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COMMITTEE  
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COMITÉ  
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Date: 26/02/2016

**DH-DD(2016)219**

Documents distributed at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers.

Meeting: 1250 meeting (8-10 March 2016) (DH)

Item reference: Communication from a NGO (YUCOM Lawyers' Committee for Human Rights and Astra-Anti trafficking action) (18/02/2016) in the case of Zorica Jovanović against Serbia (Application No. 21794/08) and reply from the authorities (26/02/2016)

Information made available under Rules 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1250 réunion (8-10 mars 2016) (DH)

Référence du point : Communication d'une ONG (YUCOM Lawyers' Committee for Human Rights et Astra-Anti trafficking action) (18/02/2016) dans l'affaire Zorica Jovanović contre Serbie (Requête n° 21794/08) et réponse des autorités (26/02/2016) (**anglais uniquement**)

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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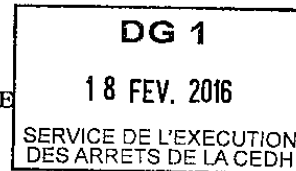
DH-DD(2016)219: Rule 9.2: NGO in Z. Jovanovic v. Serbia and reply from the authorities.

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Lawyers' Committee For Human Rights  
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COMMITTEE OF MINISTERS COUNCIL OF EUROPE  
STRASBOURG



Belgrade, 18<sup>th</sup> February 2016

**SUBMISSION TO THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE**

**UNDER RULE 9.2**

**concerning the case of**

**ZORICA JOVANOVIĆ v. SERBIA (21794/08)**

1. *ASTRA – Anti-Trafficking Action is a local non-governmental organization dedicated to eradication of all forms of trafficking in human beings founded in 2002. Since 2012, ASTRA has been running the European number for missing children 116 000 which is operative in 28 European countries. Since the establishment of the line, a large number of calls were received from the citizens whose babies went missing from the maternity wards after the birth.*
2. *YUCOM – The Lawyers' Committee for Human Rights (founded in 1997) is a professional, voluntary, non-governmental association of citizens, associated to protect and promote human rights in accordance with universally accepted civilized standards, international conventions and national law. Since the establishment, YUCOM is providing free legal assistance to victims of human rights violation, as well as developing cooperation with national and international organizations involved in human rights protection and promotion. YUCOM has profiled itself and gained much recognition as human rights defenders' organization.*
3. *ASTRA and YUCOM would therefore like, with the support of a group of parents of the missing babies, to make a submission to the Committee of Ministers under the Rule 9.2 in respect to the execution of the judgment of the European Court of*

Human Rights ("European Court") in the case of Zorica Jovanović (petition no. 21794/08).

4. We would hereby like to emphasise that the Working Group presented the Draft Law in the Round table on 10<sup>th</sup> February 2016.
5. The proposed Draft Law on determining the facts on the status of the newborns suspected to have disappeared from the maternity wards in the Republic of Serbia does not correspond to the obligations of the Republic of Serbia from the judgment in the case of Zorica Jovanović v. Serbia (petition no. 21794/08), whereby the court stated that the State is in obligation to, within a year from the date of effectiveness, and in accordance with article 44, paragraph 2 of the Convention, "to employ all appropriate measures, preferably through *lex specialis* [...] to ensure the establishing of a mechanism with aim to provide individual damages to all parents found in a situation like this one or similar enough to that of the submitter's [...] This mechanism should be monitored by an independent body with adequate powers, able to give reliable answers concerning the fate of each child and provide certain compensation pursuant to each case." By drawing the Special Law on determining the facts concerning the status of the newborns suspected to have disappeared from the maternity wards in the Republic of Serbia, the Government will only formally fulfill its obligations from the aforementioned judgment while essentially it will be utterly contrary to the obligations presented to the Republic of Serbia by the European Court in this case. Namely, prescribing a special extrajudicial procedure, with characteristics totally out of compliance with this very specific situation that the parents whose newborns are suspected to have disappeared from the maternity wards in the Republic of Serbia are in, or with the demands to determine the truth in these cases, will not essentially lead to any solution or ascertainment (of truth). Given that the European Court of Human Rights has stipulated the forming of "a mechanism that should be monitored by an independent body with adequate powers", it is unclear in what way and which independent body can monitor the work of the extrajudicial court in the Republic of Serbia. We would like to point out that at the very meeting of February 6<sup>th</sup> 2015, held on the occasion of the execution of the judgment, this question was raised, and that there was a discussion aiming to prescribe the administrative procedure so as to allow the Ombudsman to supervise its execution. The reasons for abandoning this approach and totally disregarding the responsibilities to form the mechanism with the abovementioned characteristics are unclear.
6. The title of the proposed Draft Law states that the fact of the status of the newborns suspected to have disappeared from the maternity wards in the Republic of Serbia should be established. It is our opinion that the title should inevitably be changed, in that 'maternity wards' should be replaced with 'medical institutions', bearing in mind that the children went missing not only from the maternity wards, but also from other medical institutions.
7. Considering that art. 18 par. 3 of the Constitution of the Republic of Serbia requires that "Provisions on the human and minority rights are interpreted in favour of the promotion of the values of a democracy, in agreement with valid international standards for human and minority rights, *as well as the practices of international institutions monitoring their execution*", it is clear that the

judgment of the European Court of Human Rights in this case is a practice of an international institution monitoring the execution of an international standard of human rights. As the Court has stated that for this case it is necessary to form a mechanism that will be able to monitor the independent body, thus 'the execution of the judgment' through stipulating extrajudicial procedure is not in conformance with this provision of the Republic of Serbia's Constitution, or with the principle of the legal order unity from art. 194, par. 1 of the Constitution.

8. Article 1 of this law states that it "regulates the act by which the facts on the newborns suspected to have disappeared from the maternity wards in the Republic of Serbia are established". If one closely follows the whole text of this law, surely the procedure should be about establishing the status of a 'missing child' and the reasons for its disappearance, and not in this manner. There would also have to be definitions for certain concepts. For example, the status of a 'missing child' by this law implies a newborn baby for which it cannot be ascertained without a shadow of a doubt that it has died in a maternity ward.
9. In Article 2 it is stated that the aim of the law is "to establish the facts useful for determining the truth on the status of the newborns". We propose that it should instead state establishing the truth on the status of the newborns.
10. Furthermore, prescribing that the question of determining the status of the missing babies will be conducted under the rules of an extrajudicial procedure, with a special police unit to be formed subsequently, leads to confusion in the procedure and the interference of public legal service with that in the private legal sphere, for which the proposer agreed to be adequate to establish the truth about the fate of the missing babies. It is unclear which particular powers can a police unit have in a case concerning the determining of the status of newborns suspected to have disappeared from the maternity wards in the Republic of Serbia, as well as as it is unclear as to which particular actions will this unit perform. It seems that the proposer tried, through this provision from art. 5 of the Draft Law, to answer the question which arose since the passing of judgment, which is to establish a body with strong investigative powers, competent to determine the facts in each individual case identical or similar enough with the facts of the case of *Zorica Jovanović v. Serbia*.
11. Instead of establishing a body which will have strong investigative powers and be capable of, within the boundaries necessary to protect the privacy of the case participants, publicly investigating each of the contentious cases, the proposer decided that the act of determining the truth of each individual case be reduced to an extrajudicial procedure, a procedure in which the public is involved only by exception, and which is lead far away from the public interested in the final resolution of this question. The absence of special investigatory powers which an extrajudicial court naturally lacks will not in any way create conditions needed to determine the truth about each and every case with circumstances consistent with those from the case of *Zorica Jovanović v. Serbia*.
12. Article 7 of the Draft Law states that the "Court may determine even those facts not introduced in the procedure and decide to present the evidence not submitted. The court may demand written evidence and data from the state and other bodies, as well as from private persons and legal entities, which would be required to

deliver them to the court within 30 days from receiving the court's demand". In our opinion, this would have to be the obligation of the court and not a question of a discretionary decision of whether the court would obtain the evidence or leave it to the proposers. This is why we propose the following solution: "...the court collects evidence and data *ex officio*..."

13. Article 10 reads: "The principle of interrogating the proposers and all others involved in the procedure" is contrary to art. 19 which says that "the court conducts a hearing only under impression that it is needed in order to explain certain facts, which practically excludes the obligation of 'hearing'".
14. Article 11 states that the "state and other bodies, organisations, and institutions participate in the procedure". However, it is not stipulated by the law as how the abovementioned bodies would participate, because it is a one-party procedure. In the case of a one-party procedure, the court obtains the information and evidence that said bodies are obliged to deliver, so they cannot be given the status of participant nor can they participate without 'having the status of proposer'.
15. Article 15 of the Draft Law states that the proposal may be submitted by a parent of a newborn child, under the condition that they had contacted the state bodies or maternity wards concerning the status of the newborns suspected to have disappeared from the maternity wards in the Republic of Serbia up until September 9<sup>th</sup> 2013, the time of the European Court of Human Rights judgment in the case of *Jovanović v. Serbia* (petition no. 21794/09). We believe that in this manner a lot of citizens will be harmed, especially bearing in mind that many citizens claim that they had in fact addressed the hospitals unofficially. After they had not been allowed to receive the documents evidencing the death of their children, the citizens failed to address another instance, while there has been no paper trail of their attempts to obtain the documents.
16. The Draft Law is also unconstitutional in the part concerning the amount of non-pecuniary damages awarded by the court. Namely, according to the standards of a fair trial and the principle of the free judicial opinion, it is not possible to determine in advance the highest amount of non-pecuniary damages, as the proposer had done in art. 23, par. 2 of the Draft Law. Such proposal contravenes also the provisions of the Law of Obligations, which in no way limits the height of non-pecuniary damages. In this sense and in this part, the Draft Law is contrary to the principle of the legal order unity, which implies mutual compliance of all legal regulations within the legal system of the Republic of Serbia, which generally excludes the possibility to use a law regulating one legal area (procedural law) to change or complement certain legal solutions within a law regulating another legal area (substantive law governing contractual relations). Finally, in all probability, the case of *Zorica Jovanović*, in which the European Court of Human Rights awarded 10,000 Euros as compensation for violation of rights guaranteed by the convention, is not 'the most difficult' case concerning non-pecuniary damages, and that, considering 'all the circumstances of the case' in certain cases it will lead to the conclusion of the court that the participant in the procedure has suffered damages exceeding this amount. Its statutory limitation does not lead to the application of a fair trial in this sense. This limitation is explained by 'the possibilities of budgetary funds of the Republic of Serbia' in the explanation of the Draft Law. We think that these arguments in no way influence the amount of non-

pecuniary damages to be awarded to the proposers in this case. If such argument were to be enforced, that would mean that no state in a dire economic situation could be fully responsible for human rights violation or be responsible for awarding the damages. No further explanation is needed for the inconsistency of this approach with the basic human rights standards.

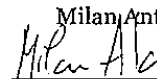
17. Furthermore, we think that it is necessary to expand the circle of proposers in the procedure, in a manner that even children can be proposers. Also, prescribing that the procedure can be started within six months from the law coming into force further restricts the access to justice for parents interested in finally discovering the truth about their babies, and is in every possible sense inadequate. We remind the proposer that the deadline initially suggested was a year from the law coming into force, and that there are no new reasons relating to such shortening of the deadline for proposals cited in the Draft Law. As a result, one may consider this deadline as arbitrarily defined and intended to restrict the number of proposers who could possibly initiate court procedures due to suspicion that their newborn children have disappeared from maternity wards in the Republic of Serbia.
18. Article 15, par. 2 states that "the proposal contains the demand to determine the status of a missing child...". We think that this paragraph should be changed so it states "to determine the status of a newborn child, or if the child had died, to state the child as dead, and if not, than to give it the status of a missing child and the reasons for its disappearance (procedural omissions or unlawful conduct of an individual or institution)". Also, in paragraph 3 of the same Article, it is said that "the proposer is obliged to complement their proposal with evidence". We believe that this should be the obligation of the court, i. e. for the court to collect evidence *ex officio*. We could possibly accept the formulation that "the proposer submits the evidence at their disposal which indicate the validity of the case", but we still maintain that collecting the evidence should be the obligation of the court.
19. Article 19, which prescribes that the court schedules a hearing when it deems it necessary to determine important facts or to present evidence or when it considers that the hearing is needed for some other justifiable reasons, should by all means be changed in that the hearing is held whenever the proposer demands it in the proposal, or in any case, regardless of the contents of the proposal submitted to the court.
20. We believe that Article 20, which states: "If during the procedure the court should discover that there is reasonable doubt that a criminal act has been committed and for which the prosecution is exercised *ex officio*, its duty is to immediately file a criminal complaint to the public prosecutor", should instead say that in the case of doubt that a criminal act has been committed, the court is obliged to deliver the evidence obtained in the procedure and inform the proposer, instead of immediately filing a criminal complaint.
21. Articles 21 and 22 regulating the decision and fair compensation in no way correspond to the essence of the problem to be regulated by passing the law nor will they, if this solution is adopted, lead to determining the truth in every individual case. Bearing in mind the point of passing the law, as well as the announcement of competent ministers that it will finally determine the truth about every individual case where the parents suspect their children have


disappeared from the maternity ward, the decisions to be made in this procedure cannot be the ones proposed by the Draft Law. In our opinion, these decisions would have to be the ones determining that the child has died, at which point the procedure would be suspended, the ones determining that the child has disappeared, as well as all the facts surrounding the disappearance of the child, and finally, the ones determining that the child has disappeared, but the evidence proving without doubt all the circumstances of disappearance is insufficient. Similarly, it is necessary to remove the provision contained in Article 21, paragraph 3, which stipulates that in case where the facts explaining what has happened to the missing child cannot be determined, the court finds that it cannot establish the status of the missing child. Should this provision remain, the procedures held at courts will only lead to a mere statement of the court that it is impossible to establish the status of a missing child, which is far removed from giving a chance to finally determine the truth about each individual case concerning the newborn children suspected to have disappeared in the maternity wards in the Republic of Serbia. Finally, we believe that art. 22, which stipulates that by the decision granting the motion, the court *may award* the proposer a fair monetary compensation for the non-pecuniary damages for the violation of the right of family life, should be changed in such manner that a clear obligation of the court to a fair compensation to the proposer is stipulated.

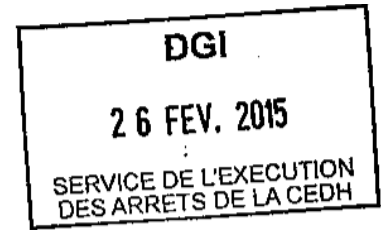
22. ASTRA and YUCOM would therefore like to once again kindly request that the Committee of Ministers consider all the facts indicated in this submission and take all steps aimed at ensuring that the European Court's judgment in the case of Zorica Jovanović is fully implemented. In this regard, if the Serbian authorities fail to take measures adequate for implementation of this judgment without further delay, ASTRA urges the Committee of Ministers to keep this case on its Order of Business of each DH meeting until the judgment is fully implemented and plight of the parents of "the missing babies" brought to an end.

Marija Andelković  
  
Director of ASTRA



Milan Antonijević  
  
Director of YUCOM





Belgrade, 25 February 2016

**Response of the Government of Serbia  
to the communication made by NGO Astra and YUCOM  
in respect of the case**

**ZORICA JOVANOVIĆ V. SERBIA**

**Appl. no. 21794/08**

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1. In response to the communication made by ASTRA and YUCOM NGOs to the Committee of Ministers on 18 February 2016, the Government of Serbia would like to submit the following provide the following information.
2. The European Court indicated in this judgment that Serbia shall have an obligation to “take all appropriate measures to secure the establishment of a mechanism aimed at providing individual redress to all parents in a situation such as, or sufficiently similar to, the applicant.”
3. The Government has taken a number of steps aimed at ensuring execution of this judgment. Following the Committee of Ministers’ decision adopted at the meeting in December 2015, the draft law was amended to reflect the above-mentioned decision. The revised draft law was prepared in February 2016. The revised draft law also incorporated recommendations made by the Department for the Execution of Judgments of the European Court of Human Rights. The Government would like to highlight that parents of “missing babies” and civil society were involved in public consultation on the draft law and were in the position to present their views.

*Concerning the mechanism and related procedure in the revised draft law*

4. Concerning the comments made by the NGO ASTRA and YUCOM on the mechanism established by the revised draft law, the Government would like to point out that courts are independent bodies providing the most ample guarantees of independent and impartial proceedings pursuant to the Constitution. The European Court has never contested impartiality and independence of the national courts. “Extra-judicial procedure”, as it is called by ASTRA and YUCOM (being in fact the judicial non-contentious procedure), is a judicial procedure adjusted for this kind of cases in order to ensure the most effective mechanism in establishing relevant facts.
5. Introducing administrative procedure, supervised by the Ombudsman, as suggested by ASTRA and YUCOM, in the mechanism is not in accordance with the national legal system. The national law provides that the supervision of



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administrative procedure shall be carried out through judicial review by the Administrative Court. Therefore, it shall be done by a judicial authority. The competences of the Ombudsman are not defined in this regard. The Government reminds that modalities of the execution of this judgment are within the margin of appreciation of the respondent State and considers the solution provided in the draft law meets the recommendations of the Council of Europe expert given to the Serbian authorities in the meeting in February 2015. At that meeting it was pointed out that the best way was to use the existing institutional framework in order to find the fastest and most efficient solution. The Government acted accordingly to that suggestion.

6. The civil society also expressed criticism on the alleged lack of obligation to schedule a “hearing” in the procedure set out in the revised draft law. The authorities would like to recall that the alleged events concerning disappearances of babies from maternity wards in Serbia mainly took place in the period from the seventies to the eighties of the last century i.e. 35 or more years ago. In such circumstances, it is reasonable to expect that the court would deal with different situations: in some cases there might be no other evidence apart from the written documents as possible witnesses might have already passed away. The revised draft law left to the courts to act in accordance with the facts of the case in order to get requested answers efficiently and without delay.
7. Bearing in mind different circumstances of particular cases, the revised draft law furthermore strengthened the evidence procedure. In particular, the fines for individuals or entities failing to provide the evidence requested by the court have been tripled with comparison to the initial draft law. This amendment will have a deterrent effect for non-cooperation with the courts in evidence procedure and will ensure that the court obtains the relevant facts and documents efficiently and rapidly. In compliance with the Committee of Ministers’ decision adopted in December 2015 and the assessment prepared by the Department for the Execution of the European Court’s judgments from October 2015, the revised draft law stipulated that no witness or expert witness could withhold testimony or expertise or answering any question posed by the court. The court will be able to summon or fine any witness or expert witness failing to appear, including the assistance of public force. As it is the duty of the courts to establish the facts it is not unreasonable that the revised draft law prescribes that the applicant should submit the evidence they have. The Government does not see any reason for criticising this solution.

*Concerning the powers of the special police unit*

8. The powers of the special police unit, which are contested by ASTRA and YUCOM, would be established by a special act of the Minister of Interior. This act will be adopted within two months from adoption of the revised draft law. The Government therefore deems that the criticism expressed by the civil society in this respect is certainly premature. The powers of the special police unit would be

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defined in such a manner as to give the widest possible authorisation to reveal the facts surrounding the alleged disappearance of babies from maternity wards.

*Concerning the role of public in the procedure*

9. Regarding criticism that the public would not be sufficiently involved in the procedures set out in the revised draft law, the Government highlights that its responsibility is to display the utmost care to protect the privacy of participants in the proceedings as well as the privacy of all persons the proceedings concern. It is recalled in this respect that this issue concerning the right to family life is extremely complex and sensitive. In view of this, the Government must take care to prevent potential violations of the Convention in respect all persons that might take part in the proceedings.

*Compensation*

10. As to the compensation, the Government would like to recall that the domestic courts will award compensation on case-by-case basis taking into account the legislative provisions of the Obligation Act and the European Court's case-law. They will establish case-law on the determination of non-pecuniary damage. The intensity of mental suffering and length of suffering sustained will be taken into account in each particular case. Given the complexity and variety of individual cases, the Government considers that the courts are best placed to make assessment on it and develop their case-law and the relevant criteria in this respect. In accordance with the national legislation, notably the provisions of the Obligation Act, award of just satisfaction in respect of non-pecuniary damage sustained shall not preclude parents of "missing babies" to claim pecuniary damage in separate proceedings before civil courts. In this way, the most ample compensation would be provided to provide redress to parents of "missing babies" concerned.
11. The Government considers that solutions prescribed by the new draft law are established in compliance with the European Court's findings. The Government would like to highlight in this respect that it highly values the bilateral discussion on these issues with the Department for the Execution and this cooperation was of fundamental importance for the Government. In this respect, the Government took into account the assessment of the initial draft law made by the Department.
12. The efforts to find a comprehensive solution for this complex and sensitive matter will be intensified. The Government of Serbia remains open for constructive suggestions of civil society in order to integrate the solution which would ensure the effective remedy for parents of "missing babies".