explicit provision of the law, any associations, foundations, unions or other civil society organisations and informal groups that have a justified interest in protecting the interests of a particular group or deal with protection against discrimination as part of their activities may file a complaint if it is likely that the defendant's actions have discriminated against a larger number of people.[866]
Anti-discrimination legal protection claims that may be implemented in this type of proceedings are the same to the claims implemented in the procedure for individual protection to a great extent. Declaratory claim, prohibitive claim, restitutional claim, and publicational claim may be raised in a lawsuit for the protection against discrimination. With collective anti-discrimination judicial protection, there is no possibility of raising a reparational claim.[867]
Unlike the Law 2010, the new LPPD 2020 does not insist, in this type of lawsuit, on an explicit consent of the person that alleges to have been discriminated to instigate the procedure, which makes the position of organisations dealing with the protection against discrimination much easier in terms of providing such type of protection.

[866] Art. 35 para 1 of the LPPD.
[867] Art. 35 para 2 of the LPPD.

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NATIONAL REPORT

"If you are lured to another country with the promise of a good job and a better life, but instead forced into prostitution or forced labour; if you have to keep silent about this because you or your family back home is being threatened; no doubt you are a victim of human trafficking."
Joy Ngozi Ezeilo, the United Nations Special Rapporteur on Trafficking in Persons

1. Introduction

Trafficking in human beings represents the most severe form of human rights violation. As a modern form of slavery, trafficking in human beings is an international problem, a type of organised crime with elements of trans-nationality since it is not limited only to one country, although internal human trafficking is getting increased. Victims of human trafficking are women, children and men who are exploited in various ways through which the fundamental human rights are violated.

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000)[869] in article 3(a) defines trafficking in persons. Trafficking in persons is often equated with smuggling of migrants. Yet, these terms are essentially different although it is not always easy to demarcate them in practice.

Human trafficking is regulated by numerous international legal instruments. In compliance with the Constitution of the RNM[870], these international treaties are a part of the legal order of the State in terms of combating trafficking in human beings Besides them, the RNM concluded a number of bilateral agreements with various states, which regulate: providing legal aid in criminal (and civil) cases, extradition agreements, agreements on return or takeover of persons whose entry and/or stay in the country is in conflict with applicable regulations, agreements on mutual enforcement of court decisions in criminal cases, agreements on cooperation in the fight against terrorism, illicit drug trafficking and organised crime, etc.

2. Trafficking in Persons and Children in the RNM

2.1. Legislative framework

The legislative framework for trafficking in human beings in the RNM meets the standards of successful dealing with human trafficking and strengthening the fight against it. The Criminal Code[871], besides *human*

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[869] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000. https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx. Accessed on 12. 11. 2021.
[870] Constitution of the Republic of North Macedonia, *Official Gazette of Macedonia*, no. 52, dated 22 November 1991.
[871] Criminal Code, *Official Gazette of the Republic of Macedonia,* no. 37, 1996; 80, 1999; 4, 2002; 43, 2003; 19, 2004; 81, 2005; 60, 2006; 73, 2006; 7, 2008; 139, 2008; 114, 2009; 51, 2011; 135, 2011; 185, 2011; 142, 2012; 166, 2012; 55, 2013;

trafficking (article 418a), provides for other criminal offences relevant for combating trafficking in human beings and children: *trafficking of migrants* (article 418b), *organisation of groups and abetting to the commission of crimes of trafficking in human beings, trafficking of a minor, and smuggling of migrants* (article 418c), *trafficking of a child* (article 418d), *abuse of the visa-free regime with the member states of the European Union and of the Schengen Agreement* (article 418g), *founding slavery and transportation of persons in slavery* (article 418).

The status and protection of victims of trafficking in human beings and children are specially strengthened with the provisions of the Criminal Procedure Code[872], regulating the special rights of vulnerable categories of victims (article 54) and *examination of extremely vulnerable victims and witnesses* (article 232). Furthermore, the provisions of the Law on Legislation for Children[873], regulating *special rights for procedural protection* (article 146) and *special measures in the procedural protection of children-victims and children-witnesses* (article 150). There are also provisions on the protection of victims of human trafficking in the Law on the Protection of Witnesses[874], then in the Family Law[875], in articles 124 and 177(a)–177(m). Exercising of *social protection of victims of human trafficking* is provided for by the Law on Social Protection[876] (article 11), as well as *emergency care* (article 92), *services and temporary accommodation* (article 83), *right to healthcare protection* (article 66). The provisions of the Law on the Protection of Children are also significant[877].

2.2. Institutional framework

The Government of the RNM, responding decisively against trafficking in human beings and children and illegal migrations, for the purpose of achieving greater efficiency and joint acting in combating such occurrences in the RNM, in March 2002, rendered the Decision on Forming the National Commission for Combating Human Trafficking and Illegal migrations in the RNM[878], and also appointed the National Coordinator and the members of the National Commission.

The main objectives of the National Commission are: to follow and analyse cases of human trafficking and illegal migrations, to coordinate activities of the competent institutions, and to cooperate with international and non-governmental organisations involved in solving problems in the area of human trafficking.

In 2003, the Secretariat of the Commission and the Anti-Trafficking Subgroup were formed, aimed at more efficient performance of the Commission's activities.

Furthermore, the Standard Operating Procedures for Dealing with Victims[879] were adopted and the state Centre for the reception of and providing shelters to victims of human trafficking was formed; several national action plans with activities were implemented; many trainings were conducted, and the complete introduction of the National Referral Mechanism for referring to the National Coordinator Office into the institutions was realised.

So far, the key partners in the work of the Commission have been: International Organisation for

82, 2013; 14, 2014; 27, 2014; 28, 2014; 41, 2014; 115, 2014; 132, 2014; 160, 2014; 199, 2014; 196, 2015; 226, 2015; 97, 2017, and 248, 2018.

872 Criminal Procedure Code, *Official Gazette of the Republic of Macedonia*, no. 150, 2010; 100, 2012; 142, 2016, and 198, 2018.

873 Law on Legislation for Children, *Official Gazette of the Republic of Macedonia*, no. 148, 2013; 152, 2019 and 275, 2019.

874 Law on the Protection of Witnesses, *Official Gazette of the Republic of Macedonia*, no. 38, 2005; 58, 2005 and 71, 2018.

875 Family Law, *Official Gazette of the Republic of Macedonia*, no. 80, 1992; 9, 1996; 38, 2004; 33, 2006; 84, 2008; 67, 2010; 156, 2010; 39, 2012; 44, 2012; 38, 2014; 115, 2014; 104, 2015; 150, 2015, and 53, 2021.

876 Law on Social Protection, *Official Gazette of the Republic of Macedonia*, no.104, 2019; 146, 19; 275, 2019; 302, 2020; 311, 2020, and 163, 2021.

877 Law on the Protection of Children, *Official Gazette of the Republic of Macedonia*, no. 23, 2013; 12, 2014; 44, 2014; 144, 2014; 10, 2015; 25, 2015; 150, 2015; 192, 2015; 27, 2016; 163, 2017; 21, 2018; 198, 2018; 104, 2019; 146, 2019; 275, 2019, and 311, 2020.

878 http://nacionalnakomisija.gov.mk/mk/. Accessed on 12.11.2021.

879 https://www.mtsp.gov.mk/content/pdf/operativni.pdf. Accessed on 12.11.2021.

Migrations - IOM; OSCE Mission in Skopje; Office of the United Nations High Commissioner for Refugees – UNHCR; International centre for Migration Policy Development – ICMPD; German Agency for International Cooperation - GIZ; US Embassy in Skopje.

The base of the mechanisms for combating human trafficking is the National Referral Mechanism for referring the victims of human trafficking[880], formed in 2005 with the support of the OSCE Mission in Skopje and works under the auspice of the Ministry for Labour and Social Policy in the RNM. The purpose of the National Referral Mechanism is to provide adequate identification, assistance and protection, based on the international standards of human rights for victims of trafficking, especially children, regardless of nationality, ethnicity, age or gender.

"At the height of improving the process of identification and protection, during the previous period, with the support of the IOM, five mobile teams were established in Skopje, Bitola, Kumanovo, Gevgelija and Tetovo for the identification of vulnerable categories of citizens, as well as victims of trafficking."[881]

2.3. Phenomenological characteristics of human and child trafficking

Trafficking in human beings and children is highly developed due to: many unreported cases; poor identification; victim's fear to report the case due to threats of traffickers; fear of being detained as illegal migrants; distrust in the competent institutions enforcing the law, and victims often do not recognise themselves as victims.

The RNM is a source, transit country and destination of men, women and children who are victims of human trafficking for the purpose of sexual services and forced labour. Within the borders of the state, Macedonian women and children are objects of human trafficking for sexual services and forced labour in restaurants, bars, night clubs, and forced begging. To a lesser/insignificant measure, the RNM is the country of end destination, where the potential victims, who are most frequently young women from the neighbouring countries, are exploited for work and sex in catering facilities in the western part of the country, or through forced marriages of children, with persons from the eastern part of the country. The victims are getting younger, and come from the neighbouring countries. According to the annual reports of the National Commission for Combating Human Trafficking and Illegal Migrations[882], the age of two thirds of the identified victims in the RNM is between 12 and 18 years of age. Victims of sexual exploitation in the RNM who are foreign nationals are most commonly from: Albania, Bulgaria, Serbia, Bosnia and Herzegovina, Ukraine and Kosovo and Metohija. More often, Macedonian nationals are victims of sexual trafficking and forced labour in: Greece, Bulgaria, Croatia, and other countries in the South, Middle and Western Europe. The latest reports of relevant organisations point out that cases of internal human trafficking and children happen more often.

2.4. Victims of trafficking in human beings and children in the period 2014 - 2020

According to the reports of the National Commission for Combating Human Trafficking for the period 2014–2020[883], we can conclude that the largest number of victims was identified in 2018. There were eight victims in 2014, with the tendency to decline in the following years, but the total number of identified victims rapidly increased in 2018. That period is characterised by a greater number of children-victims in the total number of victims. Speaking about the forms of exploitation, the most common is sexual form, followed by forced marriages. In regard to nationality, the majority are Macedonian citizens. In relation to sex, exploitation of women is more common than of men. Looking at the origin, the victims

880 https://mtsp.gov.mk/nacionalen-mehanizam-za-upatuvanje-na-zrtvi-na-trgovija-so-lugje.nspx. Accessed on 12. 11. 2021.

881 https://mvr.gov.mk/vest/16634. Accessed on 12. 11. 2021.

882 http://nacionalnakomisija.gov.mk/mk/%d0%b3%d0%be%d0%b4%d0%b8%d1%88%d0%bd%d0%b8-%d0%b8%d0%b7%d0%b2%d0%b5%d1%88%d1%82%d0%b0%d0%b8-%d0%bd%d0%b0-%d0%bd%d0%b0%d1%86%d0%b8%d0%be%d0%bd%d0%b0%d0%bb%d0%bd%d0%b0%d1%82%d0%b0-%d0%ba%d0%be%d0%bc/. Accessed on 12. 11. 2021.

883 Ditto

come from the Skopje region most commonly. The data are presented in tables below the text.

Table 1 Presentation of the number of victims of trafficking in human beings and children (2014–2020)

Year	Minor victims	Adult victims	Total number
2014	6	2	8
2015	3	1	4
2016	3	3	6
2017	2	/	2
2018	6	3	9
2019	4	2	6
2020	6	1	7

Source: *Annual reports of the National Commission for Combating Human Trafficking and Illegal Migrations*

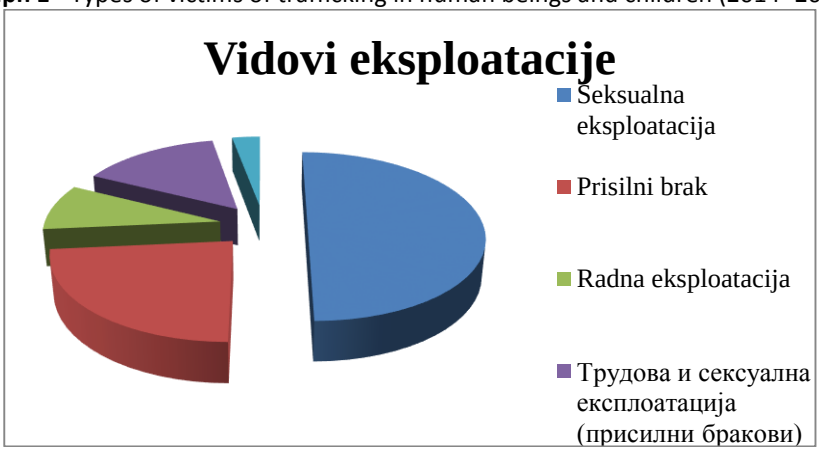
The majority of victims are victims of sexual exploitation, forced marriages and labour exploitation (begging).

Table 2 Types of victims of trafficking in human beings and children (2014–2020)

Year	Total number of victims of sexual exploitation	Total number of victims of forced marriage	Total number of victims of forced marriage and sexual exploitation	Total number of victims of sexual exploitation (begging)	Total number of victims of labour and sexual exploitation (forced marriages)	Total number
2014	3	1	/	1	3	8
2015	1	1	/	/	2	4
2016	5	1	/	/	/	6
2017	1	/	/	1	/	2
2018	6	3	/	/	/	9
2019	1	2	1	1	1	6
2020	5	/	/	2	/	7

Source: *Annual reports of the National Commission for Combating Human Trafficking and Illegal Migrations*

Graph 1 - Types of victims of trafficking in human beings and children (2014–2020)



Types of exploitation - Sexual exploitation - Forced marriage - Labour exploitation

Observably, the majority of victims of trafficking in human beings and children are domestic citizens (83.3%), comparing to foreign citizens (16.7%).

Table 3 Nationality of victims of trafficking in human beings and children (2014–2020)

Year	Domestic citizens	Foreign citizens	Total number
2014	7	1	8
2015	3	1	4
2016	5	1	6
2017	2	/	2
2018	8	1	9
2019	3	3	6
2020	7	/	7

***Source**: Annual reports of the National Commission for Combating Human Trafficking and Illegal Migrations*

2.5. Profile of offenders of trafficking in human beings and children

According to the research conducted by the MoI and annual reports of the National Commission for Combating Human Trafficking and Illegal Migration, the following characteristics of offenders of the criminal offence of trafficking in human beings and children in the RNM are defined: Sex: male; Age: 20-45; Citizens of Macedonia (majority); Nationality: Macedonian, Albanian and Roma ethnicity; Education: elementary or secondary, or no completed school; Profession: owners of catering facilities or employees therein, unemployed; Criminal groups composed of 3 to 5 members; Criminal past: mainly offenders against criminal offences against life and body, sexual freedoms and sexual moral, marriage, family and youth, against property, public order, humanity and international law; Manner of commission: sexual exploitation through forced prostitution and labour exploitation committed so that the victim is misled

that he is employed and registered in compliance with the law; Place of commission: catering facilities in the north-west part of Macedonia; Goal of commission: gaining criminal profit.[884]

2.6. Etiological characteristics of human and child trafficking

Poor socio-economic conditions; political factors; poverty (30% in the RNM); high rate of unemployment of young people; employed, but with low income; socially marginalised groups (including Roma community and children in the street, who struggle for existence and with highly limited opportunities for legitimate labour and means for supporting themselves and their families in the places of their origin) are the most common causes of human trafficking.

"Poverty, unemployment, family violence are several main causes making people vulnerable in human trafficking. The assertion that the number of domestic victims of human trafficking has been increasing, who have been sexually exploited mainly, is indisputable; additionally, forced marriages with children and labour exploitation are identified. But the fact raising concern and calling for an energetic action is the steady increase of children-victims in human trafficking."[885]

2.7. The RNM position on TIER according to the reports of the US State Secretary

According to the US State Secretary Report, the RNM was placed in the TIER 2 group n the previous six years (2016–2021), unlike the period 2015–2019, when it was in the TIER 1 group.

According to the Report "The North Macedonia Government did not fully fulfil the minimum standards for suppressing human trafficking, but it made efforts to achieve it. The authorities identified a number of victims and upgraded the total prevention measures, including the preparation of the National Strategy and the National Plan for the period 2021–2025[886] and the maintenance of regular virtual meetings of coordination bodies."[887]

Table 4 RNM ranking on TIER (2001–2021)

Year	TIER 1	TIER 2	TIER3
2021		√	
2020		√	
2019		√	
2018		√	
2017		√	
2016		√	

[884] http://nacionalnakomisija.gov.mk/mk/%d0%b3%d0%be%d0%b4%d0%b8%d1%88%d0%bd%d0%b8-%d0%b8%d0%b7%d0%b2%d0%b5%d1%88%d1%82%d0%b0%d0%b8-%d0%bd%d0%b0-%d0%bd%d0%b0%d1%86%d0%b8%d0%be%d0%bd%d0%b0%d0%bb%d0%bd%d0%b0%d1%82%d0%b0-%d0%ba%d0%be%d0%bc/. Accessed on 12. 11 2021.

[885] https://mvr.gov.mk/vest/13217. Accessed on 12.11. 2021.

[886] The North Macedonia Government, National Commission for Combating Human Trafficking, *National Strategy for Combating Human Trafficking and Illegal Migrations in the Republic of North Macedonia, National Action Plan for Combating Human Trafficking and Illegal Migrations in the Republic of North Macedonia* 2021–2025, Skopje, 2021. http://nacionalnakomisija.gov.mk/wp-content/uploads/2021/10/ NACIONALNA-STRATEGIJA-MKD-ALB-ANG-25.10.2021.pdf. Accessed on 12.11. 2021.

[887] US State Secretary, *Report on Human Trafficking 2021* https://mk.usembassy.gov/mk/%D0%B8%D0%B7%D0%B2%D0%B5%D1%88%D1%82%D0%B0%D1%98-%D0%B7%D0%B0-%D1%82%D1%80%D0%B3%D0%BE%D0%B2%D0%B8%D1%98%D0%B0%D1%82%D0%B0-%D1%81%D0%BE-%D0%BB%D1%83%D1%93%D0%B5-%D0%B7%D0%B0-2021/. Accessed on 12. 11 2021.

2015	√		
2014	√		
2013	√		
2012	√		
2011	√		
2010		√	
2009	√		
2008	√		
2007		√	
2006		√	
2005		√	
2004	√		
2003	√		
2002	√		
2001		√	

Source: US State Secretary Report

3. Conclusion

Trafficking in human beings and children is a serious problem in Macedonia. Trafficking in human beings is not only a form of organised crime, it represents an obvious violation of the fundamental human freedoms and rights, a form of modern slavery.

In the last five years, victims of trafficking in human beings and children are domestic and foreign citizens in the RNM, and victims from the RNM are exploited abroad. The most common form of exploitation in the RNM is sexual exploitation of women and girls and forced jobs home and abroad in restaurants, bars and night clubs. Offenders of trafficking in human beings and children mobilise victims from abroad for the purpose of sexual exploitation, and this most often from East Europe and the Balkans - Albania, Bosnia and Herzegovina, Kosovo and Metohija, Romania, Serbia and Ukraine. Victims, Macedonian and foreign citizens transiting through the RNM are objects of sexual and labour exploitation in construction and agriculture in South, Middle and West Europe. Traffickers exploit Roma children through forced begging and sexually - through forced marriages. Irregular migrants and refugees transiting of being smuggled through the RNM are vulnerable as potential victims of human trafficking, particularly women and unaccompanied children.[888]

The RNM, although having the legal framework satisfying the standard of successful dealing with human trafficking, still failed in the phase of its application. Namely, according to the US State Secretary Report on Human Trafficking 2021, the authorities did not meet the minimum standards in several key areas. Special remarks are highlighted in relation to insufficient investment of financial assets and equipment for

[888] US State Secretary, *Report on Human Trafficking 2021* https://mk.usembassy.gov/mk/%D0%B8%D0%B7%D0%B2%D0%B5%D1%88%D1%82%D0%B0%D1%98-%D0%B7%D0%B0-%D1%82%D1%80%D0%B3%D0%BE%D0%B2%D0%B8%D1%98%D0%B0%D1%82%D0%B0-%D1%81%D0%BE-%D0%BB%D1%83%D1%93%D0%B5-%D0%B7%D0%B0-2021/. Accessed on 12. 11 2021.

conducting investigations by the police, insufficient resources, including human resources in the Public Prosecutor's Office for the prosecution of organised crime and corruption, then cutting down the assets, which jeopardises further work of mobile teams for identification and functioning of the centre for receiving and providing shelters to victims of human trafficking. Insufficient efforts for identification and corruption bring the potential victims into risk of being punished for offences they have been forced to commit. There is still concern related to the participation of official persons in criminal offences of human trafficking.[889]

Herefrom, a series of priority recommendations is highlighted: conducting investigations, criminal prosecution and convicting persons guilty of human trafficking, also official persons; providing sufficient resources for the protection of victims; increasing efforts for pro-active identification of victims of human trafficking; allocation of sufficient assets to the police and the prosecution; providing access to alternative accommodation to victims if the capacities of a centre for receiving of and providing shelter to victims of human trafficking are full; advanced training of judges, prosecutors, and members of authorities for conducting investigations and prosecuting in the event of human trafficking; training of field officers in relation to the Standard Operating Procedures (SOP) for identification and referral of victims and giving them information on their right to indemnification.[890]

But, in order to cut off the enchanted circle of human trafficking, the solution is not only to provide a direct and short-term assistance to victims of human trafficking, but also to make efforts for their long-term inclusion in social and economic circles and to provide them with healthy family and social environment. Besides that, criminal prosecution of traffickers is more successful, identification of victims and providing them with assistance are still elements in combating human trafficking that are not paid sufficient attention in Macedonia and wider.

[889] Ditto
[890] Ditto

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NATIONAL REPORT

1. Legal Framework for the Recognition of the Right to Asylum in the Republic of North Macedonia

The procedure for the recognition of the right to asylum in the Republic of North Macedonia is regulated with the Law on International and Temporary Protection (hereinafter referred to as the LITP), passed in 2018.[892] This law represents a lex specialis as it regulates specific questions related to the recognition of the right to asylum in a special manner, as a special aspect of administrative procedure. In the very Law, the referential provision about the application of the Law on General Administrative Procedure (LGAP) for those questions that are not regulated by this special regulation.[893] Thereupon, we conclude that there is a relationship *lex specialis derogate lex generalis* between the LGAP and the LITP.

The LITP itself determines the relation of this law with respect to the procedure for residence permit, referred to in the Law on Foreigners. Namely, the provisions of the Law on Foreigners will not be applied from the day of expressing intention of and submission of an asylum application until the day of taking the final decision thereof. While, the submitted asylum application will be considered as a withdrawal of the application for issuing a residence permit for a foreigner as defined in the provisions of the Law on Foreigners[894].

Pursuant to the Law on Foreigners, a possibility of permanent residence is foreseen for all persons who have been recognised the right to asylum in the Republic of North Macedonia for a period of five years.[895] [896] The Law on Administrative Disputes is applied for exercising administrative judicial protection of foreigners. Asylum seekers are entitled to file appeals to the Ombudsman for exercising their rights, and decision making on appeals is regulated with the Law on Ombudsman[897].

In May 2019, the Law on Free Legal Aid to asylum seekers[898] was passed.

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892 Law on Asylum and Temporary Protection, *Official Gazette of the Republic of Macedonia*, no. 64, 2018. The day this law came into force, the Law on Asylum and Temporary Protection became invalid, *Official Gazette of the RM*, no. 49, 2003; 66, 2007; 142, 2008; 146, 2009; 166, 2012; 101, 2015; 152, 2015; 55, 2016, and 71, 2016.

893 See article 23 of the Law on Asylum and Temporary Protection.

894 See article 24 of the Law on Asylum and Temporary Protection.

895 Permanent residence shall be authorised to a person under international protection who, prior to the submission of an application for authorisation of permanent residence, has stayed in the territory of the Republic of North Macedonia for an uninterrupted period of minimum five years, pursuant to article 129 paragraph 2 of of the Law on Foreigners, *Official Gazette of the North Macedonia,* no. 97, dated 28. 5. 2018.

896 Macedonian association of young legal professionals, *Situacija u vezi azilom u Republici Severnoj Makedoniji 2018–2019.* (*Situation relating to asylum in the Republic of North Macedonia 2018–2019)*; https://myla.org.mk/wp-content/uploads/2020/11/Sostojba-so-azil-RSM-2018-2019.pdf

897 Law on Ombudsman, *Official Gazette of the North Macedonia,* no. 60, 2003; 114, 2009; 181, 2016; 189, 2016, and 35, 2018.

898 See article 40 of the Law on Free Legal Aid, *Official Gazette of the RNM*, no. 101, 2019 dated 22. 5.2019.

Pursuant to the Law on Social Protection, the right to accommodation of asylum seekers in adequate facility is exercised.[899]

The Law on Primary Education of Asylum Seekers guarantees the right to elementary education.[900]

In compliance with the Law on Family, an unaccompanied minor is awarded a guardian.

In addition to legal solutions, the competent authorities also apply certain by-laws in the course of exercising legal protection of asylum seekers. So, pursuant to the LITP, it is provided for that the minister of interior renders a by-law on the following: the form certifying one's expressed intention for submitting an asylum application; the form of asylum application; the form for initial registration interview of an applicant; the form for a transcript of a conducted interview about a submitted asylum application; the form of a transcript on receiving an oral request for the recognition of the right to asylum; the form for an asylum application on the basis of family reunification; the manner of obtaining fingerprints and photographing of the applicants; the form and manner of issuing and replacing documents of applicants and persons who have had the right to asylum recognised or temporary protection granted (identification document for an applicant, identity card for a person with refugee status, identity card for a person under subsidiary protection, travel document for a person with refugee status, identification document for persons under temporary protection) in the Republic of Macedonia, and the manner of keeping such registry.[901]

Likewise, the Ministry of Interior has issued the *List of Safe Third Countries of Origin*[902]. The Ministry of Labour and Social Policy, pursuant to the LITP, the *Rulebook on standards of accepting asylum seekers* and the *Rulebook on the manner of care and accommodation of unaccompanied children and vulnerable categories of persons with* recognised international protection in the RNM[903] have been adopted.

2. Institutional Framework

Several institutions are involved in exercising the rights and obligations of asylum seekers.

Namely, the Ministry of Interior (MoI), through the Asylum Sector, is responsible for conducting first-instance proceedings and rendering decisions on a filed application for exercising the right to asylum.

Administrative Court is responsible for exercising first-instance administrative judicial protection, deciding in relation to the filed lawsuit for challenging the legality of a decision rendered by the Asylum Sector, while the Higher Administrative Court is responsible for conducting second-instance administrative judicial proceedings, i.e., decides on the appeal against a decision of the Administrative Court.

The Ministry of Interior, through the Asylum Sector and the Administrative Court, cooperates with the UN High Commissioner for Refugees in the course of proceedings in all the phases of the procedure for recognising the right to asylum.[904]

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https://www.pravda.gov.mk/Upload/Documents/Zakon%20za%20besplatna%20pravna%20pomos.pdf.

[899] See articles 94, 95, and 99 of the Law on Social Protection, *Official Gazette of the RNM*, no. 104, dated 23.5. 2019.

[900] Article 13 (1): Children with foreign nationality or stateless children, children refugees, asylum seekers, children granted refugee status, children granted subsidiary protection and children granted temporary protection residing in the Republic of North Macedonia are entitled to primary education under equal conditions as children of the Republic of North Macedonia. (Law on Primary Education, *Official Gazette of the Republic of Macedonia*, no. 161, 2019, and 229, 2020; https://mon.gov.mk/stored/document/Zakon%20za%20osnovnoto%20obrazovanie%20-%20nov.pdf.).

[901] See article 96 of the Law on International and Temporary Protection.

[902] *Official Gazette of the RNM, no.* 56, 2019.

[903] *Official Gazette of the RNM, no.* 195, 2019.

[904] Access to information is allowed to the High Commissioner for Refugees, the competent authority, in compliance with the law, in relation to individual asylum applications during the procedure and the rendered decisions, along with the previously granted consent of the asylum seekers. The Ministry of Interior creates and delivers reports and statistical data on the status of asylum seekers and persons granted the right to asylum in the Republic of Macedonia, and on the implementation of the Geneva Convention, the provisions of this Law and other regulations in the area of asylum, to the High Commissioner for Refugees. The representatives of the High Commissioner for Refugees state their attitudes, pursuant

Ministry for Labour and Social Policy, for the purpose of an easier integration of asylum seekers and persons granted the right to asylum in the Republic of North Macedonia, has devised integration programmes.[905]

The public institution for accommodating asylum seekers, the Reception Centre for Asylum Seekers - Vizbegovo, Skopje, which started to work in 2008, is responsible for receiving, accommodating, food, cultural-entertainment and recreational activities, social and other services in compliance with the minimum standards for receiving asylum seekers, established with international acts and ratified with the Constitution of the Republic of Macedonia.[906]

During the procedure, some associations also play their role in providing legal aid to asylum seekers[907].

There are also two reception-transit centres for the accommodation of refugees and migrants in the RNM, which are founded and opened in 2015 due to the refugee crisis, and for the purpose of the state's response to the mass influx of refugees and migrants.[908]

3. Participants in the Procedure for Recognising the Right to Asylum

In the course of the procedure for exercising the right to asylum, the asylum seeker and the Asylum Sector of the MoI, which is responsible for decision-making upon the application, appear as participants.

In compliance with the law, the asylum seeker is a foreigner seeking international protection, who has expressed his intention or submitted an asylum application, in respect of which the final decision has not been taken in the procedure for recognising the right to asylum.[909] The asylum procedure in the first instance shall be conducted and the decision shall be taken by the Ministry of Interior through the Sector for Asylum. An administrative dispute before a competent court can be initiated against the decision of the Ministry of Interior through the Sector for Asylum.[910]

4. Specifics of the procedure for recognising the right to asylum

The procedure for the recognition of the right to asylum represents an administrative procedure conducted following a previously filed asylum application. This procedure is first-instance, implying there is no possibility to file a complaint against the first-instance decision rendered by the Asylum Sector, as a remedy in such administrative procedure, before the Administrative Court; while it is only possible to file a lawsuit for initiating an administrative dispute before the Administrative Court. In the course of the

to article 35 of the Geneva Convention, before competent authorities, in compliance with the law, on individual asylum applications, in any phase of the procedure for recognising the right to asylum. (See article 21 of the Law on International and Temporary Protection).

905 See article 60 of the Law on International and Temporary Protection.

906 The accommodation capacity of the reception centre for asylum seekers is 150 beds and meets the healthcare requirements and those related to human dignity. Namely, the reception centre for asylum seekers includes three facilities, one of which is administrative building, housing offices of the employees in the institutions on behalf of the Ministry of Labour and Social Policy, the office of the Ministry of Interior, the UNHCR office, and the offices of the non-governmental organizations: the Macedonian Association of Young Legal Professionals and the Open Door, a quarantine where the introductory admission of asylum seekers is conducted, a room for visitations of asylum seekers, a room with computers intended for asylum seekers, a kitchen, where food is distributed to asylum seekers, and a medical centre where primary health care is provided to asylum seekers http://pcba.gov.mk/

907 E.g., the MUMP is an independent, non-profitable professional organization established in 2003, which provides legal aid and advocates for human rights protection strategically; and it has been a partner of the UN High Commissioner for Refugees for the provision of legal aid to persons under the UNHCR mandate in the Republic of North Macedonia; https://myla.org.mk/%D0%BE%D0%B1%D0%BB%D0%B0%D1%81%D1%82%D0%B8-%D0%BD%D0%B0-D0%B4%D0%B5%D0%BB%D1%83%D0%B2%D0%B0%D1%9A%D0%B5/%D0%B1% D0%B5%D0%B3%D0%B0%D0%BB%D1%86%D0%B8-%D0%B8-%D0%BC%D0%B8%D 0%B3%D1%80%D 0%B0% D0%BD%D1%82%D0%B8/

908 See for more in: *Situacija u vezi sa azilom u RSM 2018–2019. godina* (*Situation related to asylum in the RNM 2018–2019*); https://myla.org.mk/wp-content/uploads/2020/11/Sostojba-so-azil-RSM-2018-2019.pdf.

909 See article 4 of the Law on International and Temporary Protection.

910 See article 20 of the Law on International and Temporary Protection.

procedure, the asylum seekers are also entitled to interpreter[911] and also to free legal aid. When interviewing the asylum seeker, the public is excluded.[912] Unaccompanied minors, who need protection, a guardian is awarded, as soon as possible, pursuant to the Family Law.

4.1. Initiating the procedure for recognising the right to asylum

The procedure for recognising the right to asylum is considered to be initiated at the moment of filing an asylum application. Apart from the application, as the initial action for instigating a procedure, the law provides for a possibility of expressing an intention for filing an asylum application. The difference that it is not enough that a foreigner expresses his intention, but to initiate the procedure, he should also file an asylum application. It means that without a filed application, the procedure is considered to have not been initiated.[913]

It should be pointed out that the asylum application may be filed before the police at the border crossing, in the nearest police station, at the Reception Centre for Foreigners or the Asylum Centre. When the application is filed before the police at the border crossing, the nearest police station, or at the Reception Centre for Foreigners, the police officer escorts the asylum seeker to the Reception Centre for Asylum Seekers. The asylum seeker who resides at the territory of the Republic of Macedonia files the asylum application to the Asylum Centre. In case of family reunion, the application may be filed to the diplomatic-consular mission of the Republic of Macedonia abroad.[914]

If the asylum seeker has unlawfully entered or unlawfully resides in the territory of the Republic of Macedonia, and comes directly from a country where his life or freedom were in danger, in terms of articles 5 and 9 of this Law (which are the provisions referring to a person under refugee status and a person under subsidiary protection), he will not be treated in accordance with the regulations on foreigners, provided that he immediately expresses such intention or submits an asylum application, and if he provides well-founded reasons for his unlawful entry or residence.[915]

Speaking about the application form, the LITP provides for that it can be submitted in written or oral form with a transcript, in Macedonian language and Cyrillic alphabet, or, if that is not possible, in the language of the country of origin, in some of the widely spoken foreign languages or in a language for which it can reasonably be presumed to be understood by the applicant.[916]

After filing the asylum application, the asylum seeker will be photographed and fingerprinted. When the asylum application is received by the Asylum Sector, an initial interview for registration of the applicant shall be conducted, by filling out the stipulated form. Simultaneously, the Sector for Asylum is obliged to issue, within three working days, a certificate to the applicant containing a seal, number and date of submission, which certifies the asylum seeker's status and proves that the applicant is allowed to stay in the territory of the Republic of Macedonia pending the procedure for his asylum application.[917] If the Sector fails to issue such a certificate, the applicant shall have the right to file an appeal to the Sector for

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911 See article 31 of the Law on International and Temporary Protection.

912 See article 32 of the Law on International and Temporary Protection.

913 For more concrete, see article 25 of the Law on International and Temporary Protection.

914 See article 26 of the Law on International and Temporary Protection.

915 See article 27 of the Law on International and Temporary Protection.

916 Article 29 of the LITP: If the applicant is in possession of documents, he is obliged to enclose them with the asylum application in case they are necessary for the asylum procedure, in particular: a travel document, visas, residence permits or other similar documents, ID card or another identification document, birth certificate and marriage certificate, travel tickets and the like, as well as other documents or papers that may be relevant in the asylum procedure. (2) The documents referred to in paragraph (1) of this article will be kept in the Sector for Asylum during the asylum procedure, whereas the applicant will be provided with photocopies of the submitted documents and will be issued a certificate confirming that his original documents are in the Sector for Asylum.

917 In the event of simultaneous submission of a large number of asylum applications, the deadline for issuing a certificate by the Sector for Asylum may be extended by 10 working days.

Asylum within 15 days from the date of expiry of the deadline. The head of the immediate higher organisational unit of the Ministry of Interior, within whose area of responsibility is decision making upon appeals, is competent for decision making on the filed appeal, and which should decide thereof within 15 days from the date of receiving the appeal. Upon the receipt of the application, the Sector for Asylum will notify the asylum seekers in written and oral forms, in a language they may reasonably be presumed to understand and within a deadline not longer than 15 days from the date of submitting the asylum application, about the manner of conducting the asylum procedure, the rights and obligations of the applicants in that procedure, the possible consequences in the event that they fail to comply with their obligations and do not cooperate with the competent authorities, as well as about the reception conditions, the right to legal assistance, as well as the right to contact persons providing legal assistance, representatives of the High Commissioner for Refugees and non-governmental humanitarian organisations, in all phases of the procedure, wherever the applicants may be situated.

The submitted asylum application will be examined by the Sector for Asylum separately, taking in consideration all the facts and circumstances relevant for decision making.[918] In order to make the decision, the asylum seeker may be interviewed in person.[919]

4.2. Time limits in the procedure

Pursuant to the LITP, it is foreseen that first-instance regular procedure for recognition of the right to asylum will be completed within six months of the date of filing the application.[920]

This time limit may be extended for three additional months, but no longer than up to nine months, if there are reasonable reasons thereof.[921]

4.3. Types of decisions rendered in the procedure for recognition the right to asylum

With respect to the filed application for the recognition of the right to asylum, the Asylum Sector decides by rendering the decision thereof. Speaking about the types of decisions, the competent authority may render a decision rejecting the application in an urgent procedure, a decision rejecting the application in regular procedure, a decision cancelling the procedure, a decision on recognition the right to asylum, a decision on recognition the refugee status, and a decision on recognition the status of a person under subsidiary protection.

If the asylum application is considered illicit or apparently illicit, the Sector for Asylum takes a decision rejecting the asylum application. Namely, an accelerated procedure is conducted.[922]

The competent authority is also authorised to render a decision for the cancellation of the procedure if established that the asylum seeker has withdrawn the asylum application, that he has not responded to the subpoena for interview in the Asylum Sector and did not justified his absence within a five-day time limit from the date of the appointed interview, or has left without permission the place determined for his accommodation pending the procedure for longer than three days, and he did not inform the

[918] For more concrete, see article 30 of the Law on International and Temporary Protection.

[919] Article 39 of the Law on International and Temporary Protection.

[920] Article 38 of the Law on International and Temporary Protection.

[921] (3) The justified reasons referred to in paragraph (2) of this article are as follows: - if it is necessary to establish complex facts i.e., legal issues related to the asylum application; - if a large number of third country nationals simultaneously submitted asylum applications; - if the asylum seeker does not comply with his obligations laid down in article 62 of this Law. (4) By way of derogation from paragraph (3) of this article, the deadline can be extended for three additional months, for the purpose of full examination of the asylum application.

(5) In the cases referred to in paragraphs (2) and (3) of this article, the asylum seeker shall be informed by the Sector for Asylum about the extension of the deadline for taking a decision, and at his own request, shall receive information on the reasons for extending the procedure and the deadline within which a decision should be taken.

[922] Article 45 of the Law on International and Temporary Protection. On inadmissible applications, see article 46 of the LITP, and on manifestly unfounded ones - article 47 of the LITP.

competent authority thereof, or was not granted the consent for leaving the place determined for his accommodation by the competent authority.[923]

The asylum application will be rejected in a regular procedure when established that: there is no well-founded fear of persecution, there are no risks of suffering serious harm, there are reasons for exclusion and persecution for reasons as defined in article 5 of this Law and risks of suffering serious harm as defined in article 9 of this Law, that he is limited only to a specific area of the country of his nationality, or, in the event of a stateless person, the country of former habitual residence, and there is a possibility for efficient protection in another part of the country, if - considering all the circumstances - the person cannot be expected to be granted protection.[924]

Pursuant to the LITP, a person with a refugee status is a foreigner who, upon the assessment of his asylum application, was granted refugee status and that it is found that he meets the conditions set out in the Geneva Convention, i.e. a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, has left the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.[925]

According to the LITP, a person under subsidiary protection is a foreigner that does not qualify as a refugee, but to whom the Republic of Macedonia will grant the right to asylum and allow him to remain within its territory, because there are reasons to believe that if he returns to his country of nationality or, in the case of a stateless person, he would face a real risk of suffering serious harm in his country of former habitual residence.[926]

A foreigner who is already in the territory of the Republic of Macedonia may be recognised international protection granted *sur place* and in cases where the well-founded fear of persecution or the real risk of suffering serious harm is based on events that have taken place or on activities in which the applicant has been engaged since he left the country of origin, in particular where it is established that the activities constitute the expression and continuation of convictions or orientations held in the country of origin.[927]

4.4. Legal protection

Asylum seekers are entitled to legal aid and clarification in connection with the requirements for the procedure for recognising the right to asylum, as well as the right to free legal aid in all the phases of the procedure, pursuant to the regulations on free legal aid.[928] Information on the right to free legal aid in the procedure for recognising the right to asylum can be provided to the asylum seeker by the institutions competent for decision making on the asylum application, the Ministry of Justice or associations authorised for providing primary legal aid.[929]

The asylum seeker may initiate an administrative dispute against the decision of the Sector for Asylum before a competent court within 30 days of the date of delivery of the decision. The complaint stays the enforcement of decision. The procedure before the competent court is accelerated.[930]

[923] Article 48 of the Law on International and Temporary Protection.
[924] Article 41 of the Law on International and Temporary Protection.
[925] Article 5 of the Law on International and Temporary Protection.
[926] Serious harm is, as follows: death penalty, execution, torture, inhuman or degrading treatment, punishment, or serious and individual threat to a civilian's life or person, but also indiscriminate violence, in situations of international or internal armed conflict. (See article 9 of the Law on International and Temporary Protection).
[927] Article 11 of the Law on International and Temporary Protection.
[928] Article 22 of the Law on International and Temporary Protection.
[929] The procedure for exercising this right is regulated with article 40 of the Law on Free Legal Aid.
[930] Article 43 of the Law on International and Temporary Protection.

The asylum seeker is entitled to an appeal initiating an administrative dispute against the decision rejecting the asylum application in procedure, within 15 days of the day of delivery of the decision.[931]

The asylum seeker is also entitled to file a complaint to the Ombudsman.

Following the final decision rejecting, annulling, terminating the right to asylum to a person in the territory of the Republic of Macedonia or it ceased to exist, the Ministry of Interior - the Sector for Asylum, will notify the person about the time limit within which he is obliged to leave the territory of the Republic of Macedonia voluntarily, and it cannot be shorter than 15 days, or to regulate his stay in compliance with the Law on Foreigners. If the person does not act in accordance with the decision, he will be treated according to the regulations on foreigners.

The Ministry of lnterior renders the decision for ordering the measures for limitation of movement to the asylum seeker, wherein the time limit for the ordered measures is specified. The asylum seeker is entitled to file a complaint to the competent court within a five-day time limit from the date of receiving the decision.

Pending the final decision on recognising the right to asylum, the asylum seekers are entitled to: residence; identification document; freedom of movement; free legal assistance; adequate accommodation and care in a Reception Centre or another place of accommodation determined by the Ministry of Labour and Social Policy - should he express need for it; family reunion; basic healthcare services - in accordance with the regulations on health insurance; right to social protection - in accordance with the regulations on social protection; right to education - in accordance with the regulations on elementary and secondary education; a job only within the Reception Centre or another place of accommodation determined by the Ministry of Labour and Social Policy, and the right of free access to the labour market, and the asylum seeker whose asylum application has not been decided upon by the Sector for Asylum - within a period not exceeding nine months from the submission of the application; access to available programmes for early integration and contacts with the High Commissioner for Refugees, as well with non-governmental humanitarian organisations for the purpose of providing legal aid in the procedure for recognising the right to asylum.[932]

In exceptional cases, the asylum seeker may be limited the freedom of movement, if other less coercive alternative measures in accordance with the national legislation (revocation of an identification document, regular reporting) cannot be applied effectively.[933] The freedom of movement can be limited with the following measures: prohibition of movement outside the Reception Centre for Asylum Seekers or another place of accommodation determined by the Ministry of Labour and Social Policy or accommodation in a Reception Centre for Foreigners.

These measures are imposed for a maximum three-month period from the date of delivery of the decision imposing limitation of freedom of movement, and, provided that the reasons for imposing continue to exist, they may be extended by maximum three months.

The manner of limitation of freedom of movement for an applicant shall be prescribed by the Minister of Interior.[934] The Ministry of lnterior renders the decision for ordering the measures for limitation of movement to the asylum seeker, wherein its duration is specified.

Persons with refugee status have the same rights and duties as the nationals of the Republic of Macedonia, except for the following: they do not have the right to vote, they cannot perform a business activity, establish an employment relationship or establish associations or political parties in cases where it is provided for by the law that the person has the nationality of the Republic of Macedonia. Persons with refugee status may acquire the right to personal movable or immovable property, may establish

931 Article 49 of the Law on International and Temporary Protection.
932 Article 61 of the Law on International and Temporary Protection.
933 Article 63 of the Law on International and Temporary Protection.
934 Article 64 of the Law on International and Temporary Protection.

employment relationship or perform a business activity under the requirements determined by the law regulating such rights of foreigners in the Republic of Macedonia.

In the event of a mass influx of persons who directly come from the country where their lives, safety or freedoms are endangered by war, occupation, internal conflict followed by violence or mass violation of human rights, they may be granted temporary protection by the Government.[935] Temporary protection in the Republic of Macedonia lasts for a year. The total duration of temporary protection is no longer than three years.

5. Empirical data

There is one reception centre for asylum seekers in the RNM, which is located in Skopje, in Vizbegovo, with a capacity for accommodation of 150 asylum seekers. According to the data of the Macedonian Association of Young Legal Professionals (MUMP), the statistics on the submitted application is as follows:

Year	**Number of persons who filed an asylum application in Macedonia**	**Persons granted international protection**
2011	744	/
2012	638	/
2013	1353	/
2014	1289	/
2015	1895	/
2016	762	7
2017	162	5
2018	299	6
2019	505	1

Source: *https://myla.org.mk*[936]

Overview of asylum applications 2015–2018

	2015	**2016**	**2017**	**2018**
Number of filed applications	1579	603	147	249
Number of applicants	1888	760	162	284
Number of granted recognised refugee statuses	4	1	0	0
Number of granted subsidiary protection statuses	0	7	5	3

[935] Article 82 of the Law on International and Temporary Protection.

[936] https://myla.org.mk/%d0%be%d0%b1%d0%bb%d0%b0%d1%81%d1%82%d0%b8-%d0%bd%d0%b0-%d0%b4%d0%b5%d0%bb%d1%83%d0%b2%d0%b0%d1%9a%d0%b5/%d0%b1%d0%b5%d0%b3%d0%b0%d0%b%d1%86%d0%b8-%d0%b8-%d0%bc%d0%b8%d0%b3%d1%80%d0%b0%d0%bd%d1%82%d0%b8/

Source: *Annual report 2018 - Rights of refugees, migrants and asylum seekers in the Republic of Macedonia*[937]

In the European Commission Report for North Macedonia 2021, it is stated that in year 2020, there were 211 asylum applications filed (490 in 2019), out of which 47 (22%) from Afghanistan, 33 (16%) from Pakistan, 26 (12%) from Turkey and 23 (11%) from Syria. The Report alleges that there is no backlog of cases for asylum, although the majority of them is suspended, due to a high level of withdrawal of applications. In 2020, the Sector for Asylum rendered two decisions granting subsidiary protection, 39 negative decisions for 49 persons and 201 decisions on the suspension of asylum procedures for 215 persons. Since 2018, there have been no positive decisions on awarding refugee status. Out of the total number of persons granted protection, majority of them are vulnerable persons, unaccompanied children or separated children. The duration of the entire asylum procedure can be very long and often the special needs of affected persons are not highlighted enough. Judicial review is administrative, and the Administrative and High Administrative Courts issue the decisions technically, and not on essential grounds. The new Law on Administrative Disputes, however, brought improvements in specific critical areas, such as the procedures for interviewing parties, but so far there have been no interviews. The Sector for Asylum continued the practice of revoking the international protection to refugees from Kosovo and Metohija who had been granted subsidiary protection. In compliance with the Law on Primary Education, admission of children asylum seekers in local schools was continued. However, additional improvements in the asylum system are necessary, particularly in relation to the systemic registration of migrants. The country cooperates with the European Asylum Support Office (EASO), based on comprehensive guidelines. A new *Roadmap to support the establishment of asylum and reception systems in line with EU standards was endorsed for the period 2020-2022*.[938]

According to the *Annual report on the efficiency of legal protection of human rights in the Republic of North Macedonia – 2019*, created by the Macedonian Association of Young Legal Professionals, it is stated that, up to and including October 2019, the MUMP represented 178 new asylum seekers in the RM, as follows: men 61, women 17, and children 100, out of which 78 were unaccompanied. The Asylum Sector of the MoI extended the status of persons under subsidiary protection to two persons from Syria. In year 2019, the MoI did not grant any recognised refugee or subsidiary protection statuses. According to the MUMP analysis, the legal ground applied in some cases where negative decisions were rendered by the Asylum Sector, is not in accordance with the stated factual state of the case. Simultaneously, it is pointed out that the judicial protection of asylum seekers in the RNM before administrative courts is long and inefficient. Up to and including October 2019, the Administrative Court rendered 34 judgements, and the Higher Administrative Court rendered 26 judgements related to the issues of asylum and international protection. It was noted that in the proceedings before the Administrative Court and the Higher Administrative Court there are delays and non-compliance with the statutory deadline of two months. A procedure before the Administrative Court lasted 255 days in average, pending the adoption of decision, and before the Higher Administrative Court - 501 days from the date of filing an appeal against violation of the right to trial within reasonable time, guaranteed by the European Convention of Human Rights and the rule on accelerated procedure, provided for by the LITP. The competent courts, till the analysed period, had not decided on meritoriously in any case in the area of asylum, nor held a public hearing although such a possibility is provided for under the Law on Administrative Disputes. Additionally, it is stated that the Higher Administrative Court continued the practice of upholding judgements of administrative courts in many cases. As another inconsistency, it is indicated in the Report that the access to labour market is prevented to asylum seekers, which right is provided for under article 48 of the Law

[937] https://mhc.org.mk/wp-content/uploads/2019/07/Help-On-Route-MK-2018-final.pdf.
[938] The European Union Report for North Macedonia 2021;
https://www.sep.gov.mk/data/file/Pregovori/North-Macedonia-Report-2021-%D0%9C%D0%9A2.pdf.

on Asylum and Temporary Protection and article 61 of the Law on International and Temporary Protection. The reason for this, the lack of legal possibility for assigning a registration number to asylum seekers, which is one of requirements to be registered in the Agency for Employment of the RNM and to have access to the labour market, is stated.[939]

According to the *Annual report on the efficiency of legal protection of legal rights in the Republic of North Macedonia 2020,* up to and including October 2020, the Administrative Court rendered 12 judgements, the Higher Administrative Court rendered 22 judgements related to the issues regarding asylum and international protection, where the MUMP was actively involved in the process of representation. In the procedures before the Administrative and Higher Administrative Courts, it is noted that there is delay in procedures and non-compliance with the stipulated statutory deadline of two months, i.e., accelerated decision making. Up to and including October 2020, none oral hearing was held before administrative courts, neither there was a meritorious decision with full jurisdiction in asylum cases.[940]

In the *Ombudsman Annual Report 201*9, it is pointed out that the Ombudsman observed that there was a great number of detaining unaccompanied children-foreigners in four accommodation facilities - reception transit centres and in reception centres for foreigners and asylum seekers. After the centres had been inspected, it was stated that children were treated in line with the Standard Operating Procedures for Dealing with Unaccompanied Children-Foreigners, a guardian was always appointed; but every trace of many of them got lost very soon. Juvenile persons in the Reception Centre for foreigners are detained for a short while (3-4 days) and most often, they are detained as witnesses in a procedure. After the procedure has been completed, children as asylum seekers are transferred to the Reception Centre for Asylum Seekers, where a guardian is appointed, in line with the *Standard Operating Procedures for Dealing with Unaccompanied Children-Foreigners*. In the Reception Centre for Asylum Seekers, a list of associations providing free legal aid was created, wherefrom asylum seekers may select, by themselves, the one to represent them before the Asylum Sector of the Ministry of Interior, in the procedure for recognising the right to asylum. However, with regard to the procedure for recognising the right to asylum, persons accommodated in the Centre are dissatisfied due to the fact that they last too long and rarely end with a positive outcome for asylum seekers - granting the status of recognised refugee.[941]

Acting upon asylum seekers' complaints where they complained about being prevented to exercise other rights, such as the right to free access to labour market, i.e. the right to employment, the Ombudsman ascertained that asylum seekers were prevented to exercises the right to free access to labour market, i.e. the right to employment, due to intentional or unintentional inconsistency in the statutory solution,

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939 *Annual report on the efficiency of legal protection of legal rights in the Republic of North Macedonia 2019;*

http://myla.org.mk/wp-content/uploads/2019/12/%D0%93%D0%9E%D0%94%D0%98%D0%A8%D0%95%D0%9D-%D0%98%D0%97%D0%92%D0%95%D0%A8%D0%A2%D0%90%D0%88-%D0%97%D0%90-%D0%95%D0%A4%D0%98%D0%9A%D0%90%D0%A1%D0%9D%D0%9E%D0%A1%D0%A2%D0%90-%D0%9D_%D0%90-%D0%9F%D0%A0%D0%90%D0%92%D0%9D%D0%90%D0%A2%D0%90-%D0%97%D0%90%D0%A8%D0%A2%D0%98%D0%A2%D0%90-%D0%9D%D0%90-%D0%A7%D0%9E%D0%92%D0%95%D0%9A%D0%9E%D0%92%D0%98%D0%A2%D0%95-%D0%9F%D0%A0%D0%90%D0%92%D0%90-%D0%92%D0%9E-%D0%A0%D0%95%D0%9F%D0%A3%D0%91%D0%9B%D0%98%D0%9A%D0%90-%D0%A1%D0%95%D0%92%D0%95%D0%A0%D0%9D%D0%90-%D0%9C%D0%90%D0%9A%D0%95%D0%94%D0%9E%D0%9D%D0%98%D0%88%D0%90-2019-1.pdf and https://myla.org.mk/wp-content/uploads/2020/12/%D0%9C%D0%97%D0%9C%D0%9F-%D0%B3%D0%BE%D0%B4%D0%B8%D1%88%D0%B5% D0% BD-%D0%B8%D0%B7%D0%B2%D0%B5%D1%88%D1%82%D0%B0%D1%98-2020-final-digital.pdf.

940 Annual report on the efficiency of legal protection of legal rights in the Republic of North Macedonia –*2020*;

https://myla.org.mk/wp-content/uploads/2020/12/%D0%9C%D0%97%D0%9C%D0%9F-%D0%B3%D0%BE%D0%B4%D0%B8%D1%88%D0%B5%D0%BD-%D0%B8%D0%B7%D0%B2%D0%B5%D1%88%D1%82% D0%B0%D1%98-2020-final-digital.pdf.

941 Ombudsman, National Preventive Mechanism, *Annual Report 2019;* http://vdemo19.semos.com.mk/CMS/Upload/NarodenPravobranitel/upload/NPM-dokumenti/2019/NPM%20Godisen%20izvestaj-2019-MK.pdf.

inter alia, and because of the impossibility to be assigned a registration number, necessary for registering in the Agency for Employment. According to the Ombudsman, the statutory solution contained in article 61 paragraph 1 item 10, directly violates the asylum seekers' right to labour market, i.e., they are only enabled to exercise this right within a nine-month period if the competent first-instance authority (Sector for Asylum) does not render any type of decision.[942]

Conclusion

Conclusively, there is a good legal framework in the RNM regulating the international legal protection of persons that have filed an asylum application. Namely, this right is also guaranteed by the Constitution of the RNM[943]. The procedure for recognising the right to asylum is regulated by the Law on International and Temporary Protection, passed in 2018 and harmonised with the following European directives in the area of asylum/international protection: 1. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted CELEX no. 32011L0095; 2. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection CELEX no. 32013L0032; 3. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection CELEX number 32013L0033 and 4. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof CELEX no. 32001L0055.

In connection with the very procedure for exercising the right to asylum, it can be determined that an asylum seeker has been recognised a number of rights in the course of procedure, out of which we would single out the following: right to exercising free legal assistance, i.e., right to free representative (lawyer or association), right to interpreter, right to be heard, appointing a guardian, right to judicial protection against a decision rendered, right to accommodation, and other rights.

Through an empirical analysis, we observe that the number of filed applications decreased in 2015; the number of positive decisions recognising the right to international protection is very low, i.e., the number of negative decisions is higher. However, what should be pointed out is the fact that the RNM is primarily a transit country, implying that persons who had filed asylum applications often left the territory of the RNM pending the completion of procedure.

Speaking about exercising judicial protection, it is concluded that oral hearings in asylum cases are very rarely held in administrative procedures. Judgements are rendered more in a dispute of legality than in a dispute of full jurisdiction. According to the types of decisions, they are most often the rejecting ones, i.e., the statement of claim is rejected, while the disputed solution is upheld; and if the appeal is acknowledged, the procedure is remanded to first-instance authority for reconsideration.[944]

Bearing all this in mind, we conclude that *de lega lata* procedure is regulated in line with European principles, but *de lege ferenda* more measures should be taken to exercise more efficient and better protection of asylum seekers. Particularly, the recommendations of the Ombudsman should also be

[942] *Ombudsman Annual Report 2020*

[943] See article 29 of the Constitution of the RNM; https://www.sobranie.mk/content/ Odluki%20USTAV/UstavSRSM.pdf.

[944] See: https://myla.org.mk/wp-content/uploads/2020/11/Sostojba-so-azil-RSM-2018-2019.pdf. Regarding types of judgements, see examples of judgements published on the Administrative Court web page; e.g., Judgement no. U-b. no. 845/2020; U-b. no. 270/2014.

observed, such as, *inter alia*, the measure of providing an unimpeded access to every person-refugee the procedure for recognising the right to asylum, and a stepped-up control of unaccompanied children.[945]

[945] *Special report on conditions in reception centres for accommodation and detention of refugees/migrants*; http://demo19.semos.com.mk/CMS/Upload/NarodenPravobranitel/upload/NPM-dokumenti/2019/Poseben%20 izvestaj-januari-avgust%202019.pdf.

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NATIONAL REPORT

1. The Right of Access to Justice for Forced Migrants (General overview)

The right of access to justice commonly concerns the possibility to make full use of the existing legal mechanisms, designed formally or informally, with the aim of purpose of protecting their rights in compliance with the fundamental standards of fairness and justice.[946] This refers to every stage in the "justice chain"[947], including: the right to be aware of and informed about human rights within the civil society; the actions of bodies/authorities responsible for enforcing the law; the right to be heard before the court in a specific case; and the right to pursue and use a relevant legal remedy. [948]

In this part of the report, we deal with the issue of foreigner/migrants' rights of access to justice in civil proceedings in B&H. International law prohibits the denial of justice in case the claimant initiating a particular proceeding is an alien. This rule may be considered to be an international custom which has been ratified in numerous international multilateral and bilateral agreements.[949] Relevant international regulations[950] on human rights impose the obligation to all signatory states (including B&H) to guarantee human rights to all individuals under their jurisdictions, including internationally displaced persons, refugees, and asylum seekers, regular and irregular migrants[951]. Although B&H is not obliged to offer the same benefits and conditions to irregular migrants as to its national citizens, the state has to abide by the core human rights standards, which *inter alia* include the right of access to justice - a mechanism which enables each individual to have access to court and seek protection of his/her subjective rights.

General principles underlying the right of access to civil justice in terms of various categories of migrants are the principles of non-discrimination, equal and effective access to justice, fair procedure guarantees including a fair trial conducted and completed within a reasonable time, and the right to an effective legal remedy.[952] For different migrant categories, the right of access to justice may be observed through various

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946 United Nations Development Programme (UNDP). *Programming for Justice: Access for All* (2005), 5. Also, Francioni, F. (2007). The Right of Access to Justice under Customary International Law. In: F. Francioni (ed.), *Access to Justice as a Human Right*, 3-4, New York : Oxford University Press : Academy of European Law, European University Institute, 2007

947 *UN Women (2011).* Progress of the World's Women: In Pursuit of Justice, *UN Entity for Gender Equality and the Empowerment of Women (UN Women), 11.*

948 UNDP (2005). *Programming for Justice: Access for All* (n. 5), 5

949 Stanivuković, M., Živković, M. (2010). *Međunarodno privatno pravo, Opšti deo* (International Private Law, General Part). *Službeni glasnik*, Beograd, 145.

950 FRA–Agencija Europske unije za temeljna prava (2011). Temeljna prava migranata u nereguliranoj situaciji u Evropskoj uniji (Fundamental rights of migrants in an unregulated situation in the European Union), Factsheet. https://fra.europa.eu/sites/default/files/fra_uploads/1848-FRA-Factsheet_FRIM_HR_BAT.pdf

951 An *irregular migrant* is a person who, owing to irregular entry, breach of an entry requirement or the expiry of the legal basis for entering and residing, lacks a legal status in a transit or destination country. The definition encompasses, *inter alia*, the persons who legally entered the transit country or the country of destination but stayed longer than they were authorised or they got employed in an irregula manner; they are also called migrants in an irregular situation. The term "irregular" is more suitable than the terms "illegal" or "unlawful" which have criminal law connotations. The International Organization for Migration/ IOM B&H (2021). *Reporting on migrations and refugees, 4-5*. Available at https://bih.iom.int/resources/reporting-migration-and-refugees-guidelines-journalists

952 IOM/The International Organization for Migration (2019) *International Migration Law – IML Information note* on Access to Justice for Migrants (2019).

stages of their migration journey (entry into the country, regulating status, employment, protection of property rights, forced detention, forced removal or refoulement, etc.), and in relation to various categories of forced migrants (children, women, LGBT, migrants, victims of different crimes). Yet, this part of the report focuses on the general access to civil justice regarding migrants (foreigners and stateless persons) and their civil rights and duties before domestic courts.

The right of access to justice is highly significant for all persons, domestic or foreign citizens, regular or irregular migrants. However, access to justice is even more crucial for migrants, given that a vast majority of them has no right to vote and can only rely on the judiciary for the protection of their rights.[953] Thus, apart from being a *right per se*, a meaningful access to justice is also a tool to ensure fulfilment of other rights. Moreover, providing justice to all migrants (regardless of their status) reduces the risk of impunity for wrongdoings in the society at large.[954] The stated approach contributes not only to migrants' protection but also to strengthening the rule of law, social cohesion and stability.[955] The key significance of the right of access to justice for migrants and its positive impact on the society as a whole has also been recognised in the final draft of the *Global Compact for Safe, Orderly and Regular Migration (GCM)*.[956] On the other hand, there are significant factors limiting the access to justice for migrants. The limiting factors include: insufficient information on available legal remedies; insufficient awareness of judges and other legal professionals about the presence, content and significance of anti-discrimination and other relevant legislation; and inadequate application of the rule on shifting the burden of proof to another party, which is particularly significant in discrimination cases.[957]

The right to a fair trial is prescribed in Article 6 of the European Convention of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).[958] Article II/3(e) of the Constitution of B&H[959] envisages the right to a fair hearing in civil and criminal proceedings. The right of access to justice is a fundamental human right and one of rare procedural human rights[960] which serves as an institutional and procedural guarantee for instituting civil proceedings in cases concerning the protection and exercise of substantive civil rights (e.g., various property rights such as ownership, copyright, lease; rights in obligation law relations; rights arising from marriage and family relations, etc.). The right to a fair trial includes specific institutional and procedural rights; the principal one among them is the right of access to court, which entails the obligation to provide a *possibility* of effective protection before at least one independent and impartial judicial instance.[961]

Whereas the asylum seekers may legally reside in B&H pending the final decision by the competent bodies on their application (they must not be deported against their will while waiting for decision to be

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953 UNDP (2005). *Programming for Justice: Access for All* (2005), 5.

954 IOM (2019). *International Migration Law – Information note* (2019), 3.

955 UN (2017). *Issues Brief No. 1, Human rights of all migrants, social inclusion, cohesion and all forms of discrimination, including racism, xenophobia and intolerance;* available at https://refugeesmigrants.un.org/sites/default/files /issue_brief_for_first_thematic_session.pdf

956 IOM (2018). *Global Compact for Safe, Orderly and Regular Migration (GCM), intergovernmentally negotiated and agreed outcome* (2018), paragraph 15. Available via link: https://www.iom.int/global-compact-migration

957 FRA-EU Agency for Fundamental Rights (2012). *Access to justice in cases of discrimination in the EU – Steps to further equality* (2012), 8.

958 Article 6 para 1 of the ECHR: 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. Judgement 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.

959 The Constitution of Bosnia and Herzegovina 1995 (revised 2009), available at https://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20CONSTITUTION%20.pdf

960 Ademović, N., Marko, J., Marković, G. (2012). *Ustavno pravo BIH* (Constitutional Law of Bosnia and Herzegovina), Sarajevo: Konrad Adenauer Stiftung, 263.

961 Ademović, Marko, Marković, 2012: 266.

rendered),[962] there may be a need during their legal residence to initiate a civil proceeding before the competent court.[963] *Persons having the subsidiary protection status,* who obtained the residence permit for a period of one year (including the possibility of its extension), have full access to educational services (access to schools, universities, professional development programmes) under the same terms as domestic citizens. They also have access to health care and social protection under the same terms as domestic citizens, as well as the possibility to maintain their family unity and the approval of the same family status.[964] A *child of a refugee or a foreigner under subsidiary protection* born in B&H follows the legal status of parents, which is decided by the Ministry of National Security of B&H. As all these and other civil rights can be violated, jeopardised or disputed. In addition, there may be a need to resolve numerous family law relationships. Therefore, the prohibition of discrimination and the right of access to justice is important for various categories of migrants.

The Act on the Prohibition of Discrimination (2009)[965] was amended in 2016, The Act on Amendments to the Act on the Prohibition of Discrimination (2016)[966] strengthened the formerly established protection mechanisms prohibiting discrimination based on actual or perceived grounds towards any person or a group of persons, their relatives or persons otherwise associated with them on the grounds of their race, skin colour, language, religion, ethnic affiliation, disability, age, national or social background, ties with a national minority, political or other opinion, property status, membership in a trade union or any other association, education, social status, sex, sexual orientation, gender identity, sexual characteristics, and *any other circumstance* aimed at or resulting in prevention or restriction of any rights and freedoms in all areas of life whose recognition, enjoyment or realisation is guaranteed on equal footing to every individual.[967] Prohibition of discrimination shall apply to all public bodies, all natural and legal persons, in both public and private sector, in all spheres and especially in the field of employment, membership in professional organisations, education, training, housing, healthcare, social protection, goods and services designated for the general public and public places, and economic activities and public services.[968]

Even in case the legislation or practice are not directly discriminatory, the justice system may be too complex, expensive, under-resourced, overly centralised, or not appropriately sensitive to migrants needs, thus making access to justice only a virtual right as opposed to an effective one.[969] In order to ensure an effective enjoyment of the aforesaid rights, the right of access to free legal aid is crucial, as well as elimination of any language, financial and other barriers (which will be discussed in more detail further

[962] UNHCR (accessed: 2021); Help/Bosnia and Herzegovina: Rights and obligations of asylum seekers, refugees, and persons granted subsidiary protection; https://help.unhcr.org/bosniaandherzegovina/applying-for-asylum/rights-and-obligations/

[963] Zakon o strancima, *Službeni glasnik BiH*, br. 88/2015 (The Aliens Act, *Official Gazette of B&H*, no. 88/2015). The Aliens Act of B&H supports the principle of non-discrimination and the principle of non-refoulement to countries where migrants could be exposed to persecution. It also prohibits collective pushbacks. According to the existing normative framework, irregular entry and stay are not considered to be a criminal offence. The supervision measure for monitoring migrants by placing them in immigration centres is not declared in case of an irregular entry into the country, nor in case of violation of the conditions of stay. After the measure of expulsion has been imposed, irregular migrants are allowed to leave the country voluntarily within the time limit specified for the enforcement of the measure. OCHCR (2019). https://www.ohchr.org/sites/default/files/Documents/Press/STMBosniaHerzegovina01oct2019.pdf

[964] Article 14 of the Asylum Act of B&H. (Zakon o azilu BiH, *Službeni glasni*k BiH, br. 11/16 i 16/16).

[965] Zakon o zabrani diskriminacije, *Službeni glasnik BiH*, br. 59/2009 (Act on the Prohibition of Discrimination, *Official Gazette of B&H*, no. 59/2009)

[966] Zakon o izmjenama i dopunama Zakona o zabrani diskriminacije,"*Službeni glasnik BiH*", broj 66/16 (Act on Amendments to the Act on the Prohibition of Discrimination, *Official Gazette of B&H*, no. 66/2016).

[967] Article 2 para. 1 of the Act on the Prohibition of Discrimination (2009); Act on Amendments to the Act on the Prohibition of Discrimination (2016).

[968] Art. 2 para 2 of the Act on the Prohibition of Discrimination (2009)

[969] IOM. *International Migration Law – Information note* (2019), 4.

on in this report). The Act on Free Legal Aid B&H[970] was aimed at ensuring an effective and equal access to justice to every natural person before the competent authorities and institutions of B&H, where individuals may pursue the exercise or protection of their individual rights, obligations and interests. The Act on Free Legal Aid prescribes that free legal aid is provided within the structural framework of the Ministry of Justice through the Office for Providing Free Legal Aid, which is an internal organisational unit of the Ministry.[971]

According to the available reports of the Institution of Ombudsman for human rights of B&H[972], cooperation of competent institutions dealing with the issue of migrations is established with the non-governmental sector, in the manner that persons under international protection are provided legal assistance by the Association "*Vaša prava* BiH" (*Your Rights* B&H), based on the Protocol signed with the Ministry of Security of B&H. The experiences of the Institution of Human Rights Ombudsman show that all complaints pertaining to migration issues have been submitted by a single organisation, the Association "*Your Rights* B&H".[973]

With regard to judicial cooperation in civil and criminal matters, the Ministry of Justice recorded a total of 4,532 requests for judicial cooperation in civil matters in 2019. It is estimated that 60% of requests originate from the EU member countries, primarily Croatia, Slovenia, Austria, Germany and Italy. B&H needs to accede to certain instruments developed within the framework of the Hague Conference on Private International Law, such as the Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, and the Protocol of 23 November 2007 on the law applicable to maintenance obligations (EC Report, 2020).[974]

The B&H authorities have ensured access to court and judicial protection to forced migrants *de jure.* Judicial protection is formally guaranteed under equal conditions both for B&H citizens and for various categories of forced migrants.[975] However, formal proclamation of rights should be observed and analysed in relation to the essential implementation of the established legal and institutional framework and the general effectiveness of civil court proceedings in B&H. In the course of 2019, the ECtHR rendered 21 judgments in connection to 379 applications lodged against B&H (as compared to 6 judgments in 2018), establishing that B&H had infringed the human rights guaranteed by the ECHR. The majority of judgments refer to the right to a fair trial, protection of property, right to freedom and security, freedom of expression, and prohibition of discrimination. During 2019, a total of 1,784 applications were submitted to the Court, bringing the total number of applications pending before the Court to 1,816. The EC Progress Report (2020) notes that B&H has no comprehensive policy framework on the promotion and enforcement of human rights, including nationwide strategies on human rights, prohibition of discrimination, and protection of minorities. In the absence of such strategies, the protection of both

[970] Zakon o besplatnoj pravnoj pomoći BiH. Službeni glasnik BiH, br. 83/16 (Act on Free Legal Aid, *Official Gazette of B&H*, no. 83/2016).

[971] An additional difficulty in exercising the right to free legal aid is the fact that the Office is understaffed. (the Institution of Human Rights Ombudsman of B&H (2018).

[972] Institucija ombudsmana za ljudska prava BiH(2018). Godišnji izvještaj o rezultatima aktivnosti Institucije ombudsmena za ljudska prava BiH za 2018. (Institution of Human Rights Ombudsman , Annual Report of the Institution of Ombudsman of B&H for 2018., p.2): https://www.ombudsmen.gov.ba/documents/obmudsmen_doc2019030109434379bos.pdf

[973] The Institution of Human Rights Ombudsman of B&H (2018)

[974] EC/European Commission (2020). Bosnia and Herzegovina 2020 Report, 44.

[975] Article II of the Constitution of B&H indicates that the rights and freedoms set forth in the European Convention on Human Rights and its Protocols are applied in B&H and have priority over all other law. Thus, Articel II stipulates that "Bosnia and Herzegovina and both Entities [...] ensure the highest level of internationally recognised human rights and fundamental freedoms"; furthermore, the "rights and freedoms provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols [...] are applied directly in Bosnia and Herzegovina", and they "have priority over all other laws".

substantive and procedural human rights continues to be uneven across the country (EC Report, 2020: 25).[976]

In conclusion, we refer to a statement contained in the EC *Bosnia and Herzegovina 2020 Progress Report,* which noted that Bosnia and Herzegovina is generally at an early stage as it has reached some level of preparation for the implementation of the EU *acquis* in the area of judiciary and fundamental freedoms but no progress was recorded in this area during the reporting period (June 2019-October 2020). The obstruction of the judiciary reform was continued by political actors and from within the judiciary, while poor functioning of the judiciary still prevents citizens and various categories of forced migrants to fully exercise their rights. The Report further states that the enacted legal provisions on foreigners are *mainly* in line with the EU *acquis,* but that they should be further harmonised in view of ensuring access to rights and justice, particularly for vulnerable categories of migrants.[977]

At the time of writing this part of the National Report[978], the available databases of court decisions[979] contained no significant data on civil court proceedings which involved migrants/foreigners as parties or interested parties. For this reason, the National Report will generally present the current legal framework on the access to civil justice in relation to various categories of migrants. In the next parts of the Report, the author primarily focuses on civil legislation in contentious and non-contentious proceedings. In line with the form of government and the delegated competences under the B&H Constitution, most legislative acts on these matters are enacted at the entity level (by the Federation of B&H and Republika Srpska; hereinafter: the FB&H and the RS). The solutions are similar or often identical; thus, the differences will be emphasized wherever it is purposeful and justifiable.

2. Procedural status of forced migrants

The procedural status of migrants is affected by a number of factors: the formal recognition of party's legal standing and litigation capacity; the obligation of paying security for the costs of judicial proceedings when a migrant/foreign citizen or a stateless person initiates proceedings against a domestic citizen (*caution judicatum solvi*); the possibility of using free legal aid and representation services; the existence of formal and factual obstacles concerning age, language and the obligation to pay legal costs (court fees, representation costs, taking of individual evidence); and the overall effectiveness of domestic civil court proceedings.

In case a concrete civil proceeding includes a foreign element, i.e. a specific fact through which the relation with a foreign state is established, it is first necessary to resolve the issue of international jurisdiction and establish the governing law in such a contentious proceeding.[980] The rules which are used in establishing the international jurisdiction of the domestic courts and the conflict of law rules on establishing the applicable law constitute Private International Law of B&H. The rules of Private International Law are applicable only if the case involves a relevant foreign element[981], such as foreign nationality, which will be the case where migrants/foreigners appear as parties to the proceedings. At this point, in order to avoid a content overlap with the part of this Report dealing with the aspects of Private International Law, we will examine only the legal provision contained in civil procedure law, namely the one concerning the

[976] EC/European Commission (2020). *Bosnia and Herzegovina 2020 Report, 25.*
[977] EC/European Commission (2020). *Bosnia and Herzegovina 2020 Report, 15.*
[978] The Report was developed in the period February - March 2021.
[979] The CSD database of judicial decisions is available at: Odijel za sudsku dokumentaciju I edukaciju (Court Documentation and Education Department Department B&H); available at: https://csd.pravosudje.ba; and Paragraf lex database, available at: https://www.paragraf.ba/generalne-informacije.html
[980] For example, see: Dika, M., Knežević, G., Stojanović, D. (1991). *Komentar Zakona o međunarodnom privatnom i procesnom pravu* (Commentary on the Act on Private International and Procedural Law). Nomos; Meškić, Z., Đorđević, S. (2016). *Međunarodno privatno pravo I opći dio* (Private International Law I, General part*)*, Sarajevo: *Privredna štampa*; Stanivuković, M., Živković, M. (2010). *Međunarodno privatno pravo opšti deo*, IV izdanje *(*Private International Law, General part, IV edition), Službeni glasnik. Beograd
[981] Meškić, Z., Đorđević, S. op. cit., 21.

jurisdiction of courts in disputes with a foreign element. The court in the Federation B&H (FB&H) or in Republika Srpska (RS) shall be competent to adjudicate disputes with an international element when its jurisdiction is explicitly established by the law of Bosnia and Herzegovina, or the law of the Federation B&H or in the RS, or an international agreement.[982] If the law or the international agreement contain no specific provision on the jurisdiction of the court in the Federation B&H or the RS for that specific type of dispute, the court in the Federation B&H or in the RS shall also be competent to adjudicate this type of disputes where its jurisdiction arises from the provisions of this law related to territorial jurisdiction[983], which implicates subsidiary application of civil procedure legislation in case of legal gaps in the provisions on international jurisdiction.

2.1. Right to trial within a reasonable time

One of the aspects of the right to a fair trial is the right to trial within a reasonable time. The relevant part of Article II/3 of the Constitution of Bosnia and Herzegovina reads as follows: "All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above" (set forth in the ECHR and its Protocols); *inter alia*, these include: e) The right to a fair hearing in civil [...] matters [...]".

The relevant part of Article 6 para. 1 of the ECHR provides that: *In the determination of his civil rights and obligations* [...], *everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law* [...]. According to the consistent practice of the ECHR and the B&H Constitutional Court, the assessment of the "reasonable time" (length of proceedings) must be conducted in light of the circumstances of each individual case, taking into account the criteria set by the judicial practice of the ECtHR, and particularly the case complexity, behaviour of parties in the proceedings, and the conduct of the competent court or other public authorities, and the significance that the concrete legal matter has for the applicant [984]. Article 6 para. 1 of the ECHR imposes a duty on the member states to organise their judicial systems in a manner that would enable the courts to satisfy the conditions stipulated in this Article, including the obligation to act within a reasonable time.[985]

The civil procedure legislations of the two entities further specify the obligation to ensure a trial within a reasonable time. The relevant provisions of the Civil Procedure Act of the Federation of Bosnia and Herzegovina (hereinafter: the CPA FB&H)[986] and the Civil Procedure Act of Republika Srpska (hereinafter: the CPA RS)[987] read as follows:

(1) *A party is entitled to receive a court decision on its requests and proposals within a reasonable time.*

(2) *The court shall be obliged to conduct the proceedings without any delay and with minimum costs, and to prevent any abuse of the parties" procedural rights..*

Article 31 of the Act on Courts of the Federation of B&H[988] prescribes that the court president is responsible for managing the entire court and court administration.

Republika Srpska (RS) enacted a subject-specific legislative act titled the Act on the Protection of the Right to Trial within a Reasonable Time (2020)[989], which entered into force on 1 January 2021. This Act regulates the protection of the right to trial within a reasonable time, as well as the right to just satisfaction (Article

[982] Article 26 paragraph 1 of the CPA FB&H and Article 26 of the CPA RS.
[983] Article 26 paragraph 2 of the CPA FB&H and Article 26 of the CPA RS.
[984] ECtHR case *Mikulić v Croatia*, application no. 53176/99 of 7 February 2002, Report no. 2002–I, paragraph 38.
[985] ECtHR case *Marinović v Croatia*, Judgement of 6 October 2005, paragraph 23.
[986] The Civil Procedure Code of the Federation B&H, *Official Gazette FBH*, no.53/2003, 73/2005, 19/2006 and 98/2015.
[987] the Civil Procedure Code of the Republic of Srpska, *Official Gazette* of the Republic of Srpska, no. 58/2003, 85/2003; 74/2005, 63/2007, 105/2008–Constitutional Court Decision, 45/2009– CC decision; 49/2009, and 61/2013.
[988] the Act on Courts of the Federation B&H, *Official Gazette FBH, no.*38/2005, 22/2006;,63/2010, 72/2010– correction; 7/2013, and 52/2014.
[989] the Act on the Protection of the Right to Trial within a Reasonable Time, *Official Gazette of RS*, no. 99/2020.

19 of the PRTRT Act)[990] due to a violation of the right to a trial within a reasonable time which is exercised in court proceedings in the manner and under conditions stipulated by this Act. Under Article 4 of this Act, legal remedies for the protection of the right to a trial within a reasonable time include: (1) a request to speed up the proceedings; and (2) a lawsuit for establishing a violation of the right to trial within a reasonable time and fair compensation for the violation of the right to trial within a reasonable time.[991] Under Article 5 of this Act, the criteria for assessing whether a trial was conducted within a reasonable time and specifying a sum for monetary compensation are: (1) case complexity in terms of factual circumstances and matters of law and procedure; (2) the conduct of court and other republic administrative bodies, bodies of local self-government units, public services and other holders of public powers; (3) the conduct of the applicant, (4) the significance of the case for the applicant. [992]

On 24. 2. 2021, the FB&H Government published the Draft Act on the Protection of the Right to Trial within a Reasonable Time, but it has not entered the adoption procedure yet.[993] The Draft Act is proposed for the purpose of ensuring mechanisms for the protection of the right to trial within a reasonable time guaranteed by the Constitution of B&H and the ECHR, particularly considering that the judicial practice of the B&H Constitutional Court continually pointed out to the systemic violation of the appellants' right to a fair trial within a reasonable time. The proposed Draft Act should provide a clear, efficient and cost-effective legislative framework governing the protection of the right to trial within a reasonable time to B&H citizens and foreigners/migrants alike. At the time of writing this Report, the FB&H Act on the Protection of the Right to Trial within a Reasonable Time has not been adopted yet.

2.2. Procedural capacity

Article 79 of the Act on Resolving Conflict of Laws with Regulations of Other Countries (hereinafter: the RCL Act)[994] regulates the party's legal standing and litigation capacity of foreigners in domestic civil court proceedings, specifying that the applicable law on these matters for a natural person is the law of the country of person's nationality. If a person is without citizenship, or if his/her citizenship cannot be established, the applicable law shall be determined on the basis of his/her domicile. If the person has no permanent residence or if his/her permanent residence cannot be established, the applicable law shall be determined on the basis of that person's residence (Article 12 RCL Act).[995]

Domestic civil procedure law on contentious proceedings specifies that a party to the proceeding may be *any* natural or legal person;[996] hence, in terms of party's legal standing (capacity to be a party in proceedings) there is no difference between domestic and foreign citizens, irrespective of their status. Similar solutions are envisaged in the legislation on non-contentious proceedings.[997] Thus, domestic or foreign citizens, including stateless persons, may appear as parties in civil court proceedings.

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[990] Article 19 of the Act on the Protection of the Right to Trial within a Reasonable Time (RS) reads: "Just satisfaction due to the violation of the right to trial within a reasonable time may be exercised by: 1) establishing a violation of the right to trial within a reasonable time, 2) establishing ae violation of the right to trial within a reasonable time and ordering equitable remuneration, 3) establishing a violation of the right to trial within a reasonable time, and ordering equitable remuneration, and publishing the judgment that the party's right to trial within a reasonable time has been violated; 4) establishing the violation of the right to trial within a reasonable time, and publishing the judgment that the party's right to trial within a reasonable time has been violated."

[991] Article 4 of the Act on the Protection of the Right to Trial within a Reasonable Time of Republika Srpska (RS).

[992] Article 5 of the Act on the Protection of the Right to Trial within a Reasonable Time of the RS.

[993] Javna rasprava (2021): Prijedlog zakona o zaštiti prava na suđenje u razumnom roku FBiH (Draft Act on the Protection of the Right to Trial within a Reasonable Time FB&H**);** https://www.javnarasprava.ba/fbih/Zakon/1601

[994] Act on Resolving Conflict of Laws with Regulations of Other Countries, *Official Gazette of SFR*Y, no. 43/1982 and 72/1982 – 1645; *Official Gazette RB&H*, number 2, 1992 – 5;13, 1994 – 189.

[995] Art. 12 of the Act on Resolving Conflict of Laws with Regulations of Other Countries (RCL Act).

[996] Art. 291 of the Civil Procedure Act/CPA FB&H/RS.

[997] Art. 4 of the Act on Non-Contentious Proceedings FB&H/RS: "A participant in a non-contentious proceeding is the person who has initiated the proceeding, the person whose rights or legal interest are being decided upon in the proceeding, as well as the authority that takes part in the proceeding on the bases of its legal power to initiate the proceeding, irrespective of whether they have initiated the proceeding or entered the proceeding later."

If a foreign citizen has no litigation capacity under the provisions of *lex nationalis* or *lex domicilii*, but has litigation capacity pursuant to B&H law, s/he may take actions in proceedings acting in personal capacity; hence, the law that is more favourable for the party in terms of being granted litigation capacity is applied.[998] According to domestic legislation, a party that has full contractual capacity may take actions in proceedings by acting in personal capacity, and such a party has litigation capacity. An adult person whose contractual capacity is partially limited has litigation capacity within the limits of his/her recognized contractual capacity. A minor who has not acquired a full contractual capacity is granted litigation capacity within the limits of his/her recognised contractual capacity.[999] Unaccompanied children encounter difficulties in exercising the right to be appointed a legal guardian in a timely manner and in compliance with the law, which further delays their access to (administrative) asylum proceedings. The stated issue is also significant for the access to civil justice. In addition, the process of determining the best interests of the child seems flawed. It has been observed that social welfare centres should improve their working methods in order to avoid unnecessary delays in providing migrant children with necessary assistance and protection.[1000]

2.3. Representation and free legal aid

The ECHR, as an integral part of the B&H Constitution, stipulates a clear obligation of the state to ensure an equal access to law and justice for all. The minimum requirements related to human rights referred to in Article 6(3) of the ECHR in the context of legal assistance arise from the ECHR interpretation and practice. Article 6 of the ECHR stipulates that legal assistance should be provided in criminal cases "where the interests of justice so require", which is also considered to be a general standard for other types of cases. In that context, the ECtHR case *Airey v Ireland*[1001] is very significant as it contains important determinants on free legal aid. This judgment set a precedent obliging states to provide legal aid, when necessary, taking into consideration the importance of the case in relation to an individual (applicant), the complexity of the case, the individual's capacity to represent himself/herself, the costs of proceedings and the individual's capacity to cover the costs. States have a positive obligation to enable a practical and effective access to court by providing free legal aid or by simplifying the proceedings to such an extent that persons can act on their own.[1002]

Free legal aid is a form of exercising the right of a natural person to fair trial and equal access to justice before the court and other authorities, the costs of which are completely or partially borne by the competent authority in charge of providing free legal aid. The right to free legal aid also includes the right to exemption from court fees, in accordance with the legislation on fees.

B&H has a decentralised legal aid system. Legislative acts on free legal aid are adopted at the state level (for proceedings conducted before the institutions and authorities of B&H), at the level of Brčko District[1003], and at the entity level (as the RS adopted a legislative act on this matter)[1004], while the relevant legislation in the FB&H was adopted at the cantonal level (10 cantons in total). Regardless of the number of legal sources regulating this matter, the free legal aid is not always available, nor unconditionally ascertained. In the FB&H, nine out of ten cantons adopted legislative acts on free legal aid, and the

998 Art. 79 para 2 of the RCL Act

999 Article 292 of the RCL Act FB&H/RS.

1000 Statement of the Special Rapporteur on the human rights of migrants, Felipe González Morales, after the completion of his mission; https://www.ohchr.org/en/statements/2019/10/end-visit-statement-un-special-rapporteur-human-rights-migrants-felipe-gonzalez?LangID=E&NewsID=25088

1001 ECtHR case: *Airey v Ireland* 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305.

1002 The so-called *Airey*-principles have been confirmed in several judgements of the ECtHR, which applies these criteria to the concrete circumstances of the complaint. Access to courts is meant to be effective for all citizens, irrespective of their economic situation. Therewith, a violation will be established if *costs* appear as an actual barrier to access to court. This practice seems to be a particular challenge for the states in a legislation procedure.

1003 The Act on Free Legal Aid Office of Brčko District BiH, *Official Gazette of Brčko District, BiH,* no.19/2007 and 23/2019.

1004 The Act on Exercising the Right to Free Legal Aid in the Republic of Srpska (RS), no. 67/2020 of 22. 7. 2020.

majority of cantons established the institution responsible for providing free legal aid (cantonal institutions/institutes for providing legal aid).[1005]

The right to free legal aid entails the exercise of the right to obtain general information on rights and obligations, assistance in filling out forms for exercising the right to free legal aid, legal advice, legal assistance in drafting all types of pleadings, representations before administrative authorities and other authorities and institutions, representations in court proceedings, drafting complaints and appeals, legal assistance in peaceful dispute settlement (mediation), and drafting submissions to international bodies for the protection of human rights.

All persons are entitled to enjoy the right to general information on rights and obligations in filling out forms for exercising the rights to free legal aid, regardless of whether they have fulfilled all the requirements prescribed by these laws. Free legal aid is provided to free legal aid beneficiaries in proceedings where the exercise and protection of their rights and interests is provided for, which *inter alia* includes contentious, non-contentious and enforcement proceedings.

A free legal aid beneficiary is a person who is provided with free legal aid in compliance with the requirements prescribed by the law in the territory of a specific canton, entity or the state. In most case, these requirements entail that the interested party/potential beneficiary is a B&H national with domicile or residence at a specific territory (canton, entity or state, depending on the administrative and territorial level where the legislative act was adopted); but, these requirements also refer to *another natural person domiciled* at the B&H territory, as well as a natural person who is in the B&H territory under international protection in line with international standards (particularly pertaining to asylum seekers, refugees, persons under subsidiary or temporary protection, stateless persons, victims of human trafficking) and in line with the obligations that B&H has taken under the respective international conventions.[1006] In 2018, the B&H Human Rights Ombudsman Institution reported that migrants were provided free legal aid by the *Your Rights* B&H Association.[1007]

2.4. Language, monetary and other barriers to the right of access to justice

a) Language

In litigation proceedings conducted before municipal (basic) courts of first-instance, and before cantonal (district) courts of second-instance, the Bosnian, the Croatian and the Serbian language are in equal use,

[1005] Bosnian-Podrinje Canton (Act on Providing Free Legal Aid, *Official Gazette of the Bosnian-Podrinje Canton*, no. 2/2013); Herzegovina-Neretva Canton (Act on Providing Free Legal Aid, *Official Gazette of the Herzegovina-Neretva Canton*, no. 7/2013); Sarajevo Canton (Act on Providing Free Legal Aid, *Official Gazette of the Sarajevo Canton*, no. 1/2012, 26/2014 and 40/2017); Posavski Canton (Act on Providing Legal Aid, *Official Gazette of the Posavina Canton*, no. 3/2010, amended in 2013); Tuzla Canton (Act on Providing Legal Aid, *Official Gazette of the Tuzla Canton*, no.10/2008 and 11/2017); Una-Sana Canton (Act on Providing Free Legal Aid, *Official Gazette of the Una-Sana Canton*, no. 22/2012 and 3/2016); West Herzegovina Canton (Act on Cantonal Institute for Legal Aid, *Official Gazette of the West Herzegovina Canton*, no. 5/2008; and later amendments published in the *Official Gazette of the West Herzegovina Canton*, no. 4/2009, 20/2013, 10/2017; and the Rulebook on the methods and conditions of providing free legal aid); Zenica-Doboj Canton (Act on Providing Free Legal Aid, *Official Gazette of the Zenica-Doboj Canton*, no. 1/2014). We received confirmation for Canton 10 (Herzeg-Bosna canton) that the relevant law was adopted in the course of 2015, but it is not available online, and we did not manage to find it in the relevant legislation databases. The Central Bosnia Canton is the only canton in the FB&H where the law on providing free legal aid has not been adopted.

[1006] Article 9 of the Act on Providing Free Legal Aid of the Sarajevo Canton. Similar provisions are contained in other cantonal laws on free legal aid.

[1007] Institucija ombudsmana za ljudska prava BIH (2018). Specijalni izvještaj o stanju u oblasti migracija u BIH (Institution of the Human Rights Ombusman B&H: Special Report on the situation in the field of migrations in B&H), Banja Luka, nov. 2018, p. 47; https://www.ombudsmen.gov.ba/documents/obmudsmen_doc2019010713545979bos.pdf. Notably, the *Your Rights* BiH Association has had an office set up in Bihać since 01. 9. 2018; the Association has been planning to open another free legal aid office in Sedra (where free legal aid will be available to migrants on a daily basis from 8 a.m. to 16 p.m.). The publication of promotional material (posters) on free legal aid by the *Your Rights* BiH Association; posters will will be translated into all languages spoken by migrants and exhibited in places which are frequented by migrants, or where migrants are located or accomodated.

including the official scripts (Latin and Cyrillic).[1008] Parties and other participants in court proceedings may use one of the official languages;[1009] summons, rulings and other court writs are served on the parties and other participants in the proceedings in the same (official) language.[1010]

If the parties and intervenors are not familiar with any of the languages in official use, civil legislation stipulates that they will provide, at their own expense, interpretation and translation of procedural actions they take, as well as other oral and written translation for their own needs.[1011] The party (a domestic or a foreign citizen, including a stateless person) is obliged to submit the document that s/he refers to as a proof of his/her allegations. The document drafted in a foreign language is to be accompanied with a certified translation.[1012] The rule that is valid for documents is also applicable to other evidentiary instruments; thus, the parties and the interveners are also obliged to ensure translation related to the presentation of evidence they proposed.[1013] The translation will be performed by interpreters.[1014] Any witness who is not familiar with the language of the procedure will be heard through an interpreter.[1015]

The right to use one's own language during the proceedings is guaranteed by the B&H Constitution and the civil procedure legislation. These provisions are based on the formal recognition of the violation of provisions on the right to use one's own language in the proceeding and they serve as the legal ground for filing an appeal (for violation of a procedural rule which always has an impact on rendering a lawful and proper judgment).[1016] On the basis of the foregoing, it can be concluded that migrants are entitled to use their own language (e.g., while being heard by the court), but they may need to use of services of a court interpreter in the proceeding, which increases the total costs of proceedings.

b) Court fees

The Act on Court Fees of Republika Srpska (RS)[1017] stipulates that a foreign natural and legal person is exempted from paying court fees if it is provided for by an international agreement or under the condition of reciprocity; in the event of any doubt regarding the existence of reciprocity, the opinion is given by the Ministry of Justice RS. In the FB&H, this issue is regulated at the cantonal level, and the provisions are similar.[1018] The Act on Court Fees of the Brčko District[1019] envisages that foreign citizen will be exempted from paying fees if it is provided for by an international agreement or under the condition of reciprocity; in the event of any doubt about the existence of reciprocity, the opinion is given by the Judiciary Commission.[1020]

c) Security for the costs of judicial proceedings

[1008] Article 6 of the CPA FB&H/RS.
[1009] Article 314 of the CPA FB&H/RS.
[1010] Article 313 of the CPA FB&H/RS.
[1011] Article 315 para. 1 of the CPA FB&H/RS.
[1012] Article 134 paragraphs 1 and 2 of the CPA FB&H/RS.
[1013] Article 315 para. 2 of the CPA FB&H/RS.
[1014] Article 315 para. 3 of the CPA FB&H/RS.
[1015] Article 145 para. 1 of the CPA RS/FB&H.
[1016] Article 209 par. 2 item 7 of the CPA FB&H and Article 227 para. 1 of the CPA RS: [...] If contrary to the provisions of this law the court refused the party's request to use his/her own language and script in the course of proceedings and to follow the proceedings in his/her own language [...]".
[1017] Article 10 para. 5 of the Act on Court Fees of Republika Srpska, *Official Gazette of Republika Srpska*, no. 73/2008, 49/2009, 67/2013, 63/2014 and 66/2018.
[1018] E. g.: Article 9 para. 3 of the Act on Court Fees of the Sarajevo Canton (*Official Gazette of the Sarajevo Canton*, no. 36/2014–consolidated text and 23/2016); Article 9 para. 3 of the Act on Court Fees with Tariffs of the Herzegovina-Neretva Canton (*Official Gazette of the Herzegovina-Neretva Canton*, no. 4/2009, 2/2013, 5/2015, 7/2017 and 6/2018); Article 11 para. 4 of the Act on Court Fees of the Tuzla Canton (*Official Gazette of the Tuzla Canton*, no. 4/2016– consolidated text); Article 9 para.3 of the Act on Court Fees of the Central Bosnia Canton (Official Gazette of the Central Bosnia Canton, no. 4/2017); Article 9 para. 3 of the Act on Court Fees (*Official Gazette of the Bosnian-Podrinje Canton*, no. 6/2010).
[1019] The Act on Court Fees of the Brčko District, *Official Gazette of the Brčko District B&H*, no. 5/2001, 12/2002, 23/2003, and 11/2020.
[1020] Article 12 of the Act on Court Fees of the Brčko District B&H.

With regard to the obligation of paying security for the costs of judicial proceedings for foreigners, Article 82 of the RCL Act prescribes as follows: when a foreign citizen or a stateless person having no residence in B&& initiates a proceeding before a court in B&H, s/he is obliged to provide security for the costs of judicial proceedings to the defendant, acting upon the defendant's request. The defendant is obliged to submit the request at the pre-trial hearing at the latest; if the pre-trial hearing is not held, the request shall be submitted at the first hearing in preparation for the main hearing (i.e. before pleading on the merits, or as soon as s/he has learned that security may to be sought.[1021] Security for the costs of judicial proceedings is given in money, but it may also be provided in another suitable form upon the approval of the court.

The defendant is not entitled to security of the costs of proceedings: (1) if B&H nationals are not obliged to provide security in the country of which the claimant is a national; (2) if the claimant enjoys the right to asylum in B&H; (3) if the claim refers to the claimant's employment relationship in B&H; (4) if the case at hand concerns marital disputes, paternity or maternity disputes or child support; and (5) if the case at hand concerns bill of exchange or cheque claims, a counterclaim or the issuance of a payment order.[1022]

In the decision on adopting the request for securing the litigation costs, the court will determine the amount of security of judicial proceedings and the time limit within which the security must be provided, and the claimant will be warned of the consequences, envisaged by the law, unless it is proven the security has been provided within the set time limit. If the claimant does not prove that s/he provided the security for litigation costs within the set time limit, the claim will be considered withdrawn, or that the claimant has waived the legal remedy if the request for security was filed later on in the proceeding for determining the legal remedy. The defendant who filed the request in a timely manner to have the litigation costs secured by the claimant is not obliged to continue the proceedings in the main hearing until the final decision on the request has been rendered; if the request is accepted, the claimant is not oblige to proceed with the main hearing-until the claimant has deposited the security. If the court rejects the request for the security of the costs of proceedings, the court may decide to continue the proceedings even before the decision on rejection becomes final.[1023]

Foreign citizens are entitled to be exempted from paying litigation costs if the reciprocity requirement has been satisfied. If there is any doubt about the existence of reciprocity, the explanation in regard to the exemption from paying the litigation costs is provided by the administrative authority in charge of the judicial affairs; in practice, it is the Ministry of Justice. Reciprocity is not a condition for exercising the right to the exemption from paying the litigation costs if the foreign citizen is domiciled in B&H. A stateless person is entitled to the exemption from paying litigation costs if he/she is domiciled or resides in B&H.[1024]

d) Costs of Court Proceedings

The competent court may exempt a party from paying the costs of court proceedings if the party is unable to bear the costs (due to his/her general financial status) without jeopardizing the necessary maintenance for himself/herself and his/her family. The exemption from paying these costs includes the exemption from paying court fees and the exemption from depositing the advance for the costs of witnesses, experts, onsite investigations, translation, and court announcements. The court may exempt the party from paying all proceedings costs or one part of the costs.[1025] While rendering the decision on exemption from paying these costs, the court will carefully assess all the circumstances, especially the value of the subject matter

[1021] Article 82 para 2 of the Act on Resolving Conflict of Laws with Regulations of Other Countries (RCL Act).
[1022] Article 83 of the RCL Act: If there is any doubt whether a B&H national is obliged to provide security in the country of the defendant's nationality, the explanation is given by the administration authority competent for judicial matters."
[1023] Article 84 of the RCL Act.
[1024] Article 85 of the RCL Act.
[1025] Article 400 of the CPA FB&H/RS.

of the dispute, the number of persons supported by the party, and the income of the party and the family members.[1026]

The decision on exemption from paying the proceedings costs is rendered by the first instance court, acting at the party's motion. The party is obliged to submit evidence on the financial situation together with the motion. When necessary, the court may *ex officio* obtain the necessary information about the financial situation of the party requesting such exemption, and it may also hear the adverse party. No appeal is allowed against the court decision approving the party's request for exemption from paying the proceedings costs.[1027] The advance payment of the proceedings costs which the party has been exempted from will be paid from the court funds.[1028]

The first instance court may revoke the decision on exemption from paying the proceedings costs in the course of the proceedings if it is established that the party is able to cover the costs of the proceedings. In such a case, the court will decide whether the party will entirely or partially compensate the costs and fees which the party has previously been exempted from.[1029] The amounts advanced from the court funds will be reimbursed first.[1030] The fees and costs advanced from the court funds are part of litigation costs.[1031]. If the adverse party (the opponent of the party who is exempted from paying the costs) has been obliged by a court decision to reimburse the litigation costs, and it is established that the adverse party is unable to bear the costs, the court may subsequently order that the costs be paid (in whole or in part) by the party who has been exempted from paying the costs; in that case, the court costs shall be paid from the awarded sum. It does not preclude the right of the party who has been exempted from payment to seek compensation from the adversary. [1032]

3. Certain procedures relevant for access to justice for forced migrants

3.1. Non-contentious proceeding for determining the time and place of birth

Pursuant to Article 13 of the Aliens Act of B&H, during the stay on the territory of B&H, a foreigner is required to have a travel document which enabled him/her to enter B&H, or another identification document, or appropriate certificate issued in B&H for the purpose of proving or certifying his/her identity and legality of entry and stay in B&H. The foreigner is obliged to present the identification document at the request of an authorised officer of the Service for Foreigners' Affairs, the police or another competent authority having such authorisations.

Under the Aliens Act, the Service is in charge of initiating and conducting a proceeding for establishing the identity of foreigners.[1033] If the proceeding for establishing identity of an alien has been initiated by the Border Police or the Police, which cannot immediately establish the foreigner's identity or there are grounds to suspect the veracity of allegations about the person's identity, and the situation cannot be clarified within a period of six hours, the Border Police/Police shall notify the Foreign Affairs Service as soon as possible. (Article 14 AA) The procedure for establishing an alien's identity is conducted in accordance with the provisions of the laws regulating the competencies of the FA Service and the laws governing the competencies of police officers in B&H. The procedure for establishing an alien's identity may also include the establishment of legality of a foreigner's stay in B&H or establishment of his/her place of temporary or permanent residence in B&H. Any alien having no evidence on his/her identity is obliged to provide the Service with a statement on his/her identity and biometric data. The Service treats

[1026] Article 401 of the CPA RS/FB&H.
[1027] Article 402 of the CPA RS/FB&H.
[1028] Article 403 of the CPA RS/FB&H.
[1029] Article 404(1) CPA RS/FB&H.
[1030] Article 404 (2) CPA RS/FB&H
[1031] Article 405 (1) CPA RS/FB&H
[1032] Article 405(4) CPA RS/FB&H.
[1033] Article 14 of the Aliens Act of B&H.

the alien who has given a statement on his/her identity in accordance with the provided data until other information is obtained or the person's real identity is established.[1034] In case a migrant lacks personal documents or the possibility of using them, the process of establishing a migrant's identity is an important issue in civil, criminal, misdemeanour and administrative proceedings.

Establishing the identity of certain categories of foreigners who entered the country under 'special conditions' is performed in a special non-contentious proceeding for determining the time and place of birth, and the persons' identity. In the FB&H, the Act amending the Act on Non-Contentious Proceedings (2021)[1035] added the special non-contentious proceeding for determining the time and place of birth to the existing non-contentious proceedings.[1036] It contributed to harmonising the entity regulations on non-contentious procedure in B&H.

As in case of other non-contentious proceedings, this special non-contentious proceeding[1037] is initiated by lodging a motion; the persons who are eligible to file the motion are: (1) a person who is not registered in the Birth Register and who cannot prove the time and place of birth in the manner envisaged in the provisions regulating the keeping of registration books; (2) the guardianship authority; and (3) any person having a legal interest thereof (Article 73a).[1038]

Proceedings for establishing the time and place of birth may be conducted by every court which has subject matter jurisdiction to decide on this issue (Article 73b). The motion for establishing the time and place of birth contains relevant data on the person whose time and place of birth (i.e. identity) is being verified; the data include forename and surname, sex, time and place of birth (if known) and other facts that may be useful in establishing the time and place of birth (Article 73c). The standard of proof is the level of verifiability, i.e., the certainty of relevant facts.

Prior to scheduling the hearing, the competent court is obliged to obtain official reports from the of the Ministry of Internal Affairs and the Registry Office in whose territory the person (whose time and place of birth is being verified) has resided, including information on whether there are records with data on the time and place of the person's birth; if needed, reports may be obtained from other authorities and institutions keeping records on natural persons.[1039] If there are indications that the person, whose time and place of birth are being verified, had residence in a foreign country, the competent court shall issue a decision on the stay of proceedings until the necessary information is obtained from the competent authorities of the foreign country (Article 73 d).

The Act amending the Act on Non-contentious Proceedings prescribes that the court will not stay the proceedings for the purpose of establishing the time and place, as well as the identity of a person "under special conditions", if the specific case pertains to establishing the time and place of birth, as well as the identity of the person who is assumed to be a child of a B&H national, *the person who was not born in the B&H territory*, and if *the person was born in a territory that in the assumed time of birth did not have international subjectivity due to war actions*. Additionally, the court will not stay the proceeding if the B&H intelligence and security authorities have recorded the entry of a person in the B&H territory from the territory that did not have international subjectivity, and if the minimum of known elements about the person's identity can be established on the basis of data and verification of the B&H intelligence and security and police authorities (e.g. photograph, fingerprints, etc) (Article 73 e).

[1034] Article 14 para. 6 of the Aliens Act of B&H.
[1035] The Act amending the Act on Non-Contentious Proceedings, *Official Gazette of the Federation BiH*, no. 11/2021.
[1036] Article 73 a –m of the amended NPC Act FB&H; and Article 73-a-k of the amended NPC Act of RS
[1037] The course of proceeding is regulated by Article 73a-73m of the Act amending the Act on Non-Contentious Proceedings of the FB&H and Articles 73a-73k of the Act amending the Act on Non-Contentious Proceedings of Republika Srpska (RS)
[1038] In case the motion is lodged by a third person having a legal interest, the motion should contain data demonstrating the petitioner's legal interest in initiating the procedure.
[1039] The time limit for delivery of the report cannot exceed 30 days from the date of receiving the court's order.

The amended NCP Act also stipulates the course and the content of the court hearing for establishing the time and place of a person, as well as the obligation to hear at least two adult witnesses, except in case of establishing the identity of a person 'under special conditions'. The court will order that the person whose time and place of birth is being verified shall be examined by a court expert of appropriate specialty, who shall present the findings and an opinion on the person's age. (Article 73 f).
If, on the basis of the presented evidence, the court cannot establish with certainty the exact time when the person was born, the person is considered to have been born on 01. 01. at 00:01 of the year which is deemed to be the most likely year of his/her birth on the basis of the presented evidence (Article 73 h).
If, on the basis of the presented evidence, the court cannot establish with certainty the exact place where the person was born, the seat of a town or municipality which is assumed to be the most likely place of the person's birth (based on the presented evidence) shall be considered to be the person's place of birth. If the place of birth cannot be established in such a way, the person shall be considered to have been born in the place where he was found, or where he/she had residence at the time of filing the motion for establishing the time and place of birth (Article 73 i).
The procedure is urgent and the time limit for rendering the decision on the established time and place of person's birth is 90 days from the date of filing the motion. The court decision may be subject to appeal; in such a case, the first-instance court without delay delivers the appeal with the cases files to the second-instance court, which is obliged to render the decision within 30 days from the date of receiving the appeal (Article 73 j).
Under the amended NCP Act, the costs of proceedings for establishing the time and place of birth shall be borne by the applicant. (Article 73 k). This provision has been criticised because such a solution is considered to be a deterring factor that can discourage the interested parties to initiate this proceeding. The court has an option to exempt the interested party from the obligation to pay these costs but it depends on the discretionary assessment of the acting judge.[1040]
The first-instance court submits the final decision on the time and place of birth of the person to the competent registry office within eight days from the day the decision becomes final in order to enter the fact of birth in the Birth Register (Article 73 l). If it is subsequently found that the person (whose time and place of birth has been established by the court decision) is already entered in the Birth Register, the court which issued the decision on the time and place of birth shall *ex officio* start the procedure for invalidating that decision. The final decision on invalidating the decision on time and place of birth shall be delivered to the competent birth registry office by the first-instance court within eight-days from the date the decision on invalidation becomes final (Article 73 m).
This procedure can also be used for establishing identity of persons *under special conditions. Inter alia,* it applies in the following cases: to persons who were not born in the territory of B&H or who were born in a territory that did not have international legal subjectivity at the presumed time of birth due to warfare; in case the B&H intelligence, security and police authorities have recorded the entry of persons into the B&H territory from the territory which at the assumed time of birth did not have international legal subjectivity; if the B&H intelligence, security and police authorities can provide (on the basis of collected data) the minimum of known elements on the person's identity (photo, fingerprint, etc.).
Therefore, the amended provision of the Non-Contentious Proceedings Act of the FB&H/RS are applied in the process of establishing the identity, time and place of birth of the aforesaid categories of persons. Yet, there are no available data that the aforementioned non-contentious proceedings are initiated for the purpose of establishing the identity, place and time of birth of migrants.

[1040] Article 29 of the Act on Non-Contentious Proceedings FB&H/RS: "The court has a discretionary power to assess and decide on procedure costs in matters relating to participants' personal and family situation, taking into account the case circumstances and the outcome of the proceeding, whereby the provisions of the Civil Procedure Act are applied in regard to the costs incurred by the participation of the guardianship authority in non-contentious proceedings."

3.2. Civil proceedings for establishing discrimination

The overarching principle of non-discrimination, established in the international law on human rights, requires the states to enable access to justice to all individuals, including migrants, without any discrimination, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or some other status.[1041] The Human Rights Committee (hereinafter: the Committee) clearly specified that the states are obliged to guarantee the rights laid down in the International Covenant on Civil and Political Rights (ICCPR), without discrimination between citizens and migrants. Regarding the access to justice, the Committee clarified that "Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law."[1042] The Committee further established the right of aliens to equal legal protection and the prohibition of discrimination in the application of rights which non-nationals are entitled to.[1043] Enabling migrants to enjoy the right of access to justice without discrimination presupposes that any relevant information must be available to migrants (through fieldwork), in a language they understand, as well as appropriate institutional support (including financial and legal assistance, if necessary). The competent authorities should be geographically available (decentralised). In that context, the positive obligations of the state also include the adoption of anti-discrimination legislation, and the elimination of any legal, social or economic obstacle preventing migrants from enjoying all elements of the right of access to justice.

The enjoyment of the rights and freedoms guaranteed by the B&H Constitution and the international agreements listed in Annex I to the Constitution is secured to all persons in Bosnia and Herzegovina, without discrimination on any ground, such as: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or some other status.[1044] The principled prohibition of discrimination of aliens in the B&H territory is contained in the provisions of various legislative acts,[1045] but they are all based on the general provision contained in Article 2 of the Act on the Prohibition of Discrimination B&H.

According to the Act on the Prohibition of Discrimination (hereinafter: PD Act), the architecture of anti-discrimination action in B&H comprises three constitutional actors: courts, the Institution of Human Rights Ombudsman of B&H, and the Ministry of Human Rights and Refugees of B&H. Judicial protection against discrimination is primarily provided by instituting specific anti-discrimination lawsuits, which are essentially aimed at facilitating the claimant's position in the litigation to a certain extent. The Institution of Human Rights Ombudsman of B&H, as the central institution for the protection against discrimination, has numerous and complex competences. In compliance with the PD Act, the Ombudsman Institution, *inter alia*, resolves individual and group complaints in relation to discrimination, collects and analyses statistical data on discrimination cases, informs the public on these occurrences, undertakes own research in this area, provides opinions and recommendations to authorities, submits annual and extraordinary reports on the occurrences of discrimination to parliaments in B&H, entities and the Brčko District, proposes laws and other acts to the competent institutions in B&H, reviews relevant legislation and

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[1041] International Covenant on Civil and Political Rights (Art. 2(1)); ECHR (Art. 14); American Convention on Human Rights (art. 1); African Charter on Human and Peoples' Rights (Art. 12).

[1042] Human Rights Committee. *General comment No. 15* (2008). The Position of Aliens under the Covenant (1986). UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 189, paragraph 7.

[1043] Ibid.

[1044] Article II/4 of the B&H Constitution.

[1045] Article 8 of the Aliens Act of B&H. The Aliens Act prohibits discrimination of aliens on any ground, such as: gender or sex, race, colour of skin, language, religion, political and other opinion, ethnic and social origin, affiliation with a national minority, property status, status acquired by birth, or any other status.

Article 9 of the Asylum Act Bi& (*Official Gazette of the BiH,* no. 59/2009) stipulates: "Discrimination of aliens is prohibited on any grounds prescribed in the Act on the Prohibition of Discrimination."

consults the competent legislative and executive authorities, and implements promotional and awareness raising activities in the context of combating discrimination. The competence of the B&H Ministry for Human Rights and Refugees in this area entails the collection of data and submission of reports to the B&H Parliamentary Assembly on occurrences of discrimination, establishing and keeping the central database of discrimination offences, and monitoring the implementation of the PD Act.[1046]

Article 12 (1) of the PD Act envisages that a person or a group of persons exposed to any form of discrimination shall have the right to initiate a lawsuit, including as follows: a claim for establishing discrimination on the basis of violation of the right to equal treatment; a claim seeking prohibition or elimination of discrimination; a claim for compensation of pecuniary and non-pecuniary damages; and a claim seeking publication of the judicial decision establishing the violation of the right to equal treatment in the media, at the expense of defendant (respondent). These claims may be filed alongside with other claims for the protection of other rights which may be the subject matter of adjudication in civil proceedings, provided that the claims are mutually correlated, regardless of whether these claims are prescribed to be resolved in regular or special civil proceedings, except for disputes on trespassing (Article 12(2) PD Act). The PD Act also envisaged the possibility of filing collective lawsuits for protection against discrimination, which is particularly significant in cases of massive violations of migrants' rights through discriminatory treatment, including various forms of systemic discrimination. Thus, associations or other organizations established in accordance with the law, and dealing with the protection of human rights or the rights of a specific group of individuals, may file a lawsuit against a subject who violated the right to equal treatment of a large group of individuals belonging predominantly to the group whose rights the claimant seeks to protect (Article 17(1) PD Act).

Acknowledging the difficulties of proving discrimination and inspired by the European solutions, domestic legislation derogated from the standard conception of burden of proof; thus, the victim of alleged discrimination is no longer obliged to prove that the discrimination occurred with a sufficient degree of certainty, but only that it is *probabl*e that discrimination has occurred.[1047] For the claimant, this lower burden of proof implies that factual circumstances of the case are more likely to be assessed as being a result of possible discrimination.[1048]

In terms of evidence, the PD Act refers to statistical data, databases and discrimination situation testing as special evidentiary instruments (Article 15(2) PD Act).. Parties may also use questionnaires, audio/video recordings (where allowed), findings and opinions of experts, and various indirect evidence which will be assessed by the court. The parties may also use the recommendations of the Institution of Human Rights Ombudsman B&H. (Article 15(9) PD Act). The available data show that this possibility has been used in a rather insignificant number of cases. As explained in relevant reports[1049], one of the reasons may be the insufficient and/or inadequate observance of the recommendations of the HR Ombudsman Institution. Under the PD Act, the acting court is obliged to assess the recommendations of the Ombudsman Institution as an evidentiary instrument, but courts seldom accepted them. Moreover, former judicial practice shows that B&H courts generally did not specifically explain their decision not to take the Ombudsman's recommendation into consideration; this fact was only briefly noted in the reasoning. For this reason, the Centre for Social Research recommended that the Act on Amendments to the Act on the

[1046] For more detail, see: Radončić, Dž., Hodžić, E., Izmirlija, M. (2018). *Kvadratura antidiskriminacijskog trougla u BiH: Zakonski okvir, politike i prakse 2016–2018 (*Quadrature of the anti-discrimination triangle in B&H: Legal framework, policies and practices), Sarajevo: Analitika – Centar za društvena istraživanja (Centre for Social Research

[1047] Article 15 (1)of the PD Act.

[1048] See: Lilla Farkas and Orlagh O'Farrell, Reversing the Burden of Proof: Practical Dilemmas at the European and National Level (Luxembourg: Publications Office of the European Union, 2015), p. 34. (first noted by Declan O'Dempsey during the seminar on the topic: Application of Equality Law or the Prohibition of Discrimination, Brussels, 28 November 2014).

[1049] See: Reljanović, M., Radončić, Dž., Malkić, A., Izmirlija, M., Hodžić, E. (2016). *Kvadratura antidiskriminacijskog trougla u BiH: Zakonski okvir, politike i prakse 2012–2016 (Quadrature of the anti-discrimination triangle in BiH: Legal framework, policies and practices)* Sarajevo: Analitika – Centar za društvena istraživanja.

Prohibition of Discrimination (2016)[1050] should introduce the court obligation to provide a detailed rationale of their decision not to take the HR Ombudsman's recommendations into account.[1051] Unfortunately, such solution was not adopted but the amended PD Act obliges the courts to consider these recommendations as an evidentiary instrument.[1052]

Significant developments in the amended PD Act refer to the principle of urgency, cumulative claims, claim for the publication of judgment, the rule on territorial jurisdiction and time limits for exercising judicial protection against discrimination[1053], discrimination situation testing, participation of third parties the proceeding,[1054] and internal protection proceedings.[1055]

The legal framework has been partially improved by introducing a new grounds of discrimination (*associativ*e discrimination)[1056] but the amended PD Act did not include nationality (as a forbidden discrimination ground)[1057] whose standardisation will gain legal significance in the prospective B&H EU integrations process. The proposals concerning other forms of discrimination and protective measures were partially adopted. The amended PD Act does not include discrimination by association and announced intention of discrimination, as specific forms of discriminatory conduct whose prohibition has been recommended by relevant international bodies.[1058] The latter form of discrimination is particularly predominant in relation to various categories of migrants, which clearly justifies the need to explicitly provide for their prohibition.

In addition, the amended PD Act regulates a collective lawsuit for protection against discrimination, by allowing all associations and other organisations dealing with human rights protection or the protection of rights of a specific group to instigate anti-discrimination proceedings before courts in B&H. It also removed the imprecise condition concerning the existence of a *reasonable interest for filing a lawsuit,* which was the subject matter of different interpretations in practice.[1059] It also removed the restrictive condition for admissibility of a collective lawsuit, which, in the initial version, implied that the claimant should make it *probable* that the right to equal treatment of a larger number of persons, predominantly belonging to a group whose rights the claimant seeks to protect, has been violated by the defendant's

[1050] The Act on Amendments to the Act on the Prohibition of Discrimination (*Official Gazette of BiH*, number 66, 2016).

[1051] See: Recommendations for improving the Act on the Prohibition of Discrimination (Analitika–Centar za društvena istraživanja, 2015).

[1052] Article 15 para 9. of the PD Act.

[1053] The time limits for exercising the protection against discrimination which were initially provided for by the PD Act (subjective three-month time limit and objective one-year time limit) were too short; as such, they did not provide sufficient protection to the victims of discrimination. Under the amended PD Act, the (subjective) time limit for filing a lawsuit is extended to three years from the date of finding out about the committed violation of the rights, and the (objective) time limit is extended to five years maximum from the date of committing the violation. In cases of a continuous discrimination, time limits are calculated from the date of the last committed violation, while in cases of systemic discrimination, time limits are not calculated.

[1054] The provision enabling the participation of third parties in the proceedings for protection against discrimination now terminologically complies with the provisions of the Civil Procedure Act of B&H, as it precisely defines that this refers to intervenors. The role of intervenors can still be taken by a body, organisation, institution, association, or another person dealing with protection against discrimination within their activities, or groups of persons whose rights are being decided upon in the proceedings, and they can participate in that capacity until an explicit cancellation of the claimant's consent.

[1055] For more detail, see: Analitika–Centar za društvena istraživanja (2018). *Izmjene i dopune zakonskog okvira za zaštitu od diskriminacije u BiH: Ostvareni pomaci i potrebna unapređenja (*Amendments to the Legal Framework for the Protection against Discrimination in B&H: Breakthroughs and Necessary Advancements.), Policy memo, available at https://www.analitika.ba/sites/default/files/publikacije/Izmjene%20i%20dopune%20zakonskog%20okvira%20-%20policy%20memo%200606.pdf

[1056] The so-called *associative discrimination* is primarily based on a related or another type of association with a discriminated person or a group of persons.

[1057] ECRI/European Commission against Racism and Intolerance, *ECRI Report on Bosnia and Herzegovina (*5th monitoring cycle), Strasbourg: ECRI Secretariat, CoE, 2017; par. 9. Cited after: Analitika–Centar za društvena istraživanja, *Izmjene i dopune zakonskog okvira za zaštitu od diskriminacije u BiH: Ostvareni pomaci i potrebna unapređenja* (2018).

[1058] Reljanović, M. et al., *Kvadratura antidiskriminacijskog okvira (Quadrature of the anti-discrimination framework)* (2016).

[1059] Art. 17 para 1 of the PD Act.

action. This change represents a positive step forward considering that this assessment (by its very nature) should be the subject matter of the evidence procedure, and not the assessment of admissibility of a lawsuit. Finally, the amended PD Act offers a more detailed and precise regulation of collective lawsuit. It is explicitly set out that, in a collective lawsuit, the claims may be raised on the following grounds: to establish a violation of the right to equal treatment in relation to the members of the group whose rights are defended by the claimant; to prohibit undertaking of actions that violate or can violate the right to equal treatment, or to perform actions aimed at eliminating discrimination or its consequences in relation to the members of the group; and to request that the judgement establishing the violation of the right to equal treatment be published in the media at the expense of the defendant.[1060] Yet, the Act has failed to envisage an additional option for protecting the victim that is present in comparative anti-discrimination legislation: to ensure that non-governmental organisations dealing with human rights protection can file a lawsuit on behalf of the victim of discrimination who refuses to appear in the proceedings as the claimant, provided that they obtain a prior explicit and written consent of that person.[1061]

Some important issues that were not included in the amended PD Act are a more detailed regulation of mobbing, exemptions from equal treatment, and costs of proceedings. Under the existing legislative framework, the generally applicable principle of civil proceedings entails that the losing party is obliged to bear the costs of proceedings of the other party, and to pay the court fees and expertise cost. This principle has a deterring effect on the victim's decision to get involved in the court proceedings. Hence, in order to encourage the use of judicial protection against discrimination, it would be necessary to envisage an exemption from or at least a significant reduction of court fees in anti-discrimination proceedings.

4. An Overview of the COVID-19 Pandemic Impact on Access to National Mechanisms of International Protection

The previously introduced emergency situation (in FB&H) or the state of emergency/emergency situation (in RS) due to the COVID-19 pandemic was lifted in B&H before the completion of this report (2021). The introduction of the emergency situation had a significant impact on the operation of courts and access to justice in general. For the territory of the FB&H, the Act on Deadlines and Procedures in Court Proceedings during the emergency situation on the territory of the Federation of Bosnia and Herzegovina[1062] was enacted; Republika Srpska enacted the Decree with the force of law on deadlines and procedures in administrative proceedings during the state of emergency/emergency situation for the territory of the Republic of Srpska.[1063].

These legal acts prescribe similar provisions governing the procedures pertaining to the application of deadlines in all judicial proceedings due to the declaration of the state of emergency/emergency situation. In terms of deadlines and urgent civil proceedings, it is stipulated that the deadlines for the submission of claims in litigation proceedings, motions for initiating non-contentious or enforcement proceedings, and any other pleadings bound by deadlines cease to run during the state of emergency/emergency situation.[1064] Exceptionally, the deadlines do not cease to run in urgent proceedings. It should be noted (as it is relevant for this report) that urgent proceedings in litigation, non-contentious and enforcement matters pertain (*inter alia)* to: proceedings in the area of family law relations between parents and children, performance of parental rights and duties, deprivation of parental care, and maintenance obligation; proceedings for protection against discrimination and harassment and violence at work;

[1060] Art. 17 para 2 of the PD Act.
[1061] Reljanović, M. et al., *Kvadratura antidiskriminacijskog okvira* (2016), p. 96.
[1062] the Act on Deadlines and Procedures in Court Proceedings during the state of emergency on the territory of the Federation of Bosnia and Herzegovinam *Official Gazette of the FB&H, no.* 28, 2020.
[1063] Decree with the force of law on deadlines and procedures in administrative proceedings during the state of emergency for the territory of the Republic of Srpska, *Official Gazette of RS*, no. 32, 2020.
[1064] Article 2 paragraph 1 of the Act of Deadlines and Procedures (FB&H) and Decree (RS).

proceedings for detaining mentally impaired persons in a healthcare institution; proceedings for issuing provisional and protective judicial measures; and enforcement proceedings in family law relations.
Deadlines for lodging regular and extraordinary remedies, motions for *restitutio in integrum* or undertaking other procedural actions in contentious, non-contentious and enforcement proceedings, as well as in administrative dispute proceedings referred to in this FB&H Act/RS Decree, cease to run during the state of emergency/emergency situation.[1065] The statutes of limitations, stipulated in the civil law legislative acts do not run during the state of emergency/emergency situation.[1066] One of the criticized provisions is the one concerning limitations, i.e. the exclusion of publicity (public trial), stipulating that "*the judge or the judicial panel (bench) may either temporarily/partly limit or fully exclude the presence of the public for the purpose of health protection.*[1067]
The Act (FB&H) and the Decree (RS) had been applied in the respective territories prior to the termination of the emergency situation in the FB&H and the state of emergency/emergency situation in the RS (in May 2020). Once this Act (FB&H) and Decree (RS) ceased to be applied, all previously prescribed deadlines (which ceased to run when this Act/Decree entered into force) continue to run, including the time elapsed before the entry into force of these regulations.
The COVID-19 pandemic and the accompanying problems highlighted the need to establish a proper balance between respect for the right to a fair trial and the protection of public health. Emergency (extraordinary) circumstances, such as health crisis, may call for introducing certain measures that undermine transparency; yet, such measures should be directly proportional to the crisis in question and limited in their reach and duration. Limiting public access to court (the principle of publicity) can affect public trust in the work of the judiciary; that risk that can be partially diminished by broadcasting court hearings, publishing transcripts or trial summaries, etc. As we could bear witness in the first half of 2020 (at the outset of the COVI-19 pandemic in B&H), the use of IT technologies (e. g. video-conferencing) to enable the work of the judiciary and the administration of justice proves to be particularly useful in emergency situations.

5. Conclusion

The right of access to justice is a fundamental human right and one of the few procedural human rights which serves as an institutional and procedural guarantee for instituting civil proceedings on the protection and exercise of substantive civil rights. A number of factors affect the procedural status of migrants, such as: formal recognition of party's legal standing and litigation capacity; the obligation of paying security for the costs of judicial proceedings when a migrant/foreign citizen or a stateless person initiates proceedings against a domestic citizen; the possibility of using free legal aid and representation services; the existence of formal and factual obstacles concerning age, language and the obligation to pay legal costs (court fees, representation costs, presenting individual evidence); and the overall effectiveness of domestic civil court proceedings.
Generally, the B&H authorities have ensured (*de iure)* access to court and judicial protection to forced migrants. Judicial protection is formally ensured under equal conditions both for B&H citizens and for various categories of forced migrants. As highlighted in the *Bosnia and Herzegovina 2020 Progress Report,* B&H is generally at an early stage as it has reached some level of preparation for implementing the EU *acquis* in the area of judiciary and fundamental freedoms, but no progress was recorded in this area during the reporting period (June 2019-October 2020). The obstruction of judiciary reform was continued by political actors and from within the judiciary, while poor functioning of the judiciary still prevents B&H citizens and various categories of forced migrants to exercise their rights fully. The enacted legislative acts on foreigners are mainly in line with the EU *acquis*, but they should be further harmonised in the field of

[1065] Article 5 of the Act (FB&H) and Decree (RS).
[1066] Article 6 of the Act (FB&H) and Decree (RS).
[1067] Article 8 of the Act (FB&H) and Decree (RS).

transparent access to human rights and justice, particularly for vulnerable categories of migrants. Considering the lack of such strategies, in combination with the need to further improve the legislative and institutional framework, the protection of human rights, including procedural human rights (right of access to justice), still remains uneven in B&H practice.

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NATIONAL REPORT

Introduction

This report includes the security aspect of migrations in Bosnia and Herzegovina emphasising data obtained by the competent institutions such as the Border Police, the Prosecutor's Office and the Ministry of Security of BiH, aimed at getting a clear picture on the security and criminal aspects of the issue of forced migrations in Bosnia and Herzegovina. In that context, certain conclusion made on the basis of research will be emphasised in the report, and we will present words about concrete measures of the competent institutions taken with the aim of solving specific issues of forced migrations.

1. Illegal migrations and criminality

Generally viewed, illegal migrations, as one of security challenges nowadays, have become one of actual problems in Bosnia and Herzegovina lately. In this regard, the migration crisis and a huge influx of mixed migration flows in the Western Balkans have revealed gaps in the protection of migrants, both of those in transit and those staying in transit countries. Viewed from the criminological aspect, migrant smuggling is the fastest growing form of organised crime.[1068] Taking the geo-strategic position of Bosnia and Herzegovina into consideration is of primary significance for the assessment concerning the risk of illegal migrations taking place either in or across its territory, and also the security threats connected therewith.[1069] With the accession of Croatia to the European Union, Bosnia and Herzegovina gained a border with the European Union, and thus a greater responsibility in terms of controlling legal and illegal migrations, but also an increased influx of migrants and thus an increased threat to its national security. Although Bosnia and Herzegovina is currently successfully combating illegal migrations, it is still important to mention that the situation, with respect to migrants/refugees, is highly risky since there are tens of thousands of migrants/refugees along the Western Balkan route, who want to cross and are crossing borders to enter the European Union countries.[1070]

According to relevant data obtained by the BiH Border Police, the number of denied entries in BiH by the Border Police was 2,342 in 2019 and was increased by 26.39% comparing to 2018, when 1,853 entries were denied.[1071] During 2018, in total 4,489 persons were detected in the attempt to cross the BiH borders illegally. During 2019, an increase of 30.2% was recorded, amounting to 5,859 persons, which is a direct consequence of mass migration movements in the last year across the BiH territory.

Noteworthy, the BiH BP recorded in 2019 that 13,251 persons were prevented in the attempt to cross illegally into the BiH territory from the territories of bordering countries, to which they returned. The described situation represents a measure provided for in article 37 of the Law on Border Control, which

[1068] According to the IOM reports of the IOM 2015, the profit of illegal transportation of migrants across state borders amounted to EUR 3 -6 billion. *Enhancing Counter Trafficking in Crisis in Western Balkan 2018*, IOM, 2018, p. 12

[1069] Ministry of Security of Bosnia and Herzegovina. *Strategy in the Area of Migrations and the Asylum and Action Plan for the period 2016–2020*, p. 14

[1070] Ministry of Security of Bosnia and Herzegovina *Strategy in the Area of Migrations and the Asylum and Action Plan for the period 2016–2020*, p. 14

[1071] Ministry of Security of Bosnia and Herzegovina *Migracijski profil Bosne i Hercegovine za 2019* (*Migration profile of Bosnia and Herzegovina 2019*), Sarajevo, pp. 20–21, Sarajevo, March 2020.

was carried out by direct engagement of police officers of the BiH Border Police directly on the border line, in which way foreign nationals were prevented from entering BiH illegally.
Furthermore, according to the relevant data of the Service for Foreigners' Affairs within the framework of the *Migration profile of Bosnia and Herzegovina 2019*, in total 2,529 measures were taken in 2019, out of which the majority went to the measure of deportation of foreigners, which was imposed 1,554 times, *inter alia*, mostly due to the reason of entering illegally the territory of Bosnia and Herzegovina, but also due to final criminal convictions.[1072] A challenge related to the identification of human trafficking (but also other criminal offences relevant for the security situation assessment) in crisis settings, that resonates also in the case of large population movement across the Western Balkans in the absence of data, and particular baseline data, that would allow states to anticipate potential risks.[1073] Based on the foregoing, we can conclude that a great number of foreigners enters the territory of Bosnia and Herzegovina illegally, stays there and the authorities have no possibility to establish their identity, which is a security threat by itself.
With respect to general crime, which is one of security threats, we cannot help but take a look at the *Report of the Cantonal Prosecutor's Office of the Una-Sana Canton 2019*, according to this Report the canton is most affected by the migrant crisis and it records a significant increase of the number of reports of general crime in the beginning of the reporting period. In the Prosecutor's Office, there remained unresolved 414 reports against 600 persons from the previous period, while during the same period, 1491 reports against 1915 persons were received, which is by 155 or 10.4 % more than in the previous year (1336), so that the Prosecutor's Office had in progress in total 1905 reports against 2515 persons. In the reporting period, in total 1507 reports against 1919 persons were resolved, which is by 16 or 1.07% more than received. Hence, the inflow is increased and the Prosecutor's Office succeeded in coping with it.[1074]
The foregoing clearly indicates an increased number of criminal offences of general crime, which is manifested through an increased number of both the reports and the conducted investigations. In the lack of a precise indicator that would link migrants and the increased number of criminal offences, the data about an increase in the number of criminal offences by unknown offenders may serve as a guideline, and this in total 4169 KTN cases (cases v unknown offenders) that were in progress in 2019, out of which 3486 cases remained unresolved from the previous period. In the course of the year, 683 cases more were received to be processed, i.e., by 199 or 5% more than in the previous year. In the reporting period, in total 700 cases were solved, which is by 82 or 12% more than in the previous year (618), while 3469 cases remained unresolved. It is important to point out that the USC Prosecutor's Office established, through an analysis, that these are undetected perpetrators of criminal offences against property (serious and ordinary thefts, damaging someone else's property), while not one perpetrator of the criminal offence of murder or any other more serious criminal offence stayed undetected in the reporting year.[1075]
With regard to investigations, at the beginning of the reporting period, investigations 90 against 130 persons remained unresolved from the previous years. In the course of the year, investigations 1154 were ordered against persons 1393, so that there were in progress in total 1244 against 1523 persons. Out of that number, 1137 investigations were resolved against 1369 persons, i.e., 17 or 1.5% less than the ordered ones. At the end of the year, investigations 107 against 154 persons remained unresolved, which is by 17 or 15.9% unresolved investigations more than at the beginning of the reporting period. Hence, there were less investigations resolved than the ordered ones by 1.5%, but the number of unresolved investigations was increased by 15.9% than those at the beginning of the reporting period.[1076]

[1072] Ministry of Security of Bosnia and Herzegovina *Migration profile of Bosnia and Herzegovina 2019*, Sarajevo, pp. 31-37
[1073] IOM. *Enhancing Counter Trafficking in Crisis in Western Balkan 2018*, IOM, 2018, p. 15.
[1074] I*vještaj o radu Kantonalnog tužilaštva Unsko–sanskog kantona za 2019. godinu* (*Report on the Activities of the Una-Sana Canton Prosecutor's Office 2019)*, Bihać, February 2020, p. 8
[1075] *Report on the Activities of the Una-Sana Canton Prosecutor's Office 2019*, Bihać, February 2020, p. 11
[1076] *Report on the Activities of the Una-Sana Canton Prosecutor's Office 2019*, Bihać, February 2020, p. 8

2. Human Trafficking and Human Smuggling

Speaking about human trafficking and human smuggling, first a clear distinction should be made between these two criminal offences. Essentially viewed, the criminal offence of trafficking in persons is committed by anyone who "by means of use of force or threat of use of force or other forms of coercion, by abduction, fraud or deception, the abuse of power or influence or a position of vulnerability, or by giving or receiving payments or other benefits to achieve the consent of a person having control over another person, recruits, transports, transfers, hands over, harbours or receives a person for the purpose of exploitation of that person in the country in which that person has no residence or is not its national [...]"[1077]. The criminal offence of human trafficking is specified as general, hence anyone can commit it. Such action is multi-act, alternatively specified with international crime elements as its disposition also refers to persons without residence in Bosnia and Herzegovina or a person who is not a national of Bosnia and Herzegovina, which is in line with the general principles of territorial validity of the criminal code through the principle of universality.[1078]

On the other hand, the criminal offence of human smuggling[1079] is committed by anyone who, out of personal or someone else's gain, illegally transports or enables transportation across the state border of one or more migrants or other persons, or whoever with the same purpose, makes, obtains or possesses false travel or personal documents.[1080]

According to the relevant data of the BiH Ministry of Security presented in the *Report on situation in the area of trafficking in persons in Bosnia and Herzegovina 2019,* there were 49 female victims and 12 male victims out of the total number of potential victims of human trafficking (61) in the period January–December 2019. There were 25 adult victims (21 female and 4 male), and 36 minor victims (28 female and 8 male) out of the total number of potential victims of human trafficking (61) in the period January–December 2019.[1081] The foregoing data, compared to the data in the GRETA (Group of Experts on Action against Trafficking in Human Begins) Report 2019, show a significant increase comparing to year 2018, in which there were 36 identified potential victims of human trafficking.[1082]

Furthermore, within the total number of potential victims of human trafficking (61) in the period January - December 2019, the following forms of exploitation were recorded: begging 36, sexual exploitation 15, sale for forced marriage 3 (combined with sexual exploitation or begging), abuse of children or minors for pornography 4, and other 3. There were 6 victims that were foreign nationals and 55 victims, nationals of Bosnia and Herzegovina, out of the total number of potential victims of human trafficking (61) in the

[1077] Article 186 paragraph 1 of the Criminal Code of BiH, *Official Gazette of Bosnia and Herzegovina*, no. 3, 2003; 32, 2003; 37, 03; 54, 2004; 61, 2004; 30, 2005; 53, 2006; 55, 2006; 32, 2007; 8, 2010; 47, 2014; 22, 2015; 40, 2015.

[1078] The ground for incriminations contained in the provisions of this article is the UN Convention against Transnational Organised Crime with 2 Protocols, and this is the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, adopted on 15 December 2000, whose BiH has been the member since 5 February 2002. The provision of article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, obliges the member states to incriminate trafficking in persons, attempts of such trafficking, complicity in such trafficking, as well as incriminating organising or directing other persons to committing this criminal offence.

[1079] The ground for incrimination contained in the provisions of this article is the UN Convention against Transnational Organised Crime, i.e., article 6 of the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the Convention.

[1080] Article 189 paragraph 1 of the Criminal Code of BiH, *Official Gazette of Bosnia and Herzegovina*, no. 3, 2003; 32, 2003; 37, 2003; 54, 2004; 61, 2004; 30, 2005; 53, 2006; 55, 2006; 32, 2007; 8, 2010; 47, 2014; 22, 2015; 40, 2015.

[1081] State Coordinator for Combating Trafficking in Persons. *Report on situation in the area of trafficking in persons in Bosnia and Herzegovina* 2019, Sarajevo, March 2020.

[1082] 9th General Report on GRETA's activities-covering the period from 1 January to 31 December 2019, Council of Europe, March 2020, p. 53

period January–December 2019.[1083] Regarding foreign citizens, there are 6 victims in total: 2 victims nationals of Sri Lanka (minor/male 1, adult/female 1), 2 victims nationals of Afghanistan (minor/male 2), and 2 victims nationals of the Republic of Serbia (adult/female 1 and minor/female 1).[1084]It is clear from the aforementioned *Report on situation in the area of trafficking in persons in Bosnia and Herzegovina* 2019 that children are most vulnerable not only according to their number in the trafficking proceedings, but it can also be reasonably doubted that children are in question in the majority of cases relating to any type of exploitation.According to the aforementioned data, women make up almost 90% of the recorded cases of human trafficking in the territory of Bosnia and Herzegovina in 2019. The number of women involved in the human trafficking system is probably higher, where particularly the factor of their physical inferiority and general poor social position should be considered, making them and children the most vulnerable categories. One of the commonest forms of exploitation of women is inducing to prostitution and other forms of sexual exploitation.

3. Concrete State Measures for the Suppression of the Stated Problems

The Council of Ministers of Bosnia and Herzegovina, at the 2nd session held on 23.01.2020, adopted the Strategy to Counter Trafficking in Human Beings in BiH for the period 2020 - 2023. The general goal of the Strategy is: to ensure a permanent, comprehensive and sustainable response of the society to human trafficking through a strengthened system of prevention, persecution of offenders of criminal offences related to human trafficking, particularly the vulnerable groups, through functional interrelation and building up capacities of all the competent institutions and organisations.[1085] The most significant novelty in the policies of combating human trafficking that is introduced in the new Strategy is the strategic measure defining establishing a completely new mechanism for the coordination of activities to counter human trafficking, comparing to the previous mechanism. This strategic measure determines the need for establishing coordinating structures at all the levels of authorities in Bosnia and Herzegovina for countering human trafficking. The Coordination Team functioning is based on holding regular meetings at the strategic level every three months minimum, and at the operational level, by forming a team for each individual case of identifying risky situations or potential victims and by a permanent coordination of activities on such a case. The team coordinator forms an operational team that plans further measures for proceeding in that case and that coordinates the implementation of planned measures, in consultations with the Prosecutor's Office, police and Social Welfare Centre in each individual case related to identifying risky situations or potential victims of human trafficking. The team members, if needed and at request, liaise and coordinate the cooperation between the acting officers from competent institutions and authorised organisations at work on concrete cases requiring the identification of a victim and the provision of assistance and protection to potential victims of human trafficking. Communication with other coordination teams is exclusively conducted through the team coordinator.[1086]

Also, in 2018, with the financial support of the High Judicial and Prosecutorial Council, the *Manual for acting in cases of gender related violence over women and children - a guide book for the police, prosecutors and judges* was developed, and in partnership with the entities' centres for education of judges and prosecutors, two trainings were organised during 2019. More than 45 prosecutors and judges from all over Bosnia and Herzegovina attended the training, the aim of which was the enhancement of practical and theoretical knowledge of the participants on elements of criminal offences of gender-based violence over women and children, including also human trafficking for the purpose of sexual exploitation.

[1083] State Coordinator for Combating Trafficking in Persons. *Report on situation in the area of trafficking in persons in Bosnia and Herzegovina* 2019, Sarajevo, March 2020.

[1084] Ibid.

[1085] *Smjernice za postupanje nadležnih institucija i ovlaštenih organizacija u suprotstavljanju trgovini ljudima u Bosni i Hercegovini (Guidelines for acting of competent institutions and authorised organise in countering human trafficking in Bosnia and Herzegovina)*, prof. Elmedin Muratbegovic, Ph.D., November 2020.

[1086] Ibid, p. 10.

In 2019, for criminal offences related to human trafficking, the Prosecutor's Offices in Bosnia and Herzegovina rendered decisions on suspending investigations in 7 cases against 8 persons, imposed 37 orders on conducting investigations against 48 persons, and raised 20 indictments against 31 persons.
In the course of 2019, courts-imposed convictions against 34 persons. Courts rendered 4 decisions against 4 persons whose complaints were rejected as ungrounded, where the first-instance judgement was upheld. In the reporting period, seven decisions were rendered on imposing correctional measures against 7 juvenile persons. Regarding the types of punishments pronounced by courts, there were pronounced: imprisonment sentences 24 against 24 persons and 1 suspended sentence against 1 person, and 2 fines against 2 persons. Also, one measure of compulsory psychiatric treatment was rendered, and custody in a healthcare institution. Additionally, in the reporting period, four judgements of acquittal were pronounced against 4 persons.[1087]

[1087] State Coordinator for Combating Trafficking in Persons. *Report on situation in the area of trafficking in persons in Bosnia and Herzegovina* 2019, Sarajevo, March 2020.

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NATIONAL REPORT

Although the migrant crisis peak in the European Union (EU) was in 2015 and 2016, the issue of the increased number of migrants in Bosnia and Herzegovina (BiH) became particularly expressed with the "closure" of the so-called West Balkan route in March 2016, used by migrants to move mainly towards the EU borders; and BiH became an alternative route for entering the EU through the territory of the Republic of Croatia (RC). Accordingly, in 2017, and even more in 2018, the number of migrants in BiH significantly increased (migrants 22,000)[1088], to reach its peak in the subsequent years. The majority of migrants in BiH enters illegally from the Republic of Serbia (RS) and heads for the west border of BiH with the Republic of Croatia - most often in the direction of Bihać.

Considering the specific form of government and legal order of Bosnia and Herzegovina in relation to other countries in the region and the division of important competences between the entities, i.e., cantons in the Federation of Bosnia and Herzegovina (FBiH), it is necessary to mention that the issues relating to migrations are within the jurisdiction of Bosnia and Herzegovina and its institutions - primarily the Ministry of Security and the Ministry for Human Rights and Refugees. According to the Law on Ministries and Other Administration Bodies of BiH[1089], the Ministry for Human Rights and Refugees is responsible for taking care on rights and issues of refugees and persons under subsidiary protection in BiH after establishing their status as such (article 12). The same law, in the provision of article 14, stipulates that it is the responsibility of the Ministry of Security of BiH to "create, generate and implement the policy of immigration and asylum in BiH", and to "regulate procedures and method of organisation of the service concerning movements and stay of aliens in BiH." The foregoing provision specifies that the Border Police of Bosnia and Herzegovina and the Service for for Foreigners' Affairs are administrative organisations within the Ministry, while their rights, duties and operating autonomy are regulated with special laws. The issue of jurisdiction of these administrative organisations in the area of migrations in BiH will be explained in more details where the specific laws in this area have been discussed herein.

The BiH Council of Ministers recognised the need for setting up a mechanism for collecting statistical data on migrations and international protection, the system of processing migration statistics, as well as the system of timely and quality reporting on migration flows in BiH; and, with its decision[1090], it specified that the Ministry of Security will collect the needed information and, on the bases thereof, it will develop a document at the annual level, with the aim of providing the BiH Council of Ministers with an insight into the key trends in the area of migrations, and enabling the Ministry of Security to develop quality policies

[1088] Institution of the Ombudsman for human rights of Bosnia and Herzegovina; *Specijalni izvještaj o stanju u oblasti migracija u Bosni i Hercegovini* (*Special report on situation in the area of migrations in Bosnia and Herzegovina*), 2018, p. 41.
[1089] *Official Gazette of BiH, no.* 5, 2003; 42, 2003; 26, 2004, 42, 2004; 88, 2007; 35, 2009; 59, 2009; 103, 2009; 87, 2012; 06, 2013; 19, 2016.
[1090] Decision on the obligation of delivering statistical data on migrations and international protection to the Ministry of Security (*Official Gazette of BiH,* no. 83, 2009).

and adopt quality regulations. According to the mentioned decision, the institutions responsible for collecting data relevant for the evaluation of migration trends are as follows: Ministry of Foreign Affairs, Ministry of Human Rights and Refugees, Ministry of Civil Affairs, BiH Agency for Labour and Employment, and BiH Ministry of Security - Asylum Sector, Service for Foreigners' Affairs, and BiH Border Police. Data collected by the listed institutions, *inter alia*, include the following data: applications and decisions for visas in BiH diplomatic and consular missions and at the BiH border, denied entries at the BiH borders, illegal crossing of BiH border; applications and decisions for permanent and temporary residence in BiH, grounds for granting temporary residence, temporary residence - issued permits in the course of a year and active permits at the end of year, on the basis of work permits, nationality, sex, age, business activity and qualifications; temporary residence granted out of humanitarian reasons throughout a year and active at the end of year; measures against aliens; cancellation of non-visa and temporary residence as per reasons; cancellation of permanent residence, per reasons; cancellation of non-visa or temporary residence with the refoulement measure from BiH, per reasons; imposed measures of refoulement from BiH, per reasons; receipt of persons in BiH per readmission agreements; deportation of aliens in BiH per readmission agreements, of aliens who left BiH on their own assisted by the International Organisation for Migrations (IOM); applications and decisions for international protection in BiH; rejected applications for international protection in BiH, per reasons; procedure upon applications for international protection in BiH cancelled, per reasons; applications and decisions for international protection in BiH for unaccompanied minors, and decisions upon applications for international protection in BiH for unaccompanied minors.

As observable from the stated list, this is about collecting very detailed data related to migration trends in BiH. Such collected data have been published by the BiH Ministry of Security since 2009 in the *Migration Profile of Bosnia and Herzegovina*, a document containing relevant information for following up migration flows in BiH. Creating the Migration Profile is a task of the Department for Analytics, Strategic Planning, Surveillance and Training, Sector for Immigration, Ministry of Security. This document enables a significant insight into the migration trends, particularly in the part relating to quantitative analysis; however, the fact that precisely determining the number of irregular migrants in BiH is difficult and that the majority of foreign citizens crossing the BiH border in such a manner does not submit applications for residence or asylum, but strive to leave BiH without identification and registration in the country, makes this task much more difficult.

The entry of aliens, their status, stay and their rights in Bosnia and Herzegovina are regulated by two laws - the Law on Aliens[1091] and the Law on Asylum[1092]. Bosnia and Herzegovina replaced with these two laws the formerly applicable Law on Stay and Movement of Aliens and Asylum[1093], and harmonised this area with Directive 2008/115/EC of 16.12.2008, referring to standards and procedures when returning irregular migrants. The Law on Aliens regulate the conditions and procedure for aliens' entering and staying in BiH, aliens' travel documents, their receipt, placing aliens under surveillance, and removal from BiH, and other issues related to the stay of aliens in BiH, as well as the competences of authorities in the application of this law. The Law also stipulates offences and punishments for offences committed through violation of the provisions of this Law[1094]. Hence, we speak about a law regulating all the issues relating to aliens in BiH, irrespective of the ground for their stay. On the other hand, the Law on Asylum is a special law referring to a specific category of aliens/migrants, and these are asylum seekers. This Law regulates principles, conditions and procedure for the approval of refugee status, status of subsidiary and temporary protection, expiry and cancellation of refugee status, status of subsidiary and temporary

[1091] *Official Gazette of BiH, no.* 88, 2015.
[1092] *Official Gazette of BiH, no.* 11, 2016.
[1093] *Official Gazette of BiH, no.* 36, 2008; 87, 2012.
[1094] Law on Aliens, art. 1.

protection, identification documents, rights and obligations of asylum seekers, refugees and aliens under subsidiary and temporary protection, and other issues related to asylum in BiH[1095].

Speaking of the institutions responsible for the issues laid down by these laws, the Law on Aliens stipulates them, as follows: BiH Council of Ministers, BiH Ministry of Security, BiH Ministry of Foreign Affairs, BiH Ministry of Civil Affairs, Service for Foreigners' Affairs, BiH Border Police, and other police authorities in BiH, and BiH Labour and Employment Agency, as well as other competent authorities.[1096] According to the Law on Asylum, the competent authorities in this area are: BiH Council of Ministers, BiH Ministry of Security, Service for Foreigners' Affairs, BiH Border Police, Court of Bosnia and Herzegovina, Ministry of Human Rights and Refugees, BiH Ministry of Civil Affairs, and other authorities of internal affairs in BiH and other competent bodies.[1097] Each of the competent authorities, when acting within their competences, acts according to the Law on Administrative Procedure of BiH[1098], unless otherwise specified by the law[1099]. According to the Law on Aliens, an administrative dispute may be initiated with a lawsuit before the Court of Bosnia and Herzegovina against the final administrative acts issued under this law, in compliance with the Law on Administrative Procedure, but the lawsuit does not stay the execution of the final administrative act[1100].

The most important institutions dealing with the issue of immigration in BiH are the afore-listed administrative organisations within the BiH Ministry of Security - Border Police and Service for Foreigners' Affairs. They are defined by special laws for each of these administrative organisations, and their competences are also specified, as well as the manner of performing them. According to the Law on the State Border Service[1101], the Border Police is "an administrative organisation within the Ministry of Security of Bosnia and Herzegovina, with operational autonomy, established for the purpose of performing police tasks related to the surveillance and control of Bosnia and Herzegovina border crossing, and other functions prescribed by law."[1102] The State Border Service has the authority to act within a zone extending to ten kilometres[1103] from the state border, when it refers to the enforcement of provisions of relevant laws relevant for the crossing of state borders, i.e. also beyond this area, when the provisions of relevant laws are enforced on trains, aircraft and vessels. The scope of activities of the border police can be extended over the territory of the entire country in cases of the competences stipulated by the Law on the Movement and Stay of Aliens and the Law on Asylum, and the activities of preventing the commission of specific criminal offences and the provision of police assistance and security measures of the civil air traffic and security of the premises of the international airports in BiH[1104].

The Law on the Service for Foreigners' Affairs[1105] lays down that this Service is "an administrative organisation within the BiH Ministry of Security, with operational autonomy for running operations and solving issues within its competences, established for the purpose of conducting administrative and managerial and inspection jobs stipulated by the Law on Movement and Stay of Aliens and Asylum"[1106]. The competences of the Service are numerous, and they include managerial tasks, decision making upon applications in administrative matters, running cases and keeping records prescribed by the law, inspection tasks, and tasks of following up, collecting, processing and analysing various data referring to

1095 Law on Asylum, art. 1
1096 Law on Aliens, art. 3
1097 Law on Asylum, art. 3
1098 Law of the Administrative Procedure (*Official Gazette of the BiH*, no. 29,2002; 12, 2004; 88, 2007; 93, 2009; 41, 2013.
1099 Law on Aliens, art. 4, Law on Asylum, art. 5
1100 Ibid., art. 5
1101 Law on the State Border Service (*Official Gazette of the BiH*, no. 50, 2004; 27, 2007; 59, 2009.
1102 Ibid, article 2 (1).
1103 Ibid, article 8 (1).
1104 Ibid, art. 7 para. 2-7.
1105 the Law on the Service for Foreigners' Affairs (*Official Gazette of BiH*, no. 54, 2005; 36, 2008).
1106 Ibid, article 2

the competences of the Service. The administrative tasks within the competences of the Service for Foreigner's Affairs are stipulated by the Law on Movement and Stay of Aliens and the Law on Asylum. These are tasks relating to the cancellation of issued visas, issuing and revocation of personal and travel documents to foreigners, registration application and change of residence of foreign citizens, certifying affidavits and invitations and issuing certificates of residence to foreigners, and tasks related to the submitted asylum applications in Bosnia and Herzegovina.[1107] The Service for Foreigner's Affairs takes decision upon applications in administrative disputes for granting temporary residence on issues related to the approval of or cancellation of temporary or permanent residence, placing a foreigner under surveillance, deportation of a foreigner from the country, and drawing conclusions on the enforcement of decisions on deportation of foreigners from the country.[1108] The Ministry of Security acts as a second-instance authority in an appellate procedure against a decision of the Service, and the decisions of the Ministry are final, and an administrative dispute may be initiated against them.[1109] The Service also has a supervisory competence[1110] over the enforcement of the Law on Movement and Residence of Foreigners and the Law on Asylum, and this in the following cases: residence control, control of the purpose of stay, control of using residence, registration of residence or change of place of residence, surveillance over legal and natural persons in relation to the residence and employment of foreign citizens, submission of registrations and applications for acting against legal or natural persons for non-compliance with the regulations that regulate the issues of movement, stay and employment of foreigners, submission of applications for initiating procedure for cancellation of granted residence, i.e. cancellation of residence on the ground of a submitted asylum application or approved asylum, as well as applications for cancellation of visas, keeping records on inspection controls and findings, regular inspection surveillance, and surveillance upon order or application, i.e. upon a delivered application, submission of application for opening a search for persons and things, submission of application for conducting searches of persons, things, vehicles and facilities, and placing an alien under surveillance, checking upon an order of the Ministry regarding the entry, movement and residence of foreign citizens who are in the process of obtaining BiH citizenship, and executing the measure of removal of an alien from the country.[1111] Among other competences of this Service, there are activities related to following up, collecting and processing data and knowledge in the area of competences of the Service, keeping records, analysing the situation within the competences of the Service, taking necessary measures and actions within the competences of the Service, and proposing measures to improve the overall situation in the area of movement, residence and employment of foreigners[1112].

Aliens are considered to have entered the country once they have crossed the state border, i.e., passed the post where the border control is performed[1113], with valid identification documents and the manner prescribed by the law. However, it happens that aliens carry out illegal crossing of state border. A crossing of state border is illegal when carried out outside a border crossing point or outside the working hours at a specific border crossing or prior the expiry of the ban on entering BiH[1114]. Illegal crossing is also when on the occasion thereof, the border control is or attempted to be averted; or an invalid, false, counterfeit or falsified travel document is used; or any stated fraudulent information is given to the border police officer; or the country is entered without a necessary visa or permission for stay.[1115] Illegal crossing of the state border also results in the illegal stay of aliens in BiH,

[1107] Ibid, art. 3 para. 1
[1108] Ibid, para 2
[1109] Ibid, art. 4
[1110] Ibid, art. 3 para. 5
[1111] Ibid, article 3 para 1-6.
[1112] Ibid, art. 3 para. 7
[1113] Law on Aliens, art. 15 para. 1
[1114] Ibid, art. 16 (a).
[1115] Ibid, (b), (c), (d), (e), (f).

i.e., the problem of irregular migrants, whose number and movement is very difficult to determine and monitor, has been particularly expressed lately.

An illegal entry in BiH is one of the grounds prescribed for the expulsion measure.[1116] Through this measure, the alien is ordered to exit BiH and prohibited to enter and stay in BiH within a specific time period, from one to five years, and this period may be shortened at the request of the alien or extended under the statutory stipulated conditions.[1117] The prohibition starts to run from the date of leaving BiH. The decision on this measure is issued by the Service *ex officio* or upon proposal of another organisational unit of the Ministry, a law enforcement authority or another authority. An appeal may be lodged against this decision to the BiH Ministry of Security within eight days from the date of delivery of the decision and it does not stay the execution of decision.[1118] The Ministry issues the decision upon the appeal within a fifteen-day time limit from the date of its receipt.[1119] This decision may specify the time limit for voluntary execution thereof, not shorter than seven or longer than thirty days, which may be extended under exceptional circumstances. The alien that enters or stays illegally in BIH may also be issued an order for voluntary leaving the BiH territory. It is issued when the alien has stayed in the country longer than the period of validity of his travel document, visa, visa-free or granted stay or out of humanitarian reasons, the purpose of which is crossing the border. Prior to issuing the order, the Service will obtain the statement of the alien confirming his intention to voluntarily leave BIH and the evidence corroborating that statement. The time limit for leaving the country in this case cannot be shorter than seven or longer than thirty days, except out of humanitarian reasons exceptionally. The decision on the expulsion of an alien with a permanent entry ban in BiH may be pronounced by the Council of Ministers, and this upon the reasoned proposal of the Ministry of Security, Service for Foreigners' Affairs, or another organisational unit if it is necessary in the interests of public order or it is grounded on the BiH security reasons, and it is in compliance with article 1 paragraph 2 of the Protocol number 7, i.e., Protocol number 11 of the European Convention. If a court proceeding is conducted against the alien, the decision on expulsion may not be enforced prior to the legally binding completion thereof, i.e., prior to the enforcement of the imprisonment sentence, if he is finally sentenced to it. The Service may grant the postponement of the measure of expulsion out of the reasons specified by the Law.[1120]

The enforceable decision on expulsion, *inter alia*, determines the country where the alien will be returned, and it is the country of origin, i.e. the habitual residence, or the state from which he has come to BiH or the state admitting him.[1121] The return costs are borne by the alien, and, if he does not have the needed financial assets, the costs bill be borne by physical or legal persons specified by the Law.[1122] In order to secure the removal of aliens from BiH, he may be placed under surveillance, and the costs related to it are borne by the alien or by the persons bearing the return costs.[1123] The surveillance over the alien in BiH is carried out in two ways: by restricting his movement to a particular area or a place with an obligation of reporting to an organisational unit of the Service or the police (milder surveillance measure) or by accommodating in a specialised institution for receiving aliens (immigration centre). The measure of accommodating such alien in an immigration centre is imposed by a decision and may last maximum ninety days, i.e. it may be extended for justifiable reasons, but so that the total surveillance period does not exceed 180 days.[1124] In the exceptional situations, in cases of lack of cooperation on the side of the alien in the procedure of removal or the delay in obtaining necessary documents from the country where

[1116] Ibid, art. 106 para. 1 (a).
[1117] Ibid, art. 105 para. 3-4.
[1118] Ibid, para 7-8.
[1119] Ibid, para 9
[1120] Ibid, art. 113 para. 5
[1121] Law on Aliens, art. 114
[1122] Ibid, art. 115 para. 2
[1123] Ibid, para 3
[1124] Ibid, art. 119 para. 3-4.

the alien is to be returned to, the surveillance may be extended for a period longer than one hundred and eighty days, but it cannot last longer than eighteen months in continuity. The Service may rescind the decision on imposed measure of surveillance and issue a decision imposing another measure of surveillance, if applicable, and in each of the cases, it takes all the necessary measures to reduce the surveillance to the shortest possible time period.[1125] The decision on placing the alien under surveillance by restricting his movement to a specific place may be appealed before the Ministry within a fifteen-day time limit from the delivery of decision, and the decision on accommodating in an immigration centre - within a three-day time limit from the delivery of decision. The appeal does not stay the execution, and an administrative appeal may be initiated against it with a lawsuit three days after submitting the appeal to the Ministry, and if it does not rescind the decision that has been appealed.[1126] The lawsuit does not stay the enforcement of the decision. The BiH Court is obliged to consider these cases to be urgent, to hear the alien and render a decision upon the lawsuit within three days from its initiation.[1127]

In cases related to minor foreign citizens who illegally entered and are staying in BiH, the Law prescribes that the competent authorities are obliged to treat them with particular attention and respect in accordance with the Convention on the Rights of the Child, as well as the BiH regulations on care of minors and their protection. In that sense, families with minors are detained in an immigration centre only if necessary and for the shortest possible time period. Unaccompanied minors are detained in an immigration centre in exceptional cases only, as the last resort and for the shortest possible time period. In the event that a minor has illegally entered BiH and is not accompanied by a parent or guardian or legal representative or who remained without their presence upon entering BiH, and who cannot be immediately returned to the country from which he has arrived, or be delivered to the representatives of the country of his citizenship, will be temporarily placed by the Service to the unit of the institution specialised for minors and inform the competent Social Welfare Centre which would immediately appoint a temporary guardian.[1128] The return of a minor to the country of habitual residence or the country which is is willing to accept him only if it is ensured that his parent or legal representation, i.e. plenipotentiary or a representative of a competent authority in the country of return has been ensured. The Law on Asylum prescribes a priority action in regard to early identification, protection and care, as well as tracing the families for the purpose of reunification with parents or other guardians, and in any case all the competent authorities are to act in the best interest of the child.[1129]

When dealing with aliens, the principle of non-*refoulement* is applied[1130], implying that the alien will not be forcedly removed or returned to the country where his life and freedom would be threatened on account of race, religion, and nationality, membership of a particular social group or political opinion. Exceptions are cases where an alien is considered dangerous for the security of BiH for justifiable reasons or convicted of a serious crime.[1131] If the alien is refused the asylum application or the granted refugee status is cancelled, and it is established in the procedure that he cannot be removed from BiH due to the *non-refoulement* principle, the stay in BiH will be granted to him. When dealing with aliens in BiH, any discrimination of aliens is prohibited on any grounds, and aliens who have expressed intention to apply for asylum, asylum-seekers, and refugees, persons under subsidiary or temporary protection are guaranteed the right to freedom of movement and free choice of residence within BiH.[1132] One of the

[1125] Ibid, para 11
[1126] Ibid, art. 120 para. 6
[1127] Ibid, para 7
[1128] Ibid, art. 123 para. 4
[1129] Law on Asylum, art. 11
[1130] Law on Aliens, art. 109
[1131] Identical with the provisions of article 6 of the Law on Asylum.
[1132] Art. 9 para -10 of the Law on Asylum.

guaranteed rights for refugees is also the reunification with family members who are outside BiH, i.e., maintaining family unity.

When aliens enter the BiH territory and express the intent to apply for asylum, or have submitted one, or they have refugee status, or persons under subsidiary and temporary protection, they have the right to be informed, in a language they understand or for which it canbe reasonably assumed that they can understand it.

The information on procedures, rights and obligations arising from their status may be communicated in writing, in the form of a leaflet, to these categories of aliens.[1133]

Aliens who seek asylum or protection in BiH have several options. These persons may submit asylum application and, if it is decided upon positively, they may be granted refugee status in BiH,[1134] i.e., in the event of non-fulfilment of the requirements for asylum, and there is an evident need for protection, they may be granted subsidiary protection[1135], and in certain cases temporary protection[1136]. The provision of article 19 of the Law on Asylum prescribes that the refugee status is granted to an alien who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, as well as to a stateless person who is outside the country of his former habitual residence and is unable or, owing to such fear, is unwilling to return to it." In that sense, the acts of persecution must be serious enough by their nature or repetition to represent a serious violation of the fundamental human rights or include a set of measures that, viewed as a whole, might affect an individual in that manner. It can be bodily or mental violence, including also sexual violence, administrative, police or court measures that are discriminatory by themselves or they are conducted in a discriminatory manner, judicial persecution or discriminatory and disproportionate punishment or which is a result of refusal to perform military service in the time of conflict, deprivation of the right to judicial protection, and offences that are by their nature specific for gender or children. The actors of persecution can be state bodies, parties or organisations that control the state or an important part of the territory, non-state entities when the state, parties or (international) organisations are not able or do not want to provide protection from persecution or serious injury.

The asylum seeker is entitled to residence in BiH; information; accommodation in the centre for asylum-seekers; primary health care; access to primary and secondary education; access to the labour market; access to free legal aid; follow up the flow of procedure in a language they can understand or for which it is reasonably assumed they can understand it; and psycho-social aid.[1137]

The obligations of these persons are as follows: to respect the BiH public order, laws, regulations and decisions of the competent authorities; to cooperate with the competent authorities in order to have their identity established, and during the entire procedure following the asylum application; to submit all available documents, which are necessary for assessing the application; to file the application for extension of their asylum-seeker cards and to report the loss thereof; to report their temporary residence and the change of the address and to comply with the house rules of the centre for reception and accommodation of asylum-seekers.[1138]

If the alien does not fulfil the requirements for acquiring refugee status, and yet there are serious reasons to believe that they will face a real risk of a serious violation of human rights and fundamental freedoms upon returning to the country of origin or habitual residence, he can enjoy subsidiary protection in BiH. Serious violations of human rights and fundamental freedoms are considered to be: death penalty or

[1133] Ibid, art. 15.
[1134] Ibid, art. 19.
[1135] Ibid, art. 22.
[1136] Ibid, art. 57.
[1137] Ibid, art. 76.
[1138] Ibid, art. 77.

execution, torture, inhuman or degrading treatment or punishment, serious and individual threat of life or physical integrity of civilians due to general violence in situations of international or internal armed conflict. Well-founded fear of being persecuted or real risk of serious violation can be based on the events that occurred after the asylum-seeker had left the country of origin or activities of the asylum-seeker after leaving the country of origin, and they represent the expression and continuation of his convictions and orientations he had in the country of origin (principle of *sur place*).[1139] A person that enjoys subsidiary protection is entitled to identification documents; information, accommodation, work, education, healthcare, social welfare; assistance in integration into the society. These persons are also entitled to a family reunification and a travel document.[1140] They are obliged to respect the BiH public order, laws and other regulations and decisions of competent authorities, apply for replacement of a refugee card and report the loss thereof, report any change of their address and all changes that may affect the exercise of these rights, and to inform the Ministry if they are going to stay outside BiH for more than six months continuously.[1141]

Finally, foreigners may also be guaranteed temporary protection, approved by the Council of Ministers at the proposal of the Ministry of Security in the event of a mass influx of foreigners who need protection, along with consultations with the UNHCR and other international organisations. The Council of Ministers also specifies the number of persons who may be provided such protection, and the institutions responsible thereof, as well as its length that may be for a year, with a possibility of an automatic extension, two times during a six-month period and subsequently for one more year, if there are reasons for it. Any of these protection types may be excluded under specific requirements prescribed by the Law.[1142] An alien under temporary protection is entitled to residence, basic living conditions and accommodation, identification document, primary health care, primary and secondary education, free legal aid, access to labour market, family reunification, minor or legally incapacitated person.[1143] The obligations of a person under temporary protection are identical to those of a beneficiary of subsidiary protection.

During the procedure for recognition, revocation and termination of refugee status and subsidiary protection, the Ministry is obliged to ensure individual, objective and impartial implementation of the procedure. Asylum seekers will be provided information on the requirements and procedure of granting refugee status or subsidiary protection status, rights and obligations, consequences of non-compliance with obligations or refusal of cooperation with the competent authorities, and presentation of all the circumstances that the asylum application is grounded on, access to evidence and proposal for presenting evidence. Apart from it, the asylum seeker must be provided with the possibility of the proceedings conducted in a language he understands or can reasonably be presumed to understand, with free access to legal aid, the proceedings to be conducted and the translator to be of the same sex, if the reasons for it are justified, and communication with the UNHCR. The Ministry acts in priority with asylum seekers whose movement is restricted, and in priority and with particular care with minors, unaccompanied minors, single parents with minor children, persons who have been tortured, raped, subjected to other forms of bodily and mental violence, pregnant women, elderly, persons with diseases and mental disorders and persons with disabilities.

The Ministry examines the merits of the asylum application in a single procedure by examining first the requirements for granting refugee status, and, if they are not met, then it examines the requirements for granting subsidiary protection. The procedure for granting asylum starts by declaring the intent to submit the asylum application to the Border Police or an organisational unit of the Service, which then issues to

[1139] Ibid, art. 27.
[1140] Ibid, art. 78.
[1141] Ibid, art. 79.
[1142] Ibid, art. 21, art. 23, art. 60.
[1143] Ibid, art. 62.

the alien an attestation thereof, including the information on the further flow of procedure, which is considered to be the right to stay in BiH during its validity. The validity period of such an attestation is eight days, or exceptionally fourteen days when there is simultaneously a high number of expressed intents. An alien who has expressed the intent to apply for asylum is entitled to accommodation in the Centre for reception and accommodation of asylum-seekers.[1144] An alien is obliged to file the asylum application within a deadline designated in the attestation, and if an alien fails to do so without a justifiable reason, it will be considered that he has withdrawn the application, and that he will be furthered treated in line with the Law on Aliens.[1145] Following the filing of the asylum application, the foreigner is registered, certain data are collected and his travel documents are seized. Afterwards, the address of residence of the asylum seeker (the Centre or private accommodation) will be registered within a three-day time period, and in one or more interviews are held in the further procedure aimed at decision making upon the asylum application. The Ministry may render a decision adopting the application of the asylum seeker and recognise the refugee status, adopt the application and recognise the status of subsidiary protection, reject the application, and determine that he cannot be removed from BiH due to the principle of non-refoulement, suspend the procedure and set the time line for voluntary leaving BiH, and reject the application and set the time line for voluntary leaving BiH.[1146] The decision approving the status of refugee or subsidiary protection and an administrative dispute may be initiated against it before the BiH Court within fifteen days. The lawsuit stays the execution of decision, and the decision of the Court must be issued within 45 days,[1147] and with respect to rejection of asylum application, the time limit is 30 days. The time limit for issuing a decision on the asylum application is six months, and exceptionally eighteen months where there are special circumstances prescribed by the law.[1148] The Ministry may approve the asylum seeker the refugee status or recognise the status of subsidiary protection in the duration of one year, which can be extended to two years upon an application. Any decision by which the Ministry rejects the extension of subsidiary protection is final and an appeal may be lodged before the BiH Court within 15 days from the receipt of decision, and it does not stay the execution of decision.[1149] Asylum may be rejected in a regular and accelerated procedure[1150], and it may also be cancelled[1151] and rejected[1152]. Refugee status or subsidiary protection status may expire or be cancelled in cases provided under the Law.[1153] The Ministry issues a decision thereof *ex officio* or at the party's request. The decision is final, and a lawsuit can be raised against it before the BiH Court, which stays the execution thereof, and the Court must render a decision within a 45-day time limit.

[1144] Ibid, art. 34 para. 2.
[1145] Ibid, art. 35.
[1146] Ibid, art. 41.
[1147] Ibid, art. 51 para. 1-2.
[1148] Ibid, art. 42.
[1149] Ibid, art. 43.
[1150] Ibid, art. 44-45.
[1151] Ibid, art. 47.
[1152] Ibid, art. 48.
[1153] Ibid, art. 52.

IV INTERNATIONAL PRIVATE LAW

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NATIONAL REPORT

1. Introduction

Any person crossing a border or seeking international protection in another country wants to have his/her status (e.g. the fact of birth, name, marriage/partnership, parenthood, death) recognised in the asylum country.[1156] Such an endeavour is primarily driven by reasons of personal nature, pertaining to the right of every individual to personal identity, which confirms their affiliation to a specific family or community.[1157] Furthermore, the recognition of one's personal status may play a significant role in exercising many other rights, such as the right to reside within the territory of a specific country, the right to freedom of movement, the right to education, the right to healthcare, the right of access to public services and social programmes, the right to family reunification, right to employment, the right of children to parental care, the right to enter into marriage or comparable relations, as well as the right to divorce or dissolution of such relations, the right to acquire property, the right to inherit, etc.[1158] The difficulties arising in the process of cross-border status recognition mostly stem from the pluralism of national legal systems. National systems principally regulate personal and family status issues by enacting substantive legislation. Such regulation is usually considered justifiable as it refers to fully internal situations where personal and family statuses reflect the person's affiliation to a particular culture or

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[1156] At the meeting held in Luxemburg in 2015, an independent group of experts in the field of Private International Law (European Group for Private International Law) adopted the Declaration on the Legal Status of Applicants for International Protection from Third Countries to the EU, emphasizing the importance of registering third-country nationals or stateless persons present in the territory of an EU Member State, who have presented an application for recognition of a refugee status or being granted a subsidiary protection status or who have obtained such a status; the registration should be effected as soon as possible - even provisionally – in terms of the important facts relating to their personal status, such as births, marriages and deaths, as well as the recognition of these records and documents relating thereto within the EU. The European Group for Private International Law 2016, "Declaration on the Legal Status of Applicants for International Protection from Third Countries to the European Union", *Netherlands International Law Review*, 63, Heidelberg: T.M.C. Asser Press by Springer-Verlag, 95–97.

[1157] Y.Ronen, "Redefining the child's right to identity", *International Journal of Law Policy and the Family*, 18(2), 2004, p. 147-177 .

[1158] I.Kunda, "Utjecaj međunarodnoprivatnopravnih rješenja Europske unije na status migranata/The Impact of EU PIL rules on the migrant status"), in: J.Barbić (ed.), *Položaj migranata u međunarodnom i europskom pravu* / The Status of Migrants in International and European Law, Zagreb: Croatian Academy of Sciences and Arts, 2020, p. 74.

state.[1159] For this reason, international cooperation is important in the field of cross-border personal statuses.[1160] In the field of Private International Law (PIL), there is a need to harmonise the rules on this matter to ensure more uniformity in terms of personal status and to avoid the so-called "limping" statuses.[1161]

This report will examine relevant sources binding for the Republic of Croatia in cases involving status recognition, with specific reference to the recognition of personal and family statuses, the issues of applying a foreign law and granting provisional measures in respect of unaccompanied minors. The review of the national legislation will be accompanied by an overview of conclusions from the Private International Law session held within the framework of a national exchange seminar within the SEELS Forced Migrations Project.[1162]

2. Legal Framework

2.1. International legal framework

The Republic of Croatia has ratified many international documents whose provisions guarantee the right to personal identity. Thus, Croatia has committed itself to harmonizing its national legislation with the accepted standards on observance of human rights, children's rights, and refugee rights. Based on the notification of succession issued on 8 October 1991, Croatia became party to a number of conventions. In the context of personal status, the most notable conventions are: the Convention and the Protocol relating to the Status of Refugees,[1163] New York Convention relating to the Status of Stateless Persons,[1164] the Convention on the Nationality of Married Women,[1165] and the Convention on the Rights of the Child[1166], which have been effective in Croatia since 8 October 1991.

In view of foreign status recognition, the Republic of Croatia has been a Contracting State to the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents since 23 April 1993.[1167] Since 8 July 1992, Croatia has been a Contracting State to the 1956 Paris Convention on the Issue of Multilingual Extracts from Civil Status Records to be used abroad (hereinafter: The Paris

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[1159] V. Van Den Eeckhout, *The personal status of migrants: still a matter of Private International Law? - The dark side of the picture*, 2005, Retrieved February 15, 2021, from https://openaccess.leidenuniv.nl/handle/1887/13853, p. 1.

[1160] See: Collection of Papers from the Roundtable: Identity in Cross-Border Private and Legal Relations, held on 25 February 2021, organised by the Croatian Academy of Sciences and Arts: J.Barbić, M.Župan (eds.), *Identitet u prekograničnim privatnopravnim odnosima /* Identity in Cross-border Private and Legal relations, Zagreb: Hrvatska akademija znanosti i umjetnosti/ Croatian Academy of Sciences and Arts, 2021, (pending publication).

[1161] M. Župan, "Utjecaj ljudskih prava na suvremeno međunarodno privatno pravo /*The Influence of human rights on contemporary Private International Law",* in: J.Barbić i H.Sikirić (ed.), *Međunarodno privatno pravo – interakcija, međunarodnih, europskih i domaćih propisa* / Private international law - interaction of international, European and national regulations, Zagreb: Hrvatska akademija znanosti i umjetnosti, 2020, p. 125-169 and 141-148.

[1162] The Private International Law session within the framework of a national exchange seminar was held on 11 December 2020, via Zoom platform. The session was moderated by prof. Mirela Župan, LL.D. and Martina Drventić, Mag. iur., PhD student (Croatian Science Foundation). During the session, presentations were given by: Prof. Ivana Kunda, LL.D., University of Rijeka, Faculty of Law; Tijana Kokić, judge, Municipal Civil Court of Zagreb; Sunčica Lončar, Ministry of Labour, Pension System, Family and Social Policy; Tena Dundović, Municipal Civil Court of Zagreb; Tihana Sakmandi, Municipal Labour Court of Zagreb; Matea Knežević, Commercial Court of Zagreb; Silvija Srdjak, Social Welfare Centre of Osijek; and Masarh Alhayatt Aldghli, lawyer. Students Tomislav Varžić and Mihaela Mokos also participated in the discussion.

[1163] Convention relating to the Status of Refugees [1951] UNTS, Vol. 189, p. 137, OG SFRY (*Official Gazette of the SFRY)*7/1960, OG IT (*Official Gazette*, International Treaties)12/1993. See: Article 12; Protocol relating to the Status of Refugees of 31 January [1967], UNTS Vol. 606, p. 267, OG SFRY 15/1967, OG IT 12/1993.

[1164] New York Convention relating to the Status of Stateless Persons [1954] UNTS Vol. 360, p.117, OG FNRY 9/1959, OG IT 12/93.

[1165] The Convention on the Nationality of Married Women [1957] UNTS, Vol. 309, p. 65, OG FNRY 115/58, OG IT 12/93.

[1166] The Convention on the Rights of the Child [1989] UNTS, Vol. 1577, p. 3, OG SFRY 15/1990, OG IT 12/1993. See: Article 8.

[1167] HCCH, the Convention of 5 April 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. 12, OG IT 11/2011.

Convention)[1168], adopted within the framework of the International Commission for Civil Status (ICCS), as well as to the 1976 Vienna Convention on the Issue of Multilingual Extracts from Civil Status Records.[1169] The 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter: The Child Protection Convention) is applicable to situations of cross-border protection of migrant children; it has been in force in the Republic of Croatia since 1 January 2010.[1170]

The international instruments are applied by virtue of international treaties and their advantage over national legislation stems from a higher position in the hierarchy of legal sources. The Constitution of the Republic of Croatia stipulates that international treaties concluded and ratified in accordance with the Constitution, which are published and in force, are part of the internal legal order of the Republic of Croatia. They are above all laws, the Constitution.[1171] This means that parties can base their claims before domestic courts directly on the international instrument and invoke to its provisions. The direct application of the international instruments obliges the courts to interpret domestic law in accordance with the standards stemming from international instruments, and thus if necessary to apply the international instrument directly.[1172]

The question that arises is whether the acting of Croatian competent authorities in situation involving migrants, is in conformity with the standards contained in the listed international conventions. The Republic of Croatia was called out for the allegations on the violence actions of the police officers toward illegal migrants at the border with the Bosnia and Hercegovina. The Human Right Council became aware of this situation on its visit to Bosnia and Hercegovina in 2020.[1173] From this point of view, it is hard to give a reliable answer on whether the Croatia had implemented the UN's Recommended Principles and Guidelines on Human Rights at International Borders.[1174] The Ombudsman of the Republic of Croatia persistently points out to this problem and had warns on the lack of official information on the events occurred on the borders.[1175] This matter surely seeks for the more in depth analyses witch goes beyond the matters of private international law.

In addition to the recognition of personal status, the convention, which is still out side of the legal system of the Republic of Croatia, is Convention of the International Protection of Adults.[1176] Despite the frequent calls of the HCCH and European Union to its Member States to ratify this Convention, the number of

[1168] ICCS, the Convention (no. 1) on the Issue of Multilingual Extracts from Civil Status Records to be used abroad was signed in Paris on 27 September 1956, OG SFRY 9/1967, OG IT 6/1994

[1169] ICCS, the Convention (no. 16) on the Issue of Multilingual Extracts from Civil Status Records was signed in Vienna on 8 September 1976,OG SFRY -8-26/1991, OG IT 6/1994.

[1170] HCCH, the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 34, OG IT 5/2009.

[1171] Constitution of the Republic of Croatia, OG 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14, Art. 134.

[1172] V. Bouček, "*International Agreements – Sources of Private International Law in the Territory of the European Union* / Međunarodni ugovori kao izvori međunarodnog privatnog prava na području Europske unije", *Zbornik Pravnog fakulteta u Zagrebu*, 61(6), 2011, pp. 1795-1836.

[1173] Human Rights Council, Visit to Bosnia and Herzegovina: Report of the Special Rapporteur on the Human Rights of Migrants, U.N. Doc. A/HRC/44/42/Add.2 (May 12, 2020). A/HRC/44/42/Add.2 (reliefweb.int), paragraphs 64-68.

[1174] United Nations Human Rights Office of the High Commissioners, Recommended Principles and Guidelines on Human Rights at International Borders, https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.

[1175] Ombudsman of the Republic of Croatia, No institutional reaction to alleged illegal police treatment of migrants, https://www.ombudsman.hr/en/no-institutional-reaction-to-alleged-illegal-police-treatment-of-migrants/. Retrieved 1 June 2021.

[1176] HCCH, Convention of 13 January 2000 on the International Protection of Adults, 35.

ratifications is generally rather small.[1177] There was still no official initiative by any Croatian authority for ratification this Convention.

2.2. The Council of Europe

The European Convention for the Protection of Human Rights and Fundamental Freedoms, which has become one of the most powerful international instruments for human rights protection after the establishment of the European Court of Human Rights, has been in force in the Republic of Croatia since 5 November 1997.[1178] Other significant conventions applicable to status recognition are the 1968 European Convention on Information on Foreign Law, which has been in force in Croatia as of 7 May 2014,[1179] and the Framework Convention for the Protection of National Minorities, in force as of 1 February 1998.[1180]

2.3 The European Union

The *acquis communautaire* has been binding on the Republic of Croatia since its accession to the EU on 1 July 2013.[1181] The European Union has jurisdiction to pass regulations in the field of immigration and asylum.[1182] However, the EU has a very restricted jurisdiction in terms of legislation related to personal status. Moreover, the EU is not a Contracting Party to most of the aforesaid conventions. Although the EU has jurisdiction to pass regulations in the area of Private International Law, EU law has regulated only the free circulation of public documents pertaining to regulating personal status.[1183]

The Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No. 1024/2012 (hereinafter: the EU Public Documents Regulation)[1184] has been binding on all EU Member States since 16 February 2019.

As for the protection of migrant children, the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (hereinafter: the Brussels II*bis* Regulation),[1185] has been binding on the Republic of Croatia since 1 July 2013.

2.4. National legal framework

[1177] M. Drventić, „The Protection of Adults in the European Union", *EU and Comparative Law Issues and Challenges Series (ECLIC)*, 3, 2019, 803–829.

[1178] The European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] ETS no. 005, OG IT 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10 See: article 8 of

[1179] The European Convention on Information on Foreign Law [1985] ETS No. 062, OG IT 13/2013.

[1180] The Framework Convention for the Protection of National Minorities [1995] ETS no.157, OG IT 14/1997 (Art. 11)

[1181] As to the primary law, the Charter of Fundamental Rights of the European Union is rather applicable to migrant situations, and has been noticed as applicable before the Croatian Courts. The analyses of the court practice had revealed two cases conducted before the Constitutional court which both concerned the migrant's appeal against the refusal of the right to asylum (Constitutional Court, U-III/424/2019, 17.12.2019. and Constitutional Court, U-III/6958/2014, 27.2.2018.).

[1182] For more, see: D. Duić, "Migracijsko pravo EU-a i prava djeteta / EU Migration Law and the Right of the Child", in: M. Župan (ed.) *Prekogranično kretanje djece u Europskoj uniji* / Cross-border movement of children in the European Union, Osijek: Faculty of Law in Osijek, 2019, p. 131-155.

[1183] M. Župan, "Identity of a Child in Cross-border legal transit (Naming Law in Focus)", *Yearbook Human Rights Protection Protection of the Rights of the Child "30 Years after the Adoption of the Convention on the Rights of the Child"*, No. 2, Novi Sad: Provincial Protector of Citizens – Ombudsman; Institute of Criminological and Sociological Research in Belgrade, 2019, p. 545-567.

[1184] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No. 1024/2012 OJ L 200, 26.7.2016.

[1185] Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 OJ L 338, 23.12.2003. As of 1 August 2022, this Regulation will be replaced by the revised Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2.7.2019.

In regard to the recognition of public documents and the recognition of foreign statuses, the applicable national legislation includes: the Private International Law Act (hereinafter: the PIL Act),[1186] the Act on Legalization of Documents in International Legal Transactions,[1187] the Civil Registers Act,[1188] the Same-sex Life Partnership Act,[1189] and the Personal Name Act.[1190] As for cross-border protection of migrants, the legislation applicable is: the International and Provisional Protection Act [1191], the Family Act[1192], the Social Welfare Act[1193], and the Aliens Act.[1194] The government of the Republic of Croatia passed the Protocol on the Treatment of Unaccompanied Minors,[1195] stipulating the procedures and duties of competent authorities and special guardians towards unaccompanied children.[1196] The Protocol on the Treatment of Unaccompanied Minors offers valuable guidance; still the objection goes to its legal nature. The protocols are not published in the official gazette and they are formally not legal regulations. They actually fall under the category of internal instructions as special types of acts through which a higher body distributes instructions to a lower body on how to act in certain situations. The biggest deficiency of this form of regulation is that the third parties cannot invoke it.[1197]

3. Defining personal status in Croatian legislation

The State Registers Act uses the term "personal status" in the context of birth, marriage, and death registers.[1198] Pursuant to the Same-sex Life Partnership Act,[1199] registrars also keep records on registered partnerships.[1200] Article 47 of the Private International Law Act regulates the issue of international jurisdiction on personal status issues and sets out typical status-related proceedings where international jurisdiction applies, such as: 1) issuing marriage licenses (permission to enter into marriage); 2) deprivation or restoration of legal capacity; 3) establishment or termination of custody; 4) establishing or contesting maternity or paternity; 5) instituting adoption; 6) declaring a missing person dead. In the context of Private International Law, we might conclude that the status of natural persons is defined more broadly, which also entails a broader concept of personal status.

4. Jurisdiction and applicable law on personal status

Conflict-of-law rules in the Republic of Croatia are cogent and the PIL Act must be applied to all private law situations with a foreign element. A conflict-of-law rule may refer to national or foreign law; in case of the latter, Article 8 of the PIL Act on the application of foreign law reflects the *iura novit curia* maxim. The application of foreign law in the Republic of Croatia may only occur in the proceedings conducted before competent authorities. For example, in the context of status-related proceedings pertaining to migrants, the authorities which are bound to apply conflict-of-law rules are the competent court, registry

[1186] The Private International Law Act, OG 101/17
[1187] The Act on Legalization of Documents in International Legal Transactions, OG SFRY 06/73, OG 53/91
[1188] The State Civil Registers Act, OG 96/93, 76/13, 98/19
[1189] The Same-sex Life Partnership Act, OG 92/14, 98/19
[1190] The Personal Name Act, OG 118/12, 70/17, 98/19
[1191] The International and Provisional Protection Act, OG 70/15, 127/17.
[1192] The Family Act, OG 103/15, 98/19.
[1193] The Social Welfare Act, OG 157/13, 152/14, 99/15, 52/16, 16/17, 130/17, 98/19, 64/20, 138/20.
[1194] The Aliens Act, OG 133/20.
[1195] Protokol o postupanju prema djeci bez pratnje, 2018 (Protocol on the Treatment of Unaccompanied Minors), https://emn.gov.hr/UserDocsImages/vijesti/Protokol-o-postupanju-prema-djeci-bez-pratnje.pdf.
[1196] For more, see: M. Drventić, "Pravni okvir za zaštitu maloljetnika bez pratnje / Legal Framework for the Protection of Unaccompanied Minors", in M. Župan(ed.), *Prekogranično kretanje djece u Europskoj uniji* /The cross-border movement of children in the European Union, Osijek: Faculty of Law in Osijek, 2019, p. 155-183.
[1197] On legal nature of protocols see: L. Ofak, M. Munivrana Vajda, „ Recommendations for Improving the Croatian Legal Framework and Measures for Suppression and Prevention of Trafficking in Human Beings / Preporuke za poboljšanje hrvatskog pravnog okvira i mjera za suzbijanje i prevenciju trgovanja ljudima", *Zbornik Pravnog fakulteta u Zagrebu*, 69(1), 2019., 59-87.
[1198] The Civil Registers Act, Article 1.
[1199] The Same-sex Life Partnership Act, Art. 22 para. 4-6.
[1200] The introduction of same-sex marriage in Croatian legal system is still not considered.

office, or the Social Welfare Centre, acting within the scope of the jurisdiction *ratione materiae* conferred to them proceedings with or without an international element. The PIL Act rules set the jurisdiction in personal status matters very broadly by envisaging an subsidiary rule on special jurisdiction; thus, Croatian authorities have jurisdiction if the person whose status is under consideration has his/her habitual residence in the Republic of Croatia or if he/she is a Croatian national.[1201] If habitual residence of migrants in the RC is established, the jurisdiction referred to in the stated provision would refer by default to the following personal status proceedings: granting a marriage licence; depriving or restoring one's legal capacity; establishment or termination of custody; establishing or contesting maternity or paternity; instituting adoption, and declaring a missing person dead.[1202] The PIL Act defines habitual residence as a place where a natural person predominantly lives, regardless of whether his/her stay or settlement in that place is registered or permitted. The competent authority will assess this factual criterion, taking into consideration the circumstances of a personal or business nature indicating the person's permanent links to that place or intention to establish such ties. In Croatia, the practice of applying this provision has not been recorded in contacts with migrants thus far; however, the interpretation of habitual residence may ensue in cases involving persons who intend to stay in Croatia for a longer period or who have no other stable places of settlement.

The status-related proceedings involving migrants that could be instituted before Croatian authorities also include proceedings related to marital status. The jurisdiction in divorce issues is determined in line with Brussels II*bis* Regulation, whose scope also extends to the issues of termination of extramarital partnerships and life partnerships.[1203] The Croatian authorities could have jurisdiction over such proceedings involving migrants by default, under the habitual residence criterion.[1204] In the context of this Regulation, it should be noted that habitual residence will have to be interpreted as a euro-autonomous concept but, in any event, it is a factual concept that does not entail a long duration of stay (Swadling) or even the existence of a registered stay.[1205]

The Croatian authorities could also conduct status-related proceedings in cases for establishing or contesting maternity or paternity, given that the PIL Act *inter alia* provides that a Croatian body has jurisdiction in this matter if at least one party has habitual residence in the Republic of Croatia.[1206] An acknowledgement of Paternity/Maternity may be declared before a body having jurisdiction *ratione materiae*, among other things, if a child or a person making the declaration has habitual residence in Croatia, or if the child is born in the Republic of Croatia.

Furthermore, in cases where an adoption is to be established or terminated, the court or another competent body of the RC may have jurisdiction in this matter, among other things, if the adoptee or adopter has habitual residence in Croatia.[1207] The Croatian court is further competent to conduct a non-contentious proceeding if the respondent has domicile or habitual residence in Croatia; in case where only one person participates in the proceedings, the Croatian court has jurisdiction if that person has domicile or habitual residence in Croatia.[1208]

The criterion of *forum necessitatis* (jurisdiction by necessity) is indisputably a very important novelty of the Croatian PIL Act which might also play a role in proceedings involving migrants. As for the defendant having domicile in a non-European Union country whereas the proceedings cannot be conducted abroad, or they may not be reasonably expected to be brought or conducted, the legislator provides that the

[1201] The PIL Act, Art. 47.
[1202] The PIL Act, Art. 47 para. 2.
[1203] The PIL Act, Art. 48.
[1204] *See*: Regulation Brussels II *bis*, Art. 3.
[1205] M. Župan, "Europski prekogranični obiteljski postupci/European cross-border family proceedings", in: T.Petrašević, I. Vuletić (eds.), *Procedural and legal aspects of the EU law,* Osijek: Faculty of Law in Osijek, 2016, 125–167.
[1206] The PIL Act, Art. 51.
[1207] The PIL Act, Art. 52.
[1208] The PIL Act, Art. 56.

Croatian court would have jurisdiction if the subject matter of such proceedings is sufficiently linked to Croatia, thus ensuring that such proceedings before the Croatian court are purposeful.[1209] Although the narrow interpretation of *forum necessitatis* is quite common in PIL literature, in the context of migrants, this provision should be read within the context of fundamental rights protection, particularly the right of access to justice. If there is a war or a post-war situation in the migrant's domicile country and the judicial system is inoperative, it is appropriate and desirable to use the *forum necessitatis* provision to ensure judicial protection.

Croatian authorities will have jurisdiction in proceedings for granting provisional, security and enforcement measures in all situations where persons or property subjected to such measures are present in the Republic of Croatia.[1210] In all such proceedings, the competent authorities establish the conflict-of-law rules and the applicable law. The applicable law for status-related matters is, as a rule, provided in the Croatian PIL Act and the purview of unified law in these matters is negligible. The choice of the connecting factor is the result of the legislator's aspiration to attain substantive or conflict-of-law fairness, whereby the legislator is not limited in the choice thereof. In *Ammdjadi v. Germany,*[1211] the ECtHR deliberated on the issue whether the application of the nationality connecting factor in family and personal relations between family members of different nationalities but of a common domicile or residence can be regarded as discrimination, as envisaged in Article 14 of the ECHR.[1212] Namely, in the case at issue, pertaining to the divorce of Iranian spouses, the applicable law was the law of their common nationality. Such a conflict-of-law rule refers to the application of Iranian substantive law, under which the applicant (wife) was deprived of the pension compensation right which she would be entitled to under German law (based on the spouses' common place of domicile in Germany). According to the ECtHR, the choice of domicile and habitual residence as connecting factors in family matters aimed at protecting a person's close connection with his/her home country; however, the use of nationality as the connecting factor cannot be considered to be without "objective and reasonable justification". Moreover, under the party autonomy principle, the spouses had been given the opportunity to choose the application of German law by notarial certification, which they did not do.[1213] The rationale of this decision suggests that the choice of objective connecting factor, in principle, should not be disputable from the discrimination aspect.

Here, we provide an overview of relevant Croatian PIL Act provisions applicable to specific status-related proceedings. In disputes pertaining to legal capacity (capacity to act) of a natural person, by relying on Art. 14 of the PIL Act, the court shall apply *lex nacionalis*, which could lead to the application of the foreign law. In case of proceedings involving deprivation or restoration of legal capacity (given the fact that a migrant has habitual residence in Croatia), the same criterion of jurisdiction and applicable law leads to the application of Croatian law and eliminates the need to determine the foreign law. The PIL Act also provides for awarding provisional measures for the protection of certain personal or property rights of a protégé in compliance with the Croatian law.[1214] In case the proceeding for declaring a missing person (migrant) dead is initiated, the PIL Act may trigger the procedure for determining the content of foreign law by referring to the law of the state of the person's last known nationality. [1215]

In the event that a migrant woman gives birth to a child in the territory of Croatia, the Civil Registers Act prescribes that the fact on child's birth shall be recorded in the birth register, whereby the registrar has

[1209] The PIL Act, Art. 58.
[1210] The PIL Act, Art. 57.
[1211] *Ammdjadi v.Germany*, Application no. 51625/08, dated 9.3.2010.
[1212] V., Bouček, "Utjecaj ljudskih prava kao specifične sastavnice europskog prava na međunarodno privatno pravo / Impact of Human Rights as a Specific Component of the European Law on Private International Law", *Hrvatska pravna revija,* 2004/12, 69.
[1213] *Ammdjadi v. Germany*, Application no. 51625/08, http://hudoc.echr.coe.int/eng?i=001-97936
[1214]The PIL Act, Art. 16
[1215]The PIL Act, Art. 17

the authority to decide on the personal name according to the law of the child's nationality, whereas the legal representatives (parents/guardians) may designate the child's personal name at the registrar's office, either pursuant to the law of the state of which one of them is a national, or under the Croatian law if at least one of them has habitual residence in Croatia. By contrast, in case the name is designated by applying the law of the child's nationality, the foreign law is applicable.[1216]

Competent authorities may also encounter situations where migrants may wish to enter into marriage in Croatia, or seek to obtain a marriage license. In Croatia, any person may enter into marriage if there are no legal impediments envisaged by the law of the state of the person's nationality; the law (and legal impediments) shall be determined by the registrar.[1217] However, the foreign law will not be applied if its effects are contrary to the Croatian public policy.[1218] Similarly, by applying the provision on the direct application rules referred to in Art. 13 of the PIL Act, the court may apply any Croatian law provision which is considered important for the protection of Croatian public interest (such as: political, social and economic structure) and which is to be applied to all situations within its scope of application, irrespective of the applicable law. For instance, this may occur if the *lex nacionalis* tolerates polygamy, child or kinship marriages. In the context of persons' marital status, the migrant crisis has engendered controversy in the international community and discussions on juvenile marriages, including fictitious or arranged marriages.[1219] In case a juvenile wants to get married in Croatia, he/she will definitely be subject to the application of the domestic standard which relaxes the requirement that only an adult can enter into marriage.[1220] In non-contentious proceedings, the court may allow a person who has reached the age of 16 to enter into marriage if the person is considered mentally and physically mature, if there is a justifiable reason for marriage, and if marriage is in compliance with the individual wellbeing of the minor.

5. The application of foreign law

The Croatian Private International Law Act firmly supports the position that foreign law is treated as a matter of law (not as a matter of fact). In this regard, Art. 8 of the PIL Act imposes an obligation on the competent authority to determine *ex officio* the content of the foreign law and apply it in the same manner as it is done by the authorities of that State.[1221] In the previous chapter, we have described the typical status-related proceedings before Croatian authorities pertaining to migrants, where the competent authorities are obliged to determine the content of foreign law. In obtaining information about a foreign law, the competent bodies are assisted by other authorities (e.g. the Ministry of Justice requesting relevant data by forwarding a Letter Rogatory) or the disputing parties themselves. The competent authorities may also resort to different models of formal and informal judicial cooperation in civil and commercial matters developed within the framework of European Judicial Network (EJN)[1222] or the International Hague Network of Judges,[1223] even though these models are not mentioned in the PIL

[1216] The PIL Act, Art. 18

[1217] The Family Act, Art. 15

[1218] Art. 12 of the PIL Act. The rules of foreign law which is applicable under the provisions of this Act shall not apply if the effect of their application would be manifestly contrary to the public order of the Republic of Croatia.

[1219] Gender equality and fight against child marriage has been established as one of the priorities of the international community by adopting the UN Resolution: Transforming our World (2015). Goal no. 5. Resolution adopted by the General Assembly on 25 September 2015 "Transforming our World: the 2030 Agenda for Sustainable Development", https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E. This is also one of the priorities of the EU 's external action; for more, see: "Children's rights and the UN SDGs: A priority for EU external action", European Parliament 2019.

[1220] The Family Act, Art. 25.

[1221] M. Župan, "Foreign law before Croatian authorities –at the crossroads?", in: Yuko Nishitani (ed.) *Treatment of Foreign Law – Dynamics towards Convergence?* Springer 2017, 93-111.

[1222] The Decision of the Council dated 28 May 2001 on establishing the f European Judicial Network in civil and commercial matters (2001/470/EC) ELI: http://data.europa.eu/eli/dec/2001/470/2011-01-01.

[1223] The International Hague Network of Judges (IHNJ) comprises over 100 judges from 73 countries. See: HCCH, https://www.hcch.net/en/news-archive/details/?varevent=426.

Act.[1224] It should be pointed out that the Republic of Croatia has been a contracting party to the European Convention on Information on Foreign Law[1225] since 2013. Some of the unresolved issues concern the translation costs of the foreign law content obtained by the Ministry or submitted by the parties, as well as the legal form and probative force of the foreign public document.[1226]

In case it is not possible to obtain information about the foreign law, the PIL Act provides for the application of Croatian law, which ensures the implementation of other internationally undertaken obligations, particularly in the domain of fundamental human rights protection. Namely, in many cross-border disputes, the ECtHR in Strasbourg established the violation of the right to a fair trial within a reasonable time, due to lengthy proceedings where the process of obtaining data on the foreign law resulted in an unreasonable delay in the proceedings.[1227] The national authorities may face this issue in the implementation of status-related proceedings where the PIL Act rests on nationality as a connecting factor. On the other hand, in the proceedings where the habitual residence is the connecting factor in terms of applicable law and international jurisdiction, the PIL Act has actually ensured the application of *lex fori.*

6. Recognition of foreign personal and family statuses in the Republic of Croatia

Personal status is highly important for applicants seeking international protection, particularly in cases concerning the date of birth, the age of minority or majority, the family status, the child–parent relationship or relations between other relatives (siblings, grandparents and grandchildren, etc.), the protégé guardian relationship, marriage or registered partnership issues. [1228] The personal or family status acquired in a third state may be vital in establishing the migrant status within the framework of migration rights, as well as in exercising other rights stemming from personal and family relations.[1229] Thus, personal status may be raised as a preliminary issue in (administrative)[1230] proceedings conducted under migration law, or in some other proceedings. From the aspect of Private International Law, the legal nature of these issues is twofold. On the one hand, they refer to the recognition or establishment of personal status; on the other hand, they refer to proving personal status by providing public documents or decisions issued by competent authorities.[1231]

6.1. Recognition by presenting public documents

When entering the EU, migrants often do not present any public documents that may prove their personal status and their family members' status. In some cases, persons who fled their countries or were expelled did not have time to take their personal documents with them. In some countries, birth or marriage certificates are not issued, or individuals do not have access to the issuing authorities. Given that migrants' personal status has a decisive impact on the legal rights that third-country nationals may enjoy/exercise within the framework of migration law, identity-related frauds pertaining to personal documents have become a huge problem for the receiving Member States.[1232] In mass migration waves, such as those during the so-called European refugee crisis, personal status data are not commonly recorded in transit

[1224] Cases of cooperation trough the judicial networks in cases regarding the migrants were still not evidenced in Croatian practice.

[1225] The Act on the Ratification of the European Convention on Information on Foreign Law, OG IT 13/2013.

[1226] *See:* Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (OG FNRY 10/62; OG IT 4/94), Act on Legalization of Documents in International Legal Transactions (OG SFRY 6/73; OG 53/91); Civil Procedure Code, Art. 231; Župan, op.cit (note 56).

[1227] Hazelhorst, M., *Free Movement of Civil Judgements in the European Union and the Right to a Fair Trial*, Springer, 2017.

[1228] Kunda, *op. cit.*, note 3, p. 76.

[1229] See: S. Corneloup, "Can Private International Law Contribute to Global Migration Governance?", in: H.Muir Watt and D.P.Fernández Arroyo (ed.), *Private International Law and Global Governance*, Oxford:Oxford University Press, 2014, p. 301-317.

[1230] The General Administrative Procedure Act, OG 47/09, Art. 55, para 2

[1231] Kunda, *op. cit.*, note 3, p. 77.

[1232] Corneloup et al., *Private international law in a context of increasing international mobility: challenges and potential,* Study for the JURI Committee, European Parliament, 2017, Retrieved February 25, 2021, p. 13.

countries. It was the case with the Republic of Croatia, which is usually not the first EU state to be entered by migrants, nor is it the state of their final destination. As a result of vast migrant flows and the lack of resources and capacities, migrants were allowed to transit without recording their personal data and status.[1233] The lack of such records may also be attributed to reluctance, given that the recording process entails migrants' longer stay in the national territory, resulting in further organisational and tangible costs, as well as certain risks of spreading diseases or unlawful conduct.[1234]

In the Republic of Croatia, and in the rest of the EU, the Regulation on Public Documents (2016/1191) envisages exceptions from the requirement to legalize and obtain the Apostille, and simplifies the process of obtaining translation and certified copies *(inter alia)* of public documents, issued by the Member State authorities in compliance with its national law, which are aimed at establishing relevant facts such as: birth, proof of life, death, name, marriage (including the capacity to marry and marital status), divorce, legal separation or nullity of marriage, registered partnership (including the capacity to enter into registered partnership and registered partnership status), dissolution of registered partnership, legal separation or nullity of registered partnership, parentage, adoption, domicile and/or residence, or nationality. The Regulation envisages that the central authorities of Member States are in charge of verifying the authenticity of the presented documents and ensuring communication through the Internal Market Information System (IMI).[1235] However, the Regulation on Public Documents does not apply to public documents originating from third countries, which raises the issue of the effect of third-county public documents brought to a Member State and the migrants' requests for their recognition in another Member State.[1236] The Regulation does not distinguish between the documents adopted by the competent authority of a Member State in relation to migrants or other persons; thus, it can be concluded that such public documents (albeit of provisional character) should have the same effect as other public documents pertaining to persons other than migrants.[1237]

The conventions adopted within the framework of the International Commission for Civil Status (ICCS) are relevant for foreign public documents from third countries. The 1956 Paris Convention could be applicable in situations where it is necessary to obtain extracts on the elements of migrants' personal status from national civil status records. Some non-EU countries on the migrant route (such as Turkey, North Macedonia, Serbia, Montenegro, and Bosnia and Herzegovina) are state parties bound by the Convention, provided that specific data has been entered in the civil status records of the respective state (e.g. data on the marriage concluded by migrants in Bosnia and Herzegovina and registered in B&H civil status records).[1238] The Republic of Croatia has also concluded bilateral agreements on legal aid in civil matters. In case of Turkey, such an agreement suspends the need for applying the Paris Convention. Here, we may refer to the Agreement on legal cooperation in civil and commercial matters (1999)[1239]. Other concluded bilateral agreements do not fully eliminate the need to apply the Paris Convention; these are: the Agreement between the Government of the Republic of Croatia, the Government of Bosnia and Herzegovina and the Government of the Federation of Bosnia and Herzegovina on legal assistance in civil

[1233] Conclusions of the National Seminar within the SEELS Forced Migrations Project.

[1234] Kunda, *op. cit.*, note 3, p. 79. According to the available information, this practice is not occurring anymore. The migrants caught in the illegal border passing not asking for the international protection are served with the return notice to the country from which they tried to enter. The migrants seeking for the international protection at the border are duly evidenced. As well, the migrants without the public document can submit the request for international protection.

[1235] S.Schlauß, "The EU Regulation on Public Documents: A first step towards the abolition of the Apostille in the EU", *ERA Forum,* Vol. 21, 2020, p. 117–128.

[1236] A.Vettorel, "EU Regulation No. 2016/1191 and the Circulation of Public Documents Between EU Member States and Third Countries", *Cuadernos de Derecho Transnacional*, Vol. 9, No. 1, 2017, p. 342–351.

[1237] Kunda, *op. cit.*, note 3, p. 80.

[1238] Kunda, *op. cit.*, note 3, p. 81.

[1239] Agreement between the Republic of Croatia and the Republic of Turkey on legal assistance in civil and criminal matters, OG IT 15/2000.

and criminal matters,[1240] the Agreement between the Republic of Croatia and the Republic of Macedonia on legal aid in civil and criminal matters,[1241] and the Agreement between the Republic of Croatia and the Federal Republic of Yugoslavia on legal aid in civil and criminal matters.[1242]

Foreign public documents originating from a third country may also be used in Croatia on the basis of the provisions of the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, provided that the third country from which the public document originates is party to that Convention, and provided that the certificate (Apostille) has been issued by its competent authority. [1243]

There are cases where migrants refer to the documents which do not originate from a Contracting State to the Convention on Abolishing the Requirement of Legalisation for Foreign Public Documents. The Croatian Act on Legalization of Documents in International Legal Affairs will be applied in such cases. This Act stipulates the need for public documents issued abroad to be legalized by the Croatian competent authority or a diplomatic or consular office abroad, if it is required on the basis of reciprocity. Thus, legalization of a foreign public document by Croatian authorities would only be required if Croatian public documents require legalisation in the country of origin of the foreign public document; otherwise, a foreign public document may be used in Croatia without legalisation. Yet, the use of a foreign pubic document does not guarantee the recognition of one's personal status, given that the public document has only probative value.[1244]

6.2 Recognition of the status evidenced by a foreign public document in the Republic of Croatia

The PIL regulations, practices and theory distinguish between two basic approaches to the recognition of personal status acquired in another state: the applicable law approach, the recognition approach, and the mixed approach (combining the previous two).[1245] The recognition approach is more common and more up-to-date than the applicable law approach in terms of its response to global movement in the contemporary world.[1246] It implies that the other county will recognise the personal status issue without *revision au fond* by applying its applicable law. Moreover, the recognition procedure is deemed not to be necessary, particularly within the EU framework, given that the lack of legal solutions in different countries can be compensated by harmonizing conflict-of-law rules.[1247]

As for the status of refugees, Art. 12 (para.2) of the 1951 Convention relating to the Status of Refugees prescribes that "Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee." Considering that this provision is perceived as the embodiment of the vested rights principle,[1248] the

[1240] Agreement between the Government of the Republic of Croatia, the Government of Bosnia and Herzegovina, and the Government of the Federation of Bosnia and Herzegovina on legal assistance in civil and criminal matters, OG IT 12/1996.

[1241] Agreement between the Republic of Croatia and the Republic of Macedonia on legal aid in civil and criminal matters, OG IT 6/1998.

[1242] Agreement between the Republic of Croatia and the Federal Republic of Yugoslavia on legal aid in civil and criminal matters, OG FNRY IT 10/1962, OG IT 4/1994.

[1243] *See:* P. Zablud, "Chapter 20: The 1961 Apostille Convention - authenticating documents for international use", in: T. John, R. Gulati, B.Koehler (eds.), *The Elgar Companion to the Hague Conference on Private International Law,* Elgar Companions to International Organisations series, Cheltenham: Edward Elgar Publishing, 2020, p. 277–287.

[1244] Kunda, *op. cit.*, note 3, p. 83.

[1245] *See:* D.Coester-Waltjen, "Recognition of legal status evidenced by documents", in: J. Basedow *et al*. (ed.) *Encyclopedia of Private International Law*, Cheltenham: Edward Elgar Publishing, 2017, p. 1504; H. Van Loon, "Unification and Cooperation in the Field of International Family Law: A Perspective from the Hague", in: A. Boras *et al.* (ed.), *E Pluribus Unum -Liber Amicorum Georges A.L. Droz*, The Hague/Boston/London: Wolters Kluwer, 1996. 173-190.

[1246] The applicable law approach is contained in Art. 93 (and possibly Art. 95) of the Act concerning the Resolution of Conflicts of Laws with the Provisions of Other Countries in Certain Matters, OG 53/91, 88/01.

[1247] Kunda, *op. cit.*, note 3, p. 83.

[1248] J. Verhellen, "Cross-Border Portability of Refugees' Personal Status", *Journal of Refugee Studies*, 31:4, 2017, pp. 427-443.

approach to this provision should be designated as recognition, without applying conflict-of-law rules, but by retaining the public order clause.[1249]

In cases where the Convention relating to the Status of Refugees is not applicable, Art. 32 (para.1) of the Private International Law Act is applied; it prescribes that the marriage concluded in a foreign country is recognised if it is concluded in compliance with the law of that country (*lex loci celebrationis*). It is apparent from this provision that the legislator has opted for the recognition approach, as it implies that the Croatian competent authority should also verify that the requirements have been met. This rests on the fact that no country would issue a marriage certificate if it was contrary to its legal rules.[1250] Art. 32 (para.2) of the PIL Act envisages adjustment; thus, if marriage was concluded in a foreign country between persons of the same sex, it is not recognised as marriage but as life partnership, provided that such marriage was concluded in compliance with the law of the country where it was entered into.[1251] According to this provision, the competent authority (to which the public document has been presented) should recognise such marriage and consider, until proven otherwise, that marriage was concluded according to the law of the respective foreign country. In case the validity of marriage is contested, the party contesting the recognition of marital status should instigate a matrimonial dispute before the competent court which will render the decision on the basis of the applicable law. The reason for non-recognition may also be a violation of the Croatian public order. Art. 12 of the PIL Act prescribes that no legal rules of a foreign law which is applicable under the PIL Act shall be applied if the effect of their application would be manifestly contrary to the Croatian public order.

As for the migrants coming to the European territory, the public order issues are mainly related to child marriages.[1252] Considering the immigration and asylum policies, refusing the recognition of a child marriage in an EU Member State may have impact on the legal consequences for the concerned child. It may affect the exercise of rights related to family reunification, issuance of visas or residence permits, the Dublin transfer, etc. The sensitivity of the situation stems from two conflicting aspects of child marriages.[1253] The first one emanates from the assumption that the child was not forced to marry. In such cases, the refusal of recognition may lead to family separation, impossibility to exercise the right to inherit, or it may have detrimental consequences to existing children or an unborn child (in the event of existing pregnancy).[1254] The other aspect emanates from the fact that it is highly possible that such a child was forced to enter into marriage, that the child is unhappy, possibly victimised or in need of urgent protection[1255] Relying on the merits of each case, it is important to find a balance between these opposed aspects.

[1249] J.C. Hathway, "The Rights of Refugees under International Law", Cambridge, (2005) 224.

[1250] Kunda,*op. cit.*, note 3, 86.

[1251] Bearing in mind a growing number of legislations that allow same-sex marriage, the legislator resorts to an adjustment and downgrades such marital union, as in terms of its effects in Croatia they are equated with a life partnership. The introduction of the solution is to be welcomed as a novelty aimed at strengthening legal certainty and eliminating limping statuses. If a legal gap would have been retained, it could possibly lead to a denial or refusal to recognise the effects of marital unions valid under foreign law as according to the Croatian constitutional category only individuals of the opposite sex can marry. Consequently, such orders could have been sanctioned before the ECHR as a violation of fundamental human rights.

[1252] See cases: C-338/13, *Marjan Noorzia v. Bundesministerin für Inneres*, 17 July 2014, ECLI:EU:C:2014:2092., Z.*H. and R.H. v. Switzerland*, Application no. 60119/ 12, 8 December 2015.

[1253] *See:* Lambertz, Göran, 2016. "Child Marriages and the Law, with special reference to Swedish Developments", in: *The Child's Interests in Conflict. The Child's Interests in Conflict Addresses the Conflicting Demands on Children from Minority Groups or Children Born to Parents of Different Cultural or Faith Backgrounds* (Jänterä-Jareborg, Maarit ur.), Cambridge-Antwerpen-Portland: Intersentia, 85-110.

[1254] *See*: M. Bogdan, "Some Critical Comments on the new Swedish Rules on Non-Recognition of Foreign Child Marriages", *Journal of Private International Law*, 15:2, 2019, p. 247–256.

[1255] S. De Vido, "Against a Girl's Will: Child Marriages, Immigration and the Directive on Family Reunification", in: E.Bergamini and C.Ragni (eds.), *Fundamental Rights and Best Interests of the Child in Transnational Families*, Cambridge-Antwerpen-Portland: Intersentia, 2019, p. 121–125.

Due to a vast migration influx, EU Member States have been dumbfounded by the legal situation of child marriages. In some EU countries, an increasing number of child marriages was an incentive for enacting more stringent legislation.[1256] The issue of recognising child marriages has not been the subject-matter of proceedings before Croatian competent authorities. In such situations, they will be bound by the case law of the European Court of Human Rights[1257] and the case law of the EU Court of Justice,[1258] which point out to the need of striking the right balance in such situations.[1259]

Court decisions rendered in cases pertaining to personal status recognition for the purpose of obtaining other statuses may, by analogy, apply to possible legal situation involving refuges. In particular, it refers to the case *Coman and Others,*[1260] where the court decided that, although every Member State is entitled to decide autonomously in compliance with its law whether it will allow the conclusion of same-sex marriages, each Member State is obliged to recognise same-sex marriage concluded in another Member State in compliance with its law, to the extent which is necessary for exercising the spouses' rights the spouses have on the basis of the EU regulations. In the *SM* case, the EU Court deliberated on the issue of legal guardianship under the Algerian kafala system; relying on the terms referred to in the Free Movement Directive, the Court construes that a child under the kafala guardianship regime cannot be considered a "direct descendant" of an EU citizen (equal to a biological child or an adoptee) but he/she can be regarded as one of the "other family members".[1261]

7. Unaccompanied children - provisional measures and protective measures

Unaccompanied minors are a particularly vulnerable group because of their age, separation from parents or guardians, and distance from home.[1262] There are numerous international conventions that impose the obligation of ensuring relevant protective and preventive measures pertaining to migrant children. Some protection mechanisms are regulated by the secondary sources of European Union law. Unaccompanied minors are subject to special treatment and rules on entry and stay in a country, accommodation, family reunification, determining the state responsible for deciding on the application for international protection, detention and expulsion, and access to justice. In Croatia, the proceedings before national bodies are additionally regulated by national legislation. As for unaccompanied minor migrants, most issues are regulated by the Protocol on the Procedure towards Unaccompanied Minors, which has been in force since August 2018. The goal of this exhaustive Protocol is not to introduce new procedures but rather to consolidate the existing ones, which are standardised in current legislative acts and by-laws.

In the proceedings on cross-border protection of unaccompanied minors, irrespective of whether they have been granted international protection or whether they have applied for one, the competent authorities also have protection mechanisms at their disposal, stemming from international law

[1256] For Sweden, see: M. Bogdan, "Some Critical Comments on the new Swedish Rules on Non-Recognition of Foreign Child Marriages", *Journal of Private International Law*, 15:2, 2019, pp. 247-256. For Germany, see: Ch. Rath, "Underage, married, separated: German law abolishes child marriages in general - not always in the interest of those affected", *Max-Planck-Gesellschaft*, March 2019, https://www.mpg.de/12797223/childmarriage-legislation-germany

[1257] *Z.H. and R.H. v. Switzerland*, Application no. 60119/ 12, 8 December 2015.

[1258] C-338/13, *Marjan Noorzia v. Bundesministerin für Inneres*, 17 July 2014, ECLI:EU:C:2014:2092.

[1259] *Z.H. and R.H. v. Switzerlan*d, para 46.

[1260] C-673/16, *Coman and Others.*, (EUCJ Grand Chamber) 5 June 2018, ECLI:EU:C:2018:385.

[1261] C-129/18, *SM* (Child placed under Algerian kafala), EUCJ (Grand Chamber) 26 March 2019, ECLI: EU:C: 2019:248. The ECtHR case law is also significant for recognising kafala; see: *Harroudj v.* France, Application no. 43631/09, 4 October 2012; *Chbihi Loudoudi v. Belgium*, Application no. 52265/ 10, 16 December 2014.

[1262] J. Bhabha, "Arendt's Children: Do Today's Migrant Children have a Right to have Rights?", *Human Rights Quarterly*, 31:2, 2009, p. 413.

regulations,[1263] more precisely: the Brussels II*bis* Regulation and the Child Protection Convention.[1264] Although international protection issues are excluded from the domain of application of the Brussels II*bis* Regulation, this Regulation does not exclude the protection of minor migrants from the scope of its application.[1265]

The general rule of the Brussels II*bis* Regulation prescribes the jurisdiction of the body of the Member State of the child's habitual residence, but some difficulties may arise when establishing a habitual residence of an unaccompanied minor.[1266] If the unaccompanied minor's habitual residence cannot be established, the solution for establishing jurisdiction is offered in Art. 13 of the Brussels II*bis* Regulation, which provides the jurisdiction criterion based on the child's mere presence in a Member State (*forum necessitatis*) and explicitly states that this criterion is applicable to refugee children or children internationally displaced due to disturbances or conflicts in their country of origin.[1267] However, this rule has a provisional character since the jurisdiction of a state body based on the child's presence ceases when the child acquires a habitual residence in the territory of a Member State. The provision of Art. 13 may be significant in asylum procedures. The envisaged criterion of child's presence in the Member State territory provides the legal ground for competent authorities to impose relevant measures, such as: appoint a legal representative/guardianship authority, institute the procedure for assessment of the child's situation, and render other appropriate measures on the protection of unaccompanied minors.[1268]

Apart from the international jurisdiction rule on the decision on parental responsibility as the main subject matter, the Brussels II*bis* Regulation (art. 20) provides the ground for imposing provisional and protective measures. Although the procedure envisaged in Art. 20 is based on the child's presence (just like the proceeding envisaged in Art. 13), there is a difference between the two provisions. The measures taken in compliance with Art. 20 represent an exception from the jurisdiction rule.[1269] The measures taken on the basis of Art. 20 can be useful in procedures involving unaccompanied minors, particularly when there is a need to take provisional measures in a country whose bodies have no jurisdiction to decide on the child's future as the main subject matter, or where the existence of such jurisdiction is uncertain or requires additional verification.[1270]

In cases where the child has a habitual residence in a Contracting State to the Child Protection Convention, the Convention will take precedence over the Regulation. Art. 11 of the Convention provides for urgent measures; thus, the competent authorities of the Contracting State (in whose territory the child or property belonging to the child is located) have jurisdiction to take any necessary protection measures, provided that they are urgent. The Explanatory Report on the Convention sets out that the provision of

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[1263] D. Fiorini, "The Protection of the Best Interests of Migrant Children – Private international Law Perspectives", in: G.Biagioni, F.Ippolito (eds.), *Migrant Children in the XXI Century. Selected Issues of Public and Private International Law, series "La ricerca del diritto"*, 2016, p. 7.

[1264] In addition, the Croatia is contracting party to the Hague Adoption Convention since 2014. The number of cases conducted upon this Convention is still generally very small, talking about only several cases and there is no case example that includes the adoption of migrant child.

[1265] See: Case C–435/06 *C* [2007] ECLI:EU:C:2007:714, Case C–523/07 *A* [2009] ECLI:EU:C:2009:225, Case C–92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255.

[1266] See: B. Heiderhoff, B.Frankemölle, "Minor refugees under the Brussels IIa-Regulation", in: B.Heiderhoff, I I.Queirolo (eds.), *Persons on the Move. New Horizons of Family Contract and Tort Law*, Roma: Aracne Editrice, 2018, p.26.

[1267] E. Pataut, E. Gallant, "Art 13 Brussels IIbis", in: U. Magnus, P. Mankowski (eds.), *Brussels IIbis-Commentary*, Cologne: Otto-Schmidt, 2017, p. 169.

[1268] S. Corneloup *et. al*., Study for the JURI Committee, European Parliament, *Children on the Move: A Private International Law Perspective*, 2017, Retrieved on 17 February 2021from http://www.europarl. europa .eu/regdata/ etudes/stud/2017/583158/iPoL-stu(2017)583158-en.pdf, p. 15.

[1269] See: P. Mceleavy, "The new child abduction regime in the European Union: symbiotic relationship or Forced Partnership?", *Journal of Private International Law*, 1:1, 2005, p.11

[1270] Corneloup *et. al*, *Children on the Move: A Private International Law Perspective, op. cit.,* note 113, p.17

Art. 11 would be useful in cases involving runaway or displaced children, when it is not possible to establish their habitual residence, or in cases involving children victims of human trafficking.[1271]

Conclusion

The analyses of legal framework as well of the some acting of competent authorities confirm s that there is a place and necessity for the implementation of additional international instruments, such as: Recommended principles and guidelines on human rights at international borders and Adults Protection Convention. On other side the national legal framework, namely the Private international Law Act had brought some improvements, which may also concern migrants. With the respect of applicable law and jurisdiction rules for the personal statuses, the PIL Act departs from nationality for the benefit of habitual residence. Act also introduced *forum necessitates* and adjustment regarding the recognition of same sex marriage. There are many challenges ahead the Croatian authorities, which may occur especially in the view of direct application of international/European instrument and recognition of child marriage or kafala, where remain to be seen whether the Croatian authorities would be able to follow the methodology set by ECJ and ECHR.

[1271] P. Lagarde, *Explanatory report on the 1996 Hague Child Protection Convention*, 1996., Retrieved on 19 February 20219 from https://assets.hcch.net/upload/expl34.pdf, para 68.

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NATIONAL REPORT

Introduction

Faced with the various legal aspects of the international forced migration, the national competent authorities (civil courts and administrative authorities) face challenges in Private International Law matters as well. Although they are not always aware of it, many issues stemming from the personal and family status acquired abroad or protection of internationally displaced (and unaccompanied) children fall into the scope of Private International Law. For example, the lack of public documents proving personal and/or family status acquired abroad might put internationally displaced persons at risk regarding the exercise of certain basic human rights (e. g. right to respect of private and family life, the right to marry, the rights of the child). Likewise, in some cases, the national authorities would have to determine the content of foreign law or to assess whether the effects of foreign law application (or the transposition/substitution of legal relationships already established abroad) would be contrary to the national public policy. Bearing in mind the States from which the forced migrants often escape in the last years,[1273] the international forced migrations phenomena raise awareness of the Serbian judicial and administrative authorities to the foreign legal systems which are significantly different from *lex fori.* Therefore, this national report focuses on following main topics: recognition of personal and family status acquired abroad, protection of internationally displaced minors (including unaccompanied minors), and application of foreign law. The purpose of this national report is to stress the difficulties which may occur before the national judicial and, especially, administrative authorities in terms of applying the national system of Private International Law which has been induced by the international forced migrations. At the same time, this Report offers some recommendations to the competent Serbian authorities in resolving the dilemmas stemming from the intersection between the Private International Law and international forced migrations.

1. Legal framework

In the Republic of Serbia, the national PIL issues are regulated by various statutory acts and international treaties which are also applicable to cases involving international forced migrations. The main Private International Law statutory act is the 1982 Acts on Resolution of Conflict of Laws with Regulations of Other Countries (hereinafter: the 1982 PIL Act)[1274]. It contains the rules on international jurisdiction (including special civil procedure rules), applicable law, and recognition and enforcement of the foreign court decisions. At the substantive and/or procedural law level, the relevant family and personal status issues

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[1273] Such as Syria, Bangladesh, Afghanistan, Iraq.
[1274] *Official Gazette of the SFRY* No. 43/1982, 72/1982: *Official Gazette of the SRY No*. 46/1996; *Official Gazette of the RS,* No. 46/2006.

are regulated in the Family Act,[1275] the Civil Registries Act,[1276] the Contentious Proceedings Act,[1277] the Non-Contentious Proceedings Act,[1278] and the General Administrative Procedure Act (hereinafter: GAPA).[1279]

The general provisions on the entry, movement, stay and return of foreign nationals are envisaged in the Aliens Act.[1280] This Act prescribes the requirements and proceeding for family reunification, applicable in cases when provided by the Act on Asylum and Temporary Protection.[1281] The latter prescribes the asylum proceeding, status, rights and duties of asylum seekers and persons granted the right to asylum and temporary protection, as well as other important issues of asylum and temporary protection (e.g. stay of the asylum seeker in Serbia, family reunification, exemption from reciprocity, special rights of unaccompanied minors).

In respect of relevant *international treaties*, the Republic of Serbia is bound by the Convention and the Protocol relating to the Status of Refugees,[1282] the New York Convention relating to the Status of Stateless Persons,[1283] Convention on the Nationality of Married Women,[1284] and the Convention on the Rights of the Child.[1285] In view of general protection of human rights, Serbia is a Contracting State of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: The European Convention).[1286]In the matters of proving *foreign personal and/or family status based on the public documents*, Serbia is bound by the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.[1287] In view of the conventions adopted under auspices of the C.I.E.C. (*Commission Internationale de l'Etat Civil*), Serbia has ratified the 1956 Paris Convention on the Issue of Multilingual Extracts from Civil Status Records to be used abroad[1288] which is supersede by the 1976 Vienna Convention on the Issue of Multilingual Extracts from Civil Status Records.[1289] Likewise, the CoE

1275 *Official Gazette of the RS,* No. 18/2005, 72/2011, 6/2015. The Family Act contains substantive and procedural provisions regarding the celebration of marriage and its termination, cohabitation, personal and property consequences of marriage and cohabitation, parental responsibility, adoption, guardianship, foster care, rights of the child, paternity and maternity, maintenance obligation, civil protection from domestic violence.

1276 *Official Gazette of the RS,* No. 20/2009, 145/2014 and 47/2018. The Act on civil records contains provisions on keeping the civil registries on birth, marriage and death (including those kept by the Serbian diplomatic and consular missions), deciding in the administrative disputes on civil registries matters, entry in the civil registries based on foreign public documents and the excerpts from the civil registries.

1277 *Official Gazette of the RS*, No. 72/2011, 49/2013, 74/2013, 55/2014, 87/2018 and 18/2020. The Act on Contentious Proceedings envisages, *inter alia,* general procedural rules, territorial jurisdiction (including the rule on filling the legal gaps of international jurisdiction), service of documents, taking of evidence, internal and international legal aid, appeal and extraordinary legal recourses, thereby supplementing the rules of personal and family status proceedings when they are subject matter of civil courts.

1278 *Official Gazette of the RS*, No. 46/95, 18/2005, 85/2012, 45/2013, 55/2014, 6/2015 and 106/2015. The Act on Non-Contentious Proceedings regulates the proceedings on the deprivation and restoration of the capacity to act; on declaration of death of a missing person and proving the death; on determining the time and place of birth; on prolongation of parental responsibility; on granting the permission to enter into marriage for minors who have attained the age of 16;

1279 *Official Gazette of the RS,* No. 18/2016 and 95/2018. The Act on general Administrative Proceeding contains general rules on administrative proceeding; on international legal aid; on the use of foreign public documents and on the procedure on oral statement of a party when the public documents are missing.

1280 Official Gazette of the RS, No. 24/2018 and 31/2019.

1281 *Official Gazette of the RS*, No. 24/2018.

1282 *Official Gazette of the SFRY - International Treaties,* No. 15/90; *Official Gazette of the FRY - International Treaties,* No. 4/96 and 2/97.

1283 *Official Gazette of the SFRY - International Treaties,* No. 9/59.

1284 *Official Gazette of the FPRY - Addendum, 115/1958, Official Gazette of the SRY - International treaties,* 12/1993.

1285 *Official Gazette of the SFRY -International Treaties*, 15/1990, *Official Gazette of the SRY - International Treaties*, 12/1993.

1286 *Official Gazette of Serbia and Montenegro-International Treaties*, No. 9/2003, 5/2005 and 7/2005; *Official Gazette of the RS - International Treaties,* No. 12/2010 and 10/2015.

1287 *Official Gazette of the FPRY - Addendum,* 10/62.

1288 *Official Gazette of the SFRY - International Treaties and other agreements,* No. 9/1967, 4/1970.

1289 *Official Gazette of the SFRY - International Treaties and other agreements,* No. 8/91.

convention relevant in matters of personal/family status binding Serbia is the 1968 European Convention on Information on Foreign Law.[1290]

Finally, with regard to the Hague conventions on Private International Law which are relevant for protection of *internationally displaced children*, Serbia is bound by the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter: the 1996 Hague Convention).[1291] In cases of international adoption of these category of children, the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption may, in certain cases, come to the fore.[1292] The civil procedure for the return of wrongfully removed or retained children (so-called international abduction of the children) is regulated in the 1980 Hague Convention on the Civil Aspects of International Child Abduction.[1293]

2. Proving and/or recognition of personal and family status acquired abroad

Before proceeding to the discussion on the issue of the personal and/or family status recognition, it should be noted that the problem of characterization of certain issues as the matter of personal or family status could also come to the fore. In that respect, the dividing line between these two types of legal status of natural persons may be, in certain cases, rather vague. The problem is triggered due to the lack of autonomous notion of personal and family status in the 1982 PIL Act. In such circumstances, the national PIL theory has strived in the past to characterize the issues of legal capacity, the capacity to act (and its special types) as the matters of personal status. Likewise, the theory offered the same interpretation of marriage and its termination, as well as the issues pertaining to parental responsibility, guardianship, adoption, granting permission to marry, and paternity and maternity.[1294] Nevertheless, it should be stressed that some of these issues (parental responsibility, adoption, paternity and maternity issues) could be equally interpreted as family status issues or, at least, as the issue of dual character. However, when it comes to the characterization of family status matters, the theory remained tacit.

On the other hand, the characterization provided in the 2014 Draft PIL Act could be understood as the *opinio communis* of the contemporary Serbian PIL theory, particularly considering composition the official Working Group.[1295] According to the Draft PIL Act, the *stricto sensu* interpretation of the personal status refers only to the issues of legal capacity, capacity to act, guardianship, and personal name. All other issues (marriage, adoption, paternity, maternity, parental responsibility) are characterized as the matters of family status. However, it cannot be denied that the latter have mixed legal nature, but their effect imply (prevailing) implications in terms of family relations.

1290 *Official Gazette of the SFRY - International Treaties and other agreements,* No. 7/1991.

1291 *Official Gazette of the RS - International Treaties,* No. 20/2015.

1292 *Official Gazette of the RS- International Treaties,* No. 12/2013. The issue of international adoption of the unaccompanied children will not be discussed here. However, the explanation (in Serbian language) of the (in)applicability of the 1993 Hague Convention to this category of children could be found in S. Marjanović, *Zaštita dece u haškim konvencijama o međunarodnom privatnom pravu* (*Children Protection in the Hague Conventions on Private International Law),* PhD thesis, Faculty of Law University of Niš, 2015, pp. 348-356.

1293 *Official Gazette of the SFRY - International Treaties*, No. 7/91. However, this issue is not included in the Report due its complexity as well as the fact that, according to the available data at the time when this Report was written (April 2021), there were no recorded cases on forced migrations involving the Republic of Serbia.

1294 M. Dika. G. Knežević, S. Stojanović, Komentar Zakona o međunarodnom privatnom i procesnom pravu (Commentary on the Private International Law and the International Civil Procedure Act), Beograd: Nomos, 1990, p. 311.

1295 The 2014 Draft PIL Act was drafted by the official Working Group established by the Ministry of Justice of the Republic of Serbia. The Working Group gathered all PIL professors in the Republic of Serbia: Prof. Mirko Živković (President of the Group), Prof. Gašo Knežević (Vice-President), Pro. Bernadet Bordaš, Prof. Maja Stanivuković, Prof. Vladimir Pavić, Prof. Slavko Đorđević, Prof. Petar Đundić, and Prof. Marko Jovanović. The author of this report was appointed the Secretary of the Working Group.

As opposed to the national PIL theory, the only statutory characterization of personal status matters is the one currently envisaged in the Civil Registries Act. In terms of the latter Act, personal status implies only birth, marriage and death.

When the so-called Western Balkan route was still open (2015-2016), the Republic of Serbia was only a transit country. At the time, forced migrants encountered the issues of proving and/or recognizing the personal and family status acquired abroad mainly in cases where their personal identity and family members' identity had to be established, especially in asylum proceedings and family reunification proceedings.[1296] In the period after the closure of the Western Balkan route, a certain number of forced migrants had to stay in Serbia for a longer time, mostly due to the fact that the European states of final destination changed their migration policies. They limited the numbers of forced migrants who were allowed to enter the respective states, not only as the matter of migration policy but also due to the constraints imposed by the Covid-19 pandemic outbreak (as *vis maior*).[1297]

Apart from those migrants who had to stay in Serbia as a result of these circumstances (while still intending to reach the states of final destination), a certain number of forced migrants eventually settled in Serbia. In the latter case, it gave rise to some issues of proving or recognizing their personal and/or family status in practice. The problems were triggered either by the (complete or partial) lack of foreign public documents or by the inability to establish the authenticity of the foreign public documents.

2.1. Probative effect of foreign public documents - general issues

In most cross-border cases, proving personal/family status on the basis of the foreign public documents would fall into the *apostille* system.[1298] If a bilateral treaty abolishing the legalization had been concluded with the State from which the document originates (State of origin), the public document would have probative effect in Serbia, and vice versa, without any formality.[1299]

Since the Republic of Serbia is not the first state whose territory the refugees enter, it is possible that some of the public documents originate from other European states bound by the *Apostille* Convention or even bilateral treaty concluded with Serbia. Hence, the recognition of status would be guaranteed.

[1296] In that regard, see the National Report of D. Vučetić and M. Prica in this Guide, *ad* 2.1.5. According to the data provided by the Group 484 (headed by Ms. Miroslava Jelačić) at the national exchange seminar on implementing the Forced Migrations Project (organized on 26 February 2021 at the Law Faculty in Niš), there are only indirect data on the quality of the application of the UN *Recommended principles and guidelines on human rights at international borders (*See: *https://childhub.org/sites/default/files/library/attachments/ohchr_recommended_principles_guidelines.pdf)*. The indirect data were based on the reports of the Republic of Serbia on the European integration process. Consequently, it should be noted that the research on the application of all ten UN principles in Serbia is much needed. The author of this Report would like to thank Ms. Jelačić for close cooperation and discussion on this issue.

[1297] On the migration policies in the EU see especially N. Reslow, *Transformation or continuity? EU external migration policy in the aftermath f migration crisis, In: Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis (eds. S. Carrera, J.S. Vara, T. Strik*), Edward Elgar Publishing, 2019, crp. 95 et seq.

[1298] It is due to the fact that the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents has an exceptionally high number of Contracting States (124 States, including Serbia).

[1299] A significant number of bilateral treaties in PIL matters in force in Serbia envisage the complete abolition of legalization (bilateral treaties regulating international legal aid in civil matters concluded with Alger (*Official Gazette of the SFRY - International Treaties, 2/81)*, Austria (*Official Gazette of the FPRY - Addendum, 8/55*), Belgium (*Official Gazette of the SFRY - Addendum, 7/74)*, Bosnia and Herzegovina (*Official Gazette of the Serbia and Montenegro International Treaties - addendum, 6/2005),* Belorussia (*Official Gazette of the RS - International Treaties, 13/2013)*, Croatia (*Official Gazette of the SRY - International Treaties, 1/1998)*, Czech Republic (*Official Gazette of the SFRY - Addendum, 13/1964)*, Cyprus (*Official Gazette of the SFRY - International treaties, 2/1986)*, Italy (*Official Gazette of the FPRY - Addendum, 5/1963)*, France (*Official Gazette of the SFRY - International Treaties, 55/72)*, Greece (*Official Gazette of the FPRY - Addendum, 7/60)*, Hungary (*Official Gazette of the SFRY - Addendum, 3/86, with amendments 1/87)*, Iraq (*Official Gazette of the SFRY - International Treaties*, 1/87), Montenegro (*Official Gazette of the RS - International Treaties, 1/2010)*, Mongolia (*Official Gazette of the SFRY - International Treaties, 7/82)*, North Macedonia (*Official Gazette of the Serbia and Montenegro* - Addendum, 22/2004), Slovenia *(Official Gazette of the RS - International Treaties, 9/2011)*, Slovakia (*Official Gazette of the SFRY - Addendum, 13/64)*, Romania (*Official Gazette of the FPRY - Addendum, 8/61)*, Russia (*Official Gazette of the FPRY - Addendum, 5/63)*, Poland (*Official Gazette of the FPRY - Addendum, 5/63)*, Ukraine (*Official Gazette of the FPRY - Addendum, 5/63*). It may be said that the abolition of legalization provision is usually envisaged in the bilateral treaties regulating PIL matters in Serbia.

Otherwise, the internal phase of "full" legalization of foreign public document has to be completed in the country of origin. The Serbian diplomatic and consular mission in the state of origin of the public document or the Serbian Ministry of Foreign Affairs (if Serbia does not have such a mission) would be competent in the international phase of legalization.[1300]

With regard to the personal/family status of the *refugee* enjoying asylum in Serbia, two scenarios could come to the fore: first, where the refugee possesses the public documents but they are not legalized (the issue of authenticity) and, second, when he/she cannot present public documents at all.

When the refugee is able to provide the public documents proving his/her personal/family status, the lack of legalization of such documents may arise as a problem. On the one hand, a number of forced migrants come from the states not bound by the Hague *Apostille* Convention; on the other hand, there are no bilateral treaties in the PIL matters between Serbia and the relevant national states of the refugees enabling full dispensation from the requirement of legalization of documents.[1301] In addition, these States are not bound by any of two *C.I.E.C.* conventions on dispensation from legalization of certain extracts from civil-status records in force in the Republic of Serbia: the 1956 Convention on the issue of certain extracts from civil-status records for use abroad (Art. 5) and the 1976 Convention on the issue of multilingual extracts from civil-status records (Art. 8).

In such circumstances, the issue of the probative effect if the foreign public document could be, at least partially, resolved through international cooperation whenever it is possible. This would be the case when the state of issuance does not coincides with the state of refugee's origin (nationality). Otherwise, international cooperation would put the refugee in danger, given the fact that revealing his/her identity and his/her location are inevitable (which further entails a breach the confidentiality principle).

If the cooperation with the state of document's origin cold be set in motion, it would include the verification of the document's authenticity.[1302] In addition, the international cooperation could result in issuing of co called *supplementary judgments* in the states of transit, especially in terms of birth and marriage, which probative value should be recognized, unless the fraud is obvious or the judgment lacks authenticity.[1303] This approach would be also in line with the administrative assistance guaranteed to the refugees by the 1951 Geneva Convention (Art. 25 para. 1). According to the Geneva Convention, administrative assistance may be rendered by issuing documents and certifications, but it can also take other forms (e.g. correspondence, investigations, recommendations, and counselling, personal assistance).[1304]

Insisting that the refugee is, in every case, obliged to prove his/her status by the public document issued in the State from which he/she had to flee is not in compliance with the refugee status and the protection envisaged by the 1951 Geneva Convention. Refugees cannot be expected to seek protection *in every single case* from the authorities of the country from which they had to flee. Therefore, the administrative assistance comes to the fore in all cases where a refugee cannot have recourse to the authorities abroad. Furthermore, the provision of Art. 25 of the Geneva Convention binds the competent Serbian authorities

[1300] Act on the Legalization of Public Documents in International Affairs (*Official Gazette of the SFRY*, No. 6/73 and the *Official Gazette of Serbia and Montenegro*, No. 1/2003).

[1301] According to the data provided by the Commessariat for refugees and migrations of the Republic of Serbia, and the Asylum Office, and collected at the national exchange seminar in February 2021, forced migrants who were granted asylum in Serbia are mostly the nationals of Syria, Pakistan, Afganistan, Bangladesh. Bearing in mind the States of forced migrants' origin, Serbia entered into a bilateral treaty with Iraq on legal and judicial cooperation, guaranting the complete dispensation from legalization (*Official Gazette of the SFRY - International Treaties*, 1/87).

[1302] This approach has been suggested for the EU Member States in relations with third states. S. Corneloup, B. Heiderhoff, C. Honorati, F. Jaul-Seseke, Th. Kruger, C. Rupp, H. van Loon, J. Verhellen, *Private International Law in a Context of Increasing International Mobility: Challenges and Potential*, 2017, pp. 13-14.

[1303] *Ibid,* p. 14.

[1304] *Commentary on the Refugee Convention 1951, Articles 2-11, 13-37*, published by the Division of International Protection of the United Nations High Commissioner for Refugees 1997, p. 60; retrieved from https://www.unhcr.org/3d4ab5fb9.pdf.

to provide administrative assistance if the refugee resides in Serbia.[1305] In that respect, Serbian authorities (usually, the civil registrar in the matters of personal status) will have to issue documents substituting the foreign public documents which cannot be presented (pursuant to Art. 25 para. 2 of the 1951 Geneva Convention). Such substitute documents will resolve both issues: the lack of document itself as well as the factual impossibility to confirm its authenticity. Documents or certifications so delivered have the probative effect in the absence of proof to the contrary.[1306] As a matter of fact, the application of the provision on the administrative assistance (Art. 25 para. 2 of the Convention) is consistent with the possibility already envisaged in the Serbian General Administrative Procedure Act (GAPA). Pursuant to Art. 134 of the GAPA, when the administrative authority cannot determine the facts by referring to other evidence, or when the gathering of evidence would hinder the exercise of the party's rights, the oral statement, given by the party to the competent authority for the official record, would suffice.

2.2. Proving the personal/family status and the right to marry

The problem of recognition of personal/family status arises also in cases when it is not directly aimed at establishing the refugee status. One of interesting issues, actually raised before Serbian civil registrar, concerns one of the basic human rights – the right to marry. In terms of international forced migrations, the celebration of marriage in the State of refuge includes not only the issuance of *nulla osta al matrimonio* but also the "controversy" about the applicable law.

In general, the material requirements for entering into marriage in Serbia are govern, for each prospective spouse, by his/her national law.[1307] Nevertheless, the statutory conflict-of-law rules are set aside in case the refugee applies for the celebration of marriage in Serbia. Instead of nationality, the personal status will be governed by the law of the refugee's domicile, or the law of the State of residence (if he/she has no domicile), as stipulated in Art. 12 para. 1 of the Geneva Convention. Since the refugees' domicile does not necessarily correspond to the stringent administrative notion of domicile envisaged in Art. 110 para. 6 of the Aliens Act,[1308] it should be determined in a more flexible way. Otherwise, domicile would usually refer to the State of origin, thereby depriving the replacement of nationality, as a connecting factor, with domicile of any sense.[1309] When a forced migrant is granted the right to take refuge in Serbia, it should be deemed that he/she has established the domicile for the purpose of Art. 12 para. 1 of the Geneva Convention.[1310] Hence, the Serbian law would govern the marital requirements. In practice of our national authorities, the type of the residence which is guaranteed to the person enjoying asylum in Serbia remains

[1305] In general, the foreign nationals could easily establish residence in Serbia. The intention to reside in Serbia more than 24 hours is sufficient (Art. 110 para. 2 of the Aliens Act). See in detail *infra* "4. Application of foreign law".

[1306] Art. 25 para. 3 of the Geneva Convention.

[1307] Art. 31 para 1 of the 1982 PIL Act.

[1308] Art. 110 para. 6 of the Aliens Act states as follows: "For the purposes of this Act, domicile is a place where a permanently resident foreigner has settled with intention to live there permanently, i.e a place where he/she has the centre of daily life activities, professional, economic, social and other ties proving his/her permanent connection with the place of settlement." (The notion of domicile has strong resemblances to the notion of habitual residence, but these two concepts are not identical. The habitual residence corresponds to the State where the person has the centre of his/her vital interests and where that person habitually resides, even in the absence of registration by the competent authority. In order to determine habitual residence, the competent authority shall assess all the circumstances of personal or professional nature that show durable connections with the specific State or indicate an intention to create such connections. The 1982 PIL Act does not envisage the habitual residence as a connecting factor at all, but the Serbian PIL recognizes the concept of habitual residence in terms of international conventions in force in Serbia (primarily, the Hague conventions on PIL). On the other hand, the 2014 Draft PIL Act of the Republic of Serbia heavily relies on this connecting factor, introducing the guiding principles for its assessment and establishment (Art. 6 of the 2014 Draft PIL Act).

[1309] *The Refugee Convention, Travaux preparatoires analysed with a commentary* by dr Paul Weiss, p. 79. Retrieved from https://www.unhcr.org/4ca34be29.pdf.

[1310] The person enjoying the asylum in the Republic of Serbia has the right to reside in Serbia (Art. 59 para. 1(1) of the Act on Asylum and Temporary Protection).

disputed,[1311] due to the inconsistencies between Act on Asylum and the Aliens Act.[1312] The issue has to be resolved consistently, in a way that provides full protection of the refugee's rights in line with the Geneva Convention which includes personal status as well.

In any case, when the proceeding for the celebration of marriage is instituted before the Serbian civil registrar, the prospective spouses of foreign nationality have to provide the certificate proving the absence of marital impediments issued in the State of their nationality (*nulla osta al matrimonio*). *Nulla osta* constitutes a public document which, being issued abroad, has to be legalized (provided that the legalization is not abolished by diplomatic or factual reciprocity).

In a recent case of an Iranian refugee, who applied in 2021 for the marriage celebration in Serbia with his fiancé - a Serbian national, the civil registrar refused the request because the Iranian refugee had not submitted *nulla osta* nor the excerpts from Iranian civil registries.[1313] In the appeal proceeding, the Ministry of Family Care and Demography had to decide on the application of Art. 12 of the Geneva Convention, but also on the issuing of substituting documents in line with Art. 25 para. 2 of the Convention. In the second instance proceeding, the Ministry reversed the first instance decision and ordered a retrial of the first instance proceeding. In the retrial, the civil registrar asked the Serbian Commissariat for refugees and migrations whether that institution is authorised to issue the documents referred to in Art. 25 of the Geneva Convention, including those necessary for the marriage celebration, if the person enjoys a refugee status and asylum in Serbia. The Commissariat replied that it was not authorised to interpret the Geneva Convention or to issue such documents to the persons who are enjoying asylum in Serbia. The civil registrar also turned to the Serbian Ministry of Internal Affairs and several other institutions which confirmed that the Commissariat is not authorized to issue documents necessary for the marriage celebration. The Iranian refugee and his Serbian fiancé provided a narrative account of the reasons for the marriage celebration (they were expecting a child), while the Iranian refugee explained that he could not ask the Iranian Embassy in Belgrade to issue the missing documents because he, being a Christian, had escaped the country fearing prosecution due to his religion. He also explained that he had been previously married in Iran, but that the marriage was divorced in 2017. At the end, the request for the marriage celebration was rejected once again on the same ground: the breach of Art. 17 of the Family Act which prohibits polygamy due to the impossibility to verify the absence of this marital impediment. Then, the refugee and his fiancé lodged an action before the Administrative Court asserting the breach of Art. 25 of the Geneva Convention, the Serbian Constitution (Arts. 17, 57, and 62), and Art. 81 of the Act on Asylum and Temporary Protection which envisages the cessation of the right to asylum in case the refugee pursues the protection of the State of origin and accepts it. The Administrative Court rejected the action as ill-founded. The Court assessed that the civil registrar acted correctly in the previous proceedings. Thus, the marriage cannot be celebrated in Serbia due to the lack of necessary documents proving the absence of polygamy as the marital impediment envisaged in Arts. 292 and 293 of the Family Act and in Art. 32 para. 2 of the 1982 PIL Act (as a special public policy clause). Likewise, the Court referred to Art. 12 of the Geneva Convention, pointing that the law applicable to marital

[1311] On the interpretation of (temporary) residence of asylum seekers in Serbia, see the National Report of D. Vučetić, M. Prica in this Guide, *ad* 2.3.4.

[1312] In their reports, some NGOs in Serbia have pointed to the same problem. E.g. L. Petrović, S. Tošković, *Institucionalni mehanizmi za integraciju osoba kojima je odobren azil – Analiza pravnog okvira u Republici Srbiji uz osvrt na relevantne direktive Evropske unije i postojeća rešenja zemalja članica koje imaju napredne sisteme integracije* (Institutional mechanisms for integration of the persons enjoying asylum - Analysis of the legal framework in the Republic of Serbia, with reference to relevant EU directives and current solutons in the Member States having advanced integration systems), Beogradski centar za ljudska prava, 2016, pp. 10–12.

[1313] Rešenje Gradske uprave Grada Beograda, Sekretarijata za upravu, Odeljenje za lična stanja građana, vođenje matičnih knjiga i izborna prava - Zvezdara (Decision of the City Administration of the City of Belgrade, Secretariat for Administation, Department for personal status of citizens and keeping the civil registries - Zvezdara), XI-03-Сл.935/2021 of 22.1.2021. The author of this Report expresses her gratitude to Mr. Vukota Vlahović (Ministry for Demography and Family Care) who, as a panelist at the exchange seminar held in February 2021 at the Law Faculty in Niš, pointed to this decision.

requirements is now Serbian Law as *lex domicili;* thus, Art. 32 para. 1 of the 1982 PIL Act should be applied accordingly. At the same time, the Court noticed that the narrative account of the parties on the fact that the previous marriage of the Iranian refugee had been divorced in Iran was not sufficient due to the lack of the Iranian public documents proving the same fact.[1314]

In this particular case, the conflict-of-laws rule on personal status envisaged in the Geneva Convention implies the application of the Serbian Family Act provisions on the marital requirements as *lex domicili* to *both* of the prospective spouses. Concerning the *nulla osta* certificate, this delicate issue cannot be solved at ease. On the one hand, the refugee cannot be expected to turn to his State which he had to escape from in every single case, despite the fact that the civil records on the basis of which the *nulla osta* certificate can be issued are kept in this State. Therefore, the Serbian civil registrar should be entitled to issue *nulla osta* pursuant to Art. 25 para. 2 of the Geneva Convention and Art. 134 of the General Administrative Procedure Act when the risk of revealing the whereabouts of the refugee leading to prosecution is too high and serious. On the other hand, the refugee's application to the authorities of the state his nationality, generally, does not necessarily lead to the cessation of the application of the Geneva Convention and the protection the refugee enjoys thereof. The Convention ceases to be applied, *inter alia*, when the refugee voluntarily addresses the authorities of his/her home country asking for protection (Article 1c(1) of the Convention).[1315] If the refugee addresses the authorities of his/her home country because he is expressly required to do so in the country of refuge, then there is no voluntariness, and further protection under the Geneva Convention is not to be denied.[1316] However, it should be borne in mind that such action of the authorities in the State of refuge violates the principle of confidentiality, which must be taken into account in cases involving refugees, as a particularly vulnerable category of persons.[1317]

Bearing in mind that the international forced migrations involve the nationals of the states in which *Sharia* law applies, the *bête noire* of every civil registrar in Serbia deciding on the application for marriage celebration is the clandestine risk of polygamy. As pointed out in the case of Iranian refugee, this is the main reason for the civil registrars to demand from refugees to submit a *nulla osta* certificate from their home country. In fact, there is no other way for the civil registrar to determine the absence of a previously valid marriage.

Yet, even when a foreign *nulla osta* certificate has been submitted, the Serbian civil registrar is entitled to decline the request if the celebration of marriage would jeopardize the Serbian public policy. In particular, the Serbian public policy includes kinship (as well as adoptive relationship and affinity),[1318] polygamy and mental incapacity[1319] as marital impediments, expressly envisaged in the 1982 PIL Act's *special* public policy exception.[1320] The rationale for the express referral to these impediments in PIL legislation may be

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[1314] Upravni sud u Beogradu (Administrative Court in Belgrade), 3 У 27033/21 of 03.03.2022. I would like to express my gratitude to Mr Vukota Vlahović (Ministry for Demography and Family Care) for his participation at the exchange seminar held on February 2021 at the Faculty of Law Niš, and also for informing me about this decion later on.

[1315] Office of the United Nations High Commissioner for Refugees, *The Cessation Clauses: Guidelines on Their Application,* 1999, paragraph 7, https://www.refworld.org/pdfid/3c06138c4.pdf.

[1316] *Ibid,* paragraph 9.

[1317] UNHCR, *Advisory opinion on the rules of confidentiality regarding asylum information*, 2005, стр. 1–4, https://www.refworld.org/pdfid/42b9190e4.pdf. UNHCR Guidelines of Sharing the Information on Individual Cases, Confidentiality Guidelines, 2001paragraph 3 et seq. On the general ban on contacting the diplomatic-consular representation of the country of origin, see also D. Vučetić, M. Prica, *op.cit*., ad 2.1.5.

[1318] Under Arts. 19-21 of the Serbian 2005 Family Act, marriage cannot be entered into by blood relatives in the direct line, or relatives in the collateral line (siblings, uncle and niece, aunt and nephew, and children of siblings). The same rule applies by analogy to the relatives by adoption. Besides, affinity is an impediments if it concerns the relatives in direct line (father-in-law and the daughter-in-law; mother-in-law and son-in-law; stepparents and stepchildren). Nevertheless, in the latter case, marriage may not be declared null and void if it was celebrated for justified reasons.

[1319] Arts. 33 and 34 of the 2005 Family Act.

[1320] Art. 31 para.2 of the 1982 PIL Act. This special public policy exception does not interfere with other impediments envisaged in Serbian family law which could also result in a voidable marriage, such as: same-sex marriages, marriages

found in Serbian family law: the marriage celebrated in spite of these constraints is *null and void*.[1321] Therefore, the civil registrar cannot verify the absence of these impediments without the public document issued in the refugee's home state.[1322]

Likewise, the proper interpretation of the public policy exception in status and family relations entails the existence of the *minimum connection* between the legal relationship in question and the Serbian legal order.[1323] As for the marriage celebration, the *minimum connection* requirement should be deemed fulfilled when the marriage is supposed to be entered into in the Republic of Serbia.

Considering the highly controversial issue of potential risk of breaching the State of refuge's public policy (which cannot be completely resolved without obtaining the foreign original excerpts from the civil registries), the jurisprudence of some other jurisdictions (also prohibiting polygamy) showed that this issue has to be resolved in favour of the refugee. In a 2017 judgment, the Mytilini County Court in Greece took a precedent-standpoint recognizing the right of a Syrian refugee to enter into marriage in Greece based on *nulla osta* issued by the Greek authorities. In its ruling, the Greek court found that the protection of the fundamental rights to celebrate marriage and to family life envisaged in the European Convention on Human Rights must prevail over the security of Greek family law. Consequently, the Greek court found that the missing documents can be substituted by a simple sworn statement.[1324]

The same approach has to be adopted by the Serbian authorities competent to decide on the application for the celebration of marriage. Otherwise, it may constitute a breach of the right to marry, envisaged in Art. 12 of the European Convention on Human Rights (ECHR). Although the ECtHR found no violation of Art. 12 of the European Convention in terms of a mere obligation of foreign nationals to submit a statement based on the national law (*nulla osta*),[1325] the refugees' right to marry should not fall under the same stance in terms of obtaining the *nulla osta*. It is unreasonable to insist in all cases on the *nulla osta* originating from the national State of the refugee. However, it is easy to understand the concerns about polygamy and the inability to investigate whether the refugee is already married in the State of origin. In case when the foreign public document cannot be submitted, Art. 25 para. 2 of the Geneva Convention leaves no room for manoeuvre. The duty of issuing a substitute document is imposed on the State in which

between the guardian and the protégée, marriages celebrated between the persons under the marital age (minority), marriages celebrated without the spouses' intention to actually cohabitate, or marriages celebrated in the absence of spouses' free will and mutual consent (Arts. 31, 32 and 36 of the Family Act).

[1321] Arts. 33-35 of the 2005 Family Act.

[1322] Arts. 31, 32 and 36 of the 2005 Family Act. Although the 1982 PIL Act defines the public policy as a general institute that is the foundation of the social system, it further narrows down its content by relying only on those basic principles envisaged in the Constitution. Namely, Art. 4 of the 1982 PIL Act envisages that the foreign applicable law shall not be applied if its effects will be contrary to the principle of social organization laid down in the Constitution of the Republic of Serbia. The formulation has already been heavily criticized in the national PIL theory, advocating for broader interpretation which includes mandatory principles and provisions contained in statutory acts as well. M. Dika, G. Knežević, S. Stojanović, op.cit., p. 16; M. Stanivuković, M. Živković, *Међународно приватно право: Општи део (Private International Law: General Part)*, Belgrade, 2015, p. 353; S. Đorđević, Z. Meškić, *Međunarodno privatno pravo I (Private International Law I)* Kragujevac, 2016, p. 129; T. Varadi, B. Bordaš, G. Knežević, V. Pavić, *Međunarodno privatno pravo (Private International Law)*, Belgrade, 2020, p. 162. Regrettably, the national legislator failed to follow an example of the public policy exception formula of the Hague conventions on Private International Law binding Serbia. With minor differences (due to the different matters regulated), conventions adopted under auspices of the Hague Conference on Private International Law envisages the public policy exception if the effects of the applicable law would be manifestly contrary to the public policy of the forum (e.g. Art. 13 of the Hague Protocol on Law Applicable to Maintenance Obligations, *Official gazette of the RS - International Treaties,* No. 1/2013).

[1323] S. Đorđević, Z. Meškić, op.cit, p. 132; M. Stanivuković, M. Živković, op.cit, pp. 355-356 ; Dika, Knežević, Stojanović, op.cit, p. 19; T. Varady, B. Bordaš, G. Knežević, V. Pavić, op.cit, p. 157. On the other hand, in terms of recognition and enforcement, foreign judgments on the status of nationals of the State of origin are to be recognized with the dispensation of the public policy assessment (Art. 94 of the 1982 PIL Act).

[1324] HIAS Greece Press Release: HIAS Greece Secures First Civil Marriage License For Syrian Refugees, 27 July 2017, https://www.hias.org/news/press-releases/hias-greece-secures-first-civil-marriage-license-syrian-refugees

[1325] ECtHR case: *Klip and Kurger v. the Netherlands*, Commission decision, 1977.

the refugee resides, or to the competent international authority, such as the UNHCR.[1326] In that regard, Italy left the issuance of *nulla osta* to the Office of the High Commissioner for Refugees.[1327]

Another risk which the authorities in the State of refuge strive to avoid is the celebration of marriage of convenience. In the Republic of Serbia, the marriage of convenience is under scrutiny of the Family Act and the Aliens Act. Although the marriage of convenience is not expressly defined in the Serbian Family Act, it could fall under the category of marriage entered into without the intention to establish conjugal community,[1328] which is the legal ground for the nullity of marriage.[1329] This marriage may be declared null and void on the claim of any spouse, or any other person having legal interest, including the public prosecutor, considering that the Serbian law will be applied to this matter.[1330] On the other hand, the Aliens Act expressly prescribes the marriage of convenience as the reason for refusing the application for family reunification (Art. 60). The Citizenship Act of the Republic of Serbia allows the foreigner who has been married to a Serbian national for at least three years to acquire the Serbian citizenship (nationality).[1331] Since the latter Act has not introduced the marriage of convenience as an impediment, the acquisition of the Serbian nationality could be avoided only based on the judgment declaring the nullity of such marriage. In any case, the risk of marriage of convenience may be ameliorated by the civil registrar's more profound investigation (than usual) on the circumstances of the case before rendering the decision on the application for marriage celebration.[1332] This approach is already implemented in some of the EU Member States.[1333]

2.3. Family reunification

The proving and recognition of the family status acquired abroad is one of the most discussed civil law issue in the context of forced international migrations.[1334] In respect of this matter, the Geneva

[1326] *Commentary on the Refugee Convention 1951*, p. 61. In France, the asylum authority issues such substitute documents to persons who have been granted international protection (refugees and beneficiaries of subsidiary protection). Likewise, the Office of the Commissioner General for Refugees and Stateless Persons (CGRS) in Belgium issues a marriage certificate to recognized refugees, but only when both spouses reside in Belgium. S. Corneloup *et al*, *op.cit*, pp. 19-20.

[1327] Italy formalized this procedure on April 9, 1974. See the data on the website of the UNHCR in Italy (https://www.unhcr.org/it/cosa-facciamo/soluzioni-durevoli/iohodiritto/).

[1328] Art. 32 para. 1 of the Family Act.

[1329] Marriage shall not be declared null and void if the conjugal communion has been established later on (Art. 32 para. 2 of the Family Act).

[1330] Art. 212 of the Family Act. The applicable law for the nullity of the marriage will be the Serbian law, pursuant to Art. 34 of the 1982 PIL Act, referring to the law applicable to the material requirements for entering into marriage. In cases involving refugees, nationality is substituted with domicile/residence of the person concerned (Art. 12 para. 1 of the Geneva Convention), which would lead to the application of Serbian law as the State of refuge.

[1331] Art. 17 of the Citizenship Act, *Official Gazette of the RS,* 135/2004, 90/2007 and 24/2018.

[1332] The civil registrar is entitled to refuse the celebration of marriage if all requirements envisaged in the Family Act have not been met (Art. 293 para. 2 of the Family Act). However, the Family Act narrows the notion of the marriage of convenience by referring only to the lack of conjugal communion. By contrast, Art. 60 of the Aliens Act envisages a much broader approach. In addition to the lack of conjugal communion, this Act also refers to other circumstances which may indicate that the marriage of convenience has been celebrated (the spouses met only at the marriage ceremony; they fail to give accurate personal data; they do not speak the language that both of them understand; the remuneration given in respect to the celebration of marriage, with exception of dowry, if it is not in compliance with the tradition in the spouses' states of origin; evidences of former marriage of convenience of either spouse).

[1333] E. g.. in Germany, a prospective spouses seeking asylum are interviewed prior to the marriage celebration approval. If the answers are plausible, they are deemed to be married. S. Corneloup *et al, op.cit*, p. 19.

[1334] It is an inevitable part of almost every handbook/guide to good practice of national authorities in the states of refuge; e.g. Council of Europe, *Family Reunification for Refugee and Migrant Children, Standards and Promising Practice*, 2020; Office of the Commissioner General for Refugees and Stateless Persons in Belgium, You are recognised as a refugee in Belgium - Your rights and obligations, 2020; A. Radjenovic, Family reunification rights of refugees and beneficiaries of subsidiary protection, European Parliamentary Research Service, 2020; United Kingdom - Family reunion: for refugees and those with humanitarian protection, 2020; F. Nicholson, The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification, UNHCR, Division on International Protection, 2018.

Convention introduces the theory of vested rights,[1335] as long as these rights, stemming from the personal status acquired abroad, are in compliance with the public policy of the State of refuge. Nevertheless, the recognition of the family status is not spared of any controversy. The lack (complete or partial) of public documents evidencing, *inter alia*, the family ties may have a negative effect on family reunification. Besides, *ordre public* of the State of refuge may be confronted with the recognition of polygamous marriages or child marriages, which could also result in refusal of family reunification. In case of a polygamous marriage, family reunification will be granted in Serbia only to one spouse and the spouses' joint children below the age of 18 who have not entered into marriage.[1336]

In terms of family reunification, Art. 70 of the Act on Asylum and Temporary Protection envisages that a person who has been granted the right to asylum has the right to be reunited with his/her family members. A minor child born in marriage or out of wedlock, as well as an adopted child or a minor stepson/stepdaughter of a person who has been granted the right to asylum, provided that he/she has not started his own family, follows the legal position of the parent who has been granted the right to asylum. As a rule, the family member status is recognized in Serbia to the spouse when the marriage was celebrated abroad before entering Serbia, to extramarital partners in accordance with the Serbian law, to their underage children regardless of the parents' marital status, to minor adoptive children and step-children.[1337] The temporary stay of other family members of a person who has been granted the right to asylum in Serbia is governed by general provisions of the Aliens Act.[1338] In exceptional cases, other persons could be recognized as the family members pursuant to the Aliens Act. This includes other relatives of Serbian national, or foreigners awarded with temporary or permanent stay permit and relatives of this person's spouse or extramarital partner, as long as these family members depend on the care of this Serbian national/foreigner and no appropriate family care could be organized in the state of origin. In addition, the Aliens Act exceptionally recognizes the right to the temporary stay based on the family reunification to the adult child of Serbian national/foreigner awarded with temporary or permanent stay permit, child of this person's spouse or extramarital partner who has not entered into marriage, if the child cannot take care of himself due to the health issues (Art. 55 para. 3 of the Aliens Act).

The lack of public documents proving the family ties or the fact that the documents have not been legalized should be resolved through international cooperation with the State of origin, as discussed in terms of the establishing evidence and recognition of personal/family status.[1339] Where the family member has the public document or substitute document issued in a state other than the State of his/her nationality (e.g. a country where he formerly enjoyed asylum), the refugee must try to obtain the necessary document from that country. If the issue of certifications/documents in that state requires cooperation through official channels, the competent authorities in Serbia would be obliged to channel such a request in accordance with the administrative assistance introduced in the Geneva Convention.[1340]

2.4. Formal recognition of personal and family status acquired abroad

The issue of formal recognition of foreign court decision on personal/family status of a refugee has been raised in the Republic of Serbia only sporadically. In respect of the recognition of family status *per se*, an interesting issue has arisen before Serbian courts concerning whether the formal recognition could be granted where the foreign judgments is missing, only on the facts proven by submitting excerpts from foreign civil records. The case involves a Syrian refugee, originating from the ex-SFRY, who was granted

[1335] Art. 12 para. 2 of the Geneva Convention states that the "rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he/she not become a refugee."

[1336] Art. 55 para. 4 of the Aliens Act.

[1337] Art. 2 para. 1(12) of the Act on Asylum and Temporary Protection.

[1338] Art. 55 paras. 1-3 of the Aliens Act.

[1339] See *supra ad* 2.1.

[1340] *Commentary on the Refugee Convention 1951*, p. 60.

the refugee status in Serbia and who, afterwards, instituted the formal proceeding on the recognition of the Syrian judgment on divorce. Yet, the applicant could not submit the judgment itself, but only *fully legalized* Syrian marriage certificate which contained an entry of the fact of divorce. The applicant informed the court (by providing a narrative account) about the circumstances of the case and the divorce proceeding carried out in Syria. She also informed the court about the provisions of *Shariah* law applied not only to the divorce but also to the parental responsibility pertaining to the applicant's minor son, which was also included in the Syrian judgment. No evidence was submitted in respect of the parental responsibility, nor had the recognition of that part of the Syrian judgment was sought by the applicant, although the child entered in Serbia with the applicant. The whereabouts of the former husband were unknown as he had fled from Syria due to the war, but he was allegedly last seen in Turkey. Finally, the Serbian court granted formal recognition of the divorce judgment.[1341] In its decision, the court stated that the fact that warfare in Syria had prevented the applicant to produce the original divorce decision was taken into account.[1342] Further on, the court stated that the fulfilment of the recognition requirements envisaged in Arts. 86-92[1343] of the 1982 PIL Act was evaluated on the basis of the legalized excerpts from civil records and the applicant's narrative account.

Despite the fact that the refugees are in need of special protection, the formal recognition proceeding should not be instituted when the foreign judgment on the merits is missing. Instead, the vested rights approach envisaged in the Geneva Convention (Art. 12 para. 2) should be applied in order to entitle the refugee to exercise the right stemming from the fact of the marriage dissolution (e.g. celebration of a new marriage).[1344]

Bearing in mind that the Syrian refugee in this case acquired the Serbian nationality later on, the issue of entering the fact of divorce in the Serbian civil records may arise. Since the recognition of foreign courts decisions falls under exclusive subject matter jurisdiction of Serbian courts, the entry into the civil registries would not be possible without obtaining the formal recognition of the foreign court decision on divorce. In an exceptional circumstances (such as this one), a possible solution may be to institute the proceeding on determining the existence or non-existence of marriage in order to substitute the missing foreign divorce judgment.[1345] The international jurisdiction of a Serbian court in such proceeding depends on domicile[1346] or Serbian nationality.[1347] Bearing in mind that such jurisdictional grounds are not broad

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[1341] Rešenje Višeg suda u Subotici (Decision of the Higher Court in Subotica), 3R. 29/17 of 13.06.2017, unpublished. The author of this Report would like to thank Judge Ms. Olivera Pejak Prokeš (Court of Appeal in Novi Sad) who pointed to this important court decision as a panellist at the national exchange seminar held in February 2021 at the Law Faculty in Niš

[1342] *Ibid.*

[1343] The recognition requirements imply the finality of the judgment (which is no longer subject to appeal), indirect jurisdiction, *res judicata*, reciprocity, public policy, and right to defence. However, if the court has characterized the subject matter of Syrian divorce judgment in accordance with the interpretation of Art. 94 as explained in the *Commentary of the 1982 PIL Act*, the judgments rather falls under category of court decisions on *personal status* of the national of the State of origin; thereby the dispensation from certain requirements for the recognition should have been applied pursuant to Art. 94 of the 1982 PIL Act (impediments of exclusive jurisdiction of Serbian courts, reciprocity, and *public policy exception*).

[1344] See *supra* ad 2.3.

[1345] Although (justifiably) heavily criticized in the Serbian family law theory, the proceeding on determining the non-existence of marriage may be, surprisingly, of high importance in such cases. For the critique of the proceeding on determining non-existence of marriage in Serbian family law, M. Draškić, *Porodično pravo i prava deteta (Family Law and the Right of the Child),* Belgrade, 2011, p. 130 ft. 373.

[1346] The domicile of the defendant leads to the general international jurisdiction of Serbian courts (Art. 46 para. 1 of the 1982 PIL Act). The special jurisdiction in cases where the spouses are foreigners is subject to the last common domicile in Serbia if both spouses are foreign nationals, or to the domicile of the plaintiff in Serbia, provided that in those cases the defendant consents to the jurisdiction of the court and that the jurisdiction is allowed by the legislation of the spouses' .national state.

[1347] The nationality is decisive when it lead to *forum nationalis communis*, irrespective of where the spouses are domiciled; also if the plaintiff is a Serbian national domiciled in Serbia or if the spouses had their last domicile in Serbia, while the plaintiff was domiciled or resident in Serbia at the time of filing a civil claim; lastly, if the defendant is a Serbian national domiciled in Serbia (Art. 61 of the 1982 PIL Act).

enough to include the cases where only one of the spouses is present in Serbia (especially when the spouses are foreigners), such proceeding could only partially resolve the issue. On the other hand, when the international jurisdiction of a Serbian court for such proceeding cannot be established, the foreign public documents may be used as evidence on the marriage termination, enabling the spouse to exercise the rights stemming from the that fact, but not as a legal ground for a formal entry in the civil registries.

3. Protection of unaccompanied children - urgent and protective measures

In the Republic of Serbia, the protection of unaccompanied children in asylum proceedings is regulated by the Act on Asylum and Temporary Protection, the Aliens Act, and by the rather general provisions of the Family Act. Likewise, in this particular case, the experts of the Commissariat for the refugees and migrations and the Social Care Centres treat the unaccompanied child according to the recommendation prescribed in the 2016 *Standard Operative Procedures on the Protection of Refugee Children and Migr*ants (hereinafter: The Standard Operative Procedures).[1348]

On Private International Law level, the 1996 Hague Convention supersedes the 1982 PIL Act on issues of international jurisdiction and applicable law. The Serbian competent authorities (courts and social care centres) establish international jurisdiction towards all children who are internationally displaced due to the disturbances in their country based on their mere presence in Serbia (Art. 6 of the 1996 Convention). This jurisdiction includes not only temporary but also all other measures related to parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.[1349] The applicable law is *lex fori* (in this case - Serbian law).[1350] Moreover, the measures taken in accordance with the Convention are recognized *ipso iure* in all other Contracting States.[1351] This rule is highly important when the child, protected by the measure rendered in Serbia, enters some EU state later on (which is usually the case).[1352] Often, children leave Serbia in a relatively short period of time, before they establish habitual residence in Serbia. However, in case they stay for a longer time, habitual residence may be established, although not always without any dilemma.[1353] Then, in compliance with Art. 5 of the 1996 Hague Convention, the jurisdiction of Serbian authorities becomes regular.[1354]

Concerning proof of minority, some EU States apply various methods of age assessment.[1355] In Serbia, this matter is not subject to the medical examination/testing. Instead, the procedure envisaged in the Standard Operative Procedures is applied. The initial identification of the child and age assessment is based on the observation of the child, or the contact and interview with the child and parents or other adults who have information about the child. Therefore, experts assessing the child's age have to conduct standardised forms of assessment.[1356]

[1348] L. Milanović, M. Perišić, M. Milić, *Standardne operativne procedure - zaštita dece izbeglica i migranata (*Standard Operative Procedures - Protection of Refugee Children and Migrants), Belgrade, 2016.

[1349] Art. 1 para. 2 of the 1996 Hague Convention.

[1350] However, an authority may exceptionally apply or take into consideration another law with which the situation has a substantial connection, when it is necessary to protect the best interest of the child (Article 15(2) of the 1996 Hague Convention). P. Lagarde, *Explanatory Report on the 1996 HCCH Child Protection Convention***,** Proceedings of the Eighteenth Session (1996), tome II, *Protection of children,* p. 575. Also available at https://assets.hcch.net/docs/5a56242c-ff06-42c4-8cf0-00e48da47ef0.pdf

[1351] Art. 23 para. 1 of the 1996 Hague Convention.

[1352] All EU Member States are bound by this Convention.

[1353] For more on this issue, see: B. Heiderhoff, B. Frankemölle, *Minor refugees under the Brussels IIa-Regulation*, in B.Heiderhoff, I.Queirolo (eds), Persons on the Move: New Horizons of Family Contract and Tort Law, Rome, 2018, p. 26.

[1354] For more on the application of the 1996 Hague Convention with case-law in Serbia, see: S. Marjanović, Private International Law of the Hague Conventions in the Republic of Serbia, Faculty of Law University of Nis, 2019, pp. 156-185, 224-231.

[1355] E.g. bone testing in France, skeletal and dental examination in Belgium, health checks in Italy. S. Corneloup et al, *Private International Law in a Context of Increasing International Mobility: Challenges and Potential*, 2017, pp. 15-18.

[1356] *Standard Operative Procedures - Protection of Refugee Children and Migrants*, pp. 17-18.

When the experts involved in the initial identification of the child assess that the child is vulnerable (e.g. an unaccompanied minor), the Social Care/Welfare Centre renders the decision on provisional guardianship. Exclusively, the guardian can be only the expert of the Centre. If a refugee/migrant child is moved from the place where he/she was initially located, or if a child has been in Serbia for a longer period, the provisional guardian may be changed. Supervision over the work of the provisional guardian is performed by the Social Care Centre as the guardianship authority. The expert of the Social Care Centre who has been appointed as a provisional guardian performs his/her tasks in accordance with the decision on provisional guardianship, subject to consultation and support of the competent Social Care Centre (including assistance of external expert groups and consultation with other professionals if needed). A provisional guardianship may be transformed into permanent if the child stays longer in Serbia and needs further protection.

The second instance authority is the (newly) established Ministry for Family Care and Demography (2020). In the meanwhile, this Ministry has been appointed as the new Competent Authority (CA) for the Republic of Serbia under the 1996 Hague Convention. The Serbian CA under the 1996 Hague Convention would be in a position to contact (via e-mail, phone, fax) the CA in the EU State which is the country of the child's destination and, thus, ensure the continuation of child protection.

In respect of the children migrants, the cases of child marriages were reported only sporadically. Bearing in mind that the families usually do not stay longer in Serbia, the experts do not have enough time to discover and assess full family situation. In cases where the experts suspected the child marriage, the age of children who were observed by social care experts, ranged usually from 16 to 18. It should be emphasized that Serbian authorities could in fact intervene in order to protect the potential child bride in cases where the minor would actually enjoy the right to marry under the Serbian Family Act.[1357] According to the data of the Serbian Commissariat for Refugees and Migration, the alleged husbands are usually aware of the legal consequences pertaining to the disclosure of child marriages; for which reason they do not publicly present the child as a spouse but rather as a daughters or a relative. Nevertheless, the experts (especially Social Care Centres' professionals) collect information in the direct contact with the child. If they have an impression that the male (adult) migrant has provided false information on the nature of his relationship with the child, they bring the decision on the separate accommodation of the child and his/her placement under provisional guardianship. As far as it is known, the children who stay in Serbia for a longer period of time are not child-brides.[1358]

4. Application of foreign law

In respect of application of foreign law, all competent Serbian authorities (civil or administrative) have the duty to determine the content of foreign law *ex officio,*[1359] not only in cases where the foreign law governs relevant legal relationship, but also in cases where the application of other PIL institutes depends on the content of the foreign law (e.g. *renvoi,* characterization, adjustment, reciprocity, etc). Besides the London Convention and bilateral treaties in PIL matters, the competent authorities mostly use the methods of determining the content of foreign law as envisaged in Art. 13 of the 1982 PIL Act. The statutory methods are rather narrowed, thereby the court or administrative authority has to request the information from the Ministry of Justice or the party may submit public document proving the content of foreign law. However, the competent authority cannot oblige the party to submit such document as it is the duty of that authority to determine the content of the foreign law.

[1357] Under Art. 23 para. 2 of the Family Act, a minor who has reached the age of 16 may enter into marriage only upon obtaining the permission of the court.

[1358] For the EU study on protection of children seeking asylum, S. Corneloup, B. Heiderhoff, C. Honorati, F. Jaul-Seseke, Th. Kruger, C. Rupp, H. van Loon, J. Verhellen, *Children on the move: Private International Law Perspective,* 2017, pp. 19-22. https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583158/IPOL_STU(2017)583158_EN.pdf

[1359] Art. 13 of the 1982 PIL Act.

Except for cases involving the personal status of the refugee (when *lex domicili* should be applied pursuant to the Geneva Convention), the application of foreign law in interantional forced migration context is quite frequently based on the nationality as the principal connecting factor envisaged in the 1982 PIL Act. Hence, the application of foreign law will include the status issues (legal capacity and capacity to act) of persons under subsidiary protection in Serbia,[1360] the deprivation or restoration of foreigner's capacity to act and guardianship (except for the provisional measures),[1361] and the declaration of death of a missing person.[1362] In family matters, refugees as well as persons under subsidiary protection would be subject to their national laws in cases pertaining to divorce,[1363] personal effects of marriage and matrimonial property regime,[1364] property consequences of cohabitation,[1365] paternity and maternity disputes,[1366] and adoption.[1367] The foreign law would also govern succession issues.[1368] As for PIL issues regulated by the HCCH conventions, the conflict-of-laws rules of the 1996 Hague Convention and Hague Protocol would, in principle, lead to the application of Serbian law.

The problem of the public policy exception may be raised especially in cases where the effects of the foreign law application are contrary to the principle of antidiscrimination[1369] or equality of man and woman as spouses[1370] or parents,[1371] or to free consent to marry principle,[1372] and in cases of child marriages (if the discrepancy in the marital capacity age is high in comparison with the one envisaged in the Family Act).

Given the fact that the Aliens Act grants the right to family reunification to only one spouse, the public policy would be rarely affected by the polygamous marriages celebrated abroad. Such cases may arise only when the other spouse is granted a refugee status independently. However, it should be borne in mind that a polygamous marriage should be assessed separately in respect of certain effects of such marriage which are not *per se* contrary to the public policy (*effet attenué*). Under certain conditions,[1373] such effects of the polygamous marriage (e.g. maintenance, divorce, succession) could be allowed, which has already been the case in some EU States.[1374] As already noted, these marriages will not lead to the family reunification. Nevertheless, one may raise the issue of compliance of such a rule with the right to family life envisaged in Art. 8 of the European Convention.[1375]

[1360] Art. 14 para 1 of the 1982 PIL Act.
[1361] Art. 15 para. 1 of the 1982 PIL Act.
[1362] Art. 16 of the 1982 PIL Act.
[1363] Art. 35 paras. 1 and 2 of the 1982 PIL Act.
[1364] Art. 36 para. 1 of the 1982 PIL Act.
[1365] Art. 39 para. 1 of the 1982 PIL Act.
[1366] Art. 41 of the 1982 PIL Act.
[1367] Arts. 44 and 45 para. 1 of the 1982 PIL Act.
[1368] Art. 30 of the 1982 PIL Act.
[1369] Art. 21 of the Serbian Constitution.
[1370] Art. 3 para. 3 of the Family Act.
[1371] Art. 7 para. 2 of the Family Act.
[1372] Art. 24 of the Family Act.
[1373] In terms of *effet attenué* of the polygamous marriage, three conditions must be fulfilled - the polygamous marriage must be validly celebrated abroad; the marriage cannot stem from *fraus legis*; the particular effect of the polygamous marriage cannot be contrary to the public policy of the forum. On this concept, see in Serbian language M. Stanivuković, M. Živkvoić, *op.cit*, pp. 356-357.
[1374] S. Corneloup *et al*, *op.cit*, p. 23. More on *effet attenué* of the Serbian public policy in cases of polygamous marriages M. Stanivuković, M. Živković, op.cit, pp. 359-361.
[1375] For the EU MS, S. Corneloup *et al*, *op.cit,* p. 24.

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NATIONAL REPORT

This report provides an overview of the legal solutions in the Republic of North Macedonia on the project topic. The legal framework includesthe Private International Law Act of 2020[1378], the International and Provisional Protection Act of 2018[1379], and the Act on Legalization of Public Documents in International Affairs of 2012[1380].Given the lack of accessible practice of the competent authorities in North Macedonia, the national report was prepared based on an analysis of the applicable legal solutions. North Macedonia, as a transit country, is not the country of destinationof internationally displaced persons, refugees, asylum seekers and other "invisible" persons without identification documents (IDs).

I. Legal framework

1. The International and Provisional Protection Act (2018)

1.1. Introduction

In North Macedonia, foreigners who are persecuted by their country of origin may be granted protection (asylum) in compliance with the ratified international agreements, as well as the domestic sources of law. The Constitution of the Republic of North Macedonia (Article 29, para. 2) prescribes that: "The Republic guarantees the right of asylum to foreign subjects and stateless persons persecuted for their democratic beliefs, political convictions and activities. "

In the context of this national report, the issues of interest were first addressed in the International and Provisional Protection Act (2018). First of all, this legislative act provides definitions of terms used in this Act. For this national report, the following terms are particularly relevant:

- "*Family members* "shall mean a spouse, provided that the marriage was concluded before the arrival in the Republic of Macedonia, an unmarried partner, minor children who are not married, parents of minor children, provided that the minor children have been granted the right to asylum, or another adult in accordance with the law.[1381]

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[1378]Закон за меѓународно приватно право, „*Службен весник на Република Северна Македонија*" бр. 32/2020./Private International Law Act (PIL Act), *Official Gazette of the Republic of North Macedonia,* no. 32/2020.
[1379]Закон за меѓународна и привремена заштита, „*Службен весник на Република Македонија*" бр. 64/ 2018/ International and Provisional Protection Act, "*Official Gazette of the Republic of Macedonia*" no. 64/2018.
[1380]Закон за легализација на јавните исправи во меѓународниот сообраќај, „*Службен весник на Република Македонија"* бр. 74/2012./Act on Legalization of Public Documents in International Affairs, *Official Gazette of the Republic of Macedonia,* no. 74/2012.
[1381]Article 2 (para. 1, item 9) , International and ProvisionalProtection Act (2018).

- A "*minor*" shall mean a foreigner who has not reached the age of 18.[1382]
- An "*unaccompanied minor*" shall mean a foreigner under the age of18, who enters the territory of the Republic of Macedonia without being accompanied by a parent or guardian, or is left unaccompanied after entering the territory of the Republic of Macedonia, or who is deprived of effective care.[1383]
- "*Country of origin*" shall mean the country whose nationality is held by a foreigner or, in case of stateless persons, the country of former habitual residence.[1384]

1.2. The legal status of asylum seekers regulated by the International and Provisional ProtectionAct (2018), observed from the perspective of Private International Law

The conditions and procedure for the acquisition and termination of the right to asylum of a foreigner or a stateless person, as well as the rights and duties of applicants (asylum seekers) and persons who have been granted the right to asylum in the Republic of Macedonia, are regulated by the International and Provisional Protection Act (2018)[1385], which replaced the former Asylum and Temporary Protection Act (2007). The new International and Provisional Protection Act was drafted based on accepted international standards, and it is aimed at improving the legal statusof refugees. This comprehensive legislative act regulates various protection aspects, including the right to family reunification which is fairly important in Private International Law.

The Act distinguishes three categories of persons who may seek protection in the Republic of Macedonia: (a) a recognized refugee; (b) a person under subsidiary protection[1386], and (c) a person under temporary protection.[1387]

The legal status of **a recognized refugee** is granted on the basis of the 1951 Convention relating to the Legal Status of Refugees, and the 1967 Protocol on the Legal Status of Refugees. **A person under subsidiary protection** is an alien who does not qualify as a person with refugee status; the Republic of Macedonia will recognize such person's right to asylum and allow him/herto remain within its territory, as there are reasons to believe that the person is likely to face a real risk of sustaining serious injuries if he/she returns to the country of origin (of which he is a national), or to the country of person's previous habitual residence in case he/she is a stateless person. Serious injuries include the death penalty or execution; torture or inhuman or degrading treatment or punishment; serious and individual threats to life or personality of a civilian; indiscriminate violence in cases of international or internal armed conflict.[1388] "**Temporary protection"**is granted in a special procedure in the event of a mass influx or an imminent threat of a mass influx of displaced persons from third countries, in case the displaced persons are unable to return to their country of origin, and especially if there is a risk that the asylum procedure cannot be implemented in the interest of the displaced persons and other persons seeking international protection due to the mass influx.[1389]

1.2.1. Personal status

The International and Provisional Protection Act provides a number of standards in terms of the legal status of recognized refugees. The personal status (legal and contractual capacity) of a recognized refugee is an issue that is not regulated in the International and Provisional Protection Act. Although the title of

[1382]Article 2 (para. 1, item 10), International and Provisional Protection Act (2018).
[1383]Article 2 (para. 1, item 11), International and Provisional Protection Act (2018).
[1384]Article 2 (para. 1, item 12), International and Provisional Protection Act (2018).
[1385]International and Provisional Protection Act, "*Official Gazette of the Republic of Macedonia*" no. 64/2018
[1386]The category "person under subsidiary protection" was introduced by the amendments to the Asylum and ProvisionalProtection Act (2007).Previously, that Act provided for another category - "person under humanitarian protection", but this category was abolished by legal amendments in 2008.
[1387]Pursuant to Article 2 of the International and Provisional Protection Act (2018)
[1388]Article 9 of the International and Provisional Protection Act (2018).
[1389]Article 2 (para.1, item 3), International and Provisional Protection Act (2018).

Article 67 is "personal status and the right of residence", Article 67of this Act contains only one provision on the status of refugees, according to which persons with a refugee status have the right to reside in the territory of the Republic of Macedonia. For inexplicable reasons, the legislator failed to regulate their personal status, unlike the previous legislative act on this matter, which provided for the application of domestic law in regulating personal status. By failing to regulate this issue, the legislator has inadvertently created a situation in which the court (and the enforcement body) will have to apply the national PIL Act to determine the legal and contractual capacity of recognized refugees.

1.2.2. Family reunification

The right to family reunification has special significance for the legal status of recognized refugees, and persons under subsidiary protection. Upon their request, the members of the nuclear family of a person with refugee status and a person under subsidiary protection shall be subject to the procedure for recognition of their right to asylum. The members of the nuclear family are considered to be the spouse (provided that the marriage was concluded before the arrival to the Republic of North Macedonia), the unmarried partner, minor children who are not married, the parents of minor children (provided that minor children have been granted asylum), and other persons in accordance with the law. The person with a refugee status shall acquire the right to reunification with the members of the nuclear family only after being granted the refugee status, while the person under subsidiary protection shall acquire the right to family reunification two years after he/she has been granted the status of a person under subsidiary protection.[1390]

1.2.3. Conclusion

Based on the analysis of the cited legal solutions, it can be concluded that the domestic legislation of the Republic of North Macedonia, in terms of the legal status of refugees, fully corresponds to the commitments undertaken by accession to the 1951 Convention relating to the Legal Status of Refugees (the Refugees Convention, 1951) and the 1967 Protocol relating to the status of refugees. Moreover, in terms of certain rights, the minimum standards prescribed in international law have been exceeded. Thus, from the date of delivery of the decision on the recognition of the status of a person under subsidiary protection, persons under subsidiary protection shall be equal with the citizens of the Republic of North Macedonia in terms of exercising social protection rights prescribed in the Social Protection Act; they may also exercise the right to healthcare protection under the same conditions as the citizens of the Republic of Macedonia until they acquire the status of an insured person in accordance with the Health Insurance Act. Persons under subsidiary protection have the same rights and obligations as the foreigners who have been granted a temporary residence in the territory of the Republic of North Macedonia.[1391] The persons who have been granted the right to temporary protection are regarded as a special category of protected persons. The Government may grant temporary protection to this category of persons in the event of a mass influx of persons coming directly from a country where their lives, security or liberty have been endangered by war, civil war, occupation, internal conflict accompanied by violence, or mass violations of human rights. In the Republic of North Macedonia, temporary protection shall be granted for a period of one year. The total duration (period of validity) of temporary protection shall not exceed three years.[1392]

2. Private International Law Act (2020)

For a person to be able to obtain the appropriate status, there is often a need to establish his/her personal status (legal and contractual capacity), determine the person's marital status acquired abroad, and provide adequate protection. It often leads to the application of foreign law as the applicable law in certain relations which are directly related to the person's status. As for the categories of persons who are the subject matter of interest in this report, the applicable law is general conflict-of-law rules

[1390] *See*: Article 16 of the International and Provisional Protection Act (2018).
[1391] *See*: Articles 76 and 77, International and Provisional Protection Act (2018).
[1392] *See*: Article 82, International and Provisional Protection Act (2018).

contained in the Private International Law Act. For these reasons, this part of the report provides an overview of the relevant legal provisions of the Private International Law Act of the Republic of North Macedonia (2020).

2. 1. Establishing legal and contractual capacity

As previously noted, the International and Provisional Protection Act lacks a definition of the personal status of persons covered by this Act. In practice, the legislator's omission to provide this definition is overcome by invoking the conflict-of-law rules contained in the Private International Law Act (hereinafter: the PIL Act). According to the PIL Act of North Macedonia, the legal capacity of a natural person is governed by the law of the state of origin (of which the person is national).[1393] In terms of contractual capacity, the applicable law is again determined by the law of the state of which the person is a citizen.[1394]

A problematic situation may arise in case the person whose personal status is being regulated in North Macedonia has no documents which may be used for establishing his/her citizenship, or in case the person does not have a nationality, or in case the person's nationality cannot be established.

In these cases, as well as in all cases where the connecting factor is nationality (which either cannot be established or which the person does not have), the applicable law is determined through subsidiary connecting factors in accordance with Article 5 of the PIL Act. Thus, if the person does not have nationality or his/her nationality cannot be established, the applicable law is determined according to the person's place of habitual residence. If the person has the status of a refugee, the applicable law is determined according to the law of one's state of habitual residence. However, if these persons do not have a place of habitual residence, or if it cannot be established, the applicable law is determined according to their place of residence.

The Private International Law Act includes an autonomous definition of habitual residence. The habitual residence of a natural person is considered to be the place where the person has established a permanent centre of life activities, where a person is not required to fulfil any formality related to applying for or obtaining a residence permit from the competent state authorities. In determining the place of habitual residence, particular consideration shall be given to personal or professional circumstances arising from the person's permanent relationship with that place or the person's intention to create such a relationship.[1395] The characterisation of the habitual residence and residence is performed in accordance with the law of North Macedonia.

2.2. Placing a person under guardianship and provisional protection measure

To provide adequate protection to persons who should be placed under guardianship or provisional protection measures, the Private International Law Act contains a special conflict-of-law rule for determining the applicable law. Thus, according to Article 18 of the PIL Act of North Macedonia regulating legal guardianship and termination of the guardianship, as well as the relationship between the guardian and the protégé (protected person), the applicable law is the law of the state of which the protégé is a national. As for provisional protection measures aimed at foreign nationals and stateless persons present in the territory of North Macedonia, they are determined according to the law of the Republic of North Macedonia, and they are valid as long as the competent state renders a decision on this matter and takes the necessary measures. However, under Article 5 of the PIL Act, if the person does not have nationality or of his/her nationality cannot be determined, the connecting factor (nationality) is replaced either with habitual residence or with residence.

In terms of jurisdiction, the competent court or authority of the Republic of North Macedonia shall take the necessary provisional measures for the protection of the personality, rights and interests of a foreign national who is presentor has property in North Macedonia.[1396]

[1393] *See*: Article 15 of the Private International Law Act (PIL Act).
[1394] *See*: Article 16 of the PIL Act.
[1395] *See*: Article 6 of the PIL Act.
[1396] *See*: Article 126 (para. 2) of the PIL Act.

2. 3. Establishment and application of foreign law

In North Macedonia, foreign law is treated as the "law" arising from the obligation of the court and other state bodies to apply it*ex officio*.[1397]Thus, in civil law relations involving a foreign elementthe judge is obliged to apply the domestic conflict-of-law rule *ex officio,* to determine the applicable law and to establish the content of the foreign substantive law.

Pursuant to Article 9 (para. 2) of the PIL Act, the competent court or other state body has the authority to determine the content of the applicable foreign law in accordance with the international treaties, and they may also request information on the content of the relevant foreign law from the competent state administration body in charge of judicial affairs.[1398]The PIL Act of North Macedonia also envisages the possibility of active participation of the parties in the process of establishing the content of the applicable foreign law. Thus, the parties to the proceedings may submit a public document or an expert opinion on the content offoreign law, which are not binding on the court. When the content of foreign law cannot be determined, the applicable law is *lex fori*(the law of the Republic of North Macedonia).Under the PIL Act of North Macedonia, the non-application or misapplication of the applicable foreign law is explicitly the legal ground for pursuing a legal remedy.[1399]

3. Legalization of foreign public documents

In order to be used in North Macedonia, a foreign public document has to be legalized. Pursuant to the Civil Procedure Act of 2005, a public document means any document issued in a prescribed legal form by a competent body acting within the scope of its authorities, as well as any document issued in such a form by an organization or other institution which has been vested with the public authority, either by law or by a decision of a municipal body based on law.[1400]

The use of public documents is regulated by the Act on the Legalisation of Public Documents in International Affairs (2012). Documents issued abroad may be used in the Republic of North Macedonia only if they are certified in accordance with the law of the respective state. The documents issued abroad are not subject to certification if, based on the principle of reciprocity, the documents issued by the Republic of North Macedonia are not subject to certification in the respective state. The foreign public documents which are subject to certification may be used in the Republic of North Macedonia if they are certified by the Ministry of Foreign Affairs ora diplomatic and consular mission of the Republic of North Macedonia abroad.[1401] If the competent authority which has been submitted a document issued abroad has some doubts about the authenticity of the submitted document, it shall file a request to the Ministry of Foreign Affairs to verify whether the document was issued by the body specified therein.[1402]The Republic of North Macedonia is a member of the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961); thus, the Convention rules are applicable in case there is a need to abolish unnecessary certification.

II. Conclusion

To obtain certain rights that are directly related to the legal status of persons that are subject to analysis in this national report, it is often necessary to apply the rules of Private International Law. The main problem arising in these situations is how to determine the applicable law in case the person does not have documents that may prove his/her status in the country of origin (regardless of the reason why the person does not have the documents). In the Republic of North Macedonia, general conflict-of-law rules contained in the Private International Law Act (2005) are applied in such circumstances. In case the

[1397]*See*: Article 9 (para. 1) of the PIL Act.
[1398]*See*: Article 9 (para. 2) of the PIL Act.
[1399]*See*: Article 10 (para. 2) of the PIL Act.
[1400]*See:* Article 215 (para.1) of the Civil Procedure Act, (2005).
[1401]*See*: Article 4 of the Act on the Legalisation of Public Documents in International Affairs (2012).
[1402]*See*: Article 5 of the Act on the Legalisation of Public Documents in International Affairs (2012).

applicable law cannot be determined by means of nationality as a connecting factor, the applicable law is the law of the state of the habitual residence.

In North Macedonia, there is no practice regarding the application of PIL rules in determining the status of foreign nationals. There are no records on exercising the right to family reunification, nor on the recognition of the status acquired abroad. Given the lack of such cases, the Republic of North Macedonia has been classified as a transit country.

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NATIONAL REPORT

1. Introduction

Various factors have contributed to the growing importance of Private International Law (PIL) in the contemporary world. Migration and globalization have certainly had a significant role in this process. Private International Law provisions regulate numerous legal areas and provide for determining, *inter alia*, whether a domestic or a foreign law is applicable to a specific case with a foreign element. In this context, PIL addresses a number of issues: the recognition of polygamous marriages, the recognition of private divorce decisions obtained abroad, the change of personal name, etc. Private International Law and International Procedure Law may provide an answer to these questions.

Historical facts and the current political situation in Bosnia and Herzegovina (B&H) have certainly influenced the large-scale displacement of the population from B&H (e.g. 151,101 people left B&H in the period 2013-2017). Thus, a large number of B&H citizens now live and work abroad, where they settle, establish their families, get divorced, enter new marriages, etc. In addition, there are approximately 10,000 migrants and refugees from different countries currently located in B&H, whose cases reflect different family situations and different backgrounds of their departure from their homeland.[1403] The largest number of cases with foreign elements that we encounter in Bosnia and Herzegovina pertain to the recognition of foreign court decisions on divorce of B&H nationals. The procedure for recognition and enforcement of foreign court decisions in family and inheritance matters is regulated by legal norms of Private International Law. Given the fact that Bosnia and Herzegovina is not a member state of the European Union, the procedure for recognition of foreign court decisions ensues under domestic private international law - the Act on Resolving Conflict of Laws with Regulations of Other Countries in Certain Relations (hereinafter: the PIL Act)[1404]. The PIL Act contains rules for determining the applicable law governing status, family, property and other substantive law relations with an international element, unless there is an international agreement that regulates it differently.[1405]

Bosnia and Herzegovina has concluded bilateral international agreements with a number of countries: Agreement between Bosnia and Herzegovina and the Republic of Croatia on Legal Assistance in Civil and

[1403]For more, see: Procjena situacije u vezi sa migrantima i izbjeglicama u Bosni i Hercegovini /Assessment: Migrant and Refugee Situation in Bosnia and Herzegovina, 2018, OSCE· Mission to Bosnia and Herzegovina, https://www.osce.org/files/f/documents/3/b/397322.pdf, (accessed 6.3.2021)

[1404]After the disolution of the SFRY, The former SFRY Act on Resolving Conflict of Laws with regulations of other countries in certain relations (Zakon o rješavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima (ZMPP), "*Službeni list SFRJ*", br. 43/82 i 72/82) was kept in force in B&H by Regulation with legal force (Uredba sa zakonskom snagom, „*Sl. list RBiH*", br. 2/92) and confirmed by the Act on Ratification of Regulations with legal force (Zakon o potvrđivanju uredbi sa zakonskom snagom, *Sl. list RBiH*": br. 13/94. In Republika Srpska, it was confirmed by Article 12 of the Constitutional Act on the implementation of the Constitution of Republika Srpska (Ustavni zakon za provođenje Ustava Republike Srpske, „*Sl. glasnik RS* 21/1992). In 2008, Bosnia and Herzegovina signed the Stabilization and Association Agreement between the European Community (and its Member States) and Bosnia and Herzegovina, which entered into force in 2015. Thus, B&H has committed itself to harmonizing the existing legislation with the Community legislation. However, as early as 2003, B&H authorities were obliged to ensure the compliance of B&H legislation with the *acquis communitaire* when drafting new regulations (Decision on Procedures in the Process of Harmonizing B&H Legislation with *acquis communitaire*, (Odluka o procedurama u postupku harmonizacije zakonodavstv BiH s *acquis communitaire*, *Službeni glasnik BiH*, 44/2003).

[1405]Article 3 of the Act on Resolving Conflict of Laws with Regulations of other countries (hereinafter: PIL Act).

Criminal Matters (with a special annex), dated 26 February 1996; Agreement between Bosnia and Herzegovina and Serbia and Montenegro on Legal Assistance in Civil and Criminal Matters (2005); Agreement between Bosnia and Herzegovina and the Republic of Macedonia on Legal Assistance in Civil and Criminal Matters (2006); Agreement between Bosnia and Herzegovina and Montenegro on Legal Assistance in Civil and Criminal Matters (2010), Agreement on Legal Cooperation in Civil and Commercial Matters between Bosnia and Herzegovina and the Republic of Turkey (2005), Agreement between Bosnia and Herzegovina and the Republic of Slovenia on Legal Assistance in Civil and Criminal Matters (2010), Agreement on Legal Assistance in Civil and Commercial Matters and Criminal Matters between Bosnia and Herzegovina and the Islamic Republic of Iran (2012).

In addition, Bosnia and Herzegovina has declared itself to be bound by a number of bilateral international agreements concluded by the former SFRY. Thus, by means of notification of succession, B&H is party to the following bilateral agreements: Agreement on Legal Assistance in Civil and Criminal Matters between the SFRY and the Democratic People's Republic of Algeria, (*Official Gazette of the SFRY*- International Agreements, No. 2/83)[1406]; Agreement between the FPRY and the Republic of Austria on Mutual Legal Transactions (*OG FPRY,* No. 8/55)[1407]; Convention between the SFRY and the Kingdom of Belgium on the Issuance of Excerpts from Legal Registers and Exemption from Legalization (OG *SFRY,* No. 55/72) and Agreement between the SFRY and the Kingdom of Belgium on Legal Assistance in Civil and Commercial Matters (*OG SFRY,* No. 7/74)[1408]; Agreement between the FPRY and the People's Republic of Bulgaria on Mutual egal Assistance *(OG*FPRY, No. 1/57)[1409]; Agreement between the SFRY and the Socialist Republic of Czechoslovakia on the regulation of legal relations in civil, family and criminal matters (*OG SFRY,* No. 13/64)[1410]; Convention between the SFRY and the French Republic on the Issuance of Documents on Personal Status and Exemption from Legalization (*OG SFRY,* No. 3/71)[1411]; Convention between the FPRY and Kingdom of Greece on Mutual Legal Relations (*OG FPRY,* No. 7/60)[1412]; Agreement on Legal and Judicial Cooperation between the SFRY and the Republic of Iraq (*OG SFRY*-International Agreements No. 1/87)[1413]; Convention between the FPRY and the Republic of Italy on Mutual Legal Assistance in Civil and Administrative Matters (*OG FPRY,* No. 5/63)[1414]; Agreement between the SFRY and the Republic of Cyprus on Legal Assistance in Civil and Criminal Matters (*OG SFRY*-International Agreements No. 2 / 86)[1415]; Agreement between the SFRY and the People's Republic of Hungary on Mutual Legal Transactions (*OG SFRY*, No. 3/68)[1416]; Agreement between the SFRY and the Mongolian People's Republic on the Provision of Legal Assistance in Civil, Family and Criminal Matters (*OG SFRY*-International Agreements, No. 7/82)[1417];

[1406]Ugovor o pravnoj pomoći u građanskim i krivičnim stvarima između SRFJ i Demokratske Narodne Republike Alžir (*Službeni list SFRJ,*Međunarodni ugovori, broj 2/83),

[1407]Ugovor između FNRJ i Republike Austrije o uzajamnom pravnom saobraćaju (*Sl. list FNRJ*-Dodatak, br 8/55),

[1408]Konvencija između SFRJ i KraljevineBelgije o izdavanju izvoda iz matičnih knjiga i oslobađanju od legalizacije*(Službeni list SFRJ*-Dodatak broj 55/72) i Sporazum između SFRJ i Kraljevine Belgije o pravnoj pomoći u građanskim i trgovačkim stvarima (*Službeni list SFRJ*-Dodatak br. 7/74),

[1409]Ugovor između FNRJ i Narodne Republike Bugarske o uzajamnoj pravnoj pomoći (*Sl..list FNRJ-D*odatak br.1/57),

[1410]Ugovor između SFRJ i Čehoslovačke Socijalističke Republike o regulisanju pravnih odnosa u građanskim, porodičinim i krivičnim stvarima (*Službeni list SFRJ*-Dodatak br. 13/64),

[1411]Konvencija između SFRJ i Francuske Republike o izdavanju isprava o ličnom stanju i oslobođenju od legalizacije (*Službeni list SFRJ*-Dodatak br. 3/71),

[1412]Konvencija između FNRJ i Kraljevine Grčke o uzajamnim pravnim odnosima (*Sl. list FNRJ*-Dodatak br. 7/60)

[1413]Ugovor o pravnoj i sudskoj saradnji između SFRJ i Republike Irak (*Sl. list SFR*J-Među. ugovori br.1/87),

[1414]Konvencija između FNRJ i Italijanske Republike o uzajamnoj pravnoj pomoći u građanskim i upravnims tvarima (*Službeni list FNRJ*-Dodatak br. 5/63),

[1415]Ugovor između SFRJ i Republike Kipar o pravnoj pomoći u građanskim i krivičnim stvarima (*Sl. list SFRJ*-Međunarodni ugovori br. 2/86),

[1416]Ugovor između SFRJ i Narodne Republike Mađarske o uzajamnom pravnom saobraćaju (*Službeni list SFR*J-Dodatak br. 3/68),

[1417]Ugovor između SFRJ i Mongolske Narodne Republike o pružanju pravne pomoći u građanskim, porodičnim i krivičnims tvarima (*Službeni list SFRJ* –Međunarodni ugovori br. 7/82),

Agreement between the FPRY and the People's Republic of Poland on Legal Affairs in Civil and Criminal Matters (*OG SFRY,* No. 5/63)[1418]; Agreement between the FPRY and the People's Republic of Romania on Legal Assistance (*OG FPRY,* No. 8/61)[1419]; Agreement between the FPRY and the Union of Soviet Socialist Republics (USSR) on Legal Assistance in Civil, Family and Criminal Matters (*OG FPRY,* No. 5/63)[1420]; Agreement between the SFRY and the Czechoslovak Socialist Republic on regulation of legal relations in civil, family and criminal matters (*OG SFRY,* No. 13/64.[1421]

The PIL Act of B&H also contains rules on the jurisdiction of courts and other bodies to discuss the aforesaid relations, rules of procedure, and rules for the recognition and enforcement of foreign judgments and arbitral awards. A foreign judgment also entails a decision of another state body which has an equal effect as a court decision or court settlement in the state where it was rendered. Finally, a recognized foreign court decision has an equal effect as a domestic court decision (the so-called principle of equivalence), and produces the same effects as a judgment rendered in Bosnia and Herzegovina.

2. Recognition of personal status acquired abroad

When recognizing foreign court decisions pertaining to personal status, a distinction is made between several kinds of decisions:

a) Decision on the personal status of a B&H citizen;

b) Decision on the personal status of a national of the state whose decision is at issue;

c) Decision on the personal status of a foreign national of the state where the decision was taken and a B&H national;

d) Decision on the personal status of aliens who are not nationals of the state where the decision was taken.

As a rule, in the procedure for recognition of foreign court decisions, the court may only review the conditions prescribed in Articles 87-92 of the B&H PIL Act. In this regard, it is significant to note that the court of recognition cannot review the foreign court decision in terms of the established facts and proper application of substantive law. An exception to this rule are decisions on status-related matters (e.g. decisions on restriction and deprivation of contractual capacity, declaring a missing person dead, divorce and annulment of marriage, adoption, establishing paternity/maternity, custody and foster care, which may also be examined in terms of assessing the applied substantive law if the status of a B&H national is at issue.

In cases involving the recognition of foreign court decisions on *the personal status of B&H nationals*, the examination is not limited to the requirements laid down in Articles 87-92 of the PIL Act, but it may also include the assessment of the merits of the foreign decision.[1422] This implies that the competent court has the power to exercise more rigid assessment over the status of B&H nationals, which may be justified by the fact that a change in the personal status should be based on the law of the state of his/her nationality. In case a foreign law has been applied, it must not be, except in cases where the applicable law is the law of Bosnia and Herzegovina, as envisaged in the PIL Act conflict-of-law rules. In case it is established that the law of Bosnia and Herzegovina should have been applied when deciding on the personal status of a B&H citizen, the foreign court decision may be recognized despite the application of the foreign law, but only provided that the decision does not significantly diverge from the B&H law.

[1418]Ugovor između FNRJ i Narodne Republike Poljske o pravnom saobraćaju u građanskim i krivičnim stvarima (*Službeni list SFRJ*-Dodatakbroj 5/63),

[1419]Ugovor između FNRJ i Rumunske Narodne Republike o pravnoj pomoći (*Sl. list FNRJ*"- Dodatak broj 8/61),

[1420]Ugovor između FNRJ i Saveza Sovjetskih Socijalističkih Republika o pravnoj pomoći u građanskim, porodičnim i krivičnim stvarima (*Službeni list FNRJ*-Dodatak br. 5/63),

[1421]Ugovor između SFRJ i Čehoslovačke Socijalističke Republike o regulisanju pravnih odnosa u građanskim, porodičnim i krivičnim stvarima (*Službeni list SFRJ*-Dodatak br. 13/64).

[1422]Dika, M., Knežević, G, Stojanović, S. (1991.) Komentar zakona o međunarodnom privatnom i procesnom pravu (Commentary on the Act on Private International Law and International Procedure Law), Nomos, Beograd, str. 311.

Pursuant to Article 94 of the PIL Act, foreign court decisions on *the personal status of a national of the state whose decision is under consideration* are recognized in Bosnia and Herzegovina without being subject to judicial assessment, as envisaged in Article 89 and Articles 91 and 92 of the PIL Act. Thus, the PIL Act facilitates the recognition of a foreign court decision concerning the personal status of nationals of the country of origin of the foreign decision. In such cases, the conditions of exclusive international jurisdiction of domestic courts, the observance of the domestic public policy and the principle of reciprocity do not have to be met. As such cases involve the personal status of a foreign national, there is no need to impose restrictions on recognition, particularly given the fact that the decision was rendered in the country of his/her nationality. Thus, the conditions for recognizing a foreign decision on the personal status of a national of the state of origin of the decision have been significantly relaxed, which is fairly understandable given the link between a foreign state and its nationals, as well as the sovereign right of any state to regulate the legal position and status of its own citizens.[1423]

Therefore, when it comes to the *recognition of personal status decisions*, the conditions depend on whether the decisions pertain to B&H nationals, nationals of the state which rendered the decision, or nationals of third countries. In cases involving B&H nationals, the law of B&H shall apply; in cases where a foreign law has been applied, the foreign court decision will be recognized if the decision does not significantly diverge from B&H law which is applicable to the specific relationship (Article 93 PIL Act). The conditions for recognizing a foreign court decision on the personal status of a national of the country of origin of the decision are considerably relaxed due to the dispensation of indirect jurisdiction requirement, public policy and reciprocity (Article 94 PIL Act). For example, a foreign court decision on divorce relating to foreign nationals shall be recognized in B&H if it is final, if the right to defense has been respected, and if the procedure has not been previously initiated in B&H.

A *foreign decision on the status of third-country nationals* (i.e. aliens who are not nationals of the issuing state) shall be recognized if the conditions for recognition have been met in the state of their nationality (Article 95 PIL Act).

As a rule, the PIL Act does not stipulate the duration of the procedure for recognition of foreign judgments but cases involving personal and family status are commonly designated as "urgent". In principle, such cases are addressed immediately and resolved in a very short time frame. Considering that the validity of a decision implies that it has been served to all parties to the proceedings, service abroad through international legal assistance may be problematic in terms of expediency, particularly given that the decision on recognition becomes final only after the expiry of the appeal time limit.

3. Recognition of family status acquired abroad

In Bosnia and Herzegovina, most family relation issues are resolved by a court decision. Given the fact that B&H courts have exclusive jurisdiction in the subject matter of divorce, it gives rise to the issue of recognition of a foreign decision (decree) on divorce issued by an a foreign administrative body, as well as the treatment of foreign extrajudicial decisions on divorce. Pursuant to the PIL Act, a foreign court decision is equated with the domestic court decision, and it produces legal effect in B&H if it is recognized by the competent B&H court.

For example, divorce is a legal institute which is regulated by the national legislation. Each state has its own laws and can autonomously decide which foreign acts will be recognized and under what conditions. Each state is also obliged to keep civil registers (on birth, citizenship, marriage, death), which are the basic official records of the personal status of citizens. As prescribed by the law, civil registers comprise relevant facts on citizen's birth, citizenship, marriage, death, other relevant facts, and changes related to those facts. For these reasons, if a B&H national obtains a divorce abroad, the foreign decision on divorce will not automatically produce legal effect in Bosnia and Herzegovina.

[1423]Poljić A. (2016), Osnove procesnog međunarodnog privatnog prava sa sudskom praksom (The Foundations of Procedural Private International Law and case law), Breza 2016., p. 228.

The PIL Act of B&H provides for the possibility of recognizing foreign judgments and decisions of other bodies which are equated with B&H court decisions if the law of the state where the decision has been issued envisages the equivalence of domestic and foreign court decisions (Article 86 PIL Act). For example, divorce abroad involves cases where at least one of the spouses does not have the citizenship of the country where divorce proceeding has been instituted. The recognition proceeding pertains to divorce decisions made by a body of a foreign state.[1424]Given the fact that Bosnia and Herzegovina was a constituent part of SFR Yugoslavia until 1992, decisions made on the territory of the former SFRY before 1992 are not regarded as foreign court decisions.[1425]Thus, the country of origin of the decision implies the country in whose name the decision was made, and not the country in whose territory the decision was made (although it is usually the same country). Yet, there are exceptions; for example, acting in the name and on behalf of a sending state, a consular body of asending state may make a decision in the national territory of the host state; such a decision is a foreign decision even though it is made in the national territory of the receiving state. In addition to having the character of a court decision, a foreign court decision must be rendered in a civil or commercial law matter, given that only such decisions are eligible for recognition and enforcement.[1426]In most cases, foreign decisions take the form of a judgment, a decision, a conclusion or a court settlement. The type of procedure (civil, non-contentious, criminal, administrative, etc.) in which the civil matter was decided is irrelevant. The most common subject matter of recognition and enforcement are judgments related to maintenance and decisions on divorce, establishing paternity, child custody, inheritance, bankruptcy, distribution of marital property, etc.

The procedure for recognition of foreign court decisions falls into the category of non-contentious proceedings, which entail the application of *ex officio* principle; it means that the procedure is not strictly formal and that the court conducting the non-contentious proceeding is vested with more extensive discretionary authority than the court conducting civil proceedings. The court in charge of non-contentious proceedings is obliged only to abide by the requirements stipulated in the basic procedural principles. Upon the application for recognition of a foreign judgment, the court renders a decision (not a judgment).

The time limit for resolving cases on the recognition of foreign court decisions is not explicitly specified but, considering that competent courts decide on important personal and family status-related issues, such cases are usually designated as urgent.

The decision on recognition has only declarative effects. Marriage is considered to be dissolved at the moment when the decision on divorce has become final in the state of origin.

The recognition of a foreign court decision shall be refused in case B&H law prescribes the exclusive jurisdiction of a B&H court or another body, in case of *res iudicata* and *lispendens*, and in case there has been a violation of public order and inobservance of the reciprocity principle. Hence, the requirements that need to be met cumulatively are as follows:

- established international jurisdiction of the court that made the decision,
- finality of the foreign decision (which can no longer be subject to appeal),
- the defendant's right to defense,
- absence of an earlier decision of the domestic court in the same matter,
- conformity with the domestic public policy, and

[1424]Duraković, A. (2016). Međunarodno privatno pravo razvoda braka u Evropskoj uniji i Bosni i Hercegovini, (Private International Law on Divorce in the European Union and Bosnia and Herzegovina), Mostar: Pravni fakultet Univerziteta „Džemal Bijedić", p.. 196.

[1425]Op.cit. p. 197

[1426]Živković, M., Stanivuković, M. (2006). Međunarodno privatno pravo(Private International Law), Beograd : Službeniglasnik, 2006,, p. 392.

- reciprocity.[1427]

In the context of divorce, competent authorities may encounter problems pertaining to various forms of private decisions on divorce, such as "*talaq*" and "*get*"; these forms of divorce raise concerns about the observance of the gender equality principle. As we have not yet had such cases in Bosnia and Herzegovina, there is no case law on this subject matter. However, the competent court in B&H may recognize such decisions provided that both parties were given the opportunity to participate in the private divorce procedure and provided that the wife's was ensured the right to be heard.

4. Application of foreign law

In this section, we will consider the application of conflict-of-law rules and foreign law in court proceedings. Foreign law is a substantive foreign law which the competent court or authority in B&H applies *ex officio*, on the basis of prescribed conflict-of-law rules.[1428] In our legal system, foreign law has the same treatment as domestic law, in line with the principle *iura novit curia*.[1429]Thus, the application of foreign law does not depend on the party's request.[1430]The characterization of the foreign law is governed by the law of that state. The content of foreign law is obtained *ex officio,* whereby the competent court files a request for information with the Ministry of Justice, some other authority or specialized institutions. The interested party may also submit evidence (a public or private document) on the content of foreign law.[1431]

If the PIL Act provisions refer to the application of the law of a foreign state, the competent authority shall take into account the foreign conflict-of-law rules.[1432] If these rules refer back to B&H law, the law of B&H shall apply. The provisions of foreign law shall not apply if they are manifestly contrary to the B&H public policy. The relevant assessment criterion is the effect of the application of foreign law on the merits of each case.[1433]

Succession: The applicable law in succession matters is the law of the state of the nationality of *de cuius* at the time of death. This legal solution pertains to both testate and intestate succession.[1434]The law applicable to the issue of testamentary capacity ist he law of the state of the testator's nationality at the time when the will was drawn up**.**

Material and formal requirements for entering into marriage: The applicable law governing the material requirements for entering into marriage is the law of the state of the person's nationality at the time when marriage was concluded (distributive cumulation). Even if the marriage requirements have been met under the law of the state of nationality of the person wishing to marry before the competent authority in B&H, marriage shall not be allowed if B&H law explicitly precludes the conclusion of marriage due to some marriage impediments (e.g. already existing marriage, kinship and mental incapacity.[1435] The applicable law governing the form of marriage is the law of the place where the marriage is concluded.[1436]

Divorce: The law applicable to divorce matters is the law of the state of nationality of both spouses at the time when the petition for divorce was filed. In case the spouses are nationals of different states, the

[1427]Muminović, T. (2005). Eksteritorijalno djelovanje sudskih odluka u sferi privatnopravnih odnosa(Extraterritorial effect of judicial decisions in the field of private law relarions) , Godišnjak Pravnog fakulteta u Sarajevu, p. 389.
[1428]Article 13, para. 1. of the PIL Act
[1429]Meškić, Z., Đorđević, S. (2016). *Međunarodno privatno pravo, opšti dio.* (Private International Law), Sarajevo: Privredna štampa.
[1430]Article 9 of the PIL Act states: " The law of a foreign state shall be applied in accordance with the intended meaning and the concepts it employs.."
[1431]Article 13, para. 3. PIL Act
[1432]Article 6. PIL Act.
[1433]Article 4 PIL Act.
[1434]Article 30 PIL Act.
[1435]Article 32 PIL Act.
[1436]Article 33 PIL Act.

subject matter shall be governed by the laws of both states cumulatively (the so-called ordinary cumulation).[1437] The requirements for divorce are determined in accordance with the applicable law.

Spouses' property-law relations: The law applicable to the spouses' personal and statutory property-law relations shall be the law of the state of their nationality. If the spouses are nationals of different countries, the applicable law is the law of the state of their domicile. If the spouses have neither common nationality nor common domicile in the same state, the applicable law is the state of their last common domicile. In case the applicable law cannot be determined in one of the above ways, the applicable law shall be the law of B&H .[1438]The law applicable to the spouses' contractual property relations shall be the law which was applicable to personal and statutory property relations at the time when the contract was concluded.[1439]

Parent-children relations: The relations between parents and children are governed by the law of the country of which they are nationals.[1440]The law applicable to the acknowledgement, establishment or contestation of paternity or maternity shall be the law of the state of nationality of the alleged father/mother at the time when the child was born.[1441]The legal requirements for the establishment and termination of adoption are governed by the law of the state of nationality of the adoptive parent(s) and the adoptee.[1442] The law applicable to the effects of adoption shall be the law of the state of nationality of the adoptive parent(s) and the adoptee at the time when the adoption was established. If the adoptive parent(s) and the adoptee are nationals of different countries, the applicable law is the law of the state of their domicile.[1443]

5. Unaccompanied children - temporary and protective measures

Unaccompanied children or minors are persons under the age of 18 who are separated from their parents and who do not have a guardian. These children may be accompanied by family members or relatives but they are separated from either parents or a person who has taken care of them in accordance with the law or customs. These children enjoy international protection. The OSCE Assessment of Migrant and Refugee Situation in Bosnia and Herzegovina (2018) reported on a total number of 175 unaccompanied children and children separated from their parents or guardians,[1444] but the number is much higher today. When it comes to refugee and migrant children, there is a number of organisation in B&H which take care of these children, including the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF), the Red Cross, the NGO "*Vašaprava*" (Your Rights), the humanitarian association "*Pomozi.ba*" (Help), and other organizations dealing with these issues. In 2018, very few social welfare centers in B&H were involved in resolving problems related to migrant children. The state of Bosnia and Herzegovina does not have sufficient funds and human resources to provide relevant care to refugee/migrant children currently in B&H. [1445]The budgets of B&H entities cannot meet the emerging needs and ensure relevant financial and personnel support to social welfare centers in providing assistance to migrant children. However, with the help of the aforesaid organizations, these children are currently provided with the basic necessities. In general, the problems pertaining to migrant children are often addressed by resorting to temporary solutions (rather than permanent ones).

Unaccompanied children may be classified into three categories: a) children having the status of undocumented migrants who migrate because they are looking for opportunities for a better life; b)

[1437]Article 35 para. 2 PIL Act.
[1438]Article 36 PIL Act.
[1439]Article 37 para.1 of the PIL Act.
[1440]Article 40 PIL Act.
[1441]Article 41 PIL Act.
[1442]Article 44 PIL Act.
[1443]Article 45 paragraphs 1 and 2 PIL Act.
[1444]OSCE Assessment: Migrant and Refugee Situation in Bosnia and Herzegovina, 2018, p. 13
[1445]OSCE Assessment: Migrant and Refugee Situation in Bosnia and Herzegovina, 2018, p. 30

children who fall victims to human trafficking during the migration process; and c) children fleeing danger in the country of origin and seeking asylum in the country of destination.

Despite the fact that Bosnia and Herzegovina is a signatory state to the Convention on the Rights of the Child, the protection of migrant children is still inadequate. The problem primarily lies in the fact that BiH does not have sufficient funds to provide these children with everything they need and create the social environment ensuring the full exercise of the guaranteed rights and children's potentials. Another problem is that migrant children (just like adult migrants) do not see their future in B&H, and there is a lack of interest in integration in the B&H society. As they all see their future in the EU, these children commonly stay in reception centers, waiting for the opportunity to continue their journey.

Bosnia and Herzegovina has ratified many international documents, thus committing itself to harmonizing national legislation with the universally accepted standards of respect for fundamental human rights, which also apply to children. Given that Bosnia and Herzegovina is a signatory to the Convention on the Rights of the Child, the best interest of the child is the fundamental principle that permeates a number of legislative acts in B&H and obliges all private and public institutions to pay special attention to children's welfare.

The applicable law governing the appointment of a guardian and termination of guardianship, as well as relations between the guardian and the protégé (person placed under guardianship), is the law of the state of the protégé's nationality. Provisional protective measures against a foreign citizen and a person without nationality who is present in BiH are determined in compliance with BiH law, and they remain in force until the competent state makes a decision and takes the necessary protective measures.[1446] The PIL Act also stipulates that the competent authority shall take the necessary provisional measures to protect the personality, rights and interests of a foreign national who resides or has property in BiH, and shall notify thereof the competent authority of the state of which the person is a national. The competent BiH authority shall also make a decision and take provisional protection measures in matters of guardianship involving a foreign national residing in BiH, if the protection of his/her personality, rights and interests has not been provided by the authority of the state of which he/she is a national.[1447]

According to **the Asylum Act** of Bosnia and Herzegovina,[1448]the best interests of the child shall be the primary consideration in all proceedings affecting a child. This Act specifies that the rights of the child are protected in accordance with the Convention on the Rights of the Child and the B&H regulations pertaining to child care and protection (Article 11 para.1 AA). Moreover, separated or unaccompanied children require a prompt action regarding their early identification, protection and care, as well as in terms of tracing the families of separated children in order to reunite them with their parents, guardians or care-givers (Article 11, para. 2 AA). An unaccompanied minor who expresses an intention to apply for asylum, or who has filed an application for asylum, shall be assigned a guardian through the social welfare center. Acting on behalf of the child, the competent Ministry shall submit the request for appointing a guardian to the social welfare centre. The child shall be immediately notified of the appointment and he/she shall enjoy the same treatment as a B&H citizen. A guardian shall not be appointed to an unaccompanied minor over the age of 16 who is married (Article 12 paras. 1-4 AA). Refugees are also eligible for family reunification with their family members who are outside the B&H territory (Article 13 AA).

Pursuant to the Asylum Act, an alien under provisional protection in B&H is entitled to:

a) Stay;
b) Basic living and accommodation conditions;
c) Identification document;

[1446]Article 15 PIL Act
[1447]Article 77 PIL Act
[1448]Zakon o aziluBiH (the Asylum Act),Službeni glasnik BiH, br. 11/2016.

d) Primary health care;
e) Primary and secondary education;
f) Free legal aid;
g) Access to the labor market;
h) Family reunification;
i) A guardian, if the alien under such protection is an unaccompanied minor or an incapacitated person.

6. Conclusion

The recognition of foreign judgments and equivalent decisions is a highly topical and frequent issue in the judicial practice of B&H courts. In order to provide for more efficient joint action in cross-border disputes, the concept of a single EU legal space should be expanded to entire Europe. A uniform regulation of cross-border legal issues in the entire territory of Europe, not only within the European Union, would significantly contribute to resolving contemporary problems related to globalization and population displacement. The problem of unaccompanied children should be addressed with particular consideration for reaching an adequate solution in all proceedings affecting a child and ensuring the best interest of the child. States like B&H obviously do not have relevant resources, social environment and opportunities to take the necessary action and provide minors with all the necessary living conditions. These contemporary issues are expected to be resolved through the activity of the European Union institutions and international organisations