

Serbia's Judges and Prosecutors: The Long Road to Independent Self-Governance

A Mission Report

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1. Introduction

This report assesses the current state of the independence and accountability of the Serbian judiciary and prosecution service, and, in particular, the self-governance of the two professions under the High Judicial Council and the State Prosecutors' Council. The report follows a mission of the International Commission of Jurists (ICJ) to Serbia in October 2015, which aimed to assess the situation of self-governance of the judiciary and of the prosecutorial service at a critical juncture in their development. The mission took place in the context of the ICJ's global objective to advance the effective administration of justice and the independence of judges and lawyers.

The ICJ considered that, following recent legislative reform of the judicial self-governance system, it is now opportune to assess the functioning of the new mechanisms and their working methods and practices. Furthermore, the ICJ considered scrutiny of the strength of the independent control system to be timely and compelling after the recent traumatic experience of a general re-appointment procedure for judges.

The ICJ mission team was composed of Ketil Lund (ICJ Commissioner and former Supreme Court Justice of Norway), Róisín Pillay (Director of the ICJ Europe Programme), and Massimo Frigo (Legal Adviser of the ICJ Europe Programme). The mission visited Serbia between 26 and 30 October 2015. It held meetings with the Constitutional Court Registry, the Supreme Court, the Ministry of Justice, the Republic Public Prosecutor's Office, members of the High Judicial Council and of the State Prosecutors' Council, the Judges' Association of Serbia, the Serbian Bar Association, the Association of Prosecutors and Deputy Prosecutors of Serbia, the Association of Judicial and Prosecutorial Assistants, as well as with NGOs, inter-governmental organizations and members of the diplomatic community.

The ICJ is familiar with the thorough independent assessments that several international and supra-national organizations have conducted on the independence of the Serbian judicial system and prosecution service. The ICJ has taken account of the recommendations of these bodies, which have informed the analysis in this report.¹

1.1. The Serbian legal system

Serbia is governed and administered under a civil law system shaped and influenced by several legal models. These include, most importantly, the Austrian-Hungarian legal tradition, as well as elements of the French and Soviet Union systems, the latter of which featured most prominently during the period of the Socialist Federal Republic of Yugoslavia.² The Soviet legal heritage and the authoritarian regime of Slobodan Milošević³ have, to a certain degree, remained resilient in the culture of the legal community.

Serbia, like most of the Western Balkans countries, has been undergoing a transition from a post-conflict and post-authoritarian situation to a democratic State, based on the rule of law. This transition is heavily supported by, and informed by the influence of, the international community. Western Balkans tran-

¹ Full reporting is not, however, possible to ensure readability of the report.

² See, Vesna Rakić Vodinelić, Ana Knežević Bojović, Mario Reljanović, *Judicial Reform in Serbia 2008–2012*, CUPS, Open Society Foundation, Belgrade, 2012 ('*Judicial Reform in Serbia*'), p. 25–26.

³ See, *Judicial Reform in Serbia*, *op. cit.*, p. 28–29.

sitions are furthermore dominated by the process of accession to the European Union. This entails especially pervasive pressure for reform and detailed international scrutiny of progress, according to a strict timetable and benchmarks.

Under the EU accession framework, while approving the new Constitution in 2006, Serbia started a comprehensive judicial reform process with a *National Judicial Reform Strategy 2006–2012* aimed at ensuring that the judiciary is independent, transparent, accountable and efficient.

Within this reform process, the general *Law on Judges* has been revised together with all other legislation governing the judicial profession. In the process of this overhaul of the Serbian judiciary and prosecution authorities, it was provided that all judges and prosecutors should be dismissed unless re-appointed. As a consequence, all positions for judges and prosecutors were re-advertised in July 2009. In December 2009, the High Judicial Council re-appointed 1,528 out of some 2,400 sitting judges, as well as 871 new judges, while some one-third of all sitting judges were not re-appointed and lost their tenure. These positions had been considered permanent since the Constitution of the Republic of Serbia of 1990.⁴ In total, 837 judges and 220 prosecutors were not re-appointed.

The dismissals were alleged to have been decided on without respect for due process obligations and without individual reasoning.⁵ The proceedings were subsequently held to be unconstitutional by the Constitutional Court due to the lack of individual reasoning and lack of respect for the right to a fair trial.⁶ The UN Human Rights Committee concluded in 2011 that “the re-election process, which was aimed at reinforcing the judiciary and which resulted in the reduction in the number of judges, lacked transparency and clear criteria for re-election, and did not provide for a proper review of the cases dismissed.”⁷ It recommended that the “judges who were not re-elected in the 2009 process [be] given access to a full legal review of the process.”⁸

After the Constitutional Court decision, a review process to reassess the decisions of non-reinstatement in the re-appointment process was put in place by the High Judicial Council and the State Prosecutors’ Council between 2011 and 2012. The review process featured several procedural shortcomings, unleashing a new round of constitutional challenges. In 2012, the Constitutional Court ordered the High Judicial Council and the State Prosecutors’ Council to reinstate all judges and prosecutors, holding they had violated their right to fair trial and arbitrarily applied the criteria for selection.⁹

As a follow up to the National Judicial Reform Strategy 2006–2012, the *2013–2018 National Judicial Reform Strategy (NJRS)*¹⁰ and *Action Plan* were adopted in 2013. Serbia is currently undergoing its second round of judicial reform.

⁴ Article 101, Constitution of Serbia of 1990.

⁵ See, the whole analysis, in *Judicial Reform in Serbia, op. cit.* See also, Judges’ Association of Serbia, *Snapshot of the reappointment of judges in Serbia*, Belgrade, 2015, p. 4.

⁶ Constitutional Court Decision No. 102/2010 of 28 May 2010.

⁷ *Concluding Observations on Serbia*, Human Rights Committee, UN Doc. CCPR/C/SRB/CO/2, 20 May 2011, para. 17.

⁸ *Concluding Observations on Serbia, op. cit.*, para 17.

⁹ Constitutional Court Decision No. VIII-U-534/2011 of 11 July 2012.

¹⁰ The *National Judicial Reform Strategy 2013–2018* (NJRS) was adopted by the Parliament on 1 July 2013. See also, the *Action Plan*.

1.2. Background: the re-appointment process

Although the mission of the ICJ did not focus on the general re-appointment process that occurred between 2009 and 2012, it was made clear by all stakeholders that this process was a critical moment in the reform of the legal system and has had a lasting traumatic effect on the judiciary and the prosecution service. The ICJ notes that the process raised serious concerns in relation to the principle of permanent tenure of judges, a fundamental tenet of the independence of the judiciary (see, below, on appointment, at section 4.1).

In the particular case of countries in transition, either from conflict or from authoritarian regimes to rule of law and democratic systems, international standards affirm that the principle of irremovability of judges "must be observed in respect of judges who have been appointed in conformity with the requirements of the rule of law. Conversely, judges unlawfully appointed or who derive their judicial power from an act of allegiance may be relieved of their functions by law in accordance with the principle of parallelism. They must be provided an opportunity to challenge their dismissal in proceedings that meet the criteria of independence and impartiality with a view toward seeking reinstatement."¹¹ Even when a country remains in crisis prior to a transition, the ICJ has stressed that "the stability and continuity of the judiciary is essential. Judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches. Judges may only be removed by, by means of fair and transparent proceedings, for serious misconduct incompatible with judicial office, criminal offence or incapacity that renders them unable to discharge their functions."¹²

The UN Special Rapporteur on the independence of judges and lawyers has set out guidance on the exceptions to the principle of irremovability of judges. While not precluding the possibility of ultimate removal of judges and judicial staff involved in a former system, the guidance stresses that in any event they "must be protected from arbitrary interference and from drastic, indiscriminate measures."¹³

It is generally considered that a 're-appointment' takes place when there is a collective dismissal of all members of the judiciary with the possibility to re-apply for their posts, as occurred in Serbia in 2009. An alternative to this is a 'review process', in which there are individualized assessments of sitting judges, with due process and the possibility of appeal. The ICJ concurs with the Special Rapporteur on the independence of judges and lawyers that the option of a review process is "the more advisable course of action."¹⁴ As the Special Rapporteur indicated, to ensure respect of the principle of permanence of tenure under the UN *Basic Principles on the Independence of the Judiciary*, any review process should follow the ordinary rules and standards under international and national law related to

¹¹ *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, in "Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher", UN Doc. E/CN.4/2005/102/Add. 1, 8 February 2005, principle 30.

¹² ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, principle 5, 2008.

¹³ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report to the UN Commission on Human Rights*, UN Doc. E/CN.4/2006/52, 23 January 2006 ('*Annual Report 2006*'), para. 50. See also, UN Special Rapporteur on the independence of judges and lawyers, *Annual Report to the UN Human Rights Council*, UN Doc. A/HRC/11/41, 24 March 2009 ('*Annual Report 2009*'), para. 64.

¹⁴ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2006*, *op. cit.*, para. 54.

disciplinary, suspension and removal proceedings.¹⁵ It would therefore consist in assessing “objectively on a case-by-case basis whether a judge was appointed unlawfully or whether he/she derives judicial power from an act of allegiance so as to determine to relieve the person from his/her functions.”¹⁶

The ICJ emphasizes that, in a situation of transition such as that in Serbia, a review process should have been instituted in order to best ensure respect of the principle of permanent tenure of judges.

1.3. The independence of the judiciary and self-governance in international law

An independent judiciary and legal profession are essential to the maintenance of the rule of law and the proper administration of justice.¹⁷ The independence of the judiciary is a cornerstone of the rule of law and is essential to guarantee the respect, protection and fulfilment of human rights, and access to justice for those whose rights have been violated.¹⁸ The Council of Europe’s Committee of Minister has also stressed that judicial independence is “indispensable to judges’ impartiality and to the functioning of the judicial system.”¹⁹

The independence of the judiciary has both an institutional, systemic dimension and a personal dimension relating to the conduct of an individual judge. The former may be characterized as the independence of the judicial branch as a whole from the interference by the other branches of government and the public, or as structural independence. The second aspect, of equal importance, refers to the independence of the individual judge within the judicial profession.²⁰ The obligation to respect personal independence has particular

¹⁵ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2006, op. cit.*, para. 55.

¹⁶ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009, op. cit.*, para. 64.

¹⁷ See, the ICJ Act of Athens (1955) and the ICJ Declaration of Delhi (1959).

¹⁸ See, *Basic Principles on the Independence of the Judiciary*, adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, principle 1; *Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies, CoE Doc. CM/Rec(2010)12 (*Council of Europe Recommendation on judges*), Preamble and articles 3, 7; *Magna Charta of Judges*, adopted by the Consultative Council of European Judges (CCJE) at its 11th plenary meeting, Strasbourg, 17–19 November 2010 (*Magna Charta of Judges*), article 3 (“judicial independence shall be statutory, functional and financial”); CCJE, *Opinion No. 10(2007) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the Service of Society*, adopted at its 8th meeting, Strasbourg, 21–23 November 2007 (*Opinion No. 10*), para. 9.

¹⁹ *Council of Europe Recommendation on judges*, Preamble. See also, article 11: “external independence is not a prerogative or privilege granted in judges’ own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. Judges’ impartiality and independence are essential to guarantee the equality of parties before the courts.”

²⁰ See, among others, *Council of Europe Recommendation on judges*, article 4: “independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law”; UNODC, *Commentary on the Bangalore Principles of Judicial Conduct*, September 2007 (*Commentary on the Bangalore Principles*), paras. 23, 39: “...judicial independence requires not only the independence of the judiciary as an institution from the other branches of government; it also requires judges being independent from each other. In other words, judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence that might come from the actions or attitudes of other judges...”

implications for the internal organization of the judiciary²¹ and it is for this reason that the Committee of Ministers of the Council of Europe has stressed that both the “independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level.”²² Furthermore, as the *Commentary to the Bangalore Principles* asserts, drawing on this principle, “[a]ny hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of a judge to pronounce the judgment freely, uninfluenced by extrinsic considerations or influences.”²³

The general objective of securing judicial independence gives rise to the need to ensure that the governance of the judiciary itself does not become an instrument of influence by other State authority or private person or entity. That is why the *European Charter on the Statute for Judges* affirms that, “[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an **authority independent** of the executive and legislative powers . . .”²⁴

There are various ways in which the obligation to ensure the independence of the judiciary in its governance might be effectively and appropriately discharged. However, the ICJ considers that, with due regard to international standards, best practice overwhelmingly favours the approach now adopted in Serbia, which also has particular momentum in Europe. This approach is the creation of Councils of the Judiciary in charge of ensuring the self-governance of the profession. It is a solution recommended by the Council of Europe’s Venice Commission,²⁵ by the UN Human Rights Committee in several concluding observations on State compliance with obligations under the ICCPR, by the UN Special Rapporteur on the independence of judges and lawyers,²⁶ by the Consultative Council of European Judges’ *Magna Charta of Judges*,²⁷ and by the

²¹ *Council of Europe Recommendation on judges*, article 22: “The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence.”

²² *Council of Europe Recommendation on judges*, article 7.

²³ UNDOC, *Commentary on the Bangalore Principles*, *op. cit.*, para. 40. See also, para 23: “an individual judge may possess that state of mind, but if the court over which he or she presides is not independent of the other branches of government in what is essential to its functions, the judge cannot be said to be independent.”

²⁴ *European Charter on the statute for judges*, Council of Europe, Strasbourg, 8–10 July 1998, article 1.3 (emphasis added). See, on a similar vein, *Magna Charta of Judges*, article 4.

²⁵ Venice Commission, *Report on independence of the judicial system—Part I: the independence of judges*, adopted at its 82nd Plenary Session, Venice, 12–13 March 2010 (*Report on the independence of judges*), para. 32. See also, Venice Commission, *Judicial Appointments*, adopted at its 70th Plenary Session, Venice, 16–17 March 2007 (*Report on judicial appointments*), paras. 44 and following.

²⁶ See, UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009*, *op. cit.*, para. 27: “Several regional standards, along with the Human Rights Committee in several concluding observations, recommend the establishment of an independent authority in charge with the selection of judges. That was also recommended by the Special Rapporteur in several country visit reports.”

²⁷ *Magna Charta of Judges*, article 13: “To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions...”

Measures for the effective implementation of the Bangalore Principles of Judicial Conduct (hereinafter '*the Bangalore Principles Implementation Guidelines*').²⁸

A definition has been given by the Committee of Ministers of the Council of Europe: "Councils for the judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system."²⁹

The Council of Europe's Consultative Council of European Judges (CCJE) has developed guidance on the functioning of councils for the judiciary. The guidance affirms that the core purpose of such councils is "to safeguard both the independence of the judicial system and the independence of individual judges."³⁰ It identifies as core tasks for a Council for the Judiciary:

- evaluation of the administration of justice;³¹
- management and administration of the judiciary;
- enabling personal independence of individual judges;³²
- selection and appointment;
- promotion, evaluation, training;
- discipline and ethics of judges;
- control and management of the judiciary's budget; and
- protecting the image of judges.³³

1.4. The independence/autonomy of the prosecution service and its self-governance in international law

The *UN Guidelines on the Role of Prosecutors* affirm that prosecutors "play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with"³⁴ the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal. The UN Special Rapporteur on the independence of judges and lawyers has characterized prosecutors as "the essential agents of the administration of justice, [that] should respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. Prosecutors also play a key role in protecting society from a culture of impunity and function as gatekeepers to the judiciary."³⁵

²⁸ Judicial Integrity Group, *Measures for the effective implementation of the Bangalore Principles of Judicial Conduct*, adopted in Lusaka, Zambia, 21 and 22 January 2010 ('*Bangalore Principles Implementing Measures*'), para. 4.1: "[t]he responsibility for court administration, including the appointment, supervision and disciplinary control of court personnel should vest in the judiciary or in a body subject to its direction and control."

²⁹ *Council of Europe Recommendation on judges*, article 26. See also, CCJE, *Opinion No. 10*, para. 11.

³⁰ CCJE, *Opinion No. 10*, para. 8.

³¹ CCJE, *Opinion No. 10*, para. 10.

³² CCJE, *Opinion No. 10*, para. 12, 14.

³³ See, CCJE, *Opinion No. 10*, para. 42. See also, Venice Commission, *Report on Judicial Appointments*, *op. cit.*, para. 25.

³⁴ *UN Guidelines on the Role of Prosecutors*, adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

³⁵ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report to the UN Human Rights Council*, UN Doc. A/HRC/20/19, 7 June 2012 ('*Annual Report 2012*'), para. 93.

While prosecutorial agencies or services typically are not institutionally independent from the executive branch for administrative purposes, they should maintain functional independence.³⁶ The Grand Chamber of the European Court of Human Rights has highlighted that “it is in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State.”³⁷ Irrespective of the particular investigation and criminal justice system, it “must however guarantee, in law and in practice, the investigation’s independence and objectivity in all circumstances and regardless of whether those involved are public figures.”³⁸ For example, in a case where criminal investigations were warranted against the Chief Public Prosecutor of Bulgaria, the Court conceded that, because of the hierarchical system of prosecution in that country, “it was practically impossible to conduct an independent investigation into circumstances implicating him, even after the constitutional amendment allowing in theory the bringing of charges against him.”³⁹

The UN Special Rapporteur on the independence of judges and lawyers has affirmed that “it is essential that . . . prosecutors should be able to play their roles independently, impartially, objectively and transparently. . . . A lack of autonomy and functional independence will expose prosecutors to undue influence and corruption and thereby erode their credibility vis-à-vis other actors in the justice system, as well as undermining public confidence in the effectiveness of the system.”⁴⁰ Indeed, “[t]he prosecutor and the prosecution service should be autonomous, irrespective of the institutional structure. States should ensure that prosecutors can perform their functional activities in an independent, objective and impartial manner.”⁴¹

The Consultative Council of European Prosecutors of the Council of Europe (CCPE), which includes prosecutors from all European legal systems, has affirmed that the “independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary.

³⁶ See, Consultative Council of European Prosecutors (CCPE), *Opinion No. 9(2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors*, CoE Doc. CCPE(2014)4Final, Strasbourg, 17 December 2014 (*Opinion No. 9*), para. 37: “Prosecutors should, in any case, be in a position to prosecute, without obstruction, public officials for offences committed by them, particularly corruption, unlawful use of power and grave violations of human rights.” See also, para. 38: “Prosecutors must be independent not only from the executive and legislative authorities but also from other actors and institutions, including those in the areas of economy, finance and media.”

³⁷ *Guja v. Moldova*, European Court of Human Rights (ECtHR), Grand Chamber, Application No. 14277/04, 12 February 2008, para. 90.

³⁸ *Kolevi v. Bulgaria*, ECtHR, Application No. 1108/02, 5 November 2009, para. 208.

³⁹ *Kolevi v. Bulgaria*, ECtHR, Application No. 1108/02, 5 November 2009, para. 209.

⁴⁰ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report to the UN General Assembly*, UN Doc. A/67/305, 13 August 2012 (*Annual Report GA 2012*), para. 47; The independent expert added that “States have an obligation to provide the necessary safeguards to enable prosecutors to perform their important role and function in an objective, autonomous, independent and impartial manner.”; UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2012, op. cit.*, para. 95; The Venice Commission has noted that, “[o]f necessity, a prosecutor, like a judge, will have on occasion to take unpopular decisions which may be the subject of criticism in the media and may also become the subject of political controversy. For these reasons it is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal which will ensure that a prosecutor cannot be victimised on account of having taken an unpopular decision.”; Venice Commission, *Report on European standards as regards the independence of the judicial system: Part II—The Prosecution Service*, adopted at its 85th Plenary Session, Venice, 17–18 December 2010 (*Report on the prosecution service*), para 18.

⁴¹ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2012, op. cit.*, para. 98.

Therefore, the general tendency to enhance the independence and effective autonomy of the prosecution services should be encouraged."⁴² As a matter of principle, prosecutors "should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability."⁴³ More specifically, "[i]ndependence of prosecutors—which is essential for the rule of law—must be guaranteed by law, at the highest possible level, in a manner similar to that of judges. In countries where the public prosecution is independent of the government, the state must take effective measures to guarantee that the nature and the scope of this independence are established by law."⁴⁴ The CCPE recommends either the extension of the Councils for the Judiciary's competence to prosecutors or the establishment of a Council for Prosecutors.⁴⁵

Whatever prosecution system is adopted must ensure that criminal cases, in particular where they involve human rights violations and/or organized crime or corruption, are effectively, independently and impartially investigated, prosecuted and tried. In cases of human rights violations, this is especially important in order to tackle impunity.

The ICJ emphasizes that the establishment of Councils of the Judiciary or of the Prosecution Service is important to ensure the respect of international human rights obligations, in particular in countries in transition. The model chosen, while it should guarantee that the majority decisions in key issues of appointment, discipline, dismissal and promotion remain in the hands of the prosecutorial profession, should nonetheless ensure openness to other stakeholders in society to avoid closed corporatist systems.

⁴² CCEP, *Opinion No. 9*, article IV.

⁴³ CCEP, *Opinion No. 9*, article V.

⁴⁴ CCEP, *Opinion No. 9*, para. 33. See also, in terms of hierarchical structures, paras. 40–44, in particular, 42: "It is essential to develop appropriate guarantees of non-interference in the prosecutor's activities. Non-interference means ensuring that the prosecutor's activities, in particular in trial procedures, are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system. In a hierarchical system, the superior prosecutor must be able to exercise appropriate control over the decisions of the office, subject to proper safeguards for the rights of individual prosecutors."; See, also UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2012, op. cit.*, paras. 80 and 99.

⁴⁵ CCEP, *Opinion No. 9*, para. 54.

2. Justice system reform in the context of EU accession

2.1. The accession negotiations

Since the Inter-Governmental Conference of 21 January 2014, the EU and Serbia have officially started the negotiations for the accession of Serbia to the European Union (EU). This marks a first phase of convergence of Serbia with the EU legal system (*acquis communautaire*) that will further advance with the opening of discussions on compliance with the particular components (Chapters) of the *acquis*. Through the opening of these Chapters, the EU will analyze in depth Serbia's progress in the adoption and implementation of EU substantive and procedural rules to align its legal system with that of the other EU Member States. The EU *acquis communautaire* comprises the whole legal system of the Union. The part relating to the rule of law and the judicial, prosecution and legal profession system is Chapter 23. During the accession phase, the European Commission produces annual Progress Reports on each candidate country to measure the advancement or regression of the adaptation of the legal system to the EU *acquis*.

At present, the EU institutions are still in a process of pre-evaluation to assess the readiness of the Serbian legal system to undergo the adaptation process that will start with the "opening of the chapters". The last assessment report—the Serbia Progress Report 2015—was published on 10 November 2015, just after the conclusion of the ICJ mission. The Head of the EU Delegation to Serbia, Michael Davenport, announced on 26 November that the "opening of the chapters" would occur soon.⁴⁶

2.2. EU assessments of the judicial reform

In this most recent November 2015 assessment of the European Commission in respect of Serbia, it is considered that "judicial independence is not assured in practice. There is scope for political interference in the recruitment and appointment of judges and prosecutors. Administration of justice is slow, with a significant backlog of cases. Frequent changes of legislation and insufficient training make the legal environment challenging."⁴⁷ The Progress Report contains further detailed recommendations that will be referred to throughout the report.

It is expected that an Action Plan for the implementation of the reforms required under Chapter 23 of the *acquis* will be endorsed by the Serbian Government, after consultations with the European Commission.

The ICJ mission did not have the opportunity to analyse the final Action Plan, of which many draft versions have circulated. The mission was, however, informed that, on paper, the Action Plan presented several reforms designed to implement the *acquis communautaire* by reinforcing the independence of the judiciary and the autonomy of the prosecution service. This report does not, therefore, make an assessment of the Action Plan, though it will refer to specific proposals for reforms likely to be included in it.

⁴⁶ EU Delegation to Serbia, 'Davenport: Opening of Negotiating Chapters Shortly', 26 November 2015.

⁴⁷ European Commission, *Serbia Progress Report 2015*, EU Doc. SWD(2015) 211 final, 10 November 2015, para. 2.3, p. 11.

The ICJ was told by some stakeholders that, while the consultations in the adoption of the Action Plan took place with involvement of civil society and professional organizations, this process was not conducted in a meaningful way but as a formalistic approach of “ticking the box”.⁴⁸ This has apparently led to a situation in which, while in the judiciary there is supposedly agreement on the goals of reform, there is no broad concurrence on the strategy of implementation.

2.3. Amendments to the Constitution

As will be underlined below, several significant reforms needed to ensure the independence of the judiciary and the autonomy of the prosecution service, which are required by the EU accession process, will necessitate amendments to the Constitution. During its mission, the ICJ was told many times that the process of constitutional reform is cumbersome and long, as noticed also by the Venice Commission in its Opinion on the 2006 Constitution.⁴⁹ The ICJ has, however, also learned that the EU position is very influential with the Serbian authorities in terms of reforms, including in pushing for approval of constitutional reforms.

According to article 203 of the Serbian Constitution on revision of the Constitution, the National Assembly would need to approve a “proposal to amend the Constitution” by a two-thirds majority of the members of the Assembly. The proposal would need to be presented “by at least one third of the total number of deputies, the President of the Republic, the Government and at least 150,000 voters.”⁵⁰

If the proposal is approved, then “an act on amending the Constitution” would need to be drafted, which would thereafter require approval by the National Assembly with the same qualified majority. The Assembly may call for a referendum and is obliged to do so when the constitutional changes modify, among others things, the section of the Constitution on the organization of the Government, which includes the judiciary and the prosecution service. Article 203 of the Constitution stipulates that “the citizens shall vote in the referendum within no later than 60 days from the day of adopting the act on amending the Constitution. The amendment to the Constitution shall be adopted if the majority of voters who participated in the referendum voted in favour of the amendment.”

Article 24 of the *Law on Referendum and Civil Initiative* provides that a quorum of 50 percent plus one of the electoral college must be reached for the referendum to be valid.⁵¹ The Venice Commission has criticized in the past the rigidity of this quorum and recommended to abrogate this requirement.⁵²

⁴⁸ The ICJ was informed that it often occurs that, while these stakeholders are invited and heard, Government authorities will later produce texts that do not reflect, neither negatively or positively, the discussion held and the recommendations provided during the consultation. It furthermore appears that several established Serbian CSOs do not recognize the appointed representative of civil society as speaking on their behalf in the consultation process.

⁴⁹ Venice Commission, *Opinion on the Constitution of Serbia*, adopted at its 70th Plenary Session, Venice, 17–18 March 2007, CoE Doc. CDL-AD(2007)004, Opinion No. 405/2006, 19 March 2007, Part IX, paras. 99–102.

⁵⁰ Article 203, Constitution of Serbia of 2006 (‘Constitution’).

⁵¹ Article 24, *Law on Referendum and Civil Initiative*, 1998.

⁵² Venice Commission, *Opinion on the Draft Law on Referendum and Civil Initiative of Serbia*, CoE Doc. CDL-AD(2010)006, 15 March 2010.

The ICJ was told by the Ministry of Justice that the reform of the judiciary will be part of a single Constitutional Reform Bill including several other constitutional changes needed in order to meet the EU demands, including the references in the Constitution on the status of Kosovo. Most stakeholders with whom the mission met indicated that it was highly unfeasible to achieve any amendment other than a single constitutional reform, due to the long constitutional review process and, particularly, to the need to secure a quorum in the referendum, which a separate bill on reform of the judiciary would be unlikely to reach. Other stakeholders expressed the fear that a single constitutional reform, including the highly controversial Kosovo question, might risk jeopardizing the whole reform of the judiciary, on which there is overall general agreement.

The ICJ considers that, in principle, it would be advisable to proceed with two separate constitutional reform bills, giving priority to the one on the judiciary that appears to be the least controversial. If there is concern that the quorum for validity of the referendum could not be reached, there would be an alternative solution available. Given that the requirement of a quorum does not appear in the Constitution but in the ordinary electoral law, it might be possible to modify this requirement in the ordinary legislation, as suggested by the Venice Commission, and subsequently present the constitutional reforms in separate bills. This, of course, would not diminish any Government obligation to ensure full, transparent and informed participation of the electorate.

The ICJ notes, however, that many stakeholders met during its mission stressed that the real challenge in Serbia is not one of adopting formal legal reforms but rather of effectively implementing them and creating ownership on the part of the relevant professions. The ICJ recommends that, in the context of accession, this process be supported by the EU in co-operation with Serbian State institutions and international and national civil society organizations (CSOs), including through a long-term plan of targeted trainings, and implementation assessment focussing not only on texts and statistics but on legal culture, with proper implementation indicators measuring effectiveness.

3. The institutional and structural independence and autonomy of the judiciary and of the prosecution service

3.1. Independence

The Constitution of Serbia of 2006 provides that the “[r]ule of law is a fundamental prerequisite for the Constitution which is based on inalienable human rights. The rule of law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of powers, independent judiciary and observance of Constitution and Law by the authorities.”⁵³ It bases the Government system on the separation of powers and the principle of checks and balances, stressing that the judicial power must be independent.⁵⁴

The Constitution further provides that “[c]ourts shall be separated and independent in their work.”⁵⁵ It affirms that “a judge shall be independent and responsible only to the Constitution and the Law. Any influence on a judge while performing his/her judicial function shall be prohibited.”⁵⁶ The *Law on Judges* recognizes the internal independence of judges by providing that a “judge is independent in his/her actions and decision taking.”⁵⁷

With regard to the prosecution service, the Constitution provides that the “Public Prosecutor’s Office is an autonomous State body.”⁵⁸ The *Law on Public Prosecution* provides that “[p]ublic prosecutors and deputy public prosecutors are independent in the performance of their competences. All forms of influence by the executive and the legislative authorities on the work of the public prosecution and its activity in cases, attempted by using public office, the public information media and any other means, which may threaten the independence of the work of a public prosecution, is prohibited.”⁵⁹ It furthermore stresses that “[a] public prosecutor and deputy public prosecutor are independent of the executive and the legislative powers in performance of their duties. A public prosecutor and deputy public prosecutor are required to maintain the confidence in their independence of work. No one outside the public prosecution is entitled to define the tasks of public prosecutors and deputy public prosecutors, or influence their decisions in cases. A public prosecutor and deputy public prosecutor shall be accountable for their decisions only to the competent public prosecutor.”⁶⁰

Article 160 of the Constitution sets forth the hierarchical structure of the prosecution service. The Republic Public Prosecutor, the head of the prosecutorial service, reports to the National Assembly; the Public Prosecutors, who head the prosecution offices, to the Republic Public Prosecutor and the National

⁵³ Article 3, Constitution.

⁵⁴ Article 4, Constitution.

⁵⁵ Article 142, Constitution.

⁵⁶ Article 149, Constitution.

⁵⁷ Article 1.1, *Law on Judges*.

⁵⁸ Article 156, Constitution. See also, article 2, *Law on Public Prosecution*.

⁵⁹ Article 5, *Law on Public Prosecution*.

⁶⁰ Article 45, *Law on Public Prosecution*.

Assembly and Deputy Public Prosecutors to the Public Prosecutors.⁶¹ This strict degree of hierarchy is reflected in the *Law on Public Prosecution*, which introduces the principle of subordination of lower ranked public prosecutors to higher ranked prosecutors. Issues of jurisdiction, mandatory instructions, devolution of cases, substitution, inspection, accountability,⁶² and administration of the prosecution office⁶³ are decided according to the principle of hierarchy. Public Prosecutors are superior in ranking to deputy public prosecutors.⁶⁴

The ICJ notes that, under the Constitution of Serbia, a member of the National Assembly "shall be free to irrevocably put his/her term of office at disposal to the political party upon which proposal he or she has been elected a deputy."⁶⁵ This provision does not protect the individual Member of Parliament who takes a position in conflict with a decision of the Government where that Government is acting under party discipline. This gives the Executive excessive influence on the Legislative power.

The High Judicial Council, according to the Constitution, "is an independent and autonomous body which shall provide for and guarantee independence and autonomy of courts and judges."⁶⁶ The State Prosecutors' Council is "an autonomous body which shall provide for and guarantee the autonomy of Public Prosecutors and Deputy Public Prosecutors, in accordance with the Law."⁶⁷

They are respectively entrusted with the competence to make recommendations on appointment and dismissal of judges or public prosecutors and deputy public prosecutors for decision by the National Assembly, and with the self-governance of the judiciary, including in career, evaluation and discipline.⁶⁸

It must be stressed that, while the High Judicial Council is independent, under the Serbian Constitution and law, the State Prosecutors' Council is considered only 'autonomous', as to the exercise of prosecutorial powers. It remains unclear whether the envisaged constitutional reforms will introduce in the Constitution a statement guaranteeing full independence, and not only autonomy, of the prosecution services.

3.2. Membership of the self-governance bodies

As defined by the Constitution and their constitutive laws, both the High Judicial Council and the State Prosecutors' Council are composed of eleven members.

Three members of each Council are members *ex officio*. These include the Minister of Justice and the Chairman of the relevant committee of the National Assembly, currently the Committee on the Judiciary, Public Administration and Local Self-Government. The High Judicial Council has, as *ex officio* member and President, the President of the Supreme Court of Cassation, while the State Prosecutors' Council has, in the same role, the Republic Public Prosecutor.

⁶¹ Article 160, Constitution.

⁶² Articles 16–22, *Law on Public Prosecution*.

⁶³ Articles 34–41, *Law on Public Prosecution*.

⁶⁴ Articles 23–25, *Law on Public Prosecution*.

⁶⁵ Article 102, Constitution.

⁶⁶ Article 153, Constitution. See also, article 2, *Law on High Judicial Council*.

⁶⁷ Article 164, Constitution. See also, article 2, *Law on the State Prosecutorial Council*.

⁶⁸ Article 154, Constitution. See also, article 13, *Law on High Judicial Council*. Article 165, Constitution. See also, article 13, *Law on State Prosecutorial Council*.

The other eight members are elected by the National Assembly for both bodies. Both of them include one lawyer proposed by the Serbian Bar Association; and a Faculty of Law Professor proposed by the joint session of Deans of law faculties in the Republic of Serbia. These members need to have at least fifteen years of professional experience. The High Judicial Council includes six permanent judges proposed by the High Judicial Council; while the State Prosecutors' Council includes six public prosecutors or deputy public prosecutors with permanent tenure, proposed by the State Prosecutors' Council. The elected members are appointed for a term of five years. They can be re-elected, but not consecutively.⁶⁹

The judges and public prosecutors or deputy public prosecutors are elected as members of the Councils according to the following system:

- For the High Judicial Council, one judge from the supreme judicial bodies, i.e. the Supreme Court of Cassation, the Commercial Appellate Court, and the Administrative Court; for the State Prosecutors' Council, one public prosecutor or deputy public prosecutor from the Republic Public Prosecutor's Office.
- For the High Judicial Council, one judge from the four appellate courts, and for the State Prosecutors' Council, one public prosecutor or deputy public prosecutor from the appellate public prosecutor's offices, the Prosecutor's Office or Organized Crime and the Prosecutor's Office for War Crimes.
- For the High Judicial Council one judge and one from the higher courts and from the commercial courts, and for the State Prosecutors' Council, one public prosecutor or deputy public prosecutor from higher prosecutor's offices.
- For the High Judicial Council, two judges from the basic courts, misdemeanour courts and the Higher Misdemeanour Court, and for the State Prosecutors' Council, two public prosecutors or deputy public prosecutors from basic public prosecutor's offices.
- One judge (High Judicial Council) and one public prosecutor or deputy public prosecutor (State Prosecutors' Council) from the courts and the public prosecutor's offices in the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija.⁷⁰

The High Judicial Council and the State Prosecutors' Council propose one name per position to the National Assembly, which only has the power to approve or reject the proposal.⁷¹

As for dismissal of members before the expiry of their term, the Councils' constitutive laws provide that it should be the Council itself that makes a proposal for dismissal to the National Assembly—without the presence of the challenged member—and that the decision should be taken by the National Assembly. During the procedure, the Council member is suspended from his or her functions.⁷²

⁶⁹ See, articles 153–155 Constitution; Articles 5–6, 12, 20, *Law on High Judicial Council*; Articles 164–165, Constitution. See also, articles 5 and 20, *Law on State Prosecutors' Council*. See also, article 12, *Law on State Prosecutors' Council*.

⁷⁰ Article 22, *Law on High Judicial Council*; Article 22, *Law on State Prosecutors' Council*; The name of the two Autonomous Provinces has been taken verbatim from article 182 of the Serbia Constitution.

⁷¹ Article 35, *Law on High Judicial Council*. Article 35, *Law on State Prosecutors' Council*.

⁷² Article 46, *Law on High Judicial Council*. Article 46, *Law on State Prosecutors' Council*.

International standards strongly affirm that at least half of the members of a Judicial Council should be judges elected by their peers and ensuring the widest representation within the judiciary.⁷³

The UN Special Rapporteur on the independence of judges and lawyers, the Consultative Council of European Judges, and the Venice Commission have stressed that council membership should be of mixed composition, with the appropriate guarantees to ensure independent self-governance and avoid political and other external influence. In particular, judges and prosecutors should be the majority of members and should be elected by their peers in both Councils.⁷⁴ Furthermore, they recommend that some of the tasks of the Council be reserved for the judge-members,⁷⁵ none of the members be an active politician—in particular no ministers⁷⁶—and non judge-members should not be appointed by the Executive.⁷⁷ One of the exigencies is to “ensure that a governmental majority cannot fill vacant posts with its followers.”⁷⁸ With regard to the chairmanship of the High Judicial Council, the CCJE and the Venice Commission assert that it should not be someone close to political parties or the legislative or the executive powers.⁷⁹

The European Commission has identified, in its recent Progress Report 2015, problems with the composition of and election of members of the two Councils and with procedures for judicial appointments and security of tenure of judges. It noted that judicial independence was undermined by public comments of representatives of the government on ongoing cases, as well as by failure to implement the rules on random allocation of cases.⁸⁰

The ICJ agrees with the Venice Commission that the composition as well as the election method of the High Judicial Council in Serbia is a “recipe for the politicization of the judiciary”.⁸¹ With regard to the State Prosecutors’ Council, the Venice Commission has recommended that, when such an institution exists, its composition “should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority.”⁸²

The ICJ heard unanimous and consistent statements during its mission favouring an exclusion of the Assembly from appointment processes. Indeed, the ICJ

⁷³ *Council of Europe Recommendation on judges*, para. 27; *European Charter on the statute for judges*, para. 1.3; *Magna Charta of Judges*, article 13; CCJE, *Opinion No. 10*, paras. 15–18, 26–31; Venice Commission, *Report on Judicial Appointments*, *op. cit.*, para. 29; Venice Commission, *Report on the independence of judges*, *op. cit.*, para. 32.

⁷⁴ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2012*, *op. cit.*, para. 28; CCJE, *Opinion No. 10*, para. 19: “a mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy.”

⁷⁵ CCJE, *Opinion No. 10*, para. 20.

⁷⁶ Venice Commission, *Report on Judicial Appointments*, *op. cit.*, para. 34.

⁷⁷ CCJE, *Opinion No. 10*, paras. 20, 23, 32. Venice Commission, *Report on Judicial Appointments*, *op. cit.*, para. 32.

⁷⁸ Venice Commission, *Report on Judicial Appointments*, *op. cit.*, para. 32.

⁷⁹ CCJE, *Opinion No. 10*, para. 33; Venice Commission, *Report on Judicial Appointments*, *op. cit.*, para. 35.

⁸⁰ European Commission, *Serbia Progress Report 2015*, *op. cit.*, para. 5.23. p. 50.

⁸¹ Venice Commission, *Opinion on the Constitution of Serbia*, *op. cit.*, para. 70.

⁸² Venice Commission, *Report on the prosecution service*, *op. cit.*, para. 66 (in bold in original text). See, *Bangalore Principles Implementing Measures*, para. 12.5.

was told that, while under the current practice the National Assembly does not vote down the names proposed by the High Judicial Council (that it can only approve or reject), it can affect the work of the Council by delaying their approval. The ICJ notes that the *National Judicial Reform Strategy 2013–2018* provides for the “exclusion of the National Assembly from the process of appointment of . . . members of the High Judicial Council and the State Prosecutorial Council [and] changes in the composition of the High Judicial Council and the State Prosecutorial Council aimed at excluding the representatives of the legislative and executive branch from membership in these bodies.”⁸³

With regard to the role of the Minister of Justice in the Councils, the ICJ heard proposals of reform aimed at limiting his or her competence in the body, but no agreement as to whether to eliminate altogether his or her membership. It was put forward that the presence of the Minister of Justice may provide a useful connection for budgetary issues (see below), but might not be appropriate for procedures of appointment and dismissal of judges and prosecutors.

The mission heard several stakeholders express concern with the *ex officio* chairmanship of the President of the Supreme Court of Cassation in the High Judicial Council and of the Republic Prosecutor in the State Prosecutors’ Council. One of the concerns raised was that these figures are appointed by the National Assembly, but the mission heard that this should be changed with the forthcoming constitutional reform.

Furthermore, the ICJ mission heard that the secrecy of the elections of the candidates for judges’ membership of the High Judicial Council may not be ensured by the current procedure, as voting pools may be composed of a handful of judges with the practical result that judges can more or less determine by inference each others’ vote. The mission learned that the Judges’ Association of Serbia asked that only four voting pools be established nationwide to ensure confidentiality of the voting process. Furthermore, some of the stakeholders met complained that the current composition of the judge-members electoral colleges (see above) does not ensure proportional representation, as the representatives from lower courts require more votes than those of higher courts.

The ICJ heard reports that the Executive has, in practice, strong influence in the High Judicial Council, despite the formal majority of judges on the Council. On 23 November 2011, a judge member resigned reportedly in protest at the lack of independence in practice of members of the High Judicial Council from the Executive.⁸⁴

The ICJ considers that the current rules of appointment of the members of the two Councils do not ensure their independence in law and in practice from the Executive. The National Assembly appoints, whether directly or indirectly (see, below, rules for appointment of the President of the Supreme Court of Cassation and of the Republic Public Prosecutor), all members of the Councils. Admittedly, the practice of appointing the judicial and prosecutorial elected members by proposing single names has reduced the discretionary interference, but it still gives some power of decision to the legislative body. This is even more alarming considering, as noted above, that the Constitution allows

⁸³ NJRS, p. 7.

⁸⁴ See, *Judicial Reform in Serbia, op. cit.*, p. 114. This case was reported to the ICJ by several stakeholders met during the visit, but the ICJ has not sufficient elements to pronounce on the veracity of its details.

party discipline in the National Assembly, making this body effectively subservient to the Executive.

Such a strong influence of the Executive in the self-governance of the two professions is an unacceptable infringement of their independence and autonomy and the ICJ welcomes the clear commitment of the Government in its reform plans to drop this parliamentary prerogative. The ICJ has also learned that, in the meantime, the election of the High Judicial Council are underway under the current system and calls on the National Assembly to confine its role in this process to formal confirmation of members, in order not to vitiate the composition of the incoming Council.

With regard to the electoral process, the ICJ endorses the suggestion of the Judges' Association of Serbia that there should be far fewer and more confidential election voting pools, so as to ensure *de facto* secrecy in voting. It understands the calls for a more proportional electoral system, while at the same time agrees that the different needs of all different bodies of the judicial system should be represented.

With regard to the other existing members of the Councils, the ICJ considers the National Assembly should likewise have no role in their appointment, for similar reasons. Furthermore, the ICJ considers it important that the Ministry of Justice does not sit in the Council as a member but could be invited on an *ad hoc* basis or included with observer status. If the political bodies are to be represented, this should be done through experts appointed by the Assembly, and not *ex officio*, in a way that ensures that the members elected are supported by majority and at least part of the opposition, and the members elected must not maintain or must resign from any active political position.

Finally, irrespective of the issue of *ex officio* chairmanship of the Councils, the ICJ considers that it is important that both the President of the Supreme Court of Cassation and the Republic Public Prosecutor remain members *ex officio* of the two Councils. The ICJ also considers important that the chairmanship of the Councils be held by members of the judiciary or of the prosecution services, respectively. Within this framework, neither the solution of *ex officio* chairmanship or of a chairman elected by the Council from among the members of the judiciary or of the prosecution services present particular problems.

3.3. Budget and internal administration

The *Recommendation of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities* ('Council of Europe's Recommendation on judges'),⁸⁵ the *Draft Universal Declaration on the Independence of Justice* ('Singhvi Declaration'),⁸⁶ the Venice Commission⁸⁷ and statements of the UN Special Rapporteur on the independence of judges and lawyers⁸⁸ indicate that Councils for the Judiciary or similar bodies should be consulted or collaborate in the preparation of the judiciary's budget. The UN Special Rapporteur considers that, where a Judicial Council exists, it "should be vested with the role of receiving proposals from the courts,

⁸⁵ *Council of Europe Recommendation on judges*, para. 40.

⁸⁶ *Draft Universal Declaration on the Independence of Justice* ('Singhvi Declaration'), 1985, article 34.

⁸⁷ Venice Commission, *Report on the independence of judges*, *op. cit.*, para. 55.

⁸⁸ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2012*, *op. cit.*, para. 39.

preparing a consolidated draft for the judicial budget and presenting it to the legislature.”⁸⁹

Furthermore, an array of international standards consistently affirm that the budget of the judiciary should be administered by the judiciary, and by Councils for the Judiciary when they exist.⁹⁰

The Consultative Council of European Prosecutors, echoed by the UN Special Rapporteur on the independence of judges and lawyers,⁹¹ points out that prosecution services “should be enabled to estimate their needs, negotiate their budgets and decide how to use the allocated funds in a transparent manner, in order to achieve their objectives in a speedy and qualified way.”⁹²

The ICJ mission was informed during its visit that the budgetary responsibility in Serbia is shared between the Ministry of Justice and, respectively for each profession, the High Judicial Council and the State Prosecutors’ Council. The principle of division of budgetary competence is that the Councils will manage the budget related to their professions’ staff and the Ministry for the support staff. The ICJ heard that responsibility for the budget should pass during 2016 to the Councils, but that both Councils were currently considered unprepared to manage this responsibility.

The ICJ welcomes the proposed passage of budgetary responsibility to the two Councils as an important reform in fostering their role of self-governance of the judiciary and the prosecutorial service. In light of the observations provided by the World Bank and other stakeholders on the judiciary and prosecutorial service capacity in planning, budgeting and management (see below at section 6.2), the ICJ would however strongly recommend that these new competences be prepared and accompanied by appropriate and targeted capacity building programmes, nationally and internationally financed, for the Councils’ members and staff.

3.4. Political influence

The *UN Basic Principles on the independence of the judiciary* and other international declaratory standards stress that the “judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”⁹³ More specifically, the Principles forbid “any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.”⁹⁴ The UN Human Rights Committee has stated that, to respect and fulfil the right to a fair trial under article 14 of the *International*

⁸⁹ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2012, op. cit.*, para. 39.

⁹⁰ *Bangalore Principles Implementing Guidelines*, para. 17.4; *The Burgh House Principles On the Independence of the International Judiciary*, International Law Association, para. 1.3; UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2012, op. cit.*, para. 43; CCJE, *Opinion No. 10*, paras. 74–76.

⁹¹ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2012, op. cit.*, para. 72.

⁹² CCPE, *Opinion No. 9*, article XIX.

⁹³ *Basic Principles on the independence of the judiciary*, principle 2. See also, *Singhvi Declaration*, article 2; *Bangalore Principles Implementing Guidelines*, para. 10.1(g).

⁹⁴ *Basic Principles on the independence of the judiciary*, principle 4.

Covenant on Civil and Political Rights (ICCPR), "States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making [and it] is necessary to protect judges against conflicts of interest and intimidation."⁹⁵

The *Council of Europe's Recommendation on judges*, in relation to comments to judges' decisions, warns that "the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal."⁹⁶ It furthermore stresses that, "[w]here judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy."⁹⁷

The Consultative Council of European Judges considers that, in the case of judges or courts "challenged or attacked by the media or by political or social figures through the media . . . , while the judge or court involved should refrain from reacting through the same channels, the Council for the Judiciary or a judicial body should be able and ready to respond promptly and efficiently to such challenges or attacks in appropriate cases. [It] should have the power not only to disclose its views publicly but should also take all necessary steps before the public, the political authorities and, where appropriate, the courts to defend the reputation of the judicial institution and/or its members."⁹⁸

These principles of non-interference are enshrined in the *Law on Judges* that states that "[a]ll state bodies and officials are required to preserve, with their actions and behaviour, the confidence in independence and impartiality of judges and courts."⁹⁹

The High Judicial Council confirmed to the mission that it does not have a codified procedure for judges to request protection from external interference with their independence. The ICJ was told that reaction to such interference would take place on an *ad hoc* basis and when signalled by the affected judge.

The ICJ was told that one of the members of the High Judicial Council resigned in protest at the interferences by the political branches with the independence of the judiciary.¹⁰⁰ Several stakeholders reported of cases of politicians announcing arrests of corruption suspects before these took place or defending some investigated suspects as innocent while investigations were ongoing. The

⁹⁵ Human Rights Committee, *General Comment No. 32—Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, section III.

⁹⁶ *Council of Europe Recommendation on judges*, para. 18.

⁹⁷ *Council of Europe Recommendation on judges*, para. 8.

⁹⁸ CCJE, *Opinion No. 10, op. cit.*, paras. 82–83.

⁹⁹ Article 3.5, *Law on Judges*.

¹⁰⁰ See also report in, JAS, *Snapshot of the reappointment of judges in Serbia*, p. 9. See his farewell speech from the same document, footnote No. 9: "I believe that day will come when there will be clear and precise rules and procedures for selection and promotion, and dismissal of judges, under which the most moral and educated will be able to stand in the courts, and then and only then, on the basis of results, with attained dignity and authority, they will be able to progress in the judicial hierarchy. Also, I want to believe in the day when the HJC will provide all the above mentioned as its most important principle, and the day then they will be watching closely that no one and in any way does not affect the autonomy and independence of judges and courts. This would certainly have earned authority, respect and trust of citizens in the courts and judges and the impartial application of the law."

mission also heard that strong media interference takes place in particular in cases of organized crime.

These allegations are corroborated by the recent report of the Council of Europe's Group of States against Corruption (GRECO) of July 2015 which reported that it had been "repeatedly told that both politicians and the media exert significant pressure on the judiciary—including with regard to individual cases—resulting in fear and lack of self-confidence on the part of judges and prosecutors."¹⁰¹

The mission heard that political influence in the judiciary takes place through informal channels, while, for the prosecutorial services, it is enshrined in its hierarchical structure. Political control is also reportedly exercised through deferential fear towards the Executive. This seems to have been caused by the repetitive overhauls and re-appointments in the judiciary that do not instil confidence of judges in the constitutional protection of judicial tenure.

The mission, through statements, information and observations, was left with the impression that, despite exceptional cases of outstanding commitment, judges and prosecutors still share a lack of culture of independence from the Executive and Legislative powers. This appears to be more accentuated for the prosecution service due to its hierarchical structure.

During its visit, the ICJ was repeatedly referred to the case of Judge Vučinić, who was sanctioned with a warning by the High Judicial Council, after having been acquitted by the Disciplinary Commission (see, disciplinary system below) for having spoken to the media against statements questioning his integrity and independence in a given case. The ICJ was informed that, prior to the disciplinary proceedings and having spoken to the media, Judge Vučinić had addressed the High Judicial Council to seek protection from such interferences from private entities and the press to no avail.

The ICJ has not inquired into the case in depth and, therefore, cannot express a definitive judgment on the facts. It remains however concerned that a judge contacting the judicial self-governance body to request protection of his independence was instead faced with a disciplinary proceeding.

The ICJ furthermore considers of concern, from a systemic point of view, that the Councils do not have an established and codified procedure for protection of judges and prosecutors from attacks to their independence, autonomy and professional integrity. The ICJ recommends that such a procedure be established with annual reporting on its implementation and use.

¹⁰¹ Group of States against Corruption (GRECO), *Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors—Serbia*, CoE Doc. Greco Eval IV Rep (2014) 8E, 2 July 2015, Council of Europe, para. 95.

4. The role of the Councils in ensuring the independence and impartiality of the judiciary and prosecution

4.1. Appointment and tenure

Under the Constitution, it is the National Assembly that, by a majority vote of its members, has the power of appointment and dismissal in respect of “the President of the Supreme Court of Cassation, presidents of courts, Republic Public Prosecutor, public prosecutors, judges and deputy public prosecutors.”¹⁰²

4.1.1. The judiciary

The President of the Supreme Court of Cassation is “elected by the National Assembly, upon the proposal of the High Judicial Council and received opinion of the meeting of the Supreme Court of Cassation and competent committee of the National Assembly.”¹⁰³ He or she has a five-year mandate and cannot be re-elected. The National Assembly also has the competence to dismiss the President of the Supreme Court of Cassation prior to the conclusion of the term of office.¹⁰⁴

Presidents of the court must be persons “with clear managerial and organizational skills.”¹⁰⁵ They are appointed by the National Assembly on the proposal of one candidate for each position by the High Judicial Council.¹⁰⁶ They sit for a four-year renewable term.¹⁰⁷

Judges have permanent tenure after having passed a probation period of three years.¹⁰⁸ The appointment for a probation period, consisting in a first temporary term of office, is made by the National Assembly on the proposal of the High Judicial Council.¹⁰⁹ After this term, it is the High Judicial Council only that appoints this temporary judge to a permanent position (permanent term of office).¹¹⁰ During the probation period, the temporary judge sits and decides cases in the same way as a permanent judge. The mixed competence in appointment is recognized by the *Law on Judges* that provides that “[t]he National Assembly and the High Judicial Council respectively decide on the election . . . of a judge and a president of the court. . . .”¹¹¹

4.1.1.1. Tenure

The *UN Basic Principles on the independence of the judiciary* provide that judges “shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”¹¹² This principle is echoed in other

¹⁰² Article 99.3, Constitution. See also, article 105.12–13.

¹⁰³ Article 144, Constitution.

¹⁰⁴ Article 144, Constitution. For more detail, see article 79, *Law on Judges*.

¹⁰⁵ Article 69, *Law on Judges*.

¹⁰⁶ Articles 70–71, *Law on Judges*.

¹⁰⁷ Article 72, *Law on Judges*.

¹⁰⁸ Article 146, Constitution. See, articles 2.1 and 12, *Law on Judges*.

¹⁰⁹ Article 147, Constitution. See, article 51, *Law on Judges*.

¹¹⁰ Article 147, Constitution. See, article 52, *Law on Judges*.

¹¹¹ Article 10.1, *Law on Judges*.

¹¹² *Basic Principles on the independence of the judiciary*, principle 12.

international instruments.¹¹³ The UN Human Rights Committee has emphasized that, for courts to constitute “an independent tribunal” that can administer a fair trial under ICCPR article 14, States must guarantee judges’ “security of tenure until a mandatory retirement age or the expiry of their term of office.”¹¹⁴

Generally, the requirement of probationary periods is problematic. The UN Special Rapporteur on the independence of judges and lawyers has indicated that “the requirement of re-appointment following a probationary period runs counter to the principle of the independence of judges.”¹¹⁵ While not rejecting absolutely the possibility of any probationary periods, the Special Rapporteur stressed that “[s]pecific safeguards need to be established in order to prevent that such short initial appointments turn into a risk for the independence of the judiciary.”¹¹⁶ Specifically, “a short, non-extendable, probationary period may be employed, provided that life appointment or fixed tenure is automatically granted afterwards, except for probationary judges who were dismissed as a consequence of disciplinary measures or the decision of an independent body following a specialized procedure that determined that a certain individual is not capable of fulfilling the role of a judge.”¹¹⁷

The Venice Commission pointed out that “setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way.”¹¹⁸ In case a temporary term exists, and usually tolerated in case of setting up of new judicial systems, the Commission considered that “refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office”.¹¹⁹ In this regard, the Commission pointed out the example of the Austrian legal system, in which “candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgments but they can not yet take judicial decisions which are reserved to permanent judges.”¹²⁰

The *Council of Europe’s Recommendation on Judges* and the *Singhvi Declaration* also affirm that, where a probationary period exists, the final decision on appointment must be taken by an independent body composed of judges.¹²¹

The ICJ heard from several stakeholders who were concerned about the existence of a three-year probationary period for judges. The ICJ, in line with the above cited authorities, considers that the way this system is applied in Serbia is highly detrimental to the independence of the judiciary, due to

¹¹³ See also, *Singhvi Declaration*, para. 16; *Universal Charter of Judges*, International Association of Judges, November 1999, article 8; *Council of Europe Recommendation on judges*, para. 49.

¹¹⁴ Human Rights Committee, *General Comment No. 32*, *op. cit.*, section III.

¹¹⁵ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009*, *op. cit.*, para. 56.

¹¹⁶ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009*, *op. cit.*, para. 56.

¹¹⁷ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009*, *op. cit.*, para. 56.

¹¹⁸ Venice Commission, *Judicial Appointments*, *op. cit.*, para. 40. See also, Venice Commission, *Report on independence of judges*, *op. cit.*, para. 38; *Bangalore Principles Implementing Measures*, paras 13.2–13.4 ; *European Charter on the Statute of Judges*, para. 3.3.

¹¹⁹ Venice Commission, *Judicial Appointments*, *op. cit.*, para. 41.

¹²⁰ Venice Commission, *Judicial Appointments*, *op. cit.*, para. 43.

¹²¹ *Council of Europe Recommendation on judges*, para. 51; *Singhvi Declaration*, para. 17.

the high level of influence on the judges under probation, who fully exercise the judicial function. Although a system of probationary appointments is not to be ruled out in all circumstances, where this exists, the probation period should be considerably shorter than three years and judges in probation should not perform a decision-making function, but only assist or audit the process. Furthermore, in both first appointment and definitive appointment process any direct or indirect influence of the Executive and Legislative powers must be excluded. Finally, any non-reconfirmation of judges in probation must follow the same rules and process that would lead a judge to be dismissed from the judiciary.

4.1.1.2. Appointment process of judges

The *Council of Europe's Recommendation on judges* affirms that the "authority taking decisions on the selection . . . of judges should be independent of the executive and legislative powers."¹²² The *Universal Charter of the Judge*,¹²³ the *European Charter on the Statute of Judges*,¹²⁴ the *Magna Charta of Judges*¹²⁵ and the Consultative Council of European Judges¹²⁶ affirm that it should be entrusted fully to the Councils for the Judiciary.

The Venice Commission has criticized the role given to the National Assembly, as a political body, in the process of appointment, dismissal of judges in several reports, including during the drafting process of the 2006 Constitution.¹²⁷ It stressed that, before the adoption of the 2006 Constitution, the National Assembly had "not limited its role to confirming candidates presented by the High Judicial Council but it has rejected a considerable number of such candidates under circumstances where it seemed questionable that the decisions were based on merit. This is not surprising since elections by a parliament are discretionary acts and political considerations will always play a role."¹²⁸

An issue that is particularly important, in particular in systems where court presidents exercise a significant degree of power in court management and case assignment, whether in law or in practice, is the procedure for their appointment (see below). The UN Special Rapporteur on the independence of

¹²² *Council of Europe Recommendation on judges*, para. 46.

¹²³ Article 9, *Universal Charter of Judges*.

¹²⁴ *European Charter on the Statute of Judges*, para. 2.1. See also, para. 3.1.

¹²⁵ *Magna Charta of Judges*, para. 5.

¹²⁶ CCJE, *Opinion No. 10, op. cit.*, para. 48. See also, para. 49: "While it is widely accepted that appointment or promotion can be made by an official act of the Head of State, yet given the importance of judges in society and in order to emphasise the fundamental nature of their function, Heads of States must be bound by the proposal from the Council for the Judiciary. This body cannot just be consulted for an opinion on an appointment proposal prepared in advance by the executive, since the very fact that the proposal stems from a political authority may have a negative impact on the judge's image of independence, irrespective of the personal qualities of the candidate proposed."

¹²⁷ European Commission for Democracy through Law (Venice Commission), *Opinion on rules of procedure on criteria and standards for the evaluation of the qualification, competence and worthiness of candidates for bearers of public prosecution's function of Serbia*, CoE Doc. CDL-AD(2009)022, 15 June 2009; Venice Commission, *Opinion on the provisions on the judiciary in the draft Constitution of the Republic of Serbia*, CoE Doc. CDL-AD(2005)023, 24 October 2005; Venice Commission, *Opinion on the Constitution of Serbia*, CoE Doc. CDL-AD(2007)004, 19 March 2007; Venice Commission, *Opinion on the draft laws on judges and on the organization of courts in the Republic of Serbia*, CoE Doc. CDL-AD(2008)007, 19 March 2008.

¹²⁸ Venice Commission, *Opinion on the draft amendments to the Law on the High Judicial Council of Serbia*, CoE Doc. CDL-AD(2014)028, 13 October 2014, para. 16.

judges and lawyers considers it decisive to ensure that the independence of judges “be protected both from outside and internal interference.”¹²⁹ To ensure judges’ independent decision making, the Special Rapporteur recommended introducing “a system whereby court chairpersons are elected by the judges of their respective court. . . . Furthermore, appropriate structures and conditions need to be put in place in order to avoid situations in which the overturn of judgments by higher judicial bodies includes a sanction to the lower-level judges that made those rulings, which would result in a lessening of the independence of an individual judge within the judiciary.”¹³⁰

The ICJ has heard similar concern during its visit from many stakeholders. The ICJ agrees with the Venice Commission that the appointment process is flawed. The National Assembly should play no role in the appointment of judges. The ICJ welcomes that the Government has included this aspect in its reform plan and urges its approval.¹³¹

4.1.2. The prosecution service

The Republic Public Prosecutor, who heads the Republic Public Prosecutor’s Office (RPPO), i.e. the “supreme Public Prosecutor’s Office in the Republic of Serbia,”¹³² is “elected by the National Assembly, on the Government proposal and upon obtaining the opinion of the authorised committee of the National Assembly”¹³³ for a renewable period of six years. His or her term of office can be terminated before expiry by the National Assembly after proposal of the Government.¹³⁴ The proposal of the Government contains “one or more candidates.”¹³⁵

Public Prosecutors are heads of prosecutorial offices that also include deputy prosecutors.¹³⁶ There are 26 senior public prosecutors’ offices across the country and 34 basic public prosecutors’ offices, four appellate public prosecutors’ offices and two special prosecution authorities.¹³⁷ They are “elected by the National Assembly, on the Government proposal”¹³⁸ for a six-year term and may be re-elected.¹³⁹ If and when their term comes to an end and is not renewed, they become deputy public prosecutors.¹⁴⁰ They are proposed in a list by the State Prosecutors’ Council to the Government that can choose whom to present to the Assembly, unless the Council presents only one name per position, in which case it can approve or reject the proposal.¹⁴¹

¹²⁹ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009, op. cit.*, para. 48

¹³⁰ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009, op. cit.*, para. 49–50.

¹³¹ The *National Judicial Reform Strategy 2013–2018, op. cit.*, provides with the “exclusion of the National Assembly from the process of appointment of court presidents, judges, public prosecutors/ deputy public prosecutors.” See, NJRS 2013–2018, p. 7.

¹³² Article 157, Constitution.

¹³³ Article 158, Constitution.

¹³⁴ Article 158, Constitution. See also, article 74, *Law on Public Prosecution*.

¹³⁵ Article 74, *Law on Public Prosecution*.

¹³⁶ Article 159, Constitution.

¹³⁷ See composition at <http://www.rjt.gov.rs/sr/organizacija/o-rjt-u>.

¹³⁸ Article 159, Constitution.

¹³⁹ See also, article 55, *Law on Public Prosecution*.

¹⁴⁰ Article 55, *Law on Public Prosecution*.

¹⁴¹ Article 74, *Law on Public Prosecution*.

Deputy Public Prosecutors “stand in for the Public Prosecutor in performing the function of the Public Prosecutor’s Office and shall be obliged to act according to his/her instructions.”¹⁴² They are appointed by the National Assembly for a probation period of three years following the proposal of the State Prosecutors’ Council of a list with one or more candidates per position. It is this same Council that can reconfirm them in permanent function after three years.¹⁴³

In relation to the independence of prosecution services, the Venice Commission considered that, in order to avoid undue deference to the political branches affecting the independence of the investigations, a Prosecutor General “should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament’s term in office. That would ensure the greater stability of the prosecutor and make him or her independent of current political change.”¹⁴⁴ The same approach is taken by the UN Special Rapporteur on the independence of judges and lawyers.¹⁴⁵

With regard to prosecutors in general, the Venice Commission concluded that, “[i]n view of the special qualities required for prosecutors, it seems inadvisable to leave the process of their appointment entirely to the prosecutorial hierarchy itself. . . . In order to prepare the appointment of qualified prosecutors expert input will be useful. This can be done ideally in the framework of an independent body like a democratically legitimised Prosecutorial Council or a board of senior prosecutors, whose experience will allow them to propose appropriate candidates for appointment. Such a body could act upon a recommendation from the Prosecutor General with the body having the right to refuse to appoint a person but only for good reason.”¹⁴⁶

The UN Special Rapporteur on the independence of judges and lawyers found that “a public competitive selection process (an examination) is an objective way to ensure the appointment of qualified candidates to the profession. Both selection and promotion processes should be transparent in order to avoid undue influence, favouritism or nepotism. Recruitment bodies should be selected on the basis of competence and skills and should discharge their functions impartially and based on objective criteria. This body should be composed by a majority of members from within the profession in order to avoid any possible political or other external interference.”¹⁴⁷

With regard to tenure, the Venice Commission considers that “[p]rosecutors should be appointed until retirement. Appointments for limited periods with the possibility of re-appointment bear the risk that the prosecutor will make his or her decisions not on the basis of the law but with the idea to please those who will re-appoint him or her.”¹⁴⁸ The UN Special Rapporteur on the independence of judges and lawyers found that “security of tenure for pros-

¹⁴² Article 159, Constitution.

¹⁴³ Article 159, Constitution. See also, articles 56 and 75, *Law on Public Prosecution*.

¹⁴⁴ Venice Commission, *Report on the prosecution service, op. cit.*, para. 37 (bold in the original text).

¹⁴⁵ A/HRC/20/19, para. 65.

¹⁴⁶ Venice Commission, *Report on the prosecution service, op. cit.*, para. 48 (bold in the original text).

¹⁴⁷ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2012, op. cit.*, para. 62.

¹⁴⁸ Venice Commission, *Report on the prosecution service, op. cit.*, para. 50.

ecutors is an important element that reinforces their independence and impartiality.”¹⁴⁹

With regard to the appointment of public prosecutors in Serbia, the Venice Commission considered that the procedure “leaves open the possibility of bringing political pressure to bear on public prosecutors and is therefore undesirable.”¹⁵⁰

The ICJ mission heard concerns that the procedure for appointment of public prosecutors, i.e. the heads of prosecutor’s offices, increases the possibility of external influence, since these appointments are made by the National Assembly on the proposal of the Government.

The ICJ considers that, in a country striving to ensure autonomy and independence of the prosecution service, the appointment process of prosecutors should be entrusted to the body of self-governance of the profession. It welcomes the commitment of the Government to eliminate the competence of the National Assembly in such appointments.¹⁵¹ A practice of selection solely on merit and based on public competition and objective criteria is to be encouraged.

4.2. Education and entry of judges and prosecutors

The *Law on Judges* states that “[a] judge has the right and duty to advanced professional education and training at the cost of the Republic of Serbia . . . Training is mandatory pursuant to the law or by the decision of the High Judicial Council in case of change of specialization, substantial changes in regulations, introduction of new work techniques and in order to eliminate deficiencies in the work of a judge noticed during performance evaluation. The content of the training programme is defined in respect of the professional experience of a judge.”¹⁵² The *Law on Public Prosecution* asserts that “[p]ublic prosecutors and deputy public prosecutors have a right and an obligation to undergo professional training at the expense of the Republic of Serbia, in a manner regulated by law.”¹⁵³

The *Council of Europe’s Recommendation on judges* affirms that members of the judiciary “should be provided with theoretical and practical initial and in-service training, entirely funded by the state. This should include economic, social and cultural issues related to the exercise of judicial functions.”¹⁵⁴ It further recommends that an “independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office.”¹⁵⁵ Competence for initial and continuing education of judges is assigned to an independent body, and, in countries where it is established,

¹⁴⁹ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2012, op. cit.*, para. 67.

¹⁵⁰ Venice Commission, *Opinion on the rules of procedure on criteria and standards for the evaluation, op. cit.*, para 8.

¹⁵¹ The *National Judicial Reform Strategy 2013–2018, op. cit.*, provides with the “exclusion of the National Assembly from the process of appointment of court presidents, judges, public prosecutors/ deputy public prosecutors.” See, NJRS 2013–2018, p. 7.

¹⁵² Article 9, *Law on Judges*.

¹⁵³ Article 54, *Law on Public Prosecution*.

¹⁵⁴ *Council of Europe Recommendation on judges*, para. 56.

¹⁵⁵ *Council of Europe Recommendation on judges*, para. 57.

a Council for the Judiciary, by the *Singhvi Declaration*,¹⁵⁶ the *European Charter on the Statute of Judges*,¹⁵⁷ the *Magna Charta of Judges*,¹⁵⁸ and the Consultative Council of European Judges.¹⁵⁹ The *UN Guidelines on the Role of Prosecutors* provide that the "State shall ensure that . . . [p]rosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law."¹⁶⁰

The ICJ understands that the establishment of a Judicial Academy in Serbia is a highly contentious issue in the Serbia legal community, as the Academy has become the main entry point to the judiciary and the prosecution service and has been seen as a source of potential discrimination against candidate judges who have not enrolled with it. The ICJ was informed that, when established, the Judicial Academy was immediately set up as the only *de facto* means of entry to the judicial and prosecutorial profession.¹⁶¹ This, in practice, nullified all the years of qualifying service of judicial and prosecutorial assistants that would have been or would have soon been qualified to enter such professions under the old entry system. In 2014, this system was declared contrary to the Constitution by the Constitutional Court after a challenge by the Association of Judicial and Prosecutorial Assistants (AJPA).¹⁶² The ICJ understands that, taking account of this judgment, the High Judicial Council is planning the introduction of an entry test for appointment to the probation period in the judiciary for those candidates that have not graduated from the Judicial Academy or that want to attempt entry despite their low marks from the Academy. Judicial Academy graduates will not be required to take the test.

An assessment of the independence and effectiveness of the Judicial Academy is outside the scope of this report. However, the ICJ notes that it heard concerns from some stakeholders that the Judicial Academy does not offer proper and adequate continuous training and their existence is particularly reliant on donors' financing, due to lack of adequate financing through the State budgets. Others with whom the mission met stressed the importance of the Judicial Academy as an agent of change in ensuring adequate quality of judges and prosecutors, particularly in light of the lack of practical training provided by Law Faculties in the country.

Whatever the merits of training provided in the Judicial Academy, it seems clear the single entry channel to the judiciary and prosecution through the Judicial Academy has been imposed hastily, without the establishment of an effective transition system taking into account the situations of existing judicial and prosecutorial assistants. This has harmed their career path and discrimi-

¹⁵⁶ *Singhvi Declaration*, para. 12.

¹⁵⁷ *European Charter on the Statute of Judges*, paras. 2.3 and 4.4.

¹⁵⁸ *Magna Charta of Judges*, para. 8.

¹⁵⁹ CCJE, *Opinion No. 10*, para. 65. See also, para. 66, 67. More detail on how to design and manage initial and continuous training programmes, see paras. 68–72.

¹⁶⁰ *UN Guidelines on the Role of Prosecutors*, Principle 2(b).

¹⁶¹ The *National Judicial Reform Strategy 2013–2018*, *op. cit.*, provides "Judicial Academy degree becoming a prerequisite for first-time election into office of judge or prosecutor." See, NJRS 2013–2018, p. 7.

¹⁶² See, Republic of Serbia, Anti-Corruption Council, *Report on judicial reform*, Doc. 700-00-3178/2014, 17 April 2014, p. 10.

nated against them in practice, which is contrary to international standards of equal entry to the judiciary.¹⁶³ The ICJ considers that a comprehensive transitional plan must be conceived and agreed upon by the different stakeholders in order to end this divisive situation that tarnishes the image of the judiciary and prosecution service.¹⁶⁴

4.3. Dismissal and disciplinary of judges and prosecutors

This report does not attempt a full analysis of the fairness of disciplinary and dismissal proceedings for judges and prosecutors in law and in practice in Serbia, but provides an overview of the institutions, standards and procedures that apply.

With regard to permanent judges, it is the High Judicial Council that decides on termination of their office. Judges have a right to appeal to the Constitutional Court against the decision.¹⁶⁵ The decision on termination is issued by the High Judicial Council and this decision can be challenged "before the High Judicial Council within 15 days from the date of the delivery of the decision."¹⁶⁶ As for the public prosecutors, it is the National Assembly on the proposal of the Government, to which the State Prosecutors' Council has forwarded its decision, that can terminate their office, while Deputy Public Prosecutors can be dismissed only by the State Prosecutors' Council.¹⁶⁷

A judge or a public prosecutor or deputy public prosecutor is "dismissed if convicted for an offence carrying imprisonment sentence of at least six months or for a punishable act that demonstrates that he/she is unfit for the judicial function, in case of incompetence or due to a serious disciplinary offence."¹⁶⁸

It must be noted that incompetence means, under the *Law on Judges*, "insufficiently successful performance of the judicial function, i.e. if a judge's performance is evaluated as 'dissatisfactory' according to the criteria for the evaluation of the work of judges."¹⁶⁹ The same rule applied for prosecutors and deputy public prosecutors.¹⁷⁰

Article 90 of the *Law on Judges* defines in quite some detail the types of disciplinary offences.¹⁷¹ These include such breaches as the "processing of cases

¹⁶³ *UN Basic Principles on the independence of the judiciary*, principle 10.

¹⁶⁴ See also, GRECO, *Fourth Evaluation Report*, *op. cit.* para. 114.

¹⁶⁵ Article 148, Constitution.

¹⁶⁶ Article 57, *Law on Judges*.

¹⁶⁷ Article 161, Constitution. See also, articles 97–98, *Law on Public Prosecution*.

¹⁶⁸ Article 62, *Law on Judges*. Article 92, *Law on Public Prosecution* is drafted in equal terms.

¹⁶⁹ Article 63, *Law on Judges*.

¹⁷⁰ Article 93, *Law on Public Prosecution*.

¹⁷¹ Article 90, *Law on Judges*: "a violation of the principle of independence; failure of a judge to request his/her recusal in cases where there are reasons for recusal or exclusion foreseen by law; unjustifiable delays in the drafting of decisions; processing of cases in an order contrary to the order of reception; unjustifiable failure to schedule a hearing; frequent tardiness for hearings; unjustifiable prolonging of proceedings; unjustifiable failure to notify the president of the court about cases with prolonged proceedings; obviously incorrect treatment of participants in proceedings and the court staff; incompliance with the working hours; acceptance of gifts contrary to the regulations on the conflict of interest; engaging in inappropriate relations with parties in proceedings and their legal representatives; comments about court decisions, activities, or cases, made to the media in a manner contrary to law and the Court Rules of Procedure; engaging in activities that are incompatible with a judge's function pursuant to the law; unjustified non-attendance of mandatory training programs; provision of incomplete or incorrect information relevant for the work and decision-making of the High Judicial Council; unjustifiable change in the court's annual schedule of judges' activities, and the violation of the principle of natural judge, contrary to the law; serious violation of provisions of the Code of Ethics."

in an order contrary to the order of reception; . . . unjustifiable failure to notify the president of the court about cases with prolonged proceedings; [or] provision of incomplete or incorrect information relevant for the work and decision-making of the High Judicial Council."¹⁷² Similar offences are included in article 104 of the *Law on Public Prosecution*.¹⁷³ As highlighted above, a judge, public prosecutor or deputy public prosecutors can be dismissed if found incompetent or if he or she has committed a 'serious' offence.

A disciplinary offence is 'serious' if its commission "caused a serious disruption in the exercise of judicial power or regular duties at the court or a severe damage to the dignity of the court or public trust in the judiciary, and in particular if it results in the statute of limitations causing serious damages to the property of the party in proceedings, as well as in the case of repeated disciplinary offence."¹⁷⁴ The definition is crafted in similar terms for prosecutors.¹⁷⁵ Disciplinary offences are 'repeated' when disciplinary responsibility has been determined three times.¹⁷⁶

Judges and prosecutors are subject to the same three-tier sanction system under disciplinary proceedings: "public reprimand, salary reduction of up to 50% for a period not exceeding one year, prohibition of advancement for a period of up to three years."¹⁷⁷ It is the Disciplinary Commission that assesses whether a disciplinary offence has been committed, and, if the disciplinary offences are serious, institutes dismissal proceedings.¹⁷⁸

The dismissal procedure may be triggered by any person who registers a complaint. It is processed "by the president of the court, the president of the immediately superior court, the President of the Supreme Court of Cassation, the Minister in charge of the judiciary, the bodies responsible for performance evaluation, and the Disciplinary Commission. The proceedings for the dismissal of a judge can also be initiated by the High Judicial Council *ex officio*."¹⁷⁹

¹⁷² Article 90, *Law on Judges*.

¹⁷³ Article 104, *Law on Public Prosecution*: "fail to render prosecutorial decisions and file ordinary and extraordinary legal remedies within stipulated time limits; frequently miss, or are late for, scheduled trials, hearings, and other procedural actions in cases allocated to them; fail to request recusal in cases where legal grounds for doing so exist; refuse to perform assigned tasks and duties; fail to comply with a written instruction of a superior public prosecutor; manifestly violate rules of proper procedure in respect of judges in proceedings, parties, their legal counsel, witnesses, staff or colleagues; engages in inappropriate relations with parties or their legal counsels in pending proceedings; provide incomplete or incorrect information important to the work of the State Prosecutorial Council in procedures for appointment or dismissal of public prosecutors and deputy public prosecutors, disciplinary accountability proceedings, and other matters under his competence; violate the principle of impartiality and jeopardizes the public's trust in the public prosecution; engage in activities set forth by the Law as incompatible with a public prosecutorial office; accepts gifts, contrary to regulations governing the conflict of interest; fail to observe working hours; make serious violations of the Code of Ethics; fail to attend mandatory training programmes without justification."

¹⁷⁴ Article 90, *Law on Judges*.

¹⁷⁵ Article 104, *Law on Public Prosecution*: "A disciplinary offence is 'serious' if its commission "resulted in a serious disruption in the performance of prosecutorial office, or in the performance of work tasks in the public prosecution, or in serious damage to the reputation of, and trust in, the public prosecution, which in particular includes the expiry of the statute of limitations for criminal prosecution, as well as in cases of repeated disciplinary offences."

¹⁷⁶ Article 90, *Law on Judges*. Article 104, *Law on Public Prosecution*.

¹⁷⁷ Article 91, *Law on Judges*.

¹⁷⁸ Article 92, *Law on Judges*. The procedure before the Disciplinary Commission, a sub-body of the High Judicial Council, is instructed by the Disciplinary Prosecutor (articles 93–98). Article 105, *Law on Public Prosecution*, the Disciplinary procedure resembles *mutatis mutandis* that in place for judges.

¹⁷⁹ Article 64, *Law on Judges*.

For public prosecutors and deputy public prosecutors, it is processed "upon a proposal by the public prosecutor, immediately superior public prosecutor, Republican Public Prosecutor, Minister responsible for the judiciary, the authority responsible for evaluating performance and the Disciplinary Commission. The procedure for dismissing a public prosecutor or deputy public prosecutor may also be initiated by the State Prosecutors' Council *ex officio*. Grounds for dismissal shall be established by the State Prosecutors' Council."¹⁸⁰ It is the High Judicial Council and the State Prosecutors' Council that, respectively, decide on the dismissal of judges or public prosecutors and deputy public prosecutors under an adversarial procedure.¹⁸¹ Appeals may be filed before the Constitutional Court.¹⁸²

The situation differs for presidents of courts, who can be dismissed by the National Assembly¹⁸³ "in the case of violation of obligations set out by the provisions governing the court administration; violation of the principle of autonomy of judges; violation of rules on the allocation of cases; departure from the rules that regulate the Annual Calendar of Judges; due to a serious disciplinary offence committed while performing the function of the president of the court, or incompetence. The president of the court is deemed as incompetent if his/her performance is evaluated as 'dissatisfactory', based on the criteria and standards for the evaluation of president of the courts."¹⁸⁴

While anyone can make a request to activate a dismissal procedure for a court president, the proceedings to establish the grounds for dismissal are conducted by the High Judicial Council, initiated "upon the proposal of the president of the immediately superior court, the session of all judges whose president is concerned, the Minister competent for the judiciary, the body responsible for performance evaluation, and the Disciplinary Commission",¹⁸⁵ and decided by the National Assembly after proposal of the High Judicial Council.¹⁸⁶ A dismissed court president returns to perform the ordinary tasks of an ordinary judge.¹⁸⁷

The *Law on Judges* states that it is the "president of the court [who] decides the mandatory suspension of a judge while the mandatory suspension of a president of the court is decided by the president of the immediately superior court. Non-mandatory suspension is decided by the President of the Supreme Court of Cassation. The suspension of the President of the Supreme Court of Cassation is decided by the General Session."¹⁸⁸ The mandatory suspension is ordered only when the judge is remanded in custody, while the discretionary one may be applied when "proceedings for his/her dismissal or criminal proceedings for a dismissible offence have been instituted."¹⁸⁹

¹⁸⁰ Article 94, *Law on Public Prosecution*.

¹⁸¹ Articles 64–65, *Law on Judges*. Articles 95–96, *Law on Public Prosecution*.

¹⁸² Article 67, *Law on Judges*. Article 161, Constitution. See also, articles 97–98, *Law on Public Prosecution*.

¹⁸³ Article 74, *Law on Judges*.

¹⁸⁴ Article 75, *Law on Judges*.

¹⁸⁵ Article 76, *Law on Judges*.

¹⁸⁶ Article 77, *Law on Judges*.

¹⁸⁷ Article 78, *Law on Judges*.

¹⁸⁸ Article 15, *Law on Judges*.

¹⁸⁹ Article 14, *Law on Judges*.

The *Law on Public Prosecution* provides that “[a] public prosecutor decides on the mandatory suspension of a deputy public prosecutor, while an immediately higher ranked public prosecutor decides on the mandatory suspension of a public prosecutor. Where suspension is not mandatory, it shall be taken by the Republican Public Prosecutor. The State Prosecutors’ Council shall decide on the suspension of the Republican Public Prosecutor.”¹⁹⁰ The mandatory suspension is ordered only when the judge is remanded in custody, while the discretionary one may be applied “upon the institution of proceedings for their dismissal, or of criminal proceedings for a dismissable offence.”¹⁹¹

The *UN Basic Principles on the independence of the judiciary* set out the international framework for discipline, suspension and removal. They state that a “charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge. . . . Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. . . . All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct. [Finally, d]ecisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.”¹⁹²

The *Council of Europe’s Recommendation on judges* provides that disciplinary proceedings “should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.”¹⁹³ Similar expressions of this principle are contained in the *Singhvi Declaration*,¹⁹⁴ the *Universal Charter of the Judge*,¹⁹⁵ the *European Charter on the Statute of Judges*,¹⁹⁶ the *Magna Charta of Judges*,¹⁹⁷ the *Bangalore Principles Implementing Measures*,¹⁹⁸ and are endorsed by the Consultative Council of European Judges¹⁹⁹ and by the Venice Commission.²⁰⁰

It is important to stress that “judges should not be personally accountable where their decision is overruled or modified on appeal.”²⁰¹ The CCJE adds that

¹⁹⁰ Article 59, *Law on Public Prosecution*.

¹⁹¹ Article 58, *Law on Public Prosecution*.

¹⁹² *UN Basic Principles on the independence of the judiciary*, Principles 17–20.

¹⁹³ *Council of Europe Recommendation on judges*, para. 69.

¹⁹⁴ *Singhvi Declaration*, para. 26(b), that continues: “The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of such a Court or Board...”

¹⁹⁵ *Universal Charter of Judges*, article 11.

¹⁹⁶ *European Charter on the Statute of Judges*, para. 5.1.

¹⁹⁷ *Magna Charta of Judges*, para. 6.

¹⁹⁸ *Bangalore Principles Implementing Guidelines*, para. 15.4.

¹⁹⁹ CCJE, *Opinion No. 3 on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality*, CoE Doc. CCJE (2002) Op. No. 3, 19 November 2002, para. 77(ii)–(iii)–(iv).

²⁰⁰ Venice Commission, *Report on Independence of the Judiciary*, op. cit., para. 43.

²⁰¹ *Council of Europe Recommendation on judges*, para. 70. See also, *Singhvi Declaration*, para. 30.

“a Head of State, Minister of Justice or any other representative of political authorities cannot take part in the disciplinary body.”²⁰²

The *UN Guidelines on the Role of Prosecutors* affirm that “[c]omplaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.”²⁰³

The CCPE further stressed that, “[g]iven their important role and function, the dismissal of prosecutors should be subject to strict requirements, which should not undermine the independent and impartial performance of their activities. All guarantees attached to the disciplinary procedures should apply.”²⁰⁴ The same principle has been adopted by the UN Special Rapporteur on independence of judges and lawyers.²⁰⁵

The ICJ mission was informed that affected persons can also file criminal complaints under a criminal offence of judicial abuse of power. However, the ICJ was told that, despite the fact that many of these criminal complaints are filed, almost all of them are dismissed by the public prosecutor who is supposed to investigate them. This was reported as the criminal offence with the highest dismissal rate. For prosecutors, the affected person can complain either against the dismissal of the investigation or prosecution to the highest prosecutorial level; or by filing an objection against the conduct of the prosecutor; or by filing charges before the Disciplinary Prosecutor and Commission that are permanent bodies of the State Prosecutors’ Council.

The ICJ, however, considers that it is inappropriate to maintain the role of the National Assembly at any point in the dismissal and disciplinary procedures and welcomes the announcements of reform in this regard (see *supra*).

Finally, the ICJ is concerned at the importance given to unsatisfactory marks in evaluations in relation to the dismissal of judges and public prosecutors and deputy prosecutors. In a system with evaluations mainly based on quantitative data (see below), this is particularly alarming as it may force judges and prosecutors to take dubious decisions leading to an increase of dismissals. Finally, given the importance of hierarchy in the prosecutorial service and of hierarchy in both professions in terms of evaluation (see below), this system runs counter to the principle of personal independence, at least for judges.

4.4. Evaluation and promotion

All judges and presidents of courts are “subject to regular evaluation [that] involves all aspects of a judge’s work and/or work of a president of the court, and represents the basis for the election, mandatory training of judges and dismissal.”²⁰⁶ The evaluation “is conducted on the basis of publicised, objective and uniform criteria and standards, in a single procedure ensuring the participation of the judge and/or president of the court whose performance is being

²⁰² CCJE, *Opinion No. 10, op. cit.*, para. 63.

²⁰³ *UN Guidelines on the role of prosecutors*, para. 21.

²⁰⁴ CCPE, *Opinion No. 9, op. cit.*, para. 72.

²⁰⁵ See, UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2012, op. cit.*, para. 70.

²⁰⁶ Article 32, *Law on Judges*.

evaluated. Criteria, standards, and procedure for the performance evaluation of judges and/or president of the courts are set by the High Judicial Council."²⁰⁷

The evaluation of performance is done by committees composed of three judges. The judges' and court presidents' performance is "regularly evaluated once in three years and of judges elected for the first time once a year."²⁰⁸ It is worth noting, as reported above, that an evaluation of dissatisfactory performance may lead to termination of office.²⁰⁹ The ICJ has been informed that these provisions have begun to be implemented only very recently and it is therefore difficult to evaluate their effective impact on the work of the judiciary.

The *Law on Public Prosecution* provides that the "evaluation of the performance of a public prosecutor or deputy public prosecutor constitutes grounds for election, mandatory training, and dismissal. The evaluation of performance shall be conducted on the basis of publicised, objective and uniform criteria based on applicable and comparable standards established by the State Prosecutors' Council in the Regulation on the Criteria and Standards for Evaluating Performance."²¹⁰ As described above, a poor evaluation can lead to dismissal. The evaluation is performed "by the immediately superior prosecutor, after obtaining the opinion of the Collegium of immediately superior public prosecution. The evaluation of the performance of a deputy public prosecutor shall be conducted by a public prosecutor, after obtaining the opinion of the Collegium of the public prosecution."²¹¹

The *Commentary to the Bangalore Principles* clarifies that "[d]ue consideration of a case takes precedence over productivity."²¹² It has stressed that assessment or inspection systems "should not lead a judge, on grounds of efficiency, to favour productivity over the proper performance of his or her role, which is to come to a carefully considered decision in each case in keeping with the law and merits of the case."²¹³

The *Council of Europe's Recommendation on judges* allows that, "[w]ith a view to contributing to the efficiency of the administration of justice and continuing improvement of its quality, member states may introduce systems for the assessment of judges by judicial authorities . . . [However, where] judicial authorities establish systems for the assessment of judges, such systems should be based on objective criteria. These should be published by the competent judicial authority. The procedure should enable judges to express their view on their own activities and on the assessment of these activities, as well as to challenge assessments before an independent authority or a court."²¹⁴

The *European Charter on the Statute of Judges* affirms that any system of promotion in the judiciary, when not based on seniority, must be "based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one

²⁰⁷ Article 32, *Law on Judges*.

²⁰⁸ Article 35, *Law on Judges*.

²⁰⁹ Article 63, *Law on Judges*.

²¹⁰ Article 99, *Law on Public Prosecution*.

²¹¹ Article 102, *Law on Public Prosecution*.

²¹² *Commentary to Bangalore Principles, op. cit.*, para. 41

²¹³ *Commentary to Bangalore Principles, op. cit.*, para. 42.

²¹⁴ *Council of Europe Recommendation on judges*, paras. 42 and 58.

or several judges and discussed with the judge concerned.”²¹⁵ The promotion decision must be taken by Judicial Councils or seminal bodies and subject to an independent complaint mechanism.²¹⁶

However, the Council of Europe’s Consultative Council of European Judges stressed that, while “the Council for the Judiciary should play a fundamental role in the identification of the general assessment criteria[, it] should not substitute itself for the relevant judicial body entrusted with the individual assessment of judges.”²¹⁷ It pointed out that “[a]n unfavourable evaluation alone should not (save in exceptional circumstances) be capable of resulting in a dismissal from office. This should only be done in a case of serious breaches of disciplinary rules or criminal provisions established by law or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial functions to an objectively assessed minimum acceptable standard.”²¹⁸

The CCJE has authoritatively stated that the “aim of all individual judicial evaluation . . . , whether it be ‘formal’ or ‘informal’, must be to improve the quality of the work of the judges and, thereby, a country’s whole judicial system.”²¹⁹ In its Opinion No. 14, it has outlined clear guidelines to conduct judicial evaluations in full respect of the independence of the judiciary.

With regard to prosecutors, the CCPE outlined that “[e]valuation of the performance of prosecutors should be carried out at regular intervals, be reasonable, on the basis of adequate, objective and established criteria and in an appropriate and fair procedure.”²²⁰ As for the guarantees, “[p]rosecutors should have access to results concerning their evaluation and have the right to submit observations and to legal redress, where appropriate.”²²¹

The GRECO mission in 2015 considered that, in the Serbian judicial system, “the [evaluation] system relies almost exclusively on elements of productivity, even among the so-called ‘qualitative’ criteria (e.g. percentage of decisions set aside after a legal remedy has been sought, time period for rendering decisions in writing). It points out in this connection that, even though productivity is certainly a necessary element of the evaluation of judges’ work, it must not be the only one. [It] is concerned that the excessive dependence on

²¹⁵ *European Charter on the Statute of Judges*, para. 4.1.

²¹⁶ *European Charter on the Statute of Judges*, para. 4.1. See also, UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009, op. cit.*, para. 71; CCJE, *Opinion No. 10, op. cit.*, para. 53–54: “[q]uality of justice can of course be measured by objective data, such as the conditions of access to justice and the way in which the public is received within the courts, the ease with which available procedures are implemented and the timeframes in which cases are determined and decisions are enforced. However, it also implies a more subjective appreciation of the value of the decisions given and the way these decisions are perceived by the general public. It should take into account information of a more political nature, such as the portion of the State budget allocated to justice and the way in which the independence of the judiciary is perceived by other branches of the government. All these considerations justify the active participation of Councils for the Judiciary in the assessment of the quality of justice and in the implementation of techniques ensuring the efficiency of judges’ work.”

²¹⁷ CCJE, *Opinion No. 10, op. cit.*, para. 56. See also, CCJE, *Opinion No. 17 on the evaluation of judges’ work, the quality of justice and respect for judicial independence*, CoE Doc. CCJE(2014)2, 24 October 2014, para. 49.5.

²¹⁸ CCJE, *Opinion No. 17, op. cit.*, para. 49.12.

²¹⁹ CCJE, *Opinion No. 17, op. cit.*, para. 49.3.

²²⁰ CCPE, *Opinion No. 9, op. cit.*, para. 65.

²²¹ CCPE, *Opinion No. 9, op. cit.*, para. 66.

quantitative criteria could instill an improper attitude where the focus is on statistical targets rather than high-quality work."²²² It was furthermore concerned "that evaluations serve as grounds for dismissal if 'unsatisfactory' and that the HJC can initiate evaluations outside the usual three-year cycle, which might carry a risk of possible harassment or pressure."²²³

With regard to prosecutors, the GRECO mission was "concerned (as in the case of the appraisal of judges, though to a lesser degree) that the system might give too much weight to quantitative factors, some of which appear inadequate—such as the percentage of final convictions—and might put inappropriate pressure on prosecutors. Furthermore, the GET is again concerned that evaluations serve as grounds for dismissal if 'unsatisfactory' and that the SPC can initiate evaluations outside the usual three-year cycle, which provides room for possible harassment or undue pressure."²²⁴

The ICJ was told by some stakeholders that the evaluations were mostly quantitative. It was further reported that this system of evaluation and establishment of workplans (see below) yields an important degree of power and control of court presidents over the other judges, being able to indirectly influence salary and career.

The ICJ considers that evaluations in the judiciary and prosecution services are not *per se* problematic. The ICJ is however very concerned that the results of evaluation have been linked with grounds of dismissal (see *supra*). This situation, coupled with the powers of court presidents in court management, efficiency and workplans, in practice re-establishes a hierarchical system within the judiciary that clashes with the principle of independence.

Furthermore, for both the judiciary and the prosecution services, the use of quantitative evaluations risks damaging effective access to justice, leading to a risk of mass dismissal of cases or repetitive ping-pong between higher and lower courts or prosecution offices. Finally, the linkage of evaluations with grounds of dismissal puts at risk the very objective of the evaluations themselves, i.e. increasing efficiencies and effective access to justice, because judges and prosecutors will be more concerned with individual case results, however reached, out of fear of dismissal, than with the solving of systemic and organizational issues.

The ICJ recommends eliminating any link between evaluation results and dismissal grounds, unless results are so poor that they reach the level of other grounds of dismissal, e.g. 'incapacity'.

²²² GRECO, *Fourth Evaluation Report*, *op. cit.* para. 117.

²²³ GRECO, *Fourth Evaluation Report*, *op. cit.* para. 118.

²²⁴ GRECO, *Fourth Evaluation Report*, *op. cit.* para. 176.

5. Further challenges in the general legal system in Serbia

The governance of the judiciary and of the prosecution service cannot be seen in a vacuum. The final goal of the effectiveness of their independence and autonomy, as essential tenets of the rule of law, is the fair and equal access to justice for all, including to vindicate the realization of human rights. It is therefore appropriate that the challenges and solutions to the effective and independent self-governance of these two professions (and of the judicial State power) be considered in the midst of the general legal challenges affecting access to justice.

5.1. The new Criminal Procedure Code

During its mission, the ICJ was informed that a new *Criminal Procedure Code* (CPC) had just entered into force, after a significant overhaul of its approach and provisions. Reportedly, the new CPC adopts an adversarial Anglo-Saxon system as opposed to the inquisitorial one, previously in force, based on the central role of investigative judges as a filter between criminal action and trial, and on a significant role of the police in heading criminal investigations.

The new CPC assigns to the prosecutors the central role of heading criminal investigations and responsibility for criminal action and investigative measures, including searches, interrogation of suspects and witnesses, gathering forensic and other evidence and pre-trial detention that were previously within the competence of the police. This has increased significantly the role and workload of the public prosecution service. During its mission, the ICJ was informed that this increased competence was not matched with the required increase in staffing, capacity building nor with equivalent guarantees for the defendants.

Furthermore, the ICJ notes that the new role of public prosecutors and deputy public prosecutors as heads of criminal investigations increases the need for their independence so as to ensure the independence of the investigations themselves (see *supra*).

5.2. Quality of jurisprudence and effectiveness of the system

The ICJ mission heard repeated complaints from different sets of stakeholders on the quality, in terms of depth and legal analysis, of judgments, in particular in terms of legal drafting, on the inconsistency of jurisprudence across the country, and on the continuing existence of a significant backlog of cases.

With regard to the issue of **inconsistent jurisprudence**, this seems to be attributed to the creation of four appellate courts that have a *de facto* final decisional role, and with the lack of competence in the Supreme Court of Cassation (SCC) to issue binding legal opinions when sitting in plenary. The mission was told that the SCC began a project whereby its judges visit every court to promote uniform jurisprudence and that this programme is showing some results. The ICJ was informed of a current reform proposal that would aim to substitute the four appellate courts with a single court based in Belgrade. The ICJ considers that, in light of the need of consistency of jurisprudence and of the size of the population of Serbia, the establishment of a single appellate court could be a helpful measure, provided that there are procedures and mechanisms to ensure that appointment to a single body are appropriate and based on independence and highest competencies.

On the side of effective and fair functioning and **efficiency** of the system, in 2011, the UN Human Rights Committee expressed concern “about issues arising from the overall inadequate functioning of the courts in the administration of justice, resulting in unreasonable delays and other shortcomings in the procedures” in Serbia.²²⁵

A very detailed analysis has been carried out by the World Bank within the Multi-Donor Trust Fund for Justice Sector Support in Serbia, resulting in the publication of its *Serbia Judicial Functional Review* (2014). It contains useful recommendations on how to enhance the efficiency of the judicial system in Serbia and access to justice.

The Review concluded that courts are currently unable to efficiently dispose of old cases that make up the country’s huge backlog. The perception of the judiciary as corrupt is high. The review found that poorly drafted legislation, inconsistent jurisprudence and high appeal rates affect the quality of the judicial services. It considered that the quantity and degree of reforms undertaken has not produced considerable results in efficiency and access to justice. The judiciary, with a number of judges per capita higher than the EU average, was reported to be inefficiently organized and not to have sufficient capacity in court management. More than a problem of under-staffing, the Review found that in Serbia there is a problem of misallocation of human and other resources. The high number of judges was considered, in particular, to be a reflection of the hasty and incorrect process of ‘re-appointment’ of judges carried out in 2009–2012 (see supra) following which all judges had to be reinstated in addition to the newly appointed judges. The Review found that, despite this increase in judicial staffing, it did not appear that the backlog had significantly decreased.

Overall, lack of capacity within the judiciary in planning, management and reporting was considered the vulnerable spot in ensuring effective access to justice. The Review asserted that there is a significant amount of judgments that are unenforced, especially when the State is a debtor. It finally noted that no Law on Legal Aid exists, despite reported announcements that it would be approved soon.

The *National Judicial Reform Strategy 2013–2018* established resolutions of the backlog and includes several goals aimed at increasing the management supervision competence of the High Judicial Council and State Prosecutors’ Council, with capacity to have budgetary competence, analysing reforms and performance results, and indicators of efficiency.²²⁶ The Functional Review described it as a “significant milestone for the Serbian judiciary”. It nevertheless noted that “the Action Plan may be overly ambitious and it will be difficult to implement effectively within the five-year timeframe. The NJRS also focuses heavily on enacting legislation more than ensuring the effective implementation of existing and new legislation to change behavior on the ground.”²²⁷

The *Council of Europe’s Recommendation on judges* recalls that the “efficiency of judges and of judicial systems is a necessary condition for the protection of every person’s rights, compliance with the [right to a fair trial], legal cer-

²²⁵ Human Rights Committee, *Concluding observations on Serbia, op. cit.*, para. 17,

²²⁶ NJRS, *op. cit.*, p. 4, p. 11.

²²⁷ World Bank, *Serbia Judicial Functional Review*, para. 58.

tainty and public confidence in the rule of law.”²²⁸ In light of this, the “authorities responsible for the organisation and functioning of the judicial system are obliged to provide judges with conditions enabling them to fulfil their mission and should achieve efficiency while protecting and respecting judges’ independence and impartiality.”²²⁹ In the case of Serbia, these authorities would be the High Council of the Judiciary and the Ministry of Justice.

More specifically, the *Council of Europe’s Recommendation on judges* stresses that “[j]udges should be provided with the information they require to enable them to take pertinent procedural decisions where such decisions have financial implications.”²³⁰ It furthermore recommends that courts need to have allocated a “sufficient number of judges and appropriately qualified support staff,”²³¹ that judges should be “encouraged to be involved in courts’ administration,”²³² and that to “prevent and reduce excessive workload in the courts, measures consistent with judicial independence should be taken to assign non-judicial tasks to other suitably qualified persons.”²³³

It is worth noting that the *Law on Judges* provides that “[t]he High Judicial Council determines the number of judges and lay judges for each court. . . . [It] reviews every five years the required number of judges and lay judges for every court [and] may at its own initiative or at the proposal of a president of the court, president of a directly superior court, President of the Supreme Court of Cassation and the Minister responsible for the judiciary, review the required number of judges and lay judges before the expiry of the five-year period.”²³⁴ Provisions to notify increased lengths of judicial proceedings, whether justified or not, are also enshrined in the *Law on Judges*, and they require notification of prolonged cases via the hierarchical channel of court presidents.²³⁵

The ICJ is not in a position at this stage to formulate detailed recommendations on how to increase efficiency in the court system. The ICJ notes that the *National Judicial Reform Strategy* engages to regularly analyse and amend the regulatory framework with a view to improve efficiency.²³⁶ The ICJ urges caution in this approach. It is apparent that Serbia has been subject to numerous legislative reform cycles that have not allowed the system to digest them. The process of implementation needs time.

The ICJ recommends a focus on the practical recommendations of the World Bank concerning judicial efficiency that do not require significant or continuous legal reforms. The ICJ underscores that efficiency, as an objective, is important

²²⁸ *Council of Europe Recommendation on judges*, paras. 30–31.

²²⁹ *Council of Europe Recommendation on judges*, para. 32.

²³⁰ *Council of Europe Recommendation on judges*, para. 34.

²³¹ *Council of Europe Recommendation on judges*, para. 35.

²³² *Council of Europe Recommendation on judges*, para. 41.

²³³ *Council of Europe Recommendation on judges*, para. 36. See, *Bangalore Principles Implementing Measures*, paras. 4.3–4.4. They state that the “judiciary should endeavour to utilize information and communication technologies with a view to strengthening the transparency, integrity and efficiency of justice. [Furthermore, in] exercising its responsibility to promote the quality of justice, the judiciary should, through case audits, surveys of court users and other stakeholders, discussion with court-user committees and other means, endeavour to review public satisfaction with the delivery of justice and identify systemic weaknesses in the judicial process with a view to remedying them.”

²³⁴ Article 10, *Law on Judges*.

²³⁵ Article 28, *Law on Judges*.

²³⁶ NJRS, *op. cit.*, p. 11.

to the extent that it enhances effectiveness in the delivery of justice for all who need or seek to access the justice system, in consonance with human rights and the rule of law. It should never be used as a justification to cut costs at the expense of delivering justice. In that regard, the ICJ considers that the important attitude in increasing efficiency is to aim for long-term results, as legal culture and perception of justice in terms of access to rights are key to ensure commitment by judges to increased judicial efficiency.

5.3. Case assignment and work management

According to the *Law on Judges*, cases are allocated to a judge “according to a schedule that is independent of personality of parties and circumstances of the legal matter. Cases are entrusted to a judge on the basis of the court schedule of tasks, pursuant to the Court Rules of Procedure, according to the order determined in advance for each calendar year, exclusively on the basis of the designation and the number of the case file. No one has the right to establish panels of judges and allocate cases by bypassing the work schedule and the order of receiving the cases.”²³⁷ However, “[d]erogation from the order of the receiving of cases is possible only in cases provided for in the law or due to heavy backlog or a justified preclusion of a judge, pursuant to the Court Rules of Procedure.”²³⁸ Judges have a right of objections against the case assignment and calendar of work decisions to the president of the directly superior court²³⁹ and a “president of the court is required to notify in writing the president of the immediately superior court of any derogation from the order of received cases.”²⁴⁰

Under the *UN Basic Principles on the independence of the judiciary*, is that “[t]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.”²⁴¹

The *Council of Europe’s Recommendation on judges* affirms that “[s]uperior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law. [Furthermore, the] allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge. It should not be influenced by the wishes of a party to the case or anyone otherwise interested in the outcome of the case.”²⁴²

The *Magna Charta of Judges* states that, “[i]n the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law.”²⁴³ The UN Special Rapporteur on the independence of judges and lawyers has stressed that “there needs to be a mechanism of allocation that also protects judges from interference from within the judiciary.”²⁴⁴ The Venice Commission has

²³⁷ Article 24, *Law on Judges*.

²³⁸ Article 25.1, *Law on Judges*.

²³⁹ Article 26, *Law on Judges*.

²⁴⁰ Article 27, *Law on Judges*.

²⁴¹ *UN Basic Principles on the independence of the judiciary*, principle 4.

²⁴² *Council of Europe Recommendation on judges*, paras. 23–24

²⁴³ *Magna Charta of Judges*, article 10.

²⁴⁴ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009*, *op. cit.*, para. 47

stressed that “the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity.”²⁴⁵

The UN Special Rapporteur has concluded in 2009, in several missions carried out under the mandate, that “assignment of court cases at the discretion of the court chairperson may lead to a system where more sensitive cases are allocated to specific judges to the exclusion of others [or] court chairpersons, in specific cases, retain the power to assign cases to or withdraw them from specific judges which, in practice, can lead to serious abuse.”²⁴⁶ These findings were corroborated by the Venice Commission.²⁴⁷

International guidance proposes solutions involving random selection, such as drawing of lots, automatic distribution according to alphabetic order, and pre-determined court management plans.²⁴⁸ When allocation of cases needs to bypass the random selection system, for reasons for example of backlog or specialization, the “criteria for taking such decisions by the court president or presidium should, however, be defined in advance. Ideally, this allocation should be subject to review.”²⁴⁹

During its visit, the ICJ was told by some stakeholders that, while a system of random assignment of cases exists, the derogation prerogatives of court presidents were not used in a transparent and accountable way. The ICJ notes that the World Bank’s Functional Review found that “not all courts use the functionality [of random case assignment technology], and those Court Presidents who do use it overrule the system relatively frequently.”²⁵⁰

The ICJ is concerned that this attitude of override of random assignment of cases, without proper reporting and motivation, may increase a hierarchical grip of Court Presidents over other judges in breach of the principle of personal independence.

²⁴⁵ Venice Commission, *Report on independence of judges*, *op. cit.*, para. 72.

²⁴⁶ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009*, *op. cit.*, para. 47

²⁴⁷ Venice Commission, *Report on independence of judges*, *op. cit.*, para. 79.

²⁴⁸ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009*, *op. cit.*, para. 47; Venice Commission, *Report on independence of judges*, *op. cit.*, para. 80.

²⁴⁹ Venice Commission, *Report on independence of judges*, *op. cit.*, para. 80. See also, para. 81. See also, *Bangalore Principles Implementing Measures*, paras. 3.2, 3.3

²⁵⁰ World Bank, *Serbia Judicial Functional Review*, *op. cit.*, Executive Summary, p. 52.

6. Conclusions and recommendations

The ICJ is conscious that many shortcomings in relation to the independence of the Serbian judiciary and of the public prosecution service and their self-governance have already been identified by international and national assessments, reports and recommendations. The ICJ welcomes the determined drive towards constitutional and institutional reform.

The ICJ considers that two obstacles stand in the path to a reform of the judiciary and prosecutorial service that would be truly effective in ensuring their independence, autonomy and effectiveness: a current lack of an established 'culture of independence' within the judiciary and the prosecution service, at institutional and individual levels; and the stress brought about by constant reform, among the national stakeholders.

The first obstacle was emphasized to varying degrees by almost everyone the mission met. The remnants of past legal culture experiences still make themselves felt in the mentality of deference to the executive—understandably, more so in the prosecution service than in the judiciary. Furthermore, the traumatic experience of the re-appointment process has led judges and prosecutors to fear for their tenure, as they have experienced themselves that constitutional guarantees of tenure may be strong currency one day and worthless paper the next. If constitutional guarantees of tenure are not felt and considered by judges and prosecutors as a shield against the interference of political branches, then all other guarantees risk failing to ensure true and effective independence.

As to the second obstacle, Serbia has undergone several, sometimes contradictory, reforms of its legal system in the last ten years at a frantic pace that has not allowed any possibility to pause for implementation and adaptation, let alone to establish ownership by the concerned professions. The nature and pace of this reform leaves the unfortunate impression that much of it has focused on the introduction and approval of constitutional and legislative texts with the sole aim of ticking boxes required for accession to the EU.

In reality, true independence in justice systems derives from the complex interplay of legal texts, structures, perceptions, cultures and behaviours that takes times to accomplish in a harmonious and functional way. The constitutional and legislative reforms envisaged in the Action Plans are indeed needed, but there is a risk that they may be interpreted as a final result instead of as a first step towards a truly independent judiciary and prosecution. This would be a grave mistake that risks jeopardizing anything achieved in the reforms to date. The ICJ considers that the further steps to build independent structures, perceptions, cultures and behaviours are essential to achieve true and effective independence and calls on all actors involved to demonstrate their commitment to addressing this need through sustained, long-term engagement.

In the envisaged reforms, as in any justice sector reform, the ultimate goal must never be lost sight of, namely, to ensure access to justice for all people who seek it, under fair procedures compliant with human rights and the rule of law.

The ICJ considers that the self-governance of the judiciary and of the prosecution service, entrusted respectively to the High Judicial Council and to the

State Prosecutorial Council, is relatively weak. The ICJ mission has identified considerable shortcomings in these bodies, including.

- excessive dependence in practice on the political branches of government;
- lack of effective procedures and of sufficient will in the Councils to defend the independence, autonomy and professional integrity of their professions and of individual judges and prosecutors;
- appointment, selection and dismissal procedures open to direct and indirect political influence;
- lack of effective procedures of evaluation of the work of judges and prosecutors;
- misuse of such procedures to impose conformity in decisions;
- a strong hierarchical system in the prosecution service and, in practice, in the judiciary, that undermines internal independence and risks undermining independence of investigations and prosecutions.

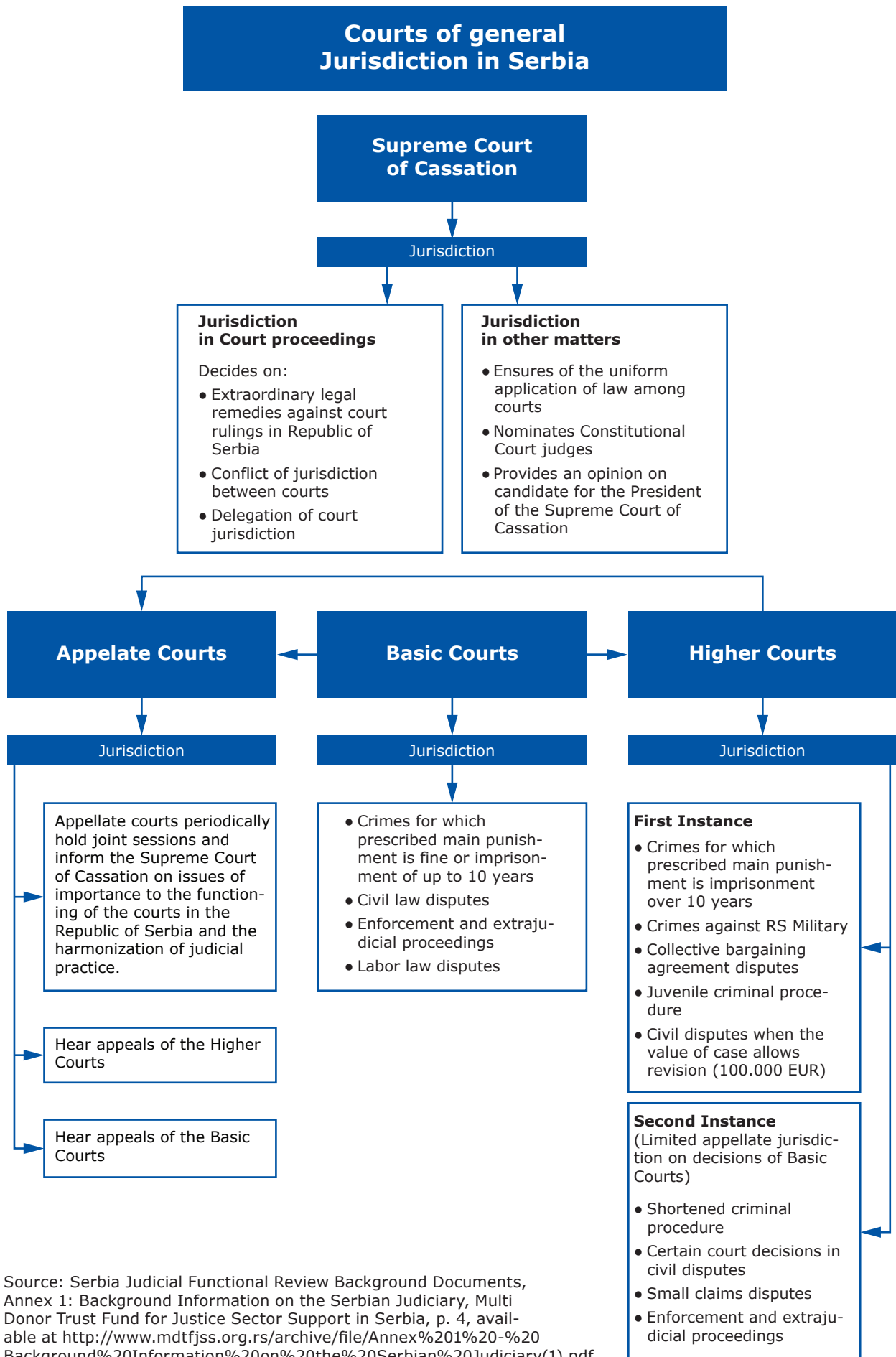
In order to pursue an effective independence of the judiciary and of the prosecution service, and of their respective systems of self-governance, the ICJ makes the following recommendations.

- *The Government and National Assembly should proceed speedily to the constitutional reform of the judiciary and its self-governing bodies, in particular:*
 - *the exclusion the National Assembly from any appointment and dismissal of judges and public prosecutors, including the President of the Supreme Court of Cassation, and of members of their Councils; and*
 - *the exclusion of the Ministry of Justice as ex officio member of the two Councils and the provision of an ad hoc or observer status.*
- *Pending the constitutional reform, the National Assembly should swiftly confirm all elected members of the two Councils.*
- *The two Councils should set up election procedures that ensure the secrecy of the voting process.*
- *The new budgetary competencies of the two Councils should be prepared and accompanied by appropriate and targeted capacity building programmes, nationally and internationally financed, for the Councils' members and staff.*
- *Each of the Councils should establish a codified procedure for protection of judges and prosecutors respectively from attacks on their independence, autonomy and professional integrity, with annual reporting on its implementation and application.*
- *The probationary three-year period for judges should be abolished. If retained, it should be considerably reduced; judges in probation should not make decisions, but only assist in or audit the process; and any non-confirmation of judges in probation must follow the same process and apply the same standards that would lead a judge to be dismissed from the judiciary.*
- *The Government should design, and the National Assembly approve, a comprehensive transitional plan, conceived and agreed upon by the different*

stakeholders, to take into account the acquired entitlements of judicial and prosecutorial assistants and smoothly pass to a Judicial Academy entry model.

- *The law should be modified in order to eliminate any link between evaluation results and grounds of dismissal, unless results are so poor that they reach the level of other grounds of dismissal, such as 'incapacity'.*

Annex 1. The Serbian Court system



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