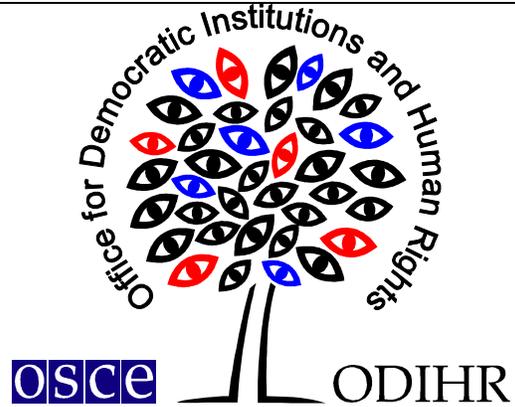


Warsaw, 27 May 2011

Opinion-Nr.: CRIM - SRB/185/2011

www.legislationline.org



OSCE/ODIHR OPINION ON SELECTED ASPECTS OF THE DRAFT CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF SERBIA

**Based on an unofficial English translation of relevant documentation provided by
the OSCE Mission to Serbia**

*This Opinion has benefited from contributions made by Professor Karoly Bard, Pro-Rector for Hungarian and EU
Affairs and Chair of the Human Rights Program of the Central European University in Budapest, Hungary*

Ulica Miodowa 10

PL-00-251 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

TABLE OF CONTENTS:

1. INTRODUCTION.....	3
2. SCOPE OF REVIEW	3
3. EXECUTIVE SUMMARY.....	4
4. ANALYSIS AND RECOMMENDATIONS.....	5

Annex 1: Draft Criminal Procedure Code of the Republic of Serbia (Excerpts)

1. INTRODUCTION

1. *On 6 April 2011, the Minister of Justice of the Republic of Serbia addressed the Head of the OSCE Office in Belgrade with a request for legal expertise on a number of questions related to a new draft of the Serbian Criminal Procedure Code (hereinafter “draft Criminal Procedure Code” or the “draft Code”). The said draft Criminal Procedure Code is part of a comprehensive judicial and criminal legislation reform agenda initiated in the Republic of Serbia, and has been prepared by a Working Group appointed by the Minister of Justice.*
2. *As per established procedure, the OSCE Mission to Serbia forwarded English translations of both the request and the draft law to the OSCE/ODIHR. The current Opinion is provided in response to this request.*
3. *Additionally, this Opinion has been co-ordinated with the Directorate General of Human Rights and Legal Affairs of the Council of Europe (DG I), which is also providing comprehensive advice to the Serbian authorities in their criminal procedure reform efforts.*

2. SCOPE OF REVIEW

4. Pursuant to the above-mentioned request of the Minister of Justice, the scope of the Opinion is limited to a number of questions on specific aspects of the draft Criminal Procedure Code, namely:
 1. Art. 106 “Measures of Special Protection” – under what conditions may the defendant and his counsel be banned from knowing the identity of a protected witness (the draft Code gives two alternative solutions)?
 2. Art. 171 “Covert Surveillance and Audio and Video Recording” – when and under what conditions may an order be issued for covert surveillance, also in the home of a suspected person?
 3. Art. 220 “Surveillance and Interception of Conversations or Correspondence with Defense Counsel” – could, under the conditions provided in par 1 of this Article, free communication between a detained person and defense counsel be intercepted or limited?
 4. Art. 300 “Attending Evidentiary Actions” – whether, exceptionally, the public prosecutor and the police may question a witness without summoning the suspect and his defense counsel to be present (the draft Code gives two alternative solutions)?
 5. Art. 303 “Discovery of Collected Evidence” – whether the discovery of the case files to the suspect may be delayed until such time as the prosecutor hears the last suspected person who is accessible (the draft Code gives two alternative solutions)?

5. Limited to these questions, the Opinion does not constitute a full and comprehensive review of the draft Code, relevant excerpts of which have been attached to this document as Annex 1. Furthermore, it does not take into account all available framework legislation regulating criminal procedure in the Republic of Serbia.
6. The ensuing recommendations are based on international human rights law and international and domestic standards on criminal procedure legislation, as found in the international agreements and commitments ratified and entered into by the Republic of Serbia.¹
7. The Opinion is based on an unofficial translation of the draft Criminal Procedure Code. Errors from translation may result.
8. This Opinion is without prejudice to any written or oral recommendations and comments to this or other related provisions that the OSCE/ODIHR may make in the future.

3. EXECUTIVE SUMMARY

9. In order to ensure the compliance of relevant parts of the Criminal Procedure Code of the Republic of Serbia with international and domestic human rights standards, it is recommended as follows:
 - A. To reformulate Article 106 par 3 in line with the case law of the European Court of Human Rights (hereinafter “ECtHR”) [par 19];
 - B. To amend the provision on the use of anonymous witness statements from undercover investigators in a similar way as the general rules (see recommendation A) and to consider limiting the use of these statements to exceptional circumstances [par 20];
 - C. To consider amending Article 163 in order to provide for the proper disposal of surveillance material at the end of an investigation [par 25];
 - D. To consider establishing a procedure to notify those who have been subject to surveillance and to create a procedure whereby they may seek legal recourse to challenge the legality of the surveillance [par 27];
 - E. To consider narrowing down the scope of monitoring and interception of the communication between a detainee and his or her defence counsel, as

¹ Of particular relevance for the purposes of this Opinion are the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, (signed on 4 November 1950, entered into force on 3 September 1953, and ratified by the Republic of Serbia on 3 March 2004) (hereinafter “ECHR”) and the United Nations International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200A (XXI) on 16 December 1966, and ratified by the Republic of Serbia on 12 March 2001) (hereinafter “ICCPR”).

well as the range of detainees that fall within the scope of this provision [par 31-32];

- F. To consider entrusting the competence to monitor and intercept the communication between a detainee and his or her defence counsel to an impartial judge [par 33];
- G. To reconsider whether oral communication between the detainee and his or her defence counsel should be monitored under any circumstances and if so, to limit monitoring to exceptional cases [par 34];
- H. To consider providing additional safeguards with regard to the use of witness statements as evidence, especially in cases where the defence has not been able to cross-examine or put questions to the witness [par 39]; and
- I. To amend Article 303 par 1 so as to include a safeguard stating that the time limit granted to the defence shall be sufficient to ensure a proper preparation for trial [par 42].

4. ANALYSIS AND RECOMMENDATIONS

- 10. Many of the issues raised in the Minister of Justice's request are areas of debate and contention in numerous jurisdictions. Several of the questions are of a rather complex nature, and different standpoints have been taken by national legislators in the OSCE area. This Opinion attempts to present and discuss the benefits and disadvantages of such standpoints, while bearing in mind relevant international human rights standards.

4.1 Measures of Special Protection for Witnesses

- 11. Article 106 of the draft Code deals with the issue of anonymous witnesses, specifically with the question of how to withhold the identity of a protected witness from the public and also, in exceptional cases, from the defendant and the defence counsel during the trial. The Draft Code provides two different options of Article 106 par 3. According to the first option, the identity of the protected witness will be revealed by court to the defence counsel and the defendant no later than 15 days before the commencement of the trial. *Prima facie*, this first option does not raise any concerns under international human rights law since the defence is allowed to cross-examine the witness during the trial with knowledge of his/her identity. Not revealing the identity of a witness until 15 days prior to trial could, however, conceivably limit the defence in the preparation of its case and could thus raise problems under the "equality of arms" principle which is part of the general fair trial right guaranteed by Article 6 of the European Convention on Human Rights (hereinafter "the ECHR"). This principle requires each party to criminal proceedings to be given a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage *vis-à-vis*

- his/her opponent.² Even in cases where there is a clear need to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual, the rights of the defence may only be restricted to such an extent that is strictly necessary. For further discussion on the equality of arms principle and the rights of the defence under the ECHR, see pars 13 and 36 *infra*.
12. The alternative solution for Article 106 par 3 states that “a court decision may not be based solely on the testimony of a protected witness whose identity is withheld”. This would imply that the identity of the witness shall then be kept from the defence counsel and the defendant throughout the entire trial.
 13. Next to Article 6 par 1 of the ECHR, the right to a fair trial is also outlined in Article 14 par 1 of the International Covenant on Civil and Political Rights³ (ICCPR) and relevant OSCE Commitments.⁴ These international standards are reflected in Article 32 par 1 of the Constitution of the Republic of Serbia, which guarantees everyone a right to a fair trial. Article 6 par 3 d of the ECHR guarantees a person charged with a criminal offence the right to interrogate witnesses who have testified against him or her. In principle, anonymous witnesses during trial will infringe the right to a fair trial, since the defence inevitably will be hampered in its cross-examination by the limitations imposed by the court in order to keep the identity of the witness secret. Amongst others, it will undoubtedly be more difficult to cast doubt on the authenticity and reliability of the witness if this witnesses’ identity is not disclosed. The reluctance of a witness to testify openly should be substantiated and genuine in a manner that justifies a certain degree of anonymity. Furthermore, the more limited the access of the defence to the witness becomes, the more exceptional the circumstances surrounding the testimony must be.
 14. In its case law on anonymous witnesses, the ECtHR has developed a balancing test whereby Article 6 par 1 taken together with Article 6 par 3 d of the ECHR are not violated if it is established that “handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities”.⁵ In order to counterbalance the handicaps suffered on account of the anonymity of the witness(es), the defence must be able to challenge the evidence of the anonymous witness(es) and be provided with the opportunity to attempt to cast doubt on the reliability of their statements. This could be done by having the defence pose questions to the witnesses (with the exception of such questions that

² See relevant ECtHR case law, e.g. the case of *Užukauskas v. Lithuania*, application no. 16965/04, ECtHR judgment of 6 July 2010, par 45. See also *Kress v. France*, application no. 39594/98, ECtHR judgment of 7 June 2001, par 72.

³ Cited in footnote 1.

⁴ See e.g. the Copenhagen Document - Second Conference on the Human Dimension of the CSCE (Copenhagen, 5 June- 29 July 1990), Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen Document), par. 5.16.

⁵ See *Kostovski v Netherlands*, application no. 11454/85, ECtHR judgment of 20 November 1989, par 43 and *Doorson v Netherlands*, application no. 20524/92, ECtHR judgment of 20 February 1996, par 72. See also *Užukauskas v. Lithuania*, op. cit., note 2, par 46.

- could reveal the identity of the witness) and ensuring that these questions are answered.⁶
15. In addition to the defendant's right to a fair trial, it is important to note that there are also international standards and evolving practise pertaining to the right of witnesses to be afforded adequate protection when providing statement before a court of law.⁷ In particular in cases involving organized crime, serious intimidation and threats against witnesses that co-operate with law enforcement and prosecution authorities are commonplace. States should therefore take appropriate measures to afford support and protection to witnesses testifying before court. Consequently, the rights of the defence must be balanced against the rights of witnesses and victims called to testify.⁸
 16. OSCE participating States have different practices as regards the issue of anonymous witnesses. Some provide for protection of the identity of witnesses against the defendant and defence counsel, while some do not.⁹ It is thus at the discretion of the national legislator to decide whether or not to accommodate anonymous witnesses in the draft Law. Should the choice be made to provide for anonymous witnesses, relevant provisions must at all times adhere to the principles of a fair trial by fulfilling the criteria elaborated by the ECtHR.
 17. According to Article 106 par 2 of the draft Code, withholding data on the identity of the witness from the defence is a measure granted to protected witness "exceptionally", if the court determines that the life, health or freedom of the witness or someone around him/her is threatened to such an extent that it justifies restricting the rights of the defence, and the witness is authentic. It is recommendable that the exceptional nature of this practice is clearly stated, so as to avoid routine usage of such extraordinary measures. Furthermore, it is positive that the proportionality principle is specifically outlined in Article 106 par 4, which states that the Court shall order a harsher special protection measure only if the purpose (i.e. protection of the witness) cannot be achieved by a more lenient measure. It is also commendable that the determination of this measure is subject to appeal by the parties and the witness to the chamber of a higher court under Article 108 par 4, as this creates a judicial safeguard against abuse.
 18. The defence will, according to Article 109 par 1, be notified about the time and place for the questioning of the anonymous witness. Based on Article. 109 par 4, there do not appear to be any other limitations on the right of the defence to pose questions to the witness other than such questions as may reveal his or her identity. Article 109 par 5 foresees the use of sound and image altering technical

⁶ *Doorson v Netherlands*, op. cit., note 5, par 75.

⁷ See the United Nations Convention against Transnational Organized Crime, (General Assembly Resolution 55/25, annex I), U.N. Doc. A/45/49 (Vol. I) (2001), entered into force on 29 September, 2003, (UNTOC), Article 24 and the Council of Europe Convention on Action against Trafficking in Human Beings, entered into force on 1 February 2008 (CETS No. 197), Article 28.

⁸ *Doorson v Netherlands*, op. cit., note 5, par 70.

⁹ See *R v Davies*, Opinions of the Lords of Appeal for Judgment of 18 June 2008, [2008] UKHL 36, as regards the United Kingdom. See also Recommendation No. R (97) 13 of the Council of Europe Committee of Ministers *Concerning Intimidation of Witnesses and the Rights of the Defence*, adopted by the Committee of Ministers on 10 September 1997, Appendix, par 10.

- means, which can be adapted to conceal the identity of the witness, whilst still allowing for questions to be posed directly by the defence. If such technical means are used properly, the court can then allow the defence to challenge a statement from an anonymous witness as a counterbalancing measure in line with ECtHR practice.¹⁰
19. At the same time, the ECtHR has pointed out that even if counterbalancing measures are taken to compensate the limitations that the defence are under due to the anonymity of a witness, a conviction should not be based solely “or to a decisive extent” on anonymous statements.¹¹ In accordance with this practice, it is recommended to expand Article 106 par 3 so as to clearly state that convictions shall not be based solely or *to a decisive extent* on statements made by anonymous witnesses.
20. According to Article 112 of the draft Code, all provisions pertaining to protected witnesses apply equally to undercover police investigators, expert witnesses and consultants. In addition, a specific section in the draft Code (Articles 183-187) regulates the work of undercover investigators (police officers) and includes a separate provision allowing such investigators to testify anonymously. Article 187 par 3 contains safeguards identical to those in Article 106 par 3, stating that the decision of a court cannot be based solely on the testimony of an undercover investigator. The ECtHR has been particularly concerned about permitting police officers to be treated as anonymous witnesses, since they form a category separate from regular witnesses, which is closely linked to the state and prosecution services. In light of these circumstances, the ECtHR has stressed that the use of police officers as anonymous witnesses “should be resorted to only in exceptional circumstances”.¹² Furthermore, the mere consideration by a court of a written witness statement from an undercover police investigator was considered to constitute a violation of the rights of the defence, even in cases where the decision of the court was not based solely on this statement.¹³ It is therefore all the more important that a court does not base a conviction solely or to a decisive extent on anonymous testimonies from undercover police officers, but that statements of such investigators are supported by other means of evidence. At the very least, Article 187 on undercover investigators should therefore be amended in the same way as Article 106 par 3 of the draft Code (see par 19 *supra*). Furthermore, it may be advisable to consider putting in place additional safeguards, which would explicitly state that the use of undercover investigators as anonymous witnesses should only be resorted to in exceptional circumstances, such as for example when there are no other means to protect the life or health of the testifying policeman or when there is a clear risk that informants or witnesses will be exposed and put in immediate danger.

¹⁰ *Ibid.*

¹¹ *Doorson v Netherlands*, op. cit., note 5, par 76.

¹² *Van Mechelen and Others v. Netherlands*, application nos. 21363/93, 21364/93, 21427/93 and 22056/93, ECtHR judgment of 18 March 1997, pars 56 and 63.

¹³ *Lüdi v. Switzerland*, application no. 12433/86, ECtHR judgment of 15 June 1992, pars 47-50.

4.2 Covert Surveillance

21. Article 171 of the draft Code prescribes the methods by which the court can order covert surveillance and audio and video recording of a suspect. In its present wording, and provided the English translation is accurate, this Article does not appear to allow audio and video surveillance in the home of a suspect, as par 1 (1) of this provision excludes such surveillance in a “dwelling”. The question put forward in the Minister of Justice’s request will therefore be interpreted as inquiring about the legal boundaries set by international law for conducting surveillance in the home of a suspect.
22. Generally, international law principles on surveillance in the home of a suspect are the same as those concerning other forms of surveillance.¹⁴ However, as set out in the paragraph below, the violation of an individual’s right to private life is more serious when committed in the home of the suspect rather than in a public place. In such situations, the existing requirements and principles must be applied in a stricter manner.
23. The surveillance of a suspect in his or her home is in principle an infringement of this person’s right to private life or privacy, a right recognized and guaranteed by both Article 8 of the ECHR and Article 17 of the ICCPR. Exceptions to the right to private life are only allowed if they are in accordance with the law, necessary in a democratic society and pursue certain legitimate aims, including “the protection of disorder or crime” (Article 8 par 2 of the ECHR).
24. Any infringement on the right to a person’s private life or home must be based on a clear and precise law which contains measures of protection against arbitrary abuse by public authorities.¹⁵ The law must sufficiently inform the citizens about the circumstances and conditions in which public authorities are authorized to resort to surveillance measures infringing people’s private lives.¹⁶ In this regard it is recommendable that the draft Code clearly states who shall be the object of such surveillance (Article 161), for which offences (Article.162) and for how long (Articles 167 par 2 and 172 par 3), how the results of such surveillance are to be used (Article 170), and what will happen to the acquired material if it is not used in proceedings (Article 163).¹⁷ Such clear definitions are essential in order to afford adequate safeguards against possible abuse.¹⁸
25. It is noted that under Article 163, material acquired through surveillance measures shall be destroyed if a prosecutor does not make use of these materials. Article 163 does not, however, reveal what will happen to such material in cases where a prosecutor has used the material to indict a suspect. This question is of particular relevance in cases where the indictment was discharged in preliminary

¹⁴ See e.g. reasoning concerning surveillance in the home of a suspect in *Khan v UK*, ECtHR judgment of 12 May 2000 (Application no. 35394/97), pars 22-28.

¹⁵ See *Halford v. the United Kingdom*, ECtHR judgment of 27 May 1997 (3/1996/692/884), par 49.

¹⁶ *Kopp v Switzerland*, ECtHR judgment of 25 March 1998 (13/1997/797/1000), par 55.

¹⁷ Compare this to the minimum safeguards explained by the ECtHR in *Weber and Saravis v Germany*, application no. 54934/00, ECtHR decision of 29 June 2006, par 95.

¹⁸ See *Kruslin v France*, application no. 11801/85, ECtHR decision of 24 April 1990, pars 33-36.

- proceedings or where the accused was acquitted.¹⁹ In order to prevent abuse, the material should in all circumstances be destroyed once it is no longer justifiable to keep it. It is therefore recommended to amend Article 163 accordingly.
26. Article 163 par 2 states that the judge for preliminary proceedings “may” inform an individual whose communication was intercepted covertly under Article 166 of the draft Code of the decision to destroy material acquired thereby under Article 163 par 1, if this would not threaten the possibility of conducting criminal proceedings. However, no such possibility is foreseen for video and audio surveillance in Article. 171. In such instances, if the suspect is not at any stage informed about the fact that his/her right to privacy has been infringed, he or she will not be able to challenge the legality of the surveillance. This in itself could then amount to a breach of the right to an effective remedy under Article 13 of the ECHR and Article 2 par 3 of the ICCPR.
27. Generally, there is no absolute right to be notified of acts of surveillance, restrictions on providing such information will often be justified for legitimate concerns related to the protection of ongoing police investigations and informers.²⁰ However, if surveillance has been discontinued because no criminal offence could be proved, it would in most cases be recommendable to notify the person who was under surveillance of this infringement of his/her right to private life. It is therefore recommended to establish a procedure on how to notify persons who have been targeted by surveillance methods. These persons should then be able to seek legal recourse to challenge the legality of the surveillance.²¹ It may be added that in the absence of such provisions, any person can file a claim with the ECtHR and allege to be a victim of a violation of privacy even if “he cannot point to any concrete measure specifically affecting him”.²²
28. It is commendable that the proportionality principle is enshrined in the last paragraph of Article 161, stipulating that the authority ordering surveillance measures is obliged to assess whether the same result could not be obtained by less intrusive means. This principle will acquire practical value when determining which measures shall be used, for example when there is a choice between intercepting communication on cellular phones and bugging the home of the suspect.

4.3 Surveillance of Contacts and Interception of Correspondence between Detainee and Defence Counsel

29. Article 220 regulates the monitoring and interception of conversations and correspondence between a detainee and his or her defence counsel. This provision touches upon both to the right of a detainee to prepare his/her case together with legal assistance (e.g. in the case of *habeas corpus* claims involving the lawfulness

¹⁹ See *Kruslin v France*, op. cit., note 18, par 35.

²⁰ *Klass and Others v Germany*, application no. 5029/71, ECtHR judgment of 6 December 1978, par 68.

²¹ See the reasoning of the ECtHR in *Klass and Others v Germany*, op. cit., note 20, par 68-72.

²² *Klass and Others v Germany*, op. cit., note 20, par 34.

- of the detention²³ in Article 5 par 4 ECHR and Article 9 par 4 ICCPR) and the right to private life.
30. Confidentiality forms the basis for the free exchange of information between a lawyer and his/her client and is therefore a key element in the effective defence of the detainee before court.²⁴ However, in exceptional circumstances, the free and confidential communication between a detainee and his defence counsel may be restricted, if such exceptions are in accordance with the law, pursue a legitimate aim and are necessary in a democratic society.²⁵
 31. Monitoring the correspondence between a detainee and his or her lawyer has likewise been deemed justifiable in ECtHR case law, but only under extraordinary circumstances.²⁶ In contrast, the conditions for ordering communication between a detainee and his/her defence counsel to be monitored and intercepted listed in Article 220 of the draft Code are in many cases similar to those that form the basis for detention in the first place. Examples of this are the risks that a detainee will influence witnesses or obstruct an investigation, if the defence counsel is used as an instrument for such activities (Article 220 par 2). This raises concerns as it may lead to an overly broad usage of measures that should only be considered in exceptional cases. It is therefore recommended that the scope of situations in which the use of these exceptional methods is permissible be narrowed down and reserved to prevent serious crimes or breaches of prison safety and security.²⁷
 32. Further, it is noted that any detainee suspected of crimes that fall within the scope of the Prosecution for Organized Crime or the Prosecution for War Crimes can be subjected to restrictions of communication envisaged in Article 220. Also in this regard, the application of these measures appears to be rather broad. It is thus recommended to consider narrowing the categories of detainees that should fall within the scope of this provision, specifically Article 220 par 2.
 33. The judge for the pre-trial proceedings is also in charge of supervising contacts between the lawyer and the detainee according to Article 220 par 4. This raises serious concerns, as there is a risk that the court could thereby be directly influenced by client-lawyer communications which are generally considered confidential. It is strongly recommended, if the option of monitoring and intercepting correspondence with defence counsel is retained in the draft Code, that the person monitoring correspondence should be an independent judge unconnected to the investigation and subject to strict confidentiality.²⁸

²³ It should also be mentioned that the guarantees provided in Article 6 of the ECHR concerning access to a lawyer have been found to be applicable in *habeas corpus* proceedings, see *Castravet v Moldova*, application no. 23393/05, ECtHR judgment 13 June 2007, par 47.

²⁴ See *Campbell v UK*, ECtHR judgment of 25 March 1992 (Application no. 13590/88), par 46.

²⁵ See Recommendation No. R (2006) 2 of the Council of Europe Committee of Ministers *On the European Prison Rules*, adopted by the Committee of Ministers on 11 January 2006, par 23.5. See also *Erdem v Germany*, application no. 38321/97, ECtHR judgment of 5 July 2001, pars 61-70.

²⁶ See *Erdem v Germany*, op. cit., note 25, par 62, where the detainee was suspected of continuing to work for a terrorist organization.

²⁷ See Recommendation *On the European Prison Rules*, op. cit., note 25, par 23.5.

²⁸ See *Erdem v Germany*, op. cit., note 25, par 67.

34. The monitoring measures contained in Article 220 cover quite a broad scope, as they involve not only written correspondence between the detainee and the defence counsel, but also direct surveillance of oral communication. It may be advisable to differentiate between these two types of measures and their application. Whilst interception of written correspondence is primarily an invasion of these persons' private lives, the monitoring of oral communication between the detainee and his or her defence counsel is also a direct interference with the right to properly prepare one's defence under Article 6 par 3 c of the ECHR. The right to a fair trial in article 6 does not contain any section on permissible limitations, as opposed to the right to privacy (Article 8 par 2 of the ECHR, see par 23 *supra*). In fact, it is still unclear whether there are any circumstances under which monitoring of oral communication between a detainee and his or her defence counsel can be tolerated. It is therefore recommended to reconsider whether or not oral communication should be monitored at all and if so, to limit the monitoring to exceptional cases.

4.4 Questioning of a Witness in the Absence of the Suspect or Defence Counsel

35. Article 300 par 2 enables the prosecutor to examine a witness without summoning the suspect or his defence counsel if the case falls under the Prosecution for Organized Crime or the Prosecution for War Crimes. A transcript of a witness statement can later be used during the trial as evidence against the defendant under certain circumstances, according to Articles 405-406.
36. The right to cross-examine a witness does not apply to all stages of a trial. It is therefore not contrary to Article 6 par 3 d of the ECHR (right of the accused to examine witnesses against him/her) to refuse the accused the right to question a witness who is being interrogated by the police or by an investigating judge during a police investigation. However, when such statements taken in the absence of the defence are used as evidence against the accused during trial, this is a clear infringement of the rights of the defendant under the equality of arms principle. Generally, all evidence must be produced in the presence of the accused at a public hearing in order to provide the opportunity for adversarial proceedings.²⁹ In this regard, the ECtHR has found a breach of Article 6 par 3 d in cases where the accused did not have the chance to question or cross-examine any witnesses either during trial or on appeal.³⁰ However, it is noteworthy that the ECtHR has deemed permissible special arrangements preventing the defence from conducting cross-examination directly in cases where the defence counsel was able to pose questions through the police officer conducting the interview.³¹
37. One reason for not allowing the suspect or his/her counsel to be present when a witness is examined may be the necessity to protect the witness against potential reprisals. International standards oblige states to take appropriate measures to

²⁹ *Kostovski v Netherlands*, op. cit., note 5, par 41.

³⁰ *Vaturi v France*, application no. 75699/01, ECtHR judgment of 13 July 2006, pars 58-59.

³¹ It should be noted that the statement in this case was provided by a minor in a case regarding sexual assault, see *S.N. v Sweden*, application no. 34209/96, ECtHR judgment of 2 October 2002, pars 49-50.

- ensure the protection of witnesses giving testimony from threats and reprisals, in particular in cases involving organized crime.³² These measures can include evidentiary rules that ensure the safety of the witness, such as the use of communication technology (video links etc).³³
38. It is noted that Article 300 par 2 states that no decision of the court should be based solely on the statement of a witness examined in the absence of the suspect and defence counsel. However, it is highly questionable whether this safeguard is adequate. First, according to ECtHR practice, a conviction should also not be based to a *decisive extent* on non-appearing (and thus not cross-examined) witnesses (see par 19 *supra*). Secondly, a balancing test is applied in all circumstances, in order to establish whether or not the rights of the defence have been respected (see par 14 *supra*).
39. Article 300 par 2 may, if a witness statement is used as evidence against the defendant, constitute a violation of the defendant's right to a fair trial. However, the wide scope of this provision, as well as the lack of procedural safeguards allowing the defence to cross-examine or at least put questions to a witness raises concerns. It is therefore recommended that Article 300 par 2 be amended so as to incorporate pertinent safeguards to limit the risk of witness statements being used as evidence in trial in cases where the defence has not had any chance to cross-examine or put questions to the witness. In all circumstances, Article 300 par 2 should be amended to state that a conviction should not be based solely or *to a decisive extent* on such witnesses.

4.5 Discovery of Collected Evidence

40. Article 303 regulates the right of a questioned suspect and his/her defence counsel to examine the prosecutor's evidence and contains two alternative proposals for amending par 1 of this provision. The first alternative option of this Article stipulates that a suspect who has been questioned shall have the right to examine the evidence "within a certain time limit". The second alternative option states that in cases with several persons suspected of the same criminal offence, the prosecutor can defer the disclosure of the evidence until the prosecutor has questioned the last accessible suspect.
41. Disclosure of the prosecutor's evidence is part of the right to an adversarial trial and in principle requires that the prosecutorial authorities should disclose to the defence all material evidence in their possession that is for or against the accused.³⁴ Furthermore, the evidence should be disclosed in due time before trial so that the defendant is provided with adequate time for the preparation of his or her defence, according to Article 6 par 3 b of the ECHR. In this context, the ECtHR has stated that evidence, for reasons of public interest, may be withheld

³² UNCTOC, op. cit., note 7, Article 24 par 1.

³³ UNCTOC, op. cit., note 7, Article 24 par 2 b.

³⁴ *Edwards and Lewis v UK*, application nos. 39647/98 and 40461/98, ECtHR judgment of 27 October 2004, par 52.

- from the defence, as long as no part of such evidence was used for or included in the prosecution's case.³⁵
42. The first option of Article 303 par 1 stating that a suspect may examine the evidence "within a certain time limit" does not reveal the extent of such time limit. In order to ensure that the practical application of this provision does not lead to conflicts with Article 6 par 3 b of the ECHR, it is recommended to include in it a certain safeguard stating that the time limit granted to the defence shall be sufficient to ensure a proper preparation for trial.
43. The second option of Article 303 par 1 includes the first alternative, and merely adds that that in case of multiple suspects, all the suspects should be heard before the disclosure of evidence. The rationale for this may be to prevent a suspect from sharing the prosecutor's evidence with those suspects who have not yet been questioned. However, the evidence will be disclosed once the last suspect has been heard, which should take place before the conclusion of the investigation, according to Article 310. This should provide the defendant with adequate time to prepare his or her defence. It is common practice for the prosecutor to delay the disclosure of evidence in this manner and thus, the provision in principle does not raise any concerns from an international law perspective.

[END OF TEXT]

³⁵ *Jasper v UK*, application no. 27052/95, ECtHR judgment of 16 February 2000, par 55.

Annex 1

Excerpts of the draft

Criminal Procedure Code of the Republic of Serbia

2. Protection of witnesses from intimidation

Protected Witness

Article 105

If there exist circumstances which indicate that by giving testimony or answering certain questions a witness would expose himself or persons close to him to a substantial danger to life, health, freedom or property, the court may authorise one or more measures of special protection by issuing a ruling determining a status of protected witness.

The measures of special protection include questioning the protected witness under conditions and in a manner ensuring that his identity is not revealed to the general public, and exceptionally also to the defendant and his defence counsel.

Measures of Special Protection

Article 106

The measures of special protection ensuring that the identity of a protected witness is not revealed to the general public are excluding the public from the trial and prohibition of publication of data about the identity of the witness.

The measure of special protection withholding from the defendant and his defence counsel data about the identity of a protected witness may be ordered by the court exceptionally if after taking statements from witnesses and the public prosecutor it determines that the life, health or freedom of the witness or a person close to him is threatened to such an extent that it justifies restricting the right to defence and that the witness is authentic.

The identity of the protected witness withheld in accordance with paragraph 2 of this Article will be revealed by the court to the defendant and his defence counsel no later than fifteen days before the commencement of the trial. (alternative solution:

A court decision may not be based solely on the testimony of a protected witness whose identity is withheld in accordance with paragraph 2 of this Article.

In deciding on the measures of special protection referred to in paragraphs 1 and 2 of this Article, the court will endeavour to order a harsher measure if the purpose cannot be achieved by the application of a more lenient measure.

...

1. Basic Provisions

Requirements for Ordering

Article 161

Special evidentiary actions may be ordered against a person for whom there exists grounds for suspicion that he has committed a criminal offence referred to in Article 162 of this Code, and evidence for criminal prosecution cannot be acquired in another manner, or their acquisition would be made substantially more difficult.

Special evidentiary actions may also exceptionally be ordered against a person for whom there exists grounds for suspicion that he is preparing one of the criminal offences referred to in paragraph 1 of this Article, and the circumstances of the case indicate that the criminal offence could not be detected, prevented or proved in another way, or it would cause disproportionate difficulties or a substantial danger.

In deciding on ordering and the duration of special evidentiary actions, the authority conducting proceedings will especially adjudge whether the same result could be achieved in a manner less restrictive to citizens' rights.

Criminal Offences in Respect of Which Special Evidentiary Actions are Applied

Article 162

Under the conditions referred to in Article 161 of this Code, special evidentiary actions may be ordered for the following criminal offences:

1) Those for which it is stipulated by separate statute are within the purview of the Prosecution for Organized Crime or the Prosecution for War Crimes;

2) aggravated murder (Article 114 of the Criminal Code), abduction (Article 134 of the Criminal Code), exhibition, procurement and possession of pornographic materials and exploiting juveniles for pornography (Article 185 paragraphs 2 and 3 of the Criminal Code), extortion (Article 214 paragraph 4 of the Criminal Code), counterfeiting money (Article 223 paragraphs 1 to 3 of the Criminal Code), money laundering (Article 231 paragraphs 1 to 4 of the Criminal Code), unlawful production and circulation of narcotic drugs (Article 246 paragraphs 1 to 3 of the Criminal Code), threatening independence (Article 305 of the Criminal Code), threatening territorial integrity (Article 307 of the Criminal Code), sedition (Article 308 of the Criminal Code), inciting sedition (Article 309 of the Criminal Code), armed insurrection (Article 311 of the Criminal Code), subversion (Article 313 of the Criminal Code), sabotage (Article 314 of the Criminal Code), espionage (Article 315 of the Criminal Code), divulging state secrets (Article 316 of the Criminal Code), inciting national, racial and religious hatred or intolerance (Article 317 of the Criminal Code), violation of territorial sovereignty (Article 318 of the Criminal Code), conspiring to conduct activities against the Constitution (Article 319 of the Criminal Code), plotting of offences against the constitutional order and security of Serbia (Article 320 of the Criminal Code), serious offences against the constitutional order and security of Serbia (Article 321 of the Criminal Code), illegal manufacture, possession and sale of weapons and explosive materials (Article 348 paragraph 3 of the

Criminal Code), illegal crossing of the national frontier and human trafficking (Article 350 paragraphs 2 and 3 of the Criminal Code), abuse of office (Article 359 of the Criminal Code), trading in influences (Article 366 of the Criminal Code), taking bribes (Article 367 of the Criminal Code), offering bribes (Article 368 of the Criminal Code), human trafficking (Article 388 of the Criminal Code) and taking hostages (Article 392 of the Criminal Code);

3) Obstruction of justice (Article 336 paragraph 1 of the Criminal Code), if committed in connection with the criminal offence referred to in items 1 and 2 of paragraph 1 of this Article.

A special evidentiary action referred to in Article 183 of this Code may be ordered only in connection with a criminal offence referred to in item 1 of paragraph 1 of this Article.

Under the conditions referred to in Article 161 of this Code the special evidentiary action referred to in Article 166 of this Code may also be ordered for the following criminal offences: unauthorised exploitation of copyrighted work or other works protected by similar rights (Article 199 of the Criminal Code), damaging computer data and programmes (Article 298 paragraph 3 of the Criminal Code), computer sabotage (Article 299 of the Criminal Code), computer fraud (Article 301 paragraph 3 of the Criminal Code) and unauthorised access to protected computers, computer networks and electronic data processing (Article 302 of the Criminal Code).

Treatment of Collected Materials

Article 163

If the public prosecutor does not initiate criminal proceedings within six months of the date of first examining the materials collected by applying special evidentiary actions or if he declares that he will not use them in the proceedings or that he will not request the conduct of proceedings against the suspect, the judge for preliminary proceedings will issue a ruling on the destruction of the collected materials.

The judge for preliminary proceedings may inform the person against whom a special evidentiary action referred to in Article 166 of this Code was conducted about the issuance of the ruling referred to in paragraph 1 of this Article if during the conduct of the action his identity was established and if it would not threaten the possibility of conducting of the criminal proceedings. The materials are destroyed under the supervision of the judge for preliminary proceedings who makes a record thereof.

If during the performance of the special evidentiary actions it was acted in contravention of the provisions of this Code or an order of the authority conducting proceedings, the court's decision may not be based on the data collected.

...

Delivery of Reports and Materials

Article 170

Upon the termination of the covert interception of communications, the authority referred to in Article 168 paragraph 1 of this Code delivers to the judge for preliminary proceedings recordings of the communications, letters and other consignments and a special report which contains: the time of commencement and termination of the interception, data on the official who conducted the interception, a description of the technical means used, the number and available data on the persons encompassed by the interception, and an assessment of the appropriateness and results of the application of the interception.

The judge for preliminary proceedings will in the opening of letters and other consignments take care not to damage seals and to preserve the covers and addresses. A record will be made of the opening. All the materials obtained by the implementation of the covert interception of communications will be delivered to the public prosecutor.

The public prosecutor will order the recordings obtained by the use of technical means to be transcribed in full or in part and to be described.

The provisions of Articles ***, ***, *** and *** paragraph * of this Code will apply accordingly to recordings made in contravention of the provisions of Articles 166 to 169 of this Code.

3. Covert Surveillance and Audio and Video Recording

Conditions for Ordering

Article 171

If the conditions referred to in Article 161 paragraphs 1 and 2 of this Code are fulfilled, acting on a substantiated motion of the public prosecutor the court may order covert surveillance and [audio and video] recording of a suspect for the purpose of:

- 1) detecting contacts or communication of the suspect in public places where access is limited or in premises, except in a dwelling;
- 2) locating persons or things.

The locations or premises referred to in item 1 of paragraph 1 of this Article or vehicles belonging to other persons may be the object of covert surveillance and [audio and video] recording only if it is probable that the suspect will be present there and that he is using those vehicles.

Order on Covert Surveillance and Audio and Video Recording

Article 172

The special evidentiary action referred to in Article 171 of this Code is ordered by the judge for preliminary proceedings by a substantiated order.

The order referred to in paragraph 1 of this Article contains data on the suspect, the legal designation of the criminal offence, the reasons on which the suspicion is based, a designation of the premises, location or vehicle, authorization to enter and emplace technical recording equipment, the manner of conduct, the scope and duration of the special evidentiary action.

Covert surveillance and [audio and video] recording may last three months, and may for important reasons be extended by a maximum of three months. If criminal offences referred to in Article 162 paragraph 1 item 1 of this Code are concerned, covert surveillance and recording may exceptionally be extended by two times three months at most. The conduct of surveillance and recording is discontinued as soon as the reasons for their application cease to exist.

...

Monitoring and Interception of Conversations or Correspondence with Defence Counsel

Article 220

If it is probable that a detainee is using a conversation or correspondence with defence counsel to try to organise an escape, exert influence of witnesses, intimidate witnesses or otherwise obstruct the investigation, the public prosecutor may ask the judge for preliminary proceedings to order monitoring and interception of conversations or correspondence.

The supervision referred to in paragraph 1 of this Article may be ordered against a detainee charged with a criminal offence specified by another law as being within the purview of the Prosecution for Organised Crime or the Prosecution for War Crimes.

Before deciding on the motion of the public prosecutor the judge for preliminary proceedings will question the detainee. The questioning may be attended by the public prosecutor and defence counsel of the detained defendant.

If he approves the motion of the public prosecutor, the judge for preliminary proceedings will issue a ruling ordering conversations of the detainee and defence counsel to be conducted under his supervision, or that letters sent by the defendant from detention to his defence counsel and letters the defence counsel send to the detained defendant are delivered only after he examines them.

The judge for preliminary proceedings is required at the expiry of each thirty days to, even without a motion of the parties and defence counsel, examine whether the reasons for the monitoring and interception referred to in paragraph 1 of this Article still exist and to issue a ruling extending or repealing the monitoring and interception.

The detainee and his defence counsel may appeal against the ruling ordering or extending supervision referred to in paragraph 1 of this Article to the chamber (Article 21 paragraph 4) within 24 hours of the time of receiving the ruling. An appeal does not stay execution of the ruling. A decision on the appeal is issued within 48 hours.

The provisions of paragraph 6 of this Article are applied accordingly to an appeal filed by the public prosecutor against a ruling denying a motion to order the monitoring

and interception referred to in paragraph 1 of this Article, or when monitoring and interception is repealed.

When the investigation is concluded, the detainee cannot be prohibited from freely and without monitoring and interception correspond with and talk to his defence counsel.

...

Attending Evidentiary Actions

Article 300

The public prosecutor is required to dispatch to the defence counsel of a suspect a summons to attend the questioning of the suspect, or to dispatch a summons to the suspect and his defence counsel, and to notify the injured party about the time and place of the questioning of a witness or an expert witness.

By exception from paragraph 1 of this Article, in proceedings in connection with criminal offences for which the Prosecution for Organised Crime or the Prosecution for War Crimes are responsible the public prosecutor may question a witness even without summoning the suspect and his defence counsel to attend the questioning. In such a case the court's decision may not be based solely on the statement of the witness. (the working group was divided on the issue of whether this provision is justified or not)

The suspect, his defence counsel and the injured party may attend an examination.

If the suspect has a defence counsel, the public prosecutor will as a rule summon or notify only the defence counsel. If the suspect is in detention, and the evidentiary action is being undertaken away from the seat of the court, the public prosecutor will decide whether the presence of the suspect is necessary.

The public prosecutor is required to notify a professional consultant that he may attend an expert examination (Article 126 paragraph 1).

If a summons to a suspect and his defence counsel could not be delivered in accordance with the provisions of this Code, or if the investigation is being conducted against an unknown perpetrator, the public prosecutor may undertake questioning of a witness or expert witness only on the basis or prior authorisation by the judge for the preliminary proceedings.

If a person sent a summons or notice about an evidentiary action is not present, the action may also be undertaken in his absence.

Persons undertaking evidentiary actions may propose to the public prosecutor to ask a suspect, witness or expert witness certain questions in order to clarify matters, and with the permission of the public prosecutor may also pose questions directly. These persons are entitled to request that their remarks in respect of the undertaking of certain actions be entered in the transcript, and may also propose that certain evidence be obtained.

In order to clarify certain technical and other professional questions which are being asked in connection with obtained evidence or during the questioning of a suspect or undertaking of other evidentiary actions, the public prosecutor may request from a person holding appropriate qualifications necessary explanations about those questions. If the suspect or defence counsel are present during the provision of explanations, they may

request that that person provide more detailed explanations. If necessary, the public prosecutor may also request explanations from an appropriate professional institution.

...

Discovery

Article 303

The public prosecutor is required to make possible for a suspect who has been questioned and his defence counsel, within a specific time limit, the examination of the files and inspection of objects serving as evidence. (alternative solution:

The public prosecutor is required to make possible to a suspect who has been questioned and his defence counsel, within a specific time limit, the examination of the files and inspection of objects serving as evidence. In case several persons are suspected in connection with the same criminal offence, examination of the files and inspection of the objects serving as evidence may be deferred until the public prosecutor has questioned the last of the suspects who is accessible.

After examination of the files and inspection of objects, the public prosecutor will call on the suspect and his defence counsel to make within a specific time limit a motion for undertaking certain evidentiary actions.

A suspect who has been questioned and his defence counsel are required after collecting evidence and other materials (Article 301) to notify the public prosecutor thereof and to make possible for him before the conclusion of the investigation the examination of the files and inspection of objects serving as evidence.

If the motion referred to in paragraph 2 of this Article is rejected (Article 302 paragraph 2) or if the suspect and his defence counsel do not act in accordance with paragraph 3 of this Article, the public prosecutor will decide on a conclusion of the investigation (Article 310).

...

Inspecting the Content of Documents and Recordings

Article 405

Transcripts of an examination away from the trial, searches of residences and other premises or persons, certificates of seized objects, as well as instruments serving as evidence, will be inspected, or, if the chamber deems it necessary, the president of the chamber will relate their content briefly, or read them out.

A video or audio recording or electronic recording which are being used as evidence will be reproduced at the trial so that those present can be informed about their content.

If it is stipulated by this Code that testimony or other procedural actions are recorded and that alongside the recording a transcript is kept in which only specific data is entered, the adduction of such evidence is performed in accordance with paragraphs 1 and 2 of this Article. Objects which may serve to clarify matters will be shown at the

trial to the defendant, witnesses or expert witnesses, and if the presentation has the significance of recognition, it will be acted in accordance with Articles 90 and 100 paragraphs 1 and 2 of this Code.

Instruments being used as evidence are if possible submitted in the original.

Inspecting the Content of Transcripts on Testimony

Article 406

Except in cases stipulated elsewhere in this Code, inspection of the contents of transcripts of the testimonies of witnesses, co-defendants or already convicted accomplices in a criminal offence, as well as transcripts of the findings and opinions of expert witnesses, may if so decided by the chamber be performed by analogous application of Article 405 of this Code:

1) if the persons examined are deceased or mentally ill, or their location is unknown, or their appearance before the court is impossible or would be substantially difficult due to advanced age, poor health or other important reasons;

2) if the parties are in agreement on such action, instead of direct examination of a witness or expert witness who is not present, irrespective of whether he was summoned or not;

3) if the witness or expert witness was examined directly before the same president of the chamber or in accordance with the provision of Article 404 of this Code;

4) if the witness or expert witness refuses to testify at the trial without a legally valid reason;

5) if what is concerned is the testimony of a co-defendant prosecuted in separated criminal proceedings or criminal proceedings already concluded by a final conviction.

Transcripts of earlier examinations of persons released from the duty of testifying (Article 94 paragraph 1) may not be adduced in accordance with the provisions of this Article if those persons were not summoned to the trial or have declared at the trial that they will not give testimony.

The reasons will be specified in the transcript of the trial due to which evidence is being adduced in accordance with the provisions of this Article, and the president of the chamber will announce whether the witness or expert witness who testified had sworn an oath.