

## **LOST IN TIME - THE ZORICA JOVANOVIĆ V. SERBIA CASE AND THE IMPACT OF THE ECHR ON DEMOCRATIC CHANGES IN POST- COMMUNIST COUNTRIES IN EUROPE**

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### *Abstract*

If it was not for one of the missing babies' mothers, Zorica Jovanović, and the judgment of the European Court of Human Rights (ECHR), it is certain that the Republic of Serbia would never decide to open the question of missing babies. According to the Association of Parents of Missing Babies, in the past 40 years between 6,000 and 10,000 newborns have falsely been declared dead in Serbia in the past 40 years. Parents claim to possess evidence that their children had been declared dead while still in maternity hospital, and then sold in the black market. In 2013, when the judgment was passed in the Zorica Jovanović v. Serbia case, Serbia had no other choice than to pay damages to Zorica Jovanović, and to take measures within one year of the final judgment to establish mechanisms that would enable all parents in similar situations (around 2,000 of them) to receive appropriate answers and compensation. However, the Republic of Serbia failed to do this. By analyzing the Zorica Jovanović v. Serbia judgment, the author shall look into two important questions that are equally present in terms of the ECHR judgment in post-communist countries: the problem of executing the ECHR judgments, and the problem of so-called syndrome of perception of powerlessness and usurpation of institutions among citizens, which is embodied in delegitimation of institutional order in citizens' eyes. The author concludes that this is precisely where the European system of human rights protection is powerless, because in cases when it is established that the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms have been breached, and when the ECHR passes a final judgment, it is up to countries to execute the obligations from the judgment, which they – especially post-communist countries - sometimes will not, and sometimes cannot do. The consequence of this is citizens' increased perception that institutions have been completely "taken away" from the citizens, that they are powerless and unprepared to operate in the public interest, as for example in Zorica Jovanović's case, where despite the final judgment and warning of the Council of Europe Committee of Ministers for not executing the judgment, the countries are not capable of investigating and finding out what happened to such a big number of missing children.

*Keywords: right to privacy and family life, missing babies, European Court of Human Rights, Zorica Jovanović, human rights.*

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## I. INTRODUCTION

At the beginning of the 2000s, the media in Serbia began to report more frequently about the alleged "theft of babies" that took place in maternity hospitals throughout Serbia, mostly in the seventies and eighties of the 20th century. The stories were initiated by parents who believed that their children, who were declared dead in state hospitals, were abducted from maternity hospitals immediately after birth. More than two thousand parents, gathered in various associations, began their quest for the truth about babies born two, three or more decades ago, because many of them never received the bodies of children or the accompanying medical documentation, especially death certificates. In a search during which they went through all the levels (from funeral companies to hospitals where the children were born), they managed to obtain some documents that testify to major omissions and illogicalities in recording the status of babies who allegedly died after birth or were stillborn. All these cases are similar to each other, but only one of them started an avalanche, the case of Zorica Jovanović.

Nearly seven years after the ECHR passed a judgement in the case of *Zorica Jovanovic v. Serbia*<sup>1</sup>, and over twenty years of suspicions that children were abducted from maternity hospitals in Serbia, on February 29, the Law on Establishing the Facts on the Status of Newborn Children Suspected to Be Missing from Maternity Hospitals in Serbia was adopted and entered into force (hereinafter: the Law).<sup>2</sup> It took many years for the Republic of Serbia to fulfil its obligation from the ECHR judgement which ordered it to take measures within a year of the final judgement to establish a mechanism for providing individual compensation to all parents in a situation similar to that of Zorica Jovanović. One such mechanism is the adoption of the so-called Law on Missing Babies. Serbia has faced a number of challenges in implementing this judgment, and the specific circumstances of the case and its sensitivity have hampered the entire process, which resulted in enhanced supervision of the case.

This case is, unfortunately, only one in an array of cases that showed how difficult it is to achieve the desired ideal of respect for basic human rights, even when the damaged party enjoys the support of a final judgment of the ECHR and a fully developed system of supervision for the execution of that judgment. Only with such cases, it seems, do we realize how difficult it is to deal with the legacy of repressive regimes and the burden shared by all post-communist countries - the consequences of the transition process. In this paper, we shall analyze the actions of the Republic of Serbia before and after the judgement in the case of Zorica Jovanović and use that example to explain in more depth the importance of mechanisms for supervision of the execution of the ECHR judgements.

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<sup>1</sup> Zorica Jovanović v. Serbia, Application no. 21794/08, Judgment of 26. March 2013., (<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-118276%22%5D%7D>), 21.01.2021.)

<sup>2</sup> Law on Establishing the Facts on the Status of Newborn Children Suspected to Be Missing from Maternity Hospitals in the Republic of Serbia, "Official Gazette of the Republic of Serbia", no.18/2020.

## II. FACTS RELATED TO THE ZORICA JOVANOVIĆ CASE

Zorica Jovanović is a Serbian citizen who lodged an application against the Republic of Serbia on April 22, 2008, with the European Court of Human Rights in Strasbourg (hereinafter: the Court in Strasbourg). She did so after three decades of unsuccessful attempts to obtain an answer from various state authorities about what happened to her baby, who she was told died the day after birth in the maternity hospital in Čuprija, a small town in central Serbia. She addressed the Strasbourg Court and won a lawsuit against the state. And she said it all started when she took an ordinary pencil in her hand and started to describe in her own words, in the Serbian Cyrillic alphabet, what had happened to her. The whole story, she says, fit on one and a half pages of paper and was sent by mail to Strasbourg.<sup>3</sup>

In the letter, she wrote that in 1983 she gave birth to a healthy boy in the health centre in Čuprija, a state institution. While she was in the hospital, for the first three days after the birth, she regularly saw her son, and on October 30, the doctors informed her that she would leave the hospital the next day, with the baby. She was never told that the baby had any health problems, and the day before leaving the hospital, the baby was in the room with her until before midnight when the baby was taken to the nursery, according to the standard procedure. Early in the morning, on October 31, 1983, at around 6.30 am, the doctor who was on call in the hospital entered her room and informed her that her baby had passed away. The applicant immediately ran to the room where her son had spent the night, however, two staff members stopped her and did not allow her to enter that room. On the same day, later in the afternoon, the applicant left the Čuprija Medical Center. Her family members were told that the baby's body could not be handed over to them yet because the autopsy of the newborn would be performed in a large hospital centre in Belgrade. However, the autopsy report was never given to Zorica or her family. She was never informed when and where the child was allegedly buried.

This event left Zorica and her family in a state of shock, and it was only after reports began to circulate more frequently about the theft of babies in Serbian maternity hospitals in 2001 and particularly 2002, that she decided to turn to the health centre in Čuprija and request all relevant documentation regarding the death of her son. After doing so, in October 2002, there was a continuous series of inconsistencies in the conduct and provision of information by various state bodies. Thus, the health centre in Čuprija sent a letter again that Zorica's son had died on October 31, 1983, at 7.15 am and that the death was marked as *exitus non signata*, i.e. as a death with unknown cause.<sup>4</sup> Also, Zorica was informed that the archive in which the medical documentation was kept was flooded, due to which many documents were destroyed and that they could not provide her with any additional information or documents. In the same year, at her request, the municipal registry office in Čuprija officially informed Zorica Jovanović and her husband that the birth of her son was registered, but not his death. Then, in January 2003, Zorica Jovanović's husband filed a criminal complaint with the Municipal Public Prosecutor in Čuprija against the medical staff of the maternity hospital for the crime of abducting a minor, but the complaint was rejected on the grounds that "there is evidence that their son died on October 31, 1983."<sup>5</sup> No other explanation was provided, not even about whether any investigation had been conducted by the prosecution. After this decision of the prosecutor, in 2007 Zorica Jovanović again sent a request

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<sup>3</sup> BBC News, The Case of Missing Babies: The Only Mother with Judgement Writes to Strasbourg Again, Jan. 22, 2019, (<https://www.bbc.com/serbian/lat/srbija-46948057> 13.01.2021).

<sup>4</sup> See par.14, 15 and 16 of the Judgement *Zorica Jovanović v. Serbia*.

<sup>5</sup> *Ibid.*

to the medical centre in Čuprija and the registrar of the municipality of Čuprija and once again received the same answers that the death of her son was never officially registered.<sup>6</sup> It is not disputed that the baby's body was never handed over to Zorica Jovanović or her family.

Since for many years, she was unable to find out what happened to her son or to find any answer that would help her in her further search, and as there was a serious suspicion that her son had not died in the maternity hospital, Zorica filed a complaint against the Republic Of Serbia to the European Court of Human Rights for the violation of Articles 4, 5 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>7</sup> The court passed a judgement that established that the Republic of Serbia violated the rights of Zorica Jovanović guaranteed by Art. 8 of the Convention - the right to privacy and family life. In the case of Zorica Jovanović, the violation of Art. 8 of the Convention was embodied in the fact that the child's body was never handed over to the family, that the cause of death was not established, that the autopsy report was never handed over to the family, that the family was not informed when and where the child was allegedly buried, that the criminal complaint was dismissed without conducting an adequate investigation and that the sued State continuously failed to provide the applicant with reliable information regarding the fate of her son.<sup>8</sup>

The judgment of the Court in Strasbourg of March 5, 2013, awarded Zorica Jovanović a non-pecuniary damage compensation for suffering in the amount of 10,000 euros, but more importantly, it ordered that within one year from the date the judgment becomes final the Republic of Serbia should take "all appropriate measures, preferably through *lex specialis* [...] to ensure the establishment of a mechanism to provide individual compensation to all parents in a situation such as or sufficiently similar to the applicant's situation".<sup>9</sup> Furthermore, the Court states that this "mechanism [...] should be supervised by an independent body with appropriate authority, which will be able to provide reliable answers in relation to the fate of each child and give the family adequate compensation, depending on the case".<sup>10</sup> At the same time, the Strasbourg Court decided to postpone the consideration of all similar petitions for one year, expecting the Republic of Serbia to adopt the *general measures* in question.<sup>11</sup>

In principle, the member states of the Council of Europe have three obligations following an unfavourable judgment of the Court: (1) to pay the compensation, if any; (2) if necessary, to take further individual measures in favour of the applicant in question, that is to put an end to the violation found by the Court and to remedy its consequences in such a way as to put that applicant, as far as possible, in the situation before the violation occurred (restitution in integrum); and (3) to take general measures to ensure that similar violations do not recur in the future.<sup>12</sup> Depending on the nature of the violation, some judgments, therefore, require the States to take general measures in order to prevent violations that essentially originate from the same cause. This can relate to

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<sup>6</sup> Par. 20 of the Judgement *Zorica Jovanović v. Serbia*.

<sup>7</sup> Par. 42 of the Judgement *Zorica Jovanović v. Serbia*.

<sup>8</sup> For more information, see: Rakić Vodinelić V. 2017., Presuda Evropskog suda za ljudska prava Jovanović protiv Srbije ( <http://pescanik.net/nestale-bebe/> , 13.01.2021), and par.74 of the Judgement *Zorica Jovanović v. Serbia*.

<sup>9</sup> Čurčić D., 2019, To je Srbija, Pescanik, ( <https://pescanik.net/to-je-srbija/> 13.01.2021).

<sup>10</sup> *Ibid.*

<sup>11</sup> Par.92-93 of the Judgement *Zorica Jovanović v. Serbia*.

<sup>12</sup> Delovski V., Rodić V., 2020, Analiza potreba u izvršavanju presuda Evropskog suda za ljudska prava protiv Srbije, str.111. , ( <https://rm.coe.int/analiza-potreba-u-procesu-izvršavanja-presuda-esljp-protiv-srbije/1680a0368c> 13.01.2021).

changing the disputed law, or administrative reform, changes in case law or the police actions.<sup>13</sup> Member States take general measures when it is necessary to harmonize case law, the practice of administrative bodies, laws, by-laws, and sometimes the constitution with the recommendations of the Court, i.e. the Convention, and they can also be very diverse, i.e. depending on the violation in question.<sup>14</sup> Those general measures are in the Court's case-law sometimes very concrete, which can be seen in the Zorica Jovanović case. The exceptional importance of this judgement is reflected, in particular, in the fact that it not only implies compensation to prosecutor Zorica Jovanović but also all other parents through individual satisfaction and the establishment of a mechanism that will ensure the provision of reliable answers regarding the fate of each child that is suspected to have disappeared from a maternity hospital in Serbia.

### **III. REACTIONS AND ACTIONS OF STATE BODIES AND THE OMBUDSMAN BEFORE AND AFTER THE JUDGEMENT**

The Court, therefore, found that the Republic of Serbia violated the rights of Zorica Jovanović under Art. 8 of the Convention - the right to privacy and family life. Essentially, the goal of the right from Art. 8 of the Convention is to "protect the individual from the arbitrary conduct of public authorities."<sup>15</sup> This arbitrary action of the public authority, which the Court recognized in the Jovanović case, unfortunately, continued even after the judgement was passed. Therefore, in the following part, we will analyze the manner in which the government behaved in the period both before and after the judgement in the case of Zorica Jovanović.

As already mentioned, the case of Zorica Jovanović was only one in a series of similar cases. Parents whose babies had "disappeared" have addressed the competent institutions in Serbia, including the Ministry of Health and the National Assembly of Serbia, on several occasions since 2000, asking them for help in resolving the problem of suspicion of the disappearance of such a large number of children.<sup>16</sup> This resulted in the fact that the National Assembly of Serbia formed an Inquiry Committee in 2005 to establish the truth about newborn children missing from maternity hospitals in several Serbian cities.<sup>17</sup> This Report of the Inquiry Committee, adopted by the Assembly in July 2006, contains several important findings: (a) that there were serious shortcomings in the applicable legislation during the period in question, as well as in the procedures of various state and healthcare institutions; (b) that these deficiencies in the conduct of

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<sup>13</sup> Đukanović, A., 2018., Izvršenje presuda Evropskog suda za ljudska prava - aktuelna pitanja. *Međunarodni problemi*, 2., str.216.

<sup>14</sup> Paunović, M., Carić, S., 2007, *Evropski sud za ljudska prava*, Pravni fakultet Univerziteta u Beogradu, Beograd, , str. 95. u: Đukanović, A., 2018, *op.cit.*, str.216. The normative framework for the execution of the ECHR judgments consists of the standards set out in several non-binding soft law instruments of the Council of Europe, but the most important is Recommendation CM / Rec (2008) 2 of the Committee of Ministers to member states on effective domestic capacities for speedy execution of the ECHR judgments. Adopted by the Committee of Ministers on February 6, 2008, at its 1017th session.

<sup>15</sup> Roagna, I., 2012, *Zaštita prava na poštivanje privatnog i porodičnog života prema Evropskoj konvenciji o ljudskim pravima*, Savet Evrope, p.11(<https://rm.coe.int/16806f1558> 13.01.2021).

<sup>16</sup> Over 2000 parents suspect that their children were stolen in maternity hospitals across Serbia. For more information, see:<http://nestalebebe.com/onama.php> (12.02.2021.).

<sup>17</sup> The Inquiry Committee of the National Assembly of the Republic of Serbia was formed on July 20, 2005, based on the Decision of the National Assembly of the Republic of Serbia, and on the occasion of addressing the Assembly several hundred parents stated the problem that they could not find information on their newborn children, expressing suspicion that their children had been stolen. From the Ombudsman's Report on the so-called cases of "missing babies" with recommendations, reg. no. 12443 dated July 29, 2010, p.1.

the competent authorities justify the parents' suspicions as to what really happened to their children; (c) that no criminal protection would be effective due to the applicable statute of limitations; (d) the willingness of the authorities to provide adequate satisfaction to the parents.<sup>18</sup> Then, in May 2010, it was announced that a parliamentary working group would be formed to prepare new legislation that would provide compensation to the parents of "missing babies".<sup>19</sup> During that time, the Ombudsman, acting on three complaints he received during 2009 and 2010, prepared a special *Report on the so-called case of missing babies with recommendations*<sup>20</sup> in which, among other things, he concluded: (a) that no complete or regulated procedures and regulations were in place at the time regarding the procedure in case of death of babies in maternity hospitals; (b) the prevailing medical view was that parents should be spared the pain of burying a newborn child, explaining the fact of refusing to surrender the body; (c) that the autopsy reports were usually incomplete, unsubstantiated and of dubious credibility; (d) that, therefore, it cannot be ruled out that the babies were unlawfully taken from their families; (e) that the reactions of the state authorities between 2006 and 2010 were inadequate; and (f) that parents had the right to know the truth about the real fate of their children, which could only be achieved by adopting a special law.<sup>21</sup>

However, neither of these reports led to more concrete results in terms of shedding more light on over two thousand requests of parents who sought to get an answer from the state about what happened to their children. None of these reports launched an investigation or led to parents being contacted and informed of future steps that the state would take. The message sent by the representatives of the authorities was clear, the reports were all that the parents of the missing babies would receive from the state. It was clear that the state did not plan to do anything to remedy this issue. Therefore, the judgment of the European Court of Human Rights in the *Zorica Jovanović* case was crucial to ignite pressure on decision-makers in Serbia.

It should be noted that in 2013, the Court ruled that within one year from the date when the judgment becomes final, the Republic of Serbia, should take all appropriate measures to ensure the establishment of a mechanism that will provide individual compensation to all parents in a situation such as or sufficiently similar to that of the applicant.<sup>22</sup> Everyone was impatiently waiting for the expiration of the deadline for the execution of the judgement in 2014. But nothing happened. The state's ignorant attitude towards the parents continued. The best indication of this appears to be the fact that the first meeting between the parents of the missing babies and the representatives of the state bodies responsible for executing the judgement was organized seven days after the deadline for the execution of the judgement, and only because of great media pressure.<sup>23</sup> After the meetings that followed, the adoption of a special law was announced for the end of May 2017, but that did not happen either.

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<sup>18</sup> Vodinelić Rakić, V., 2013, *Evropa stanuje u Babućnici*, Pešćanik, str.84. (<https://pescanik.net/wp-content/PDF/Evropa.pdf> 13.01.2021).

<sup>19</sup> Par.56. of the Judgement *Zorica Jovanović v. Serbia*.

<sup>20</sup> From the Ombudsman's Report on the so-called cases of "missing babies" with recommendations, reg. no. 12443 dated July 29, 2010, p.1.

<sup>21</sup> Vodinelić Rakić, V., 2013, *op.cit.* str.84. (<https://pescanik.net/wp-content/PDF/Evropa.pdf> 13.01.2021).

<sup>22</sup> Vidi supra funsota 11. Ćurčić, D., 2019, *To je Srbija*, (<https://pescanik.net/to-je-srbija/> 13.01.2021).

<sup>23</sup> RTS, internet portal, *Nestale bebe, predlozi rešenja na stolu*, 16.09.2014., (<https://www.rts.rs/page/stories/sr/story/125/drustvo/1698650/nestale-bebe-predlozi-resenja-na-stolu.html> 13.01.2021).



#### IV. ACTIONS AND ROLE OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE IN THE EXECUTION OF THE JUDGEMENT

The Council of Europe reacted to the failure of the Republic of Serbia to act in line with the Jovanović judgement in late 2017, expressing "deep regret" that Serbia did not provide the Committee of Ministers with data on progress in adopting the law on "missing babies".<sup>24</sup> In addition, the Council of Europe strongly appealed to the authorities in Serbia to take "urgent measures" and ensure the adoption of the law without further delay. Serbia enters 2018 with a warning from the Committee of Ministers of the Council of Europe for non-adoption of the law on "missing babies" and a resolution for non-execution of the judgment of the European Court of Human Rights in the "Zorica Jovanovic v. Serbia" case. The same scenario continues in 2019 when the Committee of Ministers of the Council of Europe in June 2019 again called on Serbia to urgently take all measures to legally resolve the case of missing babies, including above all the adoption of a special law that was forwarded to the Parliament in 2018. The Committee of Ministers of the Council of Europe also deeply regretted that the Serbian authorities had not informed it of developments in the adoption of the law and other measures to establish fact-finding mechanisms.<sup>25</sup> Only after all these pressures of the Council of Europe, on February 29, 2020, the Law on Establishing the Facts on the Status of Newborn Children Suspected to Be Missing from Maternity Hospitals in the Republic of Serbia was adopted (hereinafter: the Law).<sup>26</sup> Immediately after that, the Committee of Ministers of the Council of Europe announced that Serbia was no longer under special supervision of the Committee of Ministers of the Council of Europe due to the case of "missing babies", but also that "it was decided to continue supervising this case according to standard procedure".<sup>27</sup>

The complexity of this process was reflected in the fact that the state bodies of the Republic of Serbia submitted their action plans thirteen times,<sup>28</sup> while the Committee of Ministers adopted 19 decisions regarding this case, constantly asking Serbia to pass a law in accordance with the given judgement.<sup>29</sup> This is the only case against Serbia in which the Committee of Ministers has adopted two interim resolutions, urging Serbia to adopt the law and deciding to keep the case on the agenda of the Committee of Ministers until the National Assembly of the Republic of Serbia adopts it.<sup>30</sup>

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<sup>24</sup> For more information, see:

N1 TV, Savet Evrope žali zbog neusvajanja zakona o nestalim bebama, 07.12.2017. (<https://rs.n1info.com/vesti/a347721-savet-evrope-izrazio-zaljenje-zbog-neusvajanja-zakona-o-nestelim-bebama/> 13.01.2021).

<sup>25</sup> Euractive, SE ponovo poziva Srbiju da reši pitanje nestalih beba, 7.06.2019. (<https://euractiv.rs/10-ljudska-prava/179-vesti/13871-se-ponovo-poziva-srbiju-da-rei-pitanje-nestalih-beba> 13.01.2021):

<sup>26</sup> The Law on Establishing the Facts on the Status of Newborn Children Suspected to Be Missing from Maternity Hospitals in the Republic of Serbia, "Official Gazette of the Republic of Serbia", no.18/2020. entered into force on March 11, 2020, and it has been implemented since June 11, 2020, except for certain provisions that have been implemented since the date it entered into force, i.e. March 11 2020.

<sup>27</sup> Beta, Ministarstvo pravde: Komitet ministara SE više ne nadzire Srbiju zbog nestalih beba, 13.03.2020. (<https://www.danas.rs/politika/ministarstvo-pravde-komiteta-ministara-se-vise-ne-nadzire-srbiju-zbog-nestalih-beba/> 13.01.2021).

<sup>28</sup> Delovski, V., Rodić, V., 2020, Analiza potreba u izvršavanju presuda Evropskog suda za ljudska prava protiv Srbije, str.615.

<sup>29</sup> *Ibid.*

<sup>30</sup> CM/ResDH(2017)292) and CM/ResDH(2018)470. CM/ResDH(2017)292) Interim Resolution Execution of the judgment of the European Court of Human Rights Zorica Jovanović against Serbia, 21.09.2017.

## V. EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

The judgements of the Strasbourg Court are binding, which means that the States are obliged to comply with the final judgements of the Court in any case in which they appear as parties.<sup>31</sup> The Committee of Ministers is in charge of supervising the execution of the Court's judgements by the States.<sup>32</sup> Under such supervision, the respondent States remain free to choose the means by which they will fulfil their legal obligation under Article 46 of the Convention. In general, for each case (or group of similar cases), the Committee of Ministers considers the rights protection measures proposed by that State during special meetings on the human rights of delegates from all Member States and adopts a final resolution when it is satisfied that the judgment in question is respected.<sup>33</sup> Under the Convention, the supervision of the execution of judgments is carried out in accordance with a bilateral agreement concluded between the Committee of Ministers and the sued State, but as the Convention is a treaty by which States parties have committed themselves to respect the guaranteed rights of individuals under their jurisdiction when a State violates a provision of the European Convention, it must be justified before all other contracting states and it must also explain the weaknesses of the domestic legal system in that particular case.<sup>34</sup> This is precisely the reason why multiple bodies of the Council of Europe take part in the process of supervision of judgement execution.<sup>35</sup>

The final judgment of the Court is communicated to the Committee of Ministers, which supervises its execution and which, in particular after the entry into force of Protocol No. 11, plays a key role in the execution of judgments.<sup>36</sup> The Committee of Ministers adopted the Rules for the Implementation of Article 46, paragraph 2, of the 2001 European Convention, which were amended in 2006.<sup>37</sup> Also, after the adoption of Protocol no. 14, as of January 2011, a twin-track supervision procedure has been established.<sup>38</sup> Under the two-track supervision process introduced with the 2011 reform, most cases fall under standard supervision with minimal intervention by the Committee of Ministers, while the enhanced supervision process is largely reserved for cases where the Committee of Ministers or the Court has identified major problems, for pilot judgments, cases in which urgent individual measures are needed, as well as interstate cases.<sup>39</sup> Enhanced supervision implies a more proactive approach by the Committee of Ministers, i.e., if necessary, to put pressure on a State to act quickly on an unfavourable judgment.

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<sup>31</sup> Art. 46. (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ([https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) 13.01.2021).

<sup>32</sup> Art. 46. (2) of the Convention.

<sup>33</sup> Delovski, V., Rodić, V., 2020, *op.cit.* str.111.,( <https://rm.coe.int/analiza-potreba-u-procesu-izvrsavanja-presuda-esljp-protiv-srbije/1680a0368c> 12.01.2021).

<sup>34</sup> Krstić, I., Mainković, T., 2016, *Evropsko pravo ljudskih prava*, Savet Evrope, str.89. (<https://rm.coe.int/16806fbc17> 13.01.2021).

<sup>35</sup> *Ibid.*

<sup>36</sup> Art. 46. par. 2. of the European Convention.

<sup>37</sup> Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies. (<https://rm.coe.int/16806cebf0> 13.01.2021).

<sup>38</sup> Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan - Outstanding issues concerning the practical modalities of implementation of the new twin-track supervision system, CM/Inf/DH(2010)45, December, 7., 2010., (<https://rm.coe.int/16804a3e07> 13.01.2021).

<sup>39</sup> Delovski, V., Rodić, V., 2020, *op.cit.*, str.12.



In exercising its supervising function over the execution of judgments, the Committee of Ministers may also issue resolutions requesting information on progress in the execution of a judgment from the State in question, or it may express concerns and make suggestions regarding the execution, as it did in the Jovanović case.<sup>40</sup> If the state persistently refuses to comply with the judgment of the Court, the ultimate measure is the suspension of membership rights and the threat of expulsion, or exclusion from the membership in the Council of Europe.<sup>41</sup> Other forms of pressure are also possible, such as in relation to the member states of the Council of Europe that aspire to join the European Union, i.e. conditioning potential EU membership with respect of the Court's judgments.<sup>42</sup>

The example of the Zorica Jovanović case clearly indicates how problematic the execution of a judgement could be, however, non-execution of judgments as well as delays in the execution of judgments of the European Court of Human Rights, unfortunately, is not uncommon. For example, according to data from 2016, about 11,000 judgements had not yet been executed.<sup>43</sup> In Resolution 1226 of 2000, the Parliamentary Assembly pointed out that the Court's judgments were most often not executed due to certain political reasons, practical reasons concerning the legislative procedure, reasons related to the reform itself, a strong public opinion on a particular issue, and budget problem, vague judgments, or intertwined obligations of multiple institutions.<sup>44</sup> Also, the Report of the Steering Committee for Human Rights (CDDH), adopted at the end of 2015, caused great attention, as it points the inadequate execution of judgments at the national level as the main challenge of the Court and, in this regard, preserving the authority of the Court's judgments.<sup>45</sup>

The execution of final judgments is a key element of the rule of law. The obligation to execute judgments of the European Court of Human Rights essentially arises from the obligation of a state that has failed to fulfil the primary obligation under Article 1 of the Convention, i.e. the obligation to guarantee all rights guaranteed by the Convention.<sup>46</sup> As the European Court of Human Rights itself has pointed out, the protection of human rights would be futile if states allowed a final, legally binding court decision to the detriment of the party to remain without any effect.<sup>47</sup> It is therefore important to ensure in a national system that any binding court decision is executed, and this also applies to the system of international law, including the execution of judgments of the European Court of Human Rights. However, the readiness of Member States to execute the judgments of the Strasbourg Court is not always the same. In Resolutions 1787 (2011) and 1914 (2013), the Parliamentary Assembly pointed out that Bulgaria, Greece, Hungary, Italy, Poland, Romania, Russia, Turkey and Ukraine have the highest number of unexecuted judgments and still face a

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<sup>40</sup> Rule 16, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

<sup>41</sup> Statute of the Council of Europe", Article 8, European Treaty Series, No. 1, London, 5 May 1949. (<https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680935bd0> 13.01.2021).

<sup>42</sup> For more information, see: Đukanović, A., 2018, p.218.

<sup>43</sup> Krstić, I., Marinković, T., 2016, *op.cit.* str.89.

<sup>44</sup> Report Committee on Legal Affairs and Human Rights, Doc. 8808, Execution of Judgements of the European Court of Human Rights, July, 12., 2000, p.27. (<https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9013&lang=EN> 13.01.2021).

<sup>45</sup> The longer-term future of the system of the European Convention on Human Rights", Report of the Steering Committee for Human Rights(CDDH), Council of Europe, 11 December 2015, p.27 (<https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> 13.01.2021).

<sup>46</sup> Lambert Abdelgawad, E., 2008, The execution of judgments of the European Court of Human Rights, Council of Europe Publishing, p. 10. In: Đuknović, A., 2018, str.209.

<sup>47</sup> Para 40 of the Judgment *Hornsby v. Greece*, Application no. 18357/9, Judgment of 19. March 1997, Rep. 1997-II, (<https://curia.europa.eu/juris/document/document.jsf?text=&docid=200950&doclang=EN> 13.01.2021).

number of problems, which have not been resolved even 5 years after the judgements.<sup>48</sup> Also, statistics indicate that most applications were filed against countries in transition, so the largest number of cases was against Ukraine (24.3%), Turkey (11.2%), Hungary (10.6%), Russia (10.3%), Romania (8.3%) and Italy (8.8%).<sup>49</sup>

When it comes to Serbia, as many as 2,595 applications were filed before the European Court of Human Rights in 2019, of which 2,445 (or 94%) were rejected.<sup>50</sup> Last year, the court handed down 24 judgements in a total of 150 cases related to Serbia, of which 22 judgements found at least one violation of the European Convention on Human Rights.<sup>51</sup> In 2017 Serbia had 148 non-executed judgements.<sup>52</sup> The representative of the state before the European Court in all member states at the domestic level has the most important role in taking measures for the execution of judgments. The Republic of Serbia is represented before the Court in Strasbourg by the Ministry of Justice, which takes care of the publication of judgments relating to the Republic of Serbia and supervises their execution.<sup>53</sup> In addition, the Council for Relations with the Court has been established, which not only supervises the execution of judgments but also provides proposals and opinions.<sup>54</sup>

## VI. CONCLUSIONS

The Republic of Serbia has been a formal member of the Council of Europe since 2003 and ratified the European Convention on Human Rights in 2004. Since then, a large number of Serbian citizens have sought justice in Strasbourg. Citizens expect that at some point when they lose all proceedings before the Serbian judiciary, the Court will bring them the justice that was beyond their reach before the domestic courts. However, things do not work that way. The Court in Strasbourg is a subsidiary body, which means that the care for the implementation of the Convention is primarily entrusted to the signatory states, and the Court intervenes only in the situation when the nation-states do not do the job properly. The field of action of the Court in Strasbourg can be said to be rather narrow, while on the other hand, the field of action of the nation-state is very wide, which is why the Court in Strasbourg pays special attention to respecting the judgments of courts of the Convention signatory states. Due to insufficient information about the jurisdiction, role and powers of the Court in Strasbourg, citizens are often disappointed with the decisions it makes and the lack of the long-awaited "justice" they had hoped for.

As far as the State of Serbia is concerned, we can say that it respects and implements the decisions of the Court, but only when the judgments refer to monetary compensation of the applicants from Serbia and when the Court finds a violation of rights and orders fair monetary compensation to the

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<sup>48</sup> Glas, R., Lize, 2019, The European Court of Human Rights supervising the execution of its judgments, Netherlands Quarterly of Human Rights 2019, Vol. 37(3), p. 228–244.

<sup>49</sup> Krstić, I., Mainković, T., 2016, *op.cit.*, str.89; Vidi i: Tubić, B., 2019, Izvršavanje presuda Evropskog suda za ljudska prava, Zbornik radova Pravnog fakulteta, Novi Sad, br.1/2019, str.212.

<sup>50</sup> Avakumović, L., 2020, Traženje pravde u Strazburu – koliko i zašto se obraćamo Evropskom sudu za ljudska prava? Talas, 25.02.2020., <https://talas.rs/2020/02/25/trazenje-pravde-u-strazburu/> 13.01.2021).

<sup>51</sup> *Ibid.*

<sup>52</sup> Supervision of the Execution of Judgments and Decisions of the European Court of Human rights, 11 th Annual Report of the Committee of Ministers 2017". pp. 47, 102. (<https://rm.coe.int/annual-report-2017/16807af92b> 13.01.2021).

<sup>53</sup> Law on Ministries, Art. 9 para. 1, Official Gazette of the Republic of Serbia, no. 44/2014, 14/2015, 54/2015, 96/2015 – et al. 62/2017).

<sup>54</sup> Decision on Formation of Council for Relations with the European Court of Human Rights, Official Gazette of the Republic of Serbia, no. 55/05, 71/05 – rev. 101/07, 65/08, 16/11, 68/12 – US 72/12. The Council was formed in 2013 for a five-year period, i.e. until April 2018.

applicants. However, challenges arise when the state is obliged to solve a systemic problem in addition to financial compensation. Such is the case with the judgement in the case of Zorica Jovanović, where, as we have seen, the Court ordered the state to implement certain measures of a general nature, i.e. to take appropriate measures within one year of the judgement becoming final in order to establish a mechanism that would provide all parents in similar situations with appropriate answers to the question of what happened to the babies who disappeared from maternity hospitals in Serbia. According to the Association of Parents of Missing Babies, between 6,000 and 10,000 newborns have been falsely declared dead in maternity hospitals in Serbia in the last 40 years.<sup>55</sup> Therefore, the real epilogue of the judgement in the case of Zorica Jovanović is yet to come. Seven years after the expiration of the deadline for the execution of the judgement, the Republic of Serbia adopted a special Law on Establishing the Facts on the Status of Newborn Children Suspected to Be Missing from Maternity Hospitals in the Republic of Serbia, whose implementation began in the summer of 2020. The law provides for two types of proceedings, one before the High Courts in Belgrade, Novi Sad, Nis and Kragujevac, and the other before a special Government Commission, and the effects of the application of this law will continue to be supervised by the Committee of Ministers within a standard procedure. What is certain is that the implementation of this Law will be a very complex task for the state of Serbia and it can be expected that this case will remain in the focus of the Committee of Ministers, at least until the Strasbourg Court expresses its opinion on the effectiveness of this Law in a new similar case against Serbia.

However, ultimately, we have to ask ourselves what will be the real satisfaction for the parents of the missing children in this and similar cases, and whether, when it comes to such specific cases, the judgement of any court can bring any satisfaction? Analyzing the procedure of execution of the judgement in the Zorica Jovanović case, it seems that the only thing we can conclude with certainty is that the state, which was able not to answer questions about the alleged, suspicious death of such a large number of babies for decades, is nothing but an accomplice to that terrible act.<sup>56</sup>

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<sup>55</sup> For more about the Association of missing babies Belgrade, see: (<http://nestalebebe.com/onama.php> 12.12.2020.)

<sup>56</sup> Rakić Vodinelić, V., Presuda Evropskog suda za ljudska prava Jovanović protiv Srbije: (<http://pescanik.net/nestale-bebe/> 13.01.2021).



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