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Publisher
UNICRI
Viale Maestri del Lavoro 10, 10127 Turin (Italy)
Tel.: +39 011 6537111
Fax: +39 011 6313368
E-mail: unicri@unicri.it

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THE FIGHT AGAINST ORGANISED CRIME IN SERBIA

From the Existing Legislation to a Comprehensive Reform Proposal

Belgrade
2008

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The Task Force was composed by:

Momčilo Grubač, Professor of Criminal Procedure Law, Faculty of Law, Union University, Belgrade

Radmila Dragičević-Dičić, Judge, Organized Crime Department, District Court of Belgrade

Nevenka Važić, Judge, Crime Department, Serbia High Court

Jovan Ćirić, Director, Institute of Comparative Law of Belgrade

Robert Sepi, Assistant Researcher, Institute of Comparative Law of Belgrade

Mario Reljanović, Assistant Researcher, Institute of Comparative Law of Belgrade

Gioacchino Polimeni, Expert on International Legal Issues and Conventions

Antonio Laudati, General Director, General Directorate of Criminal Justice, Italian Ministry of Justice

Piero Grasso, Chief, Italian National Anti-mafia Bureau

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FOREWORD

Towards a political and legislative framework to counter organized crime and corruption in Serbia

Awareness of the extremely dangerous level of organized crime in the Balkans is widespread at both national and international levels. It is well known that the activities of organized criminal groups jeopardize the effectiveness of efforts aimed at supporting the democratic institutions and the Balkans' market economy. In March 2003, the Serbian Prime Minister Zoran Djindjic's assassination by a Serbian organized criminal group was further evidence of the gravity of the situation in the Balkans. The assassination happened at the beginning of a political and economic awakening that was supposed to push Serbia towards a more democratic political structure.

Despite the influence of organized criminal groups and the instability of the political and economic context, Serbia is taking part in different endeavours to preserve legality and to fight crime and corruption. Since becoming a member of the Council of Europe in 2003, Serbia joined the Group of States against Corruption (GRECO) in July of the same year. Serbia also ratified various conventions on these subjects. Among them, in September 2001, Serbia signed the United Nations Convention against Transnational Organized Crime (UNTOC) and in January 2008, ratified the Council of Europe Civil Law Convention on Corruption (CETS no. 174).

From a legislative point of view, Serbia is making greater efforts to harmonize its legislation with the main international instruments on this issue.

The background of economic and politic instability gives rise to several social problems that often are increased by a lack of response, coordination and specificity. The current situation of transition has moved Serbia to request *legislative assistance* from the international community. Frequently, however, this type of assistance is just an import of a foreign model selected by foreign experts because of the imminent need for short-term solutions.

The applied research project that leads to the publication of this study is different. It relies on the direct capacities of the country in taking advantage of the international expertise, which has been tailored to the Serbian context by a *Task Force* composed of Serbian and Italian experts. Such a result was made possible by continuous dialogue, exchange of opinions and confrontation, while avoiding the imposition of any external model. We think that this is what makes our undertaking an important breakthrough, and a model for re-thinking legislative assistance strategies.

Sandro Calvani
Director, UNICRI

EXECUTIVE SUMMARY

This monograph is the first comprehensive study of this kind in Serbia that studies the legal aspects of combat against organised crime and corruption. Given that organised crime is a recent phenomenon, one to which valid legislation still has not responded in an adequate manner, this publication is all the more important. The authors of this publication are among the most renowned jurists in the field of criminal law, including both legal scholars and practitioners, such as judges. The text offers the reader a comprehensive analysis of existing legislation and proposals for reform of legislation in this field.

I

The first part of this book is entitled "***Organised Crime, Corruption and Topical Issues of Substantive, Procedural and Organisational Criminal Law".*** This part is divided into four sections. Introductory Section One discusses organised crime in Serbia as a recent phenomenon – it deals with organised crime in general, with the fact that organised crime has become a sort of multinational industry that offers vast opportunity for earning money. It does not recognise national borders and state sovereignty. In an attempt to legalise the results of its illegal activity, it relies on transfer of capital from one bank account to another, from one state to another, in order for it to return to the home country "laundered". This section then goes on to speak of measures against organised crime, both repressive and preventive. Repressive measures include the passing of adequate a) substantive criminal legislation, b) procedural criminal legislation and c) legislation on special organisation of criminal prosecution authorities, so that they can fight the special nature of these criminal offences and their perpetrators. Preventive measures aim at eliminating the causes of organised crime. Particularly important measures of this type are those aiming at strengthening social morality and legality, but also all concrete economic and social policy measures (elimination of unemployment). An important segment of prevention also relates to the reduction of demand for organised crime services. This section also includes a report on the origin and relatively short history of organised crime in Serbia, comments on the problem of raising awareness on the increased danger posed by organised crime, as well as preparation of necessary related legislation for combating organised crime. It is underlined that the roots of organised crime lie in the wars on the territory of the former SFRY, and also in UN sanctions.

Section Two of Part One treats the problems of substantive criminal legislation, primarily provisions on criminal offences of conspiracy to commit crime and criminal association. It is pointed out that Serbian criminal legislation does not have special criminal sanctions for organised crime offences, and that this is a consequence of the fact that Serbian substantive legislation does not recognise a special group of organised crime offences. On the contrary, each of the offences

prescribed by special substantive legislation can "acquire" the status of an organised crime offence, depending on the interpretation of relevant statutory provisions. Section Two continues with an analysis of provisions for the confiscation of proceeds from crime (Articles 91, 92 and 93 of the Serbian Criminal Code) and issues related to criminal liability of legal persons and their relation to commercial transgressions.

This section also includes an analysis of provisions on terrorism, and its relation with organised crime, and also the problems related to the opening of secret service files, since experience has shown that data found in secret services' files, on the one hand, can help combat organised crime but can also, on the other hand, be subject to manipulation and abuse by networks of organised crime. Private security companies are also very interesting from the standpoint of combat against organised crime. Experience has shown that insufficient regulation in this area has enabled criminals to be engaged in security service companies, but has also allowed people to do two jobs for two very different employers – in the morning they would work for the police (the state) whereas in the afternoon for members of criminal organisations. Section two analyses the manifestations of organised crime offences, primarily on drug trafficking, that is on criminal regulations in this field, while at the same time presenting statistical evidence that testifies to the spread of this type of crime in Serbia. Section Two also includes an analysis of provisions governing trafficking in human beings, kidnapping and coercion, cyber crime, and some new forms of fraud in practice in recent times, such as insurance fraud.

Corruption has a special part in Section Two. Existing criminal offences are analysed, there is a statistical overview of frequency of indictment and conviction for some of these offences, and also of court sentencing policies. There is a detailed analysis of GRECO reports and recommendations related to Serbia, and also of provisions governing privatisation processes in Serbia, public procurement and legislative solutions related to the conflict of interest and financing of political parties.

Section Three concerns the proceedings for organised crime offences. First, the "procedural" notion of organised crime is analysed, and then there is a separate analysis of new, special investigative techniques – secret surveillance and recording of phone and other conversations and communications, provisions on the control of business and personal accounts, rendering simulated legal services, engagement of undercover agents, controlled delivery, cooperating witnesses, protected witnesses, etc. On the one hand, these analyses give special attention to the efficiency of these measures in combating corruption and organised crime, and on the other hand, to problems that can occur in relation to the abuse and violation of human rights.

Special attention should be given to the part of Section Three that concerns proceedings before the Specialised Court Department for Organised Crime – a factual and statistical analysis of the work and experiences of that court so far. It is pointed out that, following the assassination of the Prime Minister, the Government of the Republic of Serbia declared a state of emergency and started the "Sabre" operation, in which 2.697 people were imprisoned, 11.665 were brought into custody, 3.560 criminal reports were filed against 3.946 persons for 5.671

criminal offences and major quantities of firearms, explosives, diversion material and equipment, drugs, and 688 stolen vehicles etc. were confiscated. This action was both criticised and supported; its results and legality, in the part that relates to increased police powers, are still being analysed. Some cases brought before this court are also being analysed, including the number of judges presiding, the manner of their engagement and other practices. A separate topic is the confiscation of proceeds from crime, and the following conclusions, resulting from the experience so far, have been reached: legislative provisions do not give enough opportunities to establish and confiscate proceeds from crime as a part of the fight against organised crime and, consequently, the existing provisions are not sufficiently practised. In Serbian courts, punishment is still the most important instrument in the fight against and prevention of organised crime.

Section Four of Part One is an analysis of the Act on Organisation and Competences of State Authorities in Combat against Organised Crime. The provisions analysed govern the organisation and work of the special prosecutors' office, special police unit, the work of the specialised court department for fight against organised crime, conflict of interest and manner of its resolution, specialisation on the level of second-instance courts, special detention units, and special powers of competent state authorities in proceedings for organised crime offences. There is also an analysis of current initiatives for amending the Act on Organisation and Competences of State Authorities in Combating Organised Crime. The following points are of particular importance: the term of office of the special prosecutor is too short; criteria and qualifications for the selection of employees in special police units must be clearly specified by law, not by internal rules; and communication channels between the prosecutor's office and this unit must always be open, without interference from other hierarchical structures. In addition, it is indicated that the criteria for assigning judges to work in specialised departments are not clearly defined in the law, and that the term of office of the president of the panel is too short, without the explicit possibility of extending this term. There are also comments regarding the salaries of judges sitting for this specialised department, which can sometimes lead to misunderstandings and distrust among colleagues.

II

Part Two of this study is entitled "*Proposals for Amending the Legislation of the Republic of Serbia in the Field of Fighting Organised Crime and Corruption* **".** Section One concerns the Constitution of the Republic of Serbia, passed in November 2006. The Constitution envisages considerable changes in many sectors of the legal system, including criminal legislation, particularly criminal procedure and judicial organisation. Most of these changes, only hinted at in the Constitution, are to be realised in the legal system of the Republic of Serbia by the end of 2008. It is envisaged that the Constitution will include provisions for a new manner of witness examination, introduction of cross-examination and additional examination. The judge becomes closer to an arbiter from clean adversary proceedings than from inquisitive proceedings. In relation to these new constitutional provisions, there is also the issue of the hearing for determination

(and extension) of detention. The present CPC does not envisage such a hearing, which would be in the spirit of the Constitution and in accordance with the practice of the European Court of Human Rights. One question is whether the short time limit envisaged for harmonisation of procedural legislation with the new Constitution, allows for making specific proposals of new statutory provisions on the new model of investigation. One of the inevitable consequences of the introduction of prosecutorial investigation is the acceptance of a controversial component of American law – *plea bargaining*. This should also be borne in mind in forthcoming reforms. Attention should also be given to specific measures related to the reform of the organization of the public prosecutor's office and the police, which has still not been conducted in Serbia, but which is necessary due to the changing of the concept from inquisitive to adversary proceedings and due to the fact that more independence is given to these authorities.

Section Two includes a number of concrete proposals for amending the existing substantive criminal legislation in Serbia. This primarily concerns new formulations of criminal offences of conspiracy to commit crime and criminal association, but also some new solutions related to confiscation of proceeds from crime, that is the passing of a separate statute on that issue. Similarly, special legislative provisions on criminal liability of legal persons are to be adopted. This section also includes other specific proposals related to certain problems, such as mala fide commercial operation, special types of fraud, human trafficking, terrorism, opening of secret service files, private security companies, cyber crime, drug trafficking. Some proposals are given as alternatives – in some cases the authors did not have definite opinions, but left it to the future legislator to consider the issue.

Section Three relates to corruption, and it is closely connected to the previous one. It includes a number of specific notes and proposals related to the improvement of statutory solutions regarding the financing of political parties, public procurement, money laundering and privatisation.

Section Four includes proposals for amending procedural provisions, or more specifically, changes related to special procedures for organised crime offences. The proposal includes specific Articles and explanations. The problems dealt with in this section are the following: Cases to Which the Provisions of this Chapter Apply; Urgency of Proceedings, Secrecy of Preliminary Proceedings; Composition of the Judicial Chamber; Statements and Information Given to Public Prosecutor in Preliminary Proceedings; Duration of Detention and Custody; Exclusion of Summary Proceedings and Proceedings without Main Trial; Coordination of Activities of the Police and Public Prosecutor; Secret Surveillance and Recording of Phone and Other Communications of the Suspect; Rendering Simulated Business Services and Concluding of Simulated Legal Operations; Engagement of an Undercover Agent; Controlled Delivery; Automated Search of Personal and Other Data; Obtaining Data on Suspects' Pecuniary Transactions; Cooperating Witness and His/Her Examination. The section also offers a separate opinion on how the institute of Cooperating Witnesses should be regulated, given that it has been in practising, but has caused numerous controversies. This section also provides proposals of legislative measures that need to be taken to

improve the existing Act on Programme of Protection of Participants in Criminal Proceedings, even though the authors' opinion is that, in principle, this Act is satisfactory.

Section Five of Part Three concerns organisational law, that is, proposals for amending the Act on Organisation and Competencies of State Authorities for Combating Organised Crime. It provides concrete proposals and detailed provisions on the following issues: the special public prosecutor's office, competence and organisation of courts, the special police unit for detecting and suppressing organised crime and corruption offences, the special detention unit, salaries and other rights of holders of judicial and prosecutorial offices and employees in specialised authorities for combating organised crime and corruption, security checks for persons assigned to work in specialised authorities to combat organised crime and corruption. The authors of these proposals and indeed of the entire study had a dilemma relating to the organisation of courts, which is of specialised court departments for the fight against organised crime. The dilemma related to the fact that the legislation of countries in the region (countries in transition with similar problems and legal heritage) and of countries with long-term experience in combating organised crime and corruption clearly shows that very few countries have specialised courts, departments or panels for acting in these cases even in light of the right to a natural judge. For the time being, the prevailing opinion is that specialised departments for organised crime cases should be preserved and, with certain organisational changes, should be adopted as the future legislative solution.

Finally, it should be noted that the entire study, despite possible expectations, does not have any final conclusions. There are a number of reasons for this. Firstly, any study of organised crime and corruption from the standpoint of criminal law or criminology cannot lead to final, universal conclusions, except for the fact that certain social and criminological problems, corruption in particular, will always exist. This relates to the extent to which a man is a morally imperfect being. On the other hand, as was stressed by our Italian colleagues, it is not advisable to impose or copy some existing solutions from other countries, however good they may be. Every country has its legal and general social tradition, customs, culture, moral standards, different economic environment and experience. We thank them for that well-meant and correct suggestion. Therefore, once more, we use this opportunity to express our gratitude for the successful cooperation and useful suggestions. We wish to continue this cooperation on this and other issues. On the one hand, it is necessary to work on regional cooperation to combat organised crime and corruption and, on the other hand, whatever we do and whatever solutions we adopt, crime, organised or not, will always exist.

Belgrade, 2008.

METHODOLOGICAL INTRODUCTION

The significant dangerousness of organised crime in the Balkans is well known both at national and international level. The activities of criminal associations jeopardize the effectiveness of any intervention directed to support the democratic institutions and the emerging market economy. This was very clear, in Serbia, with the assassination of Prime Minister Zoran Djindjic's, a crime that took place at a very critical stage of a political and economic awakening which was pushing the country towards new democratic models; a crime that gave clear evidence of the capacity of organised crime to directly affect the political process. As it is well known, organised crime is a real obstacle to democratic stability, to sound and accountable institutions, to the firm establishment of rule of law and the economic development in the area, and, as such, it is a source of major concern for many countries and international organizations, included the European Union and the Council of Europe.

Despite the influence of organised criminal groups and the difficult development of the political and economic context, Serbia is indeed reacting. The country takes part in different initiatives and organizations to preserve legality and to fight organised crime and corruption. It has endorsed various international documents on these subjects, the most important being the UN Convention on Transnational Organised Crime, signed and ratified since 2001. Important development in legislation and in policy commitments have been the consequences of Serbia participation to the *Stability Pact* and, later, of becoming a member of the Council of Europe. Perspective accession to the European Union is another strong motivating factor and legislation developer.

The present volume will offer a detailed analysis of the Serbian efforts to fight organised crime. The study reviews the relevant law, with a particular focus on the main pieces of domestic legislation: the fundamental *Act of Organisation and Competences of State Authorities in Combat Against Organised Crime*, enacted in 2002 and establishing, among other things, new special units against organised crime (special prosecutor for organised crime, special department of the Belgrade district court for organised crime, special police unit against organised crime); the *Criminal Code* of 2005; various *extra codicem* statutes; the *Code of Criminal Procedure* and its perspective reform. The various topics are examined pointing out their most critical points, among which a central place is occupied by the issue of defining organised crime. Such an issue presents, especially in the present Serbian criminal justice system, two kinds of overlapping difficulties. On one hand, there is the well-known problem of elaborating a drafting solution capable to mirror, in few words, the complexity of a criminal phenomenon like organised crime. On the other hand, there is the difficulty to find a multi-func-

tional definition – one that can be used not only to set the elements of one or more crimes (for example, the crime of criminal conspiracy or association), but also to work as an operative concept in the field of Criminal Procedure, in that concerning the organisation of State Authorities, in the Penitentiary Law, etc.

The existence of a set of international legal documents (first of all the *UN Convention against Transnational Organised Crime*) but also standards and best practices concerning the fight against organised crime has been a constant reference in the development of the reform strategy outlined in the present research. The international parameters have been retrieved and selected; a gap analysis developed. In this context, one major issue has been to distinguish at least three different kind of international references: those arising from binding international conventions, properly signed and ratified by Serbia; those arising from pieces of soft-law or from documents (such as some EU Framework decisions) which are not presently binding on Serbia; and those arising from other countries domestic legislation. The use of comparative law analysis has been a major cultural feature of the approach; also in this respect, the cooperation of International, and especially Italian, institutions and experts has proved to be essential.

The review of current Serbian legislation with all its internal critical points and the analysis of the existing gap with international conventions, standards and best practices laid the foundations for a reform proposal that can truly be labelled as comprehensive. This result is not just the consequence of an empirical realization. On the contrary it is, first of all, the consequence of the theoretical commitment to a specific legislative model in the fight against organised crime. This model finds its remote roots in Anglo-American crime of conspiracy (and related special rules), but that has its more sophisticated and modern developments in the anti-mafia legislation produced in the Italian Criminal Justice system (American conspiracy law evolved, in fact, towards a different direction leading to *Racketeering Influenced and Corrupt Organization* legislation, which marks a quite different path). The model is, as we will immediately see, and "integrated model" of legislation; developed in Italy since the beginning of the Eighties, such a model has gained, over the years, enthusiasm and follow up in many other countries and international documents.

The "integrated model", the "Italian model", postulates that legislation against organised crime should be composed by a multidisciplinary set of rules – not only substantive criminal law provisions, such as those defining the crimes of participation in an organised criminal group/organisation or conspiracy, but also special rules allocated into different branches of the legal system. In other words, legislation against organised crime should consist in a complex and well coordinated body of rules, a body which must include special rules of criminal procedure, special rules of administrative law, special rules concerning the organization of the courts and of state authorities, special rules of penitentiary law, special rules of tax law etc.

The fight against organised crime requires, this is the concept, a general and coordinated engagement of the entire legal system. The fight requires that each branch of the law takes into account the specificity of this highly dangerous form

of criminality, providing regulations finely tailored to strengthen the effect of the criminal law.

The synergy produced by the convergence of the entire legal system can be extremely effective: a well-coordinated body of norms, including rules belonging almost to all branches of the legal system, can multiply the efficacy of the substantive law prohibitions, like a turbo device does with an engine. A good example of this efficacy is offered by the terrific crime control impact generated by special rules of criminal procedure, allowing, in case of organised crime, *ad hoc* investigative powers, or derogation to the ordinary rules of evidence (such as exception to the hearsay rule, or the prohibition to use out of court statements as substantive evidence). Another example is offered by the impact of specialised prosecutors and/or specialised courts.

The "integrated model", briefly outlined, presents, together with its advantages, also a number of risks. They are basically of two kinds. On one hand, there are risks concerning the individual guaranties of citizens: orienting all branches of the legal system towards the goal of fighting organised crime may lead to forget that each branch of the law (procedural law, administrative law, penitentiary law etc) has its own particular function and purpose (e.g. to provide fundamental fair trial guaranties, to provide good governance, to allow the rehabilitation of the offender, etc.). These functions and purposes should not necessarily go along with the vigorous stream of the crime control policy. To the contrary, sometime these branches of the legal system developed complex regulations for the very purpose of limiting and containing State policies. Criminal Procedure is a good example of this. Forms, deadlines, strict requirements for investigative action, defendant's privileges, rule of evidence, and so on, developed over the centuries to balance the crime control policy an to protect fundamental rights of the accused. A basic assumption being that anyone is presumed innocent until conviction.

On the other hand, the risks of the "integrated model" concern, so to say, its actual architectural production. The effort to involve all branches of the law may lead the legislature to forget that the centre of the system must be placed in a well-drafted set of crime definitions allocated at the substantive law level. The fundamental offences which are expression of organised crime, and in the first place the offence of participating in an organised criminal group/organisation, must be defined in the Criminal code and must remain as the main reference for the entire legislation against organised crime. The substantive law should also be the place where the legislature intervenes in order to enlarge the scope of the incriminations or to introduce more flexible and criminological sound drafting solutions. Forgetting these assumptions, the "integrated model" may grow in a disproportionate way, taking, so to say, the shape of a donut – very thick at its circumference, at its periphery, with the provision of a large number of procedural, administrative, organizational rules (special rules of procedure, rules providing special authorities, special penitentiary rules, etc.), but empty at the centre (the substantive criminal law). The consequence of this bad architecture is that the numerous rules of the periphery are produced and live without a clear definition of an univocal common *rationale* and without a certain limit for their scope of application.

The legislation that is today in force in Serbia presents risks of this kind. The development of many special rules outside the substantive criminal law cannot in fact rely upon a well-drafted definition of organised crime, expressed by a solid wording of the basic offences of participating in an organised criminal group/organisation and/or conspiracy. The reform proposal developed in this book offers a good remedy to this risk by suggesting, first of all, new paradigms for the fundamental provisions of the Criminal code.

* * *

Working to the reform of a foreign legal system is the popular dream of every comparative law scholar. It is in fact the occasion to apply knowledge that is often the result of year of studies and research. We think that this perspective should not gain the main role. Working to the reform of a foreign legal system is in fact much more: it is a wonderful opportunity to overcome the misleading "hearsay" knowledge that often comes from "general overviews" offered by the existing juridical literature; is a precious occasion to meet and work with excellent jurists, in our case the Task force members. Besides all this, working for the reform of a foreign system offers a unique chance to better understand the real nature of the matter that is at stake.

The regulation of a given sector of human activities, control of criminal conduct included, is made of many components. Some of these components are immediately recognisable: positive law, secondary legislation, court's decision, opinions of legal scholars; however, other components are much difficult to perceive and classify: the implementing policies, the mentality of the operators, the social construction of roles, the many structural features such as organization of courts and police, etc.

It is not easy to be aware of the plurality of these features and to understand the effective impact of each of them. Sometime we think that a particular statute or a single rule is what really matters in a given field; well, comparative law analysis shows us that a different legal systems works the same way without that rule. Other times we see the opposite phenomenon: countries with the same or similar statutes have different practical regulations of the matter. This means that we have to ask ourselves: what is the real effectiveness of a given statute, of a given rule? Does it really affect the practical regulation of the matter? Sometime, we can conclude that the role of a statute/rule is much more marginal than we thought *prima facie*: maybe, many different factors (other laws, courts' interpretations, but also informal factors) contribute in fact to shape the regulation of the matter as it is in practice.

What really matters? How can we effectively reform a given legal system? When we want to identify and evaluate the various factors affecting the actual regulation of a given matter, comparative analysis helps us a lot. Comparative analysis offers us the possibility to measure differences and similarities between legislations of different countries and their relation with differences and similarities in the actual regulation of the matter in the same countries. A sound comparative law methodology is fundamental to prevent many common mistakes

of the reform process. First of all the mistake of making "legal transplant", i.e. the mistake of copying and pasting statutes from one system to another. Legal transplants don't work because they disregard textual and contextual links of the relevant legislation. In the second place, comparative analysis helps us focusing a sound notion of "harmonisation among legal systems", making clear the insufficiency of harmonising or unifying only single segments of them. Harmonisation is a very difficult task, which requires to understand the complex connection between the specific norms that we want to harmonise (for example, the definition of a given criminal conduct) and the other factors that, in each legal system, shape the actual impact that norm (for example, the rules of criminal procedure, the rules of evidence, the mentality of prosecutor and judges, etc.).

The comprehensive reform proposal elaborated in this book tried to apply the best comparative law methodology. It refrained from the temptations of legal transplant and simplistic harmonisation. The evaluation of legislative solutions elaborated in other countries, in particular the Italian ones, was always meditated, and the contextual factors constantly considered. So, for example, the Italian definition of the crime of "mafia association" (art. 416 bis of the Italian Criminal code) was not considered a suitable solution for the Serbian reform, being such a definition too much linked to the Italian sociological background and to the contingent needs and goals of the Italian lawmaker. On the other hand, the Italian provisions concerning confiscation of assets constituted a good example to be followed with proper adaptation.

A final consideration concerns the intrinsic limit of all legislative reforms in the field of organised crime. As it is well demonstrated by the Italian experience, an effective action against mafia and similar associations requires a strong political will, relevant resources, but, above all, a convinced commitment of the people.

Michele Papa
Professor of Criminal Law
Dean of the Law School
University of Florence – Italy

PART ONE

ORGANISED CRIME, CORRUPTION AND TOPICAL ISSUES OF SUBSTANTIVE, PROCEDURAL AND ORGANISATIONAL CRIMINAL LAW

Section One

I. ORGANISED CRIME IN SERBIA AS A PHENOMENON OF RECENT TIMES

(M. Grubač)

1. On Organised Crime in General

1. Together with a number of other difficult and painful issues that modern states are facing, such as environmental problems, unemployment, migration, terrorism and organised crime today present first-rate problems of the humanity. In addition to its constant growth and increased aggression, modern crime is characterised by the appearance of new forms of criminal offences, the main goal of which is the incessant desire to become rich, where the use of violence and corruption are the regular and most frequently used means to achieve that goal.

Organised crime today has become a sort of multinational industry, which offers vast opportunity for earning money. It does not recognise national borders and state sovereignty. In an attempt to legalise the results of its illicit activity, it relies on the transfer of capital from one bank account to another, that is, from one state to another, so that it would finally return to the homeland "laundered".

2. The main goal of organised crime is to acquire profit. This is its main characteristic: it is a planned, long-term and joint profitable activity of a number of persons, which is performed across state borders to that end. Some other characteristics should also be mentioned, such as the increase of profit through violence and transfer of proceeds into legal activities.

Organised crime is a project, which is not ideologically motivated and which connects a number of people from similar social structures, organised on hierarchical basis, with the objective to acquire wealth and power through illegal and legal activities. The position in the hierarchical structure is based on kinship or capability, often on specialisation. Individual's status depends on the will of the person in charge. Such crime is characterised by conspiracy (secrecy) and struggle for domination in a given social activity or a given area. Force and bribery are used in order to achieve the goal and maintain discipline. Membership is limited, but sometimes criminals from outside the organisation are used.

Although there is no general consensus on the concept of organised crime, all those studying it agree that it is not only a special type of criminal offence, but extremely dangerous, *sui generis* and complex form of delinquent behaviour, which undermines the foundations of modern state and the main principles of

democratic system. Its actors are not satisfied by the only committing criminal offences, they endeavour to gain social power and establish a parallel system of social organisation as a serious competition with the official government institutions.

Organised crime is not an ordinary association of a number of criminals; it is a well-organised joint activity of a number of people with internal division of labour, who wilfully, consciously engage in committing serious criminal offences in a planned manner. In order to achieve their main objective (gaining as much profit as possible) such crime often relies on use of latest techniques and technologies.

Given its main characteristics, a criminal organisation can be described as an enterprise where a criminal activity of a number of people takes place, and such activity is: a) based on distribution of labour; b) conscious and wilful; c) planned for a period of time; d) relied on use of modern infrastructure and d) yields quick and major profit.

3. Organised crime challenges security of individuals and community, both internally and internationally. The present-day understanding of security includes all aspects of human survival and all aspects of human life within a society (economic, social, political, educational, communication– and information-related, defence-related etc.) and all types of networking and social organisation (regional, national, international). Security relates to individuals, the society or rather the state as a whole and to the international community.

National security is understood as a condition that provides physical, cultural and material survival of people, that is, of a nation in relation to other peoples or nations, or the international system as a whole. It is the role of the state to provide security from outside (attacks, occupations, blockades and the like) and inside dangers (violation of peace and order, crime).

4. Organised crime has its criminal rules, which are based on violence and abuse of victims. It resorts to deceit, evasion and deception, creates disorder and disturbance in the state, destabilises governments and undermines the legitimacy of parliamentary political system. Organised crime has its "natural milieu" in the market and it is in competition with the state and political system. It needs a relatively open society, and hence it could not develop in autocratic, totalitarian and undemocratic regimes in the same manner and to the same extent as it does in developed democratic states. The processes of introduction of market economy, political democratisation and pluralism constitute the foundation of every free democratic regime, but, at the same time, they constitute the main condition for development of organised crime, particularly in former communist countries.

Organised crime is established as a system parallel to the state, and it can be marked as an association operating outside control of the public and of the government. It is particularly dangerous when it starts to compete with social institutions charged with protecting public order and peace and preserving security and justice; when it shows an ambition to take up the leading place and predominance in the economy and to "take over" or control main state institutions (certain ministries, the government, the parliament, courts, police). Organ-

ised crime undermines citizens' trust in the state, as the most important social organisation.

Just as any other organisation, criminal association also has its members and leaders. Each member has detailed information on his/her role, and, thus, is fully aware of all consequences of the participation in its activity. Organisation of some criminal associations is fully hierarchical, where two models of organisation can be distinguished. The first one is the *bureaucratic-corporate* model, where the organisation of the criminal association resembles that of a modern commercial one, with complex hierarchy, division of labour according to professional criteria and with written communication between the members in charge and subordinates. The other is *the patrimonial* model, which consists of a network of mutual relations, where a number of persons act as protectors and others are their clients. The protector is the one who offers help or protection to the client and the client is the one in need of such favour, who in return expresses loyalty and respect.

In order to become a member of a criminal association, the candidate must meet certain conditions, such as: readiness to engage in criminal activity during a long period of time and to execute orders, to be unquestionably loyal to the criminal organisation etc. Sometimes, the new member has to have a special skill or qualification, which does not necessarily relate to the commission of criminal offences. In addition, there must be someone within the organisation who knows the candidate well – someone who recommends him/her and vouch for the new member.

In some associations, primarily the Italian ones, membership is based on family relations and kinship. However, family relations or kinship are not a mandatory precondition for forming a criminal association or becoming its member. In some organisations, members are connected through race (black), nationality (Albanian, Russian, Chinese) or social status (various closed communities).

According to the nature and area of activity, organised crime associations engage in two types of activities: illegal and legal. The area of illegal activity primarily includes gambling, all types of violence, prostitution and trafficking in narcotics, firearms, artwork, trafficking in human being, stolen cars and radioactive substances. These activities have a huge number of customers, which guarantees major profit. When it comes to prohibited operations, the risk is higher, but so is the price. An exception is the "racketeering". The profit is low, but extortion is more difficult to prove. Legal activities of organised crime can be noted in different areas of commercial activity, such as production of foodstuffs, construction, banking, commerce etc. The criminal association seeks to invest the profit gained by crime into a legal activity, in order to preserve the profit and, at the same time, wipe out the origin of money and avoid the risk of liability.

Organised crime can be easily perceived, but is very difficult to discover and prove. This is why organised crime receives more and more attention, and criminal prosecution authorities are granted special powers. This is justified by the fact that organised crime endangers the survival of the modern state and challenges national security. Such crime poses considerable and various dangers to states and may lead to a crisis of legitimacy of the political system. Organised

crime has been present in the Western states for a longer period, and is taking up more space in former socialist countries.

Internationalisation is one of the characteristics of organised crime. Its growth is enabled by closer cooperation between the states and globalisation, which result in easier circulation of people and goods across state borders. This has created conditions for the globalisation of crime and planetary networking of criminal organisations. This is why international cooperation is the main condition for successfully combating against this crime. What also must be taken into consideration are the social specificities of the different states and regions: solutions adopted abroad need to be adjusted to the national context. European organised crime associations cannot be fully assimilated to similar organisation in the USA, *inter alia*, due to a large concentration of states on a relatively small territory of the European continent, which is so varied in terms of nationality, culture, history, religion and social specificities. Precisely on such space, close cooperation between the police forces is imperative. It is notable that Europe today tends to apply certain methods and measures for combating organised crime based on experience from the USA; however, this has not always been successful, since some of those measures are quite outdated and, moreover, it is impossible for them to be taken over without adjustment required by the different environment.

Since 1990, the international criminal community has been "enriched" with new members from former communist countries and areas (Russia, Chechnya, Ukraine, Serbia, Kosovo, Croatia, Bosnia and Herzegovina, etc.). The criminals from those countries have rapidly taken over the western states. Russian mafia controls 85% of casinos in Berlin. Its ranks include 250,000 former Red Army soldiers, whose barracks have become self-service markets for weapons, ammunition and military equipment. When the military formations retreated, on some days, up to 60, 000 automatic guns and many antiaircraft rockets went missing. The Georgians have settled in Antwerp, in Belgium, which is the world centre for diamond trade, where they opened many gem shops. The Byelorussians have settled in the USA, where they connected with the Italo-American *Cosa nostra.* It is common knowledge that violence until then unheard of has developed on the territories of "Russian godfathers". Russians have also infiltrated the French underground (Holc, 2001). Narco-mafias from Columbia, Bolivia and Peru have business connections with mafias from France and Italy, and those with mafias from Russia and Poland, and independently of each other, they have contact with narco-mafia from Latin America, thus closing the circle. In the criminal proceedings concerning the assassination of the Serbian Prime Minister Zoran Đinđić, it has been proven that members of Serbian narco-mafia (Spasojević and Luković) have had intensive business relations with the Columbian narco-mafia. Russian criminal organisations, together with Polish and Hungarian ones, traffic children and girls to Western Europe to satisfy the needs of the prostitution, paedophilia and pornography markets. Their competitors are Serbian organisations that traffic children and women, particularly to Germany and the Netherlands. American criminal associations are the major exporters of videotapes and films with pornographic sadistic and paedophile contents, which they supply to the European

Union market. European pornography traders, particularly the German ones, work with the Chinese Triads, which make pornographic films in Thailand and Sri Lanka. Triads have been present in all European capitals for a considerable period of time, and they cooperate with similar criminal organisations in the communist China. They facilitate the transfer of illegal migrants from China to European Union countries, by supplying them with fake documents.

5. The most frequent illegal activities whitin the sphere of organised crime are: gambling, racketeering, usury, production and trade of narcotics, stealing and selling of artwork, prostitution, human trafficking, trafficking of human organs, trafficking stolen cars and radioactive materials, money laundering. The number of consumers of illegal organised crime activities is very large, the risk is high, but the profit is accordingly enormous. Legal activities in which organised crime association engage do not include only certain businesses, but entire branches of economy, from food production, construction, HoReCa sector, banking and insurance to car, entertainment and fashion industry.

a) Illegal trade in firearms – This type of organised crime has three main characteristics: it is done secretly, is followed by major costs and ends in money laundering. The resellers acquire major profit, primarily during local ethnic wars, when the price of firearms grows enormously, due to special prohibition of trade. Trafficking in firearms is almost always intertwined with that in narcotics. This is confirmed by cases of certain movements and communities (national, liberating, terrorist), which use the trade in narcotics in order to provide firearms for their violent actions. Over the past years, such trade was intensive in all states generated on the territory of the former Yugoslavia (Slovenia, Bosnia and Herzegovina, Serbia, Croatia, Macedonia, and Kosovo). Relatively few criminal proceedings were initiated (in Slovenia high political representatives were questioned concerning the trade of the so-called Maribor and Brnsko weapon).

b) Smuggling and trade of stolen vehicles – Stealing and smuggling of cars flourished in Serbia from 1989. The disintegration of the political system in states of the Eastern block was connected to the appearance of high unemployment and, in relation to that, with the appearance of powerful organised criminal associations, specialised in stealing vehicles. Political liberalisation has enabled Eastern Europe to become a major market for stolen cars, with its centre in Poland. From Poland, those cars were transported to the Baltic Republics, Ukraine, Russia and other countries. The business was mostly run by Russian and Bulgarian associations, and the activity was closely connected to counterfeiting of documents and insurance fraud. This was a common phenomenon in Serbia, but the police barely reacted to it, since many of its members were corrupt.

c) Smuggling of cigarettes and oil – Illegal smuggling and legal trade of cigarettes and oil were the most profitable and widespread organised crime businesses during the entire course of Slobodan Milošević's regime and international community economic sanctions. This type of smuggling represented the nucleus of organised crime in Serbia, and has created the first and strongest criminal organisation. The police and the customs service did not even try to suppress it, but rather, created conditions for its uninterrupted operation (removing regu-

lar customs control, counterfeiting of documents, police escort for smuggling convoys and the like). That was the response of the national government to the international community sanctions introduced against Serbia and Montenegro at the beginning of the nineties. The organisers of the operation included high state officials, police generals (deputy Minister of Interior, Stojičić), members of Slobodan Milošević's family (son Marko and wife Mirjana), their friends (Vlada, aka Tref) and others. Some of them were killed in "business" liquidations, while criminal proceedings are pending against others (ten members of the so-called tobacco mafia are in custody, and several, including the wife and son of Slobodan Milošević are on the run). Some, primarily Montenegrin citizens, including the highest representatives of state government of the time, are subject of interest of investigative organs of other states (e.g. Italy).

d) Trafficking in narcotics – This is the most profitable criminal activity after the abolishment of prohibition in the USA. That type of trafficking is the main source of income in most transnational criminal organisations. The industry of production and trade of narcotic drugs and psychotropic substances is extremely profitable. Since the market is enormous and the profit high, this business is hard to control, and new associations and organisations keep appearing in this field. An average of eight intermediaries stand between the producer and the final consumer, and the price is doubled each time. A Europol research shows that 80% of money used to purchase drugs by final users in Europe comes from criminal activity, and on the other hand, that constitutes a half of the total money gained by crime. The most frequently traded drugs are heroin, cocaine, cannabis and synthetic drugs.

Heroin, as the most widespread drug, originates from the golden triangle between Burma, Laos and Thailand, where 1500 tons of this narcotic are produced annually, but also from Iran, Afghanistan and Pakistan. From there it is transferred to Europe via the so-called Balkan route. During the war in former Yugoslavia, that route was interrupted and for a while it went further north through Hungary. *Cocaine* comes from Latin America (Columbia gives around 80% of the global production and most of its population live from this business). In 1999, some 380 tons of cocaine were produced in the world. *Cannabis* and its products are smuggled to Europe mainly from Morocco. Climatic conditions for the production of plant from which this drug is obtained are also favourable in Serbia, but the quality is poorer. The production of cannabis grows annually: in 1998, 3442 tons were produced, in 1999 around 4225 tons etc. *Synthetic drugs* are produced in laboratories. The raw material is chemicals and hence the production is not geographically related to any state or region. In Serbia, an entire synthetic drug factory was discovered in the town of Nova Pazova several years ago.

e) Human trafficking – This illegal trade has several forms, and the most frequent one is the *smuggling of illegal migrants* from undeveloped countries. Each year, criminal organisations smuggle around million people. Migrants are exposed to various forms of violence during the process. *Trafficking of women and children* is a special form of human trafficking and until recently was particularly developed in Southeast Asia. It is closely connected to prostitution, which

represents a considerable income for Japanese Yakuza and Triads. In Europe, prostitution is mainly controlled by the Russian mafia and mafia from the territory of former Yugoslavia. According to data, from the time before the dissolution of communism and the development of East-European mafia, around one million children were subject to trafficking annually, and the proceeds from such trafficking amounted to five billion dollars. After the dissolution of the Soviet block, both figures increased considerably. In some European Union countries (the Netherlands, Germany and Portugal), a powerful child pornographic industry has developed in recent years. The Asian market is vast. Triads traffic children from Thailand, South Korea, Sri Lanka and Philippines to Europe. Legislation on child pornography exists in all European Union states, but there is a considerable difference between its strictness and consistent application. Child abuse is taking more terrible forms, and criminal prosecution and proving of these occurrences are sometime hindered by the fact that important individuals, even priests are involved (e.g., the recent case of statute of limitations on criminal prosecution of a former prior of a monastery in Fruska Gora for prohibited sexual acts with minors).

f) Trafficking in human organs – is a more recent criminal activity undertaken with the purpose of transplantation, and it brings enormous profit. Poor countries are an important and lucrative market for obtaining human organs. Such trade is accompanied by abduction and forced transplantations, particularly in Brazil, Mexico, Argentina and Honduras and it is enabled by corrupted health care institutions. Such companies act according to the highest standards and observe all health care regulations, so as not to receive any undesirable public attention. As legal companies, they show considerable, permanent and legal income. Criminals buy and abduct children from poor countries and Eastern Europe without obstacles and thus obtain necessary "raw material" without considerable costs. Roma children are in particular danger. Traders bribe psychiatric hospital management, which often results in patients being mutilated or murdered. Trafficking also includes unborn foetuses that are removed from the mothers' body, who is either unaware or accept due to money problems.

In Serbia, there were no proceedings for this type or organised crime offences, but the public suspects that such things did take place. Parents who were told that their children were dead, and were then secretively and illegally "buried" in hospitals where they were delivered have been requesting an investigation for years. Similarly, a director of the Belgrade emergency service has recently voiced a suspicion that some doctors from that service were bribed by funeral home companies so as not to reanimate but deliver corpses without delay.

g) Cyber crime – Cyber crime includes offences whereby computer networks and databases are penetrated in order to perform financial transactions that are very difficult to reveal and prosecute. This is a development chance for organised crime, and at the same time, an area that is least regulated. Computer techniques are becoming an important instrument for efficient operation of illegal business. On the one hand, they are utilised by the law enforcement and help them discover criminal organisations. On the other hand, these organisations have now

gained tremendous possibilities to improve their criminal activities. Modern criminals no longer have to go into the bank in order to rob it, since they can do it by sitting in their chairs in front of a computer. Criminal associations hire the best computer experts from the West and employ them in the East, where the banks do not have sound and efficient computer protection yet. New techniques enable money laundering in all states, if the money is forwarded through the computer. Of course, these are not only financial transactions, but also piracy. In Serbia, illegal copying of computer programmes is common and possible on every computer. It is followed by downloading and recording of music and films. Moreover, it can also include industrial espionage through computer links. Computer experts have no trouble in gaining information about the latest products that are kept on factory disks and then sell them on the market.

Serbia has recently introduced special regulations and special organisation of police and judicial authorities (Special Internal Affairs Department, Special Public Prosecutor's Office Departments and Special Department in the Belgrade district court) for combating cyber crime.

h) Trafficking in nuclear material – This type of illegal trade has expanded over the last decade of the XX century, particularly after the dissolution of the Eastern block when the security of objects for keeping of radioactive materials has been weakened, due to corruption and poor financial status of the employees. Criminal organisations act as intermediaries, not as end users; rather, they sell them to terrorist organisations and interested states. The nuclear armament race has left the world with 3.000 000 kilograms of plutonium and uranium, and, according to experts, terrorists need only a few kilograms to make nuclear weapons. Russian criminal organisations are leading in this field. The leaders of those gangs have their seats in Moscow, and operate the smuggling from their positions in Germany. Serbian "Ravna Gora" seated in East Berlin with developed activity in Belgium and the Netherlands also has an important role (Freemantle, 1996). Former Yugoslav states are also involved in this business.

i) Money laundering – Money laundering is the main condition for the survival and spreading of trafficking in narcotics, firearms, trafficking in human beings, human organs, radioactive and nuclear materials and other kinds of organised crime. Only recently consensus was reached on the fact that the best way to fight crime is to take away its proceeds, which are its main motive and fuel. Therefore, whoever has insight into the flows of illegal money has the power to command organised crime, reach the top of a criminal organisation, or even destroy it. The objective of money laundering is to cover up the illegal sources of proceeds and to avoid taxes, and for the money to become a part of legal money flows. Money laundering is an accompanying form of organised crime and it enables support to main criminal activities. The major part of laundered money comes from trafficking in narcotics, whilst some 25% of illegal transactions are covered by other forms of transnational crime. Money laundering appeared at the time when proceeds from crime had outgrown the costs and when prosecution authorities have started to investigate the origin of illegal property, to confiscate it and use it as evidence in court proceedings. Money is mostly laundered

in developing countries. Due to the danger that this phenomenon represents for a modern state, the need of passing special statutes on confiscation of proceeds from organised crime offences is evident. To that end, the Council of Europe has adopted a special Convention on Money Laundering, the objective of which is to harmonise national legislations on money laundering and confiscation of such proceeds. Serbia has ratified this 1990 Convention only in 2002. The procedure of money laundering takes place in three stages. The first is the introduction of cash into the financial system through banks and other financial institutions. In the second stage, the money rests and is separated from its source in order for the criminal trail to be lost. The third stage consists of financial activities, such as purchase of properties or parts of the market. The phenomenon is very extended in Serbia, but is seldom processed. Some estimates show that the current purchase of state and socially owned property in the process of its transformation to private property is mainly done by laundered money, and some criminal proceedings have been initiated against several high government officials suspected of being involved in money laundering (Janjušević, Kolesar).

j) Corruption – Corruption is a phenomenon the content of which is difficult to determine, given that its importance changes in relation to social and state systems. Corruption is the abuse of public office in order to achieve personal benefit. Police forces and prosecutors' offices worldwide establish special units or authorities for combating against corruption and exchange information and knowledge on the phenomenon. A special non-governmental organisation for combat against corruption (*Transparency international*) has been formed. It is active in over eighty states, and in many others measures are taken for establishing national boards. Serbia is considered as an highly corrupted state and regularly ranks among the worst countries. In 2002, the Government has formed its Council for Combat against Corruption, but, characteristically, from the very beginning up to date, all governments have serious disagreements with the Council. The large-scale corruption (system corruption) is enabled by excessive involvement of political centres of power in the passing of business decisions. On the other hand, there are powerful companies, that is, their owners, who have key influence on the actions of state authorities and agencies (it is publicly said that they have conquered the Government and the Parliament). The role of political parties in this is a separate issue. Corruption is built in the system of education, health care and judiciary. It is in those terms we can speak of a system of corruption.

k) Extortion and debt collection – Dissolution of Yugoslavia, in addition, has opened up space for various financial speculations and lack of financial discipline. Individuals and companies had major debts. Court proceedings were inefficient when it came to resolutions of these issues. Special companies and organised criminal groups dealing with financial engineering and debt purchase appeared. They collected such claims by different methods, often by force and intimidation. The criminal offence of extortion from Article 214 of Serbian Criminal Code could not cover that type of activity, given that the condition for the existence of that criminal offence is the obtaining of illegal proceeds, which is covered by the perpetrator through a right acquired by a fake purchase.

2. Measures against Organised Crime

The incursion of organised crime in Serbia and its new forms do not allow for an optimistic prognosis. The strength of that crime, particularly in countries with high unemployment rates, such as Serbia, primarily lies on the fact that it creates some forms of employment and, in not so rare cases, enormous profit. Organised crime is always profitable and beneficial for all those participating in it. This is why combat against organised crime shall be neither simple nor easy. In this century, modern states are facing an important and difficult task: to create an efficient mechanism that will prevent the predominance of organised crime over democracy. The main problem lies in the fact that such mechanism should restrain that type of crime and not destroy democracy at the same time. Regardless of the degree of efficiency, mechanisms that would lead to the destruction of democracy are unacceptable.

Combat against organised crime is difficult, complex and long lasting. It has to take place on two levels: repressive and preventive. ***Repressive*** measures include the passing of adequate: a) substantive criminal legislation; b) procedural criminal legislation and c) legislation on special organisation of criminal prosecution authorities, so that they can deal with the special nature of these criminal offences and their perpetrators. This, primarily, requires special investigating teams to be established and properly qualified; these organs have to be granted special powers, and special forms of international cooperation need to be established, with a view to promoting the practice of discovering and proving these criminal offences.

When it comes to substantive legislation, regulations must be adopted to incriminate different forms of organisation, for which it has to be established in criminal proceedings whether they constitute organised crime offences or not. Next, provisions need to be adopted that will prevent activities suspected of being a part of organised crime (e.g. extortion, drug trafficking, money laundering). Provisions of criminal procedure law are of utmost importance in combating against organised crime. The prevailing position is that the classical methods used in discovering and proving criminal offences, when applied to organised crime, have proven to be inefficient and that prosecution authorities need to use special investigative techniques and more efficient secret surveillance measures.

Preventive measures aim at eliminating the causes of organised crime, that is, to limit the possibility of its expansion. Numerous preventive measures relate to the functioning of different sectors of the social and economic system. Particularly important are the ones aimed at strengthening social morale and legality, but equally important are the concrete economic and social policy measures (eradication of unemployment). An important segment of prevention relates to the reduction of demand for organised crime services. This includes measures such as decriminalisation of some typical organised crime activities, such as the legalisations of certain "soft" drugs, prostitution, gambling, etc. Prevention necessarily includes sound and ruthless control of state services and civil servants, since, without the possibility of their corruption, organised crime cannot exist. Preventive strategy in these terms sets considerable requirements, such as working with people who have great power. Naturally, each strategy has to strike a

balance between human freedoms and the requirement of efficient functioning of state institutions.

3. Emergence of Organised Crime in Serbia

In Serbia, organised crime is a recent-date phenomenon. In the so-called Tito's Yugoslavia, which lasted until the end of the eighties of the last century, organised crime did not exist as in the present-day meaning. The closed socialist economy and controlled market by a single-party, ideological and semi-police state did not provide for manifestation and development of that type of crime. Trade and economic relations with other countries were inconsiderable and well controlled. There was no private entrepreneurship in economy, real estate ownership was limited, while money flows were under strict supervision of the police apparatus. Foreign trade affairs were under direct control of intelligence service, which in turn were controlled by a small circle of highest party leaders.

There was the so-called economic crime, which, despite certain similarities, was different from organised crime, particularly in that it could not be internationalised, and it did not aim at acquiring social or state power. Consequently, it can be concluded that organised crime does not succeed in totalitarian or semi-totalitarian states. Italian experience can support this thesis. The mafia, which is a part of old social heritage, initially supported by civil authorities and the clergy as an authority that maintains social order and discipline, was under control for the first time during the fascist regime. These two phenomena exclude each other and cannot exist at the same time, since they are both totalitarian. .

In former Yugoslavia, there were some rudimentary forms of organised crime, such as drug trafficking, but in terms of scope and organisation, this was far below what we have today. Other forms of organised crime (money laundering, human trafficking, illegal trade in arms, smuggling of emigrants and human organs) did not exist or virtually did not exist. Some of these activities (e.g. trade in firearms) were performed by the state, rather than criminal associations. Individuals' chance in this type of crime was only to go abroad. The state encouraged such transfer and used "its men" in foreign organised crime associations to accomplish its political goals – primarily to eliminate political opponents.

Large-scale organised crime in all its forms emerged in Serbia at the beginning of the 1990s. The dissolution of socialist Yugoslavia, beginning of civil wars in Croatia and Bosnia and Herzegovina, sanctions imposed on Serbia and Montenegro by the international community (as of 1991) and the tendency of the authoritarian regime to preserve power have all enabled organised crime to flourish. In a form of self-defence, this criminality and increased corruption, was bred by Milosevic's power, as a "saving hand" and as means to preserve political positions. The regime had tacitly accepted organised crime as a source to provide for the minimum of existence needs of the population (payment of pensions and salaries to civil servants and soldiers) and for purchasing high-priced armament and ammunition for local wars.

All this had quite a bit of irrational, even some kind of "state" spite. Mr. Bulatović, who was then president of the federal government, noted in his mem-

ories: "They (international community, comment by M.G.) strikes us with sanctions, we strike them by smuggling of drugs and cigarettes". During this period, which lasted for over ten years, organised crime was not criminally prosecuted and suppressed, but was rather consciously nourished and incited in a planned manner. That period could be referred to as the golden era of organised crime in Serbia. At that time, no one knew who was a criminal and who was a member of the police, who was a customs officer and who was a smuggler, who was a member of the government and who was a member of the criminal underground, who was a colonel and who a hit man. The state was fully integrated in crime, and crime was fully integrated in the state. All the spectacular murders, which happened on daily basis, happened with direct participation of several active or former police officers or civil servants. Highest state officials, their families and the next of kin engaged in crime or were involved in it. Some of them were even leaders of criminal organisations. Active policemen, even officers, served the leaders of organised crime after working hours in the capacity of advisors, bodyguards or security guards for their families, property or facilities. Political opponents, opposition leaders, journalists and the like were killed or kidnapped by criminal organisations, following orders from the government.

During weekends, criminals went to the battle sites in Croatia and Bosnia and increased their wealth by looting, so as to continue their criminal activity in Serbia, requiring and obtaining high state recognition for their "patriotic service" and the status of deserving businessmen, with legalisation of war profit. During that period, not one conviction for organised crime was passed. Not one internal regulation was passed, nor a single international agreement on suppressing that type of criminal offences was ratified. The notion of organised crime was unfamiliar even to legal professionals. It was not considered or discussed. That expression was not used neither in political or legal speech, not even in election campaigns.

Over a short period, in the beginning of the last decade of the XX century, numerous criminal associations and all types of organised crime started to appear in Serbia. Local wars on the territory of former Yugoslavia have enabled the expansion of illegal trade in arms, which brought enormous profit, particularly after the introduction of international community embargo on that activity. Thefts and smuggling of motor vehicles, followed by insurance fraud and counterfeiting of documents, have become every-day and mass occurrence. This type of illegal international trade was conducted by many people, even by family members of the president of the state. The first criminal proceedings against the so-called tobacco mafia were initiated only in 2007, therefore, over fifteen years after the emergence of criminal organisations of that kind. Drug trafficking has become very profitable and widespread. The monopole was held by the most powerful gangs in Belgrade and Novi Sad. Heroin and cocaine, despite international community sanctions, were obtained in large quantities abroad, and cannabis was grown in the country. Subsequently, entire synthetic drug factories were discovered (in the town of Nova Pazova). Trafficking in women and children and child pornography became widespread. Similarly, there are serious indications that trafficking of human organs has grown as a new form of organised

crime. Frequent and inexplicable disappearances and unconvincing explanations of a large number of still-borne children improperly buried in Belgrade delivery hospitals (without knowledge and presence of parents), justify such doubt. Computer crime has also emerged, just as piracy and bank frauds. Some of the main routes of trade in radioactive material pass through Serbia. Money laundering, as an auxiliary phenomenon and condition for the survival of organised crime still remains unregistered and unsuppressed in many cases, even though the phenomenon is present to a considerable extent. The criminal offence under that denomination was introduced in the Serbian Criminal Code as late as 2005 (Article 231). Mass privatization of state-owned companies in the process of transition of political and economic system was largely financed by dirty money. Finally, for a long time Serbia is among countries with most corrupt civil servants.

4. Developing Awareness on the Increased Social Dangers of Organised Crime

The above-mentioned thesis, that organised crime in Serbia has emerged only in the beginning of the nineties, with a high level of tolerance of state authorities, leads to the following thesis: awareness on the increased social danger of organised crime did not exist. Likewise, there were not state activities directed towards its suppression. Neither the state nor legal professionals were interested in that phenomenon, since it appeared not to exist as a socially dangerous occurrence. Criminal activity was treated as a normal occurrence and in time, the general public grew accustomed to it. Very little was known on organised crime in Serbia, even in theoretic terms. The problem was not treated in academic circles. The bibliography of papers on organised crime in Serbian language even today would hardly be impressive. The topic of organised crime was rarely on the agenda of conferences organised by lawyers' associations, even those specialised in criminal law, which are organised regularly in Serbia several times every year.

The first serious, in-depth and systematic research on organised crime (*Countering Organized Crime and Corruption by strengthening the rule of law in Serbia and Montenegro*) in Serbia started in 2007, in the Belgrade Institute of Comparative Law, following the initiative of a UN research institute *(United Nations Interregional Crime and Justice Research Institute – UNICRI)* and a few professors of the Florence Faculty of Law (*Michele Papa, Alessandro Simoni)*. That research will represent the most important contribution to the raising of awareness on the special social danger of organised crime in Serbia. This book is a result of that research.

The social danger of organised crime is indeed special and much stronger than that one posed by ordinary crime, even though the latter must not ever be underestimated or neglected. However, the dangers posed by organised crime have started to be clearly perceived only recently, or, more precisely, since the assassination of the president of first Serbian democratic government, Zoran Đinđić, on March 12, 2003. He was assassinated because he had declared war on organised crime. After a period of time was lapsed after the change of regime (some peoplesay that it was a time of faltering, but most likely it was the time

necessary to gather and organise state force for combat with what was then a powerful enemy), Prime Minister Đinđić ordered his ministers to prepare laws necessary for organisers and members of criminal associations to be criminally prosecuted and stand trial. That cost him his life. Serbia has thus, just like Italy, paid dearly for the fight against organised crime. This sacrifice must not be forgotten or underestimated.

Social awareness on the increased danger to general interest was formed slowly. It is normal for that process to be late, since the phenomenon must first be manifested, in order to identify and take adequate measures against it. In the case of organised crime, the evolution of such awareness is particularly slow and difficult. In the course of the Serbian democratic overturn in 2000, and for some time after it, there were certain flirtations with organised crime, which has immediately and unequivocally understood that it had to turn its back to the regime that was leaving, that had created it, and offer its services to the new government.

Special and increased social danger of organised crime is a consequence of several of its characteristics that differentiate organised crime from ordinary crime to a considerable extent. These are: *high level of organisation of membership,* with military discipline and internal hierarchical relations; *great thirst for money*, which ruthlessly affects the financial existence of the state and the stability of state budget; *aspiration for power,* which threatens the survival of state institutions and *transnationality,* that is, global expansion, which does not recognise state borders and sovereignty. The latter was one of the reasons why modern states have departed from the dogma of national sovereignty, recognising the necessity of mutual co-operation and started creating joint protective institutions. Classic crime is an individual and, as a rule, unplanned, impulsive and sudden occurrence. It causes conflict between individuals, the perpetrator and the state, which has a right to punish the perpetrator (*ius puendi)*. The winner of such conflict is certain. In the case of organised crime, there is a conflict between two organisations, criminal and state, where the criminal organisation may sometimes be just as strong, or stronger, than the state. It is in the times of state crises that organised crime becomes particularly aggressive and tends to take over and replace state power, or at least become its equal partner. Organised crime undermines the foundations of the modern state and negates the main principles of its democratic and legal organisation. It destabilises governments, undermines parliamentarianism, destroys the trust of citizens in state and legal institutions, and negates legality and social moral. Organised crime challenges security, not only individual, but also collective, state and international security.

It is very difficult to define organised crime, and also to recognise and prove it in any given case. This is mainly because its illegal activity is intertwined with other, legal activities. This is done precisely in order to mislay its criminal trail and to preserve the profit gained through crime. Almost all proceeds from organised crime are invested into companies, educational institutions and humanitarian actions. Organisers of criminal associations in time gain the status of benefactors and deserving citizens. They become the first to be invited to the most important state ceremonies, they organise pompous humanitarian events, become selfless

donors, patrons of cultural and sport events, they pay out prestigious national awards for science, art and culture, establish faculties and universities bearing the names of their illiterate or semi-illiterate parents.

Today, countries in transition, including Serbia, are under particular attack of organised crime. Organised crime moves toward them from other more stable and organised states, since it has more favourable conditions to develop. This is why organised crime today flourishes in these states.

5. Preparation of Necessary Statutes for Combating Organised Crime

The activity of state authorities in this direction has begun sometime before the assassination of Prime Minister Zoran Đinđić and was the direct cause for the assassination. From the second half of 2002, when the work commenced, to date, major results can be noted in normative terms: a) new criminal substantive legislation has been passed, envisaging certain incriminations for organised crime; b) in 2002, a new chapter (XXIX/a) was added to the 2001 CPC – it governs procedural instruments for combat against organised crime; c) special statute on the organisation of state authorities (public prosecutor's office, police and court) to combat against organised crime has been passed (on July 19, 2002). A year after that, a special police department to combat against organised crime (UBPOK) was established within the Ministry of Interior. Within a short period of time, several international conventions were ratified, including the UN Convention against Transnational Organised Crime and the European Convention on Prevention of Money Laundering and all relevant conventions on international legal aid, extradition, transfer of criminal cases, etc. Necessary anti-corruption statutes have been passed, governing: prevention of conflict of interest, accessibility of information of public importance, public procurement, etc. The Government has formed "its" Council for Combat against Corruption, which has proven, on several occasions, its independence from the government.

In the process of countering organised crime that is taking place in Serbia, which started only recently, certain wanderings, misconceptions and unsuccessful legislative solutions can be noted. It needs to be stressed that this is not a local specificity, but characteristic of many other countries in the world.

In Serbia, preventive measures against organised crime are hardly considered. Until now, the only question posed was how to eliminate or mitigate the consequences of organised crime, rather than how to eradicate the causes of such crime. As in some other parts of the world, the Serbian government has so far preferred to deal with the consequences rather than with causes of the phenomenon; it finds repression more acceptable than prevention, and the general public believes that this fight is most easily and cheaply won by extending police powers, and that violation of human rights as a consequence of this policy must be accepted as collateral damage. Those who believe so are deeply mistaken.

We don't consider the Ordinance on Military Commissions against Terrorism by American President George Bush (later replaced by a similar Act adopted by the American Congress), passed after September 11, 2001 as a best practice to be followed. Not even in cases of serious dangers, such as terrorism and organised

crime, can the principles that constitute the attainments of modern civilisation and the foundation of modern criminal law not be forgotten. Unfortunately, Serbian legislation includes examples that show the propensity to take over solutions from other legislations uncritically, even when these are manifestly inadequate. For instance, the legalisation of secret placement of surveillance equipment into citizens' apartments, envisaged by the new Criminal Procedure Code of 2006[1] threatens to destroy the fundamental human right to privacy and the constitutional guarantee to inviolability of domicile (Article 40 of RS Constitution). The provision of Article 146 paragraph 7 of the new Code authorises police and Security-Information Agency officials to secretly enter citizens' apartments in order to place surveillance and recording equipment and to maintain such equipment. Likewise, the shackling of accused persons by electronic devices that reveal their movement and "spatial position" (Article 168 paragraph 9) can prove to be more inhumane that the medieval shackles placed on convicts, since modern shackles are placed on citizens before conviction.

It is worrying that these and similar novelties today easily find their way into other European states, which are considered as a cradle of democracy and human rights. Serbian legislator is prone to take them over without hesitation and criticism. Primarily under the influence of the reactions from the Bush administration after September 11, 2001, USA and many other countries have voluntarily renounced to a fair part of individual freedoms without any serious discussion. In the name of war against terrorism, many counties have started using "reinforced interrogation measures"– tapping without necessary court orders, tracking of all financial transactions all over the world, etc. Serbia has expressed readiness to accept and follow such a trend.

Precisely these days Great Britain intends to legalise the proposal of 90-days preventive detention for citizens suspected of being terrorists. A similar proposal was legalised in Serbia during the state of emergency introduced after the assassination of Prime Minister Z. Đinđić, but, fortunately, these statutory provisions were soon reversed. Preventive detention by the police could lasted up to 60 days (twice for 30 days), instead of the regular 48 hours. It was also provided for any other citizen to be detained, if there were only assumptions that he/she could provide information or evidence on organised crime, even if no other suspicion on such citizen's participation in criminal activity existed. Such detention of witnesses, according to regulations, could regularly last up to 24 hours, but under extraordinary conditions, even up to 30 days (twice for 15 days).

Recently, the German public was upset by the proposal from the federal Minister of Interior, Mr. Wolfgang Schaeuble that those accused of serious criminal offences, potential terrorists in particular, should be detained in advance, even "purposefully killed". According to the Minister's opinion, killing a potential terrorist is allowed, since terrorism is in war with the state, and killing an enemy soldier in the course of war is not prohibited. The German public considered such positions as worrying and dangerous. It is beyond dispute that dangerous

1 The Code was passed in May 2006, and should have started to be applied as of June 1, 2007, but a special Act ("RS Official Herald", 49/2007) postponed its application until December 31, 2008. Until then, the 2001 CPC ("FRY Official Gazette", 70/2001, 68/2002 and "RS Official Herald", 58/2004 and 85/2005) shall be applied.

people exist and will always exist in all societies, but they cannot be killed "on credit", in advance and without court proceedings. Terrorists are serious criminals, not fighters. And just as all other criminals, they have to answer for their crimes before the court. To kill them as fighters would mean to acknowledge their legitimacy.

These and similar approaches can be dangerous and thus must be always subject to critical analysis and public debate. It cannot be permitted that, due to them, terrorism and organised crime destroy the rule of law and human rights, this would constitute a defeat of the modern state. Efficient measures of protection from the most serious crime, which do not challenge the rule of law and human rights, must be sought elsewhere. They include the eradication of corruption, developing awareness on the necessity to involve all state institutions, the whole public and relevant political actors into the global fight against organised crime. Globalisation and internationalisation of organised crime must be answered by creating an efficient global protection mechanism, that is, by cooperation and networking of criminal prosecution authorities from all countries of the world. Special emphasis should be given to categorical confiscation of property and proceeds from crime. Proceeds are the main objective of organised crime and, consequently, it's "Achilles' heel". If such proceeds are not realised, if they are always confiscated from the perpetrator, there shall be no organised crime. Until it is clearly stated that crime does not pay, to anyone, combat against organised crime shall remain unsuccessful.

II. SERBIAN CONFRONTATION WITH ORGANISED CRIME

(J. Ćirić)

In theoretic terms, it has been argued that without a firm connection between groups from the world of organised crime and political power there is no organised crime at all, and that in such a case organised crime in the true meaning of the word cannot be talked about.[2] This coupling of politics – the state and organised crime, can be realised in different ways, the most frequent and common of which is corruption. Hence, the phenomena of organised crime and corruption imply each other and are intertwined[3]. This is why they need to be viewed in mutual interaction.

The issue of organised crime and corruption is today a topical one, particularly in Serbia, after the assassination of Prime Minister Zoran Đinđić. Nevertheless, this was not always the case, not only due to lack of knowledge and experience from other countries. In Serbia, the prevailing position for years has been that organised crime is not present. This was a consequence of corresponding

2 Read more on that in: Jovan ĆIRIĆ, *Država i organizovani kriminal,* "Sociološki pregled" No. 3/2005.

3 Read more on that in: Nebojša TEOFILOVIĆ, *Korupcija kao oblik ispoljavanja organizovanog kriminala*; u zborniku radova "Organizovani kriminalitet – stanje i mere zaštite", issued by the Ministry of Science and Environmental Protection, Ministry of Interior of the Republic of Serbia and Higher School for Internal Affairs, Beograd 2005, pp. 533–548.

political and ideological standpoints, which prevailed at the time. On the one hand, it was a heresy to say anything that would indicate a relationship between the political power and the world of crime, and, on the other hand, the starting point were dogmatic Marxist positions that organised crime is a phenomenon characteristic of capitalist system and that it is impossible as such in socialism.[4] To a certain extent, this was not completely incorrect, particularly if we accept the opinions of renown USA criminologists who, in simplified terms, treated organised crime in the light of a well-organised enterprise, that acts according to the classical market principles of supply and demand, offering its goods and services (drugs, prostitutions, weapons) on the illegal market to those in need of such services.[5] If there is no freedom and free market, then there can be no organised crime. This is why it does not exist or exists in rudimentary forms in the least democratic and totalitarian societies. Bearing in mind the fact that market and market economy were not fully liberalised in Serbia, but that rather a fair share of economic relations was controlled by the state and communist-party structures, such position is not without grounds. The lack of free market, or rather, the fact that the communist party had a say on everything, particularly on economy, have resulted in the impossibility of certain forms of illegal business to develop.[6] In simple terms, the party and political structures were a mafia above all others.

In addition, Serbia, or rather, former Yugoslavia, differed from other socialist countries because its citizens could receive passports freely and without any limits, and the group of citizens that travelled to the West as tourists and migrants also included a considerable number of those engaged in criminal activities. This was, in a way, a "safety" valve for the state (former SFRY). Due to the limited market and limited possibilities to earn money in Yugoslavia (Serbia), but also due to the repressive communist regime, a considerable number of criminals acted legally in the home country, whereas they conducted their illegal businesses and earned their wealth on great West European markets. The communist regime consciously tolerated that, often using such individuals to do the states' dirty work and deal with its political opponents abroad.[7] In this way, former SFRY, with over a million economic emigrants in the countries of the West, a

4 Milan MILUTINOVIĆ, *Kriminalna politika,* "Savremena administracija", Beograd 1984, pp. 122.

5 Primarily Edwin SUTHERLAND, *Principles of Criminology* – rewised, Chicago-New York-Philadelphia 1963, pp. 223, but also Sheila BALKAN, Ronald BERGER, Janet SCHMIDT, *Crime and Deviance in America – A Critical Approach,* Belmont, California, 1977, pp. 183.

6 At the beginning of the seventies, in the former SFRY, a strong campaing was conducted against all groups of rich people (this campaign was repeated from time to time – in the fifties and sixties) under the slogan "you have a house, return the apartment", which means that all those who were rich, regardless of the origin of such wealth, were *a priori* suspicious to the state and the communist party. Under such conditions, neither legal nor illegal richness could fully and freely develop activities, and hence crime, primarily organised crime, was held under control by such repressive, anti-liberal measures.

7 Some individuals were directly in service of the former communist secret police. They were allowed to commit robberies and sell drugs in the West, but, in return, they were forced to stay put when at home and to engage only in legal businessess. However, if we consider that one of the main characteristics of organised crime is its connection with state and political

considerable number of which engaged in criminal activities, had bought relative social peace.[8] However, after the fall of the Berlin wall in 1989, when the citizens of other East European countries were free to travel to the West, the situation changed. The scene was taken over by more powerful and better-organised criminal groups, primarily from the former USSR and Albania. It was then, when the criminals who were tolerated so far, who stayed put at home spending the money earned abroad, could no longer find their way in the great Western world, and so they started their illegal business in Serbia. At the same time, professional circles of Serbia started becoming more interested in the issue of organised crime, and even the politicians begun speaking openly on the fact that Serbia was no longer immune to the problems of organised crime.[9]

The beginning of the nineties was characterised by the tragic events concerning the dissolution of the SFRY and the war on its territory. This fact is strongly related to the come out of certain groups and actors who changed from criminals into national heroes and defenders of endangered national interests. This was also the time when both regular and paramilitary units on the territory of former Yugoslavia started to become heavily armed,[10] particularly in the republics that had declared their separation from the SFRY, which until then did not have their own armed forces and weapons. These republics found different ways to obtain adequate weapons and ammunition, which implied establishing various illegal channels from abroad, using the services of domestic and foreign mafia, including foreign mercenaries, the so-called "war dogs". Tough guys and controversial businessmen, which were euphemistic terms for criminals, became very useful for the realisation of political and war objectives, particularly for parties at war in former Yugoslavia. There was, therefore, no longer a tactical and indirect, but an open and direct understanding between state and political power in former Yugoslav republics, on the one hand, and mafia structures, on the other. To com-

power structures, it is then clear that the mentioned incidents actually formed the roots of what became a much more organised and developed organised crime.

8 Jovan ĆIRIĆ, *Sveopšta kriza jugoslovenskog društva i prognoze rasta kriminaliteta,* "Forum – čovek i pravo", No. 9–10/1991.

9 Probably one of the first papers to deal with organised crime was written by Vladana Vasilijević, named *Moguće oznake organizovanog kriminala,* "Pravni život", No. 3/1985. It was followed by other papers: Zoran STOJANOVIĆ, *Organizovani kriminal i pitanja zaštite i ostvarivanja ljudskih prava,* zb. radova Instituta za kriminološka i sociološka istraživanja, "Prava čoveka i savremena kretanja u kriminalnoj politici", Beograd, 1989; Zorica MRŠEVIĆ, *Organizovani kriminal*, referat na Savetovanju Instituta za kriminološka i sociološka istraživanja "Aktuelni problemi suzbijanja kriminaliteta" Beograd 1993; Jovan ĆIRIĆ, *Organizovani kriminal: kriminološki i krivičnopravni aspekti,* u zborniku radova "Psihologija kriminala", izd. Instituta za kriminološka i sociološka istraživanja, Beograd 1995. vol. 1. Serbian association for Criminal Law has dedicated one of its conferences in Kopaonik, in 1996, entirely to that topic – 20 papers were presented to the conference the topic of which was "Organised Crime and Corruption". See also: Mića BOŠKOVIĆ (I volume) and Đorđe IGNJATOVIĆ (II volume) under the joint title "Organizovani kriminal", issued by the Belgrade Police Academy in 1998. Other important papers include: Milan MILOŠEVIĆ, *Organizovani kriminal*, Beograd 2003 and Željko NIKAČ, *Organizovani kriminalitet*, "Pravni život", 9/2003.

10 These paramilitary units were most often only a different name for criminal organisations.

plete the paradox, mafia structures and organisations of different sides at war, despite heavy verbal, nationalistic rhetoric, had intense cooperation in the field of trade in drugs, weapons, oil and other goods that were in deficit.[11] General war chaos and full social anomie favoured the appearance and strengthening of organised crime, which was additionally emphasised in Serbia by the introduction of UN economic sanctions, which implied the impossibility of normal and legal supply of oil, but also of medications and other goods. This created a social and psychological atmosphere where everyone who managed to smuggle goods from abroad and to break the UN blockade was perceived as a person who realised positive and eligible social goals, not as someone engaging in illegal business and nobody was warned about the danger from the strengthening of organised crime.[12] Moreover, in the atmosphere of general disappointment and discontent due to the sanctions and difficult living conditions brought about by the sanctions, the countries of Western Europe and USA, which introduced the sanctions, were perceived as the enemies of Serbia by a majority of its citizens, and hence, everyone who managed to break the sanctions and the blockade was treated in extremely positive terms, as heroes.[13]

It is, therefore, not only the case of state tolerating groups engaged in criminal activities, but of the state inciting such groups. In any case, these groups experienced full social affirmation. The coupling of the state and criminal establishment[14] grew ever stronger and more apparent, and it was just a question of time when such groups would get out of control of the Milošević regime, which

11 It seems that the situation did not improve when the peace forces were deployed in Bosnia and Kosovo, since their arrival resulted in the appearance of prostitution and trafficking in women from Eastern Europe, primarily Moldova and Ukraine. Read on more on the cooperation between the parties in war and their mafia type operations in Kurt-a KEPRUNER's book *Putovanja u zemlju ratova – doživljaji jednog stranca u Jugoslaviji* (prevod sa nemačkog), "Prometej", Novi Sad 2003, pp. 181–188 and also in a book by Vinko PANDUREVIĆ, *Rat u Be&H i paravojne formacije*, "IGAM", Beograd 2004. pp. 61–67.

12 Read more on that in the paper by Zorica MRŠEVIĆ; – Embargo kao faktor organizovanog kriminaliteta, – referat na Savetovanju Srpskog udruženja za krivično pravo "Organizovani kriminal i korupcija" – Kopaonik 1996. pp. 85–86.

13 It is interesting that the same rhetoric was used by Milorad Ulemek, the first accused for the murder of Serbian Prime minister. Namely, in his deposition on the trial, he described how a group of people from the criminal zone, connected with state power structures, had smuggled an enormous quantity of drugs to the West (some 6000 kilos of heroin). Ulemek professed to have refused to participate in that, and then, according to his words, one politician, who was close to Đinđić at the time, when Đinđić was already Serbian Prime Minister, said: "This will be our little revenge to the West. They poisoned us with bombs with depleted uranium, and we shall poison their youth by heroin" Upon hearing this, Ulemek supposedly agreed to participate in it. Regardless of the authenticity of this story, one thing is beyond dispute – nationalist rhetoric, in the conditions of sanctions, pressures, imposed poverty, self-resourcefulness of individuals and the state, and bombing of Serbia, has resulted in certain individuals being perceived as positive personalities and national heroes. It would never happen under normal conditions. In other words, the extraordinary circumstances under which Serbia lived during the 1990s have resulted in the distortion of moral values and the manner in which certain individuals and actions were valued.

14 This coupling is, by definition, one of the main characteristics of organised crime, as pointed by modern criminologists worldwide. For instance, Mabel ELIOT, in a book translated into Serbian, *Zločin u savremenom društvu,* Veselin Masleša, Sarajevo 1962, pp. 107–111.

consciously tolerated and used them. Today, several years after Milošević's downfall, numerous statements and attestations of people who participated in those events reveal that a very active and important role was played by individuals and groups from the criminal underground. Those groups escaped from the existing and, until then successful, Milošević's control. In simple terms, the ghost was out of the bottle; organised crime was no longer under control and it became an independent, but also very influential factor in political events in Serbia. To complete the irony, what happened to Zoran Đinđić seems to be a similar sequence of events. After using the criminal structures to overthrow Slobodan Milošević on October 5, 2000, he too postponed the time of final confrontation with organised crime groups, partly in fear of them, but in any case convinced of being able to control and destroying them, once the conditions for it were met (once necessary legislation is passed), in a legal, regular way.[15] The course of the trial for the assassination of prime minister Đinđić so far, and testimonies and statements of some of his closest associates, imply that it was only a matter of time when the first and decisive blow was to be struck, but it was unclear who would strike – the mafia or the state. However, it seems that mafia was so strong and connected to a series of centres of political power in Serbia, that it was the mafia who struck against the state first, by killing the prime minister on March 12, 2003. This is certainly a sign of vitality and strength of what is called organised crime in theory and practice, and a message to everyone not to play with mafia, that it is hard to control, and that combat against organised crime should by no means be postponed, regardless of how expedient and pragmatic it may seem in a given moment, in political and economic terms.

An additional aggravating circumstance for Serbia and its condition was the activity of Albanian, that is, of Kosmet mafia, which was not only tolerated during the air strikes against Serbia in spring 1999, but, according to some experts, was also rather assisted from the West. Such sources, believed that the West saw the Albanian mafia, that is, the KLA, as a good and useful ally in aggression against Serbia, that is, in overthrowing[16] Slobodan Milošević. Today, this is not

15 Well-known Serbian analytical journalist, who is well informed of the state of crime in Serbia, Miloš Vasić, whose book entitled *Assassination* appeared on the two-year anniversary of the prime minister's assassination, stated in an interview for a daily paper: In summer of 2000, in some important places it was estimated that Milošević's time was up and that he should be let down the drain and it was practically then when the major actors of future events entered the scene: Dušan Spasojević (one of the main accused for the Đinđić's assassination, later killed during arrest – author's comment), Legija (first accused of Đinđić's assassination – author's comment), Čume (cooperating witness in the trial for Đinđić's assassination), Đinđić, etc. Dušan Spasojević is very well known as a famous drug dealer from Zemun ("Politika", February 11, 2005 in a text entitled *Gangsters shut up "the Witness"*"). Almost without concealment, Miloš Vasić here implies that individuals from the "grey zone" of organised crime and individuals from the political structures that overthrew and replaced Milošević's regime participated in the joint venture of overthrowing Milošević. This can confirm the thesis that, after overthrowing Milošević, the new government used the same men and the same means, and that the same men from the "grey zone" have "finished off" both Milošević and Đinđić.

16 Read more on that in, Jovan ĆIRIĆ, *O fenomenu kosovske mafije,* "Sociološki pregled" No 1/2006, with numerous quotations from West-European newspaper and other sources speaking of the activity of the Albanian mafia from Kosmet

denied by the political establishment of the USA and other NATO countries that participated in the war against Yugoslavia, or rather, in political use of mafia for fighting against Serbia and Yugoslavia.[17] Consequently, it has become clear that the phenomenon of organised crime in Serbia has wider political and geo-strategic implications than what usually comes to mind when the issue of "organised crime in Serbia" is mentioned".[18]

In order to get one, even superficial impression on the situation regarding organised crime in Serbia, it might be useful to have a look at statistical data of the Ministry of Interior, which show what type of criminal offences are lately noticeable in terms of number and scope.[19]

Number of committed criminal offences with elements of organisation in the period 2002–2004 in the territory of the Republic of Serbia without Kosovo:

Criminal offence	**2002**	**2003**	**2004**
Money laundering	1	1	3
Abduction	36	19	18
Human trafficking	0	6	55
Extortion	294	377	359
Criminal association	1	59	3
Production, distribution and marketing of narcotic substances	1019	2276	3879
Illegal crossing of state border	23	14	14
Establishing of slave relations	4	4	0
Solicitation	71	56	37
Car theft	4817	3237	3820

It is likely that each analyst could interpret this data in a different way, and say that where the police data show small figures, there are some problems in the police and in the discovery of these offences. However, this data shall not be analysed in detail on this occasion. We think that just their presentation provides sufficient insight into the situation concerning organised crime in Serbia.

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17 On that, also read: Milan Milošević, collection of papers "Sprečavanje i suzbijanje savremenih oblika kriminaliteta" – izd. Kriminalističko-policijske akademije, Beograd 2006 and Milan Milošević, *Kosovo and Metohia, The Epicentar of Terrorism in West Balkan,* pp. 71–82.

18 Among the numerous texts on the internet dealing with the activity of Kosovo mafia in Italy and other Western countries, we point out only three: article named" *Whistleblower: Kosovo 'Owned' by Albanian mafia",* on www.newsmax.com/archives/articles/2005/9/87/101219.shtml–42k, and other texts that can be found on – www.spinwatch.org/modules.php?name=News&file=article&sid=1703 and www.xavier-raufer.com/english_s.php

19 Data taken from text by Miroslav MILOŠEVIĆ, *Organizovani kriminal i terorizam – osvrt na pojavne oblike u Republici Srbiji*, zb. radova "Organizovani kriminalitet – stanje i mere zaštite", op. cit. pp. 47.

Section Two

PROBLEMS OF SUBSTANTIVE CRIMINAL LAW

I. GENERAL ISSUES

1. On Criminal Offences of Conspiracy to Commit Crime (Article 345 of the Serbian Criminal Code) and Criminal Association (Article 346 of the Serbian Criminal Code)

(R. Sepi)

Conspiracy to commit crime (Article 345 of the Serbian CC): "*Whoever conspires with another person to commit a specific criminal offence punishable by imprisonment for five years or more, shall be punished by fine or imprisonment up to one year.*"

Prescribing of this criminal offence is an incrimination of the activity, which, by its legal nature, is a preparatory action. It is assumed that the incrimination of the agreement to commit a specific criminal offence can act in terms of general and special prevention, which is why domestic legal theory considers such incriminations as "obstacle *delictis*". The *actus reus* is the agreement to commit a criminal offence, which is to be understood as any type of agreement or pact between two or more persons to jointly commit one or more specific crimes. In terms of execution of crime, the manner in which the agreement is reached is irrelevant – it can be done orally or in writing or by conclusive actions. The main condition for the existence of the *actus reus, which* is based on undisputed will of the mentioned persons to jointly commit one or more specified criminal offences, should be established.

When it comes to the definition of the notion of "specific criminal offence", the predominant position in court practice and criminal law theory is that it is not necessary to specify the time, place or the manner in which criminal offence is to be committed, but that it is necessary for the criminal offence to be specified in type and object. For example, there shall be no criminal offence of conspiracy to commit crime in case of agreement to commit one or more robberies without determining the subject or the object of attack. Conversely, this offence shall exist when agreement is reached to steal some goods from a given store on a given night. In other words, the agreement should include at least partial elaboration and further concretisation of important elements of the offence. Given that agreement can include one or more criminal offences, the question posed in theory and in practice is whether this situation constitutes one or more agreements. The prevailing position is that, if there is agreement to commit more criminal offences of the same kind (e.g. robbery) and there is unity of objective, there shall

be only one criminal offence of conspiracy to commit crime. If the agreement includes the commission of several criminal offences of different kinds, motivated by different goals, there will be as many criminal offences of conspiracy as offences.

The statute also prescribes an objective condition for incrimination by stating that the agreement must relate to a criminal offence punishable by at least five years in prison or more. This is an indication of the criminal policy behind this offence; it should cover agreements for most serious criminal offences.

The perpetrator is each party to the agreement who agrees with the commission of the offence. The phrasing of the mentioned provision implies that the existence of criminal liability requires intent, which includes the awareness that an agreement to commit a specific crime has been reached with others. This is why parties to the agreement have the capacity of principals.

The criminal offence is considered committed when the agreement to commit crime has been reached, according to the circumstances of the case. This criminal offence is a punishable preparatory action; its independence exists only up to the point when the parties to the agreement commit the actual offence. Once the criminal offence is committed or attempted, the criminal offence of conspiracy loses its independence and the parties to the agreement will answer, according to the subsidiary principle, only for the criminal offence or attempt committed, provided that it is punishable by law. Those parties to the agreement who consented to the commission of a specific criminal offence but did not participate in its execution shall answer only for the criminal offence of conspiracy to commit crime.

The subsidiary character of this offence is manifested in one more case. When the preparation of a criminal offence punishable by at least five years in prison or more is punishable or when agreement to commit such crime is incriminated as the *actus reus*, the perpetrators of such crime shall not be subjected to provisions governing the conspiracy to commit crime, provided its punishable preparation entails a more serious punishment than that prescribed for conspiracy to commit crime (e.g. perpetrators of conspiracy to commit sabotage shall not answer for conspiracy to commit crime but for the punishable preparation of sabotage for which imprisonment for 1 to 5 years can be pronounced).

Criminal Association (Article 346 Serbian CC):

(1) Whoever organises a group or other association aiming at committing criminal offences for which imprisonment for three years or more can be pronounced, shall be punished by imprisonment for three months to five years.

(2) Member of group or other association from paragraph 1 of this Article shall be punished by imprisonment up to one year.

(3) If the offence from paragraph 1 of this Article relates to a group or other association aiming at committing criminal offences for which imprisonment for twenty years or imprisonment of thirty to forty years can be pronounced, the organiser of group or other association shall be punished by imprisonment for at least ten years or imprisonment for thirty to forty years, and a member of association by imprisonment for six months to five years.

(4) Organiser of group or other association from paragraphs 1 and 3 of this Article who, by exposing the association or in another way, prevents the committing of offences for the committing of which the association was organised, shall be punished by imprisonment up to three years, and may also be remitted from punishment.

(5) Member of group or other association from paragraphs 2 and 3 of this Article who exposes the association before committing a criminal offence for the purpose of committing of which the association has been organised, shall be punished by fine or imprisonment up to one year, and may also be remitted from punishment.

This criminal offence also includes the existence of an agreement or a pact and objective conditions of incrimination. However, the existence of agreement in case of this criminal offence can only be one of activities constituting the realisation of the *acta rea* – organising of a group or other association with the aim to commit criminal offences. To organise means to create the mentioned forms and can be realised by various activities (e.g. recruiting, but also by creating a plan of action). In any case, the activity in question has to be one that directly forms and strengthens, in organisational terms, one of the mentioned forms of organisation for the purpose of joint activity. Based on the interpretation of the mentioned provision (more accurately, paragraph 2 that envisages the punishing of a member of the group or organisation), and in absence of legislator's position on the issue, it can be noted that the *actus reus* is set alternatively, by incriminating both the organising of the group and membership in the group or association. Acquiring the status of a member of the group implies consent, or, more accurately, accepting the participation in the realisation of its goals. It is assumed that such consent must be of stronger intensity than in the case of previous criminal offence, due to its nature and seriousness. Here it is also required that the group member be aware of his/her membership and ready to participate in its activities. This can be manifested in a number of ways, from express statement of will to simple participation by conclusive actions. In negative terms, a group member is any member who does not have the capacity of the organiser. When it comes to the degree of organisation, no special conditions are required. Unlike in the case of the former criminal offence, the group should be viewed in terms of provisions of Article 112 and 113 of the Criminal Code – as an association of three or more persons. Another form of organisation (gang, a conspiracy group etc.) are characterised by a larger number of individuals, certain degree of organisation and internal hierarchy. In general terms, it has to be a more permanent form of association that acts on a larger territory in order to perform criminal offences.

Regarding the previous criminal offence, the statute also prescribes objective conditions for incrimination of this criminal offence. The group, that is, other association, should be organised for committing criminal offences punishable by at least three years in prison or more. This implies that the legislator considers criminal association to be a more serious criminal offence than conspiracy, since the objective conditions for incrimination of the former include a lower special minimum prescribed sentence. An additional difference compared to the criminal offence of conspiracy is that the criminal offences for the commission of which the criminal association is being created does not need to be specified.

The agreement must include several offences, but their execution does not have to be specified in place, time, and modalities and so on. However, the prevailing opinion in theory is that at least the type of criminal offences to be committed by the group should be specified, such as smuggling of drugs and psychotropic substances and so on.

A criminal offence is committed when a form of organisation is created or when someone becomes a member of association. If none of the criminal offences for the commission of which the association is formed is attempted or committed, the organiser shall answer for organising the association, and the member for becoming part. If one of the mentioned offences is attempted or committed, one should distinguish the liability of the organiser from the liability of the members of the criminal association. The association is not of temporary character and liability related to it does not end once the criminal offence covered by the plan is committed. Member of association who participates in the commission of the offence derived from the association's plan shall answer both for membership and for the criminal offence in the commission of which he/she took part. If such separate criminal offence was attempted or committed, the organiser of the criminal association shall answer for the creation of the association together with all offences committed by group members as if he/she had committed them directly, provided that they are envisaged by the criminal plan or derive from it. The offence derives from the plan in both cases, when it is envisaged by it and also when it is not foreseen, provided that its commission is necessary in order to perpetrate a crime covered by the plan. As already mentioned, this is a question that is to be answered in each given case. Legislative provisions show that the person performing the *actus reus* of becoming a member is punished more leniently, and that this is a less serious form of criminal offence.

Anyone can be the perpetrator of a criminal offence. Bearing in mind the nature of this offence, it can only be performed with intent. Concerning the organiser, the intent must include the awareness of the creation of a group or other association the goal of which is to commit criminal offences. Members must be aware of becoming a member of an association organised for the purpose of committing criminal offences. Thus, perpetrator's *mens rea* must be kept into consideration in the incrimination and sentencing process Just as the offence of conspiracy to commit crime, the criminal offence of criminal association is also of subsidiary character in relation to all the cases where criminal association is prescribed as a special incrimination of an offence, provided that stricter punishment is prescribed for such offences (e.g. a person who organises a group for committing offences against constitutional order and security shall answer for association for the purpose of unconstitutional activity).

2. The Problem of Criminal Sanctions for Organised Crime Offences

(R. Sepi)

There is a question of whether it is necessary and if so, to what extent, to adjust substantive criminal law to organised crime offences. Moreover, it is questionable whether organised crime offences require the introduction of some new

forms of criminal sanctions in Serbian legislation, and if so, how severe these sanctions should be..

Even though the expression of social condemnation of a criminal offence is prescribed as one of the purposes of punishment,[20] Serbian legislation does not include special criminal sanctions for organised crime offences. This is largely due to the fact that Serbian substantive criminal law does not recognise such offences, that is, does not have a special group of organised crime offences. In other words, Serbian law does not recognize special organised crime offences, but, quite to the contrary, any of the offences prescribed by special substantive legislation can "gain" the character of an organised crime offence, depending on the interpretation of relevant statutory provisions. Doctrine gives no indication as to what sanction could be introduced in the general part of the substantive legislation to counter organised crime. The strictness of Serbian legislation and the fact that punishments are prescribed in wide ranges are sufficient for efficiently combat against organised crime. The ultimate solution could be to prescribe that the commission of an organised crime offence has qualitative circumstances, which would result in stricter punishing. However, the question of what kind of criminal sanctions could be used, remains open.

3. Seizure of Pecuniary Benefit (Articles 91, 92 and 93 of the Serbian CC)

(R. Sepi)

Provisions of Serbian criminal law are in accordance with the general legal principle that illegal activities cannot result in the acquisition of a right. In terms of legal technique, the legislator has opted for prescribing the special, "measure" of seizure (of pecuniary benefit),[21] which is different from confiscation of property, on the one hand (it is of more general character because it relates to all criminal offences since it includes only what has been obtained illegally, not of all property) and from property criminal sanctions, on the other hand, which affect the perpetrator's property rights and freedoms. The measure also differs from special types of criminal sanctions called security measures by the Criminal Code.

Article 91 of the general part of the Criminal Code prescribes that no one can retain pecuniary benefit from crime (paragraph 1) and that such benefit shall be seized, under the conditions prescribed by the Code and the court decision establishing that a criminal offence has been committed.

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20 Article 42 of the Criminal Code of the Republic of Serbia ("*RS Official Herald*", No. 85/2005, 88/2005 and 107/2005).

21 In historic terms, Serbian legislation accepted seizure of proceeds of crime for the first time when the Federative National Republic of Yugoslavia (FNRY) Criminal Law of 1959 was amended. The measure was classified as a security measure (even though it does not have the character of a secuirty measure; the ground for its application was not a dangerous condition or the danger of repeated execution of criminal offences – quite to the contrary, its purpose was the restoration of the situation that existed before the criminal offence was commited). The present special measure of siezure was instituted by the adoption of the Socialist Federal Republic of Yugoslavia (SFRY) Criminal Code of 1977.

In other words, the main principle of Serbian law is that no one can acquire illegal benefit for oneself or others by committing a criminal offence. The term "no one" should be understood to primarily relate to a person who participates in the commission of a criminal offence in terms of criminal law. However, pecuniary benefit it also seized from any other person to whom it has been transferred or entrusted for safekeeping. Therefore, "no one" in this case shall mean "anyone who acquired benefit", including the persons who did not participate in the commission of the criminal offence and to whom criminal sanctions cannot be applied. The law prescribes that only pecuniary benefit from crime can be seized. The mentioned wording of the text indicates that the necessary condition for the application of this measure is causality, that is, a cause and result relationship between the offence committed and proceeds obtained. In theoretic terms, the following situations are possible: benefit was obtained even before the commission of the criminal offence had begun (e.g. compensation for its committing was planned and paid in advance), benefit was obtained by the commission of the offence (e.g. by seizure of object or money) or benefit was obtained after the commission of the offence (e.g. bribery). Even though the provisions does not prescribe so, the second condition for the application of this measure, which is a consequence of its legal nature, is that the pecuniary benefit obtained should be illegal (if illegality is excluded the measure shall not be applied, which is in accordance with the main principles of Serbian legislation relating to illegality). The wording of the mentioned statutory provision indicates that the legislator intended for this measure to be mandatory. The accepted opinion in doctrine is that indemnity to damaged person by a third party, such as an insurance company, does not prevent the measure from being applied, since the primary objective of the measure is not to restore property to the damaged party, but rather to take away from the perpetrator whatever was gained illegally. Moreover, even if the value of the pecuniary benefit is low, that shall bear no relevance on the applicability of the measure, since it shall in all cases be mandatory.

Paragraph 2 of the mentioned Article prescribes the legal grounds for its application: *court decision establishing the commission of a criminal offence* reached by application of relevant provisions governing criminal procedure.

Pecuniary benefit obtained by a crime, as well as evidence for determining of its amount are established *ex officio* in the course of criminal proceedings (Article 491 CPC/2006).

Based on the principle of mandatory application, it is evident that the court decision declaring the defendant guilty must establish both the commission of a criminal offence and the existence of pecuniary benefit from such offence, and, consequently, its seizure. Such court decisions are, on the one hand, those by which the criminally liable perpetrator is sentenced to a punishment, suspended sentence, caution or by which he/she is being remitted from punishment, as well as those by which compulsory treatment and confinement in medical institution or compulsory psychiatric treatment out of medical institution are pronounced. When it comes to under-age perpetrators, this measure can be pronounced if a custodial or prison sentence is pronounced. If pecuniary benefit is obtained by a criminal offence being committed with accessories, the court must pronounce

this measure to each party to crime, by establishing the amount of benefit for each individual perpetrator (instead of making them jointly liable for its restitution). Illegal and incorrect decision on seizure constitutes grounds for challenging the judgment in criminal proceedings (Article 391 subparagraphs. 2 and 4 of the CPC/2006). If the measure is not pronounced even though statutory conditions for doing so existed, the appeal is filed on the grounds from Article 395 paragraph 2 of the CPC/2006, even though, in accordance with the principle of mandatory application of the measure established in the Criminal Code, one could claim that this constitutes violation of the Criminal Code (Article 393 of the CPC/2006).

Provisions governing seizure represent the legislator's attempt to define the object of seizure. Money, items of values and all other proceeds from crime shall be seized from the perpetrator, and if seizure is not possible, the perpetrator shall be obliged to pay a pecuniary amount corresponding to the value of such proceeds (Article 92 of the CC).

However, establishing what is covered by the concept of pecuniary benefit and how its amount is established, is a problem that affects any attempt at definition. Given that pecuniary benefits can be obtained by the commission of various criminal offences, and that circumstances under which they can be perpetrated can differ widely, it is impossible to encompass them into one provision.. The answer to the question must be given on a case-to-case basis. Following the general principle of civil law, it must be taken into consideration that proceeds include both an increase in property and prevention of its decrease. It is therefore considered that pecuniary benefit is obtained when the perpetrator increases his/her or other person's property by new objects or a sum of money, but also when the perpetrator has avoided to pay a debt, tax or hand over an object to another person by the commission of the offence. Bearing in mind that this is not a criminal sanction, due to which the perpetrator should not be damaged by its application, there is an outstanding question of costs acknowledged to the perpetrator of crime. Doctrine considers that such costs undoubtedly include the costs of purchase price, taxes paid, transportation costs and the like. On the other hand, it is generally accepted that personal costs of the perpetrator related to the commission of the criminal offence, such as hotel or phone bills, or the value of work invested, shall not be deducted from the proceeds of crime.

The moment in which the pecuniary benefit is estimated is important for calculating the real value of benefit. The main rule is that the value of pecuniary benefit is calculated according to the value the objects acquired had at the time when the criminal offence was committed. This means that the amount of pecuniary benefit will not be the profit realised by the sale of an object if the perpetrator sold it at a price lower than the market price, or otherwise diminished its value. Moreover, the seized property shall not be the price realised by the sale of object if this was done at the time when its market value had dropped – therefore, independently by the will of the perpetrator. In such a case, the perpetrator shall be obliged to compensate the value the object had at the time the criminal offence was committed. Hence, the main rule should de-stimulate future perpetrators. At the same time, if the perpetrator increased the value of the

object obtained after the crime was committed by building an additional part or removing a malfunction and then sold it, the basis for calculation of benefit shall not be the value so increased, but the value that existed at the time the criminal offence was committed. However, this rule is departed from if the increase in value took place without the perpetrator's influence, e.g. due to increase in market value, when the entire proceeds are seized. To do otherwise would mean that the perpetrator can use the fruits of the criminal activity. Doctrine does not answer the question of what value shall be seized when the perpetrator uses the objects acquired by the commission of a crime to obtain a property, either legally or illegally, e.g. by selling the drugs taken from a rival group, the street value of which is much larger than its value before sale, or by the use of funds acquired by illegal recovery of tax evasion. We are of the opinion that entire pecuniary benefit should be seized in this case as well, and the perpetrator should not be rewarded by the application of this measure. It is possible that, at the time when the measure is pronounced or enforced, the perpetrator is unable to restore the objects obtained or is unable to restore them to the same extent, regardless of the reason. This is when the perpetrator shall be obliged to pay a pecuniary amount corresponding to the benefit obtained. However, if the pecuniary benefit consists of objects of greater value that can be confiscated in part, the perpetrator shall be obliged to pay the due equivalent in dinars. If it is a property-type benefit, e.g. obtaining a credit under more favourable conditions, the amount of proceeds to be seized shall be established according to their market price that would be paid at the moment the crime was committed. If the perpetrator obtains money and then purchases certain objects or substitutes the obtained objects by other objects, the general position is that only the objects obtained by the commission of crime can be seized, and if that is not possible, the perpetrator must be obliged to pay the corresponding value.

However, the court shall use its discretionary power in establishing the amount of pecuniary benefit if its calculation would cause disproportionate difficulty or result in considerable delay in proceedings (Article 493 of the CPC/2006).

In other words, entire pecuniary benefit is seized, both that obtained by the commission of criminal offence and the pecuniary value obtained for the objects acquired. In case of complicity, the court shall identify the measure of seizure towards each component using its discretionary power. Criminal Code also includes provisions that, together with the corresponding provisions of the Criminal Procedure Code, govern the main rules and the procedure for seizing pecuniary benefit obtained by commission of a criminal offence from persons to whom they were transferred. "Pecuniary benefit shall also be seized from a person to whom it has been transferred without consideration or with consideration that manifestly does not correspond to the real value. If the pecuniary benefit obtained by commission of criminal offence was obtained for another, such benefit shall be seized" (Article 92 of the CC).

Where confiscation of pecuniary benefit acquired through commission of a criminal offence from other persons is under consideration, the person to whom the pecuniary benefit was transferred to or the person for whom it was obtained,

or the representative of a legal entity shall be summoned for hearing in preliminary proceedings and at the trial. The summons shall state that the proceedings will be held if the person does not appear. The representative of the legal entity shall be heard at the trial after the defendant. The court shall proceed in the same way regarding other person referred to in the paragraph 1 of the present Article, unless he/she is summoned as a witness. The person to whom the pecuniary benefit was transferred or the person for whom it was obtained, or the representative of the legal entity shall be entitled to propose evidence concerning the determination of the pecuniary benefit and, upon the approval of the president of the Trial Chamber, ask questions to the defendant, witnesses and expert witnesses (Article 492 of the CPC/2006).

The wording of the text leads to the conclusion that the modality through which the benefit was transferred is legally irrelevant for the application of this measure. The only differentiation is whether the benefit was transferred to another person without consideration or with consideration that manifestly it does not correspond to the real value. In such case, the pecuniary benefit is seized from other persons, by application of the same rules used when seizing the benefit from the perpetrator. In other words, it is irrelevant whether the mentioned persons had knowledge about is origin or whether they could have known that it was obtained by commission of a criminal offence. The only thing that is important is whether the benefit was transferred without consideration or with a symbolic consideration. The mentioned solution is better and simpler to use than the former, that prescribed that benefit can be seized only if the mentioned persons fail to prove they paid full consideration for the specified objects. If the benefit was transferred with a symbolic consideration, the person from whom the benefit is confiscated shall preserve the right to damages from the perpetrator of the criminal offence. These situations should be differentiated from those when the person who committed the crime entrusted the benefit to another person for safekeeping or covering-up, when it shall be seized from such person. Given the fact that there is a number of criminal offences the commission of which may result in obtaining of pecuniary benefit for another person (e.g. abuse of power in economy, criminal offences against official duty or property and the like) the statute prescribes the possibility of seizure of pecuniary benefit from such other person, whether natural or legal. The same rules applicable to seizure from the perpetrator shall apply. Special attention should be given to the fact that substantive legislation does not prescribe time limits for the enforcement of this measure, which is why it can be argued that this measure is not subject to the statute of limitations.

It is interesting that the General Part of the Criminal Code dedicated to the seizure of pecuniary benefit also includes procedural norms. Namely, the corresponding provisions of criminal procedure rules seizure with regard to the calculation of the value of the pecuniary benefit.

"If the injured person submits claim for the recovery of objects acquired through commission of criminal offence or for a corresponding value, the pecuniary benefit shall only be determined in respect of the part exceeding the claim " (Article of CPC/2006).

"The court may in a convicting judgment satisfy the claim of the authorized person fully, or it may satisfy it partially while directing the authorized person to assert the rest of the claim in a civil action. If data established in criminal proceedings doesn't provide reliable basis for either full or partial adjudication, the court shall direct the authorized person to assert the claim in its entirety in a civil action" (Article 237 of the CPC/2006).

On the other hand, the procedure for seizure of pecuniary benefit if the injured party has a property claim is prescribed by special substantive law provisions entitled "protection of injured party".

(1) If injured party's property claim was accepted in criminal proceedings, the court shall pronounce the seizure of pecuniary benefit only if it exceeds the adjudicated property claim of the injured party.

(2) The injured party who was referred to civil action in criminal proceedings in respect of the property claim may claim indemnification from the pecuniary benefit seized, provided that he/she begins a civil action within six months from the time the decision referring him/her to civil actions becomes finally binding.

(3) Injured party who failed to file a property claim in criminal proceedings may request indemnification from the pecuniary benefit seized, if he/she has initiated a civil action for the purpose of establishing his/her claim within three months from the day he/she learned of the judgment by which seizure of pecuniary benefit was pronounced, and at the latest within three years from the day the decision on seizure of pecuniary benefit becomes finally binding.

(4) In cases of paragraphs 2 and 3 of this Article, the injured party must request indemnification from the seized pecuniary benefit within there months from the day the decision by which the property claim was accepted becomes finally binding (Article 93 of the CC).

Based on the mentioned provisions, it can be concluded that the application of measure of seizure of pecuniary benefit is subsidiary in relation to the injured party's property claim, which has priority. The law also prescribes the situation where the injured party has filed the property claim, but was instructed by the court to realise it fully or in part in a civil action, and the measure of seizure of pecuniary benefit was pronounced.

In these cases, the injured party can be indemnified from the seized pecuniary benefit only if he/she meets both of the two following conditions: to initiate civil action within the prescribed time limit from the day the decision referring to civil actions becomes final and, assuming that the first condition has been met, to request indemnification from the value within three months from the day the decision by which the claim is adopted becomes finally binding. The wording of the text shows that both time limits are preclusive and the default results in the loss of right to indemnification. The mentioned provisions also cover the cases when the injured party has failed to file the property claim in criminal proceedings. Such actions from the injured party do not result in the loss of right to indemnification from seized pecuniary benefit, but its realisation requires certain conditions, prescribed by law. The first condition relates to meeting the time limit for initiating civil action for the purpose of establishing the property claim,

whilst the other relates to the filing the request for indemnification from the benefit seized within an objective, legally prescribed time limit.

4. On Liability of Legal Persons for Criminal Offences and its Relationship with Commercial Transgressions

(R. Sepi)

The necessity of statutory regulation of liability of legal persons for criminal offences (now popularly termed as "criminal liability of legal persons", which is not only a terminological difference but an incorrect and casual use of the attribute "criminal" outside its real scope[22]) is mentioned in numerous international documents[23] ratified by Serbia, thus assuming the obligation to implement the norms of international law and harmonise national legislation with them, which results from the need for a comprehensive and efficient fight against new forms of illegal and harmful operation of certain legal persons.

Despite that, Serbian legislation still does not recognise the liability of legal persons for criminal offences. Even though one of the more important reasons for passing new criminal legislation in the Republic of Serbia was the implementation of and harmonisation with international standards assumed by ratifications, the legal lacuna in terms of liability of legal persons for criminal offences is still present. Historical arguments against such solution can be dated back to the FNRY Criminal Code, which, in its general part, included Article 16 reading "Legal persons are criminally liable only for those offences for which their liability is expressly provided by law". This was also prescribed by the Act on Criminal Offences against the People and the State for Commercial Cooperation with the Enemy During Occupation and Act on Prohibited Trade, Prohibited Speculation and Commercial Sabotage for the offence of prohibited speculation (but, when the 1951 Criminal Code entered into force, such liability was revoked and was not re-instituted to date). On the other hand, well-known reasons speak against the inclusion of such liability in the new Criminal Code – the principle of individual subjective liability of natural persons and the principle *nulla poena sine culpa*.

Based on the above-mentioned, it can be argued that Serbian law today recognises a threefold differentiation of punishable acts, which differ from each other in terms of their legal nature and characteristics: criminal offences (to which provisions of the Criminal Code apply), commercial transgressions (to which provisions of the Commercial Transgressions Act apply) and petty offences (to which the Petty Offences Act applies).

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22 Such terminology may create the misunderstanding that legal persons may be liable only exceptionally, in relation to specified criminal offences and only when so prescribed by law, and not in general terms. This is why international sources of law do not nominate a special type of liability nor do they prescribe its nature (even though it is esentially a special type of criminal liability) but rather oblige the states to take steps in order to establish adequate form of liability of legal persons for specified criminal offences.

23 The last of which is the Act on Confirming on Criminal Law on Corruption ("*FRY Official Gazette – International Agreements*", No. 2/02).

Even though petty offence and criminal offences have many characteristics in common– concepts ("important elements"), institutes ("illegality", "mens rea") and rules ("exclusion of illegality"), – considerable differences between these two branches of law derive from the fact that they relate to different categories of punishable acts, which, in turn, differ from each other not only in terms of their seriousness, but also their legal nature. Criminal law concerns criminal offences, and petty offence law concerns petty offences.

Petty offence is an illegal act committed with mens rea that is prescribed as a petty offence by a regulation of the competent authority, and the petty offence does not exist, even though all important elements of petty offence exist, if illegality or mens rea are excluded (Article 2 of the Petty Offences Act – "RS Official Herald", No. 101/2005).

The difference between various forms of punishable actions entails a difference in terms of liability for criminal offences and petty offences.

Natural and legal person, responsible person in a legal person, state authority, organ of territorial autonomy or local-self government unit and entrepreneur can be liable for petty offence only when so is prescribed in the regulation governing the petty offence. Natural person, entrepreneur and responsible person in a legal person or state authority shall be liable for petty offence if they were mentally competent at the time and committed the petty offence with intent or negligently.

A legal person is liable for petty offence committed by an action taken with mens rea or failure to observe due diligence by the management body or responsible person or by action taken with mens rea by another person who was authorised to act on behalf of the legal person at the time the petty offence was committed.

The Republic of Serbia, state authority, organ of territorial autonomy, city and local self– government unit cannot be liable for a petty offence (Article 17 of the Petty Offence Act).

A responsible person is the person to whom certain operations regarding management, operation or work process are entrusted within a legal person, as well as the person performing certain duties in the state authority, organ of territorial autonomy and local self-government unit.

Statute may prescribe that responsible person in state authority, organ of territorial autonomy or local self-government unit answers for petty offence.

A responsible person who acts on the basis of orders from another responsible person or managing organ and who takes all actions he/she is obliged to take on the basis of the statute, other regulation or act, in order to prevent the commission of a petty offence, shall not be liable (Article 26 of the Petty Offences Act).

Based on the mentioned provisions, it can be concluded that petty offence liability does not constitute an adequate answer for the cases of serious forms of crime committed by legal persons. First, the petty offence liability of legal persons is established on principles of objective liability, as opposed to subjective liability of natural person, which requires mental capacity and mens rea. The explanation is that the legal person as a collectivity cannot commit the deed of offence, but does so via its organs. Therefore, consequential application of the rules

of criminal law would result in unacceptable solutions in terms of logic, social interest and criminal policy, and hence the law prescribes parallel liability of legal person and responsible person. Even though the punishable actions are the same, the natural person shall answer for a criminal offence, and the legal person shall answer for a petty offence, which is the easiest form of punishable acts, since it concerns the social goods of lesser value compared with those of criminal offences and commercial transgressions, Their severity is best certified by the sanctions applicable against perpetrators of petty offences: *short-term prison and fine, caution, protection measures (penalty points with revocation of driving licence) and educational measures (community service).*

Prison sentence cannot be prescribed for a period shorter than one day nor longer than thirty days, except for more severe petty offences against public order and peace and more severe offences violating the life and health of human beings, or that may result in other grave consequences when prison sentence up to sixty days can be prescribed (Article 32 of the Petty Offences Act).

A fine can be prescribed in the following ranges: 1) from 500 to 50,000 dinars for natural person or responsible person; 2) from 10,000 to 1,000,000 dinars for legal person; 3) from 5,000 to 500,000 dinars for entrepreneur. Fine charged on the spot when petty offence was committed can be prescribed, both for natural and responsible person, in a fixed amount from 500 to 5,000 dinars, and for legal person and entrepreneur in a fixed amount from 2,000 to 20,000 dinars. Exceptionally, the law can prescribe special ranges of punishment for special types of offences specified by law (Article 35 of the Petty Offences Act).

Community service is an unpaid service for the community that does not offend human dignity and does not achieve profit. Community service can be pronounced only with the perpetrator's consent, and can last at least for 10 hours but not longer than 120 hours, and it cannot be performed longer than two hours a day (Article 33 of Petty Offences Act).

For petty offences against traffic security, penalty points can be prescribed, ranging from 1 to 18. Together with them, additional obligations can be pronounced to the perpetrator, with the purpose of educating the driver or keeping track of his/her behaviour in traffic. If the driver obtained 18 or more penalty points in two years, the court shall revoke his/her driving licence by a judgment (Article 34 of the Petty Offences Act).

On the other hand, Serbian legislation prescribes liability of legal persons for commercial transgressions. It was first introduced by the Commercial Transgressions Act of 1960.[24]

Commercial transgression is a socially harmful violation of regulations on commercial or financial operation that has caused or could have caused serious consequences and that is prescribed as a commercial transgression by a regulation of the competent authority. Such violation of regulations on commercial or financial operation that, even if has characteristics of a commercial transgression prescribed

24 Commercial Transgressions Act (" FNRY Official Herald", 16/60).

by regulation, constitutes a minor social danger due to its minor significance or lack of harmful consequences, shall not constitute a commercial transgression.[25]

Therefore, in terms of their severity and elements, commercial transgressions, even if they are more serious forms of punishable activity than petty offences, constitute different and easier form of punishable activities compared to commercial offences. Hence the difference in terms of liability.

A legal person and a responsible person of a legal person can be liable for a commercial transgression. Social-political communities and their organs, other state authorities and local communities cannot be liable for commercial transgression. The regulation prescribing the commercial transgression can envisage that a responsible person in a social-political community organ, other state organ or local community is responsible for a commercial transgression (Article 6 of the Commercial Transgressions Act).

A foreign legal person and a responsible person of a foreign legal person are liable for commercial transgression if the foreign legal person has a branch on the territory of the Socialist Federative Republic of Yugoslavia, or if the commercial transgression is committed by means of transport, unless the regulation prescribing the commercial transgression does not provide otherwise (Article 6a of the Commercial Transgressions Act).

A legal person is liable for commercial transgression if the commercial transgression is committed by an action or lack of due diligence on the part of the managing organs or responsible person, or action of other person authorised to act on behalf of the legal person (Article 9 of the Commercial Transgressions Act).

A responsible person is liable for commercial transgression if the commercial transgression is committed by its action or its lack of due diligence and if he/she acts with intent or negligence, unless the regulation prescribing the commercial transgression provides that the commercial transgression can be committed only with intent (Article 11 of the Commercial Transgressions Act).

Liability of responsible person for commercial transgression shall not exist if he/she acted on the orders of other responsible person or managing organ and if he/she takes all actions he/she is obliged to take in accordance with law, other regulation or general act in order to prevent the committing of commercial transgression (Article 13 of the Commercial Transgressions Act).

In other words, Serbian legislation recognises the concept of parallel liability of legal persons and responsible persons for commercial transgressions. Consequently, the commission of commercial transgressions always includes two actors – legal person and responsible person. The liability of legal persons is prescribed as objective (causal), which means that it is not necessary to establish the *mens rea* of either the legal person or the person who acted on behalf of it, whilst, on the other hand, the liability of responsible person is subjective.[26] It should be

25 Article 2 of the Commercial Transgressions Act *("SFRY Official Herald"*, No. 4/77, 36/77 – corr., 14/85, 10/86, 74/87, 57/89 and 3/90 and *"FRY Official Gazette"*, No. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96 i 64/2001 and *"RS Official Herald"*, No. 101/2005).

26 Such position of the legislator is explained by the fact that subjective elements cannot be examined in regards to legal persons, since this would complicate and often prevent the

borne in mind that this is not a simple commission of crime by two subjects, but a special type of complicity, where only the natural person answers, and one that is not recognised in criminal law. Hence, liability of legal persons for commercial transgressions set in this way leads to unacceptable results from the standpoint of logic, social interest and criminal policy, since a legal person can only answer for a transgression, even though there is no subjective guilt and therefore no liability of the responsible person in the legal person.

Such situation imposes the need to introduce criminal liability of legal persons, which would constitute an adequate answer to combat against serious forms of criminal activities of legal persons. There are two opinions in this respect. First, the more dominant one considers that liability of legal persons for commercial transgressions, which exists in Serbian law, is not suitable as a measure to suppress modern legal persons' criminality, and it is therefore necessary to accept the liability of legal persons for criminal offences.[27] Supporters of the second opinion claim that legal persons' liability for commercial transgressions and petty offences justified its existence, and that the liability of legal persons for commercial transgressions should be preserved, since it can meet the set requirements, provided that, in substantive terms, all offences for which legal persons should answer are incorporated in that part of law that governs commercial transgressions.[28]

Accepting liability of legal persons for criminal offences opens the question of relation between that liability and other forms of liability, primarily in regards to the existing liability for petty offences. There are three possible ways to resolve this issue: to revoke the category of commercial transgressions and treat commercial transgressions as petty offences; to revoke commercial transgressions and treat these offences as criminal offences or to keep commercial transgressions, but apply the provisions on legal persons' liability for criminal offences only to certain offences. The first solution is inadequate, due to the fact that commercial transgressions are prescribed as punishable offences because their severity prevents them from being petty offences, and that the main concepts of petty offence and commercial transgression liability are different, which results in a different system of sanctions. The deficiency of the second solution is reflected in the fact that, if commercial transgressions were to be transferred to the general part of the Criminal Code, it would become too ample, due to their vast number (it is estimated that some 3000 commercial transgressions are prescribed in

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establishing of their liablity, and that it is sufficient to establish a causal relationshi between the commission of the commercial transgression and the action or lack of diligence on the part of the managing organs or responsible person or action of other person authorised to act on behalf to the legal person.

27 This is supported by the fact that is is valid in regards to petty offence liability.

28 As an argument, the supportes of this opionin state that over the last years, a number of laws was passed in Serbia that are harmonised with EU law, and they prescribe new comercial transgersssions. This goes in favour of the thesis that they can also provide adequate protection. The main objection to this concept is that its implementation requires substantial changes of the Commercial Transgressions Act, which may lead to commercial transgressions losing their main characteristics and conceptual difference.

around 300 statutes). If transgressions were left in special statutes, special criminal legislation would considerably exceed the scope of the Criminal Code. If the third solution is to be accepted, commercial transgressions would still constitute a special type of punishable actions, and legal persons' liability only for certain, expressly prescribed offences, would be introduced in the criminal law. In this way, the existing penal law system would be preserved, and, at the same time, criminal offences which, due to their severity, cannot be classified as either petty offences or transgressions would be introduced into criminal law. According to the prevailing opinion, this needs to be done by prescribing the possibility of legal persons' liability for criminal offences in the general part of the Criminal Code, whilst the list of those offences would be included in the special Act on Legal Persons' Liability for Criminal Offences, with general principles on legal persons' liability for criminal offences and applicable criminal sanctions. This liability (as accepted both in petty offence and commercial law) would represent the liability of a legal person for its own actions, since the responsible person acts for and on behalf of the legal person, which is why these actions are considered to be the legal person's actions. It would consist of parallel liability of both the legal person and the responsible person. If only the legal person was liable, then only the one on whose behalf the criminal offence was committed would be punished, and the real perpetrator would remain unpunished. Similarly, if only the responsible person was liable, the person on whose behalf the criminal offence was committed would remain unpunished. In terms of its legal nature, legal persons' liability for criminal offences should be subjective. This is supported by a number of arguments. Firstly, because criminal law already accepts the concept of subjective liability based on perpetrators' guilt. Secondly, for a long time theory and court practice have represented the opinion that it is necessary to pass a new Commercial Transgressions Act that would be based, instead of the present objective liability, on the principle of subjective liability of legal persons, which would be separated from *mens rea* and responsible person's liability.[29] Third, the examination of the definition of commercial transgressions is inevitable, since there are such transgressions that do not constitute only a violation of rules on financial operations, but also concern relations such as those between commercial entities themselves (monopolies), between commercial entities and consumers (product safety) and the like. Introduction of legal persons' liability for criminal offences in Serbian criminal law requires amendments to the existing system of criminal sanctions that would be adjusted to the nature of legal persons. This is because the present penal legislation recognizes only three types of criminal sanctions for commercial transgressions: punishment, conditional sentence and protection measures. The present provisions on the Act on Sanctions for Commercial Transgressions read:

29 Subjective liability of legal persons for commercial transgressions is a specific subjective liability due to the characteristics that differentiate legal from natural persons. Psychological relations of a legal person can be manifested as an apprehension or possibility of apprehension of its organs of the activities taken, wlhilst the will to take them or consent to them to be taken can be established beyond any doubt from their actions This would mean that the standpoint of commercial transgressions, the criminal offences of legal persons,and that liability of legal persons is criminal liability, would be accepted.

Only a fine can be prescribed for a commercial transgression, where the smallest amount of fine for a legal person is 10,000 dinars, and the highest amount is 3,000,000 dinars, whilst the smallest amount of fine that can be prescribed for a responsible person amounts to 2,000 dinars, and the highest to 200,000 dinars.

The amount of fine for a legal person can also be prescribed in proportion to the amount of damage caused, obligation defaulted or the value of goods that are the objects of commercial transgression, where the largest amount of fine can go up to twenty times the amount of damage caused, obligation defaulted or of other object that is the object of commercial transgression (Articles 17 and 18 of the Commercial Transgressions Act).

The court may pronounce suspended sentence to a legal person and responsible person of a legal person for a commercial transgression committed.

By a suspended sentence, the court may determine a fine to legal person in an amount up to 20,000 dinars, and to a responsible person up to 4,000 dinars, where it will not be enforced if the convicted, during the time specified by the court, which cannot be shorter than one nor longer than two years (probation) does not commit a new commercial offence, that is, if the responsible person does not commit a criminal offence that has the characteristics of a commercial transgression (Article 27 of the Commercial Transgressions Act).

Protective measures are: 1) publication of judgment; 2) confiscation of object; 3) prohibition to legal person to engage in a given commercial activity and 4) prohibition for a responsible person to perform certain duties (Article 28 of the Commercial Transgressions Act).

On the other hand, the Criminal Code of the Republic of Serbia includes four types of criminal sanctions: *punishment, caution, security measures and rehabilitation measures* (Article 4 of the CC).

A sentence of imprisonment may not be less than thirty days or more than twenty years. A term of imprisonment for thirty to forty years may exceptionally be pronounced for the most serious criminal offences or the most serious forms of criminal offences together with the penalty referred to in paragraph 1 of this Article (Article 45 of the CC).

A fine may be determined and pronounced either in daily amounts or a particular amount. A fine for criminal offences committed for gain may be pronounced as secondary punishment even when not stipulated by law or when the law stipulates that the perpetrator may be punished by imprisonment or fine, and the court pronounces imprisonment as the principal punishment (Article 48 of the CC).

A fine in daily amounts shall be determined by first defining the number of daily amounts and then the sum of the daily amount. The final amount of the fine shall be determined by the court by multiplying the adjudicated number of daily amounts with the value of one daily amount. The number of daily amounts may not be less than ten nor exceed three hundred and sixty days.

The number of daily amounts for the committed criminal offence shall be determined in accordance with the general rules for determining penalties. The sum of one daily amount is determined by dividing the difference between the income and

expenditures of the perpetrator during the previous year by the number of days in the year. A single daily amount may not be under 500 dinars or more than 50,000 dinars (Article 49 of the CC).

If it is not possible to determine the amount of a daily amount either based on the rough estimate of the court (Art. 49, paragraph 5), or collecting information would significantly prolong the criminal proceedings, the court shall pronounce a fine in set amount within the stipulated range of minimum and maximum fine. A fine may not be less than 10,000 dinars. A fine may not exceed 1,000,000 dinars and in case of criminal offences committed for gain more than 10,000,000 dinars (Article 50 of the CC).

Community service may be imposed for criminal offences punishable by imprisonment up to three years or by a fine. Community service is any socially beneficial work that does not offend human dignity and is not performed for profit. Community service may not be less than sixty hours or longer than three hundred and sixty hours. Community service shall last sixty hours during one month and shall be performed during a period that may not be under one month or more than six months (Article 52 of the CC).

The driving license of a perpetrator of an offence in whose commission or preparation a motor vehicle was used, may be revoked, which penalty may not be less than one nor more than three years, calculated from the day the decision became final, and where time spent in prison is not calculated into this sentence (Article 53 of the CC).

Cautionary measures are suspended sentence and judicial admonition. By suspended sentence the court determines punishment of the offender and concurrently determines that it shall not be enforced provided the convicted person does not commit a new offence during a period set by the court, which may not be less than one or longer than five years (probationary period). Judicial caution may be pronounced for criminal offences punishable by imprisonment under one year or fine, which have been committed under such circumstances that they render them particularly minor (Articles 64, 65 and 77 of the CC).

The following security measures may be ordered to the offender: 1) compulsory psychiatric treatment and confinement in a medical institution; 2) compulsory psychiatric treatment at liberty; 3) compulsory drug addiction treatment; 4) compulsory alcohol addiction treatment; 5) prohibition from practising a profession, activity or duty; 6) prohibition to drive a motor vehicle; 7) confiscation of objects; 8) expulsion of a foreigner from the country; 9) publishing of judgement (Article 79 of the CC).

The court may prohibit an offender from practising a particular profession, activity, or all or certain duties related to the disposition, use, management or handling of another's property or taking care of that property, if it is reasonably believed that his/her further exercise of that duty would be dangerous, which time may not be less than one more than ten years, calculated from the day the judgement became final, and the time spent in a prison or medical institution where the security measure has been exercised shall not be credited to the term of this measure. (Article 85 of the CC)

Objects used or intended for use in the commission of a criminal offence or resulting from the commission of a criminal offence may be seized, if property of the offender. The objects referred to in paragraph 1 of this Article may be seized even if not property of the offender if so required by the interests of general safety or there is still a risk that they will be used to commit a criminal offence, if without prejudice to the right of third parties to compensation of damages by the offender (Article 87 of the CC).

The court may order expulsion from the territory of Serbia of a foreigner who committed a criminal offence for a period of one to ten years (Article 88 of the CC).

5. Relationship between Terrorism and Organised Crime
(M. Reljanović)

Even though different in terms of the motives for their commission, the offences of terrorism and organised crime are phenomena that have some elements in common. Primarily, both forms of criminal behaviour imply continued commission of criminal offences. Moreover, they also imply the existence of some form of association in order to perform criminal offences. Finally, even though terrorist's motives are as a rule ideological, religious or political, and motives of organised crime exclusively lucrative, sometimes the terrorists act similarly to organised crime, with the goal to provide financial means for the commission of terrorist acts.[30]

Over the last decade, this seemingly clear distinction between terrorist groups and criminal organisations is growing more clouded by the forming of firm relations between terrorist and criminal organisations, even by divergence of terrorist organisations to branches that "provide" funds, most frequently through trafficking in drugs, firearms and human beings, and branches that deal with the performance of terrorist acts.[31]

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30 In that respect there is no difference between the activity of a criminal organisation and a terrorist group, since both engage in similar illegal activities, such as extortion and kidnapping, characteristic in particular of various Muslim terrorists groups from the Middle East, which, over the past decades, have introduced special "taxes" for Muslims who live and work outside the region. Particular connection between these phenomena can be seen in the so-called "failed states", where central power is not strong enough to supress the development of organised crime, whose armed groups literally become a substitute of power on the territories under their control. Such groups sometimes are connected with terrorists (e.g. in Columbia during the eightees of the XX century) or become terrorist-criminal entities that direct the money obtained from criminal activities to financing of terrorism (e.g. in Afganistan during the ninetees of the XX century and beginning of he XXI century).

31 Well-know examples are the PLO in the seventies of the XX century and IRA in the eighties of teh XX century, both of which directed the money obtained by criminal activities into legal businesses. Thus, the PLO held a number of factories in Lebanon and Siria, and IRA owned taxi services and a supermarket chain in Northern Ireland. More on the introduction of terrorist money into legal money flows in: Mario RELJANOVIĆ, *Međunarodna saradnja u suzbijanju terorizma*, L.L.M thesis, Pravni fakultet Univerziteta

Criminal Code of the Republic of Serbia recognises two forms of terrorism: domestic and international. Even though this division must be understood in relative terms[32] and these two criminal offences have very similar incriminations, the legislators have placed them in separate chapters. The criminal offence of "Terrorism" is a criminal offence against the constitutional order and security of the Republic of Serbia, whilst "International Terrorism" is marked as a criminal offence against humanity and other rights protected by international law.

As already mentioned, the definitions of these two offences are very close:

Terrorism, Article 312 of the Serbian Criminal Code:

Whoever with the intent to compromise the constitutional order or security of Serbia or Se&M causes an explosion or fire or commits another generally dangerous act or commits an abduction of a person or some other act of violence, or by threat of committing such generally dangerous act or use of nuclear, chemical, bacteriological or other dangerous substance and thereby causes fear or insecurity among citizens, shall be punished by imprisonment for three to fifteen years.

International Terrorism, Article 391 of the Serbian Criminal Code:

(1) Whoever with intent to cause harm to a foreign state or international organisation commits abduction of a person or other violent act, causes explosion or fire or commits other generally dangerous acts or threatens use of nuclear, chemical, bacteriological or other similar means, shall be punished by imprisonment for three to fifteen years.

(2) If the offence specified in paragraph 1 of this Article resulted in death of one or more persons, the offender shall be punished by imprisonment for five to fifteen years.

(3) If in commission of the offence specified in paragraph 1 of this Article the offender kills another person with intent, the offender shall be punished by imprisonment of minimum ten years or imprisonment from thirty to forty years.

Based on these incriminations, several conclusions can be drawn:

a) *There is no reasonable justification for the separation of these two offences.* In addition to the reasons already mentioned, which go in favour of the single perception of internal and international terrorism, same definition of the *acta rea* is another argument in favour of single incrimination.

b) However, even though the deeds of crime are practically the same, the offence of internal terrorism includes an important component of "causing fear or insecurity in citizens", which is a direct consequence that is the ultimate effect

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Union, Beograd, pp. 42–43; Loretta NAPOLEONI, *Terror Inc. – Tracing Money Behind Global Terrorism,* London, 2004, pp. 210–217.

32 The difference between modern internal and international terrorism is relative and cannot be clearly drawn, except in cases of so-called "separatist terrorism", provided it is not supported by a foreign state or transnational organisation of criminal or terrorist character. More on the problem of differentiating between internal and international terrorism in: Vojin DIMITRIJEVIĆ, *Terorizam*, Radnička štampa, Beograd, 1982, pp. 187–188; Timoti GARTON EŠ, *Slobodan svet*, Samizdat B92, Beograd, 2006, pp. 145; Mario Reljanović, *op.cit*, pp. 29–32.

of any terrorist act. *This element does not exist in regards to the offence of international terrorism*, there is only mention of intent to harm a foreign state or organisation. It can be noted that, in these terms, this definition lags behind comparative solutions, given that the intent need not be to cause material or immaterial harm, but also *to coerce* a state (or international organisation) to do something or refrain from doing something it is entitled to.

c) *Acta rea* are prescribed in a combination of enumeration and general clause, but *both definitions use unclear terms of "other violence" or "other generally dangerous act",* which are not precisely determined in the statutory text and may, in practice, be subject to arbitrary interpretation and devaluation of the gravity of the offence. This particularly relates to the offence of international terrorism, which does not include the abovementioned indirect psychological result of the commission of a terrorist act, and even less serious criminal offences could, by a wider interpretation, be classified as having a terrorist intent.

d) It is unclear *why the offence of international terrorism has aggravated forms*, and the offence of internal terrorism does not, when it is apparent that both offences can be committed in the same way and that aggravating circumstances can exist in both cases.

e) As a consequence of the abovementioned deficiency, there is a considerable disproportion between the sanctions prescribed for these two offences (even though they are the same for the main form), the statutory text prescribes that a person who commits the criminal offence of terrorism can be sentenced to a maximum of 15 years in prison, regardless of its consequences, whilst the same commission of an offence of international terrorism can result in a person being sentenced for 40 years in prison.

An uncountable relation between organised crime and terrorism was established by Article 393 of the Criminal Code, by the introduction of the special criminal offence of "Financing Terrorism"[33], which relates to both forms of terrorist activity. This incrimination reads:

(1) Whoever provides or collects funds intended for financing commission of criminal offences specified in Articles 312, 391 and 392 hereof, shall be punished by imprisonment for one to ten years.

(2) The funds specified in paragraph 1 of this Article shall be seized.

The consequences of the existence of this criminal offence are therefore twofold: on the one hand, prevention of acts of terrorism or confiscation of assets of those natural and legal persons that financed its commission is enabled. On the other hand, provisions of this Article can be efficiently used in combat against organised crime, since the routs of financing of terrorist activity most often lead to other forms of prohibited actions by a terrorist or other criminal association.

33 The denomination of this offence is somewhat imprecise, since the incrimination from Article 393 also relates to the offence of "Taking Hostages" from Article 392 of the Criminal Code. However, since the taking of hostages, primarily in international law terms, is one of the special forms of committing a terrorist act, this comment don't need to be of material, but rather of formal nature.

6. Opening of Secret Service Files
(M. Reljanović)

Relevance of this problem in relation to fight against organised crime can be viewed from a wider perspective of so-called "legal overcoming of the past", that is, of adopting certain legal measures for overcoming the burdens of the remains of the authoritarian past after an historic period marked by autocratic, ideological regime and violation of fundamental human rights.[34] The heritage Serbia is faced with is largely connected to the 1990s, but also to the period of the communist regime since 1944, a legal overcoming of the past can be considered from several aspects. Connections between organised crime and opening of files of the secret service that functioned on the territories of Serbia and Yugoslavia over the past two decades lies in the criminalisation of police and those services, that established a twofold connection with organised crime. On the one hand, many members of organised crime were at the same time members of police and security-information circles, and they distributed the information they obtained in the underground and the political and economic elites most often in accordance with their private interests. On the other hand, we witness the development of the process for those accused of murder of politicians, journalists and other people who at the time got in the way of regime and organised crime. As a rule, the accused in these processes, in addition to members of various criminal groups, were also members of the "killing service", the State Security, police and other security-defence structures of the government of the time.

It should be borne in mind that one of the key advantages in combating organised crime was to have information. What information can be found in the files of services proven to have committed criminal offences by eliminating inadequate anti-regime oriented citizens, often public persons, politicians, journalists? If one has in mind the fact that these files, but also other documents of those services almost certainly include useful data on members, organisation and activities of criminal groups, the necessity to open files in combat against organised crime becomes evident.

Serbia does not have a statutory regulation that would constitute a legal base for lifting confidentiality from files and other documents of the security services and make them available to the public. The furthest step was the adoption of an Ordinance of the Republic of Serbia Government, soon after the first democratic government was formed in 2001. The Ordinance on Lifting Confidentiality from Files kept on Citizens of the Republic of Serbia by the State Security Service, however, did not solve the problem.[35] The main deficiency of such solution is the failure to pass a statutory text and letting such important matter be regulated by secondary legislation. The Ordinance itself offered many grounds for criticism:

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34 More on the problem of legal overcoming of the past, Vladimir V. VODINELIĆ, *Prošlost kao izazov pravu (srpska strana pravnog savladavanja prošlosti)*, Beograd 2002.

35 "Republic of Serbia Official Herald", 30/2001. This Ordinance was soon renamed Ordinance on Making Certain Files Kept on Citizens of the Republic of Serbia by the State Security Service Available for Insight (Official Herald 31/2001). For a more detailed overview of the Ordinance, Vladimir V. VODINELIĆ, *Otvaranje dosijea političke policije: dockan je ili ipak nije?*, "Hereticus", 1/2004, Beograd 2004, pp. 31–41.

a) Ordinance does not cover all security services; on the contrary, it relates only to the State Security Service, whilst other files, primarily those kept by military services – intelligence and counter-intelligence, are not mentioned. This deficiency could have been overcome by the implementation of the Act on Security Services of the Federal Republic of Yugoslavia[36], which, in Article 60, envisages the passing of a special statute on the review of files kept on citizens by federal services[37], as well as the creation of a special commission that would take care of its implementation. Even though the Security Services Act (S&M) was passed in 2002, and the envisaged time limit for passing of separate statute was 60 days, this statute was never passed.

b) Right to insight was given only to certain categories of persons who have files in the capacity of "internal enemy", that is, those who were in the past marked as "internal extremists and terrorists".

c) Ordinance was inconsistent, and hence the person who met the previous condition could gain insight only to the content of files kept under his/her name, but not into data on him/her recorded in other persons' files.

d) Provisions concerning insight into data within the records were particularly restrictive; only written data was available and only *for insight* – they could not be photographed, copied or otherwise duplicated.

e) Files remained in the possession of the Security Service (renamed to Security-Information Agency in 2001–2002), which results in an absurd situation that a person who thinks that SIA has his/her file has to address to the same service in order to have insight into such file. Second, probably more dangerous consequence lies in the fact that such files can still be manipulated – starting from their physical destruction to change of real data with false ones.

The Ordinance was in force from 2001 to 2003, when it was suspended by a decision of the Serbian Constitutional Court [38] Hence, the only act that enabled insight into files was put out of force. In September 2006, a decision was passed to open the files kept by the Ministry of Foreign Affairs, but they constitute a small portion of some 20,000 files, estimated to have been kept by all security services together.

At the moment, there are two draft statutes on the opening of security services' files. None of them was considered before the National Assembly.[39] Lack of statutory regulation of this field is not the only problem that accom-

36 "FRY Official Gazette", 37/2002 and "S&M Official Gazette", 17/2004.

37 These are two services attached to the Ministry of Defence (Military Security Service and Military Intelligence Service, which were renamed by amendments to the Act in 2004 to Military-Security Agency and Military-Intelligence Agency) and two services attached to the Minsitry of Foreign Affairs (Investigation and Documentation Service and Security Service).

38 "RS Official Herald", 84/03. The grounds for putting the Ordinance provisions out of force cited by the Constitutional Court was that the modalities of manipulation envisaged by these acts could be regulated only by a statute.

39 These are the proposal drafted by theCentre for Advanced Legal Studies and Centre for Anti-War Action (now Centre for Peace and Development of Democracy) and the proposal drafted by the Committee of Lawyers for Human Rights. Both drafts can be found

panies legal overcoming of the past, since a statute that would govern denationalisation has not been passed whilst the Act on Responsibility for Violation of Human Rights "Republic of Serbia Official Herald", 58/2003) is not applied. Rehabilitation Act was passed in 2006 ("Republic of Serbia Official Herald", 33/2006).

7. Private Security Companies

(M. Reljanović)

Private security companies are a reality in Serbia and they do not differentiate in this respect from any other country, either in transition or developed. It is estimated that around 25,000 to 32,000 people work in these firms and there are signs that this number will rise in future. Although unofficially private security is called "third armed force" after the army and police,[40] this information does not necessarily have negative connotation since in many countries members of the police are more numerous than members of private security firms.[41] What differentiate Serbia from other countries, even neighbouring ones, are two facts: the lack of legislation in this field and some "bad habits" of members of the private security firms inherited from the past.

The field of private security was regulated for the first time in 1973 by the Act on Basic System of Social Self-protection (Official Journal of SRS, No. 39/73), which was in force up to 1986 when the new act was passed. This act refers to the organisation of security of property in companies and all republics of SFRY. Since it regulated the field of security when socially owned property was dominant it ceased to be present in 1993 (Official Journal of SRS, No. 18/93). Since then there is a legal gap which was never regulated.[42]

Partly, the lack of any legislative text, which would regulate this field, is the result of the lack of concept of internal security in Serbia and partly of lobbying by the owners of these firms who prefer to maintain the *status quo*.[43] If this field is regulated by any legal text the owners would have numerous additional expenses: they would have to register employees, the employees would have to pass certain training and have a uniform, equipment and arms; there would be requirements for obtaining a licence by each company dealing with private security as well as by each individual in the company; in order to get a licence certain strict conditions would be set out not only in relation to equipment and expertise of private

on the websites of mentioned organisations:: http://www.cups.org.yu, http://www.caa.org.yu, and http://www.yucom.org.yu.

40 According to certain data some say that members of private security are more numerous than police or at least equally numerous as police.

41 For example in Canada the ratio is 4.5:1 in favour of private security.

42 More details about the two laws in Dušan D. DAVIDOVIĆ, *Alternativni činioci bezbednosti (privatni polising)*, Beograd 2006, pp. 21–22.

43 Unofficially, the reported profit of different private security companies and detective agencies amounted to 26,000,000 euros in Serbia in 2003. Dušan D. Davidović believes that the real profit is much higher. *Ibidem,* str. 35.

security employees but also their social protection and other employment rights; this licence would be periodically checked and its renewal would depend on the respect of legislation and the quality of services provided by the company.

At the moment according to official data in this field there are 128 private companies and 73 agencies employing 3,545 people[44] which is ten times smaller than the actual number of employees (which means that 90 per cent are without a licence). In Serbia there is one organisation that issues working licences in the field of private security, which are recognised in the EU. So far, around 400 people obtained licences after completing their training, which is a negligible figure compared to the overall number of employees. Officially in Serbia there are five detective agencies. Their work, however, is not regulated by law and each measure of surveillance, tapping etc. represents a criminal offence that in reality does not trouble the aforementioned agencies to advertise and promote their services. Although the Physical Security Act was submitted for comments in 2002 it never entered the parliamentary procedure.

However, all those data have different meaning in the light of organised crime suppression. Namely, a great number of private security companies are owned by people who are directly or indirectly connected with organised crime. These agencies serve as bodyguards for those people but also they can be hired for assaulting others. One of the most typical misuses of private security companies for the latter purpose happened in 1998 when the Dean of the Electrical Engineering Faculty in Belgrade hired the security in order to physically eject the suspended professors from the faculty building against their will. This same security company in a later phase verified the students at the entrance of the Faculty and used force against those who supported the expelled professors. These examples were very frequent before the democratic changes in 2000; thus, it may be said that the use of force by private security companies was a rule although they faced unarmed people who did not represent any real danger. Following 2000 this practice was not abandoned but it began to be used in the economic field. Several times, private security companies intervened in recently privatised socially or state owned companies when employees who were unsatisfied with the privatisation tried to reach the new owner. That security did not hesitate to use force. The most famous is the encounter of the private security with employees of "Jugoremedija" from Zrenjanin. The lack of legislation and the real need for private security agencies resulted in a situation whereby certain powers of the private security company were implicit (understood) but on the other side they could not be limited, directed or organised. The most terrible consequence of this situation is the fact that no one was liable for these incidents, neither the employees of the private security companies nor their patrons.

Here we come to the new problem in this field, which results from the lack of legislation, and the active participation of police officers in private security companies. Can an individual work in the morning as a policeman in uniform and in the evening as a guard in a company? Maybe this is not the worse case scenario but there are more dramatic examples: can someone be a policeman in

44 *Ibidem*, p. 31.

the morning and in the afternoon work as bodyguard of a person connected to organised crime? The answer is, of course, no. This is confirmed in comparative law. However, this is very frequent in Serbia. With the aim of gaining some additional income, members of the police decide to work in private security agencies and detective agencies by using the information, contacts and resources gathered during the police work. This behaviour was very spread in 1990s and it still exists. In case of conflict to whom will be a policeman loyal? It is not hard to answer since the policeman joined the private security companies to earn additional income. As Jovan Ćirić emphasises, in this situation it is not enough to insist on better salaries of police members since the employers connected to organised crime can always offer more.[45] This behaviour must be prevented with the statutory provision which would prescribe an obligation to choose between two jobs. Ćirić mentions the Code of Conduct Guidelines prescribing in subparagraph 24 and 40 the obligation of each member of the police to "assist each person in danger, to prevent and fight action which may breach the public security and endanger someone's life, integrity, property of citizens and Constitutional order as well as not to behave in a manner that harms the reputation of the profession."[46] The described behaviour is contrary to responsibilities but the Guidelines do not prescribe sanctions for their breach.

It may be concluded that there are no rules in the field of private security which results in the following consequences:

a) there are no precise records about the number of people hired in the field of private security;

b) the relationship of private security and police is not regulated;

c) there are no criteria for selection of people capable of performing these tasks;[47]

d) there is no legislation that would regulate the behaviour and the use of arms in private security as well as the application of some other rules (for example tapping in the work of private detectives, showing identification documents to a security guard of a premises);

e) capacity and qualifications of private security employees is not controlled nor there is a system of mandatory working licences;[48]

f) there is no control on the employers and consequently they are deprived of certain employment rights and employers do not respect security rules in work performance;

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45 Jovan ĆIRIĆ, *Sukob interesa i policija*, "Nauka, bezbednost, policija", 1/2005, Beograd, p. 42.

46 *Ibidem*, p. 43.

47 Here we refer to the expertise and physical capacity. There are no obstacles for persons already convicted for robbery to work as private security in the bank.

48 Dušan D. Davidović goes one step further and elaborates by saying that in 1990s detective and similar organisations were usually opened by former criminals, former policemen who enter police with minimum training and minimum years of service in police, people wanting adventure and people who like action and easy money (*Op. cit*, str.22). It must be added that these individuals still exist together with these who respect legislation and do not abuse their position.

g) private security companies operate outside market rules, including those related to the cost of services and unlawful competition;

h) agencies and other companies which operate in this field do not fall within any control while their real profit (they do not pay tax for this) is ten times greater than the one they claim to the taxation authorities;

i) certain agencies are established and functions as the private police of financial magnates who are linked to organised crime;

j) a great number of agencies secure political figures and the political parties' officials;

k) beside performing the work the company is registered for, some companies are used for performing illegal activities, for example racketeering;

l) there is no legislation (or the legislation is not applied) regulating the conflict of interest for police officers who at the same time work in private security firms;

m) overall, the influence of organised crime on the armed forces (which will be the largest armed group after the Army reforms) is significant;

n) it is necessary to regulate this field as soon as possible. It is especially imperative to set up strict conditions for private security agencies and people working for them and obtaining compulsory working licences. In that respect the state should have control over this important sector in which currently there are no rules.

II. FORMS OF ORGANISED CRIME

1. Trafficking in Narcotics

(M. Reljanović)

Trafficking in narcotics is one of the most frequent organised crime activities. Thus, Serbia is no exception. Channels of narcotics from Middle East through Turkey, Bulgaria, Albania and Kosovo inevitably go through Serbia towards the western countries. According to data of the Ministry of Interior of Serbia only in 2006 around 700 kilograms of heroin (mainly from Afghanistan), 13 kilograms of cocaine, 60 kilograms of hashish and 19,000 tablets of ecstasy were seized. Around 1.4 tons of heroine were seized in the period of 2004 to 2006. Almost 90 per cent of incoming narcotics are smuggled to western countries and the remaining 10 per cent is used on the Serbian market. Cocaine mainly comes from South America, synthetic drugs from The Netherlands and Belgium,[49] while marijuana is a domestic product: in 2006, 2 tons of marijuana produced in Ser-

49 This data must be carefully taken into account bearing in mind that the technology for production of synthetic drugs is accessible on the territory of Serbia – the case of the discovery of the laboratory in the inner city of Belgrade testifies to this when 2 million tablets of synthetic drugs was seized. More in Darko MARINKOVIĆ, *Zloupotreba droga i organizovani kriminalitet*, u zborniku *Organizovani kriminalitet – stanje i mere zaštite*, Beograd 2005, p. 637.

bia was seized. In total there were 6300 seizures of all types of narcotics on the territory of Serbia. The Customs Administration of Serbia also made significant seizures and the total value of seizure is 4,500,000 euros.[50]

The number of seizures and quantity of seized narcotics (in grams) in the Republic of Serbia[51]

Year	Number of seizure	Total narcotics	heroin	cocaine	hashish	marihuana	tablets of ecstasy
1999	1,809	1,670,018.00	17,384.00	11,041.00	1,017.00	1,639,561.00	106
2001	3,060	2,400,695.00	60,866.00	2,555.00	589.00	2,336,480.00	10,435
2002	3,892	1,531,295.00	32,918.00	1,226.00	6,659.00	1,490,402.00	9,609
2003	3,580	1,156,575.00	262,995.00	5,337.00	649.00	774,285.00	2,076,194
2004	4,512	4,400,960.00	469,604.00	15,468.00	3,351.00	3,901,870.50	9,260
2005[52]	2,743	256,628.90	97,331.50	357.59	4,587.22	152,637.61	4,327

Number of reported criminal offences according to Articles 245 and 246 FCC and number of reported perpetrators in the Republic of Serbia [53]

Year	Number of reported criminal offences according to Article 245 FCC[54]	Number of reported criminal offences according to Article 246 FCC [55]	Number of reported perpetrators according Article 245 OKZ	Number of reported perpetrators according Article 246 OKZ
2001	890	203	1,022	232
2002	885	199	1,023	214
2003	2273	244	2,473	263
2004	3879	258	3,806	273
2005[56]	2556	182	2,516	186

50 *Srbi seju "travu"*, Večernje novosti, 14.3.2007, http://www.novosti.co.yu/code/navigate.php?Id=9&status=jedna&vest=101111

51 Data of the Analytical Office of the Ministry of Interior of Republic of Serbia – taken from the paper of Darko Marinković, *op .cit*, p. 638.

52 Data refer to period between January and July 2005.

53 Data of the Analytical Office of the Ministry of Interior of Republic of Serbia – taken from the paper of Darko MARINKOVIĆ, *op .cit*, p. 639.

54 Criminal offence "Unauthorised production, keeping and trafficking in narcotics", Article 245 of the Fundamental Criminal Code of January 1, 2006.

55 Criminal offence of "Enabling of Use of Narcotics", Article 246 of the Fundamental Criminal Code.

56 Data refer to period between January and July 2005.

In analysing the status of Serbia on this "Balkan route of narcotics" one more aspect has to be taken into consideration. As in many other sectors of crime, the trafficking in narcotics during the 1990s was evidence of the observation that "certain countries have a mafia, while in Serbia the mafia has its state". The best evidence of this statement happened after the democratic changes in 2001, when the police found 600 kilograms of heroin worth of 50,000,000 euros in the safe of Komercijalna bank in Belgrade, which was used by Security Service (now called the Intelligence Service). In an unidentified way, the drug was put in the safe after the seizure of two trucks at the Serbian-Bulgarian border in 1997.[57] The Security Service at that time was used for political murders and many other criminal offences, as well as to give support to large criminal gangs. Thus, its connection with the circulation of narcotics is not surprising. It is uncertain whether and to what extent this strong connection between the organised crime and the Security Service (Intelligence Service) survived after the changes in the last few years.

The Serbian Criminal Code incriminates offences related to narcotics in two criminal offences which are part of the Chapter 23 of the Code (Offences against human health): Unlawful Production, Keeping and Circulation of Narcotics and Facilitating the Taking of Narcotics.

Unlawful Production, Keeping and Circulation of Narcotics

Article 246

(1) *Whoever unlawfully produces, processes, sells or offers for sale, or whoever purchases, keeps or transports for sale, or who mediates in sale or buying or otherwise unlawfully puts into circulation substances or preparations that are declared narcotics, shall be punished by imprisonment for two to twelve years.*

(2) If the offence specified in paragraph 1 of this Article is committed by several persons acting in conspiracy to commit such offences, or if the offender has organised a network of dealers or middlemen, the offender shall be punished by imprisonment for five to fifteen years.

(3) Whoever unlawfully keeps substances or preparations that are declared narcotics, shall be punished by fine or imprisonment up to three years.

(4) The offender specified in paragraph 3 of this Article who keeps narcotics for self-use may be remitted from punishment.

(5) The offender specified in paragraphs 1 through 3 of this Article who discloses from whom he/she obtained narcotics may be remitted from punishment.

(6) Whoever unlawfully manufactures, obtains, possesses or gives for use equipment, material and substances that are known to be intended for production of narcotics, shall be punished by imprisonment for six months to five years.

(7) Narcotics and means for production thereof and processing shall be seized.

Article 246 is very similar to Article 245 of the Fundamental Criminal Code (FCC), which was in force before the entering into force of the Criminal Code.

57 This case is not completed and the only legislation that was violated was the one concerning the court deposit, since the narcotics after the seizure were supposed to be kept by the court which has to secure narcotics until their destruction.

However, there are differences. The basic offence is defined in the same way as in the FCC but the punishment is different (in the FCC the minimal sentence was five years of imprisonment and the sentence now prescribed goes from two to twelve years). The aggravated form is incriminated in the paragraph 2 that represents the organisation to commit this criminal offence – in this case the sentence differs from FCC where the minimum sentence was seven years imprisonment while the new Code prescribes a sentence from 5 to 15 years of imprisonment. Overall, it may be said that the new Code does not treat perpetrators of this crime in a strict manner, namely those who in an organised manner produce and distribute narcotics, bearing in mind the fact that the minimum imprisonment sentence was reduced, as well as having in mind the mild criminal policy against perpetrators.[58]

Paragraphs 3, 6 and 7 are identical with paragraphs 3, 4 and 5 of Article 245 of FCC, including the prescribed prison sentence. The new system is prescribed by paragraphs 4 and 5 of this Article that set out the possibility of remittal of punishment. Paragraph 4 stipulates that the offender specified in paragraph 3 of this Article, who keeps narcotics for self-use, may be remitted from punishment. However, it does not prescribe the amount of narcotics for self-use, which will create problems in practice. It remains to identify the border line between keeping narcotics for self-use and wide distribution and how the courts will apply this measure (and not to abuse the provision).

Paragraph 5 confuses things even more since it stipulates that the offender who discloses from whom he/she obtained narcotics may be remitted from punishment. Although this provision has a purpose in obtaining evidence against drug dealers who are at the top of the distribution chain (or have high positions within the criminal organisation) it is unjust to remit from punishment a perpetrator of a serious criminal offence for which he/she may be punished by 15 years of imprisonment. It would have been more appropriate if the mitigating circumstances were prescribed for such a person (which apply even if there was no specific referral to it in the legal text) or to rule a minimum sentence (or reduction of a sentence by half). This provision opens the door for wide abuse and the results in discovering the chain of narcotics distribution will probably be less productive, bearing in mind the fact that the persons selling narcotics directly very often don't know the name of their supplier or they do not dare to find out since there are afraid for their lives. The criminal offence of facilitating the taking of narcotics is complementary with the previous one with the aim of incriminating those procedures which do not represent a direct selling of narcotics but have the aim of widening the circle of drug users (at the beginning narcotics are given for free "to try" in order to make people dependent).

Article 247

(*1) Whoever induces another person to take narcotics or gives narcotics for his or another's use or places at disposal premises for taking of narcotics or otherwise*

58 In relation to this the statement of the Minister of Justice of the Republic of Serbia Zoran Stojković, broadcasted on B92 channel, News, April 2, 2007. More about sentencing for aggravated criminal offences in Serbia in Jovan ĆIRIĆ, Đorđe ĐORĐEVIĆ, Robert SEPI, *Kaznena politika sudova u Srbiji*, Beograd 2006.

enables another to take narcotics, shall be punished by imprisonment for six months to five years.

(2) If the offence specified in paragraph 1 of this Article is committed against a minor or several persons or has resulted in particularly severe consequences, the offender shall be punished by imprisonment for two to ten years.

(3) Narcotics shall be seized.

In this case, there are some differences regarding Article 246 of the FCC that prescribed the same offence. The differences concern the modification of prescribed prison sentence while the offence is defined in the same manner. The prison sentence prescribed by the new Criminal Code is not within the overall idea and efforts to fight the trafficking in narcotics and strategy of preventing the organised crime since it is reduced to six months to five years imprisonment for the main form of criminal offence (OKZ prescribes sentence from one to ten years of imprisonment) and for a more severe form the sentence from two to ten years of imprisonment (FCC at least three years). Moreover it is not just the reduction of potential punishment but there is the possibility to pronounce a *suspended sentence* in accordance with Article 66, paragraphs 1 and 2 of the Criminal Code[59]. This solution that will be applied in practice do not contribute to an effective fight against trafficking in narcotics.

2. Human Trafficking

(J. Ćirić)

This is a relatively new phenomenon in the world and in Serbia. It became particularly topical during the wars in the territory of former Yugoslavia and the significant presence of foreign soldiers both in Bosnia and Kosovo. In this sense the phenomenon of "human trafficking" is very often mixed and overlapped with "illegal migrations".

Serbia is not a human trafficking country of origin but it is, to certain extent, a country of destination of human trafficking victims. Most frequently, it is the country through which the human trafficking channels and illegal immigration go mainly to the Western Europe or neighbouring places where there is a significant number of soldiers. Consequently, this issue in recent times becomes very topical and it is the subject matter of much research done in Serbia.[60] Thus this

59 Article 66 of the Criminal Code *(Requirements for Pronouncing a Suspended Sentence)*: *(1) A sentence of imprisonment up to two years may be suspended. (2) For criminal offences punishable by imprisonment up to ten years or more the sentence cannot be suspended.*

60 Here we mention several examples: Saša MIJALKOVIĆ, *Trgovina ljudima*, Beograd 2005; Vladimir KRIVOKAPIĆ, *Ilegalne migracije i trgovina ljudima kao oblici organizovanog kriminala,* "Bezbednost" 6/2002; Milo BOŠKOVIĆ i Zdravko SKAKAVAC, *Trgovina ljudima – Osnovni i posebni oblici regulacije u nacionalnom i uporednom zakonodavstvu,* u zborniku radova "Kazneno zakonodavstvo: progresivna ili regresivna rešenja", izdanje Instituta za kriminološka i sociološka istraživanja i Više škole za unutrašnje poslove, Beograd 2005; Biljana SIMEUNOVIĆ – PATIĆ i Slađana JOVANOVIĆ, *Zaštita žrtava trgo-*

topic, which is *par excellence* part of the organised crime problem, is no longer unknown to researchers or those working in the fight against human trafficking.

In the previous criminal legislation there was no adequate incrimination of human trafficking, namely smuggling. It is worth mentioning two former provisions – one was in Article 155 of the Criminal Code of Yugoslavia "Holding in Slavery and Transportation of Enslaved Persons", and the other was prescribed by Article 249 "Illegal Border Crossing". These provisions are much shorter than the ones prescribed in the new Code that entered into force on 1 January 2006.

The criminal offences "Using Minors for Pornography" (Article 111-a) and "Human Trafficking" (Article 111-b) were introduced in April 2003 when the Act Amending Criminal Act was passed.

The newly adopted Criminal Code of the Republic of Serbia contains several interesting offences in this field: human trafficking, trafficking in children for adoption and Holding in Slavery and Transportation of Enslaved Person**.** These criminal offences are prescribed in the Chapter XXXIV "Criminal Offences against Humanity and other Rights Guaranteed by International Law". The legislator took into account the Rome Statute of the International Criminal Court which classifies human trafficking as one of the gravest crimes against humanity. In relation to this criminal offence there is the one prescribed by Article 350 of the Criminal Code "Illegal Crossing of State Border and Human Trafficking" prescribed in Chapter XXXI – "Offences against Public Peace and Order".

Human trafficking – Article 388

(1) Whoever 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, recruits, transports, transfers, sells, buys, acts as intermediary in sale, hides or holds another person with intent to exploit such person's labour, forced labour, commission of offences, prostitution, mendacity, pornography, removal of organs or body parts or service in armed conflicts, shall be punished by imprisonment for two to ten years.

(2) When the offence specified in paragraph 1 of this Article is committed against a minor, the offender shall be punished by the penalty prescribed for that offence even if there is no use of force, threat or any of the other mentioned methods of perpetration.

(3) If the offence specified in paragraph 1 of this Article is committed against a minor, the offender shall be punished by imprisonment for minimum three years.

(4) If the offence specified in paragraphs 1 and 3 of this Article resulted in grave bodily injury of a person, the offender shall be punished by imprisonment for three to fifteen years.

(5) If the offence specified in paragraphs 1 and 3 of this Article resulted in death of one or more persons, the offender shall be punished by imprisonment for minimum ten years.

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vine ljudima, "Pravni život", 9/2005; Ana ĐORIĆ i Jovan ĆIRIĆ, *Međunarodni i domaći pravni okvir"* (komparativna anliza) u monografiji "Trgovina ljudima (decom) – Pogled kroz Internet prozor; – izdavači "Astra" i OEBS, Beograd 2006.

(6) Whoever habitually engages in offences specified in paragraphs 1 and 3 of this Article or if the offence is committed by an organised group, shall be punished by imprisonment for minimum five years.

Trafficking in Children for Adoption– Article 389

(1) Whoever abducts a child under fourteen years of age for the purpose of adoption contrary to laws in force or whoever adopts such a child or mediates in such adoption or whoever for that purpose buys, sells or hands over another person under fourteen years of age or transports such a person, provides accommodation or conceals such a person, shall be punished by imprisonment for one to five years.

(2) Whoever habitually engages in activities specified in paragraph 1 of this Article or if the offence is committed by an organised group, shall be punished by imprisonment for minimum three years (up to 20 years).

Holding in Slavery and Transportation of Enslaved Persons– Article 390

(1) Whoever in violation of international law enslaves another person or 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 induces another to sell his/her freedom or freedom of persons under his/her support or care, shall be punished by imprisonment for one to ten years.

(2) Whoever transports persons in slavery or other similar position from one country to another, shall be punished by imprisonment for six months to five years.

(3) Whoever commits the offence specified in paragraphs 1 and 2 of this Article against a minor, shall be punished by imprisonment for five to fifteen years.

It is important to mention Article 350 of the new CC. This provision indirectly refers to human trafficking; it primarily refers to illegal migration and human trafficking and it was not present in the previous legal text.

Illegal Crossing of State Border and Human Trafficking – Article 350

(1) Whoever without a required permission crosses or attempts to cross the border of

Serbia, under arms or by use of force, shall be punished by imprisonment up to one year.

(2) Whoever enables illegal crossing of the Serbian border or illegal sojourn or transit through Serbia to a person who is not a citizen of Serbia with intent to acquire a benefit for himself or another shall be punished by imprisonment for three months to six years.

(3) If the offence specified in paragraph 2 of this Article is committed by an organised group, by abuse of authority or in a manner endangering the lives and health of persons whose illicit crossing of the Serbian border, sojourn or transit is being facilitated or if a larger number of persons is being smuggled the perpetrator shall be punished by imprisonment for one to ten years.

(4) The means intended or used for commission of the offence specified in paragraphs 1 through 3 of this Article shall be impounded.

The new Criminal Code prescribes one more criminal offence that is related to human trafficking. It represents a new form of international organised

crime, which spreads in a different manner including new forms, victims and users of services. It concerns the criminal offence prescribed by Article 185 "Showing Pornographic Material and Child Pornography" within Chapter XVIII of the Criminal "Sexual Offences". This was the result of the fact that today trafficking of children is not just done for adoption and begging purposes but also for production and distribution of pornographic material to potential users.

Showing Pornographic Material and Child Pornography – Article 185

(1) Whoever sells, shows or publicly displays or otherwise makes available texts, pictures, audio-visual or other items of pornographic content to a child or shows to a child a pornographic performance, shall be punished by a fine or imprisonment up to six months.

(2) Whoever uses a child to produce photographs, audio-visual or other items of pornographic content or for a pornographic show, shall be punished by imprisonment for six months to five years.

(3) Whoever sells, shows, publicly exhibits or electronically or otherwise makes available pictures, audio-visual or other items of pornographic content resulting from offences specified in paragraph 2 of this Article, shall be punished by imprisonment up to two years.

(4) Items specified in paragraphs 1 through 3 of this Article shall be confiscated

According to the provisions of the Criminal Code of Serbia a child is a person who is under the age of 14 and the minor is a child between 14 and 18.

In this regard, we can say that Serbian legislator is out-of-date. This is particularly true with regard to paragraph 1 of this Article – publicly displays. It is even more important to precisely define the concept of "child" since it is not in line with the international standards. The European Convention on Cyber Crime, under the notion "child pornography", defines children as those under the age of 18. Exceptionally, this Convention allows lowering the age limit up to 16 but not less than it. It seems that Serbian legislator have to accept more precise and stricter provision.

One more issue concerning human trafficking needs to be underlined. There is a question of what to do with victims of human trafficking who reach a foreign country without a residence permit and very often without documents. It is a question of whether a state should prevent a further victimisation regardless of whether that person committed petty offences or not. The mere deportation can only put those victims back into the network of human trafficking. Therefore it is important that state officials treat victims of human trafficking with care, which particularly relates to those who make initial contact with those victims. Therefore, it is necessary to mention guidelines from the Ministry of Interior issued on July 5, 2004. These guidelines prescribe conditions for temporary residence of foreign citizens who are victims of human trafficking. The other regulations are the guidelines of the Ministry of the Interior of September 20, 2004 concerning the procedure for granting temporary residence to foreign citizens who are victims of human trafficking. These regulations are partly in accordance with

international legal standards. There is a view that it would be more appropriate to regulate all these issues in one legal text, namely the Asylum Act which was not adopted in Serbia, although its adoption was predicted.

3. Criminal Offences – Abduction and Coercion

(M. Reljanović)

a) Abduction is a separate criminal offence introduced into the Serbian legislation in 1977. Before this abduction was not prescribed as a separate form of criminal behaviour but was incriminated within other criminal offences.[61]

Events in the last 15 years influenced the definition of this crime, especially its aggravated forms. The abductions of famous and rich businessmen were one of the typical signs of organised crime in Serbia.

Abduction is prescribed by Article 134 of the Serbian Criminal Code:

(1) Whoever by use of force, threat, deceit or otherwise with the intent to extort money or other property gain from that person or another or to coerce that person or another to do or refrain from doing something or to endure, shall be punished by imprisonment for one to ten years.

(2) Whoever threatens the abducted person for the purpose of accomplishing the aim of abduction with murder or grievous bodily harm, shall be punished by imprisonment for three to twelve years.

(3) If the abducted person is held more than ten days or treated in cruel manner or his/her health is seriously impaired or other serious consequences resulted or whoever commits the offence specified in paragraph 1 of this Article against a juvenile shall be punished by imprisonment for three to fifteen years.

(4) If due to the offence specified in paragraphs 1, 2 and 3 of this Article result in the death of the abducted person or the offence is committed by an organised group, the offender shall be punished by imprisonment for five to eighteen years.

Abduction has one basic and three severe forms. The definition is made in a classical way and it entails the deprivation of freedom of movement with the aim of property gain or some other benefits. *Actus reus* is the removal or holding a person or change of location against his/her will. In any case the intent must exist.

What is new is paragraph 4 of the Code that prescribes aggravated forms of abduction committed by an organised group. The legislator was conscious of the fact that one of the most frequent organised crime activities is planning and committing the offence and thus they prescribed a separate crime when the abduction is committed by organised group. At the same time, the new legislation did not include provisions from the previous Criminal Code whereby the abductor could have been remitted from punishment if he/she releases the abducted child before the fulfilment of his/her request.

In that sense the new offence is on the right track to make the new sentencing policy stricter and to improve the efficiency in fighting the organised crime groups in this field.

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61 See: Zoran STOJANOVIĆ, Obrad PERIĆ, *Krivično pravo, posebni deo*, Beograd 2000, p. 123.

b) A criminal offence of coercion is prescribed in Article 135 of the Criminal Code:

(1) Whoever by use of force or threat coerces another to do or refrain from doing something, or to endure, shall be punished by imprisonment up to three years.

(2) Whoever commits the offence specified in paragraph 1 of this Article in a cruel manner or by threat of murder or grievous bodily harm or abduction, shall be punished by imprisonment for six months to five years.

(3) If the offence specified in paragraphs 1 and 2 of this Article result in grievous bodily harm or other serious consequences, the offender shall be punished by imprisonment for one to ten years.

(4) If the offence specified in paragraphs 1 and 2 of this Article results in death of the person under coercion or if committed by an organised group, the offender shall be punished by imprisonment for three to twelve years.

Actus reus entails the use of force or threat[62] by which someone's behaviour is directly influenced, namely he/she is forced to perform certain behaviour or forced to refrain from certain behaviour or not to act in the situation in which he/she would act.

As is the case with abduction, there is one basic and three aggravated forms. The most aggravated (which is again the same with the abduction) results in the death or was committed by an organised group. Coercion is very often an addition to criminal gangs' activities in situation where their activity is under the attack of state bodies. Intent is needed to commit this crime. Since it influences the freedom of decision-making and action and in relation to the organised crime it is characteristic during the criminal prosecution of perpetrators (members of an organised group) when coercion is used to influence different state institutions and other actors in pre-criminal and criminal procedure (for example police, prosecutors, judges and witnesses).

4. Cyber Crime

(M. Reljanović)

Bearing in mind the dependence of daily life on IT (both in professional and in private life), there was a need to secure the performance of activities, as well as to secure the users of technology from abuse and unlawful actions. When it was identified that computer equipment and internet communication may be used in preparation and perpetration of crimes, as well as for the undisturbed communication of terrorists, this problem was tackled more seriously. The cause of cyber crime is easy access to data, with protection, relatively untrained state institutions to prosecute perpetrators and relatively easy concealing of evidence on a person committing a crime (or a fact that the crime was committed). Serbia is no excep-

62 The former Criminal Code used the term "serious threats" which made confusion in interpreting this provision in practice (See Zoran STOJANOVIĆ, Obrad PERIĆ, *op .cit*, str. 121). The Criminal Code in force enumerates "force or threat" which is in accordance with the notion of "threat" in criminal law without the need to prove whether the threat was "serious" that is directed to incurring (drastic, irreparable) consequences.

tion from the misuse and abuse of modern technologies bearing in mind the development of internet and use of computers.

The Serbian legal system became richer for two very important changes in this field. The new chapter under the title "Criminal offence against security of computer data" was introduced into the Criminal Code and the Act on Organisation and Competences of State Authorities in Fighting the Cyber Crime was passed (Cyber Crime Act).[63]

Chapter XXVII of the Criminal code contains seven criminal offences in the field of Criminal offence against security of computer data: Damaging Computer Data and Programs – Article 298, Computer Sabotage – Article 299, Creating and Introducing of Computer Viruses – Article 300, Computer Fraud – Article 301, Unauthorised Access to Computer, Computer Network or Electronic Data Processing – Article 302, Preventing or Restricting Access to Public Computer Network – Article 303 and Unauthorised Use of Computer of Computer Network – Article 304.

Many behaviours that up to now were not punishable became sanctioned: unlawful behaviour with computer data and programmes, design and distribution of harmful programmes, different forms of electronic financial frauds (which were very frequent on certain web pages made for that purpose as well as during payment and transfer of money done online), *hacking*, as well as any other activity on a computer or within a computer network done in an unlawful manner. More aggravated forms of this offence entail damages incurred by committing an offence, except of the "prevention and limitation of access to a public internet network" where the aggravated forms exist in cases when the offence is committed by a person in his/her professional capacity.

The analysis of the aforementioned criminal offences, which are very different, does not give us a definition of cyber-crime.[64]

The introduction of the afore-mentioned criminal offences marks significant progress in the filed of prevention of cyber crime. However, prescribed sentences are too strict. It is obvious that these criminal offences do not cover the entire field of IT abuse, bearing in mind that the unlawful use of computers is in progress. For example, the Code does not prescribe the unlawful installation of programmes, except virus, although there are numerous programmes which a user can install. Typical examples are 'Trojans'.[65] Moreover, there are also

63 "Official Journal of RS", 61/05.

64 Except if we do not accept one of the most famous definitions of cyber crime, in which the computer or network is a tool of the criminal activity.

65 Trojan horse, or simply *trojan*, is a piece of software which appears to perform a certain action but in fact performs another. Contrary to popular belief, this action, usually encoded in a hidden payload, may or may not be acutely malicious, but Trojan horses are notorious today for their use in the installation of backdoor programs. Simply put, a Trojan horse is not a computer virus. Unlike such malware, it does not propagate by self-replication but relies heavily on the exploitation of an end user. See more about trojans on web site: http://en.wikipedia.org/wiki/Trojan_horse_(computing), 22. March 2007.

spamming and spoofing,[66] and logical bombs,[67] Logging into internet in someone's else's name, blocking of computer by external commands, modification of content of websites without authorisation are some of the offences that were not prescribed by the Criminal Code.

Besides these deficiencies there are some other issues not resolved in comparative practice. For example, the internet is rarely used for committing a crime concerning one state but it has an international character. How can jurisdiction for perpetrators of these crimes be established? How to identify the person who uses the computer for committing a crime? Does this mean that the objective liability of the computer owner is introduced or a corresponding IP address from which the crime is committed?[68] How to treat minors who commit these crimes?[69] In regard to this, prosecutors and courts cannot rely on previous practice as it is inexistent. Thus, they need to be trained in accordance with the foreign practice.

The Cyber Crime Act tries to overcome some of the difficulties, especially those related to the specialisation of bodies dealing with cyber crime cases and prosecuting the offenders of these crimes. This act is complementary to the Chapter 27 of the Criminal Code which is explicitly stated in the legal text.[70] The special panel of the district court in Belgrade and the agency against cyber crime within the Ministry of Interior is established for prosecuting and ruling in cases of cyber crime which include acts against the security of computer networks,

66 E-mail spoofing is a term used to describe fraudulent email activity in which the sender address and other parts of the email header are altered to appear as though the email originated from a different source. E-mail spoofing is a technique commonly used for spam e-mail and phishing to hide the origin of an e-mail message. Financial or other types of fraud may be committed in this manner but the offence may be reduced to not permitted activity.

67 Damaging programmes, namely viruses without the possibility of self-execution. Code surreptitiously inserted into an application or OS that causes it to perform some destructive or security-compromising activity whenever specified conditions are met.

68 An IP address (Internet Protocol address) is a unique address that certain electronic devices currently use in order to identify and communicate with each other on a computer network utilizing the Internet Protocol standard (IP)—in simpler terms, a computer address. It may help in finding the location of the computer from which a criminal offence was committed. According to the data of the organisation Ipligence (http://www.ipligence.com) there is more than a billion internet users, while the number of computers with access to internet is double this number. See more about the IP address, its allocation and finding if the home address on the basis of IP address on *http://www.webopedia.com/TERM/T/TCP_IP.html* and the text *IP address,* on the web page: http://www.webopedia.com/TERM/I/IP_address.html, March 22, 2007.

69 Although the answer may seem simple, since there is a special legislation applied to minors, the perpetrators are usually children which are not conscious of the damaging effects and there is a danger to repeat the crime. There are cases that perpetrators were the age of 6 to 19.

70 Article 2, paragraph 3 and Article 3 of the statute indicate the same terminology used in both legal texts as well the fact that the Cyber Crime Act is applied in order to discover a criminal offence, criminal prosecution and trial against security of computer data and criminal offences against intellectual property and traffic when the objects and means of committing the offence are computers, a computer network or computer data in the manner defined by law.

crimes related to intellectual property when the crime is committed by computers, computer network or data as well as their products in paper and electronic versions.[71]

The Special Prosecutor's Department is established within the District Public Prosecutor's Office in Belgrade, covering the entire territory of Serbia. The work of this prosecutor's department is regulated by general laws covering the public prosecutor's office, except if otherwise prescribed by the Cybercrime Act. The Special Prosecutor runs the department and he/she is appointed by the Chief Public Prosecutor amongst public prosecutors and deputy public prosecutors who meet the criteria for deputy district public prosecutor. The consent of the candidate is also required. He/she is elected for four year renewable term. A Special Prosecutor may be dismissed before the end of the term of office by the Chief Public Prosecutor. In his/her work, he/she has the rights and duties of any other prosecutor. A Special Prosecutor proposes the staffing table to the district public prosecutor which requires the consent of the Minister of Justice. If a public prosecutor discovers that a certain case falls within the competence of his/her department he/she may require from the Chief Public Prosecutor to empower him/her to act (Article 428 of the Statute).

The Agency against Cyber Crime is established within the Ministry of Interior and acts upon the request of the Special Prosecutor. The Head, appointed by the Minister of Interior after the approval of the Special Prosecutor, manages the Agency. The Minister of Interior closely regulates the work of the Agency upon the opinion of the Special Prosecutor (Article 9 of the statute).

The Panel concerning cyber crime is responsible to act in cases of cyber crime defined by the Act for the territory of Serbia. The panel is established within the District Court in Belgrade and it is established by the President of the Court. The consent of the judges is required. The judges may be part of the panel for at most two years whereby the president of the District court may extend this provision with the consent of the judge in question (Article 10 and 11 of the statute).

The Cyber Crime Act tried to complement measures for fighting crime by using the new technological solutions and prescribing a whole set of new entities specialised for this field. However, the statute did not cover to a necessary extent the quality of future specialised bodies; thus, it may happen that in practice staff are not familiar with new technologies nor with the connected types of criminal offences and modalities of committing those offences. It is very difficult to identify the *actus reus* and the members of Agency must be highly trained and specialised for this field. However, the statute prescribes that the priority shall be given to public prosecutors and deputy public prosecutors (that is judges) who have special knowledge in IT in selecting the public prosecutors (and deputy public prosecutors) for special prosecution and judges for special panel (Article 5, paragraph 2 and Article 11, paragraph 2 of statute). Specialisation, technical and practical knowledge from the field of IT is an advantage and not a requirement.

71 If the number of author's copies overcomes five hundred or the incurred damage overcomes the amount of 850,000 dinars.

This selection condition is not prescribed as a requirement for the Agency within the Ministry of Interior but the selection lies within the discretionary power of the Ministry. This selection does not ensure the readiness of new bodies to face their tasks and to efficiently work in fighting cyber crime. An additional difficulty derives from the provision that the term of office of judges in the special panel is only two years. In this case, the permanent and planned training of judges of the District Court is required at least six months before the judges give consent to be members of the panel. If the training is undertaken following the allocation the judges will require additional time to understand the problems regarding the criminal offences and consequently, there will be delays in processing the cases or the cases will be processed without the required training – specialisation for the efficient implementation of legislation.

The second objection concerns the implementation of the statute. Although the statute was passed in 2005 the Agency within the Ministry of Interior is still not established and neither is the Panel within the District Court of Belgrade.[72] The Special Prosecutor began to work but it is uncertain how he/she will act in cases from his/her competence, bearing in mind that the Cyber Crime Act does not prescribe time limits for implementation.

The introduction of these criminal offences into the legal system of Serbia is a positive step and there are very good ideas concerning the fight against cyber crime. However, the legislation in force has to be modified and the Cyber Crime Act must be fully implemented. Besides, the greatest problem is the lack of practice, lack of information and untrained staff who will apply this legislation.

5. Certain Forms of Fraud

(J. Ćirić)

Serbia is one of the countries which do not prescribe separate forms of fraud. Regardless of the form of fraud (for example fraud in relation to insurance, fraud in external trade) the general criminal offence of fraud stipulated by Article 208 is applied. This offence is prescribed within the criminal offences against property. The Article 208, paragraph 1 stipulates:

Whoever with intent to acquire unlawful material gain for himself or another by false presentation or concealment of facts deceives another or maintains such deception and thus induces such person to act to the prejudice of his or another's property, shall be punished by a fine or imprisonment up to three years.

The different sentences are prescribed depending on the fact whether it was committed with the intent to cause damage to another (paragraph 2), whether material gain caused exceeds 450,000 dinars (paragraph 3) or 1,500,000 dinars (around 18,000 euros) – paragraphs 4. The fine or imprisonment up to six months is prescribed for an offence from paragraph 2; imprisonment of one to eight years for an offence prescribed by paragraph 3; two to twelve years for an

72 According to the Ministry of Justice the panel should have obtained special premises and other working conditions by May 2007 when the first trials for cyber crime were expected.

offence prescribed by paragraph 4. However, there are no new forms of fraud which may occur in relation to new technologies.

Fraud in Services is prescribed as a separate criminal offence – Article 363 of the Criminal Code:

An official who in discharge of duty, with the intent to acquire unlawful material gain for himself or another by submitting false accounts or otherwise misleads an authorised official to effect unlawful payment, shall be punished by imprisonment for six months to five years.

The second paragraph refers to the material gain exceeding 450,000 (6,000 euros), and the sentence is imprisonment of one to eight years. Paragraph 3 refers to material gain exceeding 1,500,000 dinars (18,000 euros) and the prescribed sentence is imprisonment of two to ten years.

For example if the insured party defrauds the insurance company he/she shall be liable for simple fraud, while an employee in the insurance company shall be liable for fraud in service if he/she commits fraud to ensure material gain to his/her friend. A special offence regarding the fraud in insurance does not exist in Serbia. Is it necessary?

When it concerns insurance it is very important to underline the principle of trust, otherwise it cannot entail insurance if an insured enters with the intent to commit fraud.[73] However, one should not only have this situation in mind. It is possible that an event that occurs regardless of an insured's wishes, intent or powers is later used by him/her to commit fraud and acquire unlawful material gain. For example a fire, accidentally burned, is later used and abused by the insured in order to fraud the insurance company. This is a situation when an accident is turned into a fortunate situation with possibility of acquiring material gain.[74] The question remains what to do in situations when an event happened just by chance, there was no negligence and no action of a third person. If damage was incurred by a person for whose actions an insured is responsible the following rule should apply: it would be considered that damage was incurred by negligence of the insured, which means that the insurance company will not compensate the damage.[75] This question is very important since it may happen, for example, that a parent forces his/her minor child to damage insured objects in order to get insurance or an employer forces his/her employee. In this case it is important to establish if an insuree insured its property for a greatly over-valued amount. If this is the case there are grounds to believe that he/she wanted to commit the fraud. However, many complications may arise.

In any case there are many very complex and interesting situations regarding insurance and insurance frauds. Serbian legislation does not prescribe separate offences of fraud in respect to insurance. A special criminal offence would allow for prescription of special characteristics in regard to insurance. In principle, special forms of criminal offences exist to be specified in a more appropriate

73 Zoran RADOVIĆ i Živojin ALEKSIĆ, *Prevare u osiguranju,* Beograd 1997, pp. 6–7.

74 59. Ibidem str. 111.

75 Predrag ŠULEJIĆ, *Pravo osiguranja*, Beograd 1980, str. 92.

manner.[76] It is clear that not each fraud is the same, not only in respect to the amount of damages but in a wider moral and social sense. For example, 'quackery' as a special form of fraud does not have the same importance and social and moral meaning as general fraud.[77] When it concerns fraud one always must have in mind the victims, namely the contribution of the victim. The contribution of a victim may be very interesting and important from the point of view of criminal law in general,[78] and it is especially interesting with fraud. It is always a question to what extent a victim contributed in being deceived. Formally the legislator should not prescribe that the extent of deception should lead to a less strict punishment of the perpetrator but it is an important case law factor when a court decides on sentencing as well as many other factors of physiological and social nature.[79] It is clear that the decision is different when a victim contributed in committing the criminal offence and when a victim did not make any contribution. This also demonstrates that there are different forms of fraud which are sometimes very different and we can speak about different types of criminal offences. Thus there is a reason to prescribe a special criminal offence such as fraud in the field of insurance.[80]

It is not clear why the new Criminal Code prescribes the criminal offence of "false bankruptcy", and does not prescribe the criminal offence of fraud in the field of insurance; the false bankruptcy is just one form of fraud. Thus, the argument that there is no need to prescribe special forms of fraud since everything can be summed up under the general notion of fraud is not persuasive since there is a form of fraud in the criminal offence of "false bankruptcy".

In the end, we should mention the issue related to new forms of contemporary and sophisticated frauds. It does not concern the legislative framework but the fact that police, prosecutors and citizens are not prepared enough and they can easily be victims of fraud. For example, we should mention one of the new forms of fraud: several years ago a national of Bosnia and Herzegovina and a German national originally from Sri Lanka were charged with withdrawing money from ATMs by using 200 false bank cards.[81] A significant number of citizens who just started to use cards as well as entrepreneurs do not have enough knowledge how to prevent possible frauds, abuse, forgery, stealing of PINs[82] and many other forms of frauds in relation to bank cards.

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76 Janko TAHOVIĆ, *Krivično pravo– posebni deo,* Beograd 1955, str. 106.

77 Stojan KNEŽEVIĆ, *Etika i medicina,* Zagreb 1979, str. 34.

78 Vesna NIKOLIĆ – RISTANOVIĆ, *Uticaj žrtve na pojavu kriminaliteta,* Beograd 1984.

79 John HOGARTH, *Sentencing as a Human Process*, University of Toronto Press, 1971. pp. 19.

80 See Jovan ĆIRIĆ, *Krivičnopravni aspekti osiguraničke prevare,* in the journal "Tokovi osiguranja", No. 1/2002.

81 In a Belgrade newspaper many speculated that these two persons were part of an organised network of international criminals who in many other countries, especially communist countries, performed many similar frauds – card numbers were taken from Internet and then they used these numbers in ATMs'. V. "Press", of March 22, 2007.

82 Here we should mention the on line payment which may be very dangerous in technically highly developed countries and with population which is highly computer literate

III. CORRUPTION

1. On Criminal Offence of Corruption

(J. Ćirić)

Before we present some most important formal and legal characteristics of corruptions it is very important to observe statistical data on the frequency of these crimes according to the number of criminal reports, charges and final convictions for these criminal offences.

Year	Abuse of Office			Acceptance of bribe			Bribe soliciting		
	reports	indictments	convictions	reports	indictments	convictions	reports	Indictments	convictions
1991	2774	1538	927	37	20	13	25	18	10
1992	2236	1009	637	58	12	9	49	13	9
1993	2619	940	589	98	25	18	90	31	22
1994	2060	829	528	79	45	25	143	46	35
1995	2112	697	428	101	27	19	194	52	42
1996	2296	604	333	65	36	25	97	43	32
1997	2220	723	427	76	56	46	116	74	59
1998	2250	786	439	68	49	43	78	59	49
1999	1712	687	434	56	34	33	112	29	25
2000	1867	701	445	73	46	31	82	35	30

Two conclusions can be made. Firstly, that the number of processed cases of abuse of office continuously decreases. Secondly, the number of people charged and sentenced for the criminal offence of soliciting and accepting bribes is constantly low, which indicates that the responsible authorities in Serbia (police, inspection, prosecutors' offices) do not deal with this problem seriously which creates an impression that this behaviour is allowed.

It may be said that whoever abuses his/her office in order to gain any direct pecuniary benefit may easily abuse his/her position (that is powers and reputation deriving from there) and to protect himself/herself from criminal prosecution by using his/her direct or indirect connections and influence.

In a general sense, law has a purpose to limit the individual interests and powers. Thus, in case of abuse of office the responsibility of an official who overpasses his/her power and uses them against the law is called into question. This is the essence of the criminal offence "abuse of office" which is often accompanied with the acceptance of bribe.

In order to fully examine the situation in Serbia it is necessary to analyse the provision of the Criminal Code of Serbia which refers to the abuse of office (Article 359). It stipulates:

"*An official who by abuse of office or authority, by exceeding the limits of his/her official authority or by dereliction of duty acquires for himself or another any benefit, or causes damages to a third party or seriously violates the rights of another, shall be punished by imprisonment for six months to five years.*"

Paragraph 2 prescribes the aggravated form of this criminal offence, namely if material gain exceeds 450,000 dinars (around 5,000 euros). In this case an official shall be punished by imprisonment for six months to five years. According to paragraph 3, if the commission of the offence specified in paragraph 1 of this Article results in acquiring material gain exceeding 450,000 dinars, the offender shall be punished by imprisonment for one to eight years

This criminal offence is the basic one of the group of offences against official duty (Violation of Law by a Judge, Public Prosecutor or his/her Deputy – Article 360, Dereliction of Duty – Article 361, Unlawful Collection and Payment – Article 362, Fraud in Service – Article 363, Embezzlement – Article 346, Unauthorised Use – Article 365, Unlawful Mediation – Article 366, Soliciting and Accepting Bribes – Article 367, Bribery – Article 368, Revealing of Official Secret – Article 369) and represent a form of criminal protection of proper performance of official duty and fight against corruption.

It is considered that the official duty is abused in an objective sense when an official overpasses his/her official authority or does not perform his/her official duty. In the subjective sense the abuse of office exists when an official performs official duties which are within his/her competence but not with the aim of achieving the official interest but to achieve his/her own interest or of a third person.[83] It is always easier to prove the objective component of a criminal offence and much harder to prove the abuse of office in the subjective sense. However, this is an auxiliary problem with corruption in Serbia.

There is no problem with the legal definition of the criminal offence of abuse of office. The problem lies in the interpretation by courts, prosecution and inspection. Thus, some say that that law remains a dead letter.

Other statistical data give some indications in this matter. In carrying out an empirical research on sentencing policy in Serbian courts, the researchers planned to process in 12 Serbian district courts (including Belgrade) six final convicting judgments for different criminal offences, including the criminal offence of abuse of office prescribed by Article 359, paragraph 3.[84] It turned out that in many courts, even in Belgrade courts in the last ten years no perpetrator was convicted for the criminal offence of abuse of office from paragraph 3. The sample of the research was not sufficient, thus the research had to cover the last

83 Zoran PEROVIĆ, *Zloupotreba službenog položaja,* referat na Savetovanju Instituta za kriminološka i sociološka istraživanja: "Privredni kriminal i korupcija", Beograd 2001, p. 208.

84 This is a situation when the unlawful material gain or damage is higher than 1.5 million dinars. In meantime the privatisation was under way in Serbia, namely socially owned and state owned companies of great value were sold. However, there were no cases of any "Abuse of Office" for the amount higher than €17000. It is at least an awkward situation.

20 years.[85] This research speaks for itself. Many researchers on corruption underline the reduction of charged and convicted persons for the criminal offence of corruption in the last 20 years that speaks in favour of the moral crisis in Serbia and the non implementation of legislation.[86]

Moreover: in cases of conviction for abuse of office, according to the results of the aforementioned research, in 55.9 per cent of cases the sentence was mitigated[87], namely the courts pronounced the sentence under the statutory limitation. Consequently, the perpetrators of the most important criminal offence in relation to corruption and organised crime were not brought before the court or in case of conviction they were pronounced mild sentences. This data indicates that the problem of organised crime and corruption in Serbia does not lie in inadequate statutory provisions but in the lack of implementation of laws.

Finally corruption and abuse of office will be reduced if individuals are given less unlimited powers. Extensive powers provoke individuals to abuse their position. This practically means the limitation of state powers and powers of its institutions and individuals in the corresponding official positions. Moreover, it means the maximum liberalisation of the economy and consequently less influence of the state in the sphere of the economy and social life. In practice, a commercial entity will not have to constantly ask for permission and approval from state bodies but it can act freely in the market. Certain individuals from the state apparatus prefer to have an extensive influence of the state over the economy, since it gives them the possibility to "ask large amounts from actors in the black market in order to leave them alone".[88] There is a positive relationship between the influence of the state and the difficulty in challenging corruption – there is an equation, more state influence means greater corruption and, vice-versa, more liberalism less corruption.[89]

Overall, every time an official has wide discretionary powers there is a possibility of abuse of office which is one of the criminal offences against official duties. Consequently, the anti-corruption policy should entail the limitation of state power. In passing an act, an official chooses the solution which he/she deems best, which opens the possibility to take into account someone else's interests.[90] If we were to look to the past, we could reflect on the work of the Commission responsible for allocation of accommodation in former state and socially owned institutions. The president of this commission always protected the interests of certain individuals. In practice, it is hard to solve this problem since it is very difficult to claim that an official abused his/her position, especially in a situation when there are at least two candidates of equal quality.[91] Both candidates did not

85 See Jovan ĆIRIĆ, Đorđe ĐORĐEVIĆ and Robert SEPI, *Kaznena politika sudova u Srbiji,* Beograd 2006.

86 See Slobodana VUKOVIĆA, *Korupcija i vladavina prava*, Beograd 2003.

87 J.ĆIRIĆ, Đ.ĐORĐEVIĆ i R.SEPI, op. cit. pp. 51.

88 Đorđe IGNJATOVIĆ, *Organizovani kriminalitet*, drugi deo, Beograd 1998, pp. 139.

89 Group of authors, *Korupcija u Srbiji,* Centar za liberalno dekomkratske studije, Beograd 2001, pp. 13.

90 Ljubiša LAZAREVIĆ, *Krivično pravo/ posebni deo*, op.cit. pp685.

91 The same was during employment.

have accommodation, they had the same years of service, same qualifications, same number of children etc. It is not hard to imagine a situation like this where one is to be allocated an apartment. The one who is not allocated the apartment have reasons to believe that he/she is discriminated,[92] and that the official abused his/her position. On the other hand, the official can always invoke his/her discretion.[93] An official must respect laws and by-laws but in practice there are complex situations which cannot be anticipated. Thus, an official must be left with the discretionary power to take a decision. Consequently, we cannot always claim that he/she abused his/her position. This is why it is very hard to prove the existence of this criminal offence in the court and the frequency of these offences before court is low. In practice of course there are situations where it's easy to prove the existence of the criminal offence of abuse of office. For example, a manager of a shop abuses his/her position by allowing the employees to buy coffee and pay for it at the end of the month for the price which was requested at the beginning of the month. An official who is responsible for the car test fills in the registration form for his/her friend without performing a technical check of the car. [94] On the basis of this example only the smaller fish is caught and not the big fish. This situation was very frequent in Serbia which resulted in a mentality whereby people thought if the 'higher-up' people could get away with it then they could too.

There is also one potential problem. It concerns the failure of the administration to act, in particular doctors in hospitals. An official has a duty to do something but he/she fails to act. How to identify the reason for this failure to act or for the slow action, Is he/she expecting a bribe? In this situation citizens react by bribing and that official suddenly becomes more efficient. So, those who insist on codes of conduct and permanent training of officials are right, which was one of the points in the report of the group of states against corruption. At the end, for a citizen does not care what the reasons are for the fact that he/she cannot exercise his/her rights.

Finally, it is necessary to point out some statistical data which refer to the extent of strictness or mildness of the sentencing policy of courts for the criminal offence of abuse of office which is a central criminal offence in connection to corruption.

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92 This was a frequent situation concerning corruption among judges. The reason for widespread corruption in courts is a consequence of the fact that always one party see himself/herself as a victim and believes that the judgement is the result of corruption or bad faith.

93 Here there are also illusions regarding courts and judges. There is always an element of judge's discretion, both in examining the evidence and in ruling on the innocence of accused person, as well as on the possibility of an offender changing his or her behaviour in future. Without that freedom and extent of discretion the whole proceeding will be pointless since it would entail that a judge does not have special powers and does not occupy an official position.

94 Belgrade District Court ruled in both cases in 1994 (quoted Dragan JOVAŠEVIĆ, Tarik HAŠIMBEGOVIĆ, *Zloupotreba službenog položaja,* Beograd, 2002. p. 36)

Indicators of strictness of sentencing policy of courts in 2000

	Percentage of total pronounced prison sentences	Percentage of pronounced suspended sentences	Percentage of pronounced of pecuniary sentences
Overall for all criminal offences	28.86%	47.90%	19.14%
Abuse of Office	28.53%	71.01%	0.22%

Pronounced sentence	Percentage of total pronounced sentences for all criminal offences	Percentage of pronounced sentences for abuse of office
Up to six month imprisonment	68.17%	74.80%
6–12 months of imprisonment	18.89%	18.89%
1–2 years of imprisonment	7.76%	3.93%
Over 2 year of imprisonment	5.16%	2.36%

There is no need to give comments on these data. Briefly, it is hard to prove the criminal offence of abuse of office and other criminal offences in relation to corruption and they are rarely processed. Finally, when the perpetrators are sentenced their punishment is less serious than those for perpetrators of other criminal offences.

2. One Important Novelty within the Criminal Offences of Corruption

(J. Ćirić)

A significant number of domestic and foreign experts classify Serbia as one of the most corrupt states in the world.[95] Without analysing the validity of these views it must be emphasised that after democratic changes in Serbia of October 5 there were efforts to adopt changes in regard to the criminal offence of corruption. The changes entailed the prescription of special forms of corruption such as "corruption in field of education", "corruption in the process of privatisation" with a higher sentence. It was expected that the results would have improved the situation in the sense that there would be more individuals charged with the crime of soliciting and accepting bribes but this did not happen. The new Criminal Code introduced again the classical definition of incrimination "general" corruption – soliciting and accepting a bribe. But this is a novelty which in practice enables the factual decriminalisation of soliciting a bribe.

95 See Miroslav PROKOPIJEVIĆ, *Evropska Unija – Uvod*, Beograd 2005.

Namely, Article 368, paragraph 4 stipulates that the offender who reports the offence before becoming aware that it has been detected, may be remitted from punishment. This is left to the court's discretion. On the other hand, this may pose many questions – above all will this increase the number of people who will openly offer a bribe and instigate the acceptance of bribe; whether people will behave in more immoral manner by offering a bribe and then report it; whether this will increase the number of *provocateurs* and spies which will result in bad mutual relationships. It seems that this provision should not raise concerns since, in the past one year of practice, this possibility was not used, perhaps because no one paid attention to it, and maybe due to the fact that "remittance of punishment" is only a possibility and the prescribed prison sentence is still very high. The punishment for soliciting a bribe is lower than for accepting bribe (soliciting bribe – six month to five years imprisonment and up to three years for milder form of criminal offence; acceptance of bribe – two to 12 years of imprisonment, two to eight years, three months to three years depending on the of seriousness of crime).

It seems that if the idea was the factual decriminalisation of soliciting bribe (paragraph 4), it should have been punished by the milder sentence for soliciting bribe. Thus, the six months to five years imprisonment could have been prescribed, which would have encouraged people to report corruption cases, namely to admit that they participated in bribe soliciting.

In any case the topic of corruption in Serbia is since a long period of time one of the main topics in the work of lawyers, analysts, experts, ordinary citizens and the general public. There is a determination to find new solutions but the results of the struggle come slowly.[96]

3. Sentencing Penal Policy and the Fight against Corruption
(J. Ćirić)

This topic is interesting and inspiring enough to be a subject of separate analysis. It seems a logical conclusion that the number of criminal offences will rise namely, that a greater number of people will commit crimes when the legislator prescribes milder sentences. It is hard to dispute this but the contrary conclusion can also be reached.

It is necessary to point to the fact which is present in Serbian legal environment but also within politics and amongst the general public; that it's only with strictly prescribed sentences that the results in combating the negative social behaviour can be reached. The opinion that punishment is the most efficient means for the control of social behaviour, the prevention of crime and other negative occurrences is very widespread amongst the general public.[97] In any case the legislator very often prescribes strict punishment believing that this will be the most

96 Milenko JELAČIĆ, *Društveno pravni aspekti i metode borbe suprotstavljanja korupcije*, Beograd, 1996.

97 Bogdan ZLATARIĆ – Zvonimir ŠEPAROVIĆ, *Krivično pravo – opći deo,* Zagreb 1977, str. 8–9.

efficient way of influencing social morality and strengthening it. Sometimes the legislator even prescribes draconian punishment thinking that this is the way of achieving the function of social control.[98] However, the prescription of strong sentences, especially if not followed by courts pronouncing those strict sentences, cannot be a magic wand for solving all possible social problems. Sometimes even the outcome can be the contrary. Strictly prescribed sentences can be an additional impetus for increasing certain forms of corruption. If the sentences are unrealistically strict, citizens will reach for non-institutional options to prevent their application. At first glance this seems absurd. For example, the author had a similar situation. He committed a traffic offence (he jay-walked at a red light) and the policeman waited for him on the other side of the street and charged him with a penalty amounting to 10 per cent of his salary. He paid the fine but if the fine was higher he would have had a moral dilemma; whether to pay the fine or to bribe a policeman by paying half the amount of the fine. Citizens often act in this manner.

It is widely known that road safety is a problem in Serbia especially bearing in mind the number of accidents and the number of deaths on the road. Although there is a problem of discipline in driving: it seems that Road Traffic Safety Act prescribes strict sentences which can encourage others to bribe police officers.

We may mention several provisions of this Act, which may lead to petty but frequent corruption which definitely does not contribute to social morality but has the contrary effect. For example, Article 226, paragraph 6 of this Act stipulates that a driver who breaks a red light shall be punished by a fine of 5000 to 25,000 dinars, which amounts to 20 to 100 percent of the average salary in Serbia. In paragraph 10 of this Article the same sentence is prescribed for a driver who accelerates while being overtaken.[99] The same sentence (20 to 100 percent of the average salary in Serbia) shall be pronounced for a person who drives 30 kilometres per hour over the speed limit in a built up area or 50 kilometres per hour over the speed limit in a rural area (point 4 of the same article). There is no doubt that these are serious offences, but the sentences are too strict for Serbian economic standards.

A fine of 3000 to 20,000 dinars (15–80% of the average monthly salary) or 30 days of prison shall be pronounced to a driver who does not adjust speed to the characteristics of the road and other conditions and is unable to stop if there is an obstacle (Article 227, paragraph 8). This provision is very unclear since it gives an arbitrary power to the traffic police who may decide to severely punish certain offenders while letting others go after taking a bribe. A similar situation derives from paragraph 2 of the same Article which stipulates that a driver who by quickly breaking puts others in danger shall be punished by a fine of 3,000 dinars which amounts to a 10 percent of the average monthly salary. Who will

98 See Katarina DAMJANOVIĆ–LAZAREVIĆ, *Sporedno (dopunsko) krivično zakonodavstvo,* "Jugoslovenska revija za kriminologiju i krivično pravo", br. 1–2/93.

99 A problem of a driver accelerating while being overtaken lies in the fact that is very hard to prove it but it is left to an arbitrary decision.

partially evaluate whether the driver abruptly brakes[100] and whether it should be punished by a severe sentence?

The fine of 1,000 dinars which is less than 5 percent of the average monthly salary is prescribed for not wearing a belt (Article 230, sub-paragraph 2) which is very high fine and may encourage an offender to bribe a policeman.

These unclear and severe punishments are not only a characteristic of the Traffic Act but of many other acts. However, here by bribing offenders will think they have got off lightly. This may seem like unimportant and petty corruption but considering its large scale it becomes significant. If the fines prescribed are within the economic standards of citizens it may happen that a lesser number of citizens would try to bribe the authorities[101] and pay the fine. Usually the offenders think that they did not deserve the fine so they do not consider immoral to bribe.

Therefore, the punishment should not be too high if we the want law to be respected. As was already mentioned, the situation is always different: the punishments are severe and no one cares if the legislation is implemented due the fact that the legislator believes that is enough to prescribe severe punishment. These punishments are not necessarily just. We succeeded in showing that they are not only unjust but also difficult to implement.

Laws do not have to reflect the needs and sense of justice of the majority of the population.[102] However, if they only reflect the wishes of legislators there is a probability that the law will never be applied in a proper manner, without any decrease of corruption in the society. This was the case with the foreign currency dealers working on the streets[103] in the 1990s. Exceptionally severe punishments were prescribed in a situation of hyper-inflation[104], which were not implemented since the majority of the citizens were living off this dealing. The legislator should not neglect the social context and by prescribing sentences which will not be implemented or which will encourage people to bribe the responsible authorities. It may be said that bribing a traffic policeman is not so important, but when one policeman accepts a bribe it opens a Pandora's Box.

Everything that was said regarding traffic police and traffic legislation may not be the most important issue but it shows that when a legislator neglects the state of affairs it risks a situation of having dysfunctional law; namely to punish those who do not deserve to be punished by such severe sentences.[105] This

100 It is interesting that the legislator does not use the term "unnecessary", although it is clear that this is the essence, because only unnecessary braking may be relevant in the light of these provisions.

101 Many are successful.

102 Mikloš BIRO, *Stavovi prema zakonitosti u tranzicionoj Srbiji,* u zborniku radova "Pet godina tranzicije u Srbiji II", Beograd 2006. str. 236.

103 M.BIRO, op.cit.

104 Onlyto mention that the daily inflation rate was 100 percent, which beats all records.

105 If someone is charged with 50 per cent of his or her salary the survival of his or her family is put at risk. What is achieved by this? The offender will be more careful next time but also he/she has a way out which entails bribing.

problem is also present in the legislation which contains penal provisions but it is most evident in traffic legislation.[106] We believe that it will be necessary to pass a general rule within the Criminal Code which would set a limit on the prescription of punishment by preventing too severe and inapplicable sentences.

In this way one of the sources of corruption would be stopped.[107]

4. GRECO Report on Corruption in Serbia

(J. Ćirić)

It is generally known and accepted that the corruption phenomenon is closely linked with the phenomenon of organised crime, even sometimes that corruption derives from organised crime and vice versa. Thus, the two phenomena are not very different and they are jointly analysed. Consequently, it is important to analyse and take into account the report of the international organisation *(Group of States against Corruption)* on the state of affairs in Serbia regarding corruption.[108] This is not done only to accept certain international standards but also to point at experiences of other countries which had or still have similar problem.[109] This report refers to a whole set of anti-corruption legislation, namely to measures and actions and modifications that need to be done within the Serbian legal system in order to make it sufficiently good to adequately respond to the challenges of corruption and organised crime.

The Legislation and Corruption Evaluation Report for the Republic of Serbia was adopted on 29th plenary session of GRECO in Strasbourg from 19–23 June 2006. This was the first and second evaluation round where the report was prepared by the following members: *Kazimir Eberg*, Director of International Affairs of Swedish Economic Crime Bureau; *Jorn Gravesen*, public prosecutor for serious economic crime in Denmark; *Anca Jurma*, Head Prosecutor, responsible

106 There was a case in which an entrepreneur of small size companies who committed a petty offence by recording a smaller profit or by making mistakes in calculations were punished by draconian sentences and had to close the shops. One of those persons in 2005 in state of rage took a bucket of petrol, spilled on the municipal taxation offices and set the office on fire.

107 Lawyers who are not experts in criminal law often draft laws and by-laws concerning non-criminal issues and they tend to prescribe stricter sentences from those prescribed in the main Criminal Code. Therefore, it would be advisable to have the following provision in the Criminal Code: "Minimum sentence for offence may not be lower than ..., that is maximum sentence for offence may not be higher...". It is an absurd situation that legislator of the draft Criminal Code prescribes the possibility of pecuniary sentence "days-pecuniary sentence for very serious criminal offences in which it adjust the punishment to the economic situation of the perpetrator. However, for less serious offence prescribed in other statutes within the criminal law this possibility does not exist.

108 The report may be found at the web site: www.coe.int/dg1/greco/evaluations/round2/GrecoEval1–1(2005)1rev_Serbia_en.pdf

109 See more about international standards in Dragana KOLARIĆ; – Međunarodni standardi u oblasti borbe protiv korupcije i nacionalno krivično zakonodavstvo; – in the edition "Organizovani kriminalitet – stanje i mere zaštite" – izdanje Ministarstva za nauku i zaštitu životne sredine, Ministarstva unutrašnjih poslova Republike Srbije i Više škole za unutrašnje poslove; Beograd, 27 – 28. oktobar 2005. str. 549–568.

for international cooperation in the Romanian Public Prosecutor's Office; *Kestutis Zaborskas*, Head of Analytical Organisational Division, Special Investigation Services in Lithuania. Their report can be accessed on the web site of the Group of States against Corruption and it has 36 pages. Experts, delegated by the Group of States against Corruption during their stay had meetings with Serbian officials and also with the independent experts in the field of corruption. They became acquainted with Serbian legal system as well as provisions of substantial and procedural criminal law.

At the end, the Group of States against Corruption gave in total 25 suggestions and proposals for the improvement of the fight against corruption that do not concern only revision of legislation. It seems necessary for readers to familiarise with recommendations and critical objections made by experts from this Group.

1. That the implementation of the Public Procurement Unit be enhanced, notably by providing training to civil servants involved in the procurement process;
2. that ways should be found to render the procedure for appointing and promoting judges and prosecutors more transparent;
3. to improve the conditions of tenure of deputy public prosecutors in order to give them a reasonable degree of stability;
4. that the term of office of Special Prosecutor for Organised Crime to be extended;
5. to create a special unit within the Public Prosecutor's Office to deal with corruption and corruption related economic crime offence;
6. to put in place a clear mechanism for cooperation between the police and prosecutors that would consolidate the leading role of the prosecutor in the preliminary investigations;
7. establishing continuous in-service training for police officers and prosecutors in order to promote their knowledge and experiences;
8. to adopt legislative and other measures to establish an efficient system of investigative techniques and to provide the competent agencies with appropriate means and training in order to make the system of special investigative techniques work efficiently in practice;
9. to introduce the necessary measures to ensure that a witness protection programme is fully operational in practice;
10. that the legal provisions regarding temporary freezing of suspicious transactions be extended in order to cover all corruption offences;
11. that the seizure and confiscation measures in corruption cases is encouraged also with regard to illicit property transferred to third parties;
12. to keep under careful review the range of reporting institutions and organisations responsible for fight against corruption;
13. that the Action Plan for the implementation of the National Anti-corruption Strategy be adopted and that an efficient monitoring of its implementation is ensured;

14. to provide training to civil servants on the public's rights under the Act on Free Access to Information of Public Importance to the public at large;
15. to speed up the setting of the ombudsperson;
16. to prepare and adopt special anti-corruption training programmes;
17. to expand the application of Prevention of Conflict Act in Discharge of Public Office so that it would include all public officials, above all judges and public prosecutors;
18. to introduce clear rules/guidelines for situations where public officials move to the private sector in order to avoid situations of conflict of interest;
19. to specify the value of any gift that may be accepted by public officials in order not to be understood as bribe;
20. to adopt codes of conduct for civil servants at national level and to organise a wide-scope campaign for their implementation in public institutions;
21. to ensure that civil servants who report suspicions of corruption in public administration in good faith are adequately protected from retaliation when they report their suspicions;
22. to limit licenses and permits issues for performance of certain tasks, especially those related with possible corruption;
23. adopting the necessary legislation to speedily implement the liability of legal persons;
24. encouraging private auditors, accountants and other professionals to report suspicions of corruption to the public prosecutor;
25. to speed up the introduction of a national auditing authority.

At the end, the Group of States against Corruption send a request to Serbian authorities to present a report on changes, namely on the implementation progress, by 31 December 2007.

5. Privatisation, Bankruptcy and Money Laundering in Serbia

(J. Ćirić)

In order to properly understand the current situation in Serbia it is necessary to briefly point out certain key problems – the forms of certain privatisations and some fraudulent behaviour which were widespread in Serbia. At the end of 1980s privatisation was understood as a magical wand to solve all problems, especially economic ones and corruption. It started with the transformation of property and privatisation. At that stage a legal framework was not established. The Restitution Act is still not adopted, nor the Investment Funds Act, while Company Act was passed in 2004 and the Bankruptcy Act in 2005.[110]

Here it is necessary to underline that in Serbia there is no corresponding act for the establishment of an auditing agency, with the task to supervise the

110 See Danilo ŠUKOVIĆ, *Korupcija u privatizaciji privrede Srbije,* in the book "Borba protiv korupcije u Srbiji", Beograd 2006, pp. 117–128.

financial work of the government and the expenditures done by the state budget. Both the experts and general public agree to pass this act, recognising the need to establish "a state auditor" (testified by the headlines in Politika "*Who is afraid of the auditor*"?[111]) The passing of this act is not planned and consequently this important instrument to fight against corruption does not exist.

In other words, the privatisation was partially carried out for some time without a legislative framework. In practice, it happened that the directors of the socially or stated owned company operated in a way that led the companies to bankruptcy. As a consequence, the price of the companies fell and in the process of property transformation or privatisation, the companies were sold for nothing, despite their high value.

The Criminal Code always prescribed the offence of "causing bankruptcy". The sentences are rather strict. Imprisonment of six months to five years is prescribed by Article 235, paragraph 1, while imprisonment of three months to three years for an offence committed with negligence (although it is debatable if bankruptcy may be committed with negligence). However, these provisions of the Criminal Code were rarely applied in practice. Application is so rare that there are no separate statistical data for this offence. This is not all. If we observe the statistical data on crime at the annual level, we may notice that the number of persons charged and convicted for other criminal offences against economic interests, which are closely related to this criminal offence such as misfeasance in business (Article 234) which is often the first phase of damaging one's own company (by lowering the price of the company in order to be cheaply bought by a director or some person close to him/her). Many authors and analysts agree with this evaluation of the situation. Presently, many (socially and state-owned) companies are in the process of privatisation for two, three and four years. Everyone knows that these companies at the end will be privatised, although they could not find a "strategic partner" for all those years. In that period, the state and its bodies did not show any interest in protecting the property of the company since it was known that the company would have been privatised. This was an ideal environment for intentional damaging contracts in order to sell the company to a "strategic partner" for a lower price.[112]

The protection of state and socially owned property from theft was not successful in the time of radical socialism, but with the privatisation the interest in it definitively ended.[113] Prosecutors did not bring charges, courts did not pass decisions especially to those who were in high political, social and economic positions, while the impoverished population was under attack.[114]

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111 Text under this title was published in "Politika" April 7, 2007, p. 13.

112 More about these issues in quoted book D. ŠUKOVIĆ, p. 121.

113 As an illustration let us mention that the criminal offence "unconscientiously protection of socially owned property" was deleted from the Serbian Criminal code in 1994 by passing the Amending Act in the Official journal no. 47/94.

114 We shall quote one more data from the empirical research done by the Institute for criminological and sociological research in Belgrade in 1980s' dealing with the judgements of the offences against economic interest. The research was done in Serbia and 15 persons

It would be very important to preserve the real value of the state and socially owned property in order to undertake privatisation in a right, just and legal manner. The parallel existence of socially and stated owned property and private property, especially in 1990 led to a systematic lowering of value of the aforementioned properties by fictitious accountancy operations.

The evaluation of the capital and the modality of evaluation are very important. These issues were regulated by the Property Transformation Act of the end of 1990s. It is not necessary to emphasise the importance of these issues but the Article 4, paragraph 4 of this Act is very concise and vested great powers to political actors, namely: "the Government of the Republic of Serbia shall closely prescribe conditions to be fulfilled by the licensed evaluator and conditions for taking away these powers". Thus, this is not an independent body which would ensure the complete transparency.

Here we should mention the penal provision of the Privatisation Act, Article 63a (Official Journal of RS, No. 38/2001, 18/2003. and 45/2005), stipulating: *The responsible person in an enterprise undergoing privatisation for presentation of the untrue or incomplete data included in the privatisation programme shall be punished by three months to five years in prison and a fine up to 800,000 dinars (around €10, 000).*

The question remains why this provision was not prescribed by the Criminal Code, but by this act. It seems that this provision should have been prescribed by the Criminal Code since it entered into force in 2006. The reason for this is probably the fact that the privatisation is a short-term process. Thus, with the termination of the privatisation there is no need to prescribe this provision. However, this is not a very good explanation since the privatisation process does not have to be limited to a certain time period since we do not know when, for example, Elektroprivreda or any other state company shall be privatised. It is not certain if the state will undertake some new forms of property transformation such as restitution of property etc. In any case, except for some general provisions of the Civil Code, there is no concrete provision such as the one prescribed by Article 63a of the Privatisation Act which would cover what happened in practice – namely that the director conscientiously, in bad faith and negligently bankrupted the company in order to lower the price of the company to subsequently buy the company for a very low price or enable an associate to do so.

The provision of Article 24 of the Privatisation Act should also be mentioned, which stipulates:

"The entity undergoing privatisation by the public auction method shall assess the range of the value of its capital or assets.

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convicted for "unconscientious work in commerce" were included in the research sample. 5 persons out of 15 were ice cream sellers which turned off the refrigerators and in that manner caused material damage. Directors or other officials were not included in the research sample neither for this nor for any other crime. Simply, there was someone who protected them (More about this in ĆIRIĆ, *Učinioci krivičnih dela protiv društvene svojine,* "Jugoslovenska revija za kriminologiju i krivično pravo", 2/1990). There is no reason to believe that this has changed.

The Privatisation Agency shall check the assessment referred to in paragraph 1 of this Article.

The price at which the capital or assets are to be sold by the methods referred to in Article 10 of this Law shall be set in accordance with market conditions.

The Government of the Republic of Serbia shall set the methods of assessing the capital or assets of the entity undergoing privatisation."

Despite this provision there is no guarantee that the evaluation of capital will not be done arbitrarily, partially, not transparently, and with many abuses.

There is one more problem that needs to be underlined: the lack of political commitment and readiness to disclose corruption cases in privatisation, bankruptcy and reducing the real price of the company. The lack of adequate training of police and prosecutors in respect to accountancy is also a serious problem which prevents them from discovering cases of fraud in the process of privatization. At first glance, it looks that everything is done according to law. However, only an expert analyst may discover problems. Therefore, it is necessary to undertake two measures: to organize specialised training in police and prosecutors' offices (even to establish an agency for fighting these forms of crime)[115] and also to organise permanent courses and seminars for members of these authorities. It seems that judges are more trained whereas there is a need to train law enforcers (police and prosecutors).[116]

Domestic experts who know what happens in practice, especially in commercial courts, emphasise that the courts allow the sale of the debtors' property (property of a legal person) without previously undertaking mandatory measures such as advertising bankruptcy procedure, making an inventory of the property, companies' accounts, examination of creditors' claims and the evaluation of the overall property and company. The National Board against Corruption emphasised that this is a violation of the procedure which indicates the existence of corruption in the commercial courts. The board submitted its report to courts and prosecutor's office expecting an investigation.[117]

To illustrate the situation, we should mention the sugar affair which was in the news and in the reports of the Board against Corruption and governmental boards for these issues. Briefly, a certain businessman Miodrag Kostic bought, for €9, three sugar factories in Serbia although those factories had sugar supplies worth €200,000. Later this scandal involved the re-export of sugar from Serbia. The EU gave concessions to Serbia, which was allowed to export sugar to the EU countries under preferential agreement. It turned out that previously imported sugar from the EU was re-packaged in those factories and exported back to the EU. OLAF asked for explanations to Serbian ministries and requested to

115 There is a Serbian Council against Corruption which is composed of independent experts. This body has a moral and advisory nature. However, there is a need for a more operational body.

116 See J. ĆIRIĆ, A. KNEŽEVIĆ-BOJOVIĆ, R. SEPI and M. RELJANOVIĆA, *Javni tužioci i njihova uloga u uspostavljanju vladavine prava,* Beograd 2006.

117 Jelisaveta VASILIĆ, *Korupcija u pravosuđu, Borba protiv korupcije u Srbiji,* Beograd 2006, str. 82.

take countermeasures. The Serbian police, namely the Agency against Organised Crime, undertook these measures. The afore-mentioned Kostic was at large for several weeks and in the meantime the scandal was forgotten and no investigation and charges were brought against him. Perhaps the reason for this was the fact that he was a close associate of the president of the Vojvodina Assembly and a close friend of the former Serbian prime minister.[118] Kostic claimed that this was a political speculation and an attack his political friends.

One more question may be raised in relation to this scandal. What happens if a company that wins the tender or auction decides not to withdraw the offer? It loses its deposit. How high is the deposit and whether it discourages a company from withdrawing? What is prescribed by Article 30 of the Privatisation Act?

"*The bidders shall pay deposit tender bonds.*

The participant in a tender whose bid was proclaimed the best or the next best bidder, who has failed to conclude the contract or to pay the contracted price within the set term shall lose the right to be paid back the deposit.

The minister dealing with privatisation shall set the value of the tender bond referred to in paragraph 1 of this Article and the method of depositing it."

Or for example Article 39:

"*The public auction participants shall deposit the auction bonds.*

The minister dealing with privatisation determines the value of auction bonds referred to in paragraph 1 of this Article and the mode of depositing them."

Here again the situation is non-transparent. What happens if the time limit for signing a contract or paying the price is six months and the value of the deposit is much smaller than the value of goods in stock? The potential buyer must be ready to sacrifice the deposit and to use the factory and the property for six months. This situation is not prescribed by law and opens the door for abuse.

A second good example of bankruptcy-related shady dealings is the steel factory 'Sartid' near Belgrade. Although it had $1.7 billion debts with an Austro-German banking consortium, the company was sold to US Steel for $21 million dollars[119] without the obligation to repay debts to the aforementioned creditors. This created diplomatic problems between Serbia and Germany and Austria. This question remains unresolved. In the meantime, members of the bankruptcy mafia were arrested, among them the president of the Belgrade Commercial Court, who was involved in the bankruptcy of Sartid.[120]

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118 More about it in the book where one of the signatories was the president of the governmental Board against Corruption, Ms Verica Barać (Verica BARAĆ i Ivan ZLATIĆ, *Korupcija, vlast, država*, Beograd 2005.

119 At the same time a Serbian footballer was sold to a foreign club for the same amount.

120 The interesting thing is that the bankruptcy case of the steel factory was allocated to a Belgrade court without any grounds, although it concerned the *lex fori* jurisdiction, namely a court in a place where the steel factory is located. More details in the book of ANTONIĆA, *Elita, građanstvo, slaba država: Srbija posle 2000,* Beograd 2006.

The procedure involved the intentional reduction of the value of the company by people[121] appointed according to political criteria and not for their expertise. They acted in a way that the company went bankrupted and so cheaply bought by private businessmen. None investigated on the origin of their money. This form of organised crime is a Serbian speciality. According to OSCE and UNICRI, the Privatisation Act and the additional guidelines are unclear as to who may participate in privatisation and how to verify the money laundering within the privatisation processes.[122] The Foreign Investment Act, which was on the agenda of the parliament but was not adopted, prescribes a bizarre rule, namely the examination of the origin of moneys coming from abroad is not allowed, since it violates the rules of business secrets. There are rumours that this may be modified under the influence of public organisations against corruption. However, this may not happen.[123]

Money-laundering is a criminal offence in Serbia but it is still not clear who performs the control of financial assets in practice. In 2001 the Money-laundering Act was passed in Serbia, which prescribes an obligation for banks and exchange offices to obtain information about the person who lodges or exchanges an amount higher than €10,000. Such information has to be sent to the Agency Against Money-laundering. Unfortunately, in 2001 with the introduction of the Euro currency, enormous amounts of money were exchanged into euros. It is estimated that around several billion Deutschmark were changed into euros and no procedure was initiated for checking cases of money-laundering. Therefore, there is concern that the provision from Article 231 prescribing money-laundering as a criminal offence is a dead-letter. Moreover, it seems that the provision is very wide and insufficiently clear. Article 231 stipulates:

"(1) Whoever converts or transfers a property aware that such property originates from a criminal offence, with intent to conceal or misrepresent the unlawful

121 These positions are occupied by politically loyal individuals. Here we have in mind prosecutors and judges, especially in commercial courts. A case was that of the Belgrade Commercial Court where the president was arrested and accused in the "bankruptcy mafia scandal". The aforementioned overtook the power in the capacity of a judge on October 5, 2000. In her memoirs the former president of the court who was removed from the position by the aforementioned judge mentions the presence of one of the main accused in killing of Prime Minister Djindjic in this these October events. It is possible that is discretionary but it reflects the situation in Serbia – books, memoirs, newspapers full of different scandals and over the top information is published; the reaction of the responsible state authorities, police and prosecutors' bodies is always delayed.

122 See in the quoted paper of D. ŠUKOVIĆ.

123 For example, the Republic Commissioner for Information of Public Importance, Rodoljub Sabic, in the interview for the daily newspaper "Kurir" of September 25, 2006 (page 2 in the text under the title "Under the counter", says that draft foreign Investments prescribe that a foreign investor, if he or she wishes, may decide not to disclose information about his or her investments. At the same time, as Sabic point out, the major number of investors are Serbian citizens, either natural or legal persons who come from Cayman and Seychelles Islands which immediately raises suspicion about money laundering and other illegal activities. If this draft law is adopted no-one will be able to raise questions or suspicion about certain individuals.

origin of the property, or conceals and misrepresents facts on the property aware that such property originates from a criminal offence, or obtains, keeps or uses property with foreknowledge, at the moment of receiving, that such property originates from a criminal offence, shall be punished by imprisonment for six months to five years.

(2) If the amount of money or property specified in paragraphs 1 of this Article exceed 1,500,000 dinars, the offender shall be punished by imprisonment for one to ten years.

(3) Whoever commits the offence specified in paragraph 1 and 2 of this Article, and could have been aware or should have been aware that the property represents proceeds acquired by criminal offence, shall be punished by imprisonment up to three years.

(4*) The responsible officer in a legal entity who commits the offence specified in paragraphs 1 through 3 of this Article shall be punished by the penalty stipulated for that offence, if aware or should have been aware that the money or property represents proceeds acquired by criminal offence.*

(5) The money and property specified in paragraphs 1, through 4 of this Article shall be seized."

The Money-laundering Act passed on December 2, 2005 is now in force in Serbia. This Act enumerates the following entities: the party, the obligor and the Administration for the Prevention of Money-laundering. Article 4 prescribes the following obligors: banks, bureau de change, postal and telecommunication enterprises, insurance companies, investment funds, stock exchanges, broker-dealer associations, custody banks, banks authorized to trade in securities and other individuals/entities engaged in transactions involving securities, precious metals and precious stones, organizers of classical and special types of gambling, as well as of other games and pawnshops.

The obligor shall be bound to establish the identity of the customer, collect data about the customer and the transaction as well as other data which is, relevant for the detection and prevention of money laundering in the following cases: when opening an account or establishing other form of business cooperation with the customer; in case of any transaction (cash or non-cash) or several inter-related transactions with the total sum amounting to or exceeding EUR 15,000 in dinars; in case of life insurance business: when the value of a single premium instalment or several premium instalments to be paid in a year amounts to or exceeds EUR 1,000 in dinars counter value; when the payment of a one-off premium exceeds the value of EUR 2,500 in dinars counter value; when a single premium instalment or several premium instalments to be paid in one year increase(s) and exceed(s) the value of EUR 1,000 in dinars counter value; in case of any transaction (cash or non-cash) regardless of the value of transaction if there are reasons to suspect money laundering with regard to a transaction or a customer and every time there are grounds to believe that it included money laundering. The obligor has to analyse the received data, supervise the implementation of this act, receive information from responsible authorities, cooperate with competent authorities, participate in drafting the indicators of suspicious transactions and perform bilateral and multilateral cooperation.

The Administration may issue an order for temporarily suspending the enforcement of transaction (Article 17); it can issue an order to the obligor to monitor all the transactions effected through the accounts encompassed by the order (Article 18).

The Administration has to issue an order to the responsible state authority concerning the undertaking of certain measures by these authorities. The Administration may conduct the examination of all transactions and persons/entities suspected to be involved in money laundering upon the initiative of the court, the public prosecutor, the National Bank of Serbia, the Ministry of Interior, the Ministry of Finance, the Privatization Agency, the Securities Commission, and other competent state bodies (Article 22). Here is the only place where the Privatisation Agency is mentioned, leading to the conclusion that Serbia is not an El Dorado for money laundering. However, it seems that the privatisation process is not clearly and directly mentioned; thus, it would require a special provision in the Privatisation Act. The statute prescribes the obligations and competences of the Administration and other bodies in the process of international cooperation, record keeping and data protection. Although the Money Laundering Act indirectly mentions privatisation by mentioning the Privatisation Agency it is necessary that the Privatisation Act and the Foreign Investment Act are clearer in regard to money laundering. The statute does not have any provision regarding the evidence. Who has the burden of proof? The practice that existed in communism and socialism, whereby each person had to prove his/her innocence, is a good basis and worth bearing in mind. However, with money laundering, the same formula should not apply – rather, the prosecutor should prove someone else's guilt. Is this correct? The issue is not regulated by the Money Laundering Act, neither in the Criminal Code and Criminal Procedure Act. It must be separately regulated in one of these statutes (Criminal Code, Criminal Procedure Act or Money Laundering Act).

The definition of a criminal offence in a Criminal Code is not debatable. However, it is debatable when the question is the origin of money, when it concerns high amounts (privatisation of large companies) is indirectly raised. On the other hand, since the number of bookmakers is growing, especially in Belgrade[124] it shows that the state did not manage to solve the issue of money laundering. What is the issue with bookmakers? When it comes to bookmakers it is easy to show in the books that the profit in the previous months was very high, since it can happen that a gambler (no one knows the name) came and bet large amounts of money. However, this amount is smaller than the amount which prescribes the examination of the origin of money if it is below €1,000 for each bet. With gambling one cannot know the profit and expenditure. It is always easy to 'fiddle the books'. In any case both the expenditure and profit can be shown to be higher than in the reality.[125] An organised crime boss can be happy even if his/her bookmakers are not doing well. For him/her it is important to be able to always justify from where the money comes, namely that it is the profit from the bookmakers.

124 Although the Money Laundering Act does not explicitly mention them, the practice is disputable.

125 The essence is to demonstrate in accountancy books a higher profit.

It happened during the period of communism that people were in some way involved in commercial crime (against socially and state owned properties) were ready to pay a lottery winner 10 or 20 times the higher amount in order to get the ticket necessary to justify the origin of his/her money. Here the reasons for hyper-appearance of bookmakers can be found.

The exchange offices can also be very appropriate for money laundering as the accounts can also be adjusted. The exchange offices operate with the commission.[126] It is easy to show in the books that someone sold a significant amount and someone else bought a significant amount which consequently led to a legal profit from the commission.

When it concerns money laundering in Serbia, it not only involves bookmakers and exchange offices. There are other mechanisms, for example assistance and donations from abroad. A significant part of donations is returned to the country of origin through the high fees of domestic and foreign experts, fees of lecturers, trainers and others. This is used as a mechanism for money laundering at the Serbian and international level. This problem is especially prevalent when it concerns assistance to civil society, namely NGOs (especially those who were significant during the Milosevic regime). They received support from abroad in order to counter balance the Milosevic regime. Therefore it is very difficult to examine their accounts whereby they are presented as victims on one side and Milosevic opponents on the other side.

The examination of the origin of money in these cases can result in inappropriate political implications, especially for whoever performs the examination. The same applies to provisions on financing political parties since it was evident after January 2007 that parties avoid transparency. As we have already seen the sanctions against political parties are not fully efficient.

Here we should mention that the Act on Associations and NGOs is still not passed. This act would enable better control and insight into the finances of NGOs. Moreover, the state auditing agency act is still not passed although it would enable the independent control of the budget.

Thus, the issue of money laundering is closely related to foreign investment and privatisation process. The act regarding foreign investment is still not passed. The Foreign Investment Act of the Federal Republic of Yugoslavia was passed in 2002 (Official Journal of FRY, No. 3/2002 and 5/2003 and Official Journal of the State Union of Serbia and Montenegro 1/2003). However, this Act does not adequately regulate the origin of money. In 25 articles there is no provision regulating the origin of investment, namely there are no guarantees that foreign investment are a veil for money laundering. The same applies to the Privatisation Act (Official Journal of Serbia 38/2001, 18/2003 and 45/2005) which contains more provisions than the previous act. However, it does not have an adequate provision which would prevent money laundering in the process of privatisation. The issue of origin of money is not regulated when it concerns two important issues; foreign investment and privatisation.

126 Maybe this is a reason of a boom of exchange offices in Serbia.

The issue of money laundering is in any case multi-dimensional and interdisciplinary which primarily entails the adequate, timely, independent and *bona fide* supervision of accounts. Moreover, it entails the permanent education and training in this field since the members of organised crime are very skilful in finding new ways of money laundering.

6. Financing of Political Parties and Conflict of Interest
(J. Ćirić)

a) In the middle of the twentieth century many respectable American criminologist claimed that the line between legal and illegal is thin and not transparent; thus, the criminal world buys its social status and the status of an untouchable group by financing political parties.[127] It may sound cynical, but it is true that a person stealing five dollars and consequently getting arrested and convicted is perceived as a thief and criminal, while a person who has a halo of respectable financier and businessman is a true citizen with great political influence.[128] There are several names whose past, in terms of how they became wealthy and influential, is easily forgotten, for example Carnegie, Rockefeller, Stanford etc.[129] In theory, this is known as white collar crime[130]. This is a very simple situation where organised crime becomes involved in political life by supporting certain groups and parties with extensive finance in order to achieve its interest.[131]

The facts are very simple: political life, work and activity of political parties are very expensive and require great financial means which entails that one lives according to one's means. Politicians need money in order to implement their political programmes.

The lack of regulatory framework concerning the financing of political parties or inadequate respect of the existing legal framework opens the door for abuse where each politician, deputy, party as whole are clients of some rich and powerful magnate who finances them. This is the reason why in developed and democratic countries this field is regulated in order to prevent the abuse and disable the connection between the state power and criminals. In the Serbian context this has more profound meaning, which entails ending with the topic that was taboo for years.

The Financing of Political Parties Act was recently passed in Serbia.[132] The total amount of contribution specified in paragraph 2 of this Article, if the con-

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127 Edwin SUTHERLAND, *Principles of Criminology, rewised,* Chicago – New York – Philadelphia, 1963, str. 223.

128 Thomas SZASZ, *The Manufacture of Madness: A Comparative Study of the Inquisition and the Mental Health Movement* (translation from English), Zagreb 1982, p. 171.

129 Sheila BALKAN; Ronald BERGER, Janet SCHMIDT, *Crime and Deviance in America, – A Critical Approach,* Belmon – California 1977, p. 183.

130 See Wright MILLS, *White Collar* (translation from English), Zagreb 1979, p. 90.

131 Vladan VASILIJEVIĆ, *Moguće oznake organizovanog kriminala,* "Pravni život", 3/1985. p. 289.

132 The act was passed in July 2003 and published in the "Official Journal of RS" of July 18, 2003.

tribution is given by a natural person, may not exceed, in one calendar year, ten average monthly salaries (which is around 3,000 euros) in the Republic of Serbia in the year preceding the year when the contribution is given (Article 5, paragraph 4). Paragraph 7 of the same Article stipulates that the amount of funds from private sources, except funds from membership dues, collected by a political party in a single calendar year for its regular work, may not exceed 100% of the funds received by a political party from the Republic of Serbia Budget. In connection with this is the provision prescribed by Article 4, paragraphs 1, 2 and 3, stipulating that public source funds appropriated for regular work of a political party whose candidates have been elected deputies and/or councillors are set at the level of 0.15% of the Republic of Serbian budget (paragraph 1). Paragraph 2 prescribes that funds in the amount of 30% shall be allocated in equal amounts to political parties with deputies or councillors, whilst the remaining funds (70%) shall be allocated in proportion to the number of deputies and/or councillors. It is important to mention the following provisions: It is prohibited to accept material and financial assistance from: foreign states, foreign legal entities and natural persons; anonymous givers; public institutions and public enterprises, institutions and companies with government capital share regardless of size of share; private companies performing public services pursuant to contract with government bodies and public offices, for the duration of such contract; enterprises and other organisations exercising public authority; trade unions; humanitarian organisations; religious communities; organisers of gambling, etc. It is also important to underline the obligation of a legal person, that is, of authorised officer of a political party to issue a receipt for the received contribution. The shareholders' assembly and managing bodies of the legal entity shall be informed of the contribution to a political party. The penal provisions are prescribed by Article 19 whereby the pecuniary sentence is prescribed for a political party which violates certain provision of this statute in the amount from 200,000 to 1,000,000 dinars (around 2,500 to 12,000 euros), while for authorized officer of the political party from 10,000 to 50,000 dinars (around 120 to 600 euros) which may seem insufficient.

The most difficult problem is how to punish a political party if it violates the statutory provisions.[133] Should the party be prohibited? This is debatable especially from the democratic aspect but also the practical one. The possible prohibition of work may lead to the registration of the same party under the new name, which represents a problem if it concerns a large party with great voting support. It seems that prohibition of work may be counter-productive which leads to the conclusion that this measure is not appropriate for Serbia,which recently became a democratic state.

What does a prohibition of a party entail? Does it entail the prohibition to use the name of the party? If this is the case then it is very easy to overcome this problem by registering the new name (for example Conservative party may be called Party of Conservatives). Even in the case of the registering the party under

133 It is very easy to imagine a situation whereby a party constantly violates the statutory provisions on financing by receiving anonymous financial means and regularly pays fines from this illegal and collected means.

a very different name the same leaders with the same political programmes may continue to work.

It is clear that the abolition of political parties that unlawfully gain financial means is not acceptable for many reasons. However, the statute without sanctions for violation of financial discipline and financial abuse is absurd and represents a dead letter. The Financial Board of the National Assembly performs financial control according to this statute.[134] Is this a proper body to perform a financial control? This may be interpreted in the manner that parties control and punish themselves.

An issue closely connected with the previous one is the question who owns the MP mandate. The electoral system in Serbia is proportional, which means that MPs come from political party lists and not as individual, which is the case in the 'first past the post' system. However, several years ago the Constitutional Court of Serbia ruled that parties are not the owners of mandates and that they do not have the right to remove and replace a non-compliant member of parliament. The court found that the MP is the owner of his/her mandate, he/she can dispose of the mandate, which practically means that he/she can change the party from whose list he/she was elected, and join another party in the parliament. This has created practical problems and stimulated the trading of mandates and bribing of deputies. This resulted in immoral behaviour and the destabilisation of the political scene in Serbia, as well as opening the door to corruption and connection with the world of organised crime.

There is yet another debatable issue, which concerns the question of whether the sanctions for the violation of provisions concerning the financing of political parties are efficient enough to guarantee the observance of these provisions by political parties. With due respect to the decision of the Constitutional Court of Serbia concerning the ownership of mandates the other question should have been resolved – to precisely prescribe measures and prevent trading of mandates, bribing of MPs and establishing links between politics and organised crime.

b) The same situation exists in regard to the Act on Prevention of Conflict of Interest in the Discharge of Public Office adopted in 2004 (Official Journal of RS No. 43/2004). It is clear that preventing a conflict of interest is of great importance in combating corruption and organised crime.[135] However, the question of efficient sanctions which should prevent a conflict of interest is raised. This was one of the first laws passed in the parliament during the first government of Vojislav Kostunica which long-expected and was considered to be a 'silver bullet' for corruption in Serbia. However, this statute lacks serious and threatening sanctions, since sanctions such as confidential caution not disclosed to the public or a measure of public announcement of recommendation for dismissal may be pronounced to an official (Articles 25–30) seem to be very mild to prevent the conflict of interest in practice. Therefore, the nature of this act is a political proc-

134 See Verica BARAĆ, *Dominantna i marginalna korupcija,* in the book "Borba protiv korupcije u Srbiji", Beograd 2006, pp. 29.

135 More in the book Nataša MRVIĆ – PETROVIĆ and Jovan ĆIRIĆ, *Sukob javnog i privatnog interesa u trouglu moći, novca i politike*, Beograd 2004.

lamation. It resembles more a code of conduct. According to media, more than 30 per cent of officials in Serbia did not file a report on income and property, although they are obliged by law.

The Republic Board for Prevention of Conflict of Interest has only nine members. Although this board has a secretariat it seems that this is insufficient since the board covers 13,000 officials. In any case without a real threat and measures pronounced by this board, its work seems unpersuasive.

It is very hard to say which sanction would be more appropriate but it is undoubtedly necessary to prescribe a stricter sanction (for example, a mandatory discussion in the parliament upon the request of the board dealing with dismissals from office). Since there is no proper sanction the Board for Prevention of Conflict of Interest does not have an authority, namely its recommendations and opinions are not respected by officials. The aforementioned statute explicitly prescribes that mayors cannot simultaneously be MPs in the National Assembly. Despite this, after the January parliamentary elections in 2007 several elected MPs were mayors. Board for Prevention of Conflict of Interest warned those MPs but not one of them resigned from their functions. One of them was the mayor of Belgrade who refused to leave his mandate until a competent court would have ruled on the matter. This is the jurisdiction of the Constitutional Court which at the moment does not exist due to the fact that half of the judges meet the requirements for retirement and new judges have yet to be elected.[136]

7. Public Procurement

(J. Ćirić)

It is not necessary to emphasise the importance of public procurement in the context of discussions on corruption. Therefore, in July 2002 the Public Procurement Act was adopted (Official Journal, No. 39/2002. 55/2004).

This act also suffers from same problems as other acts. It seems more important to discuss whether the act is applied or whether it is dead letter than to discuss whether statutory provisions are appropriate or not. What is the problem with this act?

The most important problem is that the most important body, namely the Commission for the Protection of the Bidders' Rights, did not complete its job or at least not in a satisfactory way. The first Commission was composed in May 2003[137] and operated until December of 2003. This Commission did not solve any pending case. In that period between 700 to 800 cases were filed. The second commission established in December 2003, did not last for long. *De facto* it stopped working in May 2004 when the president of the Commission due to pressures from one of the ministers of Serbian Government resigned. The second commission dealt with 143 cases. The third commission established in June 2004 is composed of two persons employed in Public Procurement Agency and three persons who were previously employed with contractors (there is a suspicion that

136 There was an article in "Politika" with the title "The court will decide on the conflict of interest" of March 26, 2007.

137 Thus, a year following the entry into force of the act.

after the term of office they will go back to work with the contractor) which puts in question their independence and impartiality. The same problem existed in the first commission which was composed of three ministers presided by Gaso Knezevic, at that time the Minister of Education.[138]

In other words, this act, as many others, is not substantially problematic but its application causes problems. Thus, when we speak about public procurement we cannot give *de lege ferenda* proposals as much as we are able to speak about political pressures on the work of the Commission, namely political pressures on the functioning of the entire legal system.[139] However, here it is necessary to point at certain statutory provisions that should be amended.

For example, Article 76 stipulates that the opening of tenders is public, while paragraph 2 of the same Article stipulates that exceptionally a procuring entity may for the purpose of protecting a trade, official, military or state secret decide not to open the tenders in public. Article 3 stipulates that procuring entity states the decision in publishing the pubic procurement procedure. It seems that these provisions are not very precise and that they do not guarantee the exercise of two main principles of this statute stipulated in Article 7 and 8, namely the principle of transparency in the use of public funds and principle of equality of bidders.

Provisions 79, paragraph 1 of the Act raises doubts: "A procuring entity shall select the best tenderer if it has received at least two independent correct tenders from two different tenderers that are not associated entities, pursuant to the provisions of the law regulating the taxation of company profit, or the law regulating the taxation of citizens' income". Here the Act amending the Public Procurement Act of May 21, 2004 should be mentioned, whereby it is stipulated in Article 2: if the values of goods or services does not exceed 3,000,000 dinars (more than 30,000 euros – underlined by the author) or 15,000,000 dinars for construction work (more than 190,000 euros – underlined by the author) a procuring entity may award a procurement contract only after receiving only one correct and independent offer. It seems that the aforementioned amounts are very high and that several consecutive procurement contracts in the short period of time may result in an unlawful material gain and cause damages. The provision from paragraph 1 of this Article also raises doubts since when it concerns only two correct tenders, the unlawful agreement between the procuring entity and bidder may be reached. This puts in question the entire concept and intention of this Act. It seems that three tenders should be more appropriate since in case of two tenders one of them may only be fictitious.

Article 55 should be mentioned. ("Types of criteria"):

The criteria for evaluating the tenders shall be:

1) the economically most advantageous tender and

2) the lowest price offered.

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138 More in the book of Stevan LILIĆ, Dragan PRLJA and Aleksandar LUKIĆ, *Zaštita prava ponuđača u postupku javnih nabavki*, Beograd 2004, pp. 34–35

139 More in the book of Ljubiša DABIĆ, Bosa NENADIĆ and Vladimir ĐURIĆ, *Javne nabavke u uporednom zakonodavstvu,* Beograd 2003, pp. 263–297.

The economically most advantageous tender shall be the tender based on different criteria, depending on the subject of public procurement, especially including:

1) delivery period or period of completion of services or works;

2) running costs;

3) cost effectiveness;

4) quality and the application of adequate systems of quality analysis/control;

5) aesthetic and functional characteristics;

6) technical and technological advantages;

7) after-sale service and technical assistance;

8) guarantee period, the type and quality of guarantees and the guaranteed values;

9) liabilities concerning spare parts;

10) post-guarantee maintenance;

11) price offered;

12) the possibility of characterization and unification;

13) the extent to which the subcontractors are engaged, etc.

To each of the elements referred to in paragraph 2 of this Article a procuring entity shall assign relative (weighted) significance in such a way that the sum total of weighted points amounts to 100.

Bearing all this in mind, one may ask a question: is it possible that a procuring entity adjusts the aforementioned criteria in order to give advantage to certain bidders. The answer is yes and those criteria should be precisely defined to be more transparent (maybe even in the statute) in order to prevent any types of criteria adjustment to the future bidders.

The most disputable provisions in legal terms are those dealing with the protection of bidders rights. Previous experience demonstrates that in more than 90 per cent of cases the procuring entities rejected the request for protection of bidders' rights and consequently a great number of cases were sent to the second instance body. The Commission for the Protection of Bidders' Rights is a part of the Public Procurement Agency and this raises the question of whether this body can pass final decisions. The next question concerns the president of the commission. Is he/she a deputy director of the Public Procurement Agency? Moreover, the commission is appointed by the Government and it is acceptable to the Government and to the Assembly, which does not seem to be the best solution. The term of office of members of the Commission is four years, which is not the best solution since the term of office of Commission members is not concurrent with the members of the government and parliament. In this way, a greater degree of independence and authority will be ensured. The Slovenian legislature prescribed that the commission is a parliamentary body, which seems to be a more appropriate solution, due to the fact that commission is guaranteed with greater independence in decision-making. However, the most disputable questions are the following: why there are only five members of the Commission, why

is the appeal time limit 15 days, why the annual number of filed cases amount to 700–800? Bearing in mind this number, is it a good solution to have only five members and such a short appeal time limit. In this situation, can the Commission act *bona fide* and *lege artis* or does it all becomes a farce which supposedly guarantees transparency and prevents corruption?

Finally, it may be underlined that statutory provisions do not create as many problems as the implementation of this statute. This does not mean that passing of the amendment would be superfluous. Above all those amendments should deal with the status and composition of the Commission, its term of office and appointment of its members. The number of five members is particularly disputable.

Section Three

PROCEDURE FOR ORGANISED CRIME OFFENCES

I. ANALYSIS OF PROVISIONS ON CRIMINAL PROCEEDINGS FOR ORGANISED CRIME OFFENCES IN SERBIAN LEGISLATION AND PROBLEMS WITH THEIR APPLICATION

(M. Grubač)

1. "Procedural" Notion of Organised Crime

Faced with the challenges of organised crime, its enormous social danger and specificities in relation to "ordinary" crime, modern countries and the international community have lately adopted special substantive, organisational and procedural regulations for their prevention, discovery and suppression. These regulations establish special organs for fighting this most dangerous type of crime, whose power in pre-trial and criminal proceedings are considerably wider than those usually vested in traditional criminal prosecution authorities. This has resulted in considerable departures from some traditional principles of criminal substantive and procedural law, changes in attitudes on criminal liability and punishability of perpetrators of criminal offences and generally accepted positions on the relations between the state and individuals and their human rights.

Heading XXIXa of the present Criminal Procedure Code of the Republic of Serbia of 2001 includes special provisions on the procedure for organised crime offences. Substantive law provisions on these criminal offences are included in criminal statutes, and there is also a special Act on Organisation and Competences of State Authorities in Combating Organised Crime ("RS Official Herald", 42/2002 with subsequent amendments[140]). There are also numerous international regulations on preventing and prosecuting organised crime: UN Convention Against Transnational Organised Crime, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and others, CoE Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime, individual provisions of which are applied directly in procedures before domestic courts (Article 504k paragraph 1 and Article 504o paragraph 2).

Article 504a paragraphs 2 and 3 are about cases of criminal offences for which special provisions of the Code on organised crime offences apply. These provisions actually determine the "procedural" notion of organised crime; in ad-

140 " RS Official Herald", 27/2003, 39/2003, 67/2003, 29/2004, 58/2004, 61/2005.

dition to the notion of the same phenomenon given in other regulations (see Article 2 of the Act on Organisation and Competences of State Authorities in Combating Organised Crime[141]). Since there is no generally adopted legal definition of organised crime, it is no wonder that such definition is not provided in Serbian legislation. Even though the phenomenon itself and its grave consequences are completely clear and easily discernible, the notion of organised crime is very difficult to define. This general difficulty is, in Serbian legislation, joined by another one: the notion of organised crime is determined in several different regulations in several different manners, and hence there are a number of various statutory definitions of the same phenomenon. This enables arbitrariness, which is a considerable danger, particularly in a country where the fight against organised crime can easily turn into a means of political repression and negation of human rights and freedoms, as has been done before, during the totalitarian regime.

In the 2001 CPC, the legislator followed the definition of organised crime given by the EU (*European Unions Working Group on Narcotics and Organized Crime – 1994)* which is also accepted by the European Court of Human Rights. This definition includes eleven requirements, at least six of which need to be met, in order for a criminal case to be called and legally treated as an organised crime case. Moreover, three of these eleven requirements 1) *that the offence is a result of organised activity of more than two persons,* 2) *that the criminal offence in question is serious* and 3) *that the objective of its commission is to gain profit or power,* – are *constant*, that is, they *have* to exist in all cases, and the remaining eight out of eleven are *variable* that is, their presence depends on the circumstances of the case, but they are also mandatory in that number. Variable requirements are the following: 1) that each member of the criminal organisation had a predetermined role or task, 2) that the activity of criminal organisation is planned for a longer or unlimited period, 3) that the activity of the organisation is based on application of certain rules of internal control and member discipline, 4) that the organisation activity is planned and executed on international scale, 5) that violence or intimidation are used in the performance of activity or that there is readiness to apply them, 6) that economic or business structures are used in performance of activity, 7) that money or illegal proceeds are being laundered, 8) that the organisation or its part have an influence on political power, the media, executive or judicial power or other social or economic factors.

New Serbian CPC of May 2006 no longer includes a separate chapter on procedure for organised crime offences. The most essential differential procedural provisions on this issue are placed elsewhere in the general part of the Code. Hence, provisions on special procedural powers of prosecution authorities, entitled "Special Evidentiary Actions" are placed in the Code Section (Heading VII) that comes after the section on general evidentiary actions, and the "procedural" notion of organised crime is given in a separate Article 21 (which precedes an

141 Organised crime in terms of this law is "commission of criminal offences by an organised criminal group or other group or its members for which four years in prison or a stricter sentence is prescribed".

article including the "interpretation of other terms in the Code"). The provisions of this Article read:

"The term "organized crime" in the present Code pertains to cases where reasonable suspicion exists that a criminal offence for which four years of imprisonment or a more severe sentence is envisaged, is a result of actions performed by three or more persons associated in a criminal organization, i.e. criminal group, with the aim of committing grave criminal offences in order to gain proceeds or power and when, in addition, at least three of the following conditions have been met: 1) that each member of the criminal organization, i.e. criminal group, had previously determined, i.e., obviously determinable task or role; 2) that the activity of the criminal organization was planned for an extensive or indefinite period of time; 3) that the activities of the organization are based on implementing certain rules of inner control and discipline of members; 4) that the activities of the organization are planned and implemented internationally; 5) that the activities include applying violence or intimidation or that there is readiness to apply them; 6) that economic or business structures are used in the activities; 7) that money laundering or illicit proceeds are used; 8) that there is influence of the organization, or part of the organization, on political structures, the media, legislative, executive or judicial authorities or other important social or economic factors.

Definition of organised crime in the new CPC has resolved the problem of the notion of organised crime by merging all definitions that existed so far into a single one, where the "organised criminal organisation or group" is conditioned by activity of at least three persons. This definition is still contradicted by a definition given in the Act on Organisation and Competences of State Authorities in Combating Organised Crime, and therefore the problem of arbitrary determination of the notion of organised crime is still present.

2. The need for and Justification of Special Provisions for Procedures for Organised Crime Offences

Organised crime is of immense danger to society. It dissolves economic, moral and political power of the state and society. It's dangerous, incomparably greater than the danger from even the most serious classical criminal offences, primarily originates from the fact that this type of crime is difficult to discover and prove, since, as a rule, it is covered by the form of regular activity, usually commercial in nature, which is, in addition, well organised and connected with important factors (individual and group) of political, state, economic and social power. Unlike classical crime, which is, as a rule, an individual phenomenon, that is an act of an individual with which the state and its criminal prosecution authorities deal with easily, in the case of organised crime there are two organisations – the state and the criminal organisation – that are in conflict, and their forces are sometimes even equal in strength. In this conflict, the criminal organisation is not unlikely to succeed and survive, particularly in times when the state is weak due to crisis caused by other reasons.

It has been shown that, due to these specificities of organised crime, classical methods in combat against it are insufficient and almost completely inefficient.

This is why all modern states today attempt to achieve greater efficiency in preventing, discovering and suppressing organised crime by changes in the organisation of criminal prosecution authorities and their substantive and procedural criminal legislation. Classical methods of prevention and criminal law repression are replaced and amended by new ones, that have to be accepted in need, although they are accompanied by argued criticism and scepticism. New solutions increase the efficiency of criminal prosecution authorities, but can easily harm other interests, in particular the protection of human rights, and even turn into an instrument of illegitimate repression in the society.

It should not be forgotten that, in addition to criminal law repression, preventive activity against organised crime must also exist in society. Social community must try to eliminate the causes leading to the emergence of such crime, or to at least limit the conditions for its commission, among other things, by taking measures that would reduce the demand for products that are today offered by criminal associations of organised crime. Such measures include those by which the state would strictly regulate, by law, the conditions for so-called lobbying, introduce efficient supervision over the financing of political parties, control of its civil servants and their activities, supervision over the money flows, business transactions and control of access to public works and investments.

3. Special Provisions for the Organisation of Courts, Public Prosecutors' Offices and Other Authorities for Prosecuting Organised Crime Offences

The mentioned Act on Organisation and Competences of State Authorities for Combating Organised Crime envisages special prosecution authorities (public prosecutor's office, police and courts) for this type of criminal offences, their special organisation and special competences.

This Act envisages the forming of a special public prosecutor's department for combating organised crime with a special public prosecutor, within the Belgrade District Public Prosecutor's Office, competent for the territory of the entire Republic (Articles 4–9). It also envisages the establishment of a special police department for combating organised crime within the Ministry of Interior (Articles 10 and 11) and of a special detention unit within the prison District in Belgrade (Article 15). Concentration of subject matter and territorial competence of these authorities aims at enabling a greater degree of specialisation and coordination and thus increasing their efficiency. Such concentration of competences is not foreign to Serbian criminal procedure law for certain phases of criminal proceedings (so-called investigation centres – Articles 245 paragraph 2 of the CPC), or for entire criminal proceedings (for juvenile offenders – Article 42 of the Act on Juvenile Offenders and Criminal-law Protection of Minors).

Provisions of Articles 12–14 of the Act also envisage the establishment of special departments within the Belgrade District and Belgrade Appellate court, for conducting first-instance and appellate criminal proceedings on organised crime cases. In comparative law, special authorities are usually established only for discovering, investigating and indicting organised crime offences (police, in-

vestigation authorities and public prosecutor's office), but not for trying in such cases, since this could be interpreted as introduction of some form of extraordinary courts. In addition, in such special court departments it is more difficult to provide necessary conditions for a fair trial: independent and unbiased judges, right of the accused to so-called natural judge, etc.

The number of judges in proceedings for organised crime cases differs from those in general criminal proceedings (see Article 24 paragraph 1). In first instance proceedings, these offences are heard by a panel of three judges, and in second instance, by a panel of five judges. There is no individual judge in these proceedings, and lay judges do not try in either first-instance or second-instance proceedings.

4. Special Procedural Powers of Prosecution Authorities in Proceedings for Organised Crime Cases

In addition to substantive and organisational criminal legislation, the fight against organised crime also requires special criminal procedure law. Experience shows that classical procedural instruments and methods are almost completely inefficient in achieving that purpose. This is why those instruments and methods, particularly in the collection of evidence, are replaced by new, more efficient solutions that either relate to use of modern technology or to the very criminal prosecution authorities and their collaborators. The first group includes: phone tapping, control of other types of communications, optical recording (even in apartments), surveillance, particularly electronic surveillance, set-up purchase or sale of objects and the like. The second group includes: special organisation of investigation, public prosecutors and police departments, undercover agents, recruitment of so-called cooperating witnesses among suspects or accused, etc. The objective is clear – to obtain evidence necessary for conviction in a "flexible manner". Delicacy and danger of these methods, as well as of other special means in combating against organised crime, consist of their susceptibility to being abused and conflicting with human rights and citizens' fundamental freedoms embedded in the constitutions by states and into regulations binding on all by the international community. Special operative criminal (police) measures for revealing, proving and preventing organised crime are the following:

a) Secret surveillance and recording of phone and other conversations or communications by other technical means and secret optical recording (Articles 232 and 233 of the CPC/2001 and Articles 146 and 147 of the CPC/2006)

This is the first secret surveillance measure in criminal law of the Republic of Serbia, introduced by the CPC of 2001. At the same time, it was then the only measure of that kind, since the others were introduced by the Act on Amendments to the CPC of 2002. One of the main citizens' political rights is the right to confidentiality of letters and other forms of communication – therefore, to communicate freely orally and in writing. Article 19 of the Serbian Constitutions states that this right is inviolable, but the Constitution, in paragraph 2 of this

Article, envisages that a *statute* can prescribe departures from the principle of inviolability of confidentiality of letter and other forms of communication among citizens, if this is necessary for conducting criminal proceedings or for country's defence, under a further condition, that it is so decided by the court. According to these constitutional provisions, the possibility of tapping phone and other conversations (control of letter will be elaborated elsewhere) and their registration via special technical devices without the knowledge of persons engaging in those conversations, could be envisaged in the CPC as a legitimate way of obtaining evidence in criminal proceedings. This possibility, according to the Constitution, could exist only if it is *necessary* for conducting criminal proceedings (or for country's defence), therefore, provided that other evidence is insufficient, but implying that other evidence exist. Therefore, such measures could not be used to obtain material in order to initiate proceedings. However, a provision prescribing that, which would, according to the Constitution, be necessary in order for the evidence so collected to be considered legitimate, was absent from Serbian criminal legislation until the adoption of the 2001 Code. The provision of Article 214 of the former Act (now Article 85), which relates to seizure of phone, telegraph and other devices, does not cover this subject.

The Constitution allows the collecting of evidence in this manner for several reasons. Primarily, because the use of technical devices in combating against some forms of crime today has become necessary. Modern crime, particularly organised crime, puts complex tasks before criminal prosecution authorities, and they cannot be successfully completed without using modern technical devices. If deprived from the use of those devices, these authorities would be in an inequitable position when compared to perpetrators of criminal offences who use them widely, particularly in cases of grave organised crime offences.

Provisions of the Code on the possibility to use these devices must be formulated so as to strike a balance between the efficiency of criminal proceedings and requirement of the protection of citizens' rights and freedoms. Used under conditions strictly prescribed by law, in justified and necessary cases, only according to court's decision and with well-organised control, these methods for collecting evidence for criminal proceedings as such neither challenge citizens' rights and freedoms (including the constitutional right to inviolability of domicile), nor the accused person's right to defence, since evidence collected in that way is not extorted or gained on false pretences. Moreover, the very similar measure of seizure of letters has been present in Serbian criminal legislation for a long time (Article 85). Many modern criminal procedure laws have adopted this manner of collecting evidence (e.g. German CPC). If strictly regulated by law and controlled by the court, it guarantees human rights more than if conducted by the police without any conditions being met.

Criminal procedure code of 2001 includes provisions on "surveillance and recording of phone and other conversations or communications by other technical means and secret optical recording of persons for whom grounds of suspicion exist that they have committed certain criminal offences, alone or with others" (Article 232 and 233). These provisions prescribe the condition for "surveillance and recording", object, time, place and implementation of the measure, and the

procedure with the material so obtained. The following can be concluded from these provisions: "surveillance" is not only a euphemism for tapping, but also a wider notion, since surveillance can also cover communications that cannot be tapped (communications through other technical means). In addition to phone conversations, other conversations can also be subject to this measure – not only conversations through other technical devices, but also live conversations (on the street, public gatherings, meetings, etc.) through tape recording. "Communications by other technical means" (e-mail and the like) do not cover the exchange of letters and telegrams, since the seizure of such correspondence is regulated by Article 85 of the Code, but it can cover such correspondence, since the provisions of Article 85 relate to the procedure and the accused, whereas these measures relate to pre-trial proceedings and the suspect. – b) Surveillance and recording are ordered by the investigative judge at public prosecutor's proposal, by a reasoned order. In the order, the investigating judge must indicate data on the person or persons whose communications are put under surveillance and recorded, the grounds of suspicion against these persons, as well as he/she has to determine the manner of implementation, scope and duration of the measure. Public prosecutor's proposal must include data necessary for the investigative judge to reach a decision. Should the investigative judge disagree with the public prosecutor's proposal, he/she will not seek a decision from the panel (as in the case of disagreement regarding the motion to open the investigation) but shall deny the proposal. – c) For the investigating judge to issue the order, it is necessary that there are grounds of suspicion (not reasonable suspicion) that the suspect has committed a given criminal offence. Some indications have to exist, but such as to be insufficient to initiate criminal proceedings. These measures have no justification when the public prosecutor has enough other evidence to initiate criminal proceedings, that is, after the passing of ruling on conducting of investigation. – d) Surveillance and recording can be considered only if there is suspicion regarding certain criminal offences. These are: (1) criminal offences against constitutional order or security, (2) criminal offences against humanity and international law, (3) criminal offences with elements of organised crime[142] (counterfeiting and money laundering,[143] unauthorised production and trafficking of narcotic drugs, illegal trade of firearms, ammunition or explosives and human trafficking, and (4) criminal offences of giving and taking bribe, extortion and abduction. The catalogue of criminal offences for which surveillance and recording are possible cannot be expanded. – e) Measures of surveillance and recording can last for three months and can be extended, for important reasons, for additional three months. Surveillance and recording must stop even before the expiry of the time limit determined in the investigating judges' order if the reasons for their implementation cease to exist. – f) Order of the investigating judge is implemented by the police. The place of surveillance and recording can

142 For the notion of organised crime, see Convention on Transnational Organised Crime, ratified by the Federal Republic of Yugoslavia (FRY) in 2001.

143 See Act on Money Laundering of 2001 and CoE Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime ("FRY Official Gazette – International Agreementsi", 7/2002).

be an apartment or other premises (e.g. hotel room, office) and any other location where there are technical conditions for implementing the measure. The object of surveillance is the phone line (private official, public) or other means of communication, and the object of recording is the conversation and written or electronic correspondence, and in case of optical recording of persons, persons, objects and events. Police authorities are not authorised to enter into the apartment to provide necessary technical conditions for tapping and recording, but perform the surveillance and recording through postal and other companies, by using their technology. – g) The collected material is forwarded to the investigating judge by the police, and the investigating judge orders for the recordings to be fully or partially transcribed and described, and then invites the public prosecutor to familiarize himself/herself with the material. The recordings of those conversations and communications that do not relate to the suspect, or are not connected to the criminal offence, are not transcribed. Such material is destroyed under the surveillance of the investigating judge. In addition, entire material is destroyed if the prosecutor states that he/she will not request initiation of criminal proceedings.

Based on what has been said, it can be concluded that any material obtained by surveillance and recording of communication in contravention of provisions of Article 232 or judge's order issued on the basis of that Article, constitutes inadmissible evidence. A court decision cannot be based on it. This is the procedural sanction for illegal surveillance and recording, whilst criminal sanctions for unauthorised tapping, recording and taking of photographs are envisaged in Articles 143 and 144 of the CC. Any technical recording made contrary to provisions of Article 232 is illegal. This includes the recordings of private citizens, which Serbian courts have been known to use as evidence in criminal proceedings, invoking the misunderstood principle of investigating the material truth.

Recordings of state authorities made in contravention to the Code provisions are also illegal. Article 13 of the Internal Affairs Act of the Republic of Serbia envisaged that the president of the Supreme Court, that is, a judge determined by the president, at the proposal of the public prosecutor, that is, the Minister of Interior, can decide to depart from the principle of inviolability of confidentiality of letters and other forms of communication in respect of individuals or organisations, if that is necessary for conducting criminal proceedings or for country's defence (paragraphs 1 and 2). Based on the decision of the president of the Supreme Court, the Minister of Interior determines measures according to which the inviolability of confidentiality of letters and other forms of communication is departed from in respect of some individuals and organisations (paragraph 3). Federal Constitutional Court declared these provisions unconstitutional, but the legislator, despite that, later transferred them to the Act on newly formed Security-Information Agency, and they are valid today, even though they are contrary to the Constitution and the CPC.

The new CPC of May 2006 has made some significant changes in these provisions, with an apparent aim to improve police efficiency, but bearing the risk of challenging constitutionally guaranteed rights of individuals. The following is envisaged: a) recordings can be made in *apartments* (Article 146 paragraph 6);

b) the number of criminal offences in cases of which this surveillance measure is possible has been expanded (the following were added: murder, aggravated murder, serial rape, banditry, robbery, tax evasion, illegal possession of weapons and explosive substances); c) implementation of measure is possible not only when there are grounds for suspicion that the given criminal offence was *committed*, but also where circumstances indicate such criminal offence is being prepared, and its execution could not be prevented in any or would be followed by irreparable damage to the lives or health of people or valuable assets (Article 146, paragraph 2); d) evidence collected in such a manner can be used even if they do not relate to the criminal offence for which such measures are permitted by law (Article 147, paragraph 5).

The main difference between the CPC/2001 and the new Code lies in the fact that the provisions on special measures and powers of criminal prosecution authorities for discovering and preventing organised crime, which used to be a part of special chapter XXIXa of the Code that governed special procedure for those criminal offences, have now been transferred to that part of the new Code that governs evidence in general. The section of the Code on special procedure for organised crime offences shall be revoked, and special powers of state authorities from that procedure, under the denomination of "special evidentiary actions" shall become a part of general proceedings. This change is not good, since it reduces the emphasis on these being exceptional powers of prosecution authorities that are necessary and justified only in combating against organised crime, not in cases of traditional criminal offences. In time, the entire procedure shall be "infected" by those extraordinary provisions, which are very risky from the standpoint of human rights' protection, which is why the powers envisaged by them have to be strictly controlled and limited, in all possible ways, to organised crime offences alone. The elimination of special procedures for these criminal offences in the CPC is not logical, since the special organisation of state authorities (court, public prosecutor, detention unit, police) and their special competences for the prosecution of this type of offences would still exist. The change is also in the fact that there shall not longer be any joint provisions for these measures, but rather, each shall be regulated separately. The result is the repetition of a number of identical provisions. What it is also striking is the terminology, unusual in a legislative text, e.g. "spatial location" (Article 146 paragraph 1), "engagement of undercover agent" (Article 152 paragraph 3), "provoking to commit a criminal offence" (Article 153 paragraph 1), etc.

Provision of Article 146 paragraph 7 of the new Code on "secret" entry into apartment "in order to install or maintain surveillance devices" could easily be contested from the standpoint of constitutionality, since, according to the Constitution, a statute can envisage the power of an official to enter another persons' apartment against the will of the owner on the basis of a court decision only to search it, with the presence of two witnesses (Article 40 of the RS Constitution). This provision of the new Code reads: "Authorized police officials or the Security-Information Agency, may, in order to carry out a special investigative technique referred to in paragraph 1 of the present Article, secretly enter an apartment or other premises and install in them or in the objects within them technical devices for the implementation of an activity referred to in paragraph 1 of the

present Article, or maintain the already installed technical devices of this kind, as needed." It should be borne in mind that "special evidentiary actions" discussed here are taken when there are grounds of suspicion (not even full suspicion) that a citizen has committed a given criminal offence, and that can be said almost always and almost against anyone, particularly if the prosecution authorities make an effort to do so.

Three months after the adoption of the new Criminal Procedure Code, the Government has prepared a proposal of Act on its Amendments, and on September 15, 2006, forwarded it to the National Assembly. By chance, the proposal was still not on parliamentary schedule and did not become a statute. Instead of abandoning the unconstitutional provision of Article 146 paragraph 7 according to which the police can secretly enter apartments in order to install surveillance and optical recording devices and maintain them, an addition is envisaged by which this secret operation is conditioned by: 1) order of the investigating judge that must be confirmed by the order of the president of the Supreme Court (it should read "Supreme Court of Cassation") and 2) assumption that evidence relating to certain criminal offences (of organised crime, against humanity and international law and against constitutional order and security of the state – which is still called Serbia and Montenegro) cannot be provided in another manner, or if that would be manifestly connected to considerable difficulty, or lead to lives or health of people being endangered or property of considerable value being destroyed. There is no doubt as to this provision being unconstitutional, since the Constitution guarantees the inviolability of domicile (Article 40), and departure that would justify secret entry into apartment is not envisaged. Even though entry into apartment and search are two separate notions, and the constitutional provision protects only the rights of those in possession of the apartment in case of search (to be present at the search alone or through a representative and two witnesses of age), it is beyond doubt that a person whose apartment is being entered has the same rights as the person whose apartment is being searched.[144] If citizens' apartments could be entered into like this, the constitutional right to inviolability of domicile would cease to exist. Dragging the president of the Supreme Court into this suspicious operation is, in the least, distasteful.

Other changes in Article 46 (paragraph 1 subparagraph 4 and paragraph 3) envisaged by the mentioned Proposal bear witness to the aggressiveness of the idea on special powers of prosecution authorities regarding grave criminal offences. Initially envisaged only for organised crime and corruption offences, these powers quickly spread to other criminal offences, and the conditions for their implementation get more liberal. This time, the catalogue of criminal offences for which secret audio and visual surveillance of the suspect are expanded by another criminal offence (illegal intermediation), and the duration of surveillance, which so far amounted to three months, with a possibility of being extended for additional three, can now be extended for additional six months. Therefore, a citizen can be under such surveillance for a year! The danger of uncontrolled spread of these extraordinary powers would be much less had the

144 Same in T. Vasiljević, Sistem krivičnog procesnog prava, Beograd 1981, pp. 400.

Code preserved a special heading on procedure for organised crime offences, as the case was in 2001 CPC. Now, these powers are scattered all over the Code, and we can easily get used to them and accept them even in cases where they should not be accepted.

b) Control of Business and Personal Accounts (Article 504k of the CPC/2001 and Article 86 of the CPC/2006)

The public prosecutor can request that the competent state authority, bank or other financial organisation perform control of the operations of certain persons and to forward to him/her documentation and data that may be used as evidence on criminal offence or proceeds from crime, as well as information on suspicious pecuniary transactions in terms of the CoE Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime. In such cases, the public prosecutor can order that the competent authority or organisation suspend the payment, that is, the issuing of suspicious money, securities or objects. He/she shall then propose to the court to pass a ruling on temporary suspension of performance of a pecuniary transaction for which there is reasonable doubt that it constitutes a criminal offence or is intended for the execution or concealment of criminal offence or proceeds from crime. If the court passes such ruling, it shall order the funds to be temporarily seized, either from an account or in cash, and deposited to a special account for safekeeping until the final completion of the criminal proceedings, or until conditions for their return are created. The decision referred to in paragraph 4 of the present Article may be appealed by the parties and defence lawyer or by the owner of the funds or his/her authorized representative, or by the legal entity from whom the funds have been temporarily seized. The non-contentious chamber referred to in Article 24, paragraph 6 shall decide on the appeal (Article 86 paragraph 1 – 6 CPC/2006).

These are the provisions taken over from Article 504k paragraph 1 of the CPC of 2001. When taking over these provisions, the legislator failed to remember that the provisions of the 2001 CPC have an introductory article that provides a general framework for the application of secret surveillance measures, limiting them to the perpetrators of organised crime offences and making their application conditional on the existence of reasonable doubt that the criminal offence committed is a result of organised activity specially defined in Article 504a. A provision taken over in this way remains completely open (Sl. Beljanski). It enables the public prosecutor to violate the integrity of banking operations and freedom of financial transactions without justification and connections with the criminal offences. One of the explanations of the new CPC openly stated that "there is no reason for these provisions to be reserved for organised crime offences only……and hence they are classified as general evidentiary actions". In any case, the tendency to extend the application of special investigative techniques and to vest prosecution authorities with special powers for discovering criminal offences could not have get rid the legislator of the obligation to observe the main assumptions for the application of procedural coercion measures in criminal proceedings, and these are: existence of reasonable suspicion, or at least grounds of suspicion, that a certain person has committed a criminal offence.

c) *Rendering Simulated Business Services and Conclusion of Simulated Legal Operations*

These measures can be used particularly when proving the criminal offence of taking bribe and drug trafficking. In the present CPC (2001) they are envisaged as special investigative techniques only for organised crime offences. The way in which the condition for their application is determined is problematic: the measure is approved by the investigative judge at public prosecutor's request "against whom there are grounds for suspicion that he/she is *preparing* an organised crime offence" (Article 504lj paragraph 1), which is in collision with the second part of the same provision that implies a committed criminal offence: "if criminal offence of organised crime could not otherwise be discovered, proven or prevented, or if that would be connected with considerable difficulty". This illogicality also applies to the engagement of undercover agent, in provision of Article 504lj paragraph 1. It is eliminated in the 2006 CPC: Article 148 paragraph 1 speaks of reasonable suspicion that a criminal offence has been committed, and Article 148 paragraph 4 on circumstances that indicate that a given criminal offence is being prepared. In case of suspicion of preparation, measures can be applied provided that there are facts that indicate that this criminal offence could not be prevented otherwise or that its prevention would be very difficult, or that it would result in irreparable damaging consequences to the lives or health of citizens or valuable assets. The new CPC enumerates specific criminal offences in cases of which the application of these measures is possible (money counterfeiting, money laundering, unauthorized production and trafficking in narcotics, unlicensed holding of weapons and explosives, human trafficking, trafficking in minors for the purpose of adoption, giving and receiving bribe and abuse of office, instead of the former general invoking of organised crime offences. It has been noted that this list of criminal offences should be extended so as to include criminal offences of blackmail, extortion and abduction, which are encompassed by the measure of secret surveillance of the suspect (B. Banović, Revija, 2/2006, pp. 140). Measures can last for nine months, and then, at the reasoned proposal of the public prosecutor, they can be extended, three times for three months, making their maximum overall duration 18 months (in the 2001 CPC it amounted to 12 months).

There is no justification for failure to prescribe prohibition to persons who render simulated legal services and conclude simulated legal operations to "incite and provoke to the commission of criminal offence", as the case is in regards to undercover agent in Article 153 paragraph 1. To agree to an illegal service or legal operation with or without incitement is not the same. The truth is that the same deficiency in regards to this measure also existed in the 2001 CPC, but this was a chance to eliminate, not repeat it.

d) *Engaging Undercover Agents*

Undercover agents are, as a rule, police officials, specially trained and with changed identity, infiltrated into a criminal organisation, where they act according to the instructions of the investigative judge and public prosecutor. This is a very delicate institution, since the activity of undercover agents is always bor-

dering on illegal. This is why the engagement of undercover agents requires the proposal of the public prosecutor and approval of the investigative judge. The condition is that the criminal offence (against the Constitutional order and security of the Republic of Serbia, against humanity and other goods protected by international law; of organized crime and any other for which a prison sentence of more than four years is envisaged – Article 151 paragraph 2 CPC/2006) could not otherwise be discovered, proven or prevented, or that it would be connected with considerable difficulties. The application of the measure is possible both in case of suspicion that a criminal offence has been committed and in cases where there is suspicion that the offence is being prepared. The measure may last for six months at the most, which does not seem as appropriate time, given that the infiltration of an undercover agent into a criminal group requires lengthy and complicated preparations and that results of the measure cannot be expected in such a short time. The actions of the undercover agent, due to their nature, are of informal character, until the agent is questioned as a witness in proceedings. The examination of undercover agent in the capacity of witness, however, should be expected as a rare exception. It is performed so as not to reveal the agents' identity. Data on the identity of undercover agent examined in the capacity of witness constitute an official secret. Court decision cannot be based only on the testimony of the undercover agent (Article 153 paragraph 6 of the CPC/2006). This at least partially removes the objection that the use of the deposition of the undercover agent as a witness anonymous to the defence, and even to the court, violates the accused's right to defence. – Data show that undercover agents are still not used in domestic police practice (B. Banović) even though the legal possibility for their engaging exists as of March 29, 2002 (day of entry into force of the 2001 CPC).

Article 152 paragraphs 5 and 6 of the CPC/2006 states that an undercover agent can only be an active or retired member of the police or Security-Information Agency, determined by the Minister, that is, the Director. Paragraph 7 of the same Article states that a member of criminal organisation or person who has already been convicted, for a serious criminal offence "punishable by four years in prison or more" (for convicted persons it should be pronounced sentence, not sentence prescribed by law) may be an undercover agent. It seems that the legislator does not differentiate between police officers and criminals, that is, assumes that there are members of criminal organisations and persons convicted of serious criminal offences within the police force.

Catalogue of criminal offences for which it is possible to engage an undercover agent ((Article 151 paragraph 2 of the CPC/2006) at first seems to be illogical. The undercover agent can be determined not only in organised crime cases, but also in cases of any criminal offence for which a sentence of four years in prison or more is prescribed, even though the notion of "criminal offence for which the prescribed sentence is four years in prison or more" is an element of the notion of organised crime (Article 21). This provision of the CPC should be interpreted so as to include criminal offences of certain gravity, even though they do not meet some of the other conditions envisaged for the construction of the notion of organised crime. In any cases, these criminal offences should also

constitute an "activity of three or more persons associated in a criminal organisation", since this secret surveillance measure is possible only in cases of criminal organisations. It is meaningless without a criminal association.

The question of liability of the undercover agent for offences he/she commits within the criminal organisation alone or accompanying other members of criminal organisation is a separate one. It is prohibited and punishable for the undercover agent to incite other members of the organisation to commit criminal offences. If, in the course of his/her engagement, he/she commits a criminal offence against a member of the criminal group or within the criminal group, provisions of the Criminal Code governing legitimate self-defence or extreme necessity shall apply (Article 153 paragraph 2). Provision of Article 153 paragraph 4 of the CPC/2006, according to which undercover agent has the right to secretly enter other persons' apartment in order to install recording or photographing devices is very dangerous for human rights guaranteed by Constitution. Invoking this provision, the police can always have efficient and fast insight into every citizen's intimate sphere, since this right of the undercover agent is not reduced to entering the apartment of member of a criminal organisation, but presupposes entering to any apartment.

e) So-called Controlled Delivery

This secret surveillance measure is regulated by Article 504o of the 2001 CPC. It allows illegal or suspicious shipments to leave, be transferred or enter the territory of one or several states, with the knowledge and under surveillance of their competent authorities, with the aim of conducting an investigation and identifying persons involved in an organised crime offence. This measure is approved by the public prosecutor (unlike others, that are approved by the investigative judge), and implemented by the police. "Suspicious shipments" can include narcotics, money, armament, ammunition and the like. The objective of the measure is to enable the identification of main perpetrators of organised crime offences, in addition to the known and, as a rule, secondary perpetrators. Controlled delivery is carried out according to the rules of Article 11 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with the consent of interested states and under the reciprocity principle. Reference to the mentioned convention may lead to an erroneous conclusion that the measure only relates to the trafficking of narcotic drugs and psychotropic substances. The deficiency of the present provisions of the CPC also lies in the fact that the implementation of the measure is placed under exclusive competence of the police, even though it would be useful to engage other state authorities, such as customs office and tax police, in the operation.

Provisions of the new CPC on this measure are much more detailed and precise. It is prescribed that the measure of controlled delivery can be applied "only if the detection or arrest of persons involved in the illegal transport of narcotics, arms, stolen objects and other objects which result from a criminal activity or objects used for the purpose of committing a criminal offence would otherwise be either impossible or very difficult, or if the detection or proving of criminal offences committed in connection with the delivery of illegal or suspi-

cious shipments would be otherwise impossible or very difficult" (Article 154 paragraph 4). This leads to the conclusion that this measure is connected to the trafficking of narcotic drugs or weapons, transport or stolen goods and objects originating from the commission of criminal offences (e.g. counterfeited money) or that served as instrumentalities in the commission of criminal offences. In addition to the police, this measure is also implemented by other state authorities (Article 154 paragraph 2). Implementation of this measure does not constitute a criminal offence of the persons competent for implementing it (failure to report a criminal offence, aiding after the commission of a criminal offence, etc) – Article 154 paragraph 4.

f) Automated Computer Search of Personal and Other Data (Article 155 of the CPC/2006)

Automated computer search of personal and other related data and their electronic processing can be taken if there are grounds of suspicion that one of the following criminal offences has been committed: 1) a criminal offence against the Constitutional order and security of the Republic of Serbia; 2) a criminal offence against humanity and other goods protected under international law; 3) an organized crime offence; 4) a criminal offence against sexual freedom; 5) murder, aggravated murder, banditry, robbery, money counterfeiting, money laundering, unauthorized production and trafficking in narcotics, unlicensed holding of weapons and explosives, human trafficking, trafficking in minors for the purpose of adoption, giving and receiving bribe, abuse of office, blackmail, extortion and abduction. Search may exceptionally be ordered if special circumstances indicate that some of the criminal offences referred to in paragraph 1 of the present Article are being prepared, and facts indicate that this would be impossible or very difficult to prevent in any other way, or that there would be irreparable damage to the lives or health of people, or valuable assets.

The measure consists of automated search of already stored personal data and other data directly correlated with them, and their automatic comparison with the data that refer to the given criminal offence and person that can be brought in connection with this criminal offence, in order to rule out as possible suspect persons who are unlikely to be in connection with the criminal offence, and to identify those persons for whom there are grounds for suspicion on the basis of the collected data. The measure is ordered by the Investigative Judge at the proposal of the Public Prosecutor, and in case circumstances exist due to which there may be no delay, the Public Prosecutor may issue an order himself/herself, which shall have to be presented to the Investigative Judge for confirmation within 24 hours. If the Investigative Judge does not confirm the Public Prosecutor's order within 24 hours after the moment he/she has received the order, it shall be revoked without any delay and all collected data shall immediately be destroyed under the supervision of the Investigative Judge and Public Prosecutor. The order of the Investigative Judge includes: the statutory title of the criminal offence referred to in paragraph 1 of the present Article; specification of data which automatic collection and sending is necessary; appointment of the government authority which has the obligation to collect the requested data automatically and to send them to the Public Prosecutor and police; scope of the

special investigative technique and its duration. The measure may last for maximum three months, and it may be extended for additional three months due to important reasons. The measure is implemented by the police, Security-Information Agency, a Customs authority or another government authority, and/or other legal persons that perform certain public duties under the law. All collected data shall be destroyed under the supervision of the Public Prosecutor and Investigative Judge if criminal proceedings are not initiated within six months after the implementation of the special investigative technique referred to in paragraph 1 of the present Article.

Personal data protection is regulated by Article 42 of Serbian Constitution. Use of personal data outside of the purpose for which they were collected is in principle prohibited and punishable, except for the needs of conducting criminal proceedings or protecting the security of the Republic, if so provided by law and in the manner provided by law. According to the Constitution, everyone is entitled to be informed of the data collected in regards to him/her and has the right to court protection because of their abuse. Serbia also has a special Personal Data Protection Act ("FRY Official Gazette", 24/98 and 26/98).

5. On Cooperating Witnesses

Cooperating witness is a person who is transferred, in special proceedings, at the proposal of public prosecutor, under conditions from Article 504d paragraph 1 of the CPC/2001, by a court decision, from the status of suspect or accused to the status of witness, with an obligation to give full and truthful deposition, in exchange for criminal prosecution against him/her being stopped. This is a type of court pardon of criminal liability on the basis of agreement the public prosecutor reaches with the suspect or the accused in order to enable or facilitate criminal prosecution in general interest.

In an attempt to suppress organised crime, modern legislations intensify repression and, on the other hand, give to certain suspects or accused some advantages in order to wind them over to cooperate with criminal prosecution authorities and dissuade them from further criminal activity. This objective has already been served by the criminal law institutes of voluntary abandonment and real penitence (which is in fact abandonment after the commission of criminal offence), mitigation of sentence and remittance of punishment etc. Provisions of the CPC go a step forward and, with the same objective, introduce abandonment of criminal prosecution as a measure of procedural law. This corresponds to "crown witnesses" in German law and "penitents" to whom Italian law recognises various benefits.

In order for a suspect or accused to be transformed into a cooperating witness, though cumulative conditions need to be met: that in the criminal offence in regards to which the person is a suspect or accused there are mitigating circumstances on the part of that person that, according to criminal law, may result in remittance of punishment or mitigation of punishment and that the importance of the testimony of that person for revealing, proving or preventing other organised crime offences is prevailing over the harmful consequences of the criminal offences with which he/she is being charged. Which interests is prevailing is de-

termined by the court using its discretion. Organiser of the criminal group cannot become a cooperating witness (Article 504đ paragraph 3).

Duties of cooperating witness are the same as the duties of any other witness: to tell the truth and withhold nothing, with a sanction of criminal liability for false testimony (Article 102 paragraph 2) and to swear an oath (Article 106). However, cooperating witness does not have the rights that other witnesses have: to be exempt from the duty to testify against the accused who is his/her relative or other close person (Article 98), or to be exempt from duty to answer individual questions by which he/she would be likely to expose himself/herself or certain close persons to serious disgrace, considerable material damage or criminal prosecution. The public prosecutor warns of these duties the cooperating witness, suspect or accused before he/she files a proposal to the court, but the court panel does the same before it decides on the proposal of the public prosecutor, even though this is not envisaged in Article 504e.

Initiative for recruiting cooperating witnesses comes from the public prosecutor, but this initiative is decided on by the court. The accused or the suspect voluntarily accepts cooperation. Application of any coercion is excluded under general regulations. The panel can grant or deny the public prosecutor's motion. Decision is in the form of a ruling, against which it is possible to appeal to a higher court only if the public prosecutor's motion was denied. The right to appeal is vested only with the public prosecutor, not the suspect or the accused.

Before passing the decision, the president of the panel schedules a special hearing to which the public prosecutor, the suspect or the accused proposed to become a cooperating witness and his/her defence counsel are summoned. If main trial is underway, this hearing can be held during recess after the suspension of the main trial before the same panel, in order for the trial to be continued once the panel passes the decision by which it grants or denies the public prosecutor's motion. The separation of minutes and official notes on previous depositions of the cooperating witness is done in accordance with provisions of Article 178.

Examination of cooperating witness is, as a rule, conducted without the public, not only during investigation but also in the course of the main trial. Examination on the main trial can exceptionally be done in the presence of the public, provided that the public prosecutor proposes so and the cooperating witness agrees. Decision on the public prosecutor's motion is passed by the main trial panel. The panel could deny the public prosecutor's motion for the witness to be heard in public guided by the principles of efficiency, witness protection and interests of proceedings. The situation in this procedure is the reverse from the usual: usually the main trial is public, and public can be exceptionally excluded for a part or the entire main trial (Article 291 and 292), whereas, in this procedure, the part of the main trail in which the cooperating witness is being examined is, as a rule, held without the presence of the public. Examination of cooperating witness in the course of investigation cannot be public, even exceptionally.

Criminal prosecution of cooperating witness shall be omitted only for the criminal offence for which proceedings are being conducted, whether pre-trial or

criminal, that is, for which criminal report has been filed, investigation opened or indictment submitted (see Article 504d). When the cooperating witness gives testimony in accordance with the obligations he/she has assumed in the course of criminal proceedings already initiated, the public prosecutor is obliged to abandon criminal prosecution against cooperating witness, and the court shall pronounce a judgment by which indictment is denied. When criminal proceedings against cooperating witness have not yet been initiated, public prosecutor shall reject the criminal report and shall not file a motion for conducting an investigation or direct indictment against cooperating witness. Subsidiary indictment is excluded, that is, the injured party is not entitled to continue criminal prosecution according to the provisions of Article 61 of the Code.

If the cooperating witness fails to perform his/her witness duties or if he/she commits a new criminal offence of organised crime before the proceedings are finally terminated, proceedings for the criminal offence committed before and for the new criminal offence shall be initiated or continued against him/her.

Ever since their introduction into Serbian criminal procedure law (in 2002), cooperating witnesses have been relatively often used in court practice. Owing to their statements, many serious criminal offences were discovered and judged – without them, they would probably have no judicial epilogue. Statutory provisions of cooperating witnesses are considerably changed in the new CPC of 2006. The most important changes are the following

a) Examination of cooperating witness is treated in the new CPC as one of the six "special evidentiary actions" (the others are: 1. secret audio and visual surveillance of a suspect, 2. rendering simulated business services and conclusion of simulated legal affairs, 3. engagement of an undercover agent, 4. controlled delivery and 5. automatic computerized search of personal and other data).

b) Capacity of cooperating witness cannot be gained after proceedings have been initiated against such person by an order of inquiry or a direct indictment being raised for an organized crime offence (Article 156 paragraph 1). According to Article 509d CPC/2001, this was possible already after the filing of criminal report, but before initiation of proceedings, or if proceedings were initiated.

c) Conditions for gaining the capacity of cooperating witness are modified and expanded: 1) co-defendant must give express provision that he/she is a member of a criminal organisation and full confession of a criminal offence for which procedure is being conducted; 2) capacity of cooperating witness is granted if this is opportune in view of the nature and circumstances of the criminal offence that he/she is suspected of having committed; 3) the importance of his/her testimony for detecting, proving or preventing other criminal offences by the criminal organization is greater (it used to state only "prevailing") than the damaging effects of the criminal offence which he/she is suspected of committing; and, finally 4) "that in view of the existing facts, there is reason to believe that the determination of important facts in criminal proceedings would be impossible or very difficult" if the cooperating witness were not examined. The final condition is illogical and impossible, since, before the judgment is pronounced, there is no "existing state of facts", and, if there were, engaging of cooperating witness would not be necessary or justified.

d) If the cooperating witness fulfils his/her obligation, the court shall pronounce the sentence within limits prescribed by the Criminal Code, and then such a sentence shall be reduced by half (Article 163 paragraph 1). According to the solution from 2001 CPC, the status of cooperating witness was an obstacle for criminal prosecution, and hence the proceedings against such witness were not initiated or were suspended. Instead of this "judicial abolition" of cooperating witness who fulfils his/her obligations (the public prosecutor waives prosecution, and the court pronounces a judgment by which the indictment is rejected – Article 504z paragraph 2 CPC/01), the solution envisaged is more moderate and more in line with the Criminal Code: cooperation of criminal group members with prosecution authorities only results in reduction of sentence by a half or, exceptionally, the sentence may not be imposed even though the witness is declared guilty (Article 163 paragraphs 1 and 3). However, it is questionable whether the public prosecutor will be able to find cooperating witnesses under such circumstances, particularly given that they may serve their sentences with persons against whom they testified.

New solution is more "fair" but it has a series of other drawbacks: 1) provisions determining penalties do not belong to a procedural statute, but rather to the Criminal Code; 2) the rule is not harmonised with the CPC provision on the content of written judgment (Article 385 CPC), which mentions the determination of sentence only as a notion of substantive law, and not as a formal presumption for pronouncing of sentence to cooperating witness. CC does not recognise the envisaged pre-determination followed by pronouncing of sentence (in cases of joinder and conditional sentence, the sentences are pre-determined, and then a single sentence is pronounced, that is, it is determined that the established sentence shall not be enforced). It is not justified that in this case the court does not establish the determined sentence in the holding and then, based on procedural powers, pronounces half of that sentence

e) Exceptionally, the court may declare the cooperating witness guilty, but remitting the sentence, but only at the proposal of public prosecutor (Article 163 paragraph 3). Public prosecutor's proposal limits the court's freedom to decide on this issue

f) Cooperating witness can be used not only in procedure for organised crime offences, but also in proceedings for war crimes and criminal offences against the constitutional order and the safety of the Republic of Serbia.

g) Article 164 paragraph 1 reads that "criminal prosecution against him/her is continued if the cooperating witness loses that capacity". This provision made sense in the 2001 CPC, when gaining the capacity of cooperating witness led to suspension of proceedings, but has no meaning in the new Code, since the criminal proceedings against him/her are not suspended or ended, but continues and end with pronouncing of a reduced sentence. What was never suspended or terminated cannot be continued.

h) The judgment by which reduced sentence is pronounced to cooperating witness "may be appealed only as far as the sentence is concerned by the cooperating witness, all persons who may appeal to the benefit of the defendant in keeping with Article 388, paragraph 2 of the present Code, as well as the Pub-

lic Prosecutor to the benefit of the cooperating witness."(paragraph 2 of Article 163). This provision causes a dilemma: can the appeal be filed on all grounds or only "in relation to the sentence" and why is the use of appeal limited? Even more confusion is caused by the new provision of paragraph 3, Article 163, according to which the appeal against first instance decision whereby cooperating witness was declared guilty but sanction was not imposed is not permitted at all. Even though without sentence, just as the judgment with reduced sentence, such judgment can be illegal and erroneous. It is questionable whether these provisions are in accordance with the Constitution, which guarantee the right to appeal against first instance court decisions (Article 36 of Serbian Constitution).

i) The Code does not contain an adequate term for co-defendant who is examined in the course of proceedings in the capacity of cooperating witness. This person is called the cooperating witness, even though criminal proceedings are instituted against him/her, his/her liability is established and criminal sanction is pronounced, which is characteristic of a defendant, not a witness. According to the Code, the appeal against judgment declaring the defendant guilty is filed by the witness, not the defendant, that is, the accused (Article 163 paragraph 2). This is an important issue, since a witness in criminal proceedings cannot have the rights that belong only to the defendant according to the Code. According to procedural functions executed by that person in proceedings, this person is both defendant and witness at the same time.

6. Cooperating Witnesses *(Amicus of Justice)* in the Serbian Legal System

(J. Ćirić)

The institute of cooperating witness showed up for the first time in Serbian legal system in the Act on Organisation and Competences of State Authorities in Combating Organised Crime, in 2002, and, as soon as it was introduced, it caused numerous dilemmas and controversies in the widest expert, political and general public. The general public was not prepared to this (new) institute and to the very possibility that a perpetrator of some of most serious criminal offences can be pardoned on account of other pragmatic interests. Provisions on cooperating witness in the new CPC, which is going to enter into force at the end of 2008, differ from the way in which the institute was conceived in 2002. According to the new CPC, the cooperating witness, once it is granted that status, shall not be fully exempt from criminal liability, that is, shall be declared guilty and get half of the sentence that would otherwise be pronounced against him/her.

Article 163, paragraph 1 of the new CPC reads: "*A cooperating witness who has testified before the court in accordance with his/her obligations referred to in Article 157 of the present Code shall be sentenced within the limits envisaged in the Criminal Code for the act of organized crime which represents the subject matter of the proceedings, which he/she has confessed and which is proved to have been committed by him/her, and such a sentence shall then be reduced by half".*

An objection could be made against this new solution that it is not stimulating enough, since, with half a sentence being pronounced, there will be fewer de-

fendants who will decide to "confess all" and become cooperating witnesses. The pardoning of entire sentence, envisaged by the 2002 Code, made more sense in these terms, since it was more tempting and stimulating for the criminals. However, from the standpoint of legal and general public, in moral terms, the former solution was much more problematic. In any case, some testimonies of cooperating witnesses, to whom everything was pardoned, had caused doubt, primarily due to possible political manipulations and their being used by the public prosecutor's office in order to accuse one of (usually) opposition politicians of cooperating with the mafia without any other evidence or arguments. This is one of the more important objections voiced in relation to the experience and practice of using cooperating witnesses in Serbia so far. However, there are more objections and dilemmas.[145] Discussion on cooperating witness, particularly when their testimonies caused reactions in the world of politics, has become very attractive and popular, not only for the experts and scholars[146], but also for the general public and the media. Here are only some of the most characteristic questions and dilemmas regarding the institute of cooperating witness.

With regard to full pardon of a person who has committed a serious crime, the first question that can be posed is: "Where is the justice?" This is a question rightfully asked by ordinary people, and it is up to us to teach them that the benefit, pragmatism, utilitarianism is the highest ethical principle – if something is beneficial, it is therefore good, moral and right. It is useful, and therefore morally allowed to release a murderer of criminal liability? Is the next step the relativization of human life itself and of all other moral values and is not something close to Anglo-Saxon pragmatism, but quite distant from Serbian patriarchal ethical model, and thus completely inappropriate and unacceptable?[147]

The other question that was posed before and is posed now, even with the changes regarding the institute of cooperating witness, is who will and to what extent believe in the testimony of a problematic criminal, who has obtained (full/half) pardon from criminal prosecution in order to give an adequate deposition and who is perhaps, or probably, lying in his/her testimony, only to avoid prison? Can the court believe him/her? Can the public believe him/her? Who shall dissuade, sometimes malicious speculations that it is a staged court proceeding and a show on the relation prosecutor-criminals. How to prevent barristers from constantly, persistently and most often quite successfully raise the question of credibility of such witness, his/her testimony and the court judgment itself? Does this not open in the last instance the question of credibility of the very judiciary, credibility that is already undermined in Serbian current social reality?

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145 On that issue, for example, read the article by Jovana ĆIRIĆA, *Svedok saradnik,* "Revija za kriminologiju i krivično pravo", 1/2004.

146 On that issue also read Milan ŠKULIĆ, *Svedok saradnik u krivičnom postupku za dela organizovanog kriminala*, in Collection of Papers "Organizovani kriminalitet – stanje i mere zaštite", izd. Ministarstva za nauku i zaštitu životne sredine, Ministarstva unutrašnjih poslova Republike Srbije i Više škole za unutrašnje poslove, Beograd 2005, pp. 212–264.

147 Alan VOTSON, *Pravni transplanti, – pristup uporednom pravu* (translation from English), Beograd 2000, pp. 19.

Thirdly, are we (we refer to the state, its authorities, specifically the police and public prosecutor's office) certain that, when we "trade" with criminals via the cooperating witness we shall truly manage to stop the criminals and the mafia, or is perhaps the mafia succeeding in fooling us, aware that the police and public prosecutor's office sometimes must succeed in combating against crime.[148] Using the cooperating witness, are we somehow infiltrating our man in their (mafia) lines, a man we think will "put an end to them" or are they (the mobsters), consciously sacrificing someone, actually infiltrating their people among us (police, prosecutors) in order to lead us to the wrong trail.[149] It is not excessive to compare the cooperating witness with a spy working for foreign countries intelligence services. Can the intelligence service of the country to which he/she forwards data to rely fully on his/her data, without checking them in any way?

The question that should not be neglected is why we are depriving the victim and the victims' family from moral and material compensation, by not allowing them to be subsidiary prosecutors once the public prosecutor abandons criminal prosecution.

In any case, it seems that the new CPC, although problematic in many other respects, has stricken the right balance on this issue. Ultimately, the person to whom entire sentence but only half is pardoned can be given a bit more faith. The person, who agrees to be punished and to serve his/her sentence, even if such sentence is mitigated, has more credibility and more trust of both the judiciary and the general public. Moreover, it seems that the moral questions and dilemmas are considerably smaller in that case.

7. Witness Protection in Criminal Proceedings

Serbian criminal procedure law has provisions on the protection of vulnerable protected witnesses. Protected witness can be awarded protection in the course of proceedings (internal or procedural witness protection) and outside criminal proceedings (external or non-procedural witness protection). Witness protection, internal and external, especially of injured parties, is important for criminal proceedings in general. It relieves the witness from fear, thus creating conditions for him/her to testify in criminal proceedings and for the testimony to be truthful. Without such protection, the witness would be exposed to pressures and threats and would often refuse to testify or would testify insincerely. Witness protection is particularly important in organised crime cases, given that threats,

148 If the police would not have any results, it would soon be heavily criticized, and even replaced (or at least some of its members) by other more capable policemen, who will be more dangerous to the mafia. This is why the mafia sometimes allowes them to acheive some succes, consciusly sacrifising one of its minor interests or members.

149 It sometimes happens that both the police and the customs office receive an anonymous tip (from mobsters) that a car "of such and such brand with such and such licence plates" carries drugs. The customs and the police then focus on that car and can be pleased, since they discovered a kilogram of drugs. But, while they deal with that car, it is followed by another, which carries 100 kilos without interference. Mafia has consciously made a small sacrifice in order to succeed in a much bigger venture. The question is who has fooled whom (see more on that in Živojin ALEKSIĆ, *Kriminalistika*, Beograd, 1979). Similar situations can happen with the cooperating witness.

such as, blackmailing, intimidation, use of violence, ruthless revenge and careless liquidation of any adversary, are the usual and generally accepted behaviour of criminal organisations.

1) Article 101 paragraph 3 of the 2001 CPC envisages that witnesses can be examined in their apartments if, due to old age, illness or serious physical defects are unable to respond to the court's summons. According to the provisions of Article 110 of the 2006 CPC (which is applied from the date this Code entered into force) particularly sensitive witnesses, including the injured party, can be examined in their apartments. Particularly sensitive witnesses are those for whom the court assesses that the examination in the courtroom could have "harmful effects on their state of mind and physical state, given their age, experience, lifestyle, gender, state of their health, nature or consequences of the criminal offence, i.e. other circumstances of the case". These witnesses can also be examined in a professional institution qualified for the examination of sensitive persons. Examination can be performed by the use of technical devices for audio-visual recording and, when necessary, with the assistance of a psychologist, social worker or other expert and without the presence of parties, who can pose questions to the witness through the authority in charge of proceedings. If the court finds it necessary, such witness shall appoint a proxy in the course of the examination. The witness recognizes the accused in a way that the accused cannot hear or see him/her. Confrontation with the accused is excluded, and with other witnesses "only at their request".

The witness (and injured party) must not be asked questions that refer to his/her sexual activity and preferences, political and ideological preferences, racial, national and ethnic background, ethical criteria and other strictly personal and family circumstances, unless the answers to such questions are in direct and obvious connection with the need to clarify the important elements that constitute the criminal offence, which is the subject matter of the proceedings (provision of Article 107 of the 2006 CPC that is applied from the day this Code entered into force).

2) The witness is the most frequently used source of knowledge on committed criminal offences in criminal proceedings and hence one of the main allies of judicial authorities in combating against crime. Despite that, until recently the state did not care much of witnesses' human rights, but rather perceived witnesses only as means of evidence, who, under the threat of sanction has to perform the duties it prescribed, regardless of the risk to oneself and those close to him/her assumed by testifying. It is only the modern state that recognises that it owes respect and protection from intimidation and revenge to the citizen in the capacity of witness. Without such protection, the witness could not perform his/her duty to testify. On the route to transformation into a rule of law, this new relationship towards witnesses in criminal proceedings was accepted by Serbia as well, thus showing that it does not only establish burdens and duties for its citizens, but also grants corresponding rights and benefits. Witness protection can be *procedural*, governed by the provisions of the Criminal Procedure Code, and *non-procedural,* governed by the provisions of the special Act on Protection of Participants of Criminal Proceedings ("RS Official Herald" 85/2005). We shall now discuss procedural witness protection.

Provisions on procedural witness protection are prescribed in Article 109 of the 2001 and in Articles 117 to 122 of the 2006/CPC (which is applied from the day this Code entered into force in June 11, 2006). Article 109 of the CPC/2001 includes general rules on witness protection. The court is obliged to protect the witness and the injured party from insult, threat and any other assault. A participant in the proceedings who insults the witness or injured party, threatens him/her or endangers his/her safety, must be warned or fined by the court and, in cases of more serious threat or violence, the court is obliged to inform the competent public prosecutor thereof, for the purpose of initiating criminal proceedings. Articles 117–122 CPC/2006 include provisions on the conditions and procedure of acquiring the status of protected witness, manner of examination of such witness, types of protection measures and measures for preserving the identity of the protected witness secret. The status of protected witness is acquired by a court ruling that is passed *ex officio* or at the written and reasoned motion of the person determined as the witness, or at the motion of parties (accused or prosecutor). Two conditions are prescribed for the passing of the ruling: first, that proceedings are conducted for a criminal offence punishable by ten years in prison or more and, exceptionally, for a criminal offence punishable by four years in prison or more and second, that the court establishes that life, health, physical integrity, freedom or any considerable assets of a witness or persons close to him/her, would be seriously threatened due to his/her testimony and answers to some questions. Protected witness is examined in a special manner, so as not to reveal his/her identity in the course of proceedings. Data on his/her identity are known only to the court and the parties. Exceptionally, under conditions prescribed in Article 119 paragraph 5, data on the identity of protected witness can be denied temporarily to the accused and his/her defence council, but at the latest until the scheduling of the main trial. The concealment of witness' identity is achieved by applying one or more protection measures prescribed by the Code during the examination of the witness and by ordering the participants in proceedings to keep the data on the protected witness confidential as an official secret (Article 120 paragraph 4). Protection measures prescribed by the Code used during the examination of protected witness are: closed trial; alteration, removal from the record or ban on the disclosure of any data referring to the witness' identity; withholding of any data referring to the witness' identity; examination of the witness under a pseudonym; concealment of the face of the witness; testifying from a separate room through voice-distortion devices; examination of the witness in a room outside the courtroom, in another place in the country or abroad, communicated to the courtroom by audio-visual devices, with the possibility of using voice– and image-distortion devices (Article 117 paragraph 3). Other protection measures are: prohibition of question, if the answer could reveal the identity of protected witness (Article 119 paragraph 3); signing the minutes under pseudonym (Article 119 paragraph 4); separation from the file and keeping separately the data on the identity of protected witness and other material that could directly or indirectly lead to revealing protected witness' identity (Article 120 paragraph 1); service in the manner that ensures that his/her identity remains secret (Article 120 paragraph 3).

8. Non-procedural Witness Protection

(R. Sepi)

The institution of "protected witness" is a novelty in the legal system of the Republic of Serbia. It was introduced by the Act on Programme for Protection of Participants in Criminal Proceedings (hereinafter: the Act).[150] There were two key reasons for passing the mentioned Act. The first lies in the fact that combating against organised crime in the Republic of Serbia is less successful without adequate programme for the protection of witnesses and persons close to them, who, without any protection and under constant pressure, threats and danger, avoid to appear before the court or to tell the truth. In addition, by ratifying the Rome Statute of the International Criminal Court,[151] UN Convention against Transnational Organised Crime[152] and Criminal Law Convention on Corruption[153], the Republic of Serbia has assumed the obligation to provide efficient and effective protection of witness and persons close to them by passing corresponding legislative provisions.

The objective of passing the law was the creation of legal basis for granting special protection not only to participants in criminal proceedings, but also to persons close to them, which differs from all forms of protection that existed in Serbian legal system so far This protection consists in the implementation of a set of measures entitled "Protection Programme".[154] This is why the Act prescribes conditions and procedure for awarding protection to participants in criminal proceedings and persons close to them who, due to given depositions or information important for proving in criminal proceedings, are exposed to danger to life, health, physical integrity, freedom and property (Article 1 of the Act).

In order for protection and assistance to be provided, it is necessary for several conditions prescribed by the Act to be met. The first condition essentially

150 Act on Programme for Protection of Participants in Criminal Proceedings (RS Official Herald No. 85/2005).

151 Act on Confirmation of the Rome Statute of International Criminal Court (*"FRY Official Gazette – International Agreements"*, No. 5/01).

152 Act on Confirmation of the UN Convention Against Transnational Organised Crime and Additional Protocols (*"FRY Official Gazette – International Agreements"*, No. 6/01).

153 Act on Confirmation of the Criminal Law Convention on Corruption (*"FRY Official Gazette – International Agreements"*, No. 2/02).

154 This special so-called non-procedural protection of participants in criminal proceedings and persons close to them, differs from the measures of procedural protection of participants in criminal proceedings (but not of persons close to them) prescribed by the provisions of the Criminal Procedure Code (e.g. Article 109 envisages that the court is obliged to protect the witness and injured party from insult, threat and any other assault), and from general measures of non-procedural protection in the narrow sense, which are regulated by special legislation (e.g. according to Artilce 73 of the Police Act, general non-procedural measurs are taken by the police in order to protect the victim or other person who has given or can give data important for criminal proceedings or of person in a relationship with the mentioned person, provided they are in danger from the perpetrator of the criminal offence or other persons). It is functionally connected to criminal proceedings and is applied only when measures of procedural and general non-procedural protection cannot ensure adequate protection.

defines who are the persons who can be covered by the protection programme. Unlike comparative legislation and international standards, which speak of "witness protection programme", Serbian legislator has opted for "protection of participants in criminal proceedings", which is why it was necessary to provide its authentic interpretation. Participant in criminal proceedings" who can participate in the Protection Programme (hereinafter: Programme) is the suspect, defendant, cooperating witness, damaged party, court expert and expert, where the meaning of these notions is determined by the provisions of the Criminal Procedure Code (Article 3 of the Act). Analysis of all mentioned provisions can lead to a conclusion that the use of the term "participants in proceedings" as a general (or inadequate – *author's comment*) term is to a certain extent problematic. In theoretic terms, there are several contestable issues. The accused is a generic term used for suspect, defendant, and convicted person, that is, any person against whom criminal proceedings have been initiated[155], and there are no reasons for using both the term suspect and the accused. On the other hand, deposition of expert witnesses and experts is only one of the activities (Article 130 CPC/06), certainly not the most important one, since court decision is based on finding and opinion (Article 128 CPC/06), not on deposition, which is why the use of terms "deposition" and "information" in regards to these persons is inadequate and far too narrow. Finally, all mentioned categories of participants are traditional subjects in criminal proceedings, except for the cooperating witness (who most often is the one in most need for protection), whose role is to be a subject (witness) but whose status is the accused. Therefore, special mention of the cooperating witness, however justified from the standpoint of criminal policy, before mentioning the witness (Article 3 of the Act) causes additional confusion. The legislator chose to depart from international standards also when defining the notion of "close person", offering a better solution. Namely, the notion of close person is not defined according to the degree of kinship and cohabitation – it is the participant in the proceedings who shall denote a person as being close to him/her (Article 3 of the Act). This enables for the protection to be awarded to persons who, due to being truly close to the participant in proceedings (not only close according to formal criteria), are most exposed to danger, which contributes to the credibility and comprehensiveness of his/her testimony. The Programme can be implemented before, in the course of, and after final termination of criminal proceedings (Article 4 of the Act). This enables protection and assistance to be provided in the most comprehensive way possible, which is commendable.

The second condition for awarding protection and help to participants in criminal proceedings comprises a list enumerating the criminal offences the proving of which a decision on implementation of the Programme can be passed. The grounds for providing protection and assistance are the criminal offences against constitutional order and safety of the Republic of Serbia, against humanity and other goods protected by international law and organised crime (Article 5 of the Act).

The content of the third condition is danger to life, physical integrity, freedom or property of participants in criminal proceedings and persons close to

155 Article 22 of the Criminal Procedure Code ("*RS Official Herald*", No. 46/2006).

them (Article 5 of the Act). The mentioned approach, which differs from offered international standards (that require the existence of serious intimidation as direct or indirect threat unlike "exposure to danger"), is a commendable solution, since its width and flexibility offers possibilities for complete and easier protection. There must be a causal relationship between the mentioned danger and the deposition given. Such connection can be twofold. Exposure to danger can be a consequence of the attempt to prevent the participant in proceedings to give depositions or information, as well as to prevent the deposition or information from being repeated. On the other hand, exposure to danger can be "retaliation" for the deposition given. This, of course, does not mean that initiation of criminal proceedings against a person for a criminal offence of preventing or obstructing evidence from Article 336 of the Criminal Code of the Republic of Serbia is a necessary condition for the implementation of the Programme. Quite to the contrary, it is possible that the initiation of mentioned proceedings arrives as a consequence of that criminal offence towards participants in criminal proceedings or a person close to him/her.

The last condition relates to the weight, that is, the evidentiary importance of the deposition or information. The deposition or information in question must be decisive in criminal proceedings, that is, it is necessary that proving in criminal proceedings would be considerably more difficult or impossible without it (Article 5 of the Act). In other words, obtaining of such deposition or information is *ultima ratio* on the route to find the truth on organised crime activities.

Data related to the Programme are confidential and constitute a secret (Article 6 of the Act). Due to the need for them to remain such, legislator prescribed the prohibition to reveal them in the widest possible way. If a person in official capacity informs another person without authorisation, or hands over to him/her, or otherwise makes available, data related to the Programme, this shall constitute the criminal offence of revealing official secret (Article 369 of the CC), whilst the same behaviour by another person constitutes the criminal offence of violation of confidentiality of proceedings (Article 337 of the CC).

The Act also regulates the forming, organisation and competence of authorities competent for implementing its provisions. The Commission for Programme Implementation (hereinafter: the Commission) is an authority having exclusive competence to pass the decision on including, prolonging, suspending and termination of the Programme (Article 6 of the Act). The Commission has three members (who have one deputy each): one is appointed by the president of the Supreme Court of Serbia among the judges of that court, the other by the Chief Public Prosecutor among his/her deputies and the third member is the head of the Protection Unit (Article 7 of the Act). The obligation of the Protection Unit (hereinafter: Unit) is the performance of expert and administrative tasks for the needs of the Commission. Term of office of the Commission members and their deputies is five years (Article 8 of the Act). Given that, after the expiry of the five-year term, the mentioned persons can be re-appointed (Article 8 of the Act), without any limits, therefore, several times. It is clear that the formally limited term of office of the members can become unlimited in actual fact.

The act lists the reasons on the basis of which membership in the Commission is terminated: at the request of a member or deputy, by expiry of the term of office, termination of duty of a judge of the Supreme Court or Deputy Chief Public Prosecutor or termination of the labour relation of the Head of Protection Unit, or his/her transfer to another position, or due to failure to observe regulations on Programme implementation (Article 9 of the Act). Based on express provision stating that membership in the Commission of the Head of Unit and his/her deputy cannot be terminated at own request (Article 9 of the Act) shows that the motion for termination of membership relates only to the judge of the Supreme Court and Deputy Chief Public Prosecutor. The mentioned provision is important in another sense – by applying analogy it can be concluded that consent of the judge of the Supreme Court or Deputy Chief Public Prosecutor is also necessary for their appointment as members, even though this is not expressly prescribed by the Act. Special attention should be given to the reason that is, in its legal nature, subjective-objective, and in terms of scope universally applicable to all members of the Commission. It is the failure to observe the regulations on implementation of the Programme, which presupposes that a member of the Commission or his/her deputy failed to observe the obligations deriving from corresponding legislation, where there is some form of *mens rea* (knowledge and will). In essence, this relates to the failure to observe the provisions that ensure the secrecy and success of the Programme, that is, actions that endanger or prevent its realisation. The decision on termination of membership in the Commission is passed by the same authority or its head that has appointed the member or the deputy (Article 9 of the Act).

The work of the Commission is headed by the president, who is always a judge of the Supreme Court of Serbia (Article 10 of the Act). The legislator justifies this solution by the fact that the Commission is an authority that decides like a judicial panel, and that it is therefore logical for it to be chaired by a judge. Even when it comes to the manner of work and character of decision-making, the provisions governing the session of the second-instance court panel deciding in criminal proceedings are referred to. Commission passes the decision by majority vote (Article 10 of the Act).

Finally, it should be mentioned that the Commission is the only authority that, according to express provisions of the Act, submits a report on its work – annual report on the work to the competent board of the National Assembly (Article 11 of the Act). This practically means that the work of the Commission should be controlled by the Justice and Administration Board of the National Assembly, comprised of members of parliament. This raises two questions. Given that the main purpose of the Programme is to award protection to a participant in proceedings or person close to him/her, there is a question of data that the mentioned report may include, and the manner in which they can be examined by the Board. Secondly, are members of parliament who enjoy immunity persons who can commit the criminal offence of giving away of official secret or the criminal offence of violation of secrecy of proceedings. At the same time, the Unit, which has numerous powers during the implementation of the Programme, according to express provisions of the Act, does not file such a report on its work,

not even to the Commission. Certainly, this does not exclude the possibility of it being controlled within the Ministry of Interior, of which it is an organisational unit.

The following protection measures apply within the programme: physical protection of persons and property; change of place of residence or transfer to another correctional facility; concealing of identity and data on ownership and change of identity (Article 14 of the Act). The mentioned protective measures can be applied without limits – individually or jointly, depending on circumstances of each case. The only exception is the measure of change of identity, which, unlike other so-called "primary protective measures" is applied only as *ultima ratio*, when the objective of the Programme cannot be accomplished by using other measures (Article 14 of the Act). Bearing in mind the fact that danger for the participants to criminal proceedings and persons close to them can occur even before the Commission passes the decision on implementation of the programme, the statute prescribes that so-called "primary protection measures" can be applied as urgent, which is not the case with the measure of change of identity (Article 14 of the Act).

In addition to protection, the Programme also includes the implementation of assistance measures. Prescribing the obligation to provide assistance, the Act mentions its two possible forms: economic and social assistance (Article 15 of the Act). Assistance measures apply from the time the protected person becomes independent, where the assistance cannot exceed the amount necessary for covering the costs of life and including the participant in the new community (Article 15 of the Act). In other words, the mentioned measures should resolve the financial problems of the protected person (although that person is also obliged to take all necessary measures to achieve financial independence – Article 30 of the Act) or to help him/her to find a source of income that is in accordance with his/her education and working experience, as well as an educational institution for the children, etc.

The differentiation in the Act between "primary protection measures" and the measure of change of identity is also reflected in the procedure of selecting the measure. The legislator opted to split competence in the procedure of choosing the measure to be applied. The decision on the choice of so-called "primary protection measures" is passed by the Unit, whilst the decision on the change of identity is passed by the Commission, at the Units' proposal (Article 15 of the Act). In both cases, the decision by which the implementation of a given measure is ordered has the form of a ruling. This opens certain questions. Primarily, the Act does not say what will happen if the Commission does not accept or deny the Unit's proposal – will the entire protection effort be jeopardized?

In an effort to provide maximum degree of confidentiality, the legislator has prescribed that, when protection measures cannot be applied in another way, the Unit may conceal the identity of its members and data on objects used in implementation of certain measures (Article 15 of the Act). The efficiency of the mentioned solution is beyond doubt. However, the problem may lie in the fact there are no precise criteria about what are the cases in which the use of original identity of a Unit's member and of means with original data bears a risk on the

implementation of the measure, that is, what is the case in which they cannot be implemented otherwise? The legislator's explanation that the mentioned provisions provides sufficient limits in application (that it is of subsidiary character – only when it is impossible to do it in another manner, it is used only in the performance of tasks from the competence of the Unit and only in the implementation of a given measure, not in general), does not contribute to legal security without an efficient control mechanism being established.

The measure of physical protection consists in the use of physical and technical measures aimed at preventing illegal endanger of the protected person, the precise enumeration of which, the procedure for its election and manner of implementation is regulated in detail by provision of special legislation – more precisely, by the Police Act. The measure of change of residence consists of temporary or permanent moving away of the protected person to a place determined by the Unit (Article 17 of the Act). In accordance with independence in selection and implementation of protective measures, the statute prescribes that the Unit is independent in determining the new place of residence or domicile of the protected person. The intentions or wishes of the protected person are not decisive (except perhaps in cases of urgent implementation, even though what is required is the protected persons' consent regarding their urgency, not the choice), but rather the Unit's assessment in terms of safety. Consequently, it is not prescribed how many times residence can be changed or how long the protected person shall remain in the new place of residence. Measure of concealing identity and data on ownership consists of making and use of identification documents or document of title of the protected person where original data have been temporarily changed (Article 18 of the Act). In other words, this measure includes two activities – making and utilizing. Given that data itself cannot be changed, since the Act prescribes that the application of this measure cannot result in change of original data kept in official records (Article 18 of the Act), which means that they are permanent. The making of such documents is entrusted to the Protection Unit (Article 18 of the Act) and, were it is not applied as protection measure, it would constitute one of the criminal offences of counterfeiting of documents. The protected person can use such document when entering into legal operations that may have an influence to third persons only with approval of the Unit (Article 19of the Act). If the Unit denies such approval, the protected person may appoint, with Unit's approval, a representative who will conclude these operation on behalf of the protected person (Article 19 of the Act). This measure is in relation with the implementation of the protective measure of concealment of identity and data on ownership, and is hence logical that Unit's consent must be asked when it is to be used. If its use is denied for the second time, there is no statutory possibility to conclude legal operations. Measure of change of identity is actually comprised of two measures: complete or partial change of protected person's personal data (mandatory) and change of physical characteristics of the protected person (optional) – (Article 20 of the Act). Unlike the measure of concealment of identity, the purpose of the mentioned provision is the creation of a completely new biography of the protected person, instead of only new personal

documents. Whether personal data will be changed partially or in full depends on the circumstances of each given case. The change of identity raises the issue of its influence on rights and obligations of the protected person, both those that occurred before, and those that took place after the change of identity. When the change of identity is ordered, the Unit invites the protected person to meet his/her outstanding obligations towards third parties before it is implemented. The Unit learns of their existence on the grounds of obligations the protected person must fulfil when entering the Programme, such as filling questionnaires or listing financial and other obligations (Articles 26 and 30 of the Act). Unit should give special attention to all status-related and other rights and obligations in relation to the protected person's original identity (Article 20 of the Act). In other words, the Unit should take care of the performance of parental rights, obligation to support family members and similar rights and duties of the protected person. The protected person may appoint a proxy who will exercise the rights and meet the obligations created before the change of identity (Article 22 of the Act). When it comes to rights and obligations of the protected person that appear after the change of identity, the legislator prescribes that the implementation of the measure can affect them only to the extent necessary to carry out the Programme, as long as this does not affect the obligations of the protected person towards third parties (Article 20 of the Act). After meeting the obligations of the protected person, the competent authority, organisation or service, based on data received from the Unit, immediately issues a personal document or other types of document (Article 21 of the Act). In other words, documents are issued by the authority, organisation or service competent for doing so in the regular course of affairs. As a consequence of such concept, the procedure for issuing documents does not differ from the procedure for issuing original documents, which contributes to the security of the protected person.

At the same time, there are two limits related to the change of identity. The first consists of a strict prohibition that data in the identification document of the protected person are identical to data of another person (Article 21 of the Act). The last phase of this measure is the Unit's request to the competent Ministry of Interior authority to make a note in the records containing the original data on the protected person on the fact that the Unit must be informed of all questions concerning the identity of the protected person (Article 21 of the Act). Records of the competent Ministry of Interior authority must be kept so that the changed identity of the protected person cannot be established.

When concluding legal operations of major importance, those that significantly depart from everyday operations and that can draw attention of third persons and thus create danger for the protected person, a document can be used only with the Unit's consent (Article 22 of the Act). Even though the Act speaks of consent to the use of documents, it is clear that this, in essence, is consent to the conclusion of legal operation, and that its denial results in the inability of the protected person to conclude such operation. Failure to observe this provision or, more precisely, failure to request consent constitutes a violation of protected persons' obligation (Article 30 of the Act) which, in turn, constitutes grounds for

filing a motion for termination of Programme (Article 33 of the Act). Changed identity has different procedural consequences, depending on the proceedings. In criminal proceedings conducted against the protected person for offence committed before the change of identity, the protected person shall participate with his/her original identity (Article 23 of the Act). If the protected person commits a criminal offence after the change of identity, the Unit is obliged to inform the competent Public Prosecutor and the Commission thereof (Article 23 of the Act). The protected person can participate in other proceedings before court or state authority with his/her original identity only with approval of the Unit. Should the Unit deny such approval, the protected person can exercise his/her procedural rights through a proxy (Article 23 of the Act). In all proceedings, the summoning of the protected person is done through the Unit (Article 23 of the Act).

The Act prescribes three different procedural situations in relation to the Programme, and, consequently, three different decision-making processes. The first is the procedure for including the protected person in the Programme, which starts when competent public prosecutor, investigating judge or president of panel *ex officio* file a motion to the Commission to include a participant in proceedings and persons close to him/her in the Programme (Article 25 of the Act). The same motion can be filed by the Unit after the final conclusion of criminal proceedings, its prolongation and its termination (Article 25 of the Act). A drawback of this solution is the impossibility for participants in the proceedings to directly initiate the procedure of participation in the Programme.

The Act prescribes in detail the form and content of the motion for inclusion in the Programme, where special attention should be given to several elements. The first is certainly the fact that the motion itself should include an assessment of the importance of evidence or information for the proceedings as well as circumstances that indicate that there is a danger for that person, the other is the questionnaire on personal data, property and finance, circle of close persons, etc. and the third is the Unit's assessment both on the danger to the person for whom protection is being requested and on the danger to which the Unit would be exposed in case of inclusion in the Programme (Article 26 of the Act). The time limit for the Unit to forward its estimate on exposure to danger is 15 days (Article 26 of the Act). The Commission session is scheduled within 3 days at the latest after receiving such estimate (Article 28 of the Act). After that, the Commission must, within 8 days, pass a decision by which it accepts or refuses the motion (Article 28 of the Act). The drawback of the procedure lies in the fact that the Commission's decision is final (Article 28 of the Act), since it cannot be challenged by any legal remedy. In other words, there is no second instance, since the legislator found that no institutional protection in relation to the Commission decision should be granted, even though the right to legal remedy is a right guaranteed by the Constitution. The conclusion that can be made based on explanation of the Act is that the desire was to preserve full confidentiality of decision-making and hence of the Programme. Once there is a positive decision on participation in the Programme, the Commission orders the head of the Unit to conclude the agreement of participation with the protected person (Article

28 of the Act). The Act mentions rescission of the agreement in two instances: first as a consequence of incorrect data even though failure to provide correct data is later prescribed as a cause for termination of the Programme (Article 35 of the Act), and secondly in relation to conditions for rescission of agreement as its comprising part. On the other hand, the protected person is obliged to fully observe the instructions and to take all necessary measures for achieving financial independence (Article 30 of the Act). Unit's obligation to implement the programme with minimal, necessary limits to the rights and freedoms of the protected person (Article 30 of the Act) has full justification, since the Programme is intended for his/her protection rather than as an instrument that will hinder or limit the rights and freedoms of the protected person. The Act also prescribes an exception from regular procedure of inclusion in the Programme. If a competent judicial authority deems that there is a direct danger to life, health, physical integrity or property of participants in proceedings or persons close to them, it shall inform the Unit of the need for taking urgent measures (Article 27 of the Act). Urgent measures shall be implemented under two conditions: they have to be ordered by the Unit's head, and agreed to by the participant in criminal proceedings (Article 27 of the Act). If both conditions are met, the Unit head immediately informs one of the authorised proposers on the implemented urgent measures that, as the statute prescribes, last until the Commission passes a decision on the motion for inclusion in the Programme (Article 27 of the Act), therefore, regardless of whether the decision shall be positive or negative.

The second procedure is the extension of duration of the Programme. Its existence is a consequence of the fact that the legislator did not, even in orientation terms, set the limits of longest possible duration of the Programme, leaving it up to the Unit to decide on its real duration, depending on the circumstances of each given case. What is striking is that the legislator did not limit the number of possible extensions of the Programme. The motion for the extension of the programme can be filed by those who are authorised to file the motion for inclusion in the Programme. The only difference exist in the fact that, in addition to doing so ex officio, authorised judicial organs can also file a motion for extension based on the proposal of the protected person or the Unit (Article 31 of the Act). The motion is filed to the Commission at the latest 30 days before the expiry of the time for which the agreement was concluded (Article 31 of the Act). The procedure itself is almost identical to that in relation to the motion for inclusion, which is why the provisions governing it shall apply accordingly (Article 31of the Act). What is also similar is the content of the motion, where the most notable difference is that the former must designate the ruling on inclusion in the Programme (Article 32 of the Act).

Third procedural situation in regards to the Programme is its termination. The Programme is terminated: if there is no longer need for protection, if criminal proceedings are initiated against the protected person for a criminal offence that compromises the justification of the Programme, if data given in the questionnaire are untrue, if the protected person, without reason, does not meet the obligations envisaged by the agreement and thus compromises the implementa-

tion of the Programme, or at the request of a foreign country to the territory of which the protected person has moved (Article 31 of the Act). As can be seen, these are the reasons for which it is necessary to consider and decide whether the circumstances of the given case should result in the Programme being terminated. The main reason that can lead to the termination of the Programme is the fail of further need for protection. Even though it is not prescribed, by analogy with the ruling upon inclusion in the Programme, it is assumed that the assessment of whether it is still necessary and justified to implement the Programme should be made by the Unit. What remains open is the question of whether such estimate is binding on the Commission or not. The second reason, which is also subject of estimation, is the opening of criminal proceedings against the protected person, since it does not lead to automatic termination of the Programme. When it comes to the very criminal offence, it is prescribed that it is irrelevant when the criminal offence was committed (before or after the inclusion in the Programme), it is only important that the proceedings have been initiated after the inclusion in the Programme, and another important factor is its gravity. Providing incorrect data in the questionnaire is another reason for termination of procedure (ultimately, as stated before, for rescission of agreement). This also raises the question whether such estimate is binding on the Commission or not? The last reason is the motion of a foreign state to the territory of which the protected person has been moved. The same persons who can file a motion for inclusion in the Programme can submit a motion for termination of the Programme. The only difference is that the proposal for the filing of such motion can only be made by the Unit, not by the protected person (Article 34 of the Act), which is a result of the very nature of the motion. In all other respects, procedural provisions on procedure of inclusion in the Programme shall apply (Article 34 of the Act).

In addition to termination of Programme, the Act also recognizes its conclusion (Article 36 of the Act). The difference between termination and conclusion is explained by the legislator by the fact that in case of conclusion the Commission only passes a declaratory decision by which it states that the reasons for conclusion have been met, whereas, in the case of termination, it is necessary to assess the conditions as a consequence of their different legal nature. In addition to termination, the reasons for the conclusion of the Programme are the expiry of time limit for which the agreement was concluded, death of protected person and statement of protected person that he/she waived protection (Article 36 of the Act). Filing *ex officio* of the motion for conclusion of Programme is in the exclusive competence of the Unit (Article 36 of the Act) which is, at the same time, competent for keeping original documents of the protected person (Article 24 of the Act), and charged with permanent keeping of records on personal data of the protected person, both original and changed (Article 40 of the Act). The unit is also obliged to take care of data protection through approval and supervision over the access to original data (Article 20 of the Act). Specifically, that means that the Unit's head approves and monitors access to data in relation to the Programme (Article 41 of the Act) which is why records of the persons to whom access was granted are kept (Article 40 of the Act). Decision on the lifting of confidentiality of such data is passed by the Commission.

Provisions of the Act also enable a simple model of international cooperation. The Unit is authorised to directly apply to the foreign state to accept the protected person, to apply measures, and to act on the request of the foreign state on acceptance of protected persons and application of measures in the Republic of Serbia (Article 39 of the Act).

9. Conditions and Procedure for Applying Secret Surveillance Measures

1) As indicated before, the new CPC does not include provisions that would envisage general conditions for the application of secret surveillance measures; it likewise does not include special provisions for proceedings on organised crime cases. The conditions are prescribed for each measure individually (in the same manner or differently), while are not regulated at all for certain measures (control of business and personal accounts). This is the major and most dangerous drawback of the new CPC. Even though not without faults, the provisions of the 2001 CPC were much better in this respect.

Two general conditions were prescribed for the implementation of these measures: a) that there is reasonable suspicion, or grounds of suspicion, that a given person "alone or with other persons" is *preparing an organised crime offence* and b) that this organised crime offence could not otherwise be discovered, proven or prevented, or that this would be possible only with considerable difficulties.

With regard to the first condition: the suspicion requested does not relate to the organised crime offence being committed, it is sufficient that an organised crime offence could be committed. Grounds of suspicion should exist in relation to at least one person. This is the drawback of these provisions, since there should also be suspicion regarding the existence of a criminal organisation and membership of a given person in that organisation. These are usually indications. There has to be more of them and they have to relate to a certain person or persons. The person for whom there are grounds of suspicion that he/she is a member of organisation for the commission of organised crime offences, shall have the capacity of a suspect (Article 221 subparagraph1). This is a departure from the rule, consequently accepted in the CPC, that the activities of pre-trial proceedings are taken only once there are grounds of suspicion that a criminal offence has been committed.

In regards to the second condition: implementation of measures can be considered only if the objective (revealing, proving and preventing organised crime) cannot be achieved in another manner or if its realisation would be much more difficult in another manner. This is the principle of proportionality, which has to exist not only when determining measures, but for their entire duration. The principle is also valid for the determination of coercive measures in order to ensure the presence of the accused in criminal proceedings in general (Article 133 paragraph 2 and 3). The objective cannot be achieved "in another manner" if criminal prosecution authorities cannot obtain any other sources of knowledge on the facts or if searching for them would be "connected to considerable (disproportionate) difficulties".

2) The mentioned measures are applied on the basis of written and reasoned order of the investigative judge, passed at the request of the public prosecutor. The content of that order is determined in Article 504q paragraph 2. Appeal against any order, including this one, is not allowed. Measures, including those from Articles 232 and 234, can last for six months and can be extended twice for three months. Therefore, they can last for twelve months at the longest. Both when ordering and extending the measures, the investigative judge is obliged to particularly assess whether they are necessary and whether the same result could be achieved in a manner less limiting citizens' rights. Measures are implemented by police authorities. After the implementation of the measure, they forward a special report, which content is prescribed, to the investigative judge and the public prosecutor. If the public prosecutor fails to initiate criminal proceedings within six months from the termination of measure, all data collected must be destroyed, and the persons to whom the data collected refer shall be informed of the fact that the measure was implemented, provided that their identity could be established.

Specificities of this special procedure also include the following:

a) Objects and proceeds (profit) from crime can be temporarily seized in these proceedings. For this seizure, it suffices that there are grounds of suspicion that an organised crime offence was committed, which means that these measures can also be applied in pre-trial proceedings. The legislator has envisaged a fairly complicated procedure of temporary seizure of objects and pecuniary benefit (ruling of first-instance court authority, appeal against ruling, hearing in second-instance proceedings). It is possible to seize valuable assets (buildings, machinery, and factories) and considerable amounts of proceeds. On that, see Articles 504r to 504h.

b) Public prosecutor can award special protection to a given witness, cooperating witness and members of their close families (Article 504p). According to the new CPC, provisions on witness protection (Articles 117 to 121) apply accordingly to the suspect, that is, the accused who is at the same time a witness in criminal proceedings (Article 122).

c) Depositions and information that public prosecutor collects in pre-trial proceedings can be used as evidence in criminal proceedings, but the decision cannot be based on them alone (Article 504j). This provision is lacking in the new CPC, but is also redundant, since the investigation is transferred to the competence of the public prosecutor and the police. Depositions and information collected by the police in these proceedings shall be separated from the records according to general regulations, except for the deposition of the suspect acquired pursuant to Article 226 paragraph 9.

d) According to the CPC/2001 the public prosecutor has special power to request from other state authorities, banks and other financial organisation the control of operations of a given person, forwarding of documents and certain information (Article 504k). Similar provisions are given in Article 234, but there, necessary data are forwarded pursuant to an order issued by the investigative judge at public prosecutor's proposal, and here, directly at the request of the public prosecutor. In the new CPC, this issue is regulated in Article 86.

e) The prosecutor is authorised to attempt to obtain testimonies through a plea bargain with one of the suspects or the accused members of a criminal organisation (see more on the part of the text dealing with cooperating witness).

f) According to the provision of Article 24 paragraph 7, in proceedings for organised crime offences, the first-instance court panel consists of three judges, and the second instance court consists of five judges (Article 504g CPC/2001). Therefore, there is not jury or individual judge in these proceedings.

II. PROCEEDINGS BEFORE THE SPECIALISED DEPARTMENT FOR ORGANISED CRIME

(R. Dragičević-Dičić)

Organised crime in Serbia has emerged during the nineties, in conditions of nearby wars and sanctions, acting in firm connection with the regime in force at the time, under the protection of the police and State Security Service. The whole region of the former Yugoslavia became a fertile ground for emergence and development of criminal organisations which primarily dealt in the trade of stolen cars, smuggling of cigarettes, trafficking in narcotics, human trafficking, smuggling of petrol and arms, and abductions. After the change of regime in Serbia, in October 2000, the fight against organised crime did not begin immediately, even though a White Paper on Crime was published at the time, naming over 100 different criminal groups with some 700 members, including the names of the group bosses and prominent members. Following the change of regime, criminal organisations have embarked on a battle to preserve their positions, acquired wealth and influence on certain structures of power where they still had their partners. On July 19, 2002, the late Prime Minister Đinđić's government had passed the Act on Organisation and Competences of State Authorities in Combating Organised Crime, thus making the beginning of the fight against organised crime official. The preparations for building the court rooms, organisation of police, prosecutor's office, courts and training of judges began.

Serbian Prime Minister Zoran Đinđić was assassinated on March 12, 2003, before the criminal prosecution of criminal organisations and the work of the Special Prosecutor's Office and the Belgrade District Court Special Department had begun. Charged with his assassination were precisely the members of the largest organised criminal group, the so-called Zemun clan, together with the members of Special Operations Unit of the Republic of Serbia Police, headed by the Unit's former commander, Milorad Ulemek Legija. After the Prime Minister's assassination, Serbian government had introduced the state of emergency and started the "Sabre" operation, in the course of which 2,697 persons were imprisoned, whilst 11, 665 persons were brought in, and 3,560 criminal reports were filed against 3,946 persons for 5,671 criminal offences. Analysis on the legality of this action, in the part related to the increased police authority, is still being conducted.

Special Department for Organised Crime within the Belgrade District Court was established in April 2003 according to the Act on Organisation and Compe-

tences of State Authorities for Combating Organised Crime. Most judges were chosen among judges of the criminal department of Belgrade District Court, while one judge was chosen from Novi Sad District Court. Due to the workload at the end of 2006 the number of judges was increased to 11. There were some criticisms in regard to the selection of judges with claims that there were no clear criteria that ensured the selection of the best judges. However, it is necessary to point out the fact that judges from the Special Department were chosen from district court judges, mainly from the Belgrade District Court, who were already selected according to criteria applied in the regular selection procedure.

There may be doubts only concerning the validity of criteria for the selection of judges and the functioning of the division of powers principle, which guarantees the independence and impartiality of judges. This is a separate question that requires special analysis and must refer to general principles of election of judges and the functioning of judicial power. At the time of establishment of the department there were no specially trained judges in Serbia for acting on organised crime cases. During the first two years of work the judges of the Special Department participated in significant number of seminars locally and abroad that were devoted to specificities of organised crime, international conventions referring to that field as well as issues regarding the implementation of the ECHR. It is necessary to continue the education of judges and prosecutors, especially concerning the application of certain investigating techniques, the relationship of judges with the standard of fair trials and other human rights, as well as the application of international conventions and international legal assistance.

Although the statute prescribes that judges are allocated to this position for two years (many justified objections were put forward regarding possible abuse of this provision), no judge has been removed so far from the department after the expiry of two years nor have there been any rumours. Thus, the continuity in cases was preserved and the pressure on the independence and impartially of judges was averted. It is true that this provision seriously puts in questions the independence and impartially of judges in this department since, although never applied, there is a possibility to make pressures. On the other hand, the application of the same statute on the Special Prosecutor's Office resulted in undertaking personnel changes, which raised doubts amongst the public about the independence of the Special Prosecutor's Office.

Special Prosecutor for Organised Crime works with a team of 7 deputies. The Act has also limited their term of office, and particularly debatable is the provision that enables resolving the Special Prosecutor of duty even before the expiry of the term of office without defining special conditions and reasons for doing so. This rule in a politically unstable environment of a transition country does not secure a high level of independence and impartiality, bearing in mind the selection of prosecutors. Only a fully independent Special Prosecutor with his/her deputies may manage the non-selective and "no compromise" oriented policy of criminal prosecution.

However, it is clear that all issues regarding fair trial and court independence may not be solely resolved by statute, but require building the right legal

culture where principles are understood and respected within the decision-making system. The draft act on state bodies in proceedings for very serious offences should prescribe certain new provisions that will solve the problems concerning the court organisation in organised crime cases – including the duration of the term of office of judges in the Department and the Special Prosecutor and his/her deputies.

Proceedings against several organised crime groups were conducted following the establishment of the Special Prosecutor's Office and the Special Department. Those groups were previously known to the police and registered as such and their actions were known to the public. Namely, the first charges were brought against criminal groups for actions between 1999 and 2003. The following cases were conducted or are still pending in the Special Department: against the Zemun group; the Surcin group; certain members of the Special operation unit and the former commander Milorad Ulemek – "Legija"; the Maka group; the Jotka group; the Krusevac groups; the Pozarevac group; the Group "Firm" with 44 members mainly from Novi Sad, which was formed by deceased Dusan Spasojevic, the leader of Zemun group; the group of Kristijan Golubovic; the group of Milan Zarubica; the so-called 'bankruptcy and road mafia'; customs' mafia; the group organised for committing fraud, abuse of office, money forgery and forging signs of value. Several cases are conducted against organized groups whose members or organizers are foreign nationals and these cases deal with the criminal offence of human trafficking and unauthorised production and trafficking in narcotics. Most of those charged are Chinese, Albanian, Russian, Ukrainian, Arab and Bosnian citizens.

The analysis of statistical data on the work of the Department shows a tendency towards increased workload, in terms of number of cases, number of persons accused, and the structure of cases related to type and number of criminal offences.

Thus, during 2003, from the establishment of the Department, 13 indictments were filed, with a total of 156 persons accused. A total of 90 persons were in custody, varying in duration. These cases were completed in 2004 and 2005, while the case for murdering of the former prime minister is in its final phase.

The first charges were brought in a case against the Maka group for killing of General Bosko Buha. This proceeding ended in passing the judgment of acquittal due to the lack of evidence which was later annulled by the decision of the Supreme Court. The proceeding is suspended since most of the accused are at large.

Indictment for the assassination of Serbian Prime Minister Zoran Đinđić was brought forward on August 21, 2003, against fifteen persons, for the criminal offence of association in the service of enemy activity and murder of representative of highest state authorities together with the criminal offence of terrorism and attempted murder. The proceeding against the 29 accused regarding the criminal offences in connection with the actions of Zemun gang was later on severed from the aforementioned proceeding. Milorad Ulemek – 'Legija', the former commander of the Special Operation Unit, together with late Dušan Spasojević,

the head of Zemun clan was denoted as the prime defendant and the organizer in both proceedings. When it comes to the assassination of the Prime Minister, in addition to Milorad Ulemek, other defendants were the members of the Special Operations Unit, which acted within the Republic of Serbia Ministry of Interior, under the control of State Security Service, members of the RS Ministry of Interior and members of the Zemun clan. By court order, they are all being prosecuted *in absentia*. The status of cooperating witness was given to four persons. One cooperating witness was killed last year, while an important eyewitness was murdered under unclear circumstances at the beginning of the proceedings. The judgement for the case of murder of the former Prime Minister was finally pronounced in May 2007.

On September 3, 2003, indictment was also brought forward against 10 persons, where the prime defendant and organiser of group is Milorad Ulemek-Legija, while also accused are Radomir Marković, then Chief of State Security Sector, Nebojša Pavković who at the time was Yugoslav Army Chief of Staff, Milorad Bracanović, then the Chief of Counterintelligence and Security Department in the Special Operations Unit. This indictment included other members of the Special Operations Unit. One of the defendants was also Slobodan Milošević, former President of Yugoslavia. The proceedings against him were severed due to the ongoing trial before the Hague Tribunal, and were suspended after his death. For the same reasons the proceeding against general of the Yugoslav Army Nebojsa Pavkovic was severed. The procedure was conducted for the criminal offence of criminal association with the aim of murdering famous politician Ivan Stambolić, Slobodan Milošević's political adversary, and attempt of murder of another famous politician and also president of a political party, Vuk Drašković, who is presently the Minister of Foreign Affairs. These crimes were committed during year 2000. The trial ended with a judgment according to which two persons were convicted with a maximum sentence of 40 years of imprisonment, three were charged with 30 and one with 35 years, whilst the others were sentenced to 15 or less years of imprisonment.

Proceedings were also conducted against the so-called Firm group (44 defendants), for crimes of murder, drug trafficking, mixed larceny, etc; another procedure was instituted against Milan Zarubica and 15 other persons related to organisation of production and sale of amphetamine on the territory of South-East Europe. In addition to mentioned cases, the criminal offences also related to other crimes of murder, unauthorised production and trafficking in narcotics, criminal association and one procedure for human trafficking against a group of 6, organised by Arab citizens.

In the course of 2004, 17 new cases were received, with a total of 96 defendants, 58 of whom are in custody. A total of 13 cases were resolved. The majority of criminal offences were made up of the same crimes, mainly unauthorised production and trafficking in narcotics, human trafficking, mixed larceny, extortion, fraud, money counterfeiting, etc. Two indictments for human trafficking referred to the group of six to ten accused (one was organized by persons of Arab nationality). Six indictments referred to unauthorized production and circulation of

narcotics committed in groups of four to six people, of which one was organised by a Dutch and a Slovenian national and one member was a Russian national.

During 2005, 15 new cases were received, with a total of 105 defendants, 61 of whom are in custody. One of the proceedings was conducted for corruption in the judiciary. One of the ten accused was the judge of the Supreme Court of Serbia who used his influence on the decision of the Supreme Court in appeal proceeding in the case for organized crime (the final decision is not yet passed). This judge was indicted for committing the criminal offence of corruption in judiciary. This proceeding was not completed with a final decision and the judges were convicted to eight years imprisonment and other persons who were responsible for bribing as well as abetting of the judge were convicted to shorter prison sentences. Three procedures were conducted for criminal offences of human trafficking, involving groups of 6, 12 and 14 persons, where two groups included foreign citizens. One group was organised by Chinese citizens and it acted on the territories of Serbia, Croatia, Bosnia and Italy, whilst another acted also on the territory of Ukraine (two girls were illegally brought from there and the further actions were planned). Other proceedings were conducted for criminal offences related to drug trafficking and grave robberies and murders. At the end of that year indictment was brought forward against three Serbian citizens for robbing a jewellery store in Japan, where the estimated price of the jewellery stolen is some 25,000 euros. This is considered to be one of the largest robberies in Japan. Eleven cases were resolved by passing the final judgement, while four were completed by suspension or joinder.

In 2006, 21 new cases were received which included 265 accused, of whom 121 are detained. Several cases were initiated upon the charges against bankruptcy mafia with 35 accused (14 of them are in custody, among them there is the former president of the Commercial Court in Belgrade and one judge of that court); road mafia with 53 accused (29 in custody); traffic mafia with 28 persons (13 in custody) and finally "City Transport mafia" with 16 accused (9 in custody).

The indictment against "bankruptcy mafia" was brought on November 11, 2006, for 105 criminal offences that damaged the state for 50,000,000 euros. Indictment against members of the "road mafia" brought on November 22, 2006, charges the defendants with organised issuing of counterfeited cards used for charging the road toll; the damage to the state is estimated in millions. In the case of "traffic mafia", the defendants have organised fake traffic accidents and by fraud and counterfeiting earned around 1,000,000 euros by charging insurance from national and foreign insurance companies. This group acted on the territories of Serbia and Bosnia. An undercover agent was used in this case for the first time. "City Transport Mafia" has organised the counterfeiting of 5.7 million city transport cards in the amount of 128,000,000 dinars. Two indictments refer to human trafficking and two for trafficking in narcotics. The majority of other offences in 2006 are in the domain of economic crime. In total there were 30 cases that year: 14 have been resolved, 11 of which by passing a judgment.

During year 2007, until the beginning of March, 8 new cases were received for 27 defendants, 17 of whom are in custody. One case, dealing with a group

of twelve persons, concerns human trafficking. According to the indictment, the group operated on the territory of Serbia, Macedonia, Turkey, Albania and Croatia and it involved human trafficking of a great number of people, mostly Turkish and Albanian nationals. Other cases refer mainly to proceedings derived from the proceeding against the "bankruptcy" mafia.

In February 2007 there were 30 ongoing cases in the Special Department. From the beginning of the Department's work, until February 2007, a total of 29 cases were resolved by judgment.

In March 2007 there were a total of 23 ongoing cases in the Investigation Department. It is interesting to note that during 2006 there were 74 pending cases in this Department, with a total of 551 defendants. In 2005 there were three times less cases, 24 cases in work, with a total of 113 defendants. The investigating procedure was initiated in the "customs' mafia" case. Forty-one people are accused in this case. They are charged for forging documentation for haulage trucks across the border by which it seemed as if those vehicles were in transit but in reality the transported goods ended up on the Serbian market. The damage to the state is estimated to be 15,000,000 euros. Most of the cases are under investigation and concern offences against economic interests, and soliciting bribes in cases against the bankruptcy mafia, while two proceedings concern the offence of human and narcotics trafficking. Thirty-nine people are under investigation.

According to the data of the Special Prosecutor's Office from mid–2003 to the end of 2006, this office rejected four criminal reports against four individuals for committing the criminal offences of fraud and abuse of office. In the same period the charges against 23 persons were sent to regular prosecutors' offices (all in 2006) and mainly because of criminal offences of forging signs of value and abuse of office.

Even though there is a connection between organised crime, corruption, and money laundering, it can be noted that, except for the first two aforementioned, no indictments were brought forward for corruption. There were occasional accusations of money laundering, but the accusations were incorrectly qualified or quite meaningless. It is apparent that there is not enough possibility and knowledge to conduct more serious investigations regarding money laundering, and that co-operation with all institutions involved in the problematic is lacking.

Many analyses demonstrate that corruption is one of the biggest problems in Serbia. According to the report of "Transparency International" concerning corruption in 2005, Serbia was on 97th place in a list of 158 countries with the average mark 2.8 out of 10. Besides the proceeding conducted against the judge of the Supreme Court and the indictment against the "bankruptcy mafia", where the indictments involve corruption, there were no other indictments for corruption in connection with organized crime. Since it concerns specific forms of organized crime, the additional education of police and prosecutors is required in order to enable them to act in cases of economic and financial crime, aggravated forms of corruption in the economy and in the sphere of public procurements and privatization.

When it comes to criminal offences of human trafficking it is characteristic that, in proceedings conducted before the Special Department, in the majority of

cases the judgment was pronounced for smuggling of people. This is primarily due to the amendments of the statute that took place in the meantime. Only in a few cases the judgment was pronounced for the basic form of human trafficking; these were the cases concerning trafficking of young girls from Ukraine and Serbia destined for prostitution. According to police data for 2006, a total of 37 criminal reports were filed for human trafficking, 33 of which concerned sexual exploitation and violent prostitution, which is why increased influx of these cases can be expected. In addition to the education of police, prosecutors and investigating judges that was already conducted, it would be necessary to organise additional education in order to gain more information on characteristics of this criminal offence, international conventions and practice.

If **sentencing policy** is analysed through decisions of the Special Department and the Supreme Court of Serbia (though adequate statistical data is still missing), it can be noted that, when it comes to criminal offences of unauthorised production and trafficking in narcotics, the organisers were convicted to final imprisonment sentences ranging from 10 to 15 years, which is within the prescribed statutory maximum of 15 years, whilst group members were sentenced to imprisonment ranging from 3 to 9 years. As for human trafficking, due to the customary re-qualification to smuggling of people, the sentences are less strict and range from 1 to 4 years. Regarding criminal offences that were judged for as human trafficking, the largest sentence so far is 8 years of imprisonment for the organiser of group related to the case were the two damaged parties were girls from Ukraine, whilst sentences for group members range from 3 to 6 years of imprisonment. According to the judgment (that is not final) regarding the case of corruption in judiciary, the Supreme Court Justice was sentenced for a single imprisonment sentence of 8 years for three criminal offences, and persons guilty of giving bribe to 3 years. For criminal offences of mixed larceny and extortion, sentences for organisers range from 10 to 12 years for organisers, and 1 to 8 years for members, depending on their role. Procedures for criminal offences against economy are pending and there are no significant judgments in that area. The highest sentences were pronounced to those convicted of murder of Ivan Stambolić and attempt of murder of Vuk Drašković, where by the second instance judgment two persons were convicted of imprisonment for 40 years, two to 30 and 35 years respectively, and three to 15 years each. In certain cases for drug trafficking and mixed larceny, some persons were conditionally sentenced since their membership in the organised criminal group had not been established.

Until March 2006, 13 persons were released, and charges against 9 persons were dropped on the main trial, while procedure against 10 persons was suspended since the prosecutor dropped the charges before the beginning of the main trial. Seven of those persons were involved in the case of the assassination of the Prime Minister.

The Supreme Court of Serbia acting up to the beginning of March 2007 in appeal proceedings passed decisions in 19 cases. Two decisions were annulled while one was partially annulled. Other decisions were confirmed. Certain decisions were partly altered in respect of punishment or form of offence. The reversal of punishments is not of great significance and it usually entails the reduction and increase of punishment for two years.

One case was resolved after filing the extraordinary legal remedy where the court rejected the request for extraordinary review of final judgement. Twelve more cases are pending in the appeal proceedings before the Supreme Court of Serbia.

Another 12 cases on appeal are before the Supreme Court, while the case against Milorad Ulemek and others for the murder of the former President of Serbia Ivan Stamoblic is in the third instance proceeding on appeal. Since it concerns small number of final decisions of the Special department it is still early to make an analysis of the sentencing policy.

Length of proceedings from the time of bringing forward of indictment to first judgment ranges from 5 months to 1 year and 10 months, where the average length of proceedings is 14 months. In one case with 44 defendants, the procedure lasted for 2 years. The oldest case still pending is the one for the assassination of the Prime Minister and all the circumstances concerning the duration of this trial are well known. Within the department, special efforts are made to ensure the reasonable duration of each proceeding, which is guaranteed by Article 6 of the ECHR. The biggest problems are cases with a high number of accused persons (over 15) where it is necessary to conduct a proceeding in one to two court rooms specially designated for such a purpose, as well as the time required to timely summon the indictment, especially if it concerns foreign nationals (when there is a need to translate the extensive indictments and even find sworn-at-court interpreters for certain languages). The participation of great number of lawyers also represents a problem since it is necessary to ensure their presence. It must be said that the barristers, to a great extent, respect their obligations towards the special department and very few trials were adjourned due to their absence. Besides four courtrooms in the special department, of which only two are equipped for cases with greater number of accused and one for a group more than 20 accused, the large courtroom in the Palace of Justice in Belgrade is also used. From 2007, due to the increased workload and the inability to timely schedule trials, certain trials are scheduled in the afternoon.

The **length of detention** is also connected to the length of the proceeding. Judges of this department are aware of their responsibility when deciding on detention, both in regard to reasons for detention and in its duration. Undoubtedly the number of accused, the seriousness of criminal offences and their number influence the duration of the proceeding and the duration of the detention. Organised criminal groups have contacts and members abroad and certain criminal offences are done on the territory of several neighbouring countries due to which the fear of escape of the accused is a frequent reason for stipulating detention. The ECHR case law already gave some guidelines in regard to the duration of detention in organised crime cases but there is no unified answer. In each case, reasons for detention must be carefully analysed and defined. As it is the obligation of the court to apply a measure less serious than detention in each case where it is possible, very often a court pronounces a measure of prohibition to leave a place of residence with corresponding orders. This measure proved to be very useful and efficient. Bail is pronounced rarely since in most cases a fear from escape is not the only reason for pronouncing detention. The implementation of the new

Criminal Procedure Act, especially provisions regarding the house detention will find adequate use in cases before this department (especially in cases of criminal offences against economic interest and abuse of office).

One of the frequent occurrences in organized crime proceeding is **trial in absence** of certain members of a group which is done according to the provisions of Article 304 of Criminal Procedure Act. Several organizers of criminal groups are trialled *in absentia*, especially when it concerns foreign nationals in human trafficking cases and trafficking in narcotics. Decisions on trial in absence are adopted based on the fact that a person is at large and the arrest warrant has been issued. The international standards and the decisions of the European Court of Human Rights allow that exceptionally a person is trialled in absence if it is proved that judicial bodies did everything to inform the accused about the proceeding against that person. Persons who are trialled *in absentia* are *ex officio* allocated a lawyer and sometimes his/her relatives choose the barrister. The law enables the repetition of the trial upon the request of the accused person and his/her barrister if there are circumstances that enable the trial in the presence of the accused person (Article 413 of the Criminal Procedure Act). Recently a convicted person was apprehended and sent to penitentiary institutions and it is still not known if this right will be used).

Some specific traits of the Special Department for Organised Crime are related to **application of special evidentiary actions,** primarily the examination of cooperating witness, surveillance measures and recording of telephone and other communications from Article 232 and 504lj of the Criminal Procedure Code, engagement of undercover agent, controlled deliveries, possibility of examining special witnesses through video-conferences, using audio-video recordings of examination of witnesses before the investigating judge on the main trial, as well as possibility of personal data protection of the witness or the damaged party. Some of these measures are used for the first time in Serbian practice, whilst the application of certain measures, such as secret audio and visual surveillance, is considerably increased. Given that these measures have to be applied carefully, primarily because of human rights protection, the practice built through the work of the Special Department and the Supreme Court of Serbia is valuable.

Examination of cooperating witness has so far been used in five cases of organised crime. In the case for the assassination of Prime Minister and in the procedure against the so-called Zemun clan, four cooperating witnesses have been examined. Dejan Milenković, Bagzi is the only cooperating witness who agreed to testify in public in the main trial, whilst others have used their right from Article 504ž to exclude the public during their examination.

In the case for murder of Ivan Stambolić one cooperating witness was examined. Owing to his cooperation, the body of the victim was found after almost three years. Other cooperating witnesses, four in total, were examined in four different cases, regarding counterfeiting of money, unauthorised production and distribution of narcotics and extortion as well as in case of Jotka group.

The role of cooperating witnesses in cases against organised crime has proven to be important both in domestic and foreign practice; this is particularly true for cases where there is a larger degree of organisation within the group, with

stricter rules and discipline. As this a new measure in Serbian legislation, it was only after its application that certain problems and deficiencies became apparent. These were somewhat mitigated by the new Criminal Procedure Code. Obviously, the prosecutor was given a possibility to make a bargain with the promise to discard criminal prosecution against the aforementioned (according the Criminal Procedure Act that applies now). The court passes the final decision on that bargain: according to Article 504e in investigation and before the beginning of the main trial, it is the panel from Article 24, paragraph 6 which passes the decision, while on the main trial it is a panel that acts in main trial. The dilemma about the morality and justice of this type of evidence is also present in the work of the Special Department and with judges and prosecutors. The court, according to Article 504d, has to estimate if the importance of cooperating witness and testimony for discovering, proving and preventing other criminal offences of criminal group is more significant that the damaging effects of crime he/she committed. Consequently, the court should estimate the testimony of the cooperating witness, as well as to use this means as the final evidence, by at the same time respecting the provisions on fair trial.

Case law is still at the beginning and certainly the importance and role of cooperating witnesses will be closely examined in the future.

From current case law it is already debatable if the court decided on the status of cooperating witnesses, while the prosecutor is the one who can deprive the person of such a status. According to Article 504i if the cooperating witness fails to act in keeping with his/her obligations referred to in Article 157 of the present Code, he/she shall lose the status of cooperating witness, prosecution against him/her shall continue, and he/she shall receive a sentence within the limits envisaged in the Criminal Code. It is not clear what will happen if the court estimates that the cooperating witnesses are not telling the truth or do not respond to all questions. It is possible that, by analysing evidence, the court finds out that cooperating witness did not fully tell the truth or did not reveal all circumstances known to him/her and still keeps his/her privileged status. Perhaps it would be better if the persecutor bears the full responsibility for this witness since it is a type of bargain between the prosecutor and the accused person where the court would not bear consequences for the possible acceptance of a bargain if this bargain is not implemented.

The new CPC prescribes a better solution for cooperating witnesses since it prescribes the determination of the sentence for a cooperating witness within the limits prescribed by the Criminal Code with its reduction by half. Exceptionally, at the proposal of the Public Prosecutor, the court, taking into account the importance of the evidence presented by the cooperating witness, behaviour of the cooperating witness before the court, his/her previous life and all other relevant circumstances, may exceptionally declare the cooperating witness guilty, but decide not to impose a sentence on him/her (Article 163). This solution is more just since it enables the mitigation for committing the criminal offence, as well as the confiscation of pecuniary gain acquired in committing the offence, as well as the protection of accused rights in the procedure. However, bearing in mind the circumstances in establishing the Special Department, the severity of criminal

offences and the structure of organised crime groups, it is hard to imagine that some of the current witnesses would accept the offer to testify with the possibility of mitigating the sentence, even if the question of cooperating witnesses was not regulated by law.

It is important to emphasise that all cooperating witnesses, except Dejan Milenkovic, were examined at the main trial without the presence of the public but in a manner that their identity was not hidden in any way. Thus, the parties have time and the possibility of examine all witnesses, the possibility of questioning their credibility and the validity of the testimony as well as the possibility of to requesting confrontation of these witnesses with accused persons. In this manner the standards of fair trial and the case law of the ECHR were fulfilled.

The use of measure of surveillance and recording of phone and other conversations and communications by other technical means and optical recording of persons from Article 232 of the CPC is increased in procedures for organised crime, in order to facilitate and speed up the investigation. The application of this measure is frequent in all other countries which are fighting the organised crime. It is prescribed as a separate measure by the UN Convention against transnational Crime in Article 20 where the special investigation techniques for efficient fights against organised crime are described as well as for investigating purposes in organised crime criminal offences. Undoubtedly, the fight against organised crime requires the application of special evidentiary actions. The importance of evidence that are lawfully gathered is crucial for the determination of the existence of an organised criminal group, organisers and their roles, as well as the nationality and origin of certain members of a criminal group, circumstances of committing the offence and the time and location of criminal groups' actions. This type of evidence is equally important for the defence and the prosecutor. This type of evidence was mainly used in human trafficking cases, unauthorised production and circulation of narcotics, corruption and money forgery.

The case law of the Special Department is constantly developing in this manner with the aim of having a unified practice and each judge must accept the principle that a court decision should not only be based on this evidence.

Since it concerns the evidence that imposes upon the right to privacy and fair trial, guaranteed by Article 6 and 8 of the ECHR, this evidence is carefully used in the Special Department, both in cases when the decision is made *ex officio* and upon the request of the party.

By now this measure was most often conducted according to Article 232 of the CPC and only in several cases according to Article 504lj. The reason for this is the fact that in large number of cases the preliminary and investigating procedure is conducted according to provisions referring to organised crime, namely, before the case is delegated to Special Prosecutor. The important difference between these two articles is the following: according to Article 504lj surveillance and recording may last up to six months and may be extended for another six months, which is a significantly longer time period than the one prescribed by Article 232 CPC. This Article certainly enables a higher extent of legal certainty. Moreover, Article 504lj unlike Article 232, prescribes the application of this measure when

there is a suspicion that an organised crime offence will be committed, if the offence cannot be discovered, proven and prevented, or its discovery will be very difficult. This possibility entails the use of an undercover agent who concludes legal operations and provides services. This solution is in accordance with international conventions that approve and encourage these measures with the aim of preventing and discovering the criminal offences of organised crime. Serbia ratified these conventions. A restrictive interpretation of Article 232 entails that the measure of "recording" may be used only when the crime is committed; this creates problems in practice since it leads to different interpretations. The extensive interpretation entails this measure with preparatory activities and time framework in which the organised crime group acted. The provision of the new CPC is more precise and prescribes exceptional use of this measure in the preparation of criminal offence. However, the application of this measure to a wider number of criminal offences is questionable (Articles 146 and 147 of the new CPC).

The most frequent reasons for reviewing legality of this measure refer to orders of investigating judges of other courts that did not contain all elements prescribe by law. For example, one part of orders was pronounced against people who were owners of the telephone number and not against accused persons who used that phone number and who were suspects. The court *ex officio* rejected evidence gathered in this manner. Often an order is issued for several persons before the procedure is initiated and charges brought. This complicates the respect of secrecy of such data, and it is apparent that Article 233 paragraph 3 is not observed, namely, the material collected related to persons against whom criminal proceedings have not been initiated is not being destroyed.

It is not necessary to issue orders for each new telephone number that a suspect uses, which impedes the review of legality of issued orders and their time duration. It would be sufficient, according to Article 232 of the CPC, to issue one order for a person under surveillance whose telephone conversation was recorded. This order would contain a telephone number that is known to be used by a suspect, as well as all other numbers and types of phones that will be used within a certain time limit. It is common that members of a criminal group change telephone numbers due to the fear of tapping of telephones.

It is accepted that conversations between co-accused may be fully used when there is an order for only one of the accused. Very often prosecutor's proposals do not contain any information that indicates the grounds of suspicion that a person committed a criminal offence for which this measure may be pronounced but only stipulates that there are grounds of suspicion. Grounds of suspicion that a person committed a certain criminal offence are a requirement to allow the measure of telephone tapping and recording of other conversations. Thus, these grounds of suspicion must be elaborated in the order with the aim of preventing discretion and the abuse of this measure.

At the beginning of the special department it often happened that the audio material was sent for expert analysis in order to verify the identity of a person. This type of expertise is very expensive and lasts for long. It happens that the accused persons, due to fear of expertise, refuses to speak but only nods and uses

gesture in court, all with the aim of avoiding the possibility to compare their voices with an audio recording and consequently use this material as an evidence.

Recently, the court uses the expert opinion to a lesser extent but it uses other indirect evidence more freely in determining the identity of a speaker, mostly through the testimony of other accused persons or witnesses who recognise the voice of a person or a person is led to a certain direction; through confirmations on seized telephones from the accused, whose telephone conversation was recorded or other evidence that derive from the content of the conversation and undoubtedly indicate a certain accused person.

Material gathered from surveillance and recording is extensive and is submitted after bringing the charges. Thus, sometimes it requires several days to listen to all the recorded conversations. The main aim is to verify the authenticity of transcripts of audio recordings. Recently, it happens very often that the court, upon the proposal of the prosecutor and defender, listens only to recordings explicitly required by a party or recordings that the court estimates should be listened to. This certainly shortens the duration of the main hearing.

Most accused persons do not question the fact that it concerns their conversation or the content of the conversation but have objections to the interpretation of these conversations by the prosecutor.

The ECHR, in several cases, analysed recordings as the investigating action for example in cases *Schenk* v *Switzerland*, *Khan* v *England* and in both cases found that the right to a fair trial guaranteed by Article 6 of the European Convention was breached, although the unlawful recorded material was used in the first case (without the order of the investigating judge) and in later the right to privacy was violated (guaranteed by Article 8 of the European Convention). The court passed this decision since it determined that the defence had an opportunity to challenge the recorded material as well as the authenticity of recorded material, especially taking into account that there was other evidence against the accused.

An undercover agent has so far been used only in one procedure before the Special Department. This is certainly a new challenge. The ECHR judgement in the case *Teixeiro de Castro v Portugal* is very interesting. In this case the court analyzed the role of an undercover agent in uncovering drug dealers. The court found the violation of the right to a fair trial since the police went beyond the role of the undercover agent and instigated the execution of criminal offence.

The possibility of examining witnesses through video conference was used in the case for the assassination of Prime Minister Zoran Đinđić, when foreign expert witnesses from the Institute in Wiesbaden were examined. In several cases, the option of viewing the recording of examination of injured party before the investigating judge was used in the main trial. The cases concerned human trafficking.

Hearings before the investigation judge were done in manner that the right of defence to be present at the hearing and to be confronted with the injured party was respected. Since it often concerned the foreign nationals as injured parties video recording was very important from the point of view of the principle of

directness when the court has more possibility to estimate the testimony of an injured party.

Another important issue in the work of the department is the issue of accepting the **functional jurisdiction** of the department in cases when the indictment does not contain all the required elements that indicate the crimes committed by members of organised group in the function of organised crime. A special problem presents a situation when it does not concern the functional jurisdiction of the Special Department but it concerns the subject matter and territorial jurisdiction of the first-instance criminal department of the Belgrade District Court (the same court to which the special department belongs).

The special department of the Belgrade District Court by the ruling of the Special Department of March 9, 2007 (confirmed by the ruling of the Supreme Court of Serbia No. Kž. II o.k. 51/07 of April 2, 2007) declared itself functionally incompetent and relinquished the case to Belgrade District Court, namely to the first-instance criminal department of that court as a court having a subject matter and territorial jurisdiction regarding the criminal offence "abuse of office" from Article 359, paragraph 3 in connection to paragraphs 1 and 4 of CC.

In another case, by ruling of February 23, 2007 the non-contentious panel declared itself of not having subject matter jurisdiction and relinquished the case to the Second Municipal Court regarding the criminal offence "abuse of office" from Article 359, paragraph 1. This ruling was confirmed by the decision of the Supreme Court No. Kž. II o.k. 38/07 of March 16, 2007.

We should also mention the circumstances related to **interest of the public,** the media and even individuals from executive power in the work of Special Department, given the type of certain cases, where the accused are high representatives of the former regime, command of the Special Operations Unit (which was at the time a part of State Security Department), the commander of State Security Department Radomir Markovic, the head of the Headquarters of the Yugoslav Army Nebojsa Pavkovic and even late Slobodan Milošević, members of the Zemun clan, well-known businessmen, judges, prosecutors.

Media interest is often justified and benevolent. However, some media contribute to the creation of certain atmosphere, influence and pressure on the work of the court, whether in favour or against the accused. Parties in the proceedings often use various media to promote their attitudes, motions, evidence analysis, and sometimes even the representatives of the executive speak in favour of somebody's guilt or criticize the work of the court.

The work of the court must be subject to public scrutiny. However, criticism and declarations by members of the executive in the course of proceedings pose a serious problem, since this creates the impression that court is not independent and that its impartiality is being influenced. In addition, the principle of presumption of innocence is often violated. It is to be expected that procedures related to observance of this principle will be initiated before the European Court of Human Rights. The case law of the ECHR in estimating the independence and impartiality of the court starts from the views of a citizens who is an observer and it often concludes that the right to a fait trial was violated is that citizen believes that the behaviour of the executive branch may be considered as improper influence at the

work of court. Very often in its courtrooms, judges of the Special department publicly warn about behaviours by which the presumption of innocence, principle of independence and impartiality are breached. However, these warnings were never publicly broadcasted because sometimes they are targeted at the media.

III. CONFISCATION OF PECUNIARY GAIN AND SEIZURE OF OBJECTS

(R. Dragičević-Dičić)

Through the provisions of the Criminal Code and Criminal Procedure Act, domestic legislation allows for the possibility of seizure of pecuniary gain acquired by committing a criminal offence, but these possibilities have shown to be inefficient in practice, both in terms of application and in terms of proving the origin of property. The general impression is that the statutory provisions do not give strong enough options to embark on combat for revealing and seizure of material gain, and hence, the existing provisions are not used often in practice. In Serbian court practice, sentence is still used as the most important tool in combat against crime and in prevention. Only lately, with increase of economic crime, where it is evident that individuals have gain considerable wealth at the expense of the state and where so-called dirty money had gained its way into regular financial flows, there is increased interest in the problematic of efficient seizure of proceeds from crime. It is also becoming more apparent that the way to go in efforts to suppress crime, organised crime in particular, is to seize property.

The legal provisions of the Serbian Criminal Code are the following:

The Criminal Code prescribes security measures as the type of criminal sanction. One of them is the **confiscation of pecuniary gain** prescribed by Article 87 of the Criminal Code. It is prescribed that objects used or intended for use in the commission of a criminal offence or resulting from the commission of a criminal offence may be seized. The objects may be seized even if not property of the offender if so required by the interests of general safety or it there is still a risk that they will be used to commit a criminal offence, if without prejudice to the right of third parties to compensation of damages by the offender. Moral reasons are left aside which were prescribed by the former statute.

This confiscation of objects is not mandatory. The mandatory seizure of these objects for certain criminal offences (narcotics, arms and forged objects) is prescribed. It is interesting to compare the criminal offence of money laundering from Article 231, paragraph 5 where the confiscation of monies and property is prescribed without stipulating that this concerns pecuniary gain with the criminal offence of accepting a bribe from Article 367 and unlawful mediation from Article 399 where it is prescribed that prizes, gifts or pecuniary gain must be seized.

Since this a measure within the criminal sanctions system, its main objective is to prevent repeated offences. This measure is applied with relative frequency, and always when the law so requires. It is most often used in cases related to narcotics; trade in arms, various forms of counterfeiting.

Significant amounts of seized narcotics and means of production of narcotics were seized in the Special Department by using this measure. For example, in the case concerning three years production of amphetamines (case "Zarubica"), five tons of chemicals used for production of narcotics, a significant number of expensive machines and laboratory equipment were seized. The seized objects were worth 1,000,000 euros. Hence, the question of confiscating immovable was posed when a factory facility (a building) owned by the mother of the organiser of the criminal group was seized in the first-instance proceeding. The facility was used for three years for the sole purpose of producing amphetamine. The object was not residential, but a plant, without which continued production of large amounts of amphetamine was impossible. In the second instance, this part of judgment was set aside. Serbian court practice does not accept seizure of immovable, even though this is neither explicitly allowed nor prohibited by law. Perhaps the seizure of immovable may be interpreted in a wider sense in future case law. It would be simpler if the statute prescribed the seizure of real estates which would be important for cases concerning money laundering.

This issue can also be important regarding human trafficking, when it is apparent that entire objects, motels for existence, are used solely for the purpose of sexual exploitation of victims of human trafficking. Of course, there is the option of seizure of pecuniary gain in these cases as well, but it would be very difficult to establish that a given immovable, often formally owned by a family member, was gained by perpetration of a crime. Treating the immovable in certain cases as objects in the wider civil-law sense would contribute to more efficient seizure of objects.

There is not one procedure before the Special Department in cases of human trafficking or smuggling where a car had been seized as the means that is often used for organised and continued transport of persons. In on case, a vehicle that was used and adapted for transport of narcotics from Turkey into Serbia was confiscated.

The Act on Enforcement of Penal Sanctions in Article 211 regulates the treatment of seized objects. The court executes the measure of seizure and, depending on the type of object, decides whether to sell it, reassign it to another state body or charity organisation or destroy it. Financial means obtained from selling the objects are collected within the budget of the Republic of Serbia as well as other means deriving from pecuniary gain. It would be more appropriate to prescribe that part of these means should go into the budget for courts, intended for the improvement of the fight against organised crime, work of the police, prosecutors and courts. This practice already exists in Europe.

In practice courts have a problem in enforcing this measure. Often due to the inadequate premises and inappropriate conditions for preserving seized good, those objects get damaged, although significant material gain may be acquired from their sale. The Ministry of Justice temporarily concludes contracts with certain agencies that sell confiscated objects for the needs of courts. However, this practice is not continuous.

Seizure of pecuniary gain is envisaged by Articles 91 to 93 of the CC and provisions of the CPC. According to Article 91, no one can detain pecuniary gain obtained by a criminal offence, and it is also stated that such gain shall be seized under specified conditions. This means that the statutory provisions make the seizure of pecuniary gain mandatory, but in practice, this provision is used as optional.

Article 92 further states that objects to be seized can be only such objects and assets, that is, any pecuniary gain, that is established to be a result of perpetration of a crime in relation to which the proceedings are being conducted. If seizure is not possible, the perpetrator shall be bound to pay the amount corresponding to the gain. Pecuniary gain shall also be seized if it was transferred to third party or gained for other person. This also indicates the possibility that pecuniary gain can also be seized from legal persons, which is regulated in more detail by Article 514 of the CPC. It envisages a relatively complicated procedure of examining the representative of legal person and establishing pecuniary gain, which is why this possibility is seldom used in practice, even though it would be very important in cases of economic crime.

Article 93 of the Criminal Procedure Act provides protection to an injured person to submit an indemnification claim for the recovery of pecuniary gain during the criminal proceeding and within certain time limits after the completion of a criminal proceeding. If the injured person submits indemnification claim for the recovery of objects acquired through commission of criminal offence or of a corresponding value, the pecuniary gain shall only be determined in respect of the part exceeding the claim for indemnification.

Criminal Procedure Act regulates procedural rules for seizure of pecuniary gain. These are included in Articles 513 to 520 and in special provisions in Heading XXIXa, related to organised crime. New Criminal Code does not include major changes in this area, but rather expands the application of special provisions to offences that are not result of organised crime.

Article 513 prescribes that in the course of proceedings, the court and other authorities before which criminal proceedings are conducted are bound to obtain evidence and investigate circumstances which are relevant for the determination of pecuniary gain. Unfortunately, this obligation applies in practice only to a court panel and it is done during the main trial. It is obvious that police, prosecutors' offices and investigating judges do not collect this evidence, nor do prosecutors submit these requests. The problem partly lies in the fact that there is a massive case workload and the investigation mainly concerns the gathering of evidence related to criminal liability when there are more than 40 accused persons. However, this practice cannot be accepted in organised crime cases. This question remains if the police and prosecutors' offices have the necessary human resources to conduct these investigations. When it concerns organised crime, especially in field of commerce, it is necessary to have trained specialised people in order to follow the flow of money and property, people who can be put in charge of investigation and who will conduct the financial investigation. Not even the precise and confidential data about the financial status of the accused and ownership of immovable and movable property and property of family members or close relatives is recorded. In organised crime cases it would be necessary to determine this information already in the phase of the police investigation – owned property, owned vehicles, bank accounts, securities, shares etc. Moreover, Article 504k CPC gives the possibility in these cases to a prosecutor to request from responsible state authorities, banks and other financial institutions to perform control over business transactions, to submit required documentation and data that may serve as evidence of a criminal offence of acquired property, as well as

information about the suspicious transactions in terms of Convention on Money Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. By the time of the main hearing it is already too late for these investigations.

Pursuant to Article 515, the court may establish the amount of pecuniary gain freely, if establishing it precisely would cause disproportionate difficulty or considerable prolongation of procedure. This provision should be important for court practice, since it avoids long-lasting precise determination of values of illegal property. The court should estimate the value as correctly as possible, using all available evidence.

According to Article 517 the court may pronounce the confiscation of pecuniary gain in the convicting judgement and other mentioned decisions in which the court decided on the responsibility of the accused.

Article 516 is significant since it enables the application of provisional measures of securing the property that is the subject matter of the seizure. In practice, this measure is used only in cases of enabling the pecuniary request of the accused and not the possible confiscation of pecuniary gain. The ban on disposing property and registration of such a prohibition in the land register is frequently pronounced.

Special provisions of the CPC referring to organised crime (most important are from 504f to 504t) give a possibility to an investigating judge, namely to a trail chamber, to confiscate property and pecuniary gain if no aforementioned conditions have been met, upon the request of the prosecutor. Based upon interpretation of Article 504s and 504t, it may be concluded that it is possible to provisionally confiscate lawfully acquired means to prevent the future confiscation of pecuniary gain. Furthermore, Article 504c prescribes the duration of the provisional measure (at the latest until the completion of the proceeding before the first instance court) and provides the legal protection and determined the appeal procedure in case of passing the decision on provisional confiscation of property and pecuniary gain.

According to data from the investigating department for organised crime, the prosecutors have so far failed to request such measure. The reason probably lies in the lack of efficient financial investigation on the origin of property, since, according to Article 504 paragraph 3, the motion for pronunciation of such measure must include the description of objects or pecuniary gain gained from crime, data on person using or holding such object, and reasons for grounds for suspicion that they are proceeds of crime. Protection of property so provided should be important regardless of whether the investigation is conducted by the police under prosecutors' supervision, the prosecutor himself/herself, or the court. It enables unexpected seizure of property, eliminating the possibility of it being subsequently hidden. The option provided in the Convention on Money Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, envisaging possibility of temporary freezing of assets abroad, is not being used. In one proceeding that was completed by passing the final decision, the case files contained many reports of transfer of money, requests for payment between banks in different countries etc. Although in this case it was obvious that the concealment of money flow was present, none of that was the subject matter of the investigation of the indictment.

The temporary seizure of property is not efficient measure during the trial since the criminal group will enable a cover up and hide the property.

In addition to existing solutions, the new Criminal Procedure Code envisages in Article 86, paragraph 4, that upon a proposal from the Public Prosecutor, the court may issue a ruling by which the financial transaction, suspected of constituting a criminal offence or of being intended for the execution or concealment of a criminal offence or proceeds from criminal offence, shall be suspended.

Article 93 prescribes that the responsible state authority temporarily administers the seized property and assets until the measure lasts.

In Serbia there is no statute that would regulate the management of property seized by the court in criminal proceedings, either temporarily or permanently. During 2006, the Ministry of Justice has formed a commission for drafting such an act. A proposal of Act on Management of Seized Assets was made, and adopted as a Bill in November. This proposal envisages the forming of a Directorate for Managing Seized Property – property temporarily or permanently seized in criminal proceedings and proceedings for commercial transgressions. In addition to managing the assets, the Directorate would be competent to establish the existence and check-up of property at request from the court, police or public prosecutor, give opinions related to implementation of statutes, conduct training programmes related to seizure of property, assist in giving international legal aid. Adoption of this act is necessary.

Given that in the court practice so far the instances of seizure of property are negligible, this needs to be changed, and existing legislative solutions should be amended. Primarily, it is necessary to examine the option of transferring the burden of proving the origin of property form the court to the defendant, and, in certain cases, having in mind international standards and the European Convention on Human Rights, define in another manner the presumption on origin of property, envisaging the option that pecuniary gain is not limited only to the criminal offence for which the trial is being conducted. According to some comparative solutions, in case of established "criminal behaviour over a long period of time" it is possible to investigate the origin of property and seize it without establishing a causal connection between the criminal offence and the property. What is established is the fact that the property and wealth are a result of professional crime. Comparative solutions where the prosecutors offers evidence for a crime committed and the type of property, and the defendant provides evidence of the legality of the property's origin have proven to be an efficient tool in combat against organised crime.

The European Court for Human Rights decided on the use of presumption and determination of the origin of property, as well as the presumption of innocence, protection from self-incrimination and the peaceful enjoyment of his/her possessions within the cases of property confiscation. The best case here is *Phillips* against *England*. In this case the Court determined that the right of fair trail was not violated nor was the right to peaceful enjoyment of possessions, determining *inter alia* that confiscation of property warrant on the basis of the Act on Trafficking in Narcotics has the aim of confiscating property and monies that would be used for committing future criminal offences. Thus, there was proportionality between the used means and ends. It was also determined that

summoning of *Phillips* to explain the origin of property which he disposed of in the last six years is not contrary to the right to fair trail.

In Serbia there is no statistical data related to seizure of pecuniary gain. According to data collected from the Special Department for Organised Crime, it is visible that only objects and money found on the defendants are seized – most often in cases related to narcotics and human trafficking. The amounts of money range from 500 to 20,000 euros per person. In several cases the court seized much greater sums of money – in several cases of which one was against eight accused persons concerning the circulation of heroin and hashish that were completed in 2005 around 360,000 euros found with the suspects were seized. The court also obliged the accused to pay the amount of 1,980,000 dinars for the remaining acquired pecuniary gain. In another case completed in 2005 for the same criminal offence against 38 accused persons, the amount of 15,000,000 dinars, that was found with accused persons were seized. In the case of the murder of Ivan Stambolic the accused undertook to pay 10,000 to 30,000 euros, rewards for committing a murder on the name of acquired pecuniary gain.

Members of Pozarevac gang, according to the final judgement of 2004 concerning narcotics are obliged to pay amount of 185,000 euros.

In the aforementioned "Zarubica" case, related to production of amphetamine, during the main trial, the court was informed by the Swiss Ministry of Justice that the defendant holds a Swiss bank account with the amount of 2, 500, 000 Swiss francs. It is interesting that in the forwarded request it was stated that Swiss authorities by accident came to this information and that on their initiative the Switzerland voluntarily forwards the information. The court, requested the freezing of these assets, which was granted, and the procedure for their permanent seizure is underway. In this procedure, the court estimated the pecuniary gain the group could have gained over the three years of production at 15, 000,000 dollars, seized the money found on the defendants, the money in the Swiss bank, and obliged them to pay additional 10,000,000 dollars in dinars counter value. It will be difficult to fully implement this measure, since all the property of the first defendant was transferred abroad, and the immovable are not formally owned by him.

Suppressing of organised crime becomes impossible without cooperation and legal aid between countries, in the part related to establishing, tracing and seizure of proceeds from crime. Even though Serbia has ratified the all important conventions related to organised crime, they are seldom applied in the work of the police, public prosecutors' offices and courts, in particular in the part related to establishing of illegal gain and seizure. This is partly a result of inadequate legislation governing this field and the possibility for implementing such actions.

Section Four

PROBLEMS IN ORGANISATIONAL LAW

ANALYSIS OF THE IMPLEMENTATION AND PRACTICE OF THE ACT ON THE ORGANISATION AND COMPETENCE OF STATE AUTHORITIES IN COUNTERING ORGANISED CRIME

(N. Važić)

The Republic of Serbia up to July 2002 did not have a legally elaborated organisational structure of state bodies responsible for the suppression of organized crime, except for the establishment of the Office for Fighting Organised Crime within the Ministry of Interior in 2001 as a specialized organisational unit of the Ministry responsible for prevention and suppression of this form of criminality and the improvement of cooperation with responsible bodies of other countries in fighting organised crime.

The Act on Organisation and Competences of State Authorities in Combating Organised Crime (hereinafter: Organised Crime Act) was published in the Official Journal No. 42/02 of July 19, 2002 and entered into force on July 27, 2002. This Act regulated for the first time the organization of state bodies in the suppression of organized crime and their competences. From that time until July 18, 2005, namely in the period of three years, this statute suffered seven modifications which indicates a certain wandering of the legislator in regulating this issue.

The objective of this statute, namely the establishment, organization, competence and powers of special government bodies for detecting and prosecuting perpetrators of criminal offences (Article 1), definition of organized crime (Article 2) and organised crime and other organized groups (Article 3) are prescribed in the introductory provisions.

In terms of this Act, organised crime is the "execution of criminal offences by an organised criminal group, which is, of other organised group or its members, for which the envisaged sentence is imprisonment of four years or more". The problem lies in the fact that this type of organised criminal activity is also regulated by Articles 504a and 232 of the Criminal Procedure Act (hereinafter CPC) and the new CPC, whose entering into force is postponed until June 1, 2007. It is also partly regulated by Article 346 of the Criminal Code (CC), which also gives the description of the criminal offence of "criminal association". Thus, there are several definitions of the notion of organised crime which creates problems in the implementation of these statues, as well as from the aspect of applica-

tion of the legality principle and the protection of human rights. Bearing in mind the fact that according to provisions of Article 15a of the Organised Crime Act, which stipulates that the provisions of the CPC shall apply unless otherwise prescribed by this statute, the principle of legality is put in question since the "creative arbitrariness" is permitted in cases when it is decided whether it concerns the case of organised crime or not, as well as special competences of the police and prosecutor's office.

Namely, in practice the evaluation whether it concerns the criminal offence of organised crime or not is done by using the definitions from both statutes or by their combination, regardless of their differences and of the fact that, in terms of definition of the organised crime, the Organised Crime Act is *lex specialis* in regard to the Criminal Procedure Act (Article 15 of the Organised Crime Act).

A similar situation exists concerning the definition of the organised criminal group and other organised groups.

Organised Crime Act defines "organised criminal group" as a group of three or more persons, which exists for a certain period of time, acts consensually in order to commit one or more criminal offences for which the prescribed sentence is four years of imprisonment or more, in order to directly or indirectly gain financial or other gain. "Other organised group" is defined as a group that is not formed with the immediate objective of committing criminal offences and that does not have such developed organisational structure, defined roles and continuity of membership, but is in the service of organised crime.

Unlike this definition of an organised crime group and other organised group, the CPC (that will be in force since January 1, 2009) in Article 504a, paragraph 3 prescribes the application of provisions for criminal offences of organised crime to cases when it is a result of actions performed by three or more persons associated in a criminal organization, i.e. a criminal group, with the aim of committing grave criminal offences in order to gain proceeds or power and when, in addition, at least three of the following conditions have been met (that each member of the criminal organization, i.e. criminal group, had previously determined, i.e., obviously determinable task or role; that the activity of the criminal organization was planned for an extensive or indefinite period of time; that the activities of the organization are based on implementing certain rules of inner control and discipline of members; that the activities of the organization are planned and implemented internationally; that the activities include applying violence or intimidation or that there is readiness to apply them; that economic or business structures are used in the activities; that money laundering or illicit proceeds are used; that there exist influence of the organization, or part of the organisation, on political structures, the media, legislative, executive or judicial authorities or other important social or economic factors). The statute does not use the term organised criminal group or other organised group in Article 504a, paragraph 4 and Article 504d concerns a criminal organisation without giving its definition.

The CPC does not resolve this discrepancy in regard to the definition (who may be perpetrator of the criminal offence of organised crime – members of organised criminal group or other organised group) since in its Article 21 it equal-

ises the criminal group and criminal organisation, determining that the organised crime is a result of actions performed by three or more persons associated in a criminal organization, i.e. criminal group, with the aim of committing grave criminal offences in order to gain proceeds or power and when, in addition at least three of the following conditions have been met (these conditions are defined in the CPC), without giving a clear definition of the criminal group or criminal organisation.

These non-adjusted criteria for determining the perpetrator of the criminal offence of organised crime, together with the different definition of the organised crime leaves room for arbitrariness in practice.

The problem with these definitions does not only lie in the fact that they are not uniform but in the fact that they are not precise. Thus, for an organized criminal group this statute requires actions performed by three or more persons and it requires a certain length of time, while for other organised group it does not require a developed organisational structure, minimal number of members or the length of time, but that this group is in the function of organised crime. Thus, the conditions that refer to length of time of an organised criminal group and other groups are not precise, since the length of time is not determined in order to know when the requirements are met. Thus, in practice it is a factual issue and it is resolved in each particular case.

Unlike this statute, the procedural statute does not prescribe as a mandatory requirement a certain duration of the criminal group (it does not prescribe the other criminal group) but it requires that the activity of the criminal organization was planned for an extensive or indefinite period of time (which equalises it with a criminal group).

The number of persons within the group is not defined when it concerns the "other organised groups" but it is logical that this number should not be smaller than the one which is required for an organised criminal group from the Organised Crime Act or criminal organisation from the CPC (the application of this act is postponed until January 1, 2009 – Article 21). This imprecision again requires that the courts treat these issues as factual in a particular case by not discriminating the non-criminal group in relation to criminal group.

When it concerns "other organised group" it is, in the light of the perpetrator of the criminal offence of organised crime, defined in a negative way (the procedural statute does not mention this type of group) since this group is not established to directly commit criminal offences. It also does not have a developed organised structure, defined roles and continuity in membership, which practically means that it concerns an *ad hoc* group which would commit a criminal offence punishable by four years of imprisonment or a more severe punishment. It also requires an additional condition for the criminal offence of organised crime to exist: that the group must be in the "function of organised crime". Determination of all these conditions created serious problems in practice, especially due to unclear notion of "being in the function of organised crime". It also may result in the application of special and stricter rules of procedure concerning the criminal prosecution of perpetrators of organised crime offences, on the estimation of the

prosecutor that the group in question is in "the function of organised crime". This leaves room for extensive interpretation, which should be avoided.

With the aim of specialising certain state bodies in the chain for suppressing the organised crime, the Organised Crime Act prescribed the establishment of special bodies for discovery, prosecution and adjudicating criminal offences of organised crime and their special jurisdiction. They are the following: special prosecutor's office, special service for suppression of organised crime, special departments of competent courts and a special detention unit.

1. Special Prosecutor's Office

The District Public Prosecutor's Office in Belgrade shall have jurisdiction for the territory of the Republic of Serbia to proceed in criminal offences specified in this Act, whereby a Special Prosecutor's Office for suppression of organized crime is established within the District Public Prosecutor's Office in Belgrade. Unless otherwise stipulated by this Act, the provisions of the Law on Public Prosecution shall apply to the Special Prosecutor's Office. Thus the Organised Crime Act is *lex specialis* in relation to the Public Prosecutor's Office Act (Article 4).

The Special Prosecutor's Office is managed by a Special Prosecutor for suppression of organized crime (hereinafter the Special Prosecutor). The Special Prosecutor is appointed by the Chief Public Prosecutor from among Public Prosecutors and Deputy Public Prosecutors meeting the requirements for appointment as District Public Prosecutor, under written consent of the appointee. The special formal requirement for the appointment of the Special Prosecutor is the decision of the Chief Public Prosecutor on seconding such a person to the Special Prosecutor's Office. The Special Prosecutor is appointed to a term of office of two years and may be re-appointed.

The Chief Public Prosecutor may dismiss the Special Prosecutor before expiry of his/her term of appointment. The statute does not prescribe reasons for dismissal of the Special Prosecutor which indicates the existence of the discretionary right of the Chief Public Prosecutor. Upon termination of his/her office the Special Prosecutor shall return to his/her previous post (Article 5).

It is very important that the head of the Special Prosecutor's Office dealing with criminal prosecution of perpetrators of organised crime offences (where this crime is usually connected to powerful commercial and business structures through which influence on media and government is possible) enjoy a high degree of independence and autonomy. However, a two year mandate of the Special Prosecutor, as well as the power of the Chief Public Prosecutor to dismiss the Special Prosecutor before the expiry of his/her term of appointment upon his/her discretionary estimation, prevents the real independence and the stability of the Special Prosecutor's function.

In a procedural sense, the status of Special Prosecutor is regulated by rules referring to the status of the public prosecutor in preliminary criminal and criminal proceeding since he/she has rights and duties as a public prosecutor.

Upon becoming aware that a particular criminal case is a case specified in Article 2 of this Law, the Special Prosecutor shall approach the Chief Public Pros-

ecutor in writing, requesting from the Chief Public Prosecutor to confer or delegate jurisdiction to him/her. The Chief Public Prosecutor shall decide on the request specified in paragraph 2 of this Article within eight days (Article 6).

Statutory regulation of the Special Prosecutor's competences concerning the actual cases, further complicate the complex issue of competence in regard to the criminal offences of organised crime.

The statute requires from a Special Prosecutor to react at each case which contains the elements of organised crime by requesting from the Chief Public Prosecutor to confer or delegate jurisdiction to him/her. The discretionary power lies on the Chief Public Prosecutor. The statute does not prescribe how that power should be exercised (verbally, in writing, in the form of decision) and what should be the leading principles in delegation jurisdiction. The procedure is unilateral since the statute does not prescribe the possibility that other state bodies, courts or other prosecutors' offices request from the Chief Public Prosecutor to confer jurisdiction to the Special Prosecutor, nor does it prescribes the obligation of those bodies to *ex officio* inform the Special Prosecutor about those cases in order to be able to act upon his/her powers.

A time limit of eight days for the decision of the Chief Public Prosecutor upon the request of the Special Prosecutor is instructive, since there is no procedural sanction for non– observance of the time limit, nor is there is a form of decision on delegating or conferring the jurisdiction. The Special Prosecutor has to submit the request to the Chief Public Prosecutor in writing. However, the Chief Public Prosecutor does not adopt his/her decision in writing.

When it concerns the staff of the Special Prosecutor's Office the statute prescribes that the Special Prosecutor autonomously decides on certain number of staff (employees) while the deputy special prosecutors are chosen by the Chief Public Prosecutor at the recommendation of the Special Prosecutor. However, before choosing staff, the District Public Prosecutor shall pass the act on internal organisation and job classification in the Special Prosecutor's Office, with the agreement of the minister responsible for the judiciary (Article 7).

This is a logical solution since the Special Prosecutor's Office is the unit of the District Public Prosecutor's Office in Belgrade.

The statute does not prescribe what happens if the minister of justice does not give his/her consent, but it is evident that this act may not be passed without this consent. It did not yet happen but there is always a possibility in case if the District Public Prosecutor's decides to amend this act upon the recommendation of the Special Prosecutor.

The Chief Public Prosecutor, following recommendation from the Special Prosecutor, may second a public prosecutor or deputy public prosecutor to the Special Prosecutor's Office. Secondment may not exceed nine months and may be extended by decision of the Chief Public Prosecutor with written consent of the seconded person (Article 8).

The legislator's concept whereby the deputies of the Special Prosecutor are sent to Special Prosecutor's office upon the proposal of the Special Prosecutor is justified due to the fact that the Special Prosecutor is responsible for the work of the Special Prosecutor's Office. Consequently, it is logical that he/she chooses

his/her deputies. However, the non-existence of criteria for the appointment of deputies may lead to a situation where the appointed deputies do not have any experience in complex criminal matters. Unlike a special prosecutor who has to meet the requirements for a district public prosecutor this is not applied to his/her deputies (it should only concern a prosecutor or his/her deputy). This means that a deputy special prosecutor may be any public prosecutor or deputy prosecutor regardless of the rank of the prosecutor's office from which the deputy is sent. Since the Special Prosecutor's Office represents a special department of the District Pubic Prosecutor's Office in Belgrade, the deputy special prosecutor, although the legislator does not prescribe this explicitly, must meet the requirements for the election to a position of a deputy district public prosecutor. This entails four years of work experience in the legal field after the passed bar exam (Article 57 of the Public Prosecutor's Office Act).

Criteria for the appointment to the position of special prosecutor entail only the duration of years of service in the legal field after the passed bar exam, which is not sufficient bearing in mind the particularities of the matters in which a prosecutor should act, as well as the requirement of specific knowledge. The stipulation of other specific criteria besides working experience should be a requirement for the establishment of Special Prosecutor's Office, an office capable of professionally performing its tasks in fighting the organised crime.

The nine months term of office of the deputy special prosecutor is very short although it may be extended. This is very important, bearing in mind the time required for specialization and the duration of proceeding in particular cases which, due to their complexity, last more than nine months. Due to the short term of office it happens regularly that a deputy whose term of office is not extended does not manage to end up a proceeding dating from the very beginning of his/her term. Besides, the statute requires a written consent of a deputy special prosecutor only for the extension of the term of office and not for the initial transfer to the special prosecutor's office, which is not a logical rule, bearing in mind the specificity of the field of work of the special prosecutor's office as well as the specific working conditions (need to protect the deputy public prosecutor). This reason requires a strong personality dedicated to work which means that no-one should be sent without his/her consent. Thus, the term of office of the special prosecutor and his/her deputies should last longer than that which is proposed in the draft act on the organization and jurisdiction of the Serbian government authorities in suppression of organized crime and other complex crime. This draft prescribes a renewable six years term of office of the special prosecutor and his/her deputies. There are some ideas that the term of office of the special prosecutor last for a certain time period while the term of office of the deputy should be linked to the duration of a case on which he/she is working. These ideas have not been accepted.

The problem with the term of office of a deputy special prosecutor is solved by seeking the written consent of the chosen deputies for the initial secondment to the Special Prosecutor's Office and so far the Special Prosecutor did not propose to the Chief Public Prosecutor a person for the position of deputy who does not meet the requirements for the deputy district public prosecutor.

An important element of each specialized prosecutor's office is to employ experts with deferent fields of expertise (financial knowledge) and not only prosecutors. Article 9 prescribes that if required by reason of conducting a criminal proceeding, the Special Prosecutor may request the competent government body or organisation to temporarily assign a person from such a body or organisation to the Special Prosecutor's Office. The drawback of this rule is the fact that it is limited to employees in state bodies. It would be much better if the statute prescribed the possibility to hire an expert outside the civil service and if the Special prosecutor has the competence to establish an expert team to assist him/her in particular cases. The statutory rule in fact entails the auxiliary staff (IT technicians, drivers, typists etc).

2. Police Service for Countering Organised Crime

Among official bodies responsible for the suppression of organised crime, an important place belongs to the police whose main task is connected to the preliminary criminal proceeding. The required ground for initiating the criminal prosecution and subsequent criminal proceeding is built in this procedural phase, that is, in discovering the criminal offence and gathering of evidence. The work of police is also important in suppressing committing of future criminal offences.

According to this Act a Special Service for Suppression of Organized Crime and corruption is established as part of the Ministry of Interior (hereinafter "the Service") to perform law enforcement duties in respect of criminal offences by this Law. This Service is functionally connected with the Special Prosecutor since it acts upon his/her request. The minister responsible for internal affairs shall appoint and dismiss the commanding officer of the Service following the opinion of the Special Prosecutor and shall specify the Service's activity, in accordance with this Law (Article 10).

This legal provision indicates the subordinate positions of the Special Prosecutor to the Service and the significant influence of the Special Prosecutor to the election of the commanding officer of the Service. This is normal since this Service provides support to the Special Prosecutor's Office.

The statute does not prescribe criteria and required qualifications for the commanding officer of the Service and its staff. Thus, the staff allocation in the Service is unclear and undefined. Due to the very sensitive issues and in regard to this state body it was necessary to prescribe in detail the criteria and qualifications required for the commanding officer and other staff of the Service and not to leave this to internal rules adopted by the Minister of the Interior.

The acting of the Service upon the request of the Special Prosecutor would entail that the Special Prosecutor and his/her deputies give instructions and directly set out requirements for performance of certain action of members of the Service, without respecting the chain of command in the Service. The communication channel between the Special Prosecutor's Office and the Service should always be open and without hierarchical interference and with the aim to avoid any type of external influence, as well as the influence within the Service by its hierarchical structures. However, it is not clear from the legal text if this is possible,

bearing in mind the prescribed role of the Minister of the Interior to independently regulate the work of Service for which the opinion of the Special Prosecutor is not required (this opinion is required for the appointment and dismissal of the commanding officer of the Service). The statute did not prescribe what happens if the minister does not act in accordance with that opinion.

The minister responsible for internal affairs may decide to deploy an organisational unit of the Ministry of Interior – the Gendarmerie, in preventing and detecting the criminal act of terrorism (Article 10 paragraph 4). The aim of this provision is to permit the use of one organised unit of the police for fighting organized crime which is set according to army principles. This is justified bearing in mind the fact that only a unit equipped and trained may fight terrorists. Although the criminal offence may be not be included in the classical criminal offences of organised crime this legal provision is justified, since the criminal offence of terrorism is mainly done by organised terrorist groups and organisations.

All government bodies and services shall at the request of the Special Prosecutor or Service:

1. without delay enable use of any technical means at their disposal,
2. ensure timely response of each of their members and employees, including superiors of the bodies or agencies, to give information or for questioning as suspect or witness;
3. without delay hand over to the Service every document or other evidence in their possession, or otherwise deliver information that may assist in uncovering criminal offences specified in paragraph 2 of this Law (Article 11).

Thus, the obligations of other state bodies are to provide the Service and Special Prosecutor with technical support, to assist in gathering information and evidence in the manner prescribed by law. When it concerns the obligation of state bodies to ensure, in a timely manner, the presence of their members to give information and to give statement at hearings, it is unclear how state bodies (except police) may fulfil their obligations in a case when a member does not come to the hearing.

It derives from this that the relationship between the Service and Special Prosecutor is unilateral (as is the case between the Special Prosecutor with other state bodies) since the other bodies are requested to cooperate with the Service and the Special Prosecutor only at their request and not ex-officio or on their request. The relationship between the Special Service for suppression of organized crime and other parts of the police is not regulated by statute since it is not clear from the text how the relationship between the Service and the regional police administration is solved in relation to other issues – outside the obligations concerning the technical support and submission of information and evidence at the request of the Service, such as the possible operational work in the field required by the Service and the Special Prosecutor.

This organisation whereby the service for discovering the criminal offences and prosecution of perpetrators is centralised may cause serious operational problems in practice, especially in discovering the criminal offences and gather-

ing evidence in the preliminary criminal proceeding. The regional or detached units of the Special Prosecutor's Office or at least the police Service for Suppression of Organized Crime would, in an operational sense, contribute to a more successful fulfilment of tasks in fighting organised crime.

3. Specialised Departments of Competent Courts

Within specialised state bodies the legislator decided to have specialised judicial units. So far Serbian legislation had specialised units only in relation to minors as perpetrators of criminal offences. Thus, there was a judge for minors and panels for minor issues. In the field of organised crime specialisation was done according to the type of criminal offence.

The District Court in Belgrade shall have first-instance jurisdiction for the territory of the Republic of Serbia in criminal cases specified in this statute. The Appellate Court in Belgrade shall have second instance jurisdiction in criminal cases specified in this statute (Article 12).

A Special Department for processing criminal cases specified in this Law (hereinafter "Special Department of the District Court") is hereby established within the Belgrade District Court. The President of the Special Department of the District Court shall manage the work of the Special Department of the District Court who is appointed by the President of the Belgrade District Court from among the judges assigned to the Special Department of the District Court. The President of the District Court appoints judges to the Special Department of the District Court for a term of two years, from among judges of that court or judges of other courts seconded to that court, with their consent. The President of the Belgrade District Court shall more closely specify the work of the Special Department of the District Court (Article 13). [156]

156 After passing the Organised Crime Act the specialisation of courts and other state bodies was continued with passing of the Act on Organisation and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes ("Official Journal of RS", No. 67/03, 135/04 and 61/05). According to this statute a prosecutor's office for War Crimes for the territory of the Republic of Serbia, with seat in Belgrade, is established to prosecute criminal offences as well as the War Crimes Investigation Service, special detention units and the War Crime Panel (consisting of several panels) and all within the Belgrade District Court. The panel also represents in some ways the Special department of the District Court of Belgrade since judges and the president of this panel are appointed and dismiss; thus have all other rights and obligations as the president and judges of the special department for organised crime with a four years term of office.

With passing of the Act on Organisation and Jurisdiction of State Bodies in Suppression of Cyber Crime ("Official Journal of RS", No. 61 of July 18, 2005) the specialisation of state bodies is further continued. A prosecutor's office for Suppression of Cyber Crime for the territory of Republic of Serbia is established within the District Public Prosecutor's Office in Belgrade as well as the Service for Suppression of Cyber Crime within the Ministry of Interior and the Cyber Crime Panel (which may have more panels). This panel is in fact the other special department within the District Court of Belgrade. Allocation of judges and prosecutors and the appointment of the Special Prosecutor and the president of the panel for this type of criminal offence are done in the same manner as for the special department for organised crime. The only difference is the duration of the

The legislator did not prescribe criteria for allocation of judges in the special department for organised crime, nor for the appointment of presidents of this unit. Thus, it is possible that the president of the Belgrade District Court allocates any judge meeting the requirements for a judge of the District Court to a Special Department for Organised Crime, regardless of the fact whether he/she acted in cases from the regular jurisdiction of the District Court and whether he/she has experience in complex criminal matters.

According to Article 41 of the Judges Act the requirement for the election of a District Court judge is six years working experience in the legal field after passing the Bar Exam (it is not mandatory to have previous experience in the capacity of a judge). In practice it means that a judge who had short experience as a judge in criminal matters (at least six years after passing the Bar exam and it does not have to be in the capacity of a judge but in any other legal matters) may be allocated in the Special Department for organised crime.

As no other requirements are required for the President of the Special Department this judge, according to statutory provisions, may become the head of the department. This extreme case did not happen in practice but the lack of any criteria leaves room for this option. In order to act in a complex criminal matter there is a need to have a significant working experience in criminal maters, which required the stipulation of expert criteria for allocation of judges in the special department. This is a significant deficiency of this statute.

The two years mandate of the president and judges allocated in the special department is too short, bearing in mind the complexity and duration of the proceedings in organised crime cases. Unlike the mandate of the special prosecutor and his/her deputies, where the legislator prescribed the possibility of extending the mandate, this possibility is not prescribed for the President of the Special Department and judges of that department. However, it is not explicitly prohibited, and it derives from the interpretation that it is allowed. This possibility was used in practice. Very often the first instance cases in certain cases of organised crime last more than two years and it may happen that the mandate of judges (the president and the other judges in panel) expires during the main trial in a particular case and his/her mandate is not extended either because a judge does not give his/her consent for the extension of mandate or for any other reason.

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term of office of the Special Prosecutor (four years) and the fact that the special panel is not established within the second instance procedure for this type of criminal offences.

It may be concluded that the intention of the legislator from 2002 was to specialise not only state bodies nut also courts as well as to centralise special court units in Belgrade District Court. This move may be observed in two ways. One hand, as the creation of small and specialise courts within regular courts and on the other hand as the legislator's aspiration to establish specialisation to a greatest possible extent and still to preserve the coherency of the regular judicial system. However, this approach has justification when it concerns specialised police and prosecutor's office but when it concerns specialised courts departments there is a danger in dividing the judicial system in smaller parts; these this issue must be tackled with more cautious. "Specialised departments" are in danger of becoming "specialised courts". The fact that the Special Department of the Belgrade District Court competent for organised crime cases is for a long time called special court not only by wide public and media but by experts indicates the existence of this danger.

This creates procedural problems: all evidence has to be presented again before the new president of the panel (Article 333 of the CPC) and it results in an additional delay due to the fact that the new president and the judge have to familiarise themselves with the content of the complex case which is already pending for a long period of time. Thus, the longer term of office of special department judges or a rule whereby the term of office will cease after the completion of the first instance procedure is necessary for the efficient work of this department. The new draft law prescribes a renewable six year term of office.

The act does not say anything about the non-contentious panel, prescribed in Article 24, paragraph 6 of the CPC, consisting of three judges when deciding on appeals against rulings of the investigating judge of the Special Department and other cases prescribed by law. However, in practice this issue is resolved by creation of ad hoc chambers amongst judges of the Special Department in accordance with the provisions of the CPC.

4. Conflicts of Interest and the Manner in which they are Resolved

Provision of Article 12 paragraph 3 of the Organised Crime Act envisages that the conflict of competences (jurisdiction) between ordinary courts for acting in organised crime cases is resolved by the Supreme Court of Serbia.

Given that the Special Department formed within the Belgrade District Court is an integral part of the Belgrade District Court, which is one of the ordinary courts in the Republic of Serbia, it is clear that the conflict of competences between the Belgrade District Court (and hence, its Special Department) and another ordinary court is resolved by the Supreme Court of Serbia.

The term "regular court" entails the view of the legislator that judicial power belongs to courts of general jurisdiction and special courts (Article 10, paragraph 1 of the Organisation of Courts Act). Municipal, appellate district courts and the Supreme Court fall within courts of general jurisdiction while courts of special jurisdiction are the Commercial court, the Higher Commercial Court and the Administrative Court. Moreover, Article 5 of the Act on Seats and Areas of Courts and Public Prosecutor's Office prescribed that the Belgrade District Court shall be established as a district court.

The exclusiveness of the District Court in Belgrade in relation to other district courts in the Republic is its exclusive first-instance jurisdiction for the territory of the whole republic in criminal proceedings for a certain type of criminal offences. This exclusive competence exists not only in relation to criminal offences of organised crime but to crimes against humanity and international law, prescribed in Chapter XVI of the Fundamental Criminal Code (which is not adjusted and cannot be equal with Chapter XXXIV of the Criminal Code and list of serious crimes against humanity and other goods protected by international law) as well as in regard to grave breaches of IHL committed on the territory of former Yugoslavia from January 1, 1991 (prescribed in the Statute of the International Tribunal for the Former Yugoslavia), crimes against computer data (prescribed by CC), criminal offences against intellectual property, property and legal traffic where the object or means of committing a crime are computers,

computer networks, computer data and their products (paper or electronic form, if number of authors copies is more than 500 or the material damage of 850, 000 is incurred).

Thus, the first-instance proceedings in the Belgrade District Court belongs t: one special department (for organised crime), two special panels (for war crimes and cyber crime; these panels more closely resemble a department) and one regular first-instance department competent for all other criminal offences outside the competence of the Special Department and special chambers.

The legal provisions contained in Article 37 to 39 of the CPC in force and Article 12, paragraph 3 of the Organised Crime Act do not resolve the question how to solve the conflict of jurisdiction between the department of the same court, namely the conflict of jurisdiction between the special department of the District Court in Belgrade for organized crime and the same department of that court competent for other criminal offences and the other panel of the same court (competent for war crimes and cyber crime). The statutes prescribing the organization and competences of panels do not regulate the conflict of jurisdiction but prescribe the application of the CPC. However, this question is not regulated by the CPC whose application is postponed to January 1, 2009 since the provision in Articles 36 to 38 prescribe the same procedure for resolving the conflict of jurisdiction as the CPC in force.

Both the CPC and the Organised Crime Act prescribe the resolution of conflict of interest between different courts and not between the departments of the same court. Namely, the court is bound to examine its subject matter and territorial jurisdiction, and as soon as it determines a lack thereof, shall declare its lack of jurisdiction and, after the ruling becomes final, refers the case to the court having jurisdiction and not to another department of the same court. No provision of the CPC or of the Organised Crime Act speaks about the conflict of "functional jurisdiction" and the manner for resolving this conflict. The lack of a legal rule in a situation when in one court, namely the District Court of Belgrade, there are four departments competent for first-instance criminal procedure creates significant problems in practice. When it comes to criminal offences of organised crime, where the Belgrade District Court Special Department has exclusive competence, according to present regulations, this Department may declare itself incompetent and relinquish the case to another ordinary court in Serbia, but not to another department of the same court. This results in unequal position of persons against whom the Special Prosecutor has initiated criminal proceedings before the Special Department for Organised Crime, if the court finds that the offence is not an organised crime offence, but one that would be within its subject-matter and territorial competence in "regular proceedings", in relation to persons for which another ordinary court would be competent in "regular proceedings". The legislator, in passing the Act on Organisation and Competences of State Authorities in Combating of Organised Crime, Act on Organisation and Competences of State Authorities for Combating War Crimes, Act on Organisation and Competences of State Authorities for Combating Cybercrime by which it prescribed the exclusive first instance jurisdiction of the District Court and obliged the same District Court to establish special chambers in certain cases,

should have also determined the manner of solving functional jurisdiction between the department and the chamber of the same court.

It is difficult to expect that in practice a conflict of competences (jurisdiction) could occur between the Special Department for Organised Crime and War Crimes Chamber, but it is very likely that this may occur between Special Department for Organised Crime and Cybercrime panel, for example if a cyber crime offence for which the prescribed sentence is imprisonment of four years or more is executed by an organised criminal group or other organised group in the service of organised crime. Most frequently, a conflict of competences takes place between the Special Department for Organised Crime and Belgrade District Court Department competent for other criminal offences.

One case was solved by final decision (KP. 6/07, KvP. 71/07) where the Special Department of the District Court in Belgrade regarding the objections against charges pronounced itself as not having functional jurisdiction to act upon charges of the Special Prosecutor. Consequently, the court decided, upon passing the final decision to submit the case to the District Court in Belgrade as a court having the subject matter and territorial jurisdiction, namely to the first instance criminal chamber of this court as a chamber giving a functional jurisdiction. The Special Department of the Supreme Court of Serbia by its decision in Kž. II o.k. 51/07 rejected the appeal of the Special Prosecutor due to lack of legal grounds. By this judicial interpretation the legal gap was solved. Here it concerns the resolution of *ad hoc* cases and not the general position of the Supreme Court in the sense of Article 28 of the Organisation of Courts Act. Against this final decision the Chief Public Prosecutor may file a motion for protection of legality but the destiny of the aforementioned decision is uncertain as long as the Supreme Court does not pass a general position on this issue. The legislator should *de lege ferenda* resolve this issue in the future draft law. The draft law on state bodies in criminal proceeding for organised crime and other complex crimes prescribes the establishment of the chamber for very complex issues (which will have, besides the jurisdiction in complex legal cases, the jurisdiction for organised crime cases) in four district courts (Belgrade, Nis, Novi Sad and Kragujevac). Thus, the problem of solving the functional jurisdiction shall be extended from District Court in Belgrade to these courts.

5. Specialisation at the level of the Second-instance Court

A Special department shall be established within the Appellate Court in Belgrade for processing criminal cases of organized crime in the appeal procedure (hereinafter: the Special department of the Appellate Court).The President of the Special Department of the Appellate Court shall manage the work of the Special Department of the Appellate Court. The President of the Special Department of the Appellate Court is appointed by the President of the Belgrade Appellate Court from among the judges assigned to the Special Department of the Appellate Court. The President of the Belgrade Appellate Court appoints judges to the Special Department of the District Court for a term of two years, from among judges of that court or judges of other courts seconded to that court, with their

consent. The President of the Belgrade Appellate Court shall more closely specify the work of the Special Department of the Appellate Court (Article 14).

As it is the case with the first instance court and its special department for organised crime, there are no prescribed criteria for the president and the judges of this Special Department of the Appellate Court. The term of office is also short. Thus, all deficiencies that were outlined in regard to the first instance department for organised crime apply to the second instance department. Besides, one more problem is the fact that from the time when the law entered into force the provision on the special department of the appellate court is still not implemented due to the fact that appellate courts are still not established. Although when the law entered into force (July 19, 2002) it was prescribed in the transitional and final provisions that the provision on the special department of the appellate court in Belgrade shall start to be applied from March 1, 2003 (as a result the Supreme Court of Serbia was designated to rule in the second instance for organised crime cases) the Appellate court in Belgrade is still not established and the implementation of Article 14 of the Organised Crime Act is being postponed for the last five years.

The Supreme Court of Serbia acts in the second instance proceeding for organised crime cases. Although not prescribed by the statute, the special department for organised crime was formed within the Supreme Court. Thus the provisions regarding the appellate court are applied to the Supreme Court of Serbia.

The president of the Supreme Court allocated judges to this department for a two year term of office with their consent. The president of department manages the work of the department and he/she is appointed by the Supreme Court of Serbia amongst the judges allocated to that special department. There are ten judges assigned to two panels of five judges and most terms of offices have been extended. The President of the Supreme Court regulates the work of this department and by the Annual Schedule appoints the presidents of panel and allocates judges to this department. Judges allocated to the special department of the Supreme Court are members of panel of the Supreme Court at the same time, and, unlike first instance judges of the special department of the Belgrade District Court, these judges both rule in second instance proceedings for organised crime cases and upon extraordinary legal remedies in other criminal cases.

Bearing in mind the comparative law experience only few countries have specialised courts for organised crime, as well as specialised appellate courts. This creates a discrepancy between regular and specialised court systems which is connected to many problems, one of which is the right to fair, impartial and independent judicial protection.

6. Special Detention Unit

The legislator decided for special organisation concerning the detention of persons against whom the criminal proceedings for criminal offences of organised crime are being conducted. Detainees are put in separate premises away from detainees accused of committing other criminal offences. With the aim of achieving a higher degree of protection concerning the possible escapes (this entails the criminal proceedings for very serious criminal offences with a greater

number of well connected perpetrators) the legislator preserved the establishment of the special detention unit in the Belgrade District Prison for detention pronounced in criminal proceedings for offences specified in this Law (hereinafter Special Detention Unit). The Minister responsible for judicial affairs shall specify the organization, work and treatment of detainees in the Special Detention Unit, in accordance with the Criminal Procedure Act and the Execution of Penal Sanctions Act (Article 15).

7. Rights and Duties of Persons Engaged in Special Organisational Units

Persons holding office and/or engaged on tasks and jobs in special organisational units specified under this Law are required, prior to taking office, to submit in writing full and accurate date on his/her financial status and the financial status of spouse, lineal blood relatives, and lateral blood relations to third degree, and relatives by marriage to second degree of kinship, in accordance with the act passed by the Government of the Republic of Serbia. These data represents an official secret.

Vetting and financial status checks of persons specified in paragraph 1 of this Article may be conducted without knowledge of such persons prior to appointment, during the term in office and during one year following termination of office, in accordance with the act of the Government of the Republic of Serbia (Article 16).

Reporting and verification of data of all persons working in specialised bodies established by this statute is an important preventive measure against corruption and not permitted influences on those persons. However, these data are very sensitive especially from the point of view of personal data protection and they should not be abused. The statute does not prescribe any guidelines regarding this procedure. It is not clear what is the subject matter of this verification process (except financial status), and who conducts the verification and submits the verification request. Everything is left to the act passed by the Government, namely the government should prescribe the manner to gather the aforementioned data, to verify them and to appoint bodies which will undertake the verification. Since this procedure inflicts on the right to privacy as one of basic human rights it would be more appropriate to regulate this issue by law and not by governmental regulation.

All persons engaged on tasks and duties within the purview of government authorities regarding suppression of organised crime shall treat all information and data they have acquired in performance of these duties as an official secret. The Special Prosecutor, President of the Special Department of the District Court, the President of the Special department of the Appellate Court and commander of the Service shall specify the official secrets act in respect of the bodies they manage (Article 17). Although it derives from this provision and procedural provisions that data from preliminary and investigating procedure for criminal offences of organised crime represent an official secret, it happens very often in practice that media, without any consequences publish these data justifying their actions by calling upon the Free Access to Information Act. However, this statute

does not allow them to publish this data. Unfortunately, there is no reaction from the competent authorities, although this behaviour is very frequent and impedes the fight against organized crime.

Persons holding office and/or engaged on jobs and tasks in special organisational units specified in this Law are entitled to salaries that may not exceed treble the amount of the salary they would be entitled to for posts and/or jobs held prior to taking office or jobs in these organisational units. This is determined by the Government (Article 18). Judges assigned to the Special Department of the District Court and the Special Department of the Appellate Court, the Special Prosecutor, public prosecutors and their deputies assigned or seconded to the Special Prosecutor's Office are entitled to accelerated pension scheme whereby 12 months of work shall be calculated as 16 months of pension insurance (Article 19). Funds for the work of the Special Prosecutor's Office, the Special Department and the Special Service are provided in the budget of the Republic of Serbia (Article 21). The ministry responsible for judicial affairs shall provide adequate premises and all technical prerequisites necessary for efficient and secure work of the Special Prosecutor's Office and the Special Department (Article 20).

In practice, all persons performing tasks and duties in special organizational units receive double the salary they had before they joined the unit (from typists, registrars, guards to judges). This financial compensation for performed tasks is justified since it prevents and mitigates the danger of corruption and unauthorized influences. On the other hand, due to the lack of any employment criteria for people allocated in these special organization units this provision becomes the crucial factor in accepting these job posts and duties. It is especially true for judges and prosecutors whose consent to work is primarily motivated by these reasons and not by personal interest and special skills to work in this field. This certainly makes it more difficult for the Chief Public Prosecutor and presidents of the District and Appellate Court in Belgrade (for the moment the president of the Supreme Court) to pass a decision and reassign the most committed and judges and prosecutors with most expertise to these units. Moreover, this difference in salaries creates a negative feeling amongst other judicial officials (prosecutors, and judges and auxiliary staff) whose work is also very demanding and complex. Thus, the legislator will have to find a new compromise solution.

The higher security risks for employees in these specialised organisational units due to exposure to threats from members of organised criminal groups certainly exist and they cannot be resolved by a mere raise of salary and provisional personal security measures. The statute does not say anything about the protection and security of family members which has to be solved in the new legal text.

8. Special Powers of Competent State Bodies in Criminal Proceedings for Organised Crime Offences

By prescribing special powers of competent state authorities in state bodies in criminal procedure for criminal offences of organised crime, the legislator stipulated the provisions having procedural nature in the statute that regulate the organization and competence of specialised bodies. In this manner the legislator

regulated, outside statute regulating procedural issues, various procedural issues in organized crime cases such as the proposal of new evidence and insight into files during investigation, establishment of special types of court decisions in investigation, determination of special rules for record keeping, determination of rules for experts and interpreters' fees, as well as the prescription of special sanctions for non-respecting the time limits for submitting an expert opinion, rules regarding the examination of witnesses and the injured party at the main hearing and protection of their personal data.

Since Article 15a prescribed the application of the Criminal Procedure Act (CPC), only if not otherwise prescribed by the Organised Crime Act it may be concluded that this statute is a *lex specialis* in regard to the general CPC.

Concerning these procedural powers, the Organised Crime Act was amended (the first version was passed in July 2002). The statute from July 19, 2002 (Official Journal No. 42/04) did not regulate special powers of competent state bodies in criminal procedures for criminal offences of organised crime. This was later amended with the statute from April 11, 2003 (Official Journal 39/03) which was passed during the state of emergency in Serbia. This statute gave to state bodies, especially specialised police service and special prosecutors, wide powers, many of which are in contradiction t the Constitution and the CPC. Due to this fact, acts passed in accordance with this statute were suspended with the decision of the Constitutional Court No. IU. 166/03 of June 6, 2003. Some other statutory provisions were subsequently deleted.

According to this statute the competent police official could, in order to gather information and evidence on organised crime, without a court order, forcefully bring a person who can give information or indicate the evidence to the Service and preventively detain him/her for 24 hours. Exceptionally, if the urgency requires, an official without a person's consent may interrogate him/her according to the relevant rules and with a compulsory presence of a lawyer (Article 15b). The main deficiency of this provision was the fact that the person apprehended without passing a formal ruling and without a legal means to review the legality of this act, as well as the possibility of hearing the person without his/her consent and without any grounds of suspicion that he/she committed a criminal offence (which is prescribed by the CPC for suspects). In fact these were more severe rules than the procedural rules concerning the interrogation of the suspect. These legal provisions were deleted after passing the amendments of May 28 2004 (Official Journal No. 58/04).

Articles 15v, 15g and 15d regulated the other forms of preventive detention of suspects and other persons for more than 24 hours.

Article 15v prescribed that a person from Article 15b (who does not have the status of a suspect) may be detained on the premises of special detention unit for up to 30 days (twice for 15 days), if the gathered information and evidence justify the presumption that this person will prevent or suppress measures of interest for a criminal proceeding for organised crime offences that are undertaken by the officials of the Service. A special prosecutor, namely the deputy appointed by a special prosecutor, shall decide by ruling within two hours about

the request of official in detention. A person has the right of appeal against this ruling. A Chief Public Prosecutor decides within 72 hours on the appeal. The time limit for submitting the appeal is not determined, which means that the appeal may be submitted during the entire detention and it does not postpone the enforcement of the decision. A detained person, in the presence of a lawyer, may be heard under different conditions than those prescribed by the CPC without his/her consent.

When it concerns persons for whom there are grounds for suspicion that he/she committed a criminal offence with elements of organised crime, Article 15g prescribes the possibility of detaining such a person in special detention unit for up to 30 days on the basis of the ruling of the official of the Service for the suppression of organised crime and the extension of that detention for special justified reasons for another 30 days on the basis of the ruling of the Minister of the Interior, without the right of appeal.

An investigating judge, upon the request of the Special Prosecutor and within 24 hours from the submission of this request, may decide to detain a person for more than three months if it was determined that the person in question belongs to a criminal group or another organised group, if it is required to determine the identity and to catch the members of the organised criminal group. If the investigating judge did not accept the request of the Special Prosecutor he/she was obliged to state reasons in the ruling and to submit this ruling for prior consent to the president of the special department of the District Court. The criminal non-contentious panel from Article 24, paragraph 6 of the CPC decides on the appeal against this ruling (the deadline for submitting an appeal is not determined). The appeal does not postpone the enforcement of the ruling. A Special Prosecutor and his/her deputy may hear this person during the detention as well as the official of the Service for suppression of organised crime upon the request of the Special Prosecutor (Articles 15e and 15dj, paragraph 2).

In case of exceptionally justified reasons, upon the elaborated request of the Special Prosecutor or the president of the Special Department of the District Court, the Supreme Court of Serbia could have extended the detention for the most three months (Article 15dj, paragraph 1) and after the expiry of the detention the Special Prosecutor was bound to bring charges. If the Special Prosecutor failed to do this the suspect would be released and the prosecutor within 30 days had to pass a decision on further criminal prosecution. After bringing charges it was determined that the detention may last for two years at the most and the first-instance judgement had to be passed in that time period. After the pronouncement of the judgment the detention may last at most one year. Within this year the Special Department of the Appellate court was obliged to pass a second-instance decision (Article 15e).

Thus, apprehension of a person against whom there are no grounds of suspicion for committing a criminal offence may last up to 31 days in the preliminary criminal proceedings. Against a suspect, it may have lasted nine months and one days before bringing the charges (one month in the capacity of a person against whom there are no grounds of suspicion for committing a criminal offence, two

months in the preliminary criminal procedure in the capacity of a suspect and six months in investigation, plus 24 hours of detention in the preliminary criminal procedure).

Due to the possibility that the application of Articles 15v, 15g and 15d of the aforementioned statute may cause irreparable damage and due to the fact that these provisions put in question the freedoms guaranteed by the Constitution, the level of protection of human rights and freedoms as well as accepted international standards on detention, the right to defence and bodies determining the detention, the Constitutional Court in its decision No. 166/03 of June 5, 2003 found that these provisions put in question the determined position of the courts and other bodies in protecting the rights and freedoms of citizens (Article 95 of the former Constitution). Thus, bearing in mind the fact that the consequences of these provisions and acts passed on the basis of these cannot be removed, the Court suspended the enforcement of individual acts and actions passed in accordance with this statute.

In some way, the legislator at the time of passing the aforementioned act was conscious of this fact, which is evident from Article 5 of the act stipulating that the National Assembly within 90 days from the entry into force of the act shall review the aforementioned legal provisions. Finally, the decision of the Constitutional Court was not necessary due to the fact that the amendments were adopted on July 1, 2003 (Official journal No. 67/03). The aforementioned provisions as well as paragraphs 2 and 3 of Article 15dj were deleted while paragraph 1 of Article 15dj and Article 15e were deleted with later amendments from May 31, 2005 (Official Journal no. 45/05). Consequently, the provisions of preventive detention of a person in the preliminary criminal proceeding, the provisions of detention and the time limits for bringing the charges, as well as the manner of hearing the suspects and others persons are left out. The provisions of the CPC are applied instead.

The Organised Crime Act regulates the question of proposing new evidence in a manner different from CPC, by prescribing that in organised crime cases the prosecutors, accused persons and their lawyers may propose new evidence, at the latest before the expiry of 30 days from passing the decision on undertaking the investigation. Upon expiry of this time limit the investigating judge of the Special Department of the District Court, at the final session for recording evidence may make records on evidence that will be presented during the investigation. All procedural and other objections referring to that phase of criminal proceeding must be recorded at that session. Exceptionally, it is possible to propose new evidence and raise objections after the expiry of that time limit (namely, after the session for recording evidence) if that evidence did not exist before or no-one could have known about it. In that case new evidence may be proposed or an objection may be put, at the latest by the completion of the investigation which is decided by a ruling of the investigating judge (Article 15ž).

When it concerns the examination of files this right may be exercised from the time of passing of the ruling on investigation. However, the investigating judge of the Special department may decide, by his/her ruling, that the right to

examine files shall be used from the moment after hearing all suspects included in the request for undertaking the investigation. The objection may be submitted against this decision to the president of the Special Department of the District Court who may decide on the objection within 48 hours (Article 15z).

The legislator did not prescribe a time limit in which the objection may be submitted and who is entitled to raise objections. This means that the objection may be raised during the entire investigation, as long as there are grounds for objection, namely as long as the right to examine files is limited by the completion of hearings of all suspects. Also the right to objection belongs to all persons who have the same right according the CPC. This provision may, in certain situations, lead to a limitation of the right to defence since the lawyers may not be allowed to examine files until all the accused included in the investigation are heard. In practice, there are usually many suspects although there are not accessible to the court. The lawyer has also a limited time limit to propose new evidence and to submit objections – within the 30 days from the passing the ruling on an investigation. This may put the defence in a bad position since due to the inability to examine files the lawyer would not know if the defence needs to propose new evidence or put objections and subsequently they will miss the 30 days time-limit. The possibility to propose new evidence and put forward objections upon the approval of the investigation judge after the expiry of this time limit does not solve this problem, since there are no guarantees that the investigation judge will give his/her consent (he/she is not bound by law but has a discretionary right).

The exception from general rules of recording during the main trail is prescribed by Article 15j of the Organised Crime Act according to which the trial shall be audio recorded containing the entire trial, as well as recorded in the written form including data in the beginning and closure of the trial, present participants and presented evidence, as well as the ruling of the President of the Chamber to manage the proceeding. The audio recording is transcribed within 72 hours and represents a component of the records kept in written form.

The audio recording during the trial insignificantly speeds up the process in practice since there is no need to dictate and subsequently discuss the authenticity of the minutes, since the parties have the right to compare the content of transcripts with the audio recording.

In a criminal proceeding for organised crime cases the legislator prescribed the possibility to specially reward experts and court interpreters for the same work they would perform in other criminal offences. Experts and interpreters may be rewarded with an amount which is double the amount they would receive in other criminal cases (Article 15j). It is evident that the legislators acted in this manner to additionally motivate experts and interpreters to participate in criminal offences for organised crime, which are by rule complex and difficult and carry other risks.

On the other hand the legislator prescribed the punishment of experts and interpreters for improper performance of their obligations in cases of organised crime by limiting that the investigating judge and the president of the special department may not determine a time limit for submission of opinions, findings and translations which exceeds 90 days. In case of a breach, experts and inter-

preters shall be fined; a legal person with 500,000 dinars, a responsible person in a legal person up to 100,000 dinars and for a natural person (either expert or interpreter) with 100,000 dinars. The investigating judge or the president of a special department passes a decision on this sentence depending on the phase of a trial. The records are kept about the pronounced punishments. In case if the time limits are again not respected during the same calendar year (it does not have to be in the same case) the president of the special department of the first-instance court may, besides a fine, propose to the Minister of Justice to erase the names of those experts and interpreters from the list with the temporary ban to perform their profession for the duration of three years (Article 15k and 15l).

In comparison to provisions of the CPC applied to all other criminal proceedings, experts and interpreters in organised crime cases cannot ask for an extension of the time limit for preparation of opinions after the expiry of a 90 day time limit for submitting an expert opinion and they are not entitled to right of appeal against this decision. This is allowed to experts in all other criminal proceedings in accordance with Article 115 CPC. However, this does not mean that stricter rules apply to experts and interpreters in organised crime cases since in other proceedings experts may be fined if they do not submit opinions within the prescribed time limit, which cannot be less than 90 days. The CPC did not prescribe a maximum time limit for submission of opinions and findings as it is done in the Organised Crime Act.

The exception from the general rule that the witnesses are examined directly on the trial (except cases when the records on their previous statements may be read according to Article 337 of the CPC) occurs in the case of an examination of the injured party or a witness by using the video-conference and international legal assistance, when it is not possible to secure the presence of that person (Article 15lj). The question of impossibility of securing the presence of an injured party or a witness is not regulated by this statute. However, the CPC regulates these issues in Articles 334 and 337, stipulating that the records of statements and witness shall be read aloud when they are unable to come before the court due to age, illness or other important reasons. Hence, the impossibility to come before the court may derive from any other important reason which is on the court to be determined. As the legislator, except this criterion, does not require any other criterion it is up to the court panel to decide which additional circumstances have to occur to hear the witness or the injured party by using video conferencing. It is especially important that the testimony of a witness or injured party is of special importance for determining other facts, that the witness or injured party has a serious reason that prevents him/her to present himself/herself, and that the accused cannot suffer damage from not being able to confront the witness. Moreover, it is necessary to secure the presence of a judge during the hearing of the witness in a premises where he/she is examined with the aim of securing the legality of the examination and determining if the witness on his/her own free will gave the statement. This becomes more difficult if the examination is followed on screen. This is similar to the situation prescribed by Article 335 of the CPC when during the trial an investigating judge is entrusted to perform certain actions to clarify facts in cases when undertaking of these actions during

the trial would delay the trial or impose other difficulties. The examined witness will take an oath and there is no need to take minutes since the audio recording of the trial is made and it is a component of the trial records. An examination before cameras has many deficiencies but on the other side it speeds up the process and improves efficiency. Hence the legislator must additionally regulate this type of examination to remove all problems related to legality of this type of examination. The new CPC that will enter into force on January 1, 2009 prescribes this type of examination for "protected witnesses". By using video-conference and in the presence of the judge of the Special Department for Organised Crime of the Belgrade District Court, the panel of the special department in a case concerning the organised crime examined witnesses that were abroad.

The protection of injured parties and witnesses in the criminal procedure for criminal cases of organised crime is not regulated by the Organised Crime Act, but this issue is regulated by the Act of Protection Programme of Participants in the Criminal Proceeding (Official Journal no. 85/05) and the CPC whose entry into force is postponed for January 1, 2009 since the provisions on procedural protection of witnesses entered into force. The Organised Crime Act only peripherally treats this issue and prescribes in Article 15m that upon the elaborated proposal of the interested party a court may decide on the protection of witnesses and the injured party's personal data. However, it does not determine content of that measure nor does it regulate the procedure in which that decision would be passed which impedes the work in practice.

The Criminal Procedure Act which is in force until January 1, 2009 does not regulate this issue. The Act of Protection Programme of Participants in the Criminal Proceeding prescribes as a measure "hiding of the identity and identity documents" (Article 18) which has a wider scope than the personal data protection – it includes hiding of the identity by making new identification cards where the original data have been altered, while the personal data protection entails non-disclosure of personal data of an injured party and a witness and making these data an official secret. Thus, all officials are obliged to keep this secret. With the application of the procedural protection of witnesses prescribed in the new CPC (Article 116–122) the protection of witnesses became efficient. These provisions are applied in accordance with Article 555.

In order to prevent all ambiguities in regard to the application of the Organised Crime Act the legislator prescribed that criminal proceedings for criminal offences specified in Article 2 of this Law in which the indictment has become effective prior to the day this Law comes into force, shall be concluded before the courts having actual and territorial jurisdiction prior to coming into force of this Law.

However, in order to prevent ambiguities in respect to the retroactive application of this statute which derive from this legal provision (it is still not precise which rule will apply to the territorial and subject matter competence of courts in completing the pending cases) the legislator decided to amend this provision and to define this issue in the manner done in Article 4 of the Organised Crime Amending Act from April 11, 2001.

9. Initiative for amending the Act on Organisation and Competence of State Authorities for Combating Organised Crime

The Working Group set up by the Commission for Implementation of Judicial Reform Strategy prepared a draft law and other types of complicated crimes, bearing in mind the deficiencies of the act in force and the essential modifications of the Criminal Procedure Act, whose implementation is postponed for January 1, 2009. This draft law is open for public debate and experts (courts, bar association and prosecutors) submitted many comments and objections. It is uncertain when and what will be the version that will be submitted to the Government in the form of a law proposal and later on sent to the National Assembly for adoption. For these reasons the analysis of this draft law is not appropriate.

PART TWO

PROPOSALS FOR AMENDING THE LEGISLATION OF THE REPUBLIC OF SERBIA TO COUNTER ORGANISED CRIME AND CORRUPTION

Section One

INTRODUCTION

I. THE NEW CONSTITUTION OF THE REPUBLIC OF SERBIA AND FORTHCOMING LEGISLATIVE REFORMS

(M. Grubač)

The National Assembly of the Republic of Serbia on November 8, 2006 proclaimed the new Constitution of Serbia. This Constitution prescribes major changes in many legal fields, such as criminal law, procedural law and changes in relation to institutional structures. Most of those provisions should be implemented in the legal system by the end of 2008. According to Article 15 of the Constitutional Act for the Implementation of the Constitution (Official Journal of RS, No. 98/2006) all laws in force which are not in accordance with the new Constitution should be harmonised with the Constitution by December 31, 2008. The following legislative activity shall not be limited only to the adjustment of existing legislation with the Constitution but it will be more extensive. It will be an opportunity to continue the transformation of the Serbian legislation in force and to introduce new legal institutions and European legal standards. The work on legislative reform regarding organised crime and corruption will be conducted within this framework. It also has to be adjusted within the time limit prescribed by the Constitution and improved keeping into consideration the current situation. Suggestions given in this part should contribute to the achievement of these goals.

I. The new Serbian Constitution contains provisions on the right to a fair trial which was not prescribed by previous constitutions. These provisions were taken, with certain modifications, from the European Convention for Protection of Human Rights. According to Article 6 of the Convention the notion of fair trial contains two group of requests or rights, where one refers to proceedings against citizens before the court (not only criminal but also administrative and civil procedure – paragraph 1) and others concern only criminal proceedings (paragraphs 2 and 3). According to the Convention, the right to a fair trial entails the following:

1) public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly. The press and public may be excluded from all or part of the trial in the interest of morals, public order or national security, 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 (paragraph 1);

2) presumption of innocence (paragraph 2);

3) to be informed promptly, in a language which the accused understands and in detail, of the nature and cause of the accusation against him/her (paragraph 3, subparagraph a); to have adequate time and the facilities for the preparation of the defence (paragraph 3, subparagraph b); to defend himself/herself in person or through legal assistance of his/her own choosing or, if the accused has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require (paragraph 3, subparagraph c); to examine or have examined witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her (paragraph 3, subparagraph d); to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court (paragraph 3, subparagraph e).

Right to fair trial is prescribed by Article 32 of the Serbian Constitution ("Right to Fair Trial"), but also in Article 33 ("Special rights of persons charged with criminal offence") and in Article 34, paragraph 3 which contains the presumption of innocence ("Legal certainty in criminal law"). These provisions are adjusted to a great extent with the provisions of Article 6 of the European Convention and they introduce few changes into the Serbian legal system.

The analysis of Article 33, paragraph 5 of the Constitution and its comparison to Article 6, paragraph 3 (d) of the Convention lead to the conclusion that the new Constitution introduces cross examination instead of the examination of witnesses and experts by the President of the Trial Chamber. The Constitution prescribes that the cross examination is the right of the defendant. The CPC in force, as well as previous procedurals acts, regulate the examination of witnesses and experts as a procedural action which results in obtaining the statements of witnesses and experts – the most common type of evidence in criminal procedure. Evaluation of witnesses' and experts' evidence is left to a judge to freely evaluate and the statute regulates in detail the presentation of this evidence. After the President of the Trial Chamber completes the examination of a particular witness or expert witness, the members of the Trial Chamber, prosecutor, defendant, defence counsel, injured party, legal representative and proxy may ask certain questions directly to the witness i.e. expert witness, namely through the President of the Trial Chamber (Article 356, paragraphs 1 and 3 CPC). The active role of court in presenting this evidence is in accordance with the principle of finding the substantive truth and court responsibility for determined facts instead of dividing the burden of proof between parties.

Article 33, paragraph 5 of the Constitution introduces a major change. According to this provision *"any person prosecuted for criminal offence shall have the right to present evidence in his/her favour by himself/herself or through his/her legal counsel, to examine witnesses against him/her and demand that witnesses on his/her behalf be examined under the same conditions as the witnesses against him/her and in his/her presence*". To some extent the provision was taken from Article 6, paragraph 3d of the European Convention in Human Rights and Fundamental Freedoms whereby the accused person shall have the right "to examine or have examined witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses

against him/her". Thus, the Convention allows both forms of presenting evidence to witnesses: Anglo-American (that accused or his/her lawyer may examine the witnesses) and the way accepted in most European and continental countries (witnesses to be heard upon the request of the accused person; it is assumed that the defendant does not examine them). The Serbian legislator, either consciously or unconsciously decided on the Anglo-American type where the accused or his/her lawyer examines the witnesses, excluding any other possibility. In this manner the Constitution introduced the cross examination of witnesses which is a new practice in Serbian legal system which traditionally accepted the other form. As experts are classified as expert witnesses the new form of presenting evidence to witnesses shall apply to examination of experts.

The new form entails direct cross examination of witnesses. The direct and main examination is done by the party which calls the witness. Subsequently, the witness is examined by the other party to obtain answers which puts in question the witness statement and then again by a party who firstly called the witness, in order to clarify the real meaning of witness answers. A judge may ask appropriate questions to a witness during the whole examination and regularly after the examination is completed by parties. Suggestive questions may be asked in direct examination and by rule they are allowed during the cross examination. In relation to this it is important to mention Article 262 of the Criminal Procedure Act of Bosnia and Herzegovina. According to Article 326, paragraph 1 of the Croatian CPC witnesses and experts are firstly questioned by parties and then by the President and the members of the Trial Chamber. If not otherwise agreed, a party that suggests the presentation of the evidence asks questions first and then the opposite party. Following this, the President and members of the Trial Chamber ask questions. If the court determines the presentation of evidence *ex officio* (without the requests of the party) the President of the Trial Chamber asks questions first and, following this, the members of the Trial Chamber. At the end, questions are asked by the prosecutor, the defendant and the lawyer. The defendant, legal representative, proxy and experts may ask questions directly with the consent of the President of the Trial Chamber.

Provisions of Article 33, paragraph 5 of the Constitution shall also have other procedural and legal consequences: a) the right of the defendant to confront prosecution witnesses or to examine them by himself/herself or through his/her legal counsel encompasses all other examination of witnesses and experts not only conducted at the main trial but before the main trial (examination of sick and elderly people, examination by reconstructing the event, urgent examinations in the preliminary procedure) that must be conducted in the presence of the parties and other persons prescribed by law and according to rules of the cross examination in order to use that evidence in future criminal proceedings. This requires the re-examination of all provisions of the CPC which prescribe that without this, the evidence may be used as evidence for criminal judgement. The change of examination of witnesses prescribed by the Constitution would require the alternation of modes of questioning the witness, although this is not prescribed by the Constitution.

b) The influx of elements of Anglo-American criminal procedure should result in changing the position of a judge during the main trial. Although, he/she

is still responsible for determining facts (he/she is obliged to equally interrogate and determine facts which favours or are detrimental to the accused person – the principle of investigating the substantive truth) the judge becomes more of an arbiter than a judge in the inquisition procedure. A judge interacts to a very small extent in the presentation of evidence (examines the witness after the parties, only if he/she finds that necessary). The main task of the judge in the presentation of evidence is to supervise the presentation of evidence and to eliminate non-allowed and irrelevant evidence. His/her role entails the management of the proceeding, preserving the trial discipline and ban on asking certain questions or responding to certain questions, if he/she estimates that the evidence is not allowed and irrelevant to the proceeding.

c) The new constitutional provision represents a full adversary principle in the main trial and elimination of all of all deviations from the principle of directness. A deviation from the principle that all evidence must be directly presented before the Trial Chamber, regardless of the fact if they were presented in the preliminary procedure would be possible only with the consent of the accused person and under the condition that evidence was presented in the form prescribed for main trial. An accused person or his/her lawyer has the right to examine witness of the defence and to request the examination of the defence witness in his/her presence. All verbal evidence (statements of witnesses and experts) must be presented at the main trial, regardless whether they were already presented in the preliminary procedure, except extraordinarily, under the condition that they were presented in the same manner in the preliminary procedure. It should concern Article 362, 355, paragraph 6 and Article 376 and others of the new Criminal Procedure Act (as well as Article 20 of the proposal of the Criminal Procedure Act). The idea behind the Constitution is that investigations do not necessarily have to be done by courts; thus the presentation of verbal evidence is moved to the main trial. This should result in extending the mandatory formal defence and defence of underprivileged people.

d) Implementation of the new constitutional provision on cross examination by rule presupposes representation by the lawyer for each accused person or at least significant extension of mandatory defence.

e) Provisions of Article 33, paragraph 5 of the Constitution introduce a new concept: the division of the witnesses to "witnesses of defence" and "prosecution witnesses". By now this division did not exist in Serbian criminal law. The principle of acquisition of evidence was applied and all evidence were regarded as the result of the criminal proceeding, regardless of who gathered evidence and who requested their presentation. This constitutional change may lead to other significant changes in the organisation of the evidentiary procedure.

f) The new provision of Article 30, paragraph 2 of the Constitution stipulates that if the detainee has not been questioned when making a decision on detention or if the decision on holding in detention has not been carried out immediately after the pronouncement, the detainee must be brought before the competent court within 48 hours from the time of sending to detention which shall reconsider the decision on detention. The provision refers to two situations and has two different aims: (1) if the ruling on detention was passed and the ac-

cused person was not examined (since he/she is at large) in order to decide again on detention after his/her examination (2) if the ruling on detention was passed and it is not executed directly after the adoption in order to decide again on detention after the examination, whether there are reasons for detention (although the accused person was not examined). The goal of the Constitution is that examination of the witness of the accused person always precedes the court decision on the detention and to base the judgement on the current state of facts.

In relation to these constitutional provisions the question of a hearing for pronouncing detention (and extension of detention) is raised. The CPC does not prescribe this hearing but it is required in the light of the Constitution and in accordance with the case law of the ECHR. The procedure on that hearing must be adversary. It serves for an examination of the accused in the presence of the lawyer and prosecutor and to determine the conditions for pronouncing and extending the detention. A defendant should be served a proposal of the prosecutor and evidence for pronouncing or extending the detention. The mandatory defence of the accused who is already in detention according the Article 71, paragraph 2 may be extended and include a hearing for pronouncing detention. At least the legislator should prescribe that the preliminary examination of the accused person is a condition for pronouncing or extending the detention.

g) Bearing in mind that new Constitution speaks about the "defence witnesses" and "prosecution witnesses" it would not be possible to keep the following provision from the CPC "detention shall be determined for an accused person if certain circumstances suggest that he/she shall impede the procedure by influencing the witnesses, co-perpetrators and harbourers" (Article 142, paragraph 2, subparagraph 2). In a procedure in which the investigation is undertaken by parties and cross examination of witnesses is done by parties, the contact between parties and witnesses before their examination cannot be barred.

II. One of the important issues which should definitely be resolved is the issue of changing or keeping the existing model of criminal investigation, namely whether to keep the existing investigation done by courts led by investigating judge or to replace it with non-judicial investigation done by parties according to Anglo-American criminal procedure. Several circumstances point at a need to decide with caution.

Bearing in mind the lack of understanding and even the confusion about the prosecutor's office that exists in Serbia, it is a question, whether in a short period of time for adjusting the criminal procedure legislation with the new Constitution, it is possible to make a proper proposal of new legal provisions on the new model of investigating procedure with numerous and different procedural consequences which occur in the entire criminal procedure due to this change. For example, Serbian public speaks about a "prosecutor's investigation" instead of "investigation done by parties". The aim of this reform is not about public prosecutors regaining the powers they had (according to the CPC in 1948) but to make the criminal procedure of mixed nature (with certain inquisition characteristics) more adversary. A goal defined in this manner presupposes the transfer of the investigation not only to a public prosecutor but to an accused person who has to have an "equal fire arm", that is the possibility to undertake an investigation together with the lawyer. In the new preliminary procedure the accused can-

not remain without the investigating powers and without the full insight into the investigating material of the public prosecutor.

On the other hand, according to provisions of the unsuccessful CPC from 2006 (which will never be applied), the Serbian legislator believes that in the new type of non-judicial investigation the accused may remain without any investigating powers and it is forced into a certain degree of participation in investigating his/her procedural adversary. It is not obvious that the new organization of the investigation procedure requires changes in the current understanding of the procedural notions of criminal procedure, procedural actions and evidence. A prosecutor's investigation or an investigation done by the parties does not enter into the composition of the criminal procedure in the narrow sense. The procedural entities are missing in the prosecution done by parties in order to base the criminal relationship. The pre-procedural activity of future procedural parties, when it concerns a public prosecutor, cannot be pronounced to be a criminal and procedural relationship; even less for the police which in future criminal proceedings does not have any procedural nature. In the same way as the enforcement of the court decision does not fall within the criminal procedure in the narrow sense, thus the prosecution investigation, police investigation and private investigation of the accused cannot be considered as a criminal procedure. After the introduction of the investigation done by parties, the criminal court procedure is reduced to the main trial in regard to its scope. It begins from the finally adopted indictment and it ends by entering into force of the judgment. The criminal procedure, in the narrow sense including the non-judicial (prosecutor's) investigation should be differentiated from this. The court does not participate in the procedure (except extraordinarily); thus, there is no guarantee of court independence and no procedural parties. Even if this exists a judge in the new preliminary criminal procedure is only a constitutional controller of human rights and not a procedural entity. Thus, the court practice cannot rely on actions undertaken in this part of the criminal procedure. Actions in that procedure are not actions of the judicial criminal procedure since the public prosecutor at the time of undertaking these actions did not submit his/her request to the court; thus, he/she did not enter into procedural relationship with other (potential) subjects of the criminal procedure. The aim of this procedure is that the state prosecutor and police gather material required for the indictment, while the defendant shall gather material for his/her defence. The material cannot be used for any other purpose. The primary aim of the prosecutor's investigation is, therefore, to present evidence in a formal way in order for material to be accepted as evidence in future criminal procedures. Instead of limiting the notion of criminal offence to the phase of trial (criminal procedure in the narrow sense) by transferring to the prosecutor's investigation, the legislator extended this notion, including in it not only the prosecutor's investigation but also the police investigation phase (the current preliminary criminal procedure which was never understood as the part of the criminal procedure).

A fair criminal procedure entails a trial (the determination of state of facts and application of law) by independent and impartial court. Thus, any part of the trial cannot be delegated to non-judicial bodies. It will happen in proceedings

which are not fully directed and in which the Trial Chamber would base the application of law on evidence presented by other non judicial bodies. This is the reason why evidentiary actions undertaken in the prosecution or police preliminary proceeding cannot be equated with those undertaken in adversary judicial main trial. Therefore, the procedural principles of directness and adversary in criminal proceeding in which the investigation is no longer activity of the court must be fully outlined and there should be very little exceptions from these principles. When it concerns investigation by the court, the Trial Chamber, under certain conditions, may rely on evidence presented in the investigation since it is presented by a judge.

The European Convention on Human Rights and Fundamental Freedoms prescribes that the defendant must "examine or have examined witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her" (Article 6, paragraph 3, subparagraph d). This Convention prescribes the right of the defendant to adversary and direct examination of witnesses (and experts) before the Trial Chamber, namely that witnesses are examined before the court. By keeping, but at the same time extending the rule of judicial investigation whereby statements of witnesses and experts given at the main trial or at the earlier examination before the main trial have the same legal force, the legislation on criminal procedure would be in conflict with the aforementioned provisions of the Convention.

One of the inevitable consequences of introducing the prosecution investigation is the acceptance of the conservative institution of American law known as *plea bargaining*. The accused person, namely the defendant and his/her lawyer, may negotiate with the prosecutor on conditions for recognition of guilt for the offence which is the subject matter of the indictment. Within that negotiation the prosecutor may suggest the pronouncement of a punishment under the statutory limit, namely the pronouncement of a milder sentence. Negotiation about the milder form of the criminal offence or deleting some of the offences from the indictment is also possible and exceptionally the remission from punishment. The achieved agreement is made in written form and does not oblige the court which may adopt or reject the agreement. If this is accepted, the court is bound by this agreement on the sanction. In passing the decision the court verifies whether the agreement was made voluntarily or consciously and whether there is enough evidence of the guilt of the accused person and whether the suspect is conscious of the consequences which result from this (to waive the right to a trial and not to submit the appeal against the decision on sanction which may be pronounced). If the court accepts the agreement the court determines the hearing in order to pronounce the agreed sanctions. This significantly facilitates the work of the court and shortens the procedure.

The acceptance of this and similar assistance in a case of transfer to the prosecutor's investigation would result in having an acceptable number of cases which, after the informal investigation, would go through to the adversary and fully direct main trial. In the US, thanks to this reached agreement there is only 10 per cent of cases left for trial. The new legislation on criminal procedure in Bosnia and Herzegovina and Serbia introduced for the same reason this agree-

ment. It is a question whether the public in Serbia and citizens who are injured parties in criminal cases will accept this solution.

The change of the investigation model in the criminal procedure opens other numerous and important questions. Some of them must be resolved before making the aforementioned changes. One of the important questions is whether the underprivileged defendant shall be entitled to a free private investigation. "Party investigation" presupposes the division of witnesses to defence witnesses and prosecution witnesses and requires a new role of the judge who should ensure supervision over the transfer of evidence of the defence and prosecution. The alteration of the investigation model presupposes prior fulfilment of many other presumptions, especially the reform of the public prosecutor's office and police, which is still not undertaken in Serbia.

If it may be concluded according to the above-mentioned that it is still not time for investigation by parties in Serbian criminal proceeding, it should be examined whether this possibility should be introduced for organised crime offences and other serious criminal offences. This idea will be implemented with less difficulty bearing in mind the fact that prosecutors' offices and police are already adapted to this and that these bodies were already entrusted with special powers for efficient detection and investigation.

Section Two

SUBSTANTIVE LAW

I. ON CRIMINAL OFFENCES OF CONSPIRACY TO COMMIT CRIME AND CRIMINAL ASSOCIATION

(R. Sepi)

Proposal of legislative measures that need to be taken in order to eliminate contradictions between the existing provisions on organised crime that presently define, in different legislative texts, the notions of organised criminal group, other organised group and criminal organisation:

Provision of Article **346 of the Criminal Code of the Republic of Serbia on criminal association** should read (by adopting a new or amending the existing provision):

*(1) Whoever organises or otherwise (**alternative: associates)** and manages an organised criminal group the aim of which is to commit criminal offences punishable by imprisonment for four years or more, in order to directly or indirectly obtain financial or other material benefit, shall be punished by imprisonment from six months to five years.*

(2) Whoever organises and manages another organised group in the function of organised crime shall be punished by imprisonment from six months to five years.

(3) A member of an organised criminal group or other organised group shall be punished by a fine or imprisonment of up to three years. .

(4) The person from paragraphs 1 and 2 of this Article who, by exposing an organised criminal group or another organised group and their activities or in another manner prevents the commission of criminal offences, that is, the realisation of its function, shall be punished by a fine or by imprisonment up to one year, and may also be released.

(5) A member of an organised criminal group or other organised group who exposes the organised criminal group or other organised group before the commission of a criminal offence as their member or for the group or before undertaking an activity contributing to the realisation of the groups' functions, may be remitted from punishment.

Explanation: Adoption of the above-mentioned provisions in necessary because Serbian legal system presently includes several provisions that define the notion of organised crime and, consequently, of organisational forms in which it can be manifested. This opens the door to "creative arbitrariness" when assessing

whether, in each given case, the criminal offence is that of organised crime or not, and, hence, whether the state authorities constituted for the purpose of combat against organised crime are competent or not. In regards to the present provision, this proposal preserves the legislator's intention and structure, whilst, at the same time, the introduction of new elements adjusts the norm to the existing provisions in other legislative texts – namely, the Criminal Procedure Code and Organised Crime Act. The innovation is the replacement of the existing imprecise provision (which is also contrary to the provisions of the two mentioned statutes), which speaks of organising a group and other association, by an incrimination of organisation of organised criminal group and other organised group, thus enabling its application based on the provisions of the two mentioned Codes and vice versa. The new provision is in line with the direction of the UN Convention against Transnational Organised Crime, which constituted a constant reference in the discussion of the various reform options.

In addition, the incrimination now also covers the managing of such organisational forms. Bearing in mind the fact that the Organised Crime Act, as *lex specialis,* gives a definition of organised criminal group and other organised group, it is not necessary to include parts of these provisions in the provisions of special substantive criminal legislation. Quite to the contrary, this provision only incriminates the activities of organiser, manager and member of organised criminal group and other organised group as the *actus reus*. Following the present structure, the provision also includes a rule on conditions for mitigating the punishment and release. The use of its adoption includes the establishing of competence of state authorities and initiating of adequate proceedings. The prescribed punishments correspond to those in surrounding countries; however, the author feels they are too mild.

It is also necessary to adopt a new provision (e.g. Article **346a of the Criminal Code of the Republic of Serbia – criminal offence of organised crime)** which should read:

(1) Whoever organises a criminal organisation for the commission of criminal offences or manages such organisation shall be punished by imprisonment from one to ten years.

(2) A member of criminal organisation from paragraph 1 of this Article shall be punished by imprisonment for one year as a minimum.

(3) A member of criminal organisation who exposes the criminal organisation before committing a criminal offence as its member or for such group may be remitted from punishment.

Explanation: Similarly to the previous Article, this one also incriminates the actions of organising, managing and being a member of a certain form of association. However, unlike the case is in the previous Article, the mentioned actions concern a form of association entitled as "criminal organisation". The organisational form of organised crime entitled as "criminal organisation" is prescribed only by the Criminal Procedure Code, unlike the Organised Crime Act, which operates with the notions of organised criminal group and other organised group. This is why this criminal offence is prescribed in addition to the exist-

ence of the criminal offence of criminal association from the previous article. Its adoption would give substantive-law support to the organisational and procedural statutes for fight against organised crime. Bearing in mind the fact that the Criminal Procedure Code defines the notion of criminal organisation, the introduction or, more accurately, the transposition of those elements in the provision of this Article would not be expedient.

NOTE: Finally, amendments to the Criminal Procedure Code should prescribe that the special provisions on the procedure for criminal offences against organised crime are to apply to proceedings initiated or conducted in cases when the criminal offence is a result of activity of criminal association. Similarly, the Organised Crime Act should include a provision stating that the competences of state authorities combating against organised crime should also cover the cases when the criminal offence is a result of an activity of a criminal organisation

II. CONFISCATION OF PECUNIARY GAIN

(R. Dragičević-Dičić and R. Sepi)

EVALUATION AND RECOMMENDATIONS

As it was already mentioned in the previous analysis of the domestic legislation, the Criminal Code and the Criminal Procedure Act allow the confiscation of property acquired from the commission of the criminal offence as well as objects used in committing criminal offence or resulting from the criminal offence. This proved inefficient in practice. Legal provisions in force do not give enough possibility of confiscating property within the fight against organised crime. Thus, these provisions are not used sufficiently in practice. In Serbian legal practice punishment is still used as the most important means for fighting and preventing crime.

It is only recently that the public became more interested in the efficient confiscation of pecuniary gain acquired from criminal activity as a result of the increase in crime against economic interests where it is evident that certain individuals became extremely wealthy and with the influx of 'dirty' money into the regular financial system. It is more evident that the right way for suppression of organised crime is through the confiscation of property.

In the last two decades great progress within the strategy for fighting organized crime and other forms of crime that results in the acquisition of material gain was made within EU member states, members of the UN and the Council of Europe and the US. Within international legislation a significant step was made in changing the opinion that the fight against crime is inefficient with classical punishment methods, unless special provisions regulating the confiscation of acquired property from criminal activity are not outlined. Therefore, many international conventions, recommendations and strategies referring to the control of the international flow of money have been passed and they facilitate the determination of the origin of property and enable the efficient confiscation of illegally acquired pecuniary benefit.

Serbia, as a signatory of international conventions for fighting organised crime and corruption is obliged to undertake efficient measures which will enable the discovery, freezing, temporary or permanent confiscation of property acquired by criminal activity, as well as the management of confiscated property within international standards

The previous analysis of domestic and comparative legislation demonstrated certain deficiencies, as well as unclear provisions in domestic legislation. Besides the principle that all property acquired from criminal activity must be seized or confiscated, these deficiencies impede the efficient implementation of this provision. The most important deficiencies and problems entail the following:

a) lack of adequate and efficient financial investigation

b) inability to conduct separate financial investigation and to confiscate the property

c) lack of extended powers and inability to delegate the burden of proof

d) imprecise provisions regarding the object of confiscation

e) inability to confiscate property as a replacement

f) problems in confiscating the property of deceased persons and persons at large

g) inefficient measures of preventive confiscation of property

h) complicated and inefficient procedure of executing measures of confiscating property and payment of amounts of money

i) inadequate management of confiscated property

j) undefined and inappropriate purpose for confiscated property.

Bearing in mind the need for the legislator to amend parts of the law dealing with the confiscation of pecuniary gain, there is a question whether to do it by passing a new criminal code or to amend the existing provisions of the criminal code, criminal procedure act and act on enforcement of penal sanctions. The new act should be applied as *lex specialis*.

Since it concerns the basic principles of criminal law, it would be better to amend the provisions of acts in force. Thus, the recommendations are done in this way.

Investigating Powers

In relation to investigating powers and obligation of investigating bodies to examine circumstances relevant to pecuniary gain, it may be determined that the statute does not give clear and mandatory powers to investigative bodies. Thus, the financial criminal investigation, which is clearly set out in many European legislations, is not undertaken in practice.

The Criminal Procedure Act determines procedural rules for confiscation of pecuniary gain and they are contained in Articles 513 to 520 and in a special chapter XXIXa referring to organised crime. The new Criminal Procedure Act did not make additional changes in this field but only extended the application of special provisions to offences that are not the result of organised crime.

Article 513 of the Act in force determines the obligation of the court to identify pecuniary gain and this obligation extended to other bodies conducting the criminal procedures. This should be interpreted as the determined obligation of police and prosecutors' offices to gather evidence and investigate circumstances relevant to identification of pecuniary gain.

Unfortunately in Serbian court practice this obligation only refers to the Trial Chamber and it is conducted during the main trial. It is evident that police, prosecutor's office and investigating judge do not gather that evidence nor prosecutor's office submit this type of request.

The problem lies in the enormous work load and the high number of cases and investigations that mainly refer to gathering evidence on criminal liability of persons in cases with more than 40 accused persons. However, it is not acceptable that the proper financial investigation is not undertaken in organised crime cases. The other question is whether the police and prosecutor's office are trained to undertake this type of investigation.

When it concerns organised crime, it is necessary to have people trained to conduct investigations and to follow the flow of money, as well as to undertake parallel financial investigation. For the moment, not even the correct and confidential data on property status of accused persons or their movable and immovable property, property of their family members and close relatives are recorded.

In organised crime cases, it would be necessary to determine owned properties already during the police investigation, as well as vehicles owned by the accused and their family members, bank accounts, securities, shares and other objects. This would enable the comparison of the accused's property before and after the execution of criminal offences.

Article 504k of the CPC gives the possibility to a prosecutor to require, in these cases from competent state authorities, banking and other financial organisations which may control transactions, to submit the evidence and data which may serve as a proof of criminal offence or acquired property as well as information on suspicious transactions in the light of the Convention on Laundering, Search, Seizure and Confiscation of gain acquired by criminal activity. When it comes to the main trial it is already late for these investigations.

The Trial Chamber is already involved in adjudication, with the obligation to rule in a reasonable time period and does not have time to fully investigate the property of accused persons and persons to whom this property was transferred to. By the time the trial is scheduled the accused person already had time to dispose of suspicious property or to hide it.

Recommendations: Special financial criminal investigation

To prescribe by the Criminal Procedure Act the possibility of initiating a separate investigation (financial criminal investigation), which would be conducted by a prosecutor's office under the control of an investigating judge, independently from criminal proceeding, with the possibility of temporary confiscation of property and limitation of disposal of property. This investigation would be conducted within a reasonable time period and by trained staff.

The financial investigation should entail the identification of bought property and the identification of the amount used for buying this property. If the identified property cannot be connected to the committed criminal offence, it still may serve as a compensation for the illegally acquired property.

Since suspicious property is very often transferred to family members and other close relatives living with the accused, as well as to legal persons, it is necessary to prescribe the identification of their property.

In some foreign legislation there is a possibility to initiate this financial investigation at the latest two years after the passing of the first instance judgement. The financial investigation shall be terminated if the accused is released by the final judgement.

The provisions regarding the investigation would accordingly apply to this investigation, as well as all powers by the Criminal Procedure Act related to gathering of evidence from banks and other legal persons – as is prescribed by Article 504k of the act in force and Article 86 of the CPC that will enter into force shortly.

The Prosecutor's Office Act should prescribe the establishment of the special unit for conducting financial investigation. These units may be established either at the level of the Republic Prosecutor's Office or the Special Prosecutor's Office, with the staff trained to use special investigative techniques for identification and following of property.

This investigation can be led in cooperation with the Management Property Office (formed according to the draft law that is in parliamentary procedure).

Framework Proposal of the Legislative Norm

The conduct of financial criminal investigation may be done by amending Article 513 of the CPC in force and Article 491 of the new CPC. Since legal provisions remain the same amendments shall refer to the statute in force.

Article 513 of the CPC regulates the procedure for confiscation of pecuniary gain.

Paragraph 1 stipulates that pecuniary gain obtained through commission of criminal offence shall be determined in the criminal proceedings instituted ex officio.

As the separate proceeding for confiscation of pecuniary gain should be established (this will be mentioned in recommendations for Article 91 of the CC) in paragraph 1 the following text should be added after the comma:

"with the determination of the circumstances of the criminal offence and the criminal sanction or in a separate proceeding for the determination of pecuniary gain".

Article 513, paragraph 1 of the CPC should stipulate the following:

Pecuniary gain obtained through commission of a criminal offence shall be determined in the criminal proceedings instituted ex officio, with the determination of the circumstances of the criminal offence and criminal sanction or in a separate proceeding for determination of pecuniary gain".

After the current paragraph 2 which stipulates that the court and other authorities before which criminal proceedings are conducted are bound to obtain evidence and investigate circumstances which are relevant for the determination of pecuniary gain, the new paragraph may be added which would refer to the conduct of a special financial investigation or this could be prescribed by new paragraph:

New paragraph 2a:

If there is suspicion that a criminal offence of organised crime, unauthorised production and trade in narcotic drugs, human trafficking, smuggling of human beings, money laundering, criminal offences with elements of corruption or terrorism has been committed, where the prescribed sentence is over 4 years in prison, and by the commission of which considerable proceeds have been acquired or if it is manifest that the establishing of such proceeds shall be considerably more difficult, separate financial criminal investigation can be initiated.

This investigation aims to establish and estimate the illicit proceeds acquired by the defendant, as well as the proceeds of which the accused disposes, aiming to reach a final decision on confiscation on the grounds of Article 91 of the CC (related to the amendments of this Article mentioned further in the text*).*

The investigation is initiated by the ruling of the investigating judge, on the reasoned proposal of authorised prosecutor and can be initiated until the indictment is filed at the latest and can last up to 2 years after the first-instance judgment is passed (this is related to the envisaged possibility to conduct separate confiscation proceedings, as mentioned further in the text).

Financial investigation is led by the authorised prosecutor with the assistance of the financial police and other competent state authorities (this may include the Directorate for Property Management).

Among other things, in the course of investigation, the following can be investigated: standard of living of persons accused for offences from paragraph 1, their available financial assets, movable and immovable property, property of companies in which the defendant are owners or co-owners and the economic activity of these persons, in order to establish the source of their income. This investigation may cover a period not longer than five years before criminal proceedings were initiated.

Financial investigation is also conducted in relation to spouse, children, parents and other persons with whom the defendant has lived in the same household in the last five years, and also in relation to legal persons the property of which the defendant could have directly or indirectly disposed of.

In a manner and under the circumstances prescribed by this Code, the investigating judge or the president of the panel can, at prosecutor's proposal, adopt measures of temporary seizure of property as well as measures of prohibition to dispose of property and financial assets.

The formation of special units for conducting financial criminal investigations may be prescribed by the Prosecutor's Office Act that *would be entrusted with this investigation***.**

Amending the Criminal Procedure Act by introducing special financial investigation may be done without making major changes to the statute. However,

it is necessary to add and amend existing provisions of the Criminal Code which regulate the issues of confiscating the pecuniary gain acquired by committing a criminal offence and, in relation to this, the provisions of the CPC.

Extended Powers

Extended powers in comparative legislation are introduced with the aim of facilitating the proving of suspicious property origin and in relation to this transferring the burden of proof to the accused person. Besides facilitating determination of the property origin it concerns the possibility to confiscate the property of the accused person for which it is estimated as corresponding to the amount of illegally acquired property, without the need to determine the relationship of that property with committed criminal offence (it is defined as the substitute confiscation).

Whether these extended powers for confiscation and limitation of property disposal should refer to an organised crime offence or to other offences (which may be lucrative, such as drug trafficking, human trafficking, money laundering, offences with elements of corruption, terrorism) remains open.

Recommendations contained in already analysed conventions and special recommendations of the Council of Europe, EU, UN bodies dealing with organised crime and drug trafficking recommend that the application of extended powers should not only be limited to an organised crime offence but should be used for the aforementioned serious offences.

With extended powers the main question is the burden of proof for property that possibly derives from criminal activity. In organised crime cases it is difficult to determine connection between the committed criminal offences and certain property, especially if the criminal organisation acted in a longer time period.

Certain comparative and international instruments and recommendations refer to the use of legal presumptions on property from criminal activity acquired in the period before and after the committed criminal offence, property that may present directly or indirectly transferred benefit to third persons. It concerns a wider understanding of the gain acquired from criminal activity of a person who is obliged to offer evidence to the court on the legal origin of the property.

Serbian Criminal Code, as the majority of European codes, requires that a direct connection between the committed criminal offence and the proceeds subject to seizure be proven; however, this cannot always be done beyond any doubt. This was hence the reason for major changes in modern legislation – the burden of proof regarding the seizure of property and estimation of proceeds is reduced; more precisely, the accused is required to prove the legal origin of the proceeds for which there is reasonable assumption that it has been obtained by committing of criminal offences and can be subject to confiscation.

This possibility can be found in Article 12 paragraph 7 of the UN Convention against Transnational Organised Crime, which mentions the possibility of requiring that the defendant prove the legality of origin of alleged proceeds from crime and of other property subject to confiscation to the extent to which such request in accordance with the principles of national law and nature of court and other proceedings.

In certain legislation, when it concerns serious criminal offences (besides organised crime offence drug trafficking, corruption, terrorism, money laundering, human trafficking) the court may presume that property for which the accused is not able to prove the lawful origin in the period of five years before bringing the charges, is a result of his/her criminal activity.

In any case, the use of law and facts must be done within the presumption of innocence and the right to a fair trial, proportionally to the importance of a certain offence and property with the absolute right of the court to freely estimate the offered evidence.

The European Court for Human Rights in several cases analysed the confiscation of property. The most important is the case of *Phillips v UK*. In this judgment the court examined whether it is allowed to use presumptions in cases of property confiscation.

The court ruled that the presumption of innocence was not violated in using legal presumption during the evaluation of property that needs to be confiscated since these presumptions were not used to determine the guilt of a person but to enable the court to determine the exact amount which will be set out in the decision on confiscation.

Subsequently, the Court rejected the statements of *Phillips* that his right to a fair trial, including his right not to incriminate himself/herself was violated by the fact that he was requested to prove the legality of assets used in the previous six years. The court concluded that the manner in which presumptions were used gave sufficient guarantees for a fair trial.

In this case the Court determined that the right of fair trail was not violated nor was the right to peaceful enjoyment of possessions, determining *inter alia* that confiscation of property was in accordance with UK legislation. The confiscation had the aim of confiscating acquired gain which would be invested in the commission of drug offences. This is considered as a preventive action and a legitimate objective which justifies the possible interference of state in the peaceful enjoyment of possessions.

Proposal for amending Article 91 of the Criminal Code:

Possible introduction of extended powers can be achieved by amending Article 91 of the CC and accompanying provisions of the CPC:

Article 91 of the Criminal Code regulates the basis for confiscation of pecuniary gain. In paragraph 1 it stipulates as the main principle that no one can retain pecuniary gain acquired by a criminal offence.

Paragraph 2 of this Article, where it its stated that the proceeds from crime shall be confiscated under the conditions envisaged by this Code and judgment establishing the committing of a criminal offence, the words "judgment establishing the committing of a criminal offence" should be replaced by **"judgment establishing that proceeds were obtained from crime".**

This amendment would be in accordance with the aforementioned UN Convention where in Article 12, paragraph 1a, it is stated that the confiscation of gain acquired by committing criminal offences included in the convention or of a property corresponding to a value of the gain shall be confiscated.

This amendment opens the possibility to initiate a separate proceeding for confiscation of pecuniary gain in situations that are not regulated by law and when it is determined that the property was acquired as a result of criminal activity and a person against whom the procedure was initiated dies, becomes mentally ill or escapes.

It is necessary to envisage the **conducting of separate proceedings for confiscation of proceeds**, which is in relation to the above-mentioned special financial investigation. Leaving sufficient time for analysis and checking of the origin of property, without burdening the main criminal proceedings, taking care of the obligation of trial within reasonable time and urgent action when it comes to detention, and of time limits related to duration of detention in the course of investigation (6 months at the most), which, in complex cases, does not leave sufficient time for the completion of a good-quality financial investigation.

Separate Proceedings
Proposal of amended provision:

It would be expedient to add a new paragraph to Article 91 of the CC, stating that *in cases when so justified by the gravity of the criminal offence or the need to conduct the trial within reasonable time, and in cases when the accused dies, escapes or becomes mentally ill or in other justified cases the decision on confiscation of proceeds will be passed or terminated in separate confiscation proceedings.*

Amendments of the CC would trigger the amendments of the CPC, namely Article 517 of the CPC which states that the confiscation of pecuniary gain shall be pronounced in convicting judgment, ruling on conviction without the main trial, judicial warning and other decisions of the court ruling on guilt.

The possibility of a separate proceeding should be prescribed here; namely the passing of the separate court decision in relation to confiscation of pecuniary gain. A separate proceeding would, according to the proposal for financial investigation, enable more time for implementing this investigation and passing the decision on confiscation of pecuniary gain and after the decision in a criminal case.

Proposal:

Either add a new paragraph to Article 517 of the CPC or introduce a new article, which would read:

In accordance with (above-mentioned amendments of Article 91 paragraph 2 of the CC) separate confiscation proceedings can be initiated until the termination of first-instance proceedings, and at the latest within 2 years after the passing of first-instance judgment.

The decision on initiation of these proceedings is passed by the non-dispute chamber upon the reasoned proposal of the competent prosecutor or ex officio.

Proposal: Extended Powers

A new paragraph would be added to Article 91, which would envisage for confiscation of proceeds with extended powers for organised crime offences and some serious criminal offences:

In case of a conviction for a criminal offence of organised crime, unauthorised production and sale of narcotic drugs, smuggling and trafficking of human beings, money laundering, criminal offences with elements of corruption or terrorism, where the prescribed sentence is over 4 years in prison, which were committed by the defendant in turns or continually, the court can rightfully assume that the difference between his/her legally obtained property and the actual property he/she disposes of directly before and after the initiation of criminal proceedings originates from the committing of criminal offences, unless the defendant gives valid and convincing evidence in legal origin of property, and such property shall be taken into account when deciding on confiscation of proceeds or equivalent value of such property.

When it concerns the introduction of extended powers in certain legislation it is prescribed that legal presumptions on the origin of property may be used for the period of five years before the initiation of the criminal procedure. In that case, it is presumed that the property was acquired by commission of similar criminal offences. These solutions are especially used regarding the criminal offences of drug trafficking where it is presumed that the perpetrator maintained his/her expensive life style by drug trafficking, unless otherwise proved.

The possible incorporation of this provision into Serbian legislation would require the complete discussion and analysis and it could possible be used for strictly defined criminal offences of organised crime, drug trafficking or action of criminal organisation in a longer time period, as well as when it is difficult to determine with certainty the connection between the property (for which there is no proof of legal origin) and the commission of criminal offences.

The provision of Austrian Criminal Code is very interesting. Article 20, paragraph 3 states: *an accused person who, as a member of a criminal or terrorist organisation, acquires pecuniary gain and property which may be presumed that derives from committing criminal offences and whose lawful origin cannot be determined shall be punished to pay the amount determined by the court proportionally to the acquired wealth.* This provision may serve as an alternative solution for extended powers and the reduction of the burden of proof.

Suggested proposals for amending Article 91 of the CC as the basic provisions with the confiscation of pecuniary gain would enable the reduction of burden of proof, conduct of a separate proceeding and a separate decision on the confiscation of pecuniary gain and subsequently confiscation of the property as a substitute.

Property that can be confiscated

Deficiencies and unclear provisions in applying existing legal provisions are identified in the analysis of the manners in which **certain property may be confiscated** in Serbian legislation.

The Criminal Code prescribes a security measure as a type of criminal sanction, and one such measure is the ***confiscation of property from Article 87 of the CC***. This measure entails that the objects used or intended for use in the commission of a criminal offence or resulting from the commission of a criminal offence may be seized, if property of the offender. These objects may be seized even

if not property of the offender if so required by the interests of general safety or it there is still a risk that they will be used to commit a criminal offence, if without prejudice to the right of third parties to compensation of damages by the offender. This seizure is not mandatory. The obligation of confiscating these objects for certain criminal offences (drugs offences, firearms offences, forgery) is prescribed in the separate part of the code. It is interesting that with the criminal offence of money laundering from Article 231, paragraph 5, the confiscation of property is requested without stipulating that it concerns the pecuniary gain unlike provisions prescribed for the criminal offence of "acceptance of bribe" from Article 367 and "illegal mediation" from Article 399 where it is stipulated that reward, gift or pecuniary gain shall be confiscated.

When it concerns a measure within the system of criminal sanctions a main objective is to prevent the repetition of the criminal offence.

It is prescribed that no one may retain material gain obtained by criminal offence and that gain shall be seized on prescribed conditions (Articles 91 to 93 of the CC).

It is prescribed that money, items of value and all other pecuniary gains obtained by a criminal offence shall be seized from the offender, and if such seizure should not be possible, the offender shall be obligated to pay a pecuniary amount commensurate with obtained pecuniary gain (Article 92 of the CC).

According to tendencies of international legislation, recommendations of competent international institutions, and especially the UN Convention against Transnational Organised Crime and the UN draft law, it is recommended to clearly define objects and property which may be confiscated, either on the basis of Article 87 of the CC or on the basis of confiscation of pecuniary gain from Article 91 to 93 of the CC.

The definition of the object from Article 87 of the CC is very imprecise and problematic in court practice since it does not clearly enumerate the possibility of confiscating the immovable (which may often be used for commission of the criminal offence). The aforementioned UN convention in Article 12 regulates the confiscation and seizure and in paragraph 1b and stipulates that property, equipment or other instrumentalities used in or destined for use in offences shall be confiscated.

In defining the property in Article 2, the Convention clearly enumerates what is understood as property, amongst which is all movable and immovable property.

The Serbian Code does not clearly prescribe the possibility of confiscating immovable property but on the other hand it is not banned. This, however, creates uncertainties and different application of provisions by courts. Problems also emerge in interpreting the possibility of confiscating larger movables such as vehicles, trucks, buses, ships as well as houses and other objects used for transfer, storage and production of narcotics and commission of human trafficking. They often represent directly or indirectly acquired pecuniary gain. This is very important in regard to money laundering.

Proposal for amending Article 87 of CC:

It is necessary to change Article 87 of the CC so as to clearly state that all objects, movable and immovable, material and immaterial, can be confiscated, as well as legal documents that can be related to the committing of criminal offence or which originate from a criminal offence.

Such solution would be fully in accordance with the UN convention.

Proposal for amending Article 92 of CC:

This Article regulates conditions and manners of confiscating pecuniary gain:

Article 92, paragraph 1 should also be amended so as to specify the type of property that can be confiscated and envisage the possibility of confiscation as a substitute, and state:

All movable and immovable property, objects and securities and any and all other proceeds from crime or originating from such proceeds shall be confiscated from the perpetrator, and if such confiscation is not possible, the perpetrator shall be obliged to pay an amount corresponding to the proceeds obtained, and other property the value of which corresponds to the proceeds can also be confiscated.

The possibility of substitution confiscation can also be envisaged by a special paragraph of Article 92 of the CC or within the CPC. In any case, it should be clearly stated that:

If, because of an action or failure of the defendant, the property subjects to confiscation has become unavailable to court, any other defendant's property the value of which corresponds to the value of proceeds from crime or originating from proceeds of crime can be confiscated to the defendant as a substitute.

Confiscation of a property as a substitute is prescribed in a majority of contemporary legislations. It is also prescribed by UN Convention against Transnational Organised Crime. Article 12, paragraphs 3, 4 and 5 of the Convention enumerate cases of confiscation when the gain was acquired from criminal activity, transformed, transferred or mixed with legally obtained property or some other property.

Confiscation from Third Persons and Legal Persons

Article 92, paragraph 2 regulates the possibility of confiscating property from third persons, although the issue of a *legal person's criminal liability* is present. This issue is not regulated by Serbian legislation, neither is the simplified manner of the confiscation of property of legal persons.

By extensive interpretation which was not uniformly and often applied in practice, the Serbian Criminal Code leaves open the possibility of confiscating property from a legal person. This is regulated by the CPC. The relatively complicated and unclear procedure of the examination of a legal person's representatives is prescribed, as well as the determination of pecuniary gain transferred to a legal person; even, the suspension of the main trial in cases of confiscation of

property from a legal person, when the court is obliged to suspend the trial and call the legal person's representative.

The introduction of the legal person's criminal liability into the Serbian Criminal Code would simplify the procedural provisions regulating the confiscation of property, which would of course create more possibilities to subject legal persons to a financial investigation and to confiscate their property. If a legal person's criminal liability is established by Serbian statute, ***Article 92, paragraph 2 should clearly state:***

Proceeds shall also be confiscated from legal persons if their enrichment was a direct or indirect result of the commission of a criminal offence.

Concerning the confiscation from third persons, Article 92 paragraph 2 of the CC should be amended, so that, in addition to the existing text stating that proceeds shall be confiscated from persons to whom it has been transferred without consideration or with consideration that manifestly does not correspond to the real value, the following should be added:

and also when property has been transferred in order to conceal the origin of property or to prevent the confiscation of proceeds of crime.

All provisions of the CPC in force regarding the protection of the injured party's interest should be retained, stating that the person should demonstrate his/her *bona fide*.

Experiences in practice often show that the confiscation of pecuniary gain is often hampered by the transfer of that property to a third person or legal persons and thus it is necessary to prevent this.

There is also a problem in the situation when the ***accused person or a suspect dies*** during the criminal procedure or before its initiation, especially in cases when it concerns a significant property for which there are grounds of suspicion that it is the result of the criminal activity.

At the moment the criminal procedure is pending against the Zemun gang for criminal offences where there are grounds for suspicion about the origin of property. Two deceased persons are denoted as organisers and leaders of the gang. If it is proved that the offences were committed by Zemun gang the subsequent question will deal with the illegally acquired property (around 10,000,000 euros which leaders of the gang disposed of). According to current legal provisions it will be very hard to confiscate this property.

The statute should clearly prescribe these situations which are very sensitive from the aspect of the European Convention on Human Rights, especially in relation to the presumption of innocence.

Proposal:

Paragraph 3 of Article 92, governing confiscation of proceeds obtained for another person reads: "If proceeds from crime were obtained from another person such proceeds shall be confiscated" should be amended so as to state:

the part of property transferred by inheritance in case of death of the defendant shall be confiscated if, after a final judgment, it has been established that the property originates from the commission of a criminal offence.

The UN Model Legislation on Laundering, Confiscation and International Cooperation in Relation to the Proceeds of Crime, prepared in 1999, in relation to property acquired from criminal activity, regulates the confiscation of property of an accused person after the convicting judgement for a serious criminal offence. It also prescribed confiscation of property of a deceased person who was formally charged for a criminal offence, as well as of a person against whom the arrest warrant was issued and if in the meantime the person dies or he/she is at large.

According to this model a civil, *in rem* confiscation of property is prescribed, namely outside criminal procedure.

The aforementioned situation of confiscation of property of a *deceased person* (against whom a criminal procedure was not initiated during his/her life) *may only be done in civil procedure for confiscation of property*.

Confiscation of a property of a person at large is not precisely defined by the Serbian statute but it leaves a possibility of confiscating the property of that person during the trial *in absentia* and convicting judgement. This case is not known in practice due to imprecise legal solutions; thus, this possibility should be clearly prescribed in ***the new legal text***.

Proposal:

The CPC regulations governing temporary seizure of property could also state that, in cases of trial in absence and passing of judgment in absence, the property of the person under trial shall be temporarily confiscated, which would be possible in all phases of criminal proceedings, and then set a fairly long time limit during which the property would be temporarily confiscated or frozen after the judgment becomes finally binding.

This is a delicate matter from the standpoint of the European Convention on Human Rights, regarding the issue of trial in absence, and requires a more detailed analysis of possible permanent confiscation, given the possibility of re-trial, if the defendant appears.

In any case, it would be possible to envisage the possibility of temporary seizure of property belonging to an absent defendant, only in cases when the property in question is of considerable value, which is suspected or proven to originate from criminal offence.

Measures of Temporary Seizure of Property as a Security Measure and Payment of Pecuniary Claim

Article 516 of the CPC and 494 of the new CPC similarly prescribe manner (this way of prescribing is brief and imprecise) of determining the temporary security measures *ex officio* and at the same time refer to the provisions of the Enforcement Procedure Act. In practice this measure is rarely applied.

The provisions of the CPC from Article 504r to 504x referring to organised crime are transferred to the new CPC to Article 87 to 95 as measures for the temporary seizure of objects and pecuniary gain for which there are grounds for

suspicion that they resulted from the criminal offence punishable by 10 years imprisonment or more. These statues also prescribe that this measure may be pronounced outside the general statutory conditions but they do not clearly set out those conditions, objectives and manner of implementing this measure.

A preventive confiscation from a party should be solved in a more complete and precise manner. Preventive confiscation, seizure and freezing of assets enable (as it is stated in international conventions) the possibility of paying pecuniary claims and confiscating property and objects from the accused, bearing in mind that the state may enforce claims only after the court decision on the confiscation of property becomes final.

The confiscation of property is not only closely connected to the commission of the criminal offence but of the property that may serve for enforced payment of claims should be prescribed as a possibility, by precisely stating that this may include immovable, securities and bank accounts.

The Italian model gives a good example of preventive measures.

New Article should be adopted in the CPC:

When there is concrete danger that the property that is likely to be confiscated in relation to Article 91 paragraph ... of the new CC (which envisages special authorities for confiscation of property), could be lost, taken, alienated or otherwise concealed, the competent prosecutor can request from investigating judge, in the course of investigation or from the trial panel, after the indictment, to issue an order on temporary seizure or freezing of property.

The prosecutor has to state reasons for the proposal in the manner envisaged by the present CPC in Article 504, which also envisages an adequate solution regarding procedure on appeal.

The court decides on prosecutor's request within 8 days from the day the request is submitted.

If the titleholders or actual holders of property subject to temporary seizure are third persons or legal persons, such property can be temporarily confiscated from them if there are grounds of suspicion that it originates from a criminal offence, with application of envisaged provisions on protection of third persons.

If the defendant has escaped or is abroad, measures of temporary seizure can be initiated and adopted only in relation to the property for which there is reasonable doubt of it originating from a criminal offence or being a re-investment of such property.

The Enforcement of Decisions on Confiscation of Pecuniary Gain and the Payment of Pecuniary Claim

The enforcement of the pecuniary gain is regulated by the Act on Enforcement of Penal Sanctions, namely Article 251 which refers to the Enforcement Procedure Act. In practice, bearing in mind the complex enforcement procedure by enforcement courts, there is a very low percentage of paid claims on the basis of pecuniary gain. The criminal court does not have control over this procedure; thus the effort of courts to identify the region of property loses its meaning by

non-enforcement of the decisions. According to current provisions, the enforcement court may make a list of immovable and movables only in the procedure of enforcing the pecuniary claim. By that time several years may pass and the property may be disposed of or rendered unavailable.

It is necessary to fully regulate the manner of paying the pecuniary claims or confiscation of property by the Act on Enforcement of Penal Sanctions and by already suggested new solutions concerning the confiscation of pecuniary gain. The procedure must also be simplified and rendered more efficient.

The enforcement of the confiscation of the pecuniary gain is problematic because Serbian CC does not define this measure as a criminal sanction (to be more precise as a security measure) but as a *sui generis* measure. If this measure was put again among criminal sanctions (as it was the case until 1977) it would be easier to regulate its enforcement within the criminal court as well as to supervise the enforcement. That measure has a special treatment in ECHR decisions, which makes a difference between different forms of property confiscation. In certain cases the ECHR treats confiscation as a punishment and in other as a security measure depending on the application of standards of the right to a far trial and the right to property.

Managing Confiscated Property

Bearing in mind that there is a proposal of the Act on Property Management which was adopted at the official proposal of the Government in November 2006, the adoption of this statute should be supported. This statute regulates the management of property confiscated by court, temporarily or permanently in criminal or petty offence procedure as well as the formation of the Office for Management of Property.

Since this statute does not regulate the purpose for which the confiscated property shall be used, the Enforcement of Penal Sanctions should regulate this purpose either movables or immovable of higher value and property of the company.

Proposal:

The Italian code regulates in detail the purpose for which the pecuniary gain shall be used for and similar provisions may be applied in Serbia.

The Decision on the purpose is entrusted to the Ministry of Finance, on the proposal of the competent of territorial service and mayors of the competent municipality.

The solution that would be most suitable for Serbia is that the decision on the intended use of property be entrusted to the Ministry of Finance, at the proposal of the court or local self-government.

When it comes to real estate property, it is to be kept as state property and used for the realisation of aims of justice, public order and civil protection, except in cases when it has to be sold in order to secure the claims of the injured parties.

Ownership on real estate property is transferred to the municipality on the territory of which it is located and is used for institutional and social purposes.

By a special decision, it can be transferred to treatment and rehabilitation centres for drug addicts and similar institutions.

Property in the form of a company remains to be owned by the state and can be leased if there are further economic and social interests.

Companies can also be sold in proceedings that guarantee the realisation of public interest or indemnification of the injured parties.

The same can be envisaged for major movable that are subject to registration, such as motor vehicles, ships, planes, etc.

At the end, it is necessary to mention that the majority of comparative law provisions prescribe exemptions from mandatory confiscation of the pecuniary gain in cases when it concerns insignificant pecuniary gain or when the confiscation of property is connected to great difficulties and expenses (which may amount to a sum equal to the pecuniary gain to be confiscated). Thus, this solution should be prescribed by Article 91 of the CC.

III. ON LIABILITY OF LEGAL PERSONS FOR CRIMINAL OFFENCES AND ITS RELATION TO COMMERCIAL TRANSGRESSIONS

(R. Sepi)

The following chapter contains a proposal of legislative measures that need to be taken in order to introduce liability of legal persons for criminal offences in Serbian legal system and thus incriminate their participation in organised crime activities:

Primarily, it is necessary to establish the possibility of criminal liability of legal persons in positive substantive criminal law. This can be done by amending the Criminal Code, namely, the provisions of its General Part, by adding a basic provision on legal persons' liability to the existing provisions; more precisely, a new Article should be added, reading:

On Liability of Legal Persons for Criminal Offences

(1) Legal persons shall be liable for a criminal offence when the perpetrator has committed a criminal offence for, on behalf or to the benefit of the legal person.

*(2) Punishment, warning and security measures can be pronounced to liable legal person (**alternative: In cases where there is legal person's liability for a criminal offence)** and legal consequences of conviction can take place in regards to legal persons.*

(3) Criminal offences for which a legal person can answer and special criminal procedure that can be conducted against a legal person shall be regulated by a special statute.

After that, it is necessary to pass a special Criminal Liability of Legal Persons Act, given that such type of liability presently does not exist in Serbian legisla-

tion. At the moment, legal persons are only liable for petty offences and commercial offences. The provisions of such Act would further elaborate and append the main provisions of the Criminal Code on criminal liability of legal persons. The following provisions would have to be included in such Act.

Main Provisions

Article 1

*(1) Legal person shall be liable for a criminal offences committed by the perpetrator for, on behalf or to the benefit of the legal person (**alternative: Legal persons' liability for a criminal offence shall exist when the perpetrator acts for, on behalf or to the benefit of the legal person):***

1) If the criminal offence committed is an execution of a decision, order or approval of its managing or supervisory bodies;
2) If its managing or supervisory bodies have influenced the perpetrator or enabled him/her to commit a criminal offence;
3) If it disposes of illegally acquired proceeds or uses objects originating from the execution of the criminal offence;
4) If its managing or supervisory bodies have failed to execute due supervision over the legality of work of persons and bodies subordinated to them.

Article 2

(1) Under the conditions prescribed in Article 1 of this Act, legal person shall be liable for the criminal offence together with the perpetrator.
(2) Legal person shall also be liable even if the perpetrator of the criminal offence is not criminally liable.
(3) Criminal liability of legal person shall not exclude the criminal liability of the natural person as the perpetrator.

Criminal Offences for Which Legal Persons Answer

Article 3

(1) Legal persons shall be liable for specifically listed criminal offences prescribed by the provisions of this Act and for other punishable activities when so prescribed by law.

Punishments, Warning Measures, Security Measures and Legal Consequences of Conviction

Article 4

(1) The following punishments can be pronounced for legal person's criminal offences:

1) fine;
2) confiscation of property
3) termination of legal person

(2) In addition to general security measures, the following security measures can be pronounced to a legal person liable for a criminal offence:

- *Confiscation of objects*
- *Publication of judgment*

- *Prohibition to work with public powers*
- *Prohibition to perform certain activities*
- *Prohibition to obtain licences, approvals, concessions, powers of subsidies*
- *Prohibition to operate with users of state or local budget*

(3) The following legal consequences of conviction can take place against a legal person liable of a criminal offence:

- *Prohibition to act on the basis of approved or allowed operations (**alternative: annulment of licences or approvals)***
- *Prohibition to execute concessions*

Criminal Procedure against Legal Persons

Article 5

(1) Single proceedings shall be conducted and one judgment shall be passed against a natural person as the perpetrator and legal person liable of a criminal offence.

(2) Proceedings from paragraph 1 of this Article shall be instituted by a single indictment lodged by authorised state prosecutor.

(3) When criminal proceedings cannot be conducted against the natural person as the perpetrator, either for reasons prescribed by law or because it has already been conducted, the proceedings shall be instituted or conducted only against the legal person.

NOTE: These proposals prompt the need for additional legislative amendments. The transitional and final provisions of the Criminal Liability of Legal Persons Act should prescribe that Commercial Offences Act and Petty Offences Act shall remain in force and apply. Consequently, it would also be necessary to amend or, more precisely, to modernize both mentioned statutes. In addition, it is necessary to introduce, either by amendments of the Criminal Code and the Criminal Procedure Code, or within the transitional and final provisions of the Criminal Liability of Legal Persons Act, a provision stating that the provisions of these two Codes also apply to the criminal liability of legal persons if this is not contrary to the provisions of the Criminal Liability of Legal Persons Act.

***Explanation*:** The mentioned amendments would preserve the existing system of Serbian law, at the same introducing liability for offences that, due to their gravity and legal nature, cannot be included either in petty offences or in commercial offences. Introduction of subjective criminal liability based on the *mens rea* of legal person and prescribing adequate sanctions would fill in the legal lacuna in Serbian legal system that has so far been expertly used by members of organised crime

IV. MALA FIDE COMMERCIAL OPERATION

(J. Ćirić)

Our attention should here be focused on two provisions: "*mala fide* work in commercial operation" (Article 234 of the CC) and "causing bankruptcy" (Article

235 of the CC). This is the present formulation of *mala fide* work in commercial operations in the Serbian CC:

(Paragraph 1 Article 234) – Responsible person in a company or other commercial entity in which he/she does not have majority share, who consciously violates laws, other regulations or general acts on operation or operates with manifest mala fide and thus negligently causes damage to such company or other commercial entity that exceeds the amount of 400 and 50,000 dinars, shall be punished by a fine or imprisonment up to three years.

The problem with this definition of the criminal offence lies in the fact that the perpetrator acts with intent in relation to *actus reus*, while with negligence in relation to the consequence. In some cases, such as the grave bodily injury which resulted in death, presents problems. Consequence is closely linked to the *actus reus* and it is hard to imagine that someone who undertakes an intentional action does not act intentionally in relation to the consequence. Thus, "negligently" should be erased. It should only stipulate "thus…". The provision on "causing bankruptcy" from Article 235 of the CC is related to this. A responsible person should not cause bankruptcy by performing one action but he/she may damage the company with several actions where each of these actions does not individually and automatically causes bankruptcy. Besides, it seems that the provision of paragraph 2, Article 235 "negligently causing bankruptcy" should also be deleted.

V. SPECIAL FORMS OF FRAUD

(J. Ćirić)

Bearing in mind that in many countries there is a special criminal offence "insurance fraud" it would be appropriate to prescribe the criminal offence of "insurance fraud" as a special form of the criminal offence of fraud. This is even more correct since this criminal offence is prescribed by neighbouring countries, as for example Republic of Serbia.

The issue of special forms of fraudulent behaviour deserves special attention of the law enforcement authorities and the legislator. We think that the most prudent mode of action would be to adjust the incrimination from the Republic of Serbia Criminal Act, which reads:

(1) Whoever intending to collect the premium from the insurance company, destroys, damages or hides the object insured against the mentioned risks, and then reports the damage, shall be punished by imprisonment for three years.

(2) Punishment from paragraph 1 of this Article shall also be pronounced to a person who, intending to collect from the insurance company the premium in case of bodily injury or damage to health, inflicts such injury or damage of health to himself/herself and reports such damage.

(3) If the material benefit from the committing of offences from paragraphs 1 and 2 of this Article 10.000 KM, the perpetrator shall be punished by imprisonment

from 69 months to 5 years, and if it exceeds 50.000 KM, he/she shall be punished by imprisonment from 1 to 10 years.

The only change, in order to adjust to the conditions in the Republic of Serbia, concerns the amount in convertible marks, which should be expressed in dinars – 1,500,000 dinars, and the punishment should also be prescribed as 1 to 10 years in prison.

VI. HUMAN TRAFFICKING
(J. Ćirić)

In analysing human trafficking issues the provisions of the EU Framework Decision on fighting the human trafficking from 2002 should be taken into consideration, which stipulates that states shall criminalise in their national legislation a situation when the life of a victim is in question, namely when the offence is committed by an organised group. The minimum punishment should be 8 years of imprisonment. Bearing in mind Serbian criminal legislation, we took into consideration the paragraphs 4, 5 and 6 of Article 388 of the Criminal Code which stipulate:

(4) If the offence specified in paragraphs 1 and 3 of this Article resulted in grave bodily injury of a person, the offender shall be punished by imprisonment from three to fifteen years.

(5) If the offence specified in paragraphs 1 and 3 of this Article resulted in death of one or more persons, the offender shall be punished by imprisonment for minimum ten years.

(6) Whoever habitually engages in offences specified in paragraphs 1 and 3 of this Article or if the offence is committed by an organised group, shall be punished by imprisonment for minimum five years.

Paragraphs of Article 388 of the Serbian CC should be reformulated, that is, the statutory minimum of punishment should be increased. Consequently, paragraph 4 should read:

If offences from paragraphs 1 and 3 of this Article have caused serious bodily injury of a person, or the life of a victim is in danger, the perpetrator shall be punished by imprisonment for at least 8 years.

Paragraph 6 should read:

(6) The person engaging in the commission of the commercial offence from paragraphs 1 to 3 of this Article, or, in cases where the offence was committed by an organised group, shall be punished by imprisonment for at least 8 years.

What needs to be mentioned here are the provisions of the European Convention on Combat against Human Trafficking of 2005, which still did not enter into force, since it was not ratified by sufficient number of countries. However, we find that the provisions that concern the "users" of sexual services, provided that such user knew that the person in question is a victim of human trafficking, are good.

We also propose that the existing 388 "Human Trafficking", be appended with paragraph 7, reading:

(7) If the user of sexual services could have known that in that specific case the person providing the service was a victim of human trafficking and has still taken actions to use such victim's services, the user can be punished by a fine or imprisonment up to one year.

VII. RELATIONSHIP BETWEEN TERRORISM AND ORGANISED CRIME

(M. Reljanović)

Proposal for incrimination of a single criminal offence of terrorism, which would replace Articles 312 and 391 of the Criminal Code:

(1) Whoever, with intent to jeopardize the constitutional order or security of Serbia, or to harm a foreign state or international organisation, coerces it to certain actions or failure to act, undertakes or threatens to undertake an activity that is of general danger or an act of violence that can alter or jeopardize political, economic or social structure of the state or international organisation, and thus cause the sense of fear or insecurity in citizens,

shall be punished by imprisonment from three to fifteen years.

(2) If offence from paragraph 1 of this Article has caused death of one or more persons, the perpetrator shall be punished by imprisonment from five to fifteen years.

(3) If, in committing the offence from paragraph 1 of this Article, the perpetrator deprives a person of his/her life with intent, he/she shall be punished by imprisonment for at least ten years or imprisonment from thirty to forty years.

In accordance with this solution, Article 392 would read:

(1) Whoever provides or collects funds intended for financing of the criminal offence from Articles 312 and 391 of this Act, shall be punished by imprisonment from one to ten years.

(2) Funds from paragraph 1 of this Article shall be confiscated.

Alternative – proposals for amending the existing criminal offences of terrorism and international terrorism:

Terrorism (Article 312 of the Serbian CC)

(1) Whoever, with intent to jeopardize the constitutional order or safety of Serbia, undertakes or threatens to undertake an action of general danger or an act of violence that can alter or jeopardize the political, economic or social structure of the state, and thus cause the feeling of fear or insecurity in citizens, shall be punished by imprisonment from three to five years.

(2) If offence from paragraph 1 of this Article has caused death of one or more persons, the perpetrator shall be punished by imprisonment from five to fifteen years.

(3) If, in committing the offence from paragraph 1 of this Article, the perpetrator deprives a person of his/her life with intent, he/she shall be punished by imprisonment of at least ten years or imprisonment from thirty to forty years.

International Terrorism (Article 391 of the Serbian CC)

(1) Whoever, in intent to harm a foreign state or international organisation, coerces it to certain actions or failure to act, undertakes or threatens to undertake an activity that is of general danger or an act of violence that can alter or jeopardize political, economic or social structure of the international organisation, and thus cause the feeling of fear or insecurity in citizens, shall be punished by imprisonment from three to fifteen years.

(2) If offence from paragraph 1 of this Article has caused death of one or more persons, the perpetrator shall be punished by imprisonment from five to fifteen years.

(3) If, in committing the offence from paragraph 1 of this Article, the perpetrator deprives a person of his/her life with intent, he/she shall be punished by imprisonment of at least ten years or imprisonment from thirty to forty years.

VIII. CRIMINAL OFFENCES OF KIDNAPPING AND COERCION

(M. Reljanović)

The existing legislation of the Republic of Serbia is in full accordance with the goals of combat against organised crime.

IX. CYBER CRIME

(M. Reljanović)

Recommendations for amending the CC:

Showing of Pornographic Material and Abuse of Children for Pornography[157]

Article 185

(1) Whoever sells, shows or by public display or otherwise makes available texts, photographs, audio-visual or other objects of pornographic content to a child or shows the child a pornographic show, shall be punished by a fine or imprisonment up to six months.

157 Here there is a discrepancy in relation to the text of the Council of Europe Convention on Cyber Crime. According to the Convention, the abuse of children for pornographic purpose should be incriminated if they are younger than 18 (exceptionally than 16), whilst the Serbian Criminal Code considers that a "child" is a person under 14 years of age, whilst a person younger than 18 is a "minor" (Article 112, paragraphs 8–10). Having this in mind, the introduction of the term (a minor under 16 years of age) should be considered; another option would be to replace the term "child" in Article 185 of the CC with the term "minor".

(2) Whoever abuses a child to produce photographs, audio-visual or other objects of pornographic content or for pornographic show, shall be punished by imprisonment from six months to five years.

(3) Whoever sells, shows, publicly displays or electronically or otherwise makes available photographs, audio-visual or other objects of pornographic content originating from the committing of criminal offence from paragraph 2 of this Article, shall be punished by imprisonment up to two years.

(4) Whoever possesses photographs, audio-visual or other objects of pornographic content originating from the committing of criminal offence from paragraph 2 of this Article, shall be punished by imprisonment up to one year.

(5) Objects from paragraphs 1 to 4 of this Article shall be confiscated.

Production, Acquisition and Use of other Devices that Can Harm a Computer or Computer System

Article 304a

(1) Whoever makes, sells, uses, buys in order to use, imports or otherwise produces or acquires devices that can illegally harm a computer or computer system in any way, or otherwise ensure illegal benefit to the person using tem, shall be punished by a fine or imprisonment up to two years.

(2) Devices and means by which the criminal offence from paragraph 1 of this Article shall be confiscated.

Recommendations for amendments of Act on Organisation and Competences of State Authorities in Combating Cyber crime:

Article 9

In order to perform operations of internal affairs authorities in relation to criminal offences from Article 3 of this act, Department for Combat against Cyber crime (hereafter: the Department) shall be formed within the Ministry competent for internal affairs.

Department shall act on the requests of the Special Prosecutor, in accordance with law.

Minister competent for internal affairs shall appoint and resolve the Head of the Department and regulate its work in detail, previously obtaining Special Prosecutor's approval.

When choosing the employees in the Service, special care must be taken in regards to their having special knowledge in the field of information technologies.

Ministry competent for internal affairs is obliged or organise special education for all employees in the Department, at the request of Special Prosecutor or Department Head.

Article 11

Chamber for Combat against Cyber crime (hereafter: the Chamber) shall be formed at the Appellate Court in Belgrade in order to act in cases of criminal offences from Article 3 of this Act.

Judges are assigned to the Chamber by the President of the Appellate Court from among the judges of this court, with their consent. Advantage shall be given to judges who have special knowledge in the field of information technologies.

President of the Appellate Court in Belgrade may assign to the Chamber judges from other courts referred to work in that court, with their consent.

Assignment from paragraphs 2 and 3 of this Article shall last for four years at the longest, and may be extended by the decision of the President of the Appellate Court in Belgrade, with written consent of the assigned person.

Ministry competent for judiciary is obliged, at the request of the President of the Appellate Court, to organise special education for judges assigned to the Chamber.

X. TRAFFICKING IN NARCOTICS
(M. Reljanović)

Recommendations for amending the CC:

Unauthorised Production, Possession and Marketing of Narcotics

Article 246

(1) Whoever illegally produces, processes, sells or offers for sale or who buys in order to sell, hold or transfer or who acts as an intermediary in the sale or purchase or otherwise markets without authorisation substances or preparations declared to be narcotic drugs, shall be punished by imprisonment for at least five years.

(2) If offence from paragraph 1 of this Article was committed by more persons who have associated in order to commit these offences, or the perpetrator of this offence has organised a network of re-sellers or intermediaries, the perpetrator shall by punished by imprisonment for at least seven years.

(3) Person who, without authorisation, holds substances or preparation that have been declared as narcotic drugs, shall be punished by a fine or imprisonment up to three years.

(4) The perpetrator of offence from paragraph 3 of this Article who holds the narcotic drugs for personal use may be remitted from punishment. Narcotic drugs for personal use shall be such quantity that is, based on all medical circumstances, evidently prepared for personal use.

(5) Whoever, without authorisation, produces, acquires, possesses or gives for use equipment, material or substances he/she knows are intended for the production of narcotic drugs, shall be punished by imprisonment from six months to five years.

(6) Narcotic drugs and means for their production and processing shall be confiscated.

Article 247

(1) Whoever incites another person to use narcotic drugs or who gives another person narcotic drugs for the use of that or another person or who makes available premises so that these persons can use narcotic drugs or otherwise enables other persons to use narcotic drugs, shall be punished by imprisonment from two to ten years.

(2) If offence from paragraph 1 of this Article was committed towards a minor or towards more persons or has caused particularly grave circumstances, the perpetrator shall be punished by imprisonment for at least three years.

(3) Narcotic drugs shall be confiscated.

Section Three

CORRUPTION

I. FINANCING OF POLITICAL PARTIES ACT AND PREVENTION OF CONFLICT OF INTEREST ACT

(J. Ćirić)

a) The Act on Financing Political Parties was published in the "Official Journal of Serbia", No. 72/2003 and 75/2003.

Provisions of Articles 16, paragraphs 5 and 6 and Article 19 are problematic. The provisions in force stipulate the following:

Article 16, paragraph 5 – A political party is required to submit to the committee of the National Assembly of the Republic of Serbia competent for finance (hereinafter "Finance Committee") the annual statement, and certificate of a certified auditor, as well as a report of all contributions exceeding 6,000 dinars and a report on property. The Minister of Finance shall specify the content of these reports.

Article 16, paragraph 6 – The annual statement and reports referred to in paragraph 5 of this Article are published at the cost of a political party in the "Official Gazette of the Republic of Serbia."

Article 19 contains penal provisions which go from 200,000 to 1,000,000 dinars for entities that breach the provisions of this act.

Instead of these provisions we suggest the following:

(Paragraph 5 Article 16) – Political party shall be obliged to file to the Republic of Serbia National Assembly Committee competent for finances a final account for each year certified by a certified auditor, as well as a report on incomes over 6,000 dinars and a report on property. The report shall be submitted by April 1st of the current year at the latest. The content of these reports shall be regulated by the Minister of Ffinance.

(Paragraph 6 Article 16) – Final account and reports from paragraph 5 of this Article shall be published in the "Official Herald of the Republic of Serbia" in the first issue after April 1st, at the cost of the political party.

(Paragraph 7 Article 16) – If a political party fails to file the report by April 1st, it shall lose the right to budget financing in the following 2 years, and can also be subject to a fine from 500,000 to 2,500,000 dinars.

(Article 19) Penal provisions governing the amount of fines for petty offences against all other provisions of this Act, except for paragraph 7 of Article 16, shall prescribe fines from 300,000 to 1,500,000 dinars.

In this manner the threat of punishment would be more efficient and especially if the party by a certain time limit (we suggest 1.IV) does not submit the final account. Although the threat of punishment in principle does not have to be the most efficient, we believe that punishment should be stricter.

b) Here we mention three problematic provisions of this act published in the Official Journal of Serbia, No. 43/2003. They should be re-examined.

Article 2, paragraph 2 – Conflict of interest in discharge of office of Supreme Court judges, judges, magistrates and public prosecutors and deputy public prosecutors shall be governed by separate law.

Article 10, paragraph 1 – A Member of Parliament, Deputy and Councillor may be a director or deputy and assistant director or member of the management or supervisory board of at most one public enterprise, institution and company or other legal entity with majority state capital share.

Article 10, paragraph 2 – In all other business entities a Member of Parliament, Deputy and Councillor may continue to exercise his/her management rights or remain as member of the management or supervisory board, director, deputy and assistant director, if this does not interfere with his/her discharge of public office and the nature of the activity of the business entity does not influence impartial and independent discharge of public duty.

Regardless of the fact that after the adoption of the new judicial laws, the conflict of interest shall be separately regulated, we believe that Article 2, paragraph 2 should stipulate the following:

Provisions of this Act shall also apply to Constitutional Court judges, magistrates, public prosecutors, deputy public prosecutors, unless otherwise prescribed by a different statute.

Article 10, paragraph 1 should stipulate the following:

Member of Parliament, member of provincial parliament and member of municipal assembly cannot be the director or assistant director or member of managing or supervisory board in a public company, institution or company or other legal person where the state owns the majority of capital.

Article 10, paragraph 2 stipulates the following:

Member of Parliament, member of provincial parliament and member of municipal assembly cannot continue to execute their managerial rights or be members of managing or supervisory board, director or assistant director in other commercial entities.

Following Article 27 which stipulates the "measure of public warning" pronounced by the Chief Board for Prevention of Conflict of Interest new Article 27a should be added:

If, even after a measure of public warning has been pronounced, a person to whom such measure was pronounced fails to act in accordance with the order of the Republican Board for the Prevention of Conflict of Interest, the Republican Board may, initiate proceedings for taking away of mandate to member of parliament, member of provincial parliament and member of municipal assembly.

II. PUBLIC PROCUREMENT
(J. Ćirić)

Problems regarding public procurement do not lie in the legal text but in the improper functioning of the system, above all in improper functioning of the Commission for Protection of Tenderers' Rights (lack of trained staff). One of GRECO's recommendations was to permanently work on training of those in charge of implementation of the Public Procurement Act. Namely, there is room for improvement of the legal text in force which may, in our opinion, reduce arbitrariness and voluntarism in evaluation of offers.

Article 55 of the Act (Types of Criteria) should be mentioned. We believe that one minor change should be prescribed. Article 55 stipulates the following:

"The criteria for evaluating the tenders shall be:

1) the economically most advantageous tender and
2) the lowest price offered.

The economically most advantageous tender shall be the tender based on different criteria, depending on the subject of public procurement, especially including:

1) delivery period or period of completion of services or works;
2) running costs;
3) cost effectiveness;
4) quality and the application of adequate systems of quality analysis/control;
5) aesthetic and functional characteristics;
6) technical and technological advantages;
7) after-sale service and technical assistance;
8) guarantee period, the type and quality of guarantees and the guaranteed values;
9) liabilities concerning spare parts;
10) post-guarantee maintenance;
11) price offered;
12) the possibility of characterization and unification;
13) the extent to which the subcontractors are engaged, etc.

To each of the elements referred to in paragraph 2 of this Article a procuring entity shall assign relative (weighted) significance in such a way that the sum total of weighted points amounts to 100."

It seems that major changes should not be made (the implementation of the act is a completely different question). We believe that after figure 100 the following should be added after a comma **"number of points on basis of subparagraphs 1, 2 and 11 should not be less than 50 (another solution is possible).**

III. MONEY LAUNDERING AND PRIVATIZATION PROCESSES

(J. Ćirić)

We already mentioned that the Act on Prevention of Money Laundering, passed in 2005, is in force in Serbia. One of the main deficiencies of the act is the fact that the question of origin of money cannot be raised in the privatisation process. Recently there are talks in public that the new legal text shall be adopted regulating the prevention of money laundering in privatisation. At least it should be achieved that privatisation does not become a form of money laundering by ensuring that the Office for Suppression of Money Laundering takes active participation in all privatisation processes, regardless if it concerns the procurement process or public auction. Two solutions are possible and both entail that the participant in the competition procedure is verified by the Office for Suppression of Money Laundering: either the Administration would verify the solvency of each participant in the privatisation process or the participants in the privatisation would be obliged to submit proofs of their solvency to the Office, namely the legality of means that are invested in the privatisation process.

We believe that the second option should be chosen. A participant in the privatisation process should submit evidence to the Office for Suppression of Money Laundering (burden of proof would be on the bidder) on the property origin, while the Office would issue a confirmation that the participant has right to take part in the privatisation. Here we should introduce a provision by which the Office will complete this in a short period of time and *bona fide*. The Office may cause damage to the participant if the Office does not perform its duties promptly and *bona fide*.

"Directorate shall be obliged to act with maximum urgency when issuing the certificate on the legality of money with which part is being taken in privatisation process.

If the Directorate fails to issue the certificate on the legality of money to the participant in the forthcoming privatisation within 30 days after filing of the request, it such certificate shall be considered issued; however, the Directorate can pass a decision on annulment of privatisation within 12 months after the privatisation has been conducted".

We should also mention the provision from Article 63-a of the Privatisation Act (RS Official Herald 38/2001; 18/2003; 45/2005):

Responsible person in the entity subject to privatisation who has forwarded incorrect or incomplete data in the privatisation programme shall be punished by imprisonment from 3 moths to 5 years.

We are proposing that such incrimination be introduced in the main Criminal Code, or, more precisely, to be prescribed in the identical form as the group of criminal offence against economy in the Serbian Criminal Code.

In any case there are some other interesting provisions regarding privatisation. In that case we mention Article 30 of the Privatisation Act:

The bidders shall pay deposit tender bonds.

The participant in a tender whose bid was proclaimed best or the next best bidder, who has failed to conclude the contract or to pay the contracted price within the set term, shall lose the right to be paid back the deposit.

The minister dealing with privatisation shall set the value of the tender bond referred to in paragraph 1 of this Article and the method of depositing it.

Or for example Article 39:

Participants in public auction are obliged to pay a deposit.

Minister competent for privatisation shall establish the amount and manner of payment of the deposit from paragraph 1 of this Article.

We propose the following formulation Minister competent for privatisation shall establish the amount and manner of payment of the deposit, but the amount of deposit (in dinars) cannot be less than 75 percent of the estimated book value, that is, of initial price, when it comes to privatisation through public auction.

We do not have illusions that this addition on deposit shall fully prevent possible corruption and manipulation but it may contribute to a higher degree of transparency (to prevent what is happening in practice and that is when a participant simply fabricates his/her participation in order to enable someone else to in reality buy a company for a smaller price offered in privatisation.

If the lower threshold of the amount of deposition is not determined, then one of the participants may in the privatisation process conscientiously offer a very small price in order to enable someone else to win at the tender for a price which is insignificantly higher than the one offered by the above-mentioned participant. For example if the real price was 100 it may happen that two participants at the tender each offer 10 and the third participant (in whose favour the other two participants act) offer 15; thus, he/she shall be pronounced as the best bidder. Formally this situation seems fair and transparent. However, substantially the situation is very different since two participants are acting mala fide.

The definition of the threshold of the deposit at the tender will not prevent any possible form of fraud but it will render the privatisation process more transparent.

IV. OPENING OF SECRET SERVICE FILES

(M. Reljanović)

A statute should be passed that would regulate the opening of secret services' files. This subject matter can also be regulated by a general legislative text that would regulate in a uniform manner the operation of all military and civil security services or by introduction of special provisions on opening of the files in individual statutes governing their respective operation. None of the existing

two drafts Acts on Opening of Secret Services' Files has been considered before the National Assembly. The mentioned proposals were drafted by the Centre for Advanced Legal Studies and Centre for Anti-war Action (now Centre for Peace and Development of Democracy) and by the Committee of Lawyers for Human Rights.

V. PRIVATE SECURITY COMPANIES

(M. Reljanović)

A statute should be passed that would regulate private security forces, in a manner that would give adequate powers to members of these forces, but also set strict criteria for performance of this profession. Additionally, future regulations would have to deal with the social rights of the members of private security and their working conditions. There is a Model Act in this field, drafted by the Centre for Civil and Military Relations, which can serve as a starting point for the drafting of a comprehensive legislative text.

Section Four

PROCEDURAL LAW

I. PROPOSALS FOR AMENDING SPECIAL PROVISIONS OF THE CPC (2001) ON PROCEDURE FOR ORGANISED CRIME OFFENCES

(M. Grubač)

Based on five years of experience in implementation of the special provisions on procedure for organised crime offences, it is necessary to improve them. To this end, the following amendments to the CPC are proposed:

Chapter X (XXIXa)

SPECIAL PROVISIONS ON PROCEDURE FOR CRIMINAL OFFENCES OF ORGANISED CRIME, *CORRUPTION AND OTHER EXCEPTIONALLY SERIOUS CRIMINAL OFFENCES*

1. GENERAL PROVISIONS

Cases to Which the Provisions of this Chapter Apply

Article X (1)

(1) Provisions of this Chapter include certain special provisions concerning the criminal proceedings for criminal offences of organised crime, *corruption and other exceptionally serious criminal offences*, the proceedings for confiscation of objects and proceeds and the procedure of international co-operation in discovering and criminal prosecution of the perpetrators of these criminal offences.

(2) If the provisions of this Chapter do not regulate in a special manner issues concerning cases from paragraph 1 of this Article, other provisions of this Code shall apply accordingly.

(3) Provisions of this Chapter shall apply to situations of reasonable doubt that *three or more persons have committed* a criminal offence *of criminal association from Article 346, paragraphs 1 to 3 of the CC, that is, the criminal offence of association for the purpose of anti-constitutional activity from Article 319 paragraph 1 of the CC, including the criminal offences committed by members of criminal group or association.*

(4) *Criminal group or association in terms of this Code shall exist if at least* three more of the following provisions *are met:* that member*s of the criminal group or association* ha**ve** pre-determined task**s** or role**s**; that the activity *of the criminal group or association* is planned for a longer *or unlimited* period of time;

that the activity *of the criminal group or association* is based on the application of certain rules of internal control and discipline of **its** members; that the activity of *criminal group or association* is planned or executed on international scale; that, violence or intimidation are applied in the committing of *criminal group or association* activities or that there is readiness to apply them; that the **c***riminal activity of the criminal group or association is covered by a commercial or other permitted activity;* that money or proceeds from crime are being laundered; that there is a **c***onnection between the criminal group or association* or part *of the criminal group or association with representatives of government,* media, *political parties or* other **s***ocial, political or commercial institutions.*

(5) Criminal offences of corruption to which the provisions of this Chapter apply include the criminal offences of abuse of official position from Article 359, illegal payment from Article 362, illegal mediation from Article 366, taking bribe from Article 367 and giving bribe from Article 368 of the Criminal Code .

(6) Exceptionally serious criminal offences to which the provisions of this Chapter apply include the following criminal offences: illegal deprivation of freedom from Article 132 paragraph 3 of the CC; kidnapping from Article 134 paragraphs 1 and 2 of the CC; coercion from Article 135 paragraph 2 of the CC; robbery from Article 206. paragraphs 2 and 3 of the CC; extortion from Article 214 paragraphs 3 and 4 of the CC; blackmail from Article 215 paragraphs 3 and 4 of the CC; concealment from Article 221 paragraph 3 of the CC; money laundering from Article 231 paragraph 2 of the CC; causing false bankruptcy from Article 236 of the CC; unauthorised production, keeping and trafficking of narcotic drugs from Article 246 paragraphs 1 and 2 of the CC; prohibited crossing of state border and smuggling of human beings from Article 350 paragraphs 2 and 3 of the CC; terrorism from Article 312 of the CC; diversion from Article 313 of the CC; sabotage from Article 314 of the CC and from Article 315 of the CC, even if they were not committed within a criminal group or association.

Explanation

The title of Chapter XXIXa of the CPC (2001) is changed, so that it does not relate only to organised crime offences, but also covers the criminal offences of corruption and other exceptionally serious criminal offences. This would harmonise the Code with the existing legislative and court practice, according to which certain powers of criminal prosecution authorities intended for organised crime have been applied to other serious criminal offences (e.g. Article 232 et seq. of the 2001 CPC and Article 146 et seq. of the 2006 CPC). It is necessary to consider whether it should also cover war crimes, since, according to Article 13 of the Act on Organisation and Competences of State Authorities in Combating Organised Crime, the provisions on procedure for organised crime offences applies to proceedings for war crime cases.

Provisions of this Act amend Article 504a of the CPC, by accurately and comprehensively listing the criminal offences to which special provisions of this procedure apply. These offences are assorted in three groups: a) organised crime offences, b) corruption offences and c) other exceptionally serious criminal offences.

a) The basis for determining organised crime offences is the criminal offence of criminal association envisaged by the Criminal Code in Article 346 paragraphs 1 to 3 of the CC (and corresponding criminal offence of association for the purpose of anti-constitutional activity from Article 319 paragraph 1 of the CC). In addition to this criminal offence, this also includes all criminal offences committed in conjunction by organisers or members of criminal group or association, regardless of the type of offence and prescribed punishment**.**

b) The five mentioned criminal offences against official duty are, in terms of this Code, considered as corruption offences (paragraph 5) to which the provisions of this CPC Chapter apply.

c) "Other exceptionally serious criminal offences" to which special procedural provisions from this CPC Chapter apply are listed *a limine* in paragraph 6 of this Act. Just as in cases of corruption offences, these offences need not be committed by a criminal group or association, that is, by more persons. Depending on the opinions that will be expressed in public discussion on this proposal, the list of these criminal offences can be expanded or narrowed.

Urgency of Proceedings

Article X (2)

Officials participating in criminal proceedings for criminal offences from Article *X (1) of this Act shall* be under the obligation to act urgently.

Explanation

Provision of Article 504b of the present CPC is harmonised with the provisions of new Article X(1) of this Proposal. Measures envisaged for other urgent criminal proceedings (detention and juvenile offenders' cases) shall apply accordingly for the purpose of providing urgency in these proceedings.

Secrecy of Preliminary Proceedings

Article X (3)

(1) Data on preliminary and investigative proceedings for *criminal offences from Article X (1) of this Code* constitute official secret. In addition to official persons, such data cannot be revealed by other participants in the proceedings to whom they become available. An official before whom the proceedings are conducted is under the obligation to inform the participant of the proceedings on the obligation to keep the secret.

(2) Data on preliminary or investigative proceedings relating to criminal offences from Article *X (1) of this Code* can be made public only on the grounds of a written consent of the competent public prosecutor or investigating judge.

Explanation

Provisions of Article 504v of the present CPC are in accordance with the provisions of the new Article X (1) of this Proposal. Paragraphs 2 and 3 of Article 504v are incorporated in paragraph 2 of this Article.

The obligation to keep an official secret takes place by the force of law, not after the order of the investigating judge (Article 261) and is valid not only in investigative, but also in preliminary proceedings.

The obligation of keeping the secret is absolute, not only when so required by certain reasons (protecting the interest of criminal proceedings, keeping of secret, public order, moral, etc) as the case is in regular investigative proceedings.

Composition of the Judicial Chamber

Article X (4)

In the proceedings for criminal offences from *Article X (1) of this Code* in the first instance, a chamber of three *permanent* judges will adjudicate, and in the second instance, a chamber of five *permanent* judges will adjudicate.

Explanation

Provisions of Article 504g of the present CPC are in accordance with the provisions of new Article X (1) of this Proposal, and this Article gives a detailed provision on the status of judges comprising the chamber (permanent judges, not lay judges).

Statements and Information Given to Public Prosecutor in Preliminary Proceedings

Article X (5)

(1) Statements and information collected by the public prosecutor in preliminary proceedings can be used as evidence in criminal proceedings, but the judgment cannot be based solely on them.

(2) Statement and information given to the public prosecutor by the suspect in preliminary proceedings can be used as evidence in criminal proceedings under the conditions from Article 226 paragraph 9 of this Code.

Explanation

Statements and information collected by the police in pre-trial proceedings are separated from the file according to general regulations, except for the deposition of the accused according to provisions of Article 226 paragraph 9 (Article 178 paragraph 3).

Duration of Detention and Custody

Article X (5/1)

(1) *In proceedings for criminal offences from Article X(1) of this Code, the detention order by a ruling of the investigating judge (Article 144 paragraph 1) may last for up to two months, and by decision of the council (Article 144 paragraph 2) for up to four months.*

(2) *The suspect can be held in custody referred to in Article 229 paragraph 1 for criminal offences from Article X(1) of this Code for 72 hours at the most.*

Explanation

Given that in organised crime cases there is usually more than one accused, the investigative proceedings take more time. This also requires longer detention and custody of person deprived of freedom in pre-trial proceedings.

Exclusion of Summary Proceedings and Proceedings without Main Trial

Article X (5/2)

In proceedings for criminal offences from Article X(1) of this Act special provisions on summary proceedings (heading XXVI) and on proceedings for pronouncing

of criminal sanctions without holding a main trial (Heading XXVII shall not apply).

Explanation

Conducting of summary proceedings according to the provisions of this heading was also excluded in cases of criminal offences that are usually tried in summary proceedings but are committed by a criminal organisation. These criminal offences are tried in regular proceedings.

Coordination of Activities of the Police and Public Prosecutor

Article X (6)

(1) If police authorities take an action for a criminal offence *from Article X (1) of this Code* in preliminary proceedings, *they shall be under the obligation* to immediately inform the competent public prosecutor thereof.

(2) Public prosecutor may request that *police* authorities take certain measures or actions within a given time limit and inform him/her thereof.

(3) Failure to carry out the *request from paragraph 2 of this Article or* exceeding of the *given* time limit has to be explained to the *public prosecutor* by the police authorities.

Explanation

Provisions of this Article correspond to provisions of Article 46 of the Code on the relations between the public prosecutor and the police, whereas, according to Article 46 paragraph 4, the public prosecutor has more options in case that police authorities fail to act upon his/her request (informs the head of authority, competent minister, government or adequate parliamentary body).

2. SPECIAL MEASURES OF PROSECUTING AUTHORITIES FOR DISCOVERING AND PROVING CRIMINAL OFFENCES FROM ARTICLE X(1) OF THIS CODE

A. SECRET SURVEILLANCE AND RECORDING OF PHONE AND OTHER COMMUNICATIONS OF THE SUSPECT

Conditions for Applying the Measure

Article X (7)

(1) At the written and reasoned proposal of the public prosecutor, the investigating judge can order surveillance and recording of phone and other conversations or communications by technical means or optical recordings of persons for whom there are grounds of suspicion that they, alone or with others, have committed or are preparing to commit one of criminal offences from Article X (1) of this Code, where evidence for criminal prosecution cannot be otherwise collected or where collecting them could jeopardize the life or health of human beings.

(2) Measures from paragraph 1 of this Article shall be determined by a reasoned order of the investigative judge. The order shall include data on the person against whom the measure is to be applied, grounds for suspicion, manner of implementation, scope and duration of the measure. The measure may last for up to three months, and can be extended for additional three months for special

reasons. Implementation of measures shall be terminated as soon as the reasons for their implementation cease to exist.

Explanation

Constitutional guarantees of inviolability of secrecy of letters and other forms of communication and conditions under which they may be departed from: Article 41 of the RS Constitution. Criminal offence of unauthorised tapping and recording and criminal offence of unauthorised taking of photographs: Article 143 and 144 of the CC.

Two conditions are envisaged for the application of this measure: a) that there are grounds of suspicion in relation to a given person (or persons) in terms of him/her (or them) having committed or preparing criminal offences from Article X(1) of this Code and b) that evidence on that cannot be collected in another manner of that collecting them could jeopardize human health or lives. The second condition includes the principle of proportionality, which must exist not only when the measure is being ordered, but for the entire duration of the measure. The objective could not be achieved in another manner, if the criminal prosecution authorities cannot reach other sources of information on the facts or if search for them would jeopardize human lives and/or health.

Implementation of Measures

Article X (8)

(1) The order of the Investigative Judge referred to in Article X (7) shall be implemented **by the police, or** the Security-Information Agency.

(2) Postal, telegraphic and other enterprises, companies and entities registered for the transfer of information have the obligation to enable police, or the Security– Information Agency to implement special investigative techniques referred to in paragraph 1 of the present Article.

(3) Recordings from Article X (7) may be made, at the order of the investigative judge, in *public venues* and premises other than apartments.

(4) *For the duration of the measure, the order of the investigative judge and procedure of its implementation shall be considered official secret.*

Explanation

Public venues are sport stadiums, streets, squares, crossroads and the like, while premises are venues such as apartments, hotel rooms, offices, casinos and the like. The obligation of keeping professional secret comes into force *ex lege.*

Investigative Judge Procedure after the Implementation of Measure

Article X (9)

(1) After the implementation of measures from Article *X (7)* of this Code, police authorities and Security-Information Agency shall forward a report and recordings to the investigative judge.

(2) Investigative judge may order that the recordings obtained by the use of technical means be transcribed and described partially or as a whole. The investigative judge shall invite the public prosecutor to familiarize himself/herself with the material obtained by the use of measures from Article *X (7)* of this Code.

(3) If data obtained by the implementation of measure are not necessary for the conducting of criminal proceedings or if the public prosecutor states that he/she will not request the conducting of proceedings against the suspect, all the material collected shall be destroyed under the supervision of the investigative judge. *Before destroying the material, the investigating judge shall inform the suspect that he/she may have insight into such data at a specified time in a specified place. The investigative judge shall make a record on actions from this paragraph.*

(4) If, in implementation of measure, actions have been taken in contravention of the provisions of this Code or of the investigative judge's order, court decision cannot be based on the data collected. Provisions of Article 99 of this Code shall apply accordingly to obtained data and information. Provisions of Article 178 paragraph 1, Article 273 paragraph 4, Article 337 paragraph 3 and Article 374 paragraph 4 of this Code shall apply accordingly to recordings made in contraventions of the provisions of this and of Article 232 of this Code.

Explanation

Criminal offence of unauthorised tapping and audio recording: Article 143 of the CC.

If the recordings are transcribed or described, the material is used as audio document.

B. RENDERING SIMULATED BUSINESS SERVICES AND CONCLUDING OF SIMULATED LEGAL OPERATIONS

Order of Investigative Judge

Article X (10)

(1) If there are grounds of suspicion that a criminal offence from Article X (1) of this Code was committed or is being prepared, the investigative judge, at public prosecutor's request, may approve the rendering of simulated business services and concluding of simulated legal operations.

(2) Measures from paragraph 1 of this Article may be implemented if the circumstnaces fo the case indicate that the criminal offence from *Article X (1) of this Code could not be otherwise proven or discovered, or prevented, or that its discovering, proving or preventing would be connected to considerable difficulties.*

(3) *Written and reasoned order of the investigative judge determining measures from paragraph 1 of this Article shall include data on person against whom the measure is to be taken, legislative designation and description of the criminal offence, manner, scope and duration of the measure.*

(4) *Measures from paragraph 1 of this Article may last for up to three months. At the public prosecutor's reasoned proposal, the investigative judge may extend the duration of measure for additional three months at the most. When ordering and extending the measure, the investigative judge shall in particular consider whether the same result could have achieved in manner less limiting to citizens' rights.*

Explanation

The provisions includes special conditions for application envisaged for this measure, special content of the decision by which the measure is ordered and

special duration of the measure, instead of the joint provisions on these issues applicable to all secret surveillance measures, as the present CPC. In these terms, the provisions are more precise and detailed. Conditions for application of measure are milder when compared to the conditions for the application of the previous secret surveillance measure.

Implementation of Measures

Article X (11)

(1) Measures are implemented by authorised members of the police or of the Security-Information Agency. Police or the Security-Information Agency shall make daily reports on the implementation of the measure and present them together with the collected documents to the investigative judge and public prosecutor at their request.

(2) After the implementation of special evidentiary actions from Article X(10) of this Code the police or the Security-Information Agency shall forward to the investigative judge and the public prosecutor a special report including: time of the beginning and termination of action, data on the official person who implemented the measure, description of tehcnical means applied, number and identity of persons covered by the measure and results of the measure implemented.

(3) Together with the report from paragraph 2 of this Article the police or the Security Information Agency forwards to the public prosecutor entire documentation on the measure taken, video, audio or electronic recordings and all other evidence collected by application of measure.

(4) *The person who, observing the order of the investigative judge, provides simulated business services or concludes simulated legal operations does not committ a criminal offence even if the action taken is envisaged as actus reus in the Criminal Code.*

Explanation

The proposal includes more precise provisions and amendments regarding the content of reports forwarded by the police and the SIA to the investigative judge upon the execution of the measure. The provison of Article 4, which excludes the existence of criminal offences if action is taken according to the order of the investigating judge is also novel.

Destruction of Data Collected

Article X (12)

(1) If the public prosecutor fails to initiate criminal proceedigns within six months from the termination of measure, all data collected must be destroyed, and the persons to whom the data refer shall be informed of the implementation of measure, provided their identity can be established.

(2) Collected data that do not relate to a criminal offence from *Article X (1) of this Code*, cannot be used in criminal proceedings conducted for a different criminal offence.

Explanation

These provisions correspond to the provisions of Article 504n paragraphs 2 and 3 of the present Code.

C. ENGAGEMENT OF AN UNDERCOVER AGENT

Order of Investigative Judge

Article X (13)

(1) The investigative judge may, at public prosecutor's request, order the engagement of an undercover agent, if there are grounds of suspicion that a criminal offence from Article X (1) of this Code is committed or is being prepared, and the circumstances of the case indicated that its discovering or revealing, or preventing would otherwise be impossible or considerably more difficult.

(2) Written and reasoned order of the investigative judge determining the special evidentiary actions from paragraph 1 of this Article, shall include data on persons or group against whom the action is to be implemented, manner, scope and duration of measure.

(3) Undercover agent is determined by the minister competent for internal affairs, that is, the director of Security-Information Agency.

(4) As a rule, the undercover agent is an authorised member of the police force, and, if so required by special circumstances of the case, another trained person.

(5) A person convicted to imprisonment of more than one year and a person for whom there is reasonable doubt that he/she is a member of a criminal group or association cannot be undercover agent.

(6) Measure from paragraph 1 of this Article shall last for as long as it is necessary to collect evidence, and one year at the longest.

Explanation

Instead of joint provisions on all secret surveillance measures and the conditions for their application, the content of investigative judge's order, duration, etc, we propose a separate provision on this specific measure. This provides for more precision and specific solutions.

Execution of Investigative Judge's Order

Article X (14)

(1) Undercover agent may use technical means to record conversations, that is, means for taking photographs or audio and video recording.

(2) For the duration of measure, the undercover agent files periodic reports to his/her direct superior. Exceptionally, the reports shall not be filed if that would jeopardize the security of the undercover agent or other persons.

(3) After the termination of measure, the superior from paragraph 1 of this Article is obliged to file a report to the investigative judge and the public prosecutor. The report shall include: time of beginning and termination of measure; data on undercover agent; description of applied procedures and technical means; data on number and identity of persons covered by the measure and description of achieved results.

(4) Together with the report from paragraph 3 of this Article, the public prosecutor shall also be supplied with photographs, audio and video recordings, collected documentation and other evidence collected by application of measure.

(5) It is prohibited and punishable for an undercover agent to incite another person to commit a criminal offence.

Explanation

Undercover agent cannot act as an agent provocateur.

Examination of Undercover Agent

Article X (15)

(1) Undercover agent can be examined as a witness in criminal proceedings. Examination shall be conducted so as not to reveal the identity of undercover agent. Data on identity of undercover agent being examined as a witness shall constitute official secret. The examination of undercover agent shall be conducted in accordance with the rules on examination of protected witnesses.

(2) Court decision cannot be based solely on the deposition of the undercover agent who was examined as a witness.

(3) The data collecteld that do not refer to the criminal offence from Article X (1) of this Code, cannot be used in criminal proceedings conducted for a different criminal offence.

Explanation

Given paragraph 2 of this Article, the court practice shall avoid to examine the undercover agent, since judgment cannot be based on his/her deposition alone, and, if there is other evidence to support the judgment, the deposition of the undercover agent is unnecessary. However, engagement of undercover agents still has a lot of sense; for finding other evidence, primarily.

D. CONTROLLED DELIVERY

ArticleX (16)

(1) The Chief Public Prosecutor may approve a controlled delivery, under which illegal or suspicious shipments may *leave, be transferred or enter the territory of one or several states, with the knowledge and under surveillance of their competent authorities,* with the aim of conducting an investigation and identifying persons involved in a criminal offence.

(2) The measure from paragraph 1 of this Article shall be implemented by the police or other state authorities.

(3) *A controlled delivery shall be carried out with the agreement of competent authorities of interested states and on the basis of reciprocity, as well as in accordance with the ratified international conventions and international agreements, which regulate the content of this action in more detail.*

(4) Measure from paragraph 1 of this Article can be implemented if the detection or arrest of suspects involved in the comitting of criminal offences *from Article X (1) of this Code* would otherwise be imposible, or would be considerably more difficult, *particularly in cases of illegal transport of narcotics, arms, and other objects that result from the commission of criminal offences or are used for the purpose of committing a criminal offence.*

(5) *Unles otherwise envisaged by an international agreement, the measure from paragraph 1 of this Article shall be taken if the competent authorities of the states through which illegal or suspicious shipments pass have previously agreed:*

1) that certain illegal or suspicious shipments will enter and and exist, that is, will pass accros the territory of the domestic state;

2) that passing and shipment of illegal or suspicious shipments will at all times be monitored by the competent authorities of the state on the territory of which they are taking place;

3) they they wil take actions in order to criminally prosecute all persons participating in the delivery of illegal or suspicious shipments;

4) that they will regularly inform competent state authorities of other states on the course and outcome of criminal proceedings against persons accused of criminal offences that were the subject matter of controlled delivery.

(6) Chief Public Prosecutor shall determine the manner of i mplementation of measure from paragraph 1 of this Article.

(7) After the implementation of measure from paragraph 1 of this Article the authorised police official or other authorised state authority official shall file to the Chief Public Prosecutor a report including: data on time of beginning and termination of measure; data on official who has implemented the measure; description of applied technical means; data on number and identity of persons covered by the implemented measure.

Explanation

Even though taken over from the UN Convention on Illicit Trafficking of Narcotic Drugs and Psychotropic substances, the measure enables supervision over flows of money, weapons, ammunition and the like. The objective is to discover the main perpetrators of criminal offence and organisers of illicit trade and transport.

E. AUTOMATED SEARCH OF PERSONAL AND OTHER DATA

Article X (17)

(1) Automated computer search of personal and other related data and their electronic processing can be taken if there are grounds of suspicion that a criminal offence from Article X (1) of this Code is committed.

(2) Measure from paragraph 1. of this Article can exceptionally be ordered also if there are grounds of suspicion that one of the criminal offences from Article X (1) of this Code is being prepared, if the circumstances of the case indicate that the commission of the criminal offence could not otherwise be prevented or that the prevention would otherwise be considerably more difficult or dangerous.

(3) Measure from paragraph 1 of this Article includes automated search of already filed personal and other, directly related, data and their automated comparison with data related to a criminal offence from paragraph 1 of this Article and to the suspect, in order to rule out as possible suspects any and all persons in relation to whom there is no probability of being connected to the criminal offence.

(4) Measure from paragraph 1 of this Article is ordered by the investigative judge at public prosecutor's request. Investigative judge's order shall include: legislative designation of criminal offence from paragraph 1 of this Article; description of data that need to be automatically collected and forwarded; designation of state authority under the obligation to automaticallly collect requested data and forward them to public prosecutor and the police; scope of special evidentiary action and its duration.

(6) Special evidentiary action from paragraph 1 of this Article can last for three months at the most, and for important reasons its duration can be extended for additional three months.

(7) Special evidentiary action from paragraph 1 of this Article is implemented by the police, Security-Informaltion Agency, customs authorities or other state authorities, or other legal persons having certain public powers.

(8) All collected data are destroyed under the supervision of the investigative judge, if criminal proceedings are not initiated within six months from the termination of measure.

Explanation

This possiblity did not exist in Serbian law so for. It is now enabled by the provision of Article 42 paragraph 3 of the new Constitution, whereby the use of personal data outside the purpose for which such data was collected is prohibited and punishable, except when such use is necessary for conducting criminal proceedings and protecting the safety of the Republic.

F. OBTAINING DATA ON SUSPECTS' PECUNIARY TRANSACTIONS

Article X (18)

At the written and explicated proposal of the public prosecutor, the investigative judge may order that the competent state authority, bank or other financial organisation perform control of the suspects' operations for the criminal offence from Article X (1) of this Criminal Code and to forward him/her the documentation and data that may serve as evidence of criminal offence or proceeds from crime, as well as information on suspicious pecuniary transactions in terms of the Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime.

(2) Under the conditions from paragraph 1 of this Article, the investigative judge may decide that the competent authority or organisation temporarily suspend a given financial transaction, payment or issuing of suspicious money, securities or objects for which there are grounds of suspicion that they originate from a criminal offence or from proceeds from crime, or are intended for the commission or concealment of a criminal offence.

(3) Decision of investigative judge from paragraph 2 of this Article shall be in the form of a ruling. The owner of funds is entitled to appeal against the public prosecutor's ruling. The appeal shall be decided upon by the chamber from Article 24 paragraph 6 of this Code.

(4) In the motion from paragraphs 1 and 2 of this Article, the public prosecutor shall indicate in more detail the content of the measure or activity being ordered.

(5) If it is established that data collected in the manner envisaged in paragraph 1 of this Article are not necessary of if the public prosecutor fails to initiate criminal proceedings against the suspect within six months, the collected data shall be destroyed under the supervision of the investigative judge. The investigative judge shall make a record thereof.

Explanation

Bank or other similar organisations cannot invoke the duty to keep the banking secret as grounds to refuse to observe the provisions of this Article. A similar provision can be found in Article 234 of the Act.

3. COOPERATING WITNESS AND HIS/HER EXAMINATION

Who can be Cooperating Witness

Article X (19)

(1) The public prosecutor may propose to the court to examine in the capacity of a witness a person for whom there are grounds for suspicion that he/she is a member of a criminal organization *or a group, and who has explicitly admitted to this* (hereinafter referred to as: cooperating witness), against whom criminal proceedings for a *criminal offence from Article X (1) of this Code* is being conducted, provided that he/she has *fully confessed the commission of the criminal offence*, that there are mitigating circumstances on the basis of which he/she can be released from punishment or the punishment can be mitigated according to Criminal Code and provided that the importance of his/her deposition for detecting, proving or preventing other criminal offences of the criminal organisation prevails of the harmful consequences of the criminal offence he/she has committed.

(2) A person for whom there is reasonable suspicion that he/she is the organiser of the criminal group cannot be a cooperating witness.

(3) The public prosecutor can file the motion from paragraph 1 of this Article until the termination of the main trial.

Explanation

Existence of mitigating circumstances on the basis of which the suspect or accused can be remitted from punishment or his/her sentence can be mitigated are assessed by the court based on the case material at the time of decision-making (motion of the public prosecutor, confession of the accused, etc..).

Duties of Cooperating Witness

Article X (20)

(1) *Before filing the motion, the public prosecutor shall inform the cooperating witness of the duties from Article 102 paragraph 2 and Article 106* and of benefits from *Article X (23) of this Code. The cooperating witness cannot invoke the benefit of being exempt from the duty to testify from Article 98 of this Code and release from duty to answer to certain questions from Article 100 of this Code.*

(2) The public prosecutor shall include in the record, which shall also be signed by the cooperating witness, the instruction referred to in paragraph 1 of this Article, cooperating witness's answers and his/her statement saying that he/she will testify about everything he/she knows and that he/she will not omit anything. The record shall be attached to the motion to the court from *Article X (19)* of this Code.

Explanation

Cooperating witness does not lose the capacity of the accused and the rights he/she has on such grounds (Article 23, paragraph 5).

Deciding on the Public Prosecutor's Motion

Article X (21)

(1) *The chamber of first-instance court* from Article 24 paragraph 6 of this Code shall decide on the public prosecutor's motion during the investigation and until the beginning of the main trial, whereas the trial before which the main trial is held shall decide on the motion during the main trial.

(2) The public prosecutor, the person proposed to be the cooperating witness and his/her defence counsel shall be invited to the chamber session. The *chamber* session shall not be public.

(3) The public prosecutor can file an appeal against the decision of the chamber from paragraph 1 of this Article denying the public prosecutor's motion within 48 hours. The decision on the appeal is made by the superior court within three days from being served the appeal and files of the first instance court.

(4) If it approves the public prosecutor's motion, the chamber shall order that all records and official notes on the previous depositions of the cooperating witness, which he/she gave in the capacity of the suspect or defendant, be extracted from the file, and they cannot be used as evidence in criminal proceedings, except in case provided in Article *X (23)* of this Code.

Explanation

Separation of minutes and official notes on previous depositions of the accused who has become a cooperating witness is done in accordance with provisions of Article 178 of the Code.

Examination of Cooperating Witness

Article X (22)

(1) The examination of a cooperating witness shall be closed to the public, unless the Chamber, upon the proposal of the public prosecutor and with the consent of the witness, decides otherwise.

(2) Before the decision referred to in paragraph 1 of this Article is made, the chamber president shall inform the cooperating witness in the presence of his/her defence counsel of the proposal of the public prosecutor and inform him/her about his/her right to be examined in a closed session. The cooperating witness's declaration stating that he/she consents to being examined in the open court shall be included in the record.

Explanation

In terms of publicity, the situation in these proceedings is quite the reverse when compared to rules governing other parts of the main trial: the main trial is public, and the public can be excluded only exceptionally, whereas, when the cooperating witness is examined, the proceedings are, as a rule, not public.

Benefits of the Position of Cooperating Witness

Article X (23)

(1) A cooperating witness who has testified before the court in accordance with his/her obligations from Article X (20) of this Code shall be sentenced within the limits envisaged in the Criminal Code for the act of organized crime which represents the subject matter of the proceedings, which he/she has confessed and which is proved to have been committed by him/her, and such a sentence shall then be reduced by half.

(2) Taking into account the importance of the testimony of the cooperating witness, his/her conduct before the court, previous life and other important circumstances, the court may exceptionally, at public prosecutor's proposal, declare the cooperating witness guilty and pronounce him/her a milder sentence or release him/her. Appeal shall not be permitted against the decision on punishment or release.

(3) Cooperating witness who fails to observe his/her obligations Article X (20) of this Code or who commits a new criminal offence from Article X (1) of this Code before the final termination of proceedings shall lose the capacity of the cooperating witness. The public prosecutor shall continue to prosecute him/her, that is, shall commence proceedings for the new criminal offence.

(4) If criminal offence mentioned in Article X (1) of this Code previously committed by the cooperating witness is detected during the proceedings, the public prosecutor may act in accordance with the provisions of Article X (19) of this Code.

(5) In addition to the duty to tell the truth and withhold nothing known to him/her concerning the subject matter of trial, the cooperating witness shall have all the rights this Code grants to the accused.

Explanation

A judgment declaring him/her guilty shall be pronounced to the accused who was a cooperating witness in the proceedings, even when he/she is exceptionally remitted from punishment, if it is established that he/she has committed a criminal offence.

II. SEPARATE PROPOSALS FOR COOPERATING WITNESSES

(J. Ćirić)

This institute has in many respects caused and is still causing a lot of controversy. However, we think that the manner in which it is regulated in the new CPC, the application of which is delayed until January 1, 2009 (Articles 156–164 of the CPC) is correct, that is, more adequate in terms of Serbian legal, social and cultural milieu, than the case was so far. Here we primarily refer to the fact that, according to the provisions of the new CPC, the cooperating witness is not fully remitted from punishment, but his/her punishment is reduced by a half (paragraph 1 of Article 163 of the CPC). However, paragraph 3 of the same Article states that, exceptionally, the cooperating witness can be fully remitted from punishment.

In this regard, we think that the legislative provisions on the institute of cooperating witness can be improved. It would be useful to envisage the possibility of the motion for granting the status of cooperating witness to be filed not only by the public prosecutor, as stated in paragraph 1 of Article 156. In relation to that, paragraph 4 of Article 156 of the CPC could read:.

Under conditions prescribed by this law, the motion for granting the status of cooperating witness can also be filed by the defence counsel of the person indicted for an organised crime offence.

Why should the public prosecutor have the exclusive right to propose who can be granted the capacity of cooperating witness? There is no reason to deprive the defence counsel of that right. Sometimes it is the defence counsel of the accused (suspect) who has important knowledge that might prove useful if the accused was to be granted the capacity of cooperating witness.

The other issue we feel might be justified and the proposal for improving the CPC in relation to the rules on cooperating witness is the provision that would regulate in more detail who can be granted the capacity of cooperating witness. Namely, the provision of Article 159 of the new CPC "Person who cannot be granted the status of cooperating witness" reads:

A person for whom there are grounds for suspicion that he/she has organized a criminal group on his/her own or together with other persons in such a way that his/her contribution has been considerable, or a person who led a criminal offense group for a long period of time may not be a cooperating witness.

We would add an additional paragraph 2 to this unclear provision, reading:

A person for whom there are grounds for suspicion that he/she has committed a criminal offence punishable by imprisonment for thirty to forty years may not be a cooperating witness.

It seems appropriate, in terms of Serbian notions of justice and moral, that the perpetrators of serious criminal offences, such as aggravated murder, genocide and the like cannot be granted the capacity of cooperating witness and consequently a pardon of half or the entire sentence.

In relation to this, the possibility of "remittance of punishment" should be corrected. Despite the fact that foreign legislations, even the Italian one, envisage the possibility of full remittance, we find that, instead of full remittance in "exceptional conditions" (paragraph 3, Article 163), it would be better to prescribe the possibility of mitigating the punishment up to 90 percent. A person who is granted the capacity of cooperating witness should receive adequate benefits and reduction of sentence, but not full remittance. Reduction of sentence by 90% could therefore be quite in place. A person who was granted the capacity of cooperating witness would be pronounced a punishment of 10 years in prison, according to regular rules (Article 163 paragraph 1), and then such punishment would be reduced by a half, and, at public prosecutor's proposal (this should be extended so as to include defence counsel, in accordance with previous suggestion that the defence counsel should also be able to propose the granting of status of cooperating witness) the court may exceptionally, taking into account the importance of the deposition of the cooperating witness, reduce his/her sentence by 90 percent (which, in this case, would amount to one year in prison).

Present Serbian society could accept justifications by any pragmatic reasons of remittance of punishment to a perpetrator of a serious criminal offence. In addition, it is our opinion that a considerably reduced but not fully remitted sentence could render the deposition of such cooperating witness more credible. If he/she was to be fully remitted, there can always be a certain degree of doubt as to the truthfulness of such deposition. It should be argued that a "serious criminal" would always be prepared to lie and to give "tailor-made" depositions only to be remitted from punishment. The use of such witness who are "ready for

everything" is not welcomed or approved by the general public, even when there are no behind the scene political games. The general public may suspect that some, or all of them, were staged and set up, in order to achieve some (usually auxiliary) political effect.

In view of that, we have proposed three most important changes and amendments to the existing solutions regarding the cooperating witness.

First, not all perpetrators of criminal offences can become cooperating witnesses. For instance, a person suspected of committing an aggravated murder or a similar criminal offence, punishable by 30–40 years in prison, could not be granted the capacity of cooperating witness.

Secondly, the motion for granting the capacity of cooperating witness should be filed not only by the prosecutor, but also by the defence counsel (if he/she finds that his/her client can contribute to the resolution of the case by his/her deposition). Actually, even now, the defence counsel can propose for his/her client to be granted the status of cooperating witness, but he/she must first forward such motion to the prosecutor, who considers the motion before making one to the competent judicial panel (Article 160 of the new CPC). The position of the public prosecutor's office in this respect should somehow be "de-monopolized". It is the word of the court, or rather, of the competent chamber, final when granting the status of cooperating witness, but, in practice, it is difficult to imagine a situation where the court shall not agree with the prosecutor's proposal, since this is a "crown witness" without whose deposition there is no case, that is, the guilt of another accused cannot be credibly proven. The provision whereby the defence counsel would also be enabled to file the motion for granting the status of cooperating witness, would contribute to the balancing of procedural positions of prosecutor and defence counsel.

Thirdly, it should not be allowed that in some, however exceptional cases and situations, someone receives full "pardon" from punishment. Not only would such an exception soon become a rule, but also there are seldom such strong, exceptional reasons for somebody's punishment to be fully remitted. Italian experiences and solutions should not serve as model here, since we feel that Serbians are not ready to accept full remittance, nor can such witness be fully trusted.

Other provisions on cooperating witness prescribed in Serbian new CPC in force satisfy the main pragmatic and other legal reasons for which this institute was introduced in Serbian legal system.

III. NON-PROCEDURAL WITNESS PROTECTION

(R. Sepi)

The following chapter includes proposals of legislative measures that need to be taken in order for the existing, very good, Act on the Programme of Protection of Participants in Criminal Proceedings, to be improved.

Primarily, there is a need to edit the existing provision, which defines who are the persons who can be awarded protection in the following manner:

Article 3

(1) Protection and help are given to the accused, witness, (alternative: keep the cooperating witness when enumerating), injured party, expert witness and professional.

Article 6

(1)The procedure of providing protection and help shall be urgent.

(2) The obligation to act urgently shall bind all natural and legal persons (alternative: all state and other authorities, organisations, officials and other persons).

Article 11

(1) Protection unit shall submit to the Programme Implementation Commission an annual report on its work as well as a report it forwards to the Minister competent for internal affairs.

(2) Unit shall be obliged to forward periodical and individual reports on its work at the Commissions' request.

Article 15

(1) Decision on the protection measure that will be implemented is passed by the Programme Implementation Commission, at the explicated proposal of the Protection Unit.

(2) In cases of extreme urgency, a decision on the choice of primary protection measures is passed by the Protection Unit, which is obliged, within 24 hours from the day of choice of measure, to file an explicated proposal for the implementation of such measure to the Programme Implementation Commission.

Explanation: Instead of the present enumeration according to various criteria, this proposal rationalises the list of possible subjects to the accused (since this is the generic term for both the accused and the suspect), leaving out the cooperating witness, since this is only a category of the accused who can only provide useful information on the subject-matter of the criminal proceedings, whilst expert witness and professional are provided protection not only when giving deposition, which is the existing solutions, but also in the course of and after termination of criminal proceedings. When it comes to the principle of urgency, the obligation to observe it is expanded to other authorities (that are not state authorities) and persons (who are not officials), which is not the case at present. In order to achieve more effective civil control of security services and in order for the members of the Programme Implementation Commission to be informed in due time, the Protection Unit is obliged to file a report, which is a novelty. So far, it was the Protection Unit that was if fact in charge of the proceedings, invoking the reasons of urgency (which are an exception, not a rule). Now, a new system of decision-making would be introduced and the Commission would play the main role, passing decisions at the explicated proposal of the Protection Unit. The only exception would be urgent cases, when the Unit would order temporary measures.

Section Five

ORGANISATIONAL LAW

I. PROPOSALS FOR AMENDING THE ACT ON ORGANISATION AND COMPETENCES OF STATE AUTHORITIES IN THE FIGHT AGAINST ORGANISED CRIME

(N. Važić)

Primarily, it is necessary to change the very name of the Act, so that in the future it would be called:

"Act on Organisation and Competences of State Authorities in Combating Organised Crime and Corruption".

The new legislative Act could have the following content:

1. INTRODUCTORY PROVISIONS

Article 1

This Act shall govern the establishment, competence and organisation of state authorities for the purpose of discovering, criminal prosecution and adjudication of criminal offences envisaged in Article 2 of this Act.

Article 2

This Act shall apply for the purpose of discovering, criminal prosecution and adjudication of:

1. Criminal offences committed by an organised criminal group or criminal association, or its members, punishable by four years in prison or more,

2. Criminal offences of malfeasance in office, taking bribe, giving bribe, illegal mediation, when:

– the value, which is an important element of the criminal offences, exceeds a certain amount of money (1,500,000 dinars, which amounts to some 20,000 euros), and the criminal offences is committed by a person holding a public office on the grounds of being elected, appointed or nominated in the authorities of the Republic of Serbia, autonomous province, municipality, city and the city of Belgrade, in organs of public companies, institutions and other organisations founded by the Republic of Serbia, autonomous province, municipality, city and the city of Belgrade or the person who is judge of the Constitutional Court, a judge, magistrate, public prosecutor or deputy public prosecutor.

3. Criminal offence of money laundering and criminal offence by which illegal proceeds were acquired, when the value that is an important feature of the

criminal offences exceeds a certain amount (1,500,000 dinars), and the offence was not committed in negligence.

4. Criminal offence of criminal association from Article 346 of the Criminal Code, including all criminal offences committed by that association, except for criminal offences against the Army of Serbia.

5. Criminal offence of conspiracy for unconstitutional activity from Article 319 paragraphs 1 and 2 of the Criminal Code, including all criminal offences committed by such association or group.

6. Criminal offences of subornation of perjury from Article 336, paragraphs 1, 2 and 4 of the Criminal Code, accessory after the fact from Article 333 of the Criminal Code, facilitating escape of person in custody from Article 339 paragraphs 2 and 3 of the Criminal Code, coercion from Article 135 of CC (especially coercion towards injured parties, witnessed, protected witness and cooperating witness), preventing an official from performing official activity from Article 322 paragraph 3 of CC (when this preventing is committed against a judge or public prosecutor in performance of judicial or prosecutorial duty or against an official in performance of activities related to public or state security or keeping of public peace and order, preventing or detecting of criminal offence, apprehension of perpetrator of criminal offence or guarding of person deprived of freedom).

if these criminal offences were committed in relation to the commission of criminal offences envisaged by this Act.

This Act shall also apply to all forms of complicity in commission of the mentioned criminal offences.

COMPETENCE AND ORGANISATION OF STATE AUTHORITIES

1. Special Public Prosecutor's Office

Article 3

Criminal prosecution in proceedings for criminal offences from Article 2 of this Act shall be carried out by the Special Public Prosecutor's Office for Organised Crime and Corruption (hereinafter: Special Public Prosecutor's Office) for the territory of the Republic of Serbia, seated in Belgrade.

Special department for organised crime and corruption, named Special Public Prosecutor's Office for Organised Crime and Corruption shall be formed within the Chief Public Prosecutor's Office.

Special Prosecutor's Office is competent for criminal prosecution for criminal offences from Article 2 of this Act in pre-trial, investigative and first-instance proceedings, as well as in proceedings on ordinary legal remedies.

Chief Public Prosecutor's Office is competent for acting in proceedings on extraordinary legal remedies for criminal offences from Article 2 of this Act.

Decision of the Special Prosecutor's Office by which it initiates or takes over the proceedings from criminal offences from Article 2 of this Act, shall be binding on all state authorities.

Article 4

All state authorities are under the obligation to inform without delay the Special Prosecutors' Office or the competent District Prosecutor's Office or the Police, of criminal offences from Article 2 of this Act and:

1. without delay forward all evidence and communicate all data that can help in detecting, prosecuting and adjudicating criminal offences from Article 2 of this Act.

2. to take all necessary measures enabling undisturbed detection and initiation of criminal proceedings for criminal offences from Article 2 of this Act.

3. enable use of any and all technical instruments they dispose of.

If other public prosecutor's office or the Ministry of Interior receive the information from paragraph 1 of this Act, they shall forward it without delay to the Special Public Prosecutor's Office.

Article 5

Special Public Prosecutor's Office is comprised of the Special Prosecutor, Deputy Prosecutors and employees.

Special Public Prosecutor's Office is managed by the Special Prosecutor.

Work of the Special Public Prosecutor's Office is regulated by an act on internal organisation and systematisation of jobs passed by the Special Prosecutor, with the approval of the Minister competent for judicial affairs.

Article 6

The Special Prosecutor is elected by the State Prosecutorial Council at the proposal of the Chief Public Prosecutor, after obtaining the opinion of the College of Chief Public Prosecutor's Office, for a period of six years, with possibility of re-appointment.

Together with the proposal, the Chief Public Prosecutor shall also forward the written consent of the candidate, including the statement on property he/she or his/her spouse or common-law spouse dispose of, and the property his/her blood relatives in a straight line, cousins of the third degree, as well as in-laws up to the second degree of kinship.

A person can be elected Special Prosecutor if he/she meets the conditions envisaged in the Public Prosecutor's Office Act for being elected Chief Public Prosecutor (12 years of professional experience on prosecutorial jobs) and who has expertise, independence and ability to investigate the most serious and complex criminal offences.

Advantage shall be given to persons who have obtained special knowledge in the field of combat against organised crime.

Special Prosecutor can be released before the expiry of the term of office for which he/she was elected, in the same manner in which he/she was elected.

After the termination of office, the Special Prosecutor returns to the duty he/she has performed before appointment.

Article 7

Special Prosecutor and his/her deputies have the same rights and obligations as the public prosecutor and his/her deputies.

Deputy Chief Public Prosecutor is elected by the State Prosecutorial Council at the proposal of the Special Prosecutor, after obtaining the opinion of the College of Chief Public Prosecutor's Office (alternative: with the opinion of the Chief Public Prosecutor) for a period of six years, with possibility of re-appointment.

Together with the proposal for Deputy Special Prosecutor, the Chief Public Prosecutor shall also forward the written consent of the candidate, including the statement on property from Article 6 paragraph 2 of this Act.

A person can be elected Deputy Special Prosecutor if he/she meets the conditions envisaged in Public Prosecutor's Office Act for being elected Deputy Chief Public Prosecutor and who has expressed propensity and capability to investigate the most serious and complex criminal offences.

Deputy Special prosecutor can be released before the expiry of the term of office for which he/she was elected, in the manner envisaged by this Act.

After the termination of office, the Deputy Special Prosecutor returns to the duty he/she has performed before appointment

Article 8

At Special Prosecutor's Proposal, Chief Public Prosecutor can refer a public prosecutor or deputy public prosecutor to work in the Special Prosecutor's Office, if there are particularly important reasons for doing so and if there is not enough deputies in the Special Prosecutor's Office.

Referral from paragraph 1 of this Act shall be done with the consent of the person referred and can last for one year at the most.

Article 9

Each year, the Special Prosecutor is obliged to make a report on the work of each of his/her deputies and to assess the quantity and quality of their work.

The deputy who receives an "unsatisfactory" mark two years in a row can be resolved of duty before the expiry of term of his/her office, at the proposal of the Special Prosecutor.

Special Prosecutor is obliged to inform each Deputy of his/her assessment and if the deputy is not satisfied by such assessment, he/she has the right of objection to the Chief Public Prosecutor, whose assessment is final.

Detailed regulations on the manner of assessment shall be passed by the Chief Public Prosecutor after obtaining the opinion of the Special Prosecutor

Procedure for release of Deputy Special Prosecutor would be the same as the election procedure.

Article 10

Special Prosecutor makes an annual detailed report on the work of the Special Prosecutor's Office and submits it to Chief Public Prosecutor, Judicial Board of the National Assembly and the State Prosecutors' Council

DEPARTMENTS OF THE SPECIAL PUBLIC PROSECUTOR'S OFFICE

Article 11

For the purpose of more efficient performance of tasks from his/her competence, the Special Prosecutor can, by a decision, establish departments of the Spe-

cial Prosecutor's Office within district public prosecutors' offices located in seats of Appellate courts (or departments of the Appellate court, if only one Appellate court is established). Department of Special Prosecutors' Office is managed by the Department Head, and it shall also include deputies.

Department Head in his/her deputies are Deputy Special Prosecutors.

Department Head is appointed by the Special Prosecutor after obtaining the opinion of the Chief Public Prosecutor and the College of Chief Public Prosecutor's Office

Department Head assesses the work of his/her deputies in the same manner as the Special Prosecutor, and the work of the Department Head is assessed by the Special Prosecutor.

(Alternative: Special Prosecutor assesses the work of both the Head and Deputies in the Department, where the Head previously forwards his/her opinion on the work of his/her deputies to the Special Prosecutor).

Article 12

Departments of Special Prosecutors' Office are competent for criminal prosecution of perpetrators of criminal offences from Article 2 of this Act, according to territorial principle, that is, according to territorial competence of the Appellate Court (and its departments) in the seats of which they were formed.

Conflict of competences between the Departments of Special Prosecutors' Office, are decided on by the Special Prosecutor.

Conflict of competences between the Special Prosecutors' Office and other public prosecutors' offices in Serbia is decided on by the Chief Public Prosecutor.

Exclusion of Deputy Special Prosecutor is decided upon by the Special Prosecutor, and the exclusion of Special Prosecutor is decided upon by the Chief Public Prosecutor.

Article 13

The Special Prosecutor's Office has at its disposal:

1. Service for research and coordination of work with the Ministry of Interior and other authorities competent for detecting criminal offences of organised crime and corruption,
2. Service for combating corruption,
3. International Cooperation Service,
4. Analytics and Archive Service,
5. Secretariat,
6. Accompanying and joint services.

Article 14

Research and Coordination Service collects data and evidence on corruption and organised crime, ways of commission of criminal offences, ways of money transfer and the like.

This Service directs the cooperation between the authorities competent for detecting and combating corruption and organised crime, such as the Directorate for Preventing Money Laundering, police, financial police, Directorate for

Managing Confiscated Property, etc. It collects data on criminal association and exchanges data with adequate services for combating organised crime from other states, and to cooperate in data collecting with services from other states.

Article 15

Service for Combating Corruption implements and directs the activities of the National Programme for Combat against Corruption, directs the activity of state institutions in this area and cooperates with non-governmental organisations and the media.

The duty of this service is also to raise public awareness on the danger from corruption and organised crime and the need to combat it, as well as training of other state authorities and legal persons in this field.

This service also works on informing the public of the manifestations and causes of corruption and methods and means for combating it, prepare reports on efficiency of existing forms of prevention and punishment of corruption and organised crime, and propose the adoption and implementation of regulations on preventing the conflict of interest in public and private sectors.

Article 16

Service for International Cooperation performs the tasks of international criminal law assistance, in accordance with ratified international conventions.

Article 17

Service for Analytics and Archive processes parts of judicial cases of organised crime and corruption in order to analytically observe the most frequent and characteristic manifestations of organised crime and corruption and, in accordance with the results obtained, contribute primarily to the prevention of this type of criminal activity.

Article 18

Secretariat and accompanying and joint services perform other – auxiliary tasks envisaged by the act on internal organisation and work of the Special Prosecutor's Office.

Article 19

Special Prosecutors' Office and its departments also employ assistant prosecutors in the rank of senior prosecutorial assistants, prosecutorial assistants and advisors, appointed in accordance with the Public Prosecutor's Office Act, and in accordance with this Act.

These persons should assist the Special Prosecutor and his/her deputies, in the manner and to the extent envisaged in the Public Prosecutor's Office Act and Rules on Proceedings on Administration.

In the procedure of employment, assignment to job and termination of work, provisions of the public prosecutor's office shall apply.

Special Prosecutors' Office also employs experts in certain field who have specific knowledge necessary for the work of this prosecutors' office and who assist the Special Prosecutor and his/her deputies in work, giving them opinions, suggestions and proposals

A Special Prosecutor decides on the employment, assignment to job and termination of work of experts.

Experts from previous paragraph have the same rights and obligations as senior prosecutorial assistants.

Article 20

Joint operative groups can be formed within the Special Prosecutors' Office and its departments. They are composed of one or more Deputy Special Prosecutors, prosecutorial assistants, experts from the Special Prosecutors' Office and members of certain police units, Security-Information Agencies, Customs Office, Directorate for Preventing Money Laundering, etc.

These operative groups are formed by the decision of the Special Prosecutor or Department Head, with a certain task or for a given period of time, in order to detect perpetrators and carry out pre-trial proceedings for criminal offences of organised crime, money laundering and corruption in a more efficient way by joint an integrated action.

COMPETENCE AND ORGANISATION OF COURTS

Article 21

District courts in Belgrade, Novi Sad, Kragujevac and Niš are competent for conducting first-instance proceedings for criminal offences from Article 2 of this Act.

Special departments for organised crime and corruption (hereinafter: special departments) are formed in courts from paragraph 1 of this Article.

The Appellate courts in Belgrade, Novi Sad, Kragujevac and Niš (or the Appellate court and its departments) shall decide in the second instance in cases from Article 2 of this Act.

Special department for organised crime and corruption shall be formed within Appellate courts.

Article 22

Work of special departments of competent courts shall be headed by the President of the special department.

Presidents of special departments of competent courts shall be appointed by presidents of competent courts from among judges assigned to work in those departments for a period of two years, with possibility of reappointment.

Judges are assigned to special departments of competent courts by the presidents of those courts for a period of six years with possibility of reappointment, from among judges of those courts or judges of other courts referred to work in those courts, with their written consent.

Judges are assigned to special departments of competent appellate courts (or Appellate court and its departments) by presidents of those courts (or the president of the Appellate court in Belgrade, if only one appellate court is formed), for a period of two (four) years, with possibility of reappointment, from among judges of those courts or judges of other courts referred to work in those courts, with their written consent.

Together with written consent for assignment to special departments of competent courts, the judges shall also forward the data from Article 6 of this Act.

Referral of judges to work in special departments of competent courts is done by the president of the Supreme Court of Cassation, in accordance with provisions of Judges' Act, for one year at the longest.

Presidents of competent courts shall pass an act governing in more detail the work of special departments.

Article 23

Supreme Court of Cassation establishes the criteria for assessing the conscientiousness, expertise and engagement of judges working in special departments.

Procedure for releasing of judges is conducted in the manner envisaged by Judges' Act.

Article 24

Conflict of interest between special departments and other departments of same courts and between special departments and other courts from the territory of the same appellate court is resolved by that Appellate court, that is, by the Supreme Court of Cassation, if it concerns departments and courts from territories of different appellate courts.

Provisions of paragraph 1 of this Article also apply in cases of conflict of interest between special departments and Department for War Crimes or Department for Cybercrime.

Conflict of interest between special departments is resolved by the Supreme Court of Cassation.

SPECIAL POLICE UNIT FOR DETECTING AND COMBATING CRIMINAL OFFENCES OF ORGANISED CRIME AND CORRUPTION

Article 25

In order to detect criminal offences from Article 2 of this Act, Service for Detecting and Combating Criminal Offences of Organised Crime and Corruption, (hereinafter: Service) is formed within the Ministry of Interior.

Service is seated in Belgrade, and has its departments in Novi Sad, Kragujevac and Niš, and, in cases of need, in other towns in the Republic.

Work of the service is regulated by an act on internal organisation, passed by the Minister of Interior Affairs with approval of the Special Prosecutor.

Article 26

Head of Service is appointed by the Minister of Interior, after obtaining the approval of the Special Prosecutor.

Head of Service can be released from duty by a decision of the Minister of Interior, with approval of the Special Prosecutor, or at the request of the Special Prosecutor.

Head and members of the Service can only be persons who have already shown exceptional professionalism and conscience in work.

Article 27

Minister of Interior passes the act by which the work and success of the head and members of the Service is assessed.

Special prosecutor has the right to assess the work of the head and members of the Service.

Article 28

Services for coordination and joint action of the Service and other police organisational units and the Special Prosecutors' Office are formed within police directorates in seats of appellate courts and, if necessary, in other directorates.

Special prosecutor has the right and duty to direct the work of these services by his/her orders, instructions and through direct communication.

SPECIAL DETENTION UNIT

Article 29

Special detention units are formed in n district prisons located in seats of courts from Article 21 of this Act, where the measure of custody or detention for criminal offences of organised crime and corruption is carried out.

Work and organisation of special detention units is regulated by an act on internal organisation passed by the Minister of Justice.

SALARIES AND OTHER RIGHTS OF HOLDERS OF JUDICIAL AND PROSECUTORIAL OFFICES AND OTHERS EMPLOYED IN SPECIALISED POSITIONS FOR COMBATING ORGANISED CRIME AND CORRUPTION

Article 30

Persons performing judicial or prosecutorial office in Special Departments of District Courts and in the Special Prosecutors' Office are entitled to salaries that can go up to the amount that is twice the salary they would receive if they still performed the duties in the offices they held before coming to work in specialised departments.

The precise amount of salary would be established by the High Judicial Council for persons assigned to special court departments, State Prosecutor's Council for persons assigned to Special Prosecutor's Office, Ministry of Interior for persons assigned to special police service and Ministry of Justice for persons assigned to special detention unit.

Article 31

Special Prosecutor and his/her deputies and judges of special departments of competent courts are entitled to insured service that is calculated with increased duration, where 12 months of work in the Special Prosecutor's Office or in special departments of competent courts is calculated as 16 months of insured service.

SECURITY CHECKS FOR PERSONS ASSIGNED TO SPECIAL STATE POSITIONS FOR COMBATING ORGANISED CRIME AND CORRUPTION

Article 32

Before being assigned to specialised authorities envisaged in this Act, the persons who run for performing the office and tasks in these authorities, together with their written consent, shall give data on their property and the property owned by their relatives from Article 6 paragraph 2 of this Act.

Article 33

Data on property is checked by the Ministry of Finance, through its organs.

Data from paragraph 1 of this Article constitute an official secret.

Article 34

Security-Information agency, at the request of the President of the Supreme Court of Cassation, presidents of Appellate Courts and District Courts, Chief Public Prosecutor or Special Prosecutor, will perform security checks for persons assigned to work in the Special Prosecutor's Office or special departments of competent courts.

Minister of Interior and the Minister of Justice are obliged to ask a security check for persons assigned to work in the Special police service for detecting and combating criminal offences of organised crime and corruption and special detention unit.

Cheeks of persons from paragraph 2 of this Article are performed by the Security-Information Agency.

Checks from paragraphs 1 and 2 of this Article can be requested up to one year after a person stops working in specialised state authorities envisaged by this Act.

Data collected by application of provisions of this Article constitute an official secret.

EXPLANATION OF PROPOSALS FOR AMENDIGN THE ACT ON ORGANISATION AND COMPETENCES OF STATE AUTHORITEIS IN COMBAT AGAINST ORGANISED CRIME

1. Introductory Considerations

When it comes to statutory regulations concerning prevention, combating, prosecution and adjudication of organised crime offences, the legislative solutions in place have shown certain drawbacks. One such drawback lies in the fact that there is no clear division between substantive, procedural and organisational norms – they are all mixed in a number of statutes. For instance, the Criminal Code, in the part that governs the "user of terms" does not give definitions of organised crime, organised criminal group, criminal organisation and other organised group, which are all issues of substantive law. These provisions can be found partly in procedural statute and partly in the statute that governs the organisation

and competences of state authorities in combating organised crime. Some terms (criminal organisation), although mentioned in the procedural statute, are not defined in any law. Similarly, procedural provisions related to organised crime are partly found n the procedural statute, whilst their other part can be found in the statute that governs the organisation and competences of specialised authorities; hence, the latter statute even includes provisions governing the action of the investigative judge, time limits for taking of certain procedural actions, establishing special types of judicial decisions in investigation, determining special rules for keeping of minutes in the procedure, determining special rules for establishing the amount of compensation for court experts and sworn-at-court interpreters and prescribing special sanctions for exceeding the time limit determined for giving expert finding and opinion, determining special manner for investigating the injured party and witness in the main trial and the protection of their personal data – which are all procedural issues.

In addition, criminal law institutes are not equally regulated in all statutes. For example, the issue of who can be the perpetrator of an organised crime offence is partly regulated by provision of Article 504a paragraphs 3 and 4 of the Criminal Procedure Code, and partly by Articles 2 and 3 of the Act on Organisation and Competences of State Authorities in Combating Organised Crime, which causes problems and dilemmas in practice.

In order to eliminate and overcome the inconsistencies and problems in practice, it is necessary that future legislative architecture concerning organised crime make a clear division of substantive, procedural and organisational norms in adequate statutes – Criminal Code, Criminal Procedure Code and Act on Organisation and Competences of State Authorities in Combating Organised Crime. This would eliminate all dilemmas related to different regulation of same legal institutes in different statutes, and, the norms would be systematically located in the statutes governing specific subject matter.

Therefore, the future statute that would deal with organisation and competences of state authorities in combating organised crime should include only organisational norms, that is, it would have to govern the organisation of police forces, prosecutors' offices, courts and special detention units, as well as their competence, whilst substantive– and procedural-law issues related to organised crime would be governed by the Criminal Code and the Criminal Procedure Code.

Finding, however, that the existing legal framework is a step in the right direction when it comes to combating organised crime, the existing problems can be eliminated by certain amendments to the existing statutes: Criminal Code, Criminal Procedure Code, Act on Organisation and Competences of State Authorities in Combating Organised Crime and other accompanying statutes.

The new Act on Organisation and Competences of State Authorities in Combating Organised Crime would encompass and advance on the existing solutions of the present law, the present and new Criminal Procedure Code (whose application has been postponed), Criminal Code, Act on the Protection of Participants in Criminal Proceedings, existing and suggested solutions in the Constitution, Constitutional Act, Courts' Act, Judges' Act, Public Prosecutor's Offices Act, Ministries Act, Police Act, judicial and prosecutorial Rules of Procedure, Government decisions etc.

On the other hand, this statute should also rely on a series of international conventions and multilateral and bilateral agreements, declarations, initiatives, resolutions, dealing with organised crime and corruption. Particularly important in that respect are the UN Convention Against Transnational Organised Crime with two additional protocols against smuggling and trafficking of human beings, COE Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Convention Against Corruption, etc.

International sources are also a part of domestic law and they are binding on the Republic of Serbia in terms of requests for more efficient action in combat against organised crime and corruption, establishing of specialised and expert units and authorities capable of quickly discovering and efficiently and professionally implementing the valid criminal proceedings in which they will investigate, prosecute and pass a decision for organised crime and corruption offences.

Precisely due to the obligations taken over by the signing and ratification of the UN Convention against Transnational Organised Crime, which applies both to organised crime and corruption offences that are closely connected with organised crime, and also due to the fact that most legislative solutions in the region, when regulating the organisation and competences of their state authorities in combating organised crime, also envisage such organisation and competences for corruption offences, it would be prudent for the Serbian legislator to do the same. *Consequently, the future statute that would govern the organisational issues and competences of state authorities in combating organised crime should bear the title: time, Act on Organisation and Competences of State Authorities in Combating Organised Crime and Corruption.*

2. SCOPE OF APPLICATION – COMPETENCE

The issue of scope of application of the Act on Organisation and Competences of State Authorities in Combating Organised Crime and Corruption (hereinafter: Act on Organised Crime and Corruption), that is, the competences of Special Prosecutor's Office and special departments of competent courts for organised crime and corruption is particularly sensitive, which is why it is important for such competence to be precisely determined.

There are several ways for determining this competence, such as:

- enumeration (catalogue) of criminal offences,
- all criminal offences committed by an organised group punishable by imprisonment in a given minimal duration,
- combination of these models.

Given that the present solution from Article 2 of Act on Organisation and Competences of State Authorities in Combating Organised Crime (hereinafter: Organised Crime Act) envisages the competence of specialised state authorities for all criminal offences committed by an organised criminal group, that is, by other organised group or its members, if such offences are punishable by four years in prison or more, which is not fully in accordance with Article 3 of the UN

Convention against Transnational Organised Crime, and given that the issue of competence is also regulated by the procedural statute (Article 504 paragraphs 3 and 4 of the CPC), which establishes additional criteria for determining competence, which causes dilemmas in practice, *it would be better if in the new Act on Organisation and Competences of State Authorities in Combating Organised Crime and Corruption its field of application was harmonised with the field of application of the UN Convention Against Transnational Organised Crime, namely, with its Article 3, that is, to apply the combined model, and that the issue of competence be regulated only by that, not procedural statute.*

This is because the present statutory solution does not envisage the competence of these specialised authorities when it comes to corruptive offences, criminal offences of money laundering and the so-called criminal offences of obstruction of justice that are not committed by an organised criminal group or other organised group, in the service of organised crime, which is contrary to provisions of Article 3 paragraph1a of the Convention. Finding that corruption is closely connected to organised crime, determination of competences in accordance with the Convention is imposed as a logical and correct solution.

Precisely because of that, it is necessary to have a legislative solution that would list all the criminal offences for the prevention, investigation, prosecution and adjudication of which the specialised authorities are competent. Determining the issue of competence, that is, the field of application of the future Act on Organisation and Competences of State Authorities in Combating Organised Crime and Corruption in accordance with the Convention, this statute should apply to the detection, criminal prosecution and adjudication for:

1. Criminal offences committed by an organised criminal group or criminal association, or its members, punishable by four years in prison or more,

2. Criminal offences of malfeasance in office, taking bribe, giving bribe, illegal mediation, when:

– the value, which is an important element of the criminal offences, exceeds a certain amount of money (1,500,000 dinars, which amounts to some 20,000 euros), and the criminal offences is committed by a person holding a public office on the grounds of being elected, appointed or nominated in the authorities of the Republic of Serbia, autonomous province, municipality, city and the city of Belgrade, in organs of public companies, institutions and other organisations founded by the Republic of Serbia, autonomous province, municipality, city and the city of Belgrade or the person who is judge of the Constitutional Court, a judge, magistrate, public prosecutor or deputy public prosecutor.

3. Criminal offence of money laundering and criminal offence by which illegal proceeds were acquired, when the value that is an important feature of the criminal offences exceeds a certain amount (1,500,000 dinars), and the offence was not committed in negligence.

4. Criminal offence of criminal association from Article 346 of the Criminal Code, including all criminal offences committed by that association, except for criminal offences against the Army of Serbia.

5. Criminal offence of conspiracy for unconstitutional activity from Article 319 paragraphs 1 and 2 of the Criminal Code, including all criminal offences committed by such association or group.

6. Criminal offences of subornation of perjury from Article 336, paragraphs 1, 2 and 4 of the Criminal Code, accessory after the fact from Article 333 of the Criminal Code, facilitating escape of person in custody from Article 339 paragraphs 2 and 3 of the Criminal Code, coercion from Article 135 of CC (especially coercion towards injured parties, witnessed, protected witness and cooperating witness), preventing an official from performing official activity from Article 322 paragraph 3 of CC (when this preventing is committed against a judge or public prosecutor in performance of judicial or prosecutorial duty or against an official in performance of activities related to public or state security or keeping of public peace and order, preventing or detecting of criminal offence, apprehension of perpetrator of criminal offence or guarding of person deprived of freedom).

if these criminal offences were committed in relation to the commission of criminal offences envisaged by this Act.

This Act should also apply to all forms of complicity in commission of the mentioned criminal offences.

In this manner, when it comes to competence and scope of application, this stature would be harmonised with the provisions of the UN Convention against Transnational Organised Crime.

3. SPECIALISED STATE AUTHORITIES FOR COMBATING ORGANISED CRIME AND CORRUPTION

In the chain of combat against organised crime and corruption, the specialised state authorities are:

– Special Prosecutor's Office for combat against organised crime and corruption (hereinafter: Special Prosecutor's Office),

– Special departments of competent court,

– Special police units,

– Special detention unit.

a) Special Prosecutor's Office

The present Serbian experience in the fight against organised crime and corruption, the experiences of other countries, both those in the region and those with longer and wider tradition in combating against organised crime and corruption, show that the regular public prosecutor's office, with their standard manner of work and organisation, could not respond to the above-mentioned tasks. *This is why it is necessary to keep the existing solution, therefore, to specify one specialised prosecutorial body that would engage in detection and prosecution of organised crime and corruption offences.*

The best solution would be if a Department would be formed within the Chief Public Prosecutor's Office, named the Special Prosecutor's Office for Organised Crime and Corruption, seated in Belgrade.

The present solution, whereby such Special Prosecutor's Office was established within the District Public Prosecutor's Office in Belgrade, causes a number of problems and impracticalities. Namely to give one part of one district prosecutor's office (out of 30 public prosecutor's office in Serbia, five of which are competent for Kosovo and Metohija) subject matter and territorial competence for the entire state, did not prove to be the best solution. Moreover, Special Prosecutor and Deputy Special Prosecutors were, as a rule, prosecutors with admirable knowledge and experience, often holding the office of Deputy Chief Public Prosecutor, and they were referred to work in the District Public Prosecutor's Office, which caused certain confusion. Additional problems in this case are also the issues of inter-prosecutorial organisation, functional competence and the question of budget. Namely, the Special Prosecutor's Office is not a direct, and therefore independent, budged user, such as the War Crimes Prosecutor's Office, which additionally complicates the functioning of the existing prosecutorial organisation, in general.

By allocating the Special Prosecutor's Office on the highest state level – in the Chief Public Prosecutor's Office would eliminate a number of dilemmas.

A solution that would exclude the Special Prosecutor's Office from the regular prosecutorial apparatus and make it completely special and independent without any organic or system connection with the regular prosecutorial structure (like the present legislative solution of the War Crimes Prosecutor's Office) would also open a series of other issues. Primarily, it concerns the principal requirement that state authorities (including repressive and prosecutorial authorities) to function in the regular manner and equally for all citizens, to the greatest extent possible. As a rule, exceptions should be rare and minimal. In addition, the creation of a completely new and specialised prosecutorial organisation would by all means be a long-term and expensive project, with a series of dilemmas that would open in its realisation, thus questioning the success of the project.

This is why this solution – therefore a specialised part of regular prosecutorial system – is the optimal solution for the Republic of Serbia. As in any other public prosecutor's office is headed by the Special Prosecutor for Organised Crime and Corruption, whilst the Special Prosecutor's Office also comprises Deputy Special Prosecutors and other employees.

Given the apparent necessary knowledge and experience required for the performance of office of Special Prosecutor and Deputy Public Prosecutor, the persons who can be elected to this office are Deputy Chief Public Prosecutor or Public Prosecutors or Deputy Public Prosecutors who meet the conditions for Deputy Chief Public Prosecutors, according to the criteria envisaged by the Public Prosecutor's Office Act .

As for the manner of election of Special Prosecutor, the present solution – that the Special Prosecutor is appointed by the Chief Public Prosecutor – has some possible drawbacks and can be challenged, since it can be argued that the Chief Public Prosecutor has too much discretionary power in this matter, even more so since there are no clear criteria or procedures preceding such decision and choice, and, moreover, the decision on appointment need not be reasoned. It

is interesting that e.g. the War Crimes Prosecutor is elected by the National Assembly, which may be an indication of the legislator's conclusion that there is a need for more transparency in the election procedure and more adequate authority for decision-making.

In the Republic of Serbia, the optimum solution would be that the Special Prosecutor be elected by the State Prosecutors' Council at the proposal of the Chief Public Prosecutor, after obtaining the opinion of the College of Chief Public Prosecutor's Office. Together with the proposal, the Chief Public Prosecutor shall also forward the written consent of the candidate, including the statement on property he/she or his/her spouse or common-law spouse dispose of, and the property his/her blood relatives in a straight line, cousins of the third degree, as well as in-laws up to the second degree. Special Prosecutor would be elected for a period of six years with the possibility of re-election.

Namely, the present solution with a two-year term of office for the Special Prosecutor proved to be inefficient and problematic for several reasons. The shortness of the term of office, accompanied by the fact that these are, as a rule, people who come into new working environment with considerably changed manner of work and position of the Special Prosecutor's Office when compared to the one they come from, the length of proceedings, complexity and comprehensiveness of cases, resulted in a certain type of inconsistency and incoherency of the Special Prosecutor's Office and prosecution policy.

With a longer term of office, a part of these problems would be resolved or at least reduced, for, the Special Prosecutor would give more attention to some long-term and system cases of organised crime and corruption, which presently, limited by the short term of office, and consequently by the need to address the court (and the public) quickly and with media promotion necessary to justify or explain what has been done, is not possible.

The present solution, according to which the Chief Public Prosecutor, at the proposal of the Special Prosecutor, refers a public prosecutor or deputy public prosecutor to work in the Special Prosecutor's Office, is not advisable, given the wide discretion attributed to the Chief Public Prosecutor.

A much better solution is for Deputy Special Prosecutor *to be elected by the State Prosecutors' Council with the opinion of the College of Chief Public Prosecutor's Office or, alternatively, with the opinion of the Chief Public Prosecutor. Clearly, this proposal would be accompanied by the candidate's written consent and statement regarding property (the same rules as those governing the election of Special Prosecutor shall apply).*

When electing the Special Prosecutor and Deputy Special Prosecutor care must be taken of them being with expertise and capacity to perform the prosecutorial office, with pronounced propensity and capabilities for independent and team work in investigation, detection and prosecution of the most serious and most complex criminal offences. The Special Prosecutor should also have manifest managerial and organisational capabilities and readiness to show determination, efficiency and consistency in application of law.

As far as the term of office of Deputy Special Prosecutor is concerned, it has to be extended to a considerably longer period – at present, it is only nine months.

Namely, it is a unanimous opinion of both legal professionals and holders of prosecutorial offices that this short term of office is sufficient for the deputy to perform the tasks on the case in pre-trial or investigation part (if it concerns the part of investigation with detention measure which cannot last for more than 6 months according to the CPC), but is insufficient for the deputy to participate in the main trial in first-instance proceedings without extension of the term of office.

The six-year term of office (with possibility of re-election) is a good measure that would leave Deputy Special Prosecutor sufficient time to successfully carry out and realise the tasks set before him/her.

In addition, the present legislative provision allowing the possibility of referral of Public Prosecutor or Deputy Public Prosecutor to work at the Special Prosecutor's Office should be preserved. Such situations should be governed by reasons of particular importance and the circumstance that the Special Prosecutor's office at the time does not have a deputy who could answer to the task at hand.

This could, for instance, be the case when criminal proceedings are initiated before regular prosecutor's office and when in later phases of investigation proceedings (of a complex case) it turns out that it is a criminal offence or offences of organised crime, which results in a well-developed case having to be continued before the Special Prosecutor's Office. It is clear that it would be much easier for the deputy prosecutor who already worked on the case to continue doing so (with the assistance of deputy special prosecutor) within the Special Prosecutor's Office. *The duration of such referral should be limited to one year at the most, and the referral itself would be carried out by the Chief Public Prosecutor in accordance with the Public Prosecutor's Office Act.*

When it comes to initiation and conducting of proceedings for organised crime and corruption offences envisaged by this Act, all state authorities (public prosecutors' offices, police, customs office, inspection organs) are obliged to inform, without delay, the Special Prosecutor's Office or the competent District Prosecutor's Office or the Police, of criminal offences of organised crime and corruption they come across in their work. They are obliged to forward all objects and evidence and communicate all data that can help in detecting and criminal prosecution for these criminal offences and to take all necessary measures enabling undisturbed detection and initiation of criminal proceedings for organised crime and corruption offences.

Decision of the Special Prosecutor's Office by which proceedings for these criminal offences is initiated or taken over is mandatory for all state authorities and the competence of the Special Prosecutor's Office is established by it.

Special Prosecutor's Office is competent to act in cases of organised crime and corruption and other criminal offences envisaged by this Act in preliminary proceedings, investigation proceedings, first-instance proceedings and the proceedings on ordinary legal remedies.

At the same time, the Chief Public Prosecutor's Office would remain competent for acting upon extraordinary legal remedies, since these are legal remedies filed with the supreme judicial instance (Supreme Court or the Supreme Court of Cassation), before which only the Chief Public Prosecutor's Office can act.

The idea for the Special Prosecutor's Office to represent the prosecutorial side in proceedings on ordinary legal remedies is a practical and efficient solution. Namely, it is logical that someone, who has been working on the case from the beginning, therefore, from the filing of criminal report and who has been following and initiating certain activities, either towards the police or other state authority or the court, in pre-trial proceedings and later, during investigative proceedings and the main trial, therefore, someone who has represented the prosecutor's office as a party in first instance proceedings and who delivers the closing arguments and possibly writes the appeal to first instance judgment (if unsatisfied by it) or rejoinder to appeal (supporting the court's decision) should also represent the prosecutorial side in proceedings on appeal. The present solution, whereby the Chief Public Prosecutor represents the prosecutorial side in proceedings before the Supreme Court (which is presently competent for deciding on both ordinary and extraordinary legal remedies) is formalistic and counterproductive. Deputy Chief Public Prosecutor has little time to become acquainted with the case in which he/she is to act in proceedings on appeal – he/she does so when the case is forwarded for insight to the Chief Public Prosecutor's Office, before the scheduling and holding of the session of the second instance panel. Often, due to the short limits (15) in the course of which the deputy prosecutor is to become acquainted with a comprehensive and complex case, he/she only has enough time to read the arguments of the judgment and the appeal, without obtaining detailed information on the evidence, which is why his/her knowledge of the case is less detailed than that of the deputy who has been "in the case" from the very beginning. Since, on the other hand, the accused is represented by the same defence counsel (or counsels) in all phases of the proceedings (from pretrial investigation to extraordinary legal remedies), the argument that the public prosecutor's office should be represented by the same prosecutor or deputy is logical and acceptable. Naturally, this solution requires adequate changes in procedural legislation and in the Public Prosecutor's Office Act.

This solution would not be affected by the planned future establishment of appellate prosecutor's office, which would control the inferior public prosecutor's office and be competent for inspecting the actions and appeals filed by inferior offices and how they represent their cases before appellate courts. In case of the Special Prosecutor's Office, the Special Prosecutor and his/her deputies must meet the conditions to be elected deputy Chief Public Prosecutor, or, in other words, in professional terms they must meet stricter criteria than those that would be envisaged for prosecutors and deputy prosecutors in appellate prosecutors' offices. Consequently, there would be no need for the actions and appeals of the Special Prosecutor and Deputy Special Prosecutor to be checked by the appellate prosecutors. In addition, such solution, and even a wider one (that War Crimes Prosecutor and his/her deputies are to represent the prosecutorial side during the entire procedure, including extraordinary legal remedies) is already regulated in Article 4 paragraph 2 of the Act on Organisation and Competences of State Authorities in Proceedings for War Crime cases.

Each year, the Special Prosecutor is obliged to write a report on the work of each of his/her deputies and to assess the quantity and quality of their work. The

deputy who receives a "unsatisfactory" mark two years in a row can be resolved of duty before the expiry of term of his/her office, at the proposal of the Special Prosecutor is obliged to inform each Deputy of his/her assessment and if the deputy is not satisfied by such assessment, he/she has the right of objection to the Chief Public Prosecutor, whose assessment is final.

The essence of this idea on assessment is for the professionalism and responsibility in the Special Prosecutor's Office to be raised to a higher level and consequently to make the Special Prosecutor's Office more efficient and operative.

Special Prosecutor answers for the work of the Special Prosecutor's Office, he/she proposes his/her deputies, has the right of subordination in relation to them as prescribed by the Public Prosecutor's Office act, and hence the idea for the Special Prosecutor to assess the work of the deputies, stimulating and motivating them for further and more professional work is therefore acceptable. On the other hand, the obligation of the Special Prosecutor to inform the deputy of the assessment and the right of objection to a certain extent prevent voluntarism and subjectivity of the Special Prosecutor.

Bearing in mind the fact that the future term of office of Deputy Special Prosecutor would last for six years, it would be too long to wait for somebody's term of office to expire in order to release them from duty in which their performance is merely satisfactory.

Detailed regulations on the manner of assessment would be passed by the Chief Public Prosecutor after obtaining the opinion of the Special Prosecutor.

Procedure for release would be the same as election procedure.

In addition, it would be good if the Special Prosecutor was to be obliged to make a detailed report on his/her work and submit it to the Chief Public Prosecutor, or to the National Assembly, that is, its Judicial Board, Ministry of Justice and State Prosecutors' Council

The new statute should also envisage the establishment of Departments of Special Prosecutors' Offices, unlike the present solution that does not envisage such option. For example, the opening of the Special Prosecutor's Office in Novi Sad shows that there is a need for doing so, but this solution is not founded in law.

Establishing of Special Prosecutor's Office departments would be very useful. Their distribution over the entire state territory would "cover" the territory better and provide better overview of work, facilitate the monitoring of negative consequences and result in more efficient discovering of organised crime and corruption offences. In addition, it would provide better insight into the work of competent state authorities from that part of the territory – public prosecutor's office, police, financial police, inspections, customs office, etc, and enable improved and closer communication with them. It is not of decisive importance but still, not irrelevant, that one of the problems in the work of the Special Prosecutor's Office is their reluctance of public prosecutors and deputies to move from the province, where their lives and the lives of their families are organised, to the capital. This problem would increase and it would be more difficult to find good-quality personnel given the extended term of office for deputies (from 9 months to 6 years).

All these reasons are decisive in the attitude that it is *necessary to establish by law departments of Special Prosecutor's Office in District Public Prosecutor's Office in seats of Appellate courts – Belgrade, Novi Sad, Kragujevac and Niš.*

Department of Special Prosecutor's Office would be managed and represented by the Department Head. It would also include deputies. Department Head in his/her deputies are Deputy Special Prosecutors. Department Head should be appointed by the Special Prosecutor after obtaining the opinion of the Chief Public Prosecutor and the College of RPP Office. Department Head would assess the work of his/her deputies in the same manner as the Special Prosecutor. Alternatively, the Special Prosecutor would assess the work of both the Head and Deputies in the Department, where the Head would previously forward his/her opinion on the work of his/her deputies to the Special Prosecutor.

One of the problems arising in regards to the present organisation of Special Prosecutor's Office, which would become more frequent if departments were to be established, is the issue of competence and conflict of competence.

This is why the new statute would have to regulate in detail the issue of competence and resolution of conflict of competence.

Departments of Special Prosecutor's Office would be competent for criminal prosecution of perpetrators of criminal offences envisaged by this Act, according to territorial principle, that is, according to territorial competence of the Appellate Court (depending on the place where the criminal offence was committed) in the seats of which they were formed.

When it comes to conflict of competences between the Departments of Special Prosecutors' Office, they should be decided on by the Special Prosecutor.

However, a major problem is the issue of conflict of competences between the Special Prosecutor's Office with one of District Public Prosecutors' Offices in Serbia or with Cybercrime Prosecutor's Office, or even with the War Crime Prosecutor's Office. In such a case, the conflict should be decided on by the Chief Public Prosecutor.

As far as the exclusion of Deputy Special Prosecutor is concerned, it should be decided upon by the Special Prosecutor, and the exclusion of Special Prosecutor is decided upon by the Chief Public Prosecutor.

The following services should exist within the Special Prosecutor's Office:

1. Research and coordination of work with the Ministry of Interior and other authorities competent for detecting criminal offences of organised crime and corruption.

2. Combating corruption.

3. International Cooperation.

4. Analytics and Archive.

5. Secretariat.

6. Accompanying and joint services.

The reason why it is necessary to establish these services on the level of the Special Prosecutor's Office lies, in part, in international obligations arising from

the signing and ratification of a series of international convention and agreements that envisage it, and in the need to make the functioning of Special Prosecutor's Office more efficient and more professional. Namely, according to the provisions of Article 36 of the UN Convention against Corruption, each state party shall ensure existence of a body or bodies or persons specialized in combating corruption. This means that the Republic of Serbia is under the obligation to ensure that the staff of such bodies has the appropriate training and resources to carry out their tasks. In addition, according to the Convention, each state party is under the obligation to nominate a central body or, depending on the circumstances, several such bodies that shall be responsible for forwarding and answering requests form other states filed in accordance with the Convention, and for execution of such requests or their referral to competent authorities. Moreover, the Convention envisages direct informing of other countries on certain facts, if it is deemed that forwarding of such information may help the recipient state party in initiating or conducting investigation or criminal proceedings or may result in that country filing a request for legal aid. These obligations, envisaged by the Convention, require the Special Prosecutor's Office to have considerable powers in criminal prosecution for criminal offences of corruption for holders of public offices, as well as in international legal aid and communication with similar bodies in other countries.

Research and Coordination Service should collect data and evidence on corruption and organised crime, manner of committing of criminal offences, ways of money transfer and the like. This Service should direct the cooperation between the authorities competent for detecting and combating corruption and organised crime, such as the Directorate for Preventing Money Laundering, police, Financial police, Directorate for Managing Confiscated Property (currently being formed) and the like, and collect data on criminal association and exchange data with adequate services for combating organised crime from other states, and to cooperate in data collecting with services from other states.

Service for Combating Corruption should implement and direct the activities of the National Programme for Combat against Corruption, direct the activity of state institutions in this area and cooperate with non-governmental organisations and the media. The duty of this service is also to raise public awareness on the danger from corruption and organised crime and the need to combat it, as well as training of other state authorities and legal persons in this field. This service should work on informing the public of the manifestations and causes of corruption and methods and means for combating it, prepare reports on efficiency of existing forms of prevention and punishment of corruption and organised crime, and propose the adoption and implementation of regulations on preventing the conflict of interest in public and private sectors, etc.

Service for International Cooperation would perform the tasks of international criminal law assistance, in accordance with the UN Convention against Transnational Organised Crime, UN Convention Against Corruption, etc.

Service for Analytics and Archive should process the part of judicial cases of organised crime and corruption in order to analytically observe the most frequent

and characteristic manifestations of organised crime and corruption and, in accordance with the results obtained, contribute primarily to the prevention of this type of criminal activity.

Some of these services can also be established on the level of Special Prosecutor's Office Departments, and the services of the Special Prosecutor's Office perform their tasks both for the Special Prosecutor's Office and the Special Prosecutor, and for the Departments, when so required.

Detailed regulation of the manner of work and organisation of work of the Special Prosecutor's Office and its Departments, the act on systematisation and internal organisation would be passes jointly by the Special Prosecutor and the Minister of Justice after obtaining the opinion of the Chief Public Prosecutor.

Namely, the Act cannot and should not regulate all the details in respect of the work and functioning of the Special Prosecutor's Office. It is therefore logical for the detailed regulations on the manner of work and functioning of this office to be regulated by the Special Prosecutor, in co-operation with the Minister of Justice. Opinion of the Chief Public Prosecutor (as in some other cases) is important in many respects: it keeps the Special Prosecutor's Office within regular prosecutorial organisation, it gives necessary awareness and attitude on the position and dimension on work and importance of the Special Prosecutor's Office and represents the necessary public and "look from the side", thus keeping the Special Prosecutor's Office and the prosecutorial organisation as a whole from hypertrophy in some of its parts.

It is also important to mention that, in addition to the Special Prosecutor and his/her deputies, the Special Prosecutor's Office and its departments would also employ assistant prosecutors in the rank of senior prosecutorial assistants, prosecutorial assistants and advisors, appointed in accordance with the Public Prosecutor's Office Act, and in accordance with this Act. These persons should assist the Special Prosecutor and his/her deputies, in the manner and to the extent envisaged in the Public Prosecutor's Office Act and Rules on Proceedings on Administration. Their task is primarily to perform certain operations, independently or under the supervision and instructions of the prosecutor or the deputy, such as taking on record depositions and reports from citizens and legal persons, drafting certain documents, etc.

Special Prosecutor's Office should also employ experts in certain field who have specific knowledge necessary for the work of this prosecutor's office and who assist the Special Prosecutor and his/her deputies in work, giving them opinions, suggestions and proposals.

Joint operative groups can be formed within the Special Prosecutor's Office and its departments. They are composed of one or more Deputy Special Prosecutors, prosecutorial assistants, experts from the Special Prosecutor's Office and members of certain police units, Security-Information Agencies, Customs Office, Directorate for Preventing Money Laundering, etc. These operative groups are formed by the decision of the Special Prosecutor or Department Head, with a certain task or for a given period of time, in order to detect perpetrators and carry out pre-trial proceedings for criminal offences of organised crime, money laundering and corruption in a more efficient way by joint an integrated action.

b) Special Departments of Competent Courts

When it comes to conducting court proceedings for organised crime and corruption offences, both in legislations of the countries in the region (there are countries in transition with similar problems and legal heritage) and in countries that have long experience in combating organised crime and corruption, it is visible that a relatively small number of countries has specialised courts, departments of panels for acting in such cases. If they do exist, they are, as a rule, first instance courts, and solutions whereby there are specialised departments and judges specified by name (as a rule, by annual schedule or order of court president) in second instance proceedings and proceedings on extraordinary legal remedies are very seldom.

Bearing in mind the principles of judicial impartiality, which implies the right to natural judge and chance distribution of cases, but, on the other hand, the need to specialise judges and concentrate proceedings in one place, which makes these large, complex and expensive cases faster and more efficient, as well as the experience of the Special Department for Organised Crime of the Belgrade District court so far, *it is our opinion that at this time, the existing solutions on the existence of specialised court department for adjudicating in organised crime cases should be preserved as a legislative solution, with certain changes.*

In addition, due to the increased number of cases, complexity of circumstances of cases, numbers of accused persons, limitations concerning space, conditions and human resources of the Special Department for Organised Crime of the Belgrade District court, *the solution by which, in addition to the District court in Belgrade, these departments are also formed in the seats of Appellate Courts – Novi Sad, Kragujevac and Niš – is a good one.*

Judges of the Special Department can be those district court judges that have shown high degree of expertise, efficiency and conscience in work and have experience in complex criminal proceedings, who have special knowledge in criminal law science, in particular regarding organised crime and corruption, its manifestations and manner of functioning.

There is no need to transfer to Special Departments judges with more working experience than that necessary for District Court judges, with already mentioned condition (as the case is with Special Prosecutor's Office). As proposed, the Special Prosecutor's Office should act both before the first-instance court and before the court competent for ordinary legal remedies. This was also the main reason why we considered that the Special Prosecutor and his/her deputies must meet the formal conditions for Deputy Chief Public Prosecutor.

When it comes to the manner of assignment, that is, referral of judges to the Special Department, we find that the existing manner – a decision of the court president – even though deficient – an optimal solution under the present circumstances. Such a decision should be preceded by an opinion of the panel of all judges of the court (or the Criminal Department, given that judges of other departments are not so well informed of the work of the candidates) and candidate's written consent. Attached to the consent should also be the statement on property he/she

or his/her spouse or common-law spouse dispose of, and the property his/her blood relatives in a straight line, cousins of the third degree, as well as in-laws up to the second degree.

The term of office or the time for which the judge is determined or referred to the special department should be six years. Reasons for such duration of the term of office should primarily be looked for in the identical duration of the term of office of Special Prosecutor and his/her deputies. There is no need for differentiating between judges and prosecutors on that issue. *We think that the judges can be re-assigned to the same department (provided they meet the same conditions). In addition, provision should be made that any judge who is not assigned to work in the Special Department continues to act until the cases initiated are concluded in the first instance. These provisions should also apply to a judge assigned to work in the Special Department of the District Court. Referral (according to Judge's Act) for one year at the longest, and is carried out by the president of the Supreme Court of Serbia, in accordance with Judges' Act.*

We think that there is room for the quantity and quality of work of judges acting in this Department to be observed and assessed with more attention and according to the criteria that should be basically the same as for "other judges". The main issue to be observed is the reckless and unprofessional work, which is primarily reflected in prolongation of resolution of cases and neglecting prescribed time limits in conducting proceedings and drafting decisions and insufficiently successful performance of judicial duty, all according to criteria established by the Supreme Court. The procedure of resolution of these judges would be carried out in the same manner as for all other judges, in accordance with Judges' Act.

The solution whereby should be preserved: work of the Special Department is managed by the president of the Special Department, determined by the president of the District Court for a period of two years. Court President is appointed among judges of the Special Department and he/she is the judge of that Department.

Court president passes an act that regulates in more detail the work of that Department and such act can be independent or a part of the act passed by the court president, which governs the work of the entire court.

Dilemmas that exist in terms of existence of specialised court departments for organised crime and corruption in first instance court become even more expressed when it comes to the existence of such departments in second instance courts that decide on ordinary legal remedies (appeal against judgment or ruling).

The present solution included the existence of such departments in second instance courts (in practice, even in proceedings on extraordinary legal remedies) the Grounds and reasons supporting the existence of such departments in second instance courts are more-less the same as those relating to first-instance courts. The reasons against the existence of such courts are similar to the mentioned reasons, but with even more intensity. Introduction of specialised appeal unit violates the principle of independence and impartiality, which requires that cases are assigned to judges according to given sequence, irrespective of parties and circumstances of the legal issue, solely on the basis of case number and mark, that is, by chance. Determining only a few judges who will act in certain cases jeopardizes this principle to a considerable extent.

Opting for the Special Department at the Appellate Court has its meaning and justification relating to the same department of the first-instance court. If the legislator opts for such a solution – which is probably the most expedient solution at this time – the judges should be assigned to this Department according to the same criteria and meeting the same conditions as the judges with the first-instance courts of these departments (to meet the conditions for being appointed an Appellate Court judge). A judge is assigned to that Department by the Court President for a period of two (four) years with the possibility of re-appointment.

Alternatively, the procedure before second instance court can also be conducted before a specially determined panel formed for such occasion by the court president (one solution from comparative law). His/her decision would not determine in any way the judge who would act as the *rapporteur* judge in the given case. However, as already mentioned, this solution would be in collision with the principle of chance distribution of cases and the right to natural judge/judges.

The issue of forming of special departments of first instance and second instance courts is certainly the most delicate one in this Act. Reasons for (not) establishing them are given in the comparative review of other legislative solutions in countries in the region and certain EU countries. Given the current situation in Serbia, to a certain extent, *the reasons for forming those special units in first-instance and second-instance courts are prevailing, but the definite legislator's decision will depend on the decision of the European Court of Human Rights, related to terminated organised crime cases (several cases are pending before that court) on the issue of whether the fact that these proceedings have been conducted before a special department of the ordinary court, therefore, before judges specially determined for that type of cases, who are paid more than other judges of the same rank, is a violation of human rights from Article 6 of the European Convention on Human Rights – (right to a fair trial, which implies the right to a natural judge) or not.*

As far as the procedure on extraordinary legal remedies for criminal offences envisaged by this Act is concerned, we find that the reasons for keeping the decision-making within the limits of the ordinary court system (which are somewhat disavowed before the first-instance and second-instance courts) fully exist in this case. Therefore, in cases of cassation there is no reason for a Special Department for Organised Crime and special judges to exist.

One of the problems that specialised court departments of competent courts are facing and will face in their work is that of the *conflict of competence.*

As already mentioned (in the part concerning the conflict of competences between the Special Prosecutor's Office and other prosecutors' offices), subject matter jurisdiction in organised crime cases envisaged by this Act is primarily determined by the Special Prosecutor's Office, which, by its initial procedural acts and subsequent indictments, determines the competence of first instance and second instance court and their special departments.

As far as the conflict of competences between specialised departments is concerned, (this could only relate to territorial competence), it should be decided on by the *Supreme Court or the Supreme Court of Cassation* (as in possible cases of delegation of competence).

A more frequent and interesting problem is the so-called ***conflict of functional competence*** (between special and other departments of same courts and between special departments and other courts). These are the cases when the Special Department of the District court finds that the Special Prosecutor's indictment does not include organised crime offences, regardless of the qualification of the criminal offence, which indicates it, since the very incrimination, or, more precisely, the description of facts of the case and evidence presented do not confirm the allegations of the indictment. This is and important issue that needs to be resolved in the very beginning of criminal proceedings, since it happens quite often, particularly for accomplices and for some minor criminal offences that, as pertinence in civil law, follow the destiny of the "main thing".

We find that in such cases the conflict of competence should be decided on by the Appellate court, if it concerns departments and courts located on the territory of the same court of appeal, or the Supreme Court of Cassation if it concerns departments and courts from the territories of different courts of appeal. The same principle would apply to cases of conflict of competence between the Special Department and Department for War Crimes or Department for Cybercrime.

c) Special Police Unit for Detecting and Combating Criminal Offences of Organised Crime and Corruption

Without dilemma, there is justification for the existence of a Special Police Unit for Detecting and Combating Criminal Offences of Organised Crime and Corruption, which has so far proven to be a good solution and a necessary factor in combating this type of criminal activity. Almost all countries in the world, which have a problem with organised crime, have specialised police units dealing with detection and combating this type of crime.

It is certainly important that the Unit, regardless of being established as a part of the Ministry of Interior, and its work being governed by a special act of the Ministry of Interior, should receive *approval of the Special Prosecutor in regards to its organisation. Approval of the Special Prosecutor is also necessary when appointing and releasing the Unit Head.* It is important to envisage that the Unit Head can be released on Special Prosecutor's request.

Head and members of the Unit must be persons who have already shown exceptional professionalism, capabilities and perseverance in work, who have special knowledge and skills necessary for efficient combat against organised crime. *We think that some system of assessing the work and results of work should also be introduced in this unit. This would be regulated in more detail by an act passed by the Minister of Interior, but would by all means include the Special Prosecutor's Office.*

It is particularly important to establish a good and well-coordinated connection between the territorial units of the Ministry of Interior, that is, between police directorates on field with the special police unit and Special Prosecutor's Office. *We think that this unit should have its departments in those cities where there are departments of the Special Prosecutor's Office – Novi Sad, Kragujevac and Niš – and, if necessary, in other major towns that are particularly "interesting" from the standpoint of combat against organised crime and corruption. In order for these*

units and the Special Prosecutor's Office to be better connected, special operative groups formed within the Special Prosecutor's Office can be used.

Police directorates (larger ones in particular) should form special services that would coordinate and connect the work of other police directorates with this unit and the Special Prosecutor's Office. Its work would in particular be based on directives given by the Special Prosecutor.

d) Special Detention Unit

It is beyond doubt that *it will be necessary to organise special detention units for organised crime and corruption offences within all District Courts Special Departments. More details on organisation and work of these units should be passed by the Minister of Justice.*

Due to the existence of *at least four special detention units, as well as a special part of the Penitentiary or Special Penitentiary* where the persons convicted of those offences will serve their sentences, we find it would be necessary to organise special training, and, to a certain extent, centralise the manner of functioning, organisation of work, selection of employees, etc. This is primarily important for reasons of security, efficiency of work and economy.

e) Salaries and Other Rights of Holders of Judicial and Prosecutorial Offices and Others Employed in Specialised Authorities for Combat against Organised Crime and Corruption

Dilemma on whether judges and prosecutors (and other employees) in special court departments or in Special Prosecutor's Office and its departments, should have increased salaries and other benefits, is in essence a conflict of two ideas and two attitudes.

On the one hand, it is beyond dispute that acting in organised crime cases that are complex and demanding in professional and legal terms, implies the exposure to greater efforts and security risks, and investing more energy and knowledge in the performance of official duty. On the other hand, differences in salaries and benefits mean that these judges and prosecutors are separated in terms of status, rights and privileges from their colleagues who act in so-called "ordinary" cases, which can still be very complex, difficult and unpleasant, and bear security risks.

We think that the present solution *should be preserved in the future law*. However, consideration should be given to future abandonment of this solution because, even though it has a number of advantages, it also leaves a considerable gap in the prosecutorial and in particular in the judicial corpus, which, in simple terms, can be defined as first-rate and second-rate judges and prosecutors.

We think that the persons performing judicial or prosecutorial office in Special Departments of District Courts and in the Special Prosecutor's Office should have salaries that can go up to the amount that is twice the salary they would receive if they still performed the duties in the offices they held before coming to work in specialised departments. The precise amount of salary would be established by the High Judicial Council and State Prosecutors' Council.

The present solution could be preserved in relation to judges acting in these cases in the second instance. Alternatively, if it is assessed that there is not a suf-

ficient number of cases for everyday and continuous work (which is now not the case – quite to the contrary, there are many of these cases pending before the Supreme Court) – a solution whereby judges acting in these cases are entitled to increased salary for each month in which they acted in such cases once or more can be offered.

As far as other persons employed in these authorities are concerned, their salaries should be paid according to the same principle applicable to judges and prosecutors.

We think that we should preserve the present system of calculation of the years of service for judges of special departments, Special Prosecutor and deputies, whereby 12 months of work in these bodies is calculated as 16 years of insured service.

In relation to the court of second instance (if the solution applicable to the court of first instance is not accepted), the years of service would be calculated so that each month in which the judges acted in these cases would be calculated as 40 days of insured service.

Of course, if the legislator opts not to form special court departments, but to have proceedings in these cases conducted before ordinary courts, then the right to increased salary and increased years of service would pertain to all judges for the time spend working on these cases, observing the statutory time limits and obligation of trial within reasonable time. The same principle would then apply to the Special Prosecutor and his/her deputies.

f) Security Checks of Persons Assigned to Special State Authorities for Combating Organised Crime and Corruption

Unlike the present legislative solution, whereby security checks and checking of property of persons assigned to work in special departments of state authorities for combating organised crime without the knowledge of those persons in accordance with an act adopted by the Government of the Republic of Serbia, we *think that this issue should be regulated by this Act. It has already been proposed that all persons, in addition to handing their written consent for work in these departments, submit statements regarding the property owned by them and their close relatives. Consequently, we think that such data should be checked by the Ministry of Finance, through its organs, and that this data should constitute an official secret, whilst other security checks would be performed by the Security-Information agency, at the request of the President of the Supreme Court of Cassation, Chief Public Prosecutor, presidents of Appellate Courts and District Courts where the special departments are located and the Special Prosecutor, depending on who is being checked. The mentioned authorities should inform the Chief Public Prosecutor (for Special Prosecutor and prosecutors referred to work in the Special Prosecutor's Office), Special Prosecutor (for Deputy Special Prosecutors) and presidents of competent Appellate and District Courts (for judges of these Departments), as well as the president of the Supreme Court (for judges referred to work in the Special Departments of competent courts), the Minister of Interior for members of special police units and the Minister of Justice for employees in special detention unit of data obtained. Such data shall constitute official secret and can be used only to assess whether a person meets security criteria for work in these units.* 4 Data refer to period between January and July 2005.

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