

SONJA TOŠKOVIĆ

THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES IN THE REPUBLIC OF SERBIA

WITH SPECIAL FOCUS ON
THE RIGHT TO WORK AND
THE RIGHT TO EDUCATION



Belgrade Centre
for Human Rights

Belgrade 2017

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TABLE OF CONTENTS

Executive Summary	5
INTRODUCTION	9
I CONCEPTUAL FRAMEWORK	13
II THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES	17
1. Migrants and Refugees	18
2. The International Law of Refugee Protection.....	18
3. The Human Rights of Migrants	19
4. The Republic of Serbia and International Human Rights Law.....	20
III INTERNATIONAL PROTECTION OF THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF MIGRANTS AND REFUGEES.....	21
1. International Human Rights Standards Relevant for Exercising of the Right to Work	22
1.1. International Covenant on Economic, Social and Cultural Rights.....	22
1.2. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	23
1.3. Human Rights Law of the Council of Europe System.....	24
2. International Human Rights Standards Relevant for Exercising of the Right to Education.....	25
2.1. International Covenant on Economic, Social and Cultural Rights.....	26
2.2. Convention on the Rights of the Child.....	27
2.3. International Convention on the Elimination of All Forms of Racial Discrimination.....	28
2.4. Human Rights Law of the Council of Europe System.....	29
3. Other Rights of Relevance for the Effective Realization of the Right to Education: Interrelation with Right to Health and Right to Child Protection	31
IV MIGRATION, HUMAN RIGHTS, AND GOVERNANCE IN THE REPUBLIC OF SERBIA.....	33
1. Migrants and Refugees in the Republic of Serbia	33
2. General Overview of Policy	34
3. Normative Framework in Serbia.....	37
4. Right to Work and Access of Migrants to the Labor Market of the Republic of Serbia.....	39
4.1. General Overview of the Normative Framework	39
4.2. Access of Migrants to the Labor Market of the Republic of Serbia	41
5. The Right to Education and Migrants' and Refugees Access to Educational System of the Republic of Serbia	43

5.1. General Overview of the Normative Framework.....	43
5.2. Access of Migrants and Refugees to the Educational System of the Republic of Serbia	45
V SOCIAL INCLUSION OF MIGRANTS IN THE LABOUR MARKET AND EDUCATIONAL SYSTEM	49
1. International Practice in the Field of Social Inclusion of Non-citizens in the Labour Market and Education System	49
2. Practice in the Field of Social Inclusion of Non-Citizens in the Labour Market and Education System in the Republic of Serbia	51
VI CONCLUSIONS AND RECOMMENDATIONS	55
1. GENERAL RECOMMENDATIONS.....	56
2. RECOMMENDATIONS IN THE FIELD OF EDUCATION	57
2.1. Recommendations to the Ministry of Education, Science and Technological Development.....	57
2.2. Recommendations for Commissariat for Refugees and Migration.....	57
2.3. Recommendation to the Ministry of Finance	58
2.4. Recommendation to the Ministry of Interior	58
3. RECOMMENDATIONS IN THE FIELD OF EMPLOYMENT AND ACCESS TO THE LABOUR MARKET	58
3.1. Recommendation to the Ministry of Interior	58
3.2. Recommendations to the Ministry of Labor, Employment, Social and Veterans' Affairs.. 58	58
3.3. Recommendations to the National Employment Service.....	59
BIBLIOGRAPHY	61
SOURCES OF RIGHTS	62

Executive Summary

The purpose of this publication is to provide legal and factual insights into the current state-of-play of the economic, social and cultural rights of migrants and refugees in the Republic of Serbia, and to bring recommendations to advance this area of policy and practice, on a human rights basis. The publication focusses on two human rights set out under international law – the right to education and the right to work. However, it also devotes attention where relevant to inter-linkages with other human rights.

Migration is a fact of human history. Periods in which people have not moved are relatively exceptional. In the context of globalization, migration provides opportunities for both migrants and host countries to which they are emigrating, but also pose potential threats in view of migrants' vulnerability and the fact that they are often subject to marginalization and discrimination.

During the past two decades, the Republic of Serbia has experienced various types of migration. Until recently, most of these movements of people have concerned either persons leaving Serbia, or ethnic Serbs and others coming to Serbia, in the context of the conflicts of the end of the former Yugoslavia. However, Serbia has always had non-Yugoslavs arriving and establishing through various legal means. Beginning in particular in late 2014 and 2015, a heightened number of migrants and refugees began arriving in Serbia along the so-called "Balkan Land Route", for the most part aiming to continue on to northern Europe. In 2015, circa 580,000 persons passed through Serbia (see below). Efforts by a concert of states to close the Balkan Land Route in 2016 have been only partially successful. At the time of writing, there are circa 6000 persons in Serbia, the majority "stranded" while hoping to continue on to northern Europe. Political developments related to this episode of large-scale movement of people have also given rise to the forced return of persons to Serbia on the basis of a Readmission Agreement with the European Union. The latter group of persons is comprised very disproportionately of Roma, Ashkalis and Egyptians.

The Universal Declaration of Human Rights (UDHR) sets out that "*all human beings are born free and equal in dignity and rights*" (art. 1). International human rights law guarantees rights to everyone, without regard to citizenship or migration status. The international human rights standards applicable to migrants may be found in a broad range of legal instruments. In the area of economic, social and cultural rights in particular, the United Nations Committee on Economic, Social and Cultural Rights has affirmed that "*the ground of nationality should not bar access to Covenant rights. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation*".

As concerns the right to education, under international law, primary education to be compulsory, free and accessible to all without discrimination. As for the other levels of education, the State shall ensure the right of equal access to secondary education, and to make it generally available and accessible to all. A similar obligation exists in terms of higher education. The European Court of Human Rights has ruled repeatedly on cases concerning the right to education, in particular finding a number of states in violation of the European Convention on Human rights in cases concerning segregated educational arrangements or exclusion from schooling.

As concerns the right to work, the International Covenant on Economic, Social and Cultural Rights (ICESCR) stipulates that "*the States Parties ... recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right*" (art. 6.1). The Covenant also recognizes "*the right of everyone to*

the enjoyment of just and favourable conditions of work, which ensure, in particular: ... fair wages and equal remuneration for work of equal value without distinction of any kind ...; a decent living for themselves and their families ...; safe and healthy working conditions; equal opportunity for everyone to be promoted in his employment ...; rest, leisure and reasonable limitation of working hours and periodic holidays with pay ...” (art. 7). The concepts of availability, accessibility, acceptability and quality make it possible to define more clearly States’ obligations with respect to the right to work. Availability requires a State to make available specialized services to assist individuals to find employment. Accessibility requires a State to ensure that its labour market is open to every person in its jurisdiction, without discrimination. Acceptability and quality require a State to ensure that everyone has access to just, favourable and safe working conditions.

Serbia has ratified and is bound by 8 of the 9 core international human rights treaties. Under Serbian Constitutional law, international law is directly applied within the Serbian legal order. Also under Serbian Constitutional law, foreigners enjoy “all rights” enjoyed by Serbian citizens, with the exception of those specifically reserved for Serbian citizens.

International human rights review bodies have issued recommendations to Serbia in these and related areas. In its most recent Universal Periodic Review in 2013, Serbia received recommendations *inter alia* to consider finalizing the ratification process of the International Convention on the Rights of Migrant Workers and Members of Their Families (ICRMW) as well as to protect the rights of immigrants and take active measures to protect the rights of foreign workers, and promote harmony among all ethnic groups. In May 2014, the United Nations Committee on Economic, Social and Cultural Rights issued a series of recommendations for Serbia, including as concerns the need to adopt “comprehensive integration programmes”.

This study is done at a time when the Serbian Government is reviewing a range of laws in these areas, for possible amendment. The new draft Law on asylum has been in parliament procedure from 12 September 2017 and new draft Law on foreigners has been in procedure from 2 December 2017. This publication also is done at the start of evidently positive changes in Serbia as concerns the human rights and social inclusion of migrants and refugees. To date, a very limited number of refugees has been recognized in Serbia. Most positive decisions recognizing persons as refugees were taken in 2016, a sign of the refugee protection system beginning to become effective.

According to current Serbian law, a foreigner is any person located on the territory of the Republic of Serbia, who has not Serbian, but foreign nationality. In the period from 1 January 2016 to 31 December 2016, the National Employment Service (NES) issued in total 7139 work permits to foreign nationals with temporary residence and 201 work permits to foreigners to foreign nationals with permanent residence. On 31 December 2016 there were (700,947 ,096 of active unemployed persons enlisted with National Employment Service (NES), of which 0, 11% registered as foreigner citizens.

In 2016, there were 6325 temporary residence approved, for the first time. By classification according to the approval, it is noted that in 2014, 2015 and 2016, the most common basis for obtaining temporary residence was based on work (in the order of 41.7%, 42.9% and 43%). Also, at the end of 2016 there were 619 foreigners in the Republic of Serbia with temporary stay on the basis of education, which represent decrease in comparison to 2015, when there were 1288 such persons.

On 19 September 2016, the United Nations General Assembly adopted the New York Declaration for Refugees and Migrants. The Declaration reaffirms the human rights of all refugees and migrants, regardless of status, and pledges to fully protect such rights. It recalls that “*though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms*”. The Declaration pledges *inter alia* to move towards the adoption in 2018 of a Global Compact on refugees and a Global Compact for safe, orderly and regular migration, to develop guidelines on treating migrants in vulnerable situations and to contribute to a fairer distribution of refugees by adopting a global refugee campaign in 2018. The New York Declaration itself for the first time envisages issues that are common to refugees and migrants, as well as modalities for responding to factors that lead to migration, both forced and regular.

According to the UN Secretary General Ban Ki-moon, the “Summit represents a breakthrough in our collective efforts to address the challenges of human mobility.” He stated that the adoption of the New

York Declaration “more children can attend school; more workers can securely seek jobs abroad, instead of being at the mercy of criminal smugglers, and more people will have real choices about whether to move once we end conflict, sustain peace and increase opportunities at home.”

The world has recently come together around renewed commitments for sustainable development which envision migration as the opportunity that it truly is. As the United Nations Secretary General has stated, “the 2030 agenda for sustainable development sets goals and targets to better reap the benefits of migration. We must advance it with creativity, compassion and courage.”

We are very much hopeful that this publication, among other things, will contribute to the Republic of Serbia achieving positive contribution in the context of the development of these global processes. Above all, this study aims to contribute to the improvement of the lives of people to whom it concerns.

INTRODUCTION

The purpose of this publication is to provide legal and factual insights into the current state-of-play of the economic, social and cultural rights of migrants in the Republic of Serbia, and to bring recommendations to advance this area of policy and practice, on a human rights basis. The study focusses on two human rights set out under international law – the right to education and the right to work. However, it also devotes attention where relevant to inter-linkages with other human rights.

The years 2015 and 2016 saw a significant increase in the numbers of refugees and migrants arriving in Europe, including via the so-called “Balkan land route”. Former UN Secretary-General Ban Ki-moon has stated that, globally, we now face the biggest refugee and migration challenges since World War II.

An internationally-recognized framework related to the human rights of migrants and refugees has been elaborated over the past decades by the Member States of the United Nations, bringing together a comprehensive set of binding human rights and related instruments together with non-binding standards of best practices and principles.¹ Core principles underpin this system: refugees have the right to seek asylum in safety. No one should be forcibly returned to face persecution. Migrants and refugees must be treated with dignity and respect. As the Secretary General stated, “we have a responsibility to define a clear path forward guided by international refugee law, human rights and humanitarian law.” International human rights law guarantees rights to everyone, without regard to citizenship or migration status, in keeping with our global commitment that all persons are born equal in dignity and in rights.²

On 19 September 2016, the United Nations General Assembly adopted the New York Declaration for Refugees and Migrants.³ The Declaration reaffirms the human rights of all refugees and migrants, regardless of status, and pledges to fully protect such rights. It recalls that “though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms”. The Declaration pledges *inter alia* to move towards the adoption in 2018 of a Global Compact on refugees and a Global Compact for safe, orderly and regular migration.

International human rights review bodies have issued recommendations to Serbia in these and related areas. In its most recent Universal Periodic Review in 2013, Serbia received recommendations *inter alia* to consider finalizing the ratification process of the International Convention on the Rights of Migrant Workers and Members of Their Families (ICRMW) as well as to protect the rights of immigrants and take active measures to protect the rights of foreign workers, and promote harmony among all ethnic groups.⁴ In May 2014, the United Nations Committee on Economic, Social and Cultural Rights issued a series of recommendations for Serbia, including the following:

- enact relevant by-laws and adopt other measures, including training for officers responsible for migration, as well as measures to protect the independence of the Asylum Office, in order

1 Office of the United Nations High Commissioner for Human Rights (OHCHR), Migration and Human Rights: Improving Human Rights Based Governance of International Migration, 2012, 14, document available on : http://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf

2 Article 1, Universal Declaration of Human Rights, available at: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

3 UN General Assembly, New York Declaration for Refugees and Migrants: Resolution / adopted by the General Assembly, 3 October 2016, A/RES/71/1, available at: <http://www.refworld.org/docid/57ceb74a4.html> [accessed 9 March 2017]

4 A/HRC/23/15, 22 March 2015.

to ensure the full implementation of the Law on Asylum of 2008, and a fair and efficient asylum procedure, in particular the respect of the principle of non-refoulement;

- establish a functional mechanism for local integration of persons who, according to the Law on Asylum, are granted the status of refugees, as well as internally displaced persons in the areas of education, social assistance, language training, professional training and housing;
- create a national strategy and action plan for addressing the issue of refugees and internally displaced persons which would include clear timelines and budget for the planned activities;
- increase the capacity of social work services in places where the centres for asylum are, in order to better respond to the needs of asylum seekers and persons granted refugee status.⁵

Also, in 2014, the United Nations Committee on Economic, Social and Cultural Rights brought a range of recommendations to the Government of Serbia in these areas, including as concerns the need to adopt “comprehensive integration programmes”⁶

Similarly, in January 2017, the United Nations Committee on the Rights of the Child (CRC) urged Serbia to ensure full implementation of relevant existing laws prohibiting discrimination, including by strengthening public education campaigns to address negative social attitudes towards Roma children, children with disabilities, minority children, refugees and asylum seeking children, migrant children, children in street situations, LGBT children and children with HIV/AIDS. While the Committee notes as positive efforts made to improve the education system it remains concerned that equity gaps continue to prevent children from vulnerable groups, including, children with disabilities; migrant and asylum seeking children; children from rural areas; deprived children; and Roma children from accessing quality education.⁷

Most recently, pursuant to its March 2017 review of Serbia’s implementation of the International Covenant on Civil and Political Rights (ICCPR), the United Nations Human Rights Committee brought a comprehensive package of recommendations to strengthen the rights of non-citizens in Serbia:

The State party should strictly respect its national and international obligations by: (a) ensuring that access to formal procedures for asylum applications is available at all border points, notably in international airports and transit zones and that all persons engaging directly with refugees or migrants are appropriately trained; (b) ensuring that all asylum applications are assessed promptly on an individual basis with full respect for the principle of non-refoulement and that decisions of denial can be challenged through suspensive proceedings; (c) refraining from collective expulsion of aliens and ensuring an objective assessment of the level of protection when expelling aliens to “safe third countries”; (d) ensuring adequate conditions both inside and outside reception centers for all refugees and asylum seekers; and (e) ensuring that appropriate protocols are in place for identifying the age of unaccompanied minors and that they receive appropriate guardianship and treatment commensurate with the principle of the best interests of the child.⁸

In December 2017, Committee on the Elimination of Racial Discrimination brought concluding observations on the combined second to fifth periodic reports of Serbia.⁹ Referring to its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee recommends that the State party:

(a) Pursue efforts to ensure that all non-citizens, including migrants and asylum seekers, enjoy their human rights and have access to adequate humanitarian services, including food, shelter and health services; (b) Take urgent measures to ensure timely and fair processing

5 Concluding Observations on the Second Periodic Report of Serbia, E/C.12/SRB/CO/2, 10 July 2014.

6 E/C.12/SRB/CO/2, para. 14.

7 Concluding Observations on the combined second and third periodic reports of Serbia, CRC/C/SRB/CO/2-3, 3 February 2017.

8 Concluding Observations on the Third Report of Serbia, CCPR/C/SRB/CO/3, 10 April 2017, paras 32-33.

9 Concluding observations on the combined second to fifth periodic reports of Serbia, CERD/C/SRB/CO/2-5, 8 December 2017.

of asylum claims, including by providing sufficient funding for relevant decision-making bodies, and to ensure consistent respect for the principle of non-refoulement; (c) Ensure that all children, including migrant children, are enrolled in primary education, and implement inclusion programs in schools to provide the linguistic and other support migrant children need; and (d) Provide in its next periodic report disaggregated statistics relating to the number and outcome of asylum claims filed.

The Council of Europe on 13 October 2017 published a Report by the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees, Ambassador Tomáš Boček, following his visit to Serbia and Hungary.

In the report, he said that the Education Ministry was making sincere efforts to have as many migrant and refugee children as possible enrolled in Serbian schools and noted the challenges, such as the children's lack of knowledge of Serbian and lack of teachers (around 350 need to be recruited). He also noted other issues limiting the children's enrolment in local schools, such as lack of information about their vaccination status, as well as practical difficulties in making arrangements for children to receive their meals outside the Asylum or Reception Centres where they were living, but underlined that these practical difficulties could be easily overcome and that the right to education should not be denied on the basis of such considerations.¹⁰

Boček said that he had not been made aware of any projects or initiatives to facilitate the adults' learning of the Serbian language or any other education programmes and that it was necessary to develop linguistic integration programmes for adult migrants in view of the fact that refugees and migrants continued to stay in Serbia for long periods of time. He issued the following recommendations based on the information he had collected. He called:

- on the competent Serbian authorities to ensure compulsory education for every child in Asylum and Reception Centres, in accordance with Serbian legislation;
- for support to the Serbian authorities in developing effective policies on linguistic support for adult migrants, in line with Council of Europe standards, while making full use of Council of Europe resources; and,
- for support to the Serbian authorities in developing sustainable and comprehensive integration policies.¹¹

The author of this study is a legal advisor at the Belgrade Center for Human Rights (BCHR). The experience gained through her work with migrants, asylum seekers and refugees – and in particular in the framework of the project “Support to Asylum Seekers and Refugees in Serbia” supported by the United Nations High Commissioner for Refugees (UNHCR) -- has enabled the author to understand better their situation, needs and rights, as well as to gain an extensive grasp of opportunities and gaps in current policy.

As part of this research, the author reviewed relevant literature from human rights law and information related to practices in other countries, including as obtained through questionnaires placed within the network of ELENA (European Legal Network on Asylum). The author chose the EU member states, whose practice has been shown in this paper, taking into account the development of asylum systems in some countries and the existence of good practice that can serve as a model for the operation of the competent authorities of the Republic of Serbia.

This study is done at a time when the Serbian Government is reviewing a range of laws in these areas, for possible amendment. It is also done as Serbia advances its efforts to harmonize its legislation with that of the European Union (EU), in preparation for EU accession. The study therefore offers recommendations in the context of these reform efforts.

10 Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees to Serbia and two transit zones in Hungary, June 2017, Council of Europe. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168075e9b2.

11 Ibid.

This publication also is done at the start of evidently positive changes in Serbia as concerns the human rights and social inclusion of migrants and refugees. To date, a very limited number of refugees has been recognized in Serbia (total of 103 international protection has been granted since adoption of Asylum Law 2008). Most positive decisions recognizing persons as refugees were taken in 2016, a sign of the refugee protection system beginning to become effective. Similarly, during the second half of 2016 and during 2017, for the first time, administrative decisions were taken to enroll refugee and migrant children in mainstream education. This study aims to support further advances in this area.

The work on the publication was completed on December 2, 2017, therefore all data and statistics published in the publication relate to this period. We would use this opportunity to thank all United Nations agencies in Serbia and Geneva, relevant state bodies (in particular the Ministry of Labor, Employment, Veterans' and Social Affairs, Ministry of Education, Science and Technological Development, Commissariat for Refugees and Migration), as well as all others relevant stakeholders who participated in consultations process and thus contributed to the quality of publication.

The world has recently come together around renewed commitments for sustainable development which envision migration as the opportunity that it truly is. As the United Nations Secretary General has stated, "the 2030 agenda for sustainable development sets goals and targets to better reap the benefits of migration. We must advance it with creativity, compassion and courage."

I CONCEPTUAL FRAMEWORK

Migration is a fact of human history. Periods in which people have not moved are relatively exceptional. In the context of globalization, migration provides opportunities for both migrants and host countries to which they are emigrating, but also pose potential threats in view of migrants' vulnerability and the fact that they are often subject to marginalization and discrimination.¹² The concept of a "migrant in a vulnerable situation" may be understood as a range of factors that are often intersecting, can coexist simultaneously and can influence and exacerbate each other. Situations of vulnerability may change over time as circumstances change or evolve. The factors that create a vulnerable situation for migrants might be what drives their migration from their countries of origin, occurs in transit and/or is related to a particular aspect of a person's identity or circumstance. Thus, vulnerability in this context can be understood as situational (external) and/or embodied (internal).¹³

- *A vulnerable situation arising from the reasons for leaving countries of origin:* The drivers for 'non-voluntary' precarious movements are multiple and often intertwined, and should be assessed on an individual basis. They can include poverty, discrimination, lack of access to fundamental human rights, including education, health, food and water, decent work, as well as violence, gender inequality, the wide-ranging consequences of natural disaster, climate change and environmental degradation, and separation from family. The New York Declaration highlights in addition that "many move, indeed, for a combination of these reasons" (para 1).¹⁴
- *A vulnerable situation occurring in the context of the situation encountered by migrants en route, at borders and in the context of reception:* People are often compelled to utilise dangerous means of transportation in hazardous conditions, and to resort to the use of smugglers and other types of facilitators which can place them in situations of exploitation, at risk of trafficking and other abuse. This journey can be marked by hunger, deprivation of water, a lack of personal security as well as of access to medical care. Many migrants can spend long durations in transit countries, often in irregular and precarious conditions, unable to access justice and at risk of a range of human rights violations and abuse. The inadequate and often harsh conditions in which they are received at borders can also violate rights and furtherly exacerbate vulnerabilities. Responses such as arbitrary closure of borders, denial of access to asylum procedures, arbitrary push-backs, increasing violence at borders by State authorities and other actors (including criminals and civilian militias), inhumane reception conditions, and denial of humanitarian assistance increase risks to the health and safety of migrants.¹⁵
- *A vulnerable situation related to a specific aspect of a person's identity or circumstance:* As they move, some people are more at risk of human rights violations than others due to their persisting unequal

12 Office of the United Nations High Commissioner for Human Rights (OHCHR), Migration and human rights: Improving HumanRights-Based Governance of International Migration, December 2012, 3, available at <http://www.refworld.org/docid/5243e8e74.html>

13 Global Migration Group, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations within large and/or mixed movements, Draft November 2016, 5. See also OHCHR report to the Human Rights Council on the promotion and protection of the human rights of migrants in the context of large movements - A/HRC/33/67, available at: <http://www.ohchr.org/EN/Issues/Migration/Pages/StudiesAndReports.aspx>.

14 Ibid.

15 Ibid.

treatment and discrimination based on factors including age, gender, ethnicity, nationality, religion, language, sexual orientation or gender identity, or migration status, singly or in combination. Certain people such as pregnant women, persons with poor health conditions including those with HIV, persons with disabilities, older persons, or children (including unaccompanied or separated children) are more at risk due to their physical and/or psychological conditions.¹⁶

The recent period has seen large-scale migration, a fact which has placed the issue of migration high on the international agenda. The magnitude and complexity of the phenomenon is such that international migration can no longer be considered peripheral to the mainstream of development policies. Today, every country is affected by migration in some way – either as country of origin, transit or destination, or sometimes by a combination of these. Almost one in every ten persons living in developed regions is a migrant compared to one out of every seventy persons in less developed regions. Sixty per cent of all the world's migrants live in developed regions.¹⁷

And all, irrespective of their national origin, race, creed or color, or their legal status – share with the nationals of their host community both a common humanity and human rights including the right to decent and humane treatment. International migrants are a heterogeneous group.¹⁸ While the migration process is an empowering experience for many of them, some are faced with exploitation and abuse in reality, either during migration journey or while staying in the country of destination. Migrant women and children are particularly vulnerable to exploitation, and therefore require special attention to ensure that their human rights are respected.

It is often migrants with irregular status that are most in need of this protection. While debate has centered either on the perceived challenges posed by migration, or on its contribution to development and poverty alleviation, the inextricable connection between migration, development and human rights has been insufficiently explored. The core principle of the international human rights regime is that human rights are universal, indivisible, inalienable, and interdependent.¹⁹ As set forth in the Universal Declaration of Human Rights, migrants are first and foremost human beings, included in the “everyone” of Article 2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The principle of universality implies that States of origin, transit, and destination are all responsible for the protection of migrants’ human rights. The Declaration embodies the fundamental universal idea that all human beings have rights. The Convention Relating to the Status of Refugees was one of the first treaties concluded after the Universal Declaration of Human Rights was adopted. It is the key legal document defining the status of refugees, their rights and the legal obligations of States. In 1990, the General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The Convention opened a new chapter in the history of efforts to establish the rights of migrant workers and to ensure that those rights are protected and respected.

The necessity to integrate the analysis of migration and development policies is supported by the indivisible, universal and interdependent character of human rights – all human beings have human rights everywhere – for migrants, in their countries of origin, countries of transit and countries of destination. A human rights approach which emphasizes State responsibility for the promotion of economic, social, cultural, civil and political rights *ab initio* may recast development policies in a way that would reduce emigration caused by the inability of States to ensure the exercise of nationals of their right to development.²⁰

16 Ibid.

17 Global Migration Group, International Migration and Human Rights Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights, October 2008, 1.

18 Ibid.2.

19 Ibid.3.

20 Global Migration Group, International Migration and Human Rights Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights, October 2008, 4.

The regulation of international migration can give rise to differentiation. In that regard, regular (lawful, legal, documented) and irregular (unlawful, secret) migration can be differentiated.²¹ *Regular migration* implies that all conditions regarding entry, residence and performance of professional activity in a host country envisaged by domestic legislature are fulfilled. By contrast, *irregular migration* refers to movements which are not in conformity with host country regulations on entry and residence, i.e. those which are out of host country's control.

21 As noted above, this study does not endorse use of the term "illegal" to describe migrants or migration, as a result of its stigmatizing character. Wherever possible, this study uses the term "irregular migration" or "irregular migrant", and sets official uses of the term "illegal" in quotation marks.

II THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES

The Universal Declaration of Human Rights (UDHR) sets out that “all human beings are born free and equal in dignity and rights” (art. 1). It further sets out global commitments that the “inherent dignity and the equal and inalienable rights of all members of the human family [which] is the foundation of freedom, justice and peace in the world”. The two human rights Covenants – the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) -- similarly grant to “all” and to “everyone” all the rights contained within those instruments, with very narrow exceptions.²² There is no hierarchy between human rights; all rights are universal, inalienable, indivisible, interdependent and of equal importance.²³

An internationally-recognized framework of human rights has been elaborated over the past decades by the Member States of the United Nations, bringing together a comprehensive set of binding human rights and related instruments together with non-binding standards of best practices and principles.²⁴ The international human rights framework is clear that every person without discrimination is entitled to consideration of his or her unique circumstances as a matter of human rights principles. Simply put, all human beings have all human rights.

Beyond this, certain legal protection regimes have been created for groups of non-nationals, including refugees, trafficked persons and migrant workers, to address particular situations and specific vulnerabilities. In applying such regimes, however, care must be taken to avoid creating hierarchies of vulnerability based on categorization.²⁵ Human rights law thus provides that every person, without discrimination, must have access to his or her human rights. States are obliged to ensure that any differences of treatment between national and non-nationals or between different groups of non-nationals are enshrined in national legislation, serve a legitimate objective, and that any course of action taken to achieve such an objective must itself be proportionate and reasonable.²⁶ States, committed by legal obligations, have the duty to respect, protect and fulfil the human rights of all migrants and refugees.

22 The United Nations Committee on the Elimination of Racial Discrimination (CERD) has characterized the scope of such exceptions in the exercise by non-citizens of internationally guaranteed human rights as follows: “Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law. . . . differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” (CERD General Recommendation 30, “Discrimination against Non-Citizens”, CERD/C/64/Misc.11/rev.3, paras. 3 and 4.)

23 Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

24 Migration and human rights, Improving Human Rights Based Governance of International Migration, Office of the High Commissioner for Human Rights, 2012,14, document available at: http://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf

25 Migration and human rights, Improving Human Rights Based Governance of International Migration, Office of the High Commissioner for Human Rights, 2012, 16.

26 The Committee on the Elimination of Racial Discrimination has provided that differences of treatment based on citizenship or immigration status will constitute discrimination if the criteria for different treatment, judged in the light of the objectives and purposes of the Convention, are not applied in pursuit of a legitimate aim or are not proportional to its achievement. CERD, General Recommendation No. 30: Discrimination against Non-Citizens, October 2004, para. 4.

1. Migrants and Refugees

In the absence of a universal, legal definition, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has defined an “international migrant” as “any person who is outside the State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence.”²⁷

The International Organization for Migration (IOM) defines a migrant as any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person’s legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.²⁸

2. The International Law of Refugee Protection

The international law of refugee protection is set out primarily in the 1951 Convention Relating to the Status of Refugees (“Refugee Convention” or “1951 Convention”).

A refugee, as defined in Article 1 A(2) of the 1951 Convention Relating to the Status of Refugees (“Refugee Convention” or “1951 Geneva Convention”), is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

Refugees, as all human beings, also enjoy of human rights protection established under international and regional instruments noted above. The principle of non-refoulement is a cornerstone of refugee protection²⁹ and it is also defined, in some cases with varying scope, under international human rights law. International protection of refugees comprises far more than simply physical safety. The 1951 Convention sets out a broad range of rights to which all refugees are entitled, including freedom of thought, of movement, and freedom from torture and degrading treatment. Economic and social rights are equally applicable. Refugees should have access to medical care, schooling and the right to work. Articles 12 - 30 of the Refugee Convention set out the rights which individuals are entitled to once they have been recognised as refugees.³⁰

The 2016 United Nations General Assembly New York Declaration for Refugees and Migrants, noted above, sets out host states commitments as concerns refugees, including the following:

- (a) Provide legal stay to those seeking and in need of international protection as refugees ...
- (b) Take measures to foster self-reliance by pledging to expand opportunities for refugees to access, as appropriate, education, health care and services, livelihood opportunities and labour markets, without discriminating among refugees and in a manner which also supports host communities;

27 Global Migration Group, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations within large and/or mixed movements, November 2016, p. 3, footnote 1. Document available at: <http://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>

28 At: <https://www.iom.int/key-migration-terms>; Some categories of migrants are defined in international instruments, particularly “migrant worker” or “migrant for employment” which are defined in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 2(1)); ILO Convention No. 97, Migration for Employment Convention (Revised), Article 11; ILO Convention No. 143, Migrant Workers (Supplementary Provisions) Convention, Article 11.

29 Article 33(1) of the 1951 Convention relating to the Status of Refugees sets out that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

30 Ibid. from article 12 do 30.

- (c) Take measures to enable refugees, including in particular women and youth, to make the best use of their skills and capacities, recognizing that empowered refugees are better able to contribute to their own and their communities' well-being;
- (d) Invest in building human capital, self-reliance and transferable skills as an essential step towards enabling long-term solutions.³¹

3. The Human Rights of Migrants

The human rights of migrants have been recognized and developed at both international and regional levels. The international human rights standards applicable to migrants may be found in a variety of legal instruments. They include all international treaties establishing human rights, as well as more specialized texts addressing a specific issue relevant to migration, such as non-discrimination, or a category of persons, such as migrant workers.

As concerns rights established under general international human rights law, migrants enjoy the rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR) and its optional protocols, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its optional protocol, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its optional protocols, the Convention on the Rights of the Child (CRC) and its optional protocols, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its optional protocols, the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention for the Protection of All Persons from Enforced Disappearance (CED).

There is also a specific international human rights treaty dedicated to setting out the human rights of migrant workers. This is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

Treaty law of the International Labour Office (ILO) also includes extensive provisions dedicated to setting out the rights of migrants, focusing again in particular primarily on migrant workers. Migration for Employment Convention (Revised), 1949, ILO Recommendation No. 86 concerning Migration for Employment (Revised 1949) ILO Convention No. 143 concerning Migrant Workers and ILO Recommendation No 151 concerning Migrant Workers (1975).

In Europe, the human rights of migrants are established primarily under the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), as well as under its sister treaties European Social Charter and Revised European Social Charter, both treaties of the Council of Europe system. There is a particular Council of Europe treaty dedicated to the protection of migrant workers: the European Convention on the Legal Status of Migrant Workers.

The 2016 United Nations General Assembly New York Declaration for Refugees and Migrants, noted above, commits to a new global compact for safe, orderly and regular migration, to be elaborated during 2017 and 2018, including *inter alia* the following:

- Effective protection of the human rights and fundamental freedoms of migrants, including women and children, regardless of their migratory status, and the specific needs of migrants in vulnerable situations;
- International cooperation for border control, with full respect for the human rights of migrants;
- Combating trafficking in persons, smuggling of migrants and contemporary forms of slavery;

³¹ UN General Assembly, New York Declaration for Refugees and Migrants: Resolution / adopted by the General Assembly, 3 October 2016, A/RES/71/1, available at: <http://www.refworld.org/docid/57ceb74a4.html> [accessed 9 March 2017], Annex 1.

- Identifying those who have been trafficked and considering providing assistance, including temporary or permanent residency, and work permits, as appropriate;
- Reduction of the incidence and impact of irregular migration;
- Addressing the situations of migrants in countries in crisis;
- Promotion, as appropriate, of the inclusion of migrants in host societies, access to basic services for migrants and gender-responsive services;
- Consideration of policies to regularize the status of migrants;
- Protection of labour rights and a safe environment for migrant workers and those in precarious employment, protection of women migrant workers in all sectors and promotion of labour mobility, including circular migration;
- Combating racism, xenophobia, discrimination and intolerance towards all migrants;
- Recognition of foreign qualifications, education and skills and cooperation in access to and portability of earned benefits;³²

4. The Republic of Serbia and International Human Rights Law

With the exception of International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the Council of Europe's European Convention on the Legal Status of Migrant Workers, the Republic of Serbia has ratified all of treaties named above. Under Serbian Constitutional Law, ratified international treaties are part of the national legal order. Serbia is also in the process of harmonizing law with European Union (EU) legislation, as part of its preparations to accede to the EU.

32 Ibid.

III INTERNATIONAL PROTECTION OF THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF MIGRANTS AND REFUGEES

On 24 February 2017, the United Nations Committee on Economic, Social and Cultural Rights (CESCR Committee) published a statement concerning the Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights (ICESCR).³³ Affirming binding international law, the CESCR Committee grounds its work in the fact that all people under the jurisdiction of the State concerned should enjoy the Covenant rights: this includes asylum-seekers and refugees, as well as other migrants, even when their situation in the country is irregular.³⁴

As regards refugees, the 1951 Geneva Convention relating to the Status of Refugees and the 1967 New York Protocol³⁵ address a number of prescriptions to its Contracting Parties with respect to the economic, social and cultural rights of refugees. However, those prescriptions leave in practice a broad margin of appreciation to States. The Covenant should be seen as the primary international human rights law governing these issues, in tandem with the 1951 Geneva Convention.

The CESCR Committee draws the attention of the States parties, in particular, to the fact that enjoyment of the Covenant rights should not depend on the legal status of the persons concerned. For example, a lack of documentation frequently makes it impossible for parents to send their children to school, or for migrants to have access to healthcare, including emergency medical treatment, to take up employment, to apply for social housing or to engage in an economic activity in a self-employed capacity. This situation cannot be tolerated. Nor can undocumented migrants who are not seeking asylum simply be ignored. Without prejudice to the possibility for State to order that they leave the territory, the very presence of such migrants under the State's jurisdiction imposes on the State certain obligations, including of course the primary obligation to acknowledge their presence and the fact that those migrants can claim rights against national authorities.³⁶

The principles of equality and non-discrimination lie at the heart of international human rights law and are directly related to that of universality, which affirms that every human being has fundamental rights. The ICESCR Covenant guarantees to "everyone" the rights it contains, including the rights to work, to just and favourable conditions of work, to trade union freedoms, to social security, to an adequate standard of living, to health, to education, as well as to child and family protection. Discrimination is prohibited by the International Covenant on Economic, Social and Cultural Rights under all circumstances.

Under the ICESCR Covenant, States have an immediate obligations in these areas. However, even though this principle is firmly established in international human rights law, misconceptions about its

33 Committee on Economic, Social and Cultural Rights, Statement regards Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Right, E/C.12/2017/1, published on 24 February 2017.

34 More detailed elaboration of the Statement is conducted in the Section II International protection of economic, social and culture rights.

35 Convention Relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950, entered into force on 22 April 1954, U.N.T.S., vol. 189, p. 150; Protocol Relating to the Status of Refugees, signed in New York on 31 January 1967, U.N.T.S., vol. 606, p. 267.

36 Committee for Economic, Social and Cultural Rights, "Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights - Statement by the Committee on Economic, Social and Cultural Rights" E/C.12/2017/1, para. 11, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/2017/1&Lang=en

application to non-nationals impede the full implementation of economic, social and cultural rights. Irregular migrants in particular often face discrimination, even when this is specifically prohibited under the relevant legislation or regulation.³⁷ International human rights law therefore narrowly restricts the circumstances in which States may legitimately permit differences of treatment between citizens and non-citizens or between different groups of non-citizens (such as regular and irregular migrants), including in regard to economic, social and cultural rights, and affirms that any differences of treatment should be objective and reasonable. While States enjoy a certain margin of discretion in assessing whether and to what extent differences in otherwise similar situations justify different treatment, they must justify how such different treatment, based exclusively on nationality or legal status, is compatible with the principle of non-discrimination. Article 2, Paragraph 2 of the ICESCR prohibits discrimination in exercising Covenant rights on the grounds of race, colour, sex, language, religion, political or other opinion, *national* or social origin, property, birth or other status. The Committee on Economic, Social and Cultural Rights has affirmed that “the ground of nationality should not bar access to Covenant rights. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”³⁸

1. International Human Rights Standards Relevant for Exercising of the Right to Work

1.1. International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁹ stipulates that “the States Parties ... recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right” (art. 6.1). The Covenant also recognizes “the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular: ... fair wages and equal remuneration for work of equal value without distinction of any kind ...; a decent living for themselves and their families ...; safe and healthy working conditions; equal opportunity for everyone to be promoted in his employment ...; rest, leisure and reasonable limitation of working hours and periodic holidays with pay ...” (art. 7).

The United Nations Committee on Economic, Social and Cultural Rights (CESCR Committee) has made clear that the right to work does not imply “an absolute and unconditional right to obtain employment”. It implies that a person may freely choose or accept work, “not being forced in any way whatsoever to exercise or engage in employment”, that a person may not be “unfairly deprived of employment”, and that he or she has “the right of access to a system of protection” guaranteeing access to employment.

The concepts of availability, accessibility, acceptability and quality make it possible to define more clearly States’ obligations with respect to the right to work. Availability requires a State to make available specialized services to assist individuals to find employment. Accessibility requires a State to ensure that its labour market is open to every person in its jurisdiction, without discrimination. Acceptability and quality require a State to ensure that everyone has access to just, favourable and safe working conditions.⁴⁰

In its general comment No. 20 on non-discrimination, issued by the CESCR Committee held that the access to rights guaranteed by the ICESCR Covenant shall be provided to everyone, including *inter*

37 Office of the United Nations High Commissioner for Human Rights (OHCHR), *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, New York and Geneva, 2014, p.23, available at: http://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf

38 CESCR General Comment No 20, para 30.

39 UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Official Gazette of SFRY, No. 7/71

40 General Comment No. 18, *The Right to Work*, E/C.12/GC/18, 6 February 2006.

alia refugees, asylum seekers, displaced persons, migrant workers, and victims of human trafficking, irrespective of their legal status and documents these persons hold.⁴¹

In terms of employment rights, Article 6 the ICESCR recognizes the right to work, whereas in general comment No. 18, the CESCR Committee envisages more categories under the right to employment, the prohibition of forced labor, access to labor market, non-discrimination in the process of employment, and pays due attention to issues of unemployment and discrimination against migrant workers and foreigners. In General Recommendation 18, the CESCR Committee held that States parties are under the obligation to respect the right to work by, inter alia, prohibiting forced or compulsory labour and refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including prisoners or detainees, members of minorities and migrant workers. In particular, States parties are bound by the obligation to respect the right of women and young persons to have access to decent work and thus to take measures to combat discrimination and to promote equal access and opportunities.⁴²

1.2. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

Under the auspices of the United Nations, a special legal instrument for the protection of migrant workers was adopted – the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), which entered into force on July 1, 2003.⁴³ As its name says, the Convention provisions are applied to all migrant workers and their family members, defining migrant worker as a “person who is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”.⁴⁴ What differentiates the Convention from other international conventions which directly or indirectly regulate position of migrant workers is the fact that the Convention recognizes to all persons who are, according to this convention, considered migrant workers, the right to enjoy their human rights, regardless of their legal position. The Convention’s provisions are thus applied not only to migrant workers in a regular position (migrant workers allowed to enter, stay or engage in remunerated activities in the country of their employment in keeping with the legislation of the state or international agreements adopted by that state⁴⁵), but also to persons who, pursuant to legislation of the host country, do not possess unequivocal permission of entry, stay or employment in the state (irregular migrant workers).

ICRMW provides for all migrant workers, irrespective of their status, to enjoy equal treatment as nationals in respect of remuneration, other conditions of work and terms of employment (art. 25.1). ICRMW provides that employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of the migrant workers’ irregularity in stay or employment (art. 25.3). The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families has requested States parties to require employers to explicitly state, in contracts that are free, fair and fully consented to, the terms of employment for migrant workers, including those in an irregular situation, in a language they understand, outlining their specific duties, hours of work, remuneration, days of rest and other conditions of work. In its General Comment No. 2 (2013), the Committee further directed that State parties should take effective measures against non-payment of wages, delay in payment until departure, transfer of wages into accounts that are inaccessible to migrant

41 General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009).

42 General comment No. 18, Right to work Article 6 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/18, 6 February 2006, article 23.

43 UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158. The Republic of Serbia signed the Convention on November 11, 2004, but to date has not ratified it.

44 Article 2, Para 1, of the International Convention on the protection of migrant workers and their family members, Article 2, Para 1.

45 Article 5, indent b) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

workers, or payment of lower wages to migrant workers, especially those in an irregular situation, than to nationals (para. 63).

1.3. Human Rights Law of the Council of Europe System

Respect and improvement, protection and development of human rights are requisite for membership of the Council of Europe. Article 3 of the Council of Europe Statute envisages that each contracting party “needs to accept principles of the rule of law and fundamental freedoms of all persons under its jurisdiction”.⁴⁶

The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or ECHR), represents the main instrument of the Council of Europe in the field of human rights, primarily civil and political ones. The European Convention on Human Rights includes explicitly only one classic social right: the right to education, recognized at Article 2 of Protocol 1.

The arbiter of the rights of the European Convention on Human Rights is the European Court of Human Rights (ECtHR). Despite the limited explicit basis for economic, social and cultural rights under ECHR, throughout its history, the Court has been called on to rule extensively on matters in economic, social and cultural rights areas, including as concerns non-citizens. It is done so within the provisions set out under the European Convention. Particularly extensive jurisprudence in this area has developed under Article 8 (right to private and family life), Article 1 of Protocol 1 (right to peaceful enjoyment of one’s possessions), Article 6 (right to fair trial), and Article 14 (ban on discrimination), but aspects can be found also in other areas of the Court’s jurisprudence, such as under Article 4, which guarantees prohibition of slavery or forced labor.

For example, in case of *Siladin v. France*⁴⁷, the Court found France in violation of Article 4 in a case concerning a female Togolese national who lived in Paris, who had served as an unpaid servant for several years as minor. In the case of *C.N. v. Great Britain*,⁴⁸ C.N. was a worker who entered Great Britain irregularly and worked as a maid for an older couple. She had only one day off a month, was not paid, had her passport taken away, and threatened to be reported to the authorities and deported.

Relying on Article 4 of the European Convention (Prohibition of slavery and forced labour), the applicant submitted that French criminal law did not afford her sufficient and effective protection against the “servitude”, or at the very least against the “forced and compulsory” labour which in practice had made her a domestic slave. In this case the Court considered that the applicant had, at the least, been subjected to forced labour and held in servitude within the meaning of Article 4 of the Convention. However, the Court held that it could not be considered that the applicant had been held in slavery in the traditional sense of that concept.⁴⁹

In the case of *M. S. S. v. Belgium and Greece*⁵⁰, despite the fact that the European Convention does not guarantee right to housing, the European Court judged that the applicant was not allowed the rights recognized to him/her as a poor asylum-seeker under national law, including social rights, such as provision of shelter, food and hygiene, thus violating Article 3 of ECHR.

National courts have also directly applied ECHR law to protect non-citizens. For example, in the United Kingdom, a number of destitute asylum seekers successfully argued that the denial of social benefits and the right to work, constituted inhuman and degrading treatment violating Article 3 ECHR.⁵¹

46 Ibid.

47 *Siladin v. France*, ECHR, Application no. 73316/01, from 26 July 2005.

48 *C. N. v. Great Britain*, ECHR, Application no. 4239/08, from 13 November 2012.

49 As also demonstrated in the case *Siladin v. France*.

50 *M. S. S. v. Belgium and Greece*, ECHR, Application no. 30696/09, from 21 January 2011.

51 House of Lords, SESSION 2005–06 [2005] UKHL 66 on appeal from: [2004] EWCA Civ 540.

The European Social Charter,⁵² was adopted in 1961. A Revised European Social Charter was adopted in 1996. The Charter and Revised Charter include a number of rights regarding housing, employment and work, healthcare, social protection and prohibition of discrimination. The European Committee for Social Rights is the arbiter of the Charter and Revised Charter.

In terms of equality and discrimination, the ECSR has stressed the necessity to have legislation in place preventing all forms of discrimination, whether direct or indirect, in employment, on the grounds of sex, race, ethnic origin, age, disability, religion or belief, sexual orientation, political conviction, etc. It concerns both the recruitment procedure and the general conditions of employment, including remuneration, promotion, training, transfer and dismissal. The Committee has held that differences in treatment between people in comparable situations constitutes discrimination in breach of the Revised Charter if it does not pursue a legitimate aim and is not based on objective and reasonable grounds. Discrimination may arise from measures applied uniformly, without taking into consideration relevant differences and the disproportionate impact they may have on certain groups or persons such as ethnic minorities. The Committee has held that certain rights are recognized to all persons staying within the territory of contracting states, including irregular migrants.⁵³

2. International Human Rights Standards Relevant for Exercising of the Right to Education

Education is a necessary precondition for the enjoyment of other human rights, which significantly contribute and affects the general improvement of living conditions. The right to education was first made into a binding international legal obligation in the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵⁴ The ICESCR recognises that everyone has the right to education directed towards the full development of the human personality, the sense of dignity, and respecting human rights and fundamental freedoms.⁵⁵ This right to education should enable all people to participate effectively in a free society, promote understanding, tolerance, and friendship among all types of people, and help maintain peace.⁵⁶ Education is also related to many other human rights because the enjoyment and realisation of other rights is dependent upon education.⁵⁷ Because of this relationship, the right to education illustrates the indivisibility and interdependence of all human rights.⁵⁸ “As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can ... obtain the means to participate fully in their communities.”⁵⁹ Education creates opportunities and enables people to enjoy the rights they are entitled to. In its General Comment No.1⁶⁰, the United Nations Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families states that “signatory states shall ensure that migrant children, irrespective of their migration status,

52 The Republic of Serbia enacted the Revised European Social Charter in 2009 (Official Gazette of the RS – international treaties, No. 42/2009). Before that time the National community of Serbia and Montenegro, which entered the European Council as 45th member, and upon reception bound itself to ratify Revised European Social Charter by 2005. Meanwhile, Montenegro became independent (2007), and Serbia as a successor of National Community of Serbia and Montenegro in the European Council, ratified the Revised European Social Charter in 2009.

53 See, for instance. *International Federation of Human Rights League v. France*, 14/2003, complaint No. 8, December 2004.

54 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. G.A.O.R., 21st Sess., Supp. No. 16, at arts. 1, 3, 6, 15, U.N. Doc. A/6316 (1966), 993 UNTS 3, (1976), Art. 13.

55 *Ibid.*, Art. 13(1).

56 *Ibid.*

57 Nowak, Manfred, ‘The Right to Education,’ in Asbjon Eide, Catarina Krause, and Allan Rosas (eds.), *Economic Social and Cultural Rights. A Textbook Second Revised Edition* (Kluwer Law International: The Hague, The Netherlands, 2001), 245; Committee on Economic, Social and Cultural Rights [herein after CESCR], General Comment no 13, The right to education (article 13 of the Covenant), U.N. Doc. E/C.12/1999/10 (1999), para. 1.

58 United Nations General Assembly, Human Rights Council Annual report of the United Nations High Commission for Human Rights and reports of the Office of the High Commission and the Secretary-General. Thematic study on the right of persons with disabilities to education. A/HRC/25/29 (18 December 2013), para. 9 [herein after Human Rights Council]

59 *Ibid.*

60 Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No. 1: General comment No. 1 on migrant domestic workers, CMW/C/GC/1, 23 February 2011, para. 57

have access to compulsory and free primary education, as well as secondary education under the same conditions as for the nationals of the respective states...”. The United Nations Committee on the Rights of the Child, in its General Comment No. 6, invites signatory states to ensure that the access to education is maintained during each phase of migration procedure.⁶¹

The right to education primarily includes the right to acquire education, primarily primary education to be compulsory, free and accessible to all without discrimination.⁶² As for the other levels of education, the State shall ensure the right of equal access to secondary education, and to make it generally available and accessible to all. A similar obligation exists in terms of higher education.

As noted below, in recent jurisprudence by the European Court of Human Rights, as well as in the work of Treaty Bodies supervising international human rights treaty law, an increasingly strong accent has been placed on the ban on segregation in education.

2.1. International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights recognizes to all people the right to education so that everyone can fully develop their personality and dignity. In terms of education, the International Covenant on Economic, Social and Cultural rights, dedicates two Articles to the right to education (Articles 13 and 14). Article 13 is the longest provision of the Covenant, and the most comprehensive Article referring to the right to education in international documents related to human rights.

The United Nations Committee on Economic, Social and Cultural Rights (CESCR Committee), in its General comment no. 13 (1999)⁶³, states that education is “the primary means by which economically and socially marginalized adults and children can overcome poverty and attain the funds with which to fully participate in their community.”⁶⁴ Access to public pre-school facilities or schools shall not be denied or confined due to irregular position in regard to stay or work of child’s parents or due to irregularity of child’s stay in the country where his/her parents are working.

The CESCR Committee further states that education on all levels should be available, accessible, acceptable, and adaptable.⁶⁵ Availability relates to creating and maintaining functional educational facilities, which include all the materials and resources needed for the education of the learners.⁶⁶ Education must be accessible to all learners.⁶⁷ This includes a non-discriminatory education that is physically and economically accessible to all. Acceptability of education refers to the form, content, curricula, and overall substance of education.⁶⁸ These must be acceptable to give all students a quality education. Finally, education has to maintain adaptability to adjust to the changing and diverse needs of students.⁶⁹ Education is not a “one-size-fits-all” concept, and because education is a right, it must adapt to the learning needs of students – not the reverse.

The CESCR Committee adopted the General Comment no. 11 of the Article 14 (action plans for primary education).⁷⁰ The CESCR Committee, in its General Comment no. 13⁷¹, states that education is “the primary tool by which economically and socially marginalized adults and children can overcome

61 This principle was supported by the Committee for Economic, Social and Cultural Rights in its General Comment No. 20 (2209), Para 30 and No. 13 (1999), Para 34.

62 Ibid. 328

63 General Comment No. 13: The Right to Education (Art. 13 of the Covenant).

64 Paragraph 1 of General Recommendation 13.

65 CESCR, General Comment no 13, (n 50), para. 6.

66 Ibid., para. 6(a).

67 Ibid., para. 6(b).

68 Ibid., para. 6(c).

69 Ibid., para. 6(d).

70 Committee on Economic, Social and Cultural Rights, General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant), 10 May 1999, E/1992/23.

71 Committee on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10.

poverty and attain the funds with which they can fully participate in their community.” (Paragraph 1). Its general comment no. 13 (1999), recalls that “primary education must be universal, ensure that the basic needs of all children in terms of learning are met taking into account the culture, needs and possibilities of the community” (paragraph 9). To ensure the right to basic education, the CESCR Committee in its general comment no. 11 (1999), indicates the state need to abolish all direct costs of education, such as tuition fees, as well as to mitigate the negative impact of indirect costs such as the cost of school supplies and uniforms (paragraph 7). General comment no. 11 and General comment 13 are complementary and shall be referred to simultaneously. The Committee is aware of the fact that the right to education for the millions of people worldwide is the goal which can hardly be achieved. Furthermore, that goal is even harder to achieve in multiple cases. The Committee is also aware of great deal of major structural and other obstacles that prevent many contracting states to take full advantage of the Article 13. The Committee points to the Article 2 of the Convention on the Rights of the Child and Article 3 (e) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination refers to all school-age persons residing on the territory of contracting state irrespective of their legal status, including non-residents as well.

2.2. Convention on the Rights of the Child

The Convention on the Rights of the Child⁷² provides a catalog human rights relating to children.⁷³ The Convention obliges states to respect and ensure the rights of every child of jurisdiction and regardless of race, sex, color, origin, language, religion, political or other opinion, ethnic or social origin and other grounds.⁷⁴ The Convention provides a catalog of human rights related to migrant children who are at particular risk because they have changed their place of residence and thus their tradition and culture, and they must be allowed to join the mainstream in the new society, and to preserve their own cultural and artistic values and practices.⁷⁵ In Article 22 of the Convention, states parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

General comment No. 6 is particularly relevant for unaccompanied children, which refers to the treatment of unaccompanied or separated children who are outside the country of origin or the country in which they reside as well as residents, and which therefore are in a particularly difficult position. The Committee underlines that children are often deprived of many rights, and therefore states need to provide protection and assistance. States have an obligation to prevent discrimination of unaccompanied, separated children, children asylum seekers, refugee children, and to take all measures to protect these children from abuses.⁷⁶

The Convention on the Rights of the Child requires State parties to make educational and vocational information and guidance available and take measures to encourage regular attendance at schools (art. 28.1 (d)–(e)). The Committee on the Rights of the Child strongly encourages States “to expeditiously reform legislation, policies and practices that prevent or discriminate against children affected by migration, in particular those in an irregular situation, from effectively accessing services and benefits such as education, among others.”⁷⁷ In its general comment No. 6, it furthermore identified several measures

72 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 157.

73 According to ICRC, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier (Article 1).

74 General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts, CRC/C/GC/17, 17. April 2013, article 16.

75 General comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, 1 September 2005.

76 Ibid, 3, 13 and 31.

77 Committee on the Rights of the Child, Report of the 2012 Day of General Discussion: The Rights of All Children in the

that should be taken to protect the access to education of separated and unaccompanied children. In particular, it affirmed that “every unaccompanied and separated child, irrespective of status, shall have full access to education in the country that they have entered Such access should be granted without discrimination and in particular, separated and unaccompanied girls shall have equal access to formal and informal education, including vocational training at all levels” (para. 41). The unaccompanied or separated child should be registered with appropriate school authorities as soon as possible and get assistance in maximizing learning opportunities. Human rights mechanisms have recommended that States should institute information campaigns in order to tackle discrimination which may prevent children from integrating fully in the school system. Such campaigns should be aimed both at public officials working on migration, especially at local level, as well as at the general public.⁷⁸ Once it has been determined that a separated or unaccompanied child will remain in the community, the relevant authorities should conduct an assessment of the child’s situation and then, in consultation with the child and his or her guardian, determine the appropriate long-term arrangements within the local community and other necessary measures to facilitate such integration. The long-term placement should be decided in the best interests of the child and, at this stage, institutional care should, wherever possible, serve only as a last resort. The separated or unaccompanied child should have the same access to rights (including to education, training, employment and health care) as enjoyed by national children. In ensuring that these rights are fully enjoyed by the unaccompanied or separated child, the host country may need to pay special attention to the extra measures required to address the child’s vulnerable status, including, for example, through extra language training.

2.3. International Convention on the Elimination of All Forms of Racial Discrimination

In International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁷⁹, the term “racial discrimination” means any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizen.⁸⁰ In article 3 of ICERD, States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction. ICERD further commits States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the scope of rights, especially economic, social and cultural rights, including in the field of education.

Under ICERD, States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.⁸¹

As concerns non-citizens, the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee), the arbiter of the ICERD treaty, has adopted General Recommendation 30⁸², a document definitively setting to rest the idea that “nationality” can be cleaved from the racial discrimination acquis

Context of International Migration, para 86.

78 Ibid.3, 13 and 31.

79 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195

80 Article 2 ICERD.

81 Article 7 ICERD.

82 United Nations Committee on the Elimination of Racial Discrimination, General Recommendation No. 30 CERD/C/64/Misc.11/rev.3

without significantly damaging that body of law. Key elements included in General Recommendation 30 include the requirement that States “ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens”, as well as that States “ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent or national or ethnic origin”. General Recommendation 30 holds that the State must remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health. Specifically, General Recommendation 30 requires that States ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State part and to avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education;

2.4. Human Rights Law of the Council of Europe System

European Convention for the Protection of Human Rights and Fundamental Freedoms

Under the European Convention on Human Rights (ECHR), the right to education is guaranteed by Article 2 of Protocol No. 1 ECHR. ECHR Article 2 of Protocol No. 1 states that “no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”.⁸³ Discrimination is banned under ECHR as a result of Article 14, as well as as a result of Protocol XII to the Convention.

The ECtHR has raised the right to education to one of the “most fundamental values of the democratic societies making up the Council of Europe”, and as such, constitutes a right to which every person is entitled. It insisted on the fact that such a fundamental right cannot be interpreted restrictively, and affirmed the universality of the right to education by holding that the exclusion of children because their parents were not regularly registered migrants violated the ECHR and the right to education. In line with the provisions of the European Social Charter (revised) and the case law of the European Committee on Social Rights, the ECtHR has established that states ought to take the necessary measures to ensure the accessibility of primary, secondary and, lastly, tertiary education, which comprises college and university.

The right to education covers a right of access to educational institutions existing at a given time⁸⁴ transmission of knowledge and intellectual development⁸⁵) but also the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which have been completed (Belgian linguistic case, §§ 3-5, pp. 30-32), for example by means of a qualification.

Article 2 of Protocol No. 1 concerns elementary schooling (but also secondary education), higher education and specialized courses. Thus, the holders of the right guaranteed in Article 2 of Protocol No. 1 are children, but also adults, or indeed any person wishing to benefit from the right to education.⁸⁶ Furthermore, the State is responsible for public but also private schools.⁸⁷ In addition, the State cannot delegate to private institutions or individuals its obligations to secure the right to education for all. Article 2 of Protocol No. 1 guarantees the right to open and run a private school, but the States do not have a positive obligation to subsidise a particular form of teaching lastly, the State has a positive obligation to protect pupils from both State and private schools from ill-treatment.

83 Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9.

84 Belgian Linguistics Case (Nos. 1 & 2,) (No.1) (1967), Series A, No.5 (1979-80) 1 EHRR 241 (No.2) (1968), Series A, No.6 (1979-80) 1 EHRR 252

85 See more in Campbell and Cosans v. the United Kingdom, ECHR, Application no. 7511/76; 7743/76, of 25 February 1982.

86 European Court of Human Rights Guide on Article 2 of Protocol No. 1 – Right to education 13.

87 See more in Kjeldsen, Busk Madsen and Pedersen v. Denmark, ECHR, Applications no. 5095/71; 5920/72; 5926/72, of 7 December 1976.

*Belgian Linguistic Case*⁸⁸ is one of the first cases at international law which consider how broad the principal of non-discrimination is in practice. Court decided that the right to education does not extend to require States to establish at their own expense, or to subsidies, education of any particular type or at any particular level, in other words it does not guarantee children or parents a right to obtain instruction in a language of his choice. Although Article 2 of Protocol 1 does not guarantee a right to ensure that public authorities create a particular kind of educational establishment, a State which had set up an establishment is prohibited from laying down entrance requirements that are discriminatory. As such, there had though been a violation of Article 14 of the Convention (anti-discrimination) in conjunction with Article 2 of Protocol 1 as the legislation prevented children from having access to French-language schools in certain communes of Brussels, solely on the basis of the residence of their parents. This was not the case for Dutch-language schools and thus constituted discriminatory treatment.

In the case of *Timishev v. Russia*, the Court held that “the applicant’s children were refused admission to the school which they had attended for the previous two years. The Government did not contest the applicant’s submission that the true reason for the refusal had been that the applicant had surrendered his migrant’s card and had thereby forfeited his registration as a resident in the town of Nalchik. As noted above, the Convention and its Protocols do not tolerate a denial of the right to education. The Government confirmed that Russian law did not allow the exercise of that right by children to be made conditional on the registration of their parents’ residence. It follows that the applicant’s children were denied the right to education provided for by domestic law. Their exclusion from school was therefore incompatible with the requirements of Article 2 of Protocol No. 1”⁸⁹.

In a series of cases concerning Roma, ECtHR has repeatedly held that various forms of segregation constitute discrimination in education and therefore violate ECHR Article 14, taken in conjunction with Article 2 of Protocol 1. In *D.H. and Others v. The Czech Republic*⁹⁰, the ECtHR ruled that segregating Romani students in special schools is a form of unlawful discrimination that violates their right to education. Two other judgments -- *Sampanis v. Greece*⁹¹ and *Oršuš and Others v Croatia*⁹² are particularly relevant for the education of migrant and refugee children. In *Sampanis*, ECtHR found Greece in violation for the discriminatory non-inclusion of children in school. In *Oršuš*, Croatia was deemed in violation for maintaining separate arrangements pre-textually based on the lack of competence in Croatian language by the children concerned.

European Social Charter and Revised European Social Charter

According to Article 17 of the Revised European Social Charter (ESC(r)), states must ensure an “effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities”. To this end, the parties have an obligation to take measures regarding education: – to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose. The appendix to the ESC(r) further explains that the provision applies to all persons, including migrants⁹³, below the age of 18 years unless according to the law applicable, the age of majority is attained earlier. Finally, the appendix to the ESC(r) adds that there is no obligation to provide compulsory education up to 18 years of age. According to

88 *Belgian Linguistic Case*, Op. cit.

89 *Timishev v. Russia*, ECHR, Application No. 55762/00 and 55974/00 of 13 December 2005.

90 *D.H. and Others v. the Czech Republic*, ECHR, Application No. 57325/00 of 7 February 2006.

91 *Sampanis and Others v. Greece*, ECHR, Application No. 32526/05 of 5 June 2008.

92 *Oršuš and Others v Croatia*, ECHR, Application No. 15766/03 of 16 March 2010.

93 According to the appendix to the ESC(r) (Scope, paragraph 1), the right to education is granted only to migrants lawfully resident and nationals of another contracting state. Nevertheless, the ECSR has ruled that the part of population which does not fulfil the definition of the appendix cannot be deprived of their rights linked to life and dignity under the ESC(r) (ECSR, *COHRE v. Italy*, Complaint No. 58/2009, merits, 25 June 2010, paragraph 33), cited by: Yannis Ktistakis, *Protecting migrants under the European Convention on Human Rights and the European Social Charter*, Handbook for legal practitioners, Council of Europe, February 2013, 59.

the appendix to the ESC(r), the right to education is granted only to migrants with legal residence and nationals of another contracting state. Nevertheless, the European Committee of Social Rights (ECSR), the arbiter of the law of the European Social Charter and Revised Charter, has ruled that the part of population which does not fulfil the definition of the appendix cannot be deprived of their rights linked to life and dignity under the ESC.

The jurisprudence of the ECSR has provided interpretation of the nature of states' obligations in order to satisfy the requirements of accessibility and effectiveness of the right to education. The ECSR has established that the scope of the right to education in terms of persons concerned, under paragraphs 1 and 2, is wide and protects all children. Moreover, access should be guaranteed on an equal basis and without discrimination, when necessary through special measures for disadvantaged children. Therefore, the ECSR has stressed the necessity to pay particular attention to children belonging to vulnerable groups and minorities, such as children seeking asylum, refugee children, children in hospital or children deprived of their liberty, etc. Measures should be taken to ensure that these children are integrated into mainstream education facilities and have access to ordinary education schemes. The ECSR has also provided a series of prerequisites in order to guide states in the establishment of a system of education compatible with the requirements of accessibility and effectiveness of the ESC(r). Hence, a functioning system of primary and secondary education should, *inter alia*:⁹⁴ – include an adequate number of schools; – ensure a fair geographical distribution, especially between rural and urban areas; – aim at enrolling 100% of children of the relevant age; – aim at reaching a reasonable teacher-pupil ratio and adequate class sizes; – establish a monitoring mechanism to ensure the quality of education and of teaching; – ensure that education is compulsory until the minimum age for admission to employment. In addition, pursuant to Article 17.2 ESC(r), primary and secondary education must be free of charge. The ECSR explained that this requirement concerns only the basic education system. However, it highlighted the existence of hidden costs related to education, such as books or uniforms, which could impede vulnerable groups' access to education.

3. Other Rights of Relevance for the Effective Realization of the Right to Education: Interrelation with Right to Health and Right to Child Protection

CESCR Committee General Comment no. 13 on the right to education sets out that education is both a human right and an indispensable means of realizing other rights, an empowerment right that should be used as a powerful vehicle by which marginalized children can participate fully in their communities.⁹⁵ As such, the right to education is influenced by a range of factors – other rights' enjoyment, availability of services and support, protection and non-discrimination. CRC General Comment no. 15 introduces the narrative of interdependence and equal importance of all rights for the development of child's mental and physical abilities, personalities and talents.⁹⁶

The principle of indivisibility, interdependence and interrelation of all human rights is a well pronounced paradigm in international human rights law. The Vienna Declaration and Programme of Action in 1993 confirmed all human rights to be universal, indivisible, interdependent and interrelated, regardless of predominantly positive or negative duties (social/political action or refraining from the State).⁹⁷ It has been confirmed on many occasions that every single human right, be it in the corpus of civil/political or economic, social and cultural rights would, towards the goal of full enjoyment demands both positive and negative obligations from the States and other duty bearers.

94 ECSR, "Conclusions 2003", conclusions concerning Article 17, p. 174.

95 Committee on Economic, Social and Cultural Rights, General Comment no. 13 on the Right to Education, 1999, para 1.

96 Committee on the Rights of the Child, General Comment no. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health, 2013

97 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 1993

The interdependence between the right to education and other rights and determinants must be acknowledged and included in observations related to the implementation of this right. The reasons why this is particularly important lie in the very vulnerability of the rights holders, wide responsibility from other actors – parents, State systems, immediate environment and others, as well as in the complexity and significance of the educational practices for the child’s development. While a lack of education, or hindered access to regular education may decrease one’s access to other rights, benefits and development, at the same time, shortcomings in the enjoyment of other rights and obstacles arising from social circumstances will affect the enjoyment of the right to education. The positive effects of interdependence are also very strong in practice. When a human rights approach is applied to serve the benefit, development and well-being of the child, the issues of health, education or security are being addressed integrally, on the basis of interdependence between different determinants and elements that are crucial for the full enjoyment of any human right.

The overarching principle in approaching child’s rights and wellbeing is the principle *child’s best interest*. The UN Convention on the Rights of the Child holds a set of protection rights, out of which the holistic approach to child’s overall wellbeing and best interest is contained in Article 4 CRC on protection of rights. This norm imposes duties on State to take all available measures to meet fulfillment and protection of all rights of the child – in the domain of social protection, health, education, in order to create environment where children can reach their full potential. Physical, mental and social wellbeing of the child are indivisible in approaching the child’s right to protection and to the fulfillment of the best interest of the child. Here again an emphasis is on the interrelatedness of different domains, entitlements and needs concerning child’s wellbeing, protection and best interest. Relevant in the domain of interpreting and approaching the best interest of the child are the guiding principles of the CRC – non-discrimination, participation, survival and development, which all should be taken into account.

The right to health, as the terrain for one of the most fundamental values for human life, wellbeing and security, has a particularly underlying interdependence with the right to education and protection of a child. This connection has been noted in the work of the treaty bodies, through observing the underlying determinant of the right to health. Full enjoyment of the right to health will contribute to better health status of a child, his physical and mental wellbeing, and therefore contribute to easier and fuller access to the enjoyment of the right to education. Similarly so, full enjoyment of the right to education will bring benefit to the child, his mental and physical wellbeing and development. Both rights are included in the protection of the child’s rights under Article 4 CRC, and seen as crucial segments of the child’s best interest, development and integral approach to child’s protection.

IV MIGRATION, HUMAN RIGHTS, AND GOVERNANCE IN THE REPUBLIC OF SERBIA

1. Migrants and Refugees in the Republic of Serbia⁹⁸

During the past two decades, the Republic of Serbia has experienced various types of migration. Until recently, most of these movements of people have concerned either persons leaving Serbia, or ethnic Serbs and others coming to Serbia, in the context of the conflicts of the end of the former Yugoslavia.⁹⁹ However, Serbia has always had non-Yugoslavs arriving and establishing through various legal means. Beginning in particular in late 2014 and 2015, a heightened number of migrants and refugees began arriving in Serbia along the so-called “Balkan Land Route”, for the most part aiming to continue on to northern Europe. In 2015, circa 580,000 persons passed through Serbia (see below). Efforts by a concert of states to close the Balkan Land Route in 2016 have been only partially successful. At the time of writing, there are circa 6000 persons in Serbia, the majority “stranded” while hoping to continue on to northern Europe. Political developments related to this episode of large-scale movement of people have also given rise to the forced return of persons to Serbia on the basis of a Readmission Agreement with the European Union. The latter group of persons is comprised very disproportionately of Roma, Ashkalis and Egyptians.¹⁰⁰

In the Republic of Serbia, according to the Migration Profile of Serbia, published by the Commissariat for Refugees and Migration in 2016, there were 203,140 displaced persons coming from Kosovo¹⁰¹ and 29,457 of recognized refugees from other parts of the former Yugoslavia.¹⁰²

In the period from 1 January 2016 to 31 December 2016, the National Employment Service (NES) issued in total 7139 work permits to foreign nationals with temporary residence and 201 work permits to foreigners to foreign nationals with permanent residence. On 31 December 2016 there were (700,947,096 of active unemployed persons enlisted with National Employment Service (NES), of which 0, 11% registered as foreigner citizens.

In 2016, there were 6325 temporary residence approved, for the first time. By classification according to the approval, it is noted that in 2014, 2015 and 2016, the most common basis for obtaining temporary residence was based on work (in the order of 41.7%, 42.9% and 43%).

At the end of 2016, there were 619 foreigners in the Republic of Serbia with temporary stay on the basis of education, which present decrease in comparison to 2015, with 1674 or in comparison to 2014, with 1,288 persons.

98 This section is based in part on information from the “Migration Profile of the Republic of Serbia” for 2016, an official document compiling data, classified according to the Regulation 862/2007 of the European Parliament. The document is available at: <http://www.kirs.gov.rs/docs/migracije/migracioni%20profil%202016.pdf> . Other data provided here is based on regular briefings from UNHCR.

99 Announcement of the Commissariat for Refugees and Migrations, On migrations, see <http://www.kirs.gov.rs/articles/migo.php?type1=59&lang=SER&date=0>

100 During 2015, according to monitoring at the Belgrade airport, 2866 persons were returned to Serbia, of whom 2340 were Romani. The vast majority of returns – 2551 persons total -- were from Germany. Of these, 135 persons officially were homeless, according to the Serbian Government’s Commissariat for Refugees and Migration.

101 According to Security Council Resolution 1244 of 1999.

102 Migration profile of the republic of Serbia 2016, 55 and 56.

In 2016, the number of foreigners who were imposed a measure of cancellation of residence in the Republic of Serbia is 6,231. Compared to 2015, this number has drastically decreased, or decreased by over 9,000 people. Of those who have been canceled in 2016, more than half of them are citizens of Afghanistan and Pakistan.

The number of citizens of other countries and stateless persons who have been imposed a protective measure for the removal of a foreigner from the territory of the Republic of Serbia in 2016 is 164.¹⁰³

From 1 January 2015 to 31 December 2015, 579,518 migrants from Asia, the Middle East and Africa crossed national border of Serbia and expressed their intention to seek asylum. This number was much higher than the number of asylum seekers in 2014 (16,500). During that period, the number of asylum seekers in the Republic of Serbia started to increase rapidly; however, the number of asylum seekers accommodated in the asylum centers gradually decreased, and some asylum centers were eventually emptied. Migrants transiting through Serbia stayed within its territory for just a few days, the time they needed to organize their further journey towards EU countries and due to the announcements of border closing in Europe.¹⁰⁴

In 2016, from 1 January to 31 December, there were 12,821 expressed intentions for asylum in the Republic of Serbia.

In 2017, from 1 January to 30 November, there was 5,702 expressed intentions for asylum in the Republic of Serbia. Of that number 215 foreigners were registered, 208 asylum applications were submitted, 96 interviews were conducted, 8 cases were rejected, 55 refused, 10 subsidiary protection were granted and 3 refugee statuses. These statistic shows that of 5,702 foreigners who expressed intention to seek asylum, only 208 people were in the asylum procedure in Serbia.

Since the beginning of application of Law on Asylum in 2008, 59 persons in total were granted subsidiary protection, and 44 persons were granted refugee status.¹⁰⁵ According to a public opinion attitude survey carried out by TNS Medium Gallup in cooperation with UNDP Serbia in March 2016¹⁰⁶, negative attitudes towards migrants arose due to fear for safety and security. On the other hand, many Serbian citizens have provided help to migrants by personally donating food and equipment, with a significantly lower level of readiness for closer interaction. Public services and hygiene (water supply, waste water system, waste and transportation) were seen as aspects most severely burdened by migrant crisis. Persons surveyed cited poverty in Serbia, as well as cultural, religious and linguistic differences, as obstacles to the acceptance of migrants and refugees in Serbia.

In the survey conducted in December 2016 as part of a project implemented by the Ana and Vlade Divac Foundation in cooperation with USAID, it was concluded that, during the period of large-scale arrival of migrants and refugees in Serbia, fear increased among the public-at-large, while empathy decreased, but also that the population that has the most contact with refugees and migrants has an overall positive attitude towards them.¹⁰⁷

2. General Overview of Policy

In September 2016, the Serbian Government Working Group on Mixed Migration Flows¹⁰⁸ adopted the Response Plan in Case of Increased Inflow of Migrants to the Republic of Serbia for the period October 2016-March 2017. The Plan envisaged the expansion of the accommodation capacities for migrants

103 Migration profile of the Republic of Serbia 2016, 36.

104 Ibid. 61

105 Data of UNHCR Office in Belgrade.

106 Research is available on : <http://www.rs.undp.org/content/serbia/en/home.html>

107 Survey is available in Serbian at: http://www.divac.com/upload/document/kljucni_nalazi_istrazivanja.pdf

108 The Working Group was established in 2015 and comprises the Minister of Labour, Employment and Veteran and Social Affairs, the Minister of Internal Affairs, the Minister of Health, the Minister of Defence, the Minister without Portfolio charged with EU Accession and the Refugee Commissioner. The Decision on the Establishment of the Working Group is available in Serbian at: <http://slg.bazapropisa.net/54-20-05-2015/29541-odluka-o-obrazovanju-radne-grupe-za-resavanje-problema-mesovitih-migracionih-tokova.html>.

in Serbia, extension of health care and provision of access to the asylum procedure to foreigners who wanted to apply for asylum. The Plan was based on several presumptions: that the uncontrolled transit of refugees and migrants via Western Balkan countries had been halted, that the number of migrants entering Serbia irregularly would drop considerably, that the number of refugees and migrants entering and leaving Serbia on a daily basis would not exceed 30, and that most refugees and migrants would not perceive Serbia as a country of asylum. The authors of the Response Plan, however, neglected the following fact: that many more migrants were entering Serbia than leaving it in 2016 (UNHCR reports showed that the average daily arrival of refugees and migrants stood at 200 in July and August and 300 in September). The Plan did not specify the legal status of foreigners irregularly present in Serbia, not wishing to seek asylum but in need of protection because they came from countries in which their liberty and security were at risk or because they find themselves in a vulnerable situation.

Most refugees and migrants still do not perceive Serbia as a country of asylum, but rather as a country of transit to states with functional asylum or migrant establishment systems, including social, economic and cultural integration programmes. This fact affected Serbia's policy on the migrants as well. A very small number of people came to Serbia intending to seek asylum in it since the Asylum Law entered into force. Most of the asylum seekers were already in Serbia on other grounds at the time the risk of persecution in their countries of origin appeared (*sur place* refugees).¹⁰⁹ On the other hand, most migrants and refugees had not planned on seeking international protection in Serbia when they were fleeing their countries of origin.¹¹⁰ The major changes in the neighbouring countries' policies on migrants in late 2015 and early 2016 prompted more and more people to decide to seek asylum in Serbia because they were unable to leave Serbia¹¹¹ or would put themselves at great risk if they did.¹¹² Migrants who have sought asylum usually filed their applications after having spent a few weeks or few months in Serbia.¹¹³ Furthermore, the Serbian asylum procedure still cannot be described as efficient, although the largest number of people -- 42 in total -- were granted international protection in Serbia in 2016 since the Asylum Law entered into force in 2008. On 26 December 2016, the Serbian Government at long last adopted the Bylaw on the Integration of Persons Granted Asylum in Social, Cultural and Economic Life, the enforcement of which was due to begin in 2017. Nevertheless, the government has not adopted any bylaw or propose programs or measures regards other categories of migrants, especially those in irregular situations.

In total 5,702 foreigners expressed the intention to seek asylum and/or were registered as asylum seekers in Serbia from 1 January to 31 December 2017, i.e. much fewer than in 2016, when 12,821 foreigners expressed the intention to seek asylum or in 2015, when as many as 577,995 foreigners expressed the intention to seek asylum.

Of the 5,702 foreigners who expressed the intention to seek asylum in 2017, 4,733 were men and 969 were women; 2,465 of them were children, 146 of whom unaccompanied.

109 For instance, a number of Libyan nationals, had already been working, studying and/or had formed a family in Serbia.

110 But in Germany, Austria, the Scandinavian and Benelux countries, et al.

111 In its August 2016 Report No. 281-60/16 on the Visit to Informal Venues in Belgrade at which Refugees and Migrants Have Been Rallying, the National Preventive Mechanism quoted allegations by a group of refugees from Afghanistan and Pakistan (including children) who had tried to enter Hungary through the green border. They claimed that as soon as they went through the fence, the Hungarian border police apprehended them and applied force against them, resorting to rubber truncheons, tear gas and service dogs to push them back to Serbia. The Report is available at: <http://www.npm.ils.rs/attachments/article/195/Report%20Belgrade%20Park.pdf>. The NPM published the same allegations regarding the practice of the Hungarian border authorities in its Report on the Visit to the Subotica Reception Centre, the Horgoš and Kelebija Border Crossings and the Home for Children with Disabilities Kolevka – Subotica, No. 281-62/16, 13 September 2016. Available at: <http://www.npm.ils.rs/attachments/article/193/Report%20Subotica%20Horgos%20Kelebija%20Kolevka.pdf>.

112 E.g. with the help of organised crime groups involved in smuggling or by attempting to circumvent the procedures at the Hungarian border. More in "Hungary Steps up Control, Pushes Migrants back behind the Fence," N1 info, 6 July 2016, available in Serbian at: <http://rs.n1info.com/a174583/Svet/Region/Madjarska-pojacala-kontrolu-vraca-migrante-iza-ograda.html>.

113 Such as the hundreds of people who spent up to several months on Belgrade streets, in abandoned barracks, or the border area with Hungary. More in the report "Migrants to be covered by Asylum System, Question is How," N1 info, 23 November 2016, available in Serbian at: <http://rs.n1info.com/a209990/Vesti/Vesti/Migrante-ukljuciti-u-azilantski-sistem.html>.

At early December 2017, more than 5,000 refugees and migrants were reportedly present in Serbia accommodated in 18 government facilities: five Asylum Centers and 13 Transit and Reception Centers.

Apart from the five Asylum Centres¹¹⁴, in which foreigners who express the intent to seek asylum are accommodated and where the official asylum procedure actions are to be conducted, the 2015/2016 episode of heightened arrival of migrants and refugees to Serbia led the Serbian authorities to successively open Reception Centres at the borders with Bulgaria, Croatia, the former Yugoslav Republic of Macedonia, and Hungary. The purpose of establishing these Centres, apart from providing the migrants with urgent humanitarian accommodation, cannot be clearly deduced from the available information and the practices of the competent authorities. Some of them were opened as “temporary registration centres”, but the migrants were not registered in them. It thus remained unclear how they differed from the other Reception Centres. Furthermore, some of the reception centres operate under the jurisdiction of the Commissariat for Refugees and Migration and others are entities under the jurisdiction of the Ministry of Labour, Employment and Veteran and Social Affairs. Reception Centres had been opened pursuant to a Government decision adopted at the proposal of the Commissariat for Refugees and Migration.¹¹⁵ Reception Centres were opened in Preševo, Miratovac and Bujanovac, near the border with former Yugoslav Republic of Macedonia, in Bosilegrad¹¹⁶, Dimitrovgrad and Pirot¹¹⁷, near the border with Bulgaria, in Sombor,¹¹⁸ Šid, Principovac and Adaševci, at the border with Croatia, and in Subotica and Kanjiža, near the border with Hungary. The Miratovac and Kanjiža Reception Centres were closed by the end of 2016, as the refugees and migrants changed route, with more of them coming from Bulgaria..

Accession to European Union presents strategic decision for the Republic of Serbia, which implies acceptance of adopted European values and standards, primarily in the area of human rights protection. Strategically, lawfully and institutionally organized field of migrations is particularly important for the accession into the EU and free movement of the Republic of Serbia nationals, for improvement of its international image, but also higher level of protection of all persons under its jurisdiction. In order to achieve this, the coordinated cooperation system of all relevant bodies and institutions must be established, from those creating policies to the operational ones, and also, in that regard, between central and local level.¹¹⁹ In July 2016, Serbia formally opened Chapter 24 and Chapter 23, which both includes issues of human rights, discrimination (Chapter 23), as well as migration and asylum policy (Chapter 24). In the context of implementing standards in the Chapter 24, Serbia also prepare Action Plan for implementation of the Chapter, which is very important for the improvement of the current situation.¹²⁰ The Ministry of the Interior of the Republic of Serbia is involved in the negotiating process with the European Union as the “lead” Ministry in the Negotiating Group for Chapter 24 – Justice, Freedom, and Security. The Action Plan for the implementation of the Chapter 24 is covering different thematic topics: Migration, Asylum, Visa Policy, External Borders and Schengen, Judicial Cooperation in Civil, Commercial and Criminal Matters, Police Cooperation, Fight against terrorism and Drugs. The Action Plan provides recommendations to the Republic of Serbia, Overall impact and Indicators of impact

114 In Krnjača, Banja Koviljača, Bogovađa, Tutin and Sjenica.

115 Article 10, Law on Migration Governance of the Republic of Serbia.

116 The first refugees were referred to the Bosilegrad Centre, under the jurisdiction of the CRM, in mid-December 2016, although the reconstruction of the old army barracks and hospital, where they were accommodated and registered, was completed in April 2016. This Reception Centre can take in up to 50 people.

117 The Reception Centre was opened on 18 December 2016 and comprises the main building and two auxiliary buildings, each with four smaller rooms. The main building houses the administrative offices, cafeteria and two large dormitories, which can accommodate up to 40 people, and two smaller dormitories, which can accommodate up to 12 people. A total of 180 people can be accommodated in the auxiliary buildings. Each building has a shared toilet/bathroom.

118 The new Reception Centre in Subotica, under the jurisdiction of the CRM, was opened on 5 November 2016 in the former army barracks. Its renovation had been funded by the German Ministry for Economic Cooperation and Development through the humanitarian organisation Help. Mostly families with children were accommodated in this Centre, which can take in up to 120 people.

119 Ibid.

120 Action Plan for Chapter 23 and 24 is available on the following webpage : <http://eukonvent.org/pravda-sloboda-i-bezbednost-2/>

regarding to each mention topic in the Plan. The main purpose of the Action Plan is to improve national legal framework and to be fully aligned with the acquis in the field of justice, freedom and security.¹²¹

3. Normative Framework in Serbia

Pursuant to the Law on Migration Governance of the Republic of Serbia,¹²² “migration is a voluntary or forced removal from the country of origin or residence due to temporary stay or permanent residence in the Republic of Serbia, and voluntary or forced removal from the Republic of Serbia due to temporary stay or permanent residence in another country (external migration), as well as the change of the place of residence within the country, or the change of the place of residence within the territory of the Republic of Serbia if the change was forced (internal migration).”¹²³ Migration governance implies collection, analysis, procession, management, exchange, recording or protection of data relevant for migration governance, establishment of indicators, data relevant for migration governance, establishment of unique system and other mechanisms for data exchange in the area of migration, establishment and suggestion of objectives and priorities of migration policy, suggestion and taking measures for implementation of migration policy and coordination of bodies dealing with migration governance, as well as contribution to other lawfully established mechanisms in the area of migrations.¹²⁴ The 2009 Migration Management Strategy for migration governance¹²⁵ envisages that the Republic of Serbia will deal with migration governance in a comprehensive way, adhering to European standards in the area of migration with respect to its own specificities. The values which form grounds for migration governance serve as the basis for: protection of state borders and all citizens alike; recognition of human rights of all migrant; facilitating integration of vulnerable migrants into society; international cooperation with countries in the region and wider, particularly with the countries of origin; ban on discrimination; facilitating family reunification; and recognizing needs of all respective parties.¹²⁶

Pursuant to the Law on Migration Governance, the Commissariat for Refugees and Migrations is the competent authority dealing with migrations.¹²⁷ Article 10 of the law regulates in detail the Commissariat’s powers, of which most relevant in the area are: establishment, recommendation and taking measures intended for integration of persons who are, pursuant to the Law on asylum, recognized the right to refuge; establishment, recommendation and taking measures intended for reintegration of returnees on the basis of the agreement on readmission; improvement of living conditions of internally displaced persons while being displaced; recommending program for the development of system of measures intended for foreigners’ families irregularly (“illegally”)¹²⁸ residing on the territory of the Republic of Serbia and proposing support program intended for voluntary return of foreigners irregularly (“illegally”) residing on the territory of the Republic of Serbia to the countries of their origin.

The Law on Migration Governance sets out a Council for dealing with migration is formed as common, competent expert body comprised of experts in the fields, and the coordinator is appointed for dealing with irregular (“illegal”) migration, who coordinates all activities and conducts operations of the Council. The Council is tasked with coordinating operations of the subjects who are implementing the Strategy aimed at opposing migrations for the period 2009-2014, notifying the Government of its

121 Action Plan for Chapter 24 is available at the webpage http://www.bezbednost.org/upload/document/akcioni_plan_za_poglavlje_24_-_mart_2016_.pdf

122 Official Gazette of the RS, No. 107/2012.

123 Article 2, Para 1 of the Law on Migration Governance.

124 Article 2, Para 4 of the Law on Migration Governance.

125 Official Gazette of the RS, No. 55/05 and No.71/05-revision, No.101/07 and No. 65/08.

126 Strategy for Migration governance, 4.

127 Before the Law on Migration Governance was enacted, the Refugee Commissariat dealt only with the issues related to refugees and displaced persons on the territory of former Yugoslavia, and since 2008 asylum seekers as well, while in 2012 its authority was expanded to migration governance.

128 As noted above, this study does not endorse use of the term “illegal” to describe migrants or migration, as a result of its stigmatizing character. Wherever possible, this study uses the term “irregular migration” or “irregular migrant”, and sets official uses of the term “illegal” in quotation marks.

implementation and eventual issues ensuing from it, and proposing measures to the Government for its revision.¹²⁹

The Law on Asylum (hereinafter LOA) was passed in 2007 and prescribes principles, conditions and procedures for granting and cessation of asylum, as well as the status, rights and obligations of asylum seekers and persons granted the right to refuge in Serbia. Thereby, this law does not apply to persons who have become refugees on the basis of the Law on Refugees of the Republic of Serbia. The Law on Asylum, apart from the right to asylum, which includes the right to refuge and the right to subsidiary protection, includes the temporary protection provided in the event of a mass influx of persons when it is not possible to conduct individual procedures for granting asylum.¹³⁰

Government adopted on 26 December Regulation on the Integration of Persons Granted Right to Asylum into Social, Cultural and Economic Life¹³¹. Regulation is offering support during integration process only to the persons who have been granted refugee status into the social, cultural and economic life in Serbia. Other migrants who are present on the territory are not recognized in this regulation, and currently there is no other regulation in Serbia which is dedicated to integration of migrants.

In the Regulation on the Integration of Persons Granted Right to Asylum into Social, Cultural and Economic Life, support should be provided through: the provision of complete and timely information about the rights, opportunities and obligations; learning Serbian language; introduction to Serbian history, culture and constitutional order; support for the integration into the education system; assistance in exercising the rights to health care and social protection and assistance for the integration into the labor market.

The integration of persons who have been granted the right to asylum into the social, cultural and economic life, shall be ensured by the Commissioner for Refugees and Migration.

Although in principle the Law on Foreigners does not apply to foreigners who have applied for asylum or have been granted asylum in the Republic of Serbia, the provisions of this law shall apply to the conditions for family reunification of persons granted subsidiary protection¹³² and expulsion of foreigners¹³³. The Law on Foreigners also applies in respect of the exercise of the rights prescribed by the law on Asylum, notably in Article 43 which foresees that persons granted the right to refuge in the Republic of Serbia shall have the same rights as permanent resident foreigners in terms of the right to work and labour rights, entrepreneurship, the right to permanent residence and freedom of movement, rights to movable and immovable property, as well as the right of association. At the time when the present study was drafted, the Law was in the process of being amended.

With an overall MIPEx¹³⁴ score of 41/100, Serbia's policies are less than halfway favorable for societal integration of migrants. The research has shown that migrants during the process of integration face more obstacles than possibilities. Serbia is considered to be new and small country of immigration in the region, along with Bulgaria and Hungary. Serbian anti-discrimination laws contribute most to setting out a human rights basis for the inclusion of migrants, which is also the case with other countries of Central Europe having similar laws. Discrimination is banned on the basis of ethnic, racial, religious or national

129 Article 12, Law on migration governance RS.

130 The subject of asylum is regulated by a large number of by-laws: the Rulebook on House Rules in the Asylum Centre (Official Gazette of the Republic of Serbia, no. 31/2008); Rulebook on housing conditions and ensuring basic living conditions at the Asylum Centre (Official Gazette of the Republic of Serbia, no. 31/2008); Regulations regarding the conduct and content of records on persons accommodated at the Asylum Centre (Official Gazette of the Republic of Serbia, no. 31/2008); Regulations on social assistance for persons seeking or who have been granted asylum (Official Gazette of the Republic of Serbia, no. 44/2008 and 78/2011); Rulebook on the content and appearance of the forms required for asylum and document which may be issued to asylum seekers and persons who have been granted asylum or temporary protection (Official Gazette of the Republic of Serbia, no. 53/2008); Rulebook on medical examinations of asylum seekers when entering the Asylum Centre (Official Gazette of RS, No. 93/2008).

131 Official Gazette RS, 101/2016.

132 Article 4 of the Law on Asylum.

133 Article 57 of the Law on Asylum.

134 Thomas Huddleston, Migration Policy Group, Serbia – Indeks razvijenosti politika integracije migranata (MIPEx), 9, December 2012, <http://www.grupa484.org.rs/publikacije/cemi/dobrovoljne-migracije/indeks-razvijenosti-politika-integracije-migranata-mipex-za-s>,

origin, as well as on other grounds, in many spheres of life, while potential victims can seek justice through mechanisms for protection against discrimination.¹³⁵

However, the state's practice is unbalanced as concerns its procedures for naturalization, permanent residence and unification (reunification) of families, as is the case in many other central European countries.¹³⁶ In Serbia, foreign workers with temporary stay, families and persons granted permanent residence, have no access to fundamental rights guaranteed in other countries, which ensue from EU regulative (such as rights ensuing from the Directive on family reunification or the Directive on permanent settlement). In addition to this, majority of migrants hardly obtain any other additional support for training, children care at schools, or participation in political life.¹³⁷

The Republic of Serbia has not developed policies nor programs relating to other migrants, such as those in transit and/or irregular situations. Although progress can be expected in the sense that Government adopted on 26 December Regulation on the Integration of Persons Granted Right to Asylum into Social, Cultural and Economic Life¹³⁸, plus process of including migrant children into education system has start during 2017, due to the currently legal gap, large number of people do not have access to many rights and therefore are unable to include themselves and their children into society. Serbian authorities have gained a lot of experience in the course of time and the process of European integration is in place, and we should use all these factors in order to briefly prepare and plan institutional mechanisms for inclusion of all migrants in the Serbian society.

4. Right to Work and Access of Migrants to the Labor Market of the Republic of Serbia

As noted above, the Republic of Serbia has been faced in the last few years with heightened numbers of persons arriving in Serbia, and therefore with very different categories of who temporarily or permanently reside in the territory of Serbia. The following section analyzes the normative framework set out under national law dedicated to right to work and the right to education, as concerns non-citizens in Serbia and their possibilities to access labor market and education system in Serbia.

4.1. General Overview of the Normative Framework

Currently, Serbia is facing a challenge in terms of migration governance, having in mind that national legal framework obligates stakeholders to provide integration services only to the persons who have been formally recognized by the national system as being refugees, i.e. granted asylum. Foreigners with regular residence in Serbia have access to a set of rights, in accordance with the law, based on their residence and work permits.

According to the current legislation, a foreigner is any person located within the territory of the Republic of Serbia, and have not Serbian, but foreign nationality.¹³⁹ Foreigners legally residing in the Republic of Serbia are persons engaged in missions of foreign and domestic companies, banks, construction sites, trade and other areas. There are also foreigners who are seeking a temporary stay on the grounds of marriage or kinship

Among immigrants in 2014, 2015, 2016 the highest number were Chinese 17% and Russian Federation nationals 12,4%. Finally, 6,325 foreigners had legal temporary stay on the work basis in 2016. Of the total number of foreigners, most were Chinese nationals (30, 5%. In the period from 1 January 2016 to 31 December 2016, the National Employment Service (NES) issued in total 7340 work permits to foreign nationals of which 981 were personal work permits. In the period from 1 January 2016 to 31 December

135 Ibid.

136 Ibid.

137 Ibid.

138 Official Gazette RS, 101/2016.

139 Law of the Foreigners, Official Gazette, 97/2008.

2016, the National Employment Service (NES) issued in total 7139 work permits to foreign nationals with temporary residence and 201 work permits to foreigners to foreign nationals with permanent residence.¹⁴⁰

In 2016, there were 6325 temporary residence approved, for the first time. By classification according to the approval, it is noted that in 2014, 2015 and 2016, the most common basis for obtaining temporary residence was based on work (in the order of 41.7%, 42.9% and 43%). Also, at the end of 2016 there were 619 foreigners in the Republic of Serbia with temporary stay on the basis of education, which represent decrease in comparison to 2015, when there were 1288 such persons.

Unemployed foreign nationals registered with NES were persons with temporary stay or permanent residence (approved by the Ministry of Interior) and are on the NES list. On 31 December 2016 there were 804 foreign citizens in total, of which 81,69 females. constituting 0.11% of the total number (700,947) of active unemployed persons enlisted with NES.

The Serbian Parliament adopted on 25 November 2014 a new Law on the Employment of Foreigners.¹⁴¹ The need for a new law has been justified on the basis of the following reasons: European integration,¹⁴² the growing economic importance of migration in relation to other migration trends, and the importance of labor migration for the development of Serbia and regulation of the labor market. This legislation should in principle set the foundation of a more comprehensive and efficient state policy and operational framework for the employment of foreigners in Serbia, and establish the legal and institutional framework for the governance of this unique vision of migration workers. It supports practical efforts aimed at promoting the employment of foreigners in accordance with the needs of the labor market of Serbia and simplified conditions for entry and employment of certain categories of foreigners (students, researchers, academics, business people, highly qualified experts).

Accordingly, the provisions of the new law specifically define the obligation to provide equal treatment¹⁴³ to foreigners when it comes to conditions of employment, wages, conditions of release and the acquisition of social benefits – e.g. in exercise of the rights related to unemployment insurance.¹⁴⁴

On the other hand, the field of labor law regulates obliges foreigners to obtain work permits for a much wider circle of foreigners. The issue of effective access to the labor market to foreigners who have applied for asylum, refugees who have been granted the right to asylum and aliens granted subsidiary protection in Serbia has not been addressed adequately. Irregular migrants are not at all included in the legal framework in this area. This issue of great significance requires harmonization not only with international conventions and the relevant EU directives, but also with the Law on Asylum. The provisions of the Law on Asylum prescribe equal status of refugees granted the right to asylum and foreigners with permanent residence in Serbia in terms of the right to work. The legislator in this case also relied on the solutions provided by the relevant EU directives governing immigration and the status of internationally protected persons and their free access to the labor market.¹⁴⁵ The provisions of the Law also contribute

140 Migration profile of the Republic of Serbia, 20 and 21.

141 Official Gazette RS, 128/14.

142 Agreement on Stabilization and Association of the Republic of Serbia to the European Union expressly provides the obligation to be on time align domestic legislation with the regulations that fall under the *acquis* of the European Communities, and drafting this law considered a number of European Union directives, which relate primarily to freedom of movement and residence, employment and ensuring the right to work under appropriate conditions.

143 Article 4, Section VII of the Law of employment of foreigners.

144 Thus, the idea is to extend the benefits so far exclusively granted to “domestic” employees when possible to foreign nationals as well who professionally engaged in the Republic of Serbia in line with this Law.

145 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, Official Journal L 180, str. 96 – 116; Directive 20 01/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 7 August 2001, Official Journal L .212/12–212/23; Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities Official Journal L 261, str. 19–23; Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

to tackling irregular migration. Pursuant to the Directive 2009/52 on minimum standards on sanctions and measures against employers of third-country nationals who are irregularly (“illegally”) staying in a Member State¹⁴⁶, non-regular or unlawful employment is sanctioned and financial punishment is imposed on employers who employ irregular migrants.¹⁴⁷

4.2. Access of Migrants to the Labor Market of the Republic of Serbia

Under Serbian law, foreigners who do not have legal grounds to stay in the territory of the Republic of Serbia are called “illegal migrants”. This is a foreigner who does not regularly enter the territory of the Republic of Serbia (entry outside a border crossing, the entry of counterfeit or otherwise irregular travel document) or who enters the country regularly, but after the expiry of the legal stay has not left the territory of Serbia. Serbia is faced with very mixed migration profile of people, and it is very difficult to define precisely the profile of migrants, bearing in mind that there are no special procedures in place in Serbia for the determination of their status, but formally and statistically the largest number of migrants are registered as aliens seeking asylum in Serbia.

For example, in 2017, a total of 5, 702 persons have expressed an intention to seek asylum, but only 208 asylum applications were submitted before the competent authorities. This actually means that only 5, 496 thousand people formally expressed their intention to seek asylum, because there is no other way to legalize their stay in Serbia and to provide them with accommodation, and base humanitarian services. Essentially, these figures express that in Serbia in 2017 the majority of people did not complete the procedure; and based on empirical evidence, it is quite likely that they have left the country and are no longer in Serbia. Some of them are accommodated in transit centers in Serbia, without any papers or legal procedures, and because of this legal limbo they do not have access to a number of services crucial for the effective realisation of rights.

A particular problem regarding irregular migrants is that unaccompanied and separated children (UASC) among whom a very small number of girls are most at-risk to become victims of sexual and labor exploitation, especially those unregistered who reside in irregular shelters. On the other hand, it’s hard to identify them as victims thus protect adequately, as it takes time to gain their trust and open them for cooperation.

Pursuant to current legal provisions, the Law on foreigners, the law on employment of foreigners, irregular migrants do not have access to work, and no other regulation identified them as vulnerable in the Republic of Serbia. What the Law on Employment of Foreigners stipulates is sanctioning non-regular or unlawful employment and possibility of financially punishing employers who employ irregular migrants.¹⁴⁸

The new proposal of the Law on Foreigners¹⁴⁹ also does not provide access to the labour market for this category of foreigners. The only law which recognizes them is Law on Migration Governance¹⁵⁰ at Article 10, which provides that the Commissioner for Refugees and Migration is obliged to propose a program to develop a system of measures towards the families of foreigners who are staying on the territory of the Republic of Serbia without relevant national permits (“illegally”) and propose programs to support the voluntary return of such foreigners who are staying on the territory of the Republic Serbia to their country of origin. To this date, Serbia has not adopted special programs or measures intended for the families of foreigners who are irregularly staying on the territory of the Republic of Serbia.

Pursuant to the Article 43 of the Law on Asylum, the employment of asylum seekers and persons granted international protection is regulated through regulations pertaining to the employment of foreigners and stateless persons. In relation to the Labour Law, which is a general law governing labour re-

146 Directive 2009/52/EC of 18 June 2009 for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Official Journal L /168/24.

147 Latković Boško, Employment of foreigners in the Republic of Serbia, Law and economy, 7-9/2015, Belgrade.8.

148 Chapter VII – penalty provisions of the Law on Employment of Foreigners.

149 New draft of Law on Foreigners is available at: <http://mup.rs/wps/portal/sr/>

150 Official Gazette RS 107/2012.

lations in general and which is applied to both domestic and foreign nationals, the Law on Employment of Foreigners falls into the category of special laws *ratione personae* which governs the regime of labour relations with foreigners.

A newly adopted Regulation on the Integration of Persons Granted Asylum into Social, Cultural and Economic Life (hereinafter “Regulation on Integration”), in article 7, provides that person who has been granted with refugee status shall be provided assistance for the integration into the labor market in the form of:

- 1) assistance for obtaining the necessary documents required for the registration with the National Employment Service and the employment agencies;
- 2) assistance for initiating the procedure of recognition of foreign degrees;
- 3) ensured participation in further education and training in line with the labor market needs;
- 4) assistance for participating in the active labor market measures;

Retraining and additional training courses shall be provided by the service providers that implement certified training courses. The measures referred will be provided in cooperation Commissariat for Refugees and Migration and the National Employment Service. The Regulation on Integration applies only to persons who have been granted refugee status into the social, cultural and economic life, but leaves out persons who have been granted subsidiary protection.

Asylum seekers in the Republic of Serbia were not allowed to work until December 2014. The right to work had only been recognized to persons granted refuge (i.e. refugee status) on the basis of the Law on Asylum, while for other forms of international protection, this right was not provided. However, after the adoption of the new Law on Employment of Foreigners¹⁵¹ in December 2014, the situation of persons seeking international protection has changed and that protection has been significantly improved. The issue of work of foreigners is generally regulated by the new Law in a more contemporary manner, and envisages the obligation of obtaining work permits for a much wider circle of foreigners. For the first time, in the Article 2, the Law specifically mentions a refugee as a foreigner who has been granted the right to refuge in accordance with the Law on Asylum, then an asylum seeker, person granted temporary protection, human trafficking victim, or a person who has been granted subsidiary protection, in accordance with the Law on Asylum. The National Strategy for Employment of the Republic of Serbia for the period 2011-2020¹⁵² has identified Roma as a particularly vulnerable group in the labour market, then refugees from former Yugoslav republics and internally displaced persons, persons with disabilities, rural people, uneducated people, victims of trafficking and others. Nevertheless, when talking about refugees, the National Strategy does not recognize the people who are beneficiaries of international protection under the Law on Asylum, which should certainly be amended and have them included in the next strategy as particularly vulnerable groups in the labour market.

The Law on Employment of Foreigners envisages that personal work permit is issued to asylum seekers, persons with temporary protection, victims of human trafficking, persons with subsidiary protection and refugees.¹⁵³ The duration of this type of permit depends on the duration of a person’s status, while the situation in the labour market can be taken into account when issuing this permit, if a decision on the quota is made. This kind of regulation is the result of harmonization of our labour legislation with the EU standards. National Employment Service is the body which is responsible for issuing work permits, as well as for the implementation of various programmes related to active policies for employment.

In line with human rights standards, it is needed to further introduce special programmes for vocational education, training programmes, gaining practical work experience as well as providing consulting services in the labour market under the same conditions as for the citizens of Serbia. Currently, these types of services are already provided by the National Employment Service, but only for citizens of the Republic of Serbia, while the special category of foreigners has not been included as a target group

151 Official Gazette of the Republic of Serbia, no. 128/14.

152 Official Gazette of the Republic of Serbia, no. 37/11, 33.

153 Article 13 of the Law on Employment of Foreigners of the Republic of Serbia.

that is in need for support related to inclusion in the labour market.¹⁵⁴ National Employment Service can offers programs to the migrants who obtain working permit, but a first obstacle is the official recognition of diplomas, having in mind that most of migrants who are coming to Serbia frequently do not have original education diplomas obtained in the country of origin. In some cases, even when they have diplomas, firstly they need to finish the nostrification procedure, which can last several years, so only way to register with the National Employment Service is without any diploma. As a result, the chances for a proper job are minimal. A second obstacle is language, having in mind that majority of such persons do not know Serbian language, and that institutional and organizes courses have been organized for the first time by the Commissariat for refugee and migration in mid-June 2017 in Serbia. Courses have been organizes only for recognized refugees, and not for asylum seekers or people with subsidiary protection.

Also, the draft of the new Law on Asylum and Temporary Protection¹⁵⁵ envisages in Article 58 the access to the labour market for asylum seekers, nine months after submission of the request, if decision has not been reached, when the person has not contributed to the absence of such decision. This solution is in line with the new Law on Employment of Foreigners, but also to some extent with the standard provided by the Directive on Reception Conditions, which in Article 15 guarantees access to the labour market for asylum seekers. However, the Directive in fact envisages that the access to the labour market must be allowed no later than nine months, while the Member States are left to themselves to regulate this issue and according to more favourable terms. In the view of the author of this study, there is no evident legitimate reason not to provide the possibility for an asylum seeker to immediately join the labour market, i.e. to change a legal solution and allow this practice, bearing in mind that this is one of the key rights for effective integration of refugees and that our social system is relieved in this way (otherwise, an asylum seeker is forced to ask for social assistance from the state because they are without means to live, or are forced to work on the black market). Additionally, currently the problem is the fact that between the time of expressing the intention to seek asylum before the Police (when the person is obtained with intention to seek asylum certificate-ISAC and refer to accommodation center) to registration before the Asylum Office (after which person is allowed to submit the request for asylum) often a number of months pass.

5. The Right to Education and Migrants' and Refugees Access to Educational System of the Republic of Serbia

5.1. General Overview of the Normative Framework

The right to education in Serbia is a constitutional right. According to the Article 71 of the Constitution of Serbia, everyone has the right to education. That means that regardless of their nationality, religion, legal status in the country, all children in the territory of the Republic of Serbia have the right to education. Primary education is compulsory and free, whereas secondary education is free but not compulsory. The law provides for foreign citizens and stateless persons the right to education under the same conditions and in the manner provided for the citizens of the Republic of Serbia. Integration of children and youth in the school system is a central component of any migration and integration policy, which improves the chances of successful integration into the society of the host country for present and future generations.

154 The draft Law on Asylum and Temporary Protection seeks to eliminate the disadvantages described above in terms of exercising the right of residence for persons whose asylum application has been approved, and therefore prescribes that the decision granting the application for asylum establishes the right to reside, which is proved with the identity card of the person to whom the asylum has been granted. However, the draft Law on Asylum and Temporary Protection does not specify what sort of residence it is nor how long it can last. In this regard, it is necessary to harmonize the Law on Foreigners to regulations governing the asylum matter, i.e. it is necessary to envisage by the Law on Foreigners that persons who have been granted asylum are entitled to temporary residence in a given duration. The only difficulty is paying state taxes, which amount to RSD 12,000, which is not covered by any institution. Bearing in mind that these people are relatively new category to the Serbian labour market, it would be useful to take into account the ability to apply for assistance with the Commissariat for Refugees and Migration.

155 Draft Law on Asylum and Temporary Protection, Article 58 and 66, available on website of the Ministry of Interior: <http://www.mup.gov.rs/wps/portal/sr/dokumenti/Regulativa/nacrti%20zakona>

According to the the Law on Foreigners¹⁵⁶, foreigner is any person who does not have the citizenship of the Republic of Serbia (article 3, para.1). Law on elementary education¹⁵⁷ on article 4. is prescribing that foreign citizens have the right to education under the same conditions and in the manner prescribed for the citizens of the Republic of Serbia. If they want, parents of foreign citizens can enroll their children in private or foreign school or institution whose founder is the Republic of Serbia, autonomous province or local self-government, while ensuring the costs of education. Law on the Basis of the Education System, in addition to a series of measures which should achieve full inclusion of vulnerable children, introduces the possibility of registering such children without having complete documentation (register documentation, permanent residence or temporary residence in the municipality in which the school operates).

In early May 2017, the Ministry of Education, Science and Technological Development issued Guidance on the Integration of all Children in the Education System (Guidance),¹⁵⁸ which governs in detail the enrolment of the pupils and extension of support to their inclusion in the school system. The adoption of the Guidance is a major step forward, particularly in view of the fact that over 2,000 migrant children of school age are living in Serbia¹⁵⁹ and that they have to be integrated in the formal school system without delay, as laid down in the Convention on the Rights of the Child¹⁶⁰ and Serbian law.¹⁶¹ Under the Guideline, children who lacking school certificates, which migrant children as a rule do not have, will be tested to check their knowledge. Based on the test results, the schools' professional inclusive education teams will draw up individual plans of support the schools will extend the pupils, which may entail the engagement of interpreters for the languages the children understand and other professionals, depending on the schools' finances. The support plans may also prescribe preparatory classes for migrant children, lasting between two weeks and two months, to facilitate their gradual adjustment, an intensive Serbian Language course, individualised teaching activities and the children's involvement in extracurricular activities. In March 2016, Ministry of Education Republic of Serbia, adopted a Rulebook of Closer Criteria for the Recognition of Forms of Discrimination by an Employee, Child, Student or Third Party in the Institution of Education.¹⁶² In Article 2 of the Rulebook, discrimination in education is defined as "any unduly discrimination or unequal treatment, or omission (exclusion, limitation or preferential treatment) in relation to the person or group of persons, and their family members, or persons close to them in an open or covert manner, based on race, color, descent, nationality, migrant status, and displacement, national or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial status, social and cultural origin, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organizations and other real or presumed personal characteristics".

This means that the Rulebook also applies to all categories of migrants, regular, irregular, asylum seekers and refugees. Under Article 13 of the Rulebook – "Discrimination in achievements and outcomes of teaching and education standards" -- discrimination exists if there are no conditions that would allow each child or student regardless of personal characteristics to achieve best results, especially if they are not used, as well as a variety of learning and assessment that is tailored to the needs of children or pupils with regard to their personal characteristics and status. Also, Rulebook Article 14. Paragraph 1, which regulates access to education, provides that discrimination exists if state do not provide any or additional support to children, and students from vulnerable social groups, especially children with disabilities, children, students and members of ethnic minorities, especially the Roma minority in preschool, primary and secondary education. Paragraph 2. bans discrimination during the enrollment of children and students seeking documents that are not provided by law or bylaw, and when the lack of law or

156 Official Gazette RS 97/2008.

157 Official Gazette RS 55/2013.

158 Ref. No 301-00-00042/2017-18 of 5 May 2017.

159 Source: Ministry of Education, Science and Technological Development. Available in Serbian at: <http://www.mpn.gov.rs/obrazovanje-dece-migranata>.

160 Articles 28 and 29 of the Convention.

161 Articles 3 and 6 of the Education System Law, Sl.glasnik RS 72/2009, 52/2011, 55/2013, 35/2015 – authentic interpretation, 68/2015 i 62/2016 – Constitutional Court Decision.

162 Official Gazette RS, 22/2016, from 04.03.2016.

bylaw documents is used as a reason to exclude children and students from education (e.g. the lack of citizenship certificates).

The Rulebook on Discrimination in the Education System emphasizes that segregation is a particularly difficult case of discrimination in the implementation of the educational process system, and that segregation exists if:

- 1) children or students are in an institution or in connection with the work of the institution, due to their personal characteristics, unjustifiably separated from other children and students,
- 2) are in separate classes or groups for reasons not in accordance with the law,
- 3) children and students who belong to different ethnic and other vulnerable groups are put in a group, class, class structure or institution which drastically differs from other institutions for children and students in the field of education, unless this is due to the specific measures and nature of the institution in accordance with the law.

A new draft Law on Foreigners¹⁶³, envisages at Article 77 that a competent authority shall issue decision on return of a foreigner not regularly (“illegally”) residing in the territory of the Republic of Serbia and define a deadline for her leaving Serbia. Within the timeframe for voluntary return, foreigner is entitled to urgent medical assistance, and in the case of minors, to the right to education. Besides, Article 84 envisages that a foreigner with postponed forced removal is recognized the right to urgent medical assistance, and in the case of minors, the right to education. It is certainly innovative solution for Serbian legal system, but it must be mentioned that it refers to foreigners whose residence was denounced pending the decisions on their forced or voluntary removal from the country.

5.2. Access of Migrants and Refugees to the Educational System of the Republic of Serbia

Although the right to education in Serbia is constitutional law, and the law provides for all non-citizens nationals (foreign nationals and stateless persons) the right to education under the same conditions and in the same manner as for the citizens of the Republic of Serbia, the current practice in Serbia, unfortunately, did not exist until 206/201. Therefore, irregular migrants who were in the territory of the Republic of Serbia did not have access to the education system, at any level. Perhaps one of the reasons is the fact that a large number of migrants are very shortly residing on the territory of Serbia in the hope that they will continue to the country of final destination, and therefore they have not had the opportunity to engage in educational systems.

The enrolment of unaccompanied migrant children in Serbian schools started in December 2016. Ninety-four unaccompanied children were enrolled in ten primary schools and the authorities planed on enrolling unaccompanied children in all the schools within the nine regional school administrations covering the municipalities in which the Asylum and Reception Centres are located at the outset of the 2017/2018 school-year.¹⁶⁴ UNICEF and its partner organisations, including the Centre for Educational Policy, planned to extend support to schools and collect data on children of school age to be covered by the Serbian education system during the summer holidays. As mentioned in previous paragraph, in early May 2017, the Ministry of Education, Science and Technological Development issued Guidance on the Integration of all Children in the Education System (Guidance),¹⁶⁵ which governs in detail the enrolment of the pupils and extension of support to their inclusion in the school system. The adoption of the Guidance is a major step forward, particularly in view of the fact that over 2,000 migrant children of school age are living in Serbia¹⁶⁶ and that they have to be integrated in the formal school system without delay, as laid down in the Convention on the Rights of the Child¹⁶⁷ and Serbian law.¹⁶⁸

163 New draft on Law on Foreigners is available at the Ministry of Interior webpage <http://mup.rs/wps/portal/sr/>

164 Information obtained from Centre for Educational Policy Project Coordinator Ivana Cenerić.

165 Ref. No 301-00-00042/2017-18 of 5 May 2017.

166 Source: Ministry of Education, Science and Technological Development. Available in Serbian at: <http://www.mpn.gov.rs/obrazovanje-dece-migranata>.

167 Articles 28 and 29 of the Convention.

168 Articles 3 and 6 of the Education System Law, Sl.glasnik RS 72/2009, 52/2011, 55/2013, 35/2015 – authentic interpretation,

In some of the Asylum and Reception Centres in local communities where formal education is not provided, civil society organisations were implementing informal education activities, including lessons in Serbian and foreign languages, math, geography, various forms of vocational training, et al. In May 2017, the humanitarian organisation ADRA started implementing vocational training in specific occupations¹⁶⁹ for unaccompanied children staying at the Asylum Centre in Krnjača. Depending on the occupation, the training lasts between one and three months; the participants are issued certificates they can apply for jobs with. Training has also been implemented within the so-called Integration House, run by the Jesuit Refugee Service, accommodating 20 unaccompanied and separated children under 14 years of age, placed under the guardianship of the city Social Work Centre.¹⁷⁰

The integration of refugee and migrant children in the primary school system began in September. The 150 or so children, who attended class during the previous school-year, continued their education in those schools.¹⁷¹ The Assistant Minister charged with preschool and primary education said that the system was prepared for the enrolment of 645 children of primary school age in the 17 municipalities with Asylum and Reception Centres.¹⁷² The circa 400 teachers in nine school administrations with jurisdiction over schools near Asylum and Reception Centres were trained to work with this group of children and received thorough instructions on the implementation of the Professional Guidance.¹⁷³ The entire process is implemented by the Education Ministry, in partnership with the Commissariat for Refugees and Migration and the Education Policy Centre, and with the support of the UNICEF Belgrade Office, which helped raise the teachers' capacity and provide the children with school supplies.¹⁷⁴ The Ministry has also drawn up a list of migrant and refugee children of secondary school age, who, according to plans, will be exempted from taking the nationwide entrance exam, but will only be able to enrol in secondary schools with room after the other children's enrolment.¹⁷⁵

In view of the fact that the number of refugee and migrant children covered by the formal education system had been much smaller (around 150 such children attended school in the 2016/2017 school-year) and that the schools had not been extended systemic support, the Education Ministry and its partners started tailoring the education system to the new needs in mid-2017, to ensure Serbia's compliance with its obligations under the Convention on the Rights of the Child, as well as national law.

The current situation in practice is such that the largest number of foreigners in Serbia are persons who either formally expressed their intention for asylum, or wish to leave for other European countries, or are foreigners in irregular position, thereby none of these categories is covered in new legal proposal of the Law on Foreigners. The Ministry of Interior announced in 2016 that it will soon bring and adopt a Regulation on tolerated stay¹⁷⁶ which could effectively complement this legal gap in the laws, and to regulate legal stay of this migrant category, thus enabling the access to a broad spectrum of rights to these persons. Nevertheless, until this date, Regulation of tolerated stay has not been adopted.

68/2015 i 62/2016 – Constitutional Court Decision.

169 Painter, hairdresser, baker, cook, beautician, tailor, car mechanic, tiler, plumber, et al.

170 See: <http://jrsserbia.rs/en/our-projects/>.

171 Ibid.

172 Backpacks and School Supplies for Migrant Children and Socially Vulnerable Children, Education of Minorities and Human and Minority Rights in Education, Ministry of Education, Science and Technological Development, September 2017, available in Serbian at: <http://www.mpn.gov.rs/rancevi-i-skolski-priborom-deci-migrantima-i-deci-iz-socijalno-ugrozenih-porodica/>.

173 Monthly Report on the Human Rights of Migrants, Refugees and Asylum Seekers in Serbia and Macedonia, Ana and Vlade Divac Foundation, August 2017.

174 Backpacks and School Supplies for Migrant Children and Socially Vulnerable Children, Education of Minorities and Human and Minority Rights in Education, Ministry of Education, Science and Technological Development, September 2017, available in Serbian at: <http://www.mpn.gov.rs/rancevi-i-skolski-priborom-deci-migrantima-i-deci-iz-socijalno-ugrozenih-porodica/>.

175 Monthly Report on the Human Rights of Migrants, Refugees and Asylum Seekers in Serbia and Macedonia, Ana and Vlade Divac Foundation, August 2017.

176 The Ministry of Interior announced the enactment of this Regulation at the session of the Committee for social issues of the National Assembly of RS on 10 November 2016.

An asylum seeker and a person who has been granted asylum have the right to free primary and secondary education and the right to social assistance.¹⁷⁷ Right to education in the Republic of Serbia is regulated by a whole set of laws, primarily the Law on the Foundations of the Education System,¹⁷⁸ while certain levels of education are regulated by the Law on Primary Education,¹⁷⁹ the Law on Secondary Education and the Law on Higher Education.¹⁸⁰ These laws also regulate the issue of education of foreign citizens and stateless persons in the Republic of Serbia, as well as the issue of recognition of foreign school documents.¹⁸¹

The Law on the Foundations of the Education System envisages the enrolment of foreign citizens and stateless persons¹⁸² in schools of elementary and secondary education, and guarantees the right to education under the same conditions and in the manner prescribed for the citizens of the Republic of Serbia. For children and students of foreign citizens and stateless persons, refugees and displaced persons who do not speak the language in which the curriculum or individual programme contents significant for continuing education are performed, the school organizes language classes, i.e. preparatory and additional classes, following special instructions issued by the Minister of Education.¹⁸³ As noted above, a newly adopted Regulation on Integration for refugees in Serbia, provides inclusion of persons who have been granted refugee status into the social, cultural and economic life through support for the integration into the education system. Having in mind that Regulation was adopted at the end of December, we cannot analyze its implementation, but we can briefly analyze its content.

In article 4. of the Regulation on Integration, Commissariat for refugees and migration shall provide lessons for learning Serbian language and alphabet, particularly for:

- 1) those who are not included in the regular education system in the Republic of Serbia;
- 2) those attending regular schools;
- 3) those over 65 years of age.

These persons referred shall have 300 Serbian language lessons provided in the course of one school year. The persons who fulfill the conditions to work at jobs that require a university qualifications may be provided, in addition to 300 Serbian language and alphabet lessons and additional 100 Serbian language and alphabet lessons in the course of a school year in foreign language schools which have certified programs for learning Serbian language.

For persons over 65 years of age, shall be provided 200 Serbian language and alphabet lessons as part of a specially tailored everyday communication Serbian language course in foreign language schools or in associations that have proposed appropriate programs and are able to hire appropriate staff. If the person who are not included in the regular education system in the Republic of Serbia; but attend Serbian language and alphabet courses outside of their place of residence, because it is not possible to organize such courses in their place of residence, shall have the right to a compensation for transportation costs at the level of the cost of public transport by Commissariat for Refugees and Migration.

The Commissioner shall refer the person who have been granted the right to asylum to attend the Serbian language and alphabet courses at the latest within two months from the date of the decision on granting refugee status, taking into account the summer or the winter semester starting dates in regular schools, and in foreign language schools.

177 Article 41 of the Asylum Law RS.

178 Official Gazette of the Republic of Serbia, no. 72/2009 and 52/2011.

179 Official Gazette of the Republic of Serbia, no. 50/92, 53/93, 67/93, 48/94, 66/94 – Decision USRS, 22/2002, 62/2009, 101/2005 and 72/2009.

180 Official Gazette of the Republic of Serbia, no. 76/2005, 100/2007 – authentic interpretation, 97/2008 and 44/2010, 93/2012 and 89/2013.

181 Migration Management in Republic of Serbia, International Organisation for Migrations – Mission to Serbia, Belgrade, 2012, 62.

182 Asylum seekers and persons granted asylum in Serbia are equated with the category of stateless persons, i.e. in some of the rights with foreign nationals. Thus, it is the same in the case of education, because the bylaws, that would further regulate this area, have not been adopted so far.

183 Article 100 of the Law on Foundations of the Education System, Official Gazette of the Republic of Serbia, No. 72/2009 and 52/2011.

Children enrolled in the preschool, elementary, and secondary education, as well as illiterate adults who have been granted refugee status, shall be provided assistance with the integration into the educational system in the Republic of Serbia.¹⁸⁴ The support shall be provided assistance in the form of: 1) the provision of textbooks and school supplies; 2) assistance to initiate the procedure of recognition of foreign degrees; 3) the provision of learning assistance and financial assistance for participation in extra-curricular activities. The assistance shall be provided in cooperation with schools and associations. Illiterate adults shall be provided assistance for participation in the adult literacy courses in cooperation with the ministry responsible for education.

When it comes to higher education, enrolment in Serbian universities and recognition of diplomas acquired in the countries of origin, there is no person granted refugee status who has managed to validate their degree or enrol in college. We would point out that one of the reasons for such situation are high recognition fees, charged in the same amount from refugees as well, and no institutions participate in covering these costs. Besides, another problem that refugees face in practice is the inability to submit evidence of acquired education, as beneficiaries of international protection commonly fail to obtain this type of evidence because they come from war zones where institutions that should provide this kind of certification are destroyed. Programs intended for checking knowledge and skills within special commission of the Ministry of Education need to be established, so that the knowledge they have already acquired in the country of origin can be recognized.

The newly adopted Regulation on Integration emphasizes that person who has been granted refugee status shall be ensured access to the Serbian culture, history and constitutional order introductory course for a maximum duration of 30 hours per year. The curriculum for the course shall be proposed by the civil society organizations, and shall be approved and financed by the Commissioner. If the person who has been granted refugee status fails to participate without just cause in the Serbian culture, history and constitutional order introductory course during the period that he/she has been assigned, the Commissioner shall not be obliged to provide new or additional hours for that person to participate in the Serbian culture, history and constitutional order introductory course.

UNICEF has provided support to capacity development of all organisations present in the field through: organization of trainings, provision of on-the-job support and development of the draft guidelines for non-formal education. OHCHR supported training for capacity building of all organizations to implement programmes aiming at development of digital competence. In cooperation with all partners, draft Guidelines for non-formal education that should support development of basic competences (communication in mother and foreign languages, digital competence, basic math and science, social and civic, cultural awareness, learning how to learn) were developed. Non-formal education programmes should develop skills that will facilitate the inclusion of children in mainstream education either in Serbia or in their countries of destination or home countries. Based on the current situation and jurisdiction of the competent authorities, it may be concluded that Serbian Government has start to develop positive steps towards migrants inclusion in education system, but still general impression is that inclusion is not a priority issue, although it is essential for establishing a comprehensive system of migration. As said before, an increasing number of people are migrating and seeking asylum in Serbia, and it is reasonable to expect that more and more people will receive international protection and that the system of support to these people must be established. This is, inter alia, the obligation of our state authorities, according to international conventions that Serbia has ratified and national law.

V SOCIAL INCLUSION OF MIGRANTS IN THE LABOUR MARKET AND EDUCATIONAL SYSTEM

1. International Practice in the Field of Social Inclusion of Non-citizens in the Labour Market and Education System

Through research and analysis of the practice of the Member States, author chose the most positive examples of countries that have an extremely high number of migrants, and that have very successful programmes involving migrants, asylum seekers and refugees into their labour market and education system.

Asylum seekers in Sweden are allowed to work immediately after applying for asylum. They also receive a daily allowance intended for language classes, medical assistance as well as other activities of their choice. If the decision related to their request is positive, they are entitled to free integration courses which include learning Swedish language and culture as well as for professional training and retraining aimed at easier integration into the labour market.¹⁸⁵ Studies have shown that open access to employment for asylum seekers and refugees affects the reduction of unemployment among this population, although statistics continue to show that this population is unemployed at higher rates compared to Sweden nationals.¹⁸⁶

Refugee Participation Network¹⁸⁷ at the labour market is actually an example of successful project between local government and the NGO *Partizipation*, financed by the German Federal Ministry of Labour and EU Social Fund that helps asylum seekers and refugees in Germany to participate in the labour market. The project has shown excellent results, not only for individuals (asylum seekers and refugees) who found a job, but also for the local community in which the project is implemented (financial benefit for the city was estimated at € 577,700 at the end of 2009, € 1,200,220 by the end of July 2007 and € 3,346,560 by the end of August 2013).¹⁸⁸

Employability Forum¹⁸⁹ is an independent organization that promotes the employment of refugees in the United Kingdom. They, among other things, provide language classes, information on the involvement in the British labour market, opportunities for work experience, volunteering, etc. The organization also provides support to refugees who, in their country of origin, were qualified teachers, through various training and development programmes for teachers, to continue their profession in the United Kingdom.¹⁹⁰

185 Ibid.

186 Several factors contribute to the unfavourable statistics in the labour market; research suggests that the following need to be taken into account: countries of origin of asylum seekers and refugees, age, cultural and linguistic barriers and level of education of refugees.

187 More about the Network at www.partizipation-wuppertal.de

188 Ad-Hoc Query on access to the labour market for asylum seekers, 10.

189 More about the organization at www.employabilityforum.co.uk/

190 Ad-Hoc Query on access to the labour market for asylum seekers, 10.

The right to education in the Netherlands¹⁹¹ is realized even during the asylum procedure. All children under 18 years of age are required to access the education system¹⁹², while centres for asylum seekers have agreements with nearby primary schools in order to make this possible for children who are in the asylum procedure as well as the children who receive international protection.¹⁹³ The Central Agency for Reception of Asylum Seekers provides various training programs in centres for asylum seekers, including teaching of Dutch language and getting acquainted with Dutch culture; this is essential for the subsequent integration test, and classes are performed regardless of the final outcome of prolonged asylum procedure.¹⁹⁴ Integration test is mandatory for all persons who have been granted asylum and can be set as a condition for the issuance of permanent residence permits. Passed integration test is a prerequisite for forgiveness of debt under the state loan that people who have been granted asylum receive, and often unsuccessful test results may be a requirement to abolish social assistance. However, in justified cases, especially when it comes to persons of limited working capacities, the requirement of taking the integration test can be completely abolished.¹⁹⁵ When it comes to the recognition of foreign diplomas and other school documents, Dutch University Foundation for Internationalisation in Education (NUFFIC) and the Association for Cooperation in Education and Economics (SBB) decide on the accreditation. In the process of recognition of foreign diplomas, authenticity and then the content of the educational programme, acquired competencies, duration and purpose of the study and whether there are significant differences in comparison with the same level of education in the Netherlands are determined. Refugees who want to enrol in higher education institutions, they need to pay for tuition fees as well as Dutch nationals. A non-governmental organization called Foundation for Refugee Students provides assistance to refugee students in this regard, and provides loans to refugees for covering the costs of studying.¹⁹⁶

In Bulgaria and Romania¹⁹⁷, there are Bulgarian language textbooks specifically tailored for refugee children and for children who are in the asylum procedure. The first edition of these textbooks in Bulgaria was published in 2000. This is actually the result of a joint project of the State Agency for Refugees, the Ministry of Education and UNHCR. Romania has also created a special curriculum for learning Romanian language for refugees and for children who are in the asylum procedure. The special programmes have been developed so as to be adapted to their age; for students between the ages of 6 and 10, 11 and 14, and for children aged 15 to 18.

In Slovakia, the NGO “Milan Simecka Foundation” started in 2010 the implementation of training programme specifically designed for teachers from different countries as part of their intercultural programmes. Although the training was not intended only for professional training of teachers in the field of refugee law, however, it was designed to familiarize teachers with special needs and specificities of pupils and students who are refugees. This training was eventually accredited by the Ministry of Education, which proved to be positive result of the project, and not only that, but they also showed that this type of training is needed for professionals who work with refugee children.¹⁹⁸

The obligation of school management to report enrolled students can discourage parents from sending their children to school for fear that they will be discovered and deported. A similar effect has the possibility of disclosure of students to the police. In Germany, the Federal Parliament in 2011

191 Pavle Kilibarda, Sonja Tošković, Miha Nabergoj, Martina Smilevska Kcheva, Serbia, from transit country to country of destination, Challenges and practice of selected countries in the area of refugee integration, Belgrade Centre for Human rights, Belgrade, 2016.

192 Article 3 of the Law on Compulsory Education (Leerplichtwet) of the Kingdom of Netherlands of 30 May 1968, available in Dutch at: http://wetten.overheid.nl/BWBR0002628/geldigheidsdatum_05-02-2016

193 See more about this at the website of the Central Agency for reception of Asylum Seekers in English at: <https://www.coa.nl/en/asylum-seekers/living-at-an-asylum-seekers-centre/work-and-education>

194 Ibid.

195 More at the website of the Government of the Kingdom of Netherlands in Dutch:

<https://www.rijksoverheid.nl/onderwerpen/nieuw-in-nederland/vraag-en-antwoord/kan-ik-ontheffing-krijgen-voor-een-inburgeringsexamen>

196 More about the organisation in English available at: <https://www.uaf.nl/home/english>

197 UNHCR, Improving Access to Education for Asylum-seekers, Refugee Children and Adolescents in Central Europe, UNHCR Regional Representation for Central Europe, Budapest, July 2011, 39.

198 Ibid.

abolished the obligation of schools, kindergartens and educational institutions to report children but it does not apply to other state institutions.¹⁹⁹

In the case of Algeria, the Committee for migrant workers stresses that, although there are no legal restrictions for migrant children in irregular position to be registered at birth and enrolled in schools, parents in reality avoid such contacts with state authorities as they fear sanctions and deportation which can eventually prevent children to realize their fundamental rights.

2. Practice in the Field of Social Inclusion of Non-Citizens in the Labour Market and Education System in the Republic of Serbia

The Belgrade Centre for Human Rights is a non-governmental organization providing free legal aid to asylum-seekers in Serbia, working as a UNHCR implementing partner since 2012. The author of the present study is engaged as a legal adviser on the project. Owing to the experience gained during the work with asylum seekers, refugees, but also migrants in irregular position, the study presents here, with the consent of the persons concerned, several cases illustrating the situation in practice regarding the integration and social inclusion of migrants in Serbian society.

The case of Mr. S.E.A.²⁰⁰ a national of Iraq and one of the first persons to be granted subsidiary protection in the Republic of Serbia in 2008 – the same year the Asylum Act went into force – is indicative of crucial problems related to the integration system of Serbia as he faced these very issues as soon as he was granted asylum. Mr. S.E.A. is a person over 60 years old, highly-educated (he has a degree in agriculture from a university in his country of origin), who desired to start the integration process as soon as he had received international protection.

However, at that time, no bylaws existed regulating the integration procedure in Serbia, for which reason his case is particularly interesting in the sense of highlighting the manner in which integration-related matters were solved in an *ad hoc* manner and with the support of civil society. S.E.A. did not have the possibility of learning the Serbian language through organized language courses, was unaware of the possibility of having his foreign diploma recognized in Serbia and was not provided with any manner of support, particularly financial, which would enable him to find accommodation outside of the asylum center.

The Serbian Commissariat for Refugees and Migrations – which is also in charge of the integration of refugees in Serbia – was unable to find other accommodation apart from that in a separate facility nevertheless located on the asylum center's premises, where he remains to this day. In time, he started learning Serbian on his own, which was of great help in allowing him to participate in the social life of the community, but also in finding acquaintances who helped him open a bank account, have the local police issue him new documents, etc. It was only in 2013 that he started working for a salary, and then only part-time as a language teacher in the asylum center, as a result of having learned Serbian and with support from UNHCR and the Danish Refugee Council. In 2014, he decided to get registered as unemployed with the National Employment Service and was issued a work booklet.

It was the first time that the local office of the National Employment Service was faced with employing a person benefiting from a specific form of international protection and who was supposed to undergo the procedure of applying to the Employment Service and being issued a work permit and booklet.²⁰¹ A person receiving any form of international protection (whether refugee status or subsidiary protection) is not automatically provided with a foreigner's registration number necessary for enjoying a whole set of rights. The competent body with jurisdiction over providing persons granted asylum with a registration number is the Asylum Office, which reacted promptly in this case, wherefore Mr. S.E.A. was swiftly provided with a permit and regulated his status on the labor market. In 2015, he decided to submit a

199 OHCHR, The economic, social and cultural rights of migrants in irregular situation, 85.

200 Persons whose cases are detailed here and below have provided their informed consent to have their cases included in the study, and to be identified through the use of initials.

201 Right to asylum 2013, Belgrade center for human rights, Belgrade, Jun 2014, 70.

request for having his foreign university diploma recognized; the procedure has been positively finish in the end of 2016.. He has covered all of the requisite fees at his own expense.

Finally, an attempt to have him provided with a travel document for refugees was made several times so that he could travel and visit his family in a country other than his country of origin (to which he does not dare return), but as a result of a faulty legal framework regulating these matters, he was never provided with such a document, and was therefore incapable of going to see his family. Today, Mr. S.E.A. still lives in an asylum center, working as an interpreter for the Commissariat for Refugees and Migrations, but also for many NGOs, hoping to someday be able to go and visit his family. The entire case illustrates the lack of institutional mechanisms for the integration of persons granted international protection, the impossibility of benefiting from an adults' education program and learning the official language as a pre-requisite of entering the labor market. The local community hasn't played any role in overcoming the considerable obstacles facing Mr. S.E.A. during his integration process, although it certainly could have contributed substantially to it. It is certain that one of the reasons for the state bodies' relatively passive stance in this case is the lack of a legal framework governing these matters, as well as a lack of understanding of the context and situation in which refugees find themselves. Support mainly came from international organizations and civil society working with refugees.

We recommend that the process of integration begin as soon as possible, during asylum process or while awaiting for a person to be granted international protection, particularly in terms of providing person with adequate information regarding the process itself, what rights he or she is entitled to and how to enjoy them, and to have them issued a registration number, as such a number is necessary for accessing a broad spectrum of personal and status-specific rights. Furthermore, it is very important that the person be accommodated outside of the asylum centre (provided they had been accommodated there during the asylum procedure), in order for them to be able to get involved in the social, cultural and economic life of the community. Serbian language courses are absolutely necessary for successful integration, accessing the labour market and social inclusion. The Commissariat for Refugees and Migrations is the central institution charged with integration under existing legislation, but will continue to play such a role based on drafts of the new Asylum Act. Commissariat officials should be able to provide prompt information on the integration proceedings, draft integration plans for individual refugees and provide language courses and various forms of adult education in order to enable their beneficiaries to successfully enter the labour market.

In the **case of Mr. K.A.**, a national of Libya, the father in a family with three underage children came to Serbia in 2015 in a regular manner on the grounds of family reunification because Mr. K.A. had been doing a PhD at the Faculty of Philosophy in Belgrade. However, as a result of the conflict in Libya, they were unable to return to their country and decided to apply for asylum in Serbia. In September 2016 they were recognized as refugees and granted asylum. The family of Mr. K.A. lived in private accommodation in Belgrade during and after the asylum procedure. This was beneficial to their integration in many respects, primarily because the three children could attend elementary school. Regardless, it cannot be said that the inclusion process ran smoothly, primarily because the school had not been acquainted with the process of enrolling children with asylum-seeker status, for which reason intervention and support from the BCHR was necessary in order to gain permission for this both from the school and the Ministry of Education. After the family, had been granted asylum, their situation did not improve considerably, bearing in mind that the children had already been enrolled in school and learning Serbian, but no additional assistance or training was provided to the children in order to facilitate their inclusion in the curriculum. That results with low grades in the school, and especially for the oldest boy who should enroll in the secondary school in September. School has proposed the creation of individual education plan that includes reducing the criteria for each subject for oldest son.

The family applied for social security at the local Social Work Centre and was interviewed by its social workers, but because Mr. K.A. had started working part-time, they gave up on their request. On the other hand, Mr. K.A.'s spouse K.A., who had studied sociology in her country of origin, but neither speaks Serbian nor is able to procure the original of her diploma from her country, still has not been able to regularize her status regarding inclusion into the Serbian society. At this moment, an NGO called PIN is financing a Serbian-Arabic language school in its offices – this remains her only possibility of

learning Serbian in order to get involved in the social life of Serbia, but also in order to assist her children with their homework, because, as she has pointed out, the children have not been provided with such assistance at school. On the other hand, Mr. K.A. wishes to start working as soon as possible, but is aware that she would require new skills in order to do so.

This case also illustrates shortcomings in the existing integration procedures and a lack of institutional mechanisms of support to refugees, all of which prevent their efficient and effective inclusion in community life; all support in this regard is provided by international organizations and civil society. This case is further indicative of the profile of refugees with integration needs – often, these are highly-educated and qualified individuals, who may in many ways contribute to the receiving society, provided their integration is conducted in an organized and planned manner.

Case of Mr. M.S.E., a national of Syria, came to Serbia in 2013 and asked for asylum for reasons related to the armed conflict in his country of origin. Mr. M.S.E. received subsidiary protection in late 2013, but BCHR lawyers in charge of his case successfully appealed and he was recognized as a refugee. Mr. M.S.E. is a computer engineer by profession, having studied at the Faculty of Technology in Aleppo. He was fortunate enough to find online work for a foreign company in Serbia already during the asylum procedure after he saw an advertisement for the position. Up until now and as a result of being employed, he was not forced to ask the authorities, such as the National Employment Service or Social Work Centres, for support. He has lived in several towns in Serbia and did not face any problems in integrating in the locations where he lived. However, Mr. M.S.E. would like to continue his education in Serbia and enroll in a Master's programme, however he is incapable of procuring the original of his diploma due to the situation in Syria. He would also like to travel and someday visit his relatives living in EU countries, but is unable to do so because the Serbian authorities refuse to issue him with a travel document for refugees. The company he works for intended to send him on courses and training programmes outside of Serbia several times, but he was unable to attend for the same reason. He has been learning Serbian on his own and with the support of friends and speaks it relatively fluently today. He hopes to see his family and that the conflict in Syria will end soon.

The case of Mr. M.S.E. is one of the few cases of the successful integration of refugees in Serbia, but also of a person granted international protection not actually needing a lot of assistance from the authorities and capable of integrating on their own. However, certain efforts on the part of state authorities are still necessary for the integration of this person to conclude successfully. The lack of a legal framework regulating certain key issues in the integration process presents a significant obstacle to successful inclusion in the local community. Mr. M.S.E. is a person who genuinely wishes to stay and work in Serbia, but because he cannot enjoy certain rights granted to him by the law, he is incapable, even as a foreigner is a permanent residence permit, live a life of dignity in our country.

Case of Ms. Z.R and Ms. N. R. who are from Iraq, requested international protection in Serbia in March 2016. The first instance decision on their request is negative, or is rejected because of the safe third country through which they passed on the way to Serbia, without considering the merits of the request. The appeal is pending. The case concerns a mother with a child who is enrolled in primary school in the town in which they live on a private housing and that is outside Belgrade. It is important that the child has access to education, and to continue with their education, even in the case that even in the last degree of their request for asylum rejected. The period of time they will spend in Serbia, until a final decision could be two years, and they would be lost absolutely, especially for a child, if there would be no access to education. This example shows how important it is to provide as soon as possible inclusion in the education system, therefore, while the asylum procedure is in progress, as this will mean that child will continue education, but on the other hand shows that our local communities have the capacity to engage these children and that teaching and training is proceeding smoothly at the local level.

Ms. S.A.'s family originating from Afghanistan, came to Serbia in August 2016. They are situated in the center for asylum in Krnjaca, or in barracks that are designed for accommodation of persons who do not have the certificate. The family has three children, among them two children of school age. Their wish is to go to Germany, but currently do not have sufficient financial funds to continue their way. Mother would most love to her children learn the German language, and if possible to continue their education.

Until now she haven't thinking of enrolling her children in the school in Serbia because she believes that the end of the year they will continue their way to Germany.

Mr. R.B.F.'s family from Pakistan is placed in a reception center in Presevo. Although they have a certificate of intent to seek asylum in Serbia, their wants is to go to Austria. Housed in a reception center in September 2016. A particular problem in the centre of Presevo is freedom of movement, or restriction of movement from the center without the permission of the manager. The fact that the persons who are placed in the center of Presevo are limited movement, without further explanation, and that the decision is subject to further review, the question of whether children would then have access to the education system, and whether local governments could effectively turn juveniles in its education system, bearing in mind that it is a small municipality, economically underdeveloped, with very modest facilities when the school system is concerned. Bearing in mind that the Center has more than 700 people located in the Centre, the question is whether the long-term local government will be able to effectively include immigrants in their community. The solution is certainly not to restrict the movement of these people, but annoying need to pre-plan and assessment of the capacities of municipalities in which the migrant accommodation centers are located, and to evaluate whether the local community will be able to integrate migrants into the social life of the community.

VI CONCLUSIONS AND RECOMMENDATIONS

Improvement of human rights and social inclusion of migrants is a challenge for all countries, but the experience of advanced economies in Europe shows that migrants create opportunities both for themselves and for the majority of the communities in which they live. However, they may do so only if they are given the tools and opportunities for inclusion in the community.²⁰² Although the Republic of Serbia is currently faced with numbers of persons seeking international protection in the country who are mostly migrating through it with a very small number of migrants who remain, it is evident that more and more of them, with the growth and expansion of the economy, are expressing an intention to live and work in Serbia.²⁰³

Already now, under national law legal migrants in Serbia, either temporary or permanent, at least formally have the same rights as the citizens, namely: the right to work, to acquire education, to get access to social services, as well as being safe and secure in the territory of the Republic of Serbia. As such, Serbia has not yet transposed all aspects of international law in the area of economic, social and cultural rights, as described above.

The central challenge for the inclusion of those non-citizens who have succeeded in legally establishing in Serbia is the creation of mechanisms to tend to their unique needs. This does not necessarily require the creation of new infrastructure and services for such persons, but policy-making in the framework of the existing system. A little investment in addressing the needs of non-citizens can pay off, in a way which is not a burden for the country, and such persons would be able to maximize their contribution to the labour market and the economy of Serbia.²⁰⁴ Obviously, further work would be needed in order to harmonize national with international law for all categories of non-citizens in Serbia.

Studies from other parts of Europe show that the success of inclusion policies and the quality of life of refugees and migrants largely depend on an active state policy aimed at ensuring better living conditions and facilitating inclusion into society, institutions and the labour market.²⁰⁵ The percentage of employed refugees, as the main condition of the long-term existential security and integration itself, still varies significantly among European States. Research shows that in almost all countries, the number of employed immigrants and refugees is much greater than the number of unemployed locals. However, in certain countries, there are variations; for example, unemployment rate of immigrants was higher by 23% in Poland compared to the native population, 21.2% in Finland, 20.1% in Denmark and 19.7% in Sweden.²⁰⁶ On the other hand, social protection policies play a major role in ensuring the quality of material existence, and therefore the integration itself, but the differences between different European Union Member States are significant.

Research also shows that the situation of migrants and refugees is particularly difficult in countries which previously did not have high percentages of migration, asylum and integration policies developed and the countries that have become the destination country relatively recently.²⁰⁷ We can conclude that these are the problems that already now characterize our system of regulation of the establishment and inclusion of non-citizens. Therefore, it is very important to timely build an efficient and accessible system

202 R. Sinai, A. Binhas, Y. Rockoff, 3.

203 Ibid.

204 Ibid.

205 Ibid, footnote 18.

206 Ibid, 111.

207 Ibid, 111.

of migration, asylum and integration support to all migrants which are temporary or permanently residing in Serbia.

The right to asylum is guaranteed by the Constitution of the Republic of Serbia, national legislation and international conventions. However, almost nine years after the implementation of the Law on Asylum in 2008, we cannot conclude that we have a functional and efficient system of asylum. Migration trends indicate that the number of migrants and refugees will continue to grow, bearing in mind that Serbia borders with EU countries in the region, which as well have a large number of migrants and refugees, and which now do not have enough capacity to accept all persons. With that in mind, there is a huge task ahead of Serbia to build the migration system to be efficient and functional and human rights-based, and that all migrants have effective possibilities to exercise their human rights during their stay in Serbia. Also, the assumption is that, as our country moves closer to the European Union and reaching economic, legal and social standards, the number of persons enjoying international protection would increase, and it is necessary to build a system timely, in which asylum seekers and persons granted asylum can easier assimilate and integrate. An important step on this road is the inclusion of migrants and refugees and the realization of their economic, social and cultural rights.

As we have seen, the Law on Asylum envisages a general obligation of the Republic of Serbia to, within its capabilities, provide the conditions for the inclusion of refugees in the social, cultural and economic life, and to facilitate the naturalization of refugees, while the Law on Migration Management stipulates the powers to the Commissioner for Refugees and Migration for accommodation and integration of persons granted the right to refuge.

The Law on Migration Management envisages that the Government of the Republic of Serbia, at the proposal of the Commissariat for Refugees and Migration, adopt the integration plan, within 12 months from the date of entry into force of the Law on Migration Management (which was in November 2012), and finally, Regulation on Integration was adopted in December 2016, which is extremely positive and important for inclusion of refugees in Serbia. The Regulation on the criteria for setting priorities for the accommodation of persons granted the right to asylum or subsidiary protection and conditions for housing as temporary accommodation (also under the jurisdiction of the Commissariat for Refugees and Migration) was adopted in June 2015.

When it comes to migrants who are in irregular position, the state has no clear policies or programs that are intended for this category of foreigners. Although the Law on Migration Management, at Article 10, specifies that the Commissioner for Refugees is responsible for this area of policy, to date efforts have been made only in the provision mainly in the field of education, accommodation and health service.

The draft Law on Foreigners recognizes the needs of foreigners whose stay was canceled and who are pending return to their country of origin, and the emphasize right to emergency medical assistance, right to education of minors, which is certainly an innovative solution and in compliance with international standards, but does not go further than that. The current situation in practice is such that the largest number of foreigners who are in Serbia, are persons who have formally expressed intention to seek asylum, but they want to go to European countries, or foreigners who are in irregular situation, and therefore none of these categories is not recognized in a new draft Law on Foreigners. The Ministry of Internal Affairs has recently announced that a regulation on tolerated stay²⁰⁸ will soon be adopted. In principle, such a regulation could be an effective way to resolve the regulatory gap that exists, and to enable effective access to rights for this category of persons.

1. GENERAL RECOMMENDATIONS

- Ensure that all migration policies and policies relevant to the situation of migrants are based on the concept of human rights; inter alia, to refrain from criminalizing irregular

208 Ministry of Interior announced enactment of this Regulation at the session of the Committee for Social Issues of the National Assembly RS on 10 November, 2016.

migration, and consider adopting measures for the regularization of the situation of irregular migrants. Ensure legislation or measures adopted are consistent with their obligations under international human rights law and do not adversely affect the full enjoyment of the human rights and fundamental freedoms of migrants, without discrimination.

- Plan, develop and place among the political priorities issue of migration management in the Republic of Serbia, especially migrants in irregular situation which are now in *legal limbo* without access to basic economic, social and culture human rights.
- Do not return any migrant into a situation where they would be faced with the risk of being denied economic, social and cultural rights or expose him to inhuman or degrading treatment, as this would be contrary to the principle of *non-refoulement*.
- The Republic of Serbia should ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
- The Republic of Serbia should ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

2. RECOMMENDATIONS IN THE FIELD OF EDUCATION

2.1. Recommendations to the Ministry of Education, Science and Technological Development

- Ensure access of all school-aged migrant children, including separated and unaccompanied children, as well as undocumented children, to adequate and appropriate education, on the basis of equality of treatment with nationals and with primary education free of charge for all.
- Introduce and develop program of teaching Serbian as foreigner language, and train teaching personnel at all levels and forms of education.
- Introduce inclusive curriculum content that fosters intercultural dialogue and understanding and addresses discrimination.
- Introduce, additional support programs for learning Serbian language during school time, in order to achieve good results during their schooling without discrimination.
- Decrease taxes for migrants and refugees or introduce the possibility of costs to be covered by the a relevant authority if refugees cannot bear the cost of validation themselves.
- Introduce scholarships for refugee students.

2.2. Recommendations for Commissariat for Refugees and Migration

- Commissariat for refugee and migration is, according to Migration Governance Law and Asylum Law, the central institution for the integration of refugees, and should continue with and develop its active role in the field of social inclusion of refugee in society.
- Propose programs to develop a system of measures intended for the families of foreigners irregularly staying in the territory of the Republic of Serbia.
- Use correct and neutral terminology to describe migrants.
- Promote evidence-based policies on migration drawing on research on the human rights of migrants and impacts and contributions of migrants to host communities, including in terms of economic growth, employment generation, investment and also cultural life.

- Establish and coordinate cooperation with all other relevant Ministries, in order to create institutional mechanism for social inclusion and integration of migrants into society.

2.3. Recommendation to the Ministry of Finance

- Amend the Law on State Administrative Fees, so that beneficiaries of international protection can be exempted from paying state taxes, if they do not have sufficient means themselves.

2.4. Recommendation to the Ministry of Interior

- New Asylum Law should prescribe a period during which minor asylum seekers be involved in the education system, if possible, no later than three months from the date of application for asylum.
- The proposed Law on Foreigners has already recognized minors waiting voluntary return to their country of origin as a category of persons who should have access to education, but law should include a category of minor migrants who are in irregular situation and enable access to education system to this category as well.
- The new Asylum Act and the new Law on Foreigners should be aligned in terms of regulating the relating rights of asylum seekers and refugees, and should include both Working law groups in order to achieve compatible solutions that these two laws prescribe.

3. RECOMMENDATIONS IN THE FIELD OF EMPLOYMENT AND ACCESS TO THE LABOUR MARKET

3.1. Recommendation to the Ministry of Interior

- The new Law on Asylum and Temporary Protection, should adopt a solution to ensure access to labor market immediately after applying for asylum - Article 58 of the draft ZOA.
- The new Law on Asylum and Temporary Protection, when it comes to refugees, should also prescribe the specific programs of vocational education, vocational training, programs of practical work experience and counseling services for inclusion in the labor market.

3.2. Recommendations to the Ministry of Labor, Employment, Social and Veterans' Affairs

- Identify asylum seekers and refugees as particularly vulnerable group in the labor market and consequently provide and include these people in various training programs for inclusion in the labor market.
- Prescribe affirmative measures for persons granted international protection under the Law on Asylum, for effective integration into the labor market.
- Consider the possibility of including other migrant categories in the labor market, while residing in the territory of the Republic of Serbia.
- Ensure migrants are not discriminated against on the basis of occupation, recognising that many migrants, especially irregular migrants are restricted to work in the informal economy and are often excluded from legal protection under national labour laws and from national statistics and legal protection.

3.3. Recommendations to the National Employment Service

- Strengthen the capacities of officers who work with foreigners, through the training so that long-term employees of the National Employment Service could provide advisory services on these models in order to include foreigners in the labor market.
- Establish special programs of vocational education, vocational training, programs of practical work experience for refugees.
- Strengthen cooperation with the Commissariat for Refugees and Migration, which is responsible for the integration of refugees and, if necessary, and create joint projects on this topic.
- Develop cooperation with the civil society dealing with the issue of migration and asylum;
- Organize workshops and training courses in which all institutions will participate, both at central and local level and civil society with the aim of long-term planning for inclusion of migrants into the labor market.

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