

Czech Republic Human Rights Review



Dear Madam, dear Sir,

It has been a very eventful year for the Czech Center for Human Rights and Democratization. First, we have been awarded a grant from Masaryk University, which has enabled us to develop a brand new web page. You can enjoy it here (<http://www.center4hrd.org>), we will keep the webpage regularly updated. Second, we would like to introduce our readers to our new logo, which you can find throughout the whole issue of the Review.

We can also proudly announce that our Center was admitted as a new member of the prestigious AHRI network (The Association of Human Rights Institutes) in September 2012. Furthermore, members of the Center prepared a report on the state of racism and discrimination in the Czech Republic for the ENAR (European Network against Racism).

Our Center organized a number of events in 2012, particularly a discussion with election observers on their experiences (you can read a report in this issue) from the Caucasus and Africa, a seminar with an ICTR and soon-to-be ICC judge Robert Fremr on the political and legal limits of effective functioning of the ICC, and a lecture by Molly M. Pucci of Stanford University on communist secret services.

The present issue of the Review features two intriguing interviews with very interesting personalities. Professor Manfred Nowak ranks among the most well-known figures in the human rights universe, not only due to his co-authorship of the report on Guantánamo prison and service for the UN as the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment. In the second conversation, a legal advisor to Radovan Karadžić, Peter Robinson, openly talks not only about his client, but also about the system of international criminal justice. You can also read about important human rights and international law related events which happened in the Czech Republic in 2012.

The Center for Human Rights and Democratization was established four years ago, as the first institution of its kind in the Czech Republic, publishing monthly Bulletin on human rights in Czech and organizing conferences and seminars. If you are interested in human rights developments and questions both in the Czech Republic and Slovakia, we would be happy to assist you with our expertise.

On behalf of the Czech Center for Human Rights and Democratization,
I wish you all the best in the year 2013,
Hubert Smekal

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The Outdated American Philosophy of Punishment

Interview with Manfred Nowak

Petr Přibyla

Why should prisons be as humane as possible? Why is the philosophy of punishment in the US completely different not only from European, but also from international standards? Petr Přibyla posed these and other questions to Manfred Nowak, Professor of International Law and Human Rights at the University of Vienna and former UN Special Rapporteur on Torture.

In 1992, **Manfred Nowak** founded the prestigious Austrian Ludwig Boltzmann Institute of Human Rights in Vienna. As one of the most significant scholars and experts in the international human rights field, Manfred Nowak has published more than 500 books and articles on international, constitutional, administrative, and human rights law, including the standard commentary on the International Covenant on Civil and Political Rights. He has been a UN expert on legal questions on enforced disappearances since 2002 and was appointed UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment in 2004 with a mandate until 2010.

PP: As practiced in the US, mostly in Virginia and Texas, many prisoners are held in solitary confinement in so-called “supermax” prisons, often isolated for 23 hours a day in small cells. According to statistics, 20,000 to 25,000 individuals are being held in the US that way. The current UN Special Rapporteur on torture Juan Mendez reported that indefinite and prolonged solitary confinement in excess of 15 days could amount to torture and thus should be absolutely banned. Are you of the same opinion?

MN: I share the same view. Of course, for some of the most dangerous criminals and terrorists you might need it.

There should be also a life after prison. The prisoners cannot be locked away indefinitely. They have to be seen as human beings who have done something wrong and therefore are punished. Every human being should also have the opportunity of having learned a lesson from what he or she did and have the hope that they can start a normal life after prison.

This is rehabilitation, which has to start in the prison. It means open prisons, regular visits, the right to recreation, the right to education, the right to work, and thus do something meaningful while in prison.

In most countries in the world there are open prisons for convicts. Prisoners are in their cells or rooms during the night, but during the day they should intermingle with other prisoners. That means having social contacts, such as working together, playing sports together, etc. This is important also in order to prepare them for life after prison. In the US you can be sentenced to 600 years in prison. The prisoner probably knows that he will never get out of prison again. Thus, there should not be prison sentences of this length. The way in which the prisoner behaves in the prison should be also taken into account for release. Prisons should be not inhumane, but as humane as possible.



Manfred Nowak | UN Photo - Mark Garten

PP: Why then do some countries adopt this inhumane approach?

MN: This has to do with the philosophy of justice. Countries like the US and the former Soviet Union still follow the philosophy of retributive justice, which should be as harsh as possible. This is not the right way. In Denmark, for instance, the normalization principle says that prison life should be made as normal and pleasant as possible, not as miserable as possible, because we want these people to be treated in a humane way and educate them. We want to prevent them from immediately committing a crime again once out of prison. By treating them as human beings, in a respectful manner, there is a much lower rate of recidivism. This is what we all should be interested in: having a crime rate as low as possible.

The way in which we treat prisoners in the prison is the major precondition for how high or low the crime rate is. According to the statistics, the US has been for years a country with the highest numbers of prisoners per 100,000 inhabitants. In the US there are between 700 to 800 prisoners per 100,000 inhabitants. In Western Europe the average is much lower, only about 100 prisoners. And there are also countries where you have only 20 or 25 prisoners for 100,000 inhabitants. This is not because the Americans are 8 times more criminal than Europeans, but it is the wrong philosophy of punishment. Supermax prisons

are only one expression of this philosophy, which is totally different not only from the European, but also from international standards.

PP: In September 2011, the US Supreme Court reached its decision in a case of Manuel Valle, who had been sentenced to death in 1988 and spent 33 years on death row. Valle had asked the Court to halt his execution, on the grounds that to spend so long on death row is “cruel and unusual punishment” and is therefore prohibited by the US Constitution. The Court decided that it does not violate the US Constitution. Manuel Valle was executed immediately the next day after the judgment. How do you see the US system of waiting even decades on death row for execution?

MN: The fact that the US is one of the countries that still keeps the death penalty is another proof of their outdated criminal justice philosophy. The US is in a category with countries such as China and Iran, to which they usually do not feel they belong to as a state promoting the rule of law and human rights. The UN General Assembly repeatedly requested all states to have a moratorium, that they will not execute people anymore. The US, however, is one of the countries with the highest number of people sent to death.

This is a shortened version of the interview published in Czech in the April 2012 Issue of the Bulletin of the Czech Center for Human Rights and Democratization.



Manfred Nowak | UN Photo - JC McIlwaine

How Is Karadžić in Private?

Interview with Peter Robinson, Legal Advisor of Radovan Karadžić

Monika Mareková

Peter Robinson is a U.S. lawyer who has been working for more than ten years as a defence counsel at international criminal tribunals. He was the lead counsel of Joseph Nzirorera, former President of Rwanda's National Council, at his trial at the ICTR. Now, he serves as a legal advisor of former president of Republika Srpska Radovan Karadžić at the ICTY. He gave me this exclusive interview for the Czech Center for Human Rights and Democratization during my internship at the ICTY in The Hague, the Netherlands.

Monika Mareková: Mr. Karadžić is self-representing himself and the public does not know much about his defence team. Could you please explain what your role of a legal advisor is and what are the roles of the other members of the team?

Peter Robinson: We have eight members on our team. My role is to be Dr. Karadžić's legal advisor because he is not a lawyer and doesn't know the jurisprudence and the other rules of the tribunal. I intervene and make objections, make legal arguments when there are legal issues represented in court and I draft the written pleadings that we file. Dr. Karadžić does all of the factual part of the trial, examines the witnesses, made the opening statement and will make the closing argument. We have two other legal associates on our team, one in Slovenia and the other one in Belgrade. They are basically responsible for the facts of the case, selecting exhibits and finding evidence

for Dr. Karadžić, so that he can use them to present his side of the story in a trial. Furthermore, we have two case managers in The Hague who are doing all of the document management for the trial and two investigators in the field in Bosnia who are contacting witnesses and trying to get favourable material for us. Then we have a team of interns that varies depending on the time of the trial. Right now, we have five interns who are helping us on legal issues and some others on the factual work.

How does your cooperation with Mr. Karadžić look like? Are you creating the defence case or is it rather Mr. Karadžić's creation?

Basically, the way Dr. Karadžić wants to lead his defence is his creation. I give him advice and help him to sustain what he wants to do, and advise him in what is permissible and what is not. He is the one that has the control of what is the substance of his defence that has been offered and I am just trying to help him to have a fair trial.

What do you think about the decision of Mr. Karadžić to represent himself? How usual is this at the ICTY and at other international tribunals?

It's pretty unusual, although other people have done it at the ICTY such as Milošević or Šešelj, but in this particular case I think it was a reasonable decision because there is no lawyer that can say: "I am going to win your case here at the tribunal," while, being honest, the chances of winning the case aren't very

good. What he basically wants to do is to present his side of the story to the public. If he is representing himself, he has the floor every day to do that. If he has a lawyer he has to wait until he testifies, maybe two or three years after the trial starts, for only one or two weeks. Now he can present his side of the story every day in the courtroom.



Do you think that his personal charisma and his personality help in this case?

Yes, it does, because he is very good with the judges. He is humble and takes advice. When they tell him to do something, he thanks them and says: "I am an amateur, I am sorry about that." He has a very good personality for dealing with people and that includes the judges.

You Always Learn Something from Karadžić

What is your personal impression of Mr. Karadžić?

I really like him a lot. I find him fascinating to talk to. He has a wide breath of knowledge. He was a medical doctor, a writer, a poet and a politician. He is religious, he knows a lot about the Orthodox religion and legends and saints. When you have a conversation with him, it's fascinating and you're always learning something. He has an excellent sense of humour even in these difficult circumstances that he finds himself to be in. He is enjoyable to be with and finally he is also very grateful for the work that I and other members of the team do for him. It's always nice to work with someone who is grateful for your help.

Do you perceive sometimes the feelings of regrets or any other self-reflections from his side when you speak with him?

Yes, definitely. I think he feels very badly for the people who suffered during the war on all sides - Serbs, Muslims, and Croats, and he frequently speaks about that. Especially about Srebrenica, he is frequently saying that he didn't know what was going on in Srebrenica. He is very angry about the people who did what was done in Srebrenica and he thinks that it was a real betrayal of the Serbian partners. He feels very badly for the people that were killed there.

Where would you put border between what self-representing defendants should be allowed to say in the court so that they are able to express themselves properly on one side and what is not appropriate to say and not concerning the proceedings, for example expressing political opinions, on the other side?

I think they should be bound by the same rules as lawyers, maybe they can be given a little leeway in some of the technical aspects of the job, but I think, if something is relevant to the trial, they have to be allowed to put those questions and make those

arguments and if it's not relevant, they shouldn't be allowed and it shouldn't really matter whether they represent themselves or whether they have a lawyer.

What do you think about Mr. Karadžić's performance when he is sometimes defending Serbian nation rather than defending himself?

Most of the time, it's about something relevant, for example when the prosecution was saying that the Serbs were responsible for shelling the market in Sarajevo and Karadžić was saying: "No, we didn't do it. That was the Muslims who did that." He was saying he was not guilty, but at the same time he was also saying that the Serbs were not guilty which is very reasonable and relevant to a defence. Other times, he gets a little bit off topic and I think the judges correctly tell him that what he is trying to say is not proper for a trial.

I Just Want a Fair Trial

How do you perceive your role as the counsel or advisor in this case and how do you personally cope with being an advocate of alleged war criminals?

I think my role is to be a champion of a fair trial. I don't feel like I have any ideological feeling to helping Serbs or Muslims or Croats, one more than the other. I could defend [Alija] Izetbegović (the first President of Bosnia and Herzegovina, ed.) or [Franjo] Tuđman (the first President of Croatia, ed.) with the same enthusiasm that I defend Karadžić. I just want to see that he is able to present all the facts that could possibly prove that he is not guilty in court and then after that it's up to the judges what they do. I am not judging my client. I think I enjoy representing people who are facing really difficult challenges in high profile cases, because those are the cases that make the law for everybody else. They have more of an impact and also these are the cases where the system is more geared up to find someone guilty and not observe all of the procedural requirements. Thus the defence lawyer is needed more.

Are you sometimes confronted with reactions saying: "How can you defend war criminals, somebody who killed thousands of people?" How do you react then?

I am used to that because in my whole career, no matter what the crime, people are always asking: "How can you defend this person? Somebody who defrauded

elderly people, someone who beat up somebody..." Whenever you're a criminal defence lawyer, somebody is always going to think: "How can you defend this person?" I have been hearing that question for thirty years, but it is actually easier in the international criminal cases because people who are the political leaders of their countries have a very good personal qualities which they used in order to get to their position. Karadžić and my client in the Rwandan tribunal have good social qualities. On a personal level, it is easier to represent them than it is to represent someone who is charged of the street crime and doesn't have this kind of social skills or any kind of education. From a day to day point of view, it is really easier to represent someone like Karadžić than it would be to represent someone charged with assault on the homeless person.

Did not you have any moral dilemma when you were taking Karadžić case?

No, not at all. I was a prosecutor for ten years before I became a defence lawyer, so I thought a long about how I would feel defending people who are charged with a crime and I think as long as I keep myself as a professional and detached from my clients in that way, then I will not have any problems to stand up for an individual in any case.

Have you ever had any moral dilemma to take some case? And if so far not, does there exist any case that you would not take?

In principle, I really feel obligated to take whatever case I am assigned to take because that's the job of a criminal defence lawyer. In other words if I am assigned by a court, I would represent anybody no matter who he was because I would feel that's my obligation. But if someone comes into my office and wants to hire me, then I can be more selective and I can decide and say: "I don't want to really do this case and you can afford to go and get some other lawyer." There are some cases that I would just really prefer not to be involved with. The things like child molestation, because I as a parent just don't really feel too comfortable with that, although there are innocent people who need good lawyers to be represented by. If I was assigned to a case like that, I would do my best. If I have my choice, I would rather not do that kind of case.

Neither Kony, nor Mladić

Could you name any international criminal case that you wouldn't take? For example Lubanga case concerning child soldiers – would you take that, if you were not assigned by court?

Yes, I think I could defend Lubanga. I don't think I would want to defend Joseph Kony because I think it would be an unpleasant experience and also I don't see any good defence that he has, so that job would be difficult and not very rewarding. I feel the same way about the General Mladić. I think he is a difficult person to have as a client and also I think the evidence against him is very strong and I couldn't do much on his behalf. Those would be two cases I would turn down.

Have you ever been personally approached by any of the victims of the defendants or have you received any threats?

I received hate mails from people in Balkan region saying: "How can you defend this guy?" I met some victims and talked to them and they've been very polite with me. They haven't been confrontational with me at all, and I think they understand what my role is. It was a bit different at the ICTR. When I first went to Rwanda, I had to have an armed escort which were about twelve soldiers and I found it unnecessary by the end, but the ICTR thought that the defence lawyers weren't safe at the time. Anyway, I couldn't do my work because you couldn't show at a witness' house with two cars of soldiers, so I ended up ditching them and I was fine. I never have any real direct threats.

How did you actually become the Karadžić's legal advisor?

When I was working on the case of General Krstić, I saw the evidence of Srebrenica and I thought: "There's not very much evidence showing that Karadžić was involved in this. If he ever gets arrested, I want to be his lawyer." I told it to all my friends in Serbia and they thought it was a joke and then two other people asked me to represent them at ICTY and I refused. I didn't want to have a conflict of interest. People were really laughing at me for being the stupid lawyer turning away his clients because he has a dream of representing Karadžić. When Karadžić was arrested it turned out to be wise. After his arrest, Karadžić was

asking his Serbian friends: "Who can help me, some lawyer from a common law jurisdiction who knows the tribunal jurisprudence?" Then a bunch of people gave him my name because they had heard that I was interested.

Do you have any idea when the Karadžić's trial is going to finish?

I think sometime in 2014.

Could you comment on information that Richard Holbrooke assured Karadžić in the middle 90's, possibly July 1996, that he would not be pursued by the international war crimes tribunal in The Hague if he left politics?

That's definitely what Karadžić said that had happened and we investigated that very thoroughly. I myself did a lot of personal investigation of that. I think that I turned over every rock to see what could be proven and what could not. We tried to get all kinds of cables from the US and other places and we ended up with 22 witnesses who confirmed that Holbrooke had made that promise including the people who were present at the meetings, people who heard about it afterwards – either from the US State Department on

Holbrooke's end or from Karadžić on his end, as well as journalists who had heard about it. I think that Karadžić made a really strong case that that promise was made to him, but the tribunal rejected his motion on that and ruled: "Even if the promise had been made, he didn't have the authority of the Security Council to make it." So I would advise any future person who has ever been assured by diplomat to get a Security Council resolution before they have any idea that they might not be prosecuted.

Narrow the Scope!

Do you think that there is any possibility how to shorten the extensive length of proceedings at the international criminal tribunals?

I think the best way is to focus the indictment on scope. That's what drives the length of the trial is the scope of the charges against somebody. If Karadžić was only tried for the worst thing that they think he did, which is Srebrenica, we could have finished that trial in about one year, because it's taking only about four months to present the evidence from Srebrenica. But instead they want to try him for everything they think he did and therefore the trial is going to take around four years. That was the theory in the Lubanga case at the ICC. It didn't quite work because of the other problems, what I would call a sort of the growing pains of the ICC and the office of the prosecutor, but maybe in the future I would be definitely persuaded that that's the way how to do it, to target something what is the worst thing that the person did and limit it, so that you can conclude the trial in a reasonable time.

Some experts criticize the developments of international criminal law for the doctrinal shortcomings, huge costs, and unclear impact on promoting stability in affected regions. Do you agree with any of the critics or would you say: „So far, so good“?

No, I would agree. I would say that I have a preference for trials in the national jurisdictions where the crimes took place, and that's better than this international tribunal because first of all, people are more truthful since they're understood in their culture, they're not being judged by people who don't understand their culture, and there's also more accountability when you're testifying in your local area than if you come to The Hague and testify in private session. If it's possible to have a trial in a region

Peter Robinson



in the area where the crime was committed, I think that's the best. And then second-best would be the hybrid tribunals that they tried to set up in Sierra Leone and in some extent in Cambodia, so that there is at least a maximum local participation.

You criticize some aspects of a “fair trial” in international criminal tribunals. What changes should be made to remove the problems and how to bring about improvements toward a fair trial?

I think the first thing would be to reduce the scope of the trial so that the cases are more manageable. We are overwhelmed with pages of disclosed documents in Karadžić case and we can't find anything that we really need. Secondly, I think there is dependence on such things as judicial notice of adjudicated facts, bar table documents, and rule 92bis admission of witness statements without being cross-examined, which is wrong and unfair and often should be curtailed, so that you have a limited trial, but a full and fair way to test the evidence that is going to be admitted against you. Otherwise, I think that the international criminal trials can be fair. I think that most of the time they are fair. Only the system is such that they could be easily unfair. However, they have good people at the ICTY, that's the difference. In the Rwandan tribunal they don't have good people and they have unfair trials and they convict people who are not actually guilty, and sometimes they acquit people who are guilty. Here, in the ICTY they seem to be more accurate in the judgements. At least, that is my own opinion, and I think they have the same statute, same rules, but it's the competence of the individuals here that makes the difference. The system can be abused and can lead to unfairness, but it can also work well.

Lies in Court

Do you think it is the political pressure from Rwanda that results in non-guilty people not being acquitted, and some people on the other side not being brought before the ICTR?

The political pressure is also a factor, but people in Rwanda don't mind lying in court, they don't have a real feeling that that's bad. The judges who are from Rwanda don't know when people are lying and telling the truth. They are really poorly equipped to judge the credibility of the witnesses that are coming before them. People from Rwanda take a really offensive attitude to the accused which are in Arusha, because the

government wants those people to be convicted and as a result of that, I think they convicted people who actually weren't guilty. They weren't at the places that witnesses said they were, they didn't do the things that they said they did, but I think the judges didn't know how to evaluate that evidence. They didn't really have experience. However they did have “gacaca” courts in Rwanda, which were the local courts, and more often they got it right because the local people knew what happened, and nobody would dare to tell them some of the stories that they tell in Arusha because everybody would know that they're lying. It turned out to be a much more reliable way to determine the truth than the international tribunal.

Are not gacaca courts biased as well, because a local community is deeply involved without independence of international community?

Yes, they are even without lawyers, the system is not perfect, but my own experience with the gacaca courts was that in general, in cases where there wasn't any kind of high profile people, for just an average person it usually worked to the benefit of the accused. In most cases, either when they pleaded guilty, they were given leniency or if they were really not guilty and they told their side of the story and it was true, they were acquitted much easier than in the international tribunals. There are problems of that system, but I think it was a better vehicle for determining the truth than the international tribunal.

Would you like to conclude with any statement for the readers of this interview?

The only thing I would really say is that having been a lawyer now for almost thirty years, the biggest thing that drives me every day when I am doing this job is the idea that I might be making a difference, so I would urge anybody who will read this to really try to make a difference. People find it really rewarding whether it's on the very smallest scale or big scale, if you can live your life in a way to try to make a difference and to make things better for others, then you can be really content.

Thank you very much.

This is a shortened version of the interview published in Czech in Issues 6/2012 and 7-8/2012 of the Bulletin of the Czech Center for Human Rights and Democratization.

Elections from the View of Their Observers

Does election observation promote democracy or is it rather a means of legitimizing the rule of pseudo-democrats?

Tereza Doležalová

Do international observer missions influence the fairness of elections? Could they be considered a tool for promoting democracy, or rather for legitimizing rule of pseudo-democrats? Three experienced elections observers answered these and other questions during a seminar organized by the Czech Center for Human Rights and Democratization, which was held in April 2012 at the Faculty of Social Studies of Masaryk University. Our invitation was accepted by Petruška Šustrová, a well-known Czech dissident, translator, and journalist and observer of elections in the Caucasus; Tomáš Šmíd, an assistant professor at FSS MU and an elections observer in Georgia and Armenia; and Matej Kurian, a program coordinator at Transparency International in Slovakia and an elections observer in Zambia.

The discussion was opened by Šustrová, who described her first-time-observer experience from Georgia, where she became, as a short-term observer for the Organization of Security and Cooperation in Europe (OSCE), a witness to open falsification of elections results through so-called “family voting” (during which only one member of a family, usually a father, votes on behalf of all other family members), or through stuffing falsified ballots into a ballot box with which ill people were being seen. Her negative experience was subsequently confirmed by Šmíd, who observed the elections in Georgia a few years later. He also had a chance to see buses transferring voters from one voting station to another and to find out that it is quite usual that Georgians have to show a confirmation for whom they voted to their employer. Both panellists then agreed that although they witnessed frauds and described them in their reports to the OSCE, the final public report evaluating the elections identified the elections as relatively fair and contributing to the development of democracy in the country. Participants of the seminar were also very surprised when they were told that the final report is usually issued earlier than the OSCE is objectively capable of reading all the reports sent by all the observers.



Petruška Šustrová talking in Ostrava in 2011, www.wikimedia.org

Kurian, who was sent by the European Commission to observe elections in Zambia, also shared his quite different experience. Although the elections were not absolutely all right there as well, he witnessed only minor errors of election commissions, who needed help with simple math and filling in the protocols, rather than frauds. Also the impression that Kurian took home with him was different. While both previous panellists talked about embarrassing cheating and disrespectful behaviour towards observers, Kurian experienced meticulous efforts of election commissions to show observers and, through them, the whole world that Zambia is really a free state. Nevertheless, he also agreed with the statement that the final report could not reflect experience of all the observers. However this could be explained, according to him, by the limited range which is dedicated to it.

The subsequent discussion naturally focused on the importance of international observer missions and on their impact on the development of democracy.

All three panellists agreed that the contribution of missions does not lie in an “objective” evaluation of the elections by an international organization, because the evaluating report is often written before the elections and is rather a political declaration, but rather in personal experience of observers. They then feel the commitment to expand public awareness of the political situation in the given country. It is also important that people living in “pseudo-democracies” meet those who know that it is possible to do it differently. This conclusion is also consistent with theoretical propositions made by Judith G. Kelley in her book *Monitoring Democracy: When International Election Observation Works, and Why It Often Fails*, based on the analysis of 600 observer missions. The answer of panellists to the question of why international missions are invited to the countries where elections are falsified was also consistent with research focusing on this issue. In *The Pseudo-Democrat's Dilemma: Why Election Observation Became an International Norm*, Professor Susan D. Hyde[1] proposes that the observation of elections became a certain norm, and that not inviting the observers into the country would signify a will to falsify the elections. It is better for the regime to invite observers,

receive a mild critique and keep the Western media happy. Professor Hyde is therefore convinced that this situation is caused by the imperfections of observer missions and by the tendency of international organizations to issue relatively positive evaluations.

And how to become an election observer and find out whether these conclusions are really true? Observer missions are being sent to various states by various international organizations. OSCE and the European Commission (representing the EU) can be considered the main observers. OSCE focuses on the post-Soviet region, and the European Commission on African states. Those interested in getting observer experience should, according to Kurian, speak another language than just English and have an experience related to elections or human rights and ideally also knowledge about a specific region where they want themselves to be sent to.

Notes

[1] For an interesting interview with her, see <http://www.youtube.com/watch?v=4xX74oyPQF0>.

[2] For web of the OSCE Office for democratic institutions and human rights see <http://www.osce.org/odihr/elections>.

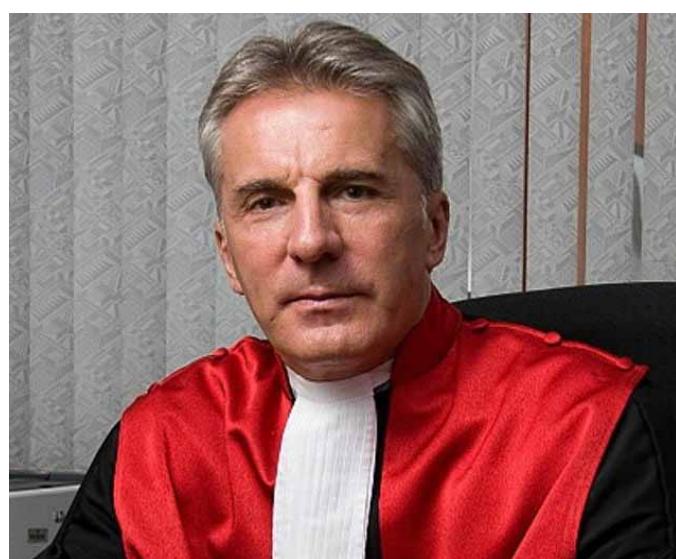
Czech Judge Robert Fremr Elected to the ICC

Linda Janků

Czech diplomacy achieved a great success in the field of international criminal justice, when Czech judge Robert Fremr was elected to the Trial Division of the International Criminal Court in December 2011. The elections were held at the Assembly of State Parties of the Rome Statute of the Court in New York and Judge Fremr was elected in the second round of the elections with 77 votes.

Judge Fremr (1957), started his career as a judge in 1983 after graduation from the Law Faculty of Charles University in Prague. He gradually rose through all levels of the Czech judicial system, and in 2004 he became a Justice of the Supreme Court of the Czech Republic. On the Supreme Court, he engaged in the most serious crimes, such as murders or sexual offenses. In 2006, he joined the International

Criminal Tribunal for Rwanda and served there as *ad litem* judge of the Trial Chamber until 2008 and then again from 2010 to 2012.



Robert Fremr, Czech Ministry of Foreign Affairs, www.mzv.cz



AHRI conference, photo: Jan Lhotský

The Czech Center for Human Rights and Democratization Becomes a Member of AHRI

Michaela Smolková, Zuzana Melcrová

In September 2012, two representatives of the Czech Center for Human Rights and Democratization took part in a conference organized by the Association of Human Rights Institutes (AHRI) in the Castle Wilhelminenberg in Vienna. The main task of the members was to present the application of the Center to the AHRI. However, the delegates of the Center took full advantage of the opportunity and were present at all three days of the conference, and as a result you can share their experience and observations.

AHRI is an association which consists of 41 member institutions (after the conference, the number rose to 43 members) that carry out research and education in the field of human rights. It has existed since September 2000 when the AHRI Co-operation Agreement was signed in Reykjavik. This prestigious network participated, for example, on two COST Actions [1]: COST project A28: Human Rights, Peace and Security in EU Foreign Policy, and COST Action IS0702: The Role of the EU in UN Human Rights Reform.

This year's conference was predominantly focused on expert presentations of the outcomes of the second mentioned COST Action. The other part consisted of "PhD Training" where doctoral students from different countries could present their dissertation

projects and received feedback from respected human rights experts. Then, a traditional annual assembly of all AHRI members took place on the last day of the conference. At this meeting, members of the Centre also had the opportunity to present the application of the Center to the AHRI, which was successfully accepted.

The conference was devoted to a discussion about UN Human Rights Reforms. Attendees heard, for example, a speech of Kyung-wha-Kang, the Deputy High Commissioner for Human Rights, Engelbert Theuermann, Permanent Chair of the EU Council's Working Party on Human Rights, and Austrian human rights lawyer Manfred Nowak. There was also a very interesting, though very controversial, proposal from the COST Action experts on the establishment of an International Court of Human Rights, under which the procedure of dealing with individual complaints lodged towards different UN treaty-based committees would be unified.

Notes

[1] COST Action, by the European Cooperation in Science and Technology, is one of the longest-running European instruments supporting cooperation among scientists and researchers across Europe and is supported by the EU RTD Framework Programme.

Discrimination of Foreign EU Students in the Czech Republic Abolished

Monika Mareková

Effective 1 January 2012, the Ministry of Finance of the Czech Republic changed its legislation and removed the price discrimination of foreign EU students who are studying in the Czech Republic and commuting to schools by public transport. The right to student fares was set in the special kind of price regulation of the Ministry of Finance, which previously included the condition of permanent residence in the Czech Republic in order to be charged the discounted student fare for public transport when commuting to schools. The Ministry of Finance made the change only after the recommendation of the Czech Ombudsman to change the price regulation which was initiated by a Slovak law student.

The condition of permanent residence in the Czech Republic caused an indirect discrimination on the grounds of nationality, which is prohibited by the Article 18 of the Treaty on the Functioning of the European Union ("TFEU"). It discriminated against foreign EU students because most of them do not have permanent residence in the Czech Republic. The student who initiated the case asked the Ministry of Finance for a change, but the Ministry argued that the student fares are subsidized from the state budget and are a kind of social benefits which the state is not required to provide to persons without permanent residence in the Czech Republic. The Czech Ombudsman, however, refused this argumentation in and declared that student fare is not any kind of a student loan, scholarship, or similar benefit or financial aid. According to the Czech Ombudsman, the student fare is an advantage granted to the service recipient. Since the student fares are subsidized by the state budget, they are on the border between the social benefit and the advantage provided to students who are service recipients. The report concluded that the condition of permanent residence might be lawful in some cases of granting financial aid; however it must be proportional, which it was not in this case.

Further, the condition of permanent residence violated the free movement of services, guaranteed by the Article 56 of the TFEU. The free movement of services was specified in Directive 2006/123/ES on services in

the internal market which in Article 20 stipulates that Member States "shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence." Differences in the conditions of access are permissible, but have to be directly justified by objective criteria, which were not present in the given case. The price regulation of the Ministry of Finance violated also the prohibition of the discrimination of a consumer which is set in the Czech Act on the Protection of Consumers.

The case has had a very interesting evolution. The discrimination of foreign EU students in providing the student discounts has bothered foreign students for a very long time, but at the end of November 2009 one Slovak law student lodged a complaint with Czech Railways. The company refused the complaint and proclaimed that it cannot do anything about it because the conditions for student fares are set by the Ministry of Finance. The student further turned to the Ministry of Finance and asked for the change of discriminatory price regulation, but was turned down. The Ministry of Finance claimed that it is within its own competency to decide which subsidies it provides to students with permanent residence in the Czech Republic.

After initial unsuccessful attempts for an out-of-court settlement, the student lodged a proposal for repeal of the price regulation with the Supreme Administrative Court. The Court could decide on the repeal of a "general measure," which is a type of legal act *sui generis* in Czech law, but could not decide on the repeal of a normal regulation. The student's proposal was finally refused because the Supreme Administrative Court in its precedent ruling concluded that the price regulation is not a general measure, and provided complex argumentation what is and what is not a general measure, as this was not clear from the law before. Nevertheless, the Court noted that some objections against the content of the price regulation are rightful, however it could not deal with them. The student further lodged a constitutional complaint with the Constitutional Court for the breach of her right to fair trial by the Supreme Administrative Court, but was again refused. Finally she asked the Ombudsman to lodge the proposal for



Photo: Radim Holíš, Source: Wikimedia Commons

repeal of the price regulation with the Constitutional Court, because an individual has no standing to lodge such a kind of proposal. The Ombudsman examined the case and before he turned to the Constitutional Court, he proposed the change of the price regulation directly to the Minister of Finance. This time the Minister agreed and issued a new price regulation without the condition of the permanent residence in the Czech Republic. The fight of the David and Goliath found its happy end.

Finally there remains to reveal that the Slovak law student is none other than the author of this article.

Sources

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Forum 2000 in Prague

Democracy, media, and a look behind the scenes

Tereza Doležalová

In October 2012, Prague hosted the sixteenth edition of perhaps the most prominent conference in the Czech Republic – Forum 2000 – which originated from the idea of former Czech president Václav Havel and Japanese philanthropist Yohei Sasakawa. As the theme of the last year's Forum – *Democracy and the Rule of Law* – was very successful, organizers decided to choose a more narrowly focused theme – the relationship between democracy and media. Despite the specificity of the chosen theme, the number of people who came to the Žofín palace during the first day of the conference was even bigger than the total number

of visitors who came last year. More than sixty panels and side events took place at 13 venues in Prague and later in Ostrava, Plzeň, and Bratislava (Slovakia) and more than hundred delegates participated in discussions, accompanied by more than eighty enthusiastic volunteers, mostly university students [1].

It is probably the last mentioned characteristic of the conference together with a certain “dissident” touch of Forum 2000 which makes it very different from other similar events. It is quite natural that an event of such magnitude cannot be organized by just a few people; however, it is less obvious that student volunteers do not only assist the delegates and are not per-

ceived as lackeys, but on the contrary, they are seen as equal partners and well-educated companions to the delegates. A companion's badge entitles you not only to be at closed receptions or to enter a VIP lounge, but mainly to meet the delegates and have a normal chat with them. Moreover, each companion spends the weeks preceding the conference in a pleasant tension, as he or she does not know which delegate will be assigned to him/her. And the choice is truly diverse – you could get a huge delegation of the former Nigerian president

Olusegun Obasanjo, a frequent participant of the conference and the author of the concept of Responsibility to Protect Gareth Evans, the former US Secretary of State Madeleine Albright, or a former member of the band The Plastic People of the Universe Paul Wilson. It is obvious that while some delegates will invite you for a dinner or spend a whole day with you walking around Prague and talking, others will, still very respectfully, rather task you. And there are also some who will ask you to carry them from a pub to their hotel. Accompanying delegates is simply an adventure.

Maybe the same adventure was to observe what conclusions emerged from various discussions. What should the media in a democratic society be like? What is the role of new media in spreading democracy? Do media shape the society or is it vice versa? There were a lot of answers to these and other questions. For instance Ingrid Deltenre, the director of the European Broadcasting Union, expressed her belief that the independence and professionalism of media can be maintained only as long as media are not dependent on a concrete source of funding and thus she advocated a model combining the paying of royalties with advertising revenues. Moroccan activist Tarik Nesh Nash emphasized that new media are quite powerless without the cooperation with the traditional ones, speaking of various "electronic" civic projects that took off only after being pointed out by traditional newspapers. And Nico Carpentier,



Opening panel in Žofín Palace, www.forum2000.cz

a member of the European Communication Research and Education Association, stressed out that media, at least the traditional ones, are not a consequence of a state of a society, but rather one of the factors that influence it, and that it is an elite system interconnected with other elite systems (politics, academia) but not with communities and ordinary people [2].

Nevertheless, the idea which connected all the panels and informal discussions and which stood behind the organization of the conference as such was not related only to media. The Croatian Minister of Foreign Affairs, Vesna Pusić, managed to articulate it quite aptly when she pointed out that media are a type of elite, and elites should be leading the society. Thus the question is not to ask whether media shape the society, but to watch whether it moves it in the right direction. And if it is not the case, who else should intervene than those who spend a lot of time by discussing the ways to make society better, politics more trustworthy, and the world fairer?

Notes

[1] The companions are chosen every year from among those who react to the call placed at the website www.forum2000.cz, send their CVs and successfully pass a personal interview.

[2] Summaries of discussions and videos from the conference are available at <http://www.forum2000.cz/cz/projekty/konference-forum-2000-2012/>.

Spring 2012 at the Constitutional Court of the Czech Republic

Ladislav Vyhnanek

Although the Constitutional Court of the Czech Republic cannot complain about the lack of attention in recent years, the spring 2012 season can be considered extremely interesting even by its standards.

In March 2012, Eliška Wagnerová, Deputy Chief Justice, left the Court, being the first Justice from the “second crew” [1] to do so. Shortly afterwards, the Constitutional Court delivered its decision in several interesting cases.

Eliška Wagnerová (now a Senator) left the Court after serving her 10-year term and the Constitutional Court lost a distinctive and original lawyer and legal philosopher in her. She drafted many controversial decisions that have found a number of both supporters and opponents. No one – no matter to which category does one belong – could describe Eliška Wagnerová as a common judge. The activity of Eliška Wagnerová at the Constitutional Court was symbolized by several things. From a formal point of view, one certainly cannot overlook the fact that as a judge

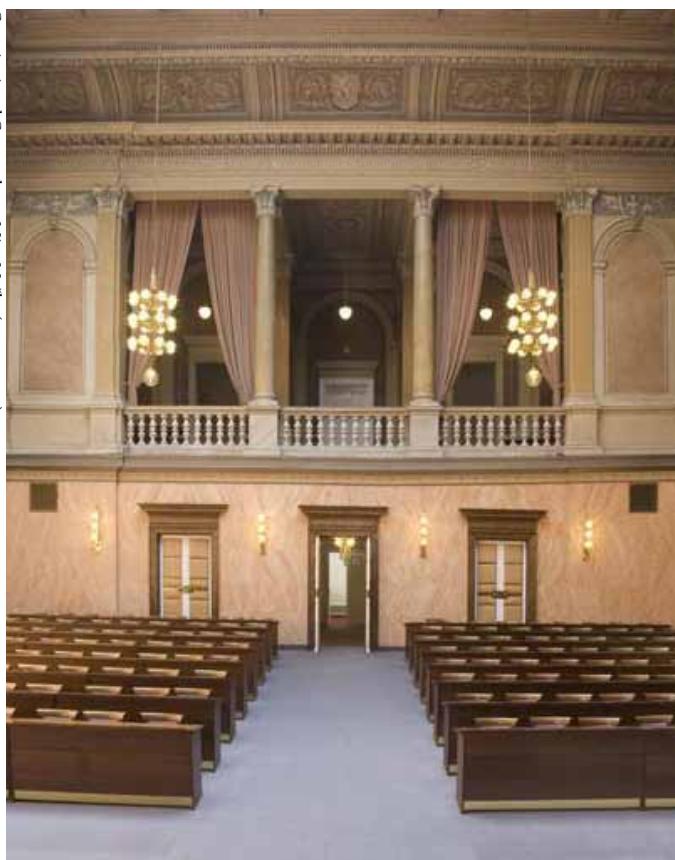
rapporteur, she had by far the highest proportion of rulings in favour of the petitioner.

Sensitivity to interferences by the state and the respect to the autonomy of an individual have belonged to defining traits of philosophical and legal thought of Eliška Wagnerová. She was never afraid to challenge a settled legal practice on behalf of individual liberty. But it would be a mistake to picture Eliška Wagnerová as a pure liberal, mainly because of her social sensitivity and the emphasis she put on human dignity. In her understanding, human dignity is not a one-dimensional value, but rather a merger of (seemingly) different aspects. This concept of human dignity, advocated for example by well-known Israeli lawyer Aharon Barak, includes recognition of the quality of human beings as such or respect for freedom of will and self-determination of human beings, but pays also attention to the physical and mental well-being of human beings.

Moreover, Eliška Wagnerová has set very high standards for the working practice of state institutions, especially the Parliament (stating on several occasions that the low formal quality of laws produced by the Parliament makes them unconstitutional). It is highly unlikely that the blank space left by Eliška Wagnerová will be filled by a similarly distinctive personality. It is even improbable that any judge will be appointed to the Constitutional Court in near future. President Václav Klaus, having seen some of his previous candidates rejected by the Senate, will probably not try to suggest another. Thus, we might witness a repetition of the situation from 2003 – 2005, when the Constitutional Court was paralyzed due to the insufficient staffing.

Regardless of the personal changes, the Constitutional Court delivered several important rulings in 2012. In its judgment *n. Pl. ÚS 54/10*, it applied a self-restrained approach in the area of fundamental social rights, and in contrast to a previous similar case dealing with the same waiting period (i.e. the first three unpaid days in the case of temporary working incapacity), it ruled against declaring it unconstitutional after the Parliament re-introduced it. It held that social security laws fall primarily in the realm

Constitutional Court, photo: Miro Myška (concourt.cz)



of Parliament's discretion and that the Constitutional Court will not review the details of legal regulation of social security. In judgment *n. Pl. ÚS 17/11*, the Constitutional Court rejected the petition of a group of Senators to annul changes in the taxation of photovoltaic power plants. The challenged modification introduced new taxes and revoked the existing exemption. The Constitutional Court came to the conclusion that even though the power plants' investors relied on the previously existing conditions of the Czech tax system, the changes constituted only so-called "pseudoretroactivity," so they did not breach the principle of non-retroactivity of law. As regards the revocation of the previous tax exemptions, the Constitutional Court held that the measure pursued

a legitimate and substantial public interest (price stability and control of public debt) which justified the potential interference with legitimate expectations of investors. In the opinion of the Constitutional Court, the principle of legal certainty does not imply an absolute permanence of legislation and its changes (such as the change in question) are merely a consequence of socio-economic factors.

Ladislav Vyhnanek is an assistant to a Judge on the Constitutional Court.

Notes

- [1] The new line-up of Constitutional Court's Justices appointed after 2002.

“Religious” Freedom of Association in the Czech Republic

Melanie Phamová

Freedom of assembly is a fundamental right, usually classified as a political right. It is one of the key rights in any modern democracy and it is even considered to be a prerequisite for the functioning of a democracy. The right to peaceful assembly includes the opportunity to organize a protest march as well as a right to organize a conference or a demonstration. It is also closely connected to the exercise of other fundamental rights and freedoms such as, for example, freedom of speech or freedom of religion.

In the Czech Republic, freedom of assembly is protected both at the international (such as in the European Convention on Human Rights) and the national level. As regards the national level, freedom of assembly is generally regulated by the Charter of Fundamental Rights and Freedoms and Special Act No. 84/1990 Coll., on the freedom of assembly. Freedom of assembly was, in theory, protected even prior to 1989, but the practice was in many ways different from the letter of law. Moreover, in order to organize an assembly, the person in question first had to obtain permission, which very often was not granted. Nowadays, the organizer of the assembly only has to notify the authorities before it takes place. Based on the notifications, the authorities try to avoid having multiple assemblies in the same place and at the same time; in other cases, the authorities use the

knowledge of the assembly to prepare security forces for the possibility of riots. However, there are exceptions from the duty to notify the authorities.

The exceptions apply for example in cases of private assemblies or so called “religious assemblies.”

As a result of the differences in legal regulation, there have recently been many attempts to disguise assemblies as “religious assemblies” and thus to circumvent the notification requirement. Typically, many examples were connected to the situation in towns with a significant Roma minority, where demonstrations and riots often took place (usually in the presence of the Workers' Party of Social Justice (WPSJ)). In March 2011, a few enraged locals invited the WPSJ to Bydžov, following a series of crimes allegedly committed by members of the Roma minority. The idea to organize a demonstration with the presence of the extremist WPSJ attracted a lot of criticism from local parties and organizations which – in response – tried to organize their own assembly on the same date (which would not be possible because of the prior notification by the WPSJ). When the day came, the protesters tried to block the WPSJ march, claiming that they had assembled for religious reasons and therefore did not have to notify the authorities.



Despite this, the police pushed the blockading protesters out of the way of the WPSJ march.

Next month, following a crime allegedly by two Roma boys and racially motivated, an assembly was convened (by the WPSJ) in Krupka. However, the initiative “We do not want Nazis in Ústí” made it clear that even though it condemned the crimes, it also opposed the WPSJ march, which could only ignite anti-Roma sentiments. This led to a campaign for an organization of a religious assembly which would again block the WPSJ march. However, even in this case, the blockading “religious” assembly was dissolved by the police.

Ironically, these attempts of civic initiatives to oppose extremist political parties were later adopted by the WPSJ itself. An assembly with a clear anti-Roma topic was originally notified by the members of WPSJ

but it was later described as having a religious meaning. After the march started heading to the parts of town inhabited by Roma minority, it was dissolved by the police as the riots were imminent.

Later on, the WPSJ even tried to institutionalize its attempts to disguise its activities as religious (and thus to evade the notification requirement). A few supporters of the WPSJ founded the “Order of the Gear” which claims to be a religious society, even though it is rather a practical joke by a member of the WPSJ. According to experts, it is a possible reaction to the exemption from the notification requirement for religious groups. Despite strong personal links between the Order and the WPSJ, any relationship between the two subjects has been denied by officials of both organizations. The extent of their cooperation in the area of organizing assemblies and marches will become obvious in the future.

Ombudsman’s Research on Representation of Ethnicities in “Practical Schools”

Miroslav Knob

The Czech Ombudsman is charged with a duty to promote the right to equal treatment and protection against discrimination (the so-called “Equality body”). The position implies several tasks, including research work in the area of discrimination.

While the first research project focused on discriminatory job advertisements, the second, which was finished in 2012, examined the ethnic composition of classes in so-called “practical schools” in the Czech Republic. The research constituted a part of the Czech reaction to the notorious case *D.H. et al. v. the Czech Republic*, in which the European Court of Human Rights (ECtHR) held that the Czech Republic indirectly discriminated Roma pupils in access to education, because a disproportionate number of Roma pupils attended “special schools.” This was deemed to constitute a *de facto* segregation. The results of the research, which was conducted five years after the delivery of the judgment, was designed to shed light on whether the Czech practice complies with Article 14 of the European Convention on Human Rights (ECHR) and Article 2 of Protocol No. 1.

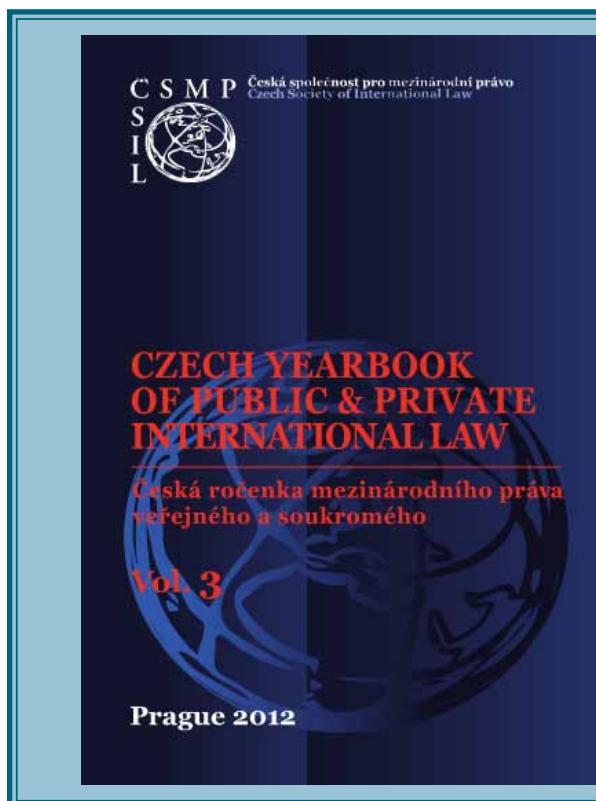


Ombudsman Pavel Várvářovský, www.ochrana.cz

The Ombudsman's research focused on the ethnic composition of pupils in practical schools, which have been introduced to replace the special schools. The Ombudsman's employees inspected a number of practical schools over the period of several months and collected data concerning the ethnic composition of students. The data were non-targeted, i.e. they were not linked to the ethnicity of a particular individual, because the targeted collection of such data is prohibited under the Act on the Protection of Personal Data. Researchers from the Office of the Ombudsman used two methods to determine the ethnicity of pupils in question. First, they distributed anonymous questionnaires to class teachers who determined the ethnicity of the pupil on the basis of his or her knowledge of the class. Second, observations

based on visual criteria were carried out by employees of the Ombudsman's office. On the other hand, the method of self-identification was not used, because some Roma pupils would probably not declare their ethnicity publicly.

The research brought a lot of data, which is very important for further discussion regarding the educational reform and discrimination of Roma pupils. The Ombudsman issued a report based on the collected data which states that the number of Roma children in practical school is disproportionate (too high) and hints at the persisting indirect discrimination of Roma pupils. Accordingly, the Ombudsman has recommended that the Government adopts measures to stop the indirect discrimination and to include the Roma pupils in the classical elementary schools.



Czech Center members Lubomír Majerčík, Anna Matušinová, and Hubert Smekal are the authors of „**The Czech Republic and the European Court of Human Rights in 2011**“, a chapter published in the Czech Yearbook of Public and Private International Law.

The chapter can be downloaded here:

<http://www.rozkotova.com/ebooks/cyil2012/index.html#/290/>