



Discussion Paper 41

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Use, Misuse and Abuse of Human Rights Rhetoric:

The Case of Serbia

Discussion Paper 41 (2006)
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Introduction

National application of international law is one of the most important tests of its efficacy. It is within the national legal system where international law is most likely to be implemented and therefore such an application is of the utmost concern for international law.¹ The lack of a systematic international institutional framework that could adequately respond to the application, implementation and enforcement thereof, inevitably directs international law towards the national legal system.²

The development of international law has raised the possibility of invoking international law in national courts. Therefore, the lack of adequate expertise on behalf of judges may be detrimental for the state: the failure of the judiciary to apply international law or remedy international wrongdoings done by other state organs may incur international responsibility of a state. There are also other actors, such as individuals and non-state agencies who, as potential beneficiaries, are interested in the judicial enforcement of international law within a state. Consequently, the extent to which a national legal system is capable of fulfilling the international obligations of the state, and how competently it is able to deal with different legal concepts, is indicative of how far a particular legal system can meet challenges of a globalised world.

This article examines the national implementation of international human rights law in the legal system of Serbia. The reasons for the focus on human rights are many, but just to name a few. First, the proliferation of human rights norms, standards, sources, bodies and NGOs, may lead to the conclusion that international human rights law has developed special rules for national implementation and enforcement.³ Second, no other area of international law relies so heavily on national legal systems due to the fact that individuals are beneficiaries of the legal guarantees vis-à-vis states. Therefore, the issue here is not only the efficacy of international law but also whether national agents respond properly to the demands and requirements of international law. The third reason stems from the criticism of the use of human rights language. We live in the 'human rights era': the frequency of and reasons for its undefined usage have blurred the clear legal concepts of human rights. This may have a counter effect, or at least lack any legal effect, which may thwart meaningful national implementation of human rights as rights vested in individuals. This is why

there is a distinction here between the use and misuse of the human rights discourse within the legal context of Serbia and Montenegro.

Serbia, together with the previous system of Serbia and Montenegro is an interesting case study because it has experienced turbulent political and legal changes, both international and national, over last 15 years. In the pursuit of state and national identity, international status and the ways for getting closer to European and world trade integrations, Serbia and Montenegro has been assigned with many tasks, effective compliance with human rights standards being one of them. What is argued here is the relevance of this particular task against the frequent problems which Serbia has been facing when using the legal concepts of human rights in an appropriate and effective manner, which has often led to the politicisation of human rights.

The structure of this analysis rests upon the assumption that international human rights are part of international law. Therefore, the paper starts with an overview of the interplay between international and national law, a part of which deals with the relevance of different political and constitutional periods, and different agents of implementation with special reference to Serbia and Montenegro. The following part is focused on the international law agenda in Serbia and Montenegro, followed by the existing legal framework for the implementation of international law in its national legal system. Based on legal research and analysis this article examines the propriety of the use of human rights law language, and discusses how legal discourse has been replaced by legally untenable concepts. As this article tests political versus legal discourse in the context of human rights, its last section makes cross-reference to different political periods of the so-called 'third Yugoslavia'. This cross-reference seems to be relevant as these political periods do not coincide with successive legal periods. Special attention is paid to judiciary because, as this paper argues, their attitude towards political and legal changes in the country is crucial for the national legal implementation of human rights. The objective of this article is to show that the increase in human rights language does not necessarily indicate the proper and correct enforcement of human rights norms, but, sometimes quite to the contrary, it demonstrates the political discourse, lack of expertise and understanding of human rights, and deference to the executive. Therefore, by pointing to these deficiencies, the article argues for the proper use of human rights language before competent and independent courts.

The Interplay between International and National Law

The complexity of the relationship between international and national law stands for the difficulty to identify all types and models of their interplay. International law has developed substantively, which means that today there are many areas regulated by both international and national law, with a variety of consequences that are certainly far beyond the traditional interstate concept of international law.

Implementation of international human rights law in national law is just one aspect of this interplay: international law may reach its national addressees via the traditional method of national treaty implementation. Therefore, human rights standards embodied in a treaty will first be addressed as treaty law. There are two main systems of national implementation of treaties: adoption and transformation, the principle distinction being the character of national constitutional order and existence or non-existence of implementing legislation.⁴ However, this is only one of the ways in which international law may enter a national legal system. For example, customary international law is more likely to find direct access to national law, as a majority of national constitutions do not require any implementing legislation for its direct application.⁵ Also, there are situations in which international bodies and courts implicitly or explicitly require the modification or annulment of certain national legislation that has been found contrary to international standards.⁶

Despite the fact that in most cases it is a treaty or some other international legal source that will serve as the legal basis for domestic implementation of international law,⁷ there are many ways in which international law impacts on national law may be examined. This article will first introduce the relevance of different political and constitutional periods in Serbia and Montenegro, as well as different national agents responsible for the national implementation of international law. Bearing in mind the importance of these factors, the examination will proceed to specific international law issues, determined by subject-matter, which presently are high on the political agenda. These issues include the current status of European integration processes, Serbia and Montenegro's treaty activity, cooperation with the International Criminal Tribunal for ex-Yugoslavia (hereinafter: ICTY), and the national legal framework for the implementation of international law. The last category of analysis will be further focused on human rights and the propriety of human rights use and enforcement

within the national legal realm, as well as on the executive's influence on the judiciary, which often goes unnoticed.

Political and constitutional periods as criteria for international law discourse in Serbia and Montenegro. The last 10 to 15 years in Serbia, and former Serbia and Montenegro witnessed different political and constitutional periods that have not necessarily coincided. Political periods may be identified from the beginning of the 1990s to 2000, and from 2000 onwards. The first political period is primarily marked by the rise and rule of Milošević, wars in the region, international isolation and crisis, economic and political sanctions, grave deterioration of standard of living of population, and other factors, which left a somber legacy to the democratic governments elected in September 2000 on the Federal level and in December 2000 in Serbia. The dramatic fall of the Milošević regime was brought about by popular protests and rallies on 5 October 2000, which were triggered by the regime's attempt to forge the election results. Newly elected federal and state governments speedily undertook a set of reforms, which were seriously obstructed by the assassination of the Prime Minister Zoran Djindjić on 27 March 2003.

As far as constitutional periods are concerned, the last two constitutional periods, being at the same time first post communist constitutions, shall be examined: first, from 27 April 1992 (Constitution of the FR Yugoslavia) until 4 February 2003 (Constitutional Charter of Serbia and Montenegro). The reason to follow both political and constitutional periods is that the judiciary seems to be more responsive to political changes than legal frameworks, as the analysis of judicial practice will show. The last constitutional period seems to be just on rise, as Montenegro has just recently opted for independence, on 24 May 2006, which inevitably leads to the dissolution of the State Union of Serbia and Montenegro.

Agents of implementation of international law in national system of Serbia and Montenegro. There are many actors who contribute to the implementation of international law in a national legal system, both state and non-state actors.⁸ Here the focus is mostly on state actors, because they are primarily responsible for international law enforcement according to both the international and national legal framework. Three branches of government stand out as the most relevant actors. Legislature, as a political branch of government vested with the competence to commit the nation to international obligations, as well as to enact legislation for the

implementation of international law, including international human rights. The second is judiciary which, as the legal branch of government, is entrusted with ensuring the application of law, settlement of disputes and protection of rights and freedoms. Therefore, effective application of international human rights will ultimately depend on the judiciary. The last branch of government is the executive, the position of which will be analyzed with respect to the judiciary, and *vice versa*.

The Law Agenda in Serbia

It seems that the ‘international orientation’ has attracted considerable consensus among many political actors in the country. However, it is not necessarily clear what is really understood by pro-international or pro-European policy. In order to determine the reality of such a policy, I shall examine the international law agenda as it has been advocated and implemented over the last few years. Such a survey should include not only human rights, but also the practical consequences and effects of the rhetoric often used within the domestic political arena, such as international economic integration, European integration processes, cooperation with the ICTY, and implementation of human rights standards. The survey includes the status of the then Serbia and Montenegro and now Serbia only in European integration processes, an overview of treaties signed and ratified during the last few years, cooperation with the ICTY, and implementation of human rights standards.

a) European integration process

This issue has been particularly attractive for all political actors in the country. After political changes during 2000 the FR Yugoslavia signed the Framework Agreement with the European Union as early as November 2000. The Framework Agreement brought with it EU economic assistance. In December 2000 the Joint Working Group was tasked to monitor reform and transition in general and to make recommendations on the further development of the process. In the end, in the short time allowed, it was not possible to meet the requirements necessary for drawing up a Stabilization and Association Agreement (according to the Council decision Conclusions on the Development of a Comprehensive Policy Based on the Commission Communication on the ‘Stabilisation and Association Process for

Countries of South-Eastern Europe’, July 22, 1999). Despite strong political determination and support from the EU, by the end of 2004 there had been no significant progress. Serbia and Montenegro failed to prepare the Feasibility Study in time, and therefore was the last country involved in the Stabilisation and Association Process to begin negotiations for accession to the EU. Once negotiations finally began, they were interrupted on 3 May 2006 for an indefinite period due to failure of Serbia and Montenegro to cooperate fully with the ICTY, namely to extradite Ratko Mladić. Structural problems, economic conditions and the paralysis of political negotiations, partly due to the fact that it is not clear who is in charge of such negotiations within the country, remain. This controversy is now partly solved with the proclaimed independence of Montenegro, leaving some of its structural problems to now new independent states.

What is more disturbing is ‘the lack of a clear accession strategy and of an unequivocal, formal political consensus on the need for the further steps and measures to be taken to that end.’⁹

There is also European integration process through membership of the Council of Europe, negotiations with which began in October 2000.¹⁰ After having defined its legal relationship with the FR Yugoslavia in its Resolution CM/Inf 2000(54),¹¹ the Committee of Ministers invited the FRY to become a party to treaties previously binding upon the SFRY (Committee of Minister decision of 20 November 2000). On 21 February 2001 Serbia and Montenegro notified the Secretary General of the Council of Europe that it would accede to 11 out of 16 treaties to which the SFRY was a party. On 3 April 2003 Serbia and Montenegro became a member of the Council of Europe and ratified the *European Convention for the Protection of Human Rights and Fundamental Freedoms* in December 2003 with several reservations,¹² with effect of 3 March 2004.

b) *Types of treaties signed and ratified*

Treaty activity was considerably accelerated after the political changes in 2000. It was not only due to the fact that after years of sanctions the country was finally reintroduced to the international arena with a number of urgent issues to address, but also because of the demands of the international community to initiate regional integration. The *Agreement on State Succession* signed on 29 June 2001

(between all SFRY successor states: Bosnia and Herzegovina, Croatia, Former Socialist Federal Republic of Macedonia, FR Yugoslavia, and Slovenia) finally resolved some of the controversial issues among successor states of the SFRY.¹³ This was followed by a number of bilateral agreements with other successor states which dealt mostly with normalization of bilateral relations, avoidance of double taxation, free trade agreements, agreements on scientific and technical cooperation, custom duties and readmission of nationals, etc.¹⁴

The succession of FR Yugoslavia in multilateral and bilateral treaties of the SFRY had been controversial and discussed for years, or at least until 1 November 2000 when the FR Yugoslavia was admitted to the United Nations. The status was finally resolved after the FR Yugoslavia deposited a general notification on succession with the UN Secretary-General according to which it succeeded to almost all multilateral treaties of the SFRY,¹⁵ with effect from 27 April 1992. The multilateral treaty activity that followed resulted in membership of 57 multilateral conventions, of which 11 are human rights treaties.

Serbia and Montenegro became a party to a number of human rights treaties. It is obvious that the majority of these conventions were acceded to before 2000, apart from the *European Convention for the Protection of Human Rights and Fundamental Freedoms* which was acceded to upon the approval of the Council of Europe membership in 2003. If membership of human rights treaties serves as the evidence of a country's commitment to human rights and the rule of law, we could easily, and very often wrongly, assume that the implementation of human rights must be proportional to evident political rhetoric around human rights. However, only after testing the efficacy of such an implementation, within certain political periods, can we draw any conclusions regarding the validity of the human rights discourse as employed in both the political and legal spheres of one country.

c) *Cooperation with the ICTY*

The cooperation with the ICTY for ex-Yugoslavia has certainly been the focus of the international law agenda in Serbia. This cooperation is of essential importance as a number of other international arrangements and integrations are conditional upon it: 'Democratic reforms, including in particular the establishment of the rule of law, respect for minority rights as well as inter-ethnic reconciliation, and respect for

international obligations, notably full cooperation with the International Criminal Tribunal for former Yugoslavia (ICTY), are among the main challenges for the State, compliance with which will be closely monitored by the European Union as these are key elements in the 'conditionality' governing the EU's Stabilisation and Association Process.¹⁶

Cooperation with the ICTY is a legal obligation under UN Security Resolution 827 of 25 May 1993. It is also an obligation under the General Framework Agreement for Peace (the 'Dayton/Paris Peace Agreement') and bilateral treaties signed between states and the ICTY. The concept of the obligation of cooperation incumbent on all states is defined in the ICTY Statute. Article 29 (Co-operation and judicial assistance) imposes the obligation of cooperation in the investigation and prosecution of persons accused of committing crimes that fall within the ICTY's jurisdiction. Also, the same Article states that 'States shall comply without undue delay with any request for assistance', assistance being the identification and location of persons, taking of testimony and the production of evidence, service of evidence,¹⁷ arrest or detention of persons, surrender or transfer of the accused. Additionally, Articles 9 and 10 are relevant as they provide for the primacy of the ICTY over the national courts. It is obvious that the cooperation, as envisaged by the Statute, is basically a one way process of meeting the demands of the ICTY rather than cooperation in the ordinary meaning of this word. The responsibility to explain to the public the character and contents of this obligation seems to have shifted to the political elites of Serbia and Montenegro. According to the negative reports given by the Tribunal,¹⁸ it seems that the 'domestication' of this part of international law agenda has been poorly conducted.

Since 2000 the Governments of Serbia and Montenegro and Republic of Serbia have taken legislative measures in order to meet these obligations, for example: Decree on the Cooperation with the ICTY¹⁹ and Law on the Cooperation with the ICTY.²⁰ This Law regulates the procedure to be followed by national authorities in the course of fulfilling Serbia and Montenegro's obligations toward the ICTY. This legislative act invokes the UN SC Resolution 827/1993 as grounds for cooperation, and affirms that the ICTY Statute represents generally accepted rules of international law. The Law further provides for the effective compliance with ICTY decisions and gives the right to the ICTY investigators to collect evidence in the territory of Serbia and Montenegro. With respect to domestic authorities, this Law

allows military and other state authorities to declassify certain documents and information, and lifts restrictions on keeping confidential information from witnesses and accused. However, declassification is neither automatic nor presumed. The ICTY primacy is confirmed with respect to crimes under the jurisdiction of the Tribunal. In order to enable interjudicial cooperation, the Law gives the right to national courts to issue arrest warrants, based on ICTY indictments, and to order detention if necessary. Also, this Law guarantees certain benefits to persons who voluntarily surrender to the ICTY: the Committee of Ministers of Serbia and Montenegro used to have competence furnish guarantees and safeguards in these cases to enable these persons to prepare their defence outside the Tribunal.

The Government also undertook a set of executive and enforcement measures, such as the establishment of the Council for the Cooperation with the ICTY, forced transfer of the accused to the Tribunal, negotiations with the accused in order to provide their voluntary surrender, giving guarantees for the accused, granting limited access to archives and documents, etc. In a broader context, this cooperation was institutionally fostered and politically supported by the establishment of two special chambers of the District Court in Belgrade for war crimes and organized crime respectively.²¹ Although such a manoeuvre was not demanded by the Tribunal, this step could be seen as the manifestation of political will for the punishment of war crimes as well as evidence that the domestic judiciary is both willing and capable of dealing with war crimes and other forms of criminality that have had detrimental effects on and Montenegro repeats not only its commitment to cooperate with the ICTY but also stresses how it meets its international obligations fully.²²

However, it seems that the Tribunal, Prosecutor and other international organizations do not share the view of the government of Serbia regarding the successful fulfillment of its international obligations.²³ Despite the fact that none of the actors of this cooperation denies the obligatory character and political importance thereof, it seems that the key term ‘cooperation’ is misunderstood by the government. This misunderstanding inevitably leads to different and often opposing views on the success of the cooperation and fulfillment of international arrangements.²⁴

However, efforts to strengthen the domestic judicial system are laudable as they help shift the agenda from political branches of government to the courts and turn political human rights discourse into national human rights law, not only with respect to conducting domestic trials for war crimes but also by institutionalizing

cooperation with the ICTY through the courts. Also, this shift is evidence that the political will exists to have these complex and significant proceedings seriously conducted by the national justice system.

d) Legal Framework of Serbia for the Implementation of International Law

The constitutional framework established by the Constitutional Charter of Serbia and Montenegro of 2003²⁵ favours the protection of human rights and implementation of international law. Interestingly, three out of the five aims of the established Union clearly belong to the progressive international law orientation: ‘respect of human rights of all persons under its jurisdiction, preservation and promotion of human dignity, equality and the rule of law; joining European structures, particularly the European Union; harmonizing regulations and practices with European and international standards’.²⁶ Such an ambitious policy is boosted by other instruments envisaged in the Charter: international human rights treaties are self-executing²⁷ and all international treaties have priority over national law.²⁸ There are a few provisions that are not usually found in constitutional texts, such as the special reference to the obligation of the country to cooperate with international tribunals,²⁹ duty of the national armed forces to respect international rules on the use of force,³⁰ and establishment of the special Ministry for Human Rights whose competence includes, *inter alia*, monitoring human rights implementation and coordination of activities for the implementation of international human rights treaties.³¹

In addition, human rights language on a constitutional level is emphasized by the Constitutional Charter on Human and Minority Rights and Civil Liberties.³² This document represents a set of civil, political, social, cultural, and minority rights, which also envisages judicial protection of these rights together with the subsidiary mechanisms for their judicial enforcement.³³ The Charter is a piece of domestic legislation with general reference to international treaties on human rights binding upon Serbia and Montenegro. This Charter contains one provision which is found infrequently in constitutional documents, namely the obligation to enforce decisions of international institutions³⁴ as well as the obligation to interpret the Charter in accordance with the jurisprudence of international institutions.³⁵ Apart from very few deficiencies,³⁶ the constitutional framework established in 2003 is favorable for the national application of international law.

However, the international normative standards were already set by the 1992 Constitution, which was in force during the 'new political period' of Yugoslavia for three years (2000-2003). The importance of this fact is in the examination whether constitutional or political framework was more relevant for the application of international law and human rights. Another reason is to see whether Cassese's model of interaction between post-totalitarian democratization and an 'opening' of new constitutions to the international system can be applied to FR Yugoslavia. Antonio Cassese perceives a correlation between initial attempts to establish democracy following the defeat of an authoritarian system and the opening of state constitutions to the international community in general and international law in particular.³⁷

The 1992 Constitution envisaged both direct implementation of international law (treaties and generally accepted rules of international law)³⁸ and the primacy of international law, raising it to the level of the Federal Constitution.³⁹ The main constitutional obstacle was the provision that prohibited the extradition of Yugoslav nationals to foreign countries, this impediment having been removed in the new Constitutional text. However, it is worth noting that the 1992 Constitution also favored international human rights language in a fashion concomitant to most CEE constitutions drafted at the beginning of the 1990s.⁴⁰ Human rights law, however, was not properly applied by enforcement agencies and the judiciary until the transition to the new political period. It seems that, in relation to Cassese's model, the opening up of the Constitution to the international law system was neither caused nor effected by the democratization of society and the national legal system.

International law agenda in Serbia: human rights

Direct reference to human rights can be found in more than 50 pieces of legislation enacted by Serbia and Montenegro, and Serbia alone. The issue to be examined here is the normative value of human rights language used in the legislative documents. A separate and distinct issue is the implementation of human rights norms by domestic agents of enforcement.

However, there is a set of documents adopted by the legislature which *stricto sensu* does not belong to the category of legislative documents because it represents political declarations and statements.⁴¹ These documents heavily rely on human rights

language. However, the nature and purpose of these documents clearly exploit the language of human rights for political ends.

I shall categorize other legislative documents using the normative values of the human rights language, normative values being preciseness, concreteness, guaranteed enforcement mechanisms and remedies. Another relevant factor for our categorization is the subject matter of a particular piece of legislation.

a) Proper use of human rights language

There are some legislative documents (laws, regulations, decisions) that enable the enforcement of human rights as legal rights vested in individuals vis-à-vis the state which guarantees them. Criminal Procedure Code (2004), for example, makes detailed reference to the rights of the accused as well as the possibility of re-opening the procedure if an international court reaches a decision contrary to the decision of the national court. Criminal Code (2006), similar to a number of criminal codes worldwide, provides for offences that are also human rights violations: the Chapter XIV of the Criminal Code is entitled “Criminal Offenses Against Human Rights and Freedoms” (e.g., prohibition of torture (Art. 137), prohibition of discrimination in general (Art. 128-131) and racial discrimination in particular (Art. 387), human trafficking (Arts. 388, 389), etc.)

There are some legislative and executive acts that properly placed human rights in action thanks to the clear legislative intent and purpose, as they provide for judicially enforceable rights as well as for the duty of state authorities to perform specific tasks. These are the acts that deal with some transitional issues, and therefore they are very specific: Law on the Cooperation with the ICTY, Law on War Crimes (2003), Law on the Organized Crime (2003), Decision on the Establishment of the Commission for Gender Equality (2003), Decision on the Establishment of the Truth and Reconciliation Commission (2001), Regulation Establishing the Committee for the Collection of Information on Crimes against Humanity and International Law, etc. Some of the legislative acts represent adequate measures for human rights implementation, such as the Directive on Police Ethics and Police Affairs of the Republic of Serbia (2003), which fully and in detail regulates the conduct of police in different areas.

b) Misuse of human rights language

There are several examples that show the political fashion for human rights by improper normative language or unclear legislative intention. These are regulations that dealt with the harmonization of markets between federal units of Serbia and Montenegro, order on social benefits expenditures, financing scientific and technological advancement, etc. Despite the fact that there are some areas where reference to human rights would be acceptable, the manner in which it has been done does not place them within the legal realm. A mere formulation 'in accordance with human rights' within the legislative text which is *per se* directly applicable does not sufficiently provide for a satisfactory application, nor for judicial protection of envisaged human rights.⁴² However, one might rightly argue that even if human rights are politically tailored within directly applicable legal texts, such an approach cannot cause any harm. Furthermore, it may alert enforcement agencies to observe general framework for the respect of human rights, especially when they are not familiar with this type of application. That is why I call these examples 'misuse' rather than the abuse of human rights language.

Another type of such misuse may be found in the discrepancy between human rights legal texts and national case-law. The limited number of human rights law cases before national courts is at odds with the number of legislative acts employing human rights language, including texts where this language has been appropriately used, to the extent that such a discrepancy could be regarded as the misuse of human rights language in the given context. Though it could be argued that even political rhetoric of human rights might bolster courts to bring human rights into their rulings, so far it has not been the case, partly due to strong deference of judiciary towards executive, as it will be explained later.

c) Abuse of human rights language

The idea and concept of human rights generally dwells on the divergent positions of an individual and a state: individuals are vested with rights vis-à-vis the state which guarantees them. In this opposing relationship human rights law necessarily provides individuals with rights and the state with obligations, because human rights are the limitation upon state authority.⁴³ Such obligations certainly imply the duty of the state

to protect individuals from harms possibly done by other individuals. However, when doing so a state will enter into other legal areas such as criminal law or other penal regulations, the difference being that for individual responsibility the applicable law will be a legislative act that must conform with the rules of human rights law. Therefore, an individual cannot be held responsible for the violation of human rights treaties, but he/she can be held politically or legally responsible for violation of other sets of rules legislated by the state. Reversal of the position of beneficiaries vis-à-vis those who have obligations would lead to the excuse for a totalitarian state according to which it is a state which matters more and which is protected by human rights. Such a use of the concept of human rights I call here the abuse of human rights language.

One such example is the Law on the Responsibility for Human Rights Violations.⁴⁴ This legislative act provides for the individual responsibility of persons who were or have been public officials and who by performing public functions violated human rights as set forth in the International Covenant on Civil and Political Rights of 1966 in the period since 1976 when this treaty came into force. It is clear that the intention of this law is to enable a systematic solution for a number of human rights abuses that happened both during the communist and post-communist periods. This law is also known as the Law on Lustration, which denotes a special process, common to many transition democracies in Central and Eastern Europe,⁴⁵ to cover a range of ways dealing with the past.

No matter whether such motives are praiseworthy or the intentions justified, the issue here is whether such a manoeuvre adequately responds to the demands of human rights law. The answer seems to be negative: 'Lustration has been severely criticized, though more by those in the West than in the societies involved, as in itself a breach of human rights, and bodies like the Council of Europe and the International Labour Organization have been unwilling to sanction it.'⁴⁶ In this particular case, there are several arguments against the approach. First, this act does not provide standing for victims nor possibility of compensation to victims, the sole beneficiary seems to be the state. Second, penal provisions have retroactive effect back to 1976, which runs against the principle of legality. Third, it is not clear why this issue of transitional justice, could not be performed through the criminal justice system in the course of application of criminal responsibility for offences that existed when the abuses were committed. This could be done either before regular courts or even through a special

judicial system that could be set up by analogy to two other special courts, for war crimes and organized crime respectively. This objection leads to the fourth argument: the Commission set up for establishing violations under this Law does not seem to satisfy the requirements of ‘independent and impartial tribunal established by law’ as envisaged in the international human rights law.⁴⁷

Another example that shows how a state may wrongly use human rights concepts was the case before the District Court in Belgrade on the freedom of press and national security.⁴⁸ The weekly ‘Svedok’ published an article comprising an interview with Miodrag Luković Legija, the main suspect for the assassination of the Serbian Prime Minister Zoran Djindjić. The Serbian Public Prosecutor filed the request for a prohibitory injunction in order to stop the distribution of the information contained in the article on the basis that dissemination would promote war and incite violence contrary to the Act on Public Information and the Constitutional order.

The Court ordered a prohibitory injunction against the distribution of the magazine as well as its destruction. The Court found that the request had been well-founded in fact and in law. The Court *proprio motu* raised the question whether international law was applicable to the case, namely the International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights and Fundamental Freedoms (ECHR). The Court found that restrictions on the freedom of press in this case were not contrary to these international instruments. The final outcome of the case does not run against international law. By relying directly on exceptions in Article 10 of the ECHR and Article 19 of the ICCPR, the Court found that it was its international duty to restrict freedom of press. What is striking here, in terms of the human rights concept, is the following reasoning of the Court: ‘This interview comprises the information of which distribution must be prohibited according to international treaties, generally accepted rules of international law and the Act on Public Information.’⁴⁹ The important point here is the willingness of the Court to raise international law arguments *proprio motu*. However, the judiciary’s misunderstanding of human rights law is disturbing. It seems that the Court interpreted international human rights instruments not only as if they were grounds for restricting the freedom of press, but also as if imposing these restrictions was part of the Serbia and Montenegro’s international obligations.

Here, as in the previous example, the state tends to use human rights as the basis for its own authority vis-à-vis individuals, which may amount to the abuse of human rights concepts.

Whereas previous examples could be justified by the fact that, *inter alia*, judges were not trained in the application of human rights, there are examples which show not only the reluctance of judges to apply international law but also their resentment of international human rights. In another case, before the Municipal Court in Novi Sad,⁵⁰ plaintiffs were awarded damages for violation of human rights through the civil law remedy of damages for suffered mental pain.⁵¹ The facts of the case are based on the events of 1 March 2000 when the Milošević's regime organized a rally to celebrate the re-opening of one of the bridges that had been reconstructed after NATO's bombing. Plaintiffs planned to organize the protest against the rally and regime. However, the police intercepted them and held them in detention for several hours without any warrant or decision. After the rally they were released.

Taking court action for damages for human rights violations during Milošević's regime was possible only after its demise. As stated above, the then existing legal framework was not the impediment for the protection of human rights, it was the executive together with the judiciary's deference to the executive, as was the case with this judgment, which was rendered in 2001. However, despite the fact that human rights were upheld in this case, the judge made a mockery of human rights by finding the following: 'All plaintiffs suffered mental pain due to the arrests and deprivations of liberty. This pain reached the highest intensity at the time of arrest and in the period that followed, when the pain decreased, which finally and completely disappeared on 5 October 2000.'

Judiciary vis-à-vis executive: a case study on human rights application

The separation of powers and independence of the judiciary are undoubtedly one of the essential elements of democracy and one of the requirements for countries in transition. Human rights protection is also among them. Is it possible to have one without the other? Or, is it possible that the existence of one can compensate for, or even disguise the lack of the other? This seems very unlikely because the independence of the judiciary and the guarantee of basic human rights and freedoms

are both theoretically and normatively accepted as necessary elements of democracy.⁵²

There are two points important to consider here: human rights case-law and deference to the executive. In case of Serbia there is an evident lack of human rights jurisprudence and human rights legal arguments are rarely invoked before national courts. This fact is at odds with the number of legislative and international instruments binding upon Serbia as well as the legal framework that favors and requires international human rights law application. The possible reasons for this are many: judges insufficiently trained for the application of human rights law; a misunderstanding of human rights as a matter of political needs and rhetoric; or even a deference to the executive.

The shift to a human rights policy as a result of deference to the executive, rather than responsiveness to the existing legal framework, can be illustrated by the following case. In 1998 the refugee K.S. instituted proceedings against the Republic of Serbia for damages on the ground that his human rights were violated. The plaintiff fled to Serbia from Croatia in August 1995 during the Croatian military operation 'Storm'. In August, Croatia had launched operation 'Storm', a massive military offensive involving more than 100,000 troops, in which it overran all Serb-controlled areas in the western and southern Krajina region of Croatia. As a result, some 200,000 Serb civilians fled, the majority of them going to the Federal Republic of Yugoslavia, while smaller numbers remained in Serb-controlled parts of Bosnia and Herzegovina. In September 1995 the Serbian police forcefully took the plaintiff to the police unit from where he was transferred to Bosnia in order to join military units there. He was there until 27 October 1995 when he was released from the hospital in Banjaluka (Republic Srpska, Bosnia and Herzegovina) after having been wounded. He claimed damages against the state for violation of human rights. The first decision in this case was rendered by the Municipal court on 19 November 1998, when the Court upheld in part the action for damages.⁵³ On 5 July 2000, the District court, acting as a court of appeal, overruled the judgment having found that it was manifestly ill-founded, and remanded the case to the lower court.⁵⁴ Having conducted the second round of deliberations, the Municipal court ruled in favor of the plaintiff. However, this time all of the plaintiff's arguments were upheld as well-founded in fact and law. This decision was handed down on 13 December 2001.⁵⁵ This reversal of judgment is made more peculiar not only by the Municipal court's disapproval of the superior

court's decision but also by the fact that the former went even further than the original decision. However, even more interesting is the fact that the District court, acting upon the second appeal of the defendant (Republic of Serbia), which comprised identical arguments as the first and successful appeal, affirmed the decision of the Municipal court, this time awarding the full amount of damages.⁵⁶ Moreover, the District court seized the opportunity and entered into a lengthy human rights and international law argument: 'Established facts are not disputed by any party to the case. Defendant's argument is that there is a lack of wrongfulness, which this Court cannot accept in the situation when the refugee, without any legal proceeding, was inadmissibly transferred to the military organ of the state from which he fled. Therefore, the participation in the transfer of the plaintiff to the territory of another state constitutes the state responsibility for a wrongful act and damage caused because of the imputability of the act to its state organ which caused the damage. Also, the Court cannot accept as the excuse the fact that the plaintiff did not have appropriate ID card nor any other relevant document, firstly because the plaintiff was not in the position to have an ID card issued by state authorities and, secondly, the lack of documents still does not give the right to the state to transfer a person to a military organ of another state. (...) Appellants claim that the appellee has Serbian ethnic origin. Therefore, his transfer to Serbian military authorities of the Republic Srpska, and not to those of Croatia, is irrelevant and unacceptable as we cannot take the ethnicity in the account when discussing this type of violations.'

By upholding the plaintiff's arguments the Court upheld the human rights aspect of the case, namely the *non-refoulement* principle envisaged in the 1951 UN Convention Relating to the Status of Refugees and 1967 Protocol,⁵⁷ and the right to liberty and security. The Court did not directly invoke these instruments as possible legal grounds for its ruling. It can be only assumed that the Court found that human rights were directly applicable to this case.⁵⁸

The plaintiff finally succeeded in vindicating his human rights before the domestic courts. Then what is so peculiar about the case? It seems that despite the shift from an anti-human rights to a pro-human rights approach, deference to the political climate has been unchanged. Different holdings of the same courts in the same cases can be explained only by the political periods they belong to. Needless to say, during the period relevant for the case (1995-2002) nothing changed substantially in the human rights legal framework. It would be unfair not to give credit for the progress made.

However, the deference of the judiciary to the executive remains an issue disguised in the language of human rights. So, is the judiciary more responsive to the political or to the legal discourse of human rights?⁵⁹

Conclusion

The legislative framework of Serbia favours the implementation of human rights and international law. Political rhetoric within the country heavily relies upon human rights, the European and international agenda. However, it seems that this approach, despite some successes, has fallen short of desired goals. Examples can be found in the legislative acts, lack of the human rights jurisprudence in general and adequate human rights jurisprudence in particular. The clash between political and legal discourses is illustrated by the higher relevance of political periods vis-à-vis existing legal frameworks. In part this clash contributed to the misunderstanding of human rights concepts.

Changes in the political climate boosted the use of human rights rhetoric. Such a course was understandable in a newly democratic country. However, existing case law shows inadequate training of the judiciary and its deference to the executive. The increase in human rights language has not led yet to the correct and proper enforcement of human rights norms

Despite vigorous debate and advocacy of the international law agenda, effective application of international law within the national legal systems seems to have failed. However, even the improper use of human rights language, in all its abundance and despite being politically inspired, may in the end have some positive effects, such as raising awareness of international human rights law and its national application.

What I would like to argue for here is not the abandonment of the human rights approach. Here it is argued for the proper use of human rights language before competent and independent courts, which is fundamental for the national application of human rights law. Possible remedies would be in extensive training of judges to apply human rights as a matter of domestic and international law in order to adopt human rights language as a matter of enforceable individual rights; more careful approach to drafting normative acts by legislature and executive; and, building institutional and political independence of judiciary which in turn could bolster their political role in a society.

Notes

¹ See generally Conforti, B. (1993) *International Law and the Role of Domestic Legal Systems*, Dordrecht: Martinus Nijhoff Publishers.

² Falk, R. (1963) *The Role of Domestic Courts in the International Legal Order*, Syracuse: Syracuse University Press, xi; Reisman, W.M. (1971) *Nullity and Revision*, New Haven: Yale University Press, 802; Schreuer, C.H. (1981) *Decisions of International Institutions Before Domestic Courts*, New York: Oceana Publications, 143.

³ Conclusion of several authors is that the implementation of human rights tend to be conducted through direct application regardless of the differences which exist among different systems. See generally Drzemczewski, A. Z. (1983) *European Human Rights Convention in Domestic Law: a Comparative Study*, Oxford: Clarendon; Beddard, R. (1967) 'The Status of the European Convention on Human Rights in Domestic Law', *International and Comparative Law Quarterly*, 16: 206-217; Erades, L. (1993) *Interactions Between International and Municipal Law*, Hague: Asser Instituut, 953.

⁴ Seidl-Hohenveldern, I. (1963) 'Transformation or Adoption of International Law into Municipal Law', *International and Comparative Law Quarterly* 12: 88-124.

⁵ Economides, C. (1993) *The Relationship Between International and Domestic Law*, Strasbourg: Council of Europe Press, 15 – 16; Crawford, J. et al. (1982) 'Application of Customary International Law by National Tribunals', *American Society International Law Proceedings* 76: 231-267; McDougal, M.S. and Lasswell, H.D. (1980) *Human Rights and World Public Order*, New Haven: Yale University Press.

⁶ *European Court of Human Rights: Effects of Judgments or Cases 1959-1998*, at <http://www.echr.coe.int/Eng/EDocs/EffectsOfJudgments.html>.

⁷ Franck, T.M. and Fox, G.H. (eds.) (1996) *International Law Decisions in National Courts*, New York: Transnational Publishers; Bulterman, M.K. and Kuijter, M. (eds.) (1996) *Compliance with Judgments of International Courts*, Hague: Martinus Nijhoff Publishers; O'Connell, M.E. (1990) 'The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States', *Virginia Journal of International Law* 30 (4): 891-940; Schreuer, C. H. (1975) 'The Implementation of International Judicial Decisions by Domestic Courts', *International and Comparative Law Quarterly*, 24 (2): 153-183.

⁸ For example, Van Panhuys studies interactions between international and domestic scenes examining the actors involved. His analysis is mainly based on the actors possessing public authority. - Van Panhuys, J.H.F. (1964) 'Relations and Interactions between International and National Scenes of Law', *Recueil des Cours de l'Academie de la Haye*, 112 (II): 1-87.

⁹ Mišćević, T. (2004) 'Serbia and Montenegro and the European Union', *Yearbook of the International Law Association of Serbia and Montenegro*, Belgrade: ILA Serbia and Montenegro, 1(1): 164-183, at 183.

¹⁰ The Secretary General of the Council of Europe (SG/Inf(2000) 39 / 25 October 2000), *Report on the secretariat mission to Belgrade (18-20 October 2000)*.

¹¹ Committee of Ministers of the Council of Europe, CM/Inf 2000/54 of 16 October 2000.

¹² *Official Gazette of Serbia and Montenegro – International Treaties*, no. 9/2003 (*Službeni list SCG - Međunarodni ugovori*, br. 9/2003)

¹³ Stahn, C. (2002) 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia', *American Journal of International Law*, 96(2): 379-397; Dimitrijević, D. (2004) 'Sukcesija državnih dugova SFR Jugoslavije', *Pravni život*, 12(4): 393-419.

¹⁴ As of 1 February 2004 Serbia and Montenegro signed or ratified the following number of bilateral agreements with other successor states: 17 with Bosnia and Herzegovina, 13 with Croatia, 16 with Slovenia, 6 with Macedonia.

¹⁵ This general notification on succession is dated 6 March 2001. After having deposited this notification, FR Yugoslavia gained the status of a member to 237 conventions previously binding upon the SFRY, which were deposited with the Secretary-General of the UN. – *Ministry of Foreign Affairs of the State Union of Serbia and Montenegro*, April 2004.

¹⁶ European Commission, *Federal Republic of Yugoslavia: Country Strategy Paper 2002-2006*, at 12;

EC Commission, *Third Annual Report of the Commission on the Stabilization and Association Process for South East Europe*, 30 March 2004, COM(2004) 202 /2 final, at 5; *U.S. Government Info*, at <http://usinfo.state.gov/dhr/Archive/2004/Apr/02-640552.html> (visited: 13 January 2005).

¹⁷ The ICTY Prosecutor complained that by limiting access to documents and archives Serbia and Montenegro violated its international obligations toward the ICTY. In order to obtain the full and unrestricted access to documents relevant for the Milošević case, the Prosecutor filed the application for order which would direct the FR Yugoslavia to comply with outstanding requests for assistance (Application was filed on 13 December 2002 and the Reply to response was filed on 27 February 2003). On 18 June 2003 the Trial Chamber rejected the Prosecution's Application having found that the request to have physical access to documentation on premises controlled by the Government amounted to the request for a search warrant, and that the Trial Chamber could not find the grounds, neither in Statute nor in the Rules of the ICTY, to grant such warrant. – *Third Decision on Prosecution Motion for Orders Pursuant to Rule 54bis Against Serbia and Montenegro*, Case: Prosecutor v. Slobodan Milošević, no. IT-02-54-T, 18 June 2003.

¹⁸ See, e.g., *Eleventh Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia submitted to the UN General Assembly*, 59th session of the UN GA, paras. 275-279 - <http://www.un.org/icty/rappannu-e/2004/index.htm>;

¹⁹ *Official Gazette of the Republic of Serbia* no. 14 of 27 March 2002.

²⁰ *Official Gazette of the Federal Republic of Yugoslavia*, no. 18 of 11 April 2002, amendments in no. 16 of 15 April 2003.

²¹ War Crimes Chamber was established by the *Law on the Organization and Jurisdiction of State Organs for the Procedure Against War Criminals*, *Official Gazette of the Republic of Serbia*, no. 67 of 1 July 2003. Chamber for organized crime was established by the *Law on Organization and Jurisdiction of State Organs for the Fight Against Organized Crime*, *Official Gazette of the Republic of Serbia*, no. 42/2002, with amendments: *Official Gazette of the Republic of Serbia* no. 42/2002, 27/2003, 39/2003, 67/2003, 29/2004.

²² *Bulletin of the Ministry of Foreign Affairs of Serbia and Montenegro* (3 November 2004), http://www.mfa.gov.yu/Srpski/Bilteni/Srpski/b031104_s.html#N13.

²³ Annual Reports submitted by the President of the ICTY to the UN General Assembly and Security Council were mostly worded in negative terms. See, *Eleventh Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia submitted to the UN General Assembly*, 59th session of the UN GA, paras. 275-279 - <http://www.un.org/icty/rappannu-e/2004/index.htm>; Also: EC Commission: *Report for Serbia and Montenegro, Stabilization and Association Report 2004*, SEC(2004) 376, p. 6, 21, at: http://www.europa.eu.int/comm/external_relations/see/sap/rep3/cr_s-m.pdf.

²⁴ 'The overall assessment is that cooperation with the Tribunal is hostage to political developments in Serbia and Montenegro. The authorities so far have done nothing more than say that cooperation with the Tribunal is an international obligation which has to be 'a two-way street', thus negating the provisions of the Statute of the Tribunal in regard to primacy.' – *Eleventh Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia submitted to the UN General Assembly*, *op. cit.*, para. 278.

²⁵ *Official Gazette of Serbia and Montenegro* no.1/2003 of 4 February 2003.

²⁶ Article 3 of the Constitutional Charter of Serbia and Montenegro.

²⁷ Article 10 (Direct Application of Treaties).

²⁸ Article 16 (Priority of International Law).

²⁹ Article 19.

³⁰ Article 55 (Duties of the Army of Serbia and Montenegro).

³¹ Article 45 of the Constitutional Charter.

³² *Official Gazette of Serbia and Montenegro*, no.6/2003 of 28 February 2003.

³³ Article 9(2) of the Constitutional Charter on Human and Minority Rights and Civil Liberties.

³⁴ Article 9(3) of the Constitutional Charter on Human Rights.

³⁵ Article 10 of the Constitutional Charter on Human Rights.

³⁶ For example, there is no provision which would define the consequences of national legislation which is contrary to international obligations of the state. Understandably, there is no provision which

would define courts or other authorities which would be competent to adjudicate upon the issue of compatibility.

³⁷ Cassese, A. (1985) 'Modern Constitutions and International Law', *Recueil des Cours de l'Academie de la Haye* 192(III): 331-475, at 351.

³⁸ Article 16 of the 1992 Constitution of FR Yugoslavia.

³⁹ Article 124 (1) of the 1992 Constitution of FR Yugoslavia.

⁴⁰ *See generally* Stein, E. (1994) 'International Law in Internal Law: Toward Internalization of Central-Eastern European Constitutions?', *American Journal of International Law* 88 (3): 427-450.

⁴¹ Republic of Serbia - Declaration on the Inherent Right of Serbian People to Self-Determination (1992), Declaration on Human and National Minorities Rights, Declaration on National Unity (1999), Declaration on the Situation in Kosovo and Metohija and the Obligations of International Community and Government of Serbia, Declaration on Kosovo and Metohija (2003), Resolution on the Accession to the European Union (2004); Yugoslavia (Serbia and Montenegro) – Resolution on Kosovo and Metohija (2003), Declaration on the Principles for the Protection of National Interest of the FR Yugoslavia with Reference to the Escalation of the Albanian Terrorism in Kosovo and Metohia and within the Security Zone (2003).

⁴² For example, *Law on System of Education* (2004) lays down the goals of public education which are *inter alia* : 'respect of human and civil rights and liberties and development of one's ability to live in a democratic society.' (Article 3 (10)).

⁴³ Gordon, J. (1998) 'The Concept of Human Rights: The History and Meaning of Its Politicization', *Brooklyn Journal of International Law*, 23(3): 689-791, at 702.

⁴⁴ Official Gazette of Republic of Serbia no. 58/2003, 61/2003.

⁴⁵ 'Lustration has come into the general constitutional law vocabulary only very recently, as a result of the collapse of the communist societies in Central and Eastern Europe and their replacement by transition democracies.' - Robertson, D. (2004) *A Dictionary of Human Rights*, London: Europa, at 155.

⁴⁶ D. Robertson, *op. cit.*, at 156.

⁴⁷ The Commission consists of 9 members to be elected by the National Assembly for a period of 6 years. Apart from the requirement that three of its members must be judges of the Supreme Court of Serbia, there are no other guarantees for judicial qualification of its members, nor any institutional insurance of the Commission's impartiality and independence.

⁴⁸ *Public Prosecutor of Serbia v. Magazine 'Svedok'*, District Court in Belgrade, Judgment of 6 June 2003.

⁴⁹ *Ibidem*.

⁵⁰ Municipal Court in Novi Sad, Case no. P-2676/01, Judgment of 24 September 2001.

⁵¹ Article 200 of the Law of Obligations provides for damages in cases of violation of human rights and civil liberties, as there is a presumption that a victim must have suffered a mental pain caused by these violations.

⁵² Berg-Schlosser offers the overview of different indicators of democratisation and good governance given by different authors and institutions, where human rights and performance of political institutions are always among them. In one of the given models (Theo Schiller), the principle of basic human rights on the macro level (political system, institutions) should be manifested by, *inter alia*, independence of judiciary. – Berg-Schlosser, D. (2004) 'The Quality of Democracies in Europe as Measured by Current Indicators of Democratization and Good Governance', *Journal of Communist Studies and Transition Politics*, 20 (1): 28-55, at 33.

⁵³ Municipal court in Zrenjanin, Judgment no. P 2138/98 of 19 November 1998. The Court awarded 40.000 dinars in damages whereas the plaintiffs asked for 120.000 dinars.

⁵⁴ District court in Zrenjanin, Judgment no. Gz 1084/99 of 5 July 2000.

⁵⁵ Municipal court in Zrenjanin, P 3281/01 of 13 December 2001.

⁵⁶ District court in Zrenjanin, Judgment no. Gz 348/02 of 20 March 2002.

⁵⁷ Article 33 (Prohibition of Expulsion or Return 'Refolement') of the 1951 *Geneva Convention on the Status of Refugees*.

⁵⁸ National courts have begun upholding refugees' claims for damages since 2000. As of 28 January 2005 93 judgments in favour of refugee plaintiffs handed down by Serbian courts have been enforced. – *Compensation for Forcefully Conscripted Refugee*, Belgrade: Humanitarian Law Centre, http://www.hlc.org.yu/english/Facing_The_Past/Press_Releases.

⁵⁹ We could also say that this is an inevitable phase in building a liberal democracy and the rule of law in transition democracies: 'Characteristically, such countries (transition democracies) have embraced all the trappings of liberal democracy, including written human rights documents or bills of rights, and

constitutional courts to help enforce them. Inevitably the actual record and reality of these new institutions varies, and can at times amount to little more than window dressing on much less savoury underlying politics.’ - Robertson, D., *op. cit.*, at 222.

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