

HUMAN RIGHTS IN MONTENEGRO 2010–2011



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Abbreviations

- ANB – Agency for National Security
- BiH – Bosnia and Herzegovina
- CC – Criminal Code of Montenegro
- CEDAW – Convention on the Elimination of all forms of Discrimination against Women
- CEDEM – Center for Democracy and Human Rights
- CEMI – Center for Monitoring
- CESCR – Committee on Economic, Social and Cultural Rights
- CETI – Center for Ecotoxicological Research of Montenegro
- CGO – Center for Civic Education
- CPC – Criminal Procedure Code
- CPT – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- DPS – Democratic Party of Socialists
- EA – Expropriation Act
- EC – European Commission
- EU – European Union
- ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950
- ECmHR – European Commission of Human Rights
- ECtHR – European Court for Human Rights
- ESC – European Social Charter (Revised)
- EU – European Union
- FA – Family Act
- FNRJ – Federal People's Republic of Yugoslavia
- FRY – Federal Republic of Yugoslavia
- FSR – Roma Scholarship Foundation
- GCA – General Collective Agreement
- GDP – Gross Domestic Product
- HRA – Human Rights Action
- ICCPR – International Covenant on Civil and Political Rights of 16 December 1966
- ICESCR – International Covenant on Economic, Social and Cultural Rights of 16 December 1966
- ICTY – International Criminal Tribunal for the former Yugoslavia
- ILO – International Labour Organisation
- IOM – International Organisation for Migration
- JIS – Judicial Information System
- JNA – Yugoslav People's Army

- KAP – Podgorica Aluminum Plant
- KBC – Clinical Center of Montenegro
- LA – Labour Act
- LGBT – Lesbian, gay, bisexual and transgender
- LHC – Law on Health Care
- LMI – Law on Medical Insurance
- MANS – Network for Affirmation of NGO Sector
- MIA – Ministry of Internal Affairs
- MNE / CG – Montenegro
- MOC – Montenegrin Orthodox Church
- MONSTAT – Montenegrin Bureau of Statistics
- MOT – Multi-disciplinary operational teams
- NGO – Non-governmental Organization(s)
- OA – Obligations Act
- ODIHR – Office for Democratic Institutions and Human Rights
- OSCE – Organization for Security and Cooperation in Europe
- Small Charter – Serbia and Montenegro Human and Minority Rights Charter
- PSEA – Penal Sanctions Enforcement Act
- RAE – Roma, Ashkali and Egyptians
- RECOM – Regional Commission Tasked with Establishing the Facts about All Victims of War Crimes and Other Serious Human Rights Violations Committed on the Territory of the Former Yugoslavia in the period from 1991–2001
- RTCG – Radio and Television of Montenegro
- SaM / SCG – Serbia and Montenegro
- SDP – Social Democratic Party
- SEC – State Election Commission
- SPRY – Socialist Federal Republic of Yugoslavia
- Sl. list – Official Gazette
- SOC – Serbian Orthodox Church
- SRJ – Federal Republic of Yugoslavia
- SSP – Supreme State Prosecutor's Office
- SSSCG – Confederation of Autonomous Trade Unions of Montenegro
- UN – United Nations
- UNDP – United Nations Development Program
- UNHCR – United Nations High Commissioner for Refugees
- UPR – UN Universal Periodic Review of Human Rights
- USSCG – Union of Free Trade Unions of Montenegro
- Venice Commission – European Commission for Democracy through Law of the Council of Europe
- VJ – Yugoslav Army
- YIHR – Youth Initiative for Human Rights
- ZIKS – Institution for Enforcement of Penal Sanctions

Introduction

This Report on the State of Human Rights in Montenegro in 2010 and the first half of 2011 was prepared to provide: 1) an overview of human rights under international treaties binding on Montenegro, 2) an overview of Montenegrin legal regulations governing human rights and their comparison with guarantees of these rights under international treaties, and 3) an overview of the respect of international human rights standards by the Montenegrin state authorities. A separate section of the Report is devoted to war crime trials, which are of particular relevance both to the respect of human rights and the rule of law in general.

The Report presents recommendations on the regulations and practice that have to be improved and aligned with international human rights standards. It, however, may provide inspiration for further improvements, given that international treaties bind states to ensure merely minimum human rights standards, but that nothing prevents them from guaranteeing a higher degree of human rights to their nationals and other people living in them.

The order in which the rights are presented in the Report follows the catalogue of human rights enshrined in the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In its interpretations of the minimum international standards, the authors of the Report cited also other international conventions on specific rights and the case law of international bodies charged with monitoring the enforcement of international treaties and their interpretation, such as the European Court of Human Rights (ECtHR), the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and other UN and Council of Europe Committees.

The Report departs from the provisions of the 2007 Constitution of Montenegro and compares the level of human rights guarantees in national legislation with the minimum international standards. The Report aims at facilitating the alignment of national human rights guarantees with minimum international standards, wherefore the recommendations entail specific suggestions on how to improve the Constitution and other regulations. On the other hand, we hope that the Report will prompt the Government experts drafting regulations governing human rights and the Assembly deputies adopting them also to pay attention to all the instruments which are mentioned in the Report and which explain the minimum human rights standards. The Report also aims to improve the understanding of human rights among the public in general and help it protect its rights before national and international bodies.

Our analysis of the respect of human rights in practice included only the human rights violations with respect to which we had reliable information. We did not mention cases where we lacked information to conclude that a human rights violation had probably occurred or about which we were not directly told or informed via the media. We highlighted cases where effective investigations of reports of human rights violations have not been conducted as specific illustrations of human rights violations. The Report is based on direct insight in court and other documents, reports by various media, interviews with individuals who claim that their rights had been violated and reports on human rights in Montenegro by the state authorities, national and international government and non-government organisations and foreign governments. The Report specifies all the sources of the published information.

The Report methodology is mostly based on the method established in 1998 by the NGO Belgrade Centre for Human Rights, headed by Prof. PhD Vojin Dimitrijević, erstwhile member and Vice-Chairman of the UN Human Rights Committee. In cooperation with Human Rights Action, the Belgrade Centre for Human Rights published its last report on the state of human rights in Serbia and Montenegro as a common state in 2005.

The Report on Human Rights in Montenegro in 2010–2011 was prepared by Tea Gorjanc-Prelević with the assistance of Human Rights Action staff: Ana Tonić, Bojana Bešović, Bojana Vujošević and Mirjana Radović and HRA associates Budislav Minić, Dalibor Tomović, Daliborka Knežević, Duška Šljivančanin, Ivan Otašević, Luka Stijepović, Nataša Gardašević, Snežana Kaluđerović, Tanja Pavićević, Veselin Radulović, Vladimir Jovanović and Zlatko Vujović. We are particularly grateful to the following for the advice and information they have extended us Aleksandar Zeković, Ana Šoć, Ana Vuković, Dalibor Kavarić, Daliborka Uljarević, Darko Pajović, Dragan Prelević, Duška Tomanović, Goran Đurović, Maja Raičević and Ljiljana Raičević, Nada Koprivica and Nataša Međedović, Maja Kostić-Mandić and Branka Bošnjak, Marijana Bojanić, Miloš Burzan and Srđa Keković.

We hope the Report will be of use to Montenegro to improve the situation in the country on time, before it is advised to do so by international bodies and international organisations.

All comments and well-founded criticism are welcome.

Podgorica, July 2011

Tea Gorjanc-Prelević,
Executive Director of the
NGO Human Rights Action

Conclusions and Recommendations

Main Prerequisite – Institution Building

The European Commission said on 9 November 2010 that negotiations for accession to the European Union should be opened with Montenegro once it has achieved “the stability of institutions guaranteeing the rule of law”, thus also drawing attention to the pillars of human rights protection, comprising the independent, impartial and professional judiciary, the Constitutional Court and other state institutions.

The independence of the judiciary is best built in an environment in which governments succeed each other. Montenegro is specific in this respect. Ever since the multi-party system was introduced in 1990, it has been ruled by the Democratic Party of Socialists (DPS), the reformed part of the communist party that had been in power since World War II. The fact that this political group, which has wielded predominant influence over all aspects of political and economic life, has reigned for 66 years has led to the impression that it is irreplaceable. Maintaining one’s independence from this group poses a serious challenge for every civil servant, particularly the degree of independence needed to conduct lawful investigations and trials against the power wielders or those close to them or protect the human rights of individuals vis-à-vis the state in contravention of their interests.

In practice, the state prosecution offices are responsible for the non-prosecution of civil servants, e.g. cases of grave abuse, torture, inhuman or degrading treatment. The state is still burdened by the failure to penalise the perpetrators of war crimes committed nearly two decades ago and identify the perpetrators of controversial assassinations, including that of *Dan* editor Duško Jovanović. There are serious indications that the investigation of his death was not impartial and professional, or in accordance with the standards of the European Court of Human Rights. Some cases of human rights violations have either not been investigated at all or the prosecutors have been concealing their results because they have refused to notify the public about them.

In the first case of discrimination against a blind person, two ministries were unable even to launch misdemeanour proceedings to establish the accountability of the Podgorica Mayor, an eminent member of the ruling political coalition. In another case, a final court decision has remained unenforced for years because it was reached against the Ministry of Internal Affairs.

These are just some of the examples illustrating the need for systemic solutions which would ensure that professional and impartial people account for the work of institutions protecting human rights and defending the rule of law.

Depoliticisation of Judicial Appointments

Although the 2007 Constitution transferred judicial appointments from the Assembly to the Judicial Council and thus depoliticised judicial appointments in principle, the system still ensures that the ruling political coalition command decisive influence on the appointments and dismissals of key judicial officials: the Supreme Court President, the Supreme State Prosecutor and other state prosecutors, the non-judicial members of the Judicial and Prosecutorial Councils and the judges of the Constitutional Court.

The composition of the Judicial Council reflects this dominant political influence. The Judicial Council is chaired *ex officio* by the Supreme Court President, who is nominated and elected by the ruling political coalition. The other Council members comprise the Justice Minister, a representative of the ruling coalition; two Assembly deputies, one of whom is a representative of the ruling coalition; two legal practitioners nominated by the President, a senior representative of the ruling coalition, and four judges, one of whom is the wife of the President. Such a Council does not instil confidence that it is autonomous and independent from the ruling political group, as it should be according to international recommendations and the constitutional principle.

In November 2010, the European Commission recommended to Montenegro to “strengthen rule of law, in particular through de-politicised and merit-based appointments of members of the judicial and prosecutorial councils and of state prosecutors as well as through reinforcement of the independence, autonomy, efficiency and accountability of judges and prosecutors”.

The Montenegrin Government in June 2011 proposed amendments to the Constitution regarding the composition of the Judicial and Prosecutorial Councils and the procedures for appointing the Supreme Court President and state prosecutors.

Amendments to the laws on courts, the Judicial Council and prosecution offices, providing for a more objective appointment of judges and prosecutors, have been submitted to the Assembly for adoption but they are not aligned either with the constitutional amendments proposed by the Government nor the Venice Commission opinion on the proposed amendments to the Constitution and laws of mid June 2011. The Venice Commission suggested that half of the Judicial and Prosecutorial Council members be appointed from among individuals who are not judges or prosecutors to ensure an adequate share of lay monitoring of the work of these bodies. Like the National Convention on European Integration, the Commission also suggested that the authorities simultaneously review the constitutional and legal provisions regulating the Council appointment procedure.

Given that the constitutional provisions on the appointment of the Constitutional Court President and judges by the ruling political coalition did not ensure the independence of this Court from the executive either, the Venice Commission reiterated that the constitutional reform was an opportunity to address this issue as well.

Depoliticisation of the Public Sector and Confidence Building

Although discrimination on grounds of political affiliation in state sector employment is clearly prohibited in theory in Montenegro, the common opinion is that political membership is prerequisite for employment and promotion in state institutions and local governments. This opinion is reinforced by pre-election coalition agreements, under which parties divide amongst themselves even offices which have to be publicly advertised under the law. There is, however, no publicly available information on whether anyone has been prosecuted for discrimination on these grounds.

Reasonings of judicial appointment decisions do not explain why some candidates with the same or lower test scores or who have not been tested at all have been appointed. It remains unclear how the Judicial Council members rate the candidates given the lack of uniform evaluation standards and criteria. Although those on the outside do not perceive the system as fair, the candidates themselves have not complained about it. Probably for similar reasons why discrimination in employment and promotion in the state sector is not prosecuted – lack of trust in the impartiality of the institutions which should rule on such disputes. Institution building is thus inevitably linked to building trust in their work, which can only be deserved by impartial and objective work, particularly in the most challenging cases.

Recommendations with Respect to Individual Human Rights, Groups and Institutions

The Right to an Effective Remedy

- Amend the constitutional guarantee of the right to a remedy so that it includes the guarantee of the right to an *effective* remedy.
- Make the constitutional appeal an effective remedy by amending the Constitutional Court Act so as to enable that Court to also decide on violations of human rights by an action or the failure to adopt an enactment, not only on individual enactments (this would allow for a legal remedy e.g. in case of the non-enforcement of a judicial decision, lack of an effective investigation, etc).
- Amend the law to enable the Constitutional Court not only to rescind individual enactments but also to take decisions ensuring more efficient human rights protection (e.g. order the release of a person unconstitutionally deprived of liberty or award just satisfaction).
- Bind the Constitutional Court to assess in every individual case whether the legal remedies exhausted or available to the applicant before s/he addressed that Court were truly *effective*.

- Specify the power of the Constitutional Court to also protect the human rights not prescribed just by the Constitution, but by ratified international agreements as well.
- Make the requests for review and just compensation claims effective legal remedies by amending the Act on the Protection of the Right to a Fair Trial and improving its implementation in practice.
- Provide for the possibility of reinitiating an administrative dispute pursuant to a decision of the European Court of Human Rights or another international human rights protection body.

Protector of Human Rights and Freedoms (Ombudsman)

- Improve the constitutional guarantees of independence of the Protector.
- Adopt a new Protector of Human Rights and Freedoms Act, which will enhance, not diminish his/her existing powers and ensure adequate funding.
- Apply for the accreditation of the Protector with an international coordinating body of National Human Rights Institutions (NHRI).

Limitation and Derogation of Human Rights

- Delete provisions from the Constitution which provide for excessively broad restrictions vis-à-vis international standards, in particular: guarantee of compensation for the publication of inaccurate information under Art. 49(3) of the Constitution, and the prohibition of political association under Art. 54 of the Constitution.
- Amend the Constitution to prevent the abuse of milder conditions for derogation from human rights than those under international treaties. Explicitly prescribe:
 - Prohibition of derogation from the prohibition of slavery,
 - Prohibition of derogation from the prohibition of debt bondage, and
 - Prohibition of derogation from the right to be recognised as a person before the law.

Prohibition of Discrimination

- Amend the Anti-Discrimination Act to eliminate shortcomings already impacting on its implementation, especially regarding the limitation of legal protection, the failure to specify hate speech as a form of discrimination, or lack of a definition of sexual orientation and gender identity.

- The criminal offences Violation of Equality (Art. 159, CC), and Racial and Other Discrimination (Art. 443, CC) overlap. Their basic forms are the same, only the penalties vary, which does not ensure legal certainty. Both offences sanction discrimination only in the enjoyment of *human* rights, not all rights, wherefore the Criminal Code should be amended and these provisions elaborated in greater detail.
- The prohibition of propaganda of racial hatred and discrimination (Art. 443(3), CC) should be expanded to include other forms of intolerance and discrimination.
- The State Prosecutor's Office should improve its annual reporting methodology and specify the outcome of each lawsuit (conviction or acquittal), as well as the grounds for discrimination in the action.
- Ensure in practice, in accordance with European standards, effective investigations of indications that suggest that the case of violence was motivated by hate based on some form of discrimination (e.g. violence against Roma often has a dimension of racial hatred). All such incidents should be prevented and combated by stricter penalties, like in the provisions on the crimes of Violent Behaviour or Aggravated Murder.
- Ensure prompt proceedings on discrimination complaints, instead of scheduling hearings after more than 6 months, as is the case now.

According to a June 2011 public opinion survey, the citizens of Montenegro believe that Roma are the most discriminated against, followed by persons with disabilities, the elderly, homosexuals and women. The citizens believe that the state has been doing the least to improve the status of sexual minorities and the elderly.

Persons with Disabilities

- Improve the implementation of the Vocational Rehabilitation and Employment of People with Disabilities Act. Ensure that the special contributions that employers pay the state for persons with disabilities, which remain unspent (almost 3 million Euros in 2010!) and are “drowned” in the state budget at the end of the year, are used to provide jobs for people with disabilities.
- Intensify the removal of architectural barriers.
- Ensure equality before the law.
- In the first prosecuted case of violation of the right of a person with disabilities, the court has for the most part successfully completed its job, but its verdict has not been effectively enforced. Ministries have proven incapable of launching misdemeanour proceedings against the Mayor, an influential member of the governing coalition.

Gender equality

Although Montenegro has more women than men with higher education, men remain dominant in managerial positions in all walks of life. Only one of the 17 ministers is a woman, there are 10 women deputies in the 81-seat Assembly and five of the 22 courts are headed by women – these facts alone best illustrate the gender imbalance.

A comprehensive and ambitious Action Plan for achieving gender equality in Montenegro for the period 2008–2012 has been adopted pursuant to the Gender Equality Act. However, it is impossible to conclude how many of these measures have been implemented and to what extent from the way the first 2009 Annual Report on the implementation of measures in this Plan has been written.

- Lay down a method for developing Government gender equality plan implementation reports so as to provide the real picture of progress in their implementation.
- Inform and encourage women to report violations of labour rights (the differences in wages between men and women for work of equal value, employers' blackmail, etc.) to the Labour Inspectorate anonymously as well and provide for supervision of the Inspectorate's actions.
- The state should establish an assistance program for single mothers.

Sexual Minorities

There has been some progress in reducing homophobia in Montenegrin society, compared to the October 2009 public opinion survey: 2.5% fewer respondents perceived homosexuality as a disease, and 8% fewer thought the state should combat homosexuality in 2010. In June 2011 even 13% fewer respondents than in 2009 were against the holding of a gay parade. However, the fact that 61% are still against it still raises serious concerns. It was established for the first time this year that 57% of the citizens would not want to have a homosexual live next door to them.

The NGO LGBT Forum Progress has been established in Montenegro, whose director is the first publicly declared gay person in Montenegro. An initiative has been filed to review the constitutionality of the Family Act in the part where common-law marriage is treated exclusively as a union between a man and a woman. A Coalition for LGBT Rights, comprising mostly NGOs, has drafted an Action Plan for combating homophobia and transphobia and submitted it to the Government for adoption.

- The Government needs to join in NGO and media efforts aimed at stifling homophobia, primarily by dismissing Human and Minority Rights Minister Ferhat Dinoša, known for his homophobic views and refusal to promote sexual minorities.

- The Human and Minority Rights Ministry should then ensure the realisation of measures proposed by the Coalition for LGBT Rights in its Action Plan for combating homophobia and transphobia.
- Ensure efficient reviews of discrimination complaints to dispel public impressions of their ineffectiveness. For more than six months the Basic Court in Podgorica has not initiated proceedings on two lawsuits filed over discrimination on grounds of sexual orientation. The police and the Basic Public Prosecutor received twelve reports claiming harassment of homosexuals. Four complaints were filed with the Director of the Police, the Police Internal Audit Unit, the Police Civilian Oversight Council, and five complaints were filed with the Human Rights and Freedoms Protector.
- Expand the prohibition of inciting racial discrimination and propaganda of racial hatred in the Criminal Code to include hatred against sexual minorities, people with disabilities and others, as 20 NGOs have suggested.

Transsexual persons are particularly invisible in Montenegro, both in legislation and in practice.

- Include hormonal and surgical sex change treatment costs in mandatory health insurance.
- Sex change in identity documents should be allowed prior to the full completion of the gender reassignment treatment and this issue should be specified by the law.

Right to Life

Montenegro is still burdened by unresolved controversial assassinations. The ineffectiveness of the investigation of the assassination of the daily *Dan* Chief Editor in 2004 has particularly raised doubts.

- Prove that the state prosecutors and the police are able to ensure the rule of law by conducting effective investigations, including of persons who ordered the killings.
- Train and remind the police and public prosecutors of their obligation to undertake effective investigations of deaths, as well as all necessary and reasonable measures to protect the safety of persons within their jurisdiction against the dangers of which they have been notified, including death threats and domestic violence that often leads to murder.
- Police officers and other officials carrying official weapons should regularly undergo psychological tests, and be trained in applying the standard of “strict proportionality” laid down in the judgments of the European Court of Human Rights.

- Stipulate the notification of the state prosecutor of any use of firearms or means of coercion by the law or by-laws governing the performance of duties of the security service in the State Administration for the Enforcement of Penal Sanctions (ZIKS).
- Organise the treatment of war veterans suffering from the post-traumatic stress syndrome (PTSS), which in practice leads to permanent disorders and murders. Montenegro is the only country in the war stricken region which has not addressed this issue in an organised manner.
- Urgently and completely remediate environmental hot spots, notably in Pljevlja. Montenegro lacks a proper policy of prosecuting polluters and punishing environmental crimes. Prosecutors, judges, lawyers and NGOs need to be trained in environmental law.

Prohibition of Torture

Although Montenegrin law absolutely protects this human right and does not allow its restriction even during a state of war, the prohibition of torture still does not enjoy the treatment in accordance with minimum international standards.

- Ensure accountability in all cases where there is reasonable doubt (of international bodies as well, e.g. CPT) that the state prosecutor failed to conduct effective investigations of serious abuse by civil servants, such as: harassment of Milovan Jovanović in 2003; beating of detainees in the Spuž penitentiary in September 2005; abuse of the persons accused of terrorism in police operation “Eagles’ Flight” in September 2006; beating of detainee Vladana Kljajić in March 2008; beating of the late Aleksandar Pejanović in Podgorica police custody in October 2008; prosecution of those responsible for the appalling living conditions of the residents of Komanski most, long-term abuse of the wards by tying them and the disappearance of two wards. Provide just satisfaction to all the victims in the above cases in which the court finds a violation of the right to protection from abuse.
- Urgently solve overcrowding in prisons, which is a continuous problem amounting to inhuman treatment and causing a chain of violations of prisoners’ rights.
- Ensure room in the Special Psychiatric Hospital for people who really require such treatment and find other accommodation for welfare cases.
- Explicitly oblige the police by law to suspend their officers accused of abuse in accordance with international standards and penalise violations of this provision.

- The police must protect their employees who are willing to testify about torture, which should be emphasised in the Police Act. On the other hand, the *obligation* of the police to provide free legal assistance to their staff prosecuted for using means of coercion should be deleted. This mandatory solidarity of the state with the officer reasonably suspected of having violated the law encourages the “freer” application of powers, contrary to international standards.
- Improve the objectivity and impartiality of the police internal auditing procedures by specifying the procedures in a by-law and preventing the possibility that the police officer, whom the complaint regards, is tasked with verifying the allegations, which clearly calls into question the objectivity of the audit.
- Doctors must be trained in or informed about their duty to provide quality medical reports on injuries, including their detailed descriptions.
- The Constitution omits the prohibition of inhuman or degrading *punishment*. This shortcoming should be rectified, particularly because there are cases of such punishment in practice. A similar flaw exists in the formulation of the prohibition of medical and other experimentation without the *permission* of the individual, rather than without the *free consent* of the individual, in accordance with international standards.
- The crimes of Torture, Abuse and Extortion of a Confession should be aligned with the Convention against Torture. The existing minimum sentences should be increased, bearing in mind the seriousness of these crimes and the tolerant penal policy, particularly in relation to civil servants.
- The deadline for establishing a national mechanism for the prevention of torture has been exceeded by postponing the adoption of the Human Rights and Freedoms Protector Act.
- The Act on Mutual International Legal Assistance in Criminal Matters must be amended to provide sufficient prohibition of extradition of persons to a country where they may be subjected to torture and other abuse. The Criminal Code, which allows the imposition of the security measure “Expulsion of Aliens” in addition to any sanction imposed in a criminal trial, should also be amended accordingly.
- Living conditions in the social institution for accommodation of mentally retarded persons “Komanski most” in Podgorica have been improved compared to the appalling conditions during the 2008 visit of the European Committee for the Prevention of Torture (CPT), but only in 2011, after the appointment of a new director who replaced the one who had run the institution for over 20 years. The Supreme State Prosecutor refused to inform the public about any action of the

prosecution to sanction the former director, who was moved to a new senior managerial post, and who ought to account for the conditions in which the wards of that institution lived for years, during which two of the wards disappeared under unexplained circumstances. It is therefore necessary to establish also the liability of the competent state prosecutor.

Prohibition of Slavery and Human Trafficking

- Align the Criminal Code with the protocols to the UN Convention against Transnational Organized Crime, to Prevent, Suppress and Punish Trafficking in Persons and against Smuggling of Migrants.
- Include the NGOs dealing with these issues in the Working Group for the monitoring and implementation of the Strategy for Combating Trafficking, and support their work.
- Media should refrain from disclosing the identity of victims of human trafficking and other crimes, as this may seriously jeopardise the safety of the victims, which is also contrary to the press code.
- Introduce the practice of compensating victims of human trafficking and confiscating the assets of human traffickers. Since 2004, 22 persons have been sentenced for trafficking, which is slightly less than 40% of the defendants. The NGO Safe Women's House warns that none of the victims of trafficking have been compensated to date and that the confiscation of assets of the perpetrators of this crime has not become entrenched in practice, because only a car used to transport the victims has so far been confiscated from one convicted offender.
- Children caught begging need to be treated with particular care. The U.S. Administration (State Department) noted that "the government also deported large numbers of children caught begging without fully examining whether any were victims of trafficking".
- Despite the recommendation of OSCE experts, the state prosecution has not initiated the reopening of the criminal proceedings in the case of damaged Moldovan national S.Č., allegedly because she was unavailable. On the other hand, the Podgorica Basic Court is trying S.Č. *in absentia* after one of the suspects for trafficking initiated proceedings against her claiming she falsely implicated him in trafficking.

The Right to Liberty and Security of Person

- Courts have to change their practice of rendering decisions ordering and extending remand in custody and reasoning them by stereotyped phrases rather than carefully reviewing and reliably establishing all the circumstances of the case. This practice leaves the impression that remand in custody anticipates prison sentences, in contravention of international standards.

- Prevent the practice of sending a message to the mostly legally uneducated of the Government's resolve to fight corruption and organised crime on the road toward EU membership by arrests and groundless custody in remand, which not strictly necessary under the CPC. Custody of suspects in the corruption cases in 2010 and 2011 ("Kotor Cadastre" and "Zavala") was set and extended based on an arbitrary assessment that public peace and order may be disrupted in the events the remanded civil servants are released from custody. In the Kotor Cadastre case, the Appellate Court also grossly violated the presumption of innocence, condemning the accused before the verdict.
- The broadly set basis for remand in custody with respect to exceptional circumstances "indicating that release would seriously endanger public peace and order" (Art. 175(1(4)) CPC) needs to be specified. Other provisions of the CPC referred to in this Report, which allow for broad interpretation and arbitrary restriction of movement, need to be amended because Montenegro does not have a tradition of carefully limiting the right to liberty.
- The CPC provisions on remand of juveniles are in contravention of the constitutional guarantee that juvenile detention may not exceed 60 days.
- In contrast to the valid CPC, the new CPC does not limit detention from the indictment to the final conclusion of criminal proceedings, but only from the indictment until the rendering of a first instance verdict, which lowers the existing level of the right to liberty guarantees.
- The valid CPC contains a discriminatory provision (Art. 572), under which the limited duration of detention did not apply to persons whose custody had been set in proceedings which commenced before the entry into force of this law. The Constitutional Court failed to provide legal protection to persons on whose behalf the Protector asked for a review of the constitutionality of that provision, which led to violations of the right to trial within a reasonable time of many detainees i.e. they were kept in custody contrary to the European standard on the prohibition of discrimination.
- The Constitution does not contain an essential guarantee of the right of anyone who is detained in any way, not only in criminal proceedings, to address the court which may investigate the lawfulness of the detention and order release if it determines that the arrest was illegal (*habeas corpus*). Other laws do not fully secure this right either: the Police Act in the case of deprivation of liberty does not provide for appeal to court, contrary to international standards; the Act on Protection of the Rights of the Mentally Ill does not specify before which judicial and other authorities an appeal against institutionalisation may be submitted, the Act on Protection of Population from Infec-

tious Diseases also does not provide persons ordered quarantine the right to appeal the order with a court.

- The crime of Endangering Security should be amended so as to provide for stringent punishment for the qualified form of this offence, i.e. when committed by an official. This became obvious in the case of Aleksandar Zeković, who was most likely threatened by a police officer, who would, had he ever been prosecuted, be held liable like any other citizen.

The Right to a Fair Trial

Independence and Impartiality

- Establish a merit-based system for the appointment, promotion and sanctioning of judges leaving no room for doubts about who should be promoted and at which rate and who should be punished in disciplinary proceedings, dismissed or criminally prosecuted. A high degree of objectivity can be established by norming the performance of judges to the greatest most reasonable extent, by introducing regular appraisals of judicial performance based on established parameters-standards and serving as indicators for promotion.
- The reasonings of Judicial Council decisions do not provide answers to the questions why it chose one candidate over another although both had the same scores or a candidate who did not score the most on the test. The Council has to finally adopt a by-law specifying the parameters for grading the criteria on a scale of 1 to 5 (as envisaged) to minimise scope for arbitrariness.
- The proposed amendments to the laws on the Judicial Council and courts need also to entitle the members of the Judicial Council, apart from the Supreme Court President, to initiate disciplinary or dismissal proceedings against judges, given that court presidents have so far mostly been reluctant to launch such proceedings.
- The Judicial Council Act should be amended and supplemented by a provision specifying how the judicial members of the Judicial Council Disciplinary Commission who are not Council members are appointed e.g. who nominates them.
- The state prosecutor must investigate whether there are grounds for criminally prosecuting a judge for Abuse of Post or Professional Negligence every time a judge is dismissed or asks to be relieved of duty after dismissal proceedings have been instituted against him/her (and subsequently discontinued). Both crimes are prosecuted *ex officio*. No criminal investigations were launched against three judges dismissed for grave negligence by which they had caused damage to a large number of people.

- The practice of assigning a judge of a lower court to help out in a higher court in the event s/he “fulfils the requirements” for appointment to that court is problematic from the point of the right to a court established by law. Such practice inevitably leads to prejudicing judicial appointments in the higher court to which one of the candidates had previously been assigned “to help out”.
- Instead of earmarking budget funds for awarding apartments and resolving the housing issues of judges, these funds should be used to raise the salaries of the judges so that they can themselves apply for housing loans or resolve their housing issues in another manner. Allocation of apartments has been continuously causing controversies in practice and bringing judicial independence into question.
- Court presidents and the Supreme Court should apply relevant ECtHR case law in their decisions on recusals, given that decisions in contravention of such case law have been observed.
- The law should specify which activities or posts a judge may and may not be involved in, to minimise scope for arbitrary interpretations by the Judicial Council on a case to case basis and enable the judges to align their activities with the law in the meantime.
- Although the Judicial Information System (JIS) introduced in mid-2010 was presented as a system allowing for the automatic assignment of cases, the filing and registration of initial enactments by which parties launch court proceedings were, however, still conducted in the traditional way in practice in June 2011, by putting the receipt stamp on the initial enactment, without assigning it a code or any other reference that would eliminate suspicions that cases are not randomly assigned, i.e. without immediate entry of the lawsuit data in the computer system which would then automatically assign the new case to a judge.
- The minimum number of workdays a judge has to spend undergoing mandatory advanced professional training every year needs to be specified by the law

Fairness

- Great delays in enforcing convictions and other court decisions still cause problems and lead to violations of the right to a court, enjoyment of property, family life, etc. Reliable statistics on the duration of enforcement and efficient court supervision over enforcement need to be ensured. The legal system has to be able to ensure the enforcement of decisions also against the MIA, the Podgorica city authorities and all other individuals or authorities, otherwise there is no rule of law.
- Courts should be entrusted with the power to advise a party to a civil lawsuit or a criminal defendant without a legal representative, the

parties to the proceedings should be entitled to apply for free legal aid under the Civil Procedure Act and the Criminal Procedure Code.

- The Free Legal Aid Act should be amended to allow for the provision of free legal aid also in administrative proceedings, and to victims of torture or discrimination (the omission to include victims of abuse is particularly unfair because policemen tried for excessive use of means of coercion are entitled to free legal aid).
- Amend the minimum value of property set in the law under which anyone who owns any vehicle (worth 960 Euros or more) is not entitled to free legal aid.
- Allow NGOs, not only lawyers, to provide free legal aid, at least legal advice, at the expense of the state.
- Minor amendments to the Act on the Protection of the Right to a Trial within a Reasonable Time and improved enforcement of the Act in practice are needed to ensure that the requests for review and just compensation claims become effective legal remedies. Only 3 of the 33 just compensation claims over violations of the right to a trial within a reasonable time from the day the Act came into force until end 2010 have been partly upheld, two of them in 2010. The Supreme Court has restrictively interpreted the legal conditions for filing just compensation claims, contrary to ECtHR case law. Rejections of requests for review and claims are not accompanied by proper and comprehensive reasonings. The application of “notifications” in Article 17 and “decisions on the groundedness of the request” in Article 18 of the Act is ineffective.
- The 2010 Annual Court Performance Report does not specify whether the assessment of the duration of the proceedings i.e. calculation of the number of cases pending from 2010, 2009 and the other years takes into account the actual year in which the case was formed (a lawsuit or indictment filed, et al) or the year when the case was filed under a new reference number after the second-instance court overturned the first-instance verdict. Namely, the cases are as a rule filed under a new reference number after the first-instance decision is quashed, wherefore there are no actual records on the duration and number of pending cases. This should be rectified in the next report on court performance.
- The Annual Court Performance Report also failed to specify in how many criminal cases the statute of limitations expired in 2010 (e.g. the media reported on two such cases). Records on the expiry of the statute of limitations need to be kept and publicised because these data testify to the judicial system’s ability to ensure the rule of law. The reasons why the statute of limitations expired in every single case also need to be established and published.

- All courts should have uniform and regularly updated websites allowing for easy search of all their decisions. Not one Basic Court, including the biggest one in Podgorica, has its own website. The Supreme, Appellate and both Superior Courts have websites and publish their verdicts, but not all of them. Only the Administrative Court has been publishing its decisions on an everyday basis since January 2008. For example, the Appellate Court rendered 2000 verdicts in 2009 but published only 33 of them. It published 56 of its 2010 verdicts and not one of its decisions rendered in 2011 by end June 2011. The criterion by which the courts publish their verdicts remains unclear, because they have failed to publish sentences in some high profile cases. Furthermore, the court websites do not allow visitors to search the cases by the key words, only by their reference numbers (codes), which has significantly hindered public access to their case law.
- Align court practice in applying the Free Access to Information Act. Although the Podgorica and Bijelo Polje Superior Courts publish even first-instance criminal verdicts which are not final on their websites, basic courts, which do not have websites, apply different practices with respect to communication of verdicts under the Free Access to Information Act. Some courts invoke the protection of the right to privacy and refuse to allow access to verdicts even with the initials or without the names of the parties and witnesses.
- The public character of hearings is still prevented in practice by the fact that trials, particularly civil cases, are conducted in judges' chambers which are too small to allow all interested members of the public to attend the hearings.
- The new Misdemeanours Act, adopted in December 2010 and coming into force on 1 September 2011, did not establish misdemeanour courts, wherefore the reform of the misdemeanour authorities has again been postponed. Misdemeanour authorities, although not independent, are entitled to pass prison sentences and order serious protective measures encroaching on human rights, which will result in further systematic violations of the right to an independent and impartial tribunal.
- The Government proposal to amend Article 33 of the Constitution to allow for prescribing misdemeanours by by-laws, e.g. ministry or local self-government decisions, not only by laws, is disputable in view of the principle *nullum crimen sine lege* guaranteed both by the ECHR (Art. 7) and the ICCPR (Art. 15). It should be borne in mind that guaranteed human rights may be restricted only by law (Art. 24 of the Constitution) and that any misdemeanour entailing restriction of liberty needs to be laid down in the law.
- The prohibition of the violation of the presumption of innocence in Art. 3 of the Criminal Procedure Code needs to be amended to allow

the court to establish a violation of the presumption of innocence and order the discontinuation of the further violation and fine anyone who does (state authorities, media, etc).

- Arrests by excessively armed policemen (bulletproof vests, rifles, et al) and particularly broadcasts of police and other recordings of such arrests should amount to a violation of the presumption of innocence and be punishable.
- Article 261 of the new CPC should be elaborated to ensure that the four-hour deadline is not reckoned from the moment first contact with a defence counsel is established, but from the moment the counsel agrees to represent the suspect and attend the questioning. The law should also specify that a suspect shall consent to questioning in the presence of his/her counsel.
- Official Roma court interpreters need to be provided.
- The Criminal Procedure Code and the Misdemeanours Act need to be aligned with the constitutional guarantee prohibiting retrials for the same *punishable* offence defined as a misdemeanour or as criminal offence. In other words, the law should ensure that a person previously convicted or acquitted in a misdemeanour proceeding is not criminally tried for the same offence or vice versa, in accordance with the principle the ECtHR established in the case of *Maresti v. Croatia*.

The Right to Privacy

- The Constitution does not prescribe the permissible restrictions of the rights to personal data protection and to protection of private life, which raises the question of the constitutionality of the restrictions of the rights stipulated by the Personal Data Protection Act.
- It is necessary to align the Personal Data Protection Act with EU legislation, specify the imprecise provisions or provisions providing insufficient protection guarantees, and, above all, change the procedure for appointing the president and members of the Personal Data Protection Agency Council, because the current procedure, under which the Council president and members are nominated and appointed by the governing coalition, does not guarantee the Council's independence.
- Abolish the conditioning of access to personal data held by public administration bodies by the existence of a legal interest "related to judicial or other proceedings" because this requirement in the Public Administration Act is not in accordance with international standards, the Constitution, the Personal Data Protection Act and the Free Access to Information Act.
- Amend the Media Act by adding provisions on privacy protection and exceptions to such protection.

- Expand the provisions in the Criminal Code penalising coercing another to declare his/her national or ethnic origin (Art. 160(2)) and religious beliefs (Art. 161(3)) to include coercing another to declare his/her sexual orientation and gender identity as well.
- Amend the provision in Art. 257(2) CPC allowing the police to request of the electronic communications service providers to check the identity of telecommunications addresses at a certain time of connection without judicial oversight, because this is in contravention of the ECHR.
- The discretionary power in the Penal Sanctions Enforcement Act to prohibit a convict from correspondence with everyone except his/her loved ones, without the need to reason such a prohibition or prove it is necessary and proportionate, is not in accordance with the ECHR.
- The National Security Agency (ANB) Act does not provide sufficient guarantees of impartiality of the ANB vis-à-vis the ruling majority, or reliable oversight mechanisms ensuring that the ANB seeks court approval every time it applies surveillance measures.
- The ANB Act allows for an infinite extension of surveillance measures, and does not stipulate the deletion of collected data from the records after the termination of reasons for which they were collected. Therefore, this Act should be substantially reformed.
- Ensure that the judges apply provisions on the burden of proof in paternity proceedings in accordance with the guidelines in the ECtHR judgment in the case *Mikulić v. Croatia*, by providing appropriate training and/or a principled position.
- Ensure that the state prosecution initiates the investigation of allegations of a journalist and a former judge about the illegal wiretapping of the Podgorica Superior Court judges and the disappearance of the case of secret surveillance measures from the court, and, related to the above, the allegations in the state prosecution's indictment in the case of the assassination of police inspector Šćekić, stating that the judges of that court allowed illegal visits to the defendants in custody.

The Right to Freedom of Religion

- Establish legal grounds and criteria for providing financial assistance approved by the Government to religious communities without discrimination.
- Given that the programme of the ruling Democratic Party of Socialists, whose Vice President is the Prime Minister, argues for the establishment of an organisationally independent Orthodox Church, which would be created by uniting Orthodox believers, it should be borne in mind that the state should not interfere with the rights of

believers. Neutral mediation between factions within the religious community generally does not amount to state interference with the rights of believers under Art. 9 ECHR, but the authorities must be extremely cautious in this delicate area.

Freedom of Expression

- Delete the constitutional guarantee of the right to damages for publishing false information, because it may lead to violations of the freedom of expression.
- Amend the Act on Public Broadcasting Services to ensure the impartiality of the RTCG Council, which is now elected by the Assembly.
- Reinforce the regular mechanism for overseeing RTCG management by the Council and the State Audit Institution, and continuously inform the public about the possibility of filing complaints and petitions about the quality of the programme to facilitate the transformation of the PBS into an institution of general interest.
- Amend the Media Act by specifying the standards of “reasonable publication”, “due journalistic diligence”, proportional damage award, protection of privacy and others in ECtHR case law in order to ensure the implementation of these standards. The Supreme Court adopted a principled position on awarding non-pecuniary damages for violations of honour and reputation via the media, in accordance with the Government Action Plan for the Implementation of the Recommendations in the EC Opinion, but this principled position is not specific enough to facilitate and ensure the implementation of European standards.
- Reinforce the practice of protecting honour and reputation by exercising the rights to a correction and a reply envisaged by the Media Act. No such lawsuits have been registered in practice, as opposed to a large number of civil and criminal lawsuits over violations of honour and reputation.
- Privatisise the daily *Pobjeda* as envisaged by the law. This daily was still mostly state owned in late June 2011 although it was to have been privatised in 2003. In the meantime, prevent the management of this daily by party officials and thus reduce the public impression of this public outlet’s bias.
- In accordance with international recommendations, an independent body rather than the Ministry of Culture should monitor the implementation of the Free Access to Information Act. Although this Act includes penal provisions, no state agency or its employee has ever been convicted for violations that have obviously been committed in practice. The existence of an independent monitoring body would

probably have resulted in greater consistency of practice and rapid improvement in actions of state bodies. The NGOs' experience shows that the authorities often do not act within the statutory deadlines, that their practical implementation of the law is inconsistent and that often, despite the rulings of the Administrative Court, they avoid providing access to information. Particularly concerning was the State Prosecution Office's decision not to provide any information about 14 cases of human rights violations that have alarmed the public, which was later quashed by the Administrative Court.

- Uphold by end 2011 draft laws aimed at harmonising the Free Access to Information Act, the Personal Data Protection Act and the Classified Information Act with European standards.
- Reform the Criminal Code provisions on Disclosure of Another's Personal and Family Circumstances (Art. 197), Harming the Reputation of Montenegro (Art. 198), Harming the Reputation of a Minority Nation or Another Minority National Community (Art. 199) and Harming the Reputation of a Foreign State or International Organisation (Art. 200), which still allow excessive restrictions of the freedom of expression, contrary to international standards. Disclosure of another's personal and family circumstances via the media, similar means or at a public gathering is punishable by up to 14,000 Euros, or 29 average salaries in Montenegro. The crime of Harming the Reputation of Montenegro (entailing the ridicule of its flag, coat of arms or anthem) still warrants imprisonment and criminal prosecution *ex officio*. The decriminalisation of Insult and Slander/Libel, conducted in June 2011, would thus be logically completed.
- Re-establish the Journalistic Self-Regulatory Body to ensure respect and promotion of the journalistic profession in accordance with European freedom of expression standards.
- Effective investigations into the killings of the daily *Dan* Chief Editor Duško Jovanović and the driver of assaulted writer Jevrem Brković Srđan Vojičić, and the assaults on journalists Mladen Stojović, Tufik Softić, Željko Ivanović, Mihailo Jovović are crucial both in terms of the freedom of expression and confidence in the rule of law and democratic environment in Montenegro.
- Concerns have also been raised over the fact that the state prosecution ordered the hearing of the NGO MANS activists and journalist Petar Komnenić about uploading on YouTube the footage of the wedding of a controversial businessman suspected of organised crime, instead of investigating why the officials of the National Security Agency were among the wedding guests. Also, the editor of *Dan*, Milan Milutinović, was interrogated about how he came into possession of an official note regarding the assassination of Duško Jovanović, while

the public was not told that the note broadened the circle of suspects in the murder of Jovanović, which has been expected for years.

- In the case of death threats against Aleksandar Saša Zeković, where the prosecutor was to simply check whether it was true that the bodyguard of the Chief of Police had threatened Zeković, the prosecutor stated four years after the threats that the evidence has disappeared from the case file. Investigation into the threats can no longer be conducted because the statute of limitations in this case expired in the meantime.
- Adopt legal provisions protecting whistleblowers in Montenegro.
- Court case law evidences a visible increase in the number of acquittals in cases against the media and more frequent references to the freedom of expression under the ECHR. However, the verdicts are still not properly based on ECtHR case law, wherefore the introduction of European standards into domestic law, especially the Media Act, would facilitate and ensure their implementation, both by the media and the courts.

Freedom of Assembly

- Align the Public Assembly Act with the Constitution and international standards and formulate its provisions in greater detail to prevent their arbitrary application.
- Abolish the prohibition of assembly of employees on strike “outside the work premises”, set forth in the Strike Act because it is contrary to the Constitution and European standards.
- Change the practice of blanket bans of assemblies by the Police Directorate. In 2010 Montenegrin Police Directorate passed 78 decisions prohibiting gatherings “in order to prevent endangering the safety of traffic, movement and work of a larger number of citizens”, which is unconstitutional. All decisions invoked legal grounds alone, without further elaborating the specific circumstances. Protest walks on the sidewalks were also prohibited, which is obviously a disproportionate restriction, which is unconstitutional and contrary to European standards.

Freedom of Association

- Specify in greater detail the constitutional ban on political association in state bodies, criticised by the Venice Commission as too broad and imprecise.
- Improve the monitoring of allocation and spending of public funds for NGOs.

Right to Peaceful Enjoyment of Property

- Align the constitutional guarantee of the right to peaceful enjoyment of property, which is narrower than the provisions guaranteeing the right to peaceful enjoyment of property in the ECHR.
- Align the Expropriation Act with European standards so as to: (1) provide for the obligation of the Government to take into account the interest of the property owner when establishing the public interest for expropriation, i.e. weigh public and private interests to determine whether expropriation would disproportionately burden individual interest, (2) provide for a reasonable duration of registration of expropriation, i.e. the owner's right to compensation if it is exceeded, (3) delete or elaborate Art. 29, under which the Real Estate Directorate may decide to transfer the real estate to the beneficiary of expropriation before the decision on expropriation becomes final in the event it assesses that such transfer is necessary due to the exigencies of construction of a specific facility or the execution of works (the case of Vasilije Miličković illustrates the disputable implementation of this Article in practice), (4) ensure the protection of the right to peaceful enjoyment from the interference of the potential beneficiary of expropriation before submitting the proposal for expropriation (Arts. 15–17 of the Act), (5) delete the absurd provision in Art. 35(4) of the Act laying down that just compensation shall involve a proportionate reduction of the market price in the event the value of the rest of the real estate still owned by the owner of the expropriated land may substantially increase due to the construction of a highway or other infrastructure.
- Restitution of Property Rights and Compensation Act first provided, but later denied the right to restitution and compensation to owners whose property was confiscated after the entry into force of the 1968 Act Amending the Expropriation Act, wherefore it can be argued that their right to property within the meaning of “legitimate expectations” has been violated. The European Court of Human Rights is expected to render a decision in this case.
- Increase the amounts paid to former owners and cut payment of compensation deadlines, particularly taking into account the age of owners given that many of the former owners are not likely to live long enough to receive the full amount, which cannot be regarded as proportionate limitation of the right to peaceful enjoyment of property.
- Raise the capacities of the Restitution and Compensation Commissions to ensure consistent and uniform application of the law. Since the entry into force of the Restitution of Property Rights and Com-

pensation Act, the Commissions reviewed only one-third of the submitted claims, many of which they rejected.

- Ensure the urgent enforcement of verdicts ordering notably the companies in which the state has a majority stake to pay the back salaries to the workers (the case of “Radoje Dakić” AD Podgorica workers, et al).

Minority Rights

According to the April 2011 census, Montenegro's population comprises 278,865 (44.98%) Montenegrins, 178,110 (28.73%), 53,605 (8.65%), 30,439 (4.91%), 2,054 (0.33%) Egyptians, 20,537 (3.31%) Moslems, 6,251 (1.01%) Roma, 6,021 (0.97%) Croats and 30,170 (4.87%) people who did not declare their nationality. Montenegro has a total of 620,029 citizens, which is nearly identical to the size of its population according to the 2003 census (620,145).

- Align the Minority Rights and Freedoms Act with the Constitution. The Constitutional Act on the Implementation of the Constitution of Montenegro laid down a three-month period for the harmonisation of this Act with the Constitution, but the Draft Law Amending the Minority Rights and Freedoms Act was last reviewed in November 2010.
- Amend the provision of the Minority Rights and Freedoms Act defining minorities as *groups of citizens*, contrary to international standards. Accept the recommendation of the Venice Commission to delete these words from the definition of minorities in the Draft Law Amending the Minority Rights and Freedoms Act.
- The 2000 Use of National Symbols Act excessively and unconstitutionally limits the constitutional right to use national symbols by prohibiting the use of symbols of “national and ethnic groups in Montenegro” in front of the buildings of the Parliament, Government, Constitutional Court, President, as well as at international conferences and meetings where the Republic is presented, and at celebrations, ceremonies and activities organised by the Republic or local governments. The Roma Scholarship Foundation has asked the Human Rights and Freedoms Protector to initiate a review of the constitutionality of this Act.
- Specify the requirement of “a significant minority share in the population” which the minorities must fulfil to exercise the right to officially use their languages.
- Provide conditions for the official use of also the Roma language, including the codification and development of written Roma language. Provide Roma language classes at the preschool, primary and higher school levels.

- Include education in minority languages in the school curriculum for Bosniaks/Moslems and Croats, regardless of the fact that these languages are part of a single language system, in accordance with the recommendation of the CoE Committee of Ministers. Set the number of interested children who need to apply for education in a minority language for tuition in that language.
- The public service is required to broadcast content in minority languages, including the Serbian language as well.
- The Election Act, supposed to clarify the constitutional right of minorities to authentic representation in the Assembly of Montenegro and the local government assemblies in which they form a significant share of the population, was not adopted even after the deadline for its adoption was extended for the sixth time, although this is the first condition for Montenegro's progress towards the EU.
- Amend the Constitution so that it guarantees also the right to "appropriate" or "fair" representation of ethnic minorities in public services rather than "proportional representation" like it does now, as the Venice Commission recommended. The results of the Human and Minority Rights Ministry questionnaire of June 2011 showed that out of a total of 13,900 employees in state and local authorities, 79.03% or 10,985 identify themselves as Montenegrins, and only 8.6% or 1,194 as Serbs. The disproportionate employment of Montenegrins and Serbs in the public administration is obvious given that the 2011 Census shows that there are some 45% Montenegrins and around 29% Serbs living in Montenegro.
- Improve the capacities and transparency of the work of the Minority Fund. There is a shortage of staff, and a method for monitoring the allocation of funds has not yet been adopted. The Fund did not allocate the funds for 2010 in a transparent fashion. The State Audit Institution Report on its audit of the Fund's annual financial report and effectiveness stressed that the Fund "does not have precisely defined criteria for evaluating projects, or indicators for assessing project impact, and does not provide for monitoring project implementation and assessment of projects results". Reports on the implementation of projects submitted to the Fund by project managers are incomplete, superficial and not accompanied by proper financial evidence of implementation costs.

Roma, Ashkali and Egyptians

- Take additional measures to improve the state of the RAE population. The Government joined the program "Decade of Roma Inclusion" in 2005 in accordance with the recommendation of the Committee of Ministers of the Council of Europe and adopted its Action Plan for

the period 2005–2015, but it has not been implemented. The Strategy for Advancing the Status of the RAE Population in Montenegro 2008–2012 is the main document defining the goals and measures in this area. In the view of the Roma Scholarship Foundation (FSR), which coordinates the National Decade Watch Team in Montenegro, there are serious problems in implementing this Strategy. The NGOs' public pressures on the Government and local governments in terms of achieving the objectives of the Decade are insufficient. The budget allocated for the implementation of the Strategy objectives dwindles every year. The amount of 390,000 Euros allocated for social housing by the individual municipalities (Nikšić, Bijelo Polje, Berane) was not used as intended and within the agreed deadline, which is why many Roma and Egyptian families lack a roof over their heads and the necessary support in education and finding employment. Little attention is being paid to improving the housing conditions and safety in Roma settlements. The European Commission's conditioning led to a speedier resolution of the problems of the residents of the refugee camp Konik in Podgorica; the same measures should also be taken in all Roma settlements in Montenegro.

- Support social inclusion, particularly the schooling and employment of the Roma population, and prevent corruption and abuse of funds designated for their integration. The overall poor and discriminatory status in society prompted the FSR to organise the first public protest of young Roma and Egyptians dubbed "Diplomas on Brooms" in front of the Montenegrin Government on 11 March 2011 at which the protesters voiced their specific demands to the Prime Minister. These active measures to include all children in primary education should be taken in all Roma settlements in Montenegro.

Political Rights

- Restore the right of 6000 citizens to propose a law to the Assembly abolished by the 2007 Constitution, which reserved that right for the deputies and the Government. This reduced rights of citizens to participate in public affairs, which they had previously enjoyed under the 1992 Constitution.
- Change the composition and procedure for the election/appointment of the Commission for the Prevention of Conflict of Interests to guarantee it the status of an independent body, as prescribed by the Conflict of Interests Act.
- Open a debate on vetting as an issue of importance to Montenegro's democratic development. None of the three Vetting Bills submitted to the Assembly have ever been included in the parliamentary agenda.

- Establish a professional and competent State Election Commission (SEC), which will act as an independent authority and control the financing of political parties.
- Re-examine the 3% threshold of votes a political party must win in order to win a seat in the state parliament. At the last parliamentary elections in 2009, 36,929 (11.2%) votes had been cast for parties that did not make it into parliament.
- Adopt an election law that will *inter alia* elaborate the constitutional right of minorities and other minority ethnic groups to authentic representation in the Assembly of Montenegro and the local assemblies in which they form a significant share of the population, according to the principle of affirmative action.
- Change the model of forming election administration bodies by the parties by creating an independent state election commission, which would not only apply the election law but also monitor the implementation of the laws on the financing of political parties and election campaigns and the financial dealings of political parties.
- Allow voters to actually vote for their representatives by abolishing the so-called *modified closed election* list – where half of the seats won by an election list are awarded based on the order of candidates, while the other half is awarded at the discretion of list submitters after the elections. A free deputy mandate would be more reasonable in such a system.
- Increase monitoring of frequently mentioned cases of violations of electoral rights. One of the rare cases of a violation of electoral rights, the vote-buying in Zeta – the so called “Mašan Case”, ended in May 2010, when the people accused of violating the freedom to freely exercise the right to vote were sentenced to 45 days i.e. three months in prison.
- Discontinue the illegal and unconstitutional practice of forging coalition party agreements in which the parties in advance divide among themselves the jobs that must be open to everyone, notwithstanding their party affiliation. According to a study of the Anti-Corruption Directorate and UN Development Programme (UNDP) published in December 2010, citizens are of the view that family ties, friends and party affiliation are the most important elements for employment and promotion in public administration

Special Protection of the Family and the Child

- Review the definition of family in the Family Act, under which the family does not exist if it is not raising children, in terms of its constitutionality and conformity with the concept of family life under Article 8 ECHR, and amend it to allow a broader interpretation of the meaning of family.

- The Domestic Violence Act does not include persons who are not extramarital partners and do not live in the same household. It also does not comprise partners living in same-sex unions, as they cannot be subsumed either under members of a “family household” or under extramarital partners.
- Adopt the by-laws for the enforcement of the Domestic Violence Act to regulate psycho-social treatment, which has not existed in Montenegro to date.
- Envisage in the Anti-Domestic Violence Strategy the establishment of a mixed Commission for monitoring the enforcement of the Act, which would also include the NGO representatives.
- Envisage the establishment of a Victims of Domestic Violence Support Fund, which would receive funds from the budget, donations and misdemeanour fines, particularly in view of the fact that the Domestic Violence Act does not provide for the possibility of restricting the batterer’s access to the joint property or enable the victim to temporarily use the joint property.
- Ensure the consistent enforcement of the Domestic Violence Act. Montenegro lacks advisory services specialised in working with the victims and batterers. The capacities of the social care centres are insufficient and a number of complaints about their work have been filed with the Human Rights and Freedoms Protector. Montenegro also lacks the capacities to evict the offenders from their homes and institutions that would accommodate the victims, apart from the NGO shelters.
- Amend the provision in Article 212 CC, under which criminal prosecution for rape and sexual intercourse with an incapacitated person is initiated by a private report against the offending spouse to ensure that the same principle of prosecution *ex officio* applies to all perpetrators.
- Re-examine the penal policy for domestic violence. According to the 2009 Report of the Supreme State Prosecution Office, only half of the reported domestic violence offenders were indicted. Most of them were sentenced to conditional jail sentences, while one-third were sentenced to imprisonment. According to the 2010 Report by the State Prosecution Office, domestic violence reports were submitted against a total of 444 persons in 2010. Nearly one-third of the reports (196) were dismissed, while slightly over one-third (212) led to indictments. The penal provisions of the Domestic Violence Act, in force as of mid-August 2010, provide for misdemeanours and protection in misdemeanour proceedings.
- Clearly define the difference between misdemeanours and crimes with respect to domestic violence, which can lead to the violation of the principle *ne bis in idem* (two trials for the same offense) or further mitigation of the already mild penal policy.

- Amend the Criminal Procedure Code to provide that protection measures shall apply in criminal proceedings as well, which are now envisaged only in misdemeanour proceedings under the Domestic Violence Act.
- Ensure monitoring of the enforcement of the protection measures pronounced under the Domestic Violence Act.
- Provide training for competent police officers, social care centres, public prosecutors and judges in the application of the Domestic Violence Act. Victims complain of lack of understanding and information from the relevant government agencies, while NGOs note that the police and judicial authorities base their opinion on whether violence occurred on the existence or absence of physical violence, not recognising other forms of violence under this Act; several cases have been registered in which the police staff had not even been aware that the Domestic Violence Act existed. It has been noted that the police generally do not use the powers prescribed by law under which a police officer may order the batterer to vacate the home or prohibit him from returning home for up to three days.
- Adopt written forms for the actions by the police in applying the Domestic Violence Act. As opposed to the Police Directorate, which registered 57 fewer domestic violence reports in Podgorica in 2010 than in 2009, NGOs recorded an increase in reports both in 2010 and 2011, only one third of which were reported to the police or public prosecutors.
- Ensure the consistent implementation of the Convention on the Rights of the Child in Montenegro. In its conclusions on the implementation of the Convention on the Rights of the Child in Montenegro, the Committee on the Rights of the Child criticised the inefficiency of the Council for the Rights of the Child, the lack of databases (especially with regard to children with disabilities and children who are not registered), the insufficiently clearly defined mandate of the Deputy Human Rights and Freedoms Protector, insufficient mechanisms allowing children to themselves seek protection against violations of their rights, the vague definition of a child in domestic law and the classification of children as younger and older juveniles, the non-compliance of the Social and Child Protection Act with the Convention, as well as its inadequate implementation due to lack of human and financial resources.
- Bearing in mind the right of every child to be entered in the birth register, it is necessary to amend the Act on Registers to elaborate in greater detail the procedure for the subsequent registration of children in the birth registers, and ensure that registry offices and MIA regional units apply a uniform practice. Provide for the identification

of all children not entered in the birth register, especially by checking Roma, Ashkali and Egyptian settlements.

- Systemically address the problem of inefficient enforcement of decisions on child custody in Montenegro, which has led to violations of the right to family life, as established by the European Court of Human Rights in the case *Mijušković v. Montenegro* in September 2010.
- Ensure the consistent enforcement of the Hague Convention on Civil Aspects of International Child Abduction, which applies to cases where one parent takes a child and keeps him or her in a foreign country. The Montenegrin Justice Ministry received nine applications for the return of children from 2006 to 2011. The children were returned in only three cases. In two cases, the return of the child was not ordered because the proceedings went on for a long time and it was assessed that the children had settled in their new environment. These procedures are disputable given that the very goal of the Convention is to ensure expeditious action. Furthermore, the question arises as to how come the authorities abided by the expediency requirement in some cases and not in others.
- Integrate the multidisciplinary teams for protecting children from abuse and neglect in the regular social and child protection system and ensure their regular activity. Expedient and efficient support by the relevant institutions in cases of domestic violence, child abuse and neglect in Montenegro falls short of the prescribed form of providing social protection. Procedures in which parental rights are revoked or limited are rare, even when all the legal conditions have been met. Counselling and psycho-social support to the child victims, urgent temporary accommodation of such children, foster services (above all urgent placement in foster care, not only with relations) and specialisation of professionals are merely some of the elements that have to be strengthened and developed to ensure the adequate protection of children.
- Ensure that measures of social and child protection, which mainly boil down to cash allowances, include the provision of other social services in terms of hiring qualified staff to work with the children and their families.
- Adopt a juvenile justice law. The draft of a juvenile justice law had not been adopted in the form of bill by end June 2011.

Nationality

- Montenegro should ratify the 1961 UN Convention on the Reduction of Statelessness.

- Allowing nationals to retain foreign citizenship acquired by 3 June 2006 is particularly discriminatory against those who want to acquire the citizenship of the Republic of Serbia, because no one was allowed to acquire Serbian citizenship prior to that date. Based on the provision of the Montenegrin Citizenship Act under which a Montenegrin citizen, with a citizenship of another country, loses Montenegrin citizenship if s/he voluntarily acquired citizenship of another country, unless the international agreement established dual citizenship and unless s/he already had another citizenship on 3 June 2006, 40 citizens of Montenegro lost Montenegrin citizenship before 26 March 2011, including the President of the People's Party, Predrag Popović.
- Ensure that administrative authorities review applications for citizenship within the legal deadline.
- Lay down a special procedure for the subsequent entry into birth registers and acquisition of Montenegrin citizenship in accordance with Montenegro's international obligations to suppress statelessness, particularly among children living in its territory. Montenegro has a particular problem with respect to persons without citizenship or any documents and who have never been entered in the registries of either Montenegro or another state – stateless persons.

Freedom of Movement

- The Aliens Act allows for the expulsion of an alien illegally residing in Montenegro or an alien whose residence has been revoked prior to the decision on the appeal against the decision on expulsion, which may lead to a breach of international obligations under Art. 13 IC-CPR and Art. 1(2) of Protocol No. 7 to the ECHR, which allow for deviations from the right to the review of a decision on expulsion only when such expulsion is necessary only on grounds of public order and national security.
- Build an Aliens Shelter, envisaged by the Aliens Act.
- The law should provide for a possibility of filing a court appeal against the police decision in the first instance on the accommodation of an alien who cannot be forcibly deported or whose identity has not been established in the Aliens Shelter for up to 90 days (*habeas corpus*), given that such decision amounts to a form of detention.
- Organise an adequate asylum system, which would be fully compliant with the Convention on the Status of Refugees. The UNHCR is of the view that Montenegro is in need of a modern asylum system which should have a legal dimension, including access to a country and a fair asylum procedure, as well as a socio-economic dimension, comprising housing, employment, education, health and local integration.

Economic, Social and Cultural Rights

Economic and Social Rights (General)

- Montenegro should ratify the Optional Protocol to the ICESCR, signed on 25 September 2009, which will allow the Committee on Economic, Social and Cultural Rights to decide on individual applications regarding violations of these human rights by the state authorities.
- Montenegro has to ratify all the provisions of the Revised European Social Charter (ESC), particularly the right to submit collective applications over violations of the ESC to the European Committee of Social Rights.

The Right to Work and Just Conditions of Work

- Improve the capacities of the Labour Inspectorate. Substantially strengthen the capacities of this service by increasing the number of expert inspectors and provide for their more efficient and impartial actions on site and on anonymous reports, in order to achieve several goals important for the respect of workers' rights: the suppression of "grey economy", i.e. employment of workers on the "black" market without paying their contributions; effective protection from the consequences of unjustified dismissals, especially in the case of trade union representatives; non-payment of overtime; suppression of non-compliance with the law regarding safety at work; non-compliance with the rules on special protection of members and representatives of trade unions, women at work and so on. At the end of June 2011 there were only 12 inspectors charged with safety at work, which constitutes an approximate ratio of 1 inspector per 17,600 workers, while ILO recommendations are 1 inspector per 10,000 workers.
- Ensure the achievement of goals set in the National Strategy for Employment and Human Resources for the 2007–2011 period, most of which have not been achieved.
- The goals provide for access to day care for children (so that both parents can work) only up to 5 years of age, although children in lower grades of elementary school attend school only about three and a half hours a day, and the schools that provide day care do so only for first-graders. This problem should be addressed regardless of the shortcoming of the Strategy.
- Amend the provision in the Draft Amendments to the Labour Act allowing employers to unilaterally terminate employment contracts with employees in all cases of "non-compliance with duties or misconduct" (disciplinary offence) unilaterally prescribed by the employer's act, without conducting a disciplinary procedure against the worker or giving the employee representative (trade union representative or

attorney) the opportunity to present the worker's defence before the employer, which is not in accordance with the ILO Convention.

- Increase the capacities of the Labour Fund, because at this rate, the claims filed in 2010 alone will not be reviewed in the next 11 years. The Labour Fund started working in January 2010 and received 21,526 claims until 8 January 2011 from "victims of transition", who had been dismissed through no fault of their own in the past 20 years and had not received any redress. The Fund reviewed 1,876 of the claims, upheld 1,613 of them and rendered decisions on the payment of a total of 3.11 million Euros to the claimants. The Fund dismissed 260 claims as groundless and three claims because they were submitted by persons who were ineligible to submit them. Of the 1,613 upheld claims, 478 were enforced and 920,000 Euros were paid to the claimants in 2010.
- Promote the procedure before the Agency for the Peaceful Resolution of Labour Disputes. The Agency was set up in April 2010 and in one year received around 150 motions for the peaceful settlement of labour disputes, comprising around 6,500 parties a year, but a high percentage of the proceedings were discontinued because the opposing parties refused to resolve the dispute in this manner.
- In all cases in which workers cannot enforce final judgments for the collection of claims from companies where the state holds the majority stake, the state is under the obligation to pay the workers-creditors, pursuant to the ECtHR case law in which it found Serbia in violation of the ECHR (*Kačapor and Others v. Serbia*, 2007). In practice, the major problems arising with respect to the rights to just and favourable conditions of work entail gross violations of basic workers' rights to payment of wages and the regular payment of social and health insurance contributions. In certain cases, the debtor – the employer is the state or local government, which is particularly worrying and constitutes the worst violation of labour rights. In other cases, the owners are private figures, sometimes foreign owners who fail to meet obligations under the privatisation contracts. The rights of employees who work in shops and small and medium sized enterprises are particularly at risk, because most are not members of trade unions and do not have collective agreements with their employers. In some cases, workers have won final and enforceable judgments upholding their claims against their employers, while others have not, although the claims are basically undisputed.

Trade Union Freedoms

- Align the 2010 Rulebook on the Registration of Representative Trade Unions with the ILO Convention because it now allows the adminis-

trative authority to abolish a trade union organisation by deleting it from the register before the court decides on the matter in an administrative dispute.

- Montenegro should sign the ILO Convention no. 154 on collective bargaining, given that the European Commission also criticised the low level of collective bargaining and noted that the bipartite dialogue must be improved, especially at the level of individual employers.
- Take measures to strengthen trade union pluralism. The Act on the Representativity of Trade Unions of May 2010 lays down the conditions a union must meet in order to become representative and be entitled to engage in collective bargaining and collective agreement at the appropriate level, participate in resolving collective labour disputes, participate in the work of the Social Council and other tripartite and multipartite bodies, and other rights laws grant authorised trade union organisations. However, the right to participate in social dialogue granted a trade union representative, has been made ineffective by reducing the number of representatives in tripartite and multipartite bodies (such as Boards of the Pension Fund, Employment Service, Agency for the Peaceful Resolution of Labour Disputes, the RTCG Council), i.e. by the formulation that the employee representative is elected from among the trade unions with greater numbers of members, because this reintroduces the monopoly of the majority trade unions and undermines the concept of union pluralism.
- Amend the Act on the Representativity of Trade Unions by introducing sanctions for an employer who fails to comply with all obligations set forth in the Act (e.g. avoids to form a commission to determine representativity).
- Review the actions of the Labour Inspectorate, especially in those cases where the Inspectorate failed to use its power to postpone the enforcement of the decision on termination of employment and the court subsequently ruled in favour of the worker. Particularly re-examine the reasons why the Inspectorate failed to act in cases involving trade union activists.
- Prevent the practice of employers' pressures on workers – union members to withdraw from the union under threat of dismissal, reassignment to another job, wage cut, denial of trade union dues or depriving one trade union of the right to operate, while favouring the other.
- Amend the Strike Act in terms of the list of activities of public interest which are subject to a special strike regime in order to substantially limit the list and narrow the need for achieving the minimum work process, as requested by the Committee on Economic, Social and Cultural Rights back in 2005, and by the Committee of the International Labour Organisation in 2006.

- Amend the Strike Act so as to limit room for arbitrariness by the employers in terms of determining the minimum work process by providing that an impartial body render a decision in the event of disagreement between the employer and employee.

Right to Social Security

- Avoid lowering the level of acquired human rights. Although, in principle, the ICESCR prohibits measures that reduce the acquired rights to social protection, Montenegro in 2010 raised the age limit and equalised men and women in terms of retirement requirements and provided for more restrictive conditions for the enjoyment of a family pension in case of death of a spouse or a parent.
- Although the absolute poverty line stood at 170 Euros per person in 2009, the amount of social insurance and assistance is much lower than this sum and needs to be increased. Furthermore, the authorities need to re-examine their allocation:
 - The minimum old-age and disability pension is set at 45 Euros a month (1.45 Euros per day);
 - The monthly allowance in the event of unemployment in June 2011 amounted to 57 Euros (1.83 Euros per day) and is provided under restrictive conditions and is typically limited in duration (it is unlimited and paid until the jobless person finds a new job only to women with 30 years of service, or men with 35 years of service, and parents with 25 years of service whose children are receiving a disability allowance);
 - The amount of family allowances range from 60.5 Euros for single-member families to 114.95 Euros for families with five or more members. These allowances are extremely low, especially given the fact that the right to a family allowance may be exercised only by families with no income or valuable property and the fact that the minimum consumer basket cost as much as 755.42 Euros in December 2010. The state does not implement the necessary control in order to establish the exact number of people who are genuinely in need of family allowances.

Right to an Adequate Standard of Living

- Verify whether the funds allocated for social housing, particularly in the municipalities of Nikšić, Bijelo Polje and Berane, have been spent as planned and within the set deadline.
- In addition to planning a lasting solution for problems of inadequate housing in camps Konik I and II in Podgorica, the state should review the situation in Roma and other settlements with “poor” living conditions under the Strategy for Reducing Poverty in the entire territory of Montenegro and develop a plan for addressing them.

- Carry out adequate investigations into all cases following reports of Inspector of the Veterinary Administration Mirjana Drašković who in July 2009 warned the public about uncontrolled and illegal imports of potentially unhealthy meat from South America, which is why she was suspended from work for a year, given that an investigation of her criminal charges was not initiated by the end of June 2011, nor was the public informed of the results of the prosecutor's actions.

Right to Highest Attainable Standard of Physical and Mental Health

- The decisions of the Health Insurance Fund Commission have to be urgently reviewed to ensure that they are reasonable, objective and transparent. The case of a patient, who was forced to live with his intestines outside his body for three years because the Commission decided not to approve his specialist treatment in London, which was ultimately successfully resolved within just a few days, proves that the decision-making procedures of this body should be urgently re-examined, given that its decisions directly impact on the exercise of the right to life of patients unable to receive adequate treatment in Montenegro because of the objective shortcomings of its health care system.
- In accordance with a resolution of the Council of Europe, the Health Insurance Fund should change the view that the treatment and sex change surgery are “cosmetic reconstructive surgery”, which does not fall under mandatory health insurance, and provide access to such treatment to transsexual persons in Montenegro.
- Although the Transplantation Act has been in force for almost two years, Montenegro has not created conditions for organ transplant. A register of organ donors has not been established either.
- Montenegro still lacks registered biobanks, provided for in the Biological Samples Act adopted in March 2010.
- The Commission for Genetic Testing, provided for by the Act on the Protection of Genetic Data adopted in May 2010, has not been established either.
- In February 2011, there was a case of death from influenza A (H1N1) that was not diagnosed in a patient, possibly because the Health Ministry previously ordered austerity measures with regard to tests to confirm the virus. It is necessary to effectively and impartially determine all the circumstances of this case, as well as the responsibility of persons involved.
- Medical negligence trials last too long and some of them therefore have likely led to violations of the procedural aspect of the right to life, in accordance with the European Court of Human Rights case law. By June 2011, Montenegrin courts had reached only one final decision on medical negligence and *in absentia* at that. However, the

Medical Association is also tasked with dealing with medical negligence, albeit only in theory to date.

- Consistently enforce the Act on the Restriction of Use of Tobacco Products.
- Increase hospital capacities to treat patients with mental disorders. Part of the problem lies in the fact that in the prevailing stigmatisation of and discrimination against people with mental disorders in Montenegro. Some 100 patients remained in the Special Hospital in Dobrota for years only because their families would not take them back in and they could not be accommodated elsewhere.

Right to Education

- The Government is yet to provide education to everyone in their native languages, which are official or officially in use in Montenegro, or minority languages, which are not defined as official (Roma).
- Change the centralised method of appointing school principals by the Minister of Education, which allows for the dominance of the political criteria of eligibility, and leave the appointments to school boards, comprising representatives of teachers' council and parents.
- The Ministry of Education should ensure the efficient identification of all children in Montenegro not included in the educational process, modelled on the action undertaken at the beginning of the 2010/2011 school-year in camps Konik I and II. This can be achieved by establishing a protocol with clearly defined roles, duties and responsibilities of all relevant authorities and institutions to ensure that all children are included in the compulsory primary education.
- The state should actively work on suppressing dropping out from primary school, especially of Roma children, who are under the pressure of poverty and specific traditional culture. It is necessary to provide permanent financing of Roma teaching assistants, whose work proved to be extremely useful and effective.
- Review the problems identified in the implementation of inclusive education practices by all stakeholders, especially those involved in its implementation.
- Prevent the deterioration of the teachers' financial situation in accordance with Montenegro's international obligation under the ICE-SCR to improve it continuously.
- Enabling the freedom of scientific research calls for establishing lawful and transparent criteria in the work of the university, as well as an effective mechanism for resolving disputes. The appointments of the University of Montenegro Rector and Dean were followed by controversies about their lawfulness. The scandals at the Law College have also undermined the reputation of these institutions.

- Create an environment in which the students can freely express their opinions. Several representatives of student organisations assessed that students in Montenegro are not sufficiently socially engaged.
- Establish a university ombudsman, as proposed by the NGO Centre for Civic Education (CGO), who would monitor the work of all three universities and give an opinion on the actions that had or may adversely impact on the rights of students and academic staff. This initiative was supported by the Rector of the University of Montenegro, representatives of student organisations and the Human Rights and Freedoms Protector.

The right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production

- Take additional measures to protect intellectual property. The implementation of the law on enforcement of regulations governing the protection of intellectual property rights has failed to lead to a substantial suppression of piracy, which is visible every step of the way.
- Increase the amount of funds to be invested in culture. The state does not invest enough in culture and provides budget funds below those prescribed by law.
- Increase investments in scientific research. Investments in scientific research are far below the average in Europe (0.26% of GDP compared to 3% of GDP) and the threshold that should be reached by all EU member states in the next ten to fifteen years. The problem in Montenegro starts from inadequate infrastructure for high-quality scientific research, which further initiates “brain drain” that has been plaguing Montenegro since the nineties, because young talents take their knowledge where they are provided with appropriate conditions for furthering it and engaging in research.

War Crime Trials

- Urgently provide advanced professional training in international humanitarian law for all prosecutors, deputy prosecutors, judges and court associates involved in war crimes cases.

Human Rights in the Legal System of Montenegro

Constitutional Provisions on Human Rights

The Constitution of Montenegro from October 2007 encompasses important human rights guarantees, but does not reach the level of guarantees previously provided for in the Charter on Human and Minority Rights and Civil Liberties of the State Union of Serbia and Montenegro (the Small Charter).¹

The Constitution does not contain a clear guarantee of the right to life, does not contain the right to a judicial appeal in every case of deprivation of liberty (*habeas corpus*), there is no prohibition of inhuman and degrading punishment, there is no prohibition of imprisonment for debt, lacks the right to an effective remedy for violations of human rights, lacks some important guarantees to a fair trial, along with the guarantee that the achieved level of rights shall not decrease (“guarantee to acquired rights” under Art. 57 of the Charter of Small), as well as an important guide for interpreting human and minority rights in accordance with international standards and practices of international bodies.² On the other hand, the Constitution incorporates guarantees to the right to damages for publication of inaccurate data or information, which is an unusual guarantee which can lead to violation of freedom of expression, according to the jurisprudence of the European Court of Human Rights. Additionally, the Constitution provides for a broad restriction of the right to political association. Most of these objections were put forward by the Venice Commission in its Opinion on the Constitution of Montenegro in December 2007.³

These shortcomings are somewhat alleviated by Article 9 of the Constitution, under which the ratified international treaties and generally accepted rules of international law represent an integral part of the domestic legal order. They, however, have precedence over national laws, and not the Consti-

¹ Human Rights Action advocated for inclusion of the Small Charter in the Constitution of Montenegro, because it was already adopted in the Parliament of Montenegro, and especially because it was an excellent document, as assessed by the Venice Commission.

² “Human and minority rights guaranteed by this Charter shall be interpreted so as to promote the values of open and free democratic society in accordance with applicable international guarantees of human and minority rights and practices of international bodies that oversee their implementation” (Art. 10, Small Charter, available at: <http://www.gov.me/biblioteka/1055252009.pdf>).

³ For the Venice Commission opinion, see Opinion of the European Commission for Democracy through Law (Venice Commission) on the Constitution of Montenegro, Strasbourg, 20 December 2007, Montenegrin translation published in “International Human Rights Standards and Constitutional Guarantees in Montenegro”, Human Rights Action, Podgorica, 2008.

tution, although in practice the Constitution can not serve as justification for guaranteeing a lower level of human rights in comparison to international standards under international treaties. It is also stipulated that international treaties shall be applied directly only if they regulate the relations “differently than national legislation”, which calls for determining whether they are really regulated differently or not. This unduly complicates the application of international standards, which are insufficiently implemented in Montenegro.⁴

A particular problem is the lack of guarantees of independence of the Protector of Human Rights and Freedoms, president and judges of the Constitutional Court, president of the Supreme Court, state prosecutors, as well as members of the Judicial Council who are elected out of the ranks of judges, given that all of them are elected by the parliamentary majority itself, i.e. the ruling coalition, which has been in power in Montenegro, with fewer personnel changes, continuously for two decades.

The Human Rights Action filed an initiative for amending the Constitution to the Heads of the State and Government and all political parties in November 2007, but has not received any feedback.⁵ As the European Commission in November 2010 recommended improvement of the guarantee for independence of the judiciary and public prosecutors, and the Government in 2011 proposed amendments to the Constitution, we hope that the constitutional reform, which is to occur in Montenegro by the end of 2011, will be used to improve the constitutional guarantees of human rights.⁶

Montenegro and the International Human Rights Treaties

Universal Treaties

Montenegro is bound by all universal international human rights treaties which used to bind the state union of Serbia and Montenegro (SCG), the

⁴ “Legislation and practice on defamation needs to be fully aligned with the jurisprudence of the European Court of Human Rights”, European Commission Opinion on Montenegro’s application for membership of the European Union, Brussels, 9 November 2011; “The Committee regrets the absence of court practice in application of the Covenant in the courts of Serbia and Montenegro”, the Committee on Economic, Social and Cultural Rights, Concluding comments of the Committee, Serbia and Montenegro, 23 June 2005. (The Committee will soon review Montenegro as an independent state and probably have same remarks).

⁵ For comparative critique of the provisions of the Constitution of Montenegro on Human Rights, by the Venice Commission and the Human Rights Action, see “International Human Rights Standards and Constitutional Guarantees in Montenegro”, p. 99–124. The initiative for amending the Constitution from 2007 is available on www.hraccion.org

⁶ This is however, highly uncertain, because the Government’s draft amendments to the Constitution contain solely a proposal to amend the principle of legality, which is debatable (for details see page 245)

Federal Republic of Yugoslavia (FRY) and the Socialist Federal Republic of Yugoslavia (SFRY).⁷

The Constitution stipulates that ratified international treaties and generally accepted rules of international law are an integral part of the domestic legal order, that they shall have primacy over national legislation and directly apply when they regulate the relations differently from national legislations, which can be a problematic solution, as stated above.⁸

Even SFRY ratified all more important universal international human rights treaties: International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination, International Convention on the Elimination of Discrimination against Women, Convention on the Rights of the Child, Convention on the Prevention and Punishment of the Crime of Genocide, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, etc.

In the period from 2010 until the end of June 2011, Montenegro has ratified the International Labour Organisation (ILO) Convention No. 183 on maternity protection,⁹ and at the end of June 2011 the Convention for the Protection of All Persons from Enforced Disappearance.

The Right to File Individual Applications

The citizens of Montenegro and others may submit individual applications to UN committees responsible for application of international human rights treaties and complain to them that the authorities of Montenegro have violated their right guaranteed by that treaty. One may appeal to the Human Rights Committee for violation of the International Covenant on Civil and Political Rights, to the Committee against Torture for violation of the Convention Against Torture, the Committee on the Elimination of Racial Discrimination for violation of the Convention on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of Discrimination against Women for violation of the International Convention on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities for violations of the Convention on the Rights of Persons with Disabilities. However, it is impossible to simultaneously conduct proceedings before these committees and the European Court of Human Rights, so this should be taken into account.

When Montenegro confirms the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, signed in December

⁷ The decision to proclaim independence of Montenegro, item 3, *Sl. list RCG*, 36/2006. After declaring independence, Montenegro submitted a statement about the succession of these international agreements to the United Nations.

⁸ See the previous chapter for the critique of Article 9 of the Constitution of Montenegro.

⁹ *Sl. list CG – Međunarodni ugovori*, 01/11.

2009, and after it enters into force, it shall provide for the right to submit individual applications to the Committee on Economic, Social and Cultural Rights. This is particularly important because the European Convention on Human Rights does not guarantee economic, social and cultural rights, and Montenegro did not endorse the right to lodge collective applications to the European Committee of Social Rights under the European Social Charter.

Reporting Obligations to International Bodies

In 2003 the State Union of Serbia and Montenegro (SCG) submitted periodic reports on the implementation of the ICCPR¹⁰ and ICESCR¹¹ to relevant treaty bodies. The Human Rights Committee reviewed the report in July 2004 and published its conclusions on the implementation of ICCPR in Serbia and Montenegro.¹² The Report of the Committee on Economic, Social and Cultural Rights on the implementation of ICESCR in SCG was published in May 2005.¹³ The Committee then expressed its regret that the state could not prove the practice of implementation of ICESCR in the courts in Serbia and Montenegro.¹⁴ Until the end of June 2011 the Human Rights Action remained unaware of a case of implementation of ICESCR in Montenegrin jurisprudence.

Montenegro was to submit a report on implementation of ICESCR to the Committee on Economic, Social and Cultural Rights by 30 June 2008, and a report on implementation of ICCPR to the Human Rights Committee by 1 August 2008, but failed to do so before the end of June 2011.

In 2010 the Committee on the Rights of the Child reviewed the Initial Report of Montenegro on the application of the Convention on the Rights of the Child, 2006–2008, and gave its opinion.¹⁵

In 2008 Montenegro submitted a report to the UN Council for Human Rights for the Universal Periodic Review on Human Rights (UPR). The Human Rights Action also filed an alternative report. The final report of the UN Working Group in charge of UPR was published in 2009.¹⁶

For reporting to the Committee on the Elimination of All Forms of Discrimination against Women, see page 109.

¹⁰ Doc. UN CCPR/C/SEMO/2003/1.

¹¹ Doc. UN E/1990/5/Add.61.

¹² Doc. UN CCPR/CO/81/SEMO.

¹³ Doc. UN E/C.12/1/Add.108. The Committee, in addition to the state report, took into consideration the reports submitted by some NGOs.

¹⁴ *Ibid*, item 10.

¹⁵ Translation of Committee's recommendations is available on the website of the Ministry of Labour and Social Welfare: <http://www.minradiss.gov.me/pretraga?query=komiteta&siteId=46&contentType=2&searchType=4&sortDirection=desc>.

¹⁶ The Report is available at: <http://www.unhcr.org/refworld/country,,UNHRC,,MNE,,497476a3d,0.html>.

Council of Europe Conventions

In December 2003 SCG ratified the European Convention on Human Rights and Fundamental Freedoms (European Convention on Human Rights – ECHR) and its fourteen protocols. Following independence, in July 2006 Montenegro submitted a statement of succession to the Council of Europe in relation to all the conventions signed by the state union of Serbia and Montenegro. This statement was accepted in relation to the conventions that were open to non-member states. After the accession of Montenegro to the Council of Europe in 2007, the successor statements in relation to the conventions that are open only to members were accepted as well, with the date of entry into force on 6 June 2006.

When ratifying the ECHR in 2004, SCG has had several reservations with regard to the Convention, which were taken over by Montenegro, relating to the provisions of the Misdemeanours Act in relation to the lack of independence of the misdemeanour authorities. In 2004 SCG stated that the reservations will be withdrawn as soon as the relevant provisions in national legislation are harmonized with European standards. However, Montenegrin governmentally appointed bodies still conduct misdemeanour proceedings.

In 2003 the SCG Parliament ratified the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.¹⁷ The Convention entered into force on 1 July 2004. That same year the delegation of the European Committee for the Prevention of Torture and other Inhuman or Degrading Treatment or Punishment (CPT) visited Montenegro for the first time, and later again in September 2008.

In 2005 SCG ratified the European Charter for Regional or Minority Languages.¹⁸ In 1998 the then FRY ratified the Framework Convention for the Protection of National Minorities.¹⁹ In 2009 Montenegro ratified the Revised European Social Charter (for details see page 474).

During the period from 2010 until the end of June 2011 Montenegro has ratified: the European Convention for the Suppression of Terrorism,²⁰ the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes,²¹ Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Abuse,²² the European Convention on the Exercise of Children's Rights,²³ the Additional Protocol to the European Charter of Local Self-Government

¹⁷ *Sl. list SCG – Međunarodni ugovori*, 9/03.

¹⁸ *Sl. list SCG – Međunarodni ugovori*, 18/05.

¹⁹ *Sl. list SRJ – Međunarodni ugovori*, 6/98.

²⁰ *Sl. list CG – Međunarodni ugovori*, 2/10.

²¹ *Sl. list CG – Međunarodni ugovori*, 11/10.

²² *Sl. list CG – Međunarodni ugovori*, 12/10.

²³ *Sl. list CG – Međunarodni ugovori*, 8/10.

on the right to participate in the affairs of a local authority;²⁴ Council of Europe Convention for the avoidance of statelessness in relation to succession of States;²⁵ the European Convention on Nationality.²⁶

The European Court of Human Rights and Montenegro

In the case *Bijelić v. Montenegro and Serbia* the European Court of Human Rights concluded that its jurisdiction in relation to Montenegro is valid as of 3 March 2004, when Montenegro, within the state union of Serbia and Montenegro, submitted instruments of ratification of the European Convention on Human Rights to the Council of Europe.

By the end of June 2011, the European Court of Human Rights issued a total of five judgments in relation to Montenegro.

In the verdict *Bijelić* of 28 April 2009, the European Court of Human Rights found a violation of the right to peaceful enjoyment of property due to delay of the enforcement of final and enforceable sentence; in the verdict *Garžičić* of 21 September 2010, the Court established an infringement of the right to access to court because the Supreme Court had unreasonably refused to consider the request for review; in the case *Mijušković* of the same date, the Court established a violation of the right to respect for private and family life due to delay of the execution of final custody judgment and failure of the state to enforce an interim custody order; in the verdict *Živaljević* of 8 March 2011, the Court established a violation of the right to trial within a reasonable time in proceedings which began in 1995; in the verdict *Šabanović* of 31 May 2011, the Court established a violation of the right to freedom of expression in a proceeding in which the applicant has been convicted for defamation.

²⁴ *Ibid.*

²⁵ *Sl. list CG – Međunarodni ugovori*, 2/10.

²⁶ *Ibid.*

Right to an Effective Legal Remedy

Article 2(3), ICCPR:

Each State Party to the present Covenant undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 13, ECHR:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

General

The existence of effective legal remedies is one of the main prerequisites for the genuine enjoyment of human rights. The right to an effective legal remedy rests upon the state's general obligation to ensure the enjoyment of human rights, not only to respect (not violate) rights under international treaties.²⁷

Article 2 of the ICCPR and Article 13 of the ECHR directly impose upon the states the obligation to ensure the protection of human rights guaranteed under these international treaties within their legal systems.²⁸ Furthermore, the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment provides for the right to a legal remedy and redress and compensation in the event the rights under the Convention are violated (Arts. 13 and 14), as do the Convention on the Elimination of All

²⁷ Human Rights Committee, *General Comment No. 3, Implementation at the national level, Article 2, 1981*.

²⁸ *Kudla v. Poland*, 2000, para 152.

Forms of Racial Discrimination (Art. 6) and the Convention on the Rights of the Child (Art. 39)²⁹. These provisions aim to oblige the state to provide everyone with the possibility of protecting their human rights at the national level before they are forced to resort to international protection mechanisms. A state must ensure a domestic legal remedy, which will allow its authorities to review complaints of violations of internationally guaranteed rights and provide appropriate redress for violations of these rights.

States are duty-bound to ensure protection in accordance with international treaties and in the manner in which international bodies charged with interpreting the treaties would provide it (e.g. the Human Rights Committee and the ECtHR), which is why state authorities acting on legal remedies filed over human rights violations have to be aware of human rights treaties and the case law of the competent international bodies.³⁰

The attributes of an effective legal remedy vary depending on the nature of the violation the consequences of which are to be eliminated. Apart from *restitutio in integrum* and redress, a legal remedy is expected to speed up proceedings in the event of a violation of the right to a trial within a reasonable time; in family matters, a legal remedy is to ensure the enforcement of a court decision on custody or contacts with the child; a legal remedy is also to ensure effective investigations of torture or killing, which may result in the punishment of the responsible actors, including those who ordered the act.³¹ A legal remedy must be “effective” in practice, as well as in law and its exercise must not be unjustifiably hindered by the acts or omissions to act of the state authorities.³²

The Constitution of Montenegro (*Sl. list CG* 1/2007) guarantees everyone the right to a legal remedy against a decision on his/her right or legally vested interest (Art. 20). This Article refers to the right to complaint in terms

²⁹ The Convention on the Rights of the Child prescribes a specific legal remedy to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, abuse or armed conflicts.

³⁰ For instance, in its General Comment No. 3 on the implementation of Article 2 of the IC-CPR, the Human Rights Committee emphasised that judicial authorities should be aware of the obligations which the State party has assumed under the Covenant. Although Article 10 of the Serbia and Montenegro Human and Minority Rights Charter explicitly laid down the obligation of interpreting human rights in accordance with the case law of competent international bodies, neither the Constitution of Montenegro nor the Constitutional Court Act comprise such a provision.

³¹ See the text in the Review of the Provisions of the Constitution of Montenegro: Protection, Right to a Legal Remedy and Right to Damage Compensation for Illegal Treatment in Light of the Right to an Effective Legal Remedy in Article 13 of the European Convention on Human Rights, Emilija Durutović in “International Standards and Constitutional Guarantees in Montenegro,” HRA, Podgorica, 2009, available at <http://www.hraccion.org/wp-content/uploads/knjiga-eng.pdf>.

³² *Gongadze v. Ukraine*, 2005, paras 190 and 191, (<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Gongadze&sessionid=72696490&skin=hudoc-en>).

of two-instance proceedings and it obviously does not aim at ensuring effective protection of human rights, as required by international treaties. Given that no other article of the Constitution refers to this issue, both the Venice Commission and the European Commission criticised this Article and the lack of the attribute “effective” in front of the words “legal remedy”.³³ It would be simplest to amend this article so as to guarantee that every remedy is effective.

Furthermore, of all the possible legal remedies for human rights violations, the Constitution only specifically guarantees the right to redress in case of wrongful deprivation of liberty and wrongful conviction (Art. 38)³⁴ and for damages caused by the publication of incorrect data or information (Art. 49(3)) although the latter may entail a direct violation of the freedom of expression.³⁵ On the other hand, for instance, the Constitution does not guarantee the right to compensation of damages for torture or other cruel, inhuman or degrading treatment or punishment, although this right is guaranteed under the Convention against Torture (Arts. 14 and 16)³⁶ and although the Committee against Torture found Montenegro (then part of the Federal Republic of Yugoslavia) in violation of this Convention in the case of *Hajrizi Džemajl et al v. Yugoslavia*, because it, *inter alia*, did not provide the injured parties with an effective legal remedy.³⁷ It should, however, be borne in mind that victims of torture, abuse or other human rights violations by the state authorities may seek compensation under the Obligations Act, the State Administration Act, the Police Act, the Anti-Discrimination Act or the Act on the Protection of the Right to a Trial within a Reasonable Time.³⁸

³³ Venice Commission Opinion on the Constitution of Montenegro, December 2007, [http://www.venice.coe.int/docs/2007/CDL\(2007\)104-e.asp](http://www.venice.coe.int/docs/2007/CDL(2007)104-e.asp) and the European Commission Analytical Report accompanying the Commission Opinion on Montenegro's application for membership of the European Union http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_rapport_2010_en.pdf.

³⁴ This right is discussed within the chapter on the Right to Liberty and Security of Person, see p. 215.

³⁵ See more under Right to Freedom of Expression, p. 301.

³⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Sl. list SFRJ – Međunarodni ugovori* 9/91.

³⁷ Views of the Committee against Torture in the case of *Hajrizi Džemajl et alt. v. Yugoslavia*, <http://www.unhcr.org/refworld/docid/3f264e774.html>

³⁸ Article 7 of the State Administration Act (*Sl. list RCG* 38/2003, *Sl. list CG* 22/2008): “Montenegro shall be responsible for damage caused by unlawful or improper work of a state administration authority”; Article 9 of the Police Act (*Sl. list RCG*, 28/2005, *Sl. list CG* 88/2009): “A person who believes his/her rights or freedoms were violated by the police shall be entitled to court protection and compensation of damages”; Articles 205 and 206 of the Obligations Act (*Sl. list CG* 47/2008); Article 24 (paragraphs 1 and 2) of the Anti-Discrimination Act (*Sl. list CG*, 46/2010): “Everyone who believes s/he was damaged by the discriminatory treatment of an authority or another legal or natural person is entitled to protection before the court in accordance with the law. Proceedings shall be initiated by filing a lawsuit”, while Article 26 (1.3) of the Act allows the person to seek

Why a Constitutional Appeal is not an Effective Legal Remedy in Montenegro

The Constitution lays down that the Constitutional Court shall rule on constitutional appeals of violations of human rights and freedoms guaranteed under the Constitution upon the exhaustion of all effective legal remedies (Art. 149(3)).

The Constitutional Court Act (*Sl. list CG 64/2008*) specifies that a constitutional appeal of a violation of human rights and freedoms guaranteed by the Constitution may be filed against an *individual enactment* adopted by a state authority, state administration authority, local self-government authority or a legal person vested with public powers (Art. 48(1)). The Constitutional Court may react only when a right was violated in a specific case by an individual enactment, and it may only repeal the enactment and refer the repealed enactment back to the authority that had adopted it to rectify it (Art. 56(1)). This restriction renders the constitutional appeal ineffective because it drastically narrows down the capacity of the Constitutional Court to protect human rights also in cases when they were violated because the authorities failed to act i.e. failed to adopt an enactment or by an actual action. For instance, the Constitutional Court does not have the jurisdiction to review a constitutional appeal in the absence of an enactment violating a right, in case of a violation of the right to life or the right to prohibition of torture due to the ineffective investigation of a homicide or a torture report, or in case of non-enforcement of a court decision, as the European Court of Human Rights found in September 2010 and in March 2011 in the judgments *Mijušković v. Montenegro*³⁹ and *Živaljević v. Montenegro*⁴⁰. The Constitutional Court Act thus needs to be amended as soon as possible to ensure that the constitutional appeal is an effective remedy for all forms of human rights violations.

compensation of damages in keeping with the law; the Act on the Protection of the Right to a Trial within a Reasonable Time (*Sl. list RCG 11/2007*); Article 13 of the Criminal Procedure Code (*Sl. list CG 57/2009 and 49/2010*): “A person unlawfully or wrongfully deprived of liberty or convicted shall be entitled to rehabilitation, compensation of damages by the state and other rights provided by the law”.

³⁹ The ECtHR noted that the applicant complained about the state’s continued failure to enforce the final court’s decision. “Taking into account that the Government have presented no case-law to the contrary, the Court considers that the constitutional appeal cannot be considered an available remedy in cases of non-enforcement due to there being no “individual decision” against which such an appeal could be filed”. The judgment is available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Mijuskovic&sessionId=72698443&skin=hudoc-en>.

⁴⁰ In both these judgments, the European Court found that there is no individual enactment against which a constitutional appeal could be lodged, because, *inter alia*, it has previously determined that even a verdict on claim for just satisfaction would not constitute such an enactment, since it is not an effective remedy that would have to be exhausted in cases of unreasonable trial delay. Judgment *Živaljević v. Montenegro*, pp. 67 and 68.

On the other hand, all the Constitutional Court can do when it finds that an individual enactment violated a human right is repeal it and refer it back to the authority that had adopted it to rectify. The protection of human rights is thus unjustifiably limited because the Constitutional Court is not entitled to immediately put a stop to the violation and prevent the occurrence of or increase in damage by ordering e.g. the immediate release from prison, the discontinuation of the extradition procedure or of the enforcement of a decision. Furthermore, the Constitutional Court should also be entitled to award just satisfaction for the sustained violation of the right as, under the valid law, the appellant has to launch a separate lawsuit seeking compensation of damages caused by the violation of his/her right or freedom.

A constitutional appeal may be filed upon the exhaustion of all effective legal remedies, which, under the Constitutional Court Act, entails that the appellant *had exhausted all the legal remedies prescribed by law* (Art. 48(2)). The definition ignores the requirement that the legal remedies that may be applied must be effective; rather, it “takes for granted” that all legal remedies envisaged by the law are effective, although this may not necessarily be the case in practice. Such a definition obliges the Constitutional Court to reject an appeal if a remedy has not been exhausted, although it may be obvious from the text of the law or practice that the remedy could not have ensured the realisation of a constitutionally guaranteed right in the specific case because it is, for instance, unavailable – because it carries high costs or is implemented inefficiently or not at all in practice. The provision in Article 48(2) should therefore be deleted and the Act should entitle judges to themselves assess whether an unexhausted remedy would have been effective and had to have been applied. Alternatively, the current text should be replaced by an adequate definition of an *effective legal remedy*.

Neither the Constitution nor the Constitutional Court Act lay down that rights guaranteed under international treaties may also be protected by a constitutional appeal, which is not in conformity with Article 17(1) of the Constitution, under which rights and freedoms shall be exercised in accordance with the Constitution *and* ratified international treaties. The Constitutional Court should address this discrepancy by interpreting Article 48 of the Constitutional Court Act in relation to Article 17 of the Constitution and allow constitutional appeals directly invoking the violation of rights guaranteed by ratified international human rights treaties but not the Constitution of Montenegro. These rights, for instance, include the rights to water, food or adequate housing, which are enshrined in the International Covenant on Economic, Social and Cultural Rights. There are, however, no guarantees that the Constitutional Court would actually interpret Article 48 in this manner, wherefore it is necessary to explicitly specify this requirement.

A constitutional appeal cannot be filed for a violation of human rights by a general enactment (a law, decree et al), even when such an enactment

directly violates constitutionally guaranteed human rights. In such cases, only an initiative for the review of the constitutionality or legality of the enactment may be filed. The Constitutional Court may, but is not obliged to, act on an initiative filed by citizens, but it must act on a motion to review the constitutionality of a general enactment filed by five parliamentary deputies, a state or local self-government authority or the Human and Minority Rights Protector.⁴¹

The Montenegrin Constitutional Court reviewed 314 constitutional appeals in 2010: it upheld three (0.95%) appeals and dismissed 135 (43%) appeals because the appellants had not fulfilled the procedural requirements. It rejected 172 (54%) appeals as unfounded, put off rendering its decisions on the appeals in three cases (0.95%) and discontinued the review of one constitutional appeal (cca 0.3%).⁴²

Adopted Constitutional Appeals⁴³

The Constitutional Court in 2010 repealed the decision of the Supreme Court of Montenegro in which the latter miscalculated the deadline for appeal, thus violating the appellant's rights to a legal remedy and of access to a court.⁴⁴ The Constitutional Court also upheld two constitutional appeals and repealed two Supreme Court decisions after finding it had been wrong to reject as inadmissible appeals on points of law, whereby the appellants' right of access to a court and right to a legal remedy were violated.⁴⁵

The Supreme Court had refused to review the appeals on points of law because it assessed that the values of the claims were below the statutory threshold – it had assessed the values on the basis of the incorrectly calculated court fees, not on the basis of the values of the claims determined at the closing sessions of the main hearings and upheld in both the first-instance and Superior Court judgments. The Constitutional Court found that “the appellant should not suffer damage because of the court's omission to order the appellant to pay the difference between the court fees that had been paid and the fees that corresponded to the established values of the claim”. The ECtHR reached the same conclusion in its judgment in the case of *Garžić v. Montenegro* on 21 September 2010.⁴⁶

⁴¹ Art. 150(2), Constitutional Court Act; Art. 26, Human Rights and Freedoms Protector Act.

⁴² Based on statements published by the Constitutional Court after its 2010 sessions, available in Montenegrin at: <http://www.ustavnisudcg.co.me/slike/ustavnisud/praksa.htm>.

⁴³ Constitutional Court 2010 Bulletin: <http://www.ustavnisudcg.co.me/slike/ustavnisud/praksa.htm>.

⁴⁴ *Ibid.* (Ref No U 138/09, *Sl. list CG*. 68/2010).

⁴⁵ Constitutional Court Decision Ref No UŽ-III 12/09, of 30 September 2010 (*Sl. list CG*, 68/2010), Ref No U. 79/09, of 28 October 2010. (*Sl. list CG*, 10/2011).

⁴⁶ The judgment is available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Garzicic&sessionid=72740303&skin=hudoc-en>.

According to data available for 2011,⁴⁷ the Constitutional Court reviewed 225 constitutional appeals by 2 June 2011: of them, it upheld eight (around 3.5%), dismissed 114 (around 50%), rejected 102 as unfounded (around 45%) and discontinued the review of one appeal (0.5%).

Like in 2010, the Constitutional Court in seven cases quashed the Supreme Court decisions to reject as inadmissible appeals on points of law because the value of the claims was set exclusively on the basis of the value of the calculated court fees, thus violating the appellants' right of access to a court and to an effective legal remedy.⁴⁸ In the eighth case, the Constitutional Court overturned a Superior Court decision because it found that the Court had not analysed the evidence carefully, which resulted in the arbitrary determination and assessment of facts and misapplication of material law, including the violation of the appellant's right to a fair trial and peaceful enjoyment of property, enshrined in the Constitution and the ECHR.⁴⁹

Examples of Other Ineffective Legal Remedies for Human Rights Violations

Under Article 115(4) of the Civil Servants and State Employees Act⁵⁰ "(a) civil servant or state employee shall not be entitled to court protection against a decision by the Appeals Commission on his/her appeal of the decision on temporary suspension from work". This provision is not in accordance with constitutional provisions (in Art. 17(2), Art. 19, Art. 20 and Art. 32)⁵¹ on human rights and freedoms and international human rights treaties binding on Montenegro (Arts. 6(1), 13 and 14 of the ECHR)⁵², because it deprives

⁴⁷ Based on published minutes of Court sessions, apart from minutes of the 6th and 8th sessions, which were not published on the Constitutional Court website.

⁴⁸ Ref Nos UŽ-III 99/10, UŽ-III 28/09 (published in *Sl. list CG* 12/2011); UŽ-III 205/10, UŽ-III 135/10, UŽ-III 112/09 (published in *Sl. list CG* 16/2011); UŽ-III 380/10 (*Sl. list CG* 18/2011) and UŽ-III 462/10 (*Sl. list CG* 22/2011).

⁴⁹ UŽ-III 25/10, *Sl. list CG* 16/2011.

⁵⁰ *Sl. list CG* 50/08.

⁵¹ Constitution: Article 17(2): "Everyone shall be equal before the law, regardless of any particularity or personal feature"; Article 19: "Everyone shall be entitled to equal protection of his or her rights and liberties."; Article 20: "Everyone shall be entitled to a legal remedy against a decision on his/her right or legally vested interest"; Article 32: "Everyone shall be entitled to a fair and public trial within a reasonable time before an independent and impartial court established by the law."

⁵² Under Article 6(1) of the ECHR: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Article 13 of the ECHR states that "[E]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity", while Article 14 prohibits the discrimination which exists in this case because

civil servants and state employees of the right of access to a court, i.e. effective legal protection in case they are suspended from work, which results in grave violations of their labour rights. Civil servants and state employees are thus deprived of the right to court protection against a final decision on their temporary suspension, although the Act does not limit the duration of “temporary” suspension. The Act thus only affords an ineffective legal remedy in the form of a complaint to the Appeals Commission of the Montenegrin Government, which is not an impartial and independent authority like the court, and which does not have the power to render a decision on the merits in the event the first-instance authority refuses to act in accordance with its decision, which has been known to occur in practice. HRA in May 2010 filed an initiative with the Constitutional Court asking it to review the constitutionality of the disputed provision.⁵³

The HRA Analysis of the Enforcement of the Act on the Protection of the Right to a Fair Trial⁵⁴ shows that the legal remedies envisaged by this Act, requests for review and just compensation claims (filed with the Supreme Court over violations of the right to a trial within a reasonable time), are insufficiently applied and ineffective. For instance, only 3 of the 33 claims filed with the Supreme Court from the day the Act came into force until end 2010 were partly upheld (cca 9%). Of the 181 requests for review filed in the same period, 19 (around 10%) were upheld, while the Court notified the parties that had filed the requests that the proceedings would be accelerated within four months in 76 cases (42%). In half of these cases, however, the proceedings were not accelerated within the four months (see Analysis, p. 8). It should be noted that in the judgments *Mijušković* and *Živaljević*, the European Court of Human Rights found that the claim for just satisfaction, according to the Act on the Protection of the Right to a Fair Trial, cannot be considered an effective remedy in the course of proceedings, because, pursuant to law, it cannot accelerate the proceeding, although it can attain just satisfaction.⁵⁵ This has been proven in practice.⁵⁶

Finally, Montenegrin law does not provide an effective legal remedy, including the possibility of filing a constitutional appeal, as mentioned above, in case of an ineffective investigation into the cause of death or a report of torture, inhuman or degrading treatment or punishment.

civil servants and state employees are discriminated against vis-à-vis all other workers, who are entitled to initiate labour disputes, and vis-à-vis judges and prosecutors, who are entitled to initiate administrative disputes against such decisions.

⁵³ The initiative is available in Montenegrin at the HRA website: <http://www.hracion.org/wp-content/uploads/inicijativa-za-ocjenu-ustavnosti.pdf>.

⁵⁴ The Analysis is available at: http://www.hracion.org/?page_id=178.

⁵⁵ *Mijušković v. Montenegro*, September 2010, § 72.

⁵⁶ See “Analysis of the Act on the Protection of the Right to a Fair Trial”, page 240. http://www.hracion.org/?page_id=178

Implementation of Decisions by International Human Rights Protection Bodies

The competences of international human rights protection bodies are inadequately heeded in Montenegrin procedural laws. The concept is reaffirmed in the Civil Procedure Act (CPA)⁵⁷. Under Article 428a of the CPA, in the event the ECtHR finds the state in violation of an applicant's right under the ECHR, the applicant may within three months from the day the ECtHR rendered its final decision file a motion with the first instance court, which had initially rendered a decision violating his/her human right or freedom, for a reversal of the decision if the violation cannot be eliminated in any other manner apart from a retrial. The retrial shall be conducted by applying the provisions on retrial and the national court is bound by the legal position in the ECtHR's final judgment establishing a violation of a fundamental human right or freedom. The problem with this solution is that it does not address the issue of enforcing the decisions of the Human Rights Committee or another international human rights protection body.

The solution was practically applied in the case of *Garžičić*. Acting in accordance with the ECtHR judgment, the Montenegrin Supreme Court reviewed the appeal on points of law, which it had previously dismissed as inadmissible.⁵⁸

The provision in the Criminal Procedure Code (CPC)⁵⁹ is somewhat more comprehensive than the one in the CPA. Under Article 424(1(6)) of the CPC, a criminal proceeding in which a final decision has been rendered may be reopened in favour of the defendant if the ECtHR or another court established by a ratified international treaty found that human rights and freedoms have been violated in the course of the criminal proceedings and that the judgment was based on such violations, provided that the reopening of the proceedings can remedy such a violation. The Human Rights Committee, the Committee against Torture, the Committee on the Rights of the Child et al are not courts, however, although their decisions are also binding on Montenegro.

The Administrative Disputes Act⁶⁰ does not provide for the reopening of proceedings in the event a subsequently rendered ECtHR position on the same matter may impact on the lawfulness of a prior dispute.

⁵⁷ *Sl. list RCG* 22/04.

⁵⁸ The ECtHR judgment in the case of *Garžićić v. Montenegro* is available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=html&highlight=Garžićić&sessionId=72740303&skin=hudoc-en>.

⁵⁹ *Sl. list CG* 57/2009 and 49/2010.

⁶⁰ *Sl. list RCG* 60/2003.

Human Rights and Freedoms Protector

General

Montenegro and other states of the former Yugoslavia have introduced the institutions of human rights protector modelled after the Swedish institute of Ombudsman. The main principle under which the protectors operate involves independence from the state and local administrations, public services and other holders of public powers, whose decisions are subject to the assessment of the protectors. The international standards on the status of these institutions are laid down in the UN General Assembly Principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles)⁶¹. An International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights has been established and is charged with accrediting such institutions depending on their compliance with the Paris Principles.⁶² The Montenegrin Human Rights and Freedoms Protector still has not been accredited by this body.⁶³ The Venice Commission's recommendations to European states may serve as guidelines on how to ensure the independence of these institutions. The 2003 Human Rights and Freedoms Protector Act (*Sl. list RCG* 41/03) defines the Protector as an "autonomous and independent authority" (Art. 2), which "protects human rights and freedoms guaranteed under the Constitution, the law, ratified international human rights treaties and generally recognised rules of international law, when these are violated by an enactment, act or failure to act of state authorities, authorities of local self-government and public services and other holders of public powers" (Art. 1). The Protector may act on complaints regarding ongoing proceedings only "in case of delay, obvious abuse of procedural powers or non-enforcement of court decisions" (Art. 24).⁶⁴

Under the 2007 Constitution, the Protector shall be nominated by the President of Montenegro (Art. 95(1.5)) and elected by a majority of all deputies (Art. 91(2)). Under the 2003 Act, the Assembly elected the Protector nominated by the competent Assembly body after consultations with scientific and professional institutions, authorities and representatives of the civil sector fo-

⁶¹ Principles relating to the status of national institutions for the promotion and protection of human rights, A/RES/48/134, 85th plenary meeting, 20 December 1993.

⁶² See the UN OHCHR website <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>.

⁶³ The list of institutions accredited as of December 2010 is available at: http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf.

⁶⁴ See Venice Commission Opinion on the Constitution of Montenegro, December 2007, [http://www.venice.coe.int/docs/2007/CDL\(2007\)104-e.asp](http://www.venice.coe.int/docs/2007/CDL(2007)104-e.asp), December 2007.

cusing on human rights and freedoms (Art. 8(2)). The election procedure laid down in the Constitution and applied since the adoption of the Constitution – under which the President (currently the vice president of the ruling party) nominates and the majority in the Assembly elects the Protector – does not provide sufficient guarantees of the independence of the Protector.⁶⁵

Everyone who believes that his/her rights and freedoms were violated by an enactment, act or omission to act of the authorities may file a complaint with the Protector (Art. 31) within a year from the day the violation was committed or the day s/he became aware of it (Art. 36(1)). The Protector may also act on a violation at his/her own initiative but only with the consent of the injured party (Art. 34). A Protector shall exceptionally act after the expiry of the one-year deadline if s/he believes that the case is important (Art. 36(2)). The Act does not require of the injured parties to exhaust all legal remedies before complaining to the Protector, but gives the Protector the discretion to ask the complainant to do so if s/he believes that the remedy would be more efficient (Art. 35).

The Protector shall notify the complainant and the head of the authority whose enactment, act or omission to act the complaint regards of the complaint and set a deadline of minimum eight days within which the head of the authority must respond to the allegations in the complaint (Art. 39). All authorities are duty-bound to provide the Protector with assistance (Art. 41) and to provide him/her upon request with access to all data and documents and copies thereof notwithstanding the degree of confidentiality, and with free access to all premises (Art. 40). The Protector renders a final decision at the end of the review and the authority whose work the complaint regards is under the obligation to file a report to the Protector on the actions undertaken to comply with the Protector's recommendation within the set deadline. In the event the authority does not comply with the recommendation, the Protector may notify the public, the immediately superior authority or submit a separate report about the non-compliance (Art. 44).

The Protector may initiate "the amendment of specific regulations, notably their alignment with internationally recognised standards of human rights and freedoms", render opinions on draft laws and other general enactments (Art. 25) and file a motion with the Constitutional Court to review the constitutionality and legality of regulations and general enactments relating to human rights (Art. 26).

Although the term of office of the first Protector (Šefko Crnovršanin) expired on 20 October 2009, his successor (Šučko Baković) was not appointed until 9 November 2009⁶⁶. Baković was nominated by the President of Montenegro, as envisaged by the Constitution. HRA and other NGOs protested

⁶⁵ This solution was also criticised by the Venice Commission in its Opinion on the Constitution of Montenegro, December 2007, [http://www.venice.coe.int/docs/2007/CDL\(2007\)104-e.asp](http://www.venice.coe.int/docs/2007/CDL(2007)104-e.asp).

⁶⁶ "Šučko Baković is the New Ombudsman", *Pobjeda*, 10 November 2009.

because the Act had not been aligned with the Constitution and Baković was nominated without consultation with the representatives of the civil sector and scientific institutions, as provided for by the Act.⁶⁷

Draft Protector Act

The Montenegrin Government endorsed the draft of the new Human Rights and Freedoms Protector Act on 29 July 2010. This draft was good and the Assembly adopted it in principle.⁶⁸ However, a large number of amendments to the draft were proposed once it entered the parliament pipeline in September 2010 and it was, unusually, withdrawn from the procedure. The Government in March 2011 submitted to the Assembly a new Draft Act, which was fiercely criticised by the opposition parties and the Protector.⁶⁹

The new Draft Act limits the powers the Protector has exercised under the 2003 Act. Under the new Draft, the Protector shall no longer be entitled to decide on how to ensure the transparency of his/her work, while the state and local authorities will no longer be under the obligation to receive him/her within five days at most. Furthermore, the Protector will no longer be entitled to act on a complaint filed after the deadline. The Draft Act does not guarantee that the Protector shall have at least four deputies and leaves it to the Assembly to determine the number of his/her deputies. Furthermore, it strips the Protector of the right to propose the budget of his/her office, which it transfers to the Assembly committee, also to be charged with setting the remuneration of the Protector. The Draft does not precisely lay down the role the Protector was also expected to have assumed, that of a national torture prevention mechanism, as opposed to the explicit provisions in the previous Draft to that effect. The provisions entitling the Protector to review complaints of discrimination filed by private individuals as well and allowing him/her access to all documents notwithstanding their degree of confidentiality also lack precision (Art. 36 specifies that the Protector shall exercise these powers “in accordance with regulations on the confidentiality of data and personal data protection”, which do not specify that the Protector has such powers).

The deputies of the opposition parties tried to improve the new Draft by filing 25 amendments, but the Assembly Human Rights and Freedoms Com-

⁶⁷ The statement is available at: <http://www.hracion.org/wp-content/uploads/protest-concerning-oversight-of-competent-state-bodies-to-nominate-ombudsman-22102009.pdf>.

⁶⁸ HRA had nevertheless proposed 10 amendments to the Assembly Human Rights and Freedoms Committee that would have further improved the already solid text of the law. (<http://www.hracion.org/?p=421>).

⁶⁹ Both drafts are available at the Assembly website: <http://www.skupstina.me/index.php?strana=zakoni&search=true>. “Human Rights Committee Session”, *Vijesti*, 6 April 2011; “Minister to Stand at Attention when Protector Sneezes”, *Dan*, 7 April 2011.

mittee (members of the ruling coalition) rejected all the amendments at its session in May 2011.⁷⁰ The Draft was then sent to the Venice Commission for review.

The Protector in Practice

According to the Protector's 2010 Annual Report⁷¹ the Protector processed 561 complaints in 2010 and completed the review of 484 of them: 137 complaints regarded the work of state administration bodies, 132 the work of courts, 68 referred to the work of public services and other holders of public authorities, 36 to the work of the police, 31 to the work of the local self-governments, 8 to the work of the state prosecutors, etc. The Protector found that his office did not have the remit or that there were no procedural grounds for reviewing 128 complaints, advised the complainants to exhaust other legal remedies in 41 cases, and ultimately completed the review of 315 complaints, finding that there had been no violation of the complainants' rights in 166 cases (52%). The established violations were eliminated during the review of 96 of the 125 cases in which the Protector had found a violation and the reviews of them were consequently discontinued. In 25 cases, the Protector rendered final decisions and recommendations. The Protector also filed a legislative initiative with the Montenegrin Assembly to adopt a law on the use of official languages and the languages and alphabets in official use and rendered opinions on the draft Anti-Discrimination, Juvenile Justice and Human Rights and Freedoms Protector Acts. The Protector also filed a motion for the review of the constitutionality and legality of a rulebook on electricity tariffs after receiving a complaint about the work of the Regulatory Energy Agency. Until 1 June 2010, the Protector published the following special reports: Special Report on the Human Rights of Institutionalised Mentally ill Persons, Special Report on the Exercise of the Rights to Restitution of Property Rights and Compensation, Special Report on Juveniles in Conflict with the Law and the Special Report on the Work of the Courts.

Additionally, the Protector publicly argued for the rights of visually impaired Marijana Mugoša to use a guide dog at work, which brought him into conflict with the Mayor of Podgorica, who opposed that.⁷² The Protector's position, in terms of incidents of abuse in prison in Spuž, was in certain aspects opposed to the defensive position of the ZIKS administration, and in terms of advocacy for the effective processing of abuse reports, opposed to the attitude of the state prosecution.⁷³ The Protector unambiguously supported the realisation of human rights of sexual minorities and combating

⁷⁰ "Spahić and Šabović at Odds over Office", *Dan*, 19 May 2011.

⁷¹ Available in Montenegrin at www.ombudsman.co.me

⁷² For more details please see page 102.

⁷³ On the prosecution of abuse cases in ZIKS, see page 175.

homophobia, unlike the Minister for Human and Minority Rights. Furthermore, the Protector has consistently advocated for the improvement of the Government Bill on the Protector of Human Rights and Freedoms in terms of strengthening the powers and independence of that institution. Based on the above, it is obvious that the Protector strove to fulfil his duties independently and conscientiously, although hardly anyone had hoped for that, given the lack of activism of his predecessor, as well as the election of the Protector by the political coalition in power. With that in mind, it seems as if the ruling coalition efforts to curb the powers of the Protector by the new law are motivated by a desire for greater control of this institution in the future.

Restrictions and Derogation from Human Rights

Article 5, ICCPR:

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Article 17, ECHR:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18, ECHR:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Article 4, ICCPR:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has

derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 15, ECHR:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Restrictions of Human Rights

International treaties, the ICCPR and the ECHR, allow for the restriction of a certain number of human rights for specific legitimate purposes, for the common good or to protect the rights of others, when it may be necessary in a democratic society. Sometimes these restrictions are strictly formulated (e.g. as regards the right to life) and sometimes they are permitted “only when they can be regarded as necessary in a democratic society” (freedom of expression, assembly, association, etc.). On the other hand, the restriction of, for instance, slavery or torture, inhuman or degrading treatment is not permitted.

The grounds when rights may be restricted (legitimate aim) are an integral part of the provision of an international treaty that guarantees a certain right. In addition to these grounds or aims being precisely stipulated in the individual articles (e.g. freedom of assembly may be restricted in order to prevent riots or crime or to protect the rights and freedoms of others), both the ICCPR (in Art. 5) and the ECHR (Art. 18) contain a special warning that the state may not impose broader restrictions than those stipulated in these treaties.

The restriction must be prescribed by a law and not a by-law, the law must be published and accessible to all, and it must be sufficiently precise and clear, so as to allow the citizens to predict the consequences of their behaviour.⁷⁴

⁷⁴ For more details see “International Human Rights Law”, V. Dimitrijević, D. Popović, T. Papić, V. Petrović, Belgrade Centre for Human Rights, 2006, page 133.

In interpreting whether a restriction is justified and necessary, the European Court of Human Rights has established in its case law the test of proportionality of the restriction with regard to the legitimate aim, which requires that the restriction is not disproportionate to the benefits achieved by the restriction.⁷⁵ In addition, one should bear in mind that the restriction is not necessary if there are less severe, but appropriate measures which can accomplish the same purpose. For example, in case of the risk of escape, deprivation of liberty must be considered as a last resort.

The requirement that the restriction must be “necessary in a democratic society” does not mean that it is always regarded as such when decided so by a democratic majority. The European Court of Human Rights has emphasised that “pluralism, tolerance and broadmindedness are hallmarks of a democratic society ... democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position”.⁷⁶

Both the ICCPR (Article 5) and the ECHR (Article 17) contain a special warning that the rights guaranteed by them cannot be interpreted so as to allow activities aimed at violating those rights. These provisions allow states to prohibit activities of associations of Nazis, fascists and other fundamentalists, whose ideology seeks to abolish the human rights of others.

Article 24 of the Constitution of Montenegro comprises a general clause relating to the restriction of human rights and freedoms. Under this Article, only the law can limit human rights and freedoms to the extent permitted by the Constitution “to the extent necessary in an open and democratic society to meet the purpose allowing the restriction. Restrictions may not be introduced for purposes other than those for which they were prescribed.”

This indicates the principle of proportionality, which prohibits the restriction of human rights more than necessary to achieve a legitimate purpose (legitimate aim). While the Venice Commission has assessed this provision of the Constitution satisfactory, it still lacks important guidelines for the interpretation of the principle of proportionality that was previously in force under Article 5 of the Serbia and Montenegro Human and Minority Rights Charter.⁷⁷

⁷⁵ For more details see text “The human rights provisions in the Constitution of Montenegro – the key findings of the Venice Commission”, Anthony Bradley in the book “International human rights standards and constitutional guarantees in Montenegro”, HRA, 2008, page 23.

⁷⁶ *Chassagnou and Others v. France*, 1999.

⁷⁷ “When restricting human rights and interpreting such restrictions, all state authorities shall be obligated to take into account the substance of rights being restricted, relevance of the purpose of limitation, nature and scope of limitation, balance between the limitation and its purpose and whether there exists any manner whatsoever to accomplish the purpose by minor restrictions to the rights. Restrictions may in no case encroach upon the substance of the guaranteed right...” (Sl. list SCG 6/03).

Also, in interpreting the allowed restrictions, one should bear in mind the principle stipulated in the Human and Minority Rights Charter (Art. 57), that the achieved level of human and minority rights cannot be reduced.⁷⁸

The Montenegrin Constitution provides certain rights to a greater extent than the international documents by providing fewer reasons, which would allow restrictions of those rights.⁷⁹ On the other hand, in the case of freedom of expression, a guarantee of compensation in case of publishing false information provided by law may result in violation of press freedom, meaning that the restriction is too broad. The same goes for the prohibition of political organising pursuant to Art. 54 (for more detail see Freedom of Association, p. 352)

Derogation from Human Rights

The ICCPR (Art. 4) and the ECHR (Art. 15) allow a temporary derogation from the internationally guaranteed rights in a situation, such as war or another emergency, which “threatens the life of the nation”.⁸⁰ However, there are absolute and fundamental basic rights which are not to be restricted or abolished, including: the right to life (except in the case of lawful war actions)⁸¹, the prohibition of torture, inhuman or degrading treatment or punishment, prohibition of slavery and debt bondage (prison for failure to meet contractual obligations), the legality rule (*nulla poena, nullum crimen sine lege*) of criminal offenses and penalties and the right to be recognised as a person before the law.

The Constitution of Montenegro stipulates when certain rights may be temporarily derogated from (Art. 25):

⁷⁸ Human Rights Action unsuccessfully advocated that this principle be included in the Constitution of Montenegro (“International Human Rights Standards and Constitutional Guarantees in Montenegro”, page 108).

⁷⁹ See, for example, Article 46 of the Constitution on the freedom of thought, conscience and religion, which does not provide for restrictions to protect morality, provided for in Art. 9 ECHR; or Article 47 of the Constitution on the right to freedom of expression contains much narrower restrictions than Art. 10 ECHR (except for the restriction provided under the Freedom of the press, Art. 49 of the Constitution, as a guarantee of the right to damages for publication of inaccurate, incomplete or incorrectly stated information, inconsistent with the practice of the ECHR).

⁸⁰ In the so-called Greek case, which arose on the occasion of a military attack in 1967, the European Commission of Human Rights found that this danger must be immediate and extraordinary, must threaten the entire country, must threaten organized community life, so that the use of otherwise allowable restrictions cannot achieve the goal (see “International Human Rights Law”, op. cit., page 130).

⁸¹ According to the Human Rights Committee, “States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence”, HRC General Comment No. 29, *States of Emergency* (article 4), 2001 (CCPR/C/21/Rev.1/Add.11).

During a declared war or emergency, the exercise of certain rights and freedoms may be restricted to the extent necessary.

The restriction shall not be introduced on the basis of gender, nationality, race, religion, language, ethnic or social origin, political or other opinion, property status or any other personal characteristics.

The following rights shall not be restricted: the right to life; the right to legal remedy and legal assistance; the right to personal dignity and respect; the right to a fair and public trial and the principle of legality; the right to the presumption of innocence; the right to defence; the right to compensation for unlawful detention or unreasonable and unfounded conviction; the right to freedom of thought, conscience and religion; the right to marriage.

The following prohibitions shall not be abolished: the prohibition of inciting hatred or intolerance; the prohibition of discrimination; the prohibition of retrial and re-conviction for the same offense; the prohibition of forced assimilation.

Measures of restrictions may be in effect only until the end of war or emergency.

For derogation from human rights (suspension), the Constitution uses the term restriction, which can lead to confusion with respect to restrictions permitted not only in emergencies.

The constitutional provision Temporary Restriction of Rights and Freedoms (Art. 25), governing the deviation, cancellation, revocation or derogation of human rights during war and other emergencies, is vague in relation to the international obligations of Montenegro under the ICCPR and the ECHR. Paragraph 1 allows the restriction of human rights “during war or a state of emergency”, “to the extent necessary”, while the ECHR and ICCPR allow derogation in emergency situations “which threaten the life of the nation” and allow restrictions “to the extent strictly required by the exigency of the situation”, which are more stringent conditions than those provided for in the Constitution of Montenegro.⁸²

This provision provides for the formal requirement for the derogation from human rights, and that is a declared state of emergency or war, in accordance with the requirements of Art. 4 of the ICCPR.

In terms of the prohibition of deviations from the basic rights, stipulated in paragraph 4, the Constitution fails to specify the prohibition of deviation from the prohibition of slavery (from Art. 4(1) ECHR and Art. 4(2) ICCPR), from the prohibition of debt bondage (prison only for failure to meet contractual obligations, Arts. 4 and 11 ICCPR), and the abolition of the right to be recognised as a person before the law (Art. 16 ICCPR), contrary to international obligations.

The Constitution also does not provide for the prohibition of imprisonment for the failure to meet contractual obligations, contrary to Montenegro's international obligations arising from Art. 11 of the ICCPR. This right was explicitly guaranteed by Art. 14(4) of the SaM Human and Minority Rights Charter.

⁸² See Venice Commission Opinion on the Constitution of Montenegro, December 2007, [http://www.venice.coe.int/docs/2007/CDL\(2007\)104-e.asp](http://www.venice.coe.int/docs/2007/CDL(2007)104-e.asp), December 2007.

Interestingly, the Constitution expressly provides for the prohibition of restriction of “the right to life” (Art. 25(3)), although the right to life does not exist under that name in the Constitution.

Unlike the Constitution of Montenegro, the Human and Minority Rights Charter prohibited derogation from the guarantees to the right to liberty and security of person (Art. 14), which partially overlaps with the constitutional guarantee Deprivation of Liberty (Art. 29), and from the right to citizenship, stipulated in the Constitution of Montenegro as the prohibition of exile and extradition to another state (Art. 12). The Constitution provides a lower level of protection than the Human and Minority Rights Charter in this respect as well.

Article 25 of the Constitution does not specify the competence for deciding on derogation or the period of validity, except that “the measures of restriction cannot exceed the duration of the state of war or emergency”.⁸³ Formerly, it was also provided that the measures would be reviewed every 90 days.⁸⁴

⁸³ Although the Constitution does not specify it, the Assembly, which is authorised to enact laws and declare a state of war or emergency, should be responsible for measures restricting human rights, unless it cannot meet in session, in which case the Defence and Security Committee renders the decision declaring a state of war or emergency. The decision is then submitted to the Assembly for confirmation as soon as it meets (Articles 132, 133).

⁸⁴ Article 6 of the Human and Minority Rights Charter of Serbia and Montenegro.

Prohibition of Discrimination

Article 2 (1), ICCPR:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26, ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 14, ECHR:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 1, Protocol No. 12 to the ECHR:

- 1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- 2) No one shall be discriminated against by any public authority on any ground such as those mentioned in para. 1.

General

Ap^Apart from the ICCPR, the ICESCR, the ECHR and Protocol 12 thereto, Montenegro is also bound by the following international documents prohibiting discrimination: the Convention on the Elimination of All Forms of Racial Discrimination,⁸⁵ the Convention on the Elimination of Discrimination against Women,⁸⁶ ILO Convention No. 111 concerning

⁸⁵ Act Ratifying the International Convention on the Elimination of All Forms of Racial Discrimination (*Sl. list SFRJ – Međunarodni ugovori i drugi sporazumi*, 6/67).

⁸⁶ *Sl. list SFRJ (Međunarodni ugovori)*, 11/81.

Discrimination (Employment and Occupation), the UNESCO Convention against Discrimination in Education⁸⁷ and, as of 2009, by the Convention on Rights of Persons with Disabilities and the Optional Protocol thereto.⁸⁸ Furthermore, after gaining its independence in 2006, Montenegro confirmed that it recognised the competence of the Committee on the Elimination of Racial Discrimination to receive and consider complaints submitted by individuals and groups alleging violations.⁸⁹

Pursuant to Article 14 of the ECHR and Article 1 of Protocol No. 12 to the ECHR,⁹⁰ the ECtHR defined discrimination as different treatment of persons in similar situations without an objective or reasonable justification. Distinction in treatment can be justified only if there is a legitimate aim that the distinction pursues and a reasonable relationship of proportionality between the means employed and the aim sought to be realised.⁹¹ The ECtHR also highlighted particularly “suspicious grounds” for differentiation, such as gender, religion, race and sexual orientation, which call for the fulfilment of the extremely heavy burden of proof to justify unequal treatment.⁹² In its recent case law, the ECtHR also established the positive obligation of the state to differently treat people in significantly different situations.⁹³

Under the Constitution, everyone shall be equal before the law, regardless of any particularity or personal characteristic (Art. 17) and everyone shall be entitled to equal protection of his rights and liberties (Art. 19). The Constitution prohibits all direct or indirect discrimination on any grounds (Art. 8(1)). It allows for the introduction of affirmative action (positive discrimination), which entails specific measures aimed at rectifying actual instances of inequality (Art. 8(2)). As stipulated by international standards, such measures may be only temporary in character (paragraph 3). The open definition of the prohibition of discrimination “on any grounds” allows for a broader interpretation of discrimination, which comprises all existing and emerging forms of discrimination in addition to the traditional ones listed in international treaties.

The prohibition of discrimination may not be abolished during a state of war or emergency, nor may the derogable rights be restricted on grounds of

⁸⁷ *Sl. list SFRJ – Međunarodni ugovori i drugi sporazumi*, 4/64.

⁸⁸ *Sl. list Crne Gore – Međunarodni ugovori*, 02/09.

⁸⁹ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#11.

⁹⁰ See the judgment in the case of *Sejdić and Finci v. Bosnia-Herzegovina*, 2009, in which the ECtHR for the first time found a violation of Article 1 of Protocol No. 12 to the ECHR laying down the general prohibition of discrimination (with respect to all rights guaranteed in a state, not only human rights enshrined in the ECHR).

⁹¹ See the *Belgian Linguistic Case*, 1968; *Van der Mussele v. Belgium*, 1983; *Rassmusen v. Denmark*, 1984 and, among the more recent judgments, *Sejdić and Finci v. Bosnia-Herzegovina*, 2009.

⁹² See *Hoffmann v. Austria*, 1993, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, 1985. For sexual orientation, see *L.B. v. France*, 2008.

⁹³ See *Thlimmenos v. Greece*, 2000; *Nachova and Others v. Bulgaria*, 2005.

gender, nationality, race, religion, language, ethnic or social origin, political or other convictions, financial standing or any other personal feature (Art. 25, Constitution).

Legislation

Anti-Discrimination Act

The Anti-Discrimination Act (*Sl. list CG*, 46/2010) came into force on 14 August 2010. Its adoption was preceded by a public debate in which the authors accepted a number of suggestions by human rights NGOs. The Act is aligned with Montenegro's international obligations, but it could have been more precise and comprehensive and taken the recommendations of international organisations and the proposals of the domestic NGOs more into account.⁹⁴

The Act prohibits discrimination and envisages protection against discrimination.

Under the Anti-Discrimination Act, discrimination shall mean “any unjustified legal or actual, direct or indirect distinction or unequal treatment or non-treatment of a person or a group of persons in comparison to other persons, and the exclusion, restriction or preference of a person in comparison to other persons on grounds of race, colour, national, social or ethnic origin, ties to a minority nation or minority national community, language, religion or belief, political or other opinions, sex, gender identity, sexual orientation, health, disability, age, financial standing, marital or family status, membership of a group or assumption of association with a group, political party or another organisation, or other personal features” (Art. 2(2)). Although this open definition allows for other grounds, it would have been useful had membership of a trade union been specified in the grounds of discrimination, because this form of discrimination is widespread both in Montenegro and more broadly.⁹⁵

This is the first Montenegrin law prohibiting discrimination on grounds of gender identity. The Act however fails to explain what is meant under “sexual orientation” (homosexuality, bisexuality) or “gender identity” (e.g. who transgender, transsexual, intersexual persons are), which may give rise to difficulties in its enforcement.

⁹⁴ See the press release on the amendments proposed by HRA at <http://www.hracion.org/?p=376> and the commentary of the Draft Act (in Montenegrin language) at: http://www.hracion.org/wp-content/uploads/komentar_nacrta_zakona_o_zastiti_od_diskriminacije_hra.pdf.

⁹⁵ See e.g. Art. 1(1) of the Croatian Act on the Suppression of Discrimination Act, Art. 2 of the Serbian Anti-Discrimination Act, Art. 2(1) of the Bosnia-Herzegovina Anti-Discrimination Act.

The Act prohibits direct and indirect discrimination. Direct discrimination exists if a person or a group of persons in the same or similar situation as another person or group of persons, is, has been or may have been brought into an unfavourable position by any enactment, action, failure to act on any of the listed grounds, unless such an enactment, action, or failure to act is objectively or reasonably justified by a legitimate aim and the means to achieve the aim are appropriate and necessary, i.e. are reasonably proportionate to the pursued aim (Art. 2(3)). Indirect discrimination exists if an apparently neutral provision, criterion or practice brings or may bring a person or a group of persons into an unfavourable position vis-à-vis another person or group of persons, on any of the listed grounds unless such a provision, criterion or practice is objectively and reasonably justified by a legitimate aim and the means to achieve the aim are appropriate and necessary, i.e. are reasonably proportionate to the pursued aim (Art. 2(4)).

Discrimination shall also mean the incitement to discrimination or issuance of instructions to discriminate against a specific person or a group of persons on any of the listed grounds (Art. 2(5)).

No one may suffer consequences for reporting discrimination (victimisation), giving a deposition before a competent authority or offering proof in an investigation of a case of discrimination, which constitutes a new form of protection of the victims and those reporting discriminatory conduct (Art. 4). Article 20 defines the aggravated forms of discrimination, when discrimination occurs on two or more grounds, is repetitive, continuous, et al. The Act however, failed to prescribe stricter penalties i.e. higher compensation for qualified forms of discrimination.⁹⁶ Affirmative action measures shall not constitute discrimination (Art. 14). A person's consent to discrimination shall not relieve from liability the perpetrator of discrimination (Art. 6).

The Act lists the following forms of discrimination to ensure their recognition and protection from them: harassment (Art. 7), mobbing (Art. 8), segregation (Art. 9), discrimination in use of public facilities and areas (Art. 10), discrimination in the provision of public services (Art. 11), discrimination on grounds of health (Art. 12), age discrimination (Art. 13), political discrimination (Art. 14), discrimination in education and vocational training (Art. 15), labour-related discrimination (Art. 16), discrimination on grounds of religion or beliefs (Art. 17), discrimination on grounds of a disability (Art. 18) and discrimination on grounds of gender identity and sexual orientation (Art. 19) Such enumeration of the forms of discrimination is frequent in the legislation of other countries and satisfies the standards of effective protection from discrimination, because it provides clear guidelines and leaves no room for dilemmas on how to enforce the law in specific cases. The Act, however, regrettably fails to specify hate speech as a form of discrimination.

⁹⁶ Although this was recommended both by the experts of the Venice Commission and the OSCE/ODIHR, as well as HRA (the expert opinions are available at [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)011-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)011-e.pdf) and www.hracion.org).

LEGAL PROTECTION

The Act envisages court protection from discrimination in the form of urgent civil proceedings and allows for revision in all instances (Art. 24) or by filing a complaint with the Human Rights and Freedoms Protector.

Court protection is afforded by the court with general territorial jurisdiction over the area in which the defendant resides or is headquartered but also by the court with territorial jurisdiction over the area in which the plaintiff (victim of discrimination) resides or is headquartered (Art. 25), which is an exception from the civil proceedings rules and facilitates the victim's access to protection. Apart from the injured party, the lawsuit may also be filed by the Protector or human rights organisations with the consent of the injured party (Art. 30). This provision, allowing third parties, i.e. human rights associations to initiate proceedings is extremely important and will undoubtedly lead to a greater number of proceedings regarding discrimination.

A lawsuit must be filed within 90 days from the day the plaintiff became aware of the alleged discrimination (Art. 27). This deadline is a better solution than the initial 60-day deadline (in the draft law). However, given that the Act envisages a new form of legal protection the citizens are yet to get used to and particularly given the absence of organised free legal aid, it should have envisaged an objective one-year deadline in addition to the subjective 90-day deadline.⁹⁷

Apart from asking the court to find the defendant guilty of discrimination, the plaintiff may also seek the prohibition of an act that may result in discrimination, i.e. of the repetition of the act of discrimination, compensation of damages and publication of the court ruling establishing discrimination at the expense of the defendant in the media in the event the discrimination was committed via the media (Art. 26). The Act, however, lays down that the plaintiff may individually file charges asking the court to find the defendant guilty of discrimination and prohibit an act that may result in discrimination or the repetition of the act of discrimination only if "such a discriminatory enactment or action would not result in the loss or violation of another right" (Art. 26(3)). It remains unclear why the legislator thought it necessary to restrict the legal protection measures in this manner. What if someone does not wish to bring charges over the loss or violation of another right?! Apart from rendering difficult the victim's protection, this provision facilitates the position of the defendant, who may succeed in delaying the proceedings and/or their discontinuation simply by stating that the action resulted in the loss of a right and that the plaintiff had opted for an impermissible protection mechanism.

The plaintiff may demand the imposition of a temporary measure before or during the proceedings if s/he proves probable that the measure is needed

⁹⁷ Such a solution is envisaged by Art. 13(4) of the Bosnia-Herzegovina Anti-Discrimination Act, while the Croatian and Serbian laws do not lay down any deadlines within which the civil charges must be filed.

to prevent the risk of irreparable damage, a particularly a gross violation of the right to equality or to prevent violence (Art. 28). The court shall decide on the temporary measure without delay. In the event the plaintiff proves probable that the defendant committed an act of discrimination, the burden of proving that the act did not result in the violation of equality in rights and before the law shall rest on the defendant (Art. 29). This provision, deviating from the civil law principle under which the burden of proof rests on the plaintiff, was incorporated to facilitate the position of the victim.

Apart from filing a lawsuit, the injured party may also submit a complaint to the Human Rights and Freedoms Protector. Such a complaint may also be filed by organisations or individuals involved in the protection of human rights, with the consent of the discriminated person or group of persons (Art. 22). A plaintiff, who also filed a complaint with the Protector, shall notify the Protector in writing that s/he had initiated court proceedings (Art. 31).

The Anti-Discrimination Act entrusts the Human Rights and Freedoms Protector with the following competences and powers: to provide the complainant who believes s/he has been discriminated against by a legal or natural person with the necessary information on his/her rights and obligations and available court and other protection; conduct reconciliation proceedings with the consent of the person who believes s/he has been discriminated against and the authority or another natural or legal person s/he believes had discriminated against him with the possibility of reaching an out-of-court settlement in accordance with the law governing mediation; publicly alert to significant manifestations of discrimination; conduct investigations of discrimination if necessary; keep separate records on filed complaints of discrimination; collect and analyse statistical data on cases of discrimination; conduct activities to raise awareness of discrimination (Art. 21). The Act, however, still does not provide the Protector with a sufficient legislative framework to act on complaints of discrimination by private individuals, initiate criminal proceedings or intervene in such proceedings and the new Human Rights and Freedoms Protector Act under preparation is expected to specify these powers.⁹⁸

The Protector devoted a chapter in his annual report to the Assembly of Montenegro on identified instances of discrimination and undertaken activities and proposed anti-discrimination measures and recommendations. It would have been expedient had the Act envisaged that the Protector's consult with civil society organisations focusing on human rights during the design of his report and recommendations, given that EU Directives⁹⁹ explicitly require the cooperation of all competent state institutions with non-govern-

⁹⁸ The powers of the Protector to initiate and participate in court proceedings with the aim of suppressing discrimination are prescribed in paragraph 24 of the General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance.

⁹⁹ See the OSCE/ODIHR comment, paragraph 40, available at www.legislationline.org/.../150_%20AntiDisc_%20MNTG%2027%20Jan%2010%20.pdf.

mental organisations. The countries in the region include such provisions in their laws.¹⁰⁰

THE RECORDS OF REPORTED DISCRIMINATION CASES

Under the Act, courts, inspectorates and misdemeanour authorities are under the obligation to keep separate records of discrimination lawsuits and promptly communicate the data in the records to the Protector (Art. 33). The Ministry has adopted a Regulation on Keeping Records of Discrimination Cases, which was published on 6 May 2011 (*Sl. list CG*, 23/11).

The basic courts, misdemeanour chambers, Police Directorate and Labour Inspectorates notified the Protector that not one case of discrimination had been reported to them and that only one lawsuit over discrimination was filed with the Podgorica Basic Court from August 2010 until the end of the year.¹⁰¹ In the meantime, according to the HRA findings, by June 2011 two lawsuits have been filed, one for mobbing and the other for discrimination based on sexual orientation. More on criminal reports below, in the section on Prohibition of Discrimination in the Criminal Code and Criminal Proceedings.

MISDEMEANOURS

The Act provides for five types of misdemeanours that legal persons and entrepreneurs may be held liable for: 1) refusal to provide public services, conditioning the provision of services by setting requirements that other persons or groups of persons need not fulfil or the intentional delay in or postponement of service provision; 2) prevention, restriction or obstruction of access to buildings and areas in public use to disabled or persons with difficulties in moving; 3) submission of a lawsuit without the written consent of the discriminated person or group of persons; 4) and 5) failure to keep separate records of all reports of discrimination or lawsuits over discrimination or the failure to promptly communicate the data to the Protector (Art. 34). This law thus fails to cover all the specific forms of discrimination it enumerates, leaving their sanctioning to criminal proceedings conducted in accordance with the Criminal Code (see below). Furthermore, it fails to envisage either criminal or misdemeanour penalties for mobbing; court protection against this specific form of discrimination can be sought solely in civil proceedings.

Inspectorial supervision over the enforcement of the Act in the fields of labour and employment, protection at work, health care, education, civil engineering, traffic, tourism and in other fields shall be conducted by the inspectorates charged with those fields (Art. 32).

¹⁰⁰ Act on the Suppression of Discrimination of the Republic of Croatia, Art. 15; Anti-Discrimination Act of Bosnia & Herzegovina, Art. 7 (paragraphs 3 and 10).

¹⁰¹ Human Rights and Freedoms Protector's 2010 Annual Report, available in Montenegrin at: <http://www.ombudsman.co.me/izvjestaji.php>.

As regards free legal aid, the Act failed to envisage a Free Legal Aid Fund, to which all funds collected through misdemeanour fines from legal persons or entrepreneurs would be channelled.¹⁰²

PROHIBITION OF DISCRIMINATION IN THE CRIMINAL CODE AND CRIMINAL PROCEEDINGS

By incriminating discrimination, Montenegro fulfilled the obligation in Article 2(1(b)) of the Convention on the Elimination of All Forms of Racial Discrimination under which each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation. The provision in the Criminal Code incriminating incitement to national, racial or religious hatred or intolerance is in accordance with Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination.

The crime of Violation of Equality (Art. 159) envisages between one and three years' imprisonment for anyone denying or limiting human rights or freedoms on grounds of national affiliation or affiliation to an ethnic group, race or religion or on grounds of absence of such an affiliation or on grounds of differences in political or other beliefs, sex, language, education, social status, social origin, financial standing or another personal feature. A person acting in an official capacity, who committed this crime, shall be sentenced to between one and eight years in prison. This Article incriminates discrimination in the enjoyment of *human rights*, not any rights, pursuant to the general prohibition of discrimination in Art. 26 of the ICCPR, Art. 1 of Protocol No. 12 to the ECHR, the Montenegrin Constitution and Anti-Discrimination Act wherefore the provision in this Article needs to be amended accordingly.

Six criminal reports for the violation of equality were filed in 2010. One other case was pending from the previous period, bringing the number of cases up to seven. The state attorneys dismissed six reports and referred the seventh to another state authority for review.¹⁰³

The Criminal Code explicitly prohibits racial and other forms of discrimination. Under Article 443 of the Criminal Code, anyone who violates fundamental human rights and freedoms guaranteed by generally recognised principles of the international law and ratified international treaties on grounds of race, colour, nationality or ethnic origin, or another individual feature shall be sentenced to between six months and five years of imprisonment. The same penalty shall be pronounced against a person persecuting organisations or individuals for advocating the equality of humans (paragraph 2), while anyone who disseminates ideas about the superiority of one race over another or propagates racial hatred or incites racial discrimination shall be sentenced to between three months' and three years' imprisonment. This

¹⁰² A solution envisaged, e.g., by Article 9.4 of the Kosovo Anti-Discrimination Law.

¹⁰³ Supreme State Prosecutor's Office 2010 Annual Report, available in Montenegrin at: <http://www.tuzilastvogc.co.me/Izvjestaj%20za%202010.%20godinu.pdf>.

Article also prohibits discrimination with respect to human rights, but not with respect to all other rights enshrined in Montenegrin laws and should be amended like the provisions in the crime of Violation of Equality, except with respect to the prescribed penalty.

The Constitution prohibits incitement to or instigation of hatred or intolerance on any grounds (Art. 7). This prohibition is not adequately dealt with in the Criminal Code, given that Article 370 (Incitement to Racial, Religious or Ethnic Hatred) incriminates public incitement to violence or hatred against a group or member of a group solely on grounds of their *race, skin colour, religion, origin, state or national affiliation*, while Article 443 (Racial and Other Forms of Discrimination) prohibits propagation, again of solely *racial* hatred and incitement to *racial* discrimination. “Racism” i.e. “racial discrimination” is defined as the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.¹⁰⁴ Therefore, propagation of “racial hatred” and incitement to “racial discrimination” does not cover other prohibited grounds of discrimination such as sex, gender identity, disability, sexual orientation; it follows that the Montenegrin Criminal Code does not prohibit propagation of hatred and incitement to discrimination on grounds of sex, gender identity, sexual orientation or another personal feature. Given the manifest incitement to hatred of people on these grounds in practice, paragraph 3 of Article 443 should be expanded to include also other forms of intolerance or discrimination, not just racial hatred and discrimination.¹⁰⁵

The prosecutors were still acting on the only criminal report regarding the crime of Racial and Other Discrimination filed in 2010 at the time this Report was completed. The investigation of another report from the previous period had been completed.¹⁰⁶ Of the seven reports of the crime of Incitement to Racial, Religious and National Hatred filed in 2010, one was dismissed, four were referred for review to other authorities and the prosecutors were investigating the two remaining cases.¹⁰⁷ Together with the eight pending reports from the previous period, the prosecutors were investigating a total of 10 criminal reports in 2010 and completed investigations of only two

¹⁰⁴ See European Commission against Racism and Intolerance, General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination.

¹⁰⁵ The legislator should bear in mind Recommendation CM/Rec(2010)5 of the CoE Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity of 31 March 2010, which in paragraph 6 recommends to member states to prohibit incitement to, spreading or promotion of hatred or other forms of discrimination sexual minorities and transgender persons.

¹⁰⁶ The Supreme State Prosecutor's Office 2010 Annual Report does not provide information in how has the case been completed (the Report is available in Montenegrin at: <http://www.tuzilastvocg.co.me/Izvjestaj%20za%202010.%20godinu.pdf>).

¹⁰⁷ *Ibid.* The report lacks further description of cases and the State Prosecutors were not prepared to submit any further information on the subject matter of those cases.

cases.¹⁰⁸ The state prosecution office should improve its reporting methodology to allow for a clear overview of how each case was resolved and the precise grounds of discrimination in each case.

The Criminal Code also penalises violations of equality in employment (Art. 225) and lays down that anyone who deliberately violates regulations or in any other unlawful manner deprives a person of the right to be freely employed under equal conditions in the territory of Montenegro or restricts this right, shall be punished by a fine or maximum one-year imprisonment.

No reports of this crime were filed in Montenegro in 2010.¹⁰⁹

Under Article 399, incriminating acts of violence, “anyone who significantly upsets the tranquillity of citizens or gravely disturbs public peace and order by rude insults or ill-treatment of another, by violence against another, by causing a fight or by rude or ruthless behaviour, shall be sentenced to between three months’ and three years’ imprisonment”. The aggravated form of the crime, warranting between six months’ and five years’ imprisonment, and including attempted violence, is perpetrated in a group or results in a light physical injury of another or the “grave humiliation of the citizens”. These articles in the Criminal Code are adequate instruments for punishing members of extremist groups committing violence against persons of another religion, race, nationality, sexual orientation, different political convictions, et al (the so-called hate crime).

The European Court of Human Rights jurisprudence requires effective investigation of indications suggesting that the act of violence was motivated by hatred based on some form of discrimination.¹¹⁰ Such investigation should be provided for in practice, and all such occurrences prevented and suppressed by more severe punishment, as prescribed in the crime of Violent Behaviour or in the crime of Murder (Art. 144, item. 2) “in case of ruthless violent behaviour”.

Article 167 incriminating Ill-Treatment and Torture prohibits “infliction of great pain or suffering, either physical or mental... *or for another reason based on discrimination*”. The aggravated form of the crime is committed by a person acting in an official capacity during the performance of his/her duties. It is not envisaged that torture is strictly motivated by discrimination is punishable as a qualified form of the work, although it is the basic form of the

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ “Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see *Nachova and others v. Bulgaria*, cited above, with further references)”, judgement *Šečić v. Croatia*, 2007, § 67. In this case, Roma man was assaulted by skinheads who shouted racist slogans, while the police did not show special attention. This case has not been effectively investigated for seven years.

work prescribed in the same range of penalties as well as violent behavior. It is not envisaged that torture strictly motivated by discrimination is punishable as a qualified form of the crime, although the basic form of this crime prescribes the same range of penalties as Violent behavior.

PROHIBITION OF DISCRIMINATION IN OTHER LAWS

The Labour Act (*Sl. list CG*, 49/2008 26/2009) prohibits direct and indirect discrimination of job-seekers and workers on grounds of sex, origin, language, race, religion, colour, age, pregnancy, state of health, disability, nationality, marital status, family responsibilities, sexual orientation, political or other affiliation, social origin, financial standing, membership of political and trade union organisations or another personal characteristic (Art. 5).

The Employment and Unemployment Insurance Act (*Sl. list CG*, 14/2010) lays down that the exercise of unemployment insurance rights shall be *inter alia* based on the principle of prohibition of discrimination.

The Electronic Media Act (*Sl. list CG*, 46/2010) lays down that radio or TV programmes may not incite, enable incitement to or disseminate hatred or discrimination on grounds of race, ethnicity, colour, sex, language, religion, political or other convictions, national or social origin, financial standing, membership of a trade union, education, social, marital or family status, age, state of health, disability, genetic inheritance, gender identity or sexual orientation (Art. 48(2)).

Article 4 of the Health Care Act (*Sl. list RCG*, 39/2004) states that all citizens shall equally exercise the right to health care, notwithstanding their nationality, race, sex, age, language, religion, education, social origin, financial standing or another personal feature.

Article 5 of the Social and Child Protection Act (*Sl. list RCG*, 78/2005) guarantees equality of citizens in realising social and child protection rights, regardless of their nationality, race, sex, language, religion, social origin or other personal features.

Under Article 3 of the Media Act (*Sl. list RCG*, 51/2002) the state shall secure part of the funds for the realisation of the constitutionally and legally guaranteed right of citizens to information without discrimination, for content relevant to: the development of science and education, development of culture and imparting information to persons with visual or hearing impairments. It prohibits publication of information or opinions encouraging discrimination, hatred or violence against a person or group of persons because they are or are not of another race, religion, nationality, ethnicity, sex or sexual orientation (Art. 23). The founder of the media outlet or author of the content shall not be held liable if the published information or opinion is part of a scientific or authorial work on a public matter and is published without the intention to incite discrimination, hatred or violence and is part of an objective media report or is published with the intention of critically

highlighting discrimination, hatred, violence or phenomena that constitute or may constitute incitement to such conduct.

The General Education Act¹¹¹ prohibits physical, psychological and social violence; abuse and neglect of children and school students; corporal punishment and insults, the sexual abuse of children, school students or school staff and all other forms of discrimination (Art. 9a).

THE CONDITION FOR OPENING NEGOTIATIONS ON EU MEMBERSHIP

Manifestations of open or tacit discrimination are an everyday occurrence in Montenegro.¹¹² In its Analytical Report on Montenegro's application for membership of the EU, the European Commission noted that the Anti-Discrimination Act needed to be fully enforced in practice and that the implementation of mechanisms for preventing, monitoring, sanctioning and prosecuting discrimination cases still needed to be strengthened¹¹³. It noted that Roma, Ashkali and Egyptians, persons with disabilities as well as lesbian, gay, bisexual and transgendered (LGBT) persons were still subject in practice to discrimination, including on the part of state authorities.¹¹⁴

RESEARCH ON PERCEPTION OF DISCRIMINATION

Montenegrin citizens believe that Roma persons are most exposed to discrimination (53.5%), followed by persons with disabilities (45.8%), seniors (37.2%), minorities (28.1%), homosexuals (26.8%) and women (19.1%), according to a survey by the NGO Centre for Democracy and Human Rights (CEDEM) conducted in cooperation with the Ministry of Human and Minority Rights in June 2011.¹¹⁵ The citizens believe that the state is less focused on improving the overall social status of sexual minorities and the elderly.

Discrimination of Persons with Disabilities

Legislation

Montenegro in 2009 ratified the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto (*Sl. list CG – International Treaties*, 02/09). The Convention is a compendium of the chief provisions of international documents on the protection of persons with dis-

¹¹¹ *Sl. list RCG*, 6472002, 31/2005, 49/2007 and 45/2010.

¹¹² Human Rights and Freedoms Protector's 2010 Annual Report, available in Montenegrin at: <http://www.ombudsman.co.me/izvjestaji.php>.

¹¹³ Analytical Report accompanying the Commission Opinion on Montenegro's application for membership of the European Union the European Commission, p. 36, available at http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_opinion_2010_en.pdf.

¹¹⁴ *Ibid.*

¹¹⁵ http://www.cedem.me/fajlovi/attach_fajlovi/pdf/istrazivanje_diskriminacije_2011-2011-6-13.pdf.

abilities and thus constitutes a very good protection instrument. By ratifying the Optional Protocol, Montenegro accepted the jurisdiction of the Committee on the Rights of Persons with Disabilities, established under Article 34 of the Convention to monitor the implementation of the Convention, to examine individual complaints against Montenegro.

The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity (Art. 1(1)),¹¹⁶ particularly by ensuring them access to infrastructure, public transport and information. Under the Convention, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others (Art. 1(2)).

States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability (Art. 4(1)). The Convention particularly emphasises the need to ensure access to justice, judicial and administrative authorities, including health, educational and others, on an equal footing with others. Specific measures, which are necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination under the terms of the Convention (Art. 5(4)). With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources with a view to achieving progressively the full realisation of these rights (Art. 4(3)).

The Convention also regulates measures and collection of statistical data on persons with disabilities (Art. 31) and envisages the establishment of a state authority that will promote, protect and monitor the implementation of the Convention on behalf of the Government; it specifies that civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process (Art. 33).

Though not legally binding, the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, which the UN adopted in 1993, is a document of relevance to equalizing effective access to rights by persons with disabilities. The *Standard Rules* regulate in detail the support services as one of the main prerequisites for creating equal opportunities. Support services usually initiated and provided by non-governmental organisations are of satisfactory quality but have difficulty maintaining sustainability. The main objective of all such services is to provide continuous assistance to persons with disabilities to increase their level of independence in their daily living, which is why they must be continuously funded and incorporated in the regular state system.

¹¹⁶ Act Ratifying the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol Thereto, adopted on 15 July 2009.

Apart from Article 159 incriminating discrimination in the enjoyment of rights based on any personal feature, the Montenegrin Criminal Code (*Sl. list RCG*, 71/03, 25/10) in Article 224 (violation of labour rights) also incriminates violations of rights or the specially protected rights of persons with disabilities at work.¹¹⁷

Under the Anti-Discrimination Act (*Sl. list CG*, 46/10), adopted in 2010, the discrimination of a person with disabilities shall particularly denote: preventing or hindering access to health care i.e. denial of the right to health care, regular medical treatment and medications, rehabilitation means and measures; denial of the right to schooling or education; denial of the right to work and employment-related rights in accordance with the needs of the person; denial of the right to marry, form a family and other matrimonial and family rights. Discrimination of a person with disabilities shall also exist in the event s/he does not have access to public facilities and areas or is prevented, restricted or hindered use of such facilities although the provision of such access by the legal or natural person obliged to ensure it would not pose a disproportionate burden on that person (Art. 18). Discrimination of a person with disabilities shall also exist when special measures are not taken to eliminate the restriction or unequal position of that person. Article 16 of the Anti-Discrimination Act governing discrimination at work states that apart from discrimination prohibited by labour and employment legislation, discrimination at work shall also entail payment of lower wages, i.e. remuneration for work of equal value to a person or group of persons based *inter alia* on disabilities. Discrimination shall not entail differentiation, exclusion or preference of a person arising from the features of a specific job in which the personal feature of the person is a real and decisive prerequisite for the performance of the job if the purpose pursued is justified, nor shall it entail taking measures to protect persons under specific criteria.

The Labour Act (*Sl. list CG*, 49/08) prohibits direct and indirect discrimination of job seekers and workers on grounds of their health or disability (Art. 5). The Act defines discrimination on a number of grounds and explicitly prohibits discrimination with respect to employment requirements and recruitment of candidates for the performance of a specific job; working conditions and all employment-related rights; education, capacity building and training; promotion at work; termination of labour contracts (Art. 7). Discrimination shall not entail the provisions of a law, collective agreement or labour contract on the special protection afforded to persons with disabilities (Arts. 11 and 113). A job-seeker or worker, who has been discriminated against, may institute proceedings before the competent court (Art. 10). Under Article 107(1) of the Labour Act, the employer shall assign a worker

¹¹⁷ “Anyone who deliberately violates the law or any other regulation, collective agreement or general enactment on labour rights or on the special protection of youth, women and persons with disabilities at work, thus depriving or restricting a right of another person, shall be punished by a fine or an imprisonment sentence not exceeding two years.”

with disabilities to a job corresponding to his/her residual work capacity and qualifications in accordance with the enactment on the staff organisational structure. In the event a worker with disabilities cannot be assigned such a job, the employer shall provide him/her with other rights in accordance with the law governing the professional training of persons with disabilities and the collective agreement (Art. 107(2)). In the event the employer cannot assign a person with disabilities to an appropriate job or provide him/her with other rights, s/he may declare such a worker redundant in which case the worker shall be entitled to a severance package (Art. 107(3)). The biological or adoptive parent or a person to whom the competent custody authority has entrusted the care of a child with developmental difficulties and a person looking after a person with severe disabilities are entitled to work half time, pursuant to separate regulations.

The Act on the Movement of Blind Persons with the Assistance of Service Dogs was enacted in 2008 at the initiative of the Association of Youth with Disabilities of Montenegro. The problems that arose in the interpretation of its provisions with respect to the access and presence of Marijana Mugoša's service dog at her workplace (see case study below) prompted the Assembly to enact in 2009 a slightly amended Act on the Movement of Persons with Disabilities with the Assistance of Service Dogs (*Sl. list CG*, 18/08, 76/09). The Act entitles persons with disabilities and their service dogs to use road, rail, sea and air transportation carriers, to freely access and stay at a public venue (Art. 4) and business premises (Art. 5). A person with disabilities exercising the rights enshrined in this Act comprise blind and deaf persons and persons using wheel chairs and trained in moving with a guide or service dog (Art. 1). The Pension and Disability Insurance Act (*Sl. list CG*, 79/08, 14/10) governs the mandatory pension and disability insurance of (former) workers. An insuree shall be declared disabled in the event s/he suffered full or partial (75%) loss of working capacity due to changes in his/her health, which cannot be eliminated by medical treatment or rehabilitation (Art. 30(1 and 2)). A disability may be caused by an injury at work, occupational disease, an injury outside work or an illness (Art. 30(3)). The Pension and Disability Insurance Fund shall order a mandatory medical check-up of the insuree within a maximum of three years from the day his/her disability was established, except in instances laid down in the Fund's general enactment or the Act.

An insuree who fully lost his/her working capacity is entitled to a full disability pension, while an insuree who partly lost his/her working capacity is entitled to a partial disability pension. In terms of this Act, a work-disabled person is an insuree who acquired the right to a disability pension on grounds of disability (Art. 32), while an insuree established to have partially lost his/her working capacity may be hired to work only one quarter of the work hours. An injury at work shall denote an injury that occurred during the performance of a job the worker was assigned to, during the performance of a job the worker was not assigned to but was performing in the interest

of the employer, on his/her regular route from his/her home to work and vice versa, or during a business trip. The Act defines occupational diseases as diseases directly caused by the work process and conditions i.e. the job the insuree was performing. The existence of an occupational disease is established by the competent state administration authority charged with pension and disability insurance affairs after hearing the opinion of the state administrative health authority. An insuree who suffered a loss of working capacity is entitled to a disability pension in the event: 1) the disability was caused by an injury at work or an occupational disease – notwithstanding his/her years of service; 2) the disability was caused by an injury outside work or an illness – provided that the loss of working capacity occurred before the insuree's retirement age and the insuree has at least one-third of the years of service required for full retirement. An insuree whose disability was caused by a disease or injury outside work before s/he turned 30 is entitled to a disability pension in the event: 1) the disability occurred before s/he turned 20 – notwithstanding his/her years of service; 2) the disability occurred when the insuree was between 20 and 30 years of age if s/he had at least one year of service altogether, if that is more favourable for the insuree.

The Professional Rehabilitation and Employment of Persons with Disabilities Act (*Sl. list CG*, 49/08) aims at creating conditions for the employment of persons with disabilities in the open labour market and in special organisations (work activity centres, sheltered employment workshops and facilities) i.e. to increase the employment opportunities of persons with disabilities. The Act provides for subsidies to motivate employers to hire persons with disabilities, while the prescribed quota system is to ensure that the employers envisage in their staff organisational structures the jobs that can be performed by persons with disabilities. Employers who do not abide by the Act are obliged to pay a special contribution into a Professional Rehabilitation Fund for every person with disabilities they were legally bound to but have not employed. The contribution is set at 20% of the average wage in Montenegro in the preceding year. The money in the Fund is to be used to develop and advance the professional rehabilitation and employment of persons with disabilities, co-fund specific organisations, pay subsidies to employers who hired persons with disabilities, co-fund the programme for maintaining the employment of persons with disabilities, and fund other activities regarding the professional rehabilitation of persons with disabilities.

Pursuant to the 2005 Social and Child Protection Act (*Sl. list RCG*, 78/05), persons with disabilities and children with physical, mental or sensory difficulties are entitled to a modest personal disability allowance of 50 Euros a month (Art. 23); care and assistance of another person remunerated in the same amount (Art. 24); placement in an institution (Arts. 25–30) and assistance in the care and education of children and youths with special needs (comprising costs of transportation and placement in an institution or another family, Arts. 35–37). A family member incapable of working or his/her family

caring for him/her is entitled to a family allowance if they satisfy the other indigency criteria. This allowance ranges from 50 to 95 Euros a month; the amount depends on the number of family members (Arts. 13–20). Whether foreign nationals living in Montenegro, who do not enjoy protection afforded refugees or displaced persons, may exercise the rights enshrined in this Act if their state of origin has not signed a bilateral agreement with Montenegro to that effect remains questionable.¹¹⁸ In its judgment in the case of *Koua Poirrez v. France* in 2003, the ECtHR established that, although France was not bound by a bilateral treaty with the applicant's state of origin and although the applicant did not fulfil the nationality requirement, France was under the obligation to award him a disabled adult's allowance without discrimination because he had been a resident of France for a number of years.

Under the Act on the Protection and Exercise of the Rights of Mentally Disabled Persons (*Sl. list CG*, 32/05), a mentally disabled person is entitled to protection from discrimination, ill-treatment and all forms of inhuman or degrading treatment; to receive treatment in the least confining setting and by the application of least restrictive, restraining or intrusive methods. The Act also stipulates the involvement of the person's family members or legal guardian. The health care and treatment of a mentally disabled person must be based on an individual plan, which the person has given his/her informed consent to. Underage mentally disabled persons are afforded special protection. They are entitled to community treatment unless such treatment is objectively impossible. Furthermore, a mentally disabled person, or his/her legal guardian in the event of his/her incapacity, is entitled to choose the doctor who will treat him/her in the mental health centre or psychiatric institution closest to his/her place of residence or the place of residence of his/her relatives or friends and to be discharged from the institution as soon as the doctors establish that his/her state of health allows it.

The Government in November 2007 adopted the Strategy for the Integration of Persons with Disabilities in Montenegro for the 2008–2016 period, focusing on health care, welfare, education, professional training and employment, culture, sports, access to buildings, public carriers and information of persons with disabilities and civil society organisations representing persons with disabilities.

In early June 2011 the Government adopted the Bill on the Prohibition of Discrimination against persons with disabilities. This law complements the Anti-Discrimination Law exclusively in terms of specifying particular forms of discrimination against persons with disabilities. The Bill, for example, does not provide for any offense, means of protection, etc., since it is understood that the provisions of the Anti-Discrimination Law refer to this part. The Bill is not as accurate as expected. For example, although it specifically prohibits

¹¹⁸ Pursuant to Art. 2(2) of the Act, aliens may exercise the rights in the Act pursuant to international treaties and conventions.

discrimination in access to education, it does not imply the obligation of universities to provide interpreters for sign language and other tools to enable equal access to higher education to people with disabilities.

Free Legal Aid Act (*Sl. list CG*, 20/11), adopted in April 2010, comes into force on 1 January 2012, provides for the right to free legal assistance to persons with disabilities (Art. 13, item 3).

Rights of Persons with Disabilities in Practice

Although Montenegro has largely harmonised its legislation with international standards on the protection of persons with disabilities, persons with disabilities are one of the most vulnerable categories of the population due to the weaknesses of the institutions charged with safeguarding their rights.

A survey conducted by the Association of Youth with Disabilities of Montenegro shows that over half of Montenegro's citizens think that persons with disabilities are discriminated against, while only 8% are of the opposite opinion. Employment and work were listed as the area in which they suffered the greatest discrimination (54%).¹¹⁹ According to CEDEM research from June 2011, most citizens (71%) believe that in Montenegro persons with disabilities are in the worst position. In terms of discrimination, most citizens believe that immediately after the Roma, persons with disabilities do not have the same opportunities for work, nor an equal treatment in access to health care or education.¹²⁰

Although the human rights of persons with disabilities have been violated for years, these problems came into the public limelight in the last two years after persons with disabilities and NGOs began addressing the competent institutions demanding the respect of their rights.

The lawsuit Marijana Mugoša filed with the competent court against the Podgorica city administration seeking protection of her right to work and use a service dog (see the case study below); the lawsuit filed by visually impaired Andrija Samardžić seeking protection against discrimination by a restaurant owner who forced him to leave the restaurant he had entered with his service dog;¹²¹ the criminal reports the Organisation of the Blind of Podgorica filed against part of the senior management for abuse of post;¹²² the criminal report filed by the Association of the Deaf and Hard of Hearing of Montenegro for the same reason¹²³ were some of the cases adjudicated or initiated in 2010.

¹¹⁹ Association of Youth with Disabilities of Montenegro 2010 survey, www.umhcg.org.

¹²⁰ http://www.cedem.me/fajlovi/attach_fajlovi/pdf/istrazivanje_diskriminacije_2011-2011-6-13.pdf

¹²¹ "Seeking Justice in Court", *Dan*, 10 December 2010.

¹²² The criminal report filed by the Organisation of the Blind for Podgorica, Danilovgrad and Kolašin to the competent Basic State Prosecutor in Podgorica, 31 December 2010.

¹²³ Criminal report filed by the Association of Deaf and Hard of Hearing to the competent Basic State Prosecutor in Podgorica, 16 April 2010.

These demands for the protection of the rights of persons with disabilities clearly indicate greater awareness among this category of the population of its rights and greater readiness by some of them to seek their protection. However, the fact that the court decided in favour of Marijana Mugoša but she was not returned to work has negatively impacted on the motivation of persons with disabilities to seek justice over violations of their rights. As a rule, they do not dare launch such proceedings, given the lack of efficient protection of competent ministry inspectorates, the length of the court proceedings and their lack of access to legal aid.¹²⁴

After the Anti-Discrimination Act came into force, the Anti-Discrimination Centre Ekvista filed charges with the competent court on behalf of student Andrija Samardžić, who uses a service dog, demanding his protection from discrimination. A restaurant owner told Samardžić to leave his restaurant because he had come in with his service dog. Although three months have passed since the charges were filed, the court still has not scheduled even the preliminary hearing although the law states that trials of discrimination cases are urgent.

The implementation of the Professional Rehabilitation and Employment of Persons with Disabilities Act is poor, as corroborated by the small number of employed persons with disabilities.¹²⁵ According to the Montenegrin Employment Bureau, over 2,000 persons with disabilities are registered as unemployed. Only 76 were hired on open-ended contracts from 2004 to mid-2010.¹²⁶ As mentioned above, the state has imposed the payment of special contributions on employers who do not employ persons with disabilities. Due to the lack of by-laws, e.g. on assistants of persons with disabilities, the funds collected through these contributions remain unspent and are transferred to the state budget at the end of the year. Of the 3,370,516.42 Euros paid into the Fund in 2010, only 481,374.04 Euros were spent on persons with disabilities, while under the Budget Act, the remaining 2,889,142.38 Euros cannot be used by the Fund in 2011 and have to be transferred to the state budget and used for other purposes.¹²⁷

Most public buildings are still inaccessible to persons with disabilities. Under the 2008 Spatial Planning and Construction Act, all public facilities shall be adapted to allow access to persons with disabilities by 2013, but the process is not unfolding at a satisfactory pace. What is particularly concerning is that not one health institution in Montenegro has been fully adapted

¹²⁴ HRA researchers' interviews with persons with disabilities conducted in December 2010.

¹²⁵ Interview with Mr. Šaranović, January 2011.

¹²⁶ "Equality for All Only on Paper", *Vijesti*, 5 December 2010.

¹²⁷ *Ibid.em.* Data provided by Milan Šaranović, member of the Professional Rehabilitation and Employment of Persons with Disabilities Fund Council (Report on the Implementation of Professional Rehabilitation and Employment of Persons with Disabilities Measures and Use of Funds in the Professional Rehabilitation and Employment of Persons with Disabilities Fund in 2010).

to meet the needs of persons with disabilities; their entrances and walkways by and large fall short of even the minimum standards and cannot be used by this category of the population.¹²⁸ Nevertheless, not one person with disabilities has filed charges demanding access to a specific public institution or public transportation yet.

The health care of persons with disabilities is provided within the general health care system and is governed by the Health Care Act, Health Insurance Act and the Act on the Protection and Exercise of Rights of Mentally Disabled Persons. The latter Act, however, is not abided by in a satisfactory manner in practice. (See the Sijarić case, described on page 163).

The European Commission noted that persons with mental disabilities, including children, are the most vulnerable and discriminated group, including when it comes to access to appropriate health care.¹²⁹ Efforts have been made to improve living conditions and treatment of adult patients in the Komanski Most facility in Podgorica for persons with mental disabilities. However conditions of their institutionalisation remain a matter of serious concern, in particular regarding the lack of adequately trained staff and sub-standards facilities (more on the situation in Komanski Most in Prohibition of Torture on page 180).

CASE STUDY: MARIJANA MUGOŠA V. THE PODGORICA CITY ADMINISTRATION

The case of Marijana Mugoša, employed in the Podgorica City Administration and user of a service dog that had its epilogue in court illustrates the shortcomings of the mechanisms for the enforcement of final court decisions and the lack of will of the Government to file misdemeanour charges against the Podgorica City Administration. Namely, Marijana Mugoša filed charges against her employer demanding the protection of her rights after she was prohibited from entering her workplace with her service dog on 10 December 2008 in contravention of the law allowing her to use this aid. The City Administration ignored and failed to enforce the court temporary measure ordering it to allow Ms. Mugoša to return to work with her dog.¹³⁰

Although the competent ministries¹³¹ were notified of the violations by the Podgorica City Administration, none of them launched misdemeanour proceedings against it for breaking the Act on the Movement of Persons with Disabilities with the Assistance of Service Dogs. Neither the Labour and Social

¹²⁸ Strategy for the Integration of Persons with Disabilities in Montenegro for the 2008–2016 period.

¹²⁹ Analytical Report accompanying the Commission Opinion on Montenegro's application for membership of the European Union published on 9 November 2010, Brussels, p. 29.

¹³⁰ Mugoša Marijana v. The Podgorica City Administration Case File.

¹³¹ Motion to initiate proceedings filed by Marijana Mugoša on 16 December 2008 and the Association of Youth with Disabilities of Montenegro; Appeal by eight human rights NGOs issued on 22 January 2009.

Welfare Ministry (which proposed the Act)¹³² nor the Ministry of Internal Affairs (within which the Administrative Inspectorate of General Affairs operates) assumed jurisdiction for the case.¹³³ The Labour Inspectorate failed to react as well. It did, however, react in the case of Andrija Samardžić,¹³⁴ which is commendable although it demonstrates unequal application of the law.

After the court judgment in favour of Mugoša became final,¹³⁵ her employer still continued prohibiting her from entering her workplace with her service dog. The enforcement procedure demonstrates the weakness of the state mechanism for enforcing legally binding decisions – the court verdict was not enforced even ten months after it became final although the case was heard in a summary procedure which stipulates the summary enforcement of the court judgment.¹³⁶

The Podgorica City Administration and its responsible person were found guilty of failing to enforce the court judgment twice. The first Podgorica Basic Court decision against the City Administration and imposing a fine on it for not enforcing the decision¹³⁷ was challenged before the Superior Court, which upheld the appeal¹³⁸ and overturned the Basic Court decision¹³⁹. In its reasoning, the Superior Court *inter alia* instructed the Basic Court to establish whether the City Administration was enforcing the judgment by enabling Marijana Mugoša to work in another office, outside the building in which the rest of the staff was working. A constitutional appeal¹⁴⁰ was filed against the Superior Court decision for going into the merits of the judgment and the findings of fact. The Basic Court acted on the Superior Court instruction, scheduled a hearing and visited the office allocated to Marijana Mugoša the same day. The court found the office, not located in the building in which the rest of the city administration staff works, locked although it was reportedly also used by another civil servant, although there was no written evidence thereto. When the court asked to be let in, it established (and noted in its records) that there was nothing in the unheated office to suggest that it was used for work.¹⁴¹ The Basic Court rendered a new decision establishing

¹³² The Ministry did not even issue its reply in writing; it merely orally announced that this case was not within its remit (information provided by attorney Daliborka Knežević).

¹³³ In reply to HRA's questions about whether any steps were taken to conduct misdemeanor proceedings against the Podgorica City Administration, the MIA said that it had rejected the motion because its units were not forwarded an enactment initiating the proceedings and requesting they act upon it (MUP, 031/09–1795/2 of 8 April 2009).

¹³⁴ This case is still ongoing.

¹³⁵ Podgorica Superior Court judgment (Gž.2999/09–08), upholding the Podgorica Basic Court judgment, rendered on 4 June 2010.

¹³⁶ The enforcement procedure in the Mugoša Marijana v. Podgorica City Administration was still ongoing by the end of June 2011.

¹³⁷ Podgorica Basic Court Decision I. 4835/10 of 21 July 2010.

¹³⁸ Podgorica City Administration appeal of 24 September 2010.

¹³⁹ Podgorica Superior Court Decision Gž..4441/10–10 of 22 October 2010.

¹⁴⁰ Constitutional appeal filed on 29 November 2010.

¹⁴¹ Court transcripts I.6899/10 of 14 December 2010.

that the Podgorica City Administration was not enforcing the judgment; the Administration appealed this decision too, but the Superior Court this time rejected the appeal and upheld the Basic Court decision.¹⁴² But not even this prompted the Podgorica City Administration to enforce the judgment.

Although the court ruled that Mugoša was entitled to bring her service dog to her workplace and keep it with her throughout the workday, Mugoša on 11 October 2010 filed criminal charges against the responsible person in the Podgorica City Administration with the competent prosecution office over the non-enforcement of the judicial decision because she was still unable to exercise her right. A number of human rights NGOs also wrote to the competent prosecution office asking it to initiate criminal proceedings.¹⁴³ Since the competent prosecution office had failed to take any action, Mugoša sent it another letter¹⁴⁴ on 25 January 2011. The Podgorica Basic State Prosecutor replied that he had asked the Podgorica City Administration and Basic Court to submit the required information on the basis of which he would render a decision.¹⁴⁵

The duration of the enforcement procedure i.e. the violation of the Act on the Protection of the Right to a Trial within a Reasonable Time prompted Mugoša to file a motion¹⁴⁶ to check the work of the court. The motion was dismissed as groundless, under the explanation that the court acted with efficiency and promptly conducted the procedural steps during the enforcement procedure¹⁴⁷. Mugoša appealed the court decision with the Podgorica Superior Court,¹⁴⁸ which was rejected under the explanation that the judiciary was acting promptly and in accordance with the Enforcement Procedure Act.¹⁴⁹

Marijana Mugoša on 21 January 2009 filed a claim seeking compensation of the mental anguish she suffered due to her discrimination from the Podgorica City Administration. The court partly upheld Mugoša's claim for compensation for non-pecuniary damages and ordered that she be paid 6,000 euros. Mugoša did not appeal the decision.¹⁵⁰ The Podgorica City Administration on 2 February 2011 appealed the verdict, challenging both the grounds on which the compensation was awarded and the amount.

Given that she was not allowed to go back to her job although the judgment in her favour became final over ten months ago and that the enforce-

¹⁴² Podgorica Superior Court Decision Gž.243/11–10 of 28 January 2011.

¹⁴³ Motion to institute criminal proceedings filed with the Podgorica Basic State Prosecutor by a number of NGOs, October 2010 (<http://www.hraction.org/?p=415>).

¹⁴⁴ Letter to the Podgorica Basic State Prosecution Office, 25 January 2011.

¹⁴⁵ Podgorica Basic State Prosecution Office reply of 28 January 2011.

¹⁴⁶ Request for accelerating the proceeding, 26 November 2010.

¹⁴⁷ Podgorica Superior Court Decision Su.VIII 166–11/2010.

¹⁴⁸ Marijana Mugoša's appeal to the Superior Court of 4 February 2011 against the Podgorica Basic Court Decision Su.VIII 166–11/2011 of 24 January 2011.

¹⁴⁹ Podgorica Superior Court Decision VI Su.24/11 of 15 February 2011.

¹⁵⁰ Judgment P.107/09 of 10 January 2011.

ment procedure was still ongoing without indication that it would be completed any time soon, Mugoša filed an application with the ECtHR on 1 December 2010.

Gender Equality

The Constitution lays down that the state shall guarantee the equality of men and women and develop the policy of equal opportunities (Art. 18), wherefore all other constitutional principles on human rights and freedoms have to be viewed in the context of such equality.

Gender Equality Act

Montenegro in 2007 adopted the Gender Equality Act (*Sl. list CG*, 46/2007) which for the first time defines gender equality as equal participation of men and women in all spheres of public and private life, their equal status, equal opportunities to enjoy and exercise all their rights and freedoms, apply their individual knowledge and skills for the development of society and equally benefit from their work (Art. 2). The Act defines gender as the social roles of men and women in public and private life that developed due to the biological differences between the sexes. The definition clearly indicates that the Act regards exclusively the suppression of gender discrimination against men and women, not against transgender or intersexual individuals, who can seek protection solely by invoking the Anti-Discrimination Act.

The Gender Equality Act was adopted with the aim of suppressing gender discrimination and creating equal opportunities for men and women in all walks of life. The Act is programmatic in character and lays down framework general and specific measures to promote equality but does not strictly prescribe the obligation that they be enforced. For instance, the only offence the Act penalises is the failure to provide statistical data disaggregated by gender (Art. 33). A comprehensive Gender Equality Plan of Activities for the 2008–2012 Period, including an action plan comprising numerous specific measures in the fields of education, health, entrepreneurship, policy and decision-making, protection from violence, etc, was adopted pursuant to the Act in July 2008.¹⁵¹ Although there is no doubt that efforts have been invested, the first annual report, covering 2009, on the implementation of the measures was designed in such a manner that one cannot conclude how many measures have been implemented or to what extent.¹⁵²

¹⁵¹ The plan is available at: <http://www.minmanj.gov.me/files/1225968263.pdf>

¹⁵² The first and hitherto only published report on the realisation of the Plan measures, the Report on the Realisation of the Plan of Activities for Achieving Gender Equality in Montenegro (2008–2012) covering the August 2008–December 2009 period is available in Montenegrin at: <http://www.minmanj.gov.me/vijesti/98516/Vlada-Crne-Gore>

The Montenegrin Assembly in July 2010 adopted the Domestic Violence Act (*Sl. list CG*, 46/2010) and the Anti-Discrimination Act (*Sl. list CG*, 46/2010). A new draft Human Rights and Freedoms Protector Act was in the pipeline at the time this Report was completed. More on the Domestic Violence Act on p. 424.

The Gender Equality Committee has been operating as a standing committee in the Montenegrin Assembly since 2001. The Government Gender Equality Office established in 2003 is charged with proposing measures for advancing policies and strategies to achieve gender equality and assess the effects of such measures. The Office was transformed into the Gender Equality Department of the Human and Minority Rights Ministry in July 2009.

In practice

Notwithstanding the legislative framework on gender equality and the formal equality of men and women, women are still at a disadvantage compared to men. The widespread albeit mostly tacit discriminatory practices prevent the equal participation of women in all areas of social development. Discrimination and violations of the principle of gender equality are the most common in the fields of employment and labour.

Although more numerous than men¹⁵³, women in Montenegro do not participate equally in the decision-making in the Assembly or the Government. Only one of the 17 members of the Government, comprising 16 ministries and the Prime Minister, is a woman, just like in the previous cabinet.¹⁵⁴ Women account for only 10 of the 81 deputies, i.e. 12.3%.¹⁵⁵ Not one political party in Montenegro is headed by a woman.

Men dominate in senior offices although there are more women with college diplomas than men.¹⁵⁶ For instance, although women account for 70% of the school staff, the vast majority of school principals are men: there were only 16% women primary school principals and 10.2% women secondary school principals in the 2008/2009 school-year.¹⁵⁷ Women account for

usvojila-izvjestaj-o-ostvarivanju-plana-aktivnosti-za-postizanje-rodne-ravnopravnosti-u-Crnoj-Gori-2008-2012-za.html.

¹⁵³ There are nearly 10,000 more women than men in Montenegro, according to the latest available data (the 2003 Census).

¹⁵⁴ The Ministry of Science is headed by Dr Sanja Vlahović: <http://www.mna.gov.me/ministarstvo/ministar>. Gordana Đurović was the European Integration Minister in Prime Minister Milo Đukanović's cabinet, until December 2010.

¹⁵⁵ Available at: http://www.skupstina.me/index.php?menu_id=4&strana=poslanici.

¹⁵⁶ A conclusion presented at a gathering of women ambassadors and women NGO representatives focusing on Increasing the public participation of women in Montenegro, organised by the United Nations Family in Montenegro and the UK Embassy in Podgorica to mark International Women's Day. Available at: <http://www.un.org.me/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=107&cntnt01origid=127&cntnt01returnid=127>

¹⁵⁷ The Report on the Realisation of the Plan of Activities for Achieving Gender Equality in Montenegro (2008–2012) covering the August 2008–December 2009 period: <http://www.>

the absolute majority of staff in the health care system, as many as 73.2%, but are in the absolute minority in senior management positions.¹⁵⁸ Although there are more women than men judges in the 22 courts (55%: 45%), only five court presidents are female.¹⁵⁹ On the other hand, 60 of the 120 state prosecutors are women (50%) and 54 of the 103 deputy state prosecutors are women (54%). The Supreme State Prosecutor is also a woman.¹⁶⁰

The gender breakdown of police and army staff demonstrate that these two areas are still traditionally dominated by men: women account for only 13.2% of the staff in the Police Directorate and 8.66% of the Army staff. In the National Security Agency, they account for 34% of the staff; only 2% hold senior, albeit not the chief, positions.¹⁶¹

Furthermore, wages paid to men and women are not the same. The survey of the NGO European Movement in Montenegro showed that the income of women was 86% of the income of men. Men were paid the gross wage of 740 Euros on average while the women's gross wage averaged at 637 Euros in March 2010.¹⁶²

The commonplace discrimination in the fields of employment and labour has prompted an increasing number of complaints against the employers. Women are, however, still reluctant to report discrimination on these grounds fearing for their jobs, that their working conditions will deteriorate or because they are unaware of the legal protection mechanisms at their disposal.¹⁶³

Employers find ways to dismiss their women workers who become pregnant.¹⁶⁴ According to the survey of the NGO European Movement in Montenegro, economically powerless women (single mothers, women whose other family members are unemployed, women with sick children) are the most discriminated against in terms of labour rights. Women in these situations agree to perform jobs under extremely unfavourable working conditions (without a contract, on the black market, on short-term contracts, for minimum wages, in two or three shifts...)¹⁶⁵

The NGO Anima – Centre for Women and Peace Studies NVO found grave violations of labour rights during its poll of women in the trade and

minmanj.gov.me/vijesti/98516/Vlada-Crne-Gore-usvojila-izvjestaj-o-ostvarivanju-plana-aktivnosti-za-postizanje-rodne-ravnopravnosti-u-Crnoj-Gori-2008-2012-za.html.

¹⁵⁸ Plan of Activities for Achieving Gender Equality in Montenegro (2008–2012), Human and Minority Rights Ministry, p. 10.

¹⁵⁹ Centre for the Education of Holders of Judicial Office in Montenegro, July 2011: http://www.coscg.org/test/sud_opis.php?sud_id=6

¹⁶⁰ Supreme State Prosecutor's Office 2010 Annual Report, available at: <http://www.tuzilas-tvocg.co.me/aktuelnosti/godisnji%20izvjestaj.htm>.

¹⁶¹ Data provided by Gender Equality Committee Chairwoman Nada Drobnjak, 10th Cetinje Parliamentary Forum entitled "Women, Peace and Security", held on 21–22 June 2010.

¹⁶² "Women Do Their Jobs More Responsibly, but are Paid Less," *Vijesti*, 8 March 2011.

¹⁶³ Human Rights and Freedoms Protector's 2010 Annual Report. Available in Montenegrin at: <http://www.ombudsman.co.me/izvjestaji.php>.

¹⁶⁴ "Women Do Their Jobs More Responsibly, but are Paid Less," *Vijesti*, 8 March 2011.

¹⁶⁵ *Ibid.*

hospitality sectors in Kotor in 2010: 76% polled women do not have a copy of their employment contracts and say that they are kept by their employers, 82% said that the employers had them registered as receiving minimum wages and paying minimum wage contributions, 88% receive their salaries in cash, while 85% of the pollees are not given their wage receipts. The poll showed that many of them were forced to work long overtime hours, on holidays and without days off during the working week and numerous other violations of the Labour Act, all of which clearly corroborates the disadvantaged social and economic position of women workers.¹⁶⁶

Although they are aware their rights are being violated, as many as 65% of the polled women in Kotor said they would not complain to anyone because they distrust the state institutions. The poll showed that working women faced numerous problems at work, such as: the termination of their contracts when they become pregnant (pregnancy and maternity discrimination); non-payment of agreed wages; non-abidance by contract deadlines and obligations; late salary payments and non-payment of their mandatory social (health, pension, disability and unemployment) insurance; payment of the minimum wage contributions although they earn more; work on Sundays and during religious and state holidays.

The most drastic violations of family rights involve domestic violence against women and children. NGOs assisting women victims of violence say that a large number of incidents went unreported because of the victims' fear and lack of measures to protect them from their abusers. The NGO Safe Women's House received 92 reports of domestic violence in 2010.¹⁶⁷ More on page 429.

Rape, including spousal rape, is prohibited but frequently goes unreported because of the traditional prejudices harboured against rape victims and their families. Five cases of rape were reported in 2010. One was dismissed, another referred to another authority, while investigations into the other three reports were opened. Along with the five investigations launched earlier, the prosecutors were investigating a total of 8 reports in 2010; three of them were completed and five were pending at the end of the year.¹⁶⁸

Sexual harassment is also prohibited by the law, but it still features as a problem in Montenegrin society although it usually goes unreported. According to the Damar agency's poll of March 2010, 20% of the pollees said that they had been victims of sexual harassment at work.¹⁶⁹

¹⁶⁶ HRA archives; "Employers Exploit Women More Easily", *Dan*, 11 October 2010.

¹⁶⁷ Available at: http://www.szk.me/index.php?option=com_content&view=article&id=103:podaci-o-broju-prijavljenih-sluajeva-porodicnog-nasilja-policiji-za-2010godin&catid=40:izvjetaji&Itemid=15.

¹⁶⁸ Supreme State Prosecutor's Office 2010 Annual Report, available at: <http://www.tuzilastvocg.co.me/>.

¹⁶⁹ "I'm Keeping Silent, I Have to Hold on to My Job", *Pobjeda*, 10 September 2010.

Single mothers are a particularly vulnerable category of women. There are many more of them than single fathers in Montenegro.¹⁷⁰ Apart from the financial hardships they face, single mothers are usually abandoned by their families and friends and the state does not have a special programme to assist them. The only shelter for single mothers is run by the NGO Home of Hope in Podgorica.¹⁷¹

Reporting obligations to the Committee on the Elimination of Discrimination against Women

In October 2006, Montenegro confirmed its responsibility of taking over the obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁷² and the accompanying Optional Protocol.¹⁷³ Pursuant to the Convention, States Parties are obliged to submit a report on its implementation every four years to the Committee on the Elimination of Discrimination against Women. Montenegro was to submit its first report on 23 October 2007 (one year after the adoption of the Convention), but the report was submitted with a delay, in February 2010.¹⁷⁴ This report will be reviewed by the Committee at the 50 session in October 2011. Bearing in mind that the above report covers the period from 2006–2009, the Department of Gender Equality within the Ministry for Human and Minority Rights is responsible to update it.

The first Alternative Report on implementation of the Convention in Montenegro, drafted by 10 women's NGOs, amongst others,¹⁷⁵ was created in anticipation of the first national report. Alternative Report included all articles of the Convention, and referred to the period from 2006–2008. The data presented in this Report rely on data of women's NGOs, the available official data for the mentioned period and the 2007 research by the NGO ANIMA. This Report was completed in 2009 without access to the official

¹⁷⁰ According to the Montenegrin Statistical Office, there were 21,272 single mothers and 5,302 single fathers in Montenegro registered in the 2003 Census.

¹⁷¹ See the Report on the Achievement of the Plan of Activities for Achieving Gender Equality in Montenegro (2008–2012) in the August 2008–December 2009 Period. p12.

¹⁷² The Convention was ratified by SFRY in 1981 (*Sl. list SFRJ – Međunarodni ugovori*, 11/81).

¹⁷³ *Sl. list SRJ – Međunarodni ugovori*, 13/02.

¹⁷⁴ The Report is available at the Government webpage: www.gov.me/files1267172023.pdf

¹⁷⁵ NGOs which participated in the drafting of the Report: “The Centre for Women and Peace Education – ANIMA”, “Shelter”, “SOS Hotline for Women and Children Victims of Violence – Podgorica”, “Montenegrin Women's Lobby”, “Home of Hope”, Women's group “Stela”, Cetinje, “Women for a better tomorrow”, “Women's Alliance for Development”, “Bona Fide”, “League of Women Voters in Montenegro”. With the consent of the Centre for Roma Initiatives (CRI) from Nikšić, the Report included the parts of the report that the organization, in cooperation with the European Roma Rights Centre (ERRC) submitted to the Committee on the Elimination of Racial Discrimination on the 74 session.

report which was still incomplete back then. Alternative Report is currently being reviewed; the representatives of women's NGOs will present it to the Committee in October 2011.

Discrimination of Persons Infected by HIV/AIDS

Although some headway has been made in the recent years, people living with HIV/ AIDS still face grave problems.¹⁷⁶

People living with HIV/AIDS have not even tried to seek legal protection against discrimination although it exists. None of them initiated labour disputes over unfair dismissals or filed criminal reports over discrimination in 2010 either. They are reluctant to seek legal protection because they distrust the system and fear exposure in a society in which prejudices against people suffering from HIV or AIDS still run high.

Landlords frequently break off rental contracts with lessees living with HIV/AIDS, most often under another pretext. The former lessees cannot even sue the landlords, because most apartments in Montenegro are rented out without formal contracts to avoid paying tax on rent income.

According to the June 2011 public poll, 54.1% of respondents would prefer not to have a person infected with HIV as a neighbour.¹⁷⁷

As far as medical assistance is concerned, some doctors refuse to even examine HIV positive patients, without giving the real reasons for their refusal. People living with HIV/AIDS still have the greatest problems accessing gynaecologic and dental care. Training of specialists and monitoring programmes conducted over the past few years have led to a greater check on discrimination in the health sector. These patients access medical treatment without delay thanks to a group of specialists whom these patients are referred to.

Rights of Sexual Minorities and Transgender Persons

International Standards

The Human Rights Committee found that the prohibition of discrimination under Arts. 2 and 26 of the ICCPR on grounds of sex entails prohibition of discrimination on grounds of sexual orientation.¹⁷⁸ Montenegro endorsed

¹⁷⁶ Information provided HRA during the interview with the representatives of the Montenegrin Association against AIDS (www.cazas.org), which provides both legal and psycho-social assistance to people living with HIV/AIDS.

¹⁷⁷ According to the same CEDEM poll, 57% do not want to have homosexuals as neighbours, and even 76.3% do not want drug users as neighbours: http://www.cedem.me/fajlovi/attach_fajlovi/pdf/istrazivanje_diskriminacije_2011-2011-6-13.pdf

¹⁷⁸ *Toonen v. Australia*, 1994.

the Declaration on Sexual Orientation and Gender Identity adopted by 88 states under UN auspices in December 2008.¹⁷⁹ The Declaration calls for the respect of the human rights of all people without discrimination on grounds of sexual orientation and gender equality. The states parties agree to work at preventing violence, harassment, exclusion, stigmatisation and prejudice against LGBT persons. The Declaration condemns killings, torture, arbitrary arrests and denial of economic, social and cultural rights motivated by hatred of LGBT persons. The Declaration requires of states and international actors to provide protection for human rights defenders.

In the opinion of the ECtHR, if the reasons advanced for a difference in treatment in the protection of rights are based solely on considerations regarding a person's sexual orientation this would amount to discrimination.¹⁸⁰ A blanket exclusion of persons living in a homosexual relationship from succession to a tenancy, as opposed to persons living in a heterosexual extramarital relationship, cannot be accepted as necessary for the protection of the family viewed in its traditional sense.¹⁸¹ The state may not discriminate between extramarital heterosexual and homosexual partners by depriving the latter of insurance cover by the partner's insurance policy.¹⁸² A parent's homosexuality has to be irrelevant when deciding on who will gain custody of the child.¹⁸³ Refusal of a request to adopt a child solely on grounds of the sexual orientation of the potential adoptive parent is a violation of the prohibition of discrimination and the right to respect of private and family life.¹⁸⁴

Homosexual partners are entitled to the respect of family life under Article 8 of the ECHR, but they cannot be considered to be entitled to the right to marry, which Article 12 of the ECHR reserves for a man and a woman, until the CoE member states reach consensus on amending the definition of marriage.¹⁸⁵ The ECtHR also found that the prohibition of the gay parade constitutes discrimination and violation of the rights to freedoms of assembly and association and underlined that the ban on "promotion of homosexuality" was not a justified reason for limiting freedoms enshrined in the ECHR.¹⁸⁶

The CoE Committee of Ministers on 31 March 2010 adopted the *Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*.¹⁸⁷ One month later, the CoE Parlia-

¹⁷⁹ http://en.wikisource.org/wiki/UN_declaration_on_sexual_orientation_and_gender_identity.

¹⁸⁰ See e.g., *E.B. v. France*, 2008, paragraph 93.

¹⁸¹ *Karner v Austria*, 2003, paragraph. 41; *Kozak v Poland*, 2010, paragraph 99.

¹⁸² *P.B. and J.S. v. Austria*, 2010.

¹⁸³ *Mouta v Portugal*, 1999.

¹⁸⁴ *E.B. v France*, 2008.

¹⁸⁵ *P.B. and J.S. v Austria*; *Schalk and Kopf v Austria*, 2010.

¹⁸⁶ *Alekseyev v Russia*, 2010.

¹⁸⁷ *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* (Adopted

mentary Assembly adopted the Resolution on the Discrimination on the basis of sexual orientation and gender identity.¹⁸⁸ States are required to prevent and punish discrimination on grounds of sexual orientation and gender identity and to that aim adopt measures from the Recommendation of the Committee of Ministers, to ensure: access to effective legal remedies; punishment and compensation for discrimination; effective investigation and punishment of perpetrators of crimes and other incidents where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive, particularly when allegedly committed by law enforcement officials or by other persons acting in an official capacity. The Committee recommends that the member states should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance. Member states should ensure that relevant data are gathered and analysed on the prevalence and nature of discrimination and intolerance on grounds of sexual orientation or gender identity, and in particular on “hate crimes” and hate-motivated incidents related to sexual orientation or gender identity. States should also take measures against all forms of hate speech and publicly condemn it, and that all measures should respect the fundamental right to freedom of expression. It underlines that neither cultural, traditional nor religious values, nor the rules of a “dominant culture”, can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity. Member states are advised to align their laws with the case law of the ECtHR and that homosexual partnerships be recognised the same rights as heterosexual partnerships,¹⁸⁹ by providing for: the same pecuniary rights and obligations as those pertaining to different-sex couples; “next of kin” status; measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship; provide the possibility for joint parental responsibility of each partner’s children.¹⁹⁰

As far as the rights of transgender persons are concerned¹⁹¹, the ECtHR underlined that the right to privacy under Article 8 of the ECHR afforded

by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers’ Deputies).

¹⁸⁸ Resolution 1728 (2010) Discrimination on the basis of sexual orientation and gender identity, 29 April 2010 (17th Sitting), <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1728.htm>.

¹⁸⁹ (23.) Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor’s pension benefits and tenancy rights *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, see footnote 187.

¹⁹⁰ See paragraph 16.9 of the CoE Parliamentary Assembly Resolution, referred to above in footnote 11.

¹⁹¹ Gender identity refers to each person’s deeply felt internal and individual experience of gender. A transgender person is someone whose gender identity does not correspond to

protection of the right of transgender persons to personal development and physical and moral security.¹⁹² It found breaches of the rights to privacy, to marry and the prohibition of discrimination in three landmark cases, when the state authorities refused to change the gender of the persons who had undergone sex reassignment surgery in their personal documents and allow their entry into marriage.¹⁹³ However, the CoE Parliamentary Assembly Resolution of 2010 clarifies that the state authorities should not condition the change of sex in the documents by any medical procedures such as sex reassignment surgery or hormonal therapy.¹⁹⁴

Montenegro Law

The Constitution of Montenegro defines marriage as a union of man and woman (Art. 71), while the Family Act defines an extramarital union as longer-term union of *man and woman* equal to a marital union with regard to the right to mutual support and other property-legal relationships (Art. 12(1)). Partners in a same-sex union cannot thus exercise property and other rights recognised heterosexual partners in marital or extramarital unions. An initiative to review the constitutionality of this provision of the Family Act was submitted in January 2011 given that this solution is in contravention of European standards.¹⁹⁵

The provision in Article 208 of the Obligations Act (*Sl. list CG*, 47/08), under which only a spouse or extramarital partner is entitled to compensation for the mental anguish caused by the death or particularly grave disability of his/her spouse/partner, is probably the most drastic example of unjustified discrimination against same-sex partners in Montenegro.

Another problem arises from the narrow definition of the family in the Family Act, as a union of parents in a marital or extra-marital union, their children and other relatives (Art. 2), which excludes even extra marital partners if they are not parents. This definition poses a problem because numerous laws guarantee specific rights and obligations to “family members” or “family household members” For instance, the Labour Act allows a worker to paid absence from work in case s/he is getting married, of a grave illness

the gender he or she was assigned at birth (on the basis of physical, sexual characteristics, note by HRA) Article 1, CoE Parliamentary Assembly Resolution 1728 (2010) *Discrimination on the basis of sexual orientation and gender identity*.

¹⁹² *Christine Goodwin v United Kingdom*, 2002, para. 90, *I. v. United Kingdom*, 2003, para. 70.

¹⁹³ *B. v. France*, 1992; *Christine Goodwin v United Kingdom*, 2002, *I. v. United Kingdom*, 2003.

¹⁹⁴ See paragraph 16.11: “(the states should) address the specific discrimination and human rights violations faced by transgender persons and, in particular, ensure in legislation and in practice their right to: ...official documents that reflect an individual’s preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy.”

¹⁹⁵ The initiative was submitted by member of the European Commission for Sexual Orientation Law (EC SOL) and MSc Aleksandar Saša Zeković, researcher of human rights violations in Montenegro “Same Rights for Homosexuals”, *Vijesti*, 19 January 2011.

or death of next of kin, but the next of kin comprises only spouses, not extramarital partners.¹⁹⁶ Therefore, even if the definition of an extramarital union is declared unconstitutional, it would be more expedient to adopt a separate law on same-sex unions explicitly laying down the rights and obligations of same-sex partners, like many European states have.

See the section entitled Prohibition of Discrimination in the Criminal Code and Criminal Proceedings for more on protection from discrimination and violence afforded by the Criminal Code. In April 2011 HRA drafted proposed amendments to the Bill on Amendments to the Criminal Code, which prescribes extending the prohibition of propaganda of racial hatred (national, religious) from Art. 443 CC to the prohibition of incitement of hatred based on sexual orientation, gender identity, disability and other personal property. The proposed amendment was supported by 21 non-governmental organizations, and submitted to all parliamentary clubs and the members of the Committee for the political system, judiciary and administration of the Parliament of Montenegro.¹⁹⁷

Practice in Montenegro

Results of a survey of 30 pollees, homosexuals, in Podgorica, which HRA conducted in October 2009, show that over half of them (18) had been exposed to violence in the form of psychological abuse, stoning and rape, but that none of them reported the violence to the police fearing the reaction of the police and the community. One of the respondents added that in Montenegro he only felt safe in his room.¹⁹⁸ Only four of the 30 respondents said that they were not concealing their sexual orientation.

The results of the public opinion survey of homophobia in Montenegro, conducted by the NGOs Juventas and Centre for Monitoring (CEMI) were published a year later, in October 2010.¹⁹⁹ According to the survey, 68.5% of

¹⁹⁶ Mandatory Social Insurance Contributions Act (*Sl. list CG*, 13/2007, 79/2008 and 86/2009); Social Insurance Contributions Act (*Sl. list RCG*, 32/93, 3/94, 17/94, 42/94, 1/95, 13/96 and 45/98), Labour and Employment Records Act (*Sl. list RCG*, 69/2003), Energy Act (*Sl. list CG*, 28/2010), Consumer Protection Act (*Sl. list RCG*, 26/2007), General Administrative Procedure Act (*Sl. list RCG*, 60/2003), Weapons Act (*Sl. list RCG*, 49/2004 and *Sl. list CG*, 49/2008.), Civil Procedure Act (*Sl. list RCG*, 22/2004 and 76/2006), Pre-school Education Act (*Sl. list RCG*, 64/2002 and 49/2007.), Act on Travel Documents (*Sl. list CG*, 21/2008), Act on Temporary and Permanent Residence Registers (*Sl. list CG*, 13/2008 and 41/2010), Ownership Rights Act (*Sl. list CG*, 19/2009.), Prevention of Conflict of Interest Act (*Sl. list CG*, 19/2009), 2010 Agricultural Census Act (*Sl. list CG*, 54/2009 and 14/2010), Court Taxes Act (*Sl. list RCG*, 76/2005), Act on Administrative Procedure Expenses (*Sl. list SR*CG, 44/81); Expropriation Act (*Sl. list RCG*, 55/2000, 28/2006 and 21/2008).

¹⁹⁷ <http://www.hracion.org/wp-content/uploads/PREDLOG-DOPUNE-PREDLOGA-ZAKONA-O-IZMJENAMA-I-DOPUNAMA-KRIVICNOG-ZAKONIKA.pdf>.

¹⁹⁸ The survey results are available at: http://www.hracion.org/wp-content/uploads/rezultati_anonimnog_upitnika_lgbt.pdf.

¹⁹⁹ *Vijesti*, 12 October 2010, p. 9; *Dan*, 17 October 2010, pp. 1, 10, 11.

the respondents think that homosexuality is a disease, 67.3% think it is unnatural, while 63.9% think it is immoral. If they found out that their child is a homosexual, 73% of the pollees would consider that they had failed as parents, while 50% of the pollees think that state institutions should be involved in suppressing homosexuality. Although the data still clearly indicate a concerning high degree of homophobia, they also point to some headway over the previous year, because now 2.5% less respondents believe that homosexuality is a disease, and 8% less that the state should suppress homosexuality.²⁰⁰ Also, although the June 2011 CEDEM research showed that 61.7% do not support the Pride Parade, it is still considerably less than 75% who were explicitly against the 2009 Parade. Research from June 2011 showed that 57% would not want to have gay neighbours.²⁰¹

The high degree of homophobia prevents the protection from discrimination and requires the state to take a particularly proactive approach and positive measures in accordance with international standards and recommendations of international organisations. Human and Minority Rights Minister Ferhat Dinoša, however, continued demonstrating how inapt he is for the demanding office he is charge with performing to the benefit of all citizens of Montenegro in 2010 as well.²⁰² After saying in November 2009 that the existence of homosexuals “is not good news for our country ... although, even if we are not to create enough breathing space for them, we definitely should not stifle them”, he went on in 2010 to say that he did not support the holding of a pride parade and that he would not take part in it, that affirmative action measures could not apply to sexual minorities and that the rights of sexual minorities could not be equated with the rights of national minorities.²⁰³ NGOs insisted on Dinoša’s resignation or dismissal both in November 2009²⁰⁴ and again in 2010.²⁰⁵ The same minister continued with similar statements in 2011. He opposed the announced pride parade in Podgorica,

²⁰⁰ The Human Rights Action survey of the views of the general population on homophobia from October 2009 is available at: <http://www.hracion.org/?p=268>.

²⁰¹ Radio Free Europe, 13 June 2011, “Roma, the elderly, the disabled and homosexuals in worst position”; “Research of minorities and marginalized social groups”, CEDEM, available at: http://www.cedem.me/fajlovi/attach_fajlovi/pdf/istrazivanje_diskriminacije_2011-2011-6-13.pdf.

²⁰² According to moderate estimates, sexual minorities account for around 5% of the population, which means that at least 30,000 people living in Montenegro are of homosexual or bisexual orientation.

²⁰³ *Dan*, 17 October 2010, pp. 1, 10, 11; *Dan*, 15 October 2010; *Monitor*, 15 October 2010, p. 6. “Minister Ferhat Dinoša’s Comments on the Rights of Sexual Minorities”, *TV Vijesti*, 9 October 2010.

²⁰⁴ “Protest to the Prime Minister over the Statements by the Human and Minority Rights Minister”, 11 November 2009, available in Montenegrin at: <http://www.hracion.org/?p=283>.

²⁰⁵ “Repeated Request for the Resignation of the Human and Minority Rights Minister”, 29 October 2010, available at: <http://www.hracion.org/?p=472>; *Vijesti*, 4 November 2010, p. 10; *Dan*, 26 November 2010; *Vijesti*, 28 December 2010, p. 2.

calling it “useless”, and refused to participate in the organizing committee of the event justifying this by “an obligation to implement the recommendations from the opinion of the EC”²⁰⁶, although one of them was the non-discrimination in relation to sexual minorities.

The Head of the Political Section of the EU Delegation to Montenegro, Clive Rumbold, said that state institutions, particularly the Human and Minority Rights Ministry, should do everything in their power to make social integration for the LGBT population more accessible.²⁰⁷ In his letter to Prime Minister Milo Đukanović, CoE Commissioner for Human Rights Thomas Hammarberg expressed his concern over the discriminatory views of the LGBT population expressed by some ministers and state officials.²⁰⁸ At a round table entitled “Neither Less nor More – Same Rights for All”, Political Analyst at the EU Delegation to Montenegro Florian Horner underlined that the respect of human rights, including LGBT rights, was one of the criteria Montenegro had to fulfil to accede to the EU. He said that the Delegation had been notified of several violent incidents against LGBT persons in Montenegro²⁰⁹. The members of the Parliamentary Stabilisation and Association Committee, consisting of 14 European and Montenegrin parliamentarians, condemned inappropriate statements from the Minister Dinoša in the joint declaration. In its Analytical Report accompanying the Commission Opinion on Montenegro’s application for membership of the European Union, the European Commission stated that the Ministry for Human and Minority Rights lacked sensitivity on the issue of LGBT rights.²¹⁰

Eight government institutions take part in the work of the “Together for LGBT Rights Coalition” rallying 16 NGOs and established at the initiative of the NGO Juventas, as part of the project “Montenegro – a bright spot on the gay map”.²¹¹ The Coalition designed the Draft National Plan for Combating Homophobia, introduced in April 2011 and submitted to the Government. This Plan proposes a variety of measures that primarily the Government should implement in the next four years, starting from the legislative reforms through the introduction of sex education in schools, measures relating to health, socio-economic area, culture and media, in order to improve

²⁰⁶ Statement by Minister Dinoša broadcasted by Vijesti TV on 30 March 2011 and the response of the Minister to LGBT Forum Progress; LGBT Forum Progress Documentation; Dinoša will not ..., *Dan*, 31 March 2011.

²⁰⁷ *Vijesti*, 20 October 2010, p. 2; <http://www.delimne.ec.europa.eu/code/navigate.php?Id=501>.

²⁰⁸ *Vijesti*, 9 December 2010, pp. 1, 3; *Dan*, 13 December 2010, p. 11; <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1723369&SecMode=1&DocId=1667996&Usage=2>.

²⁰⁹ *Dan*, 10 December 2010.

²¹⁰ European Commission Analytical Report accompanying the Commission Opinion on Montenegro’s application for membership of the European Union, 9 November 2010.

²¹¹ *Vijesti*, 16 May 2010, p. 12; *Dan*, 16 May 2010, p. 10.

the rights of sexual minorities and transgender people, as well as awareness of their rights in the Montenegrin society.²¹²

In July 2010, the Montenegrin Employment Agency and the NGO *Juventas* signed a memorandum extending support to the rights of LGBT persons,²¹³ but the Agency failed to undertake any activities to that aim. In July 2010 six Montenegrin policemen underwent training in Toronto (Canada) and Los Angeles (USA), during which they had the opportunity to see how the Canadian and US law enforcement agencies worked, how pride parades are organised and how the LGBT population is treated.²¹⁴ International conference “Justice in the Balkans – equality for sexual minorities”, held in late May 2011 in Belgrade, granted the award “Friend of Justice” to the Montenegrin Police Administration, because it is the only police in the region who took part in this specialized training.²¹⁵

The homophobic views voiced by a psychology teacher in the Podgorica High School “Slobodan Škerović” Biljana Babović in the show “Glamour Noir”, broadcasted in October 2010 on Atlas TV, prompted the Health Ministry to react and underline that homosexuality is not a disease. The school pronounced a disciplinary measure against the teacher and the Broadcasting Agency (now the Electronic Communications Agency) and the Protector of Human Rights and Freedoms recommended to the Montenegrin electronic media outlets to approach the LGBT topic with more sensitivity and professional responsibility.²¹⁶

Researcher of human rights violations Aleksandar Saša Zeković and the Centre for Civic Education presented their analysis of Montenegrin school curricula and textbooks demonstrating the absolute invisibility of sexual minorities and transgender persons in Montenegrin educational policies and practice.²¹⁷ With regard to that, the non-governmental organizations “EQUISTA” and LGBT Forum Progress filed a complaint to the Ombudsman against the state Institute for textbooks and teaching aids.²¹⁸

²¹² “The Coalition of non-governmental organizations implemented the Draft Action Plan for Combating Homophobia”, RTCG News, 7 April 2011; *Vijesti*, Dan, Podjeda, 8 April 2011; Action Plan is available at: http://www.bobancelebic.com/projekti/akcioni_plan_za_borbu_protiv_homofobije.pdf

²¹³ *Pobjeda*, 13 July 2010, p. 12.

²¹⁴ The training of Montenegrin policemen was organised within the conference Justice in the Balkans: Equality for Sexual Minorities in cooperation with the Montenegrin Police Directorate.

²¹⁵ Justice in the Balkans – Equality for Sexual Minorities, www.lu.se/justice-in-the-balkans

²¹⁶ <http://www.montenegro-gay.me/vijesti/1-crna-gora/214-saoptenje-za-javnost-iz-kancelarije-ombudsmana.html>

²¹⁷ Panel discussion “Towards the European Union: through Education against the Discrimination of the LGBT population” Centre for Civic Education, 14 December 2010; Centre’s documentation.

²¹⁸ Press release of the Center for Anti-discrimination “EQUISTA” and LGBT Forum Progress of 8 April 2011; www.ekvista.org

The first case of violence against an LGBT person was reported to all the competent authorities in late 2010. The report was filed by a citizen who disclosed his full identity. The proceedings before the Ombudsman, launched because of the inadequate reactions by the police, was still under way at the time this Report went into print. This case will serve to test the effectiveness of the provisions of the Anti-Discrimination Act. A natural person, V.R. from Podgorica, has been sued for discrimination before the Podgorica Basic Court and a criminal report against him was filed with the Basic State Prosecutor. The police had initially treated the case as a misdemeanour.²¹⁹

A new case of violence against LGBT people was reported in the first half of 2011.²²⁰ Two lawsuits against discrimination were submitted to the Basic Court in Podgorica. A total of 12 charges for harassment of LGBT persons and spreading hatred and intolerance have been filed to the Police Administration and the Basic State Prosecutor. Because of inadequate treatment by police officers, LGBT people have filed four complaints to the Director of the Police, Internal Control of the Police, the Council for Civil Control of the Police and the Protector of Human Rights and Freedoms. The Basic Court in Podgorica has not started the procedure for complaints of discrimination even after ten months of the filed complaint, which is discouraging.²²¹

In February 2011 it was announced that the NGO for promotion of the rights of sexual minorities and transgender people “LGBT Forum Progress” has been established, the first organization whose director is a publicly declared homosexual.²²²

In late April 2011 the Council for Civil Control of the Police noted that LGBT persons are subjected to various forms of intolerance and discrimination and suffer considerable social distance and exclusion. The Council stressed the importance of additional professional attention of police officers in the prosecution of violence against these persons and recommended the Police to establish communications with the NGO LGBT Forum Progress when registering violence, misdemeanour and crime, preventing violence against LGBT people and educating its employees.²²³

In March 2011 NGO LGBT Forum Progress has announced the organization of the first Montenegrin Pride parade this year.²²⁴ Minister for Human and Minority Rights has condemned such an intention, and initially refused that he or any of his assistants be involved in the organizing committee and the parade. He later announced that it is possible for one of his assistant to

²¹⁹ Interview with the plaintiff/author of the criminal reports Z.C.; December 2010; HRA's documentation.

²²⁰ According to the NGO LGBT Forum Progress data from June 2011.

²²¹ HRA researcher interview with the LGBT Forum Progress representatives, May 2011.

²²² See: www.lgbtprogres.me; “Publicly for their rights”, *Vijesti*, 18 February 2011.

²²³ Conclusion of the Council for Civil Control of the Police, 29 April 2011; Documentation of the LGBT Forum Progress.

²²⁴ “First gay parade this year”, www.portalanalitika.me, 28 March 2011.

be included, if the parade changes its title to the rally for human rights. The organisers refused such an option and sought the Government to include one of its senior officials in the organizing committee, whose responsibilities would be to take a walk with the participants of the parade and give a speech. On that occasion, the Government, after two months of waiting, decided to delegate two Deputy Ministers of Human and Minority Rights to the organizing committee and submitted that decision to the organizers of the parade just four days before the scheduled event. Bearing in mind the experience of Croatia and Serbia, where the ministers gave unequivocal support for participation in the event, the organizers have postponed this very important event for confirming the principle of equality in Montenegro due to the lack of sufficiently clear and strong political support.²²⁵

In May 2011 the NGO *Juventas* marked the International Day Against Homophobia by organizing the concert of Croatian band “Lollobrigida”²²⁶ Although the show was private and the organizers provided a private security service, and despite the presence of plainclothes police officers, pepper spray was discharged at the concert. Until June the police did not reveal who was responsible for this incident, although the *Juventas* activists presented “possible material evidence”.²²⁷ Two persons belonging to sexual minority were attacked verbally and physically at the centre of Podgorica that evening, but did not want to report the case to the police despite the assurance of the Police to professionally approach the detection of offenders.²²⁸

Transgender Persons

No headway was made in the treatment of transgender persons in Montenegro in 2010 and the first half of 2011, they still live in isolation. Most of them are poor and cannot afford the expensive medical treatment required to conform their body to the desired gender, which is not available in Montenegro or covered by health insurance.²²⁹ Although the Anti-Discrimination Act commendably explicitly prohibits discrimination on grounds of “gender identity”, it fails to define it. Transgender persons are not mentioned in any Montenegrin regulations. In practice, the gender of a person is changed in

²²⁵ “Pride parade postponed”; www.lgbtprogres.me

²²⁶ See: <http://www.montenegro-gay.me/vijesti/354-svjetski-dan-borbe-protiv-homofobije-ljubav-je-stav.html>

²²⁷ “*Juventas* claims they are not responsible for the pepper spray during the concert: the police failed”, *Vijesti*, 19 May 2011.

²²⁸ “The Police took all measures to insure safety at the parade”, www.portalanalitika.me, 11 May 2011.

²²⁹ Clinical Centre of Montenegro, Reply to the request for information No. 03/01–18056/1, 30 December 2009; Republican Health Insurance Fund, Reply to the request for access to information, No. 02–66, 14 January 2010. See also Aleksandar Saša Zeković, *Visibility of Transgender Persons in Montenegro*, Podgorica, 2010 (available in Montenegrin at: <http://www.hraccion.org/wp-content/uploads/asz-transgender-lica-report.pdf>).

his/her personal documents only after the person submits a certificate on the sex reassignment surgery to the competent police authority,²³⁰ which is in contravention of the above-mentioned recommendation of the Committee of Ministers of the Council of Europe that such changes should not be conditioned by any medical procedures. In April 2011 the LGBT Forum Progress submitted an initiative to the Parliamentary Committee for Health Care, Labour and Welfare to initiate the amendment of the Law on Health Insurance in order to meet the needs and end discrimination against transgender people.²³¹ The Action Plan for Combating Homophobia and Transphobia, developed by the Coalition for LGBT Rights, also contains the recommendation to include the sex change treatment in the health insurance and recognize the change of sex on demand prior to completion of treatment.

²³⁰ Reply of Assistant Minister of Internal Affairs and Public Administration to researcher of human rights violations Aleksandar Saša Zeković, 03 No. 202/10–1046/2, 7 February 2010.

²³¹ Initiative submitted to the Committee for Health Care, Labor and Welfare, April 2011; LGBT Forum Progress Documentation.

Right to Life

Article 6, ICCPR:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 1, Second Optional Protocol to the ICCPR:

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2, ECHR:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - a) in defence of any person from unlawful violence;

- b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Protocol No. 6 to the ECHR:

Article 1

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Article 3

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Protocol No. 13 to the ECHR:

Article 1

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 3

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

General

The right to life is guaranteed by all main international and regional human rights instruments applicable in Montenegro. This right should not be interpreted narrowly.²³² The right to life is a complex right entailing diverse obligations of the state, negative obligations denoting the prohibition of arbitrary deprivation of life and capital punishment, and positive obligations, denoting taking measures to protect life and conduct effective investigations

²³² General Comment No. 6, paragraph 1, adopted on 27 July 1982 at the Human Rights Committee's 378th meeting (16th session).

of causes of death, particularly murders.²³³ State bodies need to be reminded more frequently of the positive obligation of the authorities to adopt and undertake all measures leading to the effective ensurance and exercise of the right to life, both in terms of procedural obligations, efficient investigations into the circumstances of killings, and taking all reasonable steps to protect the persons under their jurisdiction from a risk they knew existed (see e.g. *Mahmut Kaya v. Turkey*, 2000).

As opposed to the ICCPR, ECHR, the SaM Human and Minority Rights Charter and the prior Montenegrin Constitution, the 2007 Constitution does not include a separate provision guaranteeing the right to life. Rather, it guarantees “the inviolability of the physical and mental integrity of man” (Art. 28 (2)). The Constitution explicitly prohibits capital punishment (Art. 26), cloning, medical interventions and experiments without consent (Art. 27(paragraphs 2 and 3)).

International documents do not allow derogations of the right to life (Art. 4, ICCPR and Art. 15, ECHR). The ECHR envisages the following exception: deaths resulting from lawful acts of war. The Montenegrin Constitution unusually prohibits limitation of the “right to life” in states of war or emergency (Art. 25(3)) although it does not guarantee the right to life under that name.

Pursuant to the obligation to act preventively to preserve the right to life by enacting effective criminal law provisions deterring the commission of crimes against life, which will be accompanied by enforcement mechanisms preventing, suppressing and penalising violations of these provisions (see *Nachova and Others v. Bulgaria*, 2005, paragraph 160), Montenegro’s Criminal Code comprises crimes protecting this right and obliges the state attorney to prosecute them *ex officio*. These crimes notably comprise crimes against life and body (Chapter 14, Arts. 143–149), crimes against humanity and other rights guaranteed under international treaties, such as Genocide (Art. 426), Crimes against Humanity (427), War Crimes against the Civilian Population, War Crimes against the Wounded and the Sick and War Crimes against Prisoners of War (Arts. 428–430), Unlawful Killing and Wounding of Enemies (Art. 434) and Incitement to a War of Aggression (Art. 442). The CC also incriminates offences that may jeopardise lives of people, such as crimes against human health (Chapter 24), crimes against the general safety of people and property (Chapter 26), environmental crimes (Chapter 25) and Unlawful Possession of Weapons and Explosives (Art. 403), the Failure to Participate in the Elimination of General Danger (Art. 380), etc.

The Criminal Code incriminates incitement to suicide and assisted suicide (Art. 149), which warrant between three months and ten years of imprisonment depending on the form of the crime. Euthanasia has not been

²³³ See “The Right to Life – A guide to the implementation of Article 2 of the European Convention on Human Rights”, Douwe Korff, Council of Europe, 2006 (available at: [http://www.echr.coe.int/library/DIGDOC/DG2/HRHAND/DG2-EN-HRHAND-08\(2006\).pdf](http://www.echr.coe.int/library/DIGDOC/DG2/HRHAND/DG2-EN-HRHAND-08(2006).pdf)).

decriminalised, but it is regulated as a separate and milder offence than murder.²³⁴ Under the CC, anyone who deprives of life an adult person out of compassion due to his/her serious health condition, or at his/her serious and explicit request, shall be sentenced to six months to five years of imprisonment (Deprivation of Life out of Compassion, Art. 147). Assisted suicide warrants between three months and five years imprisonment (Art. 149(2)), i.e. the Criminal Code also incriminates so-called passive euthanasia.

Human cloning and cloning experimentation is explicitly prohibited by paragraph 2 of Article 291, incriminating unlawful experimentation and clinical trials of medications.

Capital Punishment

The Constitution explicitly prohibits capital punishment (Art. 26), pursuant to the international treaties ratified by the former federal state (FRY and SaM), which Montenegro acceded by succession. The FRY in June 2001 ratified the Second Optional Protocol to the ICCPR, obliging it to abolish capital punishment; on accession to the CoE, SaM signed Protocol No. 6 to the ECHR obliging states to abolish capital punishment save “in respect of acts committed in time of war or of imminent threat of war” and Protocol No. 13 stipulating the abolition of the death penalty without exception.

The death penalty was fully abolished in criminal law in the territory of Montenegro in 2002.²³⁵

Extradition of accused and convicted persons is conducted in accordance with the provisions of international multilateral and bilateral treaties; in their absence or in the event an issue is not regulated by an international treaty, extradition is conducted in accordance with Arts. 10–34 of the International Legal Assistance in Criminal Matters Act (*Sl. list CG*, 04/08). Under Article 14 of the Act, if the offence for which extradition is requested is punishable by death under the law of the requesting state, extradition may be granted only if that state provides assurances that the death penalty will not be imposed or carried out. Article 23 lays down that the minister shall specify in the decision on extradition that “a punishment more severe than the one to which s/he has been sentenced may not be enforced against the person whose extradition is requested”, which is in accordance with Montenegro’s obliga-

²³⁴ The ECtHR has not taken an explicit position on euthanasia and leaves its regulation to the states. In the case of *Pretty v. The United Kingdom*, 2002, paragraphs 39–40, it concluded that no “right to die” can be derived from the right to life under the ECHR, but it also noted that this did not mean that a state allowing euthanasia was violating the right to life guaranteed under the ECHR.

²³⁵ The then valid republican criminal law was aligned with the amendments to the FRY Criminal Code (Act Amending the FRY Criminal Code, *Sl. list SRJ*, 61/01) abolishing capital punishment and replacing it by 40 years’ imprisonment, Act Amending the Criminal Code of the Republic of Montenegro (*Sl. list RCG*, 30/02).

tions under the European Convention on Extradition (*Sl. list (Međunarodni ugovori)*, 10/01). The Montenegrin Asylum Act envisages the application of the principle of *non-refoulement* (more in section on Asylum, p. 467).

Arbitrary Deprivation of Life

The ICCPR and ECHR oblige states to protect the lives of people from arbitrary i.e. intentional deprivation of life and to take special measures to prevent arbitrary killing by state security forces.²³⁶ However, not every use of force by the police, which ends in death, is considered a violation of the right to life. Use of force in self-defence, when it is absolutely necessary, during arrest or preventing escape or quelling a riot or insurrection cannot be considered intentional or arbitrary deprivation of life as long as it fulfils the criteria of absolute necessity i.e. proportionality (see the ECtHR judgment in the case of *McCann and Others v. the United Kingdom*, 1995 and the Human Rights Committee views in *Suarez de Guerrero v. Colombia*, No. 45/1979, 1985, UN doc. CCPR/C/OP/1). However, unintentional killing by state forces may constitute a violation of the right to life if the use of force at the time of murder was unjustified or inconsistent with the procedure envisaged in the national legislation (*Burrell v. Jamaica*, No. 546/93, UN doc. CCPR/C/53/D/546/1993, 1996; *Stewart v. The United Kingdom*, European Commission for Human Rights, 39 DR 162, 1982. and *X. v. Belgium*, 1969). The Committee requires that state legislation must strictly limit the circumstances in which a person may be deprived of his life by state agents. However, in view of the fact that national legislation itself may be arbitrary and provide excessive powers to state agents, the Committee found that even situations in which the domestic law criteria were fulfilled constituted violations of the right to life (*Suarez de Guerrero v. Colombia*, No. 45/1979, 1985, UN doc. CCPR/C/OP/1).

The Montenegrin Police Act (*Sl. list RCG*, 88/09) lays down that a police officer shall use means of coercion commensurate with the danger to be eliminated and causing minimum harm to the person against whom they are used and to warn the person that s/he will use the means of coercion (Art. 30). Firearms may be used only if it is necessary to: (1) protect human life; (2) prevent the escape of a person caught in the commission of a crime prosecuted *ex officio* and warranting minimum 10 years' imprisonment; (3) prevent the escape of a person deprived of liberty or ordered remand for committing a crime under (2); (4) repel an immediate attack endangering the life of a police officer; (5) repel an attack on a building if it is clear that the attack will jeopardise the life of a person safeguarding it or another person (Art. 40). The Act precisely regulates conditions in which firearms may be used and elaborates each of the five listed situations. Under the Act, firearms may only be used to protect the life of a person under attack in the event his/her life is

²³⁶ Human Rights Committee, General Comment 6/16, Note 1, paragraph 3.

in immediate danger and establishes the protection of life as the only good the protection of which justifies the use of firearms (Art. 41). Prior to applying the means of coercion, the police officer shall whenever possible warn the person thereof and is at all times obliged to protect the lives of other people (Art. 46). The use of firearms and other means of coercion is significantly restricted by the provision requiring the use of such means only at the order of the officer in charge of the task. A police officer, who used or ordered the use of firearms or other means of coercion, shall immediately notify the chief of police thereof; in the event the chief of police assesses that the use of the means of coercion had been unlawful, s/he shall within three days take measures to establish the responsibility of the officer (Art. 48). It is not simple to protect specific persons or buildings in practice without exceeding the threshold of “strict proportionality” (*McCann and Others v. The United Kingdom*, 1995; *Kelly and Others v. The United Kingdom*; *Gul v. Turkey*, 2000; *Matzarakis v. Greece*, 2004), wherefore police training should incorporate comparative experiences described in the above-mentioned ECtHR judgments.

Effective Investigation of Unresolved Murders

The ECtHR found that the Convention also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (*Gongadze v. Ukraine*, 2005, para. 175). If there are suspicions that state agents or bodies were involved in a killing, the persons conducting the investigation must be independent from those implicated in the incident and the investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard. It must be accepted that there may be obstacles or difficulties, which prevent progress in an investigation in a particular situation. A prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *McKerr v. The United Kingdom*, 2001, para. 108).

Protection of Life of Detainees and Prisoners

A state has a special obligation to take all the necessary and available measures to protect the lives of all persons deprived of liberty or serving a jail sentence. Failure to provide medical assistance, withholding of food, torture or failure to prevent the suicide of persons deprived of their liberty or

inadequate investigation in case of their death may constitute a violation of the right to life (*Keenan v. The United Kingdom*, ECmHR, 1999; *Dermitt Barbatto v. Uruguay*, Human Rights Committee, App. No. 84/1981, paragraph. 9.2). In that respect, the Constitution enshrines the respect of human dignity, inviolability of the physical and mental integrity of man, and prohibits all violence against a person deprived of liberty (Arts. 28 and 31, more in chapter Treatment of Persons Deprived of Liberty, page 157). The Montenegrin Penal Sanctions Enforcement Act (PSEA, *Sl. list RCG*, 25/94, 29/94, 69/03 and 65/04) obliges all state authorities to provide health care to inmates and protect them from self-injury.

An adequate and thorough investigation must be conducted in the event a person deprived of liberty had committed suicide or been killed. If the investigation proves that state authorities are responsible for the death of the victim because of their actions or failure to act, the state may be found in breach of Article 6 of the ICCPR.²³⁷

The PSEA lays down the conditions in which coercion may be used against convicts: to prevent: 1) escape, 2) physical assault on an officer or another convict; 3) injury of another; 4) self-injury or material damage; 5) resistance to a lawful order of an officer if necessary. The PSEA restricts the use of firearms to a small number of situations, i.e. only if the officer is otherwise unable to 1) repel an immediate assault endangering his/her life or the life of another, 2) repel an attack on the building s/he is guarding, 3) prevent the escape of a convict serving the sentence of imprisonment in a high security ward, 4) prevent the escape of an escorted or guarded convict only if the convict was convicted for a crime warranting ten or more years of imprisonment and the officer was unable to perform his/her duty by applying other means of coercion (Art. 180).

The Act and the Rulebook on the performance of security duties, weapons and equipment of security guards in prison establishments (*Sl. list RCG*, 68/06) lay down that a security guard shall submit a report on the use of means of coercion and including an opinion of the chief of the security unit to the prison warden, who shall compose a report establishing the facts and assessing whether the guard exceeded his powers and submit it to the Ministry of Justice within three days at most (Art. 180). The PSEA, however, does not impose the obligation to notify the state attorney of the use of firearms, who could act on it and seek an investigation and possibly criminally prosecute the guards suspected of unlawful use of weapons.

The PSEA regulates quite thoroughly the use of firearms in Articles 159 and 180. The use of firearms is regulated in even greater detail by the Rulebook on the performance of security duties, weapons and equipment of security guards in prison establishments.

²³⁷ More in the Human Rights Committee views in the case of *Hugo Haraldo Dermitt Barbatto v. Uruguay* (App. No. 84/81). The Human Rights Committee found that the State party was under an obligation to establish the facts of Hugo Dermitt's death, to bring to justice any persons found to be responsible for his death and to pay appropriate compensation to his family (paragraph 11).

The above Rulebook in Article 48 provides that, if during the escort a death of a prisoner or detainee occurs, the leader of the escort group shall: secure the scene, notify the authorities in charge of the police and inform the immediate superior officer. The state prosecutor, responsible for conducting an independent investigation and determining whether the case contains elements of the crime, should be informed immediately.

Obligation to Protect from Risks to Life

The ECtHR underlines that a state has the positive obligation to take adequate preventive measures to safeguard the lives of persons within its jurisdiction under Article 2 of the ECHR.

Protection from violence committed by third parties. – The obligation of state authorities to act preventively to protect an individual whose life is endangered by the criminal actions of another individual arises if it is established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. (see *Paul and Audrey Edwards v. The United Kingdom*, 2002, paragraph 55). In the case of *Branko Tomašević and Others v. Croatia*, 2009, the ECtHR found Croatia in breach of the right to life because its state authorities failed to act and prevent a mentally unsound person from carrying out his death threats against his spouse and children. The competent authorities failed to ensure the enforcement of the security measure of mandatory psychiatric treatment, conduct a psychiatric evaluation before releasing the man and failed to search his vehicle although they were notified of his threats that he would use a bomb.

Article 168 of the Criminal Code incriminates Endangering Security and imposes a fine or maximum one-year imprisonment for anyone who threatens the life of body of another. As opposed to the articles on the other crimes in the same chapter on crimes against the rights and liberties of man and citizen, the provisions on this crime do not envisage a qualified form of the crime in the event it is committed by a person acting in an official capacity. Article 220 of the CC also incriminates domestic violence. The Montenegrin Assembly in 2010 adopted the Act on Protection from Domestic Violence (see Special protection of family and child, p. 424 for more on this Act).

Protection from health risks. – States have an obligation to take active measures to prevent malnutrition, promote medical care and other social welfare activities aimed at reducing the mortality rate and extending life expectancy (see: Human Rights Committee General Comment No. 6/16, 1982; more details are available on p. 524 under the Right to Health).

Protection from negligent treatment. – States are required to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives (*Calvelli and Ciglio*, 2002, paras. 48–49). The Criminal Code in that respect incriminates Negligent Medical Assistance (Art. 290), Failure to Provide Medical Assistance (Art. 292) and Quackery (Art. 293). Negligent medical treatment or the failure to provide medical assistance resulting in the death of the patient warrants imprisonment ranging between one and eight years, the same penalty is envisaged for e.g. manslaughter, which entails that the perpetrator committed the murder involuntarily in a state of high agitation brought on by an attack, assault or grave insult by the murdered. This norm cannot be perceived as fair because it indicates a specific degree of tolerance of medical negligence, demonstrated in practice by the fact that not one doctor in Montenegro has been found guilty by a final decision of malpractice or any of the listed crimes (more on p. 538).

On the other hand, the procedural obligation of the right to life in Art. 2 of the ECHR requires of the state to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable. This obligation does not entail establishing the responsibility of the doctor in every case, but, rather, the establishment of a procedure that will result in the effective determination of the cause of death and accountability for it (see *Šilih v. Slovenia*, 2009). The ECtHR has underlined that the prompt and thorough examination of cases concerning death in a hospital setting is necessary because knowledge of the facts and of possible errors committed in the course of medical care are essential to enable the institutions concerned and medical staff to remedy the potential deficiencies and prevent similar errors and thus ensure the right to life of users of all health services and added that a requirement of promptness and reasonable expedition, without delays, is implicit in this context. The ECtHR has not, however, defined the duration of reasonable. In the case of *Byrzykowski v. Poland*, 2006, the ECtHR found Poland in breach of the procedural obligation in Art. 2, because a final judgment had not been rendered in any of the proceedings initiated to determine who was responsible for the death of a pregnant woman in hospital, while, in the case of *Calvelli and Ciglio*, it did not find a breach of Art. 2, because the damaged parties ultimately settled with the hospital although the statute of limitations for criminal prosecution had expired and the civil proceedings lasted over six years.

Protection from environmental risks. – The state is under the obligation to provide information on risks and environmental risks to both the public and individuals affected by such risks (*Guerra and Others v. Italy*, 1998). The ECtHR found the state in breach of the right to life in a case concerning an explosion of methane at a garbage dump which resulted in the death of 39

people, because competent authorities at several levels knew or ought to have known that there was a real and immediate risk to the lives and health of the people living near the dump, but failed to take the appropriate preventive measures (*Öneryildiz v. Turkey*, 2004) ²³⁸.

Under Article 23 of the Constitution, “(E)veryone shall have the right to a healthy environment” (paragraph 1), the right to “be promptly and fully informed about the state of the environment, to influence decisions on issues of relevance to the environment and to the legal protection of these rights” (paragraph 2), while paragraph 3 of the Article obliges everyone, particularly the state, to safeguard and improve the environment.

The following five general laws govern environmental protection in Montenegro: the Environment Act, the Nature Protection Act, the Strategic Environmental Impact Assessment Act, the Environmental Impact Assessment Act and the Integrated Pollution Prevention and Control Act.

Environmental protection and sustainable development are also governed by the Nature Protection Act, National Parks Act, the Act on Protection from Ionising Radiation, the Waste Management Act, the Act on Protection from Noise, the Act on Waters, the Act on Forests, the Air Protection Act, the Act on the Sea and the Game and Hunting Act.

Under the Montenegrin Environment Act (*Sl. list CG*, 48/08), entities charged with environmental protection shall ensure the supervision and prevention of all forms of environmental pollution and degradation, and the mitigation and remediation of the parts of the environment the quality of which was damaged by pollution or degradation. Administrative duties regarding environmental protection shall be performed by the Environmental Protection Agency, which shall be charged with licensing, oversight, preparation of analyses and reports, inspection and communication with the relevant domestic and international authorities and organisations and the public. The Agency shall oversee the enforcement of the Act via environmental inspectors and in accordance with the regulations on inspectorial supervision. The Act’s penal provisions envisage fines against legal persons and entrepreneurs who commit environmental offences.

²³⁸ In paragraphs 59 and 60 of the judgment in this case, the ECtHR invoked the following European standards: CoE Parliamentary Assembly Resolution 587 (1975) on problems connected with the disposal of urban and industrial waste, Resolution 1087 (1996) on the consequences of the Chernobyl disaster, and Recommendation 1225 (1993) on the management, treatment, recycling and marketing of waste, the Committee of Ministers Recommendation No. R (96) 12 on the distribution of powers and responsibilities between central authorities and local and regional authorities with regard to the environment; the Lugano 1993 Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment and 1998 Strasbourg Convention on the Protection of the Environment through Criminal Law, the Council of the European Union’s Framework Decision no. 2003/80 of 27 January 2003 and the European Commission’s proposal of 13 March 2001, amended on 30 September 2002, for a directive on the protection of the environment through criminal law.

The Act lays down the obligation to adopt the following sustainable development and environmental protection documents: the National Sustainable Development Strategy, the National Environmental Protection Programme and local environmental protection plans, and stipulates the adoption of plans and programmes on specific aspects of environmental protection.

Under Article 26 of the Act, in the event of an accident, depending on its magnitude and the assessment of the damages it may incur on human life or the environment, the Ministry or local self-government authority shall declare an environmental state of the emergency and notify the public of the undertaken measures.

The Report on the State of the Environment in Montenegro is developed for a four-year period to monitor the achievement of the goals in the sustainable development and environmental protection documents stipulated by the Act and the strategic, plan and programme documents regarding specific environmental aspects and impacts and other environment-related documents and provide comprehensive insight in the state of the environment.

The Act envisages the establishment of a Register of Environmental Polluters, which shall comprise data on the sources, types, quantities, manner and sites of discharge, flow and disposal of pollutants and waste in the environment. The Environmental Protection Agency keeps an Integral Register of Polluters based on the local registers of environmental polluters kept by the local self-government units. A Register of Sources of Pollution, as the main instrument of policy for adopting and planning measures to prevent and/or reduce pollution, does not exist. There is a problem with local registers of polluters in local self-government units. The Nature Protection Act (*Sl. list CG*, 51/08) defines protected nature goods, such as: nature reservations, national parks, regional parks, natural monuments, protected species of flora and fauna and protected geological and paleontological sites. It lays down the procedures for the declaration, management and registration of protected nature goods.

The Strategic Environmental Impact Assessment Act (*Sl. list CG*, 80/05) governs the conditions, methods and procedures for assessing the impact of plans and programmes on the environment.

The Environmental Impact Assessment Act (*Sl. list CG*, 80/05) regulates the procedures for assessing the impact of projects that may have significant effects on the environment, the content of environmental impact assessment studies, the participation of stakeholders, organisations and the public, the assessment and consent issuance procedures, notification of other countries of projects that may impact on their environment, monitoring and other issues relevant to environmental impact assessment.

The Integrated Pollution Prevention and Control Act (*Sl. list CG*, br. 80/05) lays down the conditions and procedures for issuing integrated licences for activities and facilities that may negatively affect human health, the

environment or material goods, types of activities and facilities, oversight and other issues of relevance to pollution control and prevention. The types of activities and facilities requiring integrated licences are classified by the degree of pollution and risk they may incur to human health and the environment, including other technically similar activities that may produce emission or environmental pollution.

As mentioned, the Montenegrin Criminal Code devotes a separate chapter to environmental crimes, including the crimes of Environmental Pollution (Art. 303), Failure to Take Environmental Protection Measures (Art. 304), Illegal Construction and Startup of Facilities and Plants that Pollute the Environment (Art. 305), Damage to Facilities and Equipment for Environmental Protection (Art. 306), Damage to the Environment (Art. 307), Abuse of Genetically Modified Organisms (Art. 307a), Destruction and Damage to Protected Natural Goods (Art. 310), Importing Hazardous Substances in Montenegro (Art. 313), Unauthorized Processing, Disposal and Storage of Dangerous Substances (Art. 314), Unauthorized Construction of Nuclear Plants (Art. 315), Failure to Enforce Decisions on Measures to Protect the Environment (Art. 316), Violation of the Right to Information about the State of the Environment (Art. 317).

Abortion

Neither the ICCPR nor the ECHR define the beginning of life. The word “everyone” in Art. 2 ECHR allows interpretations that the life of the foetus is also protected, but the European Commission of Human Rights determined that no intention of State Parties to the Convention to protect the right to life of the foetus could be established from the context of Art. 2 (*X. v. The United Kingdom*, 1980). In its judgment in the case of *Vo v. France* in 2004, the ECtHR took the view that the question of when life begins was in the jurisdiction of the member states because there was no consensual definition, neither scientifically nor legally, of when life begins in Europe. The ECtHR confirmed that an embryo/foetus may have the status of a human being in terms of protection of human dignity, but not the status of an individual enjoying protection under Art. 2 of the ECHR.

Abortion is governed by the Abortion Act (*Sl. list CG*, 53/09). Under the Act, an abortion may be performed only at the written request of the pregnant woman, while the performance of an abortion of a minor or person under guardianship shall be allowed only with the consent of her biological or adoptive parent or guardian. A simple request for abortion by the pregnant woman suffices up to the tenth week (Art. 4) and exceptionally until the twentieth week of pregnancy. The decision on the abortion is taken by the doctor until the tenth week of pregnancy and by an abortion commission

during the following ten weeks. After the twentieth week of pregnancy, the abortion must be approved by the Ethical Committee of the Clinical Centre of Montenegro.

Article 150 of the Criminal Code incriminates Unlawful Termination of Pregnancy, i.e. an abortion performed, begun or assisted in contravention of the regulations. The penalty for the crime depends on whether the abortion was performed with or without the consent of the pregnant woman i.e. her parent or guardian and on whether the pregnant woman is under or over eighteen. The penalty is higher if the abortion resulted in the death, serious health impairment or other grave physical injuries of the woman whose pregnancy was terminated and ranges between six months and six years if the abortion was performed with her consent and between two and twelve years if it was performed without her consent.

Right to Life in Practice

Deprivation of Life by the State Officials and Deaths in Custody or Prison

The police did not deprive anyone of life and no one died in custody or in prison in Montenegro in 2010. Earlier cases of such deaths were, however, prosecuted in 2010 and the courts rendered three verdicts in 2010.

The Podgorica Superior Court on 5 October 2010 sentenced four persons, three former inmates and a girlfriend of one of them, to between two and 6.5 years in jail each for selling, dealing and facilitating the abuse of heroin in the Spuž penitentiary near Podgorica, which had resulted in the death of an inmate on remand, Alen Harović (25), in October 2009.²³⁹ Several penitentiary staff members were also investigated on suspicion of complicity in smuggling the drugs into the Spuž prison.²⁴⁰ The police remanded one staff member in custody but ultimately released him due to lack of evidence.²⁴¹ Disciplinary proceedings were initiated against five prison staff for failing to implement the procedures, which resulted in their failure to observe that all the prisoners in the cells were on drugs the day preceding the night in which Harović died and another cellmate poisoned himself with heroin.²⁴² One member of staff was criminally indicted for negligence because he failed to note during Harović's admission that he had been ordered compulsory drug addiction treatment. Instead of being subjected to the appropriate treatment in the Special Hospital, he was referred to the medium security ward of the

²³⁹ "Fifteen Years for Harović's Death", *Vijesti*, 6 October 2010.

²⁴⁰ "Drug Testing the Staff", *Dan*, 4 February 2010.

²⁴¹ *Ibid.*; "Cells are Clean", *Dan*, 21 November 2009.

²⁴² "Guards Saw Neither the Heroin nor the Cellmates Taking Drugs for Hours", *Vijesti*, 4 November 2009.

prison and put in a cell shared by inmates prone to drug use, the Justice Ministry stated.²⁴³ The results of the disciplinary proceedings or the criminal proceedings launched against the officials over the death of inmate Harović were not published by the time this report went into print.

In March 2010, the Danilovgrad Basic Court rendered a first-instance judgment upholding the compensation claim and establishing that the competent prison staff was responsible for the death of prisoner Dragan Kastratović, who was electrocuted as he tried to turn on a light bulb in his cell in 2007 due to the defective isolation and the improperly installed bulb socket.²⁴⁴ The court found that there were no grounds to relieve the prison staff of responsibility, because the prison authorities failed to prove during the trial that the cause of death “could not have been predicted, avoided or eliminated”. The court found that the electrical installations in Ward D2, where Kastratović had been incarcerated, did not fulfil even the minimum technical safety requirements and that they had led to the inmate’s death. At the critical moment, Kastratović came into contact with the line-to-neutral voltage and was electrocuted due to the defective electrical installations, the court stated in its first-instance decision. One of the witnesses, who testified during the proceedings, lay stress on the fact that the prison House Rules prohibited the use of electrical appliances, with the exception of transistor radios, in the cells at the time the accident occurred. The officers performing the inquiry found a television set, coffee cookers and several improvised cables and sockets in the cell.

The Appellate Court of Montenegro on 15 December 2010 upheld the six-year prison sentence rendered against police officer Rado Popović. The Superior Court had found Popović guilty of inflicting grave physical injuries to a Danijel Dedejić which resulted in his death in 2009.²⁴⁵ The young man was gravely injured in an incident on 9 June 2009, on the road at Mojkovac, after Popović hit him with his fist so hard that Dedejić fell on the asphalt and later died. Popović was off duty at the time and the incident followed a quarrel over Dedejić’s driving.

Aleksandar Saša Pejanović, a victim of police torture in 2008, was killed in Podgorica late May 2011.²⁴⁶ He was shot in the chest by his neighbour, a policeman Zoran Bulatović, who, according to neighbours, was in dispute with Pejanović. Investigating Judge of the Superior Court in Podgorica, Radomir Ivanović, said that the video surveillance system near the coffee shop where the murder took place recorded the event.²⁴⁷ Bulatović is a member of the Special Anti-Terrorist Unit (SAU), and at the time the murder he was not on duty,

²⁴³ “Culprits Identified”, *Pobjeda*, 7 November 2009.

²⁴⁴ “Electrocuted in Prison”, *Dan*, 18 March 2010.

²⁴⁵ News, *Vijesti*, 25 December 2010; “Remand for Popović”, *Vijesti*, 21 June 2009.

²⁴⁶ See chapter Prohibition of Torture, page 178.

²⁴⁷ “Aleksandar Saša Pejanović murdered, camera recorded the murder”, *Vijesti*, 30 May 2011.

but he killed Pejanović with his official gun.²⁴⁸ After shooting, Bulatović put Pejanović in his car and drove to the ER, where he was arrested.²⁴⁹

Previously described cases where active police officers appear as murderers, suggests that the Police had to implement a serious psychiatric evaluation of officers who are expected to utilize coercive means, particularly firearms, in order to prevent similar tragic events.

In early February 2011, suspect in killing of T. B., Batrić Jovičević (71), committed suicide in a prison hospital in Spuž. On that occasion ZIKS administration stated that Jovičević committed suicide at the time while other detainees placed in the same room with him were sleeping, using one end of the prepared piece of his clothing tied to the window bars. After that event, his attorney, lawyer Dobroslov Raičević, stated that Jovičević was not able to accept the crime he had committed, and that he was ill. According to eyewitnesses, he first tried to take away his own life immediately after the murder of T.B., but was prevented.²⁵⁰

In June 2011, a convict Radojko Jurišević died at the Clinical Center of Montenegro (KBC) after being transferred from prison in Podgorica in poor health, where he served his sentence. According to the official statement of the ZIKS administration, Jurišević died after he fell ill the previous night while watching TV in his room. The statement pointed out that Jurišević has had a heart disease, for which he was examined several times and received treatment.²⁵¹ However, the family of late Jurišević, based on information received from the medical staff, doctors and commanders present at KBC, expressed a doubt that Jurišević may have been poisoned by taking 60 tablets antidepressants, and that he had left a written record of it in his room.²⁵² Later, the ZIKS administration confirmed that such letter exists, but that the family can not confirm Jurišević's handwriting,²⁵³ and that a letter will be sent to the handwriting expert after receiving the autopsy findings. Autopsy report has not been completed by the end of work on the report.

Control of Weapons in Private Possession

One out of six Montenegrin citizens has at least one weapon, many of which are not registered. According to MIA's data, there are 105,000 registered small arms and light weapons in Montenegro and many more illegal weapons in private possession.²⁵⁴ The Memorandum of Understanding, signed by the

²⁴⁸ "Member of the Special Unit murdered Saša Pejanović", *Dan*, 31 May 2011.

²⁴⁹ "Aleksandar Pejanović murdered by a neighbor – police officer", *Pobjeda*, 31 May 2011.

²⁵⁰ "Because of love killed girlfriend first, then himself", *Vijesti*, 8 February 2011, "Hanged himself in jail", *Dan*, 8 February 2011.

²⁵¹ "Convict died", *Pobjeda*, 13 June 2011.

²⁵² "Radojko died from pill poisoning, not from heart attack", *Vijesti*, 13 June 2011.

²⁵³ "ZIKS claims to have been professional towards Radojko Jurišić", *Vijesti*, 14 June 2011.

²⁵⁴ "Control the Weapons or Destroy Them", *Pobjeda*, 30 November 2010.

Minister of Internal Affairs and Public Administration, Ivan Brajović, UNDP Resident Representative Alexander Avanesov and OSCE Head of Mission Sarunas Adomavicius, envisages upgrading the capacities of the law enforcement agencies, the control of small arms and light weapons and support to a public awareness campaign on the registration of weapons and confiscation of unregistered small arms and light weapons. The UNDP established a separate fund for placing this type of weaponry under control in Montenegro.

Unresolved Murders in Montenegro

Police data show that thirty murders remain unresolved in Montenegro.²⁵⁵ The best known ones include the assassinations of three senior Montenegrin security officials Goran Žugić, Darko Beli Raspopović and Slavoljub Šćekić, the murder of the daily *Dan* journalist and owner Duško Jovanović and the killing of writer Jevrem Brković's guard Srđan Vojičić during the assault on Brković.

Assassinations of Goran Žugić and Darko Raspopović. – Former chief of the Montenegrin Trade Mission in the USA Ratko Knežević said in 2009 that the murders of Goran Žugić, the chief of Podgorica police and security adviser to the then Prime Minister Milo Đukanović, and Darko Beli Raspopović, a senior state security official, in 2000 and 2001 respectively were the consequence of quarrels over the profits from cigarette smuggling, which the leading Montenegrin state officials were involved in together with the Italian mob and the criminals in the region. Although the Supreme State Prosecutor Ranka Čarapić said back in 2009 that she would request that Knežević be questioned about his allegations, he had not been interrogated until the end of 2010 because the Croatian authorities failed to serve him the summons.²⁵⁶ The President of the Podgorica Superior Court Mušika Dujović rejected the prosecutor's motion that Court investigating judge question the then PM Milo Đukanović and businessman Stanko Subotić aka Cane within the investigation of Žugić's and Raspopović's deaths.²⁵⁷ The Prosecution Office appealed with the Supreme Court, which partly upheld the appeal and opted for a "compromise" solution – that the judge first hear Knežević and the others later on, if necessary.²⁵⁸ The authorities failed to publish any information on how the investigation of this case was progressing by May 2011.

Murder of Duško Jovanović. – As far as the police are concerned, the murder of the daily *Dan* editor Duško Jovanović has been "resolved", and as the daily *Vijesti* was unofficially told by the Police Directorate, nothing new has been revealed during the investigation for nearly two years now.²⁵⁹

²⁵⁵ "Shedding Light on the Unresolved Murders is a Priority", *Pobjeda*, 29 March 2011.

²⁵⁶ "They Don't Know Ratko's Address", *Dan*, 20 December 2010.

²⁵⁷ "Mušika Refuses to Question Milo and Cane", *Dan*, 20 January 2010.

²⁵⁸ *Ibid.*

²⁵⁹ "Police not looking for Stojović and Softić's attackers for a while", *Vijesti*, 3 December 2010.

Jovanović was killed on 27 May 2004. One day before his death, he reported the threats, which he thought were linked to *Dan*'s reports on the cigarette smuggling scandal implicating numerous powerful people with links to the Government and the then Prime Minister of Montenegro.²⁶⁰ Although seven years have passed since Jovanović's death, the reason why Jovanović was killed or who may have ordered his murder, which the senior Montenegrin police officials claim was not politically motivated, remain unknown.

Damir Mandić, who had initially been acquitted due to lack of evidence, was sentenced for participation in the killing to 30 years in jail in a retrial. The Appellate Court reduced his sentence to 18 years imprisonment. His accomplice who actually shot Jovanović or the people who ordered the killing have not been identified yet.

The prosecution office never explained why it took them four years, until 2008, to send the DNA of suspects Vuk Vulević and Muso Osmanagić for testing.²⁶¹ The latter were publicly suspected of the crime by senior police officials at the very start of the investigation, but were never indicted.

In early April, the Montenegrin press carried the allegations by the Belgrade daily *Blic*, which published a series of articles describing the organised involvement of criminals in Serbia in hiding Duško Jovanović's killers in 2004 and the assassins of police inspector Slavoljub Ščekić a year later. *Blic* said that the Montenegrin state security ordered both assassinations.²⁶²

Damir Mandić's defence counsel claims he was convicted on circumstantial evidence and that the authorities were keen on convicting someone without identifying who had ordered or actually shot Jovanović dead.²⁶³ The Supreme Court in 2010 dismissed the motion for the protection of legality Mandić had filed against the Appellate Court judgment. The Constitutional Court's decision on his constitutional appeal against the violation of his right to a fair trial was still pending at the time this report was published.²⁶⁴

In April 2011 *Dan* has released an official note that was allegedly made by a former Special Advisor to the Deputy Minister of Internal Affairs and the (then) Chief of State Security of Duško Marković, Vasilije Mijović, on 30 May 2004. The note quotes one witness, also a former employee of the State Security Agency (SDB), according to which the witness saw, from the balcony of his apartment in the night when the killing took place, Vuk Vulević and Damir Mandić getting out of the car.²⁶⁵

²⁶⁰ "Miodrag Jovanović Thanks Andrija Jovičević", *Pobjeda*, 28 October 2005.

²⁶¹ "No Traces of Muša and Vulević in the Golf", *Vijesti*, 01 June 2010.

²⁶² "Duško's Killers were Protected by Montenegrin State Security Officers", *Vijesti*, "Vuk and Čila were in the Golf", *Dan* 5 April 2011.

²⁶³ "Mandić Preparing Himself for Strasbourg, Too", *Vijesti*, 23 November 2010, "Judgment against Damir Mandić to be Reviewed in February", *Dan*, 24 January 2011.

²⁶⁴ *Ibid.*

²⁶⁵ "Witness saw Vulević getting out of the 'killer Golf'", *Dan*, 16 April 2011.

According to the same note, stamped by the Ministry of Internal Affairs, which was created based on informal conversation between Vasilije Mijović and a witness whose name was not released, the witness said that, out of fear for the safety of his family, he did not report his findings: “I am not crazy, that would kill my children, do you know who Vuk Vulević and Damir Mandić are? They are Agency people and beasts. Do you know that in 2000 Vuk killed Beli Raspopović in the middle of the day in the Slobode street,²⁶⁶ and Ranko Krivokapić witnessed the crime,²⁶⁷ but did not report it?! He also killed Miško Krstović at the same place in 2001.²⁶⁸ Everyone knows that. No one can reach them. I don’t want to get into trouble.”²⁶⁹ Duško Marković, Minister of Justice, stated that he had never seen this note, and that he first received it from the *Dan* the editorial board, after which he submitted it to the Prosecutor’s Office,²⁷⁰ and that the official note regarding Vasilije Mijović does not exist in the documentary fund of the SDB, nor it has listed in the SDB archives for 2004. As the prosecution had initiated the proceeding on this occasion, the witness from the note testified and denied that he had given the above statement to Vasilije Mijović, and to on this date, when the note was allegedly made, he was in Belgrade. He also stated that he was on good terms with Mijović and that he could not understand why after 7 years he went public with his claims.²⁷¹ During interrogation, Mijović repeated statements from the note and said that (the minister) Marković is trying to kill him, because, according to him, in early April 2010 he sent assassins to silence him, which was rejected by Markovic as a fabrication.²⁷² Although allegedly, right after the arrest, Mandić said that Vulević had murdered Jovanović, there is no official note on that. Later in the trial he defended himself with silence.²⁷³ By the time this report went into print, the prosecution has not completed investigation as regards the note.

Although the Supreme State Prosecutor’s Office (SSP) twice refused to give information on progress in the investigation of co-perpetrators and the one who ordered the murder of Duško Jovanović, in late May 2011 the Administrative Court adopted HRA claim, annulled the decision by which the Ministry of Justice (as the second instance) confirmed this decision of the SSP, and ordered the adoption of new decision.²⁷⁴

²⁶⁶ An official of the State Security of Montenegro, Darko Raspopović Beli, murdered in January 2001.

²⁶⁷ Speaker of the Parliament of Montenegro.

²⁶⁸ Private entrepreneur, killed in April 2001.

²⁶⁹ “I do not dare to testify, the SDB protected Vuk when he killed Beli”, *Dan*, 17 April 2011.

²⁷⁰ “Marković forwarded the note to the Prosecution”, *Dan*, 30 April 2011.

²⁷¹ “The witness interrogated because of official note”, *Dan*, 7 May 2011.

²⁷² “Mijović: Duško sends assassins to silence me, Marković: Vaso making up things again”, *Dan*, 2 June 2011.

²⁷³ “Regime returns a bloody debt”, *Dan*, 21 July 2010.

²⁷⁴ HRA press release on that occasion available at: <http://www.hraccion.org/?p=867>.

Assassination of Slavoljub Šćekić. – Slavoljub Šćekić, a Montenegrin police inspector and head of the department for the suppression of general crime, was killed near his home in Podgorica on 30 August 2005. The indictment referred to a number of members of a crime group: Ljubo Vujadinović and Milan Čila Šćekić were accused of committing the murder, and Saša Boreta and Ljubo Bigović of organising a group that tried to commit extortion, i.e. “racketeer” the company *Montenegrostars group* by planting explosives at the Hotel Splendid construction site, owned by the company, on three occasions. When the police investigation headed by Inspector Šćekić identified the member of Alan Kožar’s group that planted the explosives, the group organised Šćekić’s assassination. Vuk Vulević, his father Radoslav, Danica Vuković, Goran Živković and Dušanka Vujović were also indicted on criminal conspiracy charges. Only Milan Čila Šćekić was tried *in absentio*, because he was at large throughout the trial. The first three-year trial ended in August 2009. Saša Boreta, Ljubo Bigović and Ljubo Vujadinović were found guilty of organising the assassination and sentenced to 30 years in jail each, while Milan Čila Šćekić was acquitted of shooting Šćekić due to lack of evidence. The first-instance judgment convicted him to three years in jail for criminal conspiracy, while Alan Kožar was sentenced to 20 years in jail and Dušanka Vujović to two years’ imprisonment for unlawful possession of weapons. Vuk Vulević and his father Radoslav, Danica Vuković and Goran Živković, who had been indicted for criminal conspiracy and document forgery, were acquitted.

The Appellate Court overturned the judgment in early March 2010 and ordered a retrial due to a number of violations of procedural rules during the formulation of the judgment, wherefore the judgment was not founded on the amended indictment, and was incomplete and contradictory.²⁷⁵

On the fifth anniversary of Šćekić’s death in 2010, his sister reiterated that she believed that the assassination of her brother had not been fully resolved because some police officers and all the people, who had ordered his killing, had not been indicted.²⁷⁶

A series of controversies accompanied the first-instance trial to date. The State Prosecutor Stojanka Radović, the Deputy Supreme State Prosecutor, based the indictment also on the deposition of protected witness Zoran Vlaović, who testified that Boreta admitted to organising the assassination while they were in jail together. The court did not believe him in its first-instance verdict. Vlaović lost the status of protected witness after testifying, because his identity was revealed, and then he himself spoke up and stopped cooperating. The indictees’ defence counsels insisted that this witness, who was convicted *inter alia* for rape, forgery and fraud in Belgrade in 2001 and was serving his sentence in Serbia, was unreliable. They also claimed that he

²⁷⁵ “Aković Got the Indictment Wrong, Too”, *Vijesti*, 5 March 2010.

²⁷⁶ “State Concealing Those Who Ordered the Assassination”, *Dan*, 31 August 2010; “Trial at Square One, No Trace of Those Who Ordered the Assassination”, *Vijesti*, 30 August 2010.

had committed several crimes while he enjoyed the status of protected witness in Montenegro and that his prosecution for these crimes was allegedly prevented by State Prosecutor Radović.²⁷⁷ All these details gave rise to controversies about the high costs of his protection. The indictees' counsels accused the prosecutor also of planting evidence. They have claimed from the start that their clients had nothing to do with Šćekić's murder and that the indictment was made up to draw attention away from the real reasons for his assassination, which the "police circles" were responsible for.²⁷⁸ In April 2011, the Belgrade daily *Blic* quoted "unofficial police sources" as saying that the Montenegrin state security had cooperated with criminals in Montenegro and Serbia in the killings of Duško Jovanović and Slavoljub Šćekić, and that Šćekić was killed to prevent the further investigation of Jovanović's assassination.²⁷⁹

The retrial in the first instance ended in March 2011. The verdict, published on 12 May 2011, convicted Ljubo Vujadinović and Milan Čila Šćekić, extradited in late May 2011 from the Netherlands to the Montenegrin police²⁸⁰, to 30 years in jail each. Saša Boreta and Ljubo Bigović were also sentenced to 30 years' imprisonment for inciting Šćekić's assassination.²⁸¹ Alan Kožar was convicted to six years and ten months in prison for attempted extortion and planting explosives. Boreta, Bigović, Kožar, Vujadinović, Šćekić, Vuk Vulević, Goran Živković, Dušanka Vujović, Radoslav Vulević and Danica Vuković were acquitted on charges of organised criminal conspiracy due to lack of evidence.

Murder of Srđan Vojičić and Assault on Jevrem Brković. – According to unofficial police sources, the last action in the investigation into the death of Srđan Vojičić in 2006, of which no one has been accused yet, was performed in the first half of 2010.²⁸² Vojičić's uncle accused the investigating authorities of covering up the crime and alleged that two National Security Agency (ANB) officers commanded the assault on writer Brković, in which Vojičić was merely "collateral damage".²⁸³ Former ANB Director, now Deputy Prime Minister and Justice Minister Duško Marković said the authorities knew who was responsible for the killing but lacked the material evidence to prove it.²⁸⁴ In April 2011, the leader of the political party Movement for Changes,

²⁷⁷ "Majk Not to Testify about Ljubo Bigović", *Vijesti*, "Criminal Report for Fabricating Evidence", *Dan*, 18 December 2010. "Vlaović Deceived Merchants by Impersonating 'Stojanka's Bodyguard'", *Vijesti*, 23 November 2010.

²⁷⁸ *Ibid.*

²⁷⁹ "Montenegrin State Security Protected Duško's Killers", *Vijesti*, "Vuk and Čila were in the Golf", *Dan* 5 April 2011.

²⁸⁰ "Čila landed in Spuž", *Vijesti*, 28 May 2011.

²⁸¹ "120 Years of Imprisonment for Killing Šćekić, Racketeering and Bombs", *Vijesti*, 10 May 2011.

²⁸² "Police Stopped Looking for Assailants on Softić and Stojović a Long Time Ago", *Vijesti*, 3 December 2010.

²⁸³ "ANB Officers Were in Command", *Dan*, 25 October 2010.

²⁸⁴ "What I Know Will Remain Secret Forever", *Vijesti*, 25 February 2011.

Nebojša Medojević, said that there were a number of witnesses who could reliably testify about the links between Police Director Veselin Veljović and the so-called Zagorica criminal clan, which was responsible for the assault on Brković and Vojičić's murder.²⁸⁵ Brković earlier said that he believed that his book "Lover of Duklja" was the reason behind the attack on him and Vojičić's murder. In his book, published just before the attack, Brković described the criminal ties of the topmost Montenegrin government officials.²⁸⁶

The unresolved deaths of persons on board Miss Pat. – The boat "Miss Pat", registered for transport of six persons and two crew members, had about 70 Roma people, including children, on board, and after several hours of sailing in August 1999 sank en route from Montenegro to Italy. The shipwreck has killed 37 people and children, while others disappeared. The basic prosecutor in Bar in 2002 charged seven persons for crimes Illegal border crossing in relation to Serious crime against public safety and Causing general danger. The trial began in January 2003, but it was delayed a total of 18 times until February 2004, due to the absence of witnesses and failure to provide a qualified interpreter for the Roma language.²⁸⁷ After the State Prosecutor's Office changed the indictment after the trial held in April 2004, the case has been moved to the jurisdiction of the Superior Court, and the proceedings adjourned indefinitely.²⁸⁸ Superior State Prosecutor in Podgorica filed a request for conducting investigation in late May 2004.²⁸⁹ The case was under investigation for over two years (until November 2006) when the indictment was amended for the third time.²⁹⁰ The trial expected to begin in September 2010 has been repeatedly postponed, first because of the translation of the indictment to Roma language,²⁹¹ and later because of the failure to provide an interpreter for Roma language, so the trial was scheduled to continue on 20 July 2011.²⁹² So, in the proceedings that started in 2002, to establish liability in the event that killed at least 37 people, after eight years of trial, the first instance verdict has not been rendered. In this way, both the State Prosecutor's Office and the courts have shown an extremely irresponsible position regarding the protection of the right to live in Montenegro. Also, it is reasonable to question whether the delay is a result of discrimination, since the victims are Roma.

²⁸⁵ "Vojičić's Killers Treated Veljović's Wife", *Vijesti*, 9 April 2011.

²⁸⁶ "Bodyguard Slain in Attempt to Assassinate Well-Known Writer", *Vijesti*, 25 October 2006.

²⁸⁷ "Trial scheduled 18 times", *Vijesti*, 24 February 2004.

²⁸⁸ "The process moves to Podgorica", *Vijesti*, 23 April 2004.

²⁸⁹ "I expect the perpetrators to be punished", *Vijesti*, 5 September 2004.

²⁹⁰ "New indictment against eight persons for sinking the boat 'Miss Pat'", *Vijesti*, 24 November 2004.

²⁹¹ "Indictment being translated into Roma language", *Vijesti* 29 September 2009.

²⁹² "No interpreters for Roma language", *Vijesti*, 16 June 2010.

Deaths Due to Domestic Violence and Inappropriate Treatment of Mentally Ill Persons

The nine grave homicides, which occurred in Montenegro in 2010, have been solved.²⁹³ This concerning number of homicides in 2010, and the preceding years, can be ascribed to the failure to prosecute domestic violence cases or the inappropriate treatment of mentally ill persons.

Psychiatric examinations in 2009 demonstrated that five of the 40 homicides had been committed by registered mentally ill persons.²⁹⁴ Medical specialists say that the risk of aggressive and violent conduct can be predicted and monitored with significant reliability, but that there is no teamwork between the families, primary health institutions (outpatient health clinics), the social care centres and the police, i.e. experts in various professions who would be trained in working with mentally ill persons in the community.²⁹⁵

Simo Žižić from Šavnik was accused of pre-meditated cruel murder of his wife Zlatija in June 2010, with whom he had frequently quarrelled. After killing his wife, he buried her in their yard.²⁹⁶ Žižić confessed and said he killed his wife because she had harassed him for years. He was referred for psychiatric observation in November 2010.²⁹⁷

Tomica Milačić stabbed his wife Svjetlana to death after they quarrelled for days in their summer cottage at Veruša in mid-August 2010. His trial continued in 2011.²⁹⁸

Radenko Bošković has been indicted for the murder of his mother Danica Bošković in September 2010. According to the indictment, he hit his mother with a wooden stake on her head, arms and leg, inflicting on her grave injuries in front of their family home.²⁹⁹ He then would not let her enter the house and she spent the next two days in a nearby field, where she died. Their family members said that Bošković brutally beat up his mother three times in the recent years, that they reported the beatings to the police but that “nothing helped ... they would arrest him and immediately set him free”.³⁰⁰

Aleksandar Saveljić has been accused of killing his mother Mileva and his sister Ljiljana Saveljić, who were found dead in their Podgorica apartment in mid-December 2010.³⁰¹ The media reported that the neighbours heard

²⁹³ “Mothers Are the Most Frequent Victims”, *Dan*, 31 December 2010.

²⁹⁴ “Therapy Pre-Empts Plunge into Insanity”, *Pobjeda*, 21 February 2011.

²⁹⁵ *Ibid.* (statements by Dr. Željko Golubović and Dr. Tanja Mijatović – Papić).

²⁹⁶ “Strangled Wife with Rope”, *Dan*, 20 July 2010.

²⁹⁷ “Referred to Dobrota for Strangling Wife”, *Dan*, 9 November 2010.

²⁹⁸ “Slit Wife’s Throat”, *Vijesti*, 12 January 2011.

²⁹⁹ “Accused of Killing His Mother”, *Dan*, 27 November 2010.

³⁰⁰ “Police and Court Did Not Want to See Our Mother’s Plight”, *Vijesti*, “We Had Warned Our Brother Would Kill Our Mother”, *Dan*, 15 September 2010.

³⁰¹ “Killed His Mother and Sister”, *Pobjeda*, “Mother and Sister Slain”, *Dan*, 15 December 2010.

Saveljić quarrel with his mother and sister the night preceding the murders, and that he had tried to kill his mother two years earlier, that he had tried to commit suicide as well and that he suffered from a psychological disorder since his incarceration in a camp at Vukovar during the war.³⁰² The Association of the 1990s War Veterans reacted by recalling that the state, too, was responsible for the tragedy, because Montenegro was the only country in the region recently torn by wars, which has not dealt with the problem of the post-traumatic stress disorder (PTSD) among war veterans in an organised fashion, i.e. has not registered or provided adequate treatment to people suffering from PTSD.³⁰³ They underlined that not only did the competent state authorities turn down the Association initiative and open social and health files on all wounded and ill veterans, which would have constituted the basis for providing them with various forms of assistance, including the treatment of those suffering from the PTSD, but that they prevented the Association from keeping such records as well.³⁰⁴ The Committee on Economic, Social and Cultural Rights pointed to this problem in its conclusions on Serbia and Montenegro in 2005.

The state have failed to provide registered psychiatric patient Feriz Sijarić with appropriate treatment and monitoring and thus prevent him from inflicting grave injuries to his 11-year-old neighbour who was on her way to school with his knife in October 2010 by providing him.³⁰⁵ The girl would have died if it hadn't been for her school bag which cushioned the knife stabs and prevented the blade from cutting her vital organs (more on the treatment of Feriz Sijarić in detention on page 163).

In September 2010, Muharem Škrijelj from Rožaje seriously injured his former wife and their unborn child with a knife. Immediately after the incident, the mother delivered the baby prematurely.³⁰⁶ Škrijelj was sentenced to two months' imprisonment in the first instance for beating up his wife twice in May 2010, when she was six months pregnant, and was convicted by a first-instance decision to one year in jail for the crime of domestic violence after he beat her up again in June 2010.³⁰⁷

The Bijelo Polje Superior Court sentenced Enisa Kurpejović to two years in jail in November 2010 for the attempted murder of her husband Enver in March 2010, when she knifed her husband and inflicted on him grave bodily injuries that could have cost him his life. The Court simultaneously acquitted Enver of domestic violence charges. Enver had been charged with violating his wife's and mother-in-law's physical and mental integrity and inflicting physical injuries on them.³⁰⁸

³⁰² "Psychiatric Patient Worked in Government", *Dan*, 18 December 2010.

³⁰³ "State, Too, to Blame", *Dan*, 19 December 2010.

³⁰⁴ *Ibid.*

³⁰⁵ "I'll Sue the State Because My Child Almost Died", *Vijesti*, 14 October 2010.

³⁰⁶ "Claims He Injured Wife Out of Fear", *Dan*, 16 September 2010.

³⁰⁷ "One Year Jail for Violence Preceding Attempted Murder", *Pobjeda*, 29 September 2010.

³⁰⁸ "Wife in Jail, Husband Free", *Dan*, 23 November 2010.

In February 2010, the Podgorica Superior Court rendered a five years' imprisonment sentence against a man from Nikšić who tried to kill his wife in 2006 by stabbing her in the chest, stomach and shoulders a number of times.³⁰⁹ According to the media reports in 2007, the man was a chronic psychiatric patient, suffering from psychosis i.e. pathological jealousy.³¹⁰

In December 2010, the criminal chamber chaired by judge Zoran Šćepanović of the Podgorica Superior Court rendered a first-instance judgment finding Suzana Vučinović from Tivat guilty of killing Vaselj Camaj in May that year and sentenced her to four years in jail. In the reasoning of the verdict, the judge said that the court dismissed the defence counsel's allegations that she killed Camaj in self-defence. Vučinović claimed that she had answered Camaj's help ad and that he held her in his apartment for two days, where he sexually abused and tortured her. A specialist doctor who examined corroborated she had bodily injuries, the police stated at the time.³¹¹ S.J., who had earlier reported Camaj to the police and also claimed that she was abused in a similar manner, testified in court for the defence.³¹² The files of two other cases charging Camaj with domestic violence and family violence and tried in the same court were presented during the proceedings.³¹³ The Executive Director of the NGO Safe Women's House, Ljiljana Raičević, notified the investigating judge in this case that as many as four women, who had sought shelter with her organisation, also claimed that they had been abused by Camaj.³¹⁴

Environmental Protection and Public Health Risk Alerts

Regarding the Government plans to flood the Morača River to build hydro-electric power plants, the public lacks data on how such projects may endanger the environment. Non-governmental organisations (Green Home, Forum 2010, MANS) have repeatedly warned that the Government has not been notifying the public of its plans regarding the Morača River in detail or on a regular basis.³¹⁵

According to the Environmental Protection Agency data, the list of environmental hotspots has not changed for years and hardly any headway has been made, apart from the remedying of the waste disposal site in Mojkovac.³¹⁶

³⁰⁹ "Five Years for Attempted Murder", *Dan*, 10 February 2010.

³¹⁰ "Pathological Jealousy to Blame", *Dan*, 4 November 2007.

³¹¹ "She Stabbed Him after He Raped Her", *Dan*, 18 May 2010.

³¹² "The Witness from Safe Women's House Should be Questioned", *Dan*, 12 October 2010; "Witness Was Victim of Assault", *Dan*, 7 December 2010.

³¹³ "Capacity of Accused Significantly Diminished", *Dan*, 16 September 2010.

³¹⁴ "Four Camaj's Victims Sheltered in Safe Women's House", *Vijesti*, 19 May 2010.

³¹⁵ "From Podgorica to Brussels", *Monitor*, 18 March 2011; "Green Home, MANS and Forum 2010 Call on Government and Prime Minister Lukšić to Annul Tender on Concessions for Morača Hydro-Electric Plants", *Vijesti*, 28 March 2011;

³¹⁶ "Snow Stops Work on Mojkovac Disposal Site", *Dan*, 5 February 2011.

Following is the list of the persistent environmental hotspots in Montenegro, three of which are in Pljevlja.³¹⁷

- Podgorica: Podgorica Aluminum Plant (KAP, red silt ponds and industrial waste depot);
- Nikšić: Ironworks (industrial waste depot);
- Bijela: Adriatic Shipyard Bijela (industrial waste depot, grit);
- Mojkovac: the closed lead and zinc mine “Brskovo”;
- Pljevlja: Thermal Electric Power Plant Pljevlja (ash and cinder disposal site “Maljevac”) and Gradac Pljevlja (flotation waste from the closed mine “Šuplja Stijena” Pljevlja); Coal Mine A.D. Pljevlja.

In mid-May 2011 the Ministry of Sustainable Development and Tourism announced the recovery of these environmental black spots within the project “Industrial waste management and cleaning”, worth about 14 million, which is to be implemented by the Ministry of Sustainable Development and Tourism in cooperation with the World Bank.³¹⁸

The NGO Green Youths recalled that Pljevlja was the most polluted town in all of Montenegro, maybe even in Europe, and that its “residents drink, eat and breathe in phenol, fluoride, nitric oxides, hydrogen sulphide, heavy metals, cadmium, lead, chrome, and even radioactive thorium and uranium to a much greater extent than other people”.³¹⁹

Industrial and energy complexes using old technologies and usually not applying anti-pollution measures, such as filters, are the greatest sources of pollution in Montenegro. Traffic pollution is on the rise, particularly in urban areas. Apart from utility wastewater, which is usually deposited into the rivers, lakes or the sea, the water is also polluted by unprocessed industrial wastewater and inadequate waste disposal. Data on produced, collected, treated and deposited amounts and specific types or routes of waste are either incomplete or non-existent, wherefore waste management planning is still largely based on blanket assessments.³²⁰ Communal waste recycling is rare and only one depot (for the municipalities of Podgorica, Cetinje and Danilovgrad) is currently operational in the Podgorica Municipality. A waste classification recycling centre was recently opened in it.

Inadequate waste disposal, most often at ordinary dumps, significantly pollutes the air, land, underground and surface water. Given that there is no adequate classification of different types of waste before its disposal, waste that has the features of being hazardous is frequently mixed with other types of waste, which increases the health threats.³²¹

³¹⁷ “Montenegro Riddled with Hotspots”, *Dan*, 28 November 2010; see also “Human Rights in Serbia and Montenegro – 2005”, Belgrade Centre for Human Rights, Belgrade, 2006.

³¹⁸ “For black spots 14 million”, *Vijesti*, 17 May 2011.

³¹⁹ “Whole City Like the Mine”, *Dan*, 30 March 2011.

³²⁰ Assessment by NGO Green Home, Podgorica, interview with Green Home Director Darko Pajović, April 2011.

³²¹ *Ibid.*

The Environmental Protection Agency charges fees for depositing hazardous waste containing toxic substances. The Podgorica Aluminum Complex, for instance, has to pay 45,847.71 Euros in environmental tax every month, while the Nikšić Ironworks is charged an environmental tax of 1,135.14 Euros a month, etc.³²² The collected tax is paid into the state budget because, as opposed to some other countries, Montenegro has not established an environmental fund that would guarantee that the money collected through environmental taxes is used to improve the environment. On the other hand, as opposed to Montenegro, many countries have abolished dirty technologies, because the use of such taxes is unaffordable given the pollution taxes, the lawsuits the companies are sure to face and the indemnification they risk paying.

Montenegro does not have an active or adequate penal policy against violations of environmental law. According to the leading officers in the Environmental Protection Agency, most of the criminal and misdemeanour reports they file against polluters are dismissed because of the judges' and prosecutors' lack of knowledge about pollution and the vaguely worded legal provisions.³²³

According to the State Prosecutor's 2010 Annual Report, only one criminal report was filed in 2010 for the crime of Environmental Pollution (Art. 303, CC) and Environmental Damage (Art. 307), two were filed for Destruction of and Damage to a Protected Natural Good (Art. 310, CC) while no reports were filed for the crime of Failure to Take Environmental Protection Measures (Art. 304, CC) or for Unlawful Construction and Operation of Facilities Polluting the Environment (Art. 305).³²⁴ According to the Report, six of the reports regarding environmental pollution were pending and another six were processed at the end of 2010. The Report, however, does not specify what decisions the prosecutors ultimately made. One indictment for the failure to undertake environmental protection measures was filed in 2010 and another was processed in 2010, but, again, the Report does not specify what the prosecutors ultimately decided.³²⁵

After nearly two years, the Prosecution Office dismissed the criminal complaint charging the KAP and the company management director Vyacheslav Krylov with the Failure to Undertake Environmental Protection Measures submitted by the Environmental Inspectorate after nearly a ton of caustic acid was leaked into the Morača River.³²⁶

³²² "Podgorica Aluminum Complex to Pay Half a Million for Poisoning", *Dan*, 13 March 2011.

³²³ "Garbage Here, There and Everywhere Around Us", *TV Vijesti's* documentary, statement by Environmental Protection Agency Director Daliborka Pejović, see also "Krylov and KAP Won't Go to Court", *Dan*, 23 December 2010.

³²⁴ State Prosecutor's 2010 Annual Report.

³²⁵ *Ibid.*

³²⁶ "Krylov and KAP Not Going to Court", *Dan*, 23 December 2010.

Over 6,760 cubic metres of wood were cut in Montenegro's state-owned forests, while over 1,100 cubic metres of wood were illegally exploited in private forests in 2010. A total of 162 criminal complaints were filed over illegal wood cutting in 2010. Nine criminal complaints were filed against identified perpetrators and 134 reports against unidentified perpetrators for cutting down over 4,800 cubic metres of wood altogether.³²⁷

The Mojkovac company Trudbenik devastated the national park Durmitor when it cut an 11 km road through Dragišnica in 2009. The Nature Protection Bureau is now implementing a programme to remedy the area. Trudbenik owner Vuksan Radonjić was twice found guilty in first-instance trials of devastating the national park and building a road through the protected area and sentenced to a total of 15 months in jail, while his company has been ordered to pay a total of 40,000 Euros in fines.³²⁸ Neither sentence has, however, become legally binding yet.³²⁹

Montenegro does not have a register of sources of pollution, the basic instrument used in implementing policy measures and plans for preventing and/or reducing pollution emissions.

The destruction of surplus weaponry pursuant to the military technical agreement between the Montenegrin and US governments in the Nikšić municipality, in the area of Mount Golija, prompted continuous protests by the villagers fearing for their health and environmental pollution since early August 2010. The physical and chemical analyses of the samples of the surface waters, land and vegetation, conducted in late August and October 2010 by the Podgorica-based Centre for Ecotoxicological Research (CETI) at the request of the Defence Minister and by the Belgrade-based Vinča Institute at the request of the local residents' Golija Protection Committee rendered different results.³³⁰ CETI's analyses, conducted one month after the destruction of the weapons began, showed that all the values were within the prescribed limits at the analysed sites. CETI ascribed the somewhat higher values of heavy metals in the land to its composition and the vicinity of the Ironworks, the Gacko Thermal Electric Plant and the highway. After conducting its own analyses in October, Vinča found a higher concentration of heavy metals in the land at a number of sites and noted that it may be the consequence of the destruction of surplus ammunition. The Vinča Institute was unable to reach more specific conclusions because analyses that would have served as a basis for comparison had not been conducted before the destruction of the weapons began.³³¹

³²⁷ "Reports do not protect forests", *Vijesti*, 21 March 2011.

³²⁸ "Ten Thousand Euros and Three Months in Jail", *Vijesti*, 20 November 2010.

³²⁹ "Dragišnica Case Adjudicated in Advance", *Dan*, 11 April 2011; Data obtained from the NGO Green Home.

³³⁰ "Fewer Weapons, More Poison", *Vijesti*, 3 January 2011; "They Are Poisoning us and Want to Drive us Away from Our Hearths", *Vijesti*, 22 February 2011.

³³¹ "Fewer Weapons, More Poison", *Vijesti*, 3 January 2011.

The Assembly Tourism, Agricultural, Environmental Protection and Spatial Planning Committee concluded in February 2011 that the Defence Ministry should publish the main data on the destruction of surplus ammunition and conduct environmental and population health impact assessments.³³² During the debate in the Assembly Committee, initiated by the NGO MANS in late 2010 on behalf of the residents, Assistant Defence Minister Rafet Kosovac explained that no environmental impact assessment for the Praga site was conducted prior to the destruction of the ammunition because the Environmental Impact Assessment Act “does not regard defence-related activities” but that such assessments would not be superfluous in the future.³³³

Injuries at Work

Thirty miners were injured in the Coal Mine in Pljevlja in the first 11 months of 2010, 26 of them lightly and four of them gravely.³³⁴

The Pljevlja Union of Free Trade Unions warned that the large number of injuries at work was linked to the lack of protective equipment and insistence on its use. The Mine management, however, denied that.³³⁵

The environmental inspectorate had not received feedback from the prosecution office by February 2011 about the fate of its criminal report against KAP and the company’s responsible officers for endangering the health of the workers during the removal of radioactive lightning rods.³³⁶

Inspections of 48 sites of accidents, four of which ended in deaths and one of which resulted in multiple casualties, were conducted in the first 10 months of 2010.³³⁷ Forty-three of the injuries at work were grave. The inspectors concluded that most of the injuries occurred because the companies hired unqualified workers, did not conduct check-ups of the workers’ health, used rundown equipment and did not check whether it was in order. The workers who had suffered injuries at work were mostly unregistered, i.e. illegally hired, the Inspectorate’s January–October 2010 Report stated. In the latter half of October, alone, the Inspectorate ordered that 62 of the 92 construction sites it inspected be shut down.

In Montenegro in June 2011 there were 10 safety inspectors, despite the recommendation of the European Commission that one inspector is required for 10,000 employees, meaning that Montenegro needs to have 17 inspectors.³³⁸ The Labour Inspectorate also acts on anonymous reports (which can be submitted at the following telephone numbers 020/655–513 and 655–514).³³⁹

³³² “Publish Data on Ammunition Destruction at the Praga Site”, *Pobjeda*, 10 February 2011.

³³³ *Ibid.*

³³⁴ “They Earn a Lot, but They Risk Their Lives as Well”, *Dan*, 5 December 2010.

³³⁵ *Ibid.*

³³⁶ *Dan*, 15 February 2011.

³³⁷ “Four Workers Die”, *Dan*, 10 November 2010.

³³⁸ “11 workers a year die”, *Dan*, 19 June 2011.

³³⁹ Both telephones were operating on 18 May 2011.

Prohibition of Torture, Inhuman or Degrading Treatment or Punishment and Treatment of Persons Deprived of Liberty

Article 7, ICCPR:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

Article 10, ICCPR:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 3, ECHR:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

General

In addition to the obligation to prohibit torture in accordance with Article 7 of the ICCPR, Montenegro is also bound by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³⁴⁰ (hereinafter: Convention against Torture). The Convention envisages the establishment of the Committee against Torture as its monitoring mechanism. Montenegro also recognised the competence of the Committee

³⁴⁰ The Convention was ratified by the SFRY back in 1991 (*Sl. list SFRJ – International treaties 9/91*).

against Torture to receive and consider communications from state parties and individuals against Montenegro.³⁴¹

The Optional Protocol to the Convention against Torture, establishing the system of supervising places where persons deprived of liberty are or may be held by the Subcommittee for the Prevention of Torture (Art. 2) and envisaging the establishment of torture prevention mechanisms (Arts. 3 and 17), is also binding on Montenegro.³⁴² The draft of (a new) Human Rights and Freedoms Protector Act completed in November 2010 envisages the establishment of such a national mechanism under the auspices of the Protector. The adoption of the law was first put off for the spring Assembly session, and then indefinitely (for more detail see p. 74), whereby Montenegro exceeded the deadline set in the Optional Protocol for the establishment of a national preventive mechanism, which expired on 6 March 2011.³⁴³

Within the CoE, Montenegro is bound by the ECHR and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment³⁴⁴ which envisages an efficient system of monitoring the states parties' obligations regarding persons deprived of liberty in the form of the Committee for the Prevention of Torture (CPT).³⁴⁵

Furthermore, Montenegro also ratified the Statute of the International Criminal Court, which defines torture as a crime against humanity³⁴⁶.

The Constitution guarantees the inviolability of the physical and psychological integrity of the human person (Art. 28(2)). Under Article 31(2) of the Constitution, any form of violence against or inhuman or degrading treatment of a person deprived of liberty or whose liberty has been limited, and any extortion of a confession and statement shall be prohibited and punishable. As opposed to Art 7 of the ICCPR and Art. 3 of the ECHR, the Constitution, however, does not prohibit inhuman or degrading *punishment*³⁴⁷ and

³⁴¹ The SFRY confirmed the jurisdiction of the Committee during the ratification of the Convention and Montenegro reaffirmed it on 23 October 2006, after it declared independence.

³⁴² Act Ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Sl. list SCG – Međunarodni ugovori* 16/2005 and 2/2006.

³⁴³ *Ib idem*, Arts. 17 and 24.

³⁴⁴ *Sl. list SCG – Međunarodni ugovori* 9/03.

³⁴⁵ *Sl. list SCG – Međunarodni ugovori* 9/03.

³⁴⁶ ICC, *Sl. list SRJ – Međunarodni ugovori* 5/01.

³⁴⁷ In a number of its judgments, the ECtHR emphasised the difference between torture and inhuman or degrading treatment or punishment (*Ireland v. The United Kingdom*, 1978); *Tyrer v. The United Kingdom*, 1978; *Mentes and others v. Turkey*, 1997; *Selçuk and Asker v. Turkey*, 1998; *Smith and Grady v. The United Kingdom*, 1999). The assessment of the form of ill-treatment “depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim” (*Ireland v. The United Kingdom*). The Human Rights Committee has also taken the view in its recent case law that there is a significant difference between cases in which the state is responsible for torture and those in which inhuman or degrad-

should be amended accordingly.³⁴⁸ The provision prohibiting medical and other experimentation without the *permission* of the person concerned (Art. 27(3)) suffers from a similar shortcoming. The Constitution does not explicitly require that such permission or consent be “free”, although that word is key to the wording of the provision prohibiting experimentation in the second sentence of Article 7 of the ICCPR. Lack of free consent itself indicates degrading or inhuman treatment.³⁴⁹

The prohibition of torture, inhuman or degrading treatment or punishment is an absolutely protected human right, because its derogation is not permitted under any circumstances, not even during war. The Constitution allows for the derogation of human rights in exceptional circumstances and lists which rights may not be derogated from even in such circumstances (Art. 25). Although the Constitution does not explicitly list prohibition of torture among them (Art. 25(3)), it prohibits derogation from the right to “dignity and respect of persons”, the title of the Article, which prohibits torture, wherefore this provision should definitely be interpreted as required by Art. 4(2) of the ICCPR and Art. 15(2) of the ECHR.

Given that the Constitution guarantees the controversial right to redress for the publication of untrue information,³⁵⁰ an obligation not stipulated by international human rights treaties, it unjustifiably fails to guarantee the right of redress to persons who had been subjected to torture, inhuman or degrading treatment pursuant to Articles 14 and 16 of the Convention against Torture. This is particularly relevant for Montenegro because, in 2002, the Committee against Torture in the case of *Hajrizi Dzemajl et al. v. Yugoslavia*, found the Federal Republic of Yugoslavia (notably, the agents of the Republic of Montenegro, which was part of FRY) in breach of the Convention because it, *inter alia*, failed to provide an effective legal remedy in the form of fair and adequate redress to the victims of cruel, inhuman and degrading treatment by agents of the Republic of Montenegro in this case regarding the burning down of a Roma settlement in Danilovgrad.³⁵¹

Furthermore, neither the Constitution, nor the law, lay down the obligation of conducting an effective and impartial investigation of allegations of torture, inhuman and degrading treatment, one of the main segments of this

ing treatment occurred (*Soriano de Bouton v. Uruguay* No. 37/78; *Tshisekedi v. Zaire* No. 242/87; *Hajrizi et al. v. Yugoslavia*, No. 161/2000).

³⁴⁸ As noted also by the Venice Commission in its Opinion on the Constitution of Montenegro of 20 December 2007, para 26.

³⁴⁹ The Human Rights Committee underlined that special protection in regard to experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment (General Comments 7/16 and 20/44).

³⁵⁰ See criticism of this provision in the chapter on Freedom of Expression, p. 301.

³⁵¹ Danilovgrad: Committee against Torture Decision in the case of *Hajrizi Dzemajl et al. v. FR of Yugoslavia*, <http://www.unhcr.org/refworld/docid/3f264e774.html>. This is the first case in which the Committee found a state in breach of the Convention for its failure to act – failure to protect victims of inhuman or degrading treatment.

right pursuant to Article 12 of the UN Convention against Torture.³⁵² In its case law on Article 3, the ECtHR also established the obligation of the state to conduct independent, efficient and effective investigations of torture allegations. It clarified that the competent authorities, independent from those suspected of torture or other ill-treatment, are to take all reasonable steps available to them to collect the relevant evidence and to do so promptly and with reasonable expedition.³⁵³

Criminal Code

Under the Convention against Torture, each State Party shall incriminate all acts of torture, attempts to commit torture and acts by any person constituting complicity or participation in torture, and shall make these offences punishable by appropriate penalties which take into account their grave nature.³⁵⁴

The Montenegrin 2010 Act Amending the Criminal Code (*Sl. list CG* 25/2010), incriminates Torture (Art. 166a) and Ill-Treatment (Art. 167) as separate crimes.³⁵⁵ Torture is defined as a consequence, i.e. any conduct resulting in the prohibited consequence is incriminated. The provision does not differentiate between permissible and impermissible means of committing torture, which is closer to the definition of torture in Article 1 of the Convention against Torture, which refers to *any act*.³⁵⁶ The law, however, does not include an important goal of torture under the Convention – punishing him for an act he or a third person has committed or is suspected of having committed. It would be important to prescribe this, given that the constitutional provision also fails to prohibit inhuman or degrading punishment. The Article incriminating torture, however, provides a broader definition of torture than the Convention against Torture, because it envisages the commission of torture also by a private individual. This is in accordance with the interpretation of Article 3 by the ECtHR, which found that states are obliged to punish acts of torture, inhuman or degrading treatment committed by private individuals and to provide adequate protection from such acts.³⁵⁷ Whoever ill-treats another or treats him in a manner violating human dignity shall be punished by imprisonment up to one year. The qualified form of this crime is commit-

³⁵² Article 12: Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

³⁵³ See the case of *Šečić v. Croatia*, 2007;

³⁵⁴ Article 4, Convention against Torture.

³⁵⁵ Art. 43, Act Amending the Criminal Code.

³⁵⁶ Whoever inflicts great pain or suffering on another, whether physical or mental, for the purpose of obtaining a confession or other information from him or a third person, or unlawfully punishes, intimidates or coerces another or intimidates or coerces a third person, or for any reason based on discrimination, shall be punished by imprisonment ranging from six months to five years.

³⁵⁷ See e.g. the case of *Sandra v. Croatia*, 2007.

ted by a public official and warrants imprisonment ranging between three months and three years (Art. 166a, CC). Qualified forms of ill-treatment can in particular circumstances be classified as inhuman or degrading treatment prohibited also by international treaties.

National criminal legislation also incriminates acts of ill-treatment committed by private individuals through the following crimes: incitement of ethnic, racial and religious hatred, dissension or intolerance³⁵⁸, genocide³⁵⁹, war crimes³⁶⁰, cruel treatment of the wounded, the ill and prisoners of war³⁶¹, grave physical injuries³⁶², light physical injuries,³⁶³ coercion³⁶⁴, abduction³⁶⁵, crimes against sexual freedoms³⁶⁶, trafficking in humans³⁶⁷, abuse and neglect of children³⁶⁸, domestic violence³⁶⁹, violent conduct³⁷⁰ etc.

Montenegrin law also incriminates unlawful deprivation of liberty (Art. 162, CC). In the event this crime was committed in a cruel fashion or in the event it seriously impaired the health of the person unlawfully deprived of liberty or incurred him other severe consequences, the perpetrator shall be sentenced to between one and eight years of imprisonment (Art. 162(3)).

Article 166 of the CC incriminates extortion of confession, a crime that can be carried out only by an official. Inhuman or degrading treatment, where the intensity of the force and seriousness of the threat will not result in serious physical or mental suffering, are in practice usually considered a basic form of this offense. If extortion of confession was accompanied by severe violence, it would constitute an act of torture, which corresponds to the concept of torture in Article 1 of the Convention against Torture. A prison sentence of two to ten years is provided for this aggravated form of the crime (Art. 166(2), CC). Prohibition of extortion of confessions “by other illicit or improper means” in Article 1 of the Convention relates primarily to the prohibition of any medical or scientific experiments.

The Convention against Torture not only prohibits torture committed by a public official or another person acting in an official capacity, but all forms of ill-treatment committed at the explicit order or with the consent of a public official as well.³⁷¹ The CC in that sense incriminates a public official's

³⁵⁸ Art. 370 CC.

³⁵⁹ Art. 426 CC.

³⁶⁰ Art. 427–430 CC.

³⁶¹ Art. 437 CC.

³⁶² Art. 151 CC.

³⁶³ Art. 152 CC.

³⁶⁴ Art. 165 CC.

³⁶⁵ Art. 164 CC.

³⁶⁶ Arts. 204–212 CC.

³⁶⁷ Art. 444 CC.

³⁶⁸ Art. 219 CC.

³⁶⁹ Art. 220 CC.

³⁷⁰ Art. 399 CC.

³⁷¹ *Hajrizi Dzemajl et al. v. Yugoslavia*, in which the Committee against Torture in 2002 found a breach of the Convention, refers to a case of destruction of a Roma settlement in

explicit or tacit consent or incitement to torture (Art. 167(2)). An explicit order by a public official is penalised in local criminal law as deliberate incitement³⁷², while a public official, who consented to the commission of other crimes prohibiting torture or infliction of torture or inhuman or degrading treatment or abuse, may be held accountable for the following criminal offences: abuse of office³⁷³, dereliction of duty³⁷⁴, failure to report a criminal offence or the perpetrator of a criminal offence carrying a prison term of minimum five years³⁷⁵.

Pursuant to the obligation in Article 4 of the Convention against Torture, all forms of complicity in an act of torture are punishable under Montenegrin criminal legislation. Moreover, the legislator clearly envisaged penalties for attempts of unlawful deprivation of liberty, extortion of statements and ill-treatment.

Given the gravity of the crimes of torture, inhuman or degrading treatment or punishment, the minimum penalties envisaged for public officials who committed the crimes of extortion of statements (three months), ill-treatment (three months) and torture (one year) appear inadequate particularly in view of the tolerant penal policy of the domestic courts, which are prone to rendering penalties below the legal minimum. This is not in accordance with the state's obligations under the Convention against Torture.³⁷⁶

Right to an Effective Investigation, Protection of the Defendant and Treatment of Persons Deprived of Liberty

Right to an Effective Investigation

Under Article 13 of the Convention against Torture, each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities and

Danilovgrad in revenge for the rape of a non-Roma girl reportedly committed by an underage resident of the settlement. The police were watching the assailants set fire to the homes of the Roma residents but did not take any measures to protect them. This is the first case in which the Committee found a state in breach of the Convention for its failure to act – failure to protect victims of inhuman or degrading treatment.

³⁷² Art. 24 CC.

³⁷³ Art. 416 CC.

³⁷⁴ Art. 417 CC.

³⁷⁵ Art. 386 CC.

³⁷⁶ In illustration, the Podgorica Basic Court convicted the police officers found to have abetted the torture of Aleksandar Pejanović to three and five-month prison sentences respectively and State Administration for the Enforcement of Penal Sanctions (ZIKS) employee Vladana Kljajić to four-month imprisonment for torture (Judgment K.09/1172, of 8 June 2010) although this crime warrants a sentence ranging from one to eight years' imprisonment. More on page 171.

take steps to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 3 of the ECHR obliges the state to conduct an effective investigation of the abuse report. In order to be considered “effective”, the investigation must be expeditious, competent investigative authorities must be independent of those suspected of abuse, must act impartially and take all necessary and reasonable steps to provide evidence relating to the crime and its perpetrators.³⁷⁷ Furthermore, the public should have oversight of the investigation and its results, which includes the inclusion of the alleged victims in the proceedings and informing the public about the status of investigations in progress “to ensure accountability in practice as well as in theory”.³⁷⁸ In a case where the prosecutor showed the apparent lack of interest in an investigation that could lead to establishing the liability of civil servants for the gross human rights violations (forced disappearance), the ECtHR found the state responsible for inhuman and degrading treatment of the victim’s family members.³⁷⁹

Under the Criminal Code, criminal proceedings shall be initiated by the state prosecutor *ex officio* for the crimes of unlawful deprivation of liberty, extortion of statements, ill-treatment and torture (Art. 183), while the injured party may institute private prosecution for the crime of light bodily injury (Art. 152(4)). *Ex officio* prosecution for crimes of torture, inhuman and degrading treatment is in accordance with the requirements of Art. 3 ECHR.

The injured party is *de jure* deprived of the right to initiate criminal proceedings only upon the expiry of the statute of limitations for the reported crime. But even when the statute of limitations has not expired, the injured party may be deprived of the right to an effective legal remedy if the state prosecutor *de facto* prevents him from undertaking criminal prosecution. Such instances occur when the state prosecutor does not take any decision on the filed criminal report or dismisses it but fails to notify the injured party thereof. Under the law, the injured party may not take over prosecution if over three months have passed since the prosecutor dismissed his/her charges. The same consequences ensue if the investigating judge fails to notify the injured party that the investigation was discontinued because the prosecutor abandoned prosecution or if the chairman of the judicial panel fails to

³⁷⁷ See, e.g. the ECtHR judgment in the case of *Matko v. Slovenia*, 2006, paras 90–93, where the Court found that the investigation which had not led to the indictment was ineffective, because the state prosecutor relied solely on reports by police officers who were in the same hierarchical command chain as officers in respect of which there were grounds for suspicion of abuse of a person in custody, and failed to undertake any independent investigation. Also see the judgment in the case of *Sečić v. Croatia*, 2007, paras 53–54.

³⁷⁸ See the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on the visit to Montenegro from 15 to 22 September 2008, published in March 2010, p. 16.

³⁷⁹ ECtHR judgment in the case of *Kurt v. Turkey*, 1998.

communicate to the injured party not summoned to the main hearing the decision to dismiss the charges because the state prosecutor abandoned prosecution it had rendered at that hearing.

Analysing the investigation of several cases of abuse by police and prison officers, pending in Montenegro in 2008, the CPT in its Report³⁸⁰ criticised the failure of the state prosecution to act, as well as the failure of the police to act in accordance with the requirements of the state prosecutor (more detail in section Practice, p. 171).

HRA in 2010 and 2011 initiated administrative proceedings against the decisions of the Supreme State Prosecutor's Office and the Ministry of Justice to deny access to information about whether there has been any investigation into several cases of abuse that were known to the general public, and what the status of those investigations is. The SSP and the Ministry of Justice were of the view that the disclosure of such information may adversely affect the pre-investigation procedure. The Administrative Court of Montenegro, however, upheld HRA's claim and annulled the decision of the Ministry of Justice.³⁸¹

Protection of the Defendant in Criminal Proceedings

The respect for the personality of a person suspected or accused of a crime is guaranteed by provisions in the Criminal Procedure Code (CPC).³⁸² In criminal proceedings, it is prohibited to "threaten with or apply violence against a suspect, defendant or another person involved in the procedure, or extort confessions or other statements from those persons".³⁸³ An accused shall be interrogated with full respect for his personality and dignity³⁸⁴ and may not be subjected to force, threat, deceit, extortion, debilitation or medical intervention or the means to influence his mind and will, in order to obtain a statement, confession or act that could be used as evidence against him/her.³⁸⁵ Guarantees of the respect for dignity also include the provision stipulating that the search of persons shall be carried out by a person of the same sex, and that an adult person of the same sex shall be present in the capacity of witness.³⁸⁶

The CPC prohibits medical interventions or administration of agents which may affect the conscience or will of a suspect, accused or witness giving a statement.³⁸⁷ It, does, however, permit the physical examination of a suspect

³⁸⁰ *Ibid.*

³⁸¹ For more detail see: <http://www.hraction.org/?p=867>

³⁸² CPC, *Sl. list* CG 57/2009 and 49/2010.

³⁸³ Art. 11(1), CPC.

³⁸⁴ Art. 100(7), CPC.

³⁸⁵ Art. 100(8), CPC.

³⁸⁶ Art. 81(3), CPC.

³⁸⁷ Art. 154(5) CPC.

or accused without his/her consent if necessary to establish facts relevant to the criminal proceedings. A physical examination of other persons may be conducted without their consent only when determining whether there is a specific trace or consequences of the crime on their body.³⁸⁸ These provisions do not give rise to concern with respect to the prohibition of torture, inhuman or degrading treatment because they boil down to physical examinations which *per se* do not attain the lowest threshold of torture and which are conducted by doctors in accordance with the rules of medical science. Blood and DNA sampling and “other medical procedures performed in accordance with the rules of medical science in order to analyse and establish other facts of relevance to criminal proceedings may be carried out even without the consent of the person under examination provided that they do not have adverse effects to his/her health.”³⁸⁹ The CPC provides for blood sampling primarily for the purpose of establishing the presence of alcohol in the blood of drivers; given that it is a diagnostic measure, it does not constitute an experiment in the meaning of Article 7 of the ICCPR. However, the vagueness of “other medical procedures” may give rise to problems in practice. In any case, if the subject resists blood sampling or “other medical procedures” such sampling or procedures may be undertaken only upon the order of the court (Art. 154(4)). A court order is not required for DNA sampling (Art. 154(4)). Under the CPC, court decisions may not be based on evidence obtained by violating human rights or CPC provisions, or on evidence obtained in such a manner; nor may such evidence be adduced in proceedings.³⁹⁰

Treatment of Persons Deprived of Liberty

The above Art. 10 of the ICCPR supplements Art. 7 of the ICCPR, which contains a general prohibition of torture, cruel, inhuman or degrading treatment or punishment. The first paragraph applies to all persons deprived of liberty in any way, the second paragraph refers to persons in custody, the third to convicts. The treatment of persons deprived of liberty must be humane; their living conditions must respect the dignity and must be equal for all, without discrimination as to race, color, sex, language, religion, political or other opinion, national or social origin, poverty, birth or other status.³⁹¹ Persons in custody and in prison have limited freedom, but because of that, as a rule, their other human rights cannot be restricted.³⁹²

³⁸⁸ Art. 154(1), CPC (Physical Examination and Other Procedures)

³⁸⁹ Art. 154(2) CPC.

³⁹⁰ Art. 17(2) CPC.

³⁹¹ General Comment No. 21: Replaces general comment 9 concerning humane treatment of persons deprived of liberty (Art. 10): 04/10/1992.

³⁹² *Ibid*, para. 4: “Persons deprived of liberty enjoy all the rights provided for in the Covenant, except when it comes to restrictions that are unavoidable in a closed environment”.

The Constitution provides for respect of human personality and dignity “in criminal or other proceedings, in case of detention or restriction of liberty and during the enforcement of the sentence”(Art. 31(1)).

The Rights of Detainees

The CPC also devotes separate provisions to the respect for the personality of persons remanded in custody.³⁹³ The personality and dignity of a detainee shall not be violated in the course of detention and may be subject only to restrictions required to prevent his/her escape and ensure the unhindered conduct of criminal proceedings.³⁹⁴ A detainee may be visited by his/her attorney, close relations and at the request of the detainee, a doctor and other persons, or diplomatic and consular representatives with the consent of the judge. A detainee may correspond with persons outside the prison under the supervision of the judge unless such correspondence would be detrimental to the proceedings³⁹⁵. Supervision of the detention facilities and treatment of detainees must be conducted at least once a week.

The CPC lays down that inmates on remand and inmates serving their sentences shall not be held in the same room as a rule, while the PSEA provides for the segregation of inmates on remand and convicted prisoners without exception, which is fully in accordance with international standards. The PSEA also specifies that persons convicted to 30 years’ imprisonment shall as a rule serve their sentences separately from the other convicts.³⁹⁶

Supervision of the enforcement of detention is carried out by the authorized court president, or a judge authorized by him. The president of the court may visit persons in custody at any time and receive complaints from them. S/he must visit at least twice a year, according to the new CPC (Article 185), or at least once a month according to current CPC (Article 158).³⁹⁷ Director of the State Administration for the Enforcement of Penal Sanctions (ZIKS) shall notify the court president of the use of means of coercion against a detainee.³⁹⁸

The Rights of Persons Serving Their Prison Sentences

The Montenegrin Penal Sanctions Enforcement Act (PSEA) governs the status of convicted inmates.³⁹⁹ It states that a penal sanction shall be enforced in a manner guaranteeing the dignity of the person it is enforced against⁴⁰⁰

³⁹³ Art. 181–186 ZKP, *Sl. list* CG, 57/2009, 49/2010 (Art. 154–159 ZKP, *Sl. list* RCG, 71/2003, 7/2004, 47/2006).

³⁹⁴ Art. 181(2), CPC.

³⁹⁵ Art. 183 (4) CPC.

³⁹⁶ Art. 16, st. 3 PSEA.

³⁹⁷ *Sl. list* RCG, 71/2003, 7/2004 and 47/2006.

³⁹⁸ Art. 57(5) of the Rules on the Provision of Service, Weapons and Equipment of Security Officers at the Institute for Execution of Criminal Sanctions (*Sl. list* RCG 68/06).

³⁹⁹ *Sl. list* RCG, 25/94, 29/94, 69/2003 and 65/2004.

⁴⁰⁰ Art. 14a, PSEA.

and explicitly prohibits and penalises treatment subjecting a convict to any form of torture, ill-treatment, humiliation or experimentation.⁴⁰¹ The PSEA prohibits the discrimination of convicts⁴⁰² and lays down that they shall enjoy the protection of their rights under the Constitution, ratified international treaties, generally accepted rules of international law and the PSEA.⁴⁰³

Amendments to the PSEA⁴⁰⁴ supplement the guarantee that a convicted person he may be denied or restricted certain rights only to the extent proportionate to the nature and content of the imposed penalty and in a way that ensures respect for the personality of the perpetrator and his/her human dignity.⁴⁰⁵

The PSEA provisions on the convicts' right of complaint have been improved. Article 5(1) now reads: "Judicial protection in accordance with this Act shall be provided against individual enactments on the rights and obligations of convicts enacted in accordance with this Act". A convict shall seek the protection of his/her rights by initiating an administrative dispute (Art. 64). The competent court shall review the complaint within five days from the day of receipt. The PSEA also introduces an eight-day deadline within which the prison warden has to respond to a complaint in the event it is submitted to him.

There are no data on how this right of complaint is applied in practice and how effective it is. Analysis of the Administrative Court decisions from 2010 until end June 2011⁴⁰⁶ leads to the conclusion that the protection of rights in administrative proceedings was used only once in this period, in a case where this court reversed the decision of the Ministry of Justice dismissing the plaintiff's motion for a suspension of his/her sentence.⁴⁰⁷ As the Administrative Court ruled four months after the Ministry of Justice adopted its decision, either the Ministry did not forward its decision to the prosecutor on time, or the court failed to act on the complaint within the prescribed period of 5 days upon receipt of the complaint. This is particularly important because the case concerned a motion for the suspension of the sentence due to the prisoner's health problems.

Procedures in which the prisoners are subjected to any form of torture, abuse and humiliation, medical and scientific experiments are prohibited and punishable.⁴⁰⁸ The law specifies that those shall entail procedures "disproportionate to maintaining order and discipline in the organisation or organisational unit or unlawful procedures, which may thus result in suffering or

⁴⁰¹ Art. 14b, PSEA.

⁴⁰² Art. 14v, PSEA.

⁴⁰³ Art. 64a, PSEA.

⁴⁰⁴ *Sl. list RCG*, 25/94, 69/03 i 65/04.

⁴⁰⁵ Art. 14(2) PSEA.

⁴⁰⁶ Available at the Administrative Court website: <http://www.upravnisudcg.org>

⁴⁰⁷ The Ruling of the Administrative Court, U. no 1974/09, of 24 March 2010.

⁴⁰⁸ Art. 14b(1) PSEA.

excessive restriction of fundamental rights of the convicted person”.⁴⁰⁹ There is a similar provision in relation to juveniles serving corrective measures, which additionally stresses that they should be treated “in a manner appropriate to their psychological and physical development”.⁴¹⁰

The PSEA and the Rulebook on the Provision of Service, Weapons and Equipment of Security Officers at the State Administration for the Enforcement of Penal Sanctions (*Sl. list RCG*, 68/06) stipulate that the security officer shall prepare a report on the use of means of coercion, which is to be submitted to the ZIKS Director together with opinions of the Chief of the Security Service and Head of Department. The Director shall within the following three days notify the Ministry of Justice of the use of batons, firearms, chemicals, water hoses, specially trained dogs, the established facts and give his/her assessment of the lawfulness of the use of force. The Director shall notify the Ministry of the use of physical force if it resulted in serious bodily injury to persons against whom the physical force had been used (Art. 57 of the Rules). However, the PSEA and the Rules do not stipulate any obligation of the ZIKS Director to notify the state prosecutor of the use of coercive measures, who, in case s/he suspects unlawful coercion, should initiate an investigation or prosecution. The CPT has recommended that prosecutors be systematically informed of any application of force by prison officers, and that a special strategy be developed in order to prevent violence among prisoners.⁴¹¹

The CPT has proposed to amend the regulations on disciplinary punishment, to reduce the maximum penalty of 30, or 45 days in solitary confinement (disciplinary cell), to improve their treatment in solitary confinement and not prohibit contact with the family during the sentence.

According to the ICCPR (Article 10(2b)) accused juvenile persons shall be, without exception, separated from adults, with a request to decide on their cases as soon as possible.⁴¹² Under Article 16(4) of the PSEA, that adults and juveniles shall as a rule serve their sentences separately. This provision is contrary to Article 10(2b) of the ICCPR, under which minors must be separated from adults without exception.

The Penal Sanctions Enforcement Act, which was last amended in 2003, and the House Rules for Detention (*Sl. list SRG*, 15/86), House Rules of Convicts and Rulebook on the Provision of Service, Weapons and Equipment of Security Officers at the State Administration for the Enforcement

⁴⁰⁹ Art. 14b(1 and 2) PSEA.

⁴¹⁰ Art. 107(2) PSEA.

⁴¹¹ Report on the visit to Montenegro of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 22 September 2008, published on 9 March 2010, and the translation on 6 May the same year (available at: <http://www.cpt.coe.int/documents/mne/2010-03-inf-eng.htm>, <http://www.cpt.coe.int/documents/mne/2010-03-inf-eng.htm>).

⁴¹² General Comment No. 21: Replaces general comment 9 concerning humane treatment of persons deprived of liberty (Art. 10): 04/10/1992.

of Penal Sanctions State Administration for the Enforcement of Penal Sanctions (*Sl. list RCG*, 68/2006) should be harmonised with the 2006 Recommendation of the Committee of Ministers of the Council of Europe on the European Prison Rules,⁴¹³ which prescribe in detail the conditions in detention and prison starting from admission, through legal aid, contact with the outside world, nutrition, hygiene, work, education, property rights, exercise and recreation and so on. House Rules for Detainees date back to 1986 and contain a number of outdated solutions that are expected to be eliminated by the drafted new regulations, which were being fine-tuned in the Ministry of Justice in June 2011.

The Ministry of Justice is charged with controlling the legality of imprisonment, juvenile imprisonment and security measures of mandatory psychiatric treatment.⁴¹⁴ Supervision over the implementation of corrective measures is performed by the custodian, while the court, which has imposed them, controls the lawfulness of their enforcement.⁴¹⁵

The Prohibition of Extradition and Deportation of Persons at Risk of Torture

The state may not return a person to a state where s/he may be exposed to ill-treatment (the so-called obligation of non-refoulement). This prohibition pertains both to deportation and extradition. It arises from the ICCPR⁴¹⁶ and is explicitly prescribed by Article 3 of the Convention against Torture⁴¹⁷. A similar provision is found in Article 33 of the Convention Relating to the Status of Refugees.⁴¹⁸ This right has been reconfirmed by the ECtHR on a number of occasions as well. In the case of *HLR v France*⁴¹⁹ the ECtHR took the view that a state is held responsible for the expected treatment of a person it is deporting or extraditing to another state, regardless of whether the risk arises from state authorities or private individuals and organisations and the authorities of the receiving state are unwilling or unable to provide adequate protection. In the case of *Soering v The United Kingdom*,⁴²⁰ the ECtHR found the United Kingdom would have been responsible for the violation of Article 3 of the ECHR if it deported the applicant to the USA where he was at risk of

⁴¹³ Recommendation Rec (2006) of the Committee of Ministers to Member States on the European Prison Rules.

⁴¹⁴ Art. 21, 69, 82 PSEA.

⁴¹⁵ Art. 113 PSEA.

⁴¹⁶ The Human Rights Committee emphasises this obligation also in its General Comment No. 20 (44), paragraph 9.

⁴¹⁷ The Convention against Torture imposes this obligation on the state only if there is a risk of that person being subjected to torture, but not to milder forms of ill-treatment.

⁴¹⁸ *Sl. list FNRI (Dodatak)*, 7/60.

⁴¹⁹ ECHR, 26 EHRR 29, (1998).

⁴²⁰ ECHR, App. No. 14038/88 (1989).

being sentenced to capital punishment, because the death row phenomenon can be considered in breach of Article 3 of the ECHR. The ECtHR has derived the same principle also with respect to expulsion.⁴²¹

As the extradition of indicted and convicted persons is implemented in accordance with provisions of international multilateral and bilateral treaties, the authorities are obliged to respect the above rule when concluding such treaties. In the absence of an international treaty or in the event that specific issues are not covered by it, extradition is conducted pursuant to the Act on Mutual Legal Assistance in Criminal Matters (*Sl. list* CG 4/2008).

This law prohibits the extradition of persons to a country where they may be sentenced to death, in accordance with the requirements of Art. 2 of the ECHR. However, the Act does not provide sufficient protection with regard to protection from torture and other abuse. Although it provides for a two-stage jurisdiction of the court to rule in extradition proceedings, the court is not required to examine and decide whether there is a risk of abuse in a country demanding extradition.⁴²² When the proceedings before the court are completed and the casefile submitted to the Minister of Justice, he is responsible not to permit the extradition only if the person whose extradition is sought would be exposed to prosecution or punishment due to his/her race, religion, nationality, membership of a particular social group or political beliefs, or if his/her position would be exacerbated because of these features (Art. 22(3)). However, protection against torture and other ill-treatment does not only involve protection from abuse based on discrimination, but in any case.⁴²³ In the light of the above, the law should be amended.

Under the CC, the court may order the security measure of expulsion of an alien who has committed a criminal offence from the territory of Montenegro for a period ranging from one to ten years or for good in the event s/he is a repeated offender.⁴²⁴ Paragraph 4 of the Article introduces a welcome novelty inasmuch as it prohibits the ordering of such a measure against an offender enjoying protection under a ratified international treaty. However, although paragraph 4 should be interpreted as allowing the application of protection to all persons, in accordance with the requirements of Art. 3 ECHR, and not e.g. only to refugees, it does not provide sufficient clarity and ought to be specified in greater detail.

⁴²¹ A state expelling an individual, however undesirable or dangerous, is in breach of Article 3 of the ECHR if the very act of expulsion is a link in the chain of events leading to torture or inhuman or degrading treatment in the state the individual is being returned to (*Chahal v The United Kingdom*, ECHR, App. No. 22414/93 (1996)).

⁴²² See conditions for extradition under the Act in Arts. 11–14.

⁴²³ For example, in relation to Kazakhstan, the ECtHR concluded, based on information and non-governmental organisation, that any defendant in custody in this country is at risk of being subjected to torture or inhuman or degrading treatment, often without any objective, and that this circumstance is a sufficient basis for a finding of serious risk in this country to be subjected to treatment contrary to Article 3 of the ECHR (*Kaboulov v. Ukraine*, 2009, para. 112).

⁴²⁴ Art. 76 CC.

Finally, a person may file a constitutional appeal with the Constitutional Court against the final decision on deportation or extradition to a country where s/he is at risk of abuse, with a request to stay the enforcement of the decision until the Constitutional Court renders its decision, and if this proves ineffective, s/he can turn to the European Court of Human Rights with a request to immediately order an interim measure that will require of Montenegro to stop the proceedings in accordance with Rule 39 of the Rules of Court.⁴²⁵

Rights of the Mentally Ill

Under Article 4 of the Act on the Protection and Exercise of the Rights of Mentally Ill Persons,⁴²⁶ mentally ill persons are entitled to protection from all forms of ill-treatment, degrading treatment or other treatment violating their personal dignity or causing discomfort, aggressiveness, humiliation or embarrassment. Mentally ill persons are entitled to protection from ill-treatment by other patients as well.⁴²⁷ Psychiatrists and other health workers are obliged to treat mentally ill persons in a manner limiting their rights and liberties to the least possible extent and without causing them physical or psychological discomfort violating their personality and human dignity.⁴²⁸ An independent multidisciplinary body shall be established in a psychiatric institution to ensure the protection of rights of mentally ill people⁴²⁹ and monitor the respect of their human rights and freedoms and dignity.⁴³⁰ The rights to the protection of the personal dignity, physical and psychological integrity, personality, privacy, ethical and other convictions of a mentally ill person must be respected during his/her placement in a psychiatric institution.⁴³¹ More on mandatory institutionalisation on p. 214 and on the Strategy for the Improvement of Mental Health on p. The case of F.S., which shows the treatment of a mentally ill perpetrator, is reviewed below, p. 537.

Denial of adequate medical treatment to a detainee seriously suspected of suffering from a mental disorder – the case of Ferid Sijarić. –Ferid Sijarić, whose neighbours say he had been treated for a mental disorder, attacked and injured with his knife an eleven year old girl on her way to school on 7 October 2010. After arrest, Sijarić was taken to the Spuž Remand Prison, where he was tied to his bed for 18 days and not examined by a medical special-

⁴²⁵ Such requests are submitted via the following ECtHR fax number: + 33 (0) 3 88 41 39 00 (more information is available at: <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Interim+measures/Practical+information>)

⁴²⁶ *Sl. list RCG* 32/2005.

⁴²⁷ Art. 12, Act on the Protection and Exercise of the Rights of Mentally Ill Persons.

⁴²⁸ Art. 5, Act on the Protection and Exercise of the Rights of Mentally Ill Persons.

⁴²⁹ Art. 49, Act on the Protection and Exercise of the Rights of Mentally Ill Persons.

⁴³⁰ Art. 50(2), Act on the Protection and Exercise of the Rights of Mentally Ill Persons.

⁴³¹ Art. 45, Non-Contentious Procedure Act, *Sl. list RCG* 27/2006.

ist.⁴³² Such treatment is in contravention of the European Prison Rules⁴³³, the CoE Committee of Ministers Recommendation concerning the ethical and organisational aspects of health care in prison⁴³⁴, and in violation of the Act on the Protection and Exercise of the Rights of Mentally Disabled Persons (*Sl. list RCG*, 32/2005). Under Article 33(1) of the Act, police officers were duty-bound to take Sijarić to the closest psychiatric institution for an examination as soon as they suspected that he was mentally ill⁴³⁵. Furthermore, under Article 45 of the Non-Contentious Procedure Act, (*Sl. list RCG*, 27/2006), a mentally ill person is entitled to the protection of his/her dignity, physical and mental integrity and respect of person upon admission in a psychiatric institution.⁴³⁶ The CoE Committee of Ministers also stipulates that inmates are to be examined upon admission and provided with specialist medical treatment.⁴³⁷ Mechanical restraint is allowed in exceptional circumstances and under exceptional conditions. After receiving the sought information about the Sijarić case from ZIKS, HRA notified the Protector of the possibility that a mentally ill person has been subjected to inhuman and humiliating treatment. The Protector notified HRA in mid-February that he had initiated

⁴³² HRA first read about the Ferid Sijarić case in the newspapers (“Ferid Sijarić, Accused of Attacking a Girl and a Policeman, Questioned”, *Vijesti*, 9 October 2010; “Neighbour Stabs Girl”, *Novosti*, 8 October 2010; “Man Suspected of Attacking 11-Year-Old Girl Arrested”, *Vijesti*, 7 October 2010.). HRA received the ZIKS Director’s reply on 13 January 2011 stating that Ferid Sijarić was admitted to the prison on 8 October 2010, and was examined by the prison doctor, Miraš Tomić, and was subsequently tied to his bed. On 11 October 2010, Sijarić was re-examined by the prison doctor, who referred him to the psychiatrist, Alma Radovanović. The psychiatrist did not examine Sijarić until 26 October 2010, i.e. Sijarić, who is mentally ill, spent 18 days tied to his bed and without the medical assistance of a psychiatrist.

⁴³³ Available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?id=955747>.

⁴³⁴ No. R (98) 7 concerning the ethical and organisational aspects of health care in prison. Available at <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=530914&SecMode=1&DocId=463258&Usage=2>.

⁴³⁵ Article 33(1), Act on the Protection and Exercise of the Rights of Mentally Disabled Persons: “In the event police officers performing their duties suspect that a person is suffering from a mental disorder, they are duty-bound to take that person to the nearest health institution for an examination without delay.”

⁴³⁶ Article 45, Non-Contentious Procedure Act: “The human dignity, physical and mental integrity, respect of person, privacy, ethical and other convictions of a mentally ill person must be respected during his/her placement in a psychiatric institution.”

⁴³⁷ The first rule in the CoE Committee of Ministers Recommendation concerning the ethical and organisational aspects of health care in prison states that when entering prison and later on while in custody, prisoners should be able at any time to have access to a doctor or a fully qualified nurse, irrespective of their detention regime and without undue delay, if required by their state of health and lays special emphasis on mentally ill persons, who must be immediately examined like all other prisoners. Rule 55 states that prisoners suffering from serious mental disturbance should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff. The decision to admit an inmate to a public hospital should be made by a psychiatrist, subject to authorisation by the competent authorities.

an inquiry into the case,⁴³⁸ and subsequently that Sijarić has been placed in the Dobrota psychiatric hospital.⁴³⁹

Use of Means of Coercion by the Police

The Montenegrin Police Act⁴⁴⁰ lists the following means of coercion the police may use: physical force, truncheons, mechanical restraint devices, road blocks, police dogs, chemical stunners, special vehicles and special types of weapons, explosive devices and fire-arms.⁴⁴¹ Means of coercion may be used to: 1) prevent the escape of a person deprived of liberty or caught in the commission of a crime prosecuted *ex officio*; 2) subdue the resistance of a person disturbing public order and peace or to be brought in or deprived of liberty as provided for by the law, and 3) repel an attack on oneself, another person or a safeguarded building.⁴⁴² The application of the means of coercion must be commensurate to the danger to be eliminated and aim at incurring minimum adverse consequences. Prior to applying the means of coercion, the police officer shall warn the person thereof unless the warning would bring into question the fulfilment of the police task. The application of the means of coercion is significantly restricted by the provision requiring the use of such means only at the order of the officer in charge of the task.⁴⁴³ A police officer, who used or ordered the use of fire-arms or other means of coercion, shall immediately notify the chief of police thereof; in the event the chief of police assesses that the use of the means of coercion had been unlawful, s/ he shall within three days take measures to establish the responsibility of the officer.⁴⁴⁴

The Police Act also obliges the police to provide free legal aid to the police officer criminally prosecuted for overstepping his powers regarding the use of means of coercion.⁴⁴⁵ This provision in the law gives rise to concern given that it obliges the state to solidarity with its agent reasonably suspected of violating the law, and at the expense of the tax payers at that. It may also be perceived as encouraging police officers to exercise their powers “more freely” in view of the fact that the law lays down that the police shall also themselves investigate and pronounce disciplinary sanctions against their own officers, i.e. themselves report the offender to the competent prosecutor who is to institute criminal proceedings against him/her.

Apart from internal auditing, the Police Act introduces parliamentary and civilian oversight of police work in Montenegrin law for the first time. Ci-

⁴³⁸ Human Rights and Freedoms Protector Memo Ref. No. 77/11 of 14 February 2011.

⁴³⁹ Human Rights and Freedoms Protector Memo Ref. No. 77/11 of 13 June 2011 2011.

⁴⁴⁰ *Sl. list CG* 88/2009.

⁴⁴¹ Art. 30(1), Police Act.

⁴⁴² Art. 30(2), Police Act.

⁴⁴³ Art. 47, Police Act.

⁴⁴⁴ Art. 48, Police Act.

⁴⁴⁵ Art. 50, Police Act.

vilian oversight of police work is performed by the Police Civilian Oversight Council comprising five members appointed by the Bar Association, Medical Association, Association of Lawyers, the University and human rights NGOs to five-year terms of office. Citizens and police officers may ask the Council to assess whether the police exercised their powers to protect human rights and freedoms. The Act obliges the police to provide all the information required by the Council.⁴⁴⁶ The Council shall communicate its assessments and recommendations to the chief of police, who is obliged to notify the Council of the undertaken measures.

Parliamentary oversight of the police is performed by the competent working body within the Assembly of Montenegro,⁴⁴⁷ to which the chief of police shall submit a report on the work of the police at least once a year, if necessary, or at the request of the working body. There are no other provisions on the procedures and powers of the working body or parliament.

The internal audit of the police is performed by the Ministry of Internal Affairs⁴⁴⁸. Internal auditing comprises: control of the lawfulness of police work, particularly with regard to the respect and protection of human rights during the performance of police assignments and exercise of police powers; implementation of the counter-intelligence protection procedure, and other checks relevant to the efficient and lawful work of the police. The Ministry shall lay down the internal audit methods and procedures⁴⁴⁹. Internal audit of police work is conducted by a public official with the same rights, duties and powers as a police official during the audit.⁴⁵⁰ The authorised internal auditor shall act: at his/her own initiative; on the basis of collected information and other knowledge; on the basis of a proposal, complaint or submission by a natural person or police officer; on the basis of a proposal or conclusion by the competent committee of the Montenegrin Assembly; on the basis of a recommendation by the Human Rights and Freedoms Protector; on the basis of an analysis, assessment or recommendation of the Council. S/he shall promptly notify the Minister in writing every time s/he establishes that a police action or failure to act was in contravention of the law.⁴⁵¹ Police staff shall enable the authorised official to perform the internal audit and provide him/her with all the necessary professional assistance⁴⁵². The internal auditor shall take necessary action, establish the facts and collect evidence and render his/her finding in writing, which shall include a proposal on how to eliminate the

⁴⁴⁶ Art. 93, Police Act.

⁴⁴⁷ Art. 89, Police Act.

⁴⁴⁸ Art. 3, Act Amending the Police Act, Sl. list CG, 88/2009. The amendments transfer internal auditing from a special police organisational unit to the Ministry of Internal Affairs.

⁴⁴⁹ Art. 95a, Police Act.

⁴⁵⁰ Art. 95b, Police Act.

⁴⁵¹ Art. 96, Police Act.

⁴⁵² Art. 96a, Police Act.

established irregularities and the proposal to launch the relevant proceedings to establish accountability for the irregularities.⁴⁵³ The work of the authorised internal auditors is supervised by the Minister.⁴⁵⁴

It is necessary to specify the work of the Internal Audit by an appropriate by-law, in order to prevent, for example, the very police officer whom the complaint regards from also being charged with checking the allegations, which clearly brings into question the objectivity of control.⁴⁵⁵

Practice

General

Respect of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment has improved to an extent in Montenegro with respect to the living conditions in institutions in which persons deprived of liberty are held. Prison overcrowdedness has been a continuous problem that has been causing a chain of violations of prisoners' rights. Montenegro, however, still needs to address problems regarding the ineffective investigations of reported ill-treatment by police or prison officers, impunity and the mild penal policy, indicating the state prosecutors' and courts' disquieting tolerance of violations of this absolutely guaranteed right.⁴⁵⁶

According to the Supreme State Prosecutor's Report on the work of the State Prosecution Office in 2010, four criminal reports alleging extortion of a statement (Art. 166, CC) were filed in 2010. Three cases had been pending and the prosecutors worked on a total of seven reports during the year. Two of the reports resulted in the filing of indictments.

A total of 55 reports of ill-treatment and torture (Art. 167, CC) were filed in 2010, but the state prosecution office surprisingly does not have data on how many of them were filed against state agents, i.e. alleged violation of paragraph 3 of Article 167.⁴⁵⁷ Given the unavailability of data on how many state agents were charged with ill-treatment and torture either in 2010 or the

⁴⁵³ Art. 96b, Police Act.

⁴⁵⁴ Art. 96c, Police Act.

⁴⁵⁵ Such a case was described by investigator of human rights violations in Montenegro Aleksandar Zeković in his initiative submitted to the Council for the Civilian Oversight of the Police on 11 February 2011.

⁴⁵⁶ HRA has drawn this conclusion on the basis of several reports on human rights in Montenegro (CPT 2008 Report, YIHR 2009 and 2010 Reports on Human Rights, the US Embassy in Montenegro 2006, 2007, 2008 and 2009 Country Human Rights Reports; the European Commission Montenegro Progress Report, the 2009–2010 Annual Report of the Council for the Civilian Oversight of the Police) and HRA's monitoring of human rights from 2005 to 2011.

⁴⁵⁷ Supreme State Prosecution Office reply to request for access to information of 27 May 2011.

previous years and the outcome of the proceedings, HRA was unable to monitor whether any headway has been made in that respect.

The MIA Internal Audit Sector stated that not one police officer had been charged with ill-treatment or torture in 2010.⁴⁵⁸ The Police Directorate Disciplinary Commission conducted disciplinary proceedings against 18 policemen for abuse of post or excess of authority⁴⁵⁹. Ten of the officers were fined, by a 20–30% deduction of their one-month salary and none were dismissed. Eight officers were acquitted after it was established that they had not committed any disciplinary offences.⁴⁶⁰

According to the Youth Initiative for Human Rights (YIHR) 2010 Report on Human Rights in Montenegro, however, 27 cases of police torture were reported in 2010.⁴⁶¹ YIHR concluded that the injured parties were still being victimised, as evidenced by judgments finding them guilty of assaulting the officers, while investigations of their reports of ill-treatment against police officers had not been completed.⁴⁶² YIHR data show that most reports of police ill-treatment were filed in Berane⁴⁶³, wherefore staff changes were made in this regional police department. YIHR states in its Report that the chief of Berane police Novo Veljić was dismissed and Miodrag Božović appointed in his stead after its joint campaign with the NGO 35 mm (TV show “Robin Hood”)⁴⁶⁴. On the other hand, the Police Directorate did not state that the Berane police chief was dismissed for unprofessionalism, but specified that he was reassigned to another position in Podgorica upon his personal request.⁴⁶⁵

Montenegro was under the obligation to establish a torture prevention mechanism by 6 March 2011 but failed to do so as the new Human Rights and Freedoms Protector Act, which is to lay down the establishment of such a mechanism within the remit of the Protector, was not adopted by that time.⁴⁶⁶

⁴⁵⁸ MIA Internal Audit Sector report 01/4 Ref. No: 051/11–4159, of 4 March 2011, pursuant to the Request for Access to Information Ref. No. 01/4–051/11–3691/1 of 10 February 2011.

⁴⁵⁹ Art. 59 (1.4), Act on Civil Servants and State Employees.

⁴⁶⁰ MIA Internal Audit Sector report 01/4 Ref. No: 051/11–4159, of 4 March 2011, pursuant to the Request for Access to Information Ref. No. 01/4–051/11–3691/1 of 10 February 2011.

⁴⁶¹ Youth Initiative for Human Rights – Montenegro, Human Rights in Montenegro – 2010 Report, p. 21, available at http://www.yihr.me/eng/wp-content/uploads/2010/03/Human_Rights_in_Montenegro–2010.pdf.

⁴⁶² *Ibid.*

⁴⁶³ The CPT highlighted the situation in the Berane police station as critical.

⁴⁶⁴ “Beatings Continue in Berane even without Vlačko”, *Vijesti*, 25 April 2010.

⁴⁶⁵ Council for the Civilian Oversight of the Police 2009–2010 Report (material presented in the document is an integral part of the comprehensive report entitled “Effects of Civilian Oversight of Police Work in Montenegro 2005–2010”).

⁴⁶⁶ The Assembly put off the debate and vote on the new Human Rights and Freedoms Protector Act for the spring session, which led to Montenegro’s failure to respect the deadline for the establishment of a national torture prevention mechanism pursuant to Article 17 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Director of the State Administration for the Enforcement of Penal Sanctions (ZIKS), which runs all the penitentiaries in Montenegro, Milan Radović expressed the will to cooperate with NGOs, who were given the opportunity to tour the prisons and talk to the inmates outside the earshot of the guards⁴⁶⁷.

Living Conditions in Montenegrin Penitentiaries

According to the ZIKS, 1672 convicted and remanded inmates were held in the Podgorica and Bijelo Polje prisons, which together have a capacity to accommodate up to 1100 persons deprived of liberty. The situation was the worst in the Podgorica Remand Prison, which had 600 although it was built to accommodate 400 inmates.⁴⁶⁸ The Human Rights and Freedoms Protector qualified overcrowdedness as the crucial problem, impacting on everything else: the living conditions, hygiene, security and other segments of life of remanded and convicted prisoners and, thus, their human rights.⁴⁶⁹

The conditions in the Bijelo Polje prison are far below standards. The authorities have opted for refurbishing the existing prison instead of building a new prison, which should have been built by 2009 under the 2007 Action Plan for the Development of the Prison System adopted within the 2007–2012 National Judicial Reform Strategy. The then Justice Minister Miraš Radović said in mid-2010 that a new prison building would soon be built or another building would be refurbished to house the inmates.⁴⁷⁰

Police Remand Facilities

The conditions in the police detention units have improved over the situation described in the CPT September 2008 Report. The reconstruction of the cells, which began during the CPT visit⁴⁷¹, has been completed in Podgorica,

⁴⁶⁷ Although NGO representatives were unable to visit prison and remand facilities on a regular basis and unannounced, ZIKS held a meeting with representatives of four NGOs (HRA, Centre for Civic Education, Safe Women's House and *Preporod*) on 16 February 2010 and said that they hoped that the expected amendments to the PSEA would explicitly envisage such visits and that the ZIKS was willing to cooperate on such and similar projects in the meantime, as illustrated by the years-long cooperation with the NGO Juventas, the activists of which have had direct contact with convicted and remanded inmates within the project "Openly with Inmates". YIHR and ZIKS signed a Memorandum of Cooperation, allowing this NGO to visit the penitentiaries and engage in other forms of direct investigations of human rights violations in them. HRA and Safe Women's House activists were allowed to meet with women inmates in the women's prison in Podgorica in February 2011.

⁴⁶⁸ 2010 Annual Report by the Human Rights and Freedoms Protector, March 2011, pp. 51–52.

⁴⁶⁹ *Ibid.*

⁴⁷⁰ "New Building is a Must", *Pobjeda*, 22 June 2010.

⁴⁷¹ CPT 2008 Report, p. 25.

Cetinje, Bar and Nikšić. Video surveillance has been installed in all police detention cells to prevent police officers from abusing their powers.⁴⁷²

Observations by the Council for the Civilian Oversight of the Police

The Council for the Civilian Oversight of the Police is charged with reviewing citizens' complaints of police abuse of powers and issuing recommendations. The Police Directorate did not act on 10 of the Council's 34 recommendations in cases elaborated in the Council's 2009–2010 Report⁴⁷³. In this Report, published in September 2010⁴⁷⁴, the Council registered several cases of professional misconduct and grave human rights violations.⁴⁷⁵ The Council's communication with the Police Directorate has improved recently, although there were still instances in which the Council failed to obtain clear and precise answers to its questions.⁴⁷⁶

The Council's communication with the State Prosecution Office is inadequate. The prosecutors took 17 cases which the Council alerted them to under review, but initiated criminal proceedings in only four of them.⁴⁷⁷ The Council was unable to close some cases because it had not received the information it needed from the prosecutors. For instance, the Council had problems communicating with the Podgorica Basic State Prosecutor for months in the case regarding the beating of Aleksandar Pejanović.⁴⁷⁸

⁴⁷² "2,500 Inmates in Penitentiaries", *Dan*, 15 October 2010.

⁴⁷³ Council for the Civilian Oversight of the Police 2009–2010 Report (material presented in the document is an integral part of the comprehensive report entitled "Effects of Civilian Oversight of Police Work in Montenegro 2005–2010").

⁴⁷⁴ The cases and activities of the Council for the Civilian Oversight of the Police presented in the report regard 2009 and 2010 (as of October 2010, when the five-year term of office of the first members of the Council expired). Some of these cases had been initiated earlier and were still being processed or were completed in the reporting period.

⁴⁷⁵ Among the described cases of professional misconduct, the Council for the Civilian Oversight of the Police 2009–2010 Report highlighted the case of A.L. who was tortured by the police while in detention. The police denied the charges notwithstanding the relevant medical findings of the Clinical Centre of Montenegro. The report also highlighted the case of Lj.D., in which the police failed to take measures and protect Lj.D. from a group of people who broke into his house and, according to medical findings, inflicted grave physical injuries on him in order to extort information from him. Although Lj.D. was forced to change his statement in the police station and threatened with a gun, the Internal Audit Sector qualified the work of the police as "lawful and within their legal powers", saying that there was no evidence that he was forced to change his statement and that it was his word against those of all others who were there. The Council, however, concluded that the police had not taken the necessary measures to protect the injured party.

⁴⁷⁶ Statement by Council for the Civilian Oversight of the Police member Aleksandar Saša Zeković to HRA researchers on 2 March 2011.

⁴⁷⁷ Council for the Civilian Oversight of the Police 2009–2010 Report (material presented in the document is an integral part of the comprehensive report entitled "Effects of Civilian Oversight of Police Work in Montenegro 2005–2010").

⁴⁷⁸ After 10 months and a number of follow-up requests, the Basic State Prosecution Office in early September 2009 submitted to the Council the findings of the court medical

One of the Council's general conclusions is that the medical documentation on injuries is often imprecise and unclear even when it indicates the existence of injuries,⁴⁷⁹ which is particularly concerning given that medical findings are as a rule the main proof of torture.

Another issue giving rise to concern is that the so-called whistle-blowers in the police are neither protected nor encouraged to report irregularities or abuse, as demonstrated by the case of Goran Stanković, the policeman who testified about the torture of Aleksandar Pejanović.⁴⁸⁰

Furthermore, the police have failed to suspend the policemen, against whom criminal and court proceedings are conducted *ex officio*. The Council registered a number of such cases in 2009 and 2010.⁴⁸¹

There have been allegations that citizens are reluctant to report unlawful police conduct, *inter alia* due to threats which are apparently condoned by senior police staff.⁴⁸²

Ineffective Processing of Reports of Ill-Treatment by State Agents

Criminal proceedings against policemen for extortion of statements, ill-treatment, torture or abuse of post are rare and inefficient. The investigations are as a rule ineffective and the penalties pronounced against the policemen inadequate.

Three ineffective investigations of serious ill-treatment reports described and criticised in the CPT 2008 Report have either not been processed at all or have not been processed effectively by March 2011. One concerns the beating of inmate Vladana Kljajić by two women prison guards, the second the police ill-treatment and extortion of statements from persons arrested in the Eagles' Flight anti-terrorist police operation, and the third the beating of 18 detainees in the Spuž prison on 1 September 2005.

expert regarding the beating of Aleksandar Pejanović, which enabled the Council to at long last continue its work on this case (Council for the Civilian Oversight of the Police 2009–2010 Report).

⁴⁷⁹ As illustrated by the individual cases, which occurred in 2010 and which are described in the Council for the Civilian Oversight of the Police 2009–2010 Report (e.g. the beating of Aleksandar Pejanović, the cases of Selimović Anton, Selimović Ljubiša and Selimović Koni), and the cases of Fikret Čekić (Case of Fikret Čekić, Ref. No. 12–10) and Aleksandar Brnović (Case of Aleksandar Brnović Ref. No. 35–10), which are not included in the Report but which the HRA had insight in.

⁴⁸⁰ "Left the Police after his Colleagues Advised Him not to Leave his House at Night", *Vijesti*, 1 April 2011, and HRA archives.

⁴⁸¹ The policemen on trial for beating up Aleksandar Pejanovic have not been suspended.

⁴⁸² Enis Kajević from Rožaje accused policeman Dejan Dević of unlawfully confiscating his jeep. The police denied the allegations. Kajević said that the police called him up and told him they meant him well and warned him not to complain because he would not fare well. "I have over the past few days received calls on my cell phone, warning me that what I was doing was wrong, that it would not bring me any good, that I should reconsider." "Warned to Reconsider", *Dan*, 28 November 2010.

Unlawful Punishment in Detention – Vladana Kljajić. – The case of ill-treatment of Vladana Kljajić by the Podgorica Remand Prison guards in 2008 is a stark example of ineffective prosecution of the perpetrators. A final decision in this case had not been rendered by June 2011.

Vladana Kljajić was brutally beaten up in an isolation cell in the Podgorica Remand Prison by two female prison guards on 5 September 2008. Following an exchange of verbal abuse between Kljajić and one of the guards, the guard slapped Kljajić, who punched her on the nose. Kljajić claims that the guards then took her to the isolation cell, handcuffed her behind the back, and punched and kicked her and hit her with their truncheons, leaving bruises on her body.⁴⁸³ She spent five days in the isolation cell. After finally hearing about the incident and managing to see her daughter, Kljajić's mother on 13 September filed a criminal report with the Podgorica Basic Prosecution Office.⁴⁸⁴ The mother claims that her daughter was not allowed to go to the prison hospital for a check-up during the five days she spent in the isolation cell and that the doctor examined her seven days after the incident. The CPT report states that the prison medical records contained a detailed description of the injuries observed by the prison doctor who had examined the inmate on 5 September 2008; however, there was no reference to the prisoner's allegations concerning the cause of the injuries.⁴⁸⁵ Milan Radović, who was appointed ZIKS Director after the incident, told HRA at a meeting in February 2010 that this medical report was missing from Vladana Kljajić's documentation.

The mother's criminal report led to the opening of a preliminary investigation in the Danilovgrad Basic Court on 13 September 2008; the state prosecutor initially investigated the guards for the crime of light physical injuries rather than the crime of ill-treatment and torture.⁴⁸⁶ Only after the CPT demonstrated its interest in the case to the Montenegrin Government was the qualification of the crime changed and the state prosecutor launched the

⁴⁸³ NGO Safe Women's House Director Ljiljana Raičević visited the prison and saw for herself that Kljajić's body was bruised, that she had problems talking because of the kidney pains she suffered and had blood in her urine. This case is also described in the CPT 2008 Report given that the CPT members had a chance to talk to Ms. Kljajić and examine her (see paragraph 46 of the Report).

⁴⁸⁴ "Vladana Must Go to Hospital", *Vijesti*, 18 September 2008; "Beaten up by Prison Guards", *Dan*, 18 September 2008.

⁴⁸⁵ The medical records state: "5 September 2008: Examined for injuries. Left forearm – tramline rubor, slanted, near the wrist 6x2.5cm. Back of the left forearm – two red tramlines, sized 8–10x3cm. Right forearm – red tramline, slanted, circa 10x3cm. Back of chest – three red tramlines, one near the shoulder blade, one below the left clavicle, one above the left thigh, 6–12x3cm, all of them lengthwise. Outer side of the right thigh, visible bruises, haematomas, with blurred edges, dark blue, in the shape of a triangle, 15x10cm, outer side of the left thigh, left gluteus, 3 red tramlines, slanted, 6–10x3cm, Diagnosis: erythema mechanicum, antebrachia, multiple bruises, haematomas.

⁴⁸⁶ Kt.No.1542/08, Basic State Prosecutor Đurdina Nina Ivanović's reply to YIHR of 13 November 2008, in which the crime is qualified as a light physical injury.

prosecution for ill-treatment and torture,⁴⁸⁷ although he qualified the conduct of the prison guards as a milder form of the crime, as ill-treatment rather than torture – the latter entails “great pain” and “grave suffering” which Kljajić undoubtedly sustained given the description of her injuries. Furthermore, Kljajić was tried for assaulting the prison guard and convicted to seven months in prison. Kljajić did not appeal the judgment.⁴⁸⁸ On the other hand, the prison guards appealed the first-instance judgment sentencing them to four months’ imprisonment.⁴⁸⁹ The appeal proceedings were under way at the time this Report was completed (by the end of June 2011).

The penalty pronounced against the prison guards in the first instance is minimal, given that ill-treatment by a state agent warrants between three months and three years and torture between one and eight years of imprisonment.⁴⁹⁰

HRA appealed to the Supreme State Prosecutor on time to ensure the prosecution of this and other cases of torture and other inhuman or degrading treatment in accordance with European standards.⁴⁹¹

Ill-treatment in the anti-terrorist operation Eagles’ Flight. – The “anti-terrorist” police operation Eagles’ Flight conducted in September 2006 is another blatant illustration of police impunity for torture. Seventeen people suspected of planning terrorist actions were arrested during the operation and most of them were later found guilty of preparing an armed rebellion in Montenegro.

Five members of the Special Anti-Terrorist Unit were accused of exceeding their powers during the search of the Siništaj family home; they inflicted light injuries to Petar Siništaj, the father of the two brothers suspected of terrorism, and were charged with ill-treatment and torture. They were found guilty and each was sentenced to three months in jail by the Podgorica Basic Court. The court dismissed the prosecutor’s claim that the defendants beat

⁴⁸⁷ It was only on 6 April 2009 that the Podgorica Basic State Prosecution Office submitted to the Danilovgrad Basic Court the indictment against the competent Spuž prison staff for committing torture incriminated by paragraph 3 of Art. 167 with regard to paragraph 2 of that Article of the Criminal Code, concurrently with the infliction of light bodily injuries incriminated in paragraph 2 of Art. 152 with respect to paragraph 1 of that Article of the Criminal Code committed against the injured party (Government response to the CPT 2008 Report).

⁴⁸⁸ As Vladana Kljajić told the HRA representative during her visit on 18 February 2011.

⁴⁸⁹ Information HRA received from the Danilovgrad Basic Court pursuant to the Free Access to Information Act (Decision of 16 February, 2010, Ref. No. Su 35/11, in accordance with the request to access information submitted on 14 February 2011).

⁴⁹⁰ Articles 166a and 167 of the Montenegrin Criminal Code CG (*Sl. list RCG* 70/2003, 13/2004, 47/2006 and *Sl. list CG* 40/2008 and 25/2010).

⁴⁹¹ On 12 November 2009, Tea Gorjanc Prelević, on behalf of HRA, and Ljiljana Raičević, on behalf of the NGO Safe Women’s House, wrote letters to ZIKS Director Milan Radović and Supreme State Prosecutor Ranka Čarapić, appealing on them to conduct effective investigations and appropriately punish those abusing the detainees in the Spuž penitentiary (available in Montenegro at: <http://www.hraction.org/?p=284>).

Siništaj with their rifle butts and “inflicted great suffering” on him. In its explanation of the penalty, the court said that the defendants had not “insisted that the injured party provide them with information or confess”.⁴⁹² The defendants appealed the Basic Court judgment and the Superior Court on 10 November 2010 rendered a judgment acquitting the policemen due to lack of evidence.⁴⁹³

The suspects remanded in operation Eagles’ Flight claimed that they had been slapped, punched and kept in a painful position at the holding facilities of the Podgorica Superior Court and while being transported for investigative activities on 14/15 September 2006. There is medical documentation supporting their claims.⁴⁹⁴ In the 11–15 September 2006 period, they filed criminal reports for the record in the Podgorica Superior Court against unidentified policemen, who had participated in Eagles’ Flight, charging them with extortion of statements incriminated by Article 166 and ill-treatment and torture incriminated by Article 167 of the Criminal Code. The injured parties supplemented their criminal report four times, thus continuously urging the state prosecution office to launch criminal proceedings.⁴⁹⁵

According to the CPT 2008 Report, it was only 9 months after the operation that the Prosecution Office requested in writing that the criminal police perform an identification of the implicated police officers.⁴⁹⁶ These requests were ignored by the police. Furthermore, no action was taken upon a letter by the President of the Podgorica Superior Court, dated 23 November 2006, which stated that court employees had witnessed the ill-treatment of detained persons by police officers and prison escort staff at the courthouse from 11 to 15 September 2006. Notwithstanding, the prosecution office failed to apply

⁴⁹² Which is an element of the crime of torture, Article 167 of the Montenegrin CC.

⁴⁹³ “No Proof that He Was Beaten Up”, *Dan*, 23 October 2010.

⁴⁹⁴ In the minutes on the questioning of Anton Siništaj on 11 September 2006, the questioning of Nikola Ljekočević on 11 September 2006, the questioning of suspect Viktor Siništaj on 15 September 2006 and the questioning of suspect Roko Dedvukaj on 12 September 2006, Podgorica Superior Court judge Miroslav Bašović cited their allegations that they had been subjected to torture in the police and the Remand Prison and noted injuries, in the form of haematomas and flayed skin, on Ljekočević and Dedvukaj sustained due to the beating by the Montenegrin police officers. See paragraph 24 and footnote 26 of the CPT 2008 Report for more details.

⁴⁹⁵ The suspects supplemented the criminal report on 13 October by filing it also on behalf of another defendant in the case, Kolja Dedvukaj, and expanding it to include policemen who had taken Anton and Viktor Siništaj in for questioning on 11 and 15 September 2006, at which time they physically abused them, beat them up and insulted them as they were escorting them to the investigating judge and in the courthouse room in which they were waiting for the questioning to begin. The report was further supplemented on 30 October 2007, 14 January 2008 and 16 June 2008 – when it was expanded to include unidentified Spuž uniformed staff who beat up, cursed and insulted Viktor Siništaj as they were taking him to the Podgorica Superior Court for questioning on 15 September 2006 and listed the names of the policemen and prison staff which ill-treated Viktor Siništaj.

⁴⁹⁶ The CPT 2008 Report is available at <http://www.cpt.coe.int/documents/mne/2010-03-inf-eng.htm>, p. 18, paragraphs 24–26.

the legal means provided by the law, such as notifying the Government of the failure of the police to act on its request (Art. 44(4), CPC) or reviewing the court staff's accessoryship (Art. 387, CC).

Although the state prosecutor apparently has not taken further action to process the criminal report, the state prosecutor has never notified the persons who had filed that the report has been dismissed.⁴⁹⁷ Four of the injured parties filed an application with the ECtHR claiming ineffective investigation and violation of Article 3 of the ECHR.

The CPT concluded that the requirements of an "effective" investigation had not been fulfilled. It noted that the investigations were not thorough and comprehensive, as was clear from the failure to carry out an identification of those implicated, to question all victims of alleged ill-treatment and witnesses, and to give due weight to medical findings consistent with allegations of ill-treatment. Secondly, the investigations were not initiated promptly and the current arrangements for investigation of possible ill-treatment by the police did not always ensure an adequate level of independence. The CPT also highlighted that the level of engagement of the alleged victims and their lawyers raised concerns as regarded meeting the requirement of public scrutiny over investigations and procedural actions.

Mass Beating of Spuž detainees on 1 September 2005. –No one has yet been punished for the beating of 18 detainees in the Spuž penitentiary on 1 September 2005; only one person has been investigated on suspicion of negligent performance of duty.⁴⁹⁸ The Supreme State Prosecution Office rejected HRA's request to notify the public of what has been done to prosecute and punish all the implicated members of the special police unit, i.e. Police Directorate staff, who had ordered and conducted the operation.⁴⁹⁹ No investigation of

⁴⁹⁷ On 14 May 2008, the Basic State Prosecution Office filed the indictment Ref. No. Kt. 732/08 against the following police officers Marko Kalezić, Darko Šekularac, Nenad Šćekić, Branko Radičković and Milorad Mitrović for the crime of ill-treatment and torture incriminated in paragraph 3 of Art. 167 with respect to paragraph 2 of that Article of the Criminal Code, committed by the beating, torture and ill-treatment of Petar Siništaj during the Eagles' Flight operation on 9 September 2006.

⁴⁹⁸ According to the information released by the Supreme State Prosecutor on 17 December 2007 (Ref. No. Tu 654/07), the case file has been with the Basic Prosecutor since December 2005. The latter in the meantime filed a motion for investigation with the investigating judge against (only) one responsible officer in the Montenegrin Police Directorate, suspected of negligent performance of duty incriminated by Article 417(1) of the CC. The investigation was still under way at the time this Report went into print.

⁴⁹⁹ HRA asked the Supreme State Prosecutor twice for information on which special police unit officers were being investigated and on headway in the investigation into the physical ill-treatment of the Spuž detainees on 1 September 2005. The HRA requests of 12 May 2010 and 30 July 2010 are available at the following links in Montenegrin:: <http://www.hracion.org/wp-content/uploads/zahtjev-3007.pdf> and <http://www.hracion.org/wp-content/uploads/zahtjev-1205.pdf>. The Supreme State Prosecutor rejected both requests for access to information (<http://www.hracion.org/wp-content/uploads/rjesenje-vdt-0110.pdf> i <http://www.hracion.org/wp-content/uploads/rjesenje-vdt2-0110.pdf>).

the incident has been conducted notwithstanding the EU's explicit interest in this incident.⁵⁰⁰

According to the Spuž Remand Prison Director and documentation, the special police units acted on a Podgorica Superior Court search warrant and entered the Spuž prison cells at dawn on 1 September 2005 and beat up 31 detainees. The report on the incident, including medical findings on the detainees' injuries, was submitted to the Justice Minister and state prosecutor, and the whole documentation was also submitted to the Superior Court President and investigating judge. A special Health Ministry medical commission, formed at the initiative of the then Prime Minister Milo Đukanović on 5 September 2005, confirmed that 18 inmates had sustained serious injuries (in the forms of haematomas, et al).⁵⁰¹

This case was also noted by the CPT.⁵⁰² During its examination of the case, it failed to find any reports of resistance from inmates that would justify the use of force by the police officers deployed. Although the incident had been immediately reported to the Prosecution Office, it was only on 27 October 2005 (i.e. almost two months after the intervention) that the Prosecution Office requested the police authorities to indicate who was in charge of the organisation and execution of the intervention and to submit relevant documentation. On 18 December 2006 (i.e. more than a year after the incident), the Prosecution Office applied to the investigating judge to initiate proceedings against the Head of Podgorica Police Directorate on the basis of the fact that he was responsible for the conduct of the intervention. The investigative activities subsequently performed involved a forensic assessment of the medical findings concerning injuries sustained by the prisoners, and the questioning of the Head of Podgorica Police Directorate and several police officers involved in the intervention.⁵⁰³ Since the end of 2007, no further investigative activities have been carried out and the Supreme State Prosecutor has not disclosed whether any activities have been undertaken since.

The CPT noted that the investigative activities have omitted to question the penitentiary authorities, staff working at the Remand Prison and all prisoners (both those who were injured and those who had witnessed the intervention). Neither have the necessary steps been taken to seize the internal orders related to the organisation of the intervention and to question senior

The Justice Ministry first upheld the HRA appeal, annulled the SSP decision and ordered its review but subsequently upheld the SSP's second decision to deny access to this information. The HRA initiated a dispute before the Administrative Court, which was under way at the time this Report went into print.

⁵⁰⁰ In its 2005 Serbia and Montenegro Report, the European Commission noted that "police ill-treatment in the prison in Spuž (September 2005) needs to be fully and transparently investigated" (9 November 2005, p. 18).

⁵⁰¹ *Monitor*, 9 September 2007, p. 12.

⁵⁰² CPT 2008 Report, p. 17.

⁵⁰³ *Ibid.*

officials from the Ministry of the Interior who had been involved in its planning, as well as the police officers who drew up the minutes of the search and subsequent reconstruction of events. As a result, the investigation has failed to identify the officials responsible for the organisation and execution of the operation.⁵⁰⁴

The ill-treatment of three detainees that occurred since the CPT 2008 visit to Montenegro, in 2009 and 2010, warrants particular attention.

Beating of detainees Igor Milić and Dalibor Nikezić. – In February 2010, the state prosecution office dismissed the criminal reports against prison guards Igor Milić and Dalibor Nikezić who beat up the detainees after it assessed that the force they used against the detainees “was necessary”.⁵⁰⁵

Nikezić and Milić were beaten up in prison on 27 October 2009 during an altercation with the prison guards. Milić’s mother filed a criminal report against the prison guards. After the competent state prosecutor abandoned criminal prosecution, the injured parties initiated private prosecution. The Podgorica Superior Court was reviewing Milić’s and Nikezić’s appeal against the Danilovgrad Basic Court decision to reject their request for an investigation against the prison guards.⁵⁰⁶

The prison management claims that the two young men attacked five prison guards, who then applied force in accordance with the law. However, after perusing the medical documentation on their injuries and watching the video recording, the Human Rights and Freedoms Protector concluded that the guards applied unnecessary and excessive force.⁵⁰⁷ The Protector recommended to the prison management to conduct disciplinary proceedings against all the guards implicated in the incident, but concluded that not all of them had been subjected to disciplinary proceedings as he had recommended.⁵⁰⁸ A video recording of the incident was made public by the NGO YIHR, the representatives of which explained that “the footage is just a small part of what had happened that day”.⁵⁰⁹

The injured parties filed a constitutional appeal and an application with the ECtHR claiming lack of an effective legal remedy and ineffective investigation of the ill-treatment they reported.⁵¹⁰

⁵⁰⁴ CPT 2008 Report, p. 17, paragraph 23.

⁵⁰⁵ “Beating of Detainees Was Lawful”, *Vijesti*, 13 February 2010.

⁵⁰⁶ Information obtained on 30 May 2011, from Azra Jasavić, Milić’s and Nikezić’s legal counsel.

⁵⁰⁷ Human Rights and Freedoms Protector’s 2010 Annual Report, March 2011, pp. 54–55.

⁵⁰⁸ *Ibid*, p. 55.

⁵⁰⁹ “Radović Protecting Guards”, *Vijesti*, 14 November 2009 and “Human Rights and Freedoms Committee Session”, *Vijesti*, 31 March 2010. The video recording of the incident on 27 October 2010 is available at: <http://www.youtube.com/watch?v=qcdJjed1aAc>, accessed on 25 May 2011.

⁵¹⁰ Information obtained on 30 May 2011, from Azra Jasavić, Milić’s and Nikezić’s legal counsel.

Igor Milić and Dalibor Nikezić again reported that they were exposed to ill-treatment in January 2011. They filed criminal reports against the prison guards and notified ZIKS Director Milan Radović, the Justice Minister and the Superior Court President of the incident in writing.⁵¹¹

Beating of Aleksandar Pejanović in the Podgorica Police Detention Unit. – The investigation of the beating of Aleksandar Pejanović in the Podgorica Police Detention Unit, aka *Betonjerka*, on 31 October 2008 had not been expanded by the end of the reporting period to include the police officers, who had beaten the man up, or their superiors who had ordered and enabled the beating.⁵¹²

Pejanović was ill-treated several times during detention in the Podgorica police, where he was brought in on suspicion of “violent conduct” and “assaulting an officer” during an opposition protest rally on 13 October 2008 staged after the Montenegrin Government decided to recognise Kosovo’s independence. He was first struck on 31 October at 10 o’clock and the beatings continued over the next 48 hours. The court medical expert qualified the numerous bodily injuries as light physical injuries.⁵¹³

After nearly one year, on 14 September 2009, the Podgorica Basic State Prosecutor filed an indictment against six police officers for aiding and abetting torture and ill-treatment (Art. 167, paragraph 3 regarding paragraph 2, regarding Art. 25 of the CC). On 15 December, during the trial, one of the indicted police officers, Goran Stanković, testified that several of his colleagues, most of whom were superior in rank and held supervisory positions, committed a series of violations of the law by ordering, enabling and concealing Pejanović’s torture, including by forging official documentation. Stanković’s testimony fully coincided with Pejanović’s allegations, including his claim that masked men in police uniforms, members of the police intervention squad, beat him several times while he was in police custody. Stanković said

⁵¹¹ YIHR First Quarterly Report on the State of Human Rights in Montenegro, 2011, available at: <http://www.yihr.me/eng/wp-content/uploads/2010/03/YIHR-I-Quarterly-Report-on-the-state-of-human-rights-in-Montenegro.pdf>.

⁵¹² HRA twice invoked the Free Access to Information Act and asked the Supreme State Prosecution Office for information on whether any steps have been made to expand the investigation to include senior police officials but never received a reply. The HRA requests of 12 May 2010 and 30 July 2010 are available in Montenegrin at the following links: <http://www.hracion.org/wp-content/uploads/zahtjev-3007.pdf> and <http://www.hracion.org/wp-content/uploads/zahtjev-1205.pdf>. The SSP both times rendered decisions rejecting access to such information. These decisions are available in Montenegrin at: <http://www.hracion.org/wp-content/uploads/rjesenje-vdt-0110.pdf> and <http://www.hracion.org/wp-content/uploads/rjesenje-vdt2-0110.pdf>. Together with the Centre for Civic Education and researcher of human rights violations Aleksandar Zeković, HRA appealed to the SSP to expand the investigation, but the SSP did not do so by the end of 2010. The Joint Statement on the Public Testimony by Goran Stanković, one of the policemen indicted for ill-treating Aleksandar Pejanović, is available at <http://www.hracion.org/?p=313>.

⁵¹³ Findings and opinion of court medical expert Prof. Dr. Dragana Čukić of 5 April 2010 and minutes Ref. No. K 172/09 of 13 May 2010.

that Pejanović's beating "had been ordered from above", as he was told both by shift supervisor Ratko Rondović and commander Dušan Raičević. Policeman Goran Stanković was acquitted in the first instance by the Podgorica Basic Court on 8 June 2010 after both the state prosecutor and Pejanović abandoned his criminal prosecution.⁵¹⁴

None of the policemen suspected of ill-treatment and torture were suspended the moment the investigation was launched or when they were indicted.⁵¹⁵

Three of the six indicted policemen (including Goran Stanković) were acquitted because the prosecutor abandoned their criminal prosecution. One was convicted to three months' imprisonment,⁵¹⁶ and the other two to five months' imprisonment for abetting torture and ill-treatment. They were all handed down minimal penalties, given that ill-treatment, for which they were convicted, as well as aiding and abetting it, warrants between three months and three years of imprisonment when committed by a person acting in an official capacity. The Superior Court overturned this first-instance judgment and ordered a retrial in April 2011. In the meantime, Pejanović launched the private prosecution of two of the acquitted policemen.

The state prosecutor failed to expand the investigation to include the intervention squad policemen directly implicated in the beating or their superiors who had, judging by everything, ordered and enabled Pejanović's beating and denied him his right to medical assistance.⁵¹⁷ Furthermore, there was no investigation into the forgery of Pejanović's detention records, which Stanković also testified of. This is why Pejanović's lawyer Dalibor Kavarić in early March 2011 filed a criminal report against the Podgorica Basic State Prosecution Office staff for failing to conduct an effective investigation, i.e. for negligent performance of duty incriminated by Article 417 of the CC concurrently with accessoryship after the fact (Art. 387, CC). He emphasised that the state prosecutor has not acted because he is waiting for the statute of limitations on this crime to expire.

The Supreme State Prosecution Office refused to notify HRA whether the investigation has been expanded to include anyone else in this incident.

⁵¹⁴ Judgment, Podgorica Basic Court, Case File No K 09/1172, in Podgorica, 8 June 2010.

⁵¹⁵ Under the Police Act (Sl. list RCG, 28/2005 and Sl. list CG 88/2009), a police staff member prosecuted for a crime *ex officio* is unworthy of performing his/her duties (Art. 63(3)).

⁵¹⁶ The judgment (see the previous footnote) states that three police officers were found guilty of abetting torture and ill-treatment, Article 167, paragraph 3 with respect to paragraph 2, with respect to Article 25 of the Criminal Code (Sl. list RCG, 70/2003).

⁵¹⁷ On 25 February 2011, lawyer Dalibor Kavarić filed a criminal report on behalf of Aleksandar Pejanović against Ratko Rondović (who was the shift supervisor the evening Pejanović was beaten up) and Dušan Raičević (commander of the on-duty unit). No action on this report was taken by the time this Report was completed. The criminal report also states that Raičević and Rondović refused to provide the injured Pejanović with medical assistance. Neither has suffered any consequences after the Pejanović incident. Moreover, Rondović Ratko was promoted.

Furthermore, it should be noted that the Police Directorate Internal Audit Sector has not established that any police officer exceeded his official powers in this case. The Sector relied exclusively on the statements by the policemen's colleagues and official documentation in its review of the case.⁵¹⁸

Aleksandar Pejanović was murdered in late May 2011. His neighbour, policeman Zoran Bulatović, shot Pejanović with a service pistol. According to other neighbors, he was at odds with Pejanović. The questioning of witnesses pursuant to the complaint filed by Pejanović against Raičević and Rondović is still ongoing.⁵¹⁹ Witness Goran Stanković said that he felt particularly vulnerable after the murder of Pejanović.⁵²⁰

Ill-treatment of Milovan Jovanović – In late June 2003, policemen Darko Delić, Darko Knežević, Dragan Krsmanović, Velimir Rajković and Slavko Minić, members of the Podgorica police intervention unit, ill-treated and insulted Milovan Jovanović and inflicted light physical injuries on him by repeatedly punching him and hitting him with their truncheons on his head and body, arms and legs.⁵²¹ Jovanović sustained light bodily injuries – contusions, haematomas and other injuries described in detail, on the basis of which it is possible to conclude that Jovanović was brutally beaten up.⁵²²

It was not until nearly six years later, only two months before the statute of limitations for this crime was to expire, on 28 February 2009, that the Basic State Prosecutor filed an indictment (Ref. No. Kt 1547–03) against the group of policemen charging them with the above crimes. Podgorica Basic Court acquitted the policemen because the statute of limitations expired.

Inhuman and degrading treatment of Komanski most wards. – As of June 2011, no proceedings were instituted against the staff who ill-treated the wards of the Komanski most Institution for Persons with Special Needs and the disappearance of two underage wards in 2000 and 2002.⁵²³

During its visit to Komanski most in 2008, the CPT found that the residents' living conditions were appalling⁵²⁴ and qualified the treatment of the wards, particularly chaining them and punishing them by "isolation" as inhu-

⁵¹⁸ The representative of the Police Directorate Internal Audit Sector publicly stated that the Sector did not question Aleksandar Pejanović or peruse his medical records and that it limited itself to police sources, *Radio Antena M*, "Hot Chairs" show, March 2009.

⁵¹⁹ "Rondović and Raičević know about the beating of late Pejanović", *Vijesti*, 16 June 2011.

⁵²⁰ HRA information.

⁵²¹ As stated in the indictment.

⁵²² "Basic State Prosecutor on the Carpet", *Dan*, 10 May 2010.

⁵²³ No information about this was publicly released notwithstanding HRA's two requests for access to information (http://www.hraction.org/wp-content/uploads/vdt_02062010.pdf) submitted to the Supreme State Prosecution Office and the joint endeavours by the Safe Women's House and Anti-Discrimination Centre EKVISTA and HRA, who sent a letter to the Supreme State Prosecutor on 3 June 2010, which went unanswered.

⁵²⁴ CPT Report, paragraph 114.

man and degrading treatment.⁵²⁵ The CPT Report was published in English in March 2010 and in Montenegrin in September 2010.⁵²⁶ The living conditions improved since 2008, but not as much as could have been expected, given that the CPT drew the authorities' attention to the appalling situation in this institution when it ended its visit in September 2008. When the CPT Report was published, the hygiene was still not satisfactory, men were still not segregated from women and the institution was understaffed. The Human Rights and Freedoms Protector reiterated these conclusions in his recommendations to the management of the institution.⁵²⁷

The CPT advised the authorities to conduct a comprehensive review of the situation in the institution that would strategically deal with all the problematic aspects. The recommendations were abided by to an extent in 2010 but the situation in the institution is still not at the level at which it can be concluded that the human rights of its residents are fully respected.⁵²⁸

In their letter of 14 November 2008, the Montenegrin authorities notified the CPT that all chains and locks were removed and replaced by leather restraints. The reconstructed Pavilion A was officially opened on 12 November 2010, the day marked by the Komanski most institution.⁵²⁹ A separate pavilion has been built for minors, who had been accommodated together with adults until 2010. With the aim of abiding by international standards and recommendations made by international organisations and experts, the authorities decided to stop placing wards under 18 years of age in this institution.⁵³⁰

Vuk Mirković, who was the Director of the institution at the time two underage wards disappeared from it in 2000 and 2002, and in 2008, when the CPT concluded that the living conditions were "appalling", was reassigned to the position of Deputy Director of the Podgorica Social Care Centre in 2010.⁵³¹ The state prosecutor has not issued any public statements on whether criminal proceedings have been launched against Mirković or any other Komanski most staff.

⁵²⁵ *Ibid*, paragraph 127.

⁵²⁶ HRA requests to the competent authorities to publish these reports are available at www.hracion.org

⁵²⁷ HRA, Anti-Discrimination Centre EKVISTA and Safe Women's House statement on 6 May 2010, available at: <http://www.hracion.org/?p=349>.

⁵²⁸ Conclusions reached after HRA visits in 2010.

⁵²⁹ "Conditions in the Institution Improve", *Vijesti*, 13 November 2010.

⁵³⁰ "Children No Longer to be Referred to Komanski most", *Dan*, 21 January 2011.

⁵³¹ "Mirković Promoted Instead of Punished", *Vijesti*, 26 January 2011.

Prohibition of Slavery and Forced Labour

Article 8, ICCPR:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. a) No one shall be required to perform forced or compulsory labour;
 - b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
 - c) For the purpose of this paragraph the term “forced or compulsory labour” shall not include:
 - i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
 - ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
 - iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
 - iv) Any work or service which forms part of normal civil obligations.

Article 4, ECHR:

No one shall be held in slavery or servitude.

No one shall be required to perform forced or compulsory labour.

For the purpose of this article the term forced or compulsory labour shall not include:

- a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
- c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.

Article 1, Protocol No. 4 to the ECHR:

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

General

With regard to the prohibition of slavery and forced labour, Montenegro is bound by numerous international treaties prohibiting slavery and servitude, in addition to the ICCPR and ECHR.⁵³² By ratifying these treaties, Montenegro also assumed the responsibility to suppress and punish all forms of slavery, status akin to slavery, transport of persons held in slavery or servitude, trafficking in human beings and forced labour. As of 2008, Montenegro has been bound by another international treaty governing this area – the Council of Europe Convention on Action against Trafficking in Human Beings.⁵³³

Article 28(4) of the Montenegrin Constitution stipulates that no one may be held in slavery or servitude. In addition to the general prohibition of forced labour in Article 63(1), the Constitution in paragraph 2 also lists which work shall not be considered forced labour. As opposed to the ICCPR and the ECHR, which state that “any work or service which forms part of normal civil obligations” shall not be considered forced labour⁵³⁴, the Constitution grants more freedom and lays down that only “work in the ordinary course of detention, performance of service of a military nature or service exacted instead of it; work required in case of a crisis or calamity threatening human life or property” shall not be considered forced labour (Art. 63(2)).

As opposed to the ICCPR and ECHR, which explicitly prohibit derogation from the prohibition of slavery and servitude, Article 25 of the Constitution (*Temporary Restriction of Rights and Freedoms*) also prohibits restriction of the right to “dignity and respect of a person”, which should be interpreted

⁵³² 1. After it gained independence, Montenegro bound itself to apply all international documents binding upon the former Serbia and Montenegro: the Slavery Convention (*Sl. novine Kraljevine Jugoslavije*, 234/29), ILO Convention No. 29 Concerning Forced Labour (*Sl. novine Kraljevine Jugoslavije*, 297/32), Convention on the Suppression of Trade in Adult Women (*Sl. list FNRJ*, 41/50), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (*Sl. list FNRJ*, 2/51), Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (*Sl. list FNRJ – Dodatak*, 7/58), International Covenant on Economic, Social and Cultural Rights (*Sl. list SFRJ*, 7/71), Convention on the Elimination of All Forms of Discrimination against Women (*Sl. list SFRJ – Međunarodni ugovori*, 11/81), Convention on the High Seas (*Sl. list SFRJ – Dodatak*, 1/86), Convention against Transnational Organized Crime and additional protocols (*Sl. list SRJ – Međunarodni ugovori*, 6/01), Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (*Sl. list SRJ – Međunarodni ugovori*, 7/02, 18/05), the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (*Sl. list SRJ – Međunarodni ugovori*, 7/02), ILO Convention No. 105 Regarding the Abolition of Forced Labour (*Sl. list SRJ – Međunarodni ugovori*, 13/02), Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (*Sl. list SRJ – Međunarodni ugovori*, 13/02), the ILO Convention No. 182 on the Worst Forms of Child Labour (*Sl. list SRJ – Međunarodni ugovori*, 2/03).

⁵³³ *Službeni list CG – Međunarodni ugovori* 4/2008.

⁵³⁴ See Art.8(2c (IV)) of the ICCPR and Art. 4(3d)) of the ECHR.

as covering all of Article 28 (*Dignity and Respect of a Person*). Paragraph 4 of the latter Article prohibits slavery and servitude, although prohibition of slavery as such is not specifically listed in Article 25(4) among prohibitions which may not be abolished.

Trafficking in Human Beings and Smuggling of People

Holding a person in servitude is again the focus of attention as it appears in the form of trafficking in human beings on a large scale. The key international standard in this area is laid down in the United Nations Convention against Transnational Organized Crime and the Protocols thereto, binding on Montenegro since 2001.⁵³⁵ The First Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (hereinafter: the First Protocol), defines trafficking in human beings⁵³⁶, while the Second Protocol against the Smuggling of Migrants by Land, Sea and Air, (hereinafter: the Second Protocol) defines the smuggling of humans.⁵³⁷

Article 444 of the Criminal Code⁵³⁸ lays down a prison sentence ranging between one and ten years for anyone who, by force or threat, deception or fraud, abuse of power, trust, a dependency relationship, a position of vulnerability, withholding of personal documents or by giving or receiving payments or other benefits to achieve the consent of a person having control over another, recruits, transports, transfers, hands over, sells, buys, mediates in the sale of, harbours or holds another person for the purpose of labour exploitation, forced labour, submission to servitude, commission of a crime, prostitution or another form of sexual exploitation, begging, use for pornographic purposes, extraction of a body organ for transplantation, or for use in armed conflicts. The minimum penalty for committing this crime against a minor is 3 years. In the event of the crime resulting in grave physical injury to the victim, the perpetrator of the crime shall be sentenced to between one and 12 years' imprisonment and in the event it results in the death of the victim, the perpetrator shall be sentenced to a minimum of ten years' imprisonment. The Criminal Code lays down a higher legal minimum penalty than its predecessor (from 5 to 10 years' imprisonment) in the event the perpetrator was involved in trafficking in human beings or in the event the crime was committed by an organised group. It also envisages between 6 and

⁵³⁵ See footnote 1.

⁵³⁶ Trafficking in persons is defined as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation" (Art. 3(1)).

⁵³⁷ Smuggling of migrants is defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (Art. 3(1)).

⁵³⁸ *Sl. list CG*, 25/2010.

12 months' imprisonment of persons who knowingly used the services of a victim of trafficking; they will be sentenced to between 3 and 15 years in jail if the victim whose services they used was a minor. The legislator thus took into account the CoE Parliamentary Assembly Recommendation 1545 (2002) on the campaign against trafficking in women⁵³⁹, which insists on punishing the client who *knowingly* buys sexual favours from a woman victim of human trafficking. The penal policy thus targets both traffickers in humans and those availing themselves of their services.

Like its predecessor, the provisions in the CC incriminating *Trafficking in Children for Adoption* (Art. 445(1)) lay down that the perpetrators of this crime shall be sentenced to between 1 and 5 years, i.e. a minimum three years' imprisonment in the event the perpetrator committed the crime or participated in its commission in an organised group (Art. 445(2)). The CC, however, only incriminates trafficking of children under 14 years of age for adoption. Given that every human being below the age of eighteen years is considered a child under Article 1 of the Convention on the Rights of the Child⁵⁴⁰ and Art. 3(d) of the First Protocol, the provision in the Criminal Code, under which only persons under the age of 14 are considered children, deprives children aged between 14 and 18 of protection in contravention of international standards.

The Criminal Code does not consider the consent of the victim to exploitation (notwithstanding his or her age) irrelevant if use has been made of any of the listed means to commit the crime. It thus deviates from the standards laid down in Art. 3(b) of the First Protocol, under which the consent of a victim of trafficking in persons to the intended exploitation shall be considered irrelevant where any of these means have been used.

Mediation in prostitution warrants a fine or maximum one-year imprisonment, unless the crime was committed against a minor, in which case the perpetrator shall be sentenced to between one and ten years' imprisonment (Art. 210, CC)

The same penalty is laid down for the simple form of the crime of submission to slavery and transport of enslaved persons (Art. 446(1)). Transport of enslaved persons or persons in a position akin to slavery to another country warrants between six months and five years' imprisonment (Art. 446(2)), i.e. between 5 and 15 years' imprisonment in the event the crime was committed against a minor (Art. 446(3)). This provision makes the existence of the crime conditional on the transport of the victim "from one country to another". The transport of victims of human trafficking should be incriminated regardless of whether they are transported across or within the state borders.

⁵³⁹ The Recommendation is available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/EREC1545.htm>.

⁵⁴⁰ *Sl. list SFRJ – Međunarodni ugovori*, 15/90, *Sl. list SRJ – Međunarodni ugovori*, 4/96 and 2/97.

A literal interpretation of this provision would lead to the obverse conclusion – that there is no crime in the event the person was transported within the state boundaries. This is why this provision should be made more specific.

Trafficking in human organs

Article 444(1) of the Criminal Code lays down “extraction of a body organ for transplantation” as one of the purposes of human trafficking, while Articles 294 and 295 hold accountable doctors who unlawfully extract or transplant body organs. The Criminal Code thus provides for the punishment of trafficking in human organs, in accordance with the CoE Parliamentary Assembly Recommendation No. 1611 (2003) on trafficking in organs,⁵⁴¹ which emphasises the need to ensure that those responsible for organ trafficking are adequately punished, including sanctions for medical staff involved in transplanting organs obtained through illegal trafficking.

The Montenegrin Act on Extraction and Transplantation of Human Organs for Treatment Purposes,⁵⁴² which came into force on 16 November 2010, prohibits trafficking in organs, advertising of organ supply and demand in the media or in any other advertising medium and mediation in such deals (Art. 7)

Smuggling of humans

Prior legislation on illegal crossing of borders had laid down a maximum one-year imprisonment of persons who illegally crossed or tried to cross the border under arms or by resorting to violence, i.e. between six months and one year imprisonment of an offender involved in the illegal transfer of other persons across a border or facilitating another to illegally cross the border for gain. The Article sanctioning this crime (*Illegal Border Crossing and Smuggling of Humans*) has been expanded and now also incriminates a qualified form of the crime, laying down a prison sentence of between one and ten years if the crime was committed by more than one perpetrator in an organised fashion, by abuse of official position or in a manner endangering the lives or health of the person whose illicit border crossing, residence or transit the perpetrator facilitated, or in cases of smuggling a large number of persons (Art. 405(3)). The last paragraph provides for the confiscation of instrumentalities intended for or used in the commission of the crime (Art. 405(4)). The law incriminates endangering the lives or health of the smuggled migrants, but does not lay down their inhuman or degrading treatment or exploitation as a qualified form of the crime, whereby it deviates from the standard in the Second Protocol (Art. 6(3(b))), under which circumstances

⁵⁴¹ The Recommendation is available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta03/EREC1611.htm>

⁵⁴² *Sl. list* CG 76/2009.

entailing inhuman or degrading treatment, including the exploitation of the smuggled migrants, shall constitute aggravating circumstances.

The CC also failed to specify that migrants shall not be subjected to criminal prosecution for illegally crossing the border in the event that they were victims of the crime in Art. 405(3) of the CC, whereby it deviates from the standard laid down in the Second Protocol (Art. 5).

The Aliens Act⁵⁴³ comprises an article governing temporary residence for humanitarian reasons (Art. 51). Such residence may be granted an alien assumed to be a victim of the crime of human trafficking, and an under-age alien who has been abandoned or is a victim of organised crime, even when s/he does not satisfy the legal temporary residence criteria. Temporary residence for humanitarian reasons is approved for a period ranging between three months and one year and may be extended as long as the reasons for which it was granted continue to exist. An alien satisfying the criteria for this form of temporary residence may not be expelled from Montenegro for illegally entering or residing in it. The alien shall be provided with protection and shall enjoy the rights provided under the Witness Protection Act⁵⁴⁴ if there is reasonable fear that his or her life, health, physical integrity or freedom may be endangered by his or her testimony. These rights aim to encourage migrants to testify in trials against human traffickers.

Protection and compensation of victims

The presence of witnesses (victims of human trafficking) at the main court hearings is extremely important in the prosecution of human traffickers.

The 2009 Criminal Procedure Code⁵⁴⁵ applies to organised crime, corruption, terrorism and war crimes as of 26 August 2010. Organised crime entails the existence of grounds for suspicion that a criminal offence warranting a minimum four-year imprisonment was the result of the collaboration of three or more persons in a criminal organisation, i.e. a criminal group whose intention was to commit grave crimes for profit or to gain power, if at least three of the eight conditions listed in the footnote have been met.⁵⁴⁶

⁵⁴³ *Sl. list CG*, 72/2009.

⁵⁴⁴ *Sl. list RCG*, 65/2004.

⁵⁴⁵ *Sl. list RCG*, 57/2009 and 49/2010.

⁵⁴⁶ a) that every member of the criminal organisation or crime group had an assignment or role, which was defined in advance or obviously definable; b) that the activities of the criminal organisation or crime group had been planned for a longer or an unlimited period of time; c) that the activities of the criminal organisation or crime group are subject to specific rules of internal control and discipline of its members; d) that the activities of the criminal organisation or crime group are planned and carried out internationally; e) that the activities of the criminal organisation or crime group involve resorting to violence or intimidation or the readiness to use them; f) that the activities of the criminal organisation or crime group involve economic or business structures; g) that the activities of the criminal organisation or crime group involve money laundering or illicit gain;

The CPC also provides for the provisional seizure of the offenders' property and proceeds from crime (Arts. 85–97), protection of witnesses from intimidation (Art. 120), protection of the injured parties giving testimony (Art. 124) and the institute of cooperative witness (Art. 125).

The 2008 State Prosecution Office Act⁵⁴⁷ regulates the establishment of a Department for Suppressing Organised Crime, Corruption, Terrorism and War Crimes, which shall be headed by a special prosecutor (Arts. 66–82).

The Witness Protection Act governing the protection of witnesses outside court has been in force since April 2005.⁵⁴⁸

The Government of Montenegro in 2001 adopted a decision establishing the National Coordinator for Suppressing Trafficking in Humans and designed the Victim Protection Programme in Montenegro. The Government adopted a Strategy to Combat Trafficking in Humans in November 2003.⁵⁴⁹ The Ministry of the Interior in 2003 passed Instructions on the Regulation of the Residence of Foreign Nationals – Victims of Human Trafficking, to assist and protect victims through the implementation of the Strategy⁵⁵⁰. The Government in 2010 adopted an Action Plan for the Implementation of the Strategy to Combat Trafficking in Humans for 2010 and 2011. The Action Plan is implemented by the Working Group, comprising the Assistant Interior Minister, Deputy Special State Prosecutor for Organised Crime, Corruption and War Crimes, and representatives of the CoE, European Commission, international organisations (OSCE, IOM, UNICEF and *Save the Children*) and the US Embassy in Podgorica in the role of observers.

The Working Group, however, does not include any representatives of the civil society. Apart from the NGO Montenegrin Women's Lobby, which runs the state shelter, other NGOs with experience in combating human traf-

h) that the criminal organisation or group or part of it have influence on the political authorities, media, legislative, executive or judicial authorities or other relevant social or economic factors.

⁵⁴⁷ *Sl. list RCG* 69/2003 and 40/2008.

⁵⁴⁸ *Sl. list RCG*, 65/2004.

⁵⁴⁹ The Strategy is available at: <http://www.gov.me/biblioteka/strategije?pagerIndex=2>.

⁵⁵⁰ Under the Instructions, during the identification of a victim who illegally entered or is illegally residing in Montenegro, the competent administrative authority is obliged to establish any elements of coercion, force, threats or necessary defence that may eliminate or diminish the misdemeanour or criminal accountability of the victim. This marks an improvement over the prior legislation under which the victim had been automatically prosecuted for a misdemeanour or a crime. A victim is unconditionally granted three-month temporary residence for the reflection period, or for a longer period of time, six months or one year, if s/he cooperates with the police in uncovering the crime or takes part in the criminal proceedings. The Instructions emphasise that secondary victimisation during the proceedings must be prevented, that the privacy and the identity of the victim must be protected by due application of data protection regulations and that the victim must be issued a travel document if s/he does not have one (Montenegrin MIA, No. 01–011/05–48445).

ficking are hardly involved in the implementation of the activities foreseen by the Action Plan and do not receive financial assistance from the Office. Although a Project Committee was set up back in 2001 rallying representatives of all relevant stakeholders involved in fighting human trafficking, including three NGOs, this body does not have the mandate to impact the policy for combating human trafficking or the activities of the Working Group that monitors and implements the Strategy.

Seizure of criminal proceeds and compensation of victims

The Montenegrin Assembly in 2008 ratified the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism⁵⁵¹ whereby it assumed the obligation to seize proceeds from organised crime (Art. 2 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and Art. 12 of the Convention against Transnational and Organized Crime) and to regulate the use of the confiscated proceeds to give compensation to the victims of crime (Art. 14 of the Convention against Transnational and Organized Crime). The state is duty-bound to take measures to provide the victims with information on relevant proceedings (criminal trials, civil lawsuits)⁵⁵² free legal aid in obtaining proportionate compensation for damages⁵⁵³ and establish a compensation fund, to which the confiscated proceeds of physical and natural persons involved in the human trafficking chain will be channelled.⁵⁵⁴

Articles 112 and 133 of the CC governing the confiscation of proceeds from crime have been expanded. Article 112 lays down that no one may retain property obtained through crime and that the proceeds from crime shall be confiscated under conditions laid down in the law and pursuant to a court decision, and not only the *court conviction*, as before. Money, valuables and all other property gained through a criminal offence shall be seized from the perpetrator. In the event such seizure is not possible, the perpetrator shall be obliged to provide financial reimbursement corresponding to the value of the property (Art. 113(1)) The perpetrator's other property may also be seized where there are reasonable grounds to believe that it was obtained through a criminal offence unless the perpetrator demonstrates that it was lawfully obtained (extended confiscation, Art. 113(2)). The CC also lays down the condi-

⁵⁵¹ *Sl. list RCG – Međunarodni ugovori*, 5/2008.

⁵⁵² Pursuant to Article 6 of the First Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children.

⁵⁵³ Legal aid to victims of human trafficking in Montenegro has to date been provided mostly by non-governmental organisations.

⁵⁵⁴ The confiscated assets are to be used for the compensation of victims and the coverage of the assistance and legal services they are extended. See International Centre for Migration Policy Development, *Regional Best Practice Guidelines for the Development and Implementation of a Comprehensive National Anti-trafficking Response*, preliminary version, October 2004, pp. 46 and 47.

tions that must be fulfilled in order to apply the provisions on extended confiscation (Art. 113(3)). Property acquired before and/or after the commission of the crime may also be confiscated in the event the court establishes that the time context in which the property was acquired and other circumstances of the case warrant its confiscation (Art. 113(4)). Property obtained through crime shall be seized without compensation also from a person to whom it has been transferred and from a person who had, should have or had cause to have known that it had been obtained through crime (Art. 113(5)) and in the event the property was acquired through crime for another (Art. 113(6)).

Forced Labour

Forced or compulsory labour entails all work done under threat or punishment.⁵⁵⁵ Article 6(1) of the ICESCR recognises “the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”, i.e. that everyone shall have the right to work but not the duty to work.

As stated above, the Constitution prohibits forced labour and provides that the common work during the prison sentence will not be considered as forced labour, nor labour during military service or during a crisis or a major accident (Art. 63), but, unlike the ICCPR and the ECHR, it does not state that “work or service which forms part of normal civic obligations”, such as, for instance, *pro bono* advocacy in some countries, shall not be considered forced labor.⁵⁵⁶

Under the CPC, a person on remand may be obliged to perform work necessary to maintain hygiene in the cell s/he occupies. A person on remand may request and be allowed to perform a job within prison grounds in accordance with his/her mental and physical abilities, providing that such work is not prejudicial to the course of the proceedings. The person on remand shall be paid remuneration for such work, which shall be set by the prison warden (Art. 182(5)).

As far as convict labour is concerned, the European Court of Human Rights, in the case of *De Wilde, Ooms and Versyp v. Belgium* found that convict labour that did not contain elements of rehabilitation was not in accordance with Article 4 (2) of the ECHR⁵⁵⁷. Articles 37–41 of the PSEA⁵⁵⁸ on

⁵⁵⁵ Article 2(1) of ILO Convention No. 29 Concerning Forced Labour defines “forced or compulsory labour” as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily (see also *Van der Mussele v. Belgium*, ECtHR, App. No. 8919/80 (1983)).

⁵⁵⁶ *Van der Mussele v. Belgium*, ECtHR, 1983 (in Belgium mandatory defense costs are not borne by the state).

⁵⁵⁷ See: *De Wilde, Ooms and Versyp v. Belgium*, ECtHR, App. No. 2832/66 (1971).

⁵⁵⁸ *Sl. list RCG*, 25/94, 29/94, 69/2003 and 65/2004.

convict labour emphasise the rehabilitation element of work performed by convicts. A convict shall be assigned to a job in compliance with his/her rehabilitation requirements and in accordance with his/her mental and physical abilities professional qualifications, capabilities and the need to maintain order and discipline (Art. 37), and shall be entitled to remuneration for that work (Art. 38(1)) equalling at least 50% of the guaranteed wage in the state (Art. 38(2)).

The Constitution does not prescribe compulsory military service. Article 48 of the Constitution, however, lays down that no one shall be obliged to fulfil military or other service involving the use of weapons against his or her religion or beliefs. The Montenegrin Army has been professionalised.

The Defence Act⁵⁵⁹ provides for conscription, which entails participation in preparations for defence only in a state of war or emergency (Art. 7). The duty to work, which involves participation in the performance of specific jobs and tasks of relevance to national defence during a state of war or emergency, is laid down in Article 8. The duty applies to men from 18 to 65 years of age and women from 18 to 60 years of age (Art.8(3)). The Act lays down which particularly vulnerable categories of citizens may not be assigned the duty to work without their consent, e.g. a parent of a child under 15 whose spouse is engaged in military service, pregnant women and mothers of children under 15, woman during pregnancy or maternity leave, a person who is not able-bodied (Art. 9), which is in accordance with international standards. The Defence Act, however, deviates from international standards inasmuch as it does not lay down how long the work duty may last, thus allowing for arbitrary determination of its duration during a state of war or emergency. The provisions of this law thus need to be aligned with ILO Convention No. 29 Concerning Forced Labour. Article 12(1) of the Convention lays down that the maximum period for which any person may be taken for forced or compulsory labour of all kinds in any one period of twelve months shall not exceed sixty days.

Combating Human Trafficking in Practice

Miscellaneous

The Montenegrin Government Office for Combating Trafficking in Humans is charged with keeping statistics on the victims of human trafficking and the traffickers by compiling the data communicated by the Shelter for Victims of Human Trafficking, the Police Directorate, the Office of the State Prosecutor and the Supreme Court of Montenegro.⁵⁶⁰

⁵⁵⁹ *Sl. list RCG*, 47/2007 and *Sl. list CG*, 88/2009.

⁵⁶⁰ More information is available at: <http://www.antitrafficking.gov.me/kancelarija>.

According to Office statistics,⁵⁶¹ the Police Directorate filed two criminal reports against 16 people for trafficking in humans in 2010. All of them were charged with human trafficking in the case dubbed Aphrodite.

The case Aphrodite, named after a nightclub in Podgorica which was involved in prostitution, started with arrests of 15 people on 15 February, three of whom were policemen, suspected of criminal conspiracy, human trafficking and mediation in prostitution in an organised fashion. These people were suspected and later charged with membership of an organised crime group; they are charged with recruiting girls from the region, abusing their difficult financial circumstances, and deceiving them into believing that they would work as waitresses or dancers in Podgorica and Ulcinj and be adequately remunerated for their work, and then putting them up in night clubs, seizing their documents and limiting their movement. A number of these girls were allegedly forced into prostitution, while the other girls allegedly agreed to engage in prostitution. Apart from these crimes, the three police officers are also suspected of abusing their posts.⁵⁶² The police found 12 girls and placed them in the Government Shelter for Victims of Human Trafficking, where they were provided with medical aid and social assistance.⁵⁶³

The case has been assigned to a judge in the specialised organised crime trial panel of the Podgorica Superior Court. The trial opened on 7 December 2010. Most of the girls testified under pseudonyms.⁵⁶⁴ All of them have confirmed that they voluntarily stayed in the night clubs, and most testified that there was no prostitution in clubs or providing sexual services for money.⁵⁶⁵ In addition to the testimonies, recordings of telephone conversations where the girls ask about jobs, or conversations about arranging prostitution of girls were also heard at the trials.⁵⁶⁶ The June 2011 verdict of the Superior Court did not confirm indictments for the crime of human trafficking; the accused were convicted for the crime of criminal association and mediation in prostitution.⁵⁶⁷

The Nikšić police in September 2010 detained six persons on suspicion of committing the crime of human trafficking of Lj.S. (21) from Prizren, Republic of Kosovo. The Police Directorate gave the initials of the victim in a press release on the measures it had undertaken with respect to the victim

⁵⁶¹ *Ibid.*

⁵⁶² Police Directorate press release: <http://www.upravapolicije.com/navigacija.php?IDSP=3957>.

⁵⁶³ “They Made 120,000 Euros a Year”, *Pobjeda*, 15 February 2010, “Aphrodite was the Pimps’ Bane”, *Vijesti*, 15 February 2010.

⁵⁶⁴ “Dancers Entertained Czech Officials”, *Vijesti*, 8 December 2010.

⁵⁶⁵ “Selling pancakes Lea made her dream come true”, *Vijesti*, 8 February 2011.

⁵⁶⁶ “Send seven girls to Lapčiči, until the dawn”, *Vijesti*, 9 February 2011, “Meeting policemen in clubs”, *Vijesti*, 22 March 2011, “From speakers at the RTCG to ladies of the night”, *Dan*, 25 May 2011.

⁵⁶⁷ “Eleven and a half years in prison to Lakušić and Šaković”, *Dan*, 14 June 2011.

and the suspects.⁵⁶⁸ The daily *Dan*, however, published the victim's full identity three times in succession, although the NGO "SOS Hotline for Women and Children Victims of Violence – Nikšić" protested immediately.⁵⁶⁹ It thus unjustifiably jeopardised the security of the victim and violated the press Code of Conduct, which in its guidelines on the interpretation of Principle 8 (right to privacy) states that victims of accidents or crimes are entitled to special protection of their names.⁵⁷⁰ The trial is ongoing, but the hearing was postponed twice because Lj.S. is in Belgrade and does not have valid travel documents. The court has been notified on this on her behalf.⁵⁷¹

The Podgorica Superior Court⁵⁷² rendered a verdict on May 2011 acquitting M.A., A.Đ. and N.Đ. from Ulcinj, who were charged as accomplices to the crime of human trafficking. They were accused of capturing an Albanian citizen M.N. from 20 to 24 October 2004 in Ulcinj for the purpose of committing criminal activities and prostitution in an organized fashion, using threat, deception and abuse of difficult circumstances.

According to data posted on the website of the Government Office for Combating Trafficking in Humans, 56 people were charged with trafficking in persons or trafficking in children for adoption in the 2004–2010 period. Only 22 (i.e. less than 40%) of the accused were found guilty by a final decision in that period – 15 (over 68% of the 22) defendants were convicted by a final decision in 2010, while the final decisions against the other 7 were handed down in the previous five years (less than 32%).

The Report on the Work of the Supreme State Prosecutor of Montenegro for 2010⁵⁷³ states that the prosecution received 10 criminal reports for human trafficking during the reporting period, and that all 10 reports, after the investigation, resulted in an indictment.

The NGO Safe Women's House, with years of experience in providing shelter to victims of human trafficking, has pointed to the fact that not one victim of human trafficking has been compensated yet and that the courts have not convicted any traffickers of minors to maximum sentences. The opportunity provided by the law to confiscate the property of human traffickers has not taken root in practice – the authorities have to date confiscated only one car, used by a convicted trafficker to transport the victims.⁵⁷⁴

⁵⁶⁸ The Police Directorate press release is available at: <http://www.upravapolicije.com/navigacija.php?IDSP=4583>.

⁵⁶⁹ *Dan* published the name of the woman believed to be the victim of human trafficking in its article "Forced Kosovo Woman to Prostitute Herself" on 18 September 2010, and then again on 19 and 23 September and 16 October 2010.

⁵⁷⁰ The Montenegrin press Code of Conduct is available at: <http://www.mminstitute.org/ko-dexeng.php>.

⁵⁷¹ "The victim absent and has no travel documents", *Vijesti*, 17 May 2011.

⁵⁷² "They did not smuggle people", *Dan*, 7 May 2011.

⁵⁷³ The Report is available at: <http://www.tuzilastvogg.co.me/Izvjestaj%20za%202010.%20godinu.pdf>, p. 110.

⁵⁷⁴ "There is Room for Improvement", *Vijesti*, 14 June 2010.

According to the annual report by the US State Department Office to Monitor and Combat Trafficking in Persons published on 14 June 2010, Montenegro is a source, transit and destination country for men, women, and girls who are subjected to trafficking in persons in the country and transnationally for the purposes of commercial sexual exploitation and forced labour.⁵⁷⁵ Most trafficking victims are females from Ukraine, Moldova, Serbia, Albania, and Kosovo, who migrate or are smuggled through the country en route to other destinations and subjected to conditions of forced prostitution in Montenegro. Male victims of trafficking are subjected to forced labour. The Report recommends that Montenegro vigorously investigate and aggressively prosecute sex trafficking and labour trafficking crimes in Montenegro, and convict and sentence trafficking offenders, including public officials complicit in trafficking. It also recommends that Montenegro increase efforts to identify potential victims among vulnerable groups (women arrested for prostitution violations, refugees and displaced persons (particularly Roma) and child beggars), empower more victims to become witnesses who testify against their traffickers, improve specific protections for child victims of trafficking, and improve anti-trafficking training for labour inspectors to increase identification of potential forced labour victims. In its Analytical Report (accompanying the Commission Opinion on Montenegro's application for membership of the European Union), the European Commission noted that Montenegro remained a transit country for trafficking in human beings.⁵⁷⁶

The Government in 2010 continued funding shelters for victims of trafficking managed by the local NGO Montenegrin Women's Lobby and initiated two projects encouraging reporting of trafficking.⁵⁷⁷

The S.Č. case

The testimony of S.Č., a Moldovan woman who had escaped from her captors in Podgorica and gone to the police for help in November 2002, and the evidence collected during the investigation of this sex trafficking scandal still have not been processed. The police in early December 2002 arrested and placed into custody the then Deputy Supreme State Prosecutor of Montenegro Zoran Piperović on suspicion of involvement in human trafficking. His arrest was preceded by the arrest of three other people suspected of the same crime.⁵⁷⁸ In her statement to the investigating judge in February 2003, S.Č. accused a number of people of physical and sexual abuse, including several

⁵⁷⁵ The Report is available at: http://podgorica.usembassy.gov/tip_report_2010.html

⁵⁷⁶ The Report is available at: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_opinion_2010_en.pdf:

⁵⁷⁷ Projects entitled: "Transnational Referral Mechanisms for Trafficked Persons in South East Europe" and "Stop Trafficking in Humans", for more information, see: <http://www.antitrafficking.gov.me/kancelarija>.

⁵⁷⁸ "Deputy State Prosecutor Zoran Piperović Arrested on Suspicion of Involvement in Trafficking in Humans", *Vijesti*, 1 December 2002.

Montenegrin officials. Despite the huge amount of material collected during the investigation, state prosecutor Zoran Radonjić abandoned the criminal prosecution of the four people suspected of trafficking in humans and mediation in prostitution.⁵⁷⁹ Ana Vuković, the investigation judge who was leading the investigation, then said that she thought that charges should be brought both against the suspects and other persons questioned as witnesses during the investigation.⁵⁸⁰ Both Zoran Piperović and prosecutor Zoran Popović, who handled the case, were relieved of their duties the same year.⁵⁸¹ Independent OSCE and CoE experts found prosecutor Radonjić's decision not to file an indictment "unusual" and thought that there were reasons to send the case to court.⁵⁸² In a letter to the then Montenegrin Interior Minister, Amnesty International said that the Government of Montenegro must reopen the case.⁵⁸³ The then Montenegrin Prime Minister Milo Đukanović, however, claimed that the scandal was planted by an agency that had been working against Montenegro's interests since the era of King Nikola (late 19th century).⁵⁸⁴

S.Č.'s counsel was sued for libel by the defendants' lawyers. Activists of the NGO Safe Women's House, who had provided the victim with protection, were sued for libel by the then President of the Bar Association and Montenegro President's brother, because he was accused in their letter to the President of not helping the victim, although he was in a position to do so. Although she enjoyed immunity as a judge, Ana Vuković was interrogated when Zoran Piperović, one of the suspects in the investigation she had conducted, filed a motion to investigate her for alleged abuse of post.⁵⁸⁵ The court awarded Piperović damages in the amount of 13,400 euros in compensation for unlawful deprivation of liberty, damage to his reputation and personal integrity.⁵⁸⁶ The Deputy Chief Editor of the daily *Dan* was fined 14,000 euros for libel, because the daily quoted S.Č.'s statement during the investigation, ini-

⁵⁷⁹ "Basic Prosecutor Abandons Criminal Prosecution of Four Accused in Sex Trafficking Scandal; Radonjić Thinks There is not Enough Evidence and is Instructing the Moldovan to Press Charges Herself", *Vijesti*, 31 May 2003.

⁵⁸⁰ "Podgorica Basic Court Investigating Judge Ana Vuković Disagrees with Radonjić: There is Enough Evidence to Indict More than Just the Four", *Vijesti*, 31 May 2003.

⁵⁸¹ "I Hope Everything Will Soon Be Out in the Open – No Comment from Zoran Radonjić, Piperović Claims He Was Set up", *Vijesti*, 1 November 2003

⁵⁸² "OSCE and CoE Report on the Sex Trafficking Scandal: Enough Grounds to Send the Scandal to Court", *Vijesti*, 23 November 2003. The Joint Council of Europe / OSCE assistance to Montenegro in the fight against trafficking in human beings: Independent Experts' Report on their visit to Podgorica (22–24 July 2003) and Responses of the Government of Montenegro is available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?id=99171&Site=COE>

⁵⁸³ "Torturing S.Č. is not a Recommendation for Europe", *Dan*, 5 March 2005. The Amnesty International press statement is available at <http://www.amnesty.org/en/library/asset/EUR70/001/2005/en/1f593182-d528-11dd-8a23-d58a49cd652/eur700012005en.html>

⁵⁸⁴ RTCG, 19 May 2005; also, 24 December 2010.

⁵⁸⁵ *Vijesti*, 26 October 2005. The Danilovgrad Basic Court Criminal Panel subsequently dismissed the motion to prosecute judge Vuković as groundless.

⁵⁸⁶ *Beta*, 29 December 2005.

tially published by another paper (the Belgrade *Arena*).⁵⁸⁷ The Safe Women's House activists suspect that the authorities are still ignoring their work precisely because of their involvement in this case.⁵⁸⁸

Trial for the crime of giving false testimony, filed against S.Č. by Piperović, was initiated in 2011 in the Basic Court in Podgorica before Judge Nada Rabrenović. Podgorica Basic Court upheld the indictment, after the Superior Court in Podgorica overturned the previous decision of this First Instance Court to suspend the criminal proceedings against S.Č.⁵⁸⁹ The trial is being conducted *in absentia*, because the defendant has not been residing in Montenegro since 2003. With the permission of the court and with the help of the International Organization for Migration and the OSCE, in 2003 the defendant went to a third country to meet with her children, since she had been continuously threatened with death in Montenegro and her psycho-physical condition had seriously deteriorated.

There has been no initiative on part of the state prosecution to reopen investigation into this case since the Supreme State Prosecutor Vesna Medenica in 2004 found that S.Č. was unavailable.

⁵⁸⁷ The Superior Court judgment is available at the HRA website: http://www.hraction.org/wp-content/uploads/djukanovic-vukovic_visi_sud.pdf. The Basic Court judgment is available at: http://www.hraction.org/wp-content/uploads/djukanovic-vukovic_osnovni_sud.pdf.

⁵⁸⁸ "One Step Away from Jail" *Večernje novosti*, 27 January 2011. Nevertheless, the new PM of Montenegro, Igor Lukšić, approved financial assistance to the NGO in the amount of 20.000 euros and hence secured survival of this shelter.

⁵⁸⁹ "Scum in the Government to be Sent to Prison", *Vijesti*, 16 September 2010, "Moldovan Woman Tried in Absentia", *Dan*, 6 November 2010.

Right to Liberty and Security of Person and Treatment of Persons Deprived of Liberty

Article 9, ICCPR:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 5 ECHR:

- 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a the lawful detention of a person after conviction by a competent court;
 - b the lawful arrest or detention of a person for non compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

- d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
 - 3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 - 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 - 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Right to Liberty and Security of Person

The constitutional and legal regulation of rights to liberty and security of person was systemically changed by the adoption of the 2007 Constitution and the new Criminal Procedure Code, which has been partly enforced since August 2010.⁵⁹⁰

Prohibition of Arbitrary Arrest and Detention

Article 9 of the ICCPR and Article 5 of the ECHR aim to provide procedural guarantees against arbitrary and unlawful deprivation of liberty. A state party must precisely define when deprivation of liberty is justified and to provide for judicial review of the lawfulness of detention.

⁵⁹⁰ The Act Amending the Criminal Procedure Code (*Sl. list CG 49/2010* of 13 August 2010) put off the enforcement of the CPC until 1 September 2011. The new CPC, however, has applied to organised crime, terrorism and war crime proceedings as of 26 August 2010.

These rights do not regard only detention i.e. deprivation of liberty in criminal proceedings, but all other instances of deprivation of liberty as well, e.g. due to a mental illness, vagrancy, alcohol or drug addiction, as Article 5(1) of the ECHR specifies. The Constitution thus governs the guarantees regarding the right to liberty of person in two separate articles, Article 29 (*Deprivation of Liberty*) and Article 30 (*Detention*).

In addition to its immediate liability for the actions of its agents, the state is also obliged to ensure that natural persons do not violate rights guaranteed by the ICCPR by their actions.⁵⁹¹ With regard to the right to liberty and security of person, the state is obliged to prohibit and adequately investigate and punish every instance of illegal deprivation of liberty, including such deprivation perpetrated by persons who are obviously not state agents. The Montenegrin Criminal Code in that respect incriminates *Unlawful Deprivation of Liberty* (Art. 162), *Abduction* (Art. 164) and *Trafficking in Humans* (Art. 144).

Presumption of Liberty

The formulation of Art. 9(1) of the ICCPR and Art. 5(1) of the ECHR “Everyone has the right” indicates the presumption that everyone shall enjoy the right to liberty and that a person may be deprived of liberty only in exceptional circumstances. The burden of proving that the deprivation of liberty was justified and necessary is thus unquestionably on those who deprived someone of liberty.⁵⁹² A court must depart from the fundamental presumption that a person deprived of liberty ought to be free and rule in accordance with that presumption and the presumption of innocence.⁵⁹³ Deprivation of liberty is such a serious measure that the decision on which it is based must be seriously reasoned, based on the law and the facts of every individual case. It does not suffice that the deprivation of liberty is executed in conformity with national law; it must also be necessary in the circumstances.⁵⁹⁴ This means that e.g. the stereotyped form of words nearly always used in court orders confirming detention and not evidencing a careful examination of all the circumstances of the case do not satisfy that standard.⁵⁹⁵

New Criminal Procedure Code from 2009

The Assembly of Montenegro in 2009 adopted a new Criminal Procedure Code (hereinafter: new CPC)⁵⁹⁶, introducing prosecutorial investigation

⁵⁹¹ UN Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN doc. CCPR/C/21/Rev.1/Add.13 (2004).

⁵⁹² See ECtHR judgment in the case *Ilijkov v. Bulgaria*, 2001, paragraph. 85, quoted in ECtHR's judgment in the case *Milošević v. Serbia*, 2010.

⁵⁹³ See e.g. the ECtHR judgment in the case of *Pesa v. Croatia*, 2010.

⁵⁹⁴ *Witold Litwa v. Poland*, 2000.

⁵⁹⁵ *Mansur v. Turkey*, 1995, paragraph. 65.

⁵⁹⁶ Criminal Procedure Code, *Sl. list* CG No. 57/2009 and 49/2010.

and plea bargaining into the Montenegrin legal system. The new CPC also includes novel provisions governing the right to liberty and security of person. The new CPC was initially to have come into force one year upon adoption, i.e. on 26 August 2010, but its application was put off for one year by the Act Amending the CPC. The new CPC is, however, partially applied as of 2010 – the prosecutors have taken over investigations of organised crime, corruption, terrorism and war crimes. This solution may have negative impact on legal certainty because it may result in the non-uniform application of the law. Firstly, it in many situations gives the prosecutor the discretion to decide whether the investigation is in his jurisdiction or in the jurisdiction of the court. The prosecutor is authorised to initiate and launch proceedings and has the discretion to assess whether or not the particular crime falls within the categories of organised crime, corruption, terrorism or war crimes. It is thus now up to the prosecutor to decide whether the investigation is to be conducted by himself or the investigating judge. The question arises as to what will happen in the event it transpires that the prosecutor had made the wrong assessment (prosecutors or the courts have been known to change the qualification of the crime in practice) and that it is subsequently, after the prosecutor has completed his investigation, established that the particular crime falls among those investigated by the investigating judge. Such a situation may also impact on the right to liberty and security – Art. 267 of the new CPC entitles the prosecutor to hold a suspect up to 48 hours and the lawfulness of all the actions the prosecutor took in such an investigation may prove questionable.

Deprivation of Liberty of a Criminal Suspect (Art.5 (1(c)), ECHR)

Arrest or detention of criminal suspects is the type of deprivation of liberty that has provoked the greatest number of applications in practice.

REASONABLE SUSPICION THAT A PERSON HAS COMMITTED A CRIME

Art. 5(1(c)) of the ECHR stipulates that the deprivation of liberty shall be based on “reasonable suspicion” that a person being arrested or detained had committed a crime. The ECtHR is of that view that “the ‘reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 (1(c))’ and that ‘reasonableness presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.’”⁵⁹⁷ The fact that the person had committed the same or similar offences in the past does not suffice *per se* to reach the threshold of the necessary “reasonable suspicion” warranting deprivation of liberty⁵⁹⁸. In addition to a well-founded link between the person deprived of

⁵⁹⁷ See the ECtHR judgement in the case of *Fox, Campbell and Hartley v. The United Kingdom*, 1990, paragraph 32.

⁵⁹⁸ The case of persons who had previously been convicted of terrorism and were subsequently suspected and deprived of liberty only on those grounds *Fox, Campbell and Hartley v. The United Kingdom*, 1990.

liberty and the event that constitutes a crime, the event, the actions or failure to act of the person deprived of liberty must actually constitute a crime incriminated by the law.⁵⁹⁹

Although reasonable suspicion suffices for initial arrest, deprivation of liberty may be extended pending trial and subsequently only provided there are additional grounds for its extension: risk of absconsion, risk of obstruction of justice, to prevent the commission of a crime and maintain public order, all of which are defined in ECtHR case-law. To justify detention, the authorities need to prove that the purpose could not have been achieved by the application of an alternative, more lenient measure, such as e.g. the seizure of the suspect's passport or acceptance of guarantees.⁶⁰⁰

RISK OF ABSCONSION

Apart from the existence of a reasonable suspicion that a specific person committed a crime, the first reason for detention listed in the CPC is risk of absconsion (Art. 148 of the valid CPC, Art. 175 of the new CPC). Detention may be ordered if the person "is in hiding or his/her identity cannot be established or if other circumstances indicating risk of flight exist".

The ECtHR found that the gravity of the penalty for the crime the person deprived of liberty is suspected of as an abstract indicator cannot be the only criterion for establishing the risk of flight and that the authorities have to establish the existence of other specific circumstances in each particular case.⁶⁰¹ Such circumstances, for instance, include the unavailability of the accused to the prosecution authorities,⁶⁰² established contacts abroad that may facilitate absconsion, or lack of ties in the country in which the proceedings were initiated,⁶⁰³ family circumstances and economic reasons,⁶⁰⁴ etc. Extension

⁵⁹⁹ *Lukanov v. Bulgaria*, 1997, the case in which the Bulgarian Prime Minister was detained for granting funds to third countries, which was not an offence under the criminal legislation at the time.

⁶⁰⁰ *Jablonski v. Poland*, 21 December 2000. See also *Vrencev v. Serbia*, paragraph 59.

⁶⁰¹ *Stogmuller v. Austria*, 1968, paragraph 15 (in the part "As to the Law"); *Muller v. France*, 1997, paragraph 43, etc.

⁶⁰² E.g. if a person gave the police or prosecutor the address at which s/he has been registered but not living at for years and by which s/he cannot be contacted, the court is right to conclude that the person is hiding and that detention is necessary to ensure his presence in the proceedings (*Vrencev v. Serbia*, 2008); on the other hand, extension of detention is unjustified if the person is living at the registered address and had responded to summons in the past and no other circumstances indicate the risk of absconsion (*Punzelt v. The Czech Republic*, 2000)

⁶⁰³ The case of *Zannouti v. France*, 2001, in which the detainee had established contacts in foreign states, or in the *Ventura* case, which involved accomplices who had already fled the country or the case of *Pavletic v. Slovakia*, 2004, where there was a justified risk of absconsion because the accused was a foreign national without a permanent address in Slovakia.

⁶⁰⁴ *Letellier v. France*, 1991, paragraph 41, where the detainee was a mother of small children and a manager of a company representing her sole source of income, all of which indicated that there was no risk of her absconding.

sion of detention cannot be used to anticipate the prison sentence.⁶⁰⁵ In any case, a decision on detention and its extension, using a stereotyped form of words, based on abstract grounds and lacking persuasive reasoning why there is risk of absconsion in a particular case may *per se* give rise to a breach of Article 5 of the ECHR.⁶⁰⁶

The courts in practice often order detention on these grounds, without citing the specific circumstances indicating the risk of absconsion, only the abstract gravity of the crime (given the penalty it warrants under the law) or merely citing circumstances which *per se* cannot indicate risk of absconsion. For instance, the Podgorica Superior Court Order Ref. No. Kri. 741/10 states that the gravity of the crime expressed in the penalty it warrants indicates the risk of absconsion. Although the appeal against the Order states that this circumstance does not indicate risk of absconsion and that the circumstances of the case indicate that there are no grounds for detention (because the suspect lives at the registered address, is married and does not have a criminal record), the Crime Panel rejected the appeal and upheld the Detention Order. Moreover, the detention of the suspect was extended twice during the investigation and again after he was indicted, under the same explanation, with a note that a younger person was at issue (35 years of age). Courts are prone to issuing such stereotyped orders on detention or extension of detention.⁶⁰⁷ The court detention orders are primarily reasoned by the gravity of the crime expressed in the penalty it warrants and they cite grounds which do not indicate risk of absconsion, like in the above case, or in Superior Court Order Re. No. Kri. 872/08, which states that the suspect is unemployed and single, but disregards the fact that he lives at the registered address and has family ties in his town of residence, or in Superior Court Order Ref. No. Kri. 580/08, which states that the accused do not have justified interest in staying in their place of residence because they are young, single and unemployed.⁶⁰⁸ In all these and the vast majority of other orders on detention or extension of detention, the authorities extended detention by issuing stereotyped, identical reasonings, which is in contravention of international standards.

RISK OF OBSTRUCTION OF EVIDENCE BY THE DEFENDANT

Risk of obstruction of evidence by the defendant (Art. 175(1.2) of the new CPC, Art. 148(1.2) of the valid CPC) as grounds for detention is linked to the actions the accused may take to conceal, destroy or fabricate evidence or influence witnesses, accomplices or accessories. In practice, detention or-

⁶⁰⁵ See *Peša v. Croatia*, 2010, paragraph 104.

⁶⁰⁶ See *Mansur v. Turkey*, 1995, *Yagci and Sargin v. Turkey*, 1995.

⁶⁰⁷ The OSCE reached the same conclusion in its Trial Monitoring Report (May 2007–May 2009), p. 31.

⁶⁰⁸ According to unconfirmed information, the Appellate Court has overturned several detention orders based on such grounds in 2010, which may indicate that this regrettable practice is being abandoned.

ders merely superficially note the existence of these grounds, but lack specific and persuasive reasoning. This particularly holds true for police detention orders quoting the alleged existence of obstruction of evidence as grounds for detention.⁶⁰⁹ However, even if detention on these grounds may initially be justified and there is a risk that the accused will jeopardise the investigation, the risk disappears once the specific investigation activities have been completed and the evidence has been secured and may no longer justify detention, as, indeed, Art. 175(2) of the new CPC provides.⁶¹⁰

PREVENTION OF THE COMMISSION (REPETITION, COMPLETION) OF A CRIME

These grounds for detention, laid down both in the CPC (Art. 175(1(c))) and Art. 5(1(c)) of the ECHR also have to be applied with restraint, only when necessary. The danger of the accused committing a crime must be “plausible” and the measure must be “appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned”. In the case *Pesa v. Croatia*, the ECtHR, for instance, did not find that the court order of detention on these grounds was justified given that the accused had no previous criminal record and that no expert assessment of the likelihood of his reoffending had been carried out. As the accused was charged with committing criminal offences closely related to his official position, the Court found that no danger of his reoffending persisted after he had been dismissed from that position (paragraph 96)

PROTECTION OF PUBLIC ORDER (CASES “CADASTRE” AND “ZAVALA”)

The severity of punishment (minimum ten years’ imprisonment) for a crime qualified as particularly grave because of the manner in which it was committed or its consequences and the existence of exceptional circumstances indicating that the release of the person would seriously prejudice public peace and order (Art. 175(1(4)) of the new CPC) may be perceived as the broadest grounds of detention, i.e. particularly susceptible to arbitrariness by the court. Article 148(1(4)) of the valid CPC contains a similar provision: apart from the gravity of the crime, reflected in the penalty it carries, it

⁶⁰⁹ *Inter alia*: Police Directorate Order 17–246–1829/10, also issued in a stereotyped form, states that the detention of the suspect is ordered due to the existence of particular circumstances indicating that the suspect will influence the witnesses but does not list any of them or the names of any witnesses the suspect may influence. In its Decision Kr. 10/144, the Basic Court rejected the appeal of the Detention Order also in a stereotype manner, without reasoning or citing grounds for its decision.

⁶¹⁰ In its judgment in the case *Pesa v. Croatia* (paragraph 100), the ECtHR noted “that by 13 February 2008, when the indictment was lodged, all witnesses who were employees of the CPF had already given their evidence before the investigation judge. Therefore, the danger that the applicant might suborn witnesses no longer persisted after that date. It must be inferred from this that after 13 February 2008, the date on which the applicant was indicted, the risk in question disappeared and could no longer serve as justification for his detention..”

also requires the existence of particularly grave circumstances of the crime as grounds for detention. These grounds resemble the prior provisions in the SFRY legislation allowing for detention of persons who may cause public disquiet or disrupt public safety.

Although the law does not prescribe compulsory detention, which is in contravention of international standards, these grounds for detention resemble the erstwhile “compulsory detention” because the law provides the authorities with the possibility of always ordering detention on these grounds in case a grave crime is at issue. On the one hand, the penalty for a crime constitutes an element of the crime, while, on the other, the circumstances of the crime are established during the presentation of evidence at the main hearing. This is why the court as a rule orders detention whenever a person is suspected of having committed a grave crime.

The ECtHR accepts that certain crimes, by reason of their particular gravity and the public reaction to them, may give rise to public disquiet capable of justifying pre-trial detention, at least for a certain time. These grounds may be justified only if exceptional circumstances exist and if there is sufficient evidence. The courts are, for instance, expected to examine whether the release of the accused would actually prejudice public order (*Pesa v. Croatia*, 2010, paragraphs 102–103). Also, in the case of *I.A. v. France* (1998), the ECtHR did not find that the gravity of the crime (murder) and cruel circumstances in which it was committed were sufficient grounds to extend detention.

An example of implementation of such grounds for detention in an abstract way, that does not prove that exceptional circumstances do exist, or that a breach of public order could really happen, is the case from October 2010, in which the Appellate Court confirmed the decision to extend detention which previously lasted 14 months.⁶¹¹ The reasoning of this decision says that the detention is extended because:

“given the gravity of the offense for which the law prescribes a prison sentence of 10 years or more, which are particularly difficult because of the manner of commission or impact, because the accused abused their position for a long time and committed criminal acts of corruption, gaining material gain for more than one person... Also, these circumstances may be considered as exceptional circumstances which indicate that the release of the accused would lead to a serious threat to public order and peace.”

In addition to the fact that this reasoning is an obvious example of violation of the presumption of innocence, because the accused have not yet been found guilty, not even by a first instance verdict, this example indicates the risk that these grounds for detention have been set too broadly in practice and may easily be arbitrarily applied.⁶¹²

⁶¹¹ It is the case Kž. no. 728/2010, where the Kotor Cadastre director and officials, accused of bribery and abuse of office, have been in custody since July 2009.

⁶¹² The constitutional appeal was lodged in this case.

The case of extended detention for persons charged with the abuse of office in case of “Zavala”, which started with arrests on 24 December 2010, is almost identical to the previously described case of an abstract preservation of public peace and order. In this case, however, the Constitutional Court abolished decisions on extending the detention of the Podgorica Superior Court and the Appellate Court invoking Article 5 of the ECHR and ECtHR case law.⁶¹³ The Podgorica Superior Court Panel particularly persisted in extending the detention, believing that the release of the Budva municipality officials, accused of illegally acquiring material gain of about one million Euros, “would lead to a serious threat to the preservation of public peace and order”, a conclusion it reached bearing in mind that:

“the Budva Municipality’s financial status and difficulties (local government budget deficit, strikes of the workers of TV Budva, which is funded by the Municipality of Budva), wherefore it is reasonable to fear that their release would provoke a revolt among the citizens of Montenegro as taxpayers and persons interested in the fate of the budget funds they personally pay money into, which may lead to a serious threat to public peace and order.”⁶¹⁴

In the above decision, the Panel especially emphasised that the jurisdiction of that court was to take preventive action and preserve public peace and order, whereby it laid stress on the importance of work typical of the police, at the expense of the protection human rights of citizens, especially in the case of deprivation of liberty, which should be the primary duty of the court. By anticipating public disorders, the court assumed that the ignorant public would indisputable perceive the defendants as offenders who must begin serving their sentences before the trial, and that it would be prepared to forment unrest, although it is precisely the court which should promote the presumption of innocence by its actions and thus improve public awareness of this principle. This position of the court reached absurd proportions when the TV Budva workers on strike issued a statement, “bitterly” ruling out the possibility of anyone using them as a reason to restrict the freedom of others.⁶¹⁵

⁶¹³ “Taking into account these legal views (of the ECtHR, Editor’s note), the Constitutional Court found that the revoked decisions did not list specific facts nor evidence to show that the release of the submitters of constitutional appeals would outrage and upset the public to the extent that could lead to a serious threat to public peace and order.” Constitutional Court of Montenegro Decision Ref. No. U-III. 348 of 20 June 2011, <http://www.ustavnisudcg.co.me/aktuelnosti.htm>, item 9. The Constitutional Court in this Decision also found that the detainees have been illegally in custody for a certain period of time, because the decision to extend the detention was not adopted on time.

⁶¹⁴ The Appellate Court overturned the latest decision the Podgorica Superior Court Judicial Panel comprising Mušika Dujović, Dragiša Rakočević and Milenka Žižić of 22 June 2011. Interestingly, at the time it was rendering this decision, the Panel took into account the Constitutional Court decision rescinding the previous decision to extend detention based on the same rationale.

⁶¹⁵ “Budva Unions: Do Not Use Us as an Excuse for Detention”, *Vijesti*, 24 June 2011.

Right to be informed of reasons for arrest and charges. Both Art. 9(2) of the ICCPR and Art. 5(2) of the ECHR entitle every person to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. The Constitution of Montenegro accordingly includes a provision stipulating that a person deprived of liberty shall be notified immediately of the reasons for his arrest in his own language or in the language he understands (Art. 29(3)). This provision exclusively uses the formulation “deprivation of liberty” although Article 9 of the ICCPR and Article 5 of the ECHR differentiate between arrest and detention, both of which are considered deprivation of liberty. Under Art. 9(2) of the ICCPR and Art. 5(2) of the ECHR, an arrested person shall be informed of the reasons for his arrest at the time of arrest. As far as detention is concerned, the Constitution includes a provision on the right of a detained person to be served with “a reasoned order at the time of detention or within the following 24 hours at the latest” (Art. 30(2)).

The CPC provisions stipulating the prompt informing of a defendant of the charges against him are in keeping with international standards. The defendant “must be informed of the criminal offence he is charged with and of the grounds for suspicion against him during the first questioning” (Art. 4(1)), i.e. the defendant shall be informed before the first questioning “of the charges and grounds for suspicion against him, that he is not obliged to present his defence or answer any questions, that anything he says may be used against him and that he will be asked to state his defence if he so wishes” (Art. 88(2) of the valid CPC and Art. 100(2) of the new CPC).

Right to Be Brought Promptly Before a Judge and to a Trial within a Reasonable Time. These rights apply only to deprivation of liberty in criminal proceedings and guarantee that an arrested person will be brought promptly before “a judge or other officer authorised by law to exercise judicial power” and that he will be tried within a reasonable time or be released. Although “promptly” is not precisely defined, under ECtHR case-law, this period should not exceed four days even in exceptional circumstances and should be much shorter in normal circumstances.⁶¹⁶ “Other officer authorised by law to exercise judicial power” means an impartial organ which is also independent, primarily with respect to executive bodies and the prosecutor, and which is empowered to either release the arrested person or order him remanded to custody.⁶¹⁷ The right to a trial within a reasonable time or release entails that pre-trial detention should be an exception and as short as possible;⁶¹⁸ that there is the presumption of liberty i.e. that the person may be released on bail or another more lenient measure ensuring his presence at the proceedings.

⁶¹⁶ *Brogan v. The United Kingdom*, 1978, p. 33.

⁶¹⁷ See ECtHR judgment in the case of *Schiesser v. Switzerland*, 1991, p. 31.

⁶¹⁸ CCPR, *General Comment No. 08: Right to liberty and security of persons* (Art. 9): 06/30/1982.

The judges are expected to justify detention by “relevant” and “sufficient” reasons and to display special diligence in the conduct of the proceedings in which the defendant is in detention. The complexity and other particular features of the investigation are to be considered in ascertaining whether these requirements were fulfilled in each case.⁶¹⁹ The domestic courts “must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release” (see the case of *Letellier v. France*, 1991 and *Pesa v. Croatia*, 2010, p. 91).

According to the ECtHR, interpretation of a *reasonable time* pursuant to Art. 5(3) is established in each particular case and there is no defined time limit after which this right is considered violated in any case. However, the ECtHR has never found periods of pre-trial detention until the rendering of a first-instance judgment (including detention after the quashing of the first-instance judgment until the rendering of a new first-instance judgment) beyond five years to be justified, although it should be borne in mind that it found states in violation of the ECHR even when detention lasted much less, depending on whether the courts acted reasonably in the particular case, i.e. with due diligence.⁶²⁰

Police Detention

Deprivation of liberty entails holding a person against his will in a police or prison cell but also other restrictions of movement, e.g. ordering a person to stay at a specific place, in a vehicle, room or open venue, constituting an important element of compulsory police detention.⁶²¹

Under Article 258 of the new CPC, the police shall take a person found at the crime scene to the State Prosecutor or hold him/her until the State Prosecutor’s arrival if such a person may provide information relevant to the criminal proceedings and if it is likely that his/her interrogation at a later stage might be impossible or might entail considerable delays or other difficulties. The valid CPC includes an identical provision, but differs from the new CPC inasmuch as it mentions the investigating judge instead of the prosecutor. The change reflects the concept of prosecutorial investigation introduced by the new CPC. However, although holding a person at the crime scene does not constitute real deprivation of liberty, it nevertheless limits the

⁶¹⁹ See, e.g., the ECtHR judgment in the case of *Scott v. Spain*, 1996.

⁶²⁰ Assessment by Jeremy McBride, Human Rights Handbooks no. 5: The Right to Liberty and Security of the Person, Monica Macovei, Council of Europe, Belgrade, 2004, p. 75.

⁶²¹ See the case of *De Wilde, Ooms and Versyp v. Belgium*, 1971, re the compulsory character of police detention of persons who had turned themselves in, or the case of *Ashingdane v. The United Kingdom*, 1985, where the ECtHR established that the guarantees in Article 5 apply also to detention within an open ward of a psychiatric clinic.

person's liberty. Although such holding may not exceed six hours, reckoned from the moment the person is informed that s/he may not leave the crime scene, the law does not stipulate the issuance of a relevant formal order, thus providing the police with the opportunity to abuse the provision and hold a person for more than six hours.

Under Article 264 of the new CPC, the police may deprive of liberty and hold "a person" if any grounds for his/her detention exist, i.e. it may arrest and detain a suspect. As opposed to the valid CPC, which lays down that police detention will last 48 hours at most, the new CPC obliges the police to promptly take the person before the competent prosecutor, who is entitled to order his/her detention lasting up to 48 hours. The police shall release a person if they failed to bring him/her before a prosecutor within 12 hours from the deprivation of liberty. Under the valid CPC, a person may be held by the police 48 hours *at most*. The investigating judge has to be notified immediately of the detention and may demand that the person is brought before him without delay. The person may appeal the police detention order which shall not stay its enforcement. The investigating judge must rule on the appeal within four hours from the moment s/he receives it (Art. 234, paragraphs 3, 4 and 5).

These legal provisions are often violated in practice and persons are routinely held in police detention without a proper explanation. The police as a rule merely state that there are grounds for detention, without elaborating.⁶²² Moreover, the investigating judges usually reject appeals of such orders, failing to provide any reasoning or explanation for their decisions, apart from the standard statement that they did not establish "any gross violations of the criminal procedure or improper application of material law"⁶²³. Moreover, it has been noted that a judge rarely immediately summons a detained person for questioning, especially on weekends. Persons brought in on a Saturday or a Sunday are ordinarily not questioned and their appeals of detention are not reviewed before Monday.

Moreover, the police appear to resort to the following unwholesome practice: after the defence counsel appeals their detention order⁶²⁴, they do not forward the appeal to the investigating judge but issue a decision revoking the detention order⁶²⁵ and even state that the competent prosecutor and

⁶²² *Inter alia*, Order No. 17–246–1829/10, Order No. 17–246–3297/10, Order No. 17–246–1099/10. All these police detention orders are apparently worded in the same way and drafted on identical forms, which indicates that none of the police detention orders are properly reasoned.

⁶²³ *Inter alia*: Basic Court Decision Kr.10/144, Basic Court Decision Kr.10/95, etc. HRA survey of lawyers shows that investigating judges as a rule reject appeals against police detention orders.

⁶²⁴ Police Directorate Detention Order No 17–246–3299/10.

⁶²⁵ Police Directorate Decision of 3 December 2010 (without the registration number such enactments are filed under).

investigating judge have been duly notified thereof. In the case cited in the footnotes below, the police issued a new detention order against the same person for the same crime⁶²⁶ immediately after “revoking” the detention order, and brought the person before the investigating judge together with his/her appeal the following day. There is a real risk of such conduct becoming regular practice given that neither the state prosecutor nor the court took any steps against such blatant excess of powers by the police.

From the viewpoint of liberty and security, attention needs to be drawn to Article 257(2) of the new CPC under which the police may during the preliminary investigation restrict the movement of vehicles and people at a specific venue for a specific period of time. The valid CPC contains a similar provision but emphasises that movement may be restricted only as long as such restriction is necessary. Although this standard is quite imprecise, it remains unclear why the legislator dropped the adjective ‘necessary’ from the new provision, given that it indicates the urgency and caution the police have to be guided by when applying this measure limiting liberty.

Under Article 267 of the new CPC, police detention is ordered by the state prosecutor, while Article 268 governs detention during the preliminary investigation. The legislator does not specify the content of the state prosecutor’s motion for the detention of a suspect. HRA is of the view that the legislator should have obligated the state prosecutor to explain why s/he is of the view that the purpose of detention cannot be achieved by a more lenient procedural measure. In view of the presumption of liberty and the exceptional character of detention, it would be logical to require of the state prosecutor to elaborate on the necessity of detention, given that an investigating judge may not necessarily be aware of the grounds for detention at the time the prosecutor detained the suspect. Otherwise, if the state prosecutors get into the habit of not properly reasoning their motions for detention, it may transpire that the detention is actually ordered by the prosecutor and merely formally approved by the investigating judge.

Deprivation of liberty under the Police Act. – The Montenegrin Police Act provides for deprivation of liberty lasting up to six hours of a person disrupting public peace and order or endangering traffic safety “unless public peace and order or traffic safety can be established in another manner” (Art. 27(1)). This form of deprivation of liberty may last up to 12 hours, if so necessary to establish the identity of a person whose identity cannot be established without depriving him/her of liberty, if the person was extradited by a foreign authority to hand over to the competent authority or if the person is endangering the safety of another by gravely threatening to attack his/her life or body (Art. 27(3)). Paragraphs 4 and 7 of Art. 28 are problematic inasmuch as they allow the person deprived of liberty on these grounds to appeal only with the Minister, but not with the court; furthermore, the person is not provided

⁶²⁶ Police Directorate Detention Order No. 17–246–3297/10.

with the possibility of challenging the Minister's decision even in an administrative procedure (Art. 28(7)). This solution is in contravention of the international standard under which every person deprived of liberty is entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful (Art. 9(4) ICCPR, Art. 5(4) ECHR). The right of appeal against deprivation of liberty with a court pertains precisely to these cases, in which a person is deprived of liberty by another authority and not the court.⁶²⁷ Furthermore, the Human Rights Committee is of the view that judicial review must be provided immediately, not after a decision by a second-instance administrative authority.⁶²⁸

Duration of Detention under the Constitution and the CPC

The Constitution lays down that detention is an exceptional measure pronounced only when it is necessary in order to conduct the criminal proceedings (Art. 30(1)), that the duration of detention shall be reduced to the shortest possible period of time, six months at most, until an indictment is filed against the detainee (Art. 30(paragraphs 4 and 5)). The duration of detention is reckoned from the day of detention; the detainee shall be released if the indictment is not filed within six months (Art. 30(6)). Detention of minors may not exceed 60 days (Art. 30(7)).

Under the CPC, a person deprived of liberty in the absence of a court order must immediately be brought before an investigating judge (i.e. state prosecutor, under the new CPC), except in instances laid down in the CPC (Art. 5). Paragraphs 1 and 2 of Article 16 of the valid CPC (paragraphs 1 and 2 of Art. 15 of the new CPC) guarantee a prompt trial and the conduct of proceedings without delay and oblige the court to prevent any abuse of the detainee's rights and reduce the duration of detention to a minimum.

Article 176 of the new CPC (Art. 149 of the valid CPC) specifies the content of the detention order. The detention order is served on the person it regards as soon as it is issued and the date and hour of service must be noted in the case file. The detainee may appeal the order with a court panel. The appeal does not stay the enforcement of the order and the panel shall review it urgently – within 48 hours.

Paragraphs 3 and 4 of Article 152 of the valid CPC lay down the maximum duration of detention once the indictment is filed. The accused shall be released from detention if a first-instance verdict has not been delivered within two years. His/her custody may be extended by one more year at most after the delivery of the first-instance verdict i.e. if the first-instance verdict is quashed, it may be extended by one year at most after the delivery

⁶²⁷ See ECtHR judgment in the case *De Wilde, Ooms and Versyp v. Belgium*, 1971, paragraph 76.

⁶²⁸ *Inés Torres v. Finland*, 1990.

of the appellate court decision. The new CPC regulates this formal deadline in another way, which is much less propitious for the interests and rights of the defendants. Under Article 179(1) of the new CPC, detention may last a maximum of three years from the moment the indictment is filed until the delivery of the first-instance verdict. Therefore, as opposed to the now valid provisions, limiting the duration of custody from the moment the indictment is filed until the final verdict is rendered, the new CPC restricts only the period from the day the indictment is filed until the first-instance verdict is rendered. This change warrants an analysis, because it is very difficult to find justification for it. The *ratio legis* of laying down such deadlines in the CPC (both the valid and new CPCs) lies in emphasising the exceptional character of detention and formally limiting its maximum duration in cases in which the proceedings go on for a long time.

Before the law laid down the maximum duration of detention, custody sometimes lasted very long, as long as the criminal proceedings. The judiciary has recently been publishing statistical data, underlining that the courts have significantly improved their efficiency, that their backlog was much smaller and that they would soon be fully up to speed. In view of these data, there can hardly be a logical justification for extending the maximum duration of detention in the new CPC. If the law obliged the courts to abide by shorter and stricter formal deadlines at the time they were facing much greater backlogs and if those deadlines covered the period until the final verdict is delivered, why should they be relieved of such obligations now when they can fulfil them much more easily? Particularly in view of the fact that the CPC in its entirety is to come into effect in September 2011, when, as the judiciary has announced, the efficiency of the courts will have been improved even more. This way it appears that the improvement of court performance and efficiency is accompanied by lowering the standards contributing to efficiency and better respect for fundamental rights and liberties, which is absurd. It should be noted that the deadlines in Article 152(paragraphs 3 and 4) of the valid CPC cannot be considered particularly short in principle. Nor does abidance by them lead to particularly rapid trials, which again brings into question the reasons and justification for the described changes introduced by the new CPC.

The valid CPC does not stipulate custody in proceedings after the delivery of the verdict. Article 148(2) lays down that only a defendant sentenced to five or more years of imprisonment shall be kept in custody if such detention is justified by the manner in which s/he committed the crime or other particularly grave circumstances of the crime. Custody need not be ordered if grounds for detention involve the risk of absconsion or the risk that the defendant will not appear at the main hearing if s/he furnishes a surety or vows the s/he will not go into hiding (Art. 143), which is in keeping with the views of the Human Rights Committee.⁶²⁹

⁶²⁹ *Hill v. Spain*, No. 526/1993 (1997), paragraph 12.3: “bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evi-

Detention in summary proceedings is limited to eight days and may not be extended (Art. 444(2) of the valid CPC, Art. 448(2) of the new CPC) and general rules apply after the submission of information. Detention of minors is an exceptional measure and is limited to four months in case of a younger minor i.e. six months in case of an older minor during the pretrial proceedings, and then for another year at most (Paragraphs 2 and 3 of Art. 488⁶³⁰ of the valid CPC⁶³¹). These provisions of the CPC are, however, in contravention of the constitutional guarantee that the detention of a minor may not exceed 60 days (Art. 30(7)).

Discriminatory Provision in Article 572 of the Valid CPC

Article 572 is discriminatory inasmuch as it lays down that the duration of detention shall not apply to persons who were remanded in custody in proceedings initiated before the valid CPC came into force. The Constitutional Court failed to provide legal protection to the persons on whose behalf the Human Rights Protector initiated the review of the constitutionality of this provision,⁶³² which resulted in the violation of the right to a trial within a reasonable time of a large number of detainees, who were unlawfully held in detention too long in contravention of Article 5(3) of the ECHR. This experience further corroborates the need to restrict detention custody after the filing of the indictment and the delivery of the first-instance verdict, although the minimum standards of the ECHR do not require the introduction of such deadlines.

Guarantees to Appear for Trial/Bail

The second sentence of paragraph 3 of Article 9 of the ICCPR lays down that it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial,

dence, influence witnesses or flee... The mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial.... The mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in article 9, paragraph 3, of the Covenant. In these circumstances, the Committee finds that this right in respect of the authors has been violated.”

⁶³⁰ It needs to be underlined that a technical error has probably been made in the text of paragraph 3 of this Article, because it says that the detention of younger minors shall last four months at most and the detention of older minors six months at most after the pretrial proceedings, while paragraph 4 also states that detention may last another year at most after the completion of pretrial proceedings. The legislator obviously intended to regulate the duration of detention during the pretrial proceedings in paragraph 3.

⁶³¹ Under Article 515 of the new CPC, these provisions shall remain in force until a separate law on juvenile offenders is adopted.

⁶³² Decision No. 127/06, of 3 July 2008 discontinuing the constitutionality review procedure of Article 572 of the CPC initiated by the Human Rights Protector.

at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. Article 5(3) of the ECHR also lays down that release may be conditioned by guarantees to appear for trial.

The Constitution only implicitly states in Article 30 that detention shall be ordered only “if necessary”, although the Venice Commission suggested the insertion of an express reference to the right of detainees to be released on bail.⁶³³ Articles 143–146 of the valid CPC (Arts. 170–173 of the new CPC) prescribe bail as a measure for ensuring the presence of the defendant and the unobstructed conduct of criminal proceedings. Bail is however rarely resorted to in practice.⁶³⁴ One explanation may be that the defendants themselves fail to ask the court to set their bail.

Apart from detention and bail, other measures ensuring the presence of the defendant in the CPC entail summons, apprehension and supervision measures (prohibition to leave one’s dwelling; prohibition to leave one’s place of residence; prohibition to visit particular places or areas; duty to occasionally report to a certain public authority; prohibition of access to or meeting with certain persons; provisional seizure of a travel document, provisional seizure of a driver’s license).⁶³⁵ These measures may be controlled by electronic surveillance, which shall be governed by a separate Government by-law (Art. 166 of the new CPC). This by-law has not been adopted yet.

Right of Appeal to a Court Against the Deprivation of Liberty

The right of appeal against the deprivation of liberty (*habeas corpus*) pursuant to Article 9(4) of the ICCPR regards cases in which the deprivation of liberty was ordered by another authority, not the court.⁶³⁶ The Human Rights Committee is of the view that judicial review must be provided immediately, not after a decision by a second-instance administrative authority.⁶³⁷

Article 29 of the Constitution, entitled *Deprivation of Liberty*, regulates all forms of deprivation of liberty, as opposed to Article 30, entitled *Deten-*

⁶³³ Opinion on the Constitution of Montenegro, adopted by the Venice Commission at its 73rd Plenary Session (Venice, 14–15 December 2007), 392/2006, of 20 December 2007.

⁶³⁴ The OSCE May 2007-May 2009 Trial Monitoring Report states that: [O]rdering other measures such as supervision and guarantee as stated by the CPC to ensure the presence of the accused have not been observed in the reporting period (*Trial Monitoring Report*, June 2009, p. 31). A small-scale HRA survey shows that there is already an unofficial consensus on the amounts of bail the state prosecutors agree to and which depend on the gravity of the crime. For instance, bail is set at between three and five thousand euros for crimes carrying up to three years in jail. Bail is higher in case of foreign nationals. For instance, a foreigner who has violated traffic safety is set bail ranging from 15 to 20 thousand euros.

⁶³⁵ The supervision measures are laid down in Article 166 of the new CPC,

⁶³⁶ *De Wilde, Ooms and Versyp v. Belgium*, ECHR, App. Nos. 2832/66, 2835/66 and 2899/66, para. 76.

⁶³⁷ *Inés Torres v. Finland*, UN Human Rights Committee, UN CCPR/C/38/D/291/1988 (1990), para. 7.2.

tion, which exclusively refers to the deprivation of liberty of a person by a competent court if there is reasonable suspicion that the person committed a crime. Article 29 of the Constitution unjustifiably leaves out the guarantee of the right of all persons deprived of liberty, not only those suspected or accused of a crime, to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. This right had been explicitly guaranteed by Art. 14(6) of the Serbia and Montenegro Human and Minority Rights Charter.

The Non-Contentious Procedure Act (*Sl. list RCG*, 27/06) lays down the procedure for the compulsory institutionalisation of a mentally disabled person in a psychiatric institution if the person's freedom of movement or communication with the outside world must be restricted due to the nature of his/her illness (Art. 44(1)).

The Act on the Protection and Exercise of the Rights of Mentally Disabled Persons (*Sl. list RCG*, 32/05), which has been in force since 1 January 2006, explicitly entitles an institutionalised person to "file complaints with the authorised person in the psychiatric institution and to an independent multi-disciplinary body against his/her treatment, diagnosing, release from the institution or a breach of his/her rights and liberties" and to "file motions and complaints, appeals and other legal remedies to the competent judicial and other state authorities without supervision or restriction" (Art. 18(1)). The person's family members or legal representative may exercise these rights on behalf of the person. This provision appears to be rather declarative in character, because the law does not specify which judicial and other authorities these legal remedies may be filed with.

The Act on the Protection of the Population from Infectious Diseases (*Sl. list RCG*, 32/05) allows for the actual deprivation of liberty in the form of quarantine and the compulsory and strict isolation of persons suffering from infectious diseases, persons who were, or are suspected of having been, in contact with someone suffering from an infectious disease or with persons suspected of suffering from quarantine diseases (Articles 21 and 25). A person ordered the quarantine measure shall abide by the orders of the competent state administration authority or shall be quarantined by force (Art. 21(4)). The quarantine measure is implemented in facilities specified by the competent administrative authority, which organises and manages quarantine at the proposal of the Public Health Institute (Art. 21(3)). The duration of quarantine shall be set depending on the maximum incubation period of the infectious disease because of which it was ordered (Art. 21(2)). Therefore, the duration of the actual deprivation of liberty in this case is not negligible and definitely calls for the right of appeal to a court, which the Act does not provide for. Given that the quarantine measure is declared by an administrative authority, an administrative dispute may be initiated only against a second-instance administrative decision, which does not satisfy the standard in the

ICCPR⁶³⁸, or the ECHR, under which a court shall *urgently* review whether the deprivation of liberty was lawful.

Right to Compensation for Unlawful Deprivation of Liberty

Under Article 38 of the Constitution, “a person whose deprivation of liberty was unlawful or groundless or whose conviction was groundless is entitled to compensation of damages from the state”, whereby it provides for the right guaranteed under Art. 9(5) of the ICCPR and Art. 5(5) of the ECHR. The Human and Minority Rights Charter used to guarantee also the right to rehabilitation (Art. 22).

A person whose deprivation of liberty was unlawful or groundless shall have the right to rehabilitation, the right to compensation of damages from the state, and other rights stipulated by the law⁶³⁹ (Art. 14 of the valid CPC, Art. 13 of the new CPC). The right to compensation also belongs to persons whose conviction was groundless in instances listed in Article 556 of the CPC (Art. 498 of the new CPC): a person who was detained but no criminal proceedings were instituted against him or her or the proceedings were discontinued by a final decision; a person acquitted by a final decision; in the event the charges against the person were rejected; when the duration of the person’s detention exceeds the duration of imprisonment s/he was convicted to.

The compensation procedure comprises two stages: administrative and judicial (civil procedure). The injured party first files a request with the administrative authority “in order to reach a settlement on the existence of damage and the kind and amount of compensation” (Art. 555(2) of the valid CPC, Art. 499(2) of the new CPC). In the event the authority rejects the request or fails to reach a decision within three months, the injured party may initiate a civil compensation lawsuit. If a settlement had been reached on only one part of the claim, the injured party may file a civil lawsuit regarding the rest of the claim (Art. 556(1) of the CPC, Art. 500(1) of the new CPC).

The statute of limitations on compensation of damages expires three years after the day the person was finally acquitted or the charges against him/her were rejected, i.e. from the day the first-instance decision to discontinue the proceedings became final or from the day the person received the decision of the higher court in the event the appeal was reviewed by a higher court (Art. 555(1) of the CPC, Art. 499(1) of the new CPC). Compensation claims are settled quite efficiently in practice.

⁶³⁸ *Inés Torres v. Finland*, UN Human Rights Committee, No. 291/1988 (1990).

⁶³⁹ The rights to the publication of a statement declaring that the conviction or deprivation of liberty was ill-founded; to the recognition of employment-related rights, to the deletion of the conviction from the criminal record (Arts. 503–506 of the CC) (Arts. 503–506, new CC).

Right to Security of Person

In addition to the right to liberty, the Human Rights Committee is of the view that Article 9 of the ICCPR also guarantees the right to personal security, and that the states are obliged to take “reasonable and appropriate” measures to protect persons at liberty whose security is under serious threat beyond the context of deprivation of liberty.⁶⁴⁰ The state needs to investigate the threats and undertake all measures required by the “objective need” i.e. “gravity of the case”.⁶⁴¹ In keeping with this requirement, the CC includes the crime of *Threat to Security* (Art. 168, Chapter XVI, Crimes against the Rights and Liberties of Man and Citizen). However, as opposed to the other articles in this Chapter of the Criminal Code, only this one does not provide for a qualified form of the offence and stricter punishment in case the crime is committed by a person acting in an official capacity. This lapse has to be rectified because it goes without saying that the state is – through its agents – responsible for the respect for and protection of all human rights on its territory, and, thus, itself obliged to refrain from violating human rights if it is to legitimately prevent the private individuals from violating each other’s rights. Furthermore, journalists and investigators of human rights violations have frequently been threatened by no other than state agents.

The Montenegrin Assembly adopted the Witness Protection Act in October 2004 (*Sl. list CG*, 65/04), which lays down special measures for the out of court protection of persons if there is reasonable apprehension that their life, health, physical integrity, liberty or property “of a larger scale” may be jeopardised by his/her testimony. Protection is provided to witnesses, without whose testimony it would be impossible or very difficult to prove the crime (Arts. 1 and 5) or in the event the other protection measures would not suffice, which means that the protection provided by this law is subsidiary in character. Protection is afforded only to witnesses whose testimonies serve to prove the commission of the gravest crimes. Protection may also be afforded to persons close to the witness at his/her request (Art. 1(2)). The Supreme State Prosecutor proposes the protection measures to the Witness Protection Programme Commission, comprising the Deputy Supreme State The witness has to consent to the protection before the Commission reviews the prosecutor’s request (Art. 15(2)). Protection measures include the physical protection of the witness and his/her property, his/her relocation, concealment of his/

⁶⁴⁰ “It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.” *Delgado Paéz v. Colombia*, Com. No. 195/1985, paragraph 5.5.

⁶⁴¹ *Luis Asdrúbal Jiménez Vaca v. Colombia*, CCPR/C/74/D/859/1999, UN Human Rights Committee (HRC), 15 April 2002.

her identity and property and change of identity (Art. 27). At the time the Act was debated in parliament, the then police minister said that the successful implementation of witness protection measures would be difficult to achieve without international cooperation, particularly in the region given “Montenegro’s size, geographic and other features and extremely developed social network (where everyone knows everyone)”⁶⁴²

Witness protection measures envisaged by the Act were only applied once in practice, apparently unsuccessfully, in the proceedings against the men accused of killing chief of the Police Directorate Slavoljub Šćekić.⁶⁴³ Although a number of threats were voiced against prosecution witness Slobodan Pejović, who testified in the case of a war crime against the civilian population, the so-called Refugee Deportation case, the prosecution office failed to take his protection seriously until the HRA and numerous other domestic and regional NGOs repeatedly publicly called for his protection. There were also problems with respect to the choice of protection measures. Pejović did not consent to the protection he was offered – total isolation from his family in another town, but he did consent to greater police supervision of his family home. No light had been shed on any of the numerous threats to demolish Pejović’s property by the time this report went into print.⁶⁴⁴

Article 121 of the new CPC lays down measures for the protection of witnesses in criminal proceedings, entailing various modes of witness participation and testimony: “testimony under a pseudonym, use of technical equipment (protective screen, voice scrambler, audio and video transmission equipment) et al”.

⁶⁴² *Dan*, 24 November 2005.

⁶⁴³ “Criminal Report for Fabricating Evidence”, *Dan*, 18 December 2010. After his identity was disclosed, the witness himself revealed his identity to the public. The quality of evidence, the credibility of witnesses and the need for his testimony were questionable as well (for details see Right to Life, p. 139).

⁶⁴⁴ HRA Pejović Case archives.

Right to a Fair Trial

Article 14, ICCPR:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - c) To be tried without undue delay;
 - d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 6, ECHR:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b) to have adequate time and facilities for the preparation of his defence;
 - c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7, ECHR:

1. No one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission that, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.

Protocol No. 7 to the ECHR:

Article 2

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention.

Introduction – Judicial System and the Constitutional Court

The judicial system in Montenegro comprises 22 courts: 15 Basic Courts, two Superior Courts, two Commercial Courts and the Appellate, Administrative and Supreme Courts. There were 260 judges in Montenegro

at the end of 2010.⁶⁴⁵ The Judicial Reform Strategy for 2007–2012 envisages a reorganisation of the court network because the state has too many courts and judges (260) given the size of its population.⁶⁴⁶

The organisation and jurisdiction of the courts and other issues of relevance to their work are regulated by the Courts Act⁶⁴⁷ that was about to be reformed in June 2011. Basic courts are first-instance courts. Superior Courts hear appeals of Basic Court judgments and act as first-instance courts trying crimes warranting over ten years of imprisonment and organised crime and corruption cases. The Appellate Court, which is superior to the courts of general jurisdiction and commercial courts, began operating in 2005. This Court hears appeals of first-instance decisions by Superior Courts and by the Commercial Courts. The Administrative Court rules on the lawfulness of administrative enactments, of other individual enactments pursuant to the law and extraordinary legal remedies against final decisions rendered in misdemeanour proceedings. The Supreme Court is the highest court in Montenegro. It is charged with ensuring the uniform application of the law by the courts. It also acts as a third-instance court in specific cases and hears appeals of the Superior Courts, the Appellate Court and the Administrative Court. It reviews extraordinary legal remedies against the decisions of other courts and rules on territorial jurisdiction issues.

The Constitution lays down that the state prosecution office shall be a single and autonomous state authority charged with prosecuting perpetrators of crimes and other punishable offences (misdemeanours) prosecuted *ex officio* (Articles 134–138). The State Prosecution Office comprises the Supreme State Prosecution Office, two Superior and 13 Basic State Prosecution Offices. Every state prosecution office is headed by a state prosecutor, who is assisted by one or more deputy prosecutors. Montenegro in 2010 had 16 state prosecutors, one special prosecutor for organised crime, corruption, terrorism and war crimes and 103 deputy state prosecutors.⁶⁴⁸

Under Article 21 of the Constitution, legal aid shall be provided by attorneys at law, who shall be independent and autonomous, and by other

⁶⁴⁵ 2010 Annual Court Performance Report, p. 22.

⁶⁴⁶ “The participating European states which have the highest number of professional judges (more than 30 judges per 100.000 inhabitants) can be found in South-eastern Europe such as Greece and the states coming from the former Yugoslavia (Croatia, Montenegro, Serbia, Slovenia, “the former Yugoslav Republic of Macedonia”); European Judicial Systems, European Commission for the Efficiency of Justice (CEPEJ), Edition 2010 (data 2008), (Efficiency and Quality of Justice), <https://wcd.coe.int/wcd/com.intranet.InstraServlet?command=com.intranet.CmdBlobGet&IntranetImage=1694098&SecMode=1&DocId=1653000&Usage=2> p. 120.

⁶⁴⁷ *Sl. list RCG* 5/2002, 49/2004 and *Sl. list CG* 22/2008. However, the Draft Act on Amendments to the Courts Act, which was in parliamentary procedure in July, does not provide for changes to the organization of courts.

⁶⁴⁸ Supreme State Prosecutor’s Report on the Work of the State Prosecution Office in 2010, p. 1, more on the Special Prosecutor in the chapter War Crime Trials, p. 567.

services. The Free Legal Aid Act, which comes into force on 1 January 2012, states that only attorneys at law may provide legal assistance at the expense of the state. The CPC⁶⁴⁹ prescribes in which cases a criminal defendant must be represented by a defence counsel (Art. 69). Only attorneys at law may be engaged as defence counsels in criminal proceedings (Art. 66(3)). Montenegro has one Bar Association, the work of which is governed by the Attorney Act (*Sl. list RCG* 79/2006). Only members of the Bar Association may act as an attorney at law.

The Constitutional Court shall rule on the conformity of legal regulations with the Constitution and the law and decide on other issues specified in the Constitution (Art. 149, Constitution). The Constitutional Court is a judicial authority separate from the other courts and its work is governed by the Constitution and the Constitutional Court Act (*Sl. list CG* 64/08). Constitutional Court judges are nominated by the President of Montenegro and elected by the majority of votes of all Assembly deputies, which does not ensure their independence and neutrality from the ruling political majority (coalition).⁶⁵⁰ The upcoming constitutional reform will be an opportunity to address this problem in line with the Venice Commission's recommendation of June 2011.⁶⁵¹ More on the institute of constitutional appeal in the chapter Right to an Effective Legal Remedy p. 66.

Election of State Prosecutors

The Supreme State Prosecutor and other state prosecutors are nominated by the Prosecutorial Council and elected by a simple majority in the Assembly, whereby they are susceptible to the influence of the political authorities.⁶⁵² The deputy state prosecutors are appointed by the Prosecutorial Council. Under the State Prosecution Office Act, (*Sl. list CG* 69/03, 40/08) the Council shall comprise the President, the Supreme State Prosecutor and ten members, elected to four-year terms of office by a simple majority in the Assembly, just like the state prosecutors. They shall be eligible for reappointment. Six members of the Council are elected from among state prosecutors and their deputies upon nomination by the extended session of the Supreme State Prosecutor; one is appointed from the ranks of Podgorica law college professors and nominated by the Podgorica law college; one from among at-

⁶⁴⁹ *Sl. list CG* 57/2009 and 49/2010.

⁶⁵⁰ European Commission for Democracy through Law (Venice Commission) Opinion on the Constitution of Montenegro, December 2007, Opinion No. 392/2006, paragraphs 122–123 ([http://www.venice.coe.int/docs/2007/CDL\(2007\)104-e.asp](http://www.venice.coe.int/docs/2007/CDL(2007)104-e.asp)).

⁶⁵¹ *Opinion on the draft amendments to the Constitution of Montenegro*, Opinion No. 626/2011, 17 June 2011, paragraphs 26–28 ([http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)010-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)010-e.pdf))

⁶⁵² *Opinion on the draft amendments to the Constitution of Montenegro*, Opinion No. 626/2011, 17 June 2011, General Remarks, paragraphs 104–105 and 107–110 on Articles 134–138 of the Constitution ([http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)010-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)010-e.pdf))

torneys nominated by the Montenegrin Bar Association; one from among eminent legal professionals in Montenegro nominated by the Human Rights and Freedoms Protector; and one, nominated by the Justice Minister, who represents the Ministry of Justice. In the Proposal to amend the Constitution of 2 June 2011, the Government proposed that the composition of the Council be prescribed by the Constitution and that it essentially remains the same.⁶⁵³ It was not specified on whose proposal the Assembly would elect two prominent lawyers, who had been elected on the proposal of the Faculty of Law and the Ombudsman so far. The Venice Commission has suggested that they be chosen among candidates who would previously pass some form of selection that would ensure their competence and integrity.⁶⁵⁴

The Prosecutorial Council is charged with proposing the appointment, dismissal and termination of office of state prosecutors. It is also charged with proposing the dismissal of the Supreme State Prosecutor, who heads the Council. A motion for the dismissal of the Supreme State Prosecutor is filed at the reasoned initiative of the Justice Minister (Art. 53). This procedure is applied also with respect to disciplinary proceedings against the Supreme State Prosecutor. The Commission also proposed that the Constitution provide grounds for dismissal of the Supreme State Prosecutor.⁶⁵⁵

One of the conditions the European Commission set Montenegro in November 2010 regards strengthening rule of law by reforming the judiciary, by depoliticising the election of Prosecutorial and Judicial Council members. In its draft amendments to the Constitution of 2 June 2011, the Government proposed that the prosecutors no longer be elected by the Assembly, but by the reformed Prosecutorial Council, and that the Supreme State Prosecutor still be elected by the Assembly by simple majority. The Venice Commission proposed that the Supreme State Prosecutor be elected by qualified majority.⁶⁵⁶

Independence and Impartiality of Courts

Judicial independence entails independence of the court from the executive and legislative authorities and the parties to the proceedings⁶⁵⁷. Independence is ensured also by the institutional regulation of the system of

⁶⁵³ For details see The Proposal to amend the Constitution of Montenegro, Podgorica, May 2011, available at: www.skupstina.me (proposed amendments to Article 136).

⁶⁵⁴ Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the draft Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, adopted by the Venice Commission at its 87th Plenary Session, Venice, 17–18 June 2011.

⁶⁵⁵ *Ibid*, item 54.

⁶⁵⁶ *Ibid*.

⁶⁵⁷ *Ringeisen v. Austria*, 16 July 1971, paragraph 95, available in Montenegrin in the publication "Independent and Impartial Court" edited by Tea Gorjanc-Prelević, Republic of Montenegro Judicial Training Centre, Podgorica, 2001.

separation of powers ensuring sufficient guarantees of judicial independence. Subjectively, judicial impartiality entails the lack of personal partiality (prejudice or bias) of the judge. This impartiality is implied and lack of it must be proven. Objective impartiality entails that the court is perceived as impartial by the public and parties to the proceedings, i.e. that the offered guarantees are sufficient to exclude any legitimate doubt in this respect.⁶⁵⁸

The Constitution lays down the separation of powers into legislative, executive and judiciary. Judicial authority shall be exercised by the courts, which shall be autonomous and independent and shall rule on the basis of the Constitution, laws and ratified and published international agreements (Arts. 11 and 118).

Article 126 of the Constitution provides for the establishment of a reformed Judicial Council to ensure the independence and autonomy of courts. Pursuant to the Constitution and the Judicial Council Act, the Council, which began working on 19 April 2008, is tasked with appointing (and promoting), dismissing and conducting disciplinary proceedings against judges. This marks an improvement over the prior provision, under which judges were nominated by the Judicial Council and elected by the ruling majority in the Assembly. The 2007 Constitution, however, provides for the election of the Supreme Court President, who also chairs the Judicial Council, by the ruling coalition in the Assembly at the joint proposal of the leaders of that coalition, notably the President, the Prime Minister and the Assembly Speaker.⁶⁵⁹ On 2 June 2011 the Government proposed amending this part of the Constitution so that the President of the Supreme Court is still elected by the Assembly, but on the proposal of the Judicial Council with the prior opinion of the General Session of the Supreme Court. The Venice Commission suggested that a reformed Judicial Council elects the President of the Supreme Court by a two-thirds majority in order to avoid any politicization, or the Assembly by a two-thirds majority, so that the opposition parties also decide on the appointment.⁶⁶⁰

The composition of the Judicial Council indicates that political influence on the election of judges cannot be ruled out. The 10-member Judicial Council is chaired *ex officio* by the Supreme Court President, a political appointee, while the other Council members comprise the Justice Minister, two Assembly deputies, two legal professionals nominated by the President of Montenegro, and four judges⁶⁶¹, one of whom is the wife of the Montenegrin

⁶⁵⁸ In the case of *Piersack v. Belgium*, 1982, the ECtHR emphasised that domestic courts had to encourage public trust of their work, particularly in criminal trials.

⁶⁵⁹ See the Venice Commission's criticism of this issue in paragraphs 87–91 of its *Opinion on the draft amendments to the Constitution of Montenegro*, and HRA's "Assessment of the Reform of the Appointment of Judges in Montenegro (2007 – 2008)" (http://www.hraction.org/wp-content/uploads/hra-analiza_reforme_izbora_sudija_u_crnoj_gori-eng.pdf).

⁶⁶⁰ Venice Commission Opinion on the Proposal for amending the Constitution of Montenegro, item 13.

⁶⁶¹ Two of the four Judicial Council members from among judges are appointed from among the judges of the Supreme, Appellate, Administrative and two Superior Courts,

President⁶⁶². The Council is thus not perceived as autonomous or independent from the ruling political group, as it should be under international recommendations and the Constitution.⁶⁶³ In the Proposal to amend the Constitution, in June 2011 the Government proposed that the Council elects a President from among the judges, as well as the change to its composition so that it has 11 members, one of which is the Minister of Justice, six judges, four prominent lawyers, including two appointed by the Assembly and two by the president. By contrast, the Venice Commission has proposed that the Judicial Council of 11 members has five members from among the judges, including the Supreme Court president, and that the other five members are: Minister of Justice, two prominent lawyers, one appointed by the opposition and other by ruling coalition, one prominent lawyer of president's choice and one appointed by a civil society (in a way that would include NGOs, the Bar Association and the University).⁶⁶⁴

Analyses of the valid regulations and recommendations of improvements need to take into account that the judiciary in Montenegro has traditionally lacked independence, which is built in an environment in which governments change. Montenegro differs from the other former Yugoslav republics inasmuch as the reformed part of the League of Communists, the Democratic Party of Socialists (DPS), has been continuously in power since the multi-party system was introduced in 1990. This party has inevitably been surrounded by an aura of irreplaceability, of an eternal government controlling all aspects of political and economic life. Preservation of one's independence from this group poses a serious challenge, particularly with respect to investigating and prosecuting those in the establishment.⁶⁶⁵

while the other two are appointed from among "judges of all courts" (Art. 11 (paragraphs 1 and 2), Judicial Council Act). In this way, "the widest representation of the judiciary" in the Council has not been secured, as suggested in international recommendations, i.e. for one half of the judges as Council members to be elected among the judges of basic and commercial courts, which account for a striking majority vis-à-vis the first group. Furthermore, the manner in which the representatives of judges are appointed is not transparent (More in "Assessment of the Reform of the Appointment of Judges in Montenegro (2007 – 2008)", p. 83). However, the Draft Judicial Council Act which was in parliamentary procedure in July contained no such provision.

⁶⁶² HRA proposed that the Judicial Council Act be supplemented by a provision prohibiting conflicts of interest and the appointment of national and local parliamentarians, political party officials, persons named or appointed to government office, as well as their spouses, next of kin, collateral relatives up to the second degree of kinship, or in-laws, to the Council (this would not apply to Council members appointed from the ranks of deputies) (More in "Assessment of the Reform of the Appointment of Judges in Montenegro (2007 – 2008)", p. 78).

⁶⁶³ "Assessment of the Reform of the Appointment of Judges in Montenegro (2007 – 2008)", Podgorica, 2009.

⁶⁶⁴ Venice Commission Opinion on the Proposal for amending the Constitution of Montenegro, item 19.

⁶⁶⁵ The investigation the prosecutors launched just before the New Year 2011 against the Budva Mayor (and DPS member) and the brother of the former Montenegrin Deputy Prime Minister and Vice-President of the DPS may at first glance appear as proof of the

The 2007 Constitution provides the ruling political coalition with decisive influence on the appointment and dismissal of key judicial officials: the Supreme Court President, who simultaneously chairs the Judicial Council, the Conference of Judges and the Judicial Appointment Commission; the members of the Judicial and Prosecutorial Councils not appointed from among the ranks of judges and prosecutors; and all prosecutors, including the Supreme State Prosecutor (SSP), who manages and is held accountable for the work of all prosecutors.⁶⁶⁶ The impression has thus been formed that all key decisions regarding the judiciary have continuously been taken by one political group in the ruling coalition.

The European Commission called on Montenegro to strengthen the rule of law, ensure a depoliticised system of appointing members of the Judicial and Prosecutorial Councils and state prosecutors by establishing “a fully-fledged merit-based career system to strengthen independence, professionalism and transparency in the judiciary.”⁶⁶⁷

The procedure for amending the Constitution was launched in June 2011 by the draft amendments proposed by the Government. The procedure is sure to last until the end of the year given the complexity and duration of the constitutional amendment procedure. There have been suggestions to simultaneously make the relevant amendments to the laws on the judiciary, to ensure the overall improvement of guarantees of exclusively merit-based judicial appointments.⁶⁶⁸

Appointment of Judges

Under Article 128 of the Constitution, judges, lay judges and court presidents shall be appointed and dismissed by the Judicial Council. The Courts

impartiality of the system and of its resolve to prosecute corruption without discrimination on grounds of political affiliation. However, in view of the political tensions within the DPS, it would be premature to draw that conclusion, until the dilemma about whether their prosecution was initiated to sideline them in the party ranks is resolved. The Montenegrin judiciary thus needs to continuously demonstrate its willingness to prosecute everyone responsible for breaking the law.

⁶⁶⁶ The remit and duties of the Supreme State Prosecutor are specified in Articles 93, 110 and 112 of the Prosecutorial Council Act (management of the state prosecution offices, issuance of general and specific binding working instructions, the authority to directly exercise all powers of the Superior and Basic State Prosecutors). The Special State Prosecutor is appointed by and shall be accountable to the Supreme State Prosecutor (Art. 70).

⁶⁶⁷ “However, serious concerns exist over the independence of the judiciary, as the legal framework leaves room for disproportionate political influence.” Analytical Report Accompanying the Communication from the Commission to the European Parliament and the Council, Commission Opinion on Montenegro’s Application for Membership of the European Union, (COM(2010) 670) of November 2010, p. 18.

⁶⁶⁸ The rule of law working group, comprising representatives of both the state authorities and NGOs and set up within the European Movement in Montenegro’s National Convention on EU Integration, recommended the simultaneous amendment of both the Constitution and the judicial laws. The Venice Commission also made such a preliminary recommendation in May 2011 (according to MoJ representative in the working group Mrs. Branka Lakočević).

Act⁶⁶⁹, the Judicial Council Act (*Sl. list CG 13/2008*) and the Judicial Council Rules of Procedure⁶⁷⁰ lay down the general and specific requirements candidates for the offices of judges, court presidents and lay judges must fulfil. The Supreme Court President, who simultaneously chairs the Judicial Council, is appointed and dismissed by the Assembly as described above.

Both the independence and the quality of the judiciary are weakened by the absence of a fully-fledged merit-based career system.⁶⁷¹ The judicial appointment and promotion criteria are imprecise and lack parameters by which they can be graded on a scale of 1 to 5.⁶⁷² This provides room for each Council member to arbitrarily decide how to assess which criterion, whereby the regulations are not uniformly applied to every candidate. There is no mandatory coded written testing of candidates applying for judgeship.⁶⁷³ HRA is advocating the introduction of regular monitoring i.e. appraisals of judicial performance, which will provide for the transparency of their promotion.⁶⁷⁴

The recruitment and promotion of judges is still not perceived as impartial and transparent due to the decades-long practice of politically-motivated appointments by the Assembly and the conservative, politically suitable judicial structures which decided who would be promoted and who would be sidelined one way or another.⁶⁷⁵ Until the norms for the evaluation of the framework appointment criteria are specified, there will always be room for the prevalence of subjective over objective assessments of candidates and doubts about the impartiality of the appointments.⁶⁷⁶ However, neither the Bill on Amendments to the Judicial Council Act binds the Judicial Council to adopt these standards.

The Judicial Council rendered a total of 40 appointment decisions in 2010: it appointed six court presidents and 34 judges, four to the Supreme Court, two to the Appellate Court, eight to the Superior Courts and 20 to the Basic Courts.⁶⁷⁷

⁶⁶⁹ *Sl. list RCG 5/2002, 49/2004 and Sl. list CG 22/2008.*

⁶⁷⁰ Available on the following website as of June 2008 www.sudskisavjet.gov.me.

⁶⁷¹ Analytical Report Accompanying the Communication from the Commission to the European Parliament and the Council, Commission Opinion on Montenegro's Application for Membership of the European Union, (COM(2010) 670) of November 2010, p. 17.

⁶⁷² More in "Reform of the Appointment of Judges in Montenegro (2007 – 2008)", op. cit, pp. 127–133.

⁶⁷³ Bill on Amendments to the Judicial Council Act provides for mandatory testing in the first election for a judge.

⁶⁷⁴ See other recommendations for improving the impartiality and transparency of the judicial appointment system in the "Reform of the Appointment of Judges in Montenegro (2007 – 2008)", op.cit, p. 143.

⁶⁷⁵ "We Knew Some Things When Judges Used to Be Elected in Parliament", *Vijesti*, 22 January 2010.

⁶⁷⁶ "Everyone is Someone's, at Least a Friend", *Vijesti*, 23 June 2009.

⁶⁷⁷ 2010 Annual Court Performance Report, p. 16, available in Montenegrin at: <http://www.vrhsudcg.gov.me/LinkClick.aspx?fileticket=7BzEBpcWKN0%3d&tabid=84&mid=458>.

Judicial appointment decisions, published on the Judicial Council website together with the reasonings as of 2011, substantiate that there is cause to doubt the way judges are appointed and promoted.⁶⁷⁸ It is, however, also

⁶⁷⁸ Illustrative examples:

1) Of over thirty candidates who took the test for the six judgeships in the Podgorica Basic Court advertised in 2008, only the decisions on the appointment of the first one on the list, the son of the then Appellate Court President, and the second best candidate from his home town, did not include their test scores. All members of the Judicial Appointment Commission nevertheless gave the son of the Appellate Court President the highest grade by far, 4.85, while the other candidates were rated between 1.75 and 4.21, which is why he rose to the top of the list (Judicial Council Decision Ref No. Su. R 228/08 of 8 August 2008).

2) The daughter of the Appellate Court President was appointed judge in the Nikšić Basic Court. She did not do the test best (scored 207 points) but “*all Appointment Commission members gave her the final grade 3.25 and the Commission unanimously graded her 3.25*”, while a candidate “*who scored 218 points on the written test, was given the final grade of 2.50 by all members of the Commission whereby the Commission unanimously graded her 2.50*”. Each of the other candidates were graded 2.75 (Judicial Council Decision Ref No Su. R. 792/09, of 17 July 2009).

3) In the Judicial Council Decision Ref No Su. R. 541/08 of 20 November 2008 on the appointment of six judges to the Podgorica Basic Court, the sixth judge who was appointed was ranked as ninth in the reasoning of the decision although his test results placed him tenth on the list. The reasonings of the decisions do not specify which objective parameters prompted the Commission to so radically change the order of the candidates ranked by their test scores. The decisions do not provide even one piece of information on how any of the candidates were evaluated under any of the appointment criteria listed in Article 34 of the Judicial Council Act and Article 34 of the Judicial Council Rules of Procedure.

4) Judicial Council Decision Ref No Su. R. 1385/2010, of 27 December 2010 on the appointment of a judge to the Podgorica Basic Court is also quite intriguing. The successful candidate, a lawyer, was rated more highly than a Court associate, who had done the test better. The Commission graded the former 4.00 and the latter 3.75. No information was provided on how the successful candidate gained advantage over the other one under the following criteria “interview with the candidate”, “professional knowledge” (given the test results) and “advanced professional training” based upon the “opinion on the professional and performance qualities of the candidate, obtained from the court (authority) the candidates work in, the court they are applying for and the immediately superior court”.

5) Another indicative illustration is the fact that one and the same judge of the Podgorica Basic Court who applied for two judgeships received two different grades *the same day* (!?) – he was graded 4.28 and not appointed judge in the Podgorica Appellate Court (Judicial Council Decision Su. R. 369/2010 of 18 March 2010) and graded 4.57 and appointed to the Podgorica Superior Court (Judicial Council Decision Su. R. 370/2010, of 18 March 2010).

6) Adoption of decisions on appointments including appropriate detailed and precise reasonings and their publication is crucial to establishing trust in the objectivity of the Judicial Council. This is particularly important when two candidates are equally good. Such was the case when only one Podgorica Basic Court judgeship was advertised: two candidates each scored 247 points and the following two 245 points on the written test, etc, and the Commission chose the candidate it graded 3.75, while the other four candidates were each graded 3.50. However, the Judicial Council Decision Ref. No. Su. R. 166/2010, of 8 February 2010 does not specify under what criteria the successful candidate scored such a crucial advantage.

true that the unsuccessful candidates have not been appealing the decisions, despite the obvious irregularities and ambiguities and do not even dare seek access to the appointment documentation. This can be ascribed to the lack of tradition of an autonomous and independent judiciary, as well as to opportunism. Given that there are not too many candidates in general, candidates, who are not appointed judge the first time they apply, are as a rule appointed the next time the judicial vacancies are advertised and thus prefer not to cause any resentment.

Adoption of decisions on appointments including appropriate detailed and precise reasonings and their publication is crucial to establishing trust in the objectivity of the Judicial Council and the judiciary on the whole.

Disciplinary Accountability, Termination of Judicial Office and Dismissal

Under Article 121(2) of the Constitution, the term of office of a judge shall be terminated at his/her own request, when s/he fulfils the mandatory retirement requirements and in the event s/he is sentenced to an unconditional imprisonment sentence. A judge shall be dismissed in the event s/he: was convicted for a crime rendering him/her unworthy of being a judge, performed his/her duties negligently or unprofessionally, or permanently lost the capacity to exercise the duties of judge (Art. 121(3)). A judge shall be subjected to disciplinary proceedings in the event s/he exercised her/his judicial duties improperly or damaged the reputation of judges (Judicial Council Act, Art. 50).

The Act does not define “unprofessional” and “negligent” performance of duties, which constitute grounds for dismissal, whereby it leaves a lot of room for arbitrary assessments of whether the judge in question has been so negligent or unprofessional that s/he should be dismissed or just subjected to disciplinary sanctions⁶⁷⁹ or even neither of the above.⁶⁸⁰ This is why HRA

⁶⁷⁹ For instance, the Judicial Council initiated the dismissal of Podgorica Superior Court judge Lazar Aković for negligence because he published the judgment 47 days after the completion of the main hearing (exceeded the deadline for drawing up the judgment), communicated the judgment with mistakes in it to the parties and subsequently rendered a decision correcting the reasoning of the judgment. In another case, which ended up in the ECtHR (Application No. 35792/09), the judge rendered a first-instance judgment one year, seven months and 15 days after the main hearing was completed, although judges are under the obligation to draw up the judgments within a month. After the Supreme Court reviewed the appeal on points of law and the applicant criticised its decision in the media, the judge rapporteur rendered a decision correcting the reasoning of the decision, although only the presiding judge is authorised to do so. In the same case, the second-instance court judicial panel hearing the appeal was chaired by a judge, who had two years earlier, when the proceedings first opened, been the deputy state prosecutor prosecuting the case. Not one of the judges in this case has been held accountable for any of their omissions.

⁶⁸⁰ The initiation of disciplinary proceedings against a judge depends on the president of the court the judge works in i.e. the president of the immediately superior court. In 2011, a

back in 2008 called for specifying the grounds for dismissal and disciplinary offences, which would both be of use to the judges and boost the impartiality of the Judicial Council.⁶⁸¹ The European Commission, too, noted that the criteria for dismissal and disciplinary proceedings were not transparent, creating a risk of discretionary implementation.⁶⁸² On the other hand, the regular appraisals of judges, i.e. objective indicators of the efficiency and quality of their performance need to be introduced to ensure that accountability procedures are initiated automatically rather than selectively. The disciplinary and dismissal proceedings are launched by the court president, wherefore it is solely up to him or her whether the performance or conduct of any judge will be reviewed at all by the Judicial Council. HRA has called for changing the system and allowing every member of the Judicial Council to initiate proceedings against a judge or court president.⁶⁸³

Furthermore, there is no legal enactment governing the appointment of Disciplinary Committee members from among judges who are not members of the Judicial Council.⁶⁸⁴

Bill on Amendments to the Judicial Council Act and the Courts Act, which was in parliamentary procedure in July, provides the precise reasons for the dismissal and disciplinary responsibility of judges, but does not provide for regular evaluation of judges, does not introduce the manner of appointment of all members of the Disciplinary Commission, and does not include the HRA proposal to enable other members of the Judicial Council to initiate disciplinary proceedings against judges, not just the President of the Supreme Court. The Government has proposed the introduction of the Judges Code of Ethics Commission, consisting of three judges, which can also start the procedure for determining disciplinary responsibility of judges. However, the Commission can only be address by the judges or the president of the court with a request for an opinion whether a particular behavior of the judge is in accordance with the Code of Ethics.⁶⁸⁵

president of a court said he saw nothing wrong in the fact that a judge in his court, his cousin, against whom a complaint had been filed, has been adjudicating a labour dispute over wrongful dismissal “slightly over a year”, whereby he displayed an utter disregard of the obvious inefficiency of the judge (“Trial within a Reasonable Time and Court Independence and Impartiality in Practice”, Veselin D. Radulović, Podgorica lawyer, this account will be published in the book “Lawyers’ Accounts II”, Justicija, Podgorica, 2011).

⁶⁸¹ See “Reform of the Appointment of Judges in Montenegro (2007 – 2008), HRA, paragraph 8.1.2.

⁶⁸² Analytical Report Accompanying the Communication from the Commission to the European Parliament and the Council, Commission Opinion on Montenegro’s Application for Membership of the European Union, op. cit, p. 18.

⁶⁸³ See “Reform of the Appointment of Judges in Montenegro (2007 – 2008)”, op.cit, paragraph 6.2.2.

⁶⁸⁴ See “Reform of the Appointment of Judges in Montenegro (2007 – 2008)”, op.cit, paragraph 6.2.4.5.

⁶⁸⁵ Articles 8 and 34 of the Bill on Amendments to the Judicial Council Act (proposed amendments to the existing Art. 54 of the Judicial Council Act).

The practice of judges leaving at their own request after dismissal proceedings had been instituted against them has given rise to suspicions that they and the judicial authorities have reached “an understanding” under which the judge leaves of his/her “own will” and receives a severance amounting to six months of wages in return for the non-investigation of the irregularities and unlawfulness in his/her work or even the work of others (e.g. the court president).⁶⁸⁶ Two judges in 2010 and one judge in 2009 filed requests to be relieved from office after dismissal proceedings were instituted against them. For instance, six of the 13 Kotor Basic Court judges were relieved of duty “at their own request” in fifteen months alone. They include judges whose dismissal was initiated by the competent state authorities (Conflict of Interests Commission, etc).⁶⁸⁷ A Nikšić Basic Court judge also resorted to this avenue.⁶⁸⁸

The Judicial Council rendered three decisions on dismissal since 2008.⁶⁸⁹ It found grave errors in the work of the three judges, which, due to their acts of omission, resulted in denial of access to a court in civil and enforcement procedures and the discontinuation of the criminal prosecution of a number of persons because the statute of limitations had expired, wherefore some persons clearly benefited unlawfully, while others sustained damage. The public was not notified whether the state prosecutor examined the criminal liability of these judges, who had been dismissed on these grounds or others who may have contributed to such an epilogue of the cases – the court presidents and state prosecutors.

Permanence of Judicial Tenure

The Constitution provides for permanence of judicial tenure (Art. 121(1)). Montenegrin judges are appointed to permanent tenures.

Principle of Non-Transferability

The Constitution prohibits the transfer or reassignment of a judge to another court against his/her will, except by a Judicial Council decision in the

⁶⁸⁶ Kolašin Basic Court judge Ljiljana Simonović says that Judicial Council Disciplinary Committee Chairwoman Svetlana Vujanović suggested she resign and thus be entitled to a six-month salary (*Vijesti*, pp: 1, 11, 22 April 2010). Former Podgorica Superior Court Special Department judge Lazar Aković also publicly said his court president had suggested this possibility to him before the dismissal proceedings had been initiated against him (*Dan*, 26 October 2010, News of the Day). A Bar Basic Court judge was temporarily suspended on 6 August 2008 and his office was terminated already on 30 September 2008 at his own request, whereby the proceedings against him were discontinued (Su.R. 215/08, of 6 August 2008 and Su.R. 349/08 of 1 October 2008.)

⁶⁸⁷ Conflict of Interests Commission Motion, available in Montenegrin at <http://www.konfliktinteresa.me/rjesenja/PREDLOZI%20za%20razrjesenje.htm>

⁶⁸⁸ *Ibid.*

⁶⁸⁹ All decisions and reasonings are posted on the Judicial Council website: www.sudsk-isavjet.gov.me.

event of court reorganisation (Art. 121(4)). The Judicial Council Act states that the Judicial Council may temporarily assign a judge to a higher court with his/her consent in the event the court has a temporary increase in its workload or has a backlog its judges cannot handle on their own (Art. 42(3)). Only judges fulfilling the higher court's judicial appointment requirements may be temporarily assigned to work in them.

This provision has been amply invoked and the Court Performance Report provides data on which Basic Court judges were temporarily reassigned to higher courts. This practice is problematic and brings into question the obligation that everyone shall be entitled to a hearing by a “tribunal established by law”, because temporarily assigned judges adjudicating in higher courts are not formally appointed to these courts. An application with respect to this practice has been filed with the ECtHR.⁶⁹⁰

Budget of the Judiciary

Pursuant to the Constitution of Montenegro, the Judicial Council is authorised only to propose to the Government the amount of funds for the courts (Art. 128(6)), while the Courts Act (Art. 110) stipulates that funding for the courts shall be provided from a separate Montenegrin state budget line, and that the Chairman of the Judicial Council is entitled to participate in the Assembly session debating the proposed court budget. This means that there is no independence of the judiciary budget.⁶⁹¹ The Judicial Council does not decide on the amount of the funds allocated to courts and may only render its opinion. The Assembly, as a rule, approves the budget proposed by the Government and thus the allocated funds are further subject to revenue deficits in the entire system.

Housing Allocation System

Although the 2007 Government Decision on the method and criteria for addressing the housing needs of holders of public offices provides that a panel of judges (albeit it does not specify how such a panel is established) shall decide on the allocation of funds from the state budget to address the housing issues of judges,⁶⁹² this solution is still controversial in terms of judicial inde-

⁶⁹⁰ E.g. Application No 13410/10 to the ECtHR.

⁶⁹¹ International standards do not stipulate independent court budgets. The Consultative Council of European Judges recommends that the judiciary be involved in the drafting of the budget and that the decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence and the need to allocate sufficient resources to courts to enable them to function in accordance with the standards laid down in Article 6 of the ECHR, see Opinion no 2 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights).

⁶⁹² *Sl. list CG*, 47/2007, of 7 August 2007.

pendence. It is unclear why the taxpayers should fund housing for civil servants, still allocated in an insufficiently transparent manner.⁶⁹³ Judges should be provided with better wages, which would enable them to obtain housing loans from commercial banks, same as other citizens.⁶⁹⁴ In the meantime, one can expect that the judges will have a protective attitude towards the state budget, which should resolve their housing problems.

The media in March 2011 reported that, contrary to the procedure, two Supreme Court judges and a judge of the Podgorica Superior Court have been approved apartments, i.e. housing loans from the Government, and not the judicial panel in charge of the judges' housing.⁶⁹⁵ This issue caused further public consternation because one of the judges, whose housing issue was reportedly resolved contrary to the procedure, had tried a war crime case and rendered a first-instance judgment finding that a war crime had not been committed, wherefore she relieved of responsibility not only the accused civil servants, but everyone else who may have been accused of that crime in the future as well.

About one-fifth of the judges (55) do not own their apartments and are forced to rent them. They are entitled to a monthly rent compensation of 165 €, ⁶⁹⁶ which is paid irregularly.

Recusal

Under the Courts Act, a judge shall adjudicate and render decisions independently and autonomously, a judicial office may not be performed under any external influence and no one may influence a judge exercising his/her judicial duties (Art. 3). Article 4 stipulates that the court shall render decisions on the legal matter it is competent for in a lawful, impartial and timely manner. The Code of Judicial Ethics elaborates in detail the provisions on the independence and impartiality of judges.⁶⁹⁷

⁶⁹³ Concerns about the transparency of this practice are also expressed in the US Department of State: Human Rights Report on Montenegro February, 25, 2009, <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119095.htm>.

⁶⁹⁴ The Decision does not oblige a judge who has received a loan or an apartment to stay in office for at least a certain number of years, wherefore a judge may leave office soon after resolving his/her housing issue at public expense (Position of Supreme Court judge Radule Kojović, President of the Judicial Housing Panel, "One out of Three Judges Has to Rent an Apartment", *Vijesti*, 1 March 2007).

⁶⁹⁵ "Vesna Secretly Giving Away Apartments and Loans", *Dan*, 23 March 2011; "SDP Requires Review of Vesna's Decisions", *Dan*, 25 March 2011.

⁶⁹⁶ Article 9 of the Law on Salaries and Other Incomes of Holders of Judicial Office and Constitutional Court Judges (*Sl. list RCG*, 36/2007, 53/2007) provides that a judge, prosecutor or Constitutional Court judge who does not have an apartment or family apartment building in ownership, co-ownership or joint ownership, and does not live with his/her parents or in-laws, is entitled to compensation of part of apartment rental costs in the amount of three minimum wages per month.

⁶⁹⁷ Pursuant to Article 23(1(10)) of the Judicial Council Act (*Sl. list CG* 13/08), the Code of Judicial Ethics was adopted by the Conference of Judges at its session on 26 July 2008.

The procedural laws lay down the conditions for the recusal of judges, lay judges, court reporters and court presidents at the request of a party to the proceedings, his/her legal counsel, judge or lay judge (Art. 69, CPA; Art. 38, CPC). As provided for by international standards⁶⁹⁸, the procedural laws oblige judges to discontinue adjudication of a case as soon as they learn of the existence of any legal grounds for recusal (Art. 70, CPA; Art. 39, CPC). Motions for recusal are reviewed by the court presidents, while a motion for the recusal of a court president is reviewed by the president of the immediately higher court. The motion for the recusal of the Supreme Court President is reviewed by the plenary session of the Supreme Court. The non-recusal of a judge who had to have been recused constitutes a gross violation of the procedure and results in the overturning of the judgment (Art. 367, CPA; Art. 386, CPC).

The CPA lists the following among the grounds for recusal: “if the judge himself/herself is a party to the proceedings, a legal representative or proxy of a party” (Art. 69(1(1))); “if s/he participated in the rendering of a decision on the same case by a lower court or another authority or participated in the mediation procedure” (Art. 69(1(4))), or “if other circumstances giving rise to doubts about his/her impartiality exist” (Art. 69(1(7))).

These provisions led the Supreme Court to conclude that there were “no grounds for the recusal” of a judge, who had acted as a legal counsel for the defendant in the first instance, and subsequently, after she became a judge, rendered a judgment in the same case in the second instance “given that she had not taken part in the rendering of the first-instance judgment...”⁶⁹⁹ This view is in contravention of ECtHR case law.

The ECtHR emphasised that appearances of impartiality are extremely important as well and that it needs to be examined whether a party to the proceedings or the defendant in a specific case may objectively have cause to doubt the impartiality of the court⁷⁰⁰. In the case of *Wettstein v. Switzerland*, 2000, the ECtHR found that the interrelated interests of a total of two out of five judges in a case, in which the applicant was being tried by two of the five judges, who had previously been representing the opposing parties, amounted to an appearance of lack of impartiality. Although there was no material connection between the two cases, the ECtHR found that the applicant had objective reasons for concern that these two judges would continue to see in him the opposing party due to short period of time between the proceedings.

It is nearly impossible to have a judge recused in practice without extremely strong evidence or obvious partiality.

Incompatibility

Under the Constitution, a judge may not hold a seat in the parliament or another public office or professionally engage in other activities (Art.

⁶⁹⁸ *Hauschildt v. Denmark*, 1990, paragraph 48.

⁶⁹⁹ Supreme Court of Montenegro, Ref No Rev. 937/09, 22 September 2009.

⁷⁰⁰ *De Cubber v. Belgium*, 1984, paragraph 26.

123). Under the Courts Act, the Judicial Council has the exclusive authority to review cases of incompatibility (Arts. 45–46).⁷⁰¹ The Venice Commission pointed out that it was common in other European countries to allow judges to perform certain activities such as teaching.⁷⁰² The law should specify which activities a judge may and may not perform, to minimise the scope for arbitrary interpretations by the Judicial Council.⁷⁰³ No information on whether the Judicial Council reviewed any compatibility issues has been released by June 2011.

Random Assignment of Cases

Judicial impartiality, particularly public trust in the judiciary, is also ensured by the random assignment of cases. The random case assignment system was introduced only five years ago; prior to that, the cases were assigned by the court presidents, which was the key mechanism for exerting political and other forms of influence on the court. The European Commission noted in November 2010 that the rules for random allocation were not sufficiently sound and did not guarantee genuinely random allocation of cases, especially in small courts.⁷⁰⁴

Under Article 8 of the Courts Act, everyone shall have the right to have his/her legal matter heard by a randomly selected judge, regardless of the parties or the features of the legal matter. The random assignment method and other related issues are regulated in detail by the Court Rules of Procedure (*Sl. list* CG 26/11).

The Judicial Information System (JIS) introduced in mid-2010 was presented as a system enabling the automatic assignment of cases.⁷⁰⁵ The filing and registration of initial enactments by which parties launch court proceedings were, however, still conducted in the traditional way in practice in early 2011, by putting the receipt stamp on the initial enactment, without assigning it a code or any other reference that would eliminate suspicions that cases are not randomly assigned, i.e. without immediate entry of the lawsuit data in the computer system which would then automatically assign the new case to a judge.⁷⁰⁶

⁷⁰¹ Judicial Council Act (Arts. 45 and 46).

⁷⁰² “International Human Rights Standards and Constitutional Guarantees in Montenegro”, HRA, 2008, p. 160.

⁷⁰³ See “Reform of the Appointment of Judges in Montenegro (2007 – 2008)”, op.cit, p. 94.

⁷⁰⁴ Analytical Report Accompanying the Communication from the Commission to the European Parliament and the Council, Commission Opinion on Montenegro’s Application for Membership of the European Union, (COM(2010) 670) of November 2010, p. 18.

⁷⁰⁵ The Supreme Court and Judicial Council Chairwoman, Deputy Prime Minister and the Minister of Justice notified the public of the introduction of the Judicial Information System (JIS), which would “ensure better control, which is one of the prerequisites for a better and independent judiciary. The JIS assigns cases under codes, which will dispel doubts about the lack of impartiality. The JIS does not allow for any mistakes” (“You Won’t Be Able to Choose the Judge You Want Anymore”, *Vijesti*, p. 10, 8 June 2010).

⁷⁰⁶ Data obtained during the HRA survey of the Basic Courts in Podgorica, Nikšić, Danilovgrad, Kolašin, Bijelo Polje, Kotor and the Podgorica Commercial Court in February and March 2011.

Judicial Training

The Act on Judicial Training (*Sl. list CG*, 27/06) governs the training of judicial staff (judges and prosecutors) and future judges and prosecutors and other related issues. Under this law, the Judicial Training Centre, established as a separate unit within the Supreme Court, shall be charged with the provision of the training. Under the Act, the Centre shall provide initial training for prospective judges and prosecutors and advanced professional training for serving judges and prosecutors. Advanced professional training shall be mandatory in case of promotion, change of the legal matter or specialisation, introduction of new work procedures or technologies, and in other cases (Art. 39). The Act does not, however, envisage a disciplinary penalty for non-attendance. Furthermore, the JTC does not regularly organise mandatory training.⁷⁰⁷ The European Commission noted in November 2010 that there were no permanent mandatory courses and no set curricula and that training with set curricula for all members of the judiciary needed to be established.⁷⁰⁸

The seminars for the media, notably on the freedom of expression and the right to a fair trial, envisaged by the Government Action Plan for the implementation of the recommendations in the EC Opinion, were organised in the first half of 2011⁷⁰⁹ It would be useful if the law stipulated how many working days judges must attend continuous advanced professional training.

Fairness

Fairness entails a number of guarantees. The rights to an independent and impartial tribunal, of access to a court, to a trial within a reasonable time, to equality of arms, to public and oral hearings apply to all proceedings, whilst additional guarantees are afforded in criminal trials.

Right of Access to a Court

The right of access to a court is not explicitly listed in Article 14 of the ICCPR or Article 6 of the ECHR, but it is incorporated in the provisions

⁷⁰⁷ Under the Judicial Council Act, advanced professional training, which is graded on a scale of 1 to 5, is one of the criteria that have to be fulfilled by prospective judges and judges applying for promotion. Under the Judicial Council Rules of Procedure, advanced professional training entails: completed training organised by the Judicial Training Centre and international organisations, participation in seminars and other forms of training, acquisition of masters and doctoral degrees. The parameters for evaluating these forms of training have not, however, been laid down.

⁷⁰⁸ Analytical Report Accompanying the Communication from the Commission to the European Parliament and the Council, Commission Opinion on Montenegro's Application for Membership of the European Union, (COM(2010) 670) of November 2010, p. 19.

⁷⁰⁹ Fourth Monthly Report on the Realisation of Commitments from the Action Plan for Monitoring the Implementation of Recommendations Given in the European Commission's Opinion, 30 May 2011, available at http://www.gov.me/en/homepage/Monthly_Reports/

guaranteeing the right to a fair trial, which requires that the court, i.e. trials, be accessible to everyone⁷¹⁰, that the state is capable of enforcing the judgments rendered by the courts and ensuring a court system, which will instil confidence by providing reasoned judgments⁷¹¹ and uniform case law.⁷¹²

In its judgment in the case of *Garžičić v. Montenegro* on 21 September 2010, the ECtHR found the Supreme Court in violation of the right of access to a court because it erred when it set the value of the claims (on the basis of the value of the calculated court fees) and consequently refused to review an extraordinary legal remedy (more under Right to an Effective Legal Remedy p. 68.).

With respect to enforcement of judgments, the ECtHR found that the right to the enforcement of a final and enforceable court decision constitutes the essence of the right of access to a court (*Jeličić v. Bosnia and Herzegovina*, 2006), but also that delays in the enforcement of court judgments may give rise to violations of the right to peaceful enjoyment of property (*Bijelić v. Montenegro and Serbia*, 2009) and the right to respect of family life (*Mijušković v. Montenegro*, 2010).⁷¹³

Long delays in enforcement still plague Montenegrin courts. According to the data the Government of Montenegro communicated to the ECtHR in 2011, 20% of enforceable court judgments had not been executed for over a year, while the other judgments were still not enforced on time, with shorter delays.⁷¹⁴ The Government stated that a new law on the enforcement of court decisions, to be adopted by the end of 2011, was expected to ensure the efficient forcible enforcement of court decisions.

In a case which the applicants brought before the ECtHR, an effective and enforceable judgment against the Montenegrin Ministry of Internal Affairs has not been enforced for over two years⁷¹⁵ because the MIA has been ignoring the enforceable decision and has even been paying fines imposed

⁷¹⁰ “The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings”, *Golder v. The United Kingdom*, 1975, paragraph 35.

⁷¹¹ “Article 6(1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument”, *Ruiz Torija v. Spain*, 1994, paragraph 29.

⁷¹² The ECtHR found that Serbia deprived the applicants of a fair hearing because the same court (the Belgrade District Court) rendered diametrically opposed decisions in cases based on the same facts (*Rakic and Others v. Serbia*, 2010).

⁷¹³ More on this judgment on page 439.

⁷¹⁴ Action plan report on the execution of the ECtHR judgment in the *Mijušković v. Montenegro* case, 20/06/2011, Secretariat of the Committee of Ministers, Council of Europe, <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1867315&SecMode=1&DocId=1755396&Usage=2>

⁷¹⁵ Podgorica Basic Court judgment Ref. No. P. 803/07 of 18 January 2008 became final on 3 March 2009 and enforceable on 26 March 2009. The trial, which opened in 2003, concerns the resolution of the housing problem of a worker, which is why it had to be completed in urgent proceedings.

upon its responsible person. What gives particular rise to concern in this case is that the state prosecutors have refused to protect the right of access to a court and criminally prosecute the former and current ministers for the non-enforcement of court decisions, incriminated by Article 395(1) of the Criminal Code. The damaged party thus filed five criminal reports against the state attorneys for abuse of post (Art. 416 of the CC), all of which were dismissed. The last one was filed also against Deputy Supreme State Prosecutor. Although the Montenegrin Prime Minister had been alerted about the case, it remained unresolved by mid-June 2011.

Right to free legal aid

The Constitution guarantees that everyone shall be equal before the law and entitled to equal protection of their rights and freedoms. The Constitution proclaims the right to free legal aid in accordance with the law (Art. 21). Procedural laws comprise the institute of indigence as a mechanism enabling impecunious persons access to court, which entails exemption from the payment of court fees and of deposits to cover the costs of presentation of evidence and free legal representation. The CPA states that the court president shall approve free legal aid at a party's request in the form of covering fees of a qualified counsel "when s/he finds it necessary to protect the justified interests of the party or when the party is unable to bear the costs of a qualified counsel due to his/her general financial situation" (Art. 168), which allows for the application of relevant standards established by the ECtHR in its case law (*Airey v. Ireland*, 1979). HRA's 2009 survey shows that parties have rarely exercised this right. On the other hand, the Criminal Procedure Code specifies in which cases a defendant must be appointed a legal counsel at the expense of the state (Art. 69) and, like in civil proceedings, stipulates that the court president may decide to assign a defence attorney to the defendant at the expense of the state in the interests of the fairness of the proceedings and due to the defendant's financial difficulties (Art. 70). In this case too, the defence attorney is appointed "at the request of the defendant", but the CPC does not specify whether anyone is charged with advising the defendant of this right.

The Free Legal Aid Act (*Sl. list* CG 20/11), adopted in April 2011 and coming into effect on 1 January 2012, did not rescind the above possibilities of legal representation at the expense of the state. Rather, it adds new ones. Under Article 1 of the Act, free legal aid shall be provided to ensure the right to a fair trial to a natural person unable to afford the right to court protection without undermining his/her own or his/her family's bare livelihood.

Free legal aid implies provision of the necessary funds to fully or partly cover the costs of legal counselling, drafting of legal documents, representation in proceedings before the court, the state prosecution office and the Constitutional Court, in extrajudicial settlement proceedings, and exemption from the payment of the trial expenses. Free legal aid thus does not cover

legal representation in administrative proceedings. For instance, an indigent person is not entitled to free legal aid in proceedings in which his/her rights to welfare, rights regarding pension and disability insurance or work-related rights are reviewed until the case reaches the administrative dispute stage, when it may already be too late for efficient protection.⁷¹⁶

The Act specifies when free legal aid shall not be provided.⁷¹⁷ The following persons are entitled to free legal aid: welfare beneficiaries, children without parental custody, persons with special needs, victims of domestic violence or human trafficking and indigent persons (Art.13). The Act does not recognise victims of torture, abuse (by state agents) or of discrimination as persons who should be provided with free legal aid given their extreme vulnerability. This is particularly unfair in view of Art. 50(1) of the Police Act (*Sl. list RCG/CG* 28/2005, 88/2009), under which a police officer charged with “using means of coercion” shall have free legal aid.

Assets which shall not be deemed an obstacle to the exercise of this right include, *inter alia*, the person’s home up to 70 square metres in area, and a passenger vehicle the value of which the competent Montenegrin tax authority evaluates as not exceeding two average wages in Montenegro (Art. 14). The manner in which this value, which amounted to 960 Euros according to June 2011 statistical data, is set practically means that no one who owns any passenger vehicle is entitled to free legal aid.

Free legal aid is approved by the president of the basic court, or a judge designated by him/her (competent authority), within whose jurisdiction the applicant is temporarily or permanently residing (Art. 27(1)).

Free legal aid may be provided by attorneys on the list of the Montenegrin Bar Association (Art. 30). This provision was criticised the most during the public debate on the Act, because it excludes human rights NGOs, trade unions, political parties, university legal clinics and other persons, who may have the necessary expertise and have already been providing free legal aid, from the providers of free legal aid at the expense of the state.⁷¹⁸

⁷¹⁶ As opposed to the Croatian Free Legal Aid Act ((NN 62/08), which clearly states that free legal aid shall also comprise “representation in administrative matters” and “legal assistance in drawing up legal documents submitted to administrative bodies and legal entities vested with public authority”, it remains unclear whether the Montenegrin Act implies the drawing up of legal documents in administrative proceedings under “drawing up of legal documents” (Art. 23), particularly given that the provision explicitly specifies that legal documents shall comprise only appeals, but not complaints, which are filed in administrative proceedings.

⁷¹⁷ Under Article 7, these shall entail: proceedings before commercial courts and procedures for registering the performance of economic activities; libel and insult compensation claim proceedings; reviews of appeals against cuts in child support in the event the person who was under the obligation to pay child support had not fulfilled his/her obligation, unless s/he was not to blame for the non-fulfilment of the obligation.

⁷¹⁸ The Croatian Free Legal Aid Act allows also authorised civic associations and university clinics to provide free legal aid, *op. cit.* (Art. 9).

Equality of Arms (Right to Adversarial Proceedings)

Every party to a proceeding must be provided with the possibility to present its case to the court under conditions which will not place it in a significantly more unfavourable position vis-à-vis the other party. Fair balance must be established between the parties to the proceedings, by providing them with the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party (adversarial principle).⁷¹⁹ The perception of the fair administration of justice is particularly important in that context.⁷²⁰ This principle is further elaborated by the guarantees provided to criminal defendants to question also the witnesses testifying in their behalf (see below). Equality of arms is elaborated in detail in the procedural laws, as are the public character of hearings and adversarial proceedings (Art 4 of the CPC, Art 5 of the CPA, Arts. 24(2) and 28(2) of the Labour Dispute Act).

As concerns the rights of access to a court and a trial within a reasonable time, the issue of arbitrary application of the provision in Article 212 of the CPA arises as it allows the civil court to suspend proceedings until another (criminal) court renders its decision on a prior issue, i.e. the criminal court establishes whether a crime was committed.⁷²¹ This possibility to stay proceedings has been deleted from the Serbian CPA but still exists in the Montenegrin CPA.⁷²²

Right to a Trial within a Reasonable Time and Judicial Efficiency

Article 6(1) of the ECHR obliges all states parties to organise their legal systems in such a way so as to satisfy the requirement of a trial within a reasonable time, pursuant to the criteria in the ECtHR's case law. Article 32 of the Constitution guarantees everyone the right to a fair and public trial within a reasonable time. Apart from the general provision in Article 16(2), the

⁷¹⁹ *Ruiz-Mateos v. Spain*, 1993, paragraph 63.

⁷²⁰ *Borgers v. Belgium*, 1991, paragraph 24. More in: "Right to a Fair Trial: A guide to the implementation of Article 6 of the European Convention on Human Rights", Nuala Mole and Catharina Harby, CoE, <http://www.humanrights.coe.int/aware/GB/publi/materials/1093.pdf>.

⁷²¹ See, e.g. the ECtHR judgment in the case of *Smoje v. Croatia*, 2007, paragraph 45, in which it established a violation of the applicant's right to a fair trial due to a substantial delay, which resulted from the decision to stay the proceedings pending the outcome of concurrent civil and administrative cases.

⁷²² The provision in paragraph 2 of Article 215 was deleted from Serbia's CPA but still exists in Article 212(2) of the Montenegrin CPA: "The court may suspend the proceedings in the event the decision in the lawsuit depends on whether an economic offence or a criminal offence prosecuted *ex officio* is at issue, who perpetrated it and whether s/he is accountable." However, the civil court in Serbia, too, can also suspend proceedings until a decision is rendered on the issue, but it is still bound by the criminal conviction. It remains to be seen to what extent this amendment will result in fewer suspensions of proceedings and more efficient trials.

CPC elaborates this obligation in numerous provisions, including two new ones: deferred prosecution (Art. 244, CPC) and dismissal of a criminal report for the purpose of fairness (Art. 245, CPC) under the so-called bagatelle clause. Article 7 of the CPA lays down that everyone shall have the right to an impartial trial within a reasonable time. The new procedural provisions in the CPA⁷²³ eliminate the practice of endless toing and froing of cases between the first-instance and appellate courts; they lay down that the appellate court shall itself hear a case which has been appealed before it for the third time (Art. 375).

The Act on the Protection of the Right to a Trial within a Reasonable Time (*Sl. list* CG 11/2007) provides for two legal remedies: 1) requests for review, which are in the first instance reviewed by the court president and, in the second instance, by the president of the immediately superior court, and 2) just satisfaction claims, which are reviewed by the Supreme Court. The Act poses a strict procedural requirement: a just satisfaction claim may not be filed until after a final decision on the request for review is rendered.⁷²⁴

The HRA survey on the three-year implementation of this Act shows that the legal remedies envisaged by this law are not used extensively and have not proven effective in practice. This particularly applies to just satisfaction claims: only three of 33 such claims were upheld, while the rest were dismissed for procedural reasons because the Supreme Court interpreted the Act as preventing the review of a claim before a final decision is rendered in the proceedings it regards, which is in contravention of ECtHR case law and the linguistic interpretation of the Act.⁷²⁵ Of the 67 requests for review filed in 2010, 6 were dismissed, 23 were rejected, 9 were upheld, and the notification in Article 17 of the Act was issued with respect to 29 requests for review.⁷²⁶ The Court partly upheld two of the 14 just satisfaction claims over violations of the right to a trial within a reasonable time filed in 2010.⁷²⁷ The requests for review and appeals are rejected without a proper and full reasoning. The application of “notifications” in Article 17 and the “requests for review” in Article 18 of the Act is ineffective.

Courts frequently fail to abide by the legal deadlines, particularly with respect to the writing and communication of the judgments. Furthermore, they often exceed the deadlines in which they are to schedule hearings in proceedings, which should be urgent, such as labour disputes and discrimination trials.

⁷²³ Published in *Službeni list* RCG 22/2004, in force since 1 July 2004.

⁷²⁴ The Act provides for an exception “in the event the party was objectively unable to file a request for review” (Art. 33(2), see also Art. 37).

⁷²⁵ More in the Analysis of the Effectiveness of the Law on the Protection of the Right to Trial within a Reasonable Time, HRA, March 2011, [www.hraction.org](http://www.hrraction.org).

⁷²⁶ None of the 20 requests for review filed in 2008 were upheld, while only 2 of the 54 requests for review filed in 2009 were upheld.

⁷²⁷ All 7 claims filed in 2008 were dismissed; of the 12 claims filed in 2009, only one was partly upheld and the other 11 were dismissed.

In its judgment in the case of *Mijušković v. Montenegro* of 21 September 2010, the ECtHR found that the ultimate enforcement of the judgment in question was primarily, if not exclusively, the consequence of the present case having been communicated to the Government rather than the result of any domestic remedy. In the case of *Živaljević v. Montenegro* of March 2011, the ECtHR concluded that the Government failed to prove the effectiveness of the Law on the Protection of the Right to a Trial within a Reasonable Time and that it would be unreasonable to require the applicants to try this avenue of redress in proceedings, which had already been ongoing for over 11 years at the time the Law was adopted.

The 2010 Court Performance Report highlights that the courts are prompt because they completed 1.7% more cases than they received. A total of 12,463 cases were pending from 2009 and before that; 60% of them were filed in 2009 and the rest before that year.⁷²⁸ Of these cases, 7,341 regarded enforcements. The European Commission in November 2010 voiced doubts about the methodology used in drawing up these statistical reports,⁷²⁹ while the 2010 Court Performance Report underlined the methodology was based on the European Commission for the Efficiency of Justice (CEPEJ).

The Report, however, does not specify whether the assessment of the duration of the proceedings i.e. the calculation of the number of cases pending from 2010, 2009 or earlier, actually took into account the date when the case file was opened (when a lawsuit or criminal indictment was filed) or the year listed in the reference number assigned to the case after the appellate court overturned the first-instance judgment. Namely, once a verdict is overturned, the courts practice assigning the case a new reference number, whereby there are no accurate records of the actual number of cases or the duration of the proceedings. This issue should be addressed in the following court performance report.

Furthermore, the Report does not specify in how many criminal cases the statute of limitations expired in 2010. The authorities need to keep precise records of these data and notify the public about them as well, because they demonstrate the degree of the judicial system's capacity to ensure the rule of law. Expiry of the statute of limitations on criminal prosecution may also indicate corruption among prosecutors and judges, because it has the effect of "condonation" of the trial and/or penalty for the committed crimes. The authorities also need to provide data on reasons for the expiry of the statute of limitations in each individual case and on whether a judge, prosecutor, court president is accountable for it.

Two such cases were reported by the media: one regarded a private libel suit Movement for Changes leader Nebojša Medojević filed against business-

⁷²⁸ An overview of pending cases by year is given on page 18 of the 2010 Annual Court Performance Report. Of them, 87 have been pending since 2004 or earlier.

⁷²⁹ Analytical Report Accompanying the Communication from the Commission to the European and the Council, Commission Opinion on Montenegro's Application for Membership of the European Union, op. cit, p. 19.

man Dragan Brković with the Podgorica Basic Court.⁷³⁰ HRA was unable to receive any information from the Judicial Council on whether any proceedings with respect to this case have been opened. In late 2009, the statute of limitations expired on the criminal prosecution of five Podgorica Police Intervention Unit officers, Darko Delić, Darko Knežević, Dragan Krsmanović, Velimir Rajković and Slavko Minić, charged with abuse. Judging by everything, the competent state prosecutor, not the court, is to blame for the expiry. The Prosecutorial Council, however, did not pronounce any disciplinary sanctions against or dismissed a state prosecutor or his/her deputy for negligence in 2009 or 2010.

Public Character of Hearings and Judgments

Under Article 6(1) of the ECHR, everyone is entitled to a fair and *public hearing and judgment shall be pronounced publicly*. The press and public may, however, be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. Under Article 14(1) of the ICCPR any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

The Constitution in principle guarantees the right to a public trial and public rendering of judgments and allows for exceptions in accordance with international standards (Arts. 32 and 120). The procedural laws are also based on the principle of the public character of hearings and the exceptions they allow for are in accordance with the Constitution, the ECHR and the ICCPR (Arts. 299 and 300 of the CPC, Art. 308 of the CPA). Article 6 of the ECHR lays down the obligation to render judgments publicly (by depositing them in the court secretariat), without the exceptions allowed with respect to the exclusion of the public from trials.

The CPA does not explicitly lay down that the judgment shall be publicly pronounced, by the reading of the disposition. Under Article 341, the court shall upon the completion of the main hearing notify the parties of the date when the judgment will be rendered and the availability of the written copy of the judgment at the court office, including its availability to all other persons with justified interest in reviewing the judgment and case file (Art. 148(2)). Under Art. 365 of the CPC, the court is under the obligation to render the judgment immediately, within three days upon the completion of the main hearing at the latest; the disposition shall be read out in the pres-

⁷³⁰ “Expiry of the Statute of Limitations in the Basic Court”, *Dan*, 14 April 2010.

ence of the parties and the public in general, even in case the public had been excluded from the hearings. Judgments regarding minors may be published only with the consent of the court, without specifying the name of the minor or other data that may reveal his/her identity.

In its replies to the EC Questionnaire, the Government representatives stated that all judgments rendered the previous year (2009) by the Supreme Court, Administrative Court, Appellate Court, two Superior Courts and the Podgorica Basic Court were published online.⁷³¹ This does not fully reflect the situation in practice. Not one Basic Court, including the Podgorica Basic Court, has a website. The Supreme, Administrative, Appellate and both Superior Courts do have websites and publish their judgments, albeit not all of them. For example, the Appellate Court rendered 2000 judgments in 2009 but published only 33 of them. This Court published 56 decisions in 2010 but none rendered in 2011 by the end of the reporting period. The Podgorica Superior Court published nine judgments in 2009, 63 judgments in 2010 and nine judgments in 2011 by early June 2011. As opposed to all the other courts, the Administrative Court was the first to publish its decisions on the Internet and has been doing so as of 2005, when it was established; the decisions are categorised by matter. The Administrative Court has been publishing its judgments on a daily basis since January 2008, at the same time they are communicated to the parties to the proceedings.

The criterion applied in selecting the judgments to be published remains unclear given that not all judgments attracting major public attention have been published.⁷³² In addition, the court websites do not allow for search by key words, but only by the reference numbers of the cases, which significantly hinders access to the case law one is looking for.

Despite the fact that the Podgorica and Bijelo Polje Superior Courts publish on their websites first-instance criminal verdicts, which have not become final yet, as well, the basic courts without websites apply different practices with respect to the communication of judgments under the Free Access to Information Act. Some invoke the protection of the privacy of the defendants and refuse to communicate the judgments, although the Free Access to Information Act lays down the obligation to allow access to part of the information (e.g. judgment with the initials) if it assesses that access to the rest of it has to be denied to protect an overriding interest.⁷³³

⁷³¹ “We Knew Some Things When Judges Used to Be Elected in Parliament”, *Vijesti*, 22 January 2010.

⁷³² For instance, the Bijelo Polje Superior Court publishes even first-instance criminal verdicts, but failed to publish the verdict in the Bukovica war crimes case. The Podgorica Superior Court did publish the first-instance judgment in the Deportation of Refugees war crimes case but not in the Morinj war crimes case, et al.

⁷³³ E.g. The decision of the Herceg Novi Basic Court rejecting the request to access a first-instance criminal judgment by which Vuk Selić, charged with assaulting with a metal bar a witness for the prosecution witness in a war crimes trial, Slobodan Pejović, was sen-

The public character of hearings is still not ensured in practice due to the fact that the trials, particularly civil trials, are conducted in the judges' chambers, most of which lack enough room to allow all the interested members of the public to attend some of them.

Guarantees to Defendants in Criminal Cases

Montenegrin law provides for two kinds of punishable offences; criminal offences and misdemeanours.

The Montenegrin Assembly on 22 December 2010 adopted a new Misdemeanours Act (*Sl. list CG* 1/11) within its reform of the petty offence system, which will come into force on 1 September 2011. The Act, however, does not transfer jurisdiction for adjudicating misdemeanours to regular courts.⁷³⁴ The incumbent misdemeanour authorities, which will be adjudicating misdemeanours for the time being, do not satisfy the standard of an impartial tribunal which is required under the ECHR in adjudicating "criminal charges", under which misdemeanours fall as well.⁷³⁵ The right to an independent and impartial tribunal will continue to be systematically violated by the delay of a real reform in this field, given the severity of the misdemeanour sanctions and protective orders (e.g. up to 60 days' imprisonment, mandatory psychiatric treatment in a health institution, seizure of assets, prohibition of engagement in an activity, et al).

In its Draft Amendments to the Constitution, the Government proposed the amendment of Article 33 of the Constitution to allow for prescribing misdemeanours by by-laws, e.g. ministry or local self-government decisions, not only by laws, as the principle *nullum crimen sine lege* in this Article now envisages: "No one may be punished for an act, which, prior to its commission, had not been prescribed by law as punishable..."⁷³⁶

tenced to a conditional sentence. The Court invoked the protection of Selić's privacy, although numerous media had reported that he was on trial and that the judgment against him had been rendered (HRA Archives).

⁷³⁴ Article 242 of the Act states that the incumbent misdemeanour authorities will implement the new law until a separate law regulating the organisation and jurisdiction of courts conducting misdemeanour proceedings is enacted.

⁷³⁵ The Presidents and judges of the misdemeanour authorities and Misdemeanour Chamber are appointed from among applicants for the publicly advertised vacancies to five-year terms of office by the Government after hearing the opinion of the Justice Minister. Such a status of misdemeanour authorities does not satisfy the guarantees which a body ruling on a "criminal charge" has to satisfy under the ECHR (More in: "Right to a Fair Trial: A guide to the implementation of Article 6 of the European Convention on Human Rights", Nuala Mole and Catharina Harby, CoE, *op. cit.*, pp. 32 and 58). Due to the non-conformity with international standards, Serbia and Montenegro made a reservation to Article 6 with respect to their Misdemeanours Acts during the ratification of the ECHR. This reservation is still in effect with respect to Montenegro (see the Justice Ministry's "Analysis of the Work of Misdemeanour Authorities", 2009).

⁷³⁶ Apart from Article 33 of the Constitution, the same principle is enshrined also in Article 3 of the new Misdemeanours Act.

This amendment may prove disputable with respect to the principle of *nullum crimen sine lege* enshrined both in the ECHR (Art. 7) and the ICCPR (Art. 15). Namely, the ECtHR states that Article 7 is not confined to prohibiting the retrospective application of the criminal law and requires that punishable acts are also well and clearly prescribed by law.⁷³⁷ It should also be borne in mind that guaranteed human rights may be restricted only by law (Art. 24 of the Constitution) and that any offence warranting the restriction of liberty has to be prescribed by law.

This issue, too, corroborates the need for the urgent transfer of jurisdiction over misdemeanours to courts.

On the other hand, the new Misdemeanours Act comprises detailed guarantees of the right to a fair trial and envisages the relevant application of the CPC (Arts. 98(3) and 99).

PRESUMPTION OF INNOCENCE

The ECtHR emphasises the key role of the presumption of innocence in the exercise of the right to a fair trial and has established the following standards for the practical protection of the presumption of innocence: “when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused”.⁷³⁸ In the case of *Matijašević v. Serbia*, the ECtHR in 2006 found Serbia in violation of the right to presumption of innocence because the panel deciding on the remand of the defendant specified in its decision that he had “committed the criminal offences which are the subject of this prosecution” and the Supreme Court did not rectify the mistake in the appellate proceedings.

Under Article 35(1) of the Constitution, everyone shall be deemed innocent until his/her guilt is established by a final court decision. The CPC (*Sl. list CG*, 57/2009 and 49/2010, Article 3), lays down the same constitutional principle as well as the duty of the state authorities, media, civic associations, public figures and other persons to abide by the presumption of innocence but does not prescribe any penalty for the violation of this provision.

The Appellate Court has, however, been violating the presumption of innocence in practice in the same way as the Serbian court did in the *Matijašević* case.⁷³⁹ The airing of police arrests of Bijelo Polje Superior Court judge Arif Spahić and the accused in the Zavala case constitutes a specific form of violation of the CPC requirement that the state authorities and media abide by the

⁷³⁷ See, for instance, *Korbely v. Hungary*, 2008, paragraphs 69–71.

⁷³⁸ *Barberà, Messegue and Jabardo v. Spain*, 1988, paragraph 77.

⁷³⁹ On page two of the reasoning of its decision on remand in custody Ref No Kž.728/2010 of 16 October 2010, the Appellate Court stated that: “in view of the gravity of the committed crimes, particularly the manner in which they were committed and their consequences, given that the accused had over a long period of time abused their offices and committed the crimes of corruption, obtaining gains for a number of people...”

presumption of innocence. The state would do well to demonstrate its abidance by the rule of law, in which the presumption of innocence is one of the main pillars, besides demonstrating its resolve to combat corruption.

PROMPT NOTIFICATION OF CHARGES

Under Article 6 (3(a)) of the ECHR and Article 14(3(a)) of the ICCPR, everyone charged with a crime shall be entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him. A defendant who does not speak the language of the court must be provided with a written translation of the indictment in the language s/he understands. The notification must be detailed unless the offence is specified and the notification sufficiently lists the offences of which the person is accused, the place and the date thereof, refers to the relevant Articles of the Criminal Code and mentions the name of the victim.⁷⁴⁰

Article 37 of the Constitution eliminated the shortcoming in the previous Constitution given that it lays down that everyone shall be entitled to be notified of the charges against him/her in a language s/he understands, have sufficient time to prepare his/her defence and defend himself/herself personally or through a defence counsel of his/her own choosing. The CPC lays down that an accused must be notified already at the first hearing of the crimes s/he is charged with and grounds for suspicion, given the opportunity to declare himself/herself on all facts and evidence incriminating him/her and present all the facts and evidence in his/her favour, that the authority questioning the accused is duty-bound to notify him/her of the charge against him/her and the grounds for suspicion and that the accused shall be notified in detail about the crime s/he is charged with in the indictment served on him/her (Art. 4).

SUFFICIENT TIME AND FACILITIES FOR PREPARATION OF DEFENCE AND RIGHT TO COMMUNICATE WITH LEGAL COUNSEL

Article 14(3(b and c)) of the ICCPR and Article 6(3(b and c)) of the ECHR lay down that everyone accused of a criminal offence shall be entitled to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing from the initial stages of police interrogation.⁷⁴¹ The administration of the detention facility is also obliged to ensure that the suspect may converse with his/her counsel out of the guards' earshot.⁷⁴²

Article 37 of the Constitution enshrines the right to defence. Article 13(3) of the CPC lays down that a defendant must be provided with enough time to prepare his/her defence. This does not apply to questioning of the

⁷⁴⁰ *Brozicek v. Italy*, 1989, paragraph 42.

⁷⁴¹ ECtHR judgment in the case of *Öcalan v. Turkey*, 2005.

⁷⁴² ECtHR judgment in the case of *Öcalan v. Turkey*, 2005.

defendant in the preliminary proceedings, where there is no interval between the notification of the grounds of the charges against him/her and his/her interrogation. Article 293(3) states that the defendant shall be provided with at least eight days from the day s/he was served with the court summons to the main hearing to prepare his/her defence; the court shall in each case set a deadline reflecting the complexity of the case. Under Articles 349 and 350 of the CPC, the court is under the obligation to provide the defendant and his/her defence counsel with enough time to prepare the defence also in the event the indictment is modified or extended, which is ordinarily done by adjourning the hearing at the request of the defence.

Under Article 261 of the new CPC, a suspect will be questioned during preliminary investigation. Paragraph 4 of the Article lays down that in cases of mandatory defence, if the suspect fails to retain a defence attorney himself/herself or the defence attorney fails to appear within four hours from being contacted by the suspect, the state prosecutor shall appoint the suspect a defence counsel at his own discretion, and shall interrogate the suspect without delay. This provision provides room for abuse. The mere establishment of contact between the suspect and the defence counsel cannot be deemed sufficient to begin reckoning the four-hour deadline. The suspect's contacts and communication with a defence counsel must entail the counsel's consent to represent the suspect i.e. his/her presence at the interrogation. If the counsel and suspect do not come to an agreement, it cannot be deemed that the contact, marking the beginning of the reckoning of the four-hour deadline, has been established. If the wording of paragraphs 3 and 4 of Article 261 is interpreted merely from the linguistic point of view, it transpires that these provisions allow the state prosecutor to appoint a counsel to the suspect *ex officio* in case the suspect establishes contact with a specific counsel and the latter decides not to take the case, whereby the suspect is not given the opportunity to himself/herself retain another defence counsel.

Furthermore, the provisions of the new CPC do not mention the presence of the state prosecutor during the police interrogation of the suspect at all. Article 261(5) entitles the police to exceptionally interrogate the suspect with his/her consent and upon the approval of the state prosecutor in the presence of his/her defence counsel; if the suspect fails to retain a counsel, the latter shall be appointed by the state prosecutor *ex officio*, and the police shall examine the suspect without delay. The wording of this provision leads to the conclusion that the state prosecutor does not attend the police interrogation of the suspect, because it would be illogical for the state prosecutor to delegate to the police the interrogation, which is primarily within his/her remit, and merely attend it. However, although s/he is not attending the police interrogation himself/herself, the state prosecutor is the one entitled to appoint the defence counsel *ex officio*, which is a particularly problematic solution. Furthermore, the provision provides for the suspect's consent to such interrogation in the absence of his/her counsel and the state prosecutor,

which may be particularly prejudicial to his/her rights and interests. Prescribing that the counsel must be present already at the time the suspect is giving consent to interrogation would significantly limit opportunities for police abuse and “preparation of” the questioning and the content of the statement by the suspect. Article 261(1) of the new CPC leads to the conclusion that the interrogation of the suspect by the state prosecutor is not necessary prior to the issuance of an investigation order, and that the suspect may be interrogated by the police only. Therefore, the state prosecutor may issue an investigation order without having heard the suspect. It also needs to be underlined that, under the provisions of the new CPC, the suspect is not entitled to appeal the investigation order, which is not subjected to either court or any other form of oversight. Compared with the provisions in the valid CPC, under which an investigating judge shall question the suspect before issuing a decision to conduct an investigation and which entitle the suspect and his/her defence counsel to appeal the decision to conduct an investigation (Art. 251), the provisions in the new CPC considerably curtail the rights of the suspect and leave his/her rights and interests solely to the discretion of the state prosecutor.

PROHIBITION OF TRIALS *IN ABSENTIA* AND THE RIGHT TO DEFENCE

Article 14(3(d)) of the ICCPR guarantees the right of the defendant to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Article 37 of the Constitution guarantees everyone the right to defence and to defend himself/herself personally or through a counsel of his/her own choosing. Article 312 (2 and 3) of the CPC lays down that on the prosecutor's motion, the judicial panel may render a decision to try the defendant *in absentia* only if s/he is at large or otherwise out of reach of the state authorities and extremely important cause for trying him/her *in absentia* exists.

The CPC regulates the right to defence and legal assistance in detail. Both the Constitution and the CPC differentiate between personal and professional defence of the defendant. The right to defence entitles the defendant to (1) actively undertake procedural actions (declare himself/herself on facts and evidence against him/her, present facts to his/her advantage, propose evidence in favour of his/her defence, engage a counsel, etc) and (2) not to undertake procedural actions if s/he thinks they are prejudicial to his/her defence. The defendant is thus not obliged to present his/her defence, which, like non-admission of guilt, has neither material nor procedural legal repercussions on the defendant.

The right to professional assistance of a defence counsel is, in principle, an optional right given that it is up to the defendant to decide whether s/

he will defend himself/herself at all, and, if s/he decides to defend himself/herself, whether s/he will do so personally or seek professional assistance. However, Article 69 of the CPC also lays down that a defendant shall have “mandatory defence” regardless of his/her will in the event s/he is charged with a grave crime or incapable of defending himself/herself due to a personal feature: (1) if the defendant is deaf or dumb or incapable of successfully defending himself/herself or if s/he is tried for a crime warranting maximum imprisonment, the defendant shall be appointed a counsel already during the first questioning, (2) the defendant must have a defence counsel at the time s/he is served the indictment in the event s/he is indicted for a crime warranting ten or more years of imprisonment, (3) a defendant remanded in custody must have a defence counsel whilst in custody, (4) a defendant tried *in absentia* must have a defence counsel as soon as a decision on his/her trial *in absentia* is rendered; (5) in case of a minor tried for a crime warranting over five years of imprisonment or for a lighter crime in the event the juvenile judge assesses that the minor needs a defence counsel. Article 70 of the CPC also allows for the appointment of a legal counsel at the expense of the state for an indigent defendant who cannot afford to hire a lawyer and at his/her own request, in the event the requirements for mandatory defence are fulfilled and the defendant is tried for a crime warranting over three years of imprisonment, if so required by the interests of justice and in some other events (see above, p. 238). This solution eliminates the inconsistency between the prior law and the ECHR. The defence counsel is appointed by the court president, and, in the case of juveniles, by the juvenile judge. The defendant may not reject the counsel appointed *ex officio*, but may retain another counsel in his/her stead.

RIGHT TO CALL AND QUESTION WITNESSES

Article 6 (3(d)) of the ECHR and Article 6 (3(e)) of the ICCPR lay down the minimal right of the defendant to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This right elaborates the principle of equality of arms in criminal proceedings.⁷⁴³ The defendant must be provided with the opportunity to be heard and have witnesses testifying on his/her behalf heard, and not exclusively or predominantly in unfair proportions the witnesses for the prosecution.

The Constitution does not lay down the right regarding the presence and questioning of the witnesses.

Article 4(2) of the CPC states that a defendant shall be provided with an opportunity to declare himself/herself on all the facts and evidence incriminating him/her and to present all facts and evidence in his/her favour. Articles 95–108 of the CPC govern the status of witnesses in criminal pro-

⁷⁴³ See *Kovač v. Croatia*, 2007, paragraph 23.

ceedings, while Articles 108–111 regulate the status of protected witnesses, which were first introduced by this law. As opposed to an ordinary witness, a protected witness may not invoke the provision allowing him not to testify or answer particular questions, but, in return, s/he cannot be prosecuted for organised crime. A verdict may not be based exclusively on the statement of a protected witness (Art. 111) which is in accordance with the standard the ECtHR established in its case law.⁷⁴⁴

RIGHT TO AN INTERPRETER

Article 6 (3(e)) of the ECHR and Article 14 (3(f)) of the ICCPR lay down the right to the free assistance of an interpreter to a defendant if he cannot understand or speak the language used in court. The state's obligation does not end with providing the defendant with an interpreter, but comprises also a specific degree of oversight of the quality of the provided translation/interpretation, to ensure the effective exercise of this right.⁷⁴⁵

Article 37 of the Constitution enshrines the right of the defendant to be notified of the charges against him/her in the language s/he understands, while Article 79(1(3)) guarantees the right of a person belonging to a national minority to use his/her own language and alphabet in private, public and official use – but not the right to free assistance of an interpreter in criminal proceedings.⁷⁴⁶

Article 8 of the CPC lays down that criminal proceedings shall be conducted in the language officially used in court and that the parties, witnesses and other persons participating in the proceedings are entitled to use their own languages. If the proceedings are conducted in the language those persons do not understand, provision shall be made for an interpretation of statements and the translation of documents and other written evidence. The violation of this right of a defendant constitutes a substantive violation of procedure (Art. 376(1(3))). Under Article 199(5), the costs of translation and interpretation shall not be charged to persons under the obligation to cover the costs of the criminal proceedings, whereby the inconsistency of the prior CPC with the ECHR has been eliminated.

Montenegro has a problem with providing interpretation in the Roma language, as the President of the Supreme Court stated in her explanation why a first-instance trial was ongoing for eight years now.⁷⁴⁷

⁷⁴⁴ *Doorson v. the Netherlands*, 20 February 1996, paragraph 76.

⁷⁴⁵ *Kamasinski, Ucak v. The United Kingdom*, 2000; *Cusani* – quoted from: *A Practitioner's Guide to the European Convention on Human Rights*, Karen Reed 2006, Sweet&Maxwell Limited.

⁷⁴⁶ The Venice Commission criticised this in its Opinion on the Constitution of Montenegro of December 2007, [http://www.venice.coe.int/docs/2007/CDL\(2007\)104-e.asp](http://www.venice.coe.int/docs/2007/CDL(2007)104-e.asp).

⁷⁴⁷ She was referring to the trial of defendants charged “with gravely endangering general security” in the case of *Mis Pat*, when 37 adults and children died after a ship smuggling them from Montenegro to Italy sank in 1999.

PROHIBITION OF SELF-INCRIMINATION

A defendant in criminal proceedings may not be compelled to testify against himself or to confess guilt (Art. 14(3(g)), ICCPR). A suspect or defendant need not present his defence or reply to the questions asked. The court is duty-bound to instruct the defendant of this and other rights.⁷⁴⁸

Article 31 of the Constitution prohibits the extortion of statements and confessions, all violence against and inhuman or degrading treatment of a person deprived of liberty. There is, however, no explicit prohibition of self-incrimination. The closest to it is the provision in Article 35(2) under which the defendant “is not under the obligation to prove his/her innocence”, which entails the right to remain silent.

The CPC lays down that a court decision may not be based on a confession or another statement obtained by extortion, torture, humiliating and degrading treatment and states that applying any medical intervention on a suspect, defendant or witness or giving them such medication that may influence their consciousness and will when giving their statement shall be prohibited. This is an important aspect of the prohibition of torture, inhuman and degrading treatment, which is a fundamental human right allowing for no derogations or restrictions.⁷⁴⁹ Article 99 of the CPC lays down that a witness is not under the obligation to reply to specific questions if it is likely that s/he would thus incriminate himself/herself or persons close to him/her or expose himself/herself or them to serious embarrassment or criminal prosecution, and that the court is duty-bound to instruct him/her thereof.

RIGHT OF APPEAL

Article 20 of the Constitution guarantees everyone the right to a legal remedy (appeal or other legal redress) against a decision on his/her right or legally vested interest taken in criminal and other proceedings.

The CPC (always) allows for appeals of first-instance verdicts, which shall stay the enforcement of the verdict. The CPC defines the persons authorised to file the appeals, lays down exemptions from the principle of two-instance proceedings i.e. the rule that a second-instance decision may not be appealed, etc. CPC standards on the right of appeal are in accordance with international standards.

RIGHT TO REDRESS

The Constitution lays down that a person wrongfully or unlawfully deprived of liberty or convicted is entitled to compensation of damages by the

⁷⁴⁸ ECtHR *Saunders v the United Kingdom*, 1996, paragraphs. 68–69.

⁷⁴⁹ An application has been filed with the ECtHR by the defendants and convicts in the anti-terrorist action *Eagles' Flight*, who are claiming that the state did not investigate their claims of abuse and that the verdict against them was based on statements obtained by extortion which the court had not excluded from the case file (the application is available in the HRA archives).

state (Art. 38). Chapter XXXIII of the CPC governs just compensation, rehabilitation and other rights with respect to wrongful convictions and deprivation of liberty in accordance with Article 3 of Protocol No. 7 to the ECHR. This right is in practice mostly realised in procedures before the Ministry of Justice and, exceptionally, in civil proceedings.

NE BIS IN IDEM

Article 36 of the Constitution lays down that no one may be tried or convicted again for the same *punishable* offence.

Under the CPC, no one may be retried for a crime for which s/he has been convicted or acquitted by a final decision except in case of a retrial in accordance with the law (Art. 6). The CPC also states that the court shall render a decision rejecting the charges “if the defendant had already been convicted or acquitted for the same offence by a final decision or if the charge against him/her had been rejected by a final decision or if the proceedings against him/her had been discontinued by a final decision” (Art. 372(2)).

The Misdemeanours Act (*Sl. list* CG 1/2011) prohibits the retrial of a person for the same misdemeanour or an offence with the elements of a crime the person has already been convicted for in criminal proceedings (Art. 100).

Neither law is aligned with the international guarantee and constitutional provision prohibiting a retrial for the same *punishable offence*, which entails both misdemeanours and criminal offences. The Misdemeanours Act allows the retrial of a person for a misdemeanour with the elements of a crime in the event a final decision acquitting him/her of the crime, rejecting the criminal charges or discontinuing the criminal proceedings against him/her has been rendered. The CPC, on the other hand, does not rule out the possibility of trying someone for a criminal offence although s/he had already been tried for the same offence or for a misdemeanour on the same grounds.⁷⁵⁰ This interpretation was publicly voiced by the Supreme State Prosecutor with respect to the decision to launch misdemeanour proceedings against the Serbian Orthodox Church Metropolitan Amfilohije.⁷⁵¹

However, in the case of *Maresti v. Croatia*, the ECtHR in 2009 found Croatia in violation of Article 4 of Protocol No. 7 to the ECHR for first convicting a person for a misdemeanour, for disrupting public peace and order, and sentencing him to 40 days’ imprisonment, and subsequently for the crime of grave physical injury for the same act. The ECtHR found that the classifi-

⁷⁵⁰ Under Article 6(1) of the CPC (*Sl. list* CG, 57/2009 and 49/2010): *No one shall be tried again for a criminal offence s/he has already been convicted for or acquitted of by a final judgment...*

⁷⁵¹ “The (misdemeanour) proceedings will show whether his actions were of the intensity which would qualify as elements of a criminal offence and necessitate in launching criminal proceedings,” (“Ranka Weighing Intensity of Curse”, *Dan*, 21 January 2011; “The Prosecution Office Files a Motion with the Misdemeanours Court to Initiate Misdemeanour Proceedings against Amfilohije”, *TV Vijesti*, 20 January 2011).

cation of a punishable act as a misdemeanour in national law was irrelevant in assessing whether the act was criminal in nature, i.e. whether it constitutes a criminal offence pursuant to Protocol 7 to the ECHR i.e. Articles 6 and 7 of the ECHR. The Court's established case-law sets out three criteria⁷⁵² to be considered in determining whether or not there was a "criminal charge": the legal classification of the offence under national law (which is not a decisive criterion), the very nature of the offence and the degree of severity of the penalty that the person concerned risks incurring. In the *Maresti* case, the ECtHR highlighted that the criminal nature of an offence did not necessarily entail a specific degree of seriousness of the offence, and that it considered that the primary aims in establishing the offence in question were punishment and deterrence, which are recognised as characteristic features of criminal penalties. Furthermore, the ECtHR stated that where the penalty liable to be imposed and actually imposed on an applicant involves the loss of liberty, there is a presumption that the charges against the applicant are "criminal".

⁷⁵² Commonly known as the "Engel criteria" and set in the ECtHR judgment in the case of *Engel and Others v. the Netherlands*, 1976.

Right to Protection of Privacy, Family, Home and Correspondence

Article 8, ECHR:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 17, ICCPR:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

General

Article 17 of the ICCPR and Article 8 of the ECHR essentially guarantee the right to privacy and specify its particular aspects, such as family life, autonomy of the home and correspondence. The ICCPR in this context also explicitly guarantees the right to protection of honour and reputation; the ECHR, on the other hand, allows for restrictions of the freedom of expression to protect the reputation of others, if necessary in a democratic society.⁷⁵³ In the stricter sense, the right to privacy serves to protect from undesired publicity, while, in the broader sense, it entails personal autonomy of an individual, or his general freedom to choose his own lifestyle without interference by the state or other persons. The European Court of Human Rights accepts the wider interpretation of the concept of privacy and considers that the content of this right cannot be predetermined in an exhaustive manner.⁷⁵⁴ Ac-

⁷⁵³ The ECtHR has, however, recently interpreted the right to privacy in Article 8 of the Convention as comprising the right to protection of the reputation of another (see its judgments in the cases of *Pfeifer v. Austria*, 2007; *Lindon and Others v. France*, 2007).

⁷⁵⁴ *Costello-Roberts v The United Kingdom*, 1993.

cording to ECtHR's extensive case law, privacy entails both the physical and moral integrity⁷⁵⁵, personal identity⁷⁵⁶, including sexual orientation⁷⁵⁷, ethnic origin⁷⁵⁸, right to protection of image⁷⁵⁹, family life⁷⁶⁰, and relationships with other people, including both business and professional relationships.⁷⁶¹

The Constitution guarantees the inviolability of privacy (Art. 28(2)) and the right to respect for private and family life (Art. 40). Privacy is also protected through the protection of personal data (Art. 43) and freedom of expression on religious and other beliefs (Art. 46(2)), freedom of expression of national, ethnic, cultural and religious characteristics (Art. 79, item 1) and, unusually, through the special protection of consumers privacy (Art. 70). In order to protect privacy it is allowed to limit the right to access to information (Art. 51(2)) and the right to public trial (Art. 120), but these restriction must be interpreted in accordance with the necessities in a democratic society and the principle of proportionality (Art. 24(1)). Permitted restrictions of the right to privacy are provided for through the right to search one's apartment (Art. 41) and the right to surveillance by a court decision (Art. 42(2)). However, the fact that the permitted restrictions are not formulated in the manner provided for in Art. 8(2) ECHR, may call into question the legality of the restrictions necessary in the interests of, for example, national or public security, health, or the rights and freedoms of others.

The Constitution specifically protects the inviolability of home (Art. 41), confidentiality of correspondence (Art. 42), family (Art. 72), and provides special protection to mothers and children (Art. 74).

The Right to Access to Personal Data and Their Protection

General Regulations

The collection, storage and use of personal data and the possibility of an individual to access data are protected by Article 8 of the ECHR.⁷⁶² The

⁷⁵⁵ *Pretty v. the United Kingdom*, 2002.

⁷⁵⁶ *Mikulić v Croatia*, 2002, where the Court found that the courts had violated the child's right to privacy i.e. certainty as to his personal identity.

⁷⁵⁷ *Dudgeon v. The United Kingdom*, 1981.

⁷⁵⁸ Article 6 of the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data provides for special protection of personal data revealing racial origin (which includes ethnic origin), political opinions or religious or other beliefs, as well as personal data concerning health or sexual life.

⁷⁵⁹ *Sciacca v. Italy*, 2005.

⁷⁶⁰ *Mijušković v Montenegro*, 2011, *V.A.M. v Serbia*, 2007, *Tomić v Serbia*, 2007, *Karadžić v Croatia*, 2005.

⁷⁶¹ *Niemietz v Germany*, 1992.

⁷⁶² *Leander v. Sweden*, 1987; *Hewitt and Harman v The United Kingdom*, ECmHR, 1992; *Gaskin v The United Kingdom*, 1989.

CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which Montenegro has ratified as well,⁷⁶³ is the first binding international document on personal data protection. The Convention obliges the signatories to take the necessary measures to secure the legal protection of fundamental human rights with regard to the automatic processing of personal data. The Assembly of Montenegro adopted the Act Ratifying the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows.⁷⁶⁴ The Additional Protocol complements the Convention by providing for the establishment of supervisory authorities in the contracting states and regulates in detail the transborder flow of data to recipients not within the jurisdiction of the parties to the Convention.

The Montenegrin Constitution guarantees the protection of personal data (Art. 43(1)) and prohibits the use of personal data “for purposes other than those for which they were collected” (Art. 43(2)). It explicitly guarantees everyone the right to be informed about the personal data collected about him or her and the right to court protection in case they are abused (Art. 43(3)). As opposed to Art. 8(2) of the ECHR, the Constitution does not, however, list the purposes when this right may be restricted.

The Constitution guarantees the right of access to information held by state authorities and organisations with public functions (Art. 51). Under the Constitution, the right may be restricted, *inter alia*, in the interest of protecting “morals and privacy”.

Legal Protection

The protection of personal data is provided by several laws: the Personal Data Protection Act, Free Access to Information Act, Criminal Code, Police Act, Labour Act, Tax Administration Act and State Administration Act.

The Personal Data Protection Act. – The Personal Data Protection Act (*Sl. list CG*, 79/2008 and 70/2009), which has been in force since 1 July 2009, defines in greater detail the conditions under which personal data may be collected and processed. Under the Act, the purpose of data collection must be clearly predefined. Article 9 defines the terms used in the Act.⁷⁶⁵ The legislator, however, failed to include personal data of individuals receiving family allowances (welfare) or of victims of violence or human trafficking under the “special categories of personal data” (Art. 9(1)). The law thus denies the right to special labelling and protection of the personal data of vulnerable cate-

⁷⁶³ *Sl. list SRJ – Međunarodni ugovori*, 1/92, *Sl. list SRJ – Međunarodni ugovori*, 11/05.

⁷⁶⁴ *Sl. list CG – Međunarodni ugovori*, 6/2009.

⁷⁶⁵ The Act defines the following concepts: personal data, personal data processing, personal data collection, personal data user, personal data processor, consent, special categories of personal data, biometrical data and data subject.

gories forced to receive welfare due to their indigence or who were victims of violence or human trafficking, which Art. 13(2) affords special categories with the aim of preventing unauthorised access to their personal data.⁷⁶⁶ The Act distinguishes between processing personal data with the consent of the data subject (Art. 10(1)) and without his/her consent, and lists the conditions under which such processing is allowed (Art. 10(2)).⁷⁶⁷ The Act, however, does not provide for a revocation of consent in writing or by a statement for the record, whereby it does not provide for a greater degree of legal certainty allowing everyone to freely dispose of his/her personal data. The Act lists the conditions that must be fulfilled when processing a special category of personal data (Art. 13(1)). The first is the consent of the data subject. It would have been better had the Act prescribed that the data subject give his/her consent in writing given the great susceptibility to abuse of such data. The Act also stipulates that the processing of personal data collected from publicly available sources may not be used for direct commercial purposes without the data subject's consent (Art. 15(1)) but does not specify what "direct commercial purposes" entail; this may result in different interpretations of the Act and its non-uniform application.

The Act also allows the personal data collection controller to provide a data user on request the personal data he needs to fulfil his legal obligations and exercise his powers (Art. 17(1)) but provides room for abuse by not prohibiting the communication of the user's personal data to third persons. Article 43 governs the right of citizens to be informed which, if any, of their personal data are processed, the right of insight in the data, etc.⁷⁶⁸ The rights of the data subject may be restricted under this law only to ensure unobstructed conduct of preliminary criminal proceedings and trials (Art. 8).⁷⁶⁹

⁷⁶⁶ See the amendments to the Personal Data Protection Bill proposed by the HRA on 12 December 2008, [http://www.hraction.org/wp-content/uploads/amandmani-zzpl.pdf](http://www.hrraction.org/wp-content/uploads/amandmani-zzpl.pdf).

⁷⁶⁷ An authority may process personal data without the data subject's consent if such processing is necessary for the fulfilment of its legal obligations and exercise of powers of the controller of the personal data collection; for the protection of the life or health of a person unable to give his/her consent in person; for the performance of actions preceding conclusion of contracts and actions during the fulfilment of contractual obligations in accordance with the law; for the performance of duties of public interest or during the exercise of public powers within the remit of the personal data controller or user; for the realisation of the legally vested interests of the personal data controller or user, unless such interests have to be restricted to ensure the realisation and protection of the subject's rights and freedoms.

⁷⁶⁸ A data subject is entitled to be informed about whether his/her personal data are processed; about the name, temporary or permanent residence or headquarters of the personal data controller, processor or user; the source of data; the purpose and legal grounds for processing the data. A data subject is also entitled to insight in his/her personal data and amending them and to information about the personal data user and the automatic processing procedure.

⁷⁶⁹ In the case of *S. and Marper v. the UK*, 2008, the ECtHR found a breach of the right to privacy enshrined in Article 8 of the Convention by the retention of cellular and DNA

The rights provided by this law may also be restricted in the interest of defence, national and public security, the identification and prosecution of criminal offenders, the protection of an economic or financial interest or cultural objects of relevance to the state, or to protect a person or human rights and freedoms to the extent necessary to achieve the purpose of the restriction pursuant to a separate law (Art. 45). Given that neither Article 43 (protection of personal data) nor Article 40 (right to protection of private life) allow for restrictions of the right to personal data protection, the prescription of these and additional restrictions pursuant to a separate law gives rise to the issue of the constitutionality of the above legal provisions because a law can only restrict constitutionally guaranteed rights to the extent allowed by the Constitution.

Upon insight in his/her data, a data subject may request that incomplete data be supplemented, the amendment or deletion of incorrect personal data, the deletion of personal data processed in contravention of the law; discontinuation of the use of incorrect or incomplete personal data or personal data not used in accordance with the law. The collector shall act on a written request by the data subject, or his legal counsel or attorney within 15 days from the day of submission of the request to supplement, amend or delete the subject's personal data and notify the data subject thereof within eight days, unless this proves impossible (Art. 44). The collector shall be held accountable for any damage the data subject suffered due to the violation of his/her legal rights pursuant to the general regulations on redress (Art. 48).

Article 49(1) of the Act entrusts the supervision of personal data protection to the Personal Data Protection Agency (hereinafter: Agency). The Agency shall comprise the following authorities: a Council (comprising the Council Chairperson and two members elected by the Assembly of Montenegro at the proposal of the competent working body (Art. 52)) and a Director (Art. 51). Although the Act stipulates that the Agency shall be autonomous and independent (Art. 49(2)), the Council Chairperson and members are elected by a simple majority in the Assembly, i.e. the votes of the ruling coalition, and at the proposal of the competent working body (Art. 52), in this case the Human Rights and Freedoms Committee of the Assembly, in which the ruling coalition again boasts a majority. Such procedure does not guarantee election of independent candidates. Moreover, it does not stipulate the hearing of the nominees for the seats in the Agency Council, wherefore the Committee may vote on the nominees without getting to know them or obtaining information on issues relevant to their decision on whose candidacies they will support. Article 50 of the Act lays down the jurisdiction of the Agency.⁷⁷⁰

samples and fingerprints in the police records after the acquittal of a person charged with a criminal offence.

⁷⁷⁰ The Agency shall: supervise the implementation of personal data protection in accordance with the law; review motions for the protection of rights; render opinions regarding the application of the Act; approve the establishment of personal data collections; render opinions in case of doubt whether a set of personal data constitutes a collection in the

The Agency Council Chairperson and members are elected to five-year terms of office and may be re-elected once (Art. 52(2)) and shall account to the Assembly for their work (Art. 52(3)). The Act lays down the requirements the candidates for the Council posts must fulfil (Art. 53)⁷⁷¹, and grounds of ineligibility (Art. 54).⁷⁷² Article 55 lays down when the office of a Council Chairperson or member shall terminate before expiry of office, while Article 56 specifies the competences of the Agency Council. The Agency Director is appointed to a four-year term of office by the Council. The post of Director shall be publicly advertised (Art. 58(1)). A person not fulfilling the requirements to become a member of the Council may not be appointed Agency Director (Art. 58(2)). The Agency shall by 31 March submit to the Assembly annual reports on the state of personal data protection for the preceding year (Art. 62(1)). The Agency shall submit special reports on the state of personal data protection at the request of the Assembly or whenever it deems necessary (Art. 62(2)). The report shall include an analysis of the state of personal data protection, an overview of procedures launched in accordance with the Act and measures ordered, and data on the degree in which the rights of data subjects are protected during the processing of their personal data (Art. 62(3)). The Council Chairperson and members, Agency Director and Agency staff shall preserve the confidentiality of all data they become aware of during the fulfilment of their duties in accordance with regulations on classified information (Art. 64(1)) both during their employment and afterwards (Art. 64(2)). More on the Agency's work below, in the section *Practice*.

In its Analytical Report accompanying the Commission Opinion on Montenegro's application for membership of the European Union the European Commission noted that the legislation in the field of personal data

meaning of the Act; monitor the implementation of organisational and technical measures for personal data protection and propose improvements of these measures; issue proposals and recommendations to advance personal data protection; render its opinion on whether a specific method of personal data protection infringes on human rights and freedoms; cooperate with the authorities charged with supervising personal data protection in other countries; cooperate with the competent state authorities in the preparation of regulations on personal data protection; propose the review of the constitutionality of a law or the constitutionality and lawfulness of other regulations and general enactments on personal data processing; perform other duties in accordance with the law.

⁷⁷¹ A Montenegrin national with a college education and five years of working experience in the field of human rights and freedoms is eligible for the post of Council Chairperson or member.

⁷⁷² The following may not be elected Agency Council Chairperson or member: a National Assembly deputy or municipal councillor; a Government member; an official appointed or named by the Government; political party senior official; a person convicted by a final decision of a crime prosecuted *ex officio* regardless of the sentence or convicted by a final decision to a sentence of imprisonment exceeding six months for another crime, as long as the legal consequences of conviction are in effect; a spouse of a deputy, councillor, Government member, an official appointed or named by the Government, their relatives in the first degree of linear kinship or up to the second degree of lateral kinship or their in-laws.

protection had yet to be fully aligned with the EU *acquis* (especially with the provisions in EC Directive 95/46/EC)⁷⁷³ and that the independence of the Agency for the protection of personal data needed to be fully ensured.

The Free Access to Information Act. – The Free Access to Information Act (Sl. list RCG, 68/2005) lays down that every domestic and foreign legal or natural person shall be entitled access to information held by the authorities (Art. 1). On the other hand, access to information shall be restricted if its disclosure would significantly infringe on the privacy or other personal rights of individuals, except for the purposes of judiciary or administrative proceedings (Art. 9(6)). The Act also lays down that it shall be deemed that (private) interest is *significantly endangered* if the disclosure of the information would incur damages significantly outweighing the public interest in its disclosure (Art. 9(2)). This provision aims at striking a balance between two constitutionally guaranteed human rights – the right of access to information and protection of privacy, i.e. personal data. The Constitution in that sense lays down that the right of access to information may be limited to protect privacy (Art. 51(2)), but this can be done only to the extent necessary to satisfy the purpose of the limitation in an open and free democratic society (Art. 24(1)). This provides for the principle of proportionality⁷⁷⁴, which in this case means means that the authority deciding on whether to allow access to information regarding a legally protected interest is to deny access only to information the disclosure of which would incur damage (to that interest) which considerably outweighs the public interest to disclose the information. Furthermore, Article 8 of the Act lays down that a state authority shall enable access to part of the information (if it has to deny access to the whole information for justified reasons). The authority is thus obliged to allow partial access to the required information in the event its full disclosure would damage a legally protected interest. Under the Act, if access to any part of the information access is restricted, the relevant authority shall enable access to the information after deleting the part access is restricted to (Art. 13(3)). For the implementation of this Act in practice, see page. 312.

The Agency has found that the Free Access to Information Act and Data Protection Act do not refer to each other to resolve certain issues, which contributes to their mutual collision, in particular regarding the definition of private personal data of any person, and the extent to which public officials or holders of public powers should be exempt from the protection of privacy.⁷⁷⁵

⁷⁷³ Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, European Parliament and of the Council, 95/46/EC, 24 October 1995.

⁷⁷⁴ See Opinion of the Venice Commission on the Constitution of Montenegro from December 2007, item 21: “This provision ... contains the necessary elements of legality, proportionality and legitimate aims...”

⁷⁷⁵ See Special Report on the Protection of Personal Data in Montenegro, Agency for the Protection of Personal Data, 30 Jun 2011, p. 51.

Work on the harmonization of these laws is scheduled to be completed by the end of 2011.

The Criminal Code incriminates Unauthorised Collection of Personal Data (Art. 176) warranting a fine or maximum one year imprisonment for anyone who unlawfully obtains, communicates to another or uses collected, processed or used personal data for purposes other than those for which they were collected (Art. 176(1)). The same punishment shall be imposed on anyone unlawfully collecting or using personal data (Art. 176(2)). In the event the crime was committed by a public official during the performance of his/her duties, s/he shall be sentenced to up to three years' imprisonment (Art. 176(3)).

The Criminal Code. – The Criminal Code allows for the disclosure of data in criminal records only to a court, state prosecutor, or an administrative police authority with respect to criminal proceedings instituted against a person who already has a criminal record, an authority charged with the enforcement of penal sanctions, an authority participating in an amnesty, pardon or rehabilitation procedure or reviewing the cancellation of legal consequences of conviction, or custody authorities if they require such data to perform the duties within their remit (Art. 123(3)). Such data may also be disclosed to a state authority, company, another organisation or entrepreneur with a justified interest based on the law at its reasoned request if the legal consequences of conviction or security measures are still in effect (Art. 123(4)). Although Article 123(5) of the CC states that no one shall be entitled to request from a citizen to submit any evidence of the existence or non-existence of a prior record such requests are not penalised in practice. Paragraph 6 of the Article lays down that citizens may request and be issued information on the presence or absence of a prior record only if they need such information to exercise a right abroad (Art. 123(6)).

The Police Act. – Under Article 18(1) of the Police Act (*Sl. list RCG*, 28/2005 and *Sl. list CG*, 88/2009) the police shall collect, process and use personal data and keep records thereof as long as such data are needed to prevent and uncover crimes, misdemeanours and their perpetrators. The police shall collect the personal and other data by using the existing data collections or in direct contact with the persons the data regard i.e. other persons (Art. 18(2)). The police shall keep relevant records regarding the exercise of police powers, *inter alia*, records of persons subjected to the identification procedure, dactiloscropy, DNA sampling and photographed persons (Art. 19(1(4))). These data shall be stored permanently (Art. 20(1(4))). Article 23, however, states that personal data shall be deleted from the records if they were collected in contravention of the law and “upon termination of grounds on which they were entered in the records”, which, under Article 8 of the Personal Data Protection Act and the ECtHR's case law (*S. and Marper v The UK*, 2008) should mean that they are to be deleted if criminal proceedings have been discontinued

or ended in the acquittal of a person, who has been fingerprinted or whose DNA has been taken, but this should be specified. Everyone is entitled insight in the records after the termination of grounds on which s/he was entered in the records (Art. 20(1)). This provides with an opportunity to check whether the data had been deleted. The identity of the person who had provided the information must be protected during such insight (Art. 20(2)). Personal data may not be collected or used for any purpose other than the one laid down in the law or other regulations governing personal data protection (Art. 22).

The Labour Act. – The Labour Act (*Sl. list CG*, 49/2008 and 26/2009) states that the employer may not ask his/her future employee to disclose data on his/her family, marital status and family plans, or submit documents or other proof not of direct relevance to the performance of the job (Art. 18(2)). The employer may not condition the employment or conclusion of a labour contract by proof of the non-existence of pregnancy, unless the job in question poses a significant risk to the health of the mother and child and is identified as such by the competent health authority (Art. 18(3)). Everyone who violates this provision shall be fined in the amount ranging from 10 to 300 times the minimum wage in Montenegro (Art. 172).

The Tax Administration Act. – Under the Tax Administration Act (*Sl. list RCG*, 65/2001 and 80/2004), a tax secret shall denote any information or datum about the taxpayer at the disposal of the tax authority, except in circumstances laid down in the law (Art. 16).⁷⁷⁶

The State Administration Act. – Under the State Administration Act (*Sl. list RCG*, 38/2003 and *Sl. list CG*, 22/2008), citizens shall have free access to data, documents, reports and information of state administration authorities except in instances specified in the law (Art. 4). Access to data, documents, reports and information of state administration bodies regarding specific natural or legal persons shall be allowed only to a citizen with a legal interest to obtain such access with respect to a judicial or other procedure in which s/he is to realise his rights, obligations or legal interests (Art. 51(2)). Any denial i.e. rejection of a request for such information shall be justified in writing and the person who had submitted the request shall be entitled to file a complaint with the authority supervising the work of the authority that rejected the request (Art. 51(3)). Conditioning access to personal data held by a state administration authority by the existence of a public interest “with respect to a judicial or other procedure” is not in compliance with international stand-

⁷⁷⁶ A tax secret shall not denote any information or data which the taxpayer confirms in writing as not constituting a tax secret; that cannot be related to a particular taxpayer or identified in any other manner; pertaining to the existence of a tax debt if the mortgage or fiduciary transfer of title to property to serve as collateral has been registered in the public books; regarding the registration of the taxpayer, Tax Identification Number, name (company) and principal place of business; value of immovable property. A state authority may request and obtain such information in accordance with the law.

ards, the Constitution, the Personal Data Protection Act (Art. 43, *Right to be Informed*) and the Free Access to Information Act and a review of the constitutionality of this provision should be initiated.

Access to State Security Files

Pursuant to the National Security Agency (ANB) Act, the Agency is duty bound to within 30 days notify a citizen upon his/her written request, whether any of his/her data have been collected and whether the Agency is keeping a record of his personal data and to make such records available for his/her perusal at his request (Art. 18). Such documents may not comprise data on ANB officers who collected them, sources of information or the personal data of third parties. In the event any information may jeopardise the performance of the Agency's tasks or endanger the security of other persons, the ANB is not duty bound to provide it and shall inform the applicant thereof in writing within 15 days. The Agency shall provide the sought information upon the termination of such reasons (Art. 18(4)). More on the practical exercise of the right to access security files below, under *Practice*.

Before the Act was adopted, the opening of state security files was governed by the 2001 Montenegrin Government Decree on Insight in State Security Service Files on Citizens of Montenegro (*Sl. list RCG*, 45/01), which was in force for one year. Pursuant to the Decree, insight could be provided only in the files from the category "internal enemy", in the premises and under the supervision of ANB.

Although the Ministry of Domestic Affairs announced that it will be adopted by 2007,⁷⁷⁷ the Act on Access to Secret Files has not been adopted by the end of June 2011. In early 2010 the opposition party New Serbian Democracy announced the proposition of the Act on Opening of Records "because that is the civilizational need of Montenegro".⁷⁷⁸ Liberal Party and the Movement for Change also initiated the adoption of such act.

Right to Privacy and Freedom of Information

As opposed to the ECHR, which in Article 10(2) allows for restrictions of the freedom of expression for the protection of the *rights of others*, which includes the right to privacy⁷⁷⁹, the Constitution of Montenegro states that the freedom of expression may be limited only by the "rights of another to dignity, reputation and honour", which does not comprise all aspects of the

⁷⁷⁷ "Act on Secret Files to be adopted soon", *Vijesti*, 16 November 2007. According to Assistant Minister of Domestic Affairs, Nada Vukanić, Draft Act in 2007 "passed the expertise of the Council of Europe and the OSCE, as well as the consultants and local experts".

⁷⁷⁸ "Secret files to light", *Vijesti*, 4 January 2010.

⁷⁷⁹ See e.g. the ECtHR judgment in the case of *Tammer v. Austria*, 2001.

right to privacy. The ECtHR, for instance, is of the view that the “concept of private life covers personal information which individuals can legitimately expect should not be published without their consent and includes elements relating to a person’s right to their image”.⁷⁸⁰ On the other hand, the right to freedom of information on matters of public interest can sometimes mean the justified invasion of privacy of public officials, in accordance with the ECtHR case law.⁷⁸¹

The 1980 Law on Conditions for Publication of Private Diaries, Letters, Portraits, Photographs, Films and Phonograms (*Sl. list SRCG*, 2/80), adopted to ensure and protect the inviolability of personal and family life and other rights of a person (Art. 1), is still in effect. Under the Act, the above forms not intended for the public, may be published only with the consent of their author, the person appearing in them and the person they were designated to (e.g. letters), or their heirs after their death. Exceptionally, such material may be published if: 1) the portrait, photograph, film or phonogram shows or broadcasts the voice of a contemporary figure of public interest, 2) the photograph, film or phonogram is of interest to the study of social development; 3) the photograph, film or phonogram concerns an event (gatherings, processions and the like); 4) the photograph or film shows an area or scene and including specific individuals; 5) the private diary, letter, photograph, film or phonogram of interest to the judiciary (Art. 5).

The Media Act (*Sl. list RCG*, 51/2002 and 62/2002) includes a provision on the protection of integrity of minors, particularly on the protection of the identity of minors involved in crime (Art. 22). Apart from laying down that everyone is entitled to sue the author or founder of the media outlet that published content violating “a legally protected interest of a person” the information regards or violating “the integrity” of the person, which may be interpreted as impermissible interference in private life, the Act does not include any provisions devoted specifically to the protection of privacy, the balance to be struck between the right to privacy and to freedom of information in keeping with ECtHR case law standards. HRA proposed the amendment of the Media Act in that respect within its Reform Proposal for Liability for Breach of Honour and Reputation in Montenegro.⁷⁸²

⁷⁸⁰ *Iltaalehti and Karhuvaara v. Finland*, 2010, paragraph 52.

⁷⁸¹ See, e.g. *Iltaalehti and Karhuvaara v. Finland*, 2010. The Committee of Ministers of the Council of Europe in the Declaration on Freedom of Political Debate in the Media (2004) found that, although private and family lives of politicians and civil servants are worthy of protection from disclosure in the media pursuant to the right to privacy under Art. 8 of the Convention, information about their private life may be published when they are of immediate public concern regarding the way they fulfil their duty, although even then one should take into account the need to avoid damage to third parties. In the case in which politicians and civil servants draw attention to their private life, the media have the right to criticize it.

⁷⁸² The Reform Proposal is available in Montenegrin at: http://www.hracion.org/wp-content/uploads/predlog_reforme-zakon_o_kleveti_i_uvredi.pdf

Right to Privacy and Religion, National Affiliation, Gender Identity and Sexual Orientation

The Constitution guarantees everyone the freedom to declare or not declare his religion or other beliefs (Art. 46(2)). Furthermore, the freedom to declare one's nationality or ethnicity also entails the freedom not to declare it, as clearly provided for by Article 3(1) of the CoE Framework Convention for the Protection of National Minorities,⁷⁸³ which is binding on Montenegro as well, and no one may be forced to declare himself or herself on these issues. Likewise, the Anti Discrimination Act (*Sl. list CG*, 46/2010) lays down that gender identity and sexual orientation are a private matter of every individual and that no one may be asked to publicly declare his/her gender identity or sexual orientation (Art. 19(3)).

The Criminal Code incriminates Violation of the Freedom to Express One's National or Ethnic Affiliation and envisages a fine or up to one-year imprisonment for anyone who forces another to declare his or her national or ethnic affiliation (Art. 160(2)). It also incriminates the Violation of the Freedom of Confession of a Religion and Performance of Religious Rites, envisaging a fine or up to one-year imprisonment for anyone who forces another to declare his/her religious beliefs (Art. 161(3)). A person acting in an official capacity shall be punished by up to three years' imprisonment for committing this crime (Art. 161(4)).

Under the Act on the 2011 Census of the Population, Households and Homes (*Sl. list CG*, 41/2010, 44/2010 and 75/2010), the data collected in the census shall be used exclusively for statistical purposes, which shall be visibly specified on the census forms (Art. 20(1)). The census takers, instructors, controllers and other persons performing census-related duties shall preserve the confidentiality of all data collected from the persons covered by the census (Art. 20(2)). The Act, however, states that every person covered by the census is duty bound to "answer every question fully and accurately" (Art. 21(1)), i.e. also questions on their religion, ethnic or national origin (Art. 5). A fine ranging from half to twenty times the minimum wage in Montenegro shall be imposed on anyone who refuses to answer a question in the census form or who provides inaccurate or incomplete answers (Art. 28). HRA initiated the review of the constitutionality of these provisions with the Constitutional Court, which rejected the initiative explaining that the "methodology and instructions for census takers", which had not been published at the time the Constitutional Court was reviewing the initiative, clearly indicated that the Act actually guaranteed the right not to answer these questions and that "I do not want to reply" will be deemed a full and accurate answer.⁷⁸⁴

⁷⁸³ *Službeni list SRJ – Međunarodni ugovori*, 9/02

⁷⁸⁴ "They were Focusing on Instructions Rather than on the Act", *Vijesti*, 25 March 2011. HRA's view of the Constitutional Court decision is available at: [http://www.hraction.org/?p=721](http://www.hrraction.org/?p=721).

Sexual autonomy is also covered by Article 8 of the ECHR.⁷⁸⁵ According to the ECtHR's case law, any restriction of sexual autonomy must be prescribed by law, necessary and proportionate. A restriction is easy to justify when it concerns the abuse of minors,⁷⁸⁶ and relatively difficult to justify when it concerns consensual intercourse between adults.⁷⁸⁷

Chapter Eighteen of the Criminal Code incriminates offences against sexual freedoms and includes provisions prohibiting rape and sexual intercourse by use of force, threat, abuse of post, sexual intercourse with a minor or helpless person (suffering from a mental disability or retardation, etc). Children are protected by provisions on the qualified forms of these crimes. The articles incriminating offences against sexual freedoms are in accordance with the state's obligation to preserve the moral and physical integrity of the persons under its jurisdiction from sexual abuse.⁷⁸⁸

The Constitution does not explicitly recognise the right to express one's gender identity. Nor does it explicitly cover gender orientation under prohibited grounds. The Anti-Discrimination Act (*Sl. list CG*, 46/2010) is the first to introduce prohibition of discrimination on grounds of gender. It states that gender identity and sexual orientation are a private matter of every individual, that everyone has the right to express his/her gender identity and sexual orientation and that no one may be asked to publicly declare his/her gender identity or sexual orientation (Art. 19). However, the obligation to declare is not even sanctioned by a misdemeanor, as opposed to the obligation to declare a national or ethnic origin, which is a criminal offense. It is necessary to expand the offense to also include the protection against obligation to express one's gender identity and sexual orientation.

Discrimination on grounds of sexual orientation is explicitly prohibited by the Labour Act⁷⁸⁹ (Art. 5) and the Anti-Discrimination Act⁷⁹⁰ (Art. 2).

⁷⁸⁵ *Dudgeon v. The United Kingdom*, ECtHR, App. No. 7275/76 (1981); *Norris v. Ireland*, ECtHR, App. No. 10581/83 (1988); *Lusting-Prean and Beckett v. The United Kingdom*, ECtHR, App. No. 31417/96 (1999); *Sutherland v. The United Kingdom*, ECtHR, App. No. 25186/94 (1997, 1998).

⁷⁸⁶ *M. K. v. Austria*, ECmHR, App. No. 28867/95 (1997).

⁷⁸⁷ *Dudgeon v. The United Kingdom*, 1981 (incrimination of a homosexual relationship between adults in private, violation of the right to privacy); *A.D.T. v. The United Kingdom*, 2000 (criminal prosecution for a private video recording of homosexual acts among a number of adults confiscated in a private apartment is also a violation of the right to privacy). However, in *Laskey, Jaggard and Brown v. the United Kingdom*, 1997, a case involving years-long sado-masochistic relationships between a number of persons, the ECtHR found that the national authorities were entitled to consider that the prosecution and conviction of the applicants were necessary in a democratic society for the protection of health.

⁷⁸⁸ For example, the ECtHR found a violation of Article 8 of the ECHR in the case of *X. and Y. v. The Netherlands*, 1985, in which a girl with a mental disability was not provided with the possibility of criminal prosecuting a person who had sexually assaulted her because such conduct was not incriminated by criminal law.

⁷⁸⁹ *Sl. list CG*, 49/2008 and 26/2009.

⁷⁹⁰ *Sl. list CG*, 46/2010.

Criminal Legal Protection of Private Life

The Criminal Code penalises violations of the right to a private life. The crime Unauthorised Disclosure of a Secret incriminates unauthorised disclosure of confidential information by a lawyer, doctor or another person, who has learned it during performance of his/her professional duties (fine or maximum one-year imprisonment), unless the disclosure of the information is in general interest or the interest of another person and overrides the interest of maintaining confidentiality (Art. 171). The crime of Breach of Secrecy of Letters and Other Correspondence warrants a fine or up to one year of imprisonment; the qualified form of the crime, committed by a person acting in an official capacity during the performance of his/her duties warrants up to three years' imprisonment (Art. 172). The crime of Unauthorised Wiretapping and Recording is punishable by a fine or maximum one-year imprisonment or up to three years of imprisonment if it was committed by a person acting in an official capacity during the performance of his/her duties (Art. 173). The same penalties are envisaged for the crimes of Unauthorised Photographing (Art. 174), Unauthorised Publication or Presentation of Another's Written Text, Portrait or Recording (Art. 175) and Unauthorised Collection of Personal Data (Art. 176).

With the exception of Unauthorised Disclosure of a Secret, the articles on the other offences do not provide for an exception in case of an overriding general interest, like, e.g. preventing the commission of a crime or identification of the criminal offender. These provisions need to be amended given that the Criminal Code now actually incriminates recording or photographing of threats, criminal offenders or the publication of a film from the private life of the criminal offender that would facilitate the prosecution of the crime or save people or property from the adverse effects of the crime et al.

Home (Dwelling)

In terms of the ECHR, the home encompasses all places of residence. The ECtHR expanded the concept of home to include certain business premises.⁷⁹¹ The Constitution of Montenegro also mentions home and "other premises" (Art. 41(2 and 4)).

Under Article 41(1) of the Constitution, the home shall be inviolable. No one may enter or search a dwelling or other premises against the will of the owner without a court warrant (Art. 41(2)). Search shall be conducted in the presence of two witnesses (Art. 41(3)). A person acting in an official capacity may enter another's home or other premises without a court warrant and search them in the absence of witnesses if necessary to prevent the commission of a crime, immediately apprehend the perpetrator of a crime or save people or property (Art. 41(4)).

⁷⁹¹ *Niemietz v Germany*, 1992.

The Criminal Code penalises violations of the sanctity of the home in the following articles: Violation of the Inviolability of a Home, warranting a fine or up to one year imprisonment, or up to three years of imprisonment if the offence was perpetrated by a person acting in an official capacity performing his/her duties (Art. 169) and Illegal Search, warranting up to three years imprisonment (Art. 170).

Under the new Criminal Procedure Code (*Sl. list* CG, 57/2009 and 49/2010), the home or other premises of an accused person or another person and their movable possessions outside the home may be searched where probable cause exists to believe that the perpetrator will be caught or that traces of the crime or objects relevant to the criminal proceedings will be found in the course of the search (Art. 75(1)). The search warrant shall be issued by the court at the request of the state prosecutor or the police official authorised by the state prosecutor and enforced by the police (Art. 76(1)). The investigating judge shall issue the search warrant, the content of which shall be prescribed by the law (Art. 79). The search warrant shall be served on the person concerned prior to the beginning of the search (Art. 80(1)). The search may commence without the prior serving of a warrant, without a prior request for the surrender of a person or object, or without instructing the person of the right to the presence of a defence counsel or attorney, if necessary to prevent the commission of a crime, immediately apprehend the criminal offender or save persons or property in the event the search is to be carried out in public premises (Art. 80(2)). Rules of search shall be prescribed by the law (Art. 81). An authorised police officer may enter another's home or other premises and search them if necessary without a court order if so requested by the owner or to prevent the commission of a crime, immediately apprehend the criminal offender or save people or property (Art. 83(1)). The search may be conducted in the absence of witnesses in the event it is impossible to immediately secure their presence and there is a risk of delay. The reasons for the search in the absence of witnesses must be specified in the records (Art. 83(4)). The police officer who conducted a search without a search warrant shall immediately submit a report thereof to the investigating judge (Art. 83(7)). In the event the search was conducted in contravention of the CPC provisions on search, the search records and evidence obtained during the search may not be used as evidence during the criminal proceedings (Art. 84)).

See the section on *Secret Surveillance* for details regarding CPC and National Security Agency Act provisions governing the secret surveillance of the home, i.e. private premises and the interior of buildings.

Correspondence

In terms of Article 8 of the ECHR, the concept of correspondence encompasses both written correspondence and telephone conversations,⁷⁹²

⁷⁹² *Klass v. Germany*, 1979, 1980.

telex,⁷⁹³ telegraphic and other forms of electronic communication. Information on the date and duration of telephone conversations and particular the called numbers can give rise to an issue under Article 8 as such information constitutes an “integral element of the communications made by telephone” and enjoys the same protection of the right to privacy as the content of telephone conversations from unlawful wiretapping. The qualification of information on telephone conversations is to be protected, wherefore it is irrelevant whether the information was not disclosed or used against a person in court or disciplinary proceedings.⁷⁹⁴

The ECtHR also established the following minimum safeguards that should be set out in the law in order to avoid abuses of power: during wiretapping or insight in the information on dialled numbers: a definition of the categories of people liable to have their telephones tapped by judicial order, the nature of the offences which may give rise to such an order, a limit on the duration of telephone tapping, the procedure for drawing up the summary reports containing intercepted conversations, the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and by the defence and the circumstances in which recordings may or must be erased or the tapes destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court.⁷⁹⁵

The Constitution of Montenegro guarantees the confidentiality of letters, telephone conversations and other means of communication (Art. 42(2)). This principle may be derogated from only pursuant to a court order, for the purpose of conducting criminal proceedings or in the interest of the security of Montenegro (Art. 42(2)).

Article 230 of the old CPC (*Sl. list RCG*, 71/2003, 7/2004 and 47/2006), which was still in force in 2010, lays down the powers of the police in pre-trial proceedings without judicial oversight entitling them to seek information on the dialled phone numbers and on the duration of the calls and to seize personal computers to inspect them, again without a court warrant or any other form of oversight. The new CPC also comprises a provision allowing the police to request from the providers of electronic communication services to establish the identity of the telecommunication addresses with which connection had been established at a specific time without judicial oversight (Art. 257(2)). This provision does not satisfy ECtHR standards because it allows for arbitrary police action without judicial oversight.⁷⁹⁶ For example,

⁷⁹³ *Campbell Christie v. The United Kingdom*, 1994.

⁷⁹⁴ *Copland v. The United Kingdom*, 2007, paragraph. 43; *Malone v. The United Kingdom*, 1989, paragraph. 87; *Valenzuela Contreras v. Spain*, 1996, p. 47.

⁷⁹⁵ *Kruslin v. France*, 1990; *Huvig v. France*, 1997; and *Venezuela Contreras v. Spain*, 1996.

⁷⁹⁶ In late April 2011 Council of the Agency for Personal Data Protection proposed to MPs to initiate amendments to this article 257 CPC, which raises doubts (“Police to delete the information”, *Vijesti*, 29 April 2011). Agency Special Report on personal data protection in Montenegro is available at: <http://www.skupstina.me>.

the Constitutional Court of Serbia declared unconstitutional the provision in the Serbian Telecommunications Act allowing for violations of privacy and confidentiality of messages transmitted via telecommunications networks in accordance with the law, reasoning that only the court is competent to allow for derogation from the principle of inviolability of correspondence and other means of communication if necessary to conduct criminal proceedings or protect the security of the Republic of Serbia for a specified period of time and in a manner stipulated by the law.⁷⁹⁷ The Montenegrin Constitutional Court, however, rejected an initiative to review the constitutionality of the above provision in the CPC, which is further supplemented by powers given the police under the Government Anti-Corruption Action Plan, which resulted in the conclusion of a disputable contract between the Police Directorate and telecommunications service operators (more below, under *Practice*).⁷⁹⁸

According to case law under the ECHR, communication with the outside world is one of the fundamental rights of convicts and is protected under Article 8 of the ECHR. The interference of this right may be restricted only to achieve a legitimate aim such as security of prevention of a crime provided it is necessary and proportionate to the legitimate aim pursued.⁷⁹⁹

Under Article 88 of the CPC, at the request of the state prosecutor, an investigating judge shall order the provisional seizure of a letter, telegram or other parcel addressed to or sent by a detainee or convict if there is probable cause to expect that it will serve as evidence in the proceedings.

The Penal Sanctions Enforcement Act (*Sl. list CG*, 25/94, 29/94, 69/2003 and 65/2004) lays down that convicts are entitled to correspond with persons closest to them and that the prison warden may allow them to correspond with other persons as well (Art. 46). Convicts shall send and receive letters via the prison. A convict may be denied the right to receive or send written correspondence if it is assessed that the correspondence adversely impacts on his/her rehabilitation or prison security. The discretion to prohibit a convict's correspondence with anyone apart from persons closest to him/her without laying down in which cases such a restriction is justified or stipulating that such a restriction has to be necessary and proportionate is not in accordance with the ECHR or ECtHR case law.

A convict who is a foreign national is entitled to file submissions also to the diplomatic or consular mission of his/her state or the state protecting his/her interests, while stateless persons and refugees are entitled to file submissions to the organisation protecting their interests (Art. 47). Pursuant to the Human Rights and Freedoms Protector Act (*Sl. list CG*, 41/2003), letters

⁷⁹⁷ Belgrade Centre for Human Rights Human Rights in Serbia 2009 Report, p. 136, available at: <http://english.bgcentar.org.rs/images/stories/Datoteke/human%20rights%20in%20serbia%202009.pdf>

⁷⁹⁸ Constitutional Court Decision, U. 91/08, June 2010, communicated on 13 September 2010, available in HRA Archives.

⁷⁹⁹ *Silver and Others v. The United Kingdom*, 1983.

of persons deprived of liberty to the Protector shall be sent in sealed envelopes, unopened and unread; the same applies to the Protector's replies (Art. 28 (paras. 2 and 3)). The Protector did not report any violations of confidentiality of his correspondence with inmates in 2010.⁸⁰⁰ Special mail boxes are to be installed in the Podgorica and Bijelo Polje prisons in which the inmates will be able to drop their complaints to the Protector; only the Protector will have access to the mail boxes.⁸⁰¹

Secret Surveillance

General. – Powers of state authorities to wiretap and take other secret surveillance measures during police investigation pose a great risk to the right to protection of privacy. This is why the ECtHR established that the law providing them with such powers needs to comprise minimum safeguards against abuse and that it must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence (*Malone v The United Kingdom*, 1984, paragraph. 67; *Bykov v Russia*, 2009, paragraph 78.).

Secret surveillance measures are governed by the CPC and the National Security Agency Act.

Under the CPC, secret surveillance measures may be ordered if there is reasonable cause to suspect that a person has committed a specific crime, is committing one or is preparing to commit it alone or in complicity with others,⁸⁰² and evidence cannot be obtained in another manner or obtaining it would pose a disproportionate risk or jeopardise the lives of people. The types of secret surveillance shall be laid down in the law (Art. 157(1)).⁸⁰³ Secret surveillance measures may also be ordered against a person if there is

⁸⁰⁰ Human Rights and Freedoms Protector's 2010 Report, March 2011, p. 51. <http://www.ombudsman.co.me/izvjestaji.php>

⁸⁰¹ Information provided by Marijana Laković, Assistant Human Rights and Freedoms Protector.

⁸⁰² Secret surveillance measures may be ordered for crimes: warranting imprisonment of minimum 10 years; with elements of organised crime; with the following elements of corruption: money laundering, false bankruptcy, abuse of assessment, active or passive bribery, disclosure of an official secret, trading in influence, abuse of power in economy, abuse of office or fraud warranting eight or more years of imprisonment; abduction, extortion, blackmail, meditation in prostitution, displaying pornographic material, usury, tax and contributions evasion, smuggling, unlawful treatment, disposal or storage of hazardous substances, assault on a person acting in an official capacity during the performance of an official duty, obstruction of evidence, criminal association, unlawful possession of weapons or explosives, illegal crossing of the state border and human smuggling; crimes against the security of computer data.

⁸⁰³ Secret surveillance measures comprise: secret surveillance and technical recording of telephone conversations or other communication via long-distance communication devices, private conversations in private or public indoor or outdoor venues; secret pho-

reasonable cause to believe that s/he is relaying messages regarding the crime to the perpetrator or that the perpetrator has been using that person's telephone line or another electronic communication device (Art. 157(3)). The application or extension of secret surveillance measures shall be ordered by the investigating judge (Art. 159(1)). The content of the motion to order such measures shall be laid down in the law (Art. 159(2)).⁸⁰⁴ If the written order cannot be issued on time and risk of delay exists, the application of a measure may exceptionally begin pursuant to an oral order issued by the investigating judge, i.e. state prosecutor. In that case, a written order must be obtained within 12 hours from the moment the oral order was issued (Art. 159(4)). The measures may be applied only as long as necessary, four months at most, and may be extended another three months for justified reasons; the enforcement of the measure shall cease as soon as reasons for its enforcement terminate (Art. 159(5)). Officials involved in ordering and enforcing the measure shall maintain the confidentiality of all information they have learned in the procedure (Art. 159(7)). Secret surveillance measures shall be enforced by the police, which shall ensure that the privacy of persons they are not applied against is violated to the least possible extent (Art. 160(1)). The authorised police officer enforcing the measure shall keep record of all undertaken measures and submit periodical reports on the enforcement of the measure to the state prosecutor or investigating judge. In the event the state prosecutor or investigating judge assesses that it is no longer necessary to apply a specific measure, s/he shall issue an order on its discontinuation (Art. 160(5)). In the event the state prosecutor decides not to launch criminal proceedings against the suspect, the material shall be destroyed in the presence of the state prosecutor and investigating judge and the judge shall compose a record thereto (Art. 160(7)). Before the material obtained by the enforcement of secret surveillance measures is destroyed, the investigating judge shall notify the person against whom the measure was undertaken and that person shall have the right of insight in the collected material (Art. 162(1)). After hearing the opinion of the state prosecutor, the investigating judge may decide not to notify the person concerned or not to let him/her insight in the material if there is reasonable cause to believe that such notification or insight may seriously endanger the health or lives of people or an ongoing investigation or for other justified reasons (Art. 162(2)). The court may not found its judgment on information obtained by secret surveillance measures if they were

tographing and video recording in private premises, tracking or technical recording of persons and objects.

⁸⁰⁴ The motion and the order shall specify: the type of measure, data on the person against whom the measure is enforced, grounds for reasonable suspicion, how the measure will be enforced, its goal, scope and duration. If the measure entails the engagement of an undercover agent or associate, the motion and the order shall also specify which forged documents and audio and visual recording devices to be used, any participation in the conclusion of legal affairs, and the reasons justifying the engagement of a person who is not an authorised police officer as an undercover agent or associate.

undertaken in contravention to the provisions of the law or the order of the investigating judge or the state prosecutor (Art. 161(1)).

Powers of the National Security Agency. – The ECtHR is of the view that secret surveillance by state security agencies may be justified only by the necessity to protect democratic institutions.⁸⁰⁵ The law governing the work of security services must comprise precise rules on the collection of data and adequate safeguards which apply to the supervision of such activities.⁸⁰⁶ The law must envisage effective safeguards against abuse, since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it.⁸⁰⁷

The National Security Agency (ANB) was established in May 2006 in accordance with the National Security Agency Act (*Sl. list CG*, 28/2005) as a separate state authority. The ANB legally succeeded the former State Security Service of the Montenegrin Ministry of Internal Affairs, and took over its staff, cases, archives, equipment and resources.

Under the Act, the ANB shall operate in accordance with the Constitution and the law (Art. 2) and shall be politically and ideologically neutral (Art. 3). The ANB shall be charged with national security affairs regarding the protection of the constitutional order, security and territorial integrity of Montenegro, constitutionally guaranteed human rights and freedoms, and other affairs of interest to national security (Art. 1). The ANB's powers to secretly collect data by prescribed means and methods⁸⁰⁸ may infringe on the right to privacy.

Article 14 of the Act envisaged that the President of the Supreme Court of Montenegro had to approve and extend every surveillance of mail and other means of communication upon a reasoned motion in writing by the Agency Director in the event there is reason to suspect that national security was in jeopardy. The March 2011 amendments to the Act now entrust the approval of such measures to a three-judge panel of the Supreme Court.⁸⁰⁹ The initial provision formally satisfied the constitutional requirement for judicial oversight of secret surveillance. A decision by taken by three judges definitely provides stronger guarantees of independence and impartiality than a decision taken by one person, particularly in view of the fact that the current procedure for appointing the Supreme Court President, which is essentially a

⁸⁰⁵ *Rotaru v. Romania*, 2000, paras. 57–59.

⁸⁰⁶ *Ibid.*

⁸⁰⁷ *Ibid.*, para. 59.

⁸⁰⁸ The Agency is authorised to collect data in a covert manner by the following means and methods: cooperation with citizens of Montenegro and foreign nationals; tracking and surveillance by use of technical documenting means, purchase of documents and objects; surveillance of mail and other means of communication (Art. 9(1)). The Act Amending the National Security Agency Act adopted on 22 March 2011 also allows the ANB to conduct surveillance of premises inside facilities.

⁸⁰⁹ "Secret Service Awarded New Powers", *Pobjeda*, 6 April 2011.

political one, does not ensure that s/he will be independent and impartial and does not provide sufficient safeguards against abuse by the ruling coalition.⁸¹⁰ There is still, however, apprehension that the existing oversight mechanisms are insufficient to ensure that the ANB actually seeks the consent of the court every time it applies surveillance measures.

Surveillance of mail and other means of communication shall terminate as soon as the reasons for it have ceased to exist (Art. 15). The Act, however, allows for the unlimited extension of surveillance measures (Art. 15(3)) as opposed to the CPC, which limits the duration of surveillance during criminal proceedings to maximum seven months. Furthermore, the Act lacks a provision like the one in the Police Act, under which personal data collected and entered in the records shall be deleted upon the termination of the reasons for which they had been registered i.e. the destruction of such data pursuant to Arts. 160–162 of the CPC (see secret surveillance in criminal proceedings, p. 273).

Oversight of ANB's work is conducted by the Assembly (Defence and Security Committee) and the Government's internal audit mechanism – the Inspector General (Art. 5). At the request of the Committee, the ANB shall allow insight in the surveillance of mail and other means of communication provided that such insight does not jeopardise national security (Art. 43(4)). The Act does not explicitly lay down that the Committee shall perform oversight of other Agency powers e.g. of its database of information arrived at by “tracking or surveillance by use of technical documenting means” (Art. 9(1)), but the general provision in Art. 43(1) on the Assembly's oversight of ANB's work should be read as including scrutiny of its exercise of its other powers as well. The ANB may not disclose data on the identity of its associates, undercover agents or other persons, who may suffer any damage by the disclosure of such data, or on security or intelligence sources or activities under way (Art. 43 (5)).

Furthermore, the Human Rights and Freedoms Protector Act (*Sl. list RCG*, 41/2003) provides for a possibility which has not been applied in practice to date: at his/her own initiative (Art. 4), the Protector may perform oversight of ANB's work within his/her general review of issues of relevance to the protection and advancement of human rights and cooperation with human rights organisations and institutions (Art. 23) and notify the Assembly of his/her findings in the regular annual reports s/he must submit under Art. 46.⁸¹¹ With respect to parliamentary oversight of the ANB, there are problems in

⁸¹⁰ See the ECtHR judgment in the case of *Rotaru v. Romania* (2000) on the need to ensure judicial control since it affords the best guarantees of independence, impartiality and a proper procedure.

⁸¹¹ All state authorities, including the ANB, are duty-bound to place at the Protector's disposal all data and information within their purview at his/her request, regardless of their confidentiality level, and enable the Protector free access to all premises. Failure to act on the Protector's request shall be deemed obstruction of his/her work and the Protector

practice arising whenever the parliamentary majority (also boasting a majority in the Defence and Security Committee) rejects the initiative of the opposition members of the Committee for a hearing of the ANB, wherefore scrutiny of ANB's work is possible only when such oversight suits the ruling coalition, which also appoints the Agency Director. Under Article 25(3) of the Act on the ANB, the Government shall seek the opinion of the Assembly on its candidate for the post of ANB Director; the Assembly renders its opinion on the candidate after a debate in the Committee (both decisions are taken by a simple majority), i.e. the decision on who the Director will be is taken by the ruling coalition, which is also charged with overseeing his/her work. The impartiality of the Agency Director would be better guaranteed if the Government nominated the candidate and the Assembly voted him/her in by a qualified majority.

Family and Domestic Relations

Protection of Family Life

According to the ECtHR, family life is interpreted in terms of the actual existence of close personal ties.⁸¹² It comprises a series of relationships, such as marriage, children, parent-child relationships,⁸¹³ and unmarried couples living with their children.⁸¹⁴ Furthermore, the ECtHR in 2010 ruled that partners in same sex unions also enjoy the protection of the right to family life.⁸¹⁵ Even the possibility of establishing a family life may be sufficient to invoke protection under Article 8 of the ECHR.⁸¹⁶ Other relationships that have been found to be protected by Article 8 include relationships between brothers and sisters, uncles/aunts and nieces/nephews,⁸¹⁷ parents and adopted children, grandparents and grandchildren.⁸¹⁸ Moreover, a family relationship may also exist in situations where there is no blood kinship, in which cases other criteria are to be taken into account, such as the existence of a genuine family life, strong personal relations and the duration of the relationship.⁸¹⁹

shall notify the immediately superior authority, Assembly or public thereof (Art. 40, Human Rights and Freedoms Protector Act).

⁸¹² *K. v. The United Kingdom*, European Commission for Human Rights, 1991. See also The right to respect for private and family life: A guide to the implementation of Article 8 of the European convention on Human Rights, Ursula Kilkelly, CoE, 2003, p. 23, <http://www.echr.coe.int/NR/rdonlyres/77A6BD48-CD95-4CFF-BAB4-ECB974C5BD15/0/DG2ENHRHAND012003.pdf>.

⁸¹³ *Marckx v. Belgium*, 1979.

⁸¹⁴ *Johnston v. Ireland*, European Commission for Human Rights, 1986.

⁸¹⁵ *P.B. and J.S. v. Austria*, 2010; *Schalk and Kopf v. Austria*, 2010.

⁸¹⁶ *Keegan v. Ireland*, 1994.

⁸¹⁷ *Boyle v. The United Kingdom*, 1994.

⁸¹⁸ *Bronda v. Italy*, 1998.

⁸¹⁹ *X., Y. and Z. v. The United Kingdom*, ECtHR, App. No. 21830/93 (1997).

Family reunions, i.e. reunions of the parents with their children, were the aspect of the right to family life that has been violated the most by the states in the region.⁸²⁰ The parents are entitled to request of the state authorities to issue a decision on their parental rights regarding their children, and the state authorities are as a rule obliged to ensure efficient execution of such decisions, and take all reasonable measures to that end, in view of the fact that the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them. In September 2010 the European Court of Human Rights adopted the judgement in the case *Mijušković v. Montenegro*, in which it found a violation of Art. 8 ECHR by Montenegro because of ineffective enforcement of custody over a child. More about this judgment in the chapter Special protection of family and child, p. 439.

In view of the right to the protection of family life, the state has an obligation to ensure an effective system of protection from domestic violence (see ECtHR judgments *A. v. Croatia*, 2010, *Tomašić and others v. Croatia*, 2009). For more detail, see, Protection from domestic violence, page 424.

The Constitution protects the right to private and family life (Art. 40) and states that family shall enjoy special protection (Art. 72(1)). Under the Constitution, marriage may be entered into only on the basis of the free consent of the woman and the man (Art. 71(1)), wherefore it actually declares same sex marriages unconstitutional. Although marriage is governed by national laws, the authors of the Constitution need not have established the issue as a constitutional principle, whereby they hindered any potential change in the legislation (the right to marry and found a family are afforded to “men and women” under Article 12 of the ECHR as well). Under the Constitution, marriage shall be based on the equality of the spouses (Art. 71(2)).

The Family Act (*Sl. list CG*, 1/2007) does not explicitly guarantee the right to respect of family life. As opposed to ECtHR case law, the Act provides a narrow definition of family, as a union of parents, children and other relatives (Art. 2). It guarantees the right of the child to maintain a personal relationship with the parent s/he is not living with (Art. 63(1)) unless there are reasons for partly or fully depriving that parent of parental rights or in case of domestic violence (Art. 63(3)). The Act, however, does not mention the child’s right to maintain a personal relationship with other relatives s/he is particularly close to. The Act defines an extramarital union as “a longer union between a man and a woman” and equates extramarital unions and marriage with respect to alimony and other property legal relations (Art.

⁸²⁰ See judgments in cases in which the ECtHR found a violation of the right to respect of family life: *V.A.M. v. Serbia*, 2007; *Tomic v. Serbia*, 2007; *Karadzic v. Croatia*, 2005; *Sobota-Gajic v. Bosnia and Herzegovina*, 2007; *Krivosej v. Serbia*, 2010; *Mijušković v. Montenegro*, 2010, and in the case in which it did not find a breach because the state had undertaken all the reasonable measures to ensure family reunion, although the union did not take place: *Damnjanovic v. Serbia*, 2008.

12(1)). Pursuant to ECtHR's case law, the CoE in 2010 recommended that "where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples".⁸²¹

The Criminal Code incriminates Disclosure of Another's Personal and Family Circumstances (Art. 197). This offence warrants a fine ranging between three and ten thousand euros (Art. 197(1)). If it was committed via the media or similar means, or at a public gathering, the offender shall be fined between five and fourteen thousand euros (Art. 197(2)). If the disclosed information may or does incur grave consequences to the injured party, the perpetrator shall be fined minimum eight thousand euros (Art. 197(3)). This crime is incriminated within the chapter on crimes against honour and reputation, rather than the chapter on human rights. Its description clearly indicates that it is a version of insult and slander/libel, given that disclosure of information about another's personal or family circumstances is linked to damage to that person's honour or reputation. On the other hand, paragraph 4 of the Article relieves the offender of liability in the event it is established that the disclosed information is true, all of which indicates that the essence of the Article is not to protect the human right to privacy but honour and reputation.

The right to protection of privacy and family life may be exercised by invoking Article 207 of the Obligations Act⁸²² governing pecuniary compensation for violations of the rights of a person, but such case-law has not been noted.

Determination of Paternity

The ECtHR established that a person has a vital interest in receiving the information necessary to uncover the truth about an important aspect of his/her personal identity, his/her biological parents i.e. paternity, a right protected under Article 8 of the ECHR (*Mikulić v. Croatia*, 2002; *Jevremović v. Serbia*, 2007). In these two cases, the ECtHR found that the state was obliged to ensure that the courts establish paternity within a reasonable time regardless of the father's agreement to DNA testing. If the legal system lacks of any procedural measure to compel the alleged father to comply with the court order on DNA testing, it is for the states to organise their legal systems in such a way that their courts can guarantee the right of everyone to obtain a final decision within a reasonable time through the assessment of other relevant evidence.

⁸²¹ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies), paragraph 23, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1606669>.

⁸²² *Sl. list CG*, 47/2008.

The general provisions on the burden of proof in the Civil Procedure Act⁸²³ apply in paternity and maternity disputes given that the Montenegrin Family Act does not include provisions on evidence. Therefore, one should consider in practice the above ECtHR case-law.

Practice

Agreement between the Police Directorate and M'tel Company

In September 2007, the Montenegrin Government Police Directorate (Crime Police Sector) and the telecommunication services operator M'tel d.o.o. concluded an Agreement on mutual cooperation with the aim of preventing, discovering and documenting crimes and ensuring optimum conditions for the direct exchange of required data (Art. 1).⁸²⁴ The Agreement, which the Police Directorate classified as confidential, was signed pursuant to a measure envisaged by the Action Plan for the Implementation of the Programme for Combating Corruption and Organised Crime entitled "securing direct links and connections with databases of providers of telecommunication services for the purpose of collecting data in accordance with police powers under the CPC".⁸²⁵ Under Article 7 of the Agreement, the Police Directorate and M'tel agree that the police authority may access and use all the data it needs whenever necessary. Under Article 8, the equipment enabling this (and the relevant interface) is to provide the authority with round the clock access and use of the required data in real time at the moment the communication is generated (1) after it is processed by the operator (2) and in standard form (3). Executive Director of the NGO Network for the Affirmation of the NGO Sector (MANS) Vanja Čalović filed a constitutional appeal in July 2008⁸²⁶ claiming a violation of the right to privacy, because the Agreement, concluded pursuant to Article 230 of the CPC, provided the Police Directorate uncontrolled access to M'tel's database. The Constitutional Court in September 2010 rejected the appeal explaining that the Constitutional Court can review only an individual enactment impacting on the specific rights and obligations of the appellant and that it did not have the jurisdiction to review the actions of the Police Directorate during the conclusion of the agreement with M'tel or the Agreement itself.⁸²⁷ This case resulted in the filing of an application with the ECtHR in early 2011 claiming a violation of the right to privacy enshrined in Article 8 of the ECHR.

⁸²³ Articles 9 and 219, Civil Procedure Act (*Sl. list RCG 22/2004 and 76/2006*).

⁸²⁴ The Agreement is available in HRA's archives.

⁸²⁵ The Action Plan is available at: <http://www.mup.gov.me/en/library/document?pagerIndex=2>.

⁸²⁶ The text of the constitutional appeal is available in HRA's archives.

⁸²⁷ Constitutional Court Decision U. 91/08, June 2010, communicated on 13 September 2010, available in HRA's archives.

In April 2011, acting on its own initiative, the Agency for the Protection of Personal Data adopted a decision which ordered the Police Directorate to stop the practice of collecting data on phone calls, and to destroy the collected material.⁸²⁸ In subsequent inspection, the Agency found no irregularities in the work of the Police when using the direct links in databases of mobile operators.⁸²⁹

Personal Data Protection Agency

The formal requirements for the launch of the Personal Data Protection Agency were satisfied on 16 March, when the Montenegrin Assembly Administrative Committee endorsed the Rulebook on the Agency Staff and Job Structure.⁸³⁰ After the deputy of the opposition Movement for Changes (PzP) Koča Pavlović notified the Personal Data Protection Agency Director and Council that the ruling Democratic Party of Socialists (DPS) had established its database of all voters in Montenegro in contravention of the law and were using it to blackmail the citizens ahead of the elections⁸³¹, the Agency Council asked the DPS to notify it whether it had a register of the personal data of Montenegro's citizens within eight days⁸³², explaining that the Agency still did not have a body which could itself check the allegation.⁸³³ After the Agency Council members met with DPS deputy Predrag Sekulić, who said the DPS was not violating the citizens' rights and freedoms, the Council held a session and rendered an opinion that it could not establish that the DPS was violating the rights and freedoms regarding personal data protection on the basis of the obtained material.⁸³⁴ In June 2010, the opposition Socialist People's Party (SNP) asked the MIA to provide it with data of persons who had changed address in Podgorica (which would have included their first and last names, personal identification numbers, dates of change of address, former and present addresses). The MIA's reply was negative and it explained that the Agency had issued an opinion advising it to reject the request.⁸³⁵

In its first report on its work, the Agency said that most of the institutions had failed to appoint officers responsible for the databases, that the responsible officers had failed to take decisions on the installation of video

⁸²⁸ "Police stopped retrieving data from the mobile operators", *TV Vijesti*, 28 April 2011.

⁸²⁹ "They worked in accordance with the law", *Vijesti*, 6 July 2011.

⁸³⁰ "The Personal Data Protection Agency May Officially Begin Work", *Impuls 2 TV In*, 16 March 2010.

⁸³¹ "Securing Votes by Blackmail", *Vijesti*, 3 May 2010.

⁸³² "Personal Data Protection Agency Reviews PzP Request", *Info2 Montena TV*, 4 May 2010.

⁸³³ "They Will Take DPS' Word for It, Rather than Perform a Check Themselves", *Vijesti*, 5 May 2010.

⁸³⁴ "Council Takes' DPS' Word for It" *Dan*, 15 May 2010.

⁸³⁵ "Citizens, not Parties, Should Demand Protection of Their Jeopardised Rights", *Pobjeda*, 10 June 2010.

surveillance (to monitor access, entry to and departure from official or business premises, ensure the security of people and property and safety of workers) specifying the reasons for installing the video surveillance, that they had failed to visibly display notifications of video surveillance, that many of them had failed to obtain the consent of the persons whose personal data were published on their bulletin boards or websites, that the protection of personal data was inadequate and that it noted a lack of awareness of regulations governing personal data protection.⁸³⁶ The Personal Data Protection Agency in 2010 did not request the launch of misdemeanour or criminal proceedings against anyone for violating the Personal Data Protection Act.⁸³⁷

In late May 2010 the media published the names and identification numbers of donors of the Democratic Party of Socialists (DPS).⁸³⁸ The lists were downloaded from the website of the State Election Commission (SEC). Immediately after the Agency responded, the lists were removed from the SEC website. On the basis of statements of a number of persons whose names were on the list, but who stated that they had not donated money, a competent state prosecutor was expected to act.⁸³⁹

Case of Alleged Wiretapping in the Podgorica Superior Court

In October 2010, the Podgorica Superior Court upheld⁸⁴⁰ the Podgorica Basic Court judgment finding *Monitor* journalist Petar Komnenić guilty of libel and ordering him to pay 3,000 euros to the former Superior Court President Ivica Stanković.⁸⁴¹ Stanković had sued Komnenić over an article in which he had claimed the police were wiretapping Stanković at the request of the special organised crime prosecutor with respect to his alleged links with crime.⁸⁴² In his article, Komnenić quoted former Superior Court judge Radovan Mandić as saying that Stanković was under secret surveillance measures. Mandić reiterated his statement at the trial as well. The prosecutors have not yet investigated the alleged wiretapping in the Superior Court which Komnenić had talked about and provided evidence of during the trial, notably: the statement by former judge Mandić that his former colleague and Podgorica Superior Court judge Hamid Ganjola told him that he had approved wiretapping of Mandić and that “half the judges” of the Superior

⁸³⁶ “Personal Data Protection Agency Publishes Work Results”, *Infozoom TV Elmag*, 10 December 2010.

⁸³⁷ “Law is Being Broken but They Would Rather Not Report Anyone Yet”, *Vijesti*, 11 December 2010.

⁸³⁸ “Milo and Sveto donated only 1,500 Euros”, *Dan*, 19 May 2011.

⁸³⁹ “Court to verify the accuracy of the Report”, *Dan*, 5 June 2011.

⁸⁴⁰ The Superior Court judgment is available in the Montenegrin language at: http://www.hraccion.org/wp-content/uploads/Stankovic-Komnenic-Presuda_Visi_sud.pdf.

⁸⁴¹ The Basic Court judgment is available in the Montenegrin language at: http://www.hraccion.org/wp-content/uploads/komnenic_stankovic.pdf.

⁸⁴² “Judges under Surveillance”, *Monitor*, 18 May 2007.

Court were being wiretapped, the statement by the then special prosecutor Stojanka Radović, who testified that the case regarding the secret surveillance measures which judge Ganjola was charged with had “disappeared” somewhere between the court and the prosecution; the indictment against the men accused of killing police inspector Šćekić stating that the Podgorica Higher Court judges had let the co-defendants visit each other in detention in contravention of the law, etc. The state prosecution office twice rejected HRA’s requests for information on the measures the state prosecutors have taken regarding the above allegations.⁸⁴³ On 1 June 2011 the HRA won the administrative dispute regarding this case, so we expect to obtain this information.⁸⁴⁴

Data Required from the Workers of the Electricity Company of Montenegro

In December 2010, the management of the Electricity Company of Montenegro (EPCG) asked the workers to fill a form, in which they were asked to specify their health card, ID and passport numbers, national affiliation and citizenship.⁸⁴⁵ The form stated that these data were required by the Human Resources Department to implement the new human resources programme. Some of the workers alerted the media, believing that the Montenegrin members of the company management wanted to find out what their national affiliation was and that those with the ‘wrong one’ would be the first to lose their jobs if the company opted for downsizing. The EPCG said that the programme had been designed by a referent regional company with the aim of create quality records of the 2,900 or so EPCG workers, who were not obliged to answer the question on their national affiliation. The Personal Data Protection Agency said it remained unclear on what legal grounds the workers had been asked to declare their national affiliation but that it would perform a check if it received a complaint. According to the Agency, no such complaint had been submitted to it by June 2011.

Access to National Security Agency Personal Files

NGO MANS’ senior managers in July 2010 asked the National Security Agency whether it kept data and files on them and, if so, to provide them insight in the files. Agency Director Chief of Cabinet Miroslav Bjelica notified them that they could not be allowed access to their data the Agency was collecting because such access “may prevent i.e. put at risk the perform-

⁸⁴³ The request is available in Montenegrin at: <http://www.hracion.org/wp-content/uploads/zahtjev-1205.pdf>.

⁸⁴⁴ For more detail see: <http://www.hracion.org/wp-content/uploads/ADMINISTRATIVE-COURT-ADOPTED-HRA-CLAIM.pdf>.

⁸⁴⁵ “Workers against National Count”, *Vijesti*, 29 December 2010.

ance of specific duties within the remit of the National Security Agency”.⁸⁴⁶ MANS qualified the Agency’s response as pressure and attempt of intimidation.⁸⁴⁷ Another 41 people (24 journalists, ten political party representatives, seven of whom deputies in the National Assembly, and seven MANS staff) subsequently asked the National Security Agency whether it kept secret files on them.⁸⁴⁸ Most received replies stating that they were not the objects of ANB surveillance (several people did not receive any replies from the Agency).⁸⁴⁹ In response to a request for a hearing of the then ANB Director Duško Marković by the opposition members of the Defence and Security Committee, the Committee decided to put off the issue for September 2010, until the Agency submitted information on its actions in this case.⁸⁵⁰ At a session in October, the Agency notified the Committee that its agents were not following opposition politicians, NGO activists or journalists, but that the document was classified as confidential. This Committee session had been primarily called to review the candidacy of the new ANB Director and its agenda did not include the issue of the reported wiretapping and surveillance of MANS staff.⁸⁵¹ The Committee had not held a session devoted to that case by the time this Report went into print.

According to information released by the ANB, “274 requests for insight in files were submitted and it was established that only 131 of them existed in the 12 months during which the 2001 Decree was in force. Eighty two citizens were granted insight under the Decree. After the Decree went out of force and before the National Security Agency and Free Access to Information Acts were passed in 2005, the service allowed access to the files and this right was exercised by eight people. After the Acts were adopted, the ANB responded to 23 requests in accordance with the procedure. It established that no files existed or that the legal conditions for allowing insight in them had not been met in 19 cases, while four requests were approved.”⁸⁵²

According to a US State Department report, four persons sought access to files kept by the secret service in the 1945–1989 period in the first nine months of 2010. The ANB responded that it had no information about those persons.⁸⁵³ The Report states that “some observers believed that the authori-

⁸⁴⁶ “MANS under Surveillance because of Lazović”, *Dan*, 24 July 2010

⁸⁴⁷ “ANB Trying to Intimidate Us, Vanja Čalović Assesses”, *MBC*, front page, 27 July 2010.

⁸⁴⁸ “41 People File Requests”, *Pobjeda*, 27 July 2010.

⁸⁴⁹ “We Still Can’t Believe You’re Not Watching over US, at Least a Little Bit”, *Vijesti*, 24 August 2010.

⁸⁵⁰ “Defence and Security Committee Unwilling to Control ANB’s Work”, *Infozoom*, RTV *Elmag*, 30 July 2010.

⁸⁵¹ “We’re Not Following Either the Opposition, MANS or Journalists”, *Vijesti*, 7 October 2010.

⁸⁵² “Dust Fell over 10,000 Files”, *Pobjeda*, 28 December 2009.

⁸⁵³ U. S. Department of State, 2010 Human Rights Reports: Montenegro, <http://www.state.gov/g/drl/rls/hrrpt/2010/eur/154441.htm>

ties selectively used wiretapping and surveillance against opposition parties and other groups without court authorization” and that “many individuals and organizations operated on the assumption that they were, or could be, under surveillance”.⁸⁵⁴ Human Rights Action also assesses that there is significant public mistrust of the lawfulness and impartiality of the ANB’s work, to which the valid legislation has contributed.

⁸⁵⁴ *Ibid.*

Freedom of Thought, Conscience and Religion

Article 18, ICCPR:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such restrictions as are prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents, and, when applicable, legal guardians, to ensure the religious and moral education of their children in conformity with their own convictions.

Article 9, ECHR:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society, in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

General

Protection of thought, conscience and belief of every individual begins with the right to have and change one's beliefs. The essence of this right is the prevention of state indoctrination and ensuring the freedom that allows the change of thought and religion of every individual.⁸⁵⁵ This right to thought

⁸⁵⁵ For more detail see "Freedom of thought, conscience and religion – a guide for the application of Article 9 of the European Convention on Human Rights", Jim Murdoch, the Council of Europe, Belgrade, 2008 (available at: http://www.hraction.org/?page_id=230).

and belief belongs to intimate sphere, it is absolute and cannot be restricted. It is allowed to limit the way of expression of religion, only to the extent necessary in a democratic society for clearly stated reasons in paragraph 3 of Art. 18 paragraph 2 ICCPR and Art. 9 ECHR.

The European Court of Human Rights has found that religions which shall be protected are all traditional churches and Muslim communities, but also religious groups of a later age, such as Jehovah's Witnesses,⁸⁵⁶ Church of Scientology,⁸⁵⁷ Unification (Moon) Church,⁸⁵⁸ and so on. Also, the freedom of thought and religion includes the right not to be religious or practice religion.⁸⁵⁹

The State should normally refrain from interfering in the freedom of religion, and ensure religious pluralism and religious tolerance. Neutral mediation between factions within the religious community generally does not constitute state interference with the rights of believers under Art. 9 ECHR, but the government must be extremely cautious in this delicate area.⁸⁶⁰

The Constitution sets out in principle the separation of religious communities⁸⁶¹ from the state (Art. 14 (1)). Religious communities are guaranteed freedom and equality in the exercise of religious rites and religious affairs (Art. 14(2)). In contrast to the 1992 Constitution, the new Montenegrin Constitution does not explicitly state that the state shall financially support religious communities⁸⁶².

The Constitution guarantees freedom of thought, conscience and religion, the right to change one's religion or belief, and freedom, alone or in community with others and in public or private, to manifest one's religion or belief, in worship, teaching, practice and observance (Art. 46(1)). It explicitly lays down that no one is obliged to declare his religious and other beliefs (Art. 46(2)). Freedom to express religious beliefs may be restricted "only if necessary to protect human life and health, public safety, as well as other rights guaranteed by the Constitution" (Art. 46(3)), in accordance with the restrictions permitted by the ICCPR and the ECHR. The Constitution also

⁸⁵⁶ E.g. *Thlimmenos v. Greece*, 2000.

⁸⁵⁷ *Church of Scientology Moscow v. Russia*, 2007.

⁸⁵⁸ In the case *Nolan and K. v. Russia*, 2009, Russia has not presented any evidence to the European Court of Human Rights supporting the claim that the activities of missionaries of the church had a negative impact on national security, i.e. rights of others (see paragraph 74).

⁸⁵⁹ *Kokkinakis v. Greece*, 1993, para. 31.

⁸⁶⁰ The Court found this principle in ruling *Supreme Holy Council of the Muslim Community v. Bulgaria*, 2004, where it found a violation of Art. 9 ECHR because the authorities have gone beyond the "neutral mediation" by actively seeking the union of the split Islamic community and supporting the establishment of a single leadership against the will of one of two opposing leaderships.

⁸⁶¹ Art. 11 of the former (1992) Constitution of the Republic of Montenegro mentions "religions": "[The] Orthodox Church, the Islamic Religious Community, the Roman Catholic Church and other religions are separate from the state".

⁸⁶² See Art. 11 (4) of the Constitution of the Republic of Montenegro, *Sl. list RCG*, 48/92

guarantees the right to conscientious objection – no one is obliged, contrary to his religion or faith, to perform a military or other service involving the use of weapons (Art. 48).

The Constitution does not explicitly mention prohibition of the work of a religious community. It allows for a ban by court order on “dissemination of information and ideas via the public media” (Art. 50) if required so as to: prevent incitement to forcibly overthrow the constitutional order; preserve the territorial integrity of Montenegro; prevent the propagation of war or incitement to violence or commission of a crime; prevent the propagation of racial, national and religious hatred or discrimination. The Constitutional Court may prohibit the work of a political party or NGO “if their activity is directed or aimed at forcibly overthrowing the constitutional order, violation of Montenegro’s territorial integrity, guaranteed human rights and freedoms or incitement to racial, religious and other forms of hatred and intolerance”⁸⁶³, but makes no mention of religious communities”.

The Montenegrin Criminal Code incriminates *Violation of the Freedom of Confession and Performance of Religious Rites* (Art. 161), prescribing a fine or sentence of imprisonment not exceeding two years for preventing or restricting freedom of belief or confession, or for preventing or obstructing the performance of religious rites. A fine or maximum one-year imprisonment is envisaged for coercing another to declare his/her religious beliefs. Any official committing these crimes shall receive a sentence of up to three years.

It is also a crime to cause and spread religious hatred (*Incitement of National, Racial and Religious Hate, Dissension or Intolerance*, Art. 370), which includes mockery of religious symbols, the desecration of monuments, memorial tablets or tombs, punishable by a prison sentences ranging from 6 months to ten years if the crime is the result of an abuse of position or authority, or if it leads to violence or other consequences detrimental to the coexistence of peoples, national minorities or ethnic groups living in Montenegro.

The Legal Status of Religious Communities Act

The status of religious communities in Montenegro is defined by the Legal Status of Religious Communities Act which has been in force, virtually unaltered, since 1977.⁸⁶⁴ Pursuant to this law, individuals may found religious communities by registering them with the internal affairs authority in the municipality where the particular religious community is based.

⁸⁶³ Montenegrin Constitutional Court Act, Art. 74 *Sl. list RCG*, 64/08 of 27 October 2008.

⁸⁶⁴ *Sl. list SR CG*, 9/77, 26/77, 29/89, 39/89, *Službeni list RCG*, 27/94 and 36/03. (The amounts of the fines for violations were changed, and the Constitutional Court in 2003 declared Art. 13 of the Act unconstitutional. This article laid down that marriage according to religious rite could only take place after a civil marriage had been concluded before the competent state bodies and that a child could be christened only after registering it in the Register of Births).

According to the Act, all religious communities in Montenegro enjoy equal rights and have the same legal status as civil legal persons (Art. 2). There is no division into traditional and other religious communities.⁸⁶⁵

A religious community shall be considered to be founded when the founder applied for registration with the relevant internal affairs authority (Art. 2 (2)). The founder must enter the name and address of the religious community, and indicate the premises in which religious affairs will be performed. A religious community ceases to exist by submission of a statement to that effect to the competent state authority.

Religious communities are free in their conduct of religious affairs and rites, and “their abuse is prohibited, as is the abuse of religious activity or feelings for political purposes” (Art. 5). “Engagement in activity of general and particular public importance and the founding of bodies for such activity” are also forbidden by Art. 6, except where the preservation and maintenance of objects comprising the cultural, historical or ethnological heritage owned by religious communities are concerned (Art. 6 (2)). Under Article 25, a religious community engaging in work not considered to be a religious rite or religious affair is a misdemeanour, subject to a fine ranging from ten to three hundred times the minimum wage. The article also envisages imprisonment of up to 60 days for the responsible person in the religious community. Despite these provisions, religious communities in Montenegro carry out work of general and particular public importance. The SOC Metropolitan of Montenegro and the Littoral runs a registered tourist organisation, *Odigitrija*, with a head office in Budva, hospitality facilities – spiritual centres in Podgorica, Nikšić and Herceg Novi, the *Podostrog* Hotel, and a soup kitchen in Podgorica.⁸⁶⁶

Religious organisations are not liable for taxation.⁸⁶⁷ No VAT is paid on services satisfying the needs of their congregations. However, if the services they provide or produce are market-oriented and they earn more than €18,000 in the course of a year, they are subject to VAT.⁸⁶⁸

Religious communities in Montenegro are free to found religious secondary schools with independent curricula to prepare students for priesthood (Art. 18).

Under Article 23 of the Legal Status of Religious Communities Act, “socio-political communities may give [religious communities] financial assistance”, and “the decision by which assistance is distributed may declare the purpose for which such assistance or part of it may be used”.

⁸⁶⁵ As for instance in Serbia. See Art. 10 of the Churches and Religious Communities Act, *Sl. glasnik Republike Srbije*, 36/2006.

⁸⁶⁶ “From Spiritual Centres and a Tourist Agency to a Hotel in Budva”, *Vijesti*, 5 January 2011.

⁸⁶⁷ 2010 Report on International Religious Freedom, www.state.gov.

⁸⁶⁸ *Ibid.*; in the period covered by the State Department report, the revenue office received no reports from religious communities on profit-making activities subject to taxation.

A Ministry for Religion existed up to the end of the 1990s. At present there is no particular state agency for relations with religious communities. The Government General Secretariat approves financial assistance to religious communities based on the Budget Act.⁸⁶⁹ Criteria for the allocation of assistance have not been defined.

The 2010 Budget Act does not cite the legal grounds for allocating funds to religious communities, but quotes a sum of €280,000 under the heading “transfers to individuals, non-government and public sectors”.⁸⁷⁰ By 1 September 2010, the Government General Secretariat had allotted €163,133.00 of this sum to the religious communities, “by way of assistance to the religious communities, for the construction and reconstruction of religious buildings and health care for members of the clergy.”⁸⁷¹ Of this sum, €94,451.00 were allocated to the Serbian Orthodox Church, €88,500.00 to the Montenegrin Orthodox Church, €55,731.00 to the Islamic Religious Community and €17,950.00 to the Roman Catholic Church.⁸⁷²

For restitution of property confiscated from religious communities, see Chapter Right to Property, p. 369.

Religious Holidays

Pursuant to the Religious Holidays Act, believers in Montenegro have the right to paid leave on religious holidays.⁸⁷³ The Orthodox are entitled to five days: Christmas Eve and Christmas day (two days), Good Friday, Easter and their family patron saint’s day, as do Roman Catholics who have two days each for Christmas and Easter and one for All Saints’ Day. Moslems celebrate six days: three each for the beginning and end of Ramadan, and Jews two days each for Passover and Yom Kippur (Art. 3).

Under the Act, the responsible officer of a company, institution or another legal person, state authority or entrepreneur shall be fined from half to twenty times the minimum wage in the Republic for the failure to provide paid leave to their employees in order to celebrate a religious holiday (Art. 5).

The Right of Prisoners to Religious Services

The Penal Sanctions Enforcement Act sets out that convicts serving sentences in the prisons in Spuž and Bijelo Polje must be ensured the fulfillment

⁸⁶⁹ Reply by the Government PR Office of 16 September 2010.

⁸⁷⁰ Montenegrin Budget Act, 2010, SU-SK 01-976/59

⁸⁷¹ Reply by the Government General Secretariat, UP 8/2-11.

⁸⁷² *Ibid.*

⁸⁷³ Act on Celebration of Religious Holidays, *Sl. list CG*, 56/93, Art. 1 of the Act – 27/94-391

of their fundamental religious needs⁸⁷⁴ Convicts in Montenegro are entitled to lead a “religious life” and to have contacts with the clergy of their confession in keeping with the prison House Rules (Art. 51).

According to the prison administration, convicts of every religious persuasion are allowed visits from their clergy, not only on religious holidays, but also by private invitation. Each person deprived of liberty shall be permitted to fulfill his religious needs daily, by worship, adhering to a particular diet, wear the clothes [of his religion] and possess books containing the teachings and morals of the religion to which he belongs, take meals at specific times etc. Persons in solitary confinement may also have contact with the clergy should they so desire. Six religious ceremonies were allegedly conducted by 12 members of the clergy in 2010.

There is no separate building for religious rites at the penitentiaries. For the moment they take place in a separate room set aside for the purpose, the interior being adapted to the ritual of each particular religion. One of the investments envisaged in the near future is the building of a religious facility.

The food given to convicts and persons serving misdemeanor sentences at the penitentiaries is adapted to religious custom and cooked separately for Orthodox, Catholics and particularly for Muslims.

The prison administration states that the inmates are served more festive meals in keeping with their religious customs on important religious holidays. Information received by HRA from several people who finished serving their sentences in late 2010 does not quite concur with the information from the prison administration, particularly with respect to religious diets. Neither were these prisoners informed of their rights to lead a religious life in detention and prison.

Conscientious Objection

Human Rights Committee had already in 1993, and finally in 2006 confirmed the right not to be punished for refusing military service due to philosophical or religious beliefs. In 2011 in the case *Bayatyan v. Armenia* the European Court of Human Rights upheld the right to conscientious objection as a minimum European standard, and only after all members of the Council of Europe, except Turkey, recognized that right.

Mandatory military service in Montenegro was abolished in September 2006 by a decision of the Montenegrin President Filip Vujanović, and the army has been professionalised.⁸⁷⁵ Nonetheless, Art. 34 of the Constitution guarantees freedom of belief and conscience, as does Art. 166 of the Army of

⁸⁷⁴ Penal Sanctions Enforcement Act, *Sl. list RCG*, 25/94, 29/94, 69/2003 and 65/2004, Art. 15.

⁸⁷⁵ “Recruits: At Ease! President Vujanović Abolishes Military Service”, *Vijesti*, 31 August 2006.

Montenegro Act: “A person who, due to his religion and beliefs, is not prepared to participate in the performance of military duties which include the bearing of arms shall be acknowledged as a conscientious objector”.⁸⁷⁶

Religious Instruction

The state has no obligation under international agreements to permit religious instruction in public schools.⁸⁷⁷ More on the right of parents to provide their children with instruction that is consistent with their religious and philosophical convictions (from Art. 2 of Protocol 1 to the ECHR and Art. 13(3) ICESCR) in chapter The Right to Education, p. 544.

There is no religious instruction in primary or secondary schools in Montenegro. There are two secondary religious schools in Montenegro: the School of Theology at Cetinje, attached to the SOC Metropolitanate of Montenegro and the Littoral, and a medresa of the Islamic Community.

Freedom of Religion in Practice

Census

According to the results of the 2011 census, 72% of the people of Montenegro are Orthodox, 18% Moslem, 3,4% Catholic, 1,3% Agnostic and Atheist, with some other smaller religious communities, among which the Adventists are the largest (894 or 0,14%).⁸⁷⁸ Thus, Montenegro is a very religious community (only 1.3% said that they are agnostics and atheists), which is interesting, especially if one considers that only 20 years ago the Communist Party was in power. Change of attitude on the issue of religion is an integral part of freedom of religion.

Registered Religious Communities

The following religious communities are registered in Montenegro pursuant to the Religious Communities Act⁸⁷⁹: the Evangelical Church of Christ, the Christian Religious Community, Jehovah's Witnesses, the Tuzi Catholic Mission, the Christian Adventist Church, the Word of God Evangelical Church, The Military and Hospitaller Order of St. Lazarus of Jerusalem for Montenegro, the Catholic Religious Community – the Franciscan Mission to

⁸⁷⁶ Art. 166, Army of Montenegro Act, *Sl. list Crne Gore*, 88/09, 31 December 2009.

⁸⁷⁷ See, for example, the ECHR judgment *Council of Churches “Word of Life” and others v. Croatia*, 2010, para. 57–58.

⁸⁷⁸ Montenegrin Statistical Office, <http://www.monstat.org>.

⁸⁷⁹ Reply by the Ministry of Internal Affairs, No. 051/10–20778/3.

Tuzi, the *Mešihat* of the Islamic Community in Montenegro, the Christian Bible Community and the Montenegrin Orthodox Church (based in Cetinje and Nikšić church municipality).⁸⁸⁰ The Metropolitanate of Montenegro and the Littoral of the Serbian Orthodox Church in Montenegro is registered in Serbia, that is to say, it was registered at Federal level in the former State Union of Serbia and Montenegro.⁸⁸¹ Archdiocese of Bar and Diocese of Kotor of the Catholic Church are also not registered in accordance with the law, which does not interfere with their functioning. In June 2011, Prime Minister of Montenegro Igor Lukšić concluded an international treaty (Concordat) with the Vatican and announced a new act on religious communities.⁸⁸²

Relations between the State and Religious Communities

In the opinion of the State Department, the Montenegrin Government generally respects religious freedoms in practice, although there are examples of individual officials and political leaders taking advantage of the clash between the SOC and the MOC for political ends.⁸⁸³ The European Commission assessment is similar, noting that there have been cases where the authorities entered into the dispute between the Serbian and Montenegrin Orthodox Churches, particularly in property matters.⁸⁸⁴

The issue of church property in Montenegro has been the subject of fierce verbal and court disputes, giving rise to occasional incidents between the MOC and the SOC Metropolitanate of Montenegro and the Littoral. Both sides on several occasions physically wrested country churches away from each other. The state first intervened in a property dispute in 2008, when a municipal branch of the Real Estate Directorate took church lands and buildings entered in the Cetinje land register from the SOC Metropolitanate of Montenegro and the Littoral, making them over to local individual churches and monasteries, in order, as they explained, “to correct the errors made during the 1990s, when this religious community mysteriously made over all church property to the Metropolitan, the Metropolitanate, the Belgrade Patriarchate, the Serbian Orthodox Church and individual dioceses operating in Montenegro.”⁸⁸⁵ According to real estate register entries of church property, the SOC Metropolitan of Montenegro and the Littoral became the owner of 35, co-owner of 15 and user of 6 pieces of real estate in the Podgorica and Bijelo Polje municipalities in the 1990s. Specific SOC dioceses, church mu-

⁸⁸⁰ *Ibid.* Also the Internet presentation of the Montenegrin Orthodox Church, <http://www.cpc.org.me>, “On the Registration of the Montenegrin Orthodox Church”, 22 March 2001.

⁸⁸¹ “Montenegrin Metropolitanate Registered in Belgrade”, *Vijesti*, 7 January 2011.

⁸⁸² “Lukšić signed concordat with Vatican”, *Vijesti online*, 24 June 2011.

⁸⁸³ *Ibid.*

⁸⁸⁴ Analytical Report accompanying the Commission Opinion on Montenegro’s application for membership of the European Union, p. 27.

⁸⁸⁵ “Metropolitan Owns the Most”, *Vijesti*, 14 March 2008.

nicipalities, individual churches and monasteries also appear as owners, co-owners and users of church real estate.⁸⁸⁶

The Ministry of Finance annulled the decision of the Cetinje branch of the Real Estate Directorate and restored titular status over church lands and buildings in the municipality to the SOC Metropolitanate.⁸⁸⁷ When the MOC sued, the Administrative Court six months later overturned this decision by the Finance Ministry, reasoning that the conclusion by the Cetinje branch of the Real Estate Directorate had been arrived at “following examination of the records on the report and findings by a land surveyor giving the chronology of registration in each cadastral district, the real estate deed for which correction of the error is sought, and because there was no evidence to suggest that the SOC had registered ownership.”⁸⁸⁸

The Administrative Court returned the case to the Finance Ministry, requesting that the shortcomings indicated in the verdict be eliminated and requesting a new, lawful decision. The Finance Ministry did as it was instructed.

President of the ruling Democratic Party of Socialists (DPS), Milo Đukanović, Montenegrin former prime minister, said in mid-May 2011 that this party advocates for the establishment of the organizationally independent Orthodox Church in Montenegro, which would be created by merging Orthodox believers,⁸⁸⁹ which is also a part of the new program of the party.⁸⁹⁰ This idea was assessed by the MOC as impossible,⁸⁹¹ while the SOC Metropolitan Amfilohije, saw it as interference in internal affairs of the church.⁸⁹²

The Relationship between the two Churches Leading to Incidents

Although the laws in Montenegro appear to ensure a broad spectrum of religious freedoms and rights, in practice there is animosity, not among the various confessions, but between the two Orthodox churches, the Montenegrin Orthodox Church (MOC) and the Serbian Orthodox Church (SOC). The MOC sees itself as the heir to the Montenegrin Church which until 1918 was based in Cetinje, when King Aleksandar Karađorđević decreed its union with the SOC. It seeks the restitution of all churches and monasteries, church lands and other properties entered in the land registers as belonging to the SOC. On the other hand, the SOC does not recognise the MOC as a non-canonical church and considers it a sect.⁸⁹³

⁸⁸⁶ *Ibid.*

⁸⁸⁷ Lukšić Returns Property to Amfilohije”, *Vijesti*, 9 June 2008.

⁸⁸⁸ Ministry to Correct Mistakes”, *Vijesti*, 17 January 2009.

⁸⁸⁹ “DPS wants single Orthodox church”, *Dan*, 17 May 2011.

⁸⁹⁰ The Program is available at: http://www.dps.me/images/stories/Kongres/VI_KONGRES_Program.pdf.

⁸⁹¹ “Churches views on possible unification”, *RTCG*, 17 May 2011.

⁸⁹² “Atheists want to regulate the church”, *Vijesti*, 23 May 2011.

⁸⁹³ *Human Rights in Serbia and Montenegro*, 2005, Belgrade Centre for Human Rights, Belgrade, p. 375, quotes a statement by Metropolitan of the SOC Amfilohije Radović, published in *Vijesti*, 21 August 2005, p. 7.

Clashes between the clergy, congregations and supporters of the two churches are not rare. Frequently, the arbiter in these situations is the Montenegrin Police Directorate, whose personnel usually ban both sides from entering church property.

In contrast to previous years, there were not many incidents between the clergy and supporters of these two Orthodox churches in the reporting period, as was noted in the 2010 US State Department Report on Religious Freedoms. The Report recalls a case in 2009 when three policemen were injured while attempting to prevent a clash between SOC and MOC supporters at Ivanova Korita.⁸⁹⁴

There were no major incidents between the Serbian Orthodox Church (SOC) Metropolitanate of Montenegro and the Littoral and the Montenegrin Orthodox Church (MOC) in 2010 and first half of 2011. The religious holidays, Christmas Eve, Christmas Day and Easter, were celebrated separately and under police security.

According to the 2010 annual report of NGO Youth Initiative for Human Rights, the Theological School and boarding school in Cetinje were stoned on 19 March. Police arrested five minors suspected of having stoned the premises of this ecclesiastical school.⁸⁹⁵

In July, MOC Archpriest Bojan Bojović was assaulted in Risja Do near Nikšić while attempting to walk along a road which leads to a property designated as the site of an MOC church⁸⁹⁶. Local women barred his way, pulling at his robe and not allowing him to pass, after which he called the police. When the police arrived, the SOC supporters dispersed. About sixty people were detained and two were later sentenced to two months for violent conduct.

In August 2010, a gathering of members of the SOC and MOC Metropolitanate of Montenegro and the Littoral at the Church of the Transfiguration at Ivanova Korita passed off without the verbal and physical incidents of previous years⁸⁹⁷. The Cetinje police blocked the entrance to the church, thus preventing both clergy and believers from entering and holding services, which had been scheduled at different times. This was done in order to prevent incidents, a statement by the Police Directorate said⁸⁹⁸. The gatherings of the faithful were peaceful, the services being sung one after the other on the grassy area in front of the church, to the dissatisfaction of both congregations.

At 23:30 on the night of 17 August 2010, unidentified vandals stoned the SOC parish priest's house in Rožaje while the family of the parish priest, Fr. M. Stanišić, was asleep.⁸⁹⁹ The case was reported to the police, who stated

⁸⁹⁴ 2010 Report on International Religious Freedom <http://www.state.gov/g/drl/rls/irf/2010/148967.htm>. www.state.gov.

⁸⁹⁵ NGO Youth Initiative for Human Rights 2010 Report. <http://www.yihr.me>.

⁸⁹⁶ "They Won't Let Him Access His Inheritance", *Vijesti*, 11 July 2010.

⁸⁹⁷ "Police Hold Keys to Church", *Vijesti*, 20 August 2010.

⁸⁹⁸ *Ibid.*

⁸⁹⁹ Parish Priest's House Stoned", *Dan*, 17 August 2010.

that “attacks occur, but not in continuity, making it difficult to discover the culprits”, but that they would take all the necessary steps to discover those “involved in this disgraceful business” and promising to deploy a policeman to watch the priest’s house and the church. The culprits were never discovered, but there were no more attacks.

A hut of the SOC Church Municipality in Podgorica burned down in mid-August 2010 and the Church Secretary, Archpriest Velibor Džomić, stated that the fire was started deliberately. He said he had heard unofficially from members of the fire brigade that a juvenile had started fires in several places in Podgorica on Tuesday.⁹⁰⁰ Following months of investigation, the police confirmed that the fire was caused by old and faulty installations.⁹⁰¹

According to Youth Initiative for Human Rights 2010 Report, stones were thrown at SOC representatives Dragiša Jeremić, Aco Petrić, Dragoje Nišavić and Rajo Prelević on 20 September in Bijelo Polje as they were returning from a service held in the Monastery of the Blessed Virgin in the village of Voljevac. Their car was stoned by persons unknown.⁹⁰²

In early November 2010, a representative of the SOC conditioned his participation in the Coalition for RECOM regional consultations with representatives of religious communities by non-participation of the MOC Metropolitan Mihailo, member of the “non-canonical church”. This request of the SOC representative was supported by a Catholic priest, although it is not clear whether this was the attitude of the Catholic Church in Bosnia&Herzegovina. The organizer asked Metropolitan to leave the meeting to which he had previously invited him. Coordinating Council of RECOM Coalition has subsequently apologized to Metropolitan and sent a delegation to Cetinje to apologize personally.

In mid-June 2011 eight local female residents of the village Dragovoljići, Nikšić (of whom the oldest was 72 years old), avoided serving a ten-day prison sentence by paying the fine in the amount of 250 Euros. The Police Court in Nikšić fined them for disturbing the peace on 21 September 2008 when they tried to prevent priests and supporters of the MOC to reach Risji Do, where the foundation stone for the construction of the monastery has been laid down, by throwing eggs at the police officers who guarded the passage. After refusing to pay, the court amended the fine to a prison sentence, but their friends and locals collected money and paid the fine.⁹⁰³

Desecration of the Islamic Community Premises in Tivat

In late October, the premises of the Islamic Community (IZ) in Tivat were desecrated by persons unknown. According to police, a quantity of pig dung was thrown into the Islamic Community premises, located in the

⁹⁰⁰ “Church Municipality Hut Doused with Petrol”, *Dan*, 6 August 2010.

⁹⁰¹ Information provided to HRA researcher by Mr. Džomić.

⁹⁰² Youth Initiative for Human Rights 2010 Report.

⁹⁰³ “Waited for the police and gained freedom”, *Vijesti*, 14 June 2011.

Dumidran neighbourhood and used for worship and religious services.⁹⁰⁴ Reis of the Islamic Community Rifat Fejzić called for urgent intervention by the state authorities. This vandalism was condemned by some of the opposition parties: the Bosniyak Party, the Movement for Change and the Democratic Centre, together with many non-government organisations. Two days later, police discovered the culprits: Žana Mitić and Zoran Raičević. The State Prosecutor's Office in Kotor defined the crime as damage or destruction to the property of another. A day later, the Podgorica Superior State Prosecutor's Office took over the pretrial procedure and redefined the deed as causing national, racial and religious hatred incriminated under Art. 370 of the Montenegrin Criminal Code.⁹⁰⁵ At the end of March 2011, Ž.M. was sentenced to eight and Z.R. to four months in prison.⁹⁰⁶

In the same month, unidentified perpetrators threw a brick at another religious building of the Islamic Community in Tivat.⁹⁰⁷ The glass of the door was unbroken, but members of the Islamic congregation found rubble and shards outside the building where it had been struck. The police carried out an inquiry, but the culprits were never found.

Staff of Security Guard Montenegro (SGM) barred V.M. from Novi Pazar from entering the Hipotekarna Bank in Bijelo Polje because she was wearing a headscarf (hijab).⁹⁰⁸ After preventing her from entering, SGM personnel told her that this was because of the way she was dressed, and that company regulations did not permit people dressed in this or a similar manner to enter the bank premises. The Islamic Community in Montenegro demanded and obtained an apology from SGM for violating V.M.'s religious rights.⁹⁰⁹ SGM also apologised to the Islamic Community and to V.M., explaining that the entire situation was due to an error of judgement on the part of the security officer on duty. The Reis of the Islamic Community in Montenegro said that "Montenegrin laws allow Moslem women to be photographed for identity documents wearing the hijab, as this is considered to be their outward appearance". The Identity Cards Act sets out that individuals who wear caps or headscarves denoting their ethnicity, religion or customs as part of their usual mode of dress may be photographed wearing a cap or headscarf (Art. 13 (3), as long as the part of the face which permits them to be identified is not covered while the photograph is being taken (Art. 13 (4)).

Following a clash with an official of the Islamic Community, Osman Kajošević and Mirza Haklaj of Podgorica were brought into the police station where they were detained for 6 hours on a report from the Islamic Com-

⁹⁰⁴ "Islamic Community Premises Desecrated", *Vijesti*, 30 October 2010.

⁹⁰⁵ "Not Damage to Property but Incitement of Religious Hatred", *Vijesti*, 3 November 2010.

⁹⁰⁶ "Prison for inciting hatred", *Vijesti*, 26 March 2011.

⁹⁰⁷ "Brick Thrown at Door of House", *Vijesti*, 5 November 2010.

⁹⁰⁸ "Headscarf Made Her Look like Bandit", *Dan*, 24 August 2010.

⁹⁰⁹ *Ibid.*

munity for “disturbing the peace and physically attacking an official”⁹¹⁰, after which they were let go. They later told the media that the incident had not been physical but verbal, and had occurred because the Islamic Community official had called on believers to vote for the DPS Coalition and the Bosniak Party in the course of a religious service, which they took to be a violation of their religious rights. The case was not pursued further.

In mid-December, Džihad Ramović of Podgorica physically attacked the chief imam, Alen Asić, and his deputy in the mosque at Karabuško Polje.⁹¹¹ Ramović was apprehended on suspicion of having committed the crime of violating freedom of confession and religious practice and endangering public safety. The investigating judge of the Basic Court in Podgorica ordered his detention for up to 30 days.

Church on Mt. Rumija

A metal church measuring 3.5 by 2.5 metres and placed on the top of Mt. Rumija by the SOC on 18 June 2005 with the help of a Serbia and Montenegro Army helicopter and logistic support of the Bar police station, has not yet been removed despite a final court ruling. The US State Department Report recalls that according to an announcement by the Ministry of Economic Development in September 2009, the church was to be removed. The building, however, is still standing.⁹¹²

Although Minister for Spatial Planning and Environment Branimir Gvozdenović had been vowing for years that the church would be removed, the media in March 2010 learned that the Government had adopted a decision that the SOC building could not be demolished or removed until further notice, regardless of the fact that it had been established that its erection was illegal. In late 2008, the Government signed a loan with the World Bank which, *inter alia*, envisages the signing of a Memorandum of Understanding with the municipalities and defining a moratorium for the demolition of illegal structures until 30 August 2008.⁹¹³ A similar Memorandum is assumed to have been signed with Bar municipality.⁹¹⁴ The agreement with the World Bank came into effect on 24 February 2009, four years after the decision to remove the metal church on Mt. Rumija became effective.

The erection of the church on Mt. Rumija has been a source of public controversy in Montenegro, located as it is on a spot revered for centuries as

⁹¹⁰ “Imam Preaches Voting for the DPS”, *Dan*, 19 May 2010.

⁹¹¹ “Jihad in Spuž”, *Vijesti*, 11 December 2010.

⁹¹² *International Religious Freedom Report 2010*, US State Department, 2010.

⁹¹³ “Moratorium Protecting Church on Mt. Rumija?”, *Vijesti*, 8 March 2010. A sample of the Memorandum is available on the Government’s Internet page, (www.vlada.me).

⁹¹⁴ The NGO Network for the Affirmation of the Non-Government Sector (MANS) requested a copy of this document under the Freedom of Access to Information Act, but has yet to receive it.

a symbol of ecumenism, where representatives of the three largest religious communities gathered by tradition. Members of the Orthodox, Islamic and Catholic faiths for years joined in pilgrimage to the top of the mountain on the feast of Pentecost. The church is perceived to be damaging to inter-ethnic relations, and local people in the area have discontinued the traditional pilgrimage. Assembly Speaker Ranko Krivokapić condemned the erection of the metal church, calling it a political provocation that insulted a multi-ethnic and civic Montenegro.⁹¹⁵ Deputy Mehmet Bardhi asked Minister Branimir Gvozdenović to remove it from Mt. Rumija, arguing that “the building is illegal and a deliberate provocation to the indigenous Albanian population.”⁹¹⁶

Interruption of Jehovah's Witnesses meeting in Danilovgrad

Although duly reported, the meeting of Jehovah's Witnesses held in April 2011 in Danilovgrad was obstructed. Their religious ceremony marking the death of Christ has been interrupted by fifteen priests, nuns and supporters of the SOC, who, after loud opposition, started singing religious songs, which forced others to leave the Regional Museum in Danilovgrad where the meeting was held, as stated by the Jehovah's Witness representatives.⁹¹⁷ After the incident, the representatives of Jehovah's witnesses filed a criminal complaint against unknown persons for threats and incitement to religious hatred.⁹¹⁸

Church on Sveti Stefan

In mid-April 2011, the Committee for the reconstruction of churches started the process of reconstruction of the ruined church of St. Alexander Nevsky (which dates from the 15th century) in Sveti Stefan, although they did not have the permission of the Institute for Cultural Heritage Preservation.⁹¹⁹ This caused conflict between the Committee, composed of locals, believers and Metropolitanate of Montenegro and the Littoral SOC, on one hand, and the Institute for Cultural Heritage Preservation, according to which the remains of the church should remain archaeological digs, on the other hand, after which the work on Church has stopped.⁹²⁰ The government first decided to demolish the restored parts, and then reached a new

⁹¹⁵ Vesti online, www.vesti-online.com.

⁹¹⁶ Ulcinj City official website, www.visit-ulcinj.com.

⁹¹⁷ “SOC interrupted the Jehovah's Witnesses meeting”, *Vijesti*, 18 April 2011. See also the HRA press release, available at: <http://www.hraction.org/?p=783>.

⁹¹⁸ “Jehovah's Witnesses reported the attackers”, *Vijesti*, 19 April 2011.

⁹¹⁹ “Religious procession transferred stones, tiles and planks to the island”, *Vijesti*, 17 April 2011.

⁹²⁰ “Church on hold until Easter Day passes”, *Vijesti*, 22 April 2011.

decision, which provided for establishment of a Commission which is to settle this issue.⁹²¹ Dissatisfied with the new decision to avoid demolition, the ministers from among the coalition partner SDP refused to attend the Government meetings.⁹²² As the newly formed Commission in early May decided to demolish the restored part, the decision has been carried out.⁹²³ The same decision provides how and under which conditions the church will be restored.⁹²⁴

⁹²¹ “Lukšić between the law and SOC”, *Vijesti*, 29 April 2011.

⁹²² “Church more important than the Saint”, *Novosti*, 3 May 2011.

⁹²³ “Demolition machine tearing down at dawn”, *Vijesti*, 9 May 2011.

⁹²⁴ “Sveti Stefan hosted the police again”, *Vijesti*, 29 June 2011.

Freedom of Expression

Article 19, ICCPR:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in para. 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a) For respect of the rights or reputations of others;
 - b) For the protection of national security or of public order (*ordre public*), or of public health and morals.

Article 10, ECHR:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

General

The Constitution of Montenegro guarantees the freedom of thought (Art. 46(1)) and lays down that no one shall be obliged to declare his or her beliefs (Art. 46(2)). These two provisions together should ensure that there is no interference in anyone's right to hold opinions, pursuant to Article 19(1) of the ICCPR.

The Constitution enshrines the right to freedom of expression orally, in writing, by image or in any other manner (Art. 47(1)). It also guarantees the freedom of the press and other types of public information (Art. 49(1)) and the right to establish newspapers and other public media outlets without prior authorisation (Art. 49(2)). The Constitution also guarantees the freedom of scientific, cultural and artistic creativity (Art. 76(1)) and of the publication of works of art and science (Art. 76(2)). Article 52 enshrines the right of access to information.

Under the Constitution, freedom of expression may be limited only by another's right to dignity, reputation and honour or to protect the public morals or security of Montenegro (Art. 47(2)), wherefore it lays down fewer grounds for limiting the freedom of expression than international human rights treaties. The Constitution unnecessarily limits the restriction of the freedom of expression to protect "the rights of others" in the ICCPR and ECHR merely to the protection of "dignity, reputation and honour", which may comprise the right to privacy, but not some other personal rights where the restriction of the freedom of expression should be permitted, such as, for instance, the right to physical safety (integrity). On the other hand, the restriction of the freedom of expression with the aim of protecting "dignity, reputation and honour" in conjunction with the disputed guarantee of the right to compensation for the publication of untrue data or information in Article 49(3) of the Constitution, points to a broad interpretation of the restriction of freedom of expression to protect another's honour and reputation, which is in contravention of European standards.⁹²⁵ The ECtHR established the standard of so-called "reasonable publication" under which if an article published incorrect information on an issue of general interest provided that s/he was acting in good faith i.e. abided by ethics of journalism, burdening the journalist with the compensation of damages constitutes a violation of the freedom of expression.⁹²⁶ Freedom of expression is also violated if the journalist relied on a report by a state inspector or another authority, which was subsequently found to be incorrect⁹²⁷ or carried a statement of another person or media outlet to continue a debate of public interest, not with the intention of arbitrarily attacking someone's reputation.⁹²⁸ This is why the constitutional guarantee of compensation for the publication of untrue information ought to be deleted.⁹²⁹

⁹²⁵ In its Opinion on the Montenegrin Constitution, the Venice Commission stated the following: "The Articles give emphasis to the protection of "dignity, reputation and honour" and the provision of a remedy for the publication of untrue, incomplete or incorrectly conveyed information that does not necessarily represent the Strasbourg Court's approach to Article 10 ECHR", European Commission for Democracy through Law (Venice Commission), Opinion No. 392/2006, Strasbourg, 20 December 2007, paragraph. 41.

⁹²⁶ *Bladet Tromsø and Stensaa v. Germany*, ECHR, App. No. 21980/93 (1999).

⁹²⁷ *Ibid.*

⁹²⁸ *Ibid. Thoma v. Luxembourg*, ECHR, App. No. 38432/97 (2001); *Lepojić v. Serbia*, ECHR, App. No. 13909/05 (2007).

⁹²⁹ Human Rights Action in November 2010 proposed the reform of liability for breach of honour and reputation in Montenegro, which, *inter alia*, includes the proposals to amend

The Constitution lays down that there shall be no censorship in Montenegro (Art. 50(1)) and that the competent court may prevent the dissemination of information and ideas via media outlets only if necessary to: prevent calls for the violent overthrow of the constitutional order; preserve the territorial integrity of Montenegro; prevent propaganda for war or incitement to violence or the commission of crime or prevent propagation of racial, national and religious hatred or discrimination (Art. 50(2)).

Establishment and Work of Electronic Media

The establishment and work of electronic media is governed by the Electronic Media Act (*Sl. list CG*, 46/2010), the Electronic Communications Act (*Sl. list CG*, 50/2008, 70/2009 and 49/2010) and the Act on Public Broadcasting Services of Montenegro (*Sl. list CG*, 79/2008), which is a *lex specialis* for the Radio and Television of Montenegro (RTCG).

Electronic Media Act

The Electronic Media Act, adopted in July 2010, governs the rights, duties and obligations of legal and natural persons producing and providing audio-visual media services (AVM services), electronic publication services via electronic communication networks, and the powers, status and sources of funding of the Electronic Media Agency. The Electronic Media Agency is an independent authority regulating AVM services, primarily charged with granting licences to providers of AVM services. The Agency is an autonomous legal person and functionally independent from all state authorities and legal and natural persons involved in the production and broadcasting of radio and TV programmes or the provision of other AVM services. The Agency is established by the state and the five-member Agency Council exercises the founding rights on behalf of the state. The Council members from the ranks of eminent experts are appointed and dismissed by the Assembly of Montenegro at the proposal of the: University, association of commercial broadcasters, human rights NGOs and the Montenegrin PEN Centre. The Agency Director is appointed by the Council among applicants who applied in an open recruitment procedure. The Agency is financially independent and funded from one-off registration fees, annual fees paid by licensed AVM service providers and from other sources in accordance with the law.

The Electronic Communications Agency is the regulatory authority charged with electronic communication. Its Council members are still ap-

Articles 47 and 49 of the Constitution to conform the permitted restrictions of the freedom of expression to Article 10(2) of the ECHR and ECtHR case law. More in "Proposed Reform of Liability for Breach of Honour and Reputation in Montenegro", p. 16, available at http://www.hraction.org/wp-content/uploads/reform_proposal-3.pdf.

pointed by the Government but its powers are now reduced to compiling lists of available frequencies which it submits to the Electronic Media Agency. The Electronic Media Agency is charged with allocating frequencies in accordance with a public invitation for applications.

The Electronic Media Act finally improved the substandard regulations in the field of electronic media caused by the adoption of the Electronic Communications Act in 2008. Under the latter law, the allocation of broadcasting frequencies was transferred from the Broadcasting Agency (ARD) to the new Agency for Electronic Communications and Postal Services (AEKP), the Council of which was appointed by the Government after an open recruitment procedure, at the proposal of the Ministry of Transportation and Telecommunications. The allocation of broadcasting frequencies was thus directly under the influence of the Government, in contravention of European standards. The move constituted a serious step backwards after the headway made by the adoption of media laws, including the Broadcasting Act, in 2002.

The Case of TV Vijesti

The Electronic Communications Act did not clearly regulate the frequency allocation procedure and criteria. It abolished a number of powers of the ARD, most of which were not transferred to any other authority, and including powers related to the broadcasting frequency allocation procedures. The allocation of frequencies was transferred to the AEKP, while, under Article 69 of the Act, the composition of the tender commission and the tender criteria was to be set in cooperation with and with the consent of the programme content regulatory authority. The Act, however, did not specify who the programme content regulatory authority was. *TV Vijesti*, for instance, waited two years before it was allocated a TV frequency, because there were no regulations specifying which authority was to issue consent to call a tender for the allocation of TV frequencies. Only once the Assembly adopted the amendment proposed by the Government specifying that the ARD was the programme content regulatory authority was the tender for the allocation of TV channels called.

Public Broadcasting Services – RTCG.

The Act on Public Broadcasting Services of Montenegro defines as public broadcasting services the Radio of Montenegro and Television of Montenegro (Art. 2(1)), which shall produce and broadcast programmes satisfying the democratic, social, educational, cultural and other needs of public interest of all segments of Montenegrin society; ensure the realisation of the rights and interests in the field of information of citizens and other persons, notwithstanding their political, religious, cultural, racial or sexual affiliation, and promptly provide various quality information-related services (Art. 2(2)).

The Act lays down that the public broadcasting services shall be independent in terms of programming (Art. 13) and that its journalists shall be independent (Art. 14).

RTCG authorities comprise: a nine-member Council and a Director, who is appointed by the Council among the persons who applied in a public recruitment procedure and dismissed by the Council (Arts. 20 and 21). The Council shall “represent public interests” (Art. 21(1) and be independent of the state authorities and all organisations involved in the production or broadcasting of radio and TV programmes or related activities (advertising, telecommunications, et al) (Art. 21(2)). The Council members shall be appointed and dismissed by the Assembly (Art. 27) at the proposal of the: university, Academy of Arts and Sciences, and the *Matica crnogorska* (Montenegrin Cultural Heritage Institution), national cultural institutions and culture, media and human rights NGOs, trade unions, the Olympic and Paralympics Committees. The following are not eligible to apply for a seat in the Council: deputies and councillors; persons appointed by the Montenegrin President or Government; RTCG staff; political party officials; persons with interest in legal persons involved in the production of radio and TV programmes; persons convicted for specific crimes and spouses or relatives of all of the above (Art. 26). Under the prior Act on the Public Broadcasting Services of Radio Montenegro and “Television of Montenegro”⁹³⁰, which was in effect before the Act on Public Broadcasting Services of Montenegro was adopted, the Assembly merely endorsed the appointment of Council members (Art. 16). This solution was better because it guaranteed the independence of the Council members, although it was incorrectly interpreted in practice as authorisation of the appointments.⁹³¹ The Council members cannot be dismissed prior to the termination of their terms of office, except in strictly defined cases (Art. 42).

According to the prior Act, RTCG was funded partly from the licence fees, partly from the car radio taxes, RTCG’s own funds, and the state budget and other sources pursuant to the law (Art. 9). The new Act changes the mode of funding of the RTCG inasmuch as it abolishes funding from licence fees and car radio tax and introduces funding from part of the general state budget revenues (Art. 15). The change was explained by the inability to collect the licence fees from the users, which used to be the main source of funding under the prior Act.⁹³²

RTCG’s transformation into a public service still has not been completed in a satisfactory manner. Namely, the Council members are appointed by the

⁹³⁰ *Sl. list RCG*, 51/2002 and 62/2002.

⁹³¹ The Montenegrin Assembly, for instance, refused to confirm the appointment of Goran Đurović, the Executive Director of the Centre for the Development of NGOs at the time, on four occasions from 2006 to 2009, although his appointment to the post of Council member was lawfully supported by the NGOs (authorised to appoint Council members).

⁹³² “Battle for the PBS”, *Monitor*, 26 March 2010.

Assembly, whereby the Council is subject to the control of the ruling majority and the programmes broadcast are not solely in accordance with general interest.⁹³³ Last year's attempts to put the dismissal of the Director on the agenda of the Council because of RTCG's editorial policy ended in failure. According to June 2011 data, the question of the director's dismissal could be discussed by the Council in September, after the State Audit Institution and the Tax Inspectorate provide their opinion on the RTCG Financial Report for 2010, according to which the RTCG is 1.2 million Euros in debt.⁹³⁴

The RTCG Council Commission for reviewing the viewers' applications and objections was established in late 2002. The Commission received a total of three objections from viewers from 2004 to 2009. The Commission initially comprised members who were neither Council members nor RTCG staff. In October 2009, immediately after the constitution of the new Council, a three-member Commission comprising only Council members was set up in accordance with the new Act. By the end of June 2011, the Commission received a total of 19 objections.⁹³⁵

Media Act and Its Enforcement

Under the Media Act (*Sl. list RCG*, 51/2002 and 62/2002, *Sl. list CG*, 46/10), media in Montenegro shall be free (Art. 1(1)) and censorship shall be prohibited (Art. 1(2)). Freedom of information shall be guaranteed at the level of standards in international documents on human rights and freedoms (OUN, OSCE, CoE, EU) and the Act shall be interpreted and applied in accordance with the principles of the ECHR and the case law of the ECtHR (Art. 1(4)).

This declarative provision has not, however, led the courts to actually invoke ECtHR case law in practice.⁹³⁶ Under the Act, the founder of the outlet and author shall be responsible for the published programme content. The Act recalls the right already envisaged by the Obligations Act to seek damages in court from the media founder and author "in the event the media published programme content violating a legally protected interest of the person the information regards or the honour or integrity of an individual, presenting or conveying untrue allegations about his/her life, knowledge or

⁹³³ *Ibid.*

⁹³⁴ "Vojičić made it, he claims that the Council is in trouble now", *Vijesti*, 28 June 2011.

⁹³⁵ Information HRA obtained from Council member Goran Đurović in April 2011.

⁹³⁶ The practice changed mildly after the public criticism that ensued, particularly after the Podgorica Superior Court and the Supreme Court judgments finding writer and journalist Andrej Nikolaidis guilty of offending the honour and reputation and ordering him to pay compensation to the plaintiff, film director Emir Kusturica, for voicing value judgments about him. Both Courts failed to invoke ECtHR case law standards. HRA's criticisms of both verdicts are available at <http://www.hraction.org/?p=81> and in Montenegrin at <http://www.hraction.org/?p=236>.

abilities” (Art. 20(2)). The Act, however, does not specify the standards of “reasonable publication”, the journalist’s due diligence, protection of privacy and other standards in ECtHR case law that would facilitate the application of the law both among journalists, media founders and the courts. This is why HRA in November 2010 proposed that the Media Act be amended to specify grounds for exclusion of liability for damages in accordance with European standards.⁹³⁷ HRA *inter alia* proposed that the law set the maximum amount of compensation for non-pecuniary damages imposed on the journalist and editor as natural persons and the founder of the media as the legal person and that the right to protection from the disclosure of private information be specified.

A separate chapter of the Act regulates the right of correction and reply and lawsuits regarding the publication of corrections and replies (Arts. 26–35). No such lawsuits have been registered in practice, as opposed to a large number of civil and criminal lawsuits over violations of honour and reputation.

The Act lays down that a media outlet shall be established by registration and need not obtain prior consent (Art. 8), with the exception of electronic media outlets which are governed by another law, as mentioned above. Foreign media outlets may also operate in Montenegro upon registration and their work may also be prohibited only by a court decision (Arts. 36–41).

Article 21 is particularly important as it guarantees the right of journalists to protect their sources of information and their freedom to publish information obtained in an impermissible manner i.e. information constituting a state, military or other secret if there is justified public interest for its publication.

Under the Act, the media are under the obligation to protect the identity of minors (Art. 22). They are prohibited from publishing information and opinions inciting discrimination, hatred or violence against an individual or group of individuals because of their affiliation or non-affiliation to a race, religion, nation ethnic group, gender or sexual orientation (Art. 23(2) – more below, under *Prohibition of Propaganda for War and Hate Speech*). An outlet must publish information on the final discontinuation of criminal proceedings, rejection or dismissal of charges against a person if it had earlier reported that criminal proceedings against him or her had been initiated (Art. 25). The violations of these provisions shall constitute misdemeanour offences and shall warrant fines on the media founders (Art. 43). No misdemeanour proceedings against media outlets were launched in 2010.⁹³⁸

Although the Act prohibits the state from establishing media outlets (Art. 7) and lays down that the ownership and management transformation of legal persons involved in news and publishing founded by the state or a

⁹³⁷ “Proposed Reform of Liability for Violation of Honor and Reputation” HRA, Podgorica 2010, available at: http://www.hraction.org/wp-content/uploads/reform_proposal-3.pdf

⁹³⁸ Misdemeanour Chamber: Reply to the request for access to information, Decision No. 208/11.

self-government unit shall be conducted within 12 months from the day the Act comes into force (Art. 47), i.e. by 24 November 2003, the daily *Pobjeda* was still in majority state ownership by the end of June 2011. *Pobjeda* was transformed into a stock company on 29 December 2005.⁹³⁹ In 2010, the Government's stake in the company rose to 86% after the company received 12.77 million Euros from the government in the form of tax concessions and loan guarantees.⁹⁴⁰ The Political Director of the ruling Democratic Party of Socialists was appointed Chairman of the *Pobjeda* Management Board, further corroborating the fears of opposition politicians and civil society that this paper favoured the ruling coalition in its reporting.⁹⁴¹

Access to Information of Public Importance

General

In its 2002 Recommendation to member states on access to official documents⁹⁴², the Committee of Ministers recommended that Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin (Art. III). Under Article 42 of the Charter on Fundamental Rights of the European Union (Art. II–102 of the Treaty on EU), any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents. This right differs from the right of every person to have access to his or her file i.e. personal data, enshrined in Article 41 of the Charter.⁹⁴³

The ECtHR has not developed case law on the application of the right to access information of public importance within the right to freedom of expression. In two judgments, the Court found that the right of access to original documentary sources for legitimate research is an essential element of the exercise of the right to freedom of expression (*Társaság a Szabadságjogokért v. Hungary*, 2009, and *Kenedi v. Hungary*, 2009).

Montenegro's 2007 Constitution guarantees everyone the right of access to information held by state and public authorities (Art. 51(1)). The right of access to information may be restricted in the interest: of protecting life;

⁹³⁹ "More Equal than Others", *Monitor*, 12 February 2010.

⁹⁴⁰ US State Department 2010 Human Rights Report: Montenegro, available at: <http://www.state.gov/g/drl/rls/hrrpt/2010/eur/154441.htm>.

⁹⁴¹ This was also noted in the 2010 US State Department Report, see above.

⁹⁴² *Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents*, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=262135&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

⁹⁴³ *Charter of Fundamental Rights of the European Union*, available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

public health; morals and privacy; criminal proceedings; the security and defence of Montenegro; or its foreign, monetary or economic policy (Art. 51(2)).

Free Access to Information Act

Under the 2005 Free Access to Information Act (*Sl. list RCG*, 68/05), “every domestic or foreign legal or natural person” shall be entitled access to information held by the authorities (Art. 1(2)). Information shall comprise any document in written, published, video, audio, electronic or other form, including a copy or part of the information, regardless of the content, source or author of the information, the time it was composed or the system of classification (Art. 4(2)). An authority comprises a state or public authority that is a legal person, i.e. also the President of the State, and mayors, but does not include other natural persons holding public office (Art. 4(3)). This means that Government staff, office holders, are not under the obligation to disclose to the public, i.e. a domestic or foreign natural or legal person, information, which they may have personally obtained or which the state authority they work for does not officially possess. The solution was explained by the character of administrative proceedings in which the right of access to information is exercised and which does not allow natural persons to “decide on the rights, obligations or legal interests of natural or legal persons” (Art. 1, General Administrative Procedure Act, *Sl. list RCG*, 60/2003).

The authorities are under the obligation to prepare “access to information guides” i.e. publish an overview of information in their possession in an adequate manner within sixty days from the day the Act comes into force (Arts. 6 and 28).

The right of access to information may be restricted if its disclosure would “considerably endanger”: national security, defence and international relations, public safety, commercial or other economic private or public interests, the economic, monetary or foreign exchange policies of the state, the prevention, investigation or prosecution of crime, the privacy and other personal rights of individuals (Art. 9). These restrictions are additionally elaborated in the law. The provision on the protection of commercial and economic private and public interests thus refers to the possibility of denying access to information “regarding the financial, monetary or commercial affairs of the state with other states, international organisations or other legal or natural persons”, “business secrets” and information “governed by a separate law on classified information” (although the Classified Information Act⁹⁴⁴ adopted subsequently lays down that classified information shall denote all information the unauthorised disclosure of which has or may have adverse effects on Montenegro’s security or its political or economic interests (Art. 3(1.5)), a provision which is quite general in character and does not

⁹⁴⁴ *Sl. list CG*, 14/2008, 76/2009 and 41/2010.

further elaborate the provision in the Free Access to Information Act). The provision limiting access to information regarding “the economic, monetary and foreign exchange policies of the state” (Art. 9(1.4) is further elaborated to denote information on “the national economy, financial policy initiatives, economic policy operational plans and other documents”, etc. This provision was criticised the most vehemently by the opposition during the parliamentary debate on the Draft Act, which perceived it as allowing “embargoing” a lot of information that had until then been accessible.⁹⁴⁵ On the other hand, the CoE Committee of Ministers’ recommendation on the right of access to official documents allows member states to limit the right of access to official documents with the aim of protecting “commercial and other economic interests, be they private or public” unless there is an overriding public interest in disclosure (Article IV(v)).

Access to information shall also be restricted if its disclosure would significantly endanger the privacy or other personal rights of individuals, except for the purposes of court or administrative proceedings (Art. 9(1.6). The Classified Information Act (*Sl. list* CG, 79/2008 and 70/2009), however, lays down that personal data may be processed for a legally specified purpose or with the prior consent of the data subject (Art. 2(1), wherefore these provisions in the two laws need to be harmonised. The provisions in the National Security Agency Act on citizens’ access to Agency files on them are a *lex specialis* vis-à-vis this Act.

The legislator failed to heed the recommendation of the CoE Committee of Ministers that member states should consider setting time limits beyond which the limitations on access to information would no longer apply.⁹⁴⁶ The Act, however, defines in detail the principle of proportionality in restricting the right of free access to information. The protection of the mentioned interests by limiting access to information is justified only if such interests are “considerably endangered” i.e. “if the publication of information would incur damages considerably overriding the public interest to publish the information” (Art. 9(2)). Furthermore, every authority shall be under the obligation to provide access to information or part of it notwithstanding the extent of the damage that may be incurred to the protected interests, in the event it “obviously indicates non-abidance by the law, unauthorised use of public resources, negligent performance of official duties, reasonable cause to believe that an act of crime has been committed or that grounds for challenging a court decision exist” (Art. 10), whereby the Act actually defines public interest. Given that Article 1 of the Act guarantees the right of free access to information “at the level of principles and standards in international documents on human rights and freedoms” and that it is based on the principles of “freedom of information, equal exercise of the right, the openness and

⁹⁴⁵ “Šoć: Everything will be Classified”, *Vijesti*, 9 November 2005.

⁹⁴⁶ Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents Art. IV(3).

transparency of the authorities and expediency of proceedings” (Art. 2), it is clear that there are specific presumptions for an extremely restrictive interpretation and an extremely exceptional enforcement of the restrictions. Furthermore, the Act lays down that an authority is under the obligation to allow access to part of the information, when it has justified reason to deny access to the whole information (Art. 8).

A request for access to information may not be anonymous, but it need not be reasoned (Art. 12). The authority shall rule on the request immediately or within eight days at most, exceptionally within 15 days. Also exceptionally, the decision shall be communicated within 48 hours at most if necessary “to protect human life or freedom” (Art. 16). The person requesting the information shall bear the costs sustained by the authority regarding the copying, photocopying, translation and communication of the information, with the exception of persons with disabilities “pursuant to separate regulations” (Art. 19). The appeal review shall be urgent. The appeal shall be submitted to the authority supervising the work of the first-instance authority and reviewed within 15 days from the day of its submission. The person requesting access to information or another interested person may launch an administrative dispute, which shall be “expedient”, to contest the decision on the appeal or in the event there is no second-instance authority (Art. 24).

The Act includes a provision protecting whistleblowers, i.e. staff who in good faith disclose information about abuse or irregularity in the exercise of public office. The protection is, however, afforded only to a person who first notifies “the head of the authority or the competent law enforcement authority” (Art. 25). The opposition criticised the setting of any prerequisites for protecting whistleblowers from liability during the debate on the Draft Act.⁹⁴⁷

The enforcement of the Act shall be overseen by the Ministry of Culture (the Ministry of Culture and Media at the time) notwithstanding the recommendations of OSCE and CoE experts that oversight be performed by an independent authority. Article 27 of the Act lays down the misdemeanour penalties for violations of the Act by the authorities.

State Secrets

The Classified Information Act (*Sl. list CG*, 14/2008, 76/2009 and 41/2010), which governs “state secrets”, has been applied since 20 April 2008. Its enforcement rendered ineffective the Decree on Criteria for Establishing Data of Relevance of National Defence that Must be Classified as a State or Official Secret and on the Determination of Tasks and Duties of Particular Relevance to National Defence to be Protected by the Application of Special Security Measures (Art. 88).

Under the Act, classified information shall denote all information the disclosure of which to an unauthorised person has or may have adverse ef-

⁹⁴⁷ “Government Protecting Itself from Journalists”, *Dan*, 9 November 2005.

fects on Montenegro's security or its political or economic interests (Art. 3). The Act lays down a system for classifying information as confidential, access to classified information and its storage, use, registration and protection (Art. 1). The Act does away with the hitherto vague classification of secrets as state, official and military secrets and provides for four classification levels – top secret, secret, confidential and restricted (Art. 11). The person authorised to establish the classification level shall also lay down the manner by which the information shall be declassified, by specifying the date, the event or the time after which the information shall no longer be classified (Art. 18).

Information may not be qualified as classified if its classification aims at covering up a crime, excess or abuse of power, another unlawful act or action or an administrative error (Art. 4). This provision facilitates the position of the so-called whistleblowers, state employees reporting unlawful conduct, and provides protection from corruption and malversations in state institutions and public companies. The Act lays down the general and special measures for the protection of classified information and the manners in which it is kept. The Montenegrin President, Assembly Speaker, Prime Minister and Deputy Prime Ministers, ministers charged with internal or foreign affairs, ministers of finance and defence, the Supreme State Prosecutor, Supreme Court President and members of the Montenegrin Assembly Defence and Security Committee may access classified information without consent. They may access only classified information they need to perform their duties (Art. 26).

Security clearance is issued by the Directorate for the Protection of Classified Information (hereinafter: Directorate), established in April 2008⁹⁴⁸ and provided with specific competences with respect to the implementation of the Act.⁹⁴⁹

Some of these provisions totally disregard the principle of subordination of state authorities. Given that the Directorate is entrusted with granting se-

⁹⁴⁸ More information on the Directorate is available at: <http://www.dztp.sntcg.com/direkcija>.

⁹⁴⁹ Apart from issuing clearance to access classified information, the Directorate shall also 1) ensure the application of standards and regulations on classified information protection; 2) adopt the plan for the protection of classified information in emergencies and exigencies; 3) coordinate activities ensuring the protection of classified information entrusted to Montenegro by other states and international organisations; 3a) ensure the adequate and efficient selection, installation and maintenance of cryptographic systems, products and mechanisms for the protection of classified information; 3b) handle NATO and EU cryptomaterial; 3c) certify communication-information systems and processes in which classified information is processed, transferred and stored; 3d) protect premises and equipment from electromagnetic radiation risks; 4) review applications for security clearance to access classified information; 5) keep records of issued security clearances to access classified information; 6) design and maintain the Central Register of classified information of foreign states or international organisations; 7) take measures to train users of classified information and authorities in the management of classified information in accordance with standards and regulations; 7a) prepare instructions on management of classified information of foreign states or international organisations; 8) perform other tasks specified in the Act.

curity clearance, there may be instances in which a lower authority in the state hierarchy may deny access to classified information to a higher authority in the state hierarchy (e.g. the ministry of justice may not access classified information without security clearance). A Directorate decision denying access to classified information may be appealed with the minister in charge of defence (Art. 48). The lawfulness and appropriateness of the Directorate's work shall be monitored by the ministry charged with defence (Art. 80(1)) while oversight of the implementation of the Act and application of international treaties in accordance with the law shall be performed by the Directorate's authorised inspectors (Art. 80(2)).

Persons seeking access to and use of classified information shall be subjected to security checks depending on the level of classification. These security checks shall be performed by the National Security Agency (Art. 32).

Montenegro and the EU signed the Agreement on security procedures for exchanging and protecting classified information in May 2010. The Agreement defines the security procedures for exchanging and protecting classified information, security classification equivalents, the obligation to perform security checks of persons to have access to classified information, the reception and delivery of classified information. In order to implement this Agreement, security arrangements shall be established between the Directorate for the Protection of Classified Information of Montenegro, the Security Office of the General Secretariat of the Council, and the European Commission Security Directorate in order to lay down the standards for the reciprocal protection of classified information.⁹⁵⁰

Access to Information in Practice

The Analysis of the Enforcement of the Access to Information Act, based on the data of the NGO Network for the Affirmation of the Non-Governmental Sector (MANS), the Administrative Court and the Human Resources Directorate, was publicly presented in October 2010, after the Act was enforced for five years.⁹⁵¹ The Analysis notes that, as opposed to NGOs, the citizens rarely directly exercise their right of access to information, while the journalists are of the view that the procedure is much too administratively demanding to be considered an effective investigative reporting mechanism. The Analysis also notes the problem of the administration's silence, i.e. its failure to decide on the submitted requests, but also that the Administrative

⁹⁵⁰ "Agreement on security of information between Montenegro and the EU", *Impuls, Tv In*, 20 May 2010. The Agreement was not published in Montenegro "because of its sensitivity", as HRA was told by an MIA officer in March 2011. It was, however, published by the EU on the internet: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:260:2:5:EN:PDF>.

⁹⁵¹ The Human Resources Directorate's Internet link to the Analysis is interrupted. The Analysis is available in the HRA archives.

Court ruled in favour of the plaintiffs in 95% of the cases and ordered the authority to decide on the request. The Police Directorate was singled out as a typically negative example of an authority failing to act on requests for free access to information. The Analysis highlights the following institutions as those most frequently prohibiting access to information by invoking other laws: the Commercial Court, Tax Administration, and the Ministry of Internal Affairs and Public Administration. The authors of the Analysis also noted that many authorities failed to post their Access to Information Guides on their bulletin boards, although they are under the obligation to do so under the law and that the posted Guides are not promptly updated. The Analysis gives recommendations to: align the Free Access to Information Act with the Personal Data Protection Act and the Classified Information Act, which was also noted in the EC Analytical Report on Montenegro's application for membership of the EU in November 2010;⁹⁵² continue training of staff authorised to enforce the Free Access to Information Act; update the access to information guides and ensure their availability to the public and develop the practice of publishing information on the Internet websites. One out of three of the circa 30,000 requests for access to information MANS submitted since the Act came into force were rejected. MANS filed 4,200 lawsuits with the Administrative Court either because of the administration's silence or the labelling of data as classified.⁹⁵³

Experience of NGOs shows that in spite of the judgments won before the Administrative Court, the authorities often avoid to render a new decision in accordance with the recommendations of the court and provide access to information. Moreover, there are no records of any authority having been punished under the misdemeanour law for violating the Free Access to Information Act.⁹⁵⁴

In HRA's experience, the authorities do not follow a uniform practice with respect to access to information. For instance, there were cases of Basic Courts taking different decisions on identical requests for access to information submitted by the HRA.⁹⁵⁵ Furthermore, the authorities often do not abide by the deadlines within which they have to decide on a request or appeal, rendering senseless the statutory deadlines.⁹⁵⁶ Finally, the authorities

⁹⁵² The Report is available at: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_opinion_2010_en.pdf

⁹⁵³ "Government Keeping Milo's Credit Secret", *Dan*, 13 October 2010.

⁹⁵⁴ "Čalović: You are Introducing New Restrictions", *Pobjeda*, 12 October 2010.

⁹⁵⁵ For instance, all Basic Courts, except for the Podgorica Basic Court, approved requests for "requests for review" and decisions on those requests needed to analyse the enforcement of the Act on the Protection of the Right to a Trial within a Reasonable Time. The Podgorica Basic Court rejected access to the required data in its Decision SU VIII 68/2011.

⁹⁵⁶ For example, the Supreme State Prosecution Office (SSPO) on 1 July 2010 issued a decision on a request for free access to information submitted on 12 May 2010 and communicated the response three months later, on 1 October 2010. The request and the SSPO decision are available at: <http://www.hracion.org/?p=463> (24/11/2010 Statement on the

often deny any access to information, although Article 8 obliges authorities to allow access to at least part of the information in the event they have a justified interest to partly restrict access to the whole information (for instance, data on party identity is protected, in order to protect the right to privacy, but access to the judgment is allowed). The Supreme State Prosecution Office did so twice, when it refused to allow access to any information regarding the prosecution of twelve publicly known cases of human rights violations.⁹⁵⁷ Given that the Justice Ministry backed the Supreme State Prosecution Office decision, HRA initiated and won the administrative dispute against the Ministry decision.⁹⁵⁸ The decision by the Supreme State Prosecutor to refuse all access to information on whether there are any ongoing investigations and the stage they are in is in contravention of ECtHR case law, under which there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.⁹⁵⁹ This view was reiterated by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its Report on its visit to Montenegro on 15–22 September 2008.⁹⁶⁰

HRA also filed a constitutional appeal against the Supreme Court judgment upholding, in a final instance, the decision of the Herceg Novi Basic Court to deny access to a first-instance criminal judgment in order to protect the privacy of the defendant, although the defendant's first and last name were in the media on several occasions, and although the Court could have communicated the judgment after deleting the name and other personal data from it. In addition to the fact that the enacting clause of this judgment had been published, it regards the case of an assault on a war crimes witness, which is a matter of particular public interest that has to be deemed as overriding the interest of the defendant to protect his identity, already disclosed to the public.⁹⁶¹

The Government of Montenegro in July 2010 submitted for adoption the Draft Act Amending the Free Access to Information Act, explaining that the amendments facilitated access to information and specified in greater detail which information access was limited to.⁹⁶² MANS criticised the Draft Act, saying that it laid down greater restrictions on access to information than

Justice Ministry decision to invalidate the SSPO decision denying HRA access to information on the status of the investigations of 12 cases).

⁹⁵⁷ *Ibid.*

⁹⁵⁸ For more detail see the press release and two rulings of the Administrative Court of Montenegro, available at: <http://www.hracion.org/?p=858>

⁹⁵⁹ *Finucane v. The United Kingdom*, ECHR, App. No. 29178/95 (2003), paragraphs 70 and 71.

⁹⁶⁰ The Report is available at: <http://www.cpt.coe.int/documents/mne/2010-03-inf-mne.pdf>, paragraph 21.

⁹⁶¹ The documentation on the proceedings is available in HRA's archives.

⁹⁶² "Government Upholds Amendments to the Free Access to Information Act", *Impuls*, TV IN, 1 July 2010.

the ones in force and that it was not in conformity with international standards.⁹⁶³ The Government withdrew the Draft from the parliament pipeline in November 2010, to align it with the Classified Information Act.⁹⁶⁴

Criminal Code

The following offences are incriminated in Chapter 15 of the Criminal Code, entitled “Crimes against the Rights and Liberties of Man and Citizen” with the aim of protecting the freedom of expression: Violation of the Freedom of Speech and Public Appearance (Art. 178), Prevention of the Publication and Dissemination of Published Matter and Broadcasting of Programmes (Art. 179), Unauthorised Prevention of or Interference in Radio and Television Programme Broadcasting (Art. 179(2)) and Prevention of the Publication of Replies and Corrections (Art. 180). These crimes warrant fines or imprisonment up to one year, or maximum three years’ imprisonment if they were committed by a person acting in an official capacity.

Chapter 17 of the CC entitled “Crimes against Honour and Reputation”, which constitute restrictions of the freedom of expression in the form of criminal prosecution, after deleting the crimes Insult (Article 195) and Defamation (Art. 196) in June 2011, still includes the crimes: Disclosure of Another’s Personal or Family Circumstances (Art. 197), Harming the Reputation of Montenegro (Article 198), Harming the Reputation of a Minority Nation or Another Minority National Community (Art. 199) and Harming the Reputation of a Foreign State or International Organisation (Art. 200). Human Rights Action advocated for deletion of all these crimes, because they allow excessive restriction of freedom of expression, contrary to international standards.⁹⁶⁵

The crime Disclosure of Another’s Personal or Family Circumstances warrants stricter sentence if committed via the media, similar means or at a public gathering, in which case a person found guilty shall be fined up to 14,000 Euros (29 average salaries in Montenegro)⁹⁶⁶. The crime of Harming the Reputation of Montenegro (entailing the ridicule of its flag, coat of arms or anthem) still warrants imprisonment and criminal prosecution *ex officio*, although all the imposed fines may be replaced by imprisonment in the event the fine is not paid within a specific deadline (Art. 39(6)).

The crime entitled Harming the Reputation of Montenegro, which entails the ridicule of its flag, coat of arms or anthem, warrants a fine or up to one-year imprisonment (Art. 198) and is prosecuted *ex officio*. In its Declaration

⁹⁶³ “Limited Access to Corruption Data”, *Dan*, 18 September 2010.

⁹⁶⁴ “The Government Can Do Whatever It Wants”, *Dan*, 27 November 2010.

⁹⁶⁵ For detailed reasoning see “Proposed Reform of Liability for Breach of Honour and Reputation in Montenegro”, HRA, 2010, Podgorica, pp. 23, 33–34, available at www.hraction.org

⁹⁶⁶ In May 2011 average net salary in Montenegro was 479 Euros. (http://www.monstat.org/userfiles/file/zarade/2011/ZARADE_Maj_2011.pdf)

on the Freedom of Political Debate in the Media of 2004, the CoE Committee of Ministers found that the state, government or another executive, legislative or judicial authority may be the subject of criticism in the media and that, due to their dominant position, these institutions should not be protected from defamation and insult by criminal law.⁹⁶⁷

The existence of the crime of Harming the Reputation of a Minority Nation or Another Minority National Community (Art. 199) is unjustified given the existence of a separate crime Incitement to National, Racial and Religious Hatred (Art. 370), which elaborates the constitutional prohibition of inciting and promoting hatred of minorities in a satisfactory manner. On the other hand, the unspecified commission of the crime of Harming the Reputation of a Minority Nation in the form of “exposing to ridicule” unspecified persons allows for unjustified excessive limitations of the freedom of expression.

The crime of Harming the Reputation of a Foreign State or International Organisation warrants a fine ranging between three and ten thousand Euros (Art. 200). This crime protects only the reputation of foreign states with which Montenegro has diplomatic relations, i.e. the organisations Montenegro is member of, while the ridicule of those Montenegro does not have diplomatic relations with or has not acceded to, such as the EU, the WTO, NATO, et al, is allowed, which is absurd. Furthermore, some countries, whose reputation, or anthem, flag or coat of arms, is protected by such incrimination, themselves do not penalise such actions, wherefore it appears that Montenegro thus cares more about the reputation of these states than they themselves do.⁹⁶⁸

According to the Supreme State Prosecutor’s 2010 Annual Report on the work of the State Prosecution Office,⁹⁶⁹ one criminal report regarding Harming the Reputation of a Foreign State or International Organisation was filed in 2010 and it was still being processed at the end of the year. The 2008 and 2009 Annual Reports do not specify whether any criminal reports were filed claiming violations against honour and reputation, which are prosecuted *ex officio* (notably: Harming the Reputation of Montenegro, Harming the Repu-

⁹⁶⁷ Council of Europe Committee of Ministers, Declaration on freedom of political debate in the media, Adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers’ Deputies.

⁹⁶⁸ For instance, the US Supreme Court held that US states cannot forbid burning the US flag in protest, because doing so would violate the freedom of speech protected by the First Amendment pursuant to the decisions of the US Supreme Court (*Texas v. Johnson*, 1989; *United States v. Eichman*, 1990). The German Federal Constitutional Court said that an attack on national symbols, such as flag and anthem, even if rude or satirical, must be tolerated for the purpose of the constitutional protection of freedom of speech, press and art (81 FCC 278, 294 (1990) and 81 FCC 298, 308 (1990), quoted in Freedom of Expression and National Security: the Experience of Germany, Ulrich Karpen, published in the book entitled National Security, Freedom of Expression and Access to Information, Kluwer Law Int, 1999.

⁹⁶⁹ The Report is available in Montenegrin at: <http://www.tuzilastvocg.co.me/Izvjestaj%20za%202010.%20godinu.pdf>.

tation of a Minority Nation and Harming the Reputation of a Foreign State or International Organisation).

Decriminalisation of Defamation

On 9 November 2010 the European Commission expressed its concern about the media freedom in Montenegro and, as one of the conditions to start negotiations for membership in the EU requested the full harmonization of laws and practice in the area of defamation with the European Court of Human Rights.⁹⁷⁰

With the aim of aligning domestic regulations with international standards on freedom of expression, on 17 November 2010 HRA proposed the following amendments to the Criminal Code within its Proposed Reform of Liability for Breach of Honour and Reputation in Montenegro: decriminalisation of crimes against honour and reputation – deletion of all criminal offences in Chapter 17 of the CC or the reduction of all the penalties and rewording of the crimes. It proposed two new criminal offences to improve the protection of journalists: “Preventing Journalists from Performing Their Professional Duties” and “Assaulting a Journalist Performing His/Her Professional Duties”.⁹⁷¹

The Government announced the decriminalisation of defamation in December 2010⁹⁷² and also envisaged it in its Action Plan for the Implementation of the Recommendations in the EC Opinion adopted in February 2011. Although the Action Plan envisages the decriminalisation of defamation, the Draft Amendments to the CC the Government submitted to the Assembly in late March 2011 comprised a discriminatory provision exempting only journalists and editors from criminal liability for insult and defamation. This prompted 20 NGOs altogether to protest against the adoption of the amendments.⁹⁷³ The Government withdrew the bill in April and proposed the full decriminalisation of the two offences.⁹⁷⁴ In June 2011 the Parliament of Montenegro adopted the amendments to the Criminal Code providing the deletion of the crimes of defamation and insult.

⁹⁷⁰ EC Opinion on Montenegro’s application for membership of the EU, Brussels, 9 November 2010, pp. 7 and 12.

⁹⁷¹ Proposed Reform of Liability for Breach of Honour and Reputation in Montenegro, HRA, 2010: http://www.hracion.org/wp-content/uploads/reform_proposal-3.pdf

⁹⁷² “Đukanović Will Not Rule, I Use My Own Head”, *Vijesti*, 29 December 2010.

⁹⁷³ “Journalists Are Over-Protected Now”, *Vijesti*, 4 April 2011; “Protecting Only the Media”, *Vijesti*, 11 April 2010; “Lukšić Backs Decriminalisation of Defamation”, *Dan*, 10 April 2010; Joint Position in Favour of Decriminalisation of Defamation sent to the Prime Minister by 20 NGOs, http://www.hracion.org/wp-content/uploads/U-PRIOLOG-DEKRIMINALIZACIJI-KLEVETE-I-UVREDE_eng.pdf.

⁹⁷⁴ *RTCG Prime Time News*, 14 April 2011.

Prohibition of Propaganda for War and Advocacy of Hatred

Article 20, ICCPR:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The CoE Committee of Ministers in 1997 adopted a Recommendation on hate speech which stated that the term “shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”.⁹⁷⁵ The ECtHR interpreted hate speech as a form of expression not warranting protection under Article 10 of the ECHR, and falling under the ambit of Article 17, which prohibits all activities or acts aimed at the destruction of any rights and freedoms enshrined in the ECHR. The Committee of Ministers’ Recommendation on hate speech and ECtHR case law emphasise the need to clearly distinguish between the liability of the authors of such speech and the journalists alerting to such social phenomena.⁹⁷⁶

The Constitution of Montenegro does not comprise a provision explicitly prohibiting propaganda for war but it does prohibit incitement to or instigation of hatred or intolerance on any grounds (Art. 7) and does not allow for derogations of this prohibition even in a state of war or emergency (Art. 25(4)). Under the Constitution, a court may prevent the dissemination of information and ideas via media outlets if necessary to prevent the propagation of racial, national and religious hatred or discrimination (Art. 50(2)). It also prohibits activities of political and other organisations aimed at inciting national, racial, religious or other hatred or intolerance (Art. 55(1)).

The 2010 Anti-Discrimination Act⁹⁷⁷ does not explicitly prohibit hate speech, but it does lay down that the provisions of other laws governing the prohibition of and protection from discrimination on specific grounds or with respect to the realisation of individual rights shall apply also to the prohibition of and protection from discrimination (Art. 1(2)). Under Article 2(5) of the Act, discrimination shall also entail encouraging or instructing discrimination against an individual or group of individuals on any of the grounds set forth in the Act.

⁹⁷⁵ Recommendation No. R (97) 20 of the Committee of Ministers to Member States on “Hate Speech”, available at: http://www.coe.int/t/dghl/standardsetting/media/themes/free_EN.asp

⁹⁷⁶ See Principle 7 of the Recommendation and the judgment in the case of *Jersild v. Denmark*.

⁹⁷⁷ *Sl. list RCG*, 46/2010.

Article 370 (Incitement to National, Racial or Religious Hatred) of the CC⁹⁷⁸ envisages imprisonment ranging from six months to five years for anyone who “publicly advocates violence or hatred of a group or member of a group distinguished by its race, colour, religion, origin, state or national origin”. The wording of the provision restricts the requirements of the standard in Article 20 of the ICCPR, because it punishes only *public* advocacy of violence or hatred, while the ICCPR envisages the legal prohibition of any advocacy of national, racial or religious hatred.

The same sanction is envisaged for anyone who publicly condones, denies the existence or considerably diminishes the gravity of the crime of genocide, crimes against humanity and war crimes against a group or member of a group distinguished by its race, colour, religion, origin, state or national origin in a manner that may lead to violence or cause hatred of a group of individuals or a member of the group if the person has been finally convicted for one of these crimes by a court in Montenegro or an international criminal tribunal (paragraph 2). It is unclear why the verdicts of other countries have been left out.

The qualified forms of these offences are those committed by coercion, ill-treatment, endangering of safety, ridicule of national, ethnic or religious symbols, damaging another's property, desecration of monuments, memorials or graves, if the crimes were committed by abuse of post or resulted in riots, violence or gravely affected the co-existence of nations, national minorities or ethnic groups living in Montenegro in another way. They warrant between one and eight, i.e. two and ten years of imprisonment.

Article 443(3) of the CC, entitled Racial and Other Discrimination, envisages imprisonment ranging between three months and three years for dissemination of ideas on the superiority of a race, propagation of racial hatred or incitement to racial discrimination. This Article prohibits only propagation of *racial* hatred and incitement to *racial* discrimination, just like the above-mentioned Article only prohibits incitement to *racial*, *national* and *religious* hatred, wherefore neither incriminates other forms of hatred, such as homophobia, transphobia, hatred of persons with disabilities *et al.* In its Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity of 31 March 2010, the CoE Committee of Ministers recommended that member states should prohibit all forms of expression inciting, spreading or promoting hatred or other forms of discrimination against sexual minorities and transgender persons (paragraph 6).⁹⁷⁹ Paragraph 3 of Art. 443 in the CC should thus be expanded to comprise other forms of hatred and intolerance as well.⁹⁸⁰

⁹⁷⁸ *Sl. list RCG*, 70/2003, 13/2004, 47/2006 and *Sl. list CG*, 40/2008 and 25/2010.

⁹⁷⁹ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1606669>.

⁹⁸⁰ On 25 April 2011 the HRA, in cooperation with 23 NGOs, prepared and submitted to the Parliamentary Committee for the Political System, Judiciary and Administration the

Under the Electronic Media Act, Montenegro shall ensure the freedom of reception and re-broadcasting of Audio-Visual Media services (AVM services) of EU member states and other European states signatories of the European Convention on Transfrontier Television, but it may limit the freedom of reception and rebroadcasting of content inciting hatred on grounds of race, gender, religion or nationality (Art. 6(1.2)). Furthermore, AVM services may not incite, enable incitement to or disseminate hatred or discrimination on grounds of race, ethnic affiliation, colour, gender, language, religion, political or other convictions, national or social origin, financial standing, membership of a trade union, education, social, marital or family status, age, health condition, disability, genetic inheritance, gender identity or gender⁹⁸¹ orientation (Art. 48(2)). The Act, however, does not include penal provisions sanctioning the violation of these Articles.

Dajbabe Monastery Abbot Nikodim said on Radio Svetigora in March 2011 that the Montenegrin nation was created by the devil, not by God. The statement prompted the Electronic Media Agency (AEM) to state that it would take legal measures against Radio Svetigora.⁹⁸²

The Public Peace and Order Act (*Sl. list RCG*, 41/94) envisages a fine ranging from three to twenty times the minimum wage in the state or up to 60 days' imprisonment for offending the racial, national or religious feelings of the citizens or public morals (Art. 17(1)), while a legal person that produces or markets a symbol, drawing or another object offending the racial, national or religious feelings of the citizens or public morals shall be imposed a fine ranging from 50 to 300 times the minimum wage in the state and its responsible person shall be imposed a fine ranging from three to twenty times the minimum wage in the state (Art. 17(2)).

After the Superior State Prosecution Office in late January 2011 filed a motion for initiating misdemeanour proceedings against SOC Metropolitan of Montenegro and the Littoral Amfilohije Radović over hate speech, the trial was initiated in June 2011 in the misdemeanour court.⁹⁸³ In its motion, the Prosecution Office cited his statements in Bar and Podgorica on Christmas Eve, 6 January 2011 ("May God bring down the one who brought down this temple, bring him and his descendants down, and may he be judged by the honourable cross", a statement made after the removal of the illegally built church on Mt. Rumija) and part of his statement to the press during the celebration of the Orthodox New Year on 14 January in Podgorica (speaking

Proposal of Amendments that would expand the current criminal offense of "Racial and other discrimination" to intolerance on the basis of gender, disability, sexual orientation, gender identity or other personal property. Committee members have not expressed opposition, but did not propose this amendment, so the CC has not been amended in accordance with it.

⁹⁸¹ The legislator was probably thinking of sexual orientation.

⁹⁸² "SOC Priest Seeing the Devil", *Vijesti*, 29 March 2011.

⁹⁸³ "They tried to try Amfilohije in secrecy", *Dan*, 24 June 2011.

after New Year's Eve celebrated in accordance with the Julian Calendar in front of the Podgorica St. Đorđe Church, he also mentioned the new language "Ćirgylic" referring to Dr. Adnan Ćirgić, one of the authors of the Montenegrin language orthography and grammar), as well as part of a letter he handed Prime Minister Igor Lukšić in January and later disseminated to journalists (one excerpt from the letter read: "We hear grave threats from Bar, that the demolition of the church may lead to the demolition of a mosque, not to say bloodbath on religious grounds...")⁹⁸⁴.

According to the 2010 Annual Report on the work of the State Prosecution Office, seven reports for inciting national, racial or religious hatred filed with the prosecution offices were all being processed. The prosecutors also launched two investigations that resulted in the filing of indictments, wherefore the prosecutors were acting on 9 reports in all. Two of them were processed – one conviction (see below, case in Tivat), while it remained unknown how the other has been settled.

The Human Rights and Freedoms Protector in October 2010 launched an enquiry into complaints by some civil society organisations over the case publicly known as *Glamour Noir*. During her appearance in the TV show *Glamour Noir* on TV Atlas and in front of her students A Podgorica high school psychology teacher B.B. said that homosexuals suffered from a personality disorder which could be treated by psycho-therapy if the members of that sexual minority consented to and wanted to enter treatment.⁹⁸⁵ In his 2010 Annual Report, the Protector stated that the enquiry was discontinued after the high school said that the professor took part in the show in the capacity of psychologist, not school professor, and that the students attended the show at their own initiative, not at the recommendation of the school. In its reply to the Protector, the Broadcasting Agency stated that sanctioning this case would push the media even more towards commercial topics, i.e. that it would lessen media interest in addressing other similar topics provoking conflicting opinions, and that the Agency had recommended to TV Atlas and other electronic media in Montenegro to devote maximum professional and expert attention to the treatment of all aspects of sensitive issues regarding the realisation of human rights and avoid the risk of promoting or causing intolerance or hate speech.⁹⁸⁶

SOC Metropolitan of Montenegro and the Littoral in October "appealed on the participants of the gay parade to stop their violent propaganda putting them in the danger of inciting others to violent behaviour". He then said that "inner suffering, despair and misery of the paraders, a clownlike shriek over the lost moral and spiritual balance and existential insecurity" stood behind the verbal triumphalism and ostentatiousness of the gay paraders' public ap-

⁹⁸⁴ "If the Church Goes Down, a Mosque Will Go Down Too", *Pobjeda*, 19 January 2011.

⁹⁸⁵ "Glamour Noir Makes it All the Way to Vienna", *Vijesti*, 15 October 2010.

⁹⁸⁶ The 2010 Annual Report of the Human Rights and Freedoms Protector is available in Montenegrin at: <http://www.ombudsman.co.me/izvjestaji.php>.

pearances and that “one should never lose sight of the eternal symbolism of Sodom and Gomorrah: these cities and the people in them were destroyed, smothered in fire and brimstone, precisely because they turned the natural use of the male and female into the perverse and unnatural. Their end is the Dead Sea”.⁹⁸⁷ During his visit to the church on the Luštica peninsula in the Kotor Bay, he qualified the gay parade in Belgrade as “sodomitic scum contemporary civilisation elevated to the pedestal of a deity” and explained that “the violence of those godless and perverse people caused other violence. They now wonder who is to blame and call those children hooligans! But those, who let the city of Belgrade be defiled by that scum, do not wonder whether they themselves contributed to that by letting that plague, that sodomitic blight despoil Belgrade like it despoiled other European cities. God will know when to wield his whip and warning, but this is slowly in the making...”⁹⁸⁸ Proceedings against Amfilohije have been launched before the Commissioner for Equality in Serbia because of these and similar other statements he had made.

Criminal proceedings were launched in November 2010 against Ž. M. and Z. R. for desecrating the religious premises of the Islamic Community (IZ) in Gradišnica (Tivat Municipality). They are suspected of breaking the windows of the IZ building and throwing swine manure into the prayer section, after around 650 residents of two settlements in Tivat signed a petition against the construction of a mosque and Moslem cemetery in that area. The Kotor Basic State Prosecution Office initially qualified the act as Demolition and Damage of Another's Property, but the Superior State Prosecution Office subsequently requalified the charges to Incitement to National, Racial and Religious Hatred.⁹⁸⁹ In late March 2011 Ž.M. was sentenced to 8 months in prison, while Z.R. was sentenced to 4 months in prison.⁹⁹⁰ A new incident ensued, in which unidentified perpetrators threw bricks and roof tiles at the door of an IZ facility in Tivat. Investigation of the incident was still under way at the time this Report went into print.⁹⁹¹

The Montenegrin Media Act prohibits the publication of information or opinions inciting discrimination, hatred or violence against an individual or group of individuals because of their affiliation or non-affiliation to a race, religion, nation, ethnic group, gender or sexual orientation (Art. 23(2)) unless the published information or opinions are part of a scientific or authorial work on a public matter and were published: without the intention of inciting discrimination, hatred or violence and are part of an objective press report, i.e. were published with the intention of critically alerting to such phenomena (Art. 23(1)). The violation of this Article warrants a fine of the media founder

⁹⁸⁷ “Pride Parade – Symbol of Sodom” *Dan*, 8 October 2010.

⁹⁸⁸ “Amfilohije: Parade Worse than Uranium!!!”, *Alo novine*, 15 October 2010.

⁹⁸⁹ “Fejzić: Pets Have More Rights”, *Vijesti*, 4 November 2010.

⁹⁹⁰ “Prison for inciting hatred”, *Vijesti*, 26 March 2011.

⁹⁹¹ “Bricks Thrown at House Door”, *Vijesti*, 5 November 2010.

ranging from 20 to 50 times the minimum wage in the state (Art. 43(1.3)). Under Article 11 of the Act, the competent court may ban the dissemination or broadcast of published media content advocating the violation of guaranteed human and civil rights or inciting national, racial or religious intolerance or hatred". The proceedings shall be initiated on the motion of the competent state prosecutor and shall be expedient and the court shall render its decision within 24 hours from the moment the motion was submitted (Art. 12(2)). The court may decide to temporarily prohibit the broadcasting or dissemination of the content until it reaches its final decision (Art. 12(1)). According to the data of the Podgorica misdemeanour authority, no misdemeanour proceedings under the Media Act were launched against the media in 2010.

Freedom of Expression in Practice

European Commission Opinion and Recommendations, Government Action Plan and Results

In its Analytical Report accompanying the Commission Opinion on Montenegro's application for membership of the European Union of 9 November 2010,⁹⁹² the EC states that law suits for defamation and hefty fines, although less frequent, are still used to exert pressure on media. It also notes that Montenegro does not consistently comply with ECtHR case law and that the law and court practice needs to be aligned with these European standards. It states that there have been incidents of severe violence against journalists in Montenegro in the past, which have not always been satisfactorily investigated and followed up and that investigative journalists still face intimidation.

The Government upheld the HRA proposal and included in its Action Plan for Monitoring the Implementation of the Recommendations in the European Commission's Opinion the preparation of a Report on investigations and violence against journalists, which will comprise: processed cases, status of pending cases vis-à-vis processed cases, number and character of final judgments, measures taken for the efficient completion of the pending cases among the measures to be implemented by end June 2011.⁹⁹³ Under the Action Plan, the Supreme Court is under the obligation to adopt a principled position by which it will accept ECtHR case law standards on the amount of non-pecuniary compensation awarded for offending another's honour or reputation. The Supreme Court on 29 March 2011 adopted the principle position in which it literally stated that the non-pecuniary compensation

⁹⁹² The Analytical Report is available at: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_rapport_2010_en.pdf and the EC Opinion is available at http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_opinion_2010_en.pdf

⁹⁹³ The Action Plan is available at <http://www.gov.me/en/Library?query=EU%20Action%20Plan&sortDirection=desc>. HRA's proposal is available at: <http://www.hrraction.org/wp-content/uploads/proposed-amendments-to-the-draft-action-plan.pdf>.

awarded “should as a rule be in accordance with the case law of the European Court of Human Rights” and that “the awarded compensation should not be set in the amount which would deter journalists and media from their role in preserving the democratic values of society.”⁹⁹⁴ HRA is of the view that this position could have been more specific and that it cannot *per se* contribute to a better understanding of ECtHR’s case law or its adequate application.⁹⁹⁵ See the above section entitled *Criminal Code* for more detail on amendments of the CC and the decriminalisation of defamation.

The Journalistic Self-Regulatory Body

The Journalistic Self-Regulatory Body (NST) was established as a non-governmental organisation in 2003 with the aim of improving the freedom of speech and the protection of civil rights and freedoms and monitoring abidance by the Codex of Montenegrin Journalists.⁹⁹⁶ The NST Council, comprising representatives of press associations and media in Montenegro, was established as a monitoring and complaint review mechanism.⁹⁹⁷ NST published its last Report on Abidance by the Codex of Montenegrin Journalists in January 2010,⁹⁹⁸ because some media left the NST in late March 2010 in disagreement with the way decisions were being taken and with the interpretations of paragraph 2 of the Codex, under which journalists shall work in the spirit of the idea of being critical observers of those wielding power in society.⁹⁹⁹ The European Commission noted that the NST is divided and does not play its role of promoting high professional standards properly, as the main media outlets are not part of it. The Analytical report also states, that the code of ethics for journalists needs to be strengthened.¹⁰⁰⁰

Uninvestigated Assaults on Journalists

Assassination of “Dan” Chief Editor Duško Jovanović. – Chief Editor of the daily *Dan* Duško Jovanović was assassinated in May 2004 after receiving death threats for publishing numerous articles about the organized smuggling of cigarettes. Until June 2011, the investigation was initiated and concluded only with regard to one co-perpetrator of the murder, who was sentenced to 18 years

⁹⁹⁴ The principled position is available in Montenegrin at: <http://www.vrhsudcg.gov.me/Sudskapraksa/Naclnopravnistavovi/tabid/168/Default.aspx>

⁹⁹⁵ A more detailed comment is available at www.hracion.org

⁹⁹⁶ The Codex of Montenegrin Journalists is available at <http://www.osce.org/montenegro/19732>.

⁹⁹⁷ More details are available in Montenegrin at: <http://www.nstcg.org/indexst.php?page=02>.

⁹⁹⁸ The Report is available in Montenegrin at: <http://www.nstcg.org/indexst.php?page=35>.

⁹⁹⁹ “Subotić Sows Dissent among Montenegrin Media”, *Radio Free Europe*, 25 March 2010, http://www.danas.org/content/stanko_subotic_intervju_tv_in_novinarsko_samoregulatorno_tijelo/1993722.html

¹⁰⁰⁰ Analytical Report accompanying the Commission Opinion on Montenegro’s application for membership of the European Union, p. 25.

in prison. Those who ordered the murder have not been discovered, and the investigation had apparent failures. For more detail, see Right to life, page 136.

Assault on Jevrem Brković and Murder of Srđan Vojičić. – Writer Jevrem Brković was physically assaulted and injured on 26 October 2006. His driver Srđan Vojičić was killed during the incident.¹⁰⁰¹ Brković presumes that he was assaulted by those who recognised themselves in his book “*Lover of Duklja*”, in which he wrote about the links between organised crime and the ruling political elite in Montenegro.¹⁰⁰² The family members of the late Srđan Vojičić claim that Brković knows who attacked him but refused to testify about them, suggesting that a businessman closely linked to politicians in power was at issue.¹⁰⁰³ The Supreme State Prosecution Office twice rejected HRA’s requests for information on headway in the investigation of the assault on Brković and murder of Vojičić. The Administrative Court annulled the decision of the Ministry of Justice confirming the SSP decision, and ordered the adoption of the new decision. No one has yet been suspected of killing Vojičić and assaulting Brković.¹⁰⁰⁴

Assault on journalist Tufik Softić. – Berane journalist Tufik Softić, who was investigating and reporting on organised crime groups, was assaulted on 2 November 2007 by two masked men. He was hospitalised with grave injuries to his arm and head.¹⁰⁰⁵ According to Softić, the person he suspects of the assault, who had previously threatened him and was suspected of membership of Darko Šarić’s organised crime group involved in drug trafficking, has never been interrogated with respect to the assault.¹⁰⁰⁶ No headway has been made in the investigation of this incident to date. The Supreme State Prosecution Office rejected both HRA requests for access to information about the status of the investigation. The Administrative Court annulled the decision of the Ministry of Justice confirming the SSP decision, and ordered the adoption of the new decision.

Assault on Journalist Mladen Stojović. – Bar sports journalist Mladen Stojović was assaulted in his apartment in late May 2008. The assault left Stojović unconscious with grave injuries – fractured upper and lower jaws, mouth and nose bleeding; he was also stabbed by a sharp object in the jaw. In the B92 show *Insider* in January 2008, Stojović testified about frauds i.e. rigging of soccer games by the Montenegrin “soccer mafia”.¹⁰⁰⁷ The police and the Supreme State Prosecutor said that there were no traces that could lead them to

¹⁰⁰¹ “Jevrem Injured, Driver Killed”, *Dan*, 25 October, 2006.

¹⁰⁰² “Killers Still at Large”, *Vijesti*, 26 October 2006.

¹⁰⁰³ “Brković Keeping the Secret?”, *Republika*, 2 October 2006.

¹⁰⁰⁴ “Shed Light on the Murders of and Assaults on Journalists”, *Dan*, 2 February 2011.

¹⁰⁰⁵ “Republika Correspondent Tufik Softić Beaten Up”, *Republika*, 2 October 2007.

¹⁰⁰⁶ “Powerful Shield”, *Monitor*, 19 March 2010.

¹⁰⁰⁷ More information available in Serbian at: http://www.b92.net/info/emisije/insajder.php?yyyy=2008&mm=01&nav_id=283409.

the assailants.¹⁰⁰⁸ It remains unknown whether the State Prosecutor ever investigated Stojović's allegations about the existence of a soccer mafia in Montenegro. The Supreme State Prosecution Office twice rejected HRA's requests for access to information on the investigation measures undertaken by the Prosecution Office regarding Stojović's allegations and any links between the persons he named as members of the "soccer mafia" and the assault on him. The Administrative Court annulled the decision of the Ministry of Justice confirming the SSP decision, and ordered the adoption of the new decision.

Assault on Vijesti Director Željko Ivanović. – Three unidentified persons assaulted Željko Ivanović, the editor and founder of the daily *Vijesti*, in the night of 1 September 2007. Despite the objections voiced by Ivanović and other witnesses of the assault, the State Prosecutor indicted two persons, from Nikšić and Foča, for inflicting physical injuries and violent conduct, basing the indictment only on the confessions of the two alleged assailants.¹⁰⁰⁹ After an unusually efficient trial, the Podgorica Basic Court convicted both defendants to four years' imprisonment. Their sentences were modified to a year in jail by the Superior Court on appeal.¹⁰¹⁰ The defendants confessed to beating Ivanović up, claiming they had been provoked by *Vijesti's* earlier reports about them. During the investigation and the trial, Ivanović said that the defendants looked nothing like the assailants he had described to the police immediately after the assault. He also claimed that they approached him from the front, not the back, as they alleged. Another witness also claimed that the defendants did not resemble the assailants he saw.¹⁰¹¹ It seems odd that one of the defendants waited two and a half years to take revenge on Ivanović, given that this was how much time had passed since *Vijesti* and the other papers published a short police statement on his indictment. All this gives probable cause for doubt that the persons convicted for assaulting Ivanović were not the real assailants.

Assault on Boris Pejović, Vijesti photographer, and Mihailo Jovović, Vijesti editor. – Podgorica Mayor Miomir Mugoša, his son Miljan Mugoša and driver Dragan Radonjić physically assaulted *Vijesti* photographer Boris Pejović and then Deputy Editor Mihailo Jovović in August 2009 while they were documenting the Mayor's vehicle as it was illegally parking. The Mayor, his son and driver claimed that Jovović had physically assaulted them and inflicted grave injuries on the driver.¹⁰¹² Jovović said that the Mayor's son at one point even pointed a gun at him but that the police had not even tried to search

¹⁰⁰⁸ "Stojović: They Want to Water Down the Case", *Vijesti*, 29 May 2008.

¹⁰⁰⁹ "Ivanović: They Forgot What They Were Supposed to Say", *Dan*, 11 December 2007.

¹⁰¹⁰ "Only One Year for Assault", *Dan*, 9 June 2008.

¹⁰¹¹ "Witness: They Weren't the Assailants, One of Them was Huge", *Vijesti*, 13 December 2007.

¹⁰¹² "Mugoša Physically Assaults Journalists", *Dan*, 7 August 2009.

the Mayor's car and look for the weapon.¹⁰¹³ Pejović and Jovović underwent medical examinations after the incidents, and the doctors established that they had sustained several injuries. The doctors found that Jovović's eardrum had been ruptured and he was operated on.¹⁰¹⁴

The police filed criminal reports against the Mayor's son, but also against the victim, Jovović, and the Basic State Prosecutor indicted both, Jovović for incurring injuries to the driver which resulted in a brain concussion. The Podgorica Basic Court panel returned the indictment filed against Jovović and asked that the medical court expert elaborate on the driver's injuries. Court medical expert Dr. Dragana Čukić had earlier opined that it was possible that Jovović had not inflicted the injury on the driver and that the driver may have sustained it a long time ago.¹⁰¹⁵ The finding was confirmed by court medical experts in Belgrade.¹⁰¹⁶ Driver Radonjić asked for a medical examination 13 hours after the incident.

In May 2011 the State Prosecutor accused *Vijesti* editor, Mihailo Jovović, and Mayor's son Miljan Mugoša, while Mayor Mugoša was earlier fined 400 Euros for the misdemeanour of disturbing public peace and order.¹⁰¹⁷

Jovović was charged with "Causing light body injury" to the driver Radonjić. This crime is often prosecuted by private action, while in this case the State Prosecutor has undertaken prosecution ex officio, accusing Jovović the qualified form of this offense, because the alleged injury was caused by "a dangerous weapon, instrument or other means suitable to seriously injure the body or seriously impair health" (Art. 152(2) CC). The Prosecution based its decision on the opinion of the Institute of Forensic Medicine in Belgrade, which states that Radonjić sustained injuries that could be caused by "edge of a telephone or voice recorder".¹⁰¹⁸ The position of the State Prosecution that a mobile phone is a dangerous weapon that can cause serious injuries was not the usual case in practice. Trial has been scheduled for 6 September 2011. Such diligence of the State Prosecutor is in contrast with other human rights cases, where the Prosecution failed to undertake any actions whatsoever.

The Council for the Civilian Oversight of the Police found that the policemen had made several mistakes during the investigation of the incident and in their treatment of the suspects. The Council also criticised the findings of the Police Internal Audit Sector, which had qualified the police conduct as professional.¹⁰¹⁹

¹⁰¹³ "Mugi is Allowed to Beat Us up!", *Vijesti*, 8 August 2009.

¹⁰¹⁴ "Radonjić Was Only Scratched", *Dan*, 1 October 2009.

¹⁰¹⁵ "Jovović Indicted without Evidence", *Vijesti*, 20 November 2009.

¹⁰¹⁶ "Tore the Prosecution Office's Construct to Bits", *Vijesti*, 20 July 2010.

¹⁰¹⁷ "Miomir Mugoša Fined for Incident with *Vijesti* Journalists", *Vijesti*, 25 January 2010.

¹⁰¹⁸ "Jovović endangered Radonjić's life with a mobile phone", *Vijesti*, 18 May 2011.

¹⁰¹⁹ "Policemen Made Mistakes, but so did Internal Audit Sector", *Vijesti*, 14 April 2010.

Cases of Violation of the Right to Freedom of Expression of NGO Activists

Death threats against researcher of human rights violations Aleksandar Zeković. – Researcher of human rights violations and member of the Council for the Civilian Oversight of the Police Aleksandar Saša Zeković filed a criminal report after receiving death threats on his cell phone in April and May 2007.¹⁰²⁰ After the police refused to listen to the recordings of the two last death threats Zeković had recorded because they lacked voice analysis equipment, the Podgorica local radio station *Antena M* broadcast the recorded threats. Several people recognised the voice of policeman Mirko Banović, a bodyguard of Police Director Veselin Veljović at the time.¹⁰²¹ Veljović told Zeković that a procedure had been conducted and that it had been established that the threats had not been voiced by Banović, but Zeković did not attend the procedure and was only told about it subsequently.¹⁰²² The Council for the Civilian Oversight of the Police stated that the police failed to provide it with the information it required regarding the danger to the personal safety of Zeković, a Council member.¹⁰²³ The media reported that the bodyguards of a senior Montenegrin Government official were involved in the secret surveillance and harassment of Aleksandar Zeković.¹⁰²⁴ The then President of the Supreme Court, Ratko Vukotić, notified Zeković that he could not tell him whether he had been under secret surveillance measures because disclosure of such information would be in contravention of state security interests.¹⁰²⁵ At HRA's requests filed in 2007 and 2008, the Basic State Prosecutor responded that the police were ordered to conduct specific investigation activities, but not whether the police actually did as they were instructed.¹⁰²⁶ It, however, remains unknown whether the Supreme State Prosecutor ever exercised her right to notify the Ministry of Internal Affairs that the police had not acted on the prosecutors' requests. On the second anniversary of the Zeković incident, 31 NGOs sent a letter to the Supreme State Prosecutor, asking her to notify the public of the actions the prosecution office took within its remit to investigate this case. The Supreme State Prosecution Office never replied to the letter. In 2010 the Supreme State Prosecution Office twice refused to answer HRA's request for access to information on what steps the state prosecutor had undertaken to investigate the threats and the HRA challenged its decision by initiating an administrative dispute.

¹⁰²⁰ "Threatened to Kill Him While He Was with the Police Chief", *Vijesti*, 5 May 2007; "Zeković Gets Death Threats", *Dan*, 5 May 2007.

¹⁰²¹ "Prepare to Die", *Vijesti*, 6 May 2007.

¹⁰²² "Banović Passes Polygraph Test", *Dan*, 17 May 2007.

¹⁰²³ "Zeković Dissatisfied with Protection and Investigation", *Vijesti*, 28 April 2007.

¹⁰²⁴ "Policemen Followed Zeković!", *Republika*, 26 April 2007.

¹⁰²⁵ "They Won't Reveal Whether Zeković was Followed", *Dan*, 3 May 2007.

¹⁰²⁶ The State Prosecution Office's reply to the request for free access to information is available in the HRA archives.

For the first time after almost four years since the incident, when the prosecution apparently became time barred, in February 2011 Zeković was called in by Acting Basic State Prosecutor, Ljiljana Klikovac, and told that the audio recordings of the threats he had submitted to the police were not in his case file.¹⁰²⁷

Prison sentence for Milorad Mitrović. – Executive director of NGO Breznica, Milorad Mitrović, was fined with 5,000 Euros in 2008 for defamation of one of the guards on the Durmitor National Park. Since he did not pay the fine, in November 2010 the Basic Court changed Mitrović's fine to 125 days in prison.¹⁰²⁸ By the end of work on the report Mitrović has not been called to serve his prison sentence.

Hearing of journalists and NGO activists. – In June 2010 the Police Directorate questioned the Deputy Director of the Network for Affirmation of NGO Sector (MANS) Veselin Bajčeta and journalist Petar Komnenić on the occasion of uploading the wedding video of controversial businessman Safet Kalić to YouTube.¹⁰²⁹ The footage shows several persons associated with organized crime – Darko Šarić, who was indicted in Serbia for organized crime, in the company of senior officers of the National Security Agency (ANB), Zoran Lazović and Ljubiša Mijatović.¹⁰³⁰ As regards the disputed footage, a year later, in June 2011 the Executive Director of MANS, Vanja Čalović, has also been questioned by the Police at the request of the State Prosecution. MANS expressed its concern because the investigation on who had uploaded the footage still continues, and not the presence of ANB officers in such company, noting that they feel exposed to pressure from organized criminal groups. The State Prosecution failed to inform MANS and the public on the basis of which criminal offense they have been questioned.

The State Prosecutor was also interested in details from whom and in what way Dan editor in chief Mladen Milutinović and journalist Mitar Rakčević have received an official note, made by a former official of the National Security Agency, Vasilije Mijović, on the occasion of the murder of Duško Jovanović, Dan editor in chief.¹⁰³¹ Furthermore, it is not clear why the Prosecution focused on the way the note was obtained, rather than its content.

Protection of whistleblowers. – While performing her official duties of the republic veterinary inspector in Podgorica, Mirjana Drašković has repeatedly noticed irregularities in the work of the Veterinary Administration and

¹⁰²⁷ "Prosecution Office Did Not Hear the Death Threats", *Vijesti*, 18 February 2011.

¹⁰²⁸ "Mitrović: Authorities are silencing me with prison", *Dan*, 11 November 2010.

¹⁰²⁹ MANS press release available at: <http://www.mans.co.me/arhiva/2010/06/pismo-ambasadorima-i-sefovima-medunarodnih-organizacija-povodom-saslusanja-bajcete-i-komnenica/>.

¹⁰³⁰ *Ibid.*

¹⁰³¹ "Prosecutor interested in the origin, not the content of the note", *Dan*, 8 July 2011.

warned the competent authorities.¹⁰³² Since nobody reacted to her reports, and bearing in mind a high risk to public health and the denial of the right to inform the consumer, in July 2009 in a daily newspaper *Vijesti* Drašković warned the public about the presence of goods of dubious quality in Montenegrin market and accused the authorities for failing to undertake measures to protect citizens' health.¹⁰³³ The same day the Director of the Veterinary Administration launched disciplinary proceedings against her and adopted a special decision on her suspension. In September 2009 she received the decision on termination of employment after completion of disciplinary proceedings. The Appeals Commission of the Government of Montenegro has annulled that decision. Despite that, the Director of the Veterinary Administration issued two more identical decisions on termination of employment, annulled by the Commission.¹⁰³⁴ Mirjana Drašković returned to work only after one year, when conducting a disciplinary procedure became time barred.

Employment contracts of five border policemen, Enver Dacić, Mithat Nurković, Hamdo Murić, Nedžad Kuč and Reško Kalač, were not renewed in September 2010. Police Administration explained that this due to a new job classification.¹⁰³⁵ After that they began speaking publicly about the cross-border smuggling while they were officers of the police. Dacić announced publicly that he has strong evidence and information on smuggling to Kosovo and Serbia, which was enabled by the Police. He accused the Chief of the Border Police in Berane, Veselin Krgović, for discrimination on national basis, and at the end of December 2010 filed a request for investigation against him for three crimes – Inciting national, racial and religious hatred, discord and intolerance, Abuse of office and Violation of equality in employment. In court Krgović denied Dacić's charges and the court rejected them.¹⁰³⁶ Along with Dacić, two other officers, Nedžad Kuč and Mithat Nurković, claimed to have evidence of involvement of Krgović in cross-border smuggling.¹⁰³⁷

¹⁰³² Criminal charges against the Chief Veterinary Inspector, the Director of the Veterinary Directorate and the responsible Minister of Agriculture, Water and Forestry filed by Mirjana Drašković on 11 June 2009, the response of the Basic State Prosecutor, Ktr. no. 123/09 of 18 January 2011.

¹⁰³³ „Montenegrin chicken still arriving from Brazil”, *Vijesti*, 20 July 2009.

¹⁰³⁴ Decision of the Director of the Veterinary Administration, Case no. 323/09–0201–2070 from 17 September 2009, Decision of the Appeals Commission of the Government of Montenegro, Case no. 165/8 from 14 November 2009, Decision of the Director of the Veterinary Administration, Case no. 323/09–0201–3030 from 17 December 2009, Decision of the Appeals Commission of the Government of Montenegro, Case no. 323/10–0201–3030/4 from 8 February 2010, Decision of the Director of the Veterinary Administration, Case no. 323/–0201–367/3 from 3 March 2010, Decision of the Appeals Commission of the Government of Montenegro, Case no. 165/16–09 of 28 April 2010.

¹⁰³⁵ “Vukadinović protects smugglers and dishonours the police”, *Dan*, 21 March 2011.

¹⁰³⁶ “Chief of border police pleaded not guilty”, *Dan*, 12 April 2011; “All hope for justice”, *Vijesti*, 12 April 2011.

¹⁰³⁷ “Murderers, rapists, dealers...”, *Monitor*, 10 June 2011.

After informing the public about their allegations, former police officers began receiving threats.¹⁰³⁸ One of them, Mithat Nurković, recorded on his cell phone a police jeep which drove up to his bumper in extremely bad weather conditions and pulled out to pass him so that Nurković had to pull over, and handed the footage to the police. The next day the police and the prosecutor concluded that the video does not contain anything controversial and pressed criminal charges for false reporting against Mithat.¹⁰³⁹ Nurković also stated that on the same day, in addition to that recording, he submitted to the police a recording of smuggling at the border.

Regarding Dacić's statement that the Chief of the Border Police in Berane Veselin Krgović allegedly opened a smuggling corridor to Kosovo and that cigarettes, coffee, drugs and other goods are still being smuggled across the border, the Special Prosecutor Đurdina Nina Ivanović said that the Department for Combating Organized Crime acts in a way to verify the allegations about the existence of a criminal offense.¹⁰⁴⁰

The police refused to grant the requested security measures to Dacić after threatening text messages. He sought protection from the police in writing twice and received verbal response from duty police officers that the police chiefs estimated that his safety is not jeopardized.¹⁰⁴¹ Because of the threats and sense of vulnerability, on 23 April 2011 Enver Dacić's family left Montenegro. Soon after, Mithat Nurković and his family did the same.¹⁰⁴² Dacić left the country three days after the meeting held in the Government on 20 April 2011, after which he told reporters that he is satisfied and that he believes the state authorities will do a good job.¹⁰⁴³ Dacić and Nurković were joined by Suad Muratbašić, a former policeman from Bijelo Polje who in 2007 publicly admitted that prior to elections "he agitated for DPS", but his charges remained unprocessed.¹⁰⁴⁴

The perpetrators of the threats Dacić and his family were exposed to over the phone and publicly have not been discovered.¹⁰⁴⁵ Former border policemen Rešat Kalač and Hamdo Murić and their families subsequently left Montenegro.¹⁰⁴⁶

Incidents in 2010 and 2011

In May 2010, *Dan* journalist Božidar Jelovac reported unidentified perpetrators who had seized his equipment while he was trying to photograph al-

¹⁰³⁸ "Another mafia victory", *Monitor*, 20 May 2011.

¹⁰³⁹ *Ibid.*

¹⁰⁴⁰ "Đurdina Ivanović questioning citizens", 27 January 2011.

¹⁰⁴¹ "Dacić unprotected", *Vijesti*, 10 April 2010.

¹⁰⁴² "We have evidence, only if they want to take a look at it", *Vijesti*, 4 June 2011.

¹⁰⁴³ "Nurković suspected of false reporting", *Pobjeda*, 5 May 2011.

¹⁰⁴⁴ "Murderers, rapists, dealers...", *Monitor*, 10 June 2011.

¹⁰⁴⁵ *Ibid.*

¹⁰⁴⁶ "We have not fought for such country", *Vijesti*, 3 July 2011.

leged vote-buying in Pljevlja, after he had learned that DPS activists were giving citizens money to vote for the DPS.¹⁰⁴⁷ The incident prompted misdemeanour proceedings against a member of the DPS Election Headquarters, who was acquitted. Jelovac claims that this member had not participated in the incident and that the main culprit, an eminent DPS activist, got off scot free.¹⁰⁴⁸

Dan journalist Biljana Marković reported to the police that the relatives of late controversial businessman Dragan Dudić took away her equipment and forbade her to continue reporting on his funeral in June. The police soon notified her that a criminal report had been filed against the identified perpetrator.¹⁰⁴⁹ Marković has not been informed about whether the case has been processed.

In July 2010, unidentified perpetrators first took *Monitor* journalist Branka Plamenac's computer from her home and then returned it. She said that the perpetrators obviously did not intend to steal her belongings, given that nothing else was taken from her home, and that they wanted to access the data in her computer.¹⁰⁵⁰

An unidentified person set fire under two windows of a house in Rožaje, in which the local *Vijesti* correspondent Aida Skorupan lives, in July. Skorupan thinks that the fire was set on purpose because of her reports published in *Vijesti*, particularly her report on the presence of an ANB member at a celebration of the DPS' election win, which had led to his suspension. Skorupan said that she had been receiving phone calls from a hidden number for days before the attempt to set fire to her home. The Police Directorate said that the police had conducted an enquiry, i.e. that Skorupan gave a statement, but did not specify whether they assessed that her safety was in danger and to what extent.¹⁰⁵¹ During the enquiry, the police told the journalist that she "should be aware that it will be difficult to shed light on this case", which she interpreted as a message that they had given up on the investigation in advance. By June 2011 the police did not inform Skorupan whether any headway has been made in identifying the culprits.

Večernje novosti journalist Milutin Sekulović in August 2010 reported to the police that Berane Construction Agency Director Milan Golubović, the brother of Berane Mayor, threatened him over the phone: "that he will remember him for the rest of his life if he again mentions his name in the paper". Golubović denied the allegation. A day before the incident, Sekulović published an article quoting another Berane resident, Jovan Lončar, as saying that Golubović had ordered that the leased billboard promoting the relocation of the garbage dump from the Vasove vode site be ripped up. The

¹⁰⁴⁷ "Assaults on Dan Journalists Continue", *Dan*, 4 July 2010.

¹⁰⁴⁸ Information obtained in a conversation with Božidar Jelovac, 29 April 2011.

¹⁰⁴⁹ "Cussed out a Journalist, Seized His Equipment", *Dan*, 3 June 2010.

¹⁰⁵⁰ "Journalist's Computer First Stolen, then Returned", *Vijesti*, 2 July 2010.

¹⁰⁵¹ "Vijesti Journalist Warned", *Vijesti*, 8 July 2010.

journalist was told that the Basic Prosecutor failed to find any elements in Golubović's threats that warranted criminally prosecution.¹⁰⁵²

The Kragujevac weekly *Svetlost* published in August the following statement: "Bodyguards of the Majito café in Sutomore, Montenegro, attacked the journalist of the Kragujevac weekly *Svetlost* Dejan Mihajlović and incurred him light physical injuries. Instead of protecting him, the Montenegrin police insulted him and cursed him on ethnic grounds". The owner of the café in which the reported assault occurred denied the allegations.¹⁰⁵³ The Association of Journalists of Serbia and Montenegro (SNSCG), the Association of Journalists of Serbia (UNS) and the Association of Journalists of Montenegro (UNCG) condemned the physical assault on journalist Mihajlović.¹⁰⁵⁴

The founders and columnists of the daily *Vijesti* and the *Vijesti* TV station Željko Ivanović, Slavoljub Šćekić, Ljubiša Mitrović, Balša Brković and Milan Popović, received threat letters saying "You're finished, you're next" in September 2010. The criminal police conducted an enquiry and took with them the evidence.¹⁰⁵⁵ No information on what the evidence showed and on whether anyone was suspected of the crime was published by June 2011.

Dissatisfied with the programming and schedule of the reports from promotional gatherings, Ulcinj Mayor Gzim Hajdinaga in October threatened the Director of the local TV station *Teuta* Dino Ramović. The police guarded the station for several hours after the incident, which ended with Hajdinaga apologising to Ramović.¹⁰⁵⁶

An unidentified person threatened a number of times journalist Gojko Raičević, whose reports on irregularities in the allocation of Minority Fund resources were published in the daily *Vijesti*, and integrally posted on the website of IN4S, which he edits. Raičević did not report the incident to the police, because, as he said; "I know who writes that, what a bat he is, and I have no intention of reporting him to the police".¹⁰⁵⁷

Vijesti journalist, Olivera Lakić, wrote about the alleged illegal cigarette manufacturing in Mojkovac factory "Tara", owned by "Montenegro Tobacco Company" from Podgorica, and received several threats in late January and early February 2011. On that occasion the Basic State Prosecutor's Office in Podgorica filed an indictment in February 2011 against S.M. and M.P. for the criminal breach of security. Prosecutor Klikovac stated that the defendants are charged for "serious threats, directed between 31 January and 3 February, to endanger Lakić's life, while S.M., by threatening her, endangered the safety of persons with whom the journalist was on duty on 3 February".¹⁰⁵⁸ In late

¹⁰⁵² "Mayor's Brother Prohibits Mention of His Name", *Vijesti*, 12 August 2010.

¹⁰⁵³ "Attacked a Journalist from Serbia Who Was Doing His Job?", *Vijesti*, 20 August 2010.

¹⁰⁵⁴ "Journalist Threatened Because He is a Serb", *Dan*, 20 August 2010.

¹⁰⁵⁵ "Who is Really Next", *Vijesti*, 25 September 2010.

¹⁰⁵⁶ "Hajdinaga Threatens Dino Ramović", 16 October 2010.

¹⁰⁵⁷ "Money Was Allocated Only to the Politically Correct Ones", *Vijesti*, 19 December 2010.

¹⁰⁵⁸ "Charged for threatening a journalist", *Dan*, 17 February 2011.

June the trial was postponed for the third time for late July.¹⁰⁵⁹ Supreme State Prosecutor's Office in February began checking operations on the tobacco factory that Lakić wrote about, and by the end of June it has not been announced that an investigation was initiated.¹⁰⁶⁰

In mid-April 2011, the media reported that the Public Service RTCG journalist Marko Milačić has been suspended from work for taking part in one of the street protests, organized through the social network Facebook. The protest was organized against the government, under the slogan "Street protests against the Mafia". Milačić then gave a statement to the Vijesti TV, noting that he supports the protest and that he had come to assist the awakening of civic consciousness.¹⁰⁶¹ On the same occasion it was announced that the TVCG Director Radojka Rutović did not want to comment on the case, briefly stating that "everyone knows what the procedure for suspension is". However, a day later, in addition to Milačić's claims that he was "told to take a one month break", the RTCG reactions followed, noting that that was not a suspension, but that Milačić got time off at his own request due to personal obligations.¹⁰⁶²

Milačić responded that before the protest he asked for ten days off, not a month, while his private obligations the RTCG referred to have nothing to do with the case. Although Milačić, after leave, continued to work, his number of appearances in the News has been reduced, and according to him, he was told that his contract ending on 9 July 2011 will not be extended.¹⁰⁶³ After meeting the Head of the Delegation of the European Union in Montenegro, Leopold Maurer, Milačić told the HRA researcher that he believes that this meeting will contribute to the prevention of further adverse consequences he may have for voicing opinions, and expressed hope that his contract will be renewed.

Criminal Proceedings for Defamation and Insult

Only proceedings reported on by the media have been outlined here. At HRA's request for access to information on the number of criminal and civil proceedings for defamation and insult before the Podgorica Basic Court, which has the greatest caseload of defamation cases, the Court replied that the judicial IT System did not support a search of the database of judgments by those criteria and that it was thus unable to respond to the request.¹⁰⁶⁴

Durović v. Andrijašević. – In January 2010, the Podgorica Basic Court found history professor Živko Andrijašević guilty of insulting Chairman of the

¹⁰⁵⁹ "A fine of 500 Euros for Musić's lawyers", *Vijesti*, 22 June 2011.

¹⁰⁶⁰ "Proper documentation, no affair", *Dan*, 9 February 2011.

¹⁰⁶¹ "TVCG suspended Milačić for participating in facebook protests", *Vijesti*, 13 April 2011.

¹⁰⁶² "Milačić: Punished for protesting, Rutović: Asked for days off", *Dan*, 14 April 2011.

¹⁰⁶³ "TVCG to fire Milačić", *Vijesti*, 26 May 2011.

¹⁰⁶⁴ The Podgorica Basic Court reply: Su VIII No. 453/2010, of 17 December 2010.

Montenegrin Academy of Arts and Sciences (CANU) Momir Đurović, who had sued him for defamation, and ordered him to pay a 1000 Euro fine.¹⁰⁶⁵ Đurović had sued Andrijašević over an article the latter published in the weekly *Monitor* in June 2007 entitled “Misery” in which he placed misery as a phenomenon and Đurović’s views in the same context. The court requalified the offence as Insult and found that Andrijašević as a scientist and university professor was entitled to express serious criticisms of specific social phenomena but that the content of the disputed article showed that his intention was not only to describe misery as a phenomenon but also to discredit Đurović. The Superior Court modified the penalty, ordering Andrijašević to pay a fine of 2,000 Euros and upheld the rest of the Basic Court judgment. No court has addressed the standard of the European Court of Human Rights emphasizing that freedom of expression protects not only information that is favourably received or regarded as inoffensive or something that does not cause reactions, “but also the one that offends, shocks or disturbs, because such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society” (*Handyside v. United Kingdom*, 1976, *Lingens v. Austria*, 1986; *Maronek v. Slovakia*, 2001. etc.).

Đukanović v. Vuković (Dan Deputy Chief Editor). – The Podgorica Basic Court in March 2010 adopted a decision replacing the 14,000 Euro fine imposed on *Dan* Deputy Chief Editor Danilo Vuković by a six-month prison sentence.¹⁰⁶⁶ This Court found Vuković guilty of defamation via the media in 2004 after the then Prime Minister Milo Đukanović filed a private lawsuit against him and imposed the maximum fine on him.¹⁰⁶⁷ In the disputed articles, Vuković had linked Đukanović with the sex trafficking scandal via the statements the victim of trafficking gave the investigating judge and which were published in the Serbian paper *Arena*. In his defence, Vuković *inter alia* stated that he picked up the articles in *Arena*, which published S.Č.’s deposition and did not check their accuracy, that he carried them “so that the truth would be revealed” and that “Đukanović himself had said in an interview that S.Č. had mentioned him”. In its judgment, the Basic Court said that it was undisputed that the articles comprised part of S.Č.’s statements during the investigation. The Court concluded that the defendant had the goal and intention of “giving further momentum and reviving the Sex Trafficking Scandal and the role of the private plaintiff in it and his obstruction of justice with the aim of incurring maximum damage to the personality of the private plaintiff and damage moral good, his honour, reputation, family peace and tranquillity, all with the ultimate aim and intention of undermining his political honour

¹⁰⁶⁵ “Academy Chairman Offering No Explanation”, *Vijesti*, 26 January 2010; “Defence Announces it Will File a Huge Appeal”, *Pobjeda*, 28 January 2010.

¹⁰⁶⁶ The decision is available in Montenegrin at: http://www.hraction.org/wp-content/uploads/djukanovic-vukovic-rjesenje_o_pretvaranju_kazne.pdf.

¹⁰⁶⁷ The Basic Court judgment is available in Montenegrin at: http://www.hraction.org/wp-content/uploads/djukanovic-vukovic_osnovni_sud.pdf.

and reputation as a statesman and politician”. The Court did not invoke any ECtHR standards with respect to Article 10 of the ECHR, e.g. with respect to reporting on issues of general interest; on conveying information of public importance published by another media outlet; on the duty of politicians, particularly those holding the topmost positions, to exhibit a greater degree of tolerance to the media scrutiny of their every deed and word, etc. The Superior Court in February 2007 upheld the first-instance judgment and also failed to invoke the ECtHR standards.¹⁰⁶⁸ Vuković was not referred to prison by end April 2011.

Kalić v. Muminović (*Vijesti journalist*). – The Podgorica Basic Court in March acquitted *Vijesti* journalist Jasmina Muminović on charges of defamation. Controversial Rožaje businessman Safet Kalić sued Muminović over the articles in which she qualified him as “a person interesting in terms of security according to police files and ANB documents” and stated he “was identified as one of the chief drug lords in the Balkans in a Serbian police action”. Muminović defended herself by saying that she wrote the disputed articles on the basis of the information she obtained from senior Police Directorate officials and her sources in the Podgorica police and that *Vijesti* published Kalić’s reaction. The court said in the judgment that it established after reviewing the evidence that the defendant had objectively published the information which she had reason to believe, that she was not acting in a pre-meditated manner and that she was not aware that she would damage the reputation of the plaintiff, i.e. that she had justified reason to believe that what she had written was true.¹⁰⁶⁹ The Podgorica Supreme Court chamber upheld Kalić’s appeal and ordered a retrial and Muminović was again acquitted in the first-instance proceedings.¹⁰⁷⁰

Glendža v. Adrović (*Vijesti journalist*). – The Podgorica Basic Court in June 2010 found *Vijesti* journalist Samir Adrović not guilty of defamation. He had been sued by former Chief of the Security Department in Ulcinj Sreten Glendža for an article he published in 2007 and in which he said that Glendža was one of the persons suspected of deporting Bosnian Moslems during the war in Bosnia in the 1990s (case publicly known as “Deportation”, see page 579). Glendža was subsequently accused of war crimes against the civilian population.¹⁰⁷¹

Kalić v. Komnenić (*Monitor journalist*). – The Superior Court in October 2010 overturned the Podgorica Basic Court judgment finding *Monitor* journalist Petar Komnenić guilty of defamation of controversial Rožaje businessman Safet

¹⁰⁶⁸ The Superior Court judgment is available in Montenegrin at: http://www.hracion.org/wp-content/uploads/djukanovic-vukovic_visi_sud.pdf.

¹⁰⁶⁹ “Podgorica Basic Court Acquits Journalist Jasmina Muminović of Defamation Charges”, *Vijesti*, 8 March 2010.

¹⁰⁷⁰ “Journalist Acted with Due Diligence”, *Vijesti*, 23 February 2011.

¹⁰⁷¹ “Samir Adrović Did Not Libel Glendža”, *Vijesti*, 19 June 2010.

Kalić and fining him 2000 Euros.¹⁰⁷² Kalić had sued Komnenić over an article published in 2008 in which he qualified Kalić as the chief drug lord in Serbia and Montenegro and said that his wedding was attended by the members of the Serbian crime organisation Zemun Clan, and that Kalić was taken in by the police in connection to the arrest of a group accused of liquidating a person. In his article, Komnenić referred to an ANB report, which had been presented to the members of the Montenegrin Assembly Security and Defence Committee and parts of which had been leaked to the media, and an official statement by the Serbian police. The ANB did not deny the allegations in the report, and its Director at the time, Duško Marković, refused to comment the content of the document at the trial, invoking the Classified Information Act.¹⁰⁷³

Stanković v. Komnenić (Monitor journalist). – In October 2010, the Podgorica Superior Court¹⁰⁷⁴ upheld the judgment rendered by the Podgorica Basic Court¹⁰⁷⁵ finding journalist Petar Komnenić guilty of defaming Supreme Court judge Ivica Stanković, previously the President of the Superior Court, in his article “Judges under Surveillance – Why the Police Wiretapped Judges Ivica Stanković and Radovan Mandić”. Komnenić wrote about the wiretapping of the judges and subsequent disappearance of the case on the enforcement of secret surveillance measures from the Podgorica Superior Court. Komnenić called as witness a judge of that court who testified on his behalf in court, and presented a written statement of another judge on the disappearance of the case file and the statement of the Police Director, who neither confirmed nor denied the journalist’s allegations. The judgment formal reasoning in no way indicates that the court took into account the ECtHR case law standard, under which a journalist raising an issue of general interest cannot be expected to prove the absolute accuracy of the allegation s/he made, that proof that s/he had justified reasons to believe that it is true suffices.¹⁰⁷⁶

Rondović v. Mitrović (NGO activist). – The Podgorica Basic Court replaced the fine imposed on Milorad Mitrović, the chairman of the NGO Ecological Society Breznica, by a one-month prison sentence. Mitrović was sued by National Park Durmitor gamekeeper Branislav Rondović for defamation, found guilty and ordered to pay a 5000 Euro fine. Mitrović accused Rondović of complicity in poaching in 2008.¹⁰⁷⁷

¹⁰⁷² Basic Court judgment available in Montenegrin at: http://www.hracion.org/wp-content/uploads/Petar_Komnenic-Osnovni_sud.pdf.

¹⁰⁷³ Superior Court judgment available in Montenegrin at: <http://www.hracion.org/wp-content/uploads/petar-komnenic-visi-sud.pdf>.

¹⁰⁷⁴ Superior Court judgment available in Montenegrin at: http://www.hracion.org/wp-content/uploads/Stankovic-Komnenic-Presuda_Visi_sud.pdf.

¹⁰⁷⁵ Basic Court judgment available in Montenegrin at: http://www.hracion.org/wp-content/uploads/komnenic_stankovic.pdf.

¹⁰⁷⁶ The integral HRA comment is available at: http://www.hracion.org/wp-content/uploads/Stankovic-Komnenic-HRA-saopstenje_osuda_Visi_sud.pdf.

¹⁰⁷⁷ “Authorities Silencing Me by Imprisonment”, *Dan*, 11 November 2010.

Mujović and Lakićević v. Radulović (Vijesti journalist). – *Vijesti* journalist Slavko Radulović was acquitted on charges of defamation in February 2011. Law College Dean Ranko Mujović and his Assistant Bojana Lakićević had sued Radulović after he published a series of articles in which he stated that Mujović had been changing Lakićević's grades to improve her grade average. The proceedings against Radulović initiated by Mujović and Lakićević seeking compensation of non-pecuniary damages were under way at the end of the reporting period.¹⁰⁷⁸

MNSS B.V. v. Čalović (NGO activist). – Executive Director of the NGO Network for the Affirmation of the Non-Governmental Sector (MANS) Vanja Čalović was acquitted of defamation in February 2011. Čalović had been charged with libelling the Nikšić Iron Works Plant by publicly talking about its suspicious business operations. The court explained that Čalović had voiced value judgments, the truth of which is not susceptible of proof. Montenegro Speciality Steels (MNSS B.V.), the majority owner of the Nikšić Iron Works Plant, sued Čalović because she said at a news conference in late March 2010 that MNSS B.V. had a daughter company in The Netherlands, the operations of which were not covered by the audit report on the Nikšić plant's operations and that this gave rise to suspicions that it was used for channelling money out of Montenegro or laundering it.¹⁰⁷⁹

Prison Guards and Bijelo Polje Doctors v. Ibrahim Čikić. – The Bijelo Polje Basic Court in 2010 continued the trial of Ibrahim Čikić, whom prison staff and Bijelo Polje doctors: Luka Bulatović, Dr. Tomislav Karišik, Dr. Rasim Agić, Dr. Vučić Popović, Milko Kljajević, Nedeljko Petrović, Dušan Obradović, Vukić Šuković, Blažo Marijanović, Radoman Vuković and Radojko Veličković sued for libelling them in his book "Where the Sun Doesn't Shine".¹⁰⁸⁰ In his book, Čikić described the torture and ill-treatment he had suffered in the Bijelo Polje prison immediately upon his arrest in 1994 on suspicion of working on the creation of the state of Sandžak and against the constitutional order of Montenegro. Čikić, whose sight is seriously impaired, and other members of the Party of Democratic Action (SDA) were accused of preparing terrorist actions in this political trial. All defendants in this rigged trial, including Čikić, were acquitted and received compensation for unlawful deprivation of liberty. The reports on the torture and ill-treatment of Čikić and other SDA members before their arrest and in prison were never processed, although they were reiterated both in court in 1994 and 1995 and by the media, particularly the weekly *Monitor*. Čikić is being tried in absentia, although it is a shortened proceeding where the requirements for trial in the absence of the defendant are not met.¹⁰⁸¹

¹⁰⁷⁸ "Slavko Radulović Acquitted of Defamation Charges Filed by Ranko Mujović", *Vijesti*, 18 February 2011.

¹⁰⁷⁹ "Vanja Čalović Did Not Slander Iron Works Plant", *Vijesti*, 11 February 2011.

¹⁰⁸⁰ "Medical Report Was Signed by the Prosecutor", *Vijesti*, 25 September 2010.

¹⁰⁸¹ Information on the case available at the HRA archive.

Judgment of the European Court of Human Rights in the Case Šabanović v. Montenegro

In late May 2011 the ECHR has issued the first verdict against Montenegro for violation of freedom of expression. In the verdict *Šabanović v. Montenegro and Serbia*¹⁰⁸² it was determined that the applicant's freedom of expression has been violated by a suspended sentence for defamation to three months in prison. Šabanović, as a director of public company for water supply, reacted to the newspaper article from February 2006, stating, based on the report of the inspector for the water, that the water near Herceg Novi is contaminated. Šabanović denied this and said that the inspector who made the report works for the benefit of two private companies, and upon the orders of DPS, the ruling party in the municipality of Herceg Novi. The Court upheld the right to communicate information on matters of public interest in good faith, even when it comes to false and harmful statements about individuals, and stressed that one must take into account whether it comes to statements concerning the private life of a person or statements regarding his/her behavior and attitude as a state official. Also, the Court found reasonable the duty of the Director of Water supply Company, Šabanović, to respond to the allegations of the water inspector, and that Šabanović's criticism concerned the official position of the civil servant, not his private life, so in this case the limits of acceptable criticism are broader.

Misdemeanour Proceedings

Vijesti photographer Boris Pejović was again fined 500 Euros for violating the Public Peace and Order Act at a retrial in April 2010 after the Misdemeanour Chamber quashed the first-instance decision in October 2009. Pejović was found guilty of obstructing the police during the hunger strike of the *Ritam trejd* workers, because he failed to obey the order of policeman Z.T. and move away from the Black Maria and show his identity papers. Pejović again filed an appeal, but the statute of limitations for the offence expired in the meantime.¹⁰⁸³ With respect to this incident, Pejović sued policeman Z.T. for insulting and harassing him in the police station. The proceedings were discontinued after Z.T. apologised to Pejović.¹⁰⁸⁴

A 550 Euro fine for a misdemeanour offence was imposed on Telecommunications Agency Executive Director Zoran Sekulić in February 2011 for insulting *Vijesti* journalist Miodrag Babović at a public venue, in front of the *Vijesti* offices in January 2011.¹⁰⁸⁵ Babović had written a number of articles on the Agency's financial operations, misuse of funds and other alleged irregularities in its work.

¹⁰⁸² Judgment summary available at: http://www.hraction.org/wp-content/uploads/Slucaj_SABANOVIC_protiv_CG_I_SRBIE.pdf.

¹⁰⁸³ "Still Insisting on Wrong Decision", *Vijesti*, 6 May 2010.

¹⁰⁸⁴ "Policeman Apologises", *Vijesti*, 8 October 2010.

¹⁰⁸⁵ "Has to Pay 550 Euros for Insulting a Journalist", *Vijesti*, 15 February 2011.

Civil Compensation Proceedings over Breach of Honour and Reputation

Čolović v. Koprivica (editor of *Liberal*). – In early 2010, the ECtHR communicated to the state a case based on an application by former editor of the paper *Liberal* Veseljko Koprivica, found guilty of defamation by a final judgment in March 2008, after a 14-year long trial. Namely, the Podgorica Superior Court final judgment¹⁰⁸⁶ doubled the amount of compensation set in the first-instance judgment¹⁰⁸⁷ against *Liberal*'s former Chief Editor Veseljko Koprivica and the Liberal Alliance, the founder of the paper, for defamation of Božidar Čolović, RTV Montenegro editor during the wars in the former Yugoslavia in the 1990s. The court found Koprivica and the Liberal Alliance guilty of defamation because *Liberal* in 1994 published that the ICTY had launched proceedings to establish the criminal liability of Čolović and another 15 reporters; the ICTY denied this in 2002 in response to a request of the Podgorica Basic Court. However, neither the first-instance nor second-instance courts took into account whether what the defendant wrote was of exceptional public interest, or whether he had justified reason to believe the information he had received from his sources outside the country at a time when it was impossible to check its accuracy in the ICTY.¹⁰⁸⁸ Acting on a motion for review, the Supreme Court upheld the first-instance judgment and ordered Koprivica to pay the 5000 Euros and the costs of the proceedings. The Supreme Court's judgment also lacks reasoning based on ECtHR case law standards; it only states in one sentence that, under Article 10 of the ECHR, Koprivica was not entitled to publish the disputed allegations. The ECtHR is expected to render its judgment on this case in 2011.

Kusturica v. Nikolaidis (Monitor journalist). – The Constitutional Court of Montenegro still has not rendered a decision on the constitutional appeal against the Supreme Court judgment upholding the Podgorica Superior Court final judgment finding *Monitor* and its journalist Andrej Nikolaidis guilty of damaging the honour and reputation of film director Emir Kusturica and fining them 12,000 Euros. The Podgorica Basic Court in 2006 dismissed as groundless the lawsuit Kusturica filed against *Monitor*, its founder and journalist Nikolaidis, in which he sought 100,000 Euros in compensation for the damages he had sustained by the publication of untrue information in *Monitor* in 2004.¹⁰⁸⁹ In the disputed article entitled "Devil's Apprentice", Nikolaidis wrote, *inter alia*, about Kusturica's views of the war in Bosnia-

¹⁰⁸⁶ The Superior Court judgment is available in Montenegrin at: http://www.hracion.org/wp-content/uploads/drugostepena_presuda-veseljko_koprivica.pdf.

¹⁰⁸⁷ The Basic Court judgment is available in Montenegrin at: http://www.hracion.org/wp-content/uploads/prvostepena_presuda-veseljko_koprivica.pdf.

¹⁰⁸⁸ More in HRA statement: <http://www.hracion.org/?p=81>

¹⁰⁸⁹ The Basic Court judgment is available in Montenegrin at: <http://www.hracion.org/wp-content/uploads/prvostepena-presuda-osnovnog-suda.pdf>

Herzegovina in the 1990s. In its reasoning, the Basic Court quoted six standards from ECtHR judgments. However, the Superior Court in 2008 rendered a judgment accepting Kusturica's claim and ordering Nikolaidis and *Monitor* to pay him 12,000 Euros in compensation for non-pecuniary damages.¹⁰⁹⁰ The Superior Court dismissed the argumentation of the Basic Court without invoking ECtHR case law.¹⁰⁹¹ The Supreme Court in 2009 upheld the judgment ordering Nikolaidis and *Monitor* to pay Kusturica 12,000 Euros.¹⁰⁹² Its judgment is not based on any standards established in ECtHR case law, such as, for instance, that freedom of expression is applicable also to information or ideas that "offend, shock or disturb"; rather, it states that Nikolaidis was wrong to have used excessively strong sarcasm and irony.

Janković v. Milovac (NGO activist). – In February 2010, the Podgorica Basic Court rejected the claim politician and former Cetinje Mayor Milovan Janković filed against NGO MANS activist Dejan Milovac, seeking 3.05 € in compensation for the anguish he suffered due to the damage to his honour and reputation.¹⁰⁹³ Janković had sued Milovac for saying that Janković abused his post during the sale of land. The court *inter alia* said in its judgment that it found relevant that the plaintiff had the opportunity to call a news conference, which is ordinarily how politicians communicate with the media and relay their messages to the public, and provide answers about the whole land sale procedure, which had clearly elicited a lot of public attention. On the contrary, the plaintiff instead sought court protection, which, in the view of the court, was aimed at achieving a goal incompatible with the nature and social purpose of the institute of compensation of non-pecuniary damages for sustained mental anguish caused by damage to one's honour or reputation.

Lazović v. Sadiković. – Senior official Zoran Lazović sued *Monitor* journalist Sead Sadiković for offending his honour and reputation. Sadiković summed up in one sentence the gist of an article published in a weekly of a neighbouring state, in which the plaintiff was presented as a patron of organised drug traffickers. The first-instance court acquitted the journalist in May 2010, having found that he had not intended to offend the plaintiff, but to contribute to a public polemic of general interest, which, in the view of the judge, "fight against organised crime definitely is".¹⁰⁹⁴ The Podgorica Superior Court modified the first-instance judgment in October 2010 and upheld the claim, having found that the journalist was liable for publishing untrue and offensive

¹⁰⁹⁰ The Superior Court judgment is available in Montenegrin at: <http://www.hracion.org/wp-content/uploads/drugostepenapresudavisegsuda.pdf>

¹⁰⁹¹ See HRA's comment of the judgment is available at: <http://www.hracion.org/?p=81>

¹⁰⁹² The Supreme Court judgment is available in Montenegrin at: <http://www.hracion.org/?p=77>

¹⁰⁹³ The judgment is available in Montenegrin at: http://www.hracion.org/wp-content/uploads/mans2_milovan_jankovic.pdf.

¹⁰⁹⁴ The Basic Court Decision is available in Montenegrin at: <http://www.hracion.org/wp-content/uploads/drugostepenapresudavisegsuda.pdf>.

information.¹⁰⁹⁵ The Superior Court did not deliberate whether the article contributed to a debate of public interest or establish whether the defendant intended to offend the plaintiff or not, notwithstanding ECtHR case law, which in its judgments reviewed: (1) whether the freedom of expression the restriction of which is sought regarded a debate of legitimate, general social interest, and (2) whether the journalist was acting with due diligence, in so-called good faith (*bona fidae*) throughout. The Superior Court also did not review whether the journalist was entitled to convey the essence of the allegations of his colleagues in the neighbouring state, although he neither explicitly distanced himself from the allegations nor accepted them as his own and although the ECtHR had, in a very similar case (*Thoma v. Luxembourg*) concluded that the conviction of a journalist for an identical action amounted to a violation of his right to freedom of expression. Interestingly, this case was about “principle” not high compensation, because the plaintiff had sought and indeed received only 1 Euro in compensation.

Keković v. Simonović (Dan journalist). – The Podgorica Superior Court in May rejected the claim by former state security chief Vladimir Keković, who demanded that *Dan* journalist Budo Simonović pay him 15,000 to compensate him for non-pecuniary damages. Keković sued Simonović for saying in February 2009 that he was responsible for the theft of jewels from the Christian relic Lady of Philermme.¹⁰⁹⁶

Barović v. Radević (Vijesti journalist). – The Podgorica Basic Court in October 2010 rejected the claim by Podgorica businessman Veselin Barović, who sought 100,000 Euros in compensation from *Vijesti* journalist Komnen Radević. Barović had sued Radević for writing in his report on the trial of the assassins of senior police official Slavoljub Šćekić that Barović’s vehicle had been used in the assassination. The court concluded that Radević had accurately reported on the trial without adding his personal views and that Barović had provided no proof that he was not the owner of the vehicle in question.¹⁰⁹⁷

MNSS B.V. v. Čalović and NGO MANS. – The Basic Court rendered a judgment in November 2010 rejecting the claim by MNSS B.V. from The Netherlands and the Nikšić Iron Works Plant seeking 36,000 Euros in compensation for non-pecuniary damages from Vanja Čalović and the Network for the Affirmation of the Non-Governmental Sector for damaging their business reputation and violating rights of a person. The judgment, *inter alia*, stated “What is characteristic of the legal application of Article 10 of the ECHR is that it protects also expression carrying the risk of damaging or actually damaging

¹⁰⁹⁵ The Superior Court Decision is available in Montenegrin: http://www.hraction.org/wp-content/uploads/Sead_Sadikovic-Visi_sud.pdf.

¹⁰⁹⁶ “Keković Appealed in Vain”, *Dan*, 7 May 2010.

¹⁰⁹⁷ The Basic Court judgment is available in Montenegrin at: http://www.hraction.org/wp-content/uploads/veselin_barovic-dailly_press_radovic.pdf.

the interests of others, because opinions commanding a majority are usually not exposed to the risk of state intervention and this is precisely why the protection afforded by Article 10 extends to information and opinions expressed by small groups as well, or even by an individual, when such expression shocks or at least elicits major interest of the majority, due to the debate on issues of public interest.”¹⁰⁹⁸

Prison Guards and Bijelo Polje Doctors v. Ibrahim Čikić. – The Bijelo Polje Basic Court continued in 2010 the trial of Ibrahim Čikić, whom prison staff and Bijelo Polje doctors: Luka Bulatović, Dr. Tomislav Karišik, Dr Rasim Agić, Dr. Vučić Popović, Milko Kljajević, Nedeljko Petrović, Dušan Obradović, Vukić Šuković, Blažo Marijanović, Radoman Vuković and Radojko Veličković have sued for damages. The plaintiffs are seeking 120,000 Euros in compensation. They also filed private criminal charges against Čikić for the allegations he published in his book “Where the Sun Doesn’t Shine”.¹⁰⁹⁹ The court decided to suspend the civil proceedings against Čikić in February 2011 until the completion of the criminal proceedings.¹¹⁰⁰

¹⁰⁹⁸ The Basic Court judgment is available in Montenegrin at: http://www.hraction.org/wp-content/uploads/mans_zeljezara.pdf

¹⁰⁹⁹ See above p. 338..

¹¹⁰⁰ Information received from the Prelević Law Office, legal representatives of Ibrahim Čikić.

Freedom of Peaceful Assembly

Article 21, ICCPR:

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 11, ECHR:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

General

Assembly means the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose.¹¹⁰¹ The protection of the freedom to peacefully assemble is crucial to creating a tolerant and pluralist society in which groups with different beliefs, practices, or policies can exist peacefully together.¹¹⁰² Only peaceful assembly enjoys protection, but the term ‘peaceful’ should be interpreted to include conduct that may annoy or give offence, and even conduct that temporarily limit the rights of others.¹¹⁰³ The State’s duty to protect peaceful assembly is of particular significance where the persons holding, or attempting to hold, the assembly are espousing an unpopular or minority view.¹¹⁰⁴

¹¹⁰¹ OSCE/ODIHR – *Venice Commission Guidelines on Freedom of Peaceful Assembly*, 2nd edition, 2 July 2010, http://www.venice.coe.int/site/dynamics/N_Opinion_ef.asp?L=E&OID=581

¹¹⁰² *Ibid.*

¹¹⁰³ *Ibid.*

¹¹⁰⁴ *Baczowski and Others v. Poland*, 2007, paragraph. 64.

Freedom of *peaceful assembly* covers not only static meetings but also *public processions*, so-called protest walks.¹¹⁰⁵ The authorities have the duty to tolerate traffic disruptions to an extent, but may penalise e.g. hours-long highway blockages.¹¹⁰⁶ For a restriction of the right to the freedom of peaceful assembly to be lawful, the restriction must genuinely be necessary to protect the justified interests listed in Article 21 of the ICCPR and Art. 11(2) of the ECHR.

Article 52(1) of the Constitution guarantees the freedom of peaceful assembly, without approval, with prior notification of the competent authority. The freedom of assembly may be temporarily restricted by a decision of the competent authority in order to prevent disorder or the commission of a criminal offence, threat to health, morality or security of people and property, in accordance with the law (Art. 52(2)). The Constitution allows for even fewer restrictions than the ICCPR and the ECHR, since it omits restriction of the freedom of assembly in the interests of “protection of the rights and freedoms of others”.

The Criminal Code sanctions prevention of public assemblies. Under Art. 181, anyone who, by use of force, threat, deceit or in another manner prevents or disturbs the calling or holding of a public assembly organised in accordance with the law, shall be punished. Furthermore, Article 178 of the CC, entitled *Infringement of the Freedom of Speech and Public Appearance*, incriminates the denial or restriction of another person’s freedom of speech or public appearance at a public assembly.

The Public Assembly Act (*Sl. list* RCG, 31/05) regulates the freedom of peaceful assembly in greater detail. The Act still refers to “public assembly” in its title, although the Constitution, adopted two years after the Act, uses the term peaceful rather than public assembly.

Notification of Assembly

Under the Act, a public assembly shall denote: 1) peaceful assemblies and public protests, 2) public performances, and 3) other assemblies (Art. 2). A peaceful assembly and a public protest shall mean any assembly of 20 citizens at a public venue for the purpose of expressing their political, social or other convictions (Art. 3(1)).

Differentiating between various kinds of assembly is important because different kinds of assembly are subjected to different notification regimes. The Police Directorate must be notified of a peaceful assembly and provided with the required documentation at least five days before the scheduled assembly (Art. 6(2)), while other forms of assembly, such as public performances, have

¹¹⁰⁵ *Christians against Racism and Fascism v. UK*, ECmHR, 1980.

¹¹⁰⁶ *Barraco v. France*, 2009.

to be reported at least seven days in advance (Art. 24(2)). The police need not be notified of the other kinds of assemblies unless their character or expected number of participants require particular security measures falling outside the scope of ordinary police duties, in which cases notification must be submitted 48 hours before the assembly is to take place.

Under Article 3(3), other forms of assembly shall entail assemblies organised in order to achieve state, traditional, humanitarian, sports, cultural-artistic and other interests. However, the authors of the law failed to list even in the explanation of the Act examples of “other assemblies” to achieve “state”, “humanitarian” or “traditional” interests, wherefore they may be differently interpreted given the distinction between public protests and these other forms of assembly.

The Act states that the authorities need not be notified of a peaceful assembly is unnecessary if it entails a meeting, panel discussion, round table, assembly of a registered political party, trade union or another organisation in a closed venue (Art. 8).

The ECtHR is of the view that the prior assembly notification requirement ordinarily serves to reconcile different interests: on the one hand, the right to assembly, and on the other, the freedom of movement of others, i.e. prevention of unrest and crime. It thus does not *per se* constitute a violation of the freedom of assembly, unless it represents a hidden obstacle to the freedom of peaceful assembly as it is protected by the Convention. (*Balçık and Others v. Turkey*, para. 49, 2007).

Article 9 of the Act lays down that a peaceful assembly may be held at any appropriate venue but does not define such venues. The organiser of a peaceful assembly is under the obligation to ensure a sufficient number of monitors, peace and order and undertake adequate health and fire protection measures (Art. 13), while the police are under the obligation to prevent the obstruction or prevention of the holding of a peaceful assembly (Art. 14).

Restrictions of the Freedom of Assembly

The Public Assembly Act prohibits assembly in the vicinity of 1) hospitals, 2) kindergartens and primary schools (while children are inside them), 3) national parks and protected nature parks, except for peaceful assemblies promoting environmental protection, 4) cultural monuments if an assembly would result in the destruction of protected cultural values, 5) highways, arterial, regional or local roads in a manner that would jeopardise traffic safety, and 6) other venues if the assembly may seriously jeopardise the movement and work of a larger number of citizens due to its character, the time at which it is held or the number of its participants (Art. 10).

There are two problems arising with respect to restrictions of the freedom of assembly under this Act. The first pertains to restrictions not envisaged by

the Constitution, like “the protection of the movement and work of a larger number of citizens”, which gives rise to the issue of the constitutionality of Article 10 of the Act.¹¹⁰⁷ The second problem regards the broad scope of discretion the police have in establishing e.g. whether the venue of an assembly is “in the vicinity” of a site at which assemblies may not be held, i.e. whether they may prohibit an assembly because it may “seriously jeopardise the movement and work of a larger number of citizens”. The wording of the provision allows for prohibiting e.g. protest walks, which are protected under Art. 11 of the ECHR.¹¹⁰⁸

In April 2011, the NGO Youth Initiative for Human Rights (YIHR) filed an initiative with the Constitutional Court to review the constitutionality of Articles 10, 11 and 26 of the Public Assembly Act¹¹⁰⁹, claiming that these provisions are in contravention of the Constitution because they allow for the prohibition of peaceful assembly, while the Constitution allows only for temporary restrictions of the freedom of assembly. YIHR further states that Article 10 is in contravention of the Constitution because the latter does not lay down the list of venues at which public assemblies may not be held or that such a list shall be specified by law. The Roma Scholarship Foundation (FSR) also filed an initiative with the Constitutional Court to review the constitutionality of the Public Assembly Act,¹¹¹⁰ quoting the same argument -- that the freedom of peaceful assembly may only be temporarily restricted but not prohibited.

The Public Assembly Act obviously needs to be aligned with the Constitution and international standards; furthermore, some of its provisions need to be specified in greater detail to pre-empt their arbitrary enforcement.

Article 11 of the Public Assembly Act lays down when the competent authority (police) may render a decision prohibiting a peaceful assembly: in the event it was not notified properly and on time of the assembly; if the assembly is scheduled at a legally prohibited venue; if the assembly aims at violating guaranteed human rights and freedoms or inciting violence, ethnic, racial or other hatred or intolerance; if its prohibition is necessary to prevent a threat to human health at the request of the state administrative authority charged with health; or if its holding may jeopardise the safety of people or property or may disrupt public peace and order to a greater extent.

¹¹⁰⁷ Particularly in view of Article 24(2) of the Constitution (Restrictions of Human Rights and Freedoms): “Restrictions shall not be introduced for purposes other than the ones they are set for”.

¹¹⁰⁸ *Christians against Racism and Fascism v. UK*, ECmHR, 1980.

¹¹⁰⁹ The YIHR initiative submitted to the Constitutional Court in April 2011 is available in Montenegrin at: <http://www.yihr.me/wp-content/uploads/2011/04/YIHR-Inicijativa-Us-tavnom-sudu-final9411.pdf>.

¹¹¹⁰ The FSR initiative is available in Montenegrin at: http://www.isi-mne.org/cms/index.php?option=com_content&view=article&id=140%3Apotvrđiti-slobodu-okupljanja-u-praksi&catid=3%3Anews-cg&Itemid=55&lang=en.

The question arises as to which criteria the police apply to establish whether an assembly is likely to jeopardise safety or disrupt public order and whether they will allow the holding of an assembly aimed at protecting human rights, e.g. a protest against the discrimination of sexual minorities, although it is expected to cause fierce reactions and, possibly, disrupt public order to a considerable extent.¹¹¹¹ Although the Act imposes upon the police the obligation to prevent the obstruction or prevention of a lawful assembly, such protection is conditioned by the prior approval of such an assembly by the police themselves, i.e. the court.

A decision to prohibit an assembly must be rendered 48 hours before the assembly is to begin at the latest. The organiser of the assembly may appeal the decision with the Ministry of Internal Affairs; the appeal shall not stay the enforcement of the decision (Art. 12). The MIA has to render and communicate its decision on the appeal to the organiser within 24 hours and the organiser is under the obligation to notify the public of the decision to prohibit the peaceful assembly and remove public notices of the assembly. The assembly may be held in the event the MIA does not review the decision within the specified deadline. An administrative dispute may be initiated against the MIA decision.¹¹¹²

The greatest achievement of the Act is that it includes provisions prohibiting violence and incitement to violence, hatred or intolerance. Participants in a peaceful assembly are not allowed to carry objects that may be used to inflict injury or alcoholic drinks, wear uniforms, parts of uniform, clothes and other insignia inciting or encouraging armed conflicts or violence, national, racial or religious hatred or other types of intolerance (Arts. 15 and 16). Fines shall be imposed for violations of these provisions (Arts. 31–34).

The police are entitled to interrupt or prohibit a peaceful assembly in progress in the event: 1) they had not been notified of it or had prohibited it, 2) it is held at a venue other than the reported one, 3) its participants are inciting or encouraging armed conflicts, ethnic, racial, religious or other hatred or intolerance, 4) the monitors (which the organiser is under the obligation to provide, Art. 13) are unable to maintain law and order, or 5) there is real or imminent risk of violence or other forms of disruption of public peace and order of greater proportions (Art. 20). A police officer shall communicate the order on the termination or prohibition of a peaceful assembly to the manager of the assembly, who shall notify the participants thereof and ask them to disperse peacefully. In the event the manager or participants of the peaceful assembly do not abide by the order, the police officers are obliged to take the necessary measures to disperse the participants of the peaceful assembly (Art. 21).

¹¹¹¹ The ECtHR reiterated on a number of occasions that the authorities need to ensure the protection of gatherings that may cause protests of opposing groups, specifically in cases of so-called pride parades, rallies against the discrimination of sexual minorities (*Baczowski and others v. Poland*, 2007; *Alekseyev v. Russia*, 2010).

¹¹¹² Pursuant to Art. 7(1) of the Administrative Disputes Act (*Sl. list RCG*, 60/03).

Automatic prohibition of all assemblies in the absence of prior notification (Art. 20(1)) may, however, give rise to a violation of Article 11 of the ECHR, in special circumstances when an immediate response might be justified, for example in relation to a political event, in the form of a spontaneous demonstration.¹¹¹³ In the view of the ECtHR, it is important for the public authorities to show a certain degree of tolerance towards such spontaneous and peaceful gatherings if the freedom of assembly is not to be deprived of all substance.¹¹¹⁴

The Act in general restricts the freedom of speech and public appearance at any public assembly by the prohibition of incitement to and encouragement of violence, ethnic, racial, religious or other hatred or intolerance (Art. 4(2)). The police powers to interrupt and prohibit such gatherings are within the scope of the state's internationally recognized obligation to prohibit propaganda for war and incitement to ethnic, racial or religious hatred as long as they are not abused in practice and do not result in the excessive restriction of the freedom of assembly which is not necessary in a democratic society.

Article 5(3) of the Strike Act prohibits workers on strike from staging a strike at a venue outside their company compound. This blanket prohibition of the public assembly of workers on strike amounts to an obvious violation of the freedom of assembly, because it is not justified on any of the grounds on which the Constitution allows restrictions of the freedom of assembly. This provision is obviously unconstitutional given that the Constitution allows for restrictions of human rights by the law only within the scope permitted by the Constitution and to the extent necessary to meet the purpose for which the restriction is permitted in an open and democratic society (Art. 24(1)).

Freedom of Assembly in Practice

The Montenegrin Police Directorate in 2010 rendered 78 decisions prohibiting peaceful assembly by invoking Article 10(5 and 6) of the Public Assembly Act in order to prevent the risks to traffic safety and the movement and work of a larger number of citizens, which, in the view of the HRA, are unconstitutional grounds.¹¹¹⁵ All decisions invoked these legal grounds but failed to elaborate why exactly the rallies were prohibited. The police banned the gatherings of the former workers of the company "Radoje Dakić" 40 times, the workers of the electrode plant "Piva" twice, the workers of "Podgorica Aluminum Plant" blacksmithery "Kovačnica" 8 times, the workers of the "Podgorica Tobacco Factory" 20 times and the workers of the dairy company "Mljekara" seven times. They prohibited gatherings in Podgorica in front of the Government, ministry and Assembly buildings, even those scheduled to

¹¹¹³ *Eva Molnar v. Hungary*, 2008, paragraphs. 36–38.

¹¹¹⁴ *Nurettin Aldemir and Others v. Turkey*, 2007, paragraph 46.

¹¹¹⁵ Police Directorate's reply to HRA's request for access to information, 2 February 2011, 09 Ref No: 051/10–47213/2

last only one hour. The workers were even forbidden to protest by marching on the sidewalks.¹¹¹⁶

The police elaborated only one decision on the prohibition of an assembly, that of the former workers of the wood factory “Vukman Kruščić”, who had planned on protesting in the abandoned shafts of the shut Brskovo Mine. The Mojkovac police banned their protest because of the risks to human safety in the abandoned pits.¹¹¹⁷

The police prevented a spontaneous protest in front of the Podgorica City Assembly, against the Mayor who had promised the former workers of “Radoje Dakić” that the assets of the factory would be sold to pay them their claims. They drove the workers away from the stairs leading to the building and deployed a police cordon to prevent them from accessing the building.¹¹¹⁸

The police prohibited the workers of the Bijelo Polje shoe plant “Lenka”, who have not been paid for nine years and whose health insurance has not been paid for two years now,¹¹¹⁹ from staging a protest walk down the main street on Bijelo Polje Municipality Day. The properly reported gathering was prohibited under, in HRA’s opinion, the unconstitutional provision of the Strike Act; furthermore the decision failed to elaborate the reasons for the ban.¹¹²⁰

The workers of the electrode factory “Piva” (FEP), who were demanding that the factory restart work, payment of their salary and contribution arrears and severance packages for redundant workers, decided against their peaceful assembly in front of the Montenegrin Assembly building scheduled for 28 December after the Police Directorate prohibited their rally. They instead rallied in the plant.¹¹²¹

The Police Directorate banned the protest of the Roma Scholarship Foundation (FSR) in front of the Government building in March 2011. The official explanation was that the Public Assembly Act did not permit public rallies in front of buildings, such as the Assembly or Government building, which does not state anything of the kind. The FSR was offered, and agreed, to hold its rally at another venue in the immediate vicinity of the Government headquarters. However, it noted some time later that another organiser of an assembly was allowed to hold a rally in front of the Assembly building. The FSR filed a complaint with the Human Rights and Freedoms Protector claiming discrimination on grounds of racial and ethnic affiliation.¹¹²²

¹¹¹⁶ Police Directorate, Podgorica Area Unit, 17 Ref No 01–224/10–1564/2, of 27 January 2010 (prohibition of the Tobacco Factory workers’ assembly).

¹¹¹⁷ Police Directorate, Mojkovac Branch Office, 03 Ref No 062/10–560/2, of 12 February 2010.

¹¹¹⁸ “Criminal Report against Mugoša”, *Dan*, 20 May 2010; “Mugi Calls Police”, *Dan*, 13 May 2010.

¹¹¹⁹ “Threatening to Take Radical Measures”, *Dan*, 18 December 2010.

¹¹²⁰ “Bijelo Polje Shoe Plant Lenka Workers’ Protest Banned”, *Vijesti*, 03 January 2010.

¹¹²¹ *TV Vijesti*, 28 December 2010.

¹¹²² “Acknowledge Freedom of Assembly in Practice”, 8 April 2011, available in Montenegrin at http://www.isi-mne.org/cms/index.php?option=com_content&view=article&id=140%3Apotvrđiti-slobodu-okupljanja-u-praksi&catid=3%3Anews-cg&Itemid=55&lang=en

Freedom of Association

Article 22, ICCPR:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this Article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

Article 11, ECHR:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

General

Article 53(1) of the Montenegrin Constitution guarantees the freedom of political, trade union and other association and action. The Constitution does not require obtaining prior consent for founding an association and merely stipulates its registration with the competent authority.

The Constitution explicitly affords protection from forcible association (Art. 53(2)), in accordance with the ECtHR view that the state must guarantee everyone the right not to associate with others, i.e. not to join an association (*Sigurour A. Sigurjonsson v. Iceland*, 30 June 1993, A-264; *Young, James and Webster v. The United Kingdom*, 1981).

The Constitution prohibits *political* organising in state authorities (Art. 54). Constitutional Court judges, judges, state prosecutors and their deputies, the Human Rights and Freedoms Protector, members of the Central Bank Council, members of the State Audit Institution Senate, professional Army, police and other security service staff may not be members of a *political* organisation (Art. 54(2)). The Venice Commission concluded that its previous remarks concerning this provision, that the blanket ban on participation of civil servants in political association was unacceptable, had regrettably not been taken into consideration.¹¹²³ It also criticised the legislator's failure to define "political organisations" by a law, noting that it was broader than "political parties", wherefore the prohibition of association was too restrictive and allowed for arbitrary interpretations.¹¹²⁴

Prohibiting judges, public prosecutors and their deputies from political association may be considered necessary in a democratic society, just like the prohibition of the political association of professional army and police troops. However, according to the standard set by ECtHR case law, trade-union organisation in state authorities cannot be prohibited absolutely and can be restricted only exceptionally, if necessary in a democratic society, for the reasons laid down in Art. 11(2) of the ECHR (*Tum Haber Sen and Cinar v. Turkey*, 2006; *Demir and Baykara v. Turkey*, 2008.). The Montenegrin Constitution and laws accordingly do not prohibit state administration staff, army staff, judges and prosecutors from associating in trade unions.¹¹²⁵ More on trade union freedoms on p. 499.

The Constitution prohibits activities by political and other organisations directed at the violent overthrow of the constitutional order, violation of Montenegro's territorial integrity, guaranteed rights and freedoms or incitement to ethnic, racial, religious or other hatred or intolerance (Art. 55). Associations shall, therefore, be prohibited if their activities are aimed at the violent overthrow of the constitutional order, dissemination of racial or ethnic hate, et al.

¹¹²³ See Opinion of the Venice Commission on the Montenegrin Constitution of 20 December of 2007, Opinion No. 392/2006, paragraph 44.

¹¹²⁴ Venice Commission, Interim Opinion on the Draft Constitution of Montenegro, Strasbourg 2 June 2007, paragraph 78.

¹¹²⁵ Law on State Officials and Employees (Sl. list, 50/08, 86/09 and 49/10) in Article 15 stipulates that "state official or employee has a right to associate in trade unions, in accordance with general regulations on labor", and special laws for the Army, police and courts do not prohibit associating in trade unions.

In this case, the consequence is punished – the prohibition of an organisation is the ultimate sanction for the illegal activity it has been conducting. The Constitutional Court is charged with deciding on the “prohibition of the work of a political party or non-governmental organisation” (Art. 149(1.6)); its remit does not extend to trade unions, which are subject to administrative proceedings i.e. administrative disputes (more on the shortcomings of that solution on page 500) Pursuant to the Constitutional Court Act (Arts. 72–75), this court may prohibit the operation of a political party or non-governmental organization for the above reasons provided by the Constitution, acting on the proposal of the Protector of Human Rights and Freedoms, the state administration body responsible for the protection of human rights and freedoms (Ministry of Human and Minority Rights), the Council for Defence and Security or the authority responsible for registering political parties and nongovernmental organizations (Ministry of Domestic Affairs).

Pursuant to the Constitution, the State Administration Act¹¹²⁶ prohibits political organisation and activities of political organisations in state administration authorities (Art. 9).

The ICCPR and ECHR do not differentiate between associations of nationals and aliens and guarantee the freedom of association to both. Article 53 of the Constitution does not specify that the freedom of association belongs only to the citizens of Montenegro, which would lead to the conclusion that it imposes no restrictions on this issue. However, the Constitution in Art. 54(2) prohibits political association and activity of foreigners and political organisations headquartered outside Montenegro. The Venice Commission qualified the prohibition of political association by foreigners as excessive and suggested that it be avoided or formulated in a more specific and detailed manner by a law.¹¹²⁷ Montenegrin legislation does not impose any restrictions on the establishment of non-governmental organisations by foreigners (more on this issue below).

Article 182 of the Criminal Code¹¹²⁸ envisages a fine or maximum one year imprisonment for the intentional violation of the law or other unlawful prevention or obstruction of political, trade-union or other forms of association or activities by citizens or the activities of their political, trade-union or other organisations.

According to the Ministry of Domestic Affairs, there has never been a prohibition of a work of any political party, non-governmental organisations or foundation in Montenegro.¹¹²⁹

¹¹²⁶ *Sl. list RCG*, 38/2003.

¹¹²⁷ See the Venice Commission Opinion and Interim Opinion on the Constitution of Montenegro, *supra nota* 1123 and 1124.

¹¹²⁸ *Sl. list RCG*, 70/2003, latest amendments 25/2010.

¹¹²⁹ Response of the Ministry of Domestic Affairs, January 2011, HRA archive.

Non-Governmental Organisations

The Act on Non-Governmental Organisations (hereinafter: NGO Act)¹¹³⁰ governs the establishment, registration, work and dissolution of associations and foundations (Art. 1). A non-governmental association, an organisation with members, shall be established by at least five persons with permanent or temporary residence or headquarters in Montenegro, while a foundation shall be established by at least one person with permanent or temporary residence or headquarters in Montenegro or abroad (Art. 9). Prior to commencing its activities, an association must be entered in the Register kept by the MIA, by filing an application for registration and submitting its memorandum and articles of association (Arts. 13 and 14). Under the Act, the state shall financially assist NGOs via the Commission for Allocation of Funds to NGOs, which shall every year publicly invite the NGOs to apply for aid in the current year by the end of the first trimester at the latest (Art. 26).

Foreign NGOs can operate in Montenegro, if they register their office with the competent ministry (Art. 19). The rules applicable to domestic NGOs are also valid for foreign NGOs.

Under the NGO Act, an NGO may perform commercial activities as long as all its proceeds are used to achieve the goals it was established for in the territory of Montenegro. An NGO shall not be allowed to continue performing commercial activities in the event its revenues in the previous calendar year exceeded 4000 euros or 20% of its total annual revenues (Art. 25(paras. 1 and 2)).

An NGO shall cease to exist upon its deletion from the Register. An NGO shall be deleted in the event the period for which it was established has expired; the authorised person rendered a decision on the termination of its activities; its work has been prohibited; or on the day of completion of the bankruptcy proceedings or voluntary liquidation in the event the NGO was engaged in commercial activities (Art. 28).

The Constitutional Court decides on the prohibition of the work of non-governmental organizations (Art. 149(1), item 6 of the Constitution).

There were 5503 registered NGOs in Montenegro at the end of 2010¹¹³¹, but assessments are that only couple of hundreds were active.

The state provides financial assistance to NGOs through three funds, the Commission for the allocation of funds to NGOs, the Commission for allocation of funds from gambling and the Fund for minorities, as well as through local governments. In 2010 a total of 6 million Euros was distributed to non-governmental organizations, but the distribution was criticized for lacking transparency, specified criteria and monitoring of funds spending.¹¹³²

¹¹³⁰ *Sl. list RCG*, 27/99, 09/02, 30/02, *Sl. list CG*, 11/07 of 13 December 2007.

¹¹³¹ HRA researcher's conversation with the Ministry of Domestic Affairs officer, 1 April 2011.

¹¹³² Research of the Center for Democratic Transition and Youth Initiative for Human Rights on the financing of NGOs from the state and municipal budgets ("Who controls how the

The Commission for the allocation of funds to NGOs, established by the Parliament of Montenegro, announces a call for proposals for each year by the end of March.¹¹³³ The budget of the Commission for 2011 amounts to 250,000 Euros, out of which 230,000 Euros is for NGOs. The Commission supports projects only partially; it fully supported only one project this year.¹¹³⁴ In addition to the lack of transparency and control over state funds spending by the NGOs, the specific problem is the lack of control of the work of the Commission, established by the Parliament, since the Commission is not obliged to submit work reports to it.¹¹³⁵

Out of three NGO funds, only the Minority Fund has a website on which it publishes the results of the call for proposals, while the Commission for allocation of revenue from gambling and the Commission for the allocation of funds to NGOs publish the results of inappropriate websites or do not publish them at all.¹¹³⁶

Government Office for Cooperation with NGOs formed a working group which, in December 2010, developed the Analysis of regulations relevant to the work of NGOs, with the recommendation for adoption of a new NGO Act.¹¹³⁷ The Analysis identifies two groups of problems in the implementation of the NGO Act. First, it is necessary to comply certain provisions of the Act (requirement that the founder must have a residence, domicile or head office in Montenegro; mandatory registration of an organisation in order for it to act; only in organizations with 10 members or less all perform the role of the Assembly etc.) with Article 11 ECHR and the ECtHR case law.¹¹³⁸ Second, it was noted that the current law does not specify the questions of testamentary foundations, the mandatory content of the charter and statute, the registration of non-governmental organizations and foundations, bases and procedure for removal from the register and the instruments of

NGO sector spends money it receives from the budget”, TV Vijesti, 28 December 2010; “The distribution of money is not transparent enough”, Pobjeda, 29 December 2010).

¹¹³³ Non-governmental Organizations Act (*Sl. list RCG*, 27/99, 09/02, 30/02, *Sl. list CG*, 11/07), Art. 26 a-d.

¹¹³⁴ *Ibid.*

¹¹³⁵ “Not reporting to anyone, taking care of 250.000 themselves”, *Vijesti*, 25 June 2011.

¹¹³⁶ “Funding NGOs”, *Elmag*, 28 December 2010.

¹¹³⁷ The Analysis available at: http://www.mup.gov.me/rubrike/Registracija_NVO/104398/Poziv-za-Javnu-raspravu-o-Nacrtu-zakona-o-NVO.html

¹¹³⁸ Articles 8 and 9, which regulate the establishment of organizations, allow state interference in the exercise of freedom of association, and state intervention in the area of freedom of association must be minimal and must meet the conditions for the restriction of freedom of association as applied by the European Court of Human Rights, that any restriction of freedom of association must: 1) be lawful, 2) serve a legitimate purpose, 3) be proportional to the legitimate purpose it serves. Further, under Article 11 ECHR the exercise of freedom of association is not conditioned by any requirement in terms of ethnicity, nationality or residence, but in accordance with Article 1 of the Convention, but it only requires the existence of any recognizable legal relationship between Member States and a person.

legal protection in that process.¹¹³⁹ It is recommended that the transitional provisions of future law prescribe the obligation to align the statute and other NGO acts with amendments to the law, which would contribute to determining the number of active NGOs in Montenegro.

On its 13 January 2011 session, the Government ordered the Ministry of Domestic Affairs to develop the Draft NGO Act, in cooperation with the Working Group that prepared the Analysis.¹¹⁴⁰ The Draft¹¹⁴¹, prepared by a working group composed of representatives of the Ministry and NGOs, criticizes regulation of transparency, registration and equal treatment of foundations and organizations.¹¹⁴² The public debate was opened on 25 March 2011. Centre for Development of NGOs (CRNVO), Centre for Civic Education (CGO) and Centre for Monitoring (CEMI) have proposed to establish the percent of the current annual state budget for NGOs, because they will increasingly turn to domestic sources of financing.¹¹⁴³

In early June 2011, 42 NGOs urged the President of the Parliament and Prime Minister to amend the Act, other laws and by-laws, and thus provide the categorization of NGOs, provide legal protection for NGOs from unfounded repression or undue interference of state bodies in the work of NGOs, specify the criteria for funding and centralize distribution of budgetary resources for NGOs, specify the criteria for selection of NGO representatives in the bodies established by the executive or legislative authorities, specify the tax benefits and provide support to the implementation of projects that are fully or partially funded by the European Commission, embassies and other foreign organizations.¹¹⁴⁴

Political Parties

The 2004 Act on Political Parties¹¹⁴⁵ governs the establishment, organisation, registration, association and dissolution of political parties (Art. 1).

¹¹³⁹ Reasoning of the Draft law on NGOs, p. 12, available at: http://www.mup.gov.me/rubrike/Registracija_NVO/104398/Poziv-za-Javnu-raspravu-o-Nacrtu-zakona-o-NVO.html

¹¹⁴⁰ Reasoning of the Draft law on NGOs, p. 12, available at: http://www.mup.gov.me/rubrike/Registracija_NVO/104398/Poziv-za-Javnu-raspravu-o-Nacrtu-zakona-o-NVO.html

¹¹⁴¹ Draft law on NGOs is available at: http://www.mup.gov.me/rubrike/Registracija_NVO/104398/Poziv-za-Javnu-raspravu-o-Nacrtu-zakona-o-NVO.html

¹¹⁴² Proposal of the Centre for Democratic Transition and Youth Initiative for Human Rights: <http://www.cdtmn.org/images/stories/dokumenti/cdt-yihr-komentar-nacrtu-zakona-o-nvo-12.04.2011.pdf>

¹¹⁴³ “NGO representatives ask for a percentage of national budget”, *Vijesti*, 13 June 2011.

¹¹⁴⁴ Letter to the President of the Parliament and the Prime Minister: http://www.cdtmn.org/index.php?option=com_content&view=article&id=243%3Aotvoreno-pismo-predsjednika-skupstine-i-predsjedniku-vlade&catid=48%3Avijesti&lang=sr

¹¹⁴⁵ *Sl. list RCG*, 21/2004.

In terms of this Act, a party is an organisation of citizens who associated of their own free will and voluntarily to achieve political goals by democratic and peaceful means (Art. 2). A party headquartered outside of Montenegro and a party whose goals are directed at the violent overthrow of the constitutional order, violation of Montenegro's territorial integrity, constitutionally guaranteed human rights and freedoms, incitement to or encouragement of ethnic, racial, religious and other hatred or intolerance shall be prohibited (Art. 5).

A political party may pursue its activities upon registration with the ministry charged with administration affairs i.e. the Ministry of Internal Affairs (Art. 14). The decision on the registration of a political party shall be rendered within 15 days. A political party may associate in broader political alliances in Montenegro and abroad, but it shall preserve its legal personality (Art. 17(1)).

A political party shall be deleted from the Register in the event the Constitutional Court finds that its enactments are incompatible with the Constitution or the law, in the event the competent court finds that the name, abbreviation or logo of the party do not essentially differ from the ones of an already registered party, in the event the competent court finds that the name, abbreviation or logo of the party is identical or similar to the name and symbol of an institution or in the event the party merges with one or more other parties (Art. 18(1)). The competent authority shall initiate its deletion from the Register also if the authority designated in the party statute renders a decision on the termination of the work of the party; if it establishes that the party was registered on the basis of incorrect data; if the party failed to elect its statutory bodies one year upon the expiry of the deadline in the statute; or if the party had not run in local or parliamentary on its own or in coalition with other parties for six years (Art. 18(4)). The competent authority shall notify the party that it launched the procedure for its deletion from the Register and ask it to declare itself within fifteen days. An administrative dispute may be initiated against a decision on the deletion of a party from the Register (Art. 18(7)).

The Constitutional Court¹¹⁴⁶ shall render a decision prohibiting the work of a political party at the initiative of the state prosecutor or the administrative authority in charge of the Register.

A political party may be established by at least 200 citizens with the right to vote in Montenegro who voluntarily sign a statement on its establishment (Art. 7(1)). Judges and prosecutors, the Human Rights and Freedoms Protector, professional police and army staff may not found a political party (Art.

¹¹⁴⁶ Art. 149(1.6) of the Constitution; Art. 32(1.6) of the Constitutional Court Act, *Sl. list CG*, 64/2008.

7(2)); this provision is in accordance with Art. 54(2) of the Constitution, which also prohibits them from membership in a political party.

More on the financing of political parties in the chapter Political Rights, p. 408.

On trade union freedoms, see page 498.

Right to Peaceful Enjoyment of Property

Article 1 (Protocol No.1 to the ECHR)

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

General

European Convention on Human Rights protects the right to the peaceful, quiet, enjoyment of property. The term property is defined broadly in the case law of the European Court of Human Rights, and includes rights to movable and immovable property, copyrights, industrial property (patent, trademark) rights, rights to clients and other commercial interests.¹¹⁴⁷ A claim can also be considered property, but only when established adequately (e.g. there is a final verdict), or when, under the law, it is certain that it can be implemented (e.g. the right to purchase an apartment). This is a “legitimate expectation” and the ECtHR found that it exists, for example, in cases when under the law on restitution it is certain that one has a right to the restitution of property.¹¹⁴⁸ In contrast, the conditional claim can not be considered property.

A balance between public interest and the rights of individuals must be struck every time the right to peaceful enjoyment of property is interfered with. State interference (deprivation of property or restriction of its enjoyment) must be justified by the circumstances of the particular case and be conditional on adequate monetary compensation. It needs to be noted that the issue of monetary compensation does not arise only with respect to

¹¹⁴⁷ For more detail see “Right to Property under the European Convention on Human Rights”, Council of Europe, 2007, A. Grgić, Z. Mataga, A. Longar, M. Longar, A. Vilfan, available at: <http://www.humanrights.coe.int/aware/GB/publi/materials/1092.pdf>

¹¹⁴⁸ For instance, in the decision in the case *Gratzinger and Gratzingerova v. the Czech Republic*, the Grand Chamber of the ECHR found that the applicants had no legitimate expectation to exercise the right to restitution of property, because the law on restitution excluded the right to restitution to those applicants who were not Czech nationals.

deprivation of property and may be sought also in case of lesser restrictions. (*Sporrong and Lonnroth v. Sweden*, 1982; *Kostić and others v. Serbia*, 2008).

In addition, deprivation or restriction of property must be in line with the law, and not arbitrary.¹¹⁴⁹ This means that the law, under which the competent authority in the proper lawful procedure issued a decision limiting the rights, must be published, accessible and accurate enough so that its effects can be predicted, and not to lead to arbitrary decisions.¹¹⁵⁰

Property rights are guaranteed under Article 58 of the 2007 Constitution of Montenegro, adopted after Montenegro gained independence. The legislator, however, used the word ‘ownership’ (*svojina*), which is narrower in meaning than the word ‘property’ (*imovina*), used in the English translation of the Constitution.¹¹⁵¹ Paragraph 1 of the Article guarantees the right to ownership, while paragraph 2 prohibits the deprivation or restriction of anyone’s rights to ownership, except when such deprivation or restriction is required by public interest and in return for just compensation.

The Constitution, however, does not implement Art 1(2) of Protocol No. 1, under which the deprivation or restriction of property to secure the payment of taxes or other contributions or penalties shall be permitted only in accordance with the law.

Montenegro in 2009 passed the Ownership Rights Act (ORA)¹¹⁵², which differs to an extent from the federal Act it replaced. The ORA regulates the right to ownership and other real rights, possession of movable and immovable property, as well as the acquisition, transfer, protection and termination of these rights (Art. 1).

This Act allows for limitation of the right to ownership in accordance with the law and prohibits deprivation of the right to ownership unless such deprivation is in the public interest, established by law or pursuant to the law and provides for minimum just compensation (Art. 10).

The ORA introduces substantial changes, with respect to the rights of foreign persons to acquire the right of ownership over immovable property. It does away with the reciprocity condition, which used to limit the right of for-

¹¹⁴⁹ In the case *Iatridis v. Greece*, 1999, para. 58, the applicant ran a cinema in the open. He got thrown out of it, and the cinema and the land it was on had been transferred into the state property. The court found that the cinema clientele can be considered “property” that deserves protection and found, among other things, that although the Greek court overturned a decision of an administrative authority in favor of the applicant, the decision had not been implemented for over two years, which violated a basic principle of legality.

¹¹⁵⁰ For the quality of the law, see *James v. United Kingdom*, 1986

¹¹⁵¹ More on the inadequacy of the term “ownership” in International Human Rights Standards and Constitutional Guarantees in Montenegro, HRA, pp. 67 and 109, available at [http://www.hraction.org/wp-content/uploads/knjiga-eng.pdf](http://www.hrraction.org/wp-content/uploads/knjiga-eng.pdf).

¹¹⁵² *Službeni list CG*, 19/09.

eign natural persons to acquire real estate, as well as with the provision in the previous law under which only foreign legal persons conducting activities in Montenegro were entitled to buy real estate on condition that the real estate was requisite for the performance of their activities.

Under the ORA, foreign persons may own movable and immovable property just like domestic persons unless otherwise specified by the law or an international treaty, but they may not have the right of ownership over natural resources, goods in general use, farmland, forests and forestland, et al (Arts. 412 and 415(1)).

Persons who had held the right to manage and use, i.e. to permanently use and dispose of formerly socially-owned property -- now state property -- acquired right of ownership over that property when the ORA came into force (Art. 419). This provision commendably abolishes institutes dating back to the socialist era and the existence of socially-owned property, when the private ownership of land of a large number of persons was by force of law entered in the land registry only as the right to use of the land, in the absence of a legal procedure or right to compensation. The state had thus unselectively and massively limited the right to peaceful enjoyment of property, particularly of urban land.

Property Rights Violations Arising from the Non-Enforcement of Judgments

Under ECtHR case law, a right to peaceful enjoyment of property may also be violated by failure to act, by the state authorities failing to ensure the enforcement of legally binding judgments on claims to possession. The ECtHR found Serbia in violation of Article 1 of Protocol No. 1 in a number of cases (*Kačapor and others v. Serbia*, 2008; *Ilić and others v. Serbia*, 2007; *Kostić and others v. Serbia*, 2008; *Marčić and others v. Serbia*, 2007. *itd.*). It also found Montenegro in breach of this provision in its first ruling on an application against Montenegro (*Bijelić v. Montenegro and Serbia*, 2009). The *Bijelić* case is outlined below, together with the case of the Radoje Dakić AD workers currently being reviewed by the ECtHR and which is similar to the *Kačapor* case.

It is the state's responsibility to make use of all available legal means at its disposal in order to enforce a final court decision, even in cases involving litigation between private parties and that the State must make sure that the procedures provided for in the relevant domestic legislation are fully complied with (*Marčić and others v. Serbia*, 2007). The failure of the state to enforce final judgments rendered in favour of the applicants constitutes a restriction of their right to the peaceful enjoyment of possessions, as provided in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (*Kačapor and others v. Serbia*, 2008).

Expropriation

The Montenegrin legislation lays down the following two conditions with the aim of striking a balance between public and private interests and preventing violations of property rights: 1) that expropriation is in the public (general) interest and 2) that just compensation is awarded for the expropriated property.

In that sense, the Expropriation Act (EA)¹¹⁵³ defines expropriation as the deprivation or limitation of the right of ownership of real estate when such deprivation or limitation is required by public interest and in return for compensation based on the market value of the real estate (Art. 1). The Act regulates the procedure of deprivation or limitation of the right to real estate, which constitute the gravest forms of interference with the right to peaceful enjoyment of property.

The state, municipalities, state funds and public companies may be the beneficiaries of expropriation (Art. 7). The expropriation procedure is conducted by the Real Estate Directorate. As a rule, the Government of Montenegro establishes the public interest for expropriation and its enactment establishing that public interest may be challenged in an administrative dispute before the Supreme Court of Montenegro (Art. 14).

The EA, however, does not oblige the Government to take into account the interests of the real estate owner when it is establishing the existence of a public interest for expropriation i.e. to weigh the public (general) and private interests and establish whether the expropriation causes excessive, unfair burden on individual interest.¹¹⁵⁴

Once public interest is established, the beneficiary of expropriation files a proposal for expropriation with the Real Estate Directorate, which delivers a Decision on the proposal after interviewing the owner of the real estate. The Decision may be appealed with the Finance Ministry (Arts. 19 and 23). When the Decision on Expropriation becomes final, the beneficiary of expropriation acquires the right to enter into possession of the expropriated real estate after paying the former owner compensation or transferring to him or her ownership of other real estate i.e. submitting proof that the former owner had been duly invited but refused to accept payment of compensation (Art. 28).

Private (individual) interest is substantially jeopardised in the procedure preceding the rendering of a Decision on Expropriation. First of all, the owner's right to dispose of his/her real estate is endangered because the expropriation is registered *ex officio* in the land books kept by the Real Estate Directorate once the proposal for expropriation is submitted (Art. 26). The EA does not lay down the deadline for delivering a Decision and this stage can take up to several years, during which the owner is in practice prevented

¹¹⁵³ *Sl. list RCG*, 55/2000, 28/2006 and 21/2008.

¹¹⁵⁴ *Sporringandi Lonnroth v. Sweden*, 1982, para. 73.

from exercising his/her right due to the fact that a proposal for expropriation has been registered. Nor does the Act provide such owners with the right to compensation for the period during which they were effectively prevented from exercising their rights to their real estate.

An owner's rights may substantially be jeopardised by the application of Article 29 of the EA, under which the Real Estate Directorate may decide to transfer the real estate to the beneficiary of expropriation before the Decision on Expropriation becomes final¹¹⁵⁵ in the event it assesses that such transfer is necessary due to the exigencies of construction of a specific facility or the execution of works. The formulation "exigencies of construction of a specific facility or the execution of works" is vague and gives the state authorities broad powers in deciding on real estate transfers, which may result in abuse and arbitrariness. The provision is thus not in compliance with ECtHR case law, under which a law must, *inter alia*, provide protection against the arbitrary interference of the state authorities if it is to be consistent with the clarity requirement. In addition, if the court annuls the decision of the administrative body, the property must be returned to the plaintiff.¹¹⁵⁶

Miličković case

Regarding the application of Article 29 of the EA, in the beginning of May 2011 the Montenegrin public was shook by the case of expropriation of the land of Vasilije Miličković from Podgorica. Specifically, the Real Estate Directorate, at the proposal of the Municipality of Podgorica, on 25 January 2011 made the decision on expropriation of 772 m² of land owned by Miličković's company "M&V",¹¹⁵⁷ in order to build a mini detour in Zlatica, Podgorica suburb. Miličković filed a complaint with the Ministry of Finance against the decision on expropriation because the name of the owner of the land in the decision was wrong, which provides for the possibility that the compensation for expropriated land is not paid to the real owner. The complaint stated that the proposal for the expropriation did not define the land owned by the company, the parcel number, nor did it have the proof that the funds for the expropriated land have been provided, as required by law.¹¹⁵⁸

¹¹⁵⁵ In accordance with Art. 214 and 215 of the General Administrative Procedure Act (*Sl. list RCG*, 60/03) decision becomes definitive when it is no longer possible to file an appeal against it, and final when it can not be challenged in administrative proceedings.

¹¹⁵⁶ In the case *Belvedere Alberghiera v. Italy*, the land of the company which filed an application was expropriated in order to build a road on it. The competent court later overturned the decision on expropriation, declaring it illegal. However, when the company asked for restitution of the land, the claim was rejected with the courts conclusion that the transfer of ownership to the authorities has become irreversible. The European Court of Human Rights has concluded that the refusal of restitution of the land was contrary to the ECHR.

¹¹⁵⁷ "Wrong company name", *Dan*, 30 May 2011.

¹¹⁵⁸ *Vijesti*, 2 July 2011.

In April, the Ministry of Finance rejected Miličković's complaint and confirmed the decision of the Real Estate Directorate.¹¹⁵⁹ In accordance with Article 29 EA, not waiting for the decision on expropriation to become final, the Municipality of Podgorica in early May began work on Miličković's land. Claiming that the Municipality abused Article 29 EA¹¹⁶⁰, in May and June, along with his daughter, Miličković obstructed work on his land, which is why he had been arrested three times, and his daughter once. They were fined for the misdemeanor with 2,900 Euros, and Miličković was sentenced to 20 days in prison.¹¹⁶¹

Even in case of implementation of Article 29 of the EA, the expropriation user must submit, along with the proposal, an offer on the form and amount of compensation for expropriated property, which the Municipality of Podgorica has failed to provide.¹¹⁶² This fact was later found by the Administrative Court of Montenegro in the verdict which overturned the second instance decision of the Ministry of Finance and referred the case back for retrial. In addition, the Administrative Court found that the proposal for expropriation did not list Miličković's company "M&V" as entity whose property should be expropriated, nor the cadastral parcel being expropriated, all of which annuls the first instance decision.¹¹⁶³

The real estate owners' rights are also endangered by Arts. 15–17 of the EA, allowing the beneficiary of expropriation to conduct the necessary preparatory activities on the real estate (land survey, geodetic measurements, et al) before filing a proposal for expropriation. The provision thus allows the beneficiary of expropriation to use the real estate not only before the Decision on Expropriation comes into force and s/he is registered as its owner, but even before s/he files the proposal for expropriation.

Just compensation is another prerequisite that needs to be fulfilled to avoid property rights violations. The ORA lays down that compensation shall be pecuniary or in the form of ownership or co-ownership of other adequate real estate (Art. 9).

Financial compensation shall equal the market price of real estate in the same or similar zone of the municipality. A former owner compensated by ownership or co-ownership of real estate shall be given adequate real estate of equal value. In both cases, the former owner shall be compensated for any profit lost during relocation and the costs of relocation (Art. 35(1 and 2)). In practice, the market price of the expropriated real estate and the price of the real estate given in compensation are determined by real estate assessors. However, given that the expropriation procedures usually last a long time,

¹¹⁵⁹ *Vijesti*, 2 July 2011, page 25.

¹¹⁶⁰ *Vijesti*, 7 May 2011, page 24.

¹¹⁶¹ *Vijesti*, 2 July 2011, page 25.

¹¹⁶² Article 29(3) EA

¹¹⁶³ "Mugoša has been enjoying enough watching arrests", *Dan*, 1 July 2011.

the assessors are not always able to “keep up” with the changes in real estate prices and the former owners are often paid compensation lower than the market value of the real estate.

The provision in Art. 35(4), laying down that just compensation shall involve a proportionate reduction of the market price in the event the value of the rest of the real estate still owned by the owner of the expropriated land has substantially increased due to investment by the beneficiary in the expropriated land (construction of a highway or an arterial road or other infrastructural facilities), is questionable and unclear. The state is thus violating the rule under which the prior owner may be deprived of his/her property only if s/he is, *inter alia*, given just compensation in return. The question of how a beneficiary of expropriation may invest in land to which s/he has not acquired the right of ownership, in other words, which has not yet been expropriated, is a justified one.

Under the EA, the beneficiary of expropriation and the prior owner may agree on forms and amounts of compensation for the expropriated real estate. In the event they fail to reach an agreement, the amount of compensation shall be set by the court.

Restitution of Illegally Seized Property and Compensation of Prior Owners

Restitution Act

The 2004 Property Rights Restitution and Compensation Act (hereinafter Restitution Act)¹¹⁶⁴ lays down the conditions, manner and procedure for the restitution of the right to ownership and other property rights and compensation to former owners who had been deprived of their rights in favour of public, state, social, or cooperative ownership (Art. 1).

Former owners who received compensation in money or in the form of other property or rights upon the entry into force of the 1968 Act Amending the Expropriation Act, shall not be entitled to restitution or compensation in accordance with this Act. (Art. 7). The restriction, introduced by the 2007 Act Amending the Restitution Act, may prove problematic from the viewpoint of the ECtHR for two reasons. First of all, many of the former owners claim that their property was seized after 1968 and that they did not receive just compensation. Secondly, the former owners may be considered to have had the “legitimate expectation” of regaining their property seized after 1968, given that the text of the Act adopted in 2004 did not include the restriction.¹¹⁶⁵ More on application filed to the ECHR due to this see the section Practice, p. 371.

¹¹⁶⁴ *Sl. list RCG*, 21/2004, 49/07 and 60/07.

¹¹⁶⁵ In its judgment in *Kopecký v. Slovakia*, 2004, paragraph 35, the ECtHR explained: “Article 1 of Protocol No. 1 cannot be interpreted as imposing any general obligation on the Contracting States to restore property which was transferred to them before they ratified

A former owner is entitled to seek restitution of the seized property or rights or to seek compensation in the event that the property or rights are not subject to restitution in the meaning of Article 12 of the Act (Art. 11). Article 12 lays down which rights and property shall not be subject to restitution, and for which the former owners may claim compensation: property excluded from commerce, property over which the right of ownership cannot be acquired; destroyed or damaged property, property used by the state or municipal authorities in the performance of their activities, etc. Both movable and immovable property are subject to restitution, with the exception of any movable property which the law has declared to be a national treasure (Art. 13).

A former owner not entitled to restitution may exercise the right to financial compensation paid out of the Compensation Fund, an authority established by the Government to secure funds for compensation, or the right to compensation in bonds, pursuant to the Act. The amount of total compensation paid annually to the former owners may not exceed 0.5% of Gross Domestic Product (GDP) in the previous year, and the total amount of compensation may not exceed 10% of GDP in the period in which the Act is in force. The compensation shall be paid to the claimants in annual instalments, on 15 July every year pursuant to final decisions submitted to the Compensation Fund by 31 December of the previous year, depending on the availability of funds in the Compensation Fund, until it has been paid in full. The Government shall set the compensation payment schedule. Apart from pecuniary compensation, the Compensation Fund may also offer the former owners movable and immovable property it owns in compensation for property seized, and may also offer to buy the former owners' debts under the conditions set by the Government (Art. 22).

This Article also violates the right to peaceful enjoyment of property. By setting limits on the amounts to be paid former owners every year and laying down the payment of compensation in instalments, the former owners, who

the Convention. Nor does Article 1 of Protocol No. 1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners (see *Jantner v. Slovakia*, no. 39050/97, § 34, 4 March 2003). In particular, the Contracting States enjoy a wide margin of appreciation with regard to the exclusion of certain categories of former owners from such entitlement. Where categories of owners are excluded in this way, their claims for restitution cannot provide the basis for a "legitimate expectation" attracting the protection of Article 1 of Protocol No. 1 (see, among other authorities, *Gratzinger and Gratzingerova*, cited above, §§ 70–74). On the other hand, once a Contracting State, having ratified the Convention including Protocol No. 1, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement. The same may apply in respect of arrangements for restitution or compensation established under pre-ratification legislation, if such legislation remained in force after the Contracting State's ratification of Protocol No. 1 (see *Broniowski v. Poland* [GC], 31443/96, § 125, ECHR 2004-...)."

had waited to regain their seized property or property rights for decades, now have to wait several more decades to be fully compensated once the Decision on Compensation becomes legally binding. The Act does not provide for any anti-inflation clauses or for the payment of interest rates for that period.

The value of the seized property reflects the condition of the property at the time of seizure and is set in accordance with the Decree on Value Appraisal and Compensation for Property Seized¹¹⁶⁶ (Art. 23). The Decree lays down the procedure for determining the value of the property seized and compensation therefor, notably business premises, tourism and hospitality facilities, residential facilities, urban land, agricultural facilities, forests, forest-land and olive groves.

Pursuant to the Act, the Compensation Fund shall issue bonds denominated in euros and on which no interest shall be calculated. The former owners given bonds in compensation may use them to buy stocks, shares and other property of Montenegro and state-owned funds (the list of assets that may be purchased by Compensation Fund bonds is drawn up by the Government) and to pay their own i.e. their heirs' tax bills. All series of bonds issued shall be valid for 10 years as of the day of entry into force of this Act. The bond holder shall be entitled to return the bonds to the Compensation Fund and reapply for the right to financial compensation upon the expiry of the 36-month deadline from the day the s/he acquired the bonds. Unused bonds shall be withdrawn and annulled. The Compensation Fund shall adopt a decision re-establishing the right to financial compensation in the amount equivalent to the value of the unused bonds. The bond holder is entitled to file for pecuniary compensation to the value of the bonds within six months from the day of expiry of the validity of the bonds (Art. 25).

A former owner shall initiate the restitution or compensation procedure by submitting a request to the Restitution and Compensation Commission within a maximum of 18 months from the day the Commission is established in the municipality in which the property is located (Art. 27). Amendments to the Act from 2007¹¹⁶⁷ establish, instead of the previous municipal commissions, three regional Restitution and Compensation Commissions (in Bijelo Polje, Podgorica and Bar) to proceed with reviewing the claims by the former owners. The Commission members shall be appointed by the Finance Minister within 60 days from the day the Act comes into effect (Art. 28).

After the restitution or compensation claim review procedure, the Commission shall render a Decision on the claim and communicate it to the parties to the proceedings within a fortnight (Arts. 34 and 35). The former owner may appeal the Decision within 15 days with the Appeals Commission, comprising three members appointed and dismissed by the Government at the proposal of the Finance Ministry (Arts. 36 and 36a). The final Decision

¹¹⁶⁶ *Sl. list CG*, 7/08 and 74/08.

¹¹⁶⁷ *Sl. list CG*, 49/07.

on Restitution is enforced by the Real Estate Directorate, while the final Decision on Compensation is enforced by the Compensation Fund (Art. 37).

The legislator made an exception from the *res iudicata* principle, given that Article 47 allows for the submission of claims and decisions on issues regulated by this law regardless of whether a court or another state authority has rendered a final decision on a restitution or compensation claim to the detriment of the former owner before the Act came into effect.

Implementation of the Restitution Act

So far, the Commissions have only rendered decisions on approximately 30% of claims for restitution submitted since the Restitution Act came into effect. Most were rejected.

The Finance Ministry corroborated this in a press release stating that the Commissions in 2010 submitted to the Ministry 98 final decisions establishing rights to compensation totalling 8.9 million euros in value. It also stated that a total of 10,794 restitution claims had been submitted since the 2004 Restitution Act came into force and that the three regional Commissions (in Bar, Podgorica and Bijelo Polje) rendered decisions on 3,242 claims, i.e. around 30%. Acting on the Commissions' Decisions, the Fund has paid the former owners pecuniary compensation in the amount of 19.222 million euros and 81.45 million euros in bonds.¹¹⁶⁸ According to the European Commission Analytical Report accompanying the Commission Opinion on Montenegro's application for membership of the European Union published on 9 November 2010, property has been returned in only 142 cases i.e. 5% of all eligible cases. In its Analytical Report, the European Commission also noted that the denationalisation process was slow.¹¹⁶⁹

The Protector of Human Rights and Freedoms in its Report for 2010¹¹⁷⁰ stated that the process of restitution of property rights and compensation is very slow, and that during the six years of work he has received a significant number of complaints against Commissions on Restitution and Compensation, which emphasize the long duration of proceedings and other difficulties and problems in exercising the rights on property restitution and

¹¹⁶⁸ "Fund Paid Out Nine Million," *Dan*, 3 December 2010.

¹¹⁶⁹ "The government established special committees to deal with denationalisation in 2004, but the process has been slow. Out of 10,738 demands for restitution, only 2,791 (i.e. 26%) have been examined. 1,205 applications were found eligible for restitution, but property has been returned in only 142 cases so far (i.e. 5% of all cases eligible). There are cases where property subject to restitution was in the meantime privatised. Particular efforts are needed to solve such cases." (*ANALYTICAL REPORT accompanying the Commission Opinion on Montenegro's application for membership of the European Union*, Brussels, 9 November 2010 SEC(2010) 1334).

¹¹⁷⁰ <http://www.ombudsman.co.me/izvjestaji.php>. In addition to the Report for 2010, the Protector of Human Rights and Freedoms published a special report on its website on the exercise of the right to restitution of property and compensation of 21 March 2011, containing the same conclusions regarding the process of restitution and compensation in Montenegro as the Report for 2010.

compensation.¹¹⁷¹ The Report also noted that the length of proceedings for the return and compensation in Montenegro is not uniform, and that such proceedings before the Commission in Podgorica are significantly shorter than the procedures before the Commissions in Bijelo Polje and Bar. Analyzing the current dynamics of the Commissions on Restitution and Compensation, the Protector came to the conclusion that the procedures on claims for restitution and compensation submitted so far will end over the next 10 (Commission in Podgorica) to 29 years (Commission in Bijelo Polje).¹¹⁷²

As a result of untimely acting on claims for restitution and compensation, the Report emphasizes the fact that this prevents citizens from exercising their legal rights, i.e. acquire ownership rights to property subject to restitution and use it, and that the applicants whose claims will be rejected or dismissed are held in legal uncertainty, unable to use appropriate legal means to protect their rights.¹¹⁷³ It is particularly noted that the applicants for restitution and compensation are brought in a position of inequality before the law, as it can be expected that claims submitted to the Commission in Podgorica will be considered earlier than claims submitted to the Commission in Bijelo Polje or Bar.¹¹⁷⁴

On the other hand, as one of the main reasons for untimely acting on claims, the Protector of Human Rights and Freedoms underlined the fact that during the establishment of regional commissions, in accordance with amendments from 2007, no attention was paid to the required number of associates with regard to the number of claims received by the previous municipal committees in areas where the Regional Commission have been established.¹¹⁷⁵

The Restitution of Confiscated Property to Religious Communities

Unlike, for example, Serbia, which adopted the Act on Restitution of Property to Churches and Religious Communities in 2006, such an act has not yet been passed in Montenegro.

The Act on Equitable Restitution from 2002¹¹⁷⁶ and the Act on Restitution of Property Rights and Compensation from 2004, did not allow the restitution of confiscated property rights to religious communities.¹¹⁷⁷

Amendments to this Act from 2007 introduced new article 8a,¹¹⁷⁸ which provides that religious communities may file a request for registering their property in the territory of the Republic of Montenegro confiscated in favor of

¹¹⁷¹ The Protector of Human Rights and Freedoms, Report for 2010, page 65.

¹¹⁷² *Ibid*, page 69.

¹¹⁷³ *Ibid*, pages 69 and 70.

¹¹⁷⁴ *Ibid*, page 69.

¹¹⁷⁵ Report for 2010, page 70.

¹¹⁷⁶ Act on Equitable Restitution, *Sl. list RCG*, 34/02.

¹¹⁷⁷ Art. 8(2) of the Act on Restitution of Property Rights and Compensation, *Sl. list RCG*, 21/04 of 31 March 2004.

¹¹⁷⁸ Art. 4 of the Act on Amendments to the Act on Restitution of Property Rights and Compensation, *Sl. list RCG*, 49/2007 of 10 August 2007.

national, state, public or common property without just or market compensation. It also provides that this request does not represent a request for exercise of the right to compensation or restitution of confiscated property.¹¹⁷⁹

By mid-April 2010, the Serbian Orthodox Church (SOC) in Montenegro submitted to the Ministry of Finance 129 proofs of confiscated property of churches and monasteries, while many requests are still to be filed.¹¹⁸⁰

The working version of the Draft, submitted to the religious communities in early April 2010, prescribes the conditions, manner and procedure for return of property seized in the period from 1945 until the entry into force of amendments to the Expropriation Act in 2002.¹¹⁸¹ According to this Act, religious communities are entitled to restitution of agricultural land, olive groves, forests and forest and construction land, residential and business buildings, apartments and business premises, but without compensation on the basis of lost profits. Due to such solution, the SOC, Catholic Church and Islam community expressed their dissatisfaction.¹¹⁸²

The Draft also proposed that religious communities which transferred immovable property at their own request by a unilateral act or an act of public authority are not entitled to restitution, as opposed to those whose immovable property had been seized (Art. 8).

According to the draft version of the Draft, the right to restitution would be granted to all religious communities in Montenegro in case their immovable property was seized for the benefit of national, state, community or co-operative ownership, in the period after 1945 (Art. 1). The Head of the SOC Metropolitanate of Montenegro and the Littoral Amfilohije Radović and Reis of Islamic community Rifat Fejzić have expressed their disagreement with this, noting that a significant number of goods was seized before 1945.¹¹⁸³

Working version of the Draft was developed by the working group of the Ministry of Finance in cooperation with other ministries, without the participation of churches, religious organizations and NGO representatives.¹¹⁸⁴ The Draft law has not yet become a Bill, although in early 2011 the Prime Minister Igor Lukšić announced that it would soon enter the governmental procedure.¹¹⁸⁵

¹¹⁷⁹ *Ibid.*

¹¹⁸⁰ “We have evidence of the seized property”, *Dan*, 18 April 2010, p. 9.

¹¹⁸¹ Draft Law on Restitution of Immovable Property to Churches and Religious Communities, the Ministry of Finance.

¹¹⁸² Roundtable organized by the Metropolitanate of Montenegro and the Littoral of the Serbian Orthodox Church at the Hotel Premier, 17 April 2010; “The law legalizes the confiscation”, *Vijesti*, 18 April 2010, p. 8.

¹¹⁸³ “Property to be returned to religious communities”, *Dan*, 5 January 2009.

¹¹⁸⁴ “Law legalizes confiscation”, *Vijesti*, 6 January 2009.

¹¹⁸⁵ “Igor Lukšić held consultations with representatives of religious communities”, Television of Montenegro, 18 January 2011.

Olive Groves in Valdanos

One sixth of the olive grove in Valdanos, in the municipality of Ulcinj, once belonged to religious communities – the Islamic, Orthodox and Catholic, and nearly 170,000 square meters of land and about 2,500 olive trees were waqf goods, or pious endowment, and the property has not been returned to former owners to date. Out of this property, 92,822 square meters of land with 2.2 thousand olive trees were expropriated from the Islamic Community in Ulcinj, 77,014 square meters with 250 olive trees from the Diocese of Budim-Niksic, and 2,854 square feet and 78 roots of olive trees from the Catholic Church.¹¹⁸⁶

The Islamic Community of Montenegro has already asked for the restitution of rights over these parcels, and the community members said that they are determined to exercise their indisputable rights of owners of the land and olive groves in Valdanos before national courts and international instances. In addition, Protoiereus of the SOC Radojica Božović has repeatedly urged the government state authorities to return the sized property in Valdanos to the church, stating that it is a legacy which, according to religious law, can not be sold or otherwise alienated.¹¹⁸⁷

Meanwhile, in 2010 the Government opened a tender for the privatization of land in Valdanos, which caused protests from the previous owners.¹¹⁸⁸ The tender failed, but they announced a new one in June 2011, regarding a long-term lease of the bay for 30 years, with extension possibility, which again led to sharp reactions of previous owners and the civil sector, fearing that the possible tenant will devastate the famous olive groves in Valdanos by constructing tourist facilities, which is under special legal protection¹¹⁸⁹ and cause difficulties with the process of land restitution.¹¹⁹⁰

Peaceful Enjoyment of Property in Practice

Although Article 58 of the Montenegrin Constitution in general guarantees the right to peaceful enjoyment of property (albeit, as mentioned, it uses the term “ownership” in the original), this right is limited or denied by the state authorities in practice. The text below will analyse several cases of violations of the right to peaceful enjoyment of possessions laid down in Article 1 of Protocol No. 1 to the ECHR by the Montenegrin state authorities.

¹¹⁸⁶ “The state wasting endowments”, *Dan*, 21 January 2011, p. 17.

¹¹⁸⁷ *Ibid.*

¹¹⁸⁸ “Ecologists defend Valdanos”, *Večernje novosti*, 11 February 2011. Available at: <http://www.novosti.rs/vesti/planeta.70.html:319490-Ekolozi-brane-Valdanos>

¹¹⁸⁹ Art. 17 of the Act on Olive Growing (*Sl. list RCG*, 55/03);

¹¹⁹⁰ “They will cancel the new Valdanos tender too”, *Dan*, 23 June 2011. Available at: <http://www.dan.co.me/?nivo=3&rubrika=Ekonomija&datum=2011-06-23&clanak=285454>; “Valdanos could be irreversibly destroyed”, *Vijesti*, 10 February 2011.

Bijelić Case

The case originated in an application (No. 11890/05) filed with the ECtHR against the State Union of Serbia and Montenegro by Nadežda Bijelić, Svetlana Bijelić and Ljiljana Bijelić, who complained against the non-enforcement of a final eviction decision and their consequent inability to live in their apartment. The first applicant, her spouse and the other two applicants were holders of specially protected tenancy on the apartment in Podgorica in which they were living.

The first applicant and her husband divorced in 1989 and she was granted custody of the other two applicants. On 26 January 1989, the first applicant was served with a decision declaring her the holder of specially protected tenancy on the family flat and ordering her former husband to vacate the apartment within 15 days from the date when the decision became final.

Given that the respondent did not comply with the court order to vacate the apartment, the first applicant instituted a formal judicial enforcement procedure before the Podgorica Basic Court on 31 May 1994. The enforcement order was issued on the same date. On 8 July 1994, the bailiffs attempted to evict the respondent together with his new wife and minor children but the eviction was adjourned because he threatened to use force.

The bailiffs and the police again attempted to evict the respondent, who continued threatening to shoot the first applicant in their presence. There appeared to be weapons, ammunition and even a bomb in the apartment at the time.

Two other planned evictions, on 28 November 1994 and on 16 March 1995, also ended in failure, the latter because the respondent filed a request for the provision of social assistance in respect of his minor children. The following four attempts at eviction – on 3 June 1996, 1 August 1996, 27 October 1998 and 1 November 1999 – were also unsuccessful.

Another eviction was attempted in March 2004 but failed. The respondent threatened to blow up the entire flat in the presence of police officers, fire fighters, paramedics, bailiffs and the enforcement judge herself, as well as his wife and their children.

Throughout the years the first applicant complained to numerous state bodies about the non-enforcement of the judgment rendered in her favour, but to no avail. On 9 February 2006 another scheduled enforcement failed because the respondent had threatened to “spill blood” rather than be evicted.

On 15 February 2007 the enforcement judge was told, at a meeting with the police, that the eviction in question was too dangerous to be carried out, that the respondent could blow up the entire building by means of a remote control device, and that the officers themselves were not equipped to deal with a situation of this sort. The police therefore proposed that the applicants be provided with another flat instead of the one in question.

On 19 November 2007 the enforcement judge urged the Ministry of Justice to secure the kind of police assistance needed for the respondent's ultimate eviction.

The ECtHR found Montenegro in violation of Article 1 of Protocol No. 1 and stated that the inability of the second and third applicants to have the respondent evicted from the flat in question amounted to an interference with their property rights. The ECtHR also noted that the judgment became final as early as 1994 and that its enforcement had been sanctioned the same year, and most importantly, that the police themselves conceded that they were unable to fulfil their duties under the law, which is what ultimately caused the delay in question. In view of the foregoing, the Court found that the Montenegrin authorities had failed to fulfil their positive obligation, within the meaning of Article 1 of Protocol No. 1, to enforce the judgment of 31 May 1994 and, accordingly, that they were in violation of the said provision.

Radoje Dakić Factory Workers

This case indicates a violation of the right to peaceful enjoyment of property due to the years of non-enforcement of final and enforceable court judgments upholding workers' property claims.

"Radoje Dakić" AD Podgorica is a machine factory, which was transformed from a socially-owned plant into a joint stock company and in which the state owns the majority stake, i.e. in excess of 50.579%. The company has 1122 employees.

On 28 July 2004, the general meeting of the company stockholders adopted the 2003 Annual Business Report and Final Account, stating that the company owed all the employees a total of 22,618,385.00 € for wages not paid in the 1 January 1997– 30 June 2006 period.

The workers proceeded by filing a number of civil lawsuits against the company with the Podgorica Basic Court, which ruled in favour of all of them. The court decisions became final and enforceable.

Enforcement proceedings were initiated with the Podgorica Basic Court pursuant to the final decisions, but attempts to enforce them by seizure of the debtor's monetary assets and later the sale of its property ended in failure.

In view of the responsibility of the state as the majority owner, the workers alerted virtually all competent state institutions to the non-enforcement of the court decisions, notably the Protector of Human Rights, the Montenegrin Prime Minister and President, and also foreign organisations. In addition, they staged protest rallies to that end.

In response to an inquiry by the Protector of Human Rights on how the problems of "Radoje Dakić" AD Podgorica could be resolved, the Montenegrin Prime Minister on 3 June 2009 sent an official memo stating that the Government was under no obligation to spend the tax-payers' money, the use of which is precisely planned, to settle the company's debts to its creditors.

In view of the foregoing, five “Radoje Dakić” workers on 5 March 2010 filed an application with the ECtHR claiming that the failure of the Montenegrin state authorities to enforce the final judgment of 13 April 2007, when the decision to sell the company real estate was taken, violated their right to peaceful enjoyment of possessions enshrined in Article 1 Protocol No. 1.

Kaluđerović Case

This case clearly illustrates the shortcomings of the Restitution Act and the violations of the right to peaceful enjoyment of property resulting from its implementation.

The Restitution and Compensation Commission of the Podgorica Municipality on 9 June 2005 rendered Decision UP. ob. 01–030–14/04 granting Vidosava Kaluđerović compensation for seized real estate – 22,700 square meters of land. The Decision stated that the Compensation Fund was under the obligation to pay her 53,573.57 € within 15 days from the date the Decision became final. The Decision became final on 7 May 2005.

Given that the Compensation Fund failed to pay her the compensation, Kaluđerović and other beneficiaries of compensation filed a motion for enforcement with the Podgorica Basic Court, which dismissed it as inadmissible in Decision I.No. 2618/05 of 17 November 2005. The Decision was appealed with the Podgorica Superior Court, which rejected it in its Decision Gž.No.3408/05 of 20 December 2005. On 27 June 2007, Kaluđerović again filed a motion for enforcement with the Podgorica Basic Court, which again dismissed it as inadmissible on the same grounds as the first time.

The Compensation Fund has been paying Vidosava Kaluđerović the 53,573.57 €, in annual instalments, the amount of which is dependent on GDP for the previous year and on the total financial claims of the former owners from the Compensation Fund, pursuant to Article 22 of the Restitution Act. She has thus to date been paid the following amounts for 2005, 2006 and 2007 – two annual instalments, each amounting to 1785.79 €, and one annual instalment of 1339.34 €, i.e. a total of 4909.00 €.

Dissatisfied with the decision of the Montenegrin state authorities, Vidosava Kaluđerović filed an application with the ECtHR claiming violation of her right to peaceful enjoyment of property under Article 1 of Protocol No. 1 to the ECHR. She explained that by Article 22 of the Restitution Act, the state of Montenegro has “interfered with and rendered senseless the very substance of the right to property, whereby it violated Article 1 of Protocol No. 1”. According to the present rate of payment, she will have been fully compensated in 27 years’ time, so that she (who is now 70 years old) has not only been deprived of her property for 57 years, but is to be deprived of it another 27 years. The applicant also claims that the 2007 Act Amending the Restitution Act, which altered the manner of payment in the initial text of the law, cannot retroactively apply to a final decision rendered in her favour.

Calculation of Compensation for Lost Property Rights

Dissatisfied by the Finance Ministry decision to apply a new methodology for calculating compensation for lost property rights, around 500 real estate owners in the Slano, Krupac and Vrtac lakes area filed a number of submissions to the Economy Ministry, Assembly Speaker and the Montenegrin Electric Company (EPCG), seeking assistance in resolving problems with the restitution of seized land. They also filed an application with the ECtHR. Chairman of the Coordination Body and Property Restitution and Compensation Committee Branko Barović said that the situation was complicated by the Government's amendment of the Decree increasing the compensation per square metre of land by four and five times, and that some claimants had decided to seek the protection of their rights before the ECtHR.¹¹⁹¹

Land owners in the lakes area say that 20% of the claims had been settled pursuant to the old methodology, and that they have been substantially damaged compared with all those whose seized property is evaluated pursuant to the new Decree.¹¹⁹²

Case of Heirs of Former Owners of Seized Property

Around three thousand heirs of former owners of seized property in December 2008 filed an application with the ECtHR claiming that they had been unable to regain their property seized under the so-called post WWII "revolutionary laws" in Montenegrin courts and institutions. They seek the rectification of the injustice caused by the 2007 Act Amending the Restitution Act, which deprives owners, whose property was seized after 1968, of the right to restitution or material compensation.¹¹⁹³

According to the Chairman of the Podgorica-based Association for the Protection of Private Property and Restitution of Seized Property Veselin Uskoković, the 2007 amendments introduced 1968 as the cut-off date, after which the state allegedly paid just compensation for the property it seized. In his opinion, this is untrue given that there is evidence that the "revolutionary laws" were in effect until 2000 and even afterwards.¹¹⁹⁴

Uskoković also said that the Association would ask the ECtHR to find the state in breach of the former owners' right to peaceful enjoyment of property enshrined in Article 1 Protocol No. 1 because they had the legitimate expectation that they would regain or be compensated for property seized after 1968, before the 2007 amendments came into force. He said that the applicants had submitted compelling evidence that compensation was set at

¹¹⁹¹ "To Persist is to Win", *Dan*, 24 October 2010.

¹¹⁹² *Ibid.*

¹¹⁹³ "Around Three Thousand Heirs Waiting for Strasbourg to Mete Justice", *Vijesti*, 29 December 2010.

¹¹⁹⁴ *Ibid.*

15 euros per square metre in some locations although land in that area was sold at 200–300 euros per square metre. He also said that the former owners had the legitimate expectation that they would regain their seized property in kind or, if that was not possible, receive market-based compensation for it.¹¹⁹⁵

Restitution of Property Seized from Religious Communities

As opposed to Serbia, which passed the Act on Restitution of Property to Churches and Religious Communities in 2006, no such law is as yet in place in Montenegro..

The parliamentary opposition in Montenegro, led by the Liberal Alliance of Montenegro, without whose deputies neither the ruling nor the opposition coalitions had the necessary majority, in 2002 adopted the Just Restitution Act, which, however, did not provide for the restitution of seized property rights to the religious communities.¹¹⁹⁶ The Assembly in 2004 passed the Property Rights Restitution and Compensation Act, which also excluded religious communities from the right to restitution. The legislator explained that a separate law governing the restitution of seized property rights to religious communities would be adopted later.¹¹⁹⁷ Under paragraph 1 of Article 8a, added to the Act when it was amended in 2007, religious communities may file applications for the registration of property seized from them in the Republic of Montenegro, in favour of public, state, social, or cooperative ownership without fair or market compensation.¹¹⁹⁸ Paragraph 2 of Article 8a deals with the registration of property seized from religious communities. Under this provision, “the application with evidence of relevance to the identification of the former owners or their successors, the seized property and the grounds of seizure shall be submitted to the Finance Ministry within three months from the day the Act comes into effect”.¹¹⁹⁹ These amendments, however, do not entitle the religious communities to recover the property seized from them, as enounced in paragraph 3 of Article 8a. This provision explicitly states that the application referred to in paragraph 2 of the Article shall not constitute a request to realise a right on grounds of which the seized property may be restituted or compensated.¹²⁰⁰

According to Archpriest Velibor Džomić, the Serbian Orthodox Church (SOC) dioceses in Montenegro had submitted 129 pieces of evidence of seized church and monastery property to the Finance Ministry by 18 April 2010, but had failed to submit many other requests due to the short deadline and problems in finding the documentation.¹²⁰¹

¹¹⁹⁵ *Ibid.*

¹¹⁹⁶ Just Restitution Act, *Sl. list RCG* 34/02.

¹¹⁹⁷ Art. 8(2), Restitution Act, *Sl. list RCG* 21/04 of 31 March 2004.

¹¹⁹⁸ Article 4, Act Amending the Restitution Act, *Sl. list RCG* 49/2007 of 10 August 2007.

¹¹⁹⁹ *Ibid.*

¹²⁰⁰ *Ibid.*

¹²⁰¹ “We Have Proof Which Property Was Seized from Us”, *Dan*, 18 April, 2010, p. 9.

The Government presented a working draft of the Act on the Restitution of Immovable Property to Churches and Religious Communities to representatives of religious communities in April 2010.¹²⁰² At a round table held on 17 April 2010, the representatives of the SOC, the Catholic Church and the Islamic Community criticised the working draft, because it merely provides an itemised list of the property seized, protects those who privatised seized property and does not provide for the restitution or compensation of movable property.¹²⁰³

The working draft, which the religious communities received in early April 2010, provides for the restitution of property rights of which the religious communities were deprived from 1945 until the 2002 amendments to the Expropriation Act came into force.¹²⁰⁴ Under the working draft, the religious communities are entitled to the restitution of farmland, olive groves, forests and forestland, urban land, residential and business buildings, apartments and business premises, but not to compensation for loss of profits, a source of dissatisfaction to the SOC, the Catholic Church and the Islamic Community alike.¹²⁰⁵

Article 8 of the working draft lays down that restitution shall be provided only for immovable property seized, but not for any such property for which ownership was transferred by the religious communities at their own request, by a unilateral or a state enactment.

Under the draft, all religious communities in Montenegro shall be entitled to restitution of their property seized in favour of public, state, social or cooperative ownership after 1945 (Art. 1). The head of the SOC Metropolitanate of Montenegro and the Littoral, Amfilohije Radović, and the Reis of the Islamic Community, Rifat Fejzić, criticised the law for limiting restitution only to property seized after 1945. They claim that many of the assets had been seized prior to that date.¹²⁰⁶

¹²⁰² "Law Legalising Seizure", *Vijesti*, 18 April, 2010, p. 8.

¹²⁰³ *Ibid.*

¹²⁰⁴ Act on the Restitution of Immovable Property to Churches and Religious Communities, Finance Ministry of Montenegro.

¹²⁰⁵ The Round Table was organised by the SOC Metropolitanate of Montenegro and the Littoral in Hotel Premijer on 17 April 2010; "Law Legalising Seizure", *Vijesti*, 18 April, 2010, p. 8.

¹²⁰⁶ "Return Property to Religious Communities", *Dan*, 5 January 2009.

Minority Rights

Article 27, ICCPR:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

General Provisions

Montenegro is bound by many international universal and regional treaties on human rights, some of which are dedicated solely to the rights of minorities, such as the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.¹²⁰⁷

In two comprehensive articles, *Protection of Identity* (Art. 79) and *Prohibition of Assimilation* (Art. 80) contained in a separate chapter entitled “Special – Minority Rights”, the Constitution lists the principal minority rights enshrined also in the Framework Convention for the Protection of National Minorities.¹²⁰⁸

However, given that the Minority Rights and Freedoms Act¹²⁰⁹ was passed before the Constitution, certain provisions of this law must be harmonised with the Constitution. The Act had not been aligned with the Constitution by June 2011, although the Constitutional Act on the Implementation of the Montenegrin Constitution (of 19 October 2007) set a three-month deadline for its harmonisation. In March 2010, the Montenegrin Assembly moved a bill amending the Minority Rights and Freedoms Act. However, it did not receive the two-thirds majority required for adoption. At a repeat ballot in November 2010, procedural disputes led to voting being postponed *sine die*.¹²¹⁰

¹²⁰⁷ Framework Convention for the Protection of National Minorities, *Sl. list SRJ (Međunarodni ugovori)*, 6/98. (Instruments of ratification deposited with the Council of Europe, 11 May 2001). European Charter for Regional or Minority Languages, ratified 21 December 2005, *Sl. list SRJ, Međunarodni ugovori* 18/2005.

¹²⁰⁸ See Opinion of the Venice Commission on the Montenegrin Constitution, paragraphs 51–52, criticising the heading that treats minority rights as “special” in relation to the other human rights set out in chapters such as “Personal Rights”, “Political Rights”, “Economic, Social and Cultural Rights”.

¹²⁰⁹ *Sl. list RCG*, 31/06, 51/06 and 38/07.

¹²¹⁰ Minutes of the 2nd session of the second regular sitting of the Montenegrin Assembly in 2010, available at www.skupstina.me.

Definition of a “National Minority”

The preamble to the Montenegrin Constitution mentions the nations and national minorities living in Montenegro as “free and equal citizens” adopting the Constitution, notably the Montenegrins, Serbs, Bosniaks, Albanians, Moslems, Croats and others.¹²¹¹

The Constitution prescribes the rights and freedoms of “members of minority nations and other minority national communities”, which it does not separately define. The Minority Rights and Freedoms Act defines members of minorities as *a group of citizens*, fewer in number than the other, predominant population, sharing common ethnic, religious and linguistic features that differ from those of the rest of the population, historically linked to the Republic and motivated by the desire to profess and preserve their national, ethnic, cultural, linguistic and religious identity.¹²¹²

The flaw in this definition is that enjoyment of minority rights is ensured only to Montenegrin citizens, in contravention to the international standard in Art. 27 of the ICCPR.¹²¹³ The Venice Commission also criticised this provision before the law was adopted, recommending that the word “citizen” be taken out of the definition, as the scope of minority rights should be understood in an inclusive manner and restricted to citizens only when necessary, with respect to political rights.¹²¹⁴ The same criticism was reiterated by the European Commission in November 2007.¹²¹⁵ However, this recommendation was not reflected in the Draft Act Amending the Minority Rights and Freedoms Act (2009).¹²¹⁶

Right to Preserve National, Cultural and Other Features of Minority Identity

Under the heading *Protection of Identity*, Art. 70 of the Montenegrin Constitution guarantees protection of national, ethnic, cultural, linguistic and religious identity.

¹²¹¹ Montenegrin Constitution, *Sl. list CG*, 1/2007.

¹²¹² Minority Rights and Freedoms Act, *Službeni list RCG*, 31/2006 and 38/2007, Art. 2.

¹²¹³ The Human Rights Committee in its General Comment No. 23, The Rights of Minorities (CCPR/C/21/Rev.1/Add.5) emphasises that the rights under Art. 27 cannot be restricted to one's own citizens, apart from the political rights guaranteed under Art. 25 of the IC-CPR.

¹²¹⁴ See Opinion of the Venice Commission on the Montenegrin Constitution of 20 December of 2007, paragraph 54, quoting the Commission's opinion (CDL-AD(2004)026) paragraphs 31–36..

¹²¹⁵ Analytical Report Accompanying the Commission Opinion on Montenegro's Application for Membership of the European Union, 9 November 2010.

¹²¹⁶ The Draft Act is available on the Assembly's website: www.skupstina.me.

The Constitution guarantees the rights of members of minority nations and other minority national communities to found educational, cultural and religious associations, with financial support from the state, which indicates Montenegro's duty to provide financial assistance to minority associations. In order to preserve and develop minority national or ethnic identity, the Minority Rights and Freedoms Act also guarantees the right to set up institutions, societies, associations and non-government organisations in all areas of public life, and with the financial assistance of the state (Art. 8, (3)), as well as the right to protection of the cultural heritage of minorities and persons belonging to them (Art. 9). These provisions go beyond the minimum obligations set out in Art. 13 (2) of the Framework Convention, which says that the exercise of this right "shall not entail any financial obligation for the Parties".

The Minority Rights and Freedoms Act guarantees the right of expression, preservation, development and public demonstration of specific national, ethnic, cultural and religious features; the right to choose, use and publicly exhibit national symbols and to mark national holidays (Art. 8). Minorities and persons belonging to minorities are entitled to use national symbols (Art. 20), to mark important dates, events and figures from their tradition and history (Art. 21), to freedom of association, the articulation of their interests, and to take effective part in governance and the public control of government (Art. 22).

Freedom to Declare One's Nationality

The Minority Rights and Freedoms Act guarantees persons belonging to minorities the right to determine their nationality freely and independently, in accordance with the Framework Convention for the Protection of National Minorities.¹²¹⁷ The Constitution embodies a similar provision, guaranteeing the freedom of expression and public profession of national, ethnic and religious features (Art. 79 (1) (1)). More on the problematic provisions of the 2011 Census Act, which do not envisage the possibility of not declaring one's nationality, ethnicity or religion, at p. 395.

Prohibition of Discrimination against National Minorities

The Constitution, Minority Rights and Freedoms Act and the Anti-Discrimination Act all contain general guarantees prohibiting discrimination.

The Constitution forbids all indirect or direct discrimination on any grounds (Art. 8), while the Minority Rights and Freedoms Act further expounds that this means discrimination on grounds of race, colour, gender,

¹²¹⁷ *Ibid.*, Art. 10.

national or social origin, birth or similar status, religion, political or other beliefs, financial standing, culture, language, age and mental or physical disability (Art. 39 (2)).

Art. 2 of the Anti-Discrimination Act defines discrimination as any distinction on grounds of race, colour, national, social or ethnic origin, ties to a minority nation or minority national community, language, religion or belief, political or other opinions, gender, gender identity, sexual orientation, health, disability, age, financial standing, marital or family status, membership of a group or assumption of association with a group, political party or another organisation, or other personal features.¹²¹⁸

Protection of Minorities from Persecution and Hatred

The Constitution prohibits all instigation of or incitement to hatred or intolerance on any grounds (Art. 7).

Under Article 159(2) of the Criminal Code (*Infringement of Equality*), anyone who denies or restricts the rights and freedoms of another laid down in the Constitution, laws, other regulations or general enactments or ratified international treaties on grounds of his/her national or ethnic origin, race, religion or absence of such affiliation or who grants another privileges or benefits on grounds of such distinctions, or anyone who was prompted to such conduct by hate of another because of his/her race, colour, religion, origin, nationality or ethnic origin, shall be punished by a prison sentence of three months to five years.¹²¹⁹

Art. 370 of the Criminal Code, (*Inciting National, Racial and Religious Hatred*), sets out that anyone publicly encouraging violence or hatred against a group or member of a group on grounds of race, colour, religion, origin, nationality or ethnic origin, shall be convicted to imprisonment between six months and five years. The same sentence is prescribed for publicly endorsing, denying the existence or greatly diminishing the gravity of crimes of genocide, crimes against humanity or war crimes committed against a group or member of a group on grounds of race, colour, religion, origin, nationality or ethnic origin, in a manner which may lead to violence or incite hatred against a group of people or a member of such a group, if these crimes have been confirmed by a final judgement of a court in Montenegro or an international criminal court.¹²²⁰ Paragraph 3 of the same article sets out that if the act involved duress, abuse, endangering security, ridicule of national, ethnic or religious symbols, damage to the property of another or the desecration of

¹²¹⁸ Anti-Discrimination Act, *Sl. list* CG, 46/2010.

¹²¹⁹ Criminal Code, *Sl. list* RCG, 25/2010.

¹²²⁰ *Ibid*, Art. 370.

monuments, memorial tablets or graves, the culprit shall be sentenced to a prison term of between one and eight years. An aggravated form of the crime entails abuse of position, or if it resulted in unrest, violence or other grave consequences for the coexistence of the nations, national minorities or ethnic groups living in Montenegro (par. 4), and warrants a prison sentence ranging between one and eight years.

The Media Act prohibits the publishing of information and opinions, which incite discrimination, hatred or violence against persons or a group of persons because of their affiliation or lack of affiliation to a particular race, religion, nation, ethnic group, gender or sexual orientation (Art. 23 (1)). The founder of the media outlet and the author shall not be held accountable if the information or opinions published are part of the work of an author dealing with a public issue, were published with no intention of inciting discrimination, hatred or violence, are part of an objective news report, with the intention of critically pointing out the discrimination, hatred, violence or other occurrences representing, or which might represent, incitement to such conduct (Art. 23 (2)).

Use of Language and Alphabet

Pursuant to Article 10 of the Framework Convention, Montenegro is obliged to ensure persons belonging to national minorities the right to use their languages freely and without interference, in private and in public, orally and in writing. Montenegro has since 2006 also been bound by the European Charter for Regional or Minority Languages. The Charter defines the concept of regional and minority languages, the commitments which may be undertaken by the States Parties and the objectives and principles on which the States Parties must base legislation and practice. When ratifying the Charter, the states identify their minority languages and are then obliged to apply to them at least 35 provisions of Part III of the Charter, referring to the use of these languages in education, the work of the courts, state administration and public services, the media, culture, economic and social life and transfrontier exchanges. When ratifying the Charter, Montenegro identified Albanian and Roma as minority languages, as it considers the others (Serbian, Bosnian and Croatian) to be similar, almost identical languages.¹²²¹

The Constitution sets out that the official language is Montenegrin, while the languages “in official use” are Serbian, Bosnian, Croatian and Albanian (Art. 13). Official use of a language implies its use in administrative and court proceedings, the issuance of public documents, official records, ballots and other election material and in the work of representative bodies.¹²²² Art.

¹²²¹ Report on Development and Protection of Minority Rights (2008), Ministry for Human and Minority Rights, pp. 21 and 29.

¹²²² Minority Rights and Freedoms Act, Art. 11 (3))

79 of the Constitution links the right to official use of a language only to municipalities in which the majority or a significant share of the population belong to a national or ethnic group, as does Art.11 of the Minority Rights and Freedoms Act. The State Administration Act allows persons belonging to a minority community and working in the state administration to officially use their own language and alphabet and to conduct proceedings in their own language in areas where they form a significant minority of the population, pursuant to the Act (Art. 8).

In practice, however, it is not clear what is meant by “a minority as a significant share of the population”, nor in which municipalities exactly the Albanian minority has the right to official use of its language. The experts who reported to the CoE Committee of Ministers on the implementation of the European Charter for Regional or Minority Languages received conflicting interpretations as to what constituted a “significant share”, one version putting this at 5% and another at 15%.¹²²³ Furthermore, as the first state report on the implementation of the Charter for Regional and Minority Languages says that Albanian is spoken to a greater extent in five municipalities, it remains a matter of dispute as to why it is in official use only in three: Ulcinj, Podgorica and Plav, and not in all five, i.e. in Bar and Rožaje as well. In January 2010, the Committee of Ministers recommended that Montenegro should “clarify the territories where the Albanian and Romani languages are in official use and where Part III of the Charter applies;” (use of minority languages in institutions of education, before the courts in administrative proceedings etc.)¹²²⁴

However, the Roma language is not in official use. The Human and Minority Rights Ministry says that this is because Roma has not been standardised, has no literature or staff who know it.¹²²⁵ In January 2010, the CoE Committee of Ministers recommended that Montenegro “take the necessary steps to promote the codification and development of written Romani, in co-operation with the speakers [and] introduce teaching of the Romani language at pre-school, primary and secondary levels”.¹²²⁶

According to the Criminal Code, anyone who denies or limits the right of persons belonging to minority nations or other minority national communities the use of their mother tongue or alphabet when exercising their rights or addressing the authorities or organisations, shall be fined or sentenced to

¹²²³ European Charter for Regional or Minority Languages – First report of the Committee of Experts in respect of Montenegro, 20 January 2010, paragraph 27.

¹²²⁴ Recommendation CM/RecChL(2010)1 of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by Montenegro – Adopted by the Committee of Ministers on 20 January 2010 at the 1075th meeting of the Ministers’ Deputies.

¹²²⁵ *Ibid.*

¹²²⁶ Recommendation CM/RecChL(2010)1 of the Committee of Ministers on the Application of the European Charter for Regional or Minority Languages by Montenegro, adopted on 20 January 2010.

imprisonment not exceeding one year (Art. 158, *Infringement of the Right to Free Use of Language and Alphabet*).

According to the 2003 census, 393,740 people in Montenegro speak Serbian, 136,208 speak Montenegrin, 32,603 Albanian, 14,172 Bosnian, 19,906 Bosniak, 2,602 speak Roma and 2,791 speak Croatian.¹²²⁷ Albanian is the most widely used of the minority languages.

Under the Criminal Procedure Code, all detained persons, and therefore also persons belonging to minorities, have the right to be informed of the reasons for their arrest, the nature and grounds of the accusations against them, and to defend themselves in any ensuing proceedings in their own language or a language they understand.¹²²⁸ In areas where members of national minorities make up the majority or a significant part of the population, courts shall make official use of their languages and alphabets, in conformity with the law.¹²²⁹ The parties, witnesses and others taking part in the proceedings have the right to use their own language, and if the proceedings are not being conducted in that language, provision shall be made for interpretation of statements and the translation of documents and other written evidence¹²³⁰. Each individual taking part in the proceedings shall be informed of the right to a translation into his or her own language and the record must show that the parties were so advised. Art. 7 of the Civil Procedure Act also defines that the proceedings must be held in a language that is in official use, and where minorities are concerned, under the same conditions as those contained in the Criminal Procedure Code. In municipalities where the majority or a significant share of the population belong to a national or ethnic group, their languages and alphabets shall be in official use in administrative proceedings.¹²³¹

Albanian is in official use in the municipalities of Ulcinj, Plav and the Tuzi municipality of Podgorica.¹²³² Furthermore, in administrative proceedings, Albanians may send submissions to local administration agencies in their own language, although according to information from the Ministry, they have not so far exercised this right.¹²³³ In these municipalities, local government authorities will issue documents in Albanian on request.¹²³⁴

Pursuant to the Personal Names Act (2008), Montenegrin citizens may enter their personal names in the public register in one of the languages in official use (Serbian, Bosnian, Albanian and Croatian). Pursuant to the Identity Card Act (2007) the form of and information in the card shall be entered in Serbian, Bosnian, Albanian or Croatian for citizens officially using these languages, with

¹²²⁷ Montenegrin Statistics Office, based on the 2003 census.

¹²²⁸ Criminal Procedure Code, *Sl. list CG*, 57/2009 and 49/2010, Art. 5 (1)

¹²²⁹ *Ibid*, Art. 7 (2)

¹²³⁰ *Ibid*, Art. 8.

¹²³¹ Administrative Procedure Act, Art. 15.

¹²³² Report on Development and Protection of Minority Rights, Ministry for Human and Minority Rights, 2008, p. 30.

¹²³³ *Ibid*.

¹²³⁴ *Ibid*.

the exception of first and family names which shall be entered in the language and alphabet of the applicant, should he or she so request (Art. 7). A Bill to amend the Identity Card Act came before the Assembly in 2010, envisaging that data in the public register should simultaneously also be entered in the language and alphabet of the applicant.¹²³⁵ The Bill was passed in December 2010.

Right to Education in a Minority Language

The Montenegrin Constitution guarantees the right of national minorities “to education in their own language and alphabet in state institutions”, and “the right to have included in the curricula the history and culture of persons belonging to minority nations and other minority national communities” (Art. 79 (4)). The Minority Rights and Freedoms Act also provides for this right, although it is restricted to “adequate representation” of the language in general and vocational education, depending on the number of students and the available financing in the Republic (Art. 13). Under the General Education Act, education will be provided in a minority language in areas where “the majority or a significant share of the population” belong to the minority nations and other minority national communities” (Art. 11 (2)).

The Act Amending the General Education Act, adopted in 27 July 2010, changed the name of the language of instruction in Montenegro from “the language in official use” to “Montenegrin”.¹²³⁶ Because of this change, the parliamentary party New Serbian Democracy and the Serb National Council, filed a proposal to the Constitutional Court to review the constitutionality of the amendment to Art. 11 (1) of the General Education Act on grounds of discrimination, while the Socialist People’s Party initiated a review of the constitutionality of the procedure in which the new Act was passed.¹²³⁷ The Constitutional Court dismissed proposals finding that the law does not threaten the constitutional right to equality in education and does not deny the rights of minorities to education in their language.¹²³⁸ The European Commission concluded that the issue was being “politicised”.¹²³⁹

Teaching in schools is carried out by teachers whose mother tongue is the language of instruction, or by teachers possessing the relevant university qualifications in the language of instruction.¹²⁴⁰ In a 40-hour working week,

¹²³⁵ The Bill is available on the Assembly Internet page: www.skupstina.me.

¹²³⁶ Act Amending the General Education Act, Art. 6, *Sl. list CG*, 45/2010.

¹²³⁷ “Serbs in the Majority, but Discriminated Against”, *Dan*, 9 September 2010.

¹²³⁸ Press Release from V session of the Constitutional Court, 24 March 2011, available at: <http://www.ustavnisudcg.co.me/aktuelnosti.htm>; “Montenegro: Nova’s initiatives regarding language rejected”, Radio Free Europe, 24 March 2011, available at: <http://www.slobodnaevropa.org/content/news/2348595.html>.

¹²³⁹ Analytical Report Accompanying the Commission Opinion on Montenegro’s application for membership of the European Union, November 2010, p. 29.

¹²⁴⁰ Primary Education Act, Art. 78, *Službeni list RCG*, 64/2002 of 28 November 2002.

teachers must include standard theoretical instruction (class norm), comprising 18 classes of Montenegrin or the mother tongue (Art. 79).

Furthermore, Art. 15 of the Minority Rights and Freedoms Act sets out that curricula must include topics from the history, art, literature, traditions and culture of the minority, in prior consultation with the Minority Council, which will pass on its opinion to the relevant body before any curriculum reflecting their specific features is adopted. Tertiary educational institutions may also establish university departments, colleges or institutes for the education of preschool and school teachers in the language of the particular minority (Art. 16). Minorities are also guaranteed the right to found educational institutions, but funding for these is the responsibility of the founder (Art. 17). In order to ensure full enjoyment of minority rights, the University of Montenegro, on the recommendation of the Minority Council, may in each academic year enrol a certain number of students belonging to various minorities, in keeping with the University's own enactment (Art. 19).

The Alien Employment Act lays down that although the Government establishes the number of work permits granted to aliens each year, there may be exceptions including, *inter alia*, if the person is to be employed to teach in an educational institution "in the language and alphabet of persons belonging to a minority nation or another minority national community".¹²⁴¹

Additionally, in carrying out educational programmes in minority languages, Albanian being the case in point, textbooks in the mother tongue have been provided for most programmes in primary, secondary and tertiary education.¹²⁴² At the recommendation of the Commission for the Education of National and Ethnic Groups, the competent Council approved the use of textbooks published in the region (Kosovo and Albania) for subjects for which no textbooks in Albanian exist due to small circulation. Nevertheless, the European Commission expressed concern about the quality of textbooks, particularly in Albanian in November 2010.¹²⁴³

There is pre-school education in Albanian in the Ulcinj and Podgorica municipalities; primary education in Albanian takes place in 5 municipalities: Ulcinj, Bar, Podgorica, Plav and Rožaje. Instruction in Albanian in secondary schools exists in three municipalities: Ulcinj, Podgorica and Plav.¹²⁴⁴ Courses of study in Albanian for primary school teachers have been organised at the University of Montenegro in order to train up a body of teachers.¹²⁴⁵ In the 2009–2010 school year, 12 out of 162 primary schools in Montenegro and four out of the 47 secondary schools were teaching in Albanian.¹²⁴⁶

¹²⁴¹ Alien Employment Act, Art. 6, *Službeni list CG*, 22/2008 of 2 April 2008.

¹²⁴² Report on Development and Protection of Minority Rights, Ministry for Human and Minority Rights, 2008.

¹²⁴³ Analytical Report Accompanying the Commission Opinion on Montenegro's application for membership of the European Union, November 2010, p. 30.

¹²⁴⁴ *Ibid.*, p. 22.

¹²⁴⁵ *Ibid.*

¹²⁴⁶ Data announced by Assistant Minister for Human and Minority Rights Sabahudin Delić, ("Language is a Tool for Assimilation", *Dan*, 30 March 2010).

A 2008 report by the Human and Minority Rights Ministry says that Bosniaks, Moslems and Croats share joint curricula as the language they speak is part of a single language system.¹²⁴⁷ In 2009, however, the CoE Committee of Ministers recommended that “further steps need to be taken regarding the availability of minority language teaching as part of the school curriculum, including Bosniaks/Moslems and Croats”.¹²⁴⁸

Montenegro’s Croatian minority, mainly settled around the Bay of Kotor, received the approval of the Education and Science Ministry to introduce additional teaching of the Croatian language.¹²⁴⁹ With the financial assistance of *Matica Hrvatske*, a teacher of Croatian was found who gives classes in Croatian language and culture to school children in the Kotor and Tivat municipalities. A primary school in Tivat provided the premises for this course, which is not part of the formal educational system.¹²⁵⁰ However, “there has to be more children if teaching in Croatian is to be introduced into official education,” President of the parliamentary party Croatian Civil Initiative Marija Vučinović explained.¹²⁵¹ No legal enactment lays down the number of children necessary for the language of instruction to be in a minority language.

Use of Names and Toponyms in Mother Tongue

The Constitution guarantees minorities the right to register and use first and family names in their own language and alphabet in official documents, and in areas where they form a significant share of the population, and the inscription of traditional local designations, the names of streets and neighbourhoods and topographical signs in the language of the minority nations and other minority national communities (Art. 79 (7 and 8)).

The Right to (Public) Information in a Minority Language

The Constitution guarantees persons belonging to minorities the right to be informed in their own language (Art. 79 (11)), while the Minority Rights and Freedoms Act guarantees freedom of information at the level of the standards set forth in international documents on human rights and freedoms

¹²⁴⁷ *Ibid*, p. 19.

¹²⁴⁸ Resolution CM/ResCMN(2009)2 on the implementation of the Framework Convention for the Protection of National Minorities by Montenegro, Adopted by the Committee of Ministers on 14 January 2009 at the 1045th meeting of the Ministers’ Deputies.

¹²⁴⁹ Report on Development and Protection of Minority Rights, Ministry for Human and Minority Rights, 2008, p. 25.

¹²⁵⁰ *Ibid*, p. 25.

¹²⁵¹ “We Want the Croatian Language and Flag”, *Vijesti*, 10 August 2010.

(Art. 12). The Act sets out that persons belonging to minorities are entitled to freely set up their own media and to work without interference pursuant to the: freedom of expression, freedom to research, gather, disseminate, publish and receive information, unimpeded access to all sources, protection of personality and human dignity, and the free flow of information¹²⁵².

The law makes it incumbent on management and editorial bodies in the media founded by the Republic to allocate the appropriate number of broadcast hours for information, cultural, educational, sports and entertainment programmes in the languages of the minorities and programme content relating to the life, tradition and culture of the minorities, and ensure sufficient funds to finance them (Art. 12 (3)).

Content relating to the life, culture and identity of minorities in the official language shall be broadcast over the public service at least once a month.¹²⁵³ The law also sets out that the state may, as far as finances allow, provide subtitles by way of translation from the minority to the official language.¹²⁵⁴

The right to use a minority language is defined by the Electronic Communications Act, Article 9 of which says that Montenegrin, as the official language, is not obligatory in programmes intended for persons belonging to minority nations and other minority national communities.¹²⁵⁵

Under the provision on the realisation of public interest, the law obliges public broadcasters to produce and broadcast informative, cultural, art, educational, scientific, children's, entertainment, sports and other types of content ensuring the realisation of the rights and interests of the citizens and other persons in the field of information. They must also produce and broadcast programmes for various segments of society, without discrimination, displaying particular care for certain groups such as children, young people, minority nations and other minority national communities, the disabled and those who are vulnerable socially or because of their state of health, *et al* (Art. 74).

The state also encourages media pluralism, production by commercial broadcasters and the preservation of the diversity of electronic media in Montenegro, notably, from part of the revenues from games of chance. The funds are used to encourage production by commercial broadcasters of programmes in the public interest and of particular significance to, *inter alia*, persons belonging to minority nations and other minority national communities in Montenegro.¹²⁵⁶

According to a report by the YIHR, the public services air content in Albanian and Roma, but not in the other minority languages.¹²⁵⁷ Those respon-

¹²⁵² Minority Rights and Freedoms Act, Art. 12 (2).

¹²⁵³ *Ibid*, Art. 12 (4).

¹²⁵⁴ *Ibid*, Art. 12 (5).

¹²⁵⁵ Electronic Communications Act, Art. 9, *Službeni list CG*, 46/2010 of 6 August 2010.

¹²⁵⁶ *Ibid*, Art. 136.

¹²⁵⁷ Report: "State of Human Rights in Montenegro 2010", NGO Youth Initiative for Human Rights, www.yihr.me.

sible say that the reason is that the other languages such as Serbian, Croatian, Bosnian and Montenegrin are similar.

The Right to an Authentic Representation and Election Legislation

The Constitution guarantees minorities the right to “authentic representation” in the Montenegrin Assembly and local self-government assemblies in areas where they form a significant share of the population, in accordance with the principle of affirmative action (Art. 79(9)).

Before the adoption of the new Constitution in 2007, the Constitutional Court in 2006 rescinded Arts. 23 and 24 of the Minority Rights and Freedoms Act which decreed that an additional number of seats in for deputies and councillors representing the minorities would be ensured by affirmative action in electoral legislation. These articles were repealed as being contrary to the constitutional principle of equality of all citizens.¹²⁵⁸

Now, given that the Constitution enjoins positive discrimination of minorities, the right to authentic representation in keeping with the principle of affirmative action will be enshrined in a new electoral law.

The deadline for harmonising the electoral law with the Constitution, envisaged by the Constitutional Act on the Implementation of the Constitution, has been extended five times, until 31 May 2011 by the last amendment, but even this date has been overstepped, and 31 July 2011 set as the next one.¹²⁵⁹ For more detail on the modalities proposed for authentic representation see Political Rights, p. 411.

Proportional Representation in State Services

The Constitution guarantees members of minority nations and national communities the right to “proportional representation in public services, government and local government bodies” (Art. 79 (10)).

In its Analytical Report, the European Commission in November 2010 noted that the provision of the Constitution on “proportional representation” of national minorities in the public services needed to be explained and then put into effect.¹²⁶⁰ Earlier, the Venice Commission in its Opinion on the Montenegro Constitution criticised the use of the term “proportional” rep-

¹²⁵⁸ Decision of the Constitutional Court, *Sl. list RCG*, 51/2006.

¹²⁵⁹ More information is available at www.skupstina.co.me

¹²⁶⁰ Analytical Report accompanying the Commission Opinion on Montenegro's application for membership of the European Union, 9 November 2010.

resentation and recommended using the term “adequate” or “fair”,¹²⁶¹ as it will not be possible to foresee a model of absolute proportionality between the number of members of minority nations and their representation in the public services.

The Civil Servants and State Employees Act envisages that when deciding on the recruitment of a civil servant, “the head of the state authority must ensure that the right to proportional representation of minority nations or other minority national communities is respected.”¹²⁶² It also envisages that the human resources department will monitor the measures taken to achieve proportional representation of minority nations and other minority national communities in state bodies.¹²⁶³ As far as government employment is concerned, the decision shall be taken by the minister, pursuant to the State Administration Act. It is his/her duty when employing staff to ensure that the right to proportional representation of minorities is respected.¹²⁶⁴

There are no official figures on the numbers of persons belonging to minority groups employed in the state services. In its 2009 report on Montenegro, the Committee for the Elimination of Racial Discrimination expressed its concern at the lack of disaggregated data on members of minority groups employed in the central and local State bodies, in the police force as well as the judiciary and recommended that this data be collected.¹²⁶⁵

Human and Minority Rights Minister Ferhat Dinoša announced that by the end of 2010, his ministry would collect data on the ethnic breakdown of the state administration, explaining that it had tried to do so in 1999 and 2003 without success due to the fact that the majority of those employed did not declare their nationality.¹²⁶⁶ Now all candidates for employment in the civil service are called upon to state their nationality, as this will be considered “a plus” for the candidate.¹²⁶⁷ Surveys conducted in 2010 by the Office of the Ombudsman and YIHR of the representation of minorities in state bodies and institutions showed that all ethnic communities are under-represented in relation to Montenegrins.¹²⁶⁸

¹²⁶¹ Opinion on the Montenegrin Constitution, Venice Commission, December 2007, published in *International Standards of Human Rights and Constitutional Guarantees in Montenegro*, Action for Human Rights, 2008, p. 204.

¹²⁶² The Civil Servants and State Employees Act, Art. 25, *Sl. list CG*, 50/2008, 86/2009 and 49/2010.

¹²⁶³ *Ibid.*, Art. 117.

¹²⁶⁴ State Administration Act, Art. 49.

¹²⁶⁵ Report submitted by the States Parties under Art. 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, 16 March 2009, CERD/C/MNE/CO/1, (14).

¹²⁶⁶ “Nationality to be Advantage for Employment in State Bodies”, *TV Vijesti*, 6 September 2010.

¹²⁶⁷ *Ibid.*

¹²⁶⁸ The Youth Initiative for Human Rights (YIHR) survey is available at www.yihr.me/wp-content/uploads/2010/03/cg-izvestaj-2010-web.pdf.

In June 2011, the results of a questionnaire the Ministry for Human and Minority Rights forwarded to state agencies and local governments have shown that out of a total of 13,900 officials employed in state and local agencies, 79.03% or 10,985 declare themselves as Montenegrins, and 8.6% or 1,194 as Serbs.¹²⁶⁹ Disproportionate employment of Montenegrins and Serbs in government agencies is evident if one considers that according to the 2003 census, 43% were Montenegrins and 32% Serbs. This data also points to discrimination on the basis of political affiliation.

Protection from Assimilation

The Constitution forbids assimilation and obliges the state to protect minorities from all forms of forced assimilation (Art. 80).

Art. 7 of the Minority Rights and Freedoms Act of 2006 defines the duty of the Montenegrin Government to adopt a Minority Strategy Policy in order to ensure the free enjoyment and nurturing of the specific national or ethnic features of minorities. The Strategy was adopted in July 2008, with the primary objective to contribute to the exercise of minority rights and public education about the value and meaning of respect and protection of minorities, inter-ethnic tolerance, and models of living together in multiethnic communities. Continuous goal is “integration without assimilation”.¹²⁷⁰

At a gathering on the implementation of the Framework Convention for the Protection of National Minorities in Montenegro in March 2010, the Bosniak Party deputy Kemal Purišić warned of “massive assimilation in the field of language, which is the product of an inadequate educational system”.¹²⁷¹ Persons belonging to minorities, he said, did not like to declare which language they spoke. The last census established that about 33,000 people spoke Bosnian, but did not declare this to the MIA. In just over a year, while replacing their old identity cards with new ones, 1180 people put themselves down as speaking Bosnian.¹²⁷²

The Serb National Council (SNS) stated that introducing Montenegrin language and literature as subjects in the school curriculum “completes the project of suppressing Serbian as a language and legalises the discrimination and assimilation of the Serb people in Montenegro”.¹²⁷³ According to the SNS, this programme, “with the grammar, orthography, vocabulary and new letters of the Montenegrin language is absolutely unacceptable to the Serb people in

¹²⁶⁹ http://www.slobodnaevropa.org/content/nacionalnost_i_partija_i_dalje_bitni_pri_zaposljavanju/24256351.html

¹²⁷⁰ Minority Policy Strategy, June 2008, www.gov.me, p. 30–31.

¹²⁷¹ “Assimilation in Action”, *Vijesti*, “Language as a Tool for Assimilation”, *Dan*, 30 March 2010.

¹²⁷² *Ibid.*

¹²⁷³ “Council Unlawfully Rooting Out Serbian Language”, *Vijesti*, 28 December 2010.

Montenegro” and it criticises the executive for “hastily patching together an obligatory Montenegrin language general curriculum, blending in Serb and other mother tongue subjects”.¹²⁷⁴

For more on the Government attitude towards the use of minority languages, see above, p. 382.

Institutional Protection of Minorities

The protection of minority rights and advancement of their status has been within the purview of the Human and Minority Rights Ministry since 1998. The Montenegrin Assembly has a standing committee, the Human Rights and Freedoms Committee, which reviews the draft regulations and is entitled to hold hearings.

The Human Rights and Freedoms Protector acts as an independent, autonomous institution of the state in cases where rights have been infringed by an enactment, action or failure to act on the part of the state authorities or public services. The Assembly failed to adopt a new Human Rights and Freedoms Protector Act expanding the jurisdiction of the Protector also to suppressing discrimination against private individuals, in keeping with the Anti-Discrimination Act, by the end of 2010.

The Centre for the Preservation and Development of the Culture of Minorities, the minority councils and a Fund for Minorities have been established pursuant to the Minority Rights and Freedoms Act.

The Minority Councils and the Fund for Minorities

The Minority Councils. – The Constitution guarantees minority nations the right to establish councils (Art. 79 (13)), and the Minority Rights and Freedoms Act regulates the founding of minority councils (Art.33). Under the Act, a minority may elect only one council for a period of four years, with at least 17 and not more than 35 members.

The council consists of: deputies on the minority ticket, members of the Government proposed by the representatives of the minority ticket, mayors of municipalities where the minority in fact forms the majority, other deputies and government members, and mayors who themselves belong to a minority, presidents of minority parliamentary parties and chiefs of municipal minority party caucuses. The other members of the council are elected by secret ballot at the electoral assembly of the particular minority.

The Human and Minority Rights Ministry, pursuant to the Act, adopted Rules for the first elections of minority councils and Instructions on standard forms for electing members to the council.¹²⁷⁵

¹²⁷⁴ *Ibid.*

¹²⁷⁵ *Sl. list RCG*, 46/07

The council members elect their chairperson and secretary by secret ballot from their own ranks. The council, in its capacity of a legal person, adopts a budget, statute and rules of procedure. Funds for the council come from the Republican budget (Art. 33).

The council represents and acts on behalf of the minority, makes recommendations to government agencies and the public services for the promotion and development of minority rights, takes part in planning and setting up educational institutions and renders opinions on programmes which express the specific features of the minority.¹²⁷⁶ It also proposes the enrolment of a certain number of students from the minority at the University of Montenegro, initiates amendment regulations or other enactments governing minority rights and makes representations to the state president not to pass laws that would adversely affect minority rights.¹²⁷⁷

The following councils have been established: the Albanian Council, the Bosniak Council, the Croatian Council, the Moslem Council, the Roma Council and the Serb Council. Serb political representatives in parliament oppose the existence of a Serb National Council, as they do not consider Serbs in Montenegro to be a national minority. The Moslem Council thinks that the use of the nonexistent dual nationality of Bosniak Moslem is an attack on the Moslem people's cultural heritage because it denies and appropriates it, declaring it to be Bosniak.¹²⁷⁸

Since August 2008, the work of the councils has been financed through the Human and Minority Rights Ministry, by public competition announced by the Fund for Minorities.

The role of national councils has not yet reached a satisfactory level. In the opinion of the YIHR, there is no system that would act as a mechanism controlling the work of the councils.¹²⁷⁹ The European Commission feels that cooperation between the Government and the minority councils should be enhanced in terms of setting up a legal framework and identifying projects linked to minorities.¹²⁸⁰

The Fund for Minorities. – The Fund for Minorities was founded by the Montenegrin Assembly, in order to support activities relevant for preserving and developing the specific national or ethnic minority features in the areas of national, ethnic, cultural, linguistic and religious identity.¹²⁸¹ Financing comes from the state budget and other sources, and is distributed in

¹²⁷⁶ Minority Rights and Freedoms Act, Art. 34.

¹²⁷⁷ *Ibid*, Art. 35.

¹²⁷⁸ For example: Reaction by the Moslem National Council of Montenegro and the *Matica Muslimanska*, RTCG, 31 January 2009.

¹²⁷⁹ The Report "State of Human Rights in Montenegro 2010", NGO Youth Initiative for Human Rights, <http://www.yihr.me>

¹²⁸⁰ Analytical Report Accompanying the Commission Opinion on Montenegro's Application for Membership of the European Union, 9 November 2010, p. 29.

¹²⁸¹ Minority Rights and Freedoms Act, Art. 36 (1).

proportion to the percentage of the population the minorities account for in Montenegro¹²⁸². Representatives of the minorities participate in deciding on how funds are to be allocated, in keeping with the decision of the Minority Council.¹²⁸³

The Fund for Minorities is still not functioning properly. Shortage of staff is a problem, and there is no control mechanism to keep a check on distribution of monies. Those disbursed for 2010 were not allocated in a transparent manner. In the Report on audit of annual financial report and audit of the effectiveness of the Fund for Minorities of the State Audit Institution, it was stressed that the Fund “does not have precisely defined criteria for evaluating projects, the indicators for evaluating projects impact, and that it does ensure monitoring of project implementation and evaluation of projects impact. Reports on the implementation of projects submitted to the Fund by project managers are incomplete, superficial and without proper financial evidence of expenditure incurred on account of their realization.”¹²⁸⁴

The Fund’s Management Committee, consisting of six representatives of the minority councils, the Human and Minority Rights Ministry Secretary, the chairman of the parliamentary Human Rights Committee and seven deputies, allocated €850,000 to 126 projects on the principle of ethnic breakdown. Approximately €517,000 were approved for Serb projects, while €330,000 were distributed to the other 118 projects submitted by the councils, NGOs and individuals belonging to the other minorities.¹²⁸⁵

Because of the lack of transparency in allocating the money, chairmen of the national councils were alleged to have given money to projects run by organisations where they themselves sat on the boards of management. Roma and Egyptian students, the Croatian Civil Society of Montenegro, the NGO *Behar* and the YIHR sought to annul the decision by the Fund’s Management Board and called for the establishment of an independent expert commission allocate money to projects.

The Government announced that the competition for the allocation of the €850,000 should be annulled, and this was debated by the Assembly leadership, which did not prevent the director of the Fund for Minorities from signing a contract on 20 December with most of the minority councils, non-government organisations and individuals, prerequisite for the payment of the grants¹²⁸⁶.

The European Commission concluded that the Fund still was not functioning properly and noted that amendments to the Minority Rights and

¹²⁸² *Ibid*, (paragraphs 2, 3).

¹²⁸³ *Ibid*, (paragraph 4)

¹²⁸⁴ The Report is available at: http://www.dri.co.me/index.php?option=com_docman&task=doc_view&gid=91.

¹²⁸⁵ “Half a Million for Serb Council”, *Vijesti*, 14 December 2010.

¹²⁸⁶ “Kurtagić Hands Out Money After All”, *Vijesti*, 21 December 2010

Freedoms Act that should clarify the functioning of the Fund, were pending.¹²⁸⁷ It also recommended that the Minority Councils' elected representatives needed to be more closely involved in the procedure for allocation of funds from the Fund.¹²⁸⁸

Montenegro: Demographic Picture and Census

The last published census results of the population, households and homes, conducted in 2003, yielded an intricate demographic picture of Montenegro.¹²⁸⁹

The 2003 census showed that 267,669 Montenegrins made up 43.16% of the population; 198,414 declared themselves as Serbs (31.99%), and only 1,860 as Yugoslavs (0.30%). There were 31,163 Albanians (5.03%), 48,184 Bosniaks (7.77%), 225 Egyptians (0.04%), 127 Italians (0.02%), 819 Macedonians (0.13%), 362 Hungarians (0.06%), 24,625 Moslems (3.97%), 118 Germans (0.02%), 2,601 Roma (0.42%), 240 Slovenes (0.04%), 415 Croats (0.07%), 6,811 others (1.10%), 2,180 undeclared (0.35%).

The new Montenegrin census of the population, households and homes was conducted on 1–15 April 2011¹²⁹⁰ and included all inhabitants, citizens, aliens and stateless persons temporarily or permanently residing in Montenegro.¹²⁹¹

According to the published preliminary census results, the population in Montenegro is 625,266¹²⁹² (about 5 thousand more than in 2003). Data on nationality, religion and language will be published later.¹²⁹³

Complications with the Census Act

The Act on Census of Population, Households and Homes in 2011 provides that, inter alia, data will be collected on citizenship, "national i.e. ethnic affiliation"¹²⁹⁴, religion, mother tongue (Montenegrin, Serbian, Bosnian, Albanian, Croatian or other languages).¹²⁹⁵ Art. 21 (1)) of the Census Act sets

¹²⁸⁷ Analytical Report accompanying the Commission Opinion on Montenegro's application for membership of the European Union, 9 November 2010, p. 30

¹²⁸⁸ *Ibid.*

¹²⁸⁹ Montenegrin Statistics Office, <http://www.monstat.org/cg>

¹²⁹⁰ 2011 Population, Household and Home Census Act of 19 July 2010, SU-SK 01–360/19, with amendments of 9 December 2010.

¹²⁹¹ *Ibid.*, Art. 2 (1).

¹²⁹² Preliminary results available at: <http://www.monstat.org/userfiles/file/popis2011/saopstenje/saopstenje.pdf>.

¹²⁹³ "The first results of the census today", *Pobjeda*, 13 May 2011. Data on religion, language and nationality should be published until the end of July 2011.

¹²⁹⁴ "Ethnic affiliation" in the original wording of the Act was replaced by: "national i.e. ethnic affiliation" in the Act Amending the Population, Household and Home 2011 Census Act of 9 December 2010.

¹²⁹⁵ *Ibid.*, Art. 5.

out that respondents must give the census takers the information required of them and provide full and truthful answers to all questions. Article 28 lays down a fine for anyone refusing to provide information. Both articles run counter to the international standard of freedom to declare one's nationality, which includes the right of anyone not to declare his or her national affiliation, with no disadvantage resulting from this choice, as envisaged by the Framework Convention for the Protection of National Minorities (Art. 3 (1)). Furthermore, the Constitution speaks of freedom of expression and public profession of national, ethnic and religious features (Art. 79 (1i.)), and the Minority Rights and Freedoms Act of the right of minorities "to independently and freely declare their nationality" (Art.10) which subsumes the freedom not to declare themselves nationally, ethnically or confessionally, i.e. that a person does not want to be categorised in this way. On that occasion, the HRA filed the initiative for the constitutional review of these articles of the Census Act,¹²⁹⁶ which the Constitutional Court rejected,¹²⁹⁷ finding that the by-laws (instructions of the Institute of Statistics and Methodology) provide for the right not to express national affiliation. At the time of rendering this decision, the by-laws to which the Constitutional Court referred were not available to the public. Also, by deciding in this manner, the Constitutional Court violated the basic principle of legality, which implies that human rights must be provided by law, not by-laws.¹²⁹⁸

Roma, Ashkali and Egyptians (RAE)

Roma, Ashkali and Egyptians (RAE) are the most vulnerable ethnic group in Montenegro stricken by severe poverty and unemployment, low level of education and the fact that they are poorly informed; also partly due to their own traditions such as young, arranged marriages, an offhand attitude towards education, tolerance of breaking their own rules, and a strong racial and ethnic distance on the part of the rest of the population towards them¹²⁹⁹, the non-existence of an adequate government plan and framework for the improvement of their status and rights in the past, etc.¹³⁰⁰ A large share of members of these communities experience problems in obtaining personal identity documents, which prevents their inclusion in the social life of the community at large.¹³⁰¹

¹²⁹⁶ The Initiative available at: <http://www.hracion.org/?p=607>.

¹²⁹⁷ "Constitutional Court collaborates with the regime", *Dan*, 25 March 2011.

¹²⁹⁸ For more detail please see: <http://www.hracion.org/?p=715>.

¹²⁹⁹ The most striking is the ethnic distance towards Roma and Albanians; Ethnic Distance in Montenegro, research, CEDEM, 2007.

¹³⁰⁰ Study: Social inclusion of ethnic groups in the Western Balkans through education and training, article by Aleksandar (Saša) Zeković, Europe Training Foundation (ETF), Torino, 2008.

¹³⁰¹ Status of displaced persons, internally displaced persons and the RAE population, CEMI, Alternative and European Movement in Montenegro, Podgorica, 2010.

According to the results of the population census of 2003, Roma and Egyptians make up about 0.5% of the population of Montenegro.¹³⁰² Experience on the ground and work with the community have shown that this figure is not reliable. The relevant NGOs, international organisations, and indeed the Government, consider that it is much higher, ranging between 15,000 and 20,000 (ca. 3%). Following the reregistration carried out between 14 September 2009 and 14 February 2010, the Refugee Care Bureau announced that 3,200 internally displaced persons from the RAE group were living in Montenegro.¹³⁰³ In recent years, thanks to the efforts of UN agencies, a number of refugees returned to Kosovo. Most of them opted for integration into Montenegrin society. On his departure from Montenegro, UNHCR representative Serge Ducasse pointed out the right of each refugee to freely choose whether or not he or she wanted to return to Kosovo.¹³⁰⁴ The urgency of resolving the status of the Kosovo refugees is also acknowledged in the European Commission 2010 Analytical Report.¹³⁰⁵ In 2008, an informal statistical survey by the Statistics Office showed that about 11,000 RAE members currently live in Montenegro, accounting for just under 2% of the population¹³⁰⁶. Roma and Egyptian NGOs protested because funds earmarked for their inclusion were used for this statistical undertaking, whose results were not binding on a single state body. Inadequate statistics on the Roma and Egyptians were also reflected in the treatment of these groups during the allocation of the money from the Fund for Minorities.

Early in 2005, the Government launched a programme called “The Decade of Roma Inclusion” and adopted an action plan for the 2005–2015 period. The action plan defined the priorities the government and society should focus on – education, health, employment and housing. The action plan never came into effect because the conditions required to achieve its objectives were not in place.¹³⁰⁷ The Strategy to Improve the Status of the RAE Population in Montenegro in 2008–2012 is a corrective mechanism for the Decade of Roma Inclusion action plan, and has been in use for several years. It comprises a set of specific measures and activities over a four-year period: legal, political, economic, social, urban planning/communal, educational, cultural/informative and in the area of health care, with identifiable persons in charge, deadlines and a budget.¹³⁰⁸ The Commission monitoring

¹³⁰² 2003 Census, publication “Population – National or Ethnic Affiliation”, MONSTAT, Podgorica, September 2004.

¹³⁰³ “The State prevents their accepting”, *Vijesti*, 27 October 2010.

¹³⁰⁴ “Sarkozy Went Too Far, Don’t You Do the Same”, *Dan*, 21 September 2010.

¹³⁰⁵ http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/strategy_paper_2010_en.pdf

¹³⁰⁶ Page 31, Study of a Practical Message: Access to the Labour Market, Review of the positions of the OSI, Roma and Egyptians, Juventas, AD Ekvista and the FSR, Podgorica, 2011, http://www.cemi.org.me/images/dokumenti/studije/studija_zaposljavanje.pdf

¹³⁰⁷ DecadeWatch Update 2007; www.romadecade.org/decade_watch_update_2007

¹³⁰⁸ Decade Watch: Results of the 2009 Survey: www.romadecade.org/decade_watch_results_of_the_2009_survey

the implementation of the Strategy and deciding on the allocation of funds counts two members from the Roma and Egyptian Community in addition to Government representatives.¹³⁰⁹ Public pressure by NGOs on the Government and local government bodies to achieve the objectives of the “Decade” is insufficient.¹³¹⁰ The Commission is chaired by the Human and Minority Rights Minister. The budget for achieving the Strategy objectives is shrinking from year to year.¹³¹¹ According to the Roma Scholarship Foundation (FSR), which coordinates the National Decade Watch Team for Montenegro, there are serious problems with applying this Strategy. The amount of 390,000 Euros earmarked for welfare housing by certain municipalities (Nikšić, Bijelo Polje, Berane) was not used for its intended purpose nor within the agreed time frame. As a result, many Roma and Egyptian households were deprived of a roof over their heads and essential support for education and employment programmes was withheld.¹³¹² There is insufficient concern to improve living conditions and security in Roma settlements. The right to life of refugees in the camps is seriously endangered.¹³¹³

There are crucial problems in the area of education. Grants for Roma and Egyptian school children and students are delayed for several months, contrary to their purpose, which is to enable regular schooling. According to official figures, over 50% of Roma and Egyptian children of school age are not integrated into the obligatory primary education system. The rate of enrolment of these children in primary schools is about 25%.¹³¹⁴ The state is insufficiently active in ensuring that all children of school age living in Montenegro are enrolled in school in good time and that they attend regularly. After the 2009 appeal filed by the HRA, the representatives of the Ministry of Education visited the camp in Konik in 2010 and for the first time, in co-

¹³⁰⁹ One represents the Roma and Egyptian National Council and the other the NGO sector. A number of NGOs publicly disputed the legitimacy of their representative and sought that the Government more clearly define criteria; statement by a group of NGOs, July 2010; Documentation of the Women's RAE Network.

¹³¹⁰ Page 31, Study of a Practical Message: Access to the Labour Market, Review of the positions of the OSI, Roma and Egyptians, Juventas, AD Ekvista and the Roma Scholarship Foundation, Podgorica, 2011, http://www.cemi.org.me/images/dokumenti/studije/studija_zaposljavanje.pdf

¹³¹¹ In 2009, €600,000 was set aside, in 2010, €400,000 (source: Human and Minority Rights Ministry). According to information available to the Roma and Egyptian National Council, only €300,000 is planned for 2011, occasioning a letter of protest to the Montenegrin Prime Minister (Council's documentation).

¹³¹² Call by Biljana Alković, coordinator of the National DW team, to the Human and Minority Rights Minister to demand the return of money from those municipalities that had not spent it for the purpose for which it was intended; Podgorica, 17 February 2011, FSR documentation.

¹³¹³ Ten cases of death from fires were registered in recent years. Although it conducted training, the emergency sector of the Ministry of Internal Affairs did not enable voluntary fire fighting units to work (Documentation of Aleksandar Zeković, researcher of human rights violations).

¹³¹⁴ Roma Education Fund, 2009.

operation with the Red Cross, checked whether all children of school age attend school.¹³¹⁵ According to international agencies and local NGOs, a small number of children finish school with success – a mere 10%.¹³¹⁶ Dropping out of primary school is particularly visible in Podgorica.¹³¹⁷ There is also a problem of the quality of education in primary schools.¹³¹⁸ The number of members of the RAE Population who have finished secondary school is exceptionally small (about 2%, FSR). The number of students at secondary school is commendably increasing from year to year.¹³¹⁹ The FSR points out that the state does little to provide employment for those who do finish secondary school. HRA researchers were told that almost all find work as cleaners in the communal services where they work together with people who are illiterate. Only two have a college diploma, while about a dozen are pursuing a university course of studies. Of the two university graduates, one Roma man is already employed in the civil service, at the Human and Minority Rights Ministry, while another, an Egyptian woman, is professionally engaged in the NGO sector and independent media. However, none of the 13 people who passed the professional civil service examination is employed.¹³²⁰

The adherence to tradition in the community reflects negatively on the lives of young Roma, their education and their inclusion in society in general. This refers particularly to women, or rather young girls, because of the custom of young arranged marriages, which has given rise to protest by young Roma and Egyptians.¹³²¹

Because of the poor and discriminatory position in the society, the first public protest of young Roma and Egyptians called “Diplomas on brooms” was organized by the FSR in front of the Montenegrin Government on 11 March 2011. The protesters demanded from the Prime Minister to provide stronger support for the social inclusion of the RAE population and prevent corruption and abuse of funds intended for their integration.¹³²²

¹³¹⁵ “Textbooks and clothing for 55 children”, *Pobjeda*, 28 September 2010.

¹³¹⁶ UNDP, 2006.

¹³¹⁷ The drop-out rate, according to FSR data, was about 50% in the last two years.

¹³¹⁸ Examples have been registered of 6th grade Roma children with sub-standard literacy and poor understanding of official Montenegrin; FSR; p. 32, Study of a Practical Message: Access to the Labour Market, Review of the positions of the OSI, Roma and Egyptians, Juventas, Ekvista and the RSF, Podgorica, 2011, http://www.cemi.org.me/images/dokument/studije/studija_zaposljavanje.pdf

¹³¹⁹ There were 37 students in Montenegrin secondary schools in the 2009/10 school year, 61 in 2010/11. The drop-out rate in secondary schools is ca. 6%. FSR documentation.

¹³²⁰ FSR, 2011.

¹³²¹ “A bad tradition of the Roma and Egyptians is affecting our brighter future”, letter by a secondary school student to the National Council, 10 December 2010; www.isi-mne.org

¹³²² The Commission which allocates funds for improving the situation of the RAE population is chaired by the Minister for Human and Minority Rights, and his brother is the Secretary of this body. While offering appropriate evidence, relevant NGOs have publicly accused minister Dinosa of spending over 100,000 Euros in a non-transparent manner over the course of three years and making decisions at his own discretion. Roma

FSR later filed a complaint with the Protector of Human Rights and Freedoms for discrimination by the Police Directorate in terms of the permit for the place of protest. The Police Directorate responded to the FSR that the 11 March protest can not be organized in front of the Government and Parliament, while they subsequently learned that another organization is allowed to protest in front of the Parliament.¹³²³

The occupations of social inclusion organiser and associate were commendably introduced in 2011. They may contribute to more employment of educated Roma and Egyptians and effect their better integration.¹³²⁴ Professionals and NGOs hope that these persons will encourage enrolment and regular attendance at primary school (through the so-called assistants), as well as the availability of other public services.

In 2011 the first Roma radio with planned bilingual program started operating.

The NGOs say that the judicial system is not accessible to Roma and Egyptians, mainly due to the non-existence of free legal aid. Examples of discrimination by the judicial bodies and the police are frequent.¹³²⁵

A grave violation of children's rights among the Roma, Ashkali and Egyptians is the forcing of children into begging. The results obtained by a group of Roma and Egyptian students show that Montenegrin institutions have insufficient information on the nature and extent of begging, that no records are kept of this problem, and that the work of multidisciplinary operative teams attached to local social welfare centres for the protection of children from neglect and abuse is not efficient.¹³²⁶

During its monitoring of the implementation of the Convention on the Rights of the Child in Montenegro, the UN Committee on the Rights of the Child noted that a large number of children, mainly Roma, live and work on the streets and are particularly vulnerable to human trafficking, economic and sexual exploitation. The Committee stated its concern at the low standard of living of a significant number of children and their families, particularly the Roma and Egyptian population, who are socially excluded and live in

Scholarship Foundation publicly indicated that it is under most serious pressure and threats regarding the termination of work; www.isi-mne.org

¹³²³ "Roma discriminated against even when protesting", *Dan*, 10 April 2011.

¹³²⁴ Interview with representatives of the Vocational Training Centre and the FSR; January 2011.

¹³²⁵ Interview with representatives of Roma and Egyptian NGOs, the Roma and Egyptian National Council and a member of the Council for Civil Oversight of the Police; November and December 2010.

¹³²⁶ Procedures in certain cases are too lengthy. One case where volunteers were working to house children dragged on for 20 months, while the children continued to live in inadequate surroundings; "Child beggars in Montenegro: a special report by Roma and Egyptian students, beneficiaries of FSR grants"; FSR, Podgorica, 2010, www.isimne.org/cms/images/fsr%20prosjacenje%20djece%20u%20crnoj%20gori.pdf

poverty, without access to basic services or equal opportunities. It also noted the serious lack of support systems and the inconsistent and ineffective application and follow-up of local strategic documents on children's rights.¹³²⁷

A fundamental legal problem among the RAE population is the lack of identity documents and restricted financial means for obtaining them.¹³²⁸ In 2010 and 2011, the Government channelled a significant sum of money by way of support to the Roma and Egyptian National Council in an effort to solve the problem of personal documents.¹³²⁹ Concrete results of this programme, however, have not yet been announced.

After the European Commission expressed its concern regarding the living conditions and education of people and children living in refugee camp Konik in Podgorica,¹³³⁰ the Government included the measures to improve their housing conditions and education in the Action Plan for monitoring the implementation of recommendations from the European Commission's opinion. According to the fourth monthly report on implementation of measures under the Action Plan,¹³³¹ a project proposal for IPA 2011 "Permanent solutions for Camps Konik I and II" has been developed so far. This project includes construction of 90 residential units, construction of multipurpose centre, the voluntary return of displaced persons to the countries of their origin, employment, education, social issues and technical assistance to the residents of the camp. Submission of this project is expected. Also, there has been some progress in providing access to primary education.

¹³²⁷ *Ibid.*

¹³²⁸ "No Justice without Big Money", *Dan*, 5 December 2010.

¹³²⁹ <http://www.mmp.gov.me/ministarstvo>

¹³³⁰ Analytical Report Accompanying the Commission Opinion on Montenegro's Application for Membership of the European Union, 9 November 2010, p. 30.

¹³³¹ The Report available at: <http://www.gov.me/vijesti/107094/Drzavna-sekretarka-za-evropske-integracije-Milacic-Vlada-usvojila.html>.

Political Rights

Article 25, ICCPR:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c) To have access, on general terms of equality, to public service in his country.

Article 3, Protocol No. 1 to the ECHR:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

General

The Constitution of Montenegro of October 2007 provides that the citizens of Montenegro, Montenegrin citizenship holders, shall exercise power directly and through freely chosen representatives (Art. 2). The Constitution provides for the establishment of government based on the freely expressed will of citizens in democratic elections, in accordance with the law (Art. 2(3)). Active and passive voting right is prescribed, as universal and equal (Art. 45). The Constitution prescribes the general prohibition of discrimination, but not a special right to equal access to public services. This right is provided by the Civil Servants Act (*Sl. list CG*, 50/08).

Participation in the Conduct of Public Affairs

Under Article 2 of the Constitution, sovereignty shall be vested in citizens bearing Montenegrin citizenship. Article 45 accordingly guarantees the general and equal right to vote and stand for elections to all citizens of Montenegro over 18 years of age, who have permanently resided in Montenegro for at least two years.

The Constitution provides Montenegro's citizens with the possibility of directly voting on other specific issues at both the national and local levels. At the national level, they are entitled to directly take decisions at referenda. The Constitution lays down which constitutional amendments have to be endorsed at a referendum. Amendments to the following three groups of provisions need to be upheld by at least three-fifths of the registered voters: a) the independence, territorial integrity and sovereignty and state symbols of Montenegro (Arts. 1–4); b) citizenship, language, accession to international organisations and independence (Arts. 12, 13 and 15); and c) voting eligibility requirements and the obligation to endorse amendments to these provisions by such a high (three-fifths) majority of the electorate (Arts. 45 and 157).

The Act on the Referendum on the State Legal Status of Montenegro (*Sl. list RCG*, 12/06.) adopted in 2006 introduced restrictive requirements for changing Montenegro's state legal status. It altered the legal framework set by the 2001 law, which had been unacceptable to those who wanted Montenegro to remain in a common state with Serbia. The Act was applied at the referendum on 21 May 2006, at which Montenegro gained its independence upheld by more than 55% of the voters. The Montenegrin Assembly did not pass a law on referenda after the new Constitution was adopted. The Constitution lays down the requirements for calling a national referendum and the required majority which are much stricter than the ones in 2006 – a change in Montenegro's state legal status now has to be upheld by two-thirds of all Assembly deputies and endorsed by three-fifths of all voters at a referendum.

The Constitution also formally provides for civil initiatives. As opposed to the prior solution in the 1992 Constitution, under which the Assembly reviewed an initiative supported by 6000 voters (equivalent to the election of one Assembly deputy per every 6000 registered voters laid down in the Act on the Election of Councillors and Deputies), the 2007 Constitution introduced an additional requirement, that the initiative must be advocated by a deputy. This additional requirement renders a civil initiative senseless as it can be suspended if none of the deputies agree to advocate it. A deputy is also entitled to propose a draft law without the signatures of 6000 voters. The degree of human rights the citizens had in Montenegro has thus been lowered, contrary to the pledge in the Human and Minority Rights Charter, which had earlier been adopted also by the Montenegrin Assembly, that the attained degree of rights would not be reduced.¹³³²

The Local Self-Government Act¹³³³ lays down a number of mechanisms by which citizens can take decisions. One of them is the institute of recalling the mayor, which has remained in force although the amendments to the Act

¹³³² Art., Guarantees of Vested Rights, Human and Minority Rights Charter of Serbia and Montenegro, *Sl. list SCG*, 6/03.

¹³³³ *Sl. list RCG*, 42/2003, 28/2004, 75/2005, 13/2006 and *Sl. list CG*, 88/2009 (Art. 54, and 3/2010).

have in the meantime abolished the direct election of mayors. The initiative to recall the mayor may be launched by at least 20% of the voters in the municipality. If the recall of the mayor was not successful, the procedure for his/her recall may not be relaunched for at least one year from the day the citizens voted on the recall of the mayor.

The Local Self-Government Act entitles citizens to launch initiatives with the competent municipal authorities on issues of interest to the local population (Art. 101). The competent authority is obliged to take a position on the initiative and communicate it to the submitter of the initiative within 30 days. In the event the authority does not act on the initiative within the deadline, the submitter is entitled to make a representation with the mayor or municipal assembly. The citizens are also entitled to submit civil initiatives for the adoption or amendment of an enactment governing important issues within the remit of the local government (Art. 102). In the event the competent authority rejects the civil initiative, a referendum may be called on the issue the civil initiative concerned.¹³³⁴ Municipalities have laid down different requirements for the submission of civil initiatives. In Nikšić, for instance, a civil initiative may be submitted by at least 2% of the voters entered in the municipal voter register. Other municipalities, like Pljevlja, specify the number of signatures required in support of a civil initiative (300 signatures in case of Pljevlja).

The Local Self-Government Act also includes another institute of direct democracy, the so-called assembly of citizens, at which requests and proposals are voted in by a majority of votes and then submitted to the competent municipal authority (Art. 103). The local self-government authority is obliged to review the request or proposal within 60 days from the day the assembly of citizens was held and notify the citizens thereof. The assembly of citizens shall call a meeting of the local community council at its own initiative or at the proposal of at least 1% of the citizens in the area for which the assembly of citizens is organised. An assembly of citizens may be convened also by the mayor or municipal assembly speaker to obtain their opinions on specific issues of local interest, or by a councillor in the municipal assembly entered in the voter register of the area for which the assembly of citizens is called, to obtain their opinion on a specific issue.

The Local Self-Government Act provides for two types of referendums: (1) municipal and (2) local community referendums. At a municipal referendum, the citizens of a municipality shall express their views on specific issues within the remit of the local-self government. At a local community referendum, citizens living in a particular municipal local community shall express their views on issues within the remit of the local self-government. A proposal to call a municipal referendum may be submitted by the mayor, at

¹³³⁴ *Ib idem*, Art. 102. Therefore, citizens file an initiative requiring a review and decision on a particular issue, and a civil initiative requiring the adoption or amendment of a legal enactment.

least 1/3 of the councillors or 5% of the voters entered in the municipal voter register according to the data on the electorate at the last elections. The decision to call a referendum shall be upheld by a two-thirds majority in the Municipal Assembly. A local community referendum shall be called on issues of direct interest to citizens in the territory for which the referendum is called, particularly on the introduction of local community self-contributions, construction of infrastructure facilities for the territory and other issues of interest to the residents of that area. The decision to call a local community referendum shall be taken by the Municipal Assembly at the proposal of at least 20% of the voters in the territory of the Municipality for which the referendum is initiated.¹³³⁵

Citizens are also entitled to file complaints and petitions. Under the Local Self-Government Act, everyone is entitled to file a civil complaint or petition with the local self-government authorities and seek information concerning their remit (Art. 107).

Restrictions on Performing a Public Office

The ICCPR and the ECHR guarantee citizens active and passive suffrage, i.e. the right to vote and stand for election.¹³³⁶ The ICCPR also acknowledges the rights of citizens to participate in the conduct of public affairs and to have access, on general terms of equality, to public service in their country. These rights may be restricted. The ICCPR insists the restrictions cannot be unreasonable, while the ECtHR found that the right of a citizen to be elected may be subjected to qualification requirements as long as they are not discriminatory.¹³³⁷

Conflict of Interests Act

Montenegro adopted its first Conflict of Interests Act in 2004, which was replaced by a new Conflict of Interests Act in 2009 (*Sl. list CG*, 1/2009). International and domestic experts had on a number of occasions criticised the prior Act, which had allowed officials to exercise more than one office and had not included a precise definition of a public official. The new Act introduces provisions restricting the activities a former public official may engage in (Art. 13). The legislator expanded but ultimately failed to include all the

¹³³⁵ *Statute of the Nikšić Municipality*, Arts. 95–98, quoted by Srđan Žarić in – Legal Analysis of the Work of Local Self-Governments in Monitoring the Work of Local Self-Governments – 2008 Report, CEMI, Podgorica, 2009.

¹³³⁶ This right is deemed to be implicitly recognised by Article 3 of Protocol 1. *Blackstone's Human Rights Digest*, Blackstone Press Limited, London 2001, p. 336.

¹³³⁷ *Gitonas v. Greece*, ECtHR, RJD 1997-IV No. 42, ECmHR (1997); *Fryske Nasjonale Partij v. The Netherlands* (1985) 45 DR 240, ECmHR.

required categories in the definition of a public official (Art. 3). The status of the Commission implementing the Act is problematic. Although Article 4 of the Act states that the Commission shall be independent, the procedure in which its members are appointed does not guarantee its independence. The members of the Commission for the Prevention of Conflict of Interests are nominated by the Assembly Administrative Committee and elected to five-year terms of office by a simple majority of Assembly deputies (Art. 41). This manner of election is particularly problematic given that the procedure in which a violation of the Act is reviewed is launched by the Commission at the initiative of the government authority in which the public official had or is performing a public office, the authority charged with the election or appointment of a public official, another state or municipal authority, another legal or natural person or *ex officio* (Art. 24). The nominees for seats in the Commission cannot be elected without the support of the political parties and can hardly be expected to be impartial, although visible headway has been made after the adoption of the new law. The manner in which the Commission members are elected is the main factor constraining the quality and impartial implementation of the legal provisions.

Under the Act, a public official who owns a company, is a founder of a public company, another company, institution or legal person must transfer his/her management rights in these entities to another legal or natural unfiliated person within 15 days from the day s/he was appointed, elected or named to a public office and that person shall in its own name and on behalf of the public official exercise those rights until the end of the public official's term of office. Under the Act, the transfer of management rights also entails the resignation of the public official from membership of a management authority in a company or another entity in which s/he had been exercising his/her management rights in such an authority established by the company or another entity (Art. 7). The Act also prohibits a public official from holding the office of chairperson or member of a management or supervisory authority or the office of an executive director or management board member in a company (Art. 8). A person elected, appointed or named to a public office in terms of this law must resign from that office within 15 days from the day s/he was elected, appointed or named to a public office.

Notwithstanding the suggestions made by experts, the Act includes a provision letting public officials sit on management boards of companies in which the state owns at least 25% of the shares (Art. 9(2) and Art. 5(7)). This provision remained in the law because the deputies did not wish to deprive themselves of the high remuneration they receive as members of company management boards. The Montenegro Assembly Speaker, for instance, sits on the Management Board of the public company Montenegrin Airports. This provision places public companies and deputies at an advantage over others and provides ample room for influencing the deputies.

Draft Law on Amendments to the Conflict of Interests Act, which was submitted to the Parliament in late June 2011, provides for the amendments to this provision, under which MPs can no longer be members of management boards in companies where the state has at least 25% ownership.

Vetting

Montenegro does not have a law governing vetting. The Liberal Party drafted such a law and submitted it to the parliament for adoption back in 2007, but it did not receive the support of either the ruling parties or most of the opposition parties. The law governed all violations of human rights as of 23 March 1976, the day when the ICCPR, which the SFRY had ratified back in 1971, came into force.

Access to Secret Service Files Act

A law governing access to secret service files was not adopted by the end of June 2011 although the MIA said it would be enacted by 2007.¹³³⁸ The opposition New Serb Democracy Party said in early 2010 that it would propose a law on the opening of secret files “because this was Montenegro’s civilisational need”¹³³⁹, but failed to submit a draft to the Assembly. The opposition Liberal Party and Movement for Changes also voiced initiatives for the adoption of such a law. Instead of a law, Montenegro in 2001 enacted a decree valid for one year and allowing perusal of secret service files, but only of persons classified as “internal enemies”, in the premises and under the supervision of the secret service.

Political Parties

General

The Act on Political Parties (*Sl. list RCG*, 21/04) is the main law governing the right to political association. The law was drafted and submitted for adoption to the Assembly by the NGO Centre for Monitoring (CEMI) in 2004 and it was supported by over 6000 voters. The Act on Political Parties governs the establishment, organisation, registration, dissolution of political parties and conditions under which they may form alliances. Twenty parties were automatically entered in the Register of Political Parties because they had at least one deputy or councillor in the national or municipal assemblies at the time the Act was adopted. The other parties were deleted from the

¹³³⁸ “Law on Secret Files Soon”, *Vijesti*, 16 November 2007. According to Assistant Minister of Internal Affairs Nada Vukanić, the draft of the law was reviewed and upheld by the Council of Europe, OSCE, consultants and domestic experts in 2007.

¹³³⁹ “Secret Files to See the Light of Day”, *Vijesti*, 4 January 2010.

Register and had to again apply for registration and fulfil the requirements laid down in the new law. The Act governs the prohibition and deletion of political parties from the Register. Not one party has been deleted from the Register to date.

Political Party Funding

The electoral law, under which the first multi-party elections were held in Montenegro on 9 December 1990, gave advantage to the ruling Alliance of Communists of Montenegro because it did not provide for allocation of funds to finance the election campaigns of parties and independent candidates and thus deprived the opposition of a level playing field in this respect. The development of party funding evolved by treating the issue of funding of (1) election campaigns and (2) regular party activities. The funds allocated from the state budget did not depend on the party's election results (number of won seats) until 1997. Changes in the funding of political parties were part of the agreement forged between the democratic opposition parties and part of the then Democratic Party of Socialists (DPS) headed by Milo Đukanović. The opposition parties conditioned their support to Đukanović at the presidential elections by this agreement and the Act on Financing of Political Parties was adopted in 1997 (*Sl. list RCG*, 44/97). The Act entitled parties to funding from the budget but did not impose on them the obligation to report how they spent them. The Assembly in 2004 adopted a new Law on Financing of Political Parties; the bill was proposed by the NGO CEMI and supported by the signatures of 6000 voters. Funds for campaigning have since been allocated to submitters of election lists and parties that won seats in the parliament. The upper limit of funds allocated from the state budget for the regular work of political parties was abolished in 2005. Four years later, in 2008, the Assembly adopted the now valid Act on Financing of Political Parties and the Act on Funding Election Campaigns for the President of Montenegro, Mayors and Presidents of Municipalities.¹³⁴⁰ The 2010 amendments to the Act on Financing of Political Parties considerably increased budget subsidies for political parties.

The 2008 Act on Financing of Political Parties considerably improves the efficiency of reporting on raised and spent funds. Parties earlier refused to submit such reports and the competent authorities refused to prosecute them in misdemeanour proceedings for not abiding by the law. Efficiency was boosted by the introduction of the institute of refunding 80% of the funds a party is entitled to on the basis of its election results, which it qualifies for only after the Finance Ministry auditor endorses its report (Art. 11). The provision has prompted all parliamentary parties to submit election campaign financial reports. However, notwithstanding the penalties provided for by the Act, parties, which have failed to win any seats, have not been submitting

¹³⁴⁰ These laws were also drafted by NGO CEMI.

their financial reports. Namely, 20% percent of the allocated budget funds are divided equally amongst all the proclaimed election lists and 80% in proportion with the number of seats they won. Parties, which had not won any seats, are not allocated any funds and they do not abide by the obligation to submit financial reports.¹³⁴¹ After the 2009 parliamentary elections, NGO CEMI submitted an initiative to the Finance Ministry to launch misdemeanour proceedings against 10 election lists and their authorised officers for failing to submit their financial reports. Some of the parties meanwhile submitted their reports, while misdemeanour proceedings are under way against the rest.¹³⁴² No one has yet been punished for not abiding by the laws governing the funding of political parties and election campaigns although the provisions of these laws have been violated on a number of occasions.

The greatest problem arising in the implementation of current Act is the fact that the State Election Commission (SEC) lacks professional and adequate resources ensuring that it performs independent checks of political party funding. The SEC does not have a professional staff and has one employee – its chairman. The financial reports are temporarily being checked by a Finance Ministry auditor, until an independent SEC or another anti-corruption agency independent from the executive is established.

Property of the Alliance of Communists

An issue of particular relevance to fair election conditions and party funding regards the status and use of the property of 18 erstwhile socio-political organisations, managed by the Alliance of Communists until 1990, the Socialist Alliance of the Working People and the Alliance of Socialist Youth and in the last 20 years managed by the ruling DPS. The 2000 Act on the Property of Former Socio-Political Organisations (*Sl. list RCG*, 57/00, 54/01), stipulating the transformation of this extremely valuable property into state property and its use by all parties with seats in the national or local parliaments and the state authorities, was never applied and a new State Property Act was passed in February 2009 (*Sl. list CG*, 21/09). It, too, lays down the obligation and deadline within which the property of the Alliance of Communists has to be inventorised and the real estate has to be registered as state property. The implementation of this law has dragged on as well; the most valuable real property, the Government headquarters in Jovana Tomaševića Str. in Podgorica, for instance, which had been leased by the DPS for two decades, was registered as state property only in April 2010.¹³⁴³ According to data given in reply to a deputy question five years ago, DPS earned 636,000 euros a year from renting the building out.¹³⁴⁴ The Socialist People's Party

¹³⁴¹ CEMI data.

¹³⁴² *Ib idem*.

¹³⁴³ A survey conducted by SNP Deputy Snežana Jonica shows that “The Government is Paying the Highest Rent to the Prime Minister’s Brother”, *Dan*, 26 June 2010.

¹³⁴⁴ “Government Hiding Alliance of Communists’ Property”, *Vijesti*, 10 January 2010.

(SNP) in 2008 asked the state prosecutor to initiate the proceedings to declare the lease contract between the DPS and the Government null and void because it was prejudicial to the state.¹³⁴⁵ SNP Deputy Snežana Jonica said that the DPS had earned 5.5 million euros from renting state property “as if it were its own” over nine years and recalled that the amount of funds from which all parties funded their election campaigns and worked all year round and which were the opposition parties’ only source of funding were “merely pocket money” for the DPS.¹³⁴⁶

The Right to Vote and Stand for Elections

Article 45 of the Montenegrin Constitution lays down equal conditions for acquiring the right to vote and stand for elections. Notably, a person must 1) be a citizen of Montenegro, 2) be at least 18 years of age, and 3) a permanent resident of Montenegro for at least two years.

To run for president of Montenegro, a person must also fulfil an additional residential requirement – to have permanently resided in Montenegro at least ten of the past 15 years (Art. 96(2)).

The adoption of the new Montenegrin Constitution opened the question of whether a significant number of voters would be deleted from the voter registers now that Montenegrin and not federal citizenship is the condition for acquiring the right to vote. Many voters had the citizenship of Serbia and Montenegro or just Serbia and had exercised their right to vote because they fulfilled the residential requirement (at least two years of permanent residence in Montenegro prior to the parliamentary (then republican) elections). The opposition parties estimated that as many as 50,000 voters would be deleted from the voter register because they did not have Montenegrin citizenship. The alignment of the electoral legislation laws with the Constitution was put off for 2011 because there was not a two-thirds majority in the Assembly to amend it. Presumptions are that these changes would greatly affect the electorate and especially adversely impact on the voters of the opposition, particularly those who were for a common state with Serbia. Given that any amendments to the Act on the Election of Councillors and Deputies must be supported by a two-thirds majority in parliament, the ruling coalition has been forced to negotiate with the opposition parties and find a compromise regarding the duration of the transitional period during which voters without Montenegrin citizenship will remain in the voter register. DPS offered a one-year transitional period, while the opposition insisted that it last five years. This would in practice mean that persons without Montenegrin citizenship but entered in the voter registers would be able to vote during the transitional

¹³⁴⁵ “The Government is Paying the Highest Rent to the Prime Minister’s Brother”, *Dan*, 26 June 2010.

¹³⁴⁶ *Ibid.em*.

period. Those who do not acquire Montenegrin citizenship in the meantime will be deleted from the voter register. The parties are expected to find a compromise and set a period ranging between one and five years.

As opposed to the neighbouring country (Croatia, Serbia, Kosovo, Bosnia-Herzegovina), the Montenegrin Constitution does not entitle its diaspora, i.e. its nationals not fulfilling the permanent residence requirement, to take part in elections. This, however, does not mean that many of them do not vote. Due to the poor record keeping, Montenegrin nationals, who are residing in other countries but have not deregistered, are still entered in the voter registers. Moreover, a number of Serbian nationals, who own real estate in Montenegro, had also registered as residents of Montenegro. The negative effects of this phenomenon will be dampened by the introduction of Montenegrin citizenship as a requirement and the change of identification documents.

Election Procedure

Montenegro has a proportional election system in place and the entire country is one election unit. The D'Hondt formula has been applied in distributing seats to date. With the aim of preventing the fragmentation of the parliament, an election threshold was introduced at the national and local levels in 1990 – it first stood at 4% and was lowered to 3% in 1998. The threshold has resulted in a high percentage of “dispersed votes” i.e. a significant number of voters voted for parties that did not pass the threshold. At the last parliamentary elections in 2009, 36,929 votes (11.2%) had gone to parties that did not win any parliamentary seats.

Institutional Mechanisms Ensuring the Adequate Representation of Minorities

According to the 2011 census data, not one national community in Montenegro commands an absolute majority (there are 44.98% Montenegrins, 28.73% Serbs, 8.65% Bosniaks, 4.91% Albanians, 3.31% Moslems, 0.97% Croats, 1.01% Roma, while others account for 5.5% of the population).

The September 1997 agreement between the democratic opposition parties and the part of the DPS headed by Milo Đukanović envisaged the introduction of mechanisms guaranteeing seats to the minority Albanian parties. The agreement was prerequisite for the parties' support to Đukanović at the presidential elections. A positive discrimination system was then introduced in the Montenegrin electoral legislation and it guarantees the ethnic Albanians the election of their representatives to the Montenegrin parliament in

the form of so-called “polling stations defined under a special Republic of Montenegro Assembly decision”¹³⁴⁷, at which ethnic Albanian deputies are elected. Parties that won seats at the special polling stations are not required to pass the threshold at the national level as opposed to other parties running for seats at other polling stations, which must pass the threshold at the national level as well.

To ensure the better representation of the ethnic Albanians representatives, the Assembly decided that 5 of the 78 seats in the 1998 parliamentary elections would go to parties that win the most votes in the polling stations defined in the Assembly special decision and in which the Albanians account for most of the electorate.¹³⁴⁸ The same solution was applied at the elections in 2001 and 2002 (although the number of seats was reduced to 4) and again in 2006 (when the number of seats was increased to five again).

The existence of instruments of positive discrimination of persons belonging to only one national community was criticised also by international election observers.¹³⁴⁹ The issue of providing institutional mechanisms for the adequate representation of minority communities has dominated the alignment of electoral legislation with the Constitution in view of the increasingly vociferous demands of, above all the Moslems and Bosniaks, to rectify the existing system, and the pressures of the international community.

Before the 2006 independence referendum, the Montenegrin Assembly passed the Human Rights and Freedoms Act which envisaged the introduction of “reserved” seats for the representatives of the minority communities, but these provisions were declared unconstitutional by the Constitutional Court in July 2006, after the independence referendum.¹³⁵⁰ The institute of “authentic representation of minorities” in Article 79 of the Constitution is instead to be addressed by amending the Act on the Election of Councillors and Deputies. The process of amending this Act has been blocked from the very start. The Assembly working group was unable to begin working for a long time. When it eventually did, it refused to make its work transparent or let NGO representatives take part or observe its work.¹³⁵¹

The greatest controversies have arisen with respect to the model of minority representation i.e. what answer will be found to the following question: will seats be reserved for *representatives of national minorities or parties with*

¹³⁴⁷ Act on the Election of Councillors and Deputies, Art. 118.

¹³⁴⁸ Art. 17, Act Amending the Act on the Election of Councillors and Deputies, (*Sl. list RCG*, 41/02).

¹³⁴⁹ Parliamentary Elections 10 September 2006 OSCE/ODIHR Election Observation Mission Final Report, Warsaw, 2006. p. 16. <http://www.osce.org/odihr/elections/montenegro/23566>

¹³⁵⁰ Montenegrin Constitutional Court Decision U.53/06 of 11 July 2006, (*Sl. list RCG*, 15/06)

¹³⁵¹ At the time of the publication of this report the process has remained closed to the public, which was particularly criticized by NGOs (see position of the Centre for Democratic Transition, “File: election law is at hand”, *Vijesti*, 7 June 2011).

the attributes of the national minorities?! Namely, representatives of ethnic Albanian parties are vehemently opposed to any changes of the existing system of representation of the Albanian community and insist that only ethnic parties and not civic parties may run for the reserved seats. The other minority communities disagree. The representatives of the Bosniak party were advocating a model entailing some kind of reserved seats, accepting some of the arguments of the ethnic Albanian parties, demanding that those seats be reserved for the ethnic parties notwithstanding voter support, i.e. that persons belonging to these national minorities who are members of civic parties, cannot run for these seats.

The working group came out with two drafts but neither won the necessary support.¹³⁵² One was drafted by the ruling coalition deputies and the other by the deputies of the opposition. At the request of the ruling parties, the Venice Commission and the OSCE/ODIHR issued a joint opinion on the proposal drafted by the ruling parties.¹³⁵³ The opposition's proposal is an improved version of the ruling party's draft, amended in accordance with the recommendations made by the international monitoring missions and the Venice

¹³⁵² The draft, which was to have been the product of the whole the working group, was ultimately submitted only by the deputies of the ruling party, not the working group. The solution to the minority representation issue was sought within the existing system of party lists and Montenegro as a single election unit. As opposed to Serbia, which fully abolished the election threshold and left the prohibitive effect to the so-called effective threshold, the Montenegrin legislator introduced a kind of guarantee of seats for every minority community, guaranteeing each of them one seat. Both proposals aimed at avoiding the effect of the so-called natural threshold, which would have stood at 1.041% at the last elections – given the small size of the Montenegrin parliament (81 deputies) the abolition of a legal threshold would not have ensured the representation of specific minorities. This particularly pertains to the Croatian minority – nearly all registered Croatian voters would have to vote for the party of the Croatian minority for it to enter parliament. This is why this solution would not have been comprehensive” (Z.Vujović, N. Tomović – Sustainable Institutional Mechanisms to Improve the Representation of Minorities in the Montenegro Parliament, CEMI, Podgorica, p. 27).

¹³⁵³ The OSCE/ODIHR and the Venice Commission stated the following in their Joint Opinion on the Draft Act Amending the Act on the Election of Councillors and Deputies: “The draft law introduces a system of “authentic” representation of minorities which is based on the following principles: affirmative action is extended to all minority groups (not only the Albanians as previously); not only political parties and coalitions, but also groups of citizens may submit lists of candidates; two different kinds of measures of affirmative action are foreseen for larger minority groups and for smaller ones (less than 2%); the declaration of belonging to a minority group is purely voluntary; there is no maximum numerical threshold for a national group to benefit from the affirmative measures foreseen in the law (Montenegrins and Serbs lists are free to declare that they represent a minority group); the votes expressed in favour of a certain minority are not lost; there are no reserved seats: in order to obtain a seat it is necessary to have received a certain number of votes; in certain conditions, however, the smallest minorities are guaranteed a seat, provided that they reach a certain threshold.” *Joint Opinion on the Draft Law on Amendments and Supplements to the Law on the Election of Councilors and Members of Parliament of Montenegro*, Opinion No. 578/2010, pp. 6–7 available at [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)023-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)023-e.pdf).

Commission.¹³⁵⁴ It was impossible to predict the conclusion of the process at the end of the reporting period, although the authorities are expected to step up work on this issue because the EU, too, called for the resolution of this issue, i.e. the harmonisation of the electoral legislation with the Constitution prior to the launch of talks on Montenegro's membership of the EU.

Election Authorities

The election authorities comprise election commissions and election boards regulated by the provisions governing the administration of elections of the Act on the Election and Recall of Councillors and Deputies (Arts. 17–37)¹³⁵⁵ The legislator opted for the pro-party model of the election administration, laying down that no election commission or board may have more than 1/3 members from the ranks of one political party.

¹³⁵⁴ “After leaving the working group, the Venice Commission opinion, and after the proposal by the deputies of the ruling parties was not adopted, the opposition parties proposed their own draft amendments, supported by the three strongest opposition parties. The proposed amendments do not focus on institutional mechanisms ensuring minority representation but on issues the opposition parties are most interested in: (1) use of state resources, (2) representation in the media and (3) election administration. Most of the amendments reflect the OSCE ODIHR recommendations but, unfortunately, aim at strengthening the position of the opposition parties rather than the integrity of the election administration. The opposition parties took the OSCE ODIHR recommendations into account with respect to other issues, e.g. on the representation of women. Under the draft amendments, at least one-third of the elected deputies must be members of the less represented gender i.e. women. The introduction of closed block election lists is also commendable. As far as minorities are concerned, the SNP proposed the improvement of the model proposed by the ruling parties, partly based on Venice Commission recommendations, notably with respect to preventing the possibility of a minority party resorting to affirmative action in the event the minority is represented in the Assembly by a party which regularly won seats in the parliament. It also attempts to minimise room for manipulation by illegitimate minority representatives who may abuse the institute of affirmative action in the provision under which the State Election Commission, i.e. the local election commission shall decide on whether a party registered for elections may apply the institute of affirmative action. The draft, however, does not lay down the criteria by which the election commissions will take their decisions, which increases room for abuse because they have the discretion to decide whether someone may invoke affirmative action in the election process. Neither camp unfortunately opted for writing a brand new law; the ruling parties proposed a total of 40 amendments and the opposition parties as many as 73 amendments to the existing Act. The amendments do not address all the issues and there is no study reviewing the effects of the proposed amendments. The opposition draft amendments, mostly relying on the OSCE and Venice Commission recommendations and NGO analyses, are of better quality than the draft amendments of the ruling parties because they comprehensively open issues that must be addressed to improve the electoral framework although they fail to provide a quality solution to the issue of minority representation. (Z.Vujović, N. Tomović – Sustainable Institutional Mechanisms to Improve the Representation of Minorities in the Montenegro Parliament, CEMI, Podgorica, pp. 29–30).

¹³⁵⁵ Act on the Election of Councillors and Deputies – *Službeni list RCG*, 4/98, 5/98, 17/98, 14/00, 18/00, 9/01, 41/02, 46/02, 45/04, 48/06, 56/06.

This pro-party model is a consequence of a consensus political parties have clearly reached not to allow the establishment of an independent state election commission that would have the capacity to implement both the electoral law, and the laws on the funding of political parties and election campaign i.e. supervise the financial operations of political parties. The SEC is not independent and most of its members are members of the ruling parties. The law lays down only one requirement a candidate for a seat on the SEC has to fulfil – s/he has to have a degree in law.¹³⁵⁶ This requirement does not guarantee quality and professionalism. The SEC has suffered from a lack of administrative capacity for years, best illustrated by the fact that only the SEC Chairman is fully employed in the SEC, and only since 2010 at that. Although it is headquartered in the Assembly building, the SEC has the status of “lessee” and the basement offices it has been allocated do not satisfy even the minimum conditions an institution of such relevance should be operating in. CEMI drafted a public policy study proposing the introduction of an independent SEC model which would considerably limit the influence political party representatives wield on the decision-making processes. CEMI proposed that most of the SEC members be appointed from the ranks of judges which, in its view, would improve the quality of its procedural actions and simultaneously strengthen its integrity in decision-making. The Judicial Council had earlier established that judicial membership of in election commissions was incompatible with the judicial code of ethics.¹³⁵⁷

Control of the Number of Printed Ballots and Storage of Election Material

The SEC shall render a decision on the format, content and printing of ballots and other election material ahead of every election. Under the Act, submitters of election lists and candidates for seats in the state or municipal parliaments are entitled to insight in the election material, notably the voter registers, election commission and board records and ballots (Art. 77). They may perform insight in this material in the official premises of the election commission i.e. authority keeping the election material. The competent authority is also obliged to permit the submitter of an election list to photocopy the election material upon request and at his/her expense. Insight in election material is allowed within the first five days from election day. Parliamentary parties may also apply for insight in and photocopying of the election material after the five-day deadline expires. The election material shall be stored for at least four years, while the ballots shall be stored for 90 days i.e. until the com-

¹³⁵⁶ Art. 30, Act on the Election of Councillors and Deputies – *Službeni list RCG* 4/98, 5/98, 17/98, 14/00, 18/00, 9/01, 41/02, 46/02, 45/04, 48/06, 56/06.

¹³⁵⁷ “New Election Commission Appointed”, *Pobjeda*, 2 June 2009.

pletion of any proceedings on the violations of rights during the election (Art. 78). The SEC lays down the election material storage and use procedures.

Determination of Election Results

The election results are established by the competent election commission – the state or municipal election commission. The election commission counts the total number of votes each election list won and establishes the number of seats each party won by applying the D'Hondt formula. Only the election lists that won at least 3% of all votes cast in the election unit are awarded seats (Art. 94, Act on the Election of Councillors and Deputies).

The distribution of seats among the candidates on the election list depends on the type of election list. The so-called *modified closed election list* is used in Montenegro – half of the seats won by an election list are awarded based on the order of candidates while the other half is awarded at the discretion of list submitters after the elections. Voters are thus prevented from really electing their representatives while party leaderships are given control over the party caucuses. This kind of closed election list is used only in Montenegro and Serbia. The OSCE has on a number of occasions criticised this solution since 2002.

Termination of Terms of Office (“Andrijevic” Case)

Under Article 87 of the Montenegrin Constitution, the term of office of a deputy shall terminate before the expiry of the period for which s/he was elected in the event s/he 1) resigned, 2) was irrevocably sentenced to an unconditional prison sentence of minimum 6 months, 3) was irrevocably deprived of his/her working capacity, or 4) in the event his/her Montenegrin citizenship was terminated. The Constitution entitles deputies to perform their duties as a full-time occupation. Although the Constitution lays down that the deputy shall decide and vote according to his/her own convictions (Art. 85(1)), deputies are still as a rule toeing the party line. The mandates were imperative since the introduction of the multi-party system until the Constitutional Court in 2004 declared that they belonged to the deputies.¹³⁵⁸ The imperativeness had been strengthened by the existence of the institute of recall. The mandates of the deputies are still indirectly linked to the party inasmuch as Art. 101(8) of the Act on the Election of Councillors and Deputies lays down that a deputy shall be stripped of his/her mandate in the event the party on whose election list s/he ran is prohibited.¹³⁵⁹

¹³⁵⁸ In its Decision published in *Sl. list RCG*, 45/04 of 2 July 2004, the Montenegrin Constitutional Court established that Art. 101(1.7) of the Act on the Election of Councillors and Deputies (*Sl. list RCG*, 4/98, 17/98, 14/00, 9/01, 41/02 I 46/02) was incompatible with the Constitution of Montenegro.

¹³⁵⁹ *Sl. list RCG*, 4/98, 5/98, 17/98, 14/00, 18/00, 9/01, 41/02, 46/02, 45/04, 48/06, 56/06.

However, the free mandate allows for the trade of mandates. When on 1 March 2011 a member of the Movement for Changes (PZP) in the assembly of Andrijevica, Uroš Čukić, joined the ranks of the Democratic Party of Socialists (DPS) and thus secured a majority in the assembly to that party, President of the Movement for Changes, Nebojša Medojević, filed a criminal complaint for corruption against Čukić and Slavko Stijović, head of the DPS assembly committee, arguing that Čukić has joined the DPS for tens of thousands of Euros and an apartment in Podgorica.¹³⁶⁰ This case showed the absurdity of free mandates in the proportional election system, where voters opt for parties but have no impact on who will be on the list and do not directly vote for individuals on the list. Switching to a different party, especially from the opposition party to the party in power, certainly does not reflect the will of the citizens and raises the question of the legitimacy of Andrijevica Assembly. Emergency elections have been requested, but the DPS refused.¹³⁶¹

Grounds for Election Annulment

The Act on the Election of Councillors and Deputies does not enumerate grounds for repeat voting at a polling station. Under the law, a decision to repeat voting is taken by the election commission pursuant to a complaint (Art. 102).

Legal Protection (“Mašan” Case)

According to the European Court of Human Rights, electoral and political rights are not “civil rights” in the sense of the right to a fair trial in Article 6 of the European Convention (*Priorello v. Italy*, ECmHR, 43 DR 195, (1985)), and guarantees of a fair trial are not applied to the procedures following the revision of legality of the conduct of elections (*Pierre-Bloch v. France*, 1996).

Municipal election commissions, the State Election Commission and the Constitutional Court of Montenegro are the authorities charged with protecting voting rights. A complaint against a breach of the right to vote, which is reviewed by the competent election administration authority, is the main legal instrument for protecting these rights (Art. 107(1) of the Act on the Election of Councillors and Deputies). Complaints may be filed within 72 hours from the moment of occurrence of the breach i.e. the rendering of a decision or commission of an action (Art. 107(2)). The competent election commission shall render a decision on the complaint within 24 hours. A decision

¹³⁶⁰ At the end of June 2011, when this report was completed, the fate of this criminal complaint was unknown.

¹³⁶¹ “New elections most honest solution”, *Dan*, 28 June 2011.

by the State Election Commission may be appealed with the Constitutional Court (Art. 110). Under Article 111 of the Act on the Election of Councillors and Deputies, the General Administrative Procedure Act shall apply to “all actions regarding the delivery of decisions, conclusions and other enactments, records, documents, submissions et al” unless otherwise stipulated by the Act.

The Act on the Election of Councillors and Deputies lays down misdemeanour penalties (Art. 101).

Chapter 16 of the Criminal Code is devoted solely to crimes against electoral rights: Violation of the Right to Stand for Election (Art. 184), Violation of the Right to Vote (Art. 185), Violation of the Freedom to Freely Exercise the Right to Vote (Art. 186), Abuse of the Right to Vote (Art. 187), Tampering with Voter Registers (Art. 188), Obstruction of Election (Art. 189), Obstruction of Election Monitoring (Art. 190) Violation of the Secrecy of Voting (Art. 191), Falsification of Voting Results (Art. 192), Destruction of Voting Documentation (Art. 193), Grave Crimes against Electoral Rights (Art. 194). Penalties for these crimes range from fines up to five years’ imprisonment. A perpetrator of a grave crime against electoral rights shall be sentenced to imprisonment ranging between 6 months and 18 years. Grave crimes against electoral rights constitute crimes in which any of the eight of the ten crimes against electoral rights in Arts. 185–193 resulted in grave consequences i.e. the disruption of public law and order, property damage or grave physical injuries or death.

One of the rare cases of a violation of electoral rights was the vote-buying in Zeta – the so called “Mašan Case”. During the independence referendum campaign, a recording made public by the bloc for the common state showed three DPS activists trying to influence a Mašan Bušković; they promised to arrange the writing off of his electricity debt exceeding 1,500 euros if he and his family voted for independence. The Podgorica Superior Court in May 2010 upheld the judgment of the Podgorica Basic Court in a re-trial in which the protagonists of “Zeta Film” in the referendum campaign were sentenced to 45 days i.e. three months in prison for violating the freedom to freely exercise the right to vote (Art. 186).¹³⁶² The accused had initially been sentenced to six and ten months’ imprisonment in 2006; this judgement was overturned by the Higher Court.¹³⁶³

President of the opposition Movement for Changes was physically assaulted by a close relative of, Branislav Mićunović, a controversial businessman who, according to the media and opposition parties, is allegedly implicated in a number of criminal activities in Montenegro. The assailant, Nenad Mićunović, admitted he had attacked Nebojša Medojević for publicly accusing his family and qualifying Branislav Mićunović as the “Montenegrin sultan

¹³⁶² “Prison for Buying Votes”, *Dan*, 6 May 2010.

¹³⁶³ “New Episode in Spuž”, *Vijesti*, 29 April 2006.

who has to be asked about everything” and recommended to the Assembly to send a delegation “to ask him to extradite Darko Šarić”, wanted in Serbia for cocaine trafficking.¹³⁶⁴ The assailant was fined 950 euros in a misdemeanor trial and the Supreme State Prosecutor stated she would consider initiating criminal proceedings against him, but had failed to do so by the end of 2010.¹³⁶⁵ The assault met with sharp criticism of both the opposition and the ruling parties and senior state officials. Medojević was physically assaulted only one year after a sympathiser of the ruling coalition verbally assaulted him at a polling station. Medojević’s underage son was also attacked by persons with criminal records while he was playing with his friend on sports grounds. Although the police identified the assailants, they immediately issued an unusual statement in which they said that the assailants “had not known whose son they were attacking”. Acting on a HRA initiative, the Council for the Civilian Oversight of the Police reviewed the conduct of the police and qualified their publication of the motives of the attack as inappropriate excess of authority.¹³⁶⁶

Conflict of Interest Cases

According to the data published by the Montenegrin Commission for the Prevention of Conflict of Interests, the requirement to submit property statements was fulfilled by a greater number of public officials in 2010.¹³⁶⁷ Out of 1122 state officials, only 6 failed to submit their property statements (one deputy, one judge, three chief inspectors and one Assembly official), i.e. 99.5% abided by the law. In April 2011 the Commission announced that 22 government officials have not provided data on the property in 2010.¹³⁶⁸ As for local officials, 86 (4.9%) failed to submit their property statements in 2010, and 116 in 2011. Most of them were just elected councillors or are members of the management boards at the local level. The Commission filed misdemeanor reports against all these officials.

The Commission in 2010 found Radoman Gogić from Pljevlja in violation of the provisions prohibiting conflict of interests because he simultaneously held the offices of councillor and director and failed to transfer his management rights in the company Studium.¹³⁶⁹

The Commission has still not begun checking the accuracy of the property statements filed by public officials. CEMI created and placed at the Commission’s disposal a database on the property of state officials, which has

¹³⁶⁴ “Assaulted for Mentioning Brano”, *Vijesti*, 21 February 2010.

¹³⁶⁵ “Threats of Liquidation Cost 950 Euros”, *Vijesti*, 21 April 2010.

¹³⁶⁶ “The Court Should Establish the Motive of the Attack”, *Dan*, 4 October 2010.

¹³⁶⁷ Data are available at: <http://www.konfliktinteresa.me/funkcioneri/EvidencijaFun.php>

¹³⁶⁸ *Ibid*, announcement of 15 April 2011.

¹³⁶⁹ Data available at: <http://www.konfliktinteresa.me/funkcioneri/EvidencijaFun.php>

enabled the continuous monitoring of any changes in the property of public officials.¹³⁷⁰

The Right to Equal Access to Public Office (Prohibition of Discrimination)

Article 25(c) ICCPR specifically guarantees the right to have access, on general terms of equality, to public service in one's country. ECHR does not contain this right, but it is now covered by the general prohibition of discrimination on the basis of the Protocol 12.

In Montenegro, discrimination is prohibited on any grounds (Art. 8 of the Constitution). More specifically, on several grounds, including nationality, social or ethnic origin, as well as political or other opinion, direct and indirect discrimination are prohibited by Anti-discrimination Act. In Article 14, this Act specifically prohibits discrimination against "individuals or groups of persons because of political beliefs, belonging or not belonging to a political party or other organization".

The Civil Servants Act (*Sl. list CG*, 50/08), provides that a civil servant, or employee performs work in a politically neutral and impartial manner, in accordance with the public interest (Article 5); that during the hiring of civil servants and employees, the applicants have access to all the posts on equal terms, and that the hiring is based on public advertising (Art. 8). The Act particularly prohibits privileges or denial of rights to civil servants and employees, in particular because of political, ethnic, racial or religious affiliation, gender or other reason contrary to the Constitution and statutory rights and freedoms (Art. 11). Violations of these provisions is not subject to misdemeanor liability provided for by the Act (Art. 124), but it can be sanctioned under the Criminal Code, i.e. by filing a lawsuit for discrimination before the court, so as to determine the violation of rights and redress.

According to a study of the Anti-Corruption Directorate and UN Development Programme (UNDP) published in December 2010¹³⁷¹, a widespread opinion among the population of Montenegro is that the most important elements for employment and advancement in public administration are family and friends ties and party affiliation. Political parties often emphasized this type of discrimination, especially in regard to the Serbs.¹³⁷² The June 2010 coalition agreement between DPS and SPD pre-determined which party will get 17 positions in the city government, including secretaries, assistant

¹³⁷⁰ Data available at: <http://www.konfliktinteresa.me/funkcioneri/EvidencijaFun.php>.

¹³⁷¹ "The level of corruption in public administration lower than three years ago", Radio Free Europe / Program for Montenegro, 21 December 2010; "The easiest way to state offices through 'connections'", *Vijesti*, 21 December 2010.

¹³⁷² E.g. "Serbs denied the right to work", *Dan*, 12 March 2011.

secretaries and directors of the Capital, which is not in accordance with the Civil Servants Act, which provides for a public tender for these posts.¹³⁷³ It is known that such pre-election coalition agreements between the political parties are a rule.

However, the HRA is aware of only one known attempt to prosecute this type of discrimination, not on the basis of political affiliation, but kinship. Admir Šabotić from Bijelo Polje filed a criminal complaint against the Minister of Labour and Social Welfare Suad Numanović and his deputy Snezana Mijušković, who is also acting director of the public institution “Nursing home” in Bijelo Polje, for alleged violation of equality in employment in that home.¹³⁷⁴ By the end of June the fate of the criminal complaint remained unknown.

The results of the questionnaire of the Ministry for Human and Minority Rights showed that out of a total of 13,900 officers in state and local government, 79.03% or 10,985 identify themselves as Montenegrins, and 8.6%, or 1,194 as Serbs.¹³⁷⁵ The relationship is particularly disproportionate between Montenegrins and Serbs as regards employment in government agencies, if one considers that according to the latest census 45% are Montenegrins and 28.7% Serbs, while the census of 2003 showed similar results – 43% Montenegrins and 32% Serbs.

¹³⁷³ This information was confirmed to the media by the chief of the SDP negotiating team Vujica Lazović (“Marić: Agreement between DPS and SDP is illegal”, *Dan*, 25 June 2011).

¹³⁷⁴ “Open competition for the prosecutor”, *Vijesti*, 16 February 2011; “Claiming he was employing relatives and friends”, *Vijesti*, 6 March 2011.

¹³⁷⁵ http://www.slobodnaevropa.org/content/nacionalnost_i_partija_i_dalje_bitni_pri_zaposljavanju/24256351.html

Special Protection of the Family and the Child

Article 23, ICCPR:

1. The family is the natural and fundamental grouping of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognised.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24, ICCPR:

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality

Article 8, ECHR:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12, ECHR:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 5, Protocol No. 7 to the ECHR:

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

Protection of the Family

Article 72 of the Constitution guarantees special protection of the family. Parents are under the obligation to care for, raise and educate their children. Children are under the obligation to take care of their own parents in need of assistance. Children born out of wedlock shall have the same rights and responsibilities as children born in wedlock. The Constitution also guarantees everyone the right to respect of his/her private and family life (Art. 40), which is in accordance with the wording in Article 8(1) of the ECHR. The general protection of the family envisaged by the Constitution is elaborated by the laws.

Under the Family Act (*Sl. list RCG*, 1/2007), a family denotes a cohabiting union of parents, children and other relatives who in terms of this law have mutual rights and obligations, as well other fundamental cohabiting unions in which children are cared for and raised (Art. 2). As opposed to the ECtHR, which broadly interprets the family i.e. “family life” as a cohabiting union of persons between whom real strong emotional ties exist, the definition of the family in the Montenegrin Family Act is narrow, given that it does not provide for the existence of a family unless children are raised in it. Such a definition of family has led to unjustifiably different treatment of childless couples vis-à-vis persons raising children or living in unions in which children are raised, because marital and extramarital partners without children are not considered each other’s “family members”, i.e. do not have the rights and obligations which family members or family households have.¹³⁷⁶ This is why this narrow definition of family needs to be reviewed with respect to its constitutionality and the notion of family life in Article 8 of the ECHR, and amended to allow for a broad interpretation of its meaning. Particularly given that the ECtHR guarantees the right to respect of family life also to partners in same-sex unions,¹³⁷⁷ which is not the case in Montenegro where marital

¹³⁷⁶ All the below listed laws lay down the rights or obligations of “family” or “family household” members without defining whether spouses or extramarital spouses, without children, are members of a family or family household: Mandatory Social Insurance Contributions Act (*Sl. list CG*, 13/2007, 79/2008 and 86/2009), Social Insurance Contributions Act (*Sl. list RCG*, 32/93, 3/94, 17/94, 42/94, 1/95, 13/96 and 45/98), Labour and Employment Records Act (*Sl. list RCG* 69/2003), Energy Act (*Sl. list CG* 28/2010), Consumer Protection Act (*Sl. list RCG* 26/2007), General Administrative Procedure Act (*Sl. list RCG* 60/2003), Weapons Act (*Sl. list RCG* 49/2004 and *Sl. list CG* 49/2008.), Civil Procedure Act (*Sl. list RCG* 22/2004 and 76/2006), Pre-School Education Act (*Sl. list RCG* 64/2002 and 49/2007.), Travel Documents Act (*Sl. list CG* 21/2008), Act on Temporary and Permanent Residence Registers (*Sl. list CG* 13/2008 and 41/2010), Ownership Rights Act (*Sl. list CG*, 19/2009.), Prevention of Conflict of Interest Act (*Sl. list CG*, 19/2009), 2010 Agricultural Census Act (*Sl. list CG*, 54/2009 and 14/2010), Court Taxes Act (*Sl. list RCG*, 76/2005), Act on Administrative Procedure Expenses (*Sl. list SRCG*, 44/81); Expropriation Act (*Sl. list RCG*, 55/2000, 28/2006 and 21/2008).

¹³⁷⁷ See *P.B. and J.S. v Austria*; *Schalk and Kopf v Austria*, 2010.

and extramarital unions are defined as unions of persons of different sexes i.e. a man and a woman.¹³⁷⁸

The Family Act defines numerous institutes regulating family relations, such as parental rights (Arts. 59–60), joint exercise of parental rights, which may also be regulated by agreement (Arts. 76–79), the adoption procedure and adoption-related rights and obligations (Arts. 121–156), foster care (Arts. 157–177), child custody, alimony and child support, mediation in family disputes, et al.

Protection from Domestic Violence

Domestic Violence Act

The long-awaited Domestic Violence Act came into force in August 2010 (*Sl. list CG* 46/2010). The Act lays down who shall enjoy protection under this law, what actions constitute domestic violence, the state authorities' competences in enforcing the protection afforded by this law, penalties for the violations of the Act and, notably, introduces new protection measures which are to ensure immediate protection and preclude the recurrence of domestic violence.

The Act defines domestic violence as conduct jeopardising the physical, psychological, sexual or economic integrity, mental health or tranquillity of a family member regardless of where such conduct occurred (Art. 2). The Act lists actions which constitute domestic violence, but the open definition of domestic violence commendably allows for broader interpretations of such violence, depending on the circumstances of the case (Art. 8). Article 3 of the Act specifies who shall be considered a family member in terms of this law, but fails to include persons who are not extramarital partners and do not live in the same household.¹³⁷⁹ It also does not comprise partners living in same-sex unions, as they cannot be subsumed under members of a “family household” or under extramarital partners given the definition of family and an extra-marital union. (More on discriminatory treatment of homosexuals on p. 114).

¹³⁷⁸ Constitution (Art. 71), Family Act (Arts. 3, 12 and 15). More on discrimination against sexual minorities on page 110.

¹³⁷⁹ The United Nations, too, recommends expanding the list of beneficiaries of protection in the proposed manner. See: United Nations, Good practices in legislation on violence against women, Report of the expert group meeting, Vienna, 26–28 May 2008, p. 27. This and other objections to the Act given in the text below are part of the 24 amendments to the Draft Domestic Violence Act proposed by seven Montenegrin NGOs. Only five of the recommendations were upheld. More in Montenegrin on: http://www.hracion.org/wp-content/uploads/Izvestaj_unaprjedjenje_Nacrta_zakona_o_zastiti_od_nasilja_u_porodici2.pdf.

Apart from the institutions charged with protection from domestic violence, Article 9(2) of the Domestic Violence Act obliges every person to report such violence to the police when s/he becomes aware of it.

Under the Act, the social care centre or another authority, institution or organisation charged with protection shall establish a professional team comprising representatives of the centre, local administration services and authorities, police, non-governmental organisations and experts on family to design a plan of assistance to the victim and coordinate activities in the process of assisting the victim in accordance with the victim's needs and decisions (Art. 11).

Articles 20 and 26 envisage the following protective orders to be applied independently or concurrently with the penalties in order to combat and prevent domestic violence, eliminate the consequences of the violence and take efficient measures for the rehabilitation of the offender: removal of the offender from the home, restraining order, mandatory addiction treatment and mandatory psycho-social treatment. The by-laws for the enforcement of this Act had not been adopted by the time this Report was published, wherefore it remains unclear how these orders, particularly psycho-social treatment, which has not existed in Montenegro to date, will be enforced.

The Act envisages misdemeanour penalties for domestic violence, including child negligence (Arts. 36 and 37). Given that these acts are also incriminated by the Criminal Code (Art. 219, Neglect and Abuse of a Minor; Art. 220, Domestic Violence), there is a risk of violating the principle of *ne bis in idem*, i.e. of a person being prosecuted twice for the same offence, in misdemeanour and criminal proceedings, or of being sentenced to a milder sentence in misdemeanour proceedings than s/he would have been in criminal proceedings.¹³⁸⁰ On the other hand, misdemeanour trials are shorter and faster, given that the misdemeanour authorities are not as burdened as criminal courts and can thus pronounce protection orders within the short deadlines laid down in the Act.

Efficient monitoring and improvement of the enforcement of the Act is still under question, given that the Act does not provide for the establishment of a mixed commission for that purpose, as required by the Montenegrin NGOs and recommended by UN experts.¹³⁸¹ The NGOs expect that the Anti-Domestic Violence Strategy will envisage the establishment of such an authority (see below).¹³⁸²

¹³⁸⁰ See The Right to Fair Trial, *Ne bis in idem*, p. 253..

¹³⁸¹ United Nations, *Good practices in legislation on violence against women, Report of the expert group meeting*, Vienna, 26–28 May 2008, p. 59.

¹³⁸² Seven NGOs, which jointly proposed the 24 amendments to the Draft Domestic Violence Act (Safe Women's House, HRA, Hotline for Women and Children Victims of Violence Nikšić, Hotline for Women and Children Victims of Violence Podgorica, Centre for Civic Education, Anti-Discrimination Centre EKVISTA, Centre for Women and Peace Studies ANIMA), the first of which suggests that the Act envisage the establishment of such a

The Strategy should also envisage the establishment of a Victims of Domestic Violence Support Fund, which would receive funds from the budget, donations and misdemeanour fines.¹³⁸³ The vast majority of victims of domestic violence are women, who are not economically independent, which is the main reason why they feel they have to tolerate the batterer. The Fund would ensure that women victims of violence and their children are not financially destitute when they decide to report or move away from the offender. The Act does not provide the possibility of limiting the batterer's disposal of the joint assets, i.e. of providing the victim with the possibility of temporarily disposing of the joint assets. Article 21, regulating the protective vacation of home order, lays down that the offender may be ordered to vacate the home for a minimum of thirty days and a maximum of six months. The maximum period is too short given the possibility that the household members may include pregnant women and children under one¹³⁸⁴ and that division of property trials take several years to complete in practice.

The Act envisages the adoption of a Anti-Domestic Violence Strategy, which is to assess the situation and identify the key problems in social and other forms of protection, lay down the goals and measures for improving protection from domestic violence, particularly with respect to: raising public awareness of domestic violence, developing programmes for domestic violence prevention and support to families in preventing violence, advancement of the system for collecting data on domestic violence and their analysis and domestic violence reporting. In cooperation with NGOs and with UNICEF's and OSCE's technical support, the Labour and Social Welfare Ministry by thbegan drafting the Strategy and Action Plan for its implementation in June 2011. The initial six-month deadline within which the Strategy, Action Plan and by-laws for the enforcement of the Act were to have been adopted (which expired on 27 January 2011) has been extended.

Montenegro lacks the requisites for the consistent enforcement of the Domestic Violence Act. It lacks advisory services specialised for working with the victims and batterers. The capacities of the social care centres are insufficient and a number of complaints about their work have been filed with the Human Rights and Freedoms Protector.

Montenegro lacks the capacities to evict the offenders from their homes and institutions that would accommodate the victims, apart from the NGO

mixed commission, were reassured by the women parliamentarians, notably the chairwoman of the Montenegrin Assembly Gender Equality Committee, that the Strategy provide for the establishment of such a commission.

¹³⁸³ Ghana established such a fund under its 2007 Domestic Violence Act – United Nations, *Good practices in legislation on violence against women, Report of the expert group meeting*, Vienna, 26–28 May 2008, p. 37; Article 13 (Ensuring the Protection of a Person Exposed to Violence) of the Bosnia-Herzegovina Domestic Violence Act entitles a person exposed to domestic violence to temporary financial support from the alimony fund.

¹³⁸⁴ See: principle of protection of pregnant women and children under one, Article 58, Montenegrin Family Act.

shelters. Children, victims of domestic or other violence, are often placed in the Ljubović Centre for Children and Youths – a correctional centre for children at risk and children in conflict with the law (see p. 444.), or the orphanage in Bijela. Neither institution, however, allows for the accommodation of such children together with their non-violent parents. Foster care (in non-relative families), the most desirable form of protection of children without parental or other adequate care, including victims of violence, is totally undeveloped.

Domestic Violence in Criminal Law

Under Article 220(1), entitled Violence in a Family or Family Union of the Criminal Code (CC) of Montenegro (*Sl. list RCG*, 70/2003, 13/2004, 47/2006 and *Sl. list CG*, 40/2008 and 25/2010), whoever “jeopardises the tranquillity, physical integrity or mental state of a member of his/her family or family union by resorting to violence or arrogant or ruthless conduct” shall be punished by a fine or up to one year imprisonment. The qualified forms of this crime warrant imprisonment ranging from three months to five years, while the offender shall be sentenced to between three and twelve years’ imprisonment in the event the crime resulted in the death of the victim (Art. 220, paras. 2–4).

Article 9 of the Family Act envisages the obligation of support within a family, while Article 221 of the Criminal Code punishes the failure to provide such support. The CC incriminates violations of family obligations: Neglect and abuse of a minor (Art. 219), Desertion of or leaving in dire circumstances a family member who is unable to look after himself or herself (Art. 222). The amendments to the CC unfortunately did not rectify the provisions in Article 212 under which criminal prosecution for rape and sexual intercourse with an incapacitated person is initiated by a private report against the offending spouse, while rape or intercourse with an incapacitated person perpetrated by other persons is prosecuted *ex officio*.¹³⁸⁵

According to the 2009 Report of the Supreme State Prosecution Office, only half of the reported domestic violence offenders were indicted for the crime. Most of them were sentenced to conditional jail sentences, while one-third were sentenced to imprisonment.¹³⁸⁶ The number of domestic violence offenders fell by 19% in 2010 over 2009 (when the percentage was 9% lower than in 2008). According to the 2010 Report by the State Prosecution Office, domestic violence reports were submitted against a total of 444 persons

¹³⁸⁵ The UN OHCHR in Podgorica made a series of comments about the quality of the Criminal Code back in 2005. The Office was of the view that protection from sexual harassment was unjustifiably left out of the CC, that domestic violence targeting women should be distinguished from other forms of domestic violence, and in particular, that these crimes should have been incriminated under the chapter on crimes against life and body, which would have emphasised the danger they pose to society (HRA archives).

¹³⁸⁶ Supreme State Prosecutor’s 2009 Report on the work of the State Prosecution Office

in 2010. Nearly one-third of the reports (196) were dismissed, while slightly over one-third (212) led to indictments.

It is sometimes difficult to distinguish between domestic violence and abuse and neglect, because both crimes often entail the same acts and incur the same consequences. The available statistics (annual reports on the work of the State Prosecution Office) do not disaggregate between reports of simple and aggravated forms of the crimes. Nor do they give a breakdown of the victims by age or sex, how many are children, whether they are boys or girls. Lack of such data precludes a more effective prevention and protection of children from domestic violence.

In addition, the Domestic Violence Act provides for misdemeanors and protection in the misdemeanour proceedings. It does not clearly define the difference between the actions of the misdemeanor and crime, which can lead to the violation of the principle *ne bis in idem* (two trials for the same offense), or further mitigation of the already mild penal policy. As the Act provides that the protective measures are imposed in the misdemeanour, not in the criminal proceedings, the victims are therefore increasingly opting for misdemeanor proceedings which, in this regard, provide more effective protection than a criminal one.

Amendments to the Criminal Procedure Code should introduce safeguards in the criminal procedure too, which are provided by the Domestic Violence Act only for misdemeanor procedure.

Protection from Domestic Violence in Practice

The state has not organised support services for victims of domestic violence. Such support is still provided exclusively by NGOs but the two existing shelters for women and children are insufficient and, furthermore, inaccessible to women in rural areas and remote towns. Montenegro also lacks psychiatrists specializing in work with abused children, and proper counseling.

According to Police Directorate data, Podgorica police officers received 99 reports of domestic violence in 2010, compared to 156 reports in 2009. The police representatives qualified this decrease as proof that domestic violence is effectively combated.¹³⁸⁷

NGO data, however, paint a different picture. The Podgorica Hotline for Women and Children Victims of Violence received calls for help from 137 people in the first four months of 2010 alone, much more than in the same months in the previous years. Furthermore, the victims reported a greater variety of crimes than in the past. The Podgorica Hotline Director says that, as opposed to the previous years, when 90% of the reported violence had been perpetrated against women, 35% of the cases the Hotline was alerted of in 2010 regarded abuse of children. Victims are increasingly exposed to various

¹³⁸⁷ Dan, 6 January 2011.

forms of institutional violence, which additionally traumatises them, particularly when it comes precisely from the institutions that should be providing them with adequate protection. Civil servants as a rule treat verbal violence as ordinary marital squabbles.¹³⁸⁸

The Safe Women's House (SŽK) was visited by 289 people in 2010; 77 of them were sheltered in this NGO. It received nearly 400 telephone calls and its psychologist talked to 60 persons in distress during the year. Thanks to SŽK's counselling and support, 92 domestic crime reports were filed with the police in that period. The number of people who have turned to SŽK for help is on the rise: 40 did so in November 2010 and a record high 73 turned to it for help in March 2011 (25 people on average seek assistance from SŽK every month). Many of the women just call to ask for information about institutional procedures. Only one-third of the callers, however, muster the courage to report violence. Most of the women's requests regard free legal aid, which includes legal counselling and assistance in writing the complaints for divorce, division of property, child support, alimony, etc. Given that the institutions still do not provide victims of domestic violence with free legal aid,¹³⁸⁹ the support provided by the few NGOs is insufficient to meet the real needs.

The NGO Nikšić Hotline for Women and Children Victims of Violence was approached by 109 women in 2010, i.e. 17% more than in 2009, when 91 persons sought its assistance.¹³⁹⁰

Two-thirds of the women who asked the Nikšić Hotline for help were married or living in extra-marital unions, while the rest were single, divorcees or widows. Around 80% had children. Over two thirds of the clients asked for confidential counselling with the volunteers and one-third asked the Hotline staff to accompany them when they visited the institutions. The Nikšić Hotline reacted in urgent domestic violence incidents involving 28% of their clients. It provided legal counselling to 71 clients and the Hotline lawyer represented 42 of them (59.2%) in court. Psychological counseling services were provided for 7 women and 13 children. The Nikšić Shelter for Women and Children accommodated 93 people (41 women and 52 children) in 2010, a 9.5% increase over 2009. Most (77.3%) of the women and children who had stayed in the shelter were Montenegrin nationals; the rest came from Serbia, Albania, Switzerland and Kosovo. One victim was stateless. The women and children spent 11–12 days in the shelter on average.

SŽK's expert team notes that reporting of domestic violence and cooperation with the competent institutions is on average much better in communities, which have domestic violence teams and in which women NGO are more active (Podgorica and Nikšić). However, in smaller communities,

¹³⁸⁸ Source: Podgorica Hotline for Women and Children Victims of Violence, December 2010.

¹³⁸⁹ The Legal Aid Act was adopted on 22 March 2010, but will not come into force until 1 January 2012.

¹³⁹⁰ Data of the Nikšić Hotline for Women and Children Victims of Violence, 1 June 2011.

particularly in the north of the country, the police and the social care centres' response to domestic violence leaves a lot to be desired and even results in grave violations of the victims' human rights on occasion.¹³⁹¹

What is encouraging is the rise in the number family members, friends and neighbours, who call up the hotlines and report domestic violence against women and children. The number of calls in which family members reported such cases rose by 40% in 2010. All this clearly indicates that more and more citizens do not perceive domestic violence as commonplace and acceptable conduct.¹³⁹² The responsible staff in schools and health institutions are, however, still insufficiently aware of the obligation to report domestic violence.

The most drastic violations of family rights involve domestic violence against women and children. According to the data in the Human Rights and Freedoms Protector's 2010 Annual Report, local misdemeanour authorities in Montenegro received 184 motions to initiate misdemeanour proceedings since the Domestic Violence Act came into force and completed the review of 105 cases. The cases involved 188 perpetrators, 162 of whom were men and 26 of whom were women. All were adults of different ages, mostly with primary or secondary schooling and most of them were jobless. In 121 cases, the offenders were the members of the immediate family (husband, father, brother or son), most of them were husbands. The 184 motions to initiate misdemeanour proceedings regarded allegations of violence against 196 victims, 49 of whom were women (wives, mothers, sisters, daughters) and 47 were men (fathers, and in a few instances other male family members).¹³⁹³ The proceedings were completed by the imposition of 13 sentences of imprisonment, 52 fines, 13 warnings, 7 protective alcoholism treatment orders, three protective orders of mandatory psychiatric treatment in a day clinic, one protective order of mandatory institutionalised psychiatric treatment (plus a fine), one protective order of eviction from the family home and restraining order, one protective order of mandatory drug addiction treatment, 2 restraining orders. The proceedings were discontinued in 15 cases.¹³⁹⁴

The following problems inhibit the suppression of domestic violence in practice: the victims' claims can rarely be corroborated by material evidence and the witnesses are reluctant to appear in court or the police lest they antagonise the batterers. The police and judicial authorities still tend to base their judgments on the existence or non-existence of physical violence and have difficulty recognising other forms of violence.¹³⁹⁵ This particularly applies to economic and psychological violence, as well as child neglect and depriving the victims of the bare necessities, although Article 8 of the Domestic Violence

¹³⁹¹ Interview with Maja Raičević, Safe Women's House, February 2011.

¹³⁹² "137 People Sought Assistance in 120 Days", *Dan*, 25 May 2010. "I'll Break Your Bones if You Even Bat an Eyelid", *Pobjeda*, 19 September 2010.

¹³⁹³ The Report is available at: <http://www.ombudsman.co.me/izvjestaji.php>.

¹³⁹⁴ *Ibid.*

¹³⁹⁵ SZK's cases

Act explicitly prohibits these forms of violence as well. Most victims of domestic violence are dissatisfied with the response of the state institutions, primarily the police, social care centres and the judiciary. They complain of lack of understanding of the staff and their poor coordination. Most of the victims have failed to receive the adequate information from the institutions on their competences and procedures that ensue after they receive reports of domestic violence. Some of the victims are thus left with the impression that they had reported domestic violence in vain and that the institutions are doing nothing to protect them, which, in turn, results in dwindling trust in these institutions. The overly long court proceedings (coupled with the courts' tendency not to issue protective orders wherefore the victims are forced to continue living with the batterers) and the mild penal policy give rise to the greatest concern. Furthermore, the police and judicial authorities have not been trained in enforcing the Domestic Violence Act at all. The SŽK has registered several cases in which the police staff had not even been aware that such a law had been passed. In result, the police have continued taking the batterer in and keeping him in custody, usually only after incidents that can be qualified as disruption of public peace and order. In such cases, they are primarily guided by the Police Act and the Criminal Procedure Code, which limit custody to 12 and 48 hours respectively. It has been noted that the police do not invoke Article 28 of the Domestic Violence Act, under which a police officer may order the batterer to vacate the home or prohibit him from returning home for up to three days.¹³⁹⁶ Moreover, the Montenegrin MIA has not adopted a by-law on the form of the order and the procedure for issuing it, although it should have done so by 14 February 2011.

Lack of oversight of the enforcement of the protective measures under the Domestic Violence Act, which lays down misdemeanour or criminal sanctions against those violating them, poses a significant problem. Although batterers have been known to violate the protective orders on a number of occasions in practice, it remains unknown whether any courts have ever punished them. Furthermore, the misdemeanour judges are unaware of the victims' right to seek the imposition of protective orders themselves.¹³⁹⁷ Batterers are mostly sentenced to conditional sentences and, to a lesser extent, to fines.

The ECtHR has extensive case law in which it found the states in violation of the right to life under Article 2 of the ECHR because they failed to take measures to protect the victims from domestic violence (*Kontrovà v. Slovakia*; *Branko Tomašić et al v. Croatia*). Cases of domestic violence with a fatal outcome have been reported in Montenegro as well. The Criminal Code provides for a crime of Grave Murder (Article 144), which is a murder of a family member or family unit who has previously been abused. The murder

¹³⁹⁶ SŽK representatives' conversation with domestic violence inspectors, Podgorica Police Department, Police Directorate, February 2011.

¹³⁹⁷ Interview with the President of the Misdemeanours Court, May 2011.

of Danica Bošković (81) in 2010 could have maybe been prevented had the state authorities adequately reacted to the prior domestic violence reports against her son. More on this case and other cases under the chapter Right to Life, p. 142.

Marriage

The Constitution emphasises that marriage may be entered into “only on the basis of the free consent of a woman and a man” (Art. 71). As opposed to the former Charter on Human and Minority Rights and Civil Liberties of Serbia and Montenegro, which in Article 25(1) guaranteed the freedom of marriage of the intending “spouses” without defining their sexes, the valid Montenegrin regulations neither allow marriage between same sex couples nor recognise extra-marital same sex unions. More on the rights of homosexual, bisexual and transgender persons on p. 110.

Under Montenegrin law, a man and woman shall be spouses and shall be equal in marriage. The Family Act lists grounds precluding entry into marriage. Some of them ensure that the intending spouses are entering into marriage of their own free will (a marriage shall be invalid in case of coercion, deceit, lack of capacity to work), others prohibit marriage between blood and in-law relatives. As a rule, a person may enter into marriage after s/he turns eighteen and, exceptionally at the age of sixteen, subject to the consent of the court.

The law permits annulment of a marriage and divorce, which may be consensual (Art. 57, FA) or upon the request of one of the spouses (after a divorce trial) in the event the relations between the spouses are seriously and permanently impaired or if the spouses can no longer live together for objective reasons (disappearance, mental illness, et al) (Art. 52, FA).

The assets the spouses acquire during marriage constitute their joint assets, which they shall administer and dispose of jointly and by mutual consent (Arts. 288 and 291, FA). The assets of one spouse acquired prior to marriage shall remain that spouse’s property (Art. 286, FA). The Family Act in 2007 introduced pre-nuptial and post-nuptial agreements (Arts. 301–303, FA) by which the spouses regulate their property relationships of their own free will.

Montenegrin NGOs focusing on women’s rights have recorded forced marriages in Montenegro, particularly in the Roma population, which practices arranging marriages among children, but also in other, extremely patriarchal families in the vicinity of Ulcinj, Tuzi and Rožaje.¹³⁹⁸

Trials on the division of property as a rule take very long. Courts rarely uphold motions for protective orders prohibiting a spouse (as a rule, the husband) from disposing of the property in his name until the end of the trial. This has frequently resulted in the husband selling, mortgaging or giving away all the assets or part of them before the completion of the divorce proceedings and additional lawsuits.

¹³⁹⁸ Source: Safe Women’s House data.

Special Protection of the Child

International Obligations

Montenegro is bound by the Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the Optional Protocol on the involvement of children in armed conflicts. When it acceded to the Convention, Montenegro assumed the responsibility to submit periodic reports on its implementation to the Committee for the Rights of the Child (CRC). The Government submitted its Initial Report on the Implementation of the Convention on the Rights of the Child in the 2006–2008 period. In early 2010, the CRC also received reports on the rights of the child in Montenegro from NGOs, the Human and Minority Rights Protector, the UNICEF Office in Montenegro and other international organisations. Based on this material and its talks with Government and NGO representatives, the CRC adopted its Concluding Observations on 1 October 2010.¹³⁹⁹

The CRC was pleased by the headway in reforming some of the legislation, the design of strategies and coordination mechanisms, but emphasised the problems regarding the realisation of the rights of the child under the Convention. It voiced concern about the inefficiency of the Council for the Rights of the Child, the topmost national coordination body for the protection of the rights of the child and monitoring Montenegro's compliance with the Convention. It criticised the lack of databases (particularly with respect to children with disabilities and unregistered children) and expressed its concern that the mandate of the Deputy Human Rights and Freedoms Protector was not explicitly legally defined and that mechanisms allowing children to themselves seek protection against violations of their rights were inefficient, etc.

The CRC recommended that Montenegro amend all relevant laws and raise public awareness of the negative impact of corporal punishment on children in keeping with the CRC's General Comment No. 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment¹⁴⁰⁰, and take measures to consolidate the social care system with the aim of protecting the right of the child to life in a family environment, the development of alternative forms of child care (foster care)¹⁴⁰¹, prevent the placement of children in institutions, improve the quality of education, take measures to address the high drop out rates of Roma, Ashkali and Egyptian students, etc.

¹³⁹⁹ The CRC Concluding Observations are available at <http://www.ohchr.org/en/countries/enacaregion/pages/meindex.aspx>

¹⁴⁰⁰ CRC/GC/2006/8. See UNICEF 2009 survey, under which 55% of the parents had hit their child at least once the previous week (www.unicef.org/montenegro).

¹⁴⁰¹ Foster care, the most desirable form of protection of children without parental care, is totally undeveloped.

Definition of a Child

Neither the Constitution nor other Montenegrin laws give a general definition of a child. Under the Family Act, a person is an adult when s/he turns 18. Full working capacity is acquired when one comes of age or upon entry into marriage prior to one's 18th birthday with the consent of the court (Art. 11). The Constitution links coming of age to the acquisition of the active and passive voting rights (Art. 45).

Specific laws lay down different and mutually unharmonised working capacity thresholds with respect to the age of the child (Inheritance Act, Family Act, et al).

The CRC regretted the absence of a definition of the child in domestic legislation and the lack of clarity therein in the use of the terms of child, minor and juvenile.¹⁴⁰² The CRC found unacceptable the distinction made between children and minors, who are further classified as younger and older minors, depending on their age.

Name, Birth Registration and Nationality

The Convention on the Rights of the Child guarantees the child's right to from birth to a name, to be registered and the right to acquire a nationality, particularly if s/he would otherwise not have a nationality and be stateless (Arts. 7 and 8). Article 18 of the Act on Registers (*Sl. list CG* 47/08) lays down that a child shall be entered in the birth register of the municipality in which s/he was born, while a child whose parents are unknown shall be entered in the birth register of the municipality in which s/he was found and pursuant to a decision issued by the custody authority.

Under the Act on Personal Names (*Sl. list RCG*, 20/93), a personal name shall comprise a forename and a surname, and constitute a personal right and obligation of the citizens of Montenegro. A personal name is acquired by entry in the birth register. Pursuant to Article 6, the personal name of the child shall be agreed on by both parents, unless one parent is unknown, deceased or cannot exercise his/her parental rights. In the event both parents are unknown, deceased or unable to exercise their personal rights, the child's name shall be chosen by the competent custody authority.

The Montenegrin Citizenship Act (*Sl. list CG*, 13/08 and 40/10) lays down that Montenegrin citizenship shall be acquired by descent, birth, naturalisation or in accordance with international treaties and agreements (Art. 4). More on the acquisition of Montenegrin citizenship in the chapter on the Right to Citizenship p. 449.

¹⁴⁰² The Police Act (*Sl. list RCG* 28/2005 and *Sl. list CG* 88/2009), for instance, distinguishes between a minor and a child, which is inconsistent with the Convention, given that a minor is a person who has not turned 18 yet, i.e. a child. On the other hand, the Road Traffic Safety Act (*Sl. list RCG* 27/2006) commendably uses the word 'child' for all persons under 18 years of age notwithstanding their further breakdown into specific age groups.

There have been problems in the practical enforcement of the Act on Registers because it does not elaborate the procedure for subsequent birth registration clearly and precisely enough. The most glaring problem arises from the discrepant practices of the birth register departments and the regional police units and the complicated procedures prolonging the subsequent birth registration procedures due to.¹⁴⁰³

The CRC voiced its concern that there were still a number of children who lacked registration and identity documentation, many of whom were Roma, Ashkali and Egyptian refugee children and that there was no strategy for identifying children who lacked birth registration and/or identity documentation. It recommended that the state undertake a survey to identify children lacking birth registration and/or identity documentation and take immediate administrative and judicial measures to ensure retroactive birth registration and issuance of documents for these children and that it take immediate measures to ensure that children lacking identity documents are not refused access to education, health, and public services, including child allowance.¹⁴⁰⁴

The obstacles the RAE population has faced in subsequent registration comprise: their inability to obtain the documents from Serbia and Kosovo they need in order to be entered in the registers, the short validity of the documents, lack of information on legal regulations and documentation they need to submit to be entered in the registers.¹⁴⁰⁵

The results of a 2009 survey conducted by the NGO Legal Centre covering 7,166 people, 3,546 of whom are domicile RAE and 3,620 of whom are RAE Kosovo refugees show that 2,767 (38.6%) of them do not have all their identity documents and need to be entered in the registers or need to have their registration renewed. Of the 2,767 persons lacking an identity document, 1,928 were children.¹⁴⁰⁶ The survey results also showed that 318 children born in Montenegro have not been registered when they were born. According to latest data from July 2011, only a small number of these children, who were born in hospitals in Montenegro, were subsequently entered in the

¹⁴⁰³ There have been instances in practice that the authorities would not let a child be entered in the birth register in the event one of the parents (the mother) did not have personal documents, although the child was born in a hospital in the territory of Montenegro (which is under the obligation to notify the birth register department of the birth of every child) and although the father of the child was a national of Montenegro and possessed all the required documents (case of I.S. from Ulcinj, HRA archives).

¹⁴⁰⁴ CRC Recommendations of 1 October 2010, p. 13

¹⁴⁰⁵ More in the chapter Right to Citizenship.

¹⁴⁰⁶ Civic Registration and Prevention of Statelessness: Survey of Roma, Ashkali and Egyptians in Montenegro, NGO Legal Centre, May 2009; State Department 2008 Human Rights Reports: Montenegro; EC Montenegro 2007 Progress Report; 2004–2010 National Action Plan for the Rights of Children in Montenegro; Cases documented by the NGO Legal Centre (legal representation of 15 children in the procedure for their retroactive entry in the birth registers).

register of births, while most others, who were born outside of hospitals, are still not registered. The administrative proceeding on this occasion is currently pending. One should also bear in mind that one of the strategic goals laid down in the 2004–2010 National Action Plan for the Rights of Children in Montenegro was “that all children shall be entered in the birth registers and issued citizenship certificates”.

The parents also have considerable financial outlays when they embark upon obtaining the necessary documents. Thanks to cooperation with similar organisations in the region, the NGO Legal Centre has been helping parents obtain the necessary documents in their countries of origin and covering the administrative tax costs, thus simplifying and facilitating their status of a party to a subsequent registration procedure.¹⁴⁰⁷

According to the authorities, a technical problem was to blame for the initial difficulties in entering the information in the registers in the languages and scripts of the children’s ethnic groups when the Act came into force. This standard has since been applied in accordance with internationally accepted regulations.

The European Commission has called for “guaranteeing the legal status of displaced persons, particularly Roma, Ashkali and Egyptians, and respect for their rights” in November 2010, as one of the seven conditions for starting negotiations with Montenegro on the EU membership. With regard to this, the Government included in the Action Plan for implementation of Recommendations from the Opinion of the European Commission a series of measures aimed at detailed analysis of the status of displaced persons, informing IDPs about their rights and regulating the status of persons with permanent residence, and the communication with neighboring countries to help displaced persons to obtain the documents they need to achieve this status. Present results of these measures are listed in the reports on implementation of the Action Plan, published on the website of the Government of Montenegro.

Special Child Social Protection Measures

Article 24(1) of the ICCPR obliges states to special child protection measures, while the Convention on the Rights of Child lays down that the best interests of the child shall be the primary consideration in all actions concerning children. It also obliges the states to ensure adequate care of the child if the parents/guardians do not provide such care.

The Constitution of Montenegro states that children born in and out of wedlock shall have equal rights and responsibilities (Art. 72(3)). Under the Family Act, relationships between parents and children shall be based on their mutual rights and duties, especially of parents to ensure the protection of their children’s interests and welfare and their responsibility to bring up, educate

¹⁴⁰⁷ Source: NGO Legal Centre.

and enable their children to lead independent lives, and of children to look after their parents and treat them with respect (Art. 4). These rights and duties shall apply equally to children born in and out of wedlock (Art. 6). Mothers and fathers shall exercise their parental rights together. In the event one parent is deceased, unknown or deprived of parental rights, the parental rights shall be vested with the other parent. A parent may not renounce his/her parental rights. Abuse of parental rights shall be prohibited (Art. 60). Section 3 of the Family Act is devoted to the exercise of parental rights and envisages joint, consensual and independent exercise of parental rights (Arts. 76–79).

The Family Act explicitly lays down that parents have the right and duty to care for their child. Parents are entitled to receive all information about their child from the educational and health institutions (Art. 69).

A child custody authority is duty-bound to provide the parents with adequate assistance and support and take appropriate measures to protect the rights and best interests of the child (Arts. 80–84, FA). Specialised professional services or family counselling teams have been established within the social care centres, which are usually the only institutions the parents can turn to help, although Article 81 of the Family Act envisages referral of parents to specific institutions and counselling centres. There are no services providing couple and family therapy, focusing on advancing parenthood or reversing the effects of abuse. There are no specialised services addressing marital and family problems, or for assisting children, youths, addicts or single parents. The social care centres have modest human capacities, who are overburdened by administrative duties, are paid low salaries, all of which impacts on their satisfaction and motivation to assist those in need of their help.

The Social and Child Protection Act (*Sl. list CG*, 78/05) envisages special protection of children without parental care, children with physical, intellectual or sensory difficulties, abused and neglected children and children with behavioural disorders (Art. 4). Apart from material assistance, the Act envisages placement in an institution, placement in another family, assistance in raising and educating children and youths with special needs (Art. 12) and the recreation of children (Art. 43) among the main social protection rights of children.

Apart from state institutions providing social protection services free of charge, the Social and Child Protection Act also allows other legal and natural persons to provide such services (Art. 83). The criteria and requirements for the provision of such services have not, however, been formulated yet. The Act lays down that the professional work of the staff in social and child protection system shall be supervised (Art. 108).

The CRC noted that the Social and Child Protection Act is not consistent with the Convention on the Rights of the Child.¹⁴⁰⁸ The CRC further said it

¹⁴⁰⁸ A debate on the draft of the proposed structure of the new law on social and child protection was held in May 2011 (http://www.unicef.org/montenegro/media_17158.html).

was concerned at the poor implementation of the laws due, *inter alia*, to the scarcity of human, technical and financial resources. The illustrated problem of the complicated procedure for acquiring Montenegrin citizenship has prevented a large number of children from exercising the rights to social and child protection (child allowance, family allowance, personal disability allowance, placement in an institution, etc).

The social and child protection system is still underdeveloped and does not provide some of the main services to children without parental care. Although placement in the child's extended family has traditionally been the most widespread form of protection of children without parental care, foster care by non-relatives is negligible. A large number of children in Montenegro are still the wards of social and child protection institutions.

On the other hand, notwithstanding the recent endeavours by the government to ensure the full inclusion of children with developmental difficulties (see the Right to Education, p. 551), there is still intolerance of persons with disabilities, as evidenced by the reaction of the residents of Ždrebaonik in the Danilovgrad municipality to plans to relocate the children from Komanski most to a new facility that was to have been located in their village.¹⁴⁰⁹

Day care centres for children with developmental difficulties have been established in specific Montenegrin municipalities (Bijelo Polje, Nikšić, Pljevlja). They conduct programmes tailored to children with developmental difficulties and provide them with day care, thus providing both the children and their families with significant support.

Oddly, no such centre exists in the municipality of Podgorica, which has the largest population and thus the greatest needs for such a service, particularly in view of the importance of such support to the children and their families, given the lack of institutional support, weakening social inclusion and the parents' inability to work because they have to look after their children, all of which further exacerbates the financial status of these families, weakens family cohesion and increases risks of them being forced to permanently institutionalise their children.

Child Custody, Visitation Rights and Child Support

Under ECtHR case law, mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life within the meaning of Article 8 of the ECHR (e.g. *Monory v. Romania and Hungary*, 2005.). Article 8 comprises the right of the parents to take measures allowing their reunification with their children and the obligation of state authorities to undertake such actions (see the judgments in the cases of *V.A.M v. Serbia*, *Tomić v. Serbia*).

¹⁴⁰⁹ "Home for Children with Special Needs Not Welcome in Ždrebaonik", Radio Free Europe, 7 June 2010.

Article 217 of the Criminal Code envisages a fine or up to one year imprisonment for anyone who prevents the enforcement of a decision by a competent authority on how a minor will maintain his/her personal relations with his/her parent or another relative. Thirteen reports of violations of this Article were submitted in 2010 and the prosecutors had nine reports pending from the previous period. Two of the reports were dismissed and nine cases were resolved by the end of the year, but the Report does not specify how.¹⁴¹⁰

The data of the Human Rights and Freedoms Protector, social care centres and NGOs show that problems often arise with respect to child custody, exercise of specific custody rights, visitation rights and the exercise of the right to child support.

A number of complaints filed with the Human and Minority Rights Protector in 2010 regarded court decisions on custody, visitation rights and overdue child support. The Protector found most of the complaints justified and that long drawn out divorce trials grossly violate not only the right to a trial within a reasonable time, but the rights of the children under the Convention on the Rights of the Child as well.

The length of the proceedings can frequently be blamed on the parents themselves, particularly if their divorce is antagonistic and they cannot agree on who will have custody of the children. In such cases, the courts rely on the opinions of the social care centres, while the children's views are merely formally registered but not actually taken into account.

The case Mijušković v. Montenegro. – The problem of the ineffective enforcement of child custody orders and drawn-out proceedings in Montenegro made it to Strasbourg. In the case of *Mijušković v. Montenegro*, the ECtHR rendered a judgment in favour of the applicant on 21 September 2010.¹⁴¹¹ The applicant, Svetlana Mijušković, claimed a violation of Article 8 of the ECHR, because the irrevocable custody decision was enforced with a delay and the state failed to enforce a temporary custody order, given that she was unable to regain custody of her two underage children nearly four years and nine months after the Nikšić Social Care Centre rendered its order, i.e. three years and seven months after the court judgment became final. During this period, the competent authorities: tried to enforce the Nikšić Social Care Centre custody order only once; fined the father only once, two years and nine months after the applicant sought the enforcement of the order; tried to enforce the custody order by force only after the Government of Montenegro was notified of the application and then enforced the judgment within less than three months.

¹⁴¹⁰ Supreme State Prosecutor's 2010 Annual Report on the work of the State Prosecution Office.

¹⁴¹¹ The judgment is available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=html&highlight=Montenegro%20|%20Mijuskovic&sessionId=69612166&skin=hudoc-en>.

Given all the facts, including the time that elapsed, and the fact that the children were finally returned to the applicant, the ECtHR concluded that the state authorities failed to invest adequate and effective efforts to enforce the Nikšić Social Care Centre custody order and final court judgment on time and found Montenegro in violation of Article 8 of the ECHR.

Implementation of the Hague Convention on the Civil Aspects of International Child Abduction. – Montenegro is bound by the 1980 Convention on the Civil Aspects of International Child Abduction (hereinafter: The Hague Convention),¹⁴¹² which provides for an expeditious procedure for returning a child to the territory of the state in which the child was habitually resident and was unlawfully removed from, in contravention of regulations or the decision on his/her custody. The Convention aims at protecting the rights of a child to maintain contact with both parents and to combat wrongful removal and retention of a child in another country by another parent, pursuant to Article 11 of the Convention on the Rights of the Child. The enforcement of this Convention gained in significance upon the disintegration of the former Yugoslavia into a number of independent states.

Pursuant to Article 6(1) of The Hague Convention, Montenegro designated the Justice Ministry as the central authority to discharge the duties which are imposed by the Convention. The competent courts, social care centres and police authorities are also charged with enforcing the Convention. The applications of the competent foreign central executive authorities for the return of the children are submitted to the Justice Ministry of Montenegro, which forwards them to the competent authorities for action.

The Montenegrin authorities have not yet adopted specific regulations on the enforcement of The Hague Convention. A law on international legal assistance in civil matters, which is to regulate this issue as well, was being drafted at the time this Report was completed.

Nine applications for the return of children were filed with the Montenegrin Justice Ministry from 2006 to February 2011.¹⁴¹³ The children were returned in only three cases. The reasons why the other children were not returned vary. In two cases, the children were not in Montenegro; in one case, a Montenegrin court rendered a final decision in the divorce case and awarded custody to the parent residing in Montenegro and notified the other party thereof and on legal remedies s/he could pursue; in the remaining two cases, the return of the child was not ordered because the proceedings went on for a long time and it was assessed that the children had settled in their new environment and that their return would not be in their best interests, in terms of Art. 12(3) of the Hague Convention.¹⁴¹⁴ These procedures, in which the pro-

¹⁴¹² Act Ratifying the Convention on the Civil Aspects of International Child Abduction (*Sl. list SFRJ – Međunarodni ugovori*, 7/91).

¹⁴¹³ Based on information obtained from the Montenegrin Justice Ministry on 28 February 2011.

¹⁴¹⁴ *Ibid.*

ceedings took a long time, are disputable given that the very goal of the Convention is to ensure expeditious action, to prevent the children from settling in the new environment by force of circumstance. Furthermore, the question arises as to how come the authorities abided by the expediency requirement in some cases and did not abide by it in others.

Parents often fail to pay the child support set in enforceable court judgments, although failure to pay child support is punishable under Article 221 of the Criminal Code. According to the 2010 Annual Report on the work of the State Prosecution Office, 119 and 108 criminal reports alleging a violation of this Article were filed in 2010 and 2009 respectively.¹⁴¹⁵

According to the information at the disposal of the NGO Safe Women's House, child support set by the national courts verges on the minimum rather than the maximum amount set by the law.

Right to Life, Survival and Development of the Child and Protection of Children from Abuse and Neglect

In order to afford special protection to children, the Criminal Code defines the murder of a child as aggravated murder (Art. 144) and incriminates infanticide (Art. 146). Incitement to suicide and aid in the commission of suicide are qualified as aggravated forms of the crime if they are perpetrated against a child under 14 or between 14 and 18 years of age.

The CC also provides for a criminal act of Neglecting and Abusing a Minor (Art. 219), sanctioning the parent, adoptive parent, guardian or other person who by gross dereliction of their duty of care and upbringing neglects a minor s/he was obliged to take care of. The abuse of minors, forcing to excessive work or work which does not correspond to his/her age, or persuading, for gain, to perform other actions harmful to their development is particularly punishable.

As far as the survival and development of a child is concerned, the Family Act imposes on the state the obligation to ensure conditions for free and responsible parenthood through social, health and legal protection measures, the education and information systems, employment, housing and tax policies and by the development of all other activities to the benefit of the family and its members. As per family planning, the Act entitles every person to freely decide whether to have children and the parents to create the possibilities and ensure conditions for their healthy mental and physical development in the family and in the society.

Under the Family Act, judicial authorities, other bodies, medical, educational and other institutions, NGOs and citizens shall notify child custody authorities as soon as they become aware that a parent is unable to exercise

¹⁴¹⁵ *Ibid.*

his/her parental rights. The authority shall promptly review such reports and take measures to protect the rights of the children (Art. 80 (2 and 3)). The court may restrict the parental rights of a negligent parent (Art. 85). Furthermore, the court may strip a parent abusing or grossly neglecting his/her parental rights of his/her parental rights (Art. 87–91).

Social Care Centres and MOT

Social care centres are primarily entrusted with protecting children from abuse or neglect. Multi-disciplinary operational teams (MOTs) had been established in seven of Montenegro's ten social care centres in cooperation with UNICEF and UNHCR. The teams that operated in all seven municipalities processed 908 cases of children who had been subjected to violence, abuse or neglect by end 2008.¹⁴¹⁶ The MOTs comprise social protection, health, judicial, prosecutorial, police and education professionals and representatives of the NGO sector. The Government has failed to take the requisite actions and measures to integrate them in the regular social and child protection system and other relevant sectors. Such teams have stopped meeting altogether or meet irregularly. The Human and Minority Rights Protector has found that the social care centres had failed to organise child protection in a planned manner in a number of instances. There is no continuous monitoring of families, even in events a centre has assessed that the child may be at risk from his/her family. Centres, which are charged with exercising child custody duties, have failed to take all the necessary measures within their remit or have taken such measures with great delays.¹⁴¹⁷ Social and child protection measures usually boil down to the payment of allowances; they do not comprise provision of other social services or the engagement of professionals to work with and assist the children and their families.¹⁴¹⁸

„Mario“ Case

Researcher of human rights violations Aleksandar Zeković in November 2008 reported a case of gross negligence of four siblings to the Podgorica Social Care Centre and the police department. Six-year-old Mario Kozica was visibly neglected (sparsely dressed although it was extremely cold, with visible face skin changes), did not go to school and spent his days begging and collecting garbage in the streets. The Podgorica Social Care Centre registered that all four underage children of Sead Kozica from Prijepolje were wandering the streets of Podgorica alone and begging. The Centre did not pursue

¹⁴¹⁶ Source: UNICEF.

¹⁴¹⁷ One illustrative case is that of the children in the Kozica family, Mario and his siblings, which prompted researcher of human rights violations Aleksandar Zeković to file a criminal report against the Podgorica Social Care Centre staff accusing them of negligence. The case archives are available at HRA.

¹⁴¹⁸ Experience of the NGOs Safe Women's House, Nikšić Hotline, HRA.

any other measures after the father convinced the Centre staff that he had a house, was earning a living and was capable of providing normal living conditions for his children. Zeković also addressed the Labour and Social Welfare Ministry and other competent bodies, asking them which measures had been undertaken and the outcome of the launched proceedings. He received the required information after three months and repeated inquiries. It was subsequently concluded that the children were at risk, that their living conditions were inadequate and that they were neglected. The Centre's professional team in March 2009 took the view that the children had to be removed from their home as soon as possible. However, it did not take any action with respect to the neglected children until December that year. The persistent pressures by Zeković and HRA activists on the Centre resulted in their relocation to the Ljubović Centre for Children and Youths on 22 January 2010. In February 2010, the children and their father, who had been unlawfully residing in Montenegro the whole time, were sent to live with the children's grandparents in Prijepolje, Serbia. The Social Care Centre in Prijepolje assumed the responsibility to monitor the Kozica family, with the mediation of the Serbian child rights ombudsman.

Deaths of Two Children in Nikšić

Another child neglect case ended in the deaths of two boys in Nikšić.

Researcher of human rights violations Aleksandar Zeković maintains that the state authorities failed to prevent the death of a nine-month baby boy in July 2009 because they failed to investigate the cause of death of one-year boy B.A. in the same Nikšić family in October 2008. The Council for the Civilian Oversight of the Police concluded that the Nikšić police had failed to take appropriate and timely action after B.A.'s death was reported to them. In 2010, Zeković asked Supreme State Prosecutor Ranka Čarapić which steps the state prosecutor had undertaken to investigate the deaths of both children, but received no reply until end May 2011. According to a document of the Nikšić, Plužine and Šavnik Social Care Centre, the two boys had been entrusted to their aunt and uncle according to Roma common law, who were at that moment caring for their own nine children. The Centre stated that the children had been neglected, starved and abused, but no information on what the Centre did to protect their interests has been released. Nor does the Centre document specify the probable cause of death.¹⁴¹⁹

These cases illustrate that the competent institutions' reactions to cases of violence, abuse and neglect of children in Montenegro fall far below the standards of expediency and efficiency required of social protection services. Procedures in which parental rights are revoked or limited are rare, even when all the legal conditions have been met. Counselling and psychosocial support to the child victims, urgent temporary accommodation of such

¹⁴¹⁹ Archives of Aleksandar Zeković, researcher of human rights violations

children, foster services (above all urgent placement in foster care, not only with relations) and specialisation of professionals are merely some of the elements that have to be strengthened and developed to ensure the adequate protection of children.

School without Violence

According to UNICEF's 2009 data, nearly half of Montenegrin children have been exposed to some form of peer violence in school. Research in eight Montenegrin primary schools, comprising 7000 pupils, found that 48% of children had experienced some form of verbal or physical violence such as bullying by their peers in the last couple of months. On the other hand, around 80% of the surveyed children had not talked about violence to any adults at home or in school during this period.¹⁴²⁰ The research showed that urgent measures needed to be taken to change attitudes and combat tolerance of violence in order to prevent further violence against children. UNICEF and the Education Ministry have been supporting schools in creating a safe school environment for all children within the School without Violence – Creating a Safe and Protective Environment in Schools project, designed as a multi-year effort to create a safety net in schools and prevent violent behaviour and provide assistance to all children, victims of violence and the witnesses and perpetrators of violence.

The Human and Minority Rights Protector in 2009 conducted a survey entitled Violence against Children. The survey covered 1200 respondents, students of 6th–9th grades. Most of the children (823) identified violence with the use of force, i.e. physical abuse, while 699 recognised emotional violence as a form of violence as well. A relatively small albeit not negligible number of children (4.58%) had been exposed to grave physical abuse, having sustained injuries, been locked up or tied down.¹⁴²¹

The Education Ministry has not been keeping records of violence in schools or the motives of such violence because the law does not lay down such an obligation¹⁴²². Lack of such records precludes the monitoring of peer violence and its adequate suppression.

Juvenile Justice and Treatment of Children in Conflict with the Law

Under Article 37 of the Convention on the Rights of the Child, no child shall be deprived of his or her liberty unlawfully or arbitrarily or subjected to torture or other cruel, inhuman or degrading treatment or punishment.

¹⁴²⁰ UNICEF site: http://www.unicef.org/montenegro/reallives_14981.html, "Half of the Pupils Victimised by their Peers", *Dan*, 20 October 2010.

¹⁴²¹ Available in Montenegrin at: <http://www.ombudsman.co.me/djeca/page.php?id=256>

¹⁴²² Education Ministry's reply to an HRA request for access to information, 22 January 2010.

Every child deprived of liberty shall be separated from adults and shall have the right to prompt access to legal and other appropriate assistance. A child in conflict with the law is entitled to a procedure promoting his or her sense of dignity, and shall be treated in a manner which takes into account his or her age and his or her reintegration in society. Court proceedings and placement in correctional institutions should be avoided whenever possible. The state seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law (Art. 40). These main provisions of the CRC have been elaborated in other international instruments and recommendations.¹⁴²³

With UNICEF's technical and EU's financial support, the Government of Montenegro implemented the Juvenile Justice Reform (2008–2010) project, which involved the multidisciplinary reform of juvenile justice to facilitate the full enforcement of all international standards in this field.

The adoption of a juvenile justice law and creation of conditions for its consistent implementation was the main goal of the reform. This Draft had not been adopted in the form of Bill by end of June 2011 although the Government endorsed the draft, which has been publicly debated, back in December 2009.

The CRC welcomed the decision to design a juvenile justice law but regretted that it had not been submitted to parliament for adoption by October 2010. Although it noted that the percentage of children in conflict with the law was small, it expressed concern over the fact that such children were being subjected to the same laws and procedures as adults.

The CRC recommended that Montenegro speedily adopt the Draft Law on Juvenile Justice and take the necessary measures in order to implement it; urgently set up a separate, adequate system of juvenile justice, including juvenile courts with specialized judges for children; ensure the separation of children and adult offenders; use deprivation of liberty, including placement in correctional-educational institutions, as a means of last resort and, when used, regularly monitor and review it taking into account the best interests of the child; continue to ensure training for all judges and all law enforcement personnel who come into contact with children from the moment of arrest to the implementation of administrative or judicial decisions taken against them; ensure independent monitoring of detention conditions, etc.

The Committee also recommended that Montenegro ensure that all children victims and or witnesses of crimes are provided with the protection required by the Convention through adequate legal provisions and regulations,

¹⁴²³ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), UN Rules for the Protection of Juveniles Deprived of Their Liberty (Havana Rules) Vienna Guidelines for Action on Children in the Criminal Justice System, CRC General Comment No. 10 (CRC/C/GC/10) on children's rights in juvenile justice.*

and to take fully into account the United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime¹⁴²⁴.

The Montenegrin courts lack the technology to treat minors in accordance with the recommended standards. There is a possibility to question minors via a video link in Podgorica, or behind a one-way mirror screen in the Bijelo Polje Child and Family Protection Centre. This means that residents of other towns have to travel to Podgorica or Bijelo Polje to exercise their guaranteed rights, which is consuming both in terms of time and money and inevitably leads to the prolongation of the proceedings. This is why the judges usually hear minors in inappropriate conditions. A case corroborating such practices is that of a girl – victim of sexual abuse – who had been questioned in front of the perpetrator and her classmates (attending the hearing in the capacity of witnesses). The judge did not notify the underage girl of her right to be heard in a separate room and via a video link (Art, 101(5), CPC). By the time her parents heard which rights she had, the traumatised girl had already been questioned on a number of occasions while the trip to Podgorica, for further questioning, posed a major financial burden on them. The Human Rights and Minorities Protector forwarded his final opinion and recommendation to the Pljevlja Basic Court.¹⁴²⁵ The deadline within which the court was to have acted on the recommendation had not expired by the time this Report was published.

Another open issue with regards to the judiciary is how it enforces the Convention on the Rights of the Child in court decisions regarding the protection of the best interests of the child and other child rights during proceedings. One-off training of judges and prosecutors had been organised within the juvenile justice project and the authorities are yet to provide continuous specialisation and advanced training of both the judges and prosecutors and all other civil servants whose remit involves rendering decisions on children.

The Ljubović Centre for Children and Youths is the only social and child protection institution in Montenegro providing institutional protection to children in conflict with the law. It is the only one competent for enforcing juvenile correctional measures prescribed by Article 83 of the Criminal Code: a) referral to a correctional institution for a period ranging from six months to two years, b) enhanced supervision and mandatory attendance of day programmes in the correctional institution, and c) mandatory attendance of programmes several hours a week at the correctional centre.¹⁴²⁶ Although the Criminal Code also envisages referral to a juvenile home, the Ljubović Centre does not have the capacity to enable the enforcement of this measure,¹⁴²⁷

¹⁴²⁴ Annexed to Economic and Social Council Resolution 2005/20 of 22 July 2005.

¹⁴²⁵ <http://www.ombudsman.co.me/djeca/page.php?id=258>

¹⁴²⁶ The Criminal Code lays down criminal sanctions against juveniles, which comprise various correctional measures and juvenile imprisonment (Art. 81).

¹⁴²⁷ Ljubović Centre for Children and Youths Transformation Programme, 2010 Annual Report, available at the Centre's website www.centarljubovic.me.

wherefore the courts do not pronounce it and the existence of this measure is rendered meaningless. A special unit within the ZIKS operates as a juvenile prison, but it is mostly empty because this penalty is rarely pronounced.¹⁴²⁸ In 2010, the Ljubović Centre had twenty wards referred for specific periods of time and two children under enhanced supervision and attending the Centre's day programmes.¹⁴²⁹ The measure comprising the referral of a juvenile to attend several hours of programme a week is limited only to juveniles living in Podgorica and maybe Danilovgrad. This measure was pronounced only twice since the adoption of the Criminal Code, once in 2009 and once in 2010, but was not implemented because the juveniles were not brought to the Centre.¹⁴³⁰

Pursuant to the Social and Child Protection Act (*Sl. list RCG*, 78/05) and the Family Act (Art. 83), the court may render a decision in non-contentious proceedings referring a child to the Ljubović Centre for Children and Youths in the event the child is suffering from a behavioural disorder, needs to attend organised correctional programmes or be removed from his/her setting. In its report on Montenegro, the CPT noted that its delegation found 11 children staying in the Centre at the time of its visit, some for more than three years, voiced its concern about the current mixing of different categories of juveniles, with different profiles and needs, and asked to receive detailed explanations about their treatment.¹⁴³¹ The Centre's 2010 Report does not elaborate whether any children had been placed in this establishment under these grounds, but the Social Care Centre says that on this basis several children have been placed at the Ljubović Centre.¹⁴³²

The Centre has a so-called reception centre-station, established to provide urgent social assistance in the form of provisional accommodation to children and youths who were found wandering the streets, begging or during the commission of a crime or in need of other social assistance and lacking parental or other adult supervision, until a lasting solution is found. The Centre temporarily accommodated 182 children in the reception station in 2010.¹⁴³³

The construction of a new building for the wards of the Ljubović Centre was completed in early June 2011. The building comprises five small apartments, which were designed to simulate life in a family and thus facilitate the wards' reintegration into society once they leave the Centre.

¹⁴²⁸ Report of the European Committee for the Prevention of Torture (CPT) on a visit to Montenegro in September 2008, published in March 2010.

¹⁴²⁹ Ljubović Centre for Children and Youths 2010 Annual Report, www.centarljubovic.me.

¹⁴³⁰ Source: Office of the Human and Minority Rights Protector.

¹⁴³¹ *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 22 September 2008*, published on 9 March 2010, p. 65.

¹⁴³² Conversation between researcher L.S. and the employee of the Social Care Centre on 6 June 2011.

¹⁴³³ *Ibid.*

Right to a Nationality

Article 15, Universal Declaration of Human Rights:

Everyone has the right to a nationality.

No one shall be arbitrarily deprived of his nor denied the right to change his nationality.

Article 24 (3), ICCPR:

Every child has the right to acquire a nationality.

International Standards

The right to a nationality is regulated by international agreements binding on Montenegro, the International Covenant on Civil and Political Rights (Art. 24(3)), the UN Convention on the Status of Stateless Persons (*Sl. glasnik FNRJ*, 7/60), the Convention on the Rights of the Child (*Sl. list SFRJ – Međunarodni ugovori*, 15/90) and two European conventions ratified by Montenegro in 2010 – European Convention on Nationality and the Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession (*Sl. list CG – Međunarodni ugovori*, 2/2010). Montenegro has not ratified the 1961 UN Convention on the Reduction of Statelessness.

Under Article 15 of the Universal Declaration of Human Rights, the first comprehensive document on human rights,¹⁴³⁴ everyone shall have the right a nationality. This Article prohibits the arbitrary deprivation of nationality and denial of the right to change nationality. The ICCPR and the Convention on the Rights of the Child (Articles 7 and 8) lay down that every child has a right to acquire a nationality. These provisions oblige states to enable new-born children to acquire a nationality, but not necessarily to grant citizenship to every child. Convention on the Status of Stateless Persons obliges the state to enable stateless persons, who are not refugees and do not enjoy protection under the Convention on the Status of Refugees, the enjoyment of rights enjoyed by other aliens on the basis of reciprocity, as well as the right to travel documents, prohibition discrimination, access to court, acquisition of property, etc. The Convention specifically encourages states to allow the naturalization of stateless persons and minimize the cost of that process.

¹⁴³⁴ Adopted by the UN General Assembly on 10 December 1948.

The European Convention on Nationality, which Montenegro ratified in 2010,¹⁴³⁵ lays down that each State shall determine under its own law who its nationals are and that this law shall be accepted by other states in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality (Art. 3) Under Article 4 of the Convention, everyone shall have the right to a nationality, statelessness shall be avoided, no one may be arbitrarily deprived of his or her nationality, and neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse. Rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin and discriminatory conduct by a state between its nationals, whether they are nationals by birth or have acquired its nationality subsequently, shall be prohibited (Art. 5)

The CoE Convention on the Avoidance of Statelessness in Relation to State Succession lays down that the state shall take all appropriate measures to prevent persons who, at the time of the State succession, had the nationality of the predecessor State, from becoming stateless as a result of the succession. Furthermore, the predecessor state shall not withdraw its nationality from its nationals who have not acquired the nationality of a successor State and who would otherwise become stateless as a result of the State succession. The State shall facilitate the acquisition of its nationality by persons lawfully and habitually residing on its territory and who would become stateless as a result of the State succession.

Acquisition of Montenegrin Citizenship

General

Montenegrin nationality is regulated by the Constitution of Montenegro, the above mentioned international agreements, the Montenegrin Citizenship Act (*Sl. list CG*, 13/08 and 40/2010), the Asylum Act (*Sl. list CG*, 45/06), the Naturalisation Criteria Decision (*Sl. list CG*, 47/2008, 80/2008 and 30/2010) and the Decision on Criteria for Establishing Montenegro's Scientific, Economic, Cultural and Sport Interests for Acquisition of Montenegrin Citizenship by Naturalisation (*Sl. list CG*, 34/2010).

The Constitution lays down that there shall be Montenegrin citizenship in Montenegro, that Montenegro shall protect the rights and interests of the Montenegrin citizens and that a Montenegrin citizen shall not be expelled or extradited to another state, except in accordance with the international obligations of Montenegro, i.e. in accordance with international treaties (Art. 12).

¹⁴³⁵ European Convention on Nationality, Strasbourg, 6 November 1997; Act Ratifying the European Convention on Nationality, *Sl. list CG* 2/2010.

The provisions of the Yugoslav Citizenship Act (*Sl. list SRJ*, 33/96 and 9/01) and the Montenegrin Citizenship Act (*Sl. list RCG*, 41/99) were in force in Montenegro until 2008. These laws had recognised the category of dual citizenship given that a citizen of Montenegro was simultaneously a citizen of the then common state (FRY, SaM).

As opposed to the 1999 Montenegrin Citizenship Act, which did not provide for the resolution of the citizenship status of refugees from the former SFRY republics, the present Citizenship Act regulates the acquisition of Montenegrin citizenship by this category of people.

Since the independence of Montenegro and the dissolution of the State Union of Serbia and Montenegro in June 2006, citizens of Montenegro for the first time in nearly a century no longer have complex nationality entailing two citizenships.

The new Montenegrin Citizenship Act embraces the principles of the European Convention on Nationality, although Montenegro placed a reservation on the Convention, thus indirectly preventing dual or multiple citizenships and allowing conditionality of acquisition or retention of Montenegrin citizenship by giving up another citizenship.¹⁴³⁶ This Montenegrin Citizenship Act governs the acquisition and termination of Montenegrin citizenship and registration of Montenegrin citizenship (Art. 1).

Four Ways for Acquisition of Citizenship

The Act allows dual citizenship in exceptional situations and as such is among the more restrictive laws on citizenship. Montenegrin citizenship may be acquired in one of the following four ways: by descent, birth, naturalisation or in accordance with international treaties and agreements (Art. 4).

Articles 5 and 6 of the Act enumerate the following requirements to be fulfilled for the acquisition of Montenegrin citizenship by descent:

Montenegrin citizenship by descent shall be acquired by a child:

- 1) whose both parents are Montenegrin citizens at the moment of the child's birth;
- 2) born on the territory of Montenegro, whose one parent is a Montenegrin citizen at the moment of the child's birth;
- 3) born on the territory of another state, whose one parent is a Montenegrin citizen at the moment of the child's birth and the other parent is stateless, of unknown citizenship or unknown;
- 4) born on the territory of another state, whose one parent is a Montenegrin citizen at the moment of the child's birth, if s/he would otherwise be without citizenship. (Art. 5)

¹⁴³⁶ Article 3 of the Act Ratifying the Convention on Nationality includes a reservation on Article 16, which specifies that "(A) State Party shall not make the renunciation or loss of another nationality a condition for the acquisition or retention of its nationality where such renunciation or loss is not possible or cannot reasonably be required".

Montenegrin citizenship by descent may also be acquired:

- 1) by a child born on the territory of another state, whose one parent is a Montenegrin citizen at the moment of the child's birth provided that the child does not have the citizenship of the other parent and applies for entry in the birth register and the register of Montenegrin citizens before s/he turns 18 years of age;
- 2) by a person over 18 years of age, whose one parent is a Montenegrin citizen and the other one is a citizen of another state, provided that the child does not have the citizenship of the other parent and submits an application for entry in the register of Montenegrin citizens before s/he turns 23 years of age;
- 3) by an adopted child, in case of *adoptio plena*, in the event one of the adoptive parents is a Montenegrin citizen and provided that the child does not have the citizenship of the other adoptive parent. (Art. 6)

Montenegrin citizenship may also be acquired by birth. Children born or found in the territory of Montenegro shall acquire its citizenship in the event their parents are unknown, of unknown nationality or stateless, or in the event that the children themselves are stateless (Art. 7).

A number of articles in the new law are devoted to the acquisition of Montenegrin citizenship by naturalisation (Art. 8–17). Citizenship by naturalisation shall be acquired at the request of a person over 18 years of age, who has lawfully and without interruption resided in Montenegro for 10 years, was released from the citizenship of another state, has secure accommodation and guaranteed source of income, has not been convicted to a final unconditional sentence of imprisonment, knows Montenegrin, has fulfilled all his or her tax and other legal duties, provided that there are no legal constraints with respect to defence and security (Art. 8(1)).

Under the 2010 Act Amending the Montenegrin Citizenship Act¹⁴³⁷ release from the citizenship of another state shall not be required of an applicant “*whose application for release had been rejected by the other state because s/he had failed to regulate his/her military duty in that state provided that s/he signs a statement that s/he will renounce the citizenship of the other state if s/he acquires Montenegrin citizenship*”.

Under Article 9 of the Montenegrin Citizenship Act, an alien shall upon request be issued a two-year certificate that s/he shall be granted Montenegrin citizenship in the event s/he satisfies the other citizenship requirements in Art. 8(1). Apart from facilitating the alien's release from the citizenship of another state, this certificate also provides the alien with certainty that s/he will not become stateless during the two years.

¹⁴³⁷ Art. 8, Act Amending the Montenegrin Citizenship Act (*Sl. list CG*, 40/2010).

Art. 9(1) of the Montenegrin Citizenship Act also allows the naturalisation of a person who has been married to a national of Montenegro for at least three years and has lawfully and without interruption resided in Montenegro for at least five years (Art. 11), of an immigrant and members of his/her family up to the third degree of kinship (Art. 10), a person recognised the status of refugee pursuant to the Asylum Act (Art. 13), a stateless person (Art. 14), a person born in Montenegro or on the territory of another state but who has lawfully and without interruption resided in Montenegro before s/he turned 18 (Art. 15).

The Naturalisation Criteria Decision enumerates the lawful residence requirements (Art. 2), which were amended by a Decision amending this Decision.¹⁴³⁸

A child without citizenship of another state or released from the citizenship of another state shall acquire Montenegrin citizenship if both of his/her parents acquired Montenegrin citizenship by naturalisation or if one of his/her parents acquired Montenegrin citizenship and has lawfully and continuously resided with the child in Montenegro. Montenegrin citizenship shall also be granted to a child who has lawfully and continuously resided in Montenegro with his adoptive Montenegrin parent in case of *adoptio minus plena*.

Conferral of citizenship based on the criteria of particular relevance to Montenegro. – Article 12 lays down specific grounds for the naturalisation of persons of particular relevance to Montenegro. An adult may be granted Montenegrin citizenship even if s/he does not fulfill the requirements referred to in Article 8 of the Act if that would be of particular relevance to Montenegro's scientific, economic, cultural, sport or other interests (see requirements above).¹⁴³⁹ This provision proved particularly controversial with respect to the authorities' decision to grant citizenship to Thaksin Shinawatra, the former Thai Prime Minister, sentenced to two years' imprisonment *in absentia* for corruption.¹⁴⁴⁰ EU officials, as well as the members of the opposition and NGOs in Montenegro, voiced their dissatisfaction over the fact that Shinawatra was granted Montenegrin citizenship although he is on the Interpol wanted list.¹⁴⁴¹

The 2010 amendments to the Montenegrin Citizenship Act lay down that the Montenegrin Ministry of Internal Affairs and Public Administration

¹⁴³⁸ Naturalisation Criteria Decision (*Sl.list* CG 47/2008 and 80/2008).

¹⁴³⁹ The Constitutional Court rejected the initiative to review the constitutionality of the provisions in the Montenegrin Citizenship Act allowing conferral of Montenegrin citizenship to persons "of particular relevance to Montenegro's scientific, economic, cultural, sport or other interests" although they do not fulfil the other requirements. In response to the initiative, the Government said that the issue of nationality was within the jurisdiction of the state and that the European Convention on Nationality allows facilitated acquisition of citizenship in specific cases. Judge Rapporteur Desanka Lopičić underlined that the European Convention on Nationality stated that each state could determine under its own law who are its nationals. *Vijesti*, p. 2, 12 December 2008.

¹⁴⁴⁰ "Shinawatra Closed Deal in Montenegro", *Vijesti*, 27 August 2009.

¹⁴⁴¹ "Brussels Threatening to Re-Introduce Visa Regime", *Vijesti*, 9 November 2010.

shall decide on the state and other interests warranting the conferral of Montenegrin citizenship to an individual at the proposal of the Montenegrin President, Prime Minister or Assembly Speaker.¹⁴⁴² The Government also enacted a Decision defining in greater detail the naturalisation criteria to be satisfied by persons of particular relevance to Montenegro's scientific, economic, cultural or sport interests.¹⁴⁴³ The interest of both the domestic and international public was particularly aroused by the so-called "economic citizenship" that may be granted to persons of particular relevance to Montenegro's economic interests. The Government drafted the Instructions on the application of criteria for establishing the existence of Montenegro's economic interests to grant citizenship by naturalisation but they were not published by the end of the year.¹⁴⁴⁴

Termination of Citizenship

Montenegrin citizenship shall terminate at the request of a Montenegrin national, by release, by force of law or pursuant to international treaties or agreements.

Release from citizenship shall be granted a Montenegrin national in the event s/he is at least 18 years of age, has another citizenship or proof that s/he will be granted the citizenship of another state and is actually residing on the territory of the other state. In the event the person granted release from Montenegrin citizenship did not acquire the citizenship of another state within one year, the competent authority shall upon his/her request declare the decision on release from citizenship null and void. This provision prevents and suppresses statelessness.

A person who lost Montenegrin citizenship may recover it at his/her own request in the event s/he fulfils the requirements (Art. 26).

The competent MIA authority shall review applications for the verification, acquisition and termination of Montenegrin citizenship. Applications for citizenship may be submitted in person, by a proxy, guardian, a diplomatic or consular mission.

The most controversial provision of this law is the one based on which a Montenegrin citizen, with a citizenship of another country, loses Montenegrin citizenship if s/he voluntarily acquired citizenship of another country, unless the international agreement established dual citizenship and unless s/he already had another citizenship on 3 June 2006 (Art. 24(1(1))). Based on

¹⁴⁴² Act Amending the Montenegrin Citizenship Act (*Sl. list* CG 40/2010).

¹⁴⁴³ Decision on Criteria for Establishing Montenegro's Scientific, Economic, Cultural and Sport Interests for Acquisition of Montenegrin Citizenship by Naturalisation (*Sl. list*, CG 34/2010).

¹⁴⁴⁴ "Awaiting EC's Suggestions", *Vijesti*, 3 September 2010. The authorities announced the enforcement of the Instructions in early August 2010, but they were not published by the end of the reporting period.

this provision, 40 citizens of Montenegro lost Montenegrin citizenship before 26 March 2011¹⁴⁴⁵, including the President of the People's Party, Predrag Popović.¹⁴⁴⁶ Popović has officially confirmed validity of the Serbian document¹⁴⁴⁷ which confirms that he is a citizen of that country,¹⁴⁴⁸ so his Montenegrin citizenship was taken away right before the census in Montenegro, which was publicly perceived as pressure on the population (especially the Serbs) to declare nationality.¹⁴⁴⁹

The provision of the Act on Montenegrin Citizenship which allows for retention of citizenship of another country to Montenegrin citizens who acquired foreign citizenship before 3 June 2006 particularly discriminates against those who wish to acquire citizenship of the Republic of Serbia. Given that Serbia and Montenegro were one country before 3 June 2006, these persons have not had the opportunity to acquire Serbian citizenship as a dual before that date.¹⁴⁵⁰

Citizens of Former SFRY Republics

The transitional and final provisions of the Act govern the acquisition of Montenegrin citizenship by nationals of the former SFRY republics.

Article 39 envisages the legal continuity of Montenegrin citizenship. Persons with registered residence in Montenegro on 3 June 2006 and the nationality of a former SFRY republic may acquire Montenegrin citizenship under more lenient conditions than other aliens (they need not have lawfully resided in Montenegro for at least ten years or know the Montenegrin language), but they are have to obtain release from the citizenship of the other state. The deadline for submitting applications on these grounds and applications for the verification of Montenegrin citizenship of persons not entered in the registers of Montenegro is limited to one year from the day the Act comes into force.¹⁴⁵¹ Upon the expiry of the deadline, the person may be naturalised i.e. his/her Montenegrin citizenship may be verified only if s/he is to become stateless and files an application within five years from the day the Act came

¹⁴⁴⁵ "Ministry of Home Affairs: 40 citizens lost Montenegrin citizenship", *Cafe del Montenegro Portal*, 26 March 2011.

¹⁴⁴⁶ *Vijesti*, 25 March 2011, page 2.

¹⁴⁴⁷ On the other hand, Andrija Mandić, President of the political party New Serbian Democracy, was not stripped of citizenship because there was no evidence that he had acquired the citizenship of Serbia, although he publicly stated that he has a Serbian passport. Serbian authorities are not obliged to inform Montenegro on Montenegrin citizens who have Serbian citizenship. (*Vijesti*, 31 March 2011, page 2).

¹⁴⁴⁸ *Vijesti*, 31 March 2011, page 2.

¹⁴⁴⁹ *Dan*, 26 March 2011.

¹⁴⁵⁰ On the other hand, the Citizenship Act of Serbia (Article 23) provides that a Serb who does not reside in Serbia has the right to be granted citizenship of Serbia without the discharge from foreign citizenship, if s/he is over 18, able to work and provides a written statement that Serbia is his/her country.

¹⁴⁵¹ Art. 41(2), Montenegrin Citizenship Act.

into force. The Amendments to the Montenegrin Citizenship Act¹⁴⁵² extended the deadline for naturalisation until 5 May 2011 provided that the applicant had not reregistered as a temporary resident outside Montenegro before submitting his/her application.¹⁴⁵³

Naturalisation of Displaced and Internally Displaced Persons in Montenegro

The status of displaced and internally displaced persons in Montenegro is regulated by the following laws: the Aliens Act, the Act Amending the Aliens Act and the Asylum Act.

Persons, who had fled the wars in the former SFRY republics, acquired the status of displaced persons under the Decree on Care for Displaced Persons¹⁴⁵⁴ while the persons who moved from Kosovo to Montenegro in 1999 were granted the status of internally displaced persons, pursuant to a decision by the then Montenegrin Government Commissariat for Displaced Persons. It is important to note that the persons who had moved from these areas to Montenegro have never been granted the status of refugees.

Status of displaced persons. – The Asylum Act¹⁴⁵⁵, envisages the review of the status of displaced persons from the former SFRY republics. They are provided with the possibility of acquiring the status of a refugee provided that they were permanently residing in Montenegro at the time the Act came into effect and that there is no cause to revoke or terminate their refugee status.

The July 2006 Government Decision¹⁴⁵⁶ allows these persons to temporarily retain their status. They are provided with the opportunity to integrate in the local community by acquiring Montenegrin citizenship or the right to permanent residence. While the Montenegrin Citizenship Act limits conferral of Montenegrin citizenship only to a small number persons from the former SFRY republics, who do not have the documents of their countries of origin and satisfy all the other legal requirements, internally displaced persons are only provided with the possibility to acquire the right of permanent residence, pursuant to the 2009 Act Amending the Aliens Act, and the right to citizenship only 10 years after they were granted permanent residence.

¹⁴⁵² Art. 41a, Act Amending the Montenegrin Citizenship Act (*Sl. list CG*, 40/2010).

¹⁴⁵³ In June 2011, at the time of completion of work on this report, the Government's Draft Law on Amendments to the Citizenship Act, which proposed an extension of this deadline to 31 July 2012, was in the parliamentary procedure.

¹⁴⁵⁴ Decree on Care for Displaced Persons (*Sl. list RCG*, 37/92).

¹⁴⁵⁵ Asylum Act (*Sl. list RCG* 45/2006).

¹⁴⁵⁶ Decision on the Temporary Retention of the Status and Rights of Displaced and Internally Displaced Persons in the Republic of Montenegro (*Sl. list RCG*, 46/2006).

These people¹⁴⁵⁷ encounter numerous problems in practice. Given that over 18 years have passed since the wars in Bosnia-Herzegovina and Croatia and over 11 years since the war in Kosovo, most of the persons from these areas obtained the documents of their countries of origin whereby their residence in Montenegro can longer be deemed as uninterrupted in the meaning of the Act¹⁴⁵⁸ and the Decision¹⁴⁵⁹ and they thus no longer fulfil the citizenship requirement. Many of the applicants have been waiting two or more years for the completion of various administrative procedures, although the law lay down a one-year deadline. During its review of the applications, the Ministry of Internal Affairs and Public Administration checks whether the applicants have acquired the personal documents of their countries of origin from which they had fled¹⁴⁶⁰. On the other hand, many people can not obtain the documents of their countries of origin, since that implies an unbearable financial expenditure.

The applications are reviewed in administrative proceedings. If the applicants receive no response, they are entitled to abetment, and if that proves unsuccessful, they face a long complaints procedure. The law also provides them with the possibility of filing a lawsuit with the Administrative Court, all of which necessitates in professional assistance and further exacerbates the exercise of rights by this category of persons.

The Act Amending the Aliens Act (*Sl. list CG*, 72/09), facilitates the acquisition of the status of an alien with permanent residence in Montenegro by displaced and internally displaced persons. Application for permanent residence may be filed as of 7 November 2009, the day the Act came into force, until 7 November 2011. Persons approved permanent residence shall lose the status of a displaced or internally displaced person, while those, who fail to regulate their status in Montenegro by that date, shall be deemed to be unlawfully residing on the territory of Montenegro.¹⁴⁶¹ Under Article 105a of the Act Amending the Aliens Act, *displaced persons from the former Yugoslav republics, who temporarily retained the status of a displaced person pursuant to the Decision on the Temporary Retention of the Status and Rights of Displaced and Internally Displaced Persons in the Republic of Montenegro (Sl. list RCG, 46/06), may be approved permanent residence if they are entered in the register*

¹⁴⁵⁷ Around 130,000 people fled to Montenegro during the NATO air strikes on the FRY in 1999. Together with the 28,000 people, who had fled Bosnia-Herzegovina and Croatia in the early 1990s, they accounted for 25% of Montenegro's population at the time. There were 16,259 people from Kosovo, 5,812 people from Bosnia-Herzegovina and 2,211 people from Croatia in Montenegro in 2009. Ninety-four returned to Kosovo and seven to Bosnia-Herzegovina within the repatriation programmes in 2008 (*Vijesti*, 21 June 2009).

¹⁴⁵⁸ Montenegrin Citizenship Act (*Sl. list CG*, 13/08 and 40/2010).

¹⁴⁵⁹ Naturalisation Criteria Decision (*Sl. list CG*, 47/2008, 80/2008 and 30/2010).

¹⁴⁶⁰ Two thousand documents have been obtained for people from Bosnia-Herzegovina and Croatia in cooperation with the Legal Centre. Some of these documents are valid only six months (*Vijesti*, 21 June 2009).

¹⁴⁶¹ Act Amending the Aliens Act (*Sl. list CG*, 72/2009).

of displaced persons on the day this Act comes into force; a certificate of registration shall be issued by the Asylum Office.

Permanent residence may also be granted to an internally displaced person from Kosovo, who temporarily retained the status of an internally displaced person pursuant to the Decision referred to in paragraph 1 of this Article, provided that s/he registered with the authority charged with caring for refugees by 14 November 2009; certificate of registration is issued by the authority. An internally displaced person may register within three months from the day of expiry of the deadline in paragraph 2 of this Article if s/he submits a medical certificate issued by a public health institution that s/he was unable to register within the deadline referred to in paragraph 2 of this Article for health reasons.

A displaced or internally displaced person without a valid travel document needed to realise the right to permanent residence may be granted temporary residence until s/he obtains a travel document, for a period of three years at most, during which s/he must obtain a passport of his/her country of origin. Pursuant to the amended Aliens Act, a displaced or internally displaced person with approved temporary residence may apply for permanent residence once s/he obtains the passport. The application for permanent residence may be submitted within two years from the day that Act comes into effect.

An alien who has been a permanent resident of Montenegro for ten years may apply for Montenegrin citizenship.

In the opinion on Montenegro's application for EU membership, in November 2010 the European Commission required Montenegro to "guarantee legal status of displaced persons, particularly Roma, Ashkali and Egyptians, and respect their rights", as one of the seven conditions for the start of membership negotiations. As a result, the Government Action Plan for implementation of recommendations from the opinion of the European Commission provides a range of measures aimed at detailed analysis of the status of displaced persons, informing displaced persons about their rights and regulating the status of persons with permanent residence, as well as communication with the neighboring countries in order to assist displaced persons to obtain the documents they need to achieve this status. The results of implementation of these measures are listed in the reports on the implementation of the Action Plan, published on the website of the Government of Montenegro.

The problem of Domiciled Stateless Persons

Montenegro has a particular problem of statelessness – stateless persons without any documents who have never been entered in the register in Montenegro or in neighboring countries. Stateless persons are often indigenous Roma or immigrants, for whom citizenship is a particular problem, because the law, as a condition for citizenship, requires lawful residence during a particular period in the territory of Montenegro, and these people do not have

such residence, nor can acquire it because they do not have any documents. It would be necessary to lay down a special provision of the Citizenship Act for them, in accordance with international obligations of Montenegro to suppress the occurrence of statelessness, particularly among children living in its territory.

Asylum Act. – Under the Asylum Act, a refugee is guaranteed the following rights: to legal aid and access to the UNHCR and NGOs providing legal aid in the asylum procedure;¹⁴⁶² to submit an application for asylum and statements in a language s/he has indicated s/he understands; to residence and freedom of movement; to an identification document confirming his/her identity, legal status, right of residence and other rights envisaged by this law; to a non-national travel document for travelling abroad pursuant to regulations on the residence of aliens; to free primary and secondary education in schools established by the state; to accommodation, if necessary, and adequate living standards; to health care in accordance with separate regulations; to family unity; to work within a Centre or another collective accommodation facility; to social protection, to freedom of religion; to humanitarian aid. The Refugee Care Bureau, charged with providing care to the refugees, is obligated to assist these persons in the realisation of the above rights.

The basic principles to be adhered to during the procedures include: the principle of subsidiary protection, non-refoulement, confidentiality, non-discrimination, data protection, family unity, non-liability for unlawful entry or residence, protection of persons with special needs, respect of gender, legal protection, et al.

The Act devotes a separate chapter to asylum seekers and lays down the duties of the authorities to provide them with assistance: enable them to immediately file an application for asylum, provide them with information (on the procedure, their rights and duties, and legal aid) et al.

Pursuant to the Asylum Act, the review of asylum applications is in the first instance in the jurisdiction of the Ministry of Internal Affairs and Public Administration. The duties within the jurisdiction of the Ministry are performed by the Asylum Office, established within the Ministry's Administrative Internal Affairs Sector in 2007. It receives and reviews asylum applications and takes decisions granting, terminating and revoking asylum, reviews, takes decisions on the status of persons who already have the status of a refugee or are recognised the status of displaced person, issues identity and travel documents, documents certifying the applicant's legal status and rights in accordance with regulations, keeps records of the situation in the applicants' countries of origin, conducts the procedure for approving and revoking subsidiary protection and performs other asylum-related affairs.

¹⁴⁶² Law on Free Legal Aid (*Sl. list CG*, 20/11), which comes into force on 1 January 2012, provides that a person seeking asylum has the right to free legal assistance at public expense (Article 12).

Appeals against the decisions of the first-instance authority are reviewed by the State Asylum Appeals Commission, established under a Montenegrin Government decision in November 2007 and comprising a chairman, his/her deputy and three members.

An administrative dispute may not be initiated against the Commission decision, but the Commission may be contested by a constitutional appeal, although it is not certain that in this case it would be an effective remedy, which could postpone the execution of the decision on expulsion.¹⁴⁶³ The Asylum Office performs the administrative duties for the State Asylum Appeals Commission. The Commission members shall be appointed from among employees of the judiciary, state administration or public services with a degree in law and five years of working experience.

The Asylum Act devotes particular attention to the right to free legal aid. When they apply for asylum, asylum seekers are provided with information in writing and in a language they indicated they know on how to exercise their rights and on organisations providing free legal aid. Asylum seekers are entitled to free legal aid entailing assistance in submitting asylum applications, during interviews, in the realisation of their rights laid down in the Asylum Act and in drafting written submissions, including appeals.

Nine persons sought asylum in 2010. Four applications were rejected by the Asylum Office, four are still pending, while the review of one application was suspended.

¹⁴⁶³ The constitutional appeal, as a rule, does not postpone the execution of an individual act against which it was filed (Art. 52(1) of the Constitutional Court of Montenegro Act, *Sl. list CG*, br. 64/08). However, the Constitutional Court during the proceedings may order suspension of the execution until a final decision is rendered, if the appellant makes the unavoidable occurrence of adverse effects certain.

Freedom of Movement

Article 12, ICCPR:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13, ICCPR:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Protocol No. 4 to the ECHR:

Article 2

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Everyone shall be free to leave any country, including his own.

No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Article 3

No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

No one shall be deprived of the right to enter the territory of the state of which he is a national.

Article 4

Collective expulsion of aliens is prohibited.

Protocol No. 7 to the ECHR:

Article 1

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
 - a) to submit reasons against his expulsion,
 - b) to have his case reviewed, and
 - c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

General

Freedom of Movement and Free Choice of Residence

Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence. As a rule, nationals of a country are lawfully within the territory of the state they are nationals of and the state is free to regulate by law the conditions under which aliens may lawfully reside in its territory as long as those regulations are in keeping with its international obligations. The international treaties, the ICCPR and ECHR, therefore do not guarantee aliens the right to enter and reside in the territory of a state party; this matter is governed by the individual states. But, once an alien is granted entry into a state bound by the ECHR and ICCPR, s/he has the right to freedom of movement in that state in keeping with its laws and the right to protection from expulsion, which is subject to exceptional restrictions.

The Human Rights Committee established that an alien who entered the state illegally, but whose status has been regularised, must have the right to enjoy the rights protecting all aliens lawfully residing in that state.¹⁴⁶⁴ States must protect the freedom of movement not only from public, but also from private interference. For example, it is incompatible with Art. 12 if the right of a woman to move freely and choose her residence is made subject to a decision by her husband, father or another relative.¹⁴⁶⁵

¹⁴⁶⁴ General Comment No. 27: Freedom of movement (Art.12): 11/02/1999. CCPR/C/21/Rev.1/Add.9, General Comment No. 27 paragraph 4.

¹⁴⁶⁵ *Ibid*, paragraph 6.

Within the EU, the main instrument governing the free movement of nationals of Member States is the Directive 2004/38/EC on the rights of citizens and their family members to move and settle freely in the territories of EU Member States. EU Member States may restrict this freedom, in the individual, specific cases, when it is determined that the conduct of a person, regardless of his/her nationality, is a serious threat to the fundamental interests of society, based on public policy, public security or public health, but not for economic reasons.

Right to Leave the Territory of a State, Including One's Own State

This freedom means that the state is not entitled to limit anyone's right, including the right of its own nationals, to leave its territory or condition it by approving the destination or the period of time the individual chooses to stay outside the country. Given that this right is guaranteed to everyone, including aliens unlawfully residing in its territory, an alien being expelled for unlawfully residing in it is also entitled to elect the state of destination, subject to the agreement of the state.¹⁴⁶⁶ This right also entails the right to obtain the necessary travel documents from the state.¹⁴⁶⁷

Restrictions of the Right to Freedom of Movement

Restrictions on freedom of movement for legitimate purposes, which are set out in paragraph 3 of Article 12 ICCPR and paragraph 3 Article 2 of the Protocol 4 ECHR, in each case must be necessary and proportionate to a particular purpose which calls for the restriction. For example, these conditions will not be met if one is prevented from leaving the country because s/he is aware of a "state secret" or because someone is prohibited from moving within the country without special permission.¹⁴⁶⁸

Right to Enter One's Own Country

This right implies the right to remain in one's own country and to return to it; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's state of nationality).¹⁴⁶⁹ The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.¹⁴⁷⁰

¹⁴⁶⁶ *Ibid*, paragraph 8.

¹⁴⁶⁷ *Ibid*, paragraph 9.

¹⁴⁶⁸ *Ibid*, item 16. For violation of Article 2, paragraph 2 of Protocol 4 ECHR, for refusal to issue a passport to a retired military officer who was familiar with military secrets, see the Judgment of the European Court of Human Rights in the case *Soltysyak v. Russia*, 2011.

¹⁴⁶⁹ *Ibid*, paragraph 19.

¹⁴⁷⁰ *Ibid*.

The scope of “one’s own country” is broader than the concept of “country of one’s nationality” and embraces also the right of an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would, for example, be the case of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them, or, the case of long-term residents (persons with temporary residence in but not the nationality of the state they are living in), including stateless persons (persons without a nationality) who are arbitrarily deprived of the right to acquire the nationality of the country of such residence.¹⁴⁷¹

Procedural Guarantees

Art. 13 of the ICCPR and Article 1 of Protocol No. 7 to the ECHR lay down that the rights every alien shall have in a procedure in which a decision on his/her expulsion is taken. The purpose of these provisions is to prevent arbitrary expulsions not laid down in or based on the law.¹⁴⁷² Every alien shall be entitled to a review of his/her expulsion in a procedure; collective, mass expulsions are thus prohibited as well.¹⁴⁷³ Every alien whose expulsion is reviewed is entitled to a reasoned decision by the competent authority, the right to be represented before it and the right to a review of the first instance decision (albeit not necessarily by a court). In any case, an alien must be provided with the opportunity to resort to this legal remedy ensuring that the right is really effective.¹⁴⁷⁴ Article 13 of the ICCPR allows derogation from these procedural rights only for national security reasons, while Art. 1(2) of Protocol No. 7 to the ECHR allows derogation from them in order to protect public order. There may be no discrimination against aliens in the implementation of these rights.¹⁴⁷⁵

Constitutional Guarantees

The Constitution guarantees the freedom of movement and residence in Montenegro and the right to leave Montenegro (Art. 39). The grounds for limiting this right are more narrowly defined than those allowed by the ICCPR and ECHR. Freedom of movement may be restricted for the purpose of conducting criminal proceedings, preventing the spreading of contagious diseases and protecting Montenegro’s security. Therefore, as opposed to international treaties, Montenegro does not allow restrictions of this right to protect morals or the rights and freedoms of others. Under Article 39(3) of

¹⁴⁷¹ *Ibid.*, paragraph 20.

¹⁴⁷² *Ibid.*

¹⁴⁷³ *Ibid.*, paragraph 10.

¹⁴⁷⁴ *Ibid.*

¹⁴⁷⁵ *Ibid.*

the Constitution, the movement and residence of aliens shall be regulated by a law. The Constitution lays down that an alien may be expelled from Montenegro only in pursuance of a decision by a competent authority and in a procedure provided for by the law (Art. 44(3)).

With regard to the restriction of the freedom of movement in the context of criminal proceedings and preventing the spread of infectious diseases, see the Right to liberty and security of person, p. 197.

Aliens in Montenegro

The Aliens Act (*Sl. list CG*, 82/2008 and 72/2009) governs the rights of aliens to enter, move and reside within the territory of Montenegro (Art. 1). The Act does not apply to aliens enjoying privileges or immunity under international law, while provisions of ratified and published international agreements and generally accepted rules of international law shall apply to stateless persons, if they are more favourable to them (Art. 2). The General Administrative Procedure Act shall generally apply in proceedings on the rights and obligations of aliens, unless otherwise provided for by the Aliens Act (Art. 5).

Prohibition of entry. – An alien shall be prohibited entry into Montenegro if: s/he does not have a valid travel document, except in exceptional cases and in accordance with international obligations (see below); s/he does not have enough money to support himself/herself during his/her stay in Montenegro and to return to the state s/he came from or travel to a third state; s/he is in transit but does not satisfy the requirements for entering a third state; s/he has been issued a protective measure of expulsion, the security measure of deportation or his/her residence permit has been revoked; so required for reasons of national security, public order or public health; s/he is registered as an international offender in the relevant records (Art. 8).

Prohibition on leaving the country. – An alien may be prohibited from leaving Montenegro if s/he uses another's travel or other document or an invalid or forged travel or other document; if there is reasonable suspicion that s/he intends to avoid criminal or misdemeanour prosecution, serving his/her sentence, enforcement of a court order or deprivation of liberty; or for reasons of national security or the protection of public order (Art. 9).

Entry, movement and stay. – An alien may enter, move and stay in the territory of Montenegro with a valid travel document in which a visa or residence permit has been entered (Art. 10(1)). An alien, whom Montenegro is bound to allow entry under international treaties for humanitarian reasons or to protect public order or public health, shall be allowed entry without a valid travel document (Art. 10(2)). Nationals of specific states may enter Montenegro with a valid ID card or another document proving their identity and citizenship pursuant to an international treaty or visa regime regulations (Art. 10(3)). Articles 14–29 of the Act govern the visa regime.

The ICCPR and the ECHR do not guarantee aliens the right to enter and reside in the territory of a state party; this matter is governed by every state. However, an alien may under specific circumstances enjoy the protection of the international treaties even with respect to entry or residence, for example, when considerations of non-discrimination, prohibition of torture, inhuman or degrading treatment and respect for family life arise.¹⁴⁷⁶ The Montenegrin Aliens Act, thus, also allows an alien to exercise the right to temporary residence for the purpose of family reunion (Art. 48) or for “humanitarian reasons” – this right is granted aliens presumed to be victims of human trafficking or underage aliens, who have been abandoned or are victims of organised crime (Art. 51).

The Aliens Act differentiates between short-term residence (under 90 days), temporary residence (over 90 days) and permanent residence (Art. 30). An alien’s *short-term residence* may be revoked if s/he does not have a valid travel or another document, does not fulfil the entry and residence requirements, lacks the funds to support himself/herself during his/her stay, fails to pay a fine imposed on him/her in Montenegro, or if there is reasonable suspicion that s/he is not staying in Montenegro for the reason s/he gave. A decision to cancel an alien’s short-term residence permit is issued by the police, which specify the deadline within which the alien must leave Montenegrin territory and the period in which s/he may not re-enter it. The decision may be appealed with the MIA within 8 days. The appeal does not stay the enforcement of the decision (Art. 32). The provision may result in a breach of Art. 13 of the ICCPR and Art. 1(2) of Protocol No. 7 to the ECHR, which allow for deviations from the right to the review of a decision on expulsion only when such expulsion is necessary only on grounds of public order and national security, whereas the Aliens Act also includes other grounds for revoking an alien’s residence.

Temporary residence denotes residence exceeding 90 days (Art. 35). An alien must satisfy the following requirements to be granted temporary residence: have the funds to support himself/herself; secured accommodation; health insurance; that s/he has not been prohibited from entering Montenegro; and has proof supporting the application for temporary residence (Art. 36). Aliens are granted temporary residence by the MIA subject to the consent of the police (Art. 37). A decision not to grant temporary residence may be appealed with the Ministry within eight days from the day of delivery of the decision (Art. 38). Given that the Aliens Act does not stipulate that the appeal shall not stay the enforcement of the decision, the general rule in Article 225(1) of the General Administrative Procedure Act – that the first-instance decision may not be enforced until the decision on the appeal is served on the appellant – applies. The same provision applies in case the temporary residence permit is revoked (Art. 52). Temporary residence may be extended for two years at most.

¹⁴⁷⁶ CCPR General Comment No. 15: *The position of aliens under the Covenant*: 04/11/1986, para. 5.

An application for the extension of temporary residence must be submitted at least 30 days before the current one expires (Art. 40).

Permanent residence. – Nationals of states created in the area of the former SFRY, who had been registered as temporary residents in Montenegro before 3 June 2006, are entitled to permanent residence. They do not have to file an application or obtain a special permit, only apply for registration. Permanent residence may also be approved an alien, who had resided in Montenegro pursuant to a temporary residence permit without interruption for five years at the time s/he applied for permanent residence, for humanitarian reasons or if his/her permanent residence would be in Montenegro's interest (Art. 54). An alien with a permanent residence permit is entitled to: work and employment; education and professional specialisation/training; recognition of diplomas and certificates; social assistance, health and pension insurance; tax relief; access to the market of goods and services; freedom of association, integration and membership in organisations advocating the rights of workers or employers (Art. 55). An administrative dispute may be initiated against an MIA decision revoking permanent residence (Art. 58).

Unlawful presence. – Unlawful presence of an alien in Montenegro entails his/her presence without a visa, a residence permit or other legal grounds (Art. 61). The police shall set the deadline within which an alien unlawfully present in the territory of Montenegro must leave its territory (Art. 62(1)). The decision may be appealed with the MIA within three days from the day of service of the decision and the MIA must render its decision on the appeal within eight days (Art. 62). This appeal does not stay the enforcement of the decision on expulsion either, wherefore the provision may give rise to a breach of the procedural rights of aliens under Art. 13 of the ICCPR and Art. 1(2) of Protocol No. 7 to the ECHR.

Deportation of unlawfully present aliens. – The police shall deport an alien unlawfully present in Montenegro or who did not leave Montenegro within the set deadline (Art. 64). An alien may not be deported to a state in which his/her life or freedom would be in danger on any grounds such as sex, religion or nationality, association with a specific social group, political opinion, or in which s/he may be subjected to torture, inhuman or humiliating treatment or punishment (Art. 65), which is in accordance with the international standards prohibiting torture and inhuman or degrading treatment or punishment (Art. 3 of the ECHR; Art. 7 of the ICCPR). An alien may be exceptionally detained by the police, but not longer than 12 hours, if so required to ensure his/her deportation (Art. 66).

Protective measure of deportation. – A protective measure of deportation from the territory of Montenegro lasting up to one year may be issued against an alien found to have committed a misdemeanour under the Aliens Act independently or in conjunction with a fine (Art. 63).

Restriction of the Freedom of Movement

The freedom of movement of an alien who cannot be deported immediately or whose identity has not been established shall be restricted by placing him/her in the Aliens Shelter for a period not exceeding 90 days (Arts. 67(1) and 68). Exceptionally, other appropriate accommodation shall be provided an alien with health or other special needs or for other reasons (Art. 67(2)). An alien with secured accommodation and funds to support himself/herself and who cannot be deported may be ordered to remain in a specific place, at a specific address and to regularly report to the police (Arts. 73 and 74). The police shall order the placement of an alien in the Aliens Shelter; the decision may be appealed with the MIA within 8 days and the MIA shall rule on the appeal within 8 days (Art. 68). The alien may not leave the Shelter without a special permit – this provision may be viewed not only as a restriction of the freedom of movement but as a form of deprivation of liberty as well. The legislator has to amend the Aliens Act and provide the alien with the right to appeal directly with the court pursuant to the right to liberty of person (Art. 9(4) of the ICCPR, Art. 5(4) of the ECHR).

Asylum

Montenegro has ratified numerous international treaties that are directly or indirectly relevant to the issue of asylum. Most important ones among them are the 1951 UN Convention on the Status of Refugees and the 1967 Protocol on the Status of Refugees, the ICCPR, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the ECHR, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child.

The Constitution stipulates the right of an alien “who has a founded fear of persecution because of race, language, religion or affiliation to a nation or group or political opinion” to seek asylum in Montenegro (Art. 44(1)). Expulsion of aliens is prohibited to a country “where due to his/her race, religion, language or nationality, s/he is threatened with death sentence, torture, inhuman degradation, persecution or serious violation of rights guaranteed by the Constitution” (Art. 44(2)), which is broader than the obligation of Montenegro under international agreements to prevent the expulsion to a country in which a person is threatened with death sentence, torture, inhuman or degrading treatment or punishment (on the basis of Art. 3 ECHR and Art. 7 ICCPR).

The Asylum Act (*Sl. list CG*, 45/2006) came into force on 25 January 2007.

Refugee status is recognized to an alien if, upon his/her request for asylum, it is established that his/her fear of persecution because of race, religion,

nationality, affiliation to a particular social group or political opinion in the country of origin is well-founded and therefore s/he is unable or unwilling to use protection of the country of origin. *Additional protection* is granted to an alien who is not eligible for the grant of refugee status, but who would be subjected to torture or inhuman or degrading treatment or punishment if returned to the country of origin or another country, or if his/her life, safety or freedom would be threatened with violence of general proportions, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which may seriously endanger the life, safety or freedom. *Temporary protection* is an urgent and exceptional measure which provides protection to aliens in the case of a massive, sudden or expected arrival from a country where their life, safety or freedom are threatened by violence of general proportions, external aggression, internal conflicts, massive violation of human rights or other circumstances that seriously endanger the life, safety or liberty, and due to the mass arrival it is not possible to carry out the procedure for determining individual applications for refugee status (Art. 2).

If the Ministry of Internal Affairs, after considering the asylum application, determines that the conditions for the recognition of refugee status are not met, it is obliged to determine whether the conditions for approval of another form of protection in accordance with this law are met (Art. 5).

The Refugees Act guarantees the rights to: legal aid and access to the UN High Commissioner for Refugees and NGOs so as to provide legal assistance in the asylum procedure;¹⁴⁷⁷ application for asylum and a statement in a language s/he understands; residence and freedom of movement; identification document confirming identity, legal status, right of residence and other rights under this law; laissez-passer for traveling abroad, according to the regulations on residence of aliens; free primary and secondary education in schools established by the state; providing accommodation if needed and adequate standard of living; health care, in accordance with special regulations; the unity of family; work within the Centre or other facility for collective housing; social protection; freedom of religion; humanitarian aid. Bureau of Refugees, as the authority responsible for care, is obliged to assist these persons in the exercise of these rights.

The person who was given asylum or whose asylum had been dissolved or suspended may not be returned or expelled to the border of the country where his/her life or freedom would be threatened or may be subjected to torture, inhuman or degrading treatment or punishment (Art. 6).

Discrimination on any grounds in the asylum procedure is prohibited (Art. 7). During this procedure, the measures to preserve family unity shall be undertaken, with the consent of the person seeking asylum (Art. 9). It is

¹⁴⁷⁷ Free Legal Aid Act (*Sl. list CG*, 20/11), which comes into force on 1 January 2012, provides that a person seeking asylum has the right to free legal assistance at public expense (Article 12).

forbidden to punish illegal entry or residence of an asylum seeker who came directly from a country where his/her life or freedom would be threatened, if s/he promptly filed an application for asylum with valid reasons for illegal entry or residence. This person shall not be deprived of liberty except when prescribed by law (Art. 10).

Asylum Office within the Ministry of Internal Affairs conducts initial procedures, receives requests and decides on applications, conducts procedures and decides on termination and cancellation of asylum. Decision on application for asylum shall be made within three months from the date of application, unless the law provides for a shorter deadline (Art. 19). A claim on the first instance decision may be submitted to the State Commission which decides on asylum claims (Art. 20(1)). There is no possibility to initiate an administrative dispute, but there is a possibility of lodging a constitutional appeal.

The administrative authority responsible for the care of refugees performs activities related to the care of asylum seekers, persons who were granted refugee status, or additional or temporary protection (Art. 21).

Under the Asylum Act, an asylum seeker's freedom of movement outside the Centre or another collective accommodation facility or a designated area may be restricted up to 15 days if: his or her identity needs to be established; he or she has destroyed his or her travel or personal documents or possesses forged documents with the intention of misleading the competent authorities; it is necessary to restrict the alien's movement to protect the safety of the community (Art. 31).

After the procedure of decision-making on asylum, the Ministry can: adopt the conclusion of the suspension, adopt the decision granting the status of refugee or additional protection granted, or refuse the application for asylum. This decision must be made in writing (Art. 38).

The decision to refuse the application for asylum contains the reasoning for refusing the application for asylum, guidelines regarding the right to appeal and the deadline until which the person is obliged to leave Montenegro, which shall not be shorter than 15 days, or three days after the final decision, if the decision was issued because of the obvious insubstantiality of the asylum application (Art. 42).

The law also provides for the circumstances under which refugee status ceases, or when the status can be revoked (Arts. 51 and 52).

After the final decision on the rejection of the asylum application, termination or cancellation of refugee status and protection, termination of temporary protection and termination of rights on this basis, if the person stays in Montenegro, the provisions of law regulating the stay of aliens shall be applied (Art. 63 (2)).

Since the implementation of the Asylum Act in January 2007, the Asylum Office at the Ministry of Internal Affairs was addressed by 135 persons

with a request for asylum until the end of June 2011. Only one person was recognized a refugee status, which was terminated in July 2010. Four decisions were adopted on approval of additional protection, three of which are still in force, while the fourth was abolished in June 2011. In the first half of 2011, 96 persons sought asylum.¹⁴⁷⁸

The UNHCR believes that Montenegro needs an adequate system of asylum, which would be compliant with the Convention on the Status of Refugees. According to UNHCR, modern asylum system should have several dimensions. The legal dimensions include access to a country and fair asylum procedures. Socio-economic dimension includes housing, employment, education, health and local integration, which includes language acquisition, full participation in society. Access to asylum must be positive and beneficial for both the individual and for the society as a host.¹⁴⁷⁹

According to EU legislation, each state must have a reception centre for asylum seekers. Montenegro is one of the last countries in the region addressing this issue only in the last two years. By the end of June 2011, the building of the Asylum Centre in Spuž was not completed, but asylum seekers are provided with alternative accommodation in a house rented by the Ministry of Internal Affairs for this purpose.

Montenegro still lacks a centre for the accommodation of aliens whose freedom of movement has to be restricted because their identity has not been established or their compulsory deportation cannot be performed immediately and provided for by the Aliens Act.¹⁴⁸⁰ The construction of the centre is to be completed by June 2011.¹⁴⁸¹

Issuance of Travel Documents

Possession of a travel document is prerequisite for exercising the freedom of movement outside one's own country. The Montenegrin Assembly adopted the Act on Travel Documents in late March 2008 (*Sl. list CG*, 21/2008, 25/2008). The Act governs the issuance of travel documents to Montenegrin nationals to travel to other states, procedure for issuing and termination of travel documents, as well as other issues of importance to the use of travel documents.

The Ministry of Internal Affairs shall issue the passport i.e. review the application as soon as possible, within 15 days at most in the event the application was submitted to the Ministry of Internal Affairs, or within 30 days at

¹⁴⁷⁸ Ministry of Internal Affairs, Legal and Internal Affairs Sector, Office for Asylum, 03/5 no. 206/11 – 13523/1, Podgorica 18 July 2011.

¹⁴⁷⁹ "Asylum must be accessible", *Dan*, 25 November 2010.

¹⁴⁸⁰ "Still no Shelter in Montenegro", *Dan*, 30 September 2010.

¹⁴⁸¹ "Shelter to be Built by Next June", *Pobjeda*, 30 September 2010.

most in the event the application was submitted to a Montenegrin diplomatic or consular mission. Exceptionally, in urgent cases (medical treatment in another state, death or illness of a family member, urgent business trip), the Ministry of Internal Affairs must review the application within 72 hours; the applicant must submit proof corroborating why s/he urgently needs a passport (Art. 36). A diplomatic or consular mission shall issue a replacement travel document¹⁴⁸² as soon as possible, within five days from the day of application at the latest (Art. 37). At the request of a Montenegrin citizen whose passport application was rejected or his/her passport seized, the Ministry may issue a passport of limited validity in particularly justified circumstances (death of a family member, medical treatment abroad, urgent business trips). The validity of such a passport may not be shorter than six months and the Ministry must first obtain the consent of the authority that had demanded the prohibition of the issuance of the passport before issuing it (Art. 40).

Readmission Agreement

In September 2007, Montenegro and the European Union (i.e. EU member states with the exception of Denmark) signed an Agreement on the Readmission of Persons Residing without Authorisation in the Territory of the other High Contracting Party.¹⁴⁸³

Under the Agreement, Montenegro shall readmit, upon application by a Member State and without further formalities other than those provided for in the Agreement, any person who does not fulfil the conditions in force for entry to, presence in, or residence on, the territory of the Requesting Member State (Art. 2 (1)). Montenegro would be obliged to receive its nationals in any case but the Agreement facilitates the procedure.

Under the Agreement, Montenegro is above all obliged to readmit its own nationals. The citizenship of the person need not be established with certainty but “proved, or (...) assumed on the basis of *prima facie* evidence furnished, that such a person is a national of Montenegro.” Montenegro shall also readmit persons who have renounced the nationality of Montenegro since entering the territory of a Member State, unless such persons have at least been promised naturalisation by that Member State. Apart from its nationals, Montenegro shall also readmit their minor unmarried children regardless of their place of birth or their nationality, and their spouses, holding another nationality provided they have the right to enter and stay or receive the right to enter and stay in the territory of Montenegro, unless they have an independent right of residence in the Requesting Member State (Art. 2).

¹⁴⁸² “A replacement travel document is a document issued to a Montenegrin citizen who has been left without a travel document abroad for the purpose of returning to Montenegro” (Article 9, Act on Travel Documents).

¹⁴⁸³ The Agreement is available at the Montenegrin MFA webpage, www.vlada.me.

Under the Agreement, in case the person to be readmitted possesses the nationality of a third state in addition to Montenegrin nationality, the Requesting Member State shall take into consideration the will of the person to be readmitted to the state of his/her choice (Art. 2 (5)).

Montenegro shall readmit all third-country nationals or stateless persons provided that it is proved, or “may be validly assumed” on the basis of *prima facie* evidence furnished, that such persons hold, or at the time of entry held, a valid visa or residence permit issued by Montenegro or had illegally and directly entered the territory of the Member States after having stayed on, or transited through, the territory of the Montenegro. The readmission obligation, however, shall not apply if these persons had only been in airside transit or unless those persons are in possession of a visa or residence permit, issued by Montenegro, which expires later. The readmission obligation shall also not apply if the visa or residence permit issued by the Requesting Member State has been obtained by using forged or falsified documents or if that person fails to observe any condition attached to the visa and that person has stayed on, or transited through, the territory of Montenegro (Art. 3).

Montenegro shall also readmit former nationals of the Socialist Federal Republic of Yugoslavia who have acquired no other nationality and whose place of birth and place of permanent residence on 27 April 1992, was in the territory of Montenegro (Art. 3 (3)).

EU Member States shall readmit any person illegally in the territory of Montenegro. The conditions that need to be fulfilled for readmission in the EU correspond to those that need to be fulfilled for Montenegro to readmit persons illegally in the EU (Art. 4 (1–3) and Art. 5 (1–2)).

Under the Agreement, Montenegro and EU Member States have assumed also the obligation to restrict the transit of third-country nationals or stateless persons to cases where such persons cannot be returned to the State of destination directly and at the request of the other Party to the Agreement if the onward journey in possible other States of transit and the readmission by the State of destination is assured (Art. 13 (1–2)). Article 13 (3), however, lists the conditions under which they may refuse transit.

This Agreement explicitly sets out that it shall be without prejudice to the rights, obligations and responsibilities arising from International Law and, in particular, from: the Convention on the Status of Refugees and the Protocol on the Status of Refugees, the international conventions determining the State responsible for examining applications for asylum lodged, the ECHR, the Convention of against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, international conventions on extradition, multilateral international conventions and agreements on the readmission of foreign nationals (Art. 17).

Economic, Social and Cultural Rights

International Agreements

International Covenant on Economic, Social and Cultural Rights

Montenegro is bound by International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by SFRY in 1971.¹⁴⁸⁴ The rights provided herein, unlike civil and political rights, are more of a program nature. The state is not obliged to provide them fully, but to constantly improve the conditions for their respect. However, when taking these measures, it can not act discriminatory (Art. 2(2) ICESCR).¹⁴⁸⁵

Based on the ICESCR, the Committee on Economic, Social and Cultural Rights has been established, which is responsible for supervising the implementation of this agreement. The States Parties shall submit to the Committee a report on its implementation every four years, and Montenegro should have already submitted a first report as an independent state.

Optional Protocol to the ICESCR, signed by Montenegro on 25 September 2009, will enable the Committee to decide on individual complaints from individuals who complain of a violation by the state. The Protocol will enter into force once ratified (confirmed) by 10 states. So far it has been signed by a total of 36 countries, but in 2010 only three countries joined ratification: Ecuador, Mongolia and Spain.¹⁴⁸⁶

This international way of protection of economic, social and cultural rights will be particularly valuable given the limited jurisdiction of the Constitutional Court of Montenegro, which can only revoke decisions of state bodies, but can not replace missing document with its decision and immediately order e.g. access to water, food, shelter, etc, to be ensured. It should also be borne in mind that the Constitution of Montenegro, as well as laws, do not provided some of the economic, social and cultural rights guaranteed under the ICESCR, such as the right to housing, protection from hunger, and the like.

¹⁴⁸⁴ *Sl. list SFRJ*, 7/71.

¹⁴⁸⁵ It is only allowed for developing countries to resort to discrimination against foreign nationals, but only in relation to the enjoyment of economic rights (right to work and just conditions of work, trade unions, strike, etc.). See Art. 2(3) ICESCR.

¹⁴⁸⁶ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en

Revised European Social Charter

European Social Charter (ESC), the main instrument of protection of social and economic rights within the Council of Europe,¹⁴⁸⁷ establishes the social and economic rights related to the existential questions of everyday life of citizens, such as housing, employment and labor relations, health and education, social care and enjoyment of these rights in a lawful manner, without discrimination.

Ratification of the Revised European Social Charter Act (*Sl. list CG – Međunarodni ugovori*, 6/2009), in terms of content, adopted most of the text of the Charter, with reservations to certain articles. The Act adopted minimum obligations under the Charter in respect of all its articles and paragraphs that need to be confirmed. The Act provides that Montenegro will not ratify certain provisions of the Charter of the Art. 2, concerning the right to just conditions of work, Art. 4, concerning the right to just compensation, Art. 7, concerning the protection of children and youth, Art. 10, concerning the right to vocational training, Art. 19, concerning the right of migrant workers and their families to protection and assistance, and Art. 26, concerning the right to decent treatment at work. In addition, the Act did not endorse Art. 18 of the Charter which protects the right to gainful employment in the territory of the other Contracting Party, Art. 21 regulating the right to information and consultation, Art. 22 regulating the right to participate in decisions concerning working conditions and working environment and their improvement, Art. 25 on the right of workers to protection of their claims in the event of insolvency of their employer, Art. 27, the duty to take into account the needs of employees who have a responsibility to family members in relation to conditions of employment and social security, and to develop or improve services in the field of child care or other forms of child care, Art. 30 regulating the right of workers to protection against poverty and social exclusion and Art. 31 regulating the right to housing.¹⁴⁸⁸

It is unclear why the ratification of all these provisions is rejected, bearing in mind that these rights are mostly provided for in Montenegrin laws.

The greatest shortcoming of the ratification is the fact that Montenegro has not adopted the right to submit collective applications to the European Committee of Social Rights, which is a very effective form of international legal protection of the rights envisaged by the Charter.

¹⁴⁸⁷ The Charter was adopted in 1961, entered into force in 1965, and revised in 1996.

¹⁴⁸⁸ Table with an overview of adopted provisions is available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRev_en.pdf.

Right to Work

Article 6, ICESCR:

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 1, ESC:

With a view to ensuring the effective exercise of the right to work, the Parties undertake:

- 1 to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
- 2 to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
- 3 to establish or maintain free employment services for all workers;
- 4 to provide or promote appropriate vocational guidance, training and rehabilitation

Article 24, ESC:

With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

- a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;
- b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body.

General

According to the Committee for Economic, Social and Cultural Rights (CESCR), the right to work should not be understood as an absolute and unconditional right to obtain employment, but the state's obligation to progressively ensure full employment.¹⁴⁸⁹ This right entails the establishment of civil employment services and training programs which should help in employment.

Montenegro is a member of the International Labor Organization and a signatory of 71 conventions adopted under the auspices of the ILO, including the Employment Policy Convention (No. 122)¹⁴⁹⁰ and Convention No. 111 Concerning Discrimination in Employment and Occupation.¹⁴⁹¹ Montenegro in December 2009 ratified the European Social Charter (Revised), with which it is to align its regulations and practice.¹⁴⁹²

Under Article 62 of the Constitution of Montenegro, everyone shall have the right to work, to free choice of occupation and employment, to fair and human working conditions and to protection during unemployment. Article 63 of the Constitution prohibits forced labour.¹⁴⁹³

Apart from the Constitution, labour law is also governed by the following regulations: the General Collective Agreement (*Sl. list CG*, 01/04, latest amendments published in issue 65/10), the Labour Act (*Sl. list CG*, 49/2008, 26/2009), the Employment and Unemployment Insurance Act (*Sl. list CG*, 14/2010), the Act on the Employment and Work of Aliens (*Sl. list CG*, 22/2008), the Aliens Act (*Sl. list CG*, 82/2008 and 72/2009), the Act on the Professional Rehabilitation and Employment of Persons with Disabilities (*Sl. list CG*, 49/2008), the Civil Servants and State Employees Act (*Sl. list CG*, 5 0/2008 and 86/2009), the Act on Remuneration of Civil Servants and State Employees (*Sl. list RCG* 27/04, *Sl. list CG*, 17/07, 27/08), the Social Council Act (*Sl. list CG*, 16/2007), the Peaceful Resolution of Labour Disputes Act (*Sl. list CG* 16/2007), the Labour Fund Act (*Sl. list CG*, 88/2009), the Decree on the Realisation of Rights by Displaced Persons from the Former Yugoslav Republics and Internally Displaced Persons from Kosovo Residing in Montenegro (*Sl. list CG*, 45/2010).

The Government endorsed the Draft Act Amending the Labour Act on 31 March 2011 with a view to aligning it with European law and eliminating

¹⁴⁸⁹ CESCR General Comment No. 18, Right to Work, 24 November 2005, UN doc. E/C.12/GC/18. paragraph 6

¹⁴⁹⁰ *Sl. list SFRJ* 34/71.

¹⁴⁹¹ *Sl. list FNRJ (Dodatak)* 3/61.

¹⁴⁹² See the interpretation of the ESC in the *Digest of The Case Law of The European Committee of Social Rights*, a CoE document of 1 September 2008: http://www.coe.int/t/dghl/monitoring/socialcharter/digest/digestindex_EN.asp

¹⁴⁹³ More on what is considered forced labour in chapter Prohibition of Slavery and Forced Labour, p. 190.

some of the inconsistencies.¹⁴⁹⁴ The endorsed draft amendments, however, did not include those proposed by a Working Group established by the Social Council, comprising representatives of trade unions, employers, the Government and the University of Montenegro.¹⁴⁹⁵ This prompted the protests of trade unions and the Government was forced to open a second round of a social dialogue on the text of the amendments at the level of a broader Social Council working group, which was completed in mid-May 2011.¹⁴⁹⁶ After the working group agreed on amendments to its Draft Act, the Government endorsed a new Draft Act Amending the Labour Act on 23 June 2011.

Attainment of Full Employment

According to Article 1 of the ESC, the existence of unemployment does not constitute a violation of the Charter but the state is under the obligation to invest adequate efforts to eliminate it in the light of the economic situation and the level of unemployment.¹⁴⁹⁷ The high unemployment level and inefficient protection of work-related rights are among the chief reasons why an increasing number of people are forced to look for jobs in the informal sector, the so-called grey economy, where they do not enjoy any protection. In its General Comment No. 18, the CESCR underlined that states must take the requisite measures, legislative or otherwise, to reduce to the fullest extent possible the number of workers outside the formal economy, who as a result of that situation have no protection. These measures would compel employers to respect labour legislation and declare their employees, thus enabling the latter to enjoy all the rights of workers.¹⁴⁹⁸ This could, for instance, be achieved by laying down in the new Labour Act that employers shall as a rule conclude permanent contracts with their workers. The law could also envisage an increase in inspections of the employers, et al.

In accordance with its obligation to progressively take measures to attain full employment, Montenegro adopted the National Strategy for Employment and Human Resource Development for the 2007–2011 period, which aimed at increasing the level and quality of employment in Montenegro by improving the conditions for the opening of new jobs and encouraging investments in the development of human capital. The Strategy set the following goals (indicators of success), which have not been achieved: minimum 60% general employment rate; minimum 50% employment rate of women; minimum 32% employment rate of older workers; unemployment rate below 10%; provision of every unemployed person with the opportunity to start afresh within less

¹⁴⁹⁴ “Government Undermines Social Dialogue”, *Dan*, 2 April 2011.

¹⁴⁹⁵ *Enactment on Achieved Consensus of Working Group Members* of 2 February 2011.

¹⁴⁹⁶ “Rereading the Labour Act”, *Vijesti*, 27 April 2011.

¹⁴⁹⁷ *Digest of The Case Law of The European Committee of Social Rights*, p. 19.

¹⁴⁹⁸ See paragraph 10 of CESCR’s General Comment No 18.

than six months (young people) i.e. 12 months (adults) from the day they lost their jobs in the form of training, re-training, on the job training, employment or other adult employment measures combined with ongoing assistance in job-seeking; coverage of at least 50% long-term unemployed persons by active measures in the form of training, re-training, on the job training, employment or other employment measures combined with ongoing assistance in job-seeking; increase in the percentage of 22 year olds who have graduated from high school; reduction of the drop out rate; involvement of at least 10% of the active population in lifelong learning; provision of greater access to day care for children between 1 and 3 years of age and day care for at least 30% of preschool children (3–5 year olds). Measures aimed at taking care of children of school age have not been envisaged, although children spend only 3–4 hours a day in primary schools in Montenegro during first few school years.

Unemployment in Montenegro. – The global economic crisis also hit Montenegro, leading to a drop in labour demand, fewer employment opportunities, lesser recruitment of foreign workers and a greater unemployment rate of college graduates in Montenegro. On 31 December 2010, 32,026 were jobless (of whom 14,353 or 44.81% were women) and the unemployment rate stood at 12.12%.¹⁴⁹⁹

The number of employed workers in Montenegro fell by 14,589 from January to November 2010, i.e. 8.5% of the jobs were closed in Montenegro in 11 months.¹⁵⁰⁰ The decrease is ascribed to the decline in economic activity and lay offs of redundant workers by the Podgorica Aluminum Plant (KAP), the Nikšić Bauxite Mines, the Montenegrin Telekom, the Nikšić Foundry, Podgorica-based *Duvankomerc*, the Podgorica Dairy (*Mljekara*), the Podgorica Railway Infrastructure, the daily *Pobjeda*. A total of 39,168 jobs were advertised by the Employment Bureau in 2010¹⁵⁰¹, i.e. 8,383 or 17.63% less than in 2009, when 47,551 jobs were advertised.¹⁵⁰²

One of the reasons for the rising unemployment rate lies in the lay off of workers by the leading industrial companies: the KAP, the Nikšić Bauxite Mines and Ironworks. Over 600 workers left the KAP in 2009, while over 840 miners lost their jobs in the Nikšić mines; another 979 workers will leave the Nikšić Ironworks (*Željezara*) in 2011.¹⁵⁰³

Employers prefer hiring unqualified and semi-qualified workers who cost them less. Jobless workers with college degrees accounted for 5,206 (16.26%) of

¹⁴⁹⁹ The rate stood at 11.43% on 31 December 2009 (when 30,169 people were unemployed, with women accounting for 12,763 or 45.95%). The highest unemployment rate, of 32.7%, was recorded in July 2000. Employment Bureau of Montenegro 2010 Report, <http://www.zzzcg.org/shared/dokumenti/Izvjestaji/Godisnji%202010%20SZZ.pdf>

¹⁵⁰⁰ *Vijesti*, 5 January 2011, p. 5.

¹⁵⁰¹ Montenegrin Employment Bureau 2010 Annual Report: <http://www.zzzcg.org/shared/dokumenti/Izvjestaji/Godisnji%202010%20SZZ.pdf>

¹⁵⁰² *Ibid.*

¹⁵⁰³ “Dožić Returning to Aluminum Complex”, *Dan*, 16 March 2011; “979 Workers Apply for Redundancy”, *Dan*, 18 May 2011.

the unemployed at the end of 2010, or 700 more than at the end of 2009 (when they accounted for 4,580 or 15.18%).¹⁵⁰⁴ The under 25 category accounted for 5,298 or 16.54% of the unemployed at the end of 2010, i.e. 150 less than at the end of 2009. Fixed-term contracts predominate because they allow employers to rid themselves of the unnecessary workers more easily and cheaply.¹⁵⁰⁵

The only sectors that saw a rise in employment were financial intermediation, real estate related activities and the state administration. Although the authorities had announced that the state administration would downsize its staff, the number of workers in it rose by nearly 400 in 2010, from 18,686 to 19,037.¹⁵⁰⁶

Free Employment Services. – The Employment and Unemployment Insurance Act (*Sl. list CG*, 14/2010) governs the work of the Employment Bureau and Employment Agency, the rights and duties of the unemployed and employers, the employment policy, unemployment insurance and unemployment benefits¹⁵⁰⁷ and other employment-related issues. The Labour and Social Welfare Ministry is charged with supervising the enforcement of the Act and the subsidiary legislation and the work of the Employment Bureau and Agency.

The European Commission in November 2010 singled out as areas of concern the substantial level of informal employment (in the black market), the increasing segmentation of the labour market, with increased usage of fixed-term contracts and the persisting skills mismatch. It noted that developing reliable data and statistics remained an outstanding issue in several areas, in particular for labour market analysis. It observed that the employment policy consisted mainly of a number of active labour market measures (e.g. co-financing of apprentices, training, retraining and credits for self-employment), which up to 2009 took more than 50% of the total budget for labour market measures and assessed that the training programmes seemed under-utilised and that cooperation between the employment offices and the training institutions should be strengthened.¹⁵⁰⁸

For specific measures for employment of persons with disabilities, see the Prohibition of Discrimination, p. 94.

Labour Act and Draft Amendments

The Labour Act adopted in August 2008 equated fixed-term and permanent employment contracts (most employment contracts until then had

¹⁵⁰⁴ Montenegrin Employment Bureau 2010 Annual Report, p. 3.

¹⁵⁰⁵ According to the Employment Bureau, 39,168 jobs were advertised in 2010; 4,785 were permanent and 34,383 fixed-term contracts (*Dan*, 5 January 2011, p. 11; *Pobjeda*, 9 January 2011, p. 10).

¹⁵⁰⁶ *Vijesti*, 5 January 2011, p. 5.

¹⁵⁰⁷ More on unemployment benefits in the chapter on the Right to Social Security, p. 514..

¹⁵⁰⁸ Analytical Report accompanying the Commission Opinion on Montenegro's application for membership of the European Union, 9 November 2010, 3.19: Chapter 19, *Social Policy and Employment*.

been permanent), simplified the dismissal of staff made redundant after the restructuring of companies, introduced the institute of protection of workers in case their companies go bankrupt or are liquidated and laid down the procedure for claiming funds from the Labour Fund, introduced the institute of minimum wage, simplified the disciplinary proceedings for work-related violations. The Act allowed for the pluralism of representative employers' organisations but not for the pluralism of representative trade unions¹⁵⁰⁹, which was provided for by the adoption of the Act on the Representativity of Trade Unions (*Sl. list CG*, 26/2010) in May 2010.

The Act introduces the possibility of amending the employment contract and adopting an annex in which the contract terms and conditions are defined and specified. As opposed to the prior practice, when only employers were able to amend the contract terms and conditions, the 2008 Labour Act allows both the workers and the employers to propose an amendment to the contracted working conditions in an annex to the contract, which, if both parties agree, constitutes an integral part of the employment contract. The law specifies when the contract may be amended: in case of reassignment to another appropriate job if so required by the work process, reassignment to another job with the same employer if the employer's activities involve work outside the employer's headquarters or facilities, change in the elements for setting the basic wage, performance, compensation of wages, increase in wages and other incomes, duration of the daily and weekly working hours, breaks, et alt. (Art. 40). However, in the event the other party does not accept the amendments proposed in the annex, the employment contract may be unilaterally broken off only in the event the proposal referred to reassignment to another appropriate job, but not to other elements of the employment contract. Employers, however, have frequently been abusing this institute to unilaterally break off permanent employment contracts.¹⁵¹⁰

As far as legal protection is concerned, a worker who believes s/he has been denied a work-related right or that such a right has been violated may complain to the labour inspectorate¹⁵¹¹ (Art. 122), initiate a dispute before the competent court (Art. 120) or seek the arbitration of the disputed issues together with the employer (Art. 121). The Act also lays down that there shall be no statute of limitations on work-related financial claims (Art. 123). Individual and collective labour disputes may also be resolved by applying the provisions of the Peaceful Resolution of Labour Disputes Act (*Sl. list CG*

¹⁵⁰⁹ In terms of this Act, a representative trade union is the one with the greatest number of members and is as such registered with the ministry (Art. 155).

¹⁵¹⁰ Information obtained from Secretary General of the Union of Free Trade Unions of Montenegro Srđa Keković, March 2011.

¹⁵¹¹ Labour Inspectorate – Podgorica (Danilovgrad, Tuzi, Golubovci, Cetinje); Tel/fax: 020 – 655 – 513, 020 – 655 – 514; Address: Atinska Str. 42; The Inspectorate has field offices in Cetinje, Nikšić, Berane, Rožaje, Bijelo Polje, Pljevlja, Budva, Bar and Herceg-Novi (Labour and Social Welfare Ministry website: <http://www.minradiss.gov.me/vodici/info/98619/INSPEKCIJA-RADA.htm>).

16/07), pursuant to which the Agency for the Peaceful Resolution of Disputes has been established (more on the Agency below).

Permanent and fixed-term employment contracts. – One of the key criticisms of the Government Draft voiced by the trade unions was that it did not envisage permanent employment contracts as a rule and the conclusion of fixed-term employment contracts for a maximum of two years (with the exception of seasonal jobs, standing in for an absent worker and work on projects, in which cases such contracts may be concluded for periods exceeding two years). According to the Labour and Social Welfare Ministry data, around 90% contracts concluded since the Labour Act was adopted in 2008 were fixed-term, while only 10% were permanent contracts.¹⁵¹² The trade unions are of the view that fixed-term contracts cause the economic and social instability of the workers, expose them to stress caused by the fear that they will lose their jobs, prevent them from organising in trade unions and put them in a submissive position vis-à-vis their employers.¹⁵¹³ The European Commission, too, voiced concern over the greater usage of fixed-term contracts in its November 2010 report.¹⁵¹⁴

Mobbing. – The draft amendments further elaborate the prohibition of mobbing (Art. 8a), given that the Labour Act only prohibits harassment and sexual harassment (Art. 8). Article 8a prohibits all forms of abuse at work (mobbing), i.e. all conduct towards a worker or group of workers of an employer, which is repetitive, and is aimed at or constitutes a violation of the dignity, reputation, personal or professional integrity, status of the worker and causes fear or creates a hostile, humiliating or abusive environment, undermines the working conditions or results in the isolation of the worker or induces him or her to break off the employment contract at his/her own initiative. Furthermore, an employer may terminate the employment of a worker established to have engaged in mobbing. The amendments envisage the adoption of a separate law specifying the measures for preventing abuse, the procedure for the protection of workers exposed to abuse and other issues relevant to the prevention and protection from work-related abuse.

According to the results of the Mobbing in Montenegro survey conducted by the Social Council in March 2010, around 7.4% of the workers in Montenegro have been harassed at work, while over 27% recognised that their co-workers had been victims of such harassment. The survey covered 503 respondents, 53 of whom were employers.¹⁵¹⁵ No data have yet been made

¹⁵¹² “Law Turning Workers into Vassals”, interview with USSCG Secretary General on portal Analitika, 4 May 2011.

¹⁵¹³ *Ibid.*

¹⁵¹⁴ Analytical Report accompanying the Commission Opinion on Montenegro’s application for membership of the European Union, 9 November 2010, 3.19: Chapter 19, *Social Policy and Employment*.

¹⁵¹⁵ Available at the Labour and Social Welfare Ministry website in Montenegro: www.mrs.gov.me/biblioteka/izvjestaji

public about proceedings over mobbing. HRA is aware of one lawsuit filed with the Podgorica Basic Court in late May 2011.

Equal rights to parental leave. – Under the amendments, both parents are entitled to parental leave, pursuant to their mutual agreement. Under the current regulations (Art. 111(6) of the Labour Act), fathers are entitled to parental leave only if the mother had abandoned the child, died or is prevented from taking leave for other justified reasons (e.g. is serving a prison sentence, suffers from a grave illness, et al).

The abolition of service contracts. – The amendments abolish service contracts between employers and workers, which employers have often used to avoid paying the mandatory social insurance for the workers or redundancies in case the workers were dismissed through no fault of their own, etc.

Rights of Workers in Case of Termination of Employment

Apart from the general protection of workers in case of termination of employment (Art. 24), which comprises the right of all workers not to have their employment terminated without a valid reason connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service, the ESC also entitles workers whose employment terminated without a valid reason to adequate compensation or other appropriate relief and the right to appeal to an impartial body, as well as the right to protection of their claims in the event of the insolvency of their employer (Art. 25).

ILO Termination of Employment Convention No. 158 (1982) defines the lawfulness of dismissal and imposes in Article 4 the obligation to provide a valid reason for such termination and the right to compensation in case of unjustified dismissal (Art. 4).

The Labour Act comprises provisions aiming to provide particular protection to specific groups and thus prohibits dismissal of pregnant women, women on maternity leave, on leave to care for their child suffering from grave developmental difficulties, single parents with children under seven or suffering from a grave disability and the protection of trade union and workers' representatives during engagement in union activities and six months upon termination of engagement in such activities provided that they have not violated the law or the collective agreement. This is in keeping with both the principles of freedom of union activities and ILO Convention No. 135 on Workers' Representatives.¹⁵¹⁶ More on the protection of the rights of union representatives in practice in the chapter on Trade Union Freedoms, p. 503.

¹⁵¹⁶ *Sl. list SFRJ – Međunarodni ugovori*, 14/82.

Proposed Amendments to the Labour Act of June 2011 provide special protection to employees who report corruption against dismissal, suspension, limitation any employment rights, as well as revealing the identity to unauthorized persons (Art. 102a).

The Labour Act provides that an employer can terminate the employment contract only for the listed “legitimate reasons” (Art. 143), and Draft Act on Amendments to the Labour Act specifically states the reasons which can not be considered justified. In some cases the employer is obliged to pre-warn the employee in writing about the possible dismissal (Art. 143, 143(a)). The Draft amendments to the Labour Act provide that in the event of any dispute regarding the termination of employment, the burden of proof justifying the reasons for termination of employment is borne by the employer (Article 143 (c)).

However, the Government has proposed the amendment to Article 143 LA, according to which the employer can unilaterally terminate the contract with the employee in all cases “of non-compliance with duties or misconduct”, unilaterally prescribed by the employer by his own act, without taking disciplinary action, or without the possibility that an employee’s representative (union trustee or attorney) presents the defense in the procedure before the employer. In all these cases, in order to unilaterally terminate the employment for violation of duties or misconduct, it is sufficient that the employer require the statement of the employee or union within 5 days before delivery of the contract termination. On the other hand, the ILO Convention no. 158 specifies in Article 7 that “employment is not terminated for reasons related to the employee’s behavior or work before s/he gets an opportunity to defend against the allegations expressed and contained, unless it is reasonable not to expect the employer to give him/her this opportunity”, and the adopted decision is not in accordance with this Convention.

On legal protection see the Legal Protection below.

The safety of jobs is additionally jeopardised by the ongoing transformation of the economy and transition to market economy in Montenegro. The CESCR underlined the obligation of states to take adequate measures to ensure that privatisation measures do not undermine workers’ rights.¹⁵¹⁷

A set of provisions in the Labour Act is devoted to the termination of employment against the workers’ will due to redundancy caused by technological, economic or organisational changes within the companies, i.e. the rights of workers whose companies went bankrupt. It specifically guarantees the right of the worker to be paid the outstanding claims from the employer against whom bankruptcy proceedings have been instituted. Under Article 98 of the Labour Act, outstanding claims shall comprise: wage and wage compensation for the period of absence from work due to temporary inability to work in accordance with the regulations on health insurance which the

¹⁵¹⁷ See paragraph 25 Of CESCR General Comment No. 18.

employer was obliged to pay in accordance with this law; compensation of damages for unused annual leave through the fault of the employer in the calendar year in which the bankruptcy proceedings were initiated if the worker had the right prior to the launch of the bankruptcy proceedings; retirement bonuses in the calendar year in which the bankruptcy proceedings were initiated if the worker fulfilled the retirement requirements prior to the initiation of the bankruptcy proceedings; compensation of damages for an injury at work or occupational disease pursuant to a court decision rendered in the calendar year in which the bankruptcy proceedings were initiated in the event the decision became final prior to the initiation of the bankruptcy proceedings. A worker is entitled to the payment of his/her mandatory social insurance contributions pursuant to the regulations on mandatory social insurance. See the Right to Just and Favourable Conditions of Work on p. 490, which gives an overview of the problems in exercising these rights in practice.

The Labour Fund

The Labour Fund is tasked with realising the right of payment of outstanding claims of workers, whose employment was terminated due to the bankruptcy of their employers. The Labour Fund began working in January 2010. Pursuant to the Labour Fund Act (*Sl. list CG 88/2009*), the proceedings for realising this right are initiated at the request of the workers or the bankruptcy manager submitted to the Fund Management Board within 30 days from the day the final decision establishing the right to the claim has been submitted.¹⁵¹⁸

The Labour Fund received 21,526 requests from “victims of transition”, who had been dismissed through no fault of their own in the past 20 years and had not received any redress, until 8 January 2011.¹⁵¹⁹ The Fund reviewed 1,876 of the requests pursuant to the legally prescribed procedure and upheld 1,613 of them and rendered decisions on the payment of a total of 3.11 million Euros to the claimants. The Fund dismissed 260 requests as groundless and three requests because they were submitted by persons who were ineligible to submit them. Of the 1,613 upheld requests, 478 were enforced and 920,000 Euros were paid to the claimants in 2010.¹⁵²⁰

The unemployment benefits paid out under specific conditions by the Montenegrin Employment Bureau stand at 57 Euros per capita a month.¹⁵²¹

¹⁵¹⁸ The Labour Fund is headquartered in Jovana Tomaševića Str b.b, Podgorica and receives clients from 10:00 to 14:00; The Fund’s telephone numbers are: 020/ 246 219, 482 587, 247 136.

¹⁵¹⁹ Persons dismissed prior to the enforcement of the 2008 Labour Act. The Act laid down that all such requests were to be filed by 8 January 2011.

¹⁵²⁰ *Vijesti*, 6 February 2011, p. 5.

¹⁵²¹ More in Right to Social Security, p. 514.

Prohibition of Discrimination

Montenegro acceded by succession ILO Convention No. 111 Concerning Discrimination in Employment and Occupation, ILO Convention No 122 on Employment Policy Convention, ILO Convention No. 19 Concerning Equality of Treatment (Accident Compensation), ILO Convention No. 100 Concerning Equal Remuneration and ILO Convention No. 156 Concerning Workers with Family Responsibilities.

According to the CESCER, states have the fundamental and directly applicable obligation under the ICESCR to ensure that there is no discrimination in employment, direct, indirect or systemic, and to ensure equal protection related to employment, at all ages, from primary education to retirement.¹⁵²² The ESC explicitly lays down the right to right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex ((Art. 20) and the right of workers with family responsibilities to equal opportunities and equal treatment (Art. 27).

The Constitution of Montenegro prohibits any direct or indirect discrimination on any grounds (Art. 8).

The Labour Act defines in detail discrimination (direct, indirect, positive) and harassment on various grounds: gender, language, race, religion, skin colour, age, pregnancy, health condition, disability, marital status, family obligations, sexual orientation, political or other convictions, social background, financial status, membership of political and trade union organisations or other personal features (Art. 5) The Act is the first to prohibit sexual harassment, which is defined as any verbal or non-verbal conduct violating the dignity of a job-seeker or worker in the field of sexual life and causes fear or humiliation (Art. 8).

The Labour Act explicitly prohibits discriminatory conduct particularly with respect to employment and recruitment criteria, working conditions and all work-related rights, education, training and advanced professional training, promotion at work and in case of termination of employment. It also lays down that discriminatory provisions in employment contracts shall be null and void (Art. 7). Differentiation necessary for the performance of a specific job shall not be deemed discrimination. Paragraph 2 of Article 9 explicitly lays down the exception to the rule on the prohibition of discrimination in case of affirmative action towards specific categories. A worker or job-seeker may initiate civil proceedings if these provisions were violated (Art. 10).

Draft Act on Amendments to the Labour Act provides for a special provision that guarantees women and men equal pay for equal work.

The Anti-Discrimination Act (*Sl. list CG 46/10*) prohibits discrimination in general and discrimination in the field of work specifically. Every

¹⁵²² More on the prohibition of discrimination in employment in CESCER's General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural rights, Doc UN E/C.12/GC/20, 10 June 2009 and paragraph 32 of CESCER's General Comment No. 18.

employed person and every person engaged in work on any grounds shall enjoy protection from discrimination (Art. 16(1)). The Act emphasises that discrimination at work shall also entail the payment of different salaries for work of equal value to a person or group of persons on any of the prohibited grounds of discrimination (paragraph 2). The Act particularly emphasises that any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof where the personal feature of a person constitutes a real and decisive prerequisite for the performance of the job shall not be deemed to be discrimination shall not constitute discrimination if the purpose to be fulfilled is justified, and that measures of protection of specific categories of people, such as women, pregnant women, mothers of children under one, parents, minors, persons with disabilities and others shall not constitute discrimination (Art. 3).

The Anti-Discrimination Act prohibits mobbing, which it defines as conduct at the workplace involving systematic, prolonged physical abuse or humiliation of a person by one or more persons involving insults, disparagement, harassment or other activities putting that person in an unequal position and aiming to undermine his/her reputation, honour, dignity and integrity and which may incur adverse mental, psycho-somatic or social consequences or bring into question the professional future of the person who is the victim of mobbing (Art. 8).

The Act also prohibits discrimination of persons with disabilities with respect to the denial of their right to work and labour rights in accordance with the needs of such persons (Art. 18). The Act provides for several forms of protection from discrimination, notably: filing a complaint to the Human Rights and Freedoms Protector, initiating a court dispute and filing a report to the labour inspectorate (more under Prohibition of Discrimination, p. 94.)

Inspectorial supervision performed by the Labour inspectorate should not be disregarded as a form of protection from discrimination. Cases of discrimination may be anonymously reported to it at the following phone numbers 020/655–513 and 020/655–514.¹⁵²³ The Anti-Discrimination Act emphasises that *no one may suffer adverse consequences* for reporting a case of discrimination, giving a deposition to a competent authority or offering evidence in proceedings on discrimination (Art. 4)

Cases of discrimination of trade union activists are presented on page. 503. An overview of the discrimination case initiated in 2009 by Podgorica City Assembly worker Marijana Mugoša, who has been prohibited from coming to work with her service dog, is available on p. 102. Roma are particularly exposed to discrimination with respect to employment, see page 396 (Roma, Ashkali and Egyptians). For more on discrimination against women vis-à-vis men with respect to equal pay for work of equal value, see page. 105 (Gender Equality).

¹⁵²³ These telephone numbers were operational on 1 June 2011.

There has been a lot of talk about discrimination in recruitment on grounds of political affiliation, particularly in local self-governments in Montenegro. HRA, however, is unaware that discrimination on these grounds has ever been prosecuted.

The Montenegrin Assembly in 2008 adopted the Act on the Employment and Work of Aliens (*Sl. list CG*, 22/2008), which replaced the 2004 law by the same name and the Decree on the Employment of Non-Resident Natural Persons¹⁵²⁴. Under the 2008 Act, an alien may be employed in Montenegro if s/he has a work permit, permanent or temporary residence approval, an employment contract and has been registered by the employer with the competent authority. The Act differentiates between personal work permits, employment permits and work permits. Employers who violate the Act shall be punished by a fine ranging from 20 to 300 times the minimum wage in Montenegro.

The Employment and Unemployment Insurance Act also enshrines the principles of prohibition of discrimination, impartiality of the recruiters, gender equality and allows for affirmative action to facilitate the employment of difficult-to-employ persons (Art. 5).

Legal Protection

Employee who believes that his or her labour rights have been violated may contact, anonymously, Labour Inspection¹⁵²⁵, may initiate proceedings before a competent court, which must be urgently resolved, or may present disputed issues to arbitration, together with the employer (Art. 120–122 of the Labour Act). The Labour Act also stipulates that labour-based monetary claims can not become obsolete (Art. 123).

In the event of a dismissal, when it is obvious that the right of a worker has been violated and the worker has launched a labour dispute, the worker may within a fortnight ask the Labour Inspectorate to render a decision staying the enforcement of the employer's decision on dismissal until the court renders a final decision (Art. 122, Labour Act). The Labour Inspector has to render a decision thereof within a fortnight. The Act thus provides more efficient protection than the one the court may provide in the form of a temporary measure imposed within a labour dispute.

However, the practice has shown unduly delaying in labour disputes and inefficient handling of labour inspection.¹⁵²⁶

¹⁵²⁴ Decree on Employment of Non-Resident Natural Persons (*Sl. list RCG* 28/03)

¹⁵²⁵ Labour Inspection – Podgorica (Danilovgrad, Tuzi, Golubovci, Cetinje); Tel/fax: 020/655–513, 655– 514; Address: Atinska 42; The Inspection has regional offices in Cetinje, Nikšić, Berane, Rožaje, Bijelo Polje, Pljevlja, Budva, Bar and Herceg-Novi (Website of the Ministry of Labour and Social Welfare: <http://www.minradiss.gov.me/vodici/info/98619/INSPEKCIJA-RADA.htm>).

¹⁵²⁶ For more detail see Right to Fair Trial, p. 240. and Right to Trade Unions, p. 503–504..

Anti-discrimination Act provides for several forms of protection against discrimination in the form of submitting complaints to the Protector of Human Rights and Freedoms, initiating litigation and infringement procedure (for details see the Prohibition of discrimination, p. 85.). This Act points out that *no one may suffer adverse consequences* for reporting cases of discrimination, testifying before a competent authority or offering evidence in a proceeding which examines the case of discrimination (Article 4).

Agency for the Peaceful Resolution of Labour Disputes

The Peaceful Resolution of Labour Disputes Act envisages the establishment of the Agency for the Peaceful Resolution of Labour Disputes, a separate organisation with which a party may file a motion for the peaceful resolution of a labour dispute (Arts. 10–12 and 50). Parties may file motions for the resolution of their labour disputes individually or together (Art. 25). Parties, which file a motion together, are entitled to themselves select an arbitrator-conciliator from the list and then proceed to present their suggestions and evidence to the arbiter and are entitled to propose that the arbiter hear their expert witnesses. The parties are obliged to abide by the settlement proposed by the arbiter.¹⁵²⁷ Under the November 2010 amendments to the General Collective Agreement (GCA), any contracting party may partly or entirely break off the GCA prior to its date of expiry and shall notify the other contracting parties thereof and forward them an explanation three months in advance; the party is also under obligation to forward to the other contracting parties the new General Collective Agreement or the part it is breaking off. In such cases, the contracting parties shall immediately open negotiations and, in the event they fail to reach an agreement within two months, they shall entrust the settlement of the disputed issues to the Agency for the Peaceful Resolution of Labour Disputes (collective labour dispute). This may contribute to the more efficient achievement of a social dialogue consensus.

The Agency was set up in April 2010 and in one year received around 150 motions for the peaceful settlement of labour disputes, comprising around 6,500 parties.¹⁵²⁸ A high percentage of the proceedings were discontinued because the opposing parties refused to resolve the dispute in this manner.¹⁵²⁹ Reasons for initiating the individual labour disputes include unlawful dismissal, non-payment of mandatory social insurance contributions, denial of the right to annual leave, non-payment of holiday bonuses, redundancy and overtime dues and work during religious or state holidays, as well as unlawful reassignment to another job. Collective labour disputes mostly regard non-abidance by the provisions of collective agreements, notably the

¹⁵²⁷ Unless the arbiter's decision is overturned in court (Art. 46).

¹⁵²⁸ "6,500 Workers Seeking Help", *Dan*, 11 May 2011; "Easier and Faster Resolution of Conflicts", *Pobjeda*, 11 May 2011.

¹⁵²⁹ *Ibid.* Data provided by Agency Director Zdenka Burzan.

non-payment of compensation for work in shifts, winter preserve bonuses and transportation fees.¹⁵³⁰

Right to Work of Displaced and Internally Displaced Persons

The Act Amending the Aliens Act provides for granting displaced and internally displaced persons permanent residence and thus the work permits they need to access the labour market. Under the amendments to the Act,¹⁵³¹ this category of persons, who still had this status the day the Act came into force, may be granted permanent residence within two years from that day, whereby they essentially lose the status of displaced or internally displaced persons. The Act also allows these persons, who do not have the valid travel documents they need in order to exercise the right to permanent residence, to be granted temporary residence until they obtain the valid travel document, within three years at most from the day they were granted temporary residence.

In order to regulate this transition period until the permanent resolution of their status and provide such persons with free access to the labour market and the opportunity to exercise their labour rights, the Government on 8 July 2010 adopted a Decree on the Exercise of Rights by Displaced Persons from Former Yugoslav Republics and Internally Displaced Persons from Kosovo Residing in Montenegro.¹⁵³²

Under Article 1 of the Decree, these persons are entitled to the same rights as Montenegrin citizens to work and employment and to unemployment insurance rights unless a separate law lists Montenegrin citizenship as a job requirement; they are also entitled to education, advanced professional training and recognition of their diplomas and certificates; to social and child protection, health care and health insurance and to pension and disability insurance.

Once their status is resolved in terms of the Aliens Act, these persons will be able to apply for personal work permits with the Employment Bureau.¹⁵³³ Such permits are not subject to quota restrictions set by the government and provide them with free access to the labour market, i.e. the opportunity to find employment like all Montenegrin nationals, unless Montenegrin citizenship is a job requirement.

¹⁵³⁰ *Ibid.*

¹⁵³¹ Article 105, Act Amending the Aliens Act (*Sl.list CG* 72/09)

¹⁵³² Decree on the Exercise of Rights by Displaced Persons from Former Yugoslav Republics and Internally Displaced Persons from Kosovo Residing in Montenegro (*Sl. list CG* 45/2010)

¹⁵³³ Art. 17(2), Act on the Employment and Work of Aliens.

Right to Just and Favourable Conditions of Work

Article 7, ICESCR

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- a) Remuneration which provides all workers, as a minimum, with:
 - i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- b) Safe and healthy working conditions;
- c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays..

Fair Wages and Equal Remuneration for Work

Montenegro acceded by succession to the ILO conventions and recommendations, including, notably ILO Minimum Wage Fixing Convention (No. 131)¹⁵³⁴ and the ILO Equal Remuneration Convention (No. 100)¹⁵³⁵.

The Constitution guarantees that workers shall have the right to adequate remuneration (Art. 64(1)).

Under the Labour Act, adequate remuneration shall be set in accordance with the law, the collective agreement and the employment contract.

The institute of *minimum wage* is to ensure minimum social and financial security of the worst paid workers, particularly in the event of a disruption in business operations, when it is impossible to exercise the right to adequate remuneration. Minimum wages protect the most vulnerable categories of workers and also help combat grey economy and improve the tax and

¹⁵³⁴ *Sl. list FNRJ – Međunarodni ugovori*, 11/52

¹⁵³⁵ *Sl. list SFRJ – Međunarodni ugovori*, 14/82

contribution payment rates. The General Collective Agreement (GCA) was amended in 2010 and thus aligned with the Labour Act because it introduced the institute of accounting value of the coefficient to replace the “minimum cost of labour” and the setting of the minimum wage. Under the amended GCA, a minimum wage of a worker whose performance is standard and who works full time, an average of 176 hours a month, may not fall under 30% of the average wage in Montenegro in the previous six-month period. The amendments also introduce a new institute “the start part of the wage” which comprises the meal allowance and one twelfth of the holiday bonus. The gross accounting value of the coefficient (net minimum cost of labour, income tax and contributions paid by the worker) and the start part of the wage for an average of 176 hours a month, are set in a separate agreement negotiated by the representatives of the signatories of the collective agreement. The minimum hourly rate may be set as the accounting value of the coefficient in branch collective agreements and collective agreements with employers. The Agreement on the Gross Accounting Values of the Coefficient and the Start Parts of the Wages lays down that a gross wage shall be calculated in the following manner: the sum of the start part of the wage and co-efficient of complexity increased by years of service is multiplied by the accounting value of the coefficient.¹⁵³⁶ The gross accounting value of the coefficient is set at the monthly level and stands at minimum 90 Euros.

The minimum wage in Montenegro stood at 143.7 Euros in May 2011.¹⁵³⁷ According to Statistical Office data, the average (net) wage stood at 479 Euros in May 2011, i.e. it was 1.6% less than in May 2010 but actually equalled the average monthly wage in 2010 in general.¹⁵³⁸

Article 65 of the Constitution provides for the establishment of a Social Council, a body comprising the representatives of workers, employers and the Government, and tasked with harmonising the social status of workers through social dialogue. The Council comprises 11 representatives of the Government, 11 representatives of the representative Montenegrin trade union organisation and 11 representatives of the representative association of employers in Montenegro. After the adoption of the Act on the Representativity of Trade Unions in May 2010, two trade unions proved their representativity at the national level in November 2010 (the Union of Free Trade Unions of Montenegro – USSCG and the Confederation of Trade Unions of Montenegro – SSSCG), which gave rise to the need to amend the Social Council Act. The amendments to the Act were adopted in 2011.¹⁵³⁹ Under these amendments, if there is more than one representative trade union or

¹⁵³⁶ Agreement on Setting the Gross Accounting Values of the Coefficient and the Start Parts of the Wages (*Sl. list CG* 80/2010)

¹⁵³⁷ Thirty percent of the average wage, which, according to the Statistical Office (MON-STAT) stood at 479 Euros in May 2011, amounts to 143.7 Euros.

¹⁵³⁸ MONSTAT, <http://www.monstat.org/eng/novosti.php?id=202>

¹⁵³⁹ Act Amending the Social Council Act (*Sl. list CG* 20/2011)

employers' organisation, the seats allocated to their representatives in the Social Council shall be divided equally among them. If these seats cannot be equally divided among them, the extra seat will be granted the organisation with more trade union members i.e. workers. This solution is not in the spirit of pluralism, because it results in the monopoly of the organisation with more members, which particularly comes to the fore where union or employers' organisations are entitled to delegate only one representative to a tri-partite or multi-partite body (e.g. the Management Boards of the Pension and Disability Insurance Fund, Employment Bureau, Agency for the Peaceful Resolution of Labour Disputes, the RTV of Montenegro Council), where the same model of appointing representatives is applied. Pluralism would be ensured by increasing the number of seats for these representatives, or, if that is impossible, by applying the principle of rotation. USSCG representatives still were not represented in the Social Council but the Government was expected to verify the mandates of its five representatives in June 2011.

In practice, the greatest problem arising with respect to the right to fair and just working conditions regards the gross violations of the workers' rights to remuneration and regular payment of their social and health insurance contributions. In a number of cases, the state i.e. the local self-governments are the debtors – the employers, which gives rise to particular concern and constitutes the most severe violation of the right to work.¹⁵⁴⁰ For instance, the municipalities of Budva, Berane and Nikšić have not been paying their staff for months; Montenegrin judges have not received remuneration for overtime work on Saturdays for months either. Owners of private companies, some of whom are foreigners, have also reneged on their obligations laid down in the privatisation contracts (CAP, Nikšić Ironworks, Novi prvoborac). The rights of workers in commercial establishments and small and medium sized enterprises are particularly jeopardised because the vast majority of them are not union members and have no collective agreements with their employers. Some of the workers have sued the companies and the courts have rendered final and enforceable decisions upholding their claims, others have not although the claims are basically indisputable.

The case of the erstwhile industrial giant “Radoje Dakić” AD Podgorica is a good illustration of years-long violations of the workers' fundamental right to remuneration. The workers of this company, 1,650 of them, have been protesting for over two years now in an effort to be paid the money owed them after the Podgorica Basic Court rendered final and enforceable decisions upholding their claims. The state's inability to pay them 77 wage arrears amounting to around 37 million Euros, 7 million of which are interest

¹⁵⁴⁰ The state, as a rule, cannot justify itself by claiming it lacks funds for the enforcement of judgments in cases in which it is the direct debtor, i.e. when it holds a majority stake in the debtor (ECtHR judgments in the cases of *Jellic v. Bosnia-Herzegovina*, 2006, and *Kacapor and Others v Serbia*, 2008).

rates¹⁵⁴¹, led the workers to file an application with the ECtHR on 8 March 2010. This case is specific inasmuch as the state holds the majority stake in this share-holding company and is thus under the obligation to pay the workers-creditors, pursuant to the ECtHR case law in which it found Serbia in violation of the ECHR (*Kačapor and Others v. Serbia*, 2007). The state hopes it will be able to sell the real estate owned by the company in enforcement proceedings and pay the workers. However, several auctions scheduled by the Podgorica Basic Court by 1 June 2011 proved unsuccessful because no one was interested in buying the real estate.¹⁵⁴² Talks with potential buyers also failed because none of them were willing to offer an amount that would cover all the workers' claims and the accruing interest rates.

More on fair wages and lack of equal pay for work of the same value performed by men and women in chapter Gender Equality p. 105.

Promotion at Work

The Constitution of Montenegro states that the state shall guarantee the equality of men and women and develop the policy of equal opportunities (Art. 18), which must be interpreted as benefitting the affirmation of equality of men and women in promotion at work. The Labour Act explicitly prohibits all discrimination with respect to promotion at work (Art. 7(4)). Furthermore, Art. 225 of the Criminal Code lays down that whoever unlawfully denies or limits a citizen's right to free employment under equal conditions shall be fined or sentenced to maximum one year imprisonment.

Safety at Work

Montenegro acceded by succession ILO Convention No. 17 Concerning Workmen's Compensation (Accidents), Convention No. 18 Concerning Workmen's Compensation (Occupational Diseases), Convention No. 19 Concerning Equality of Treatment (Accident Compensation), Convention No. 81 Concerning Labour Inspection, Convention No. 121 Concerning Employment Injury Benefits, Convention No. 129 Concerning Labour Inspection (Agriculture), Convention No. 155 Concerning Occupational Safety and Health, Convention No. 161 Concerning Occupational Health Services Convention and Convention No. 167 Concerning Safety and Health in Construction.

The Constitution guarantees the protection of workers at work and special protection of young people, women and persons with disabilities (Art. 64 (paras. 3 and 4)).

¹⁵⁴¹ "Mugoša Was Busy", *Novosti*, 9 June 2011.

¹⁵⁴² "Left without Millions", *Dan*, 26 March 2011.

Under the Labour Act, a worker is entitled to adequate remuneration, safety and protection of his/her life and health at work, to professional training and other rights under the law and the collective agreement. A worker may not be assigned to a job or work overtime or at night in the event the competent health authority assesses that such work may adversely affect his/her health (Art. 102). Only workers fulfilling both the requirements in the company staff and job structure enactment and additional requirements regarding health, psycho-physical abilities and age may be assigned to jobs which carry greater risks of disability, occupational or other diseases. These jobs mostly comprise: jobs performed under ground or water, at high altitudes, in open space, at high noise or vibration levels, entail exposure to strong ionising or other irradiation, pollution, jobs involving work with poisons, carcinogenic substances, flammable and explosive material and other adverse conditions which pose a danger to the lives and health of the workers.

Under the Safety at Work Act (*Sl. list RCG*, 79/2004, *Sl. list CG*, 26/2010), every employer with over 20 workers is under the obligation to adopt a general enactment in accordance with the law which shall regulate in detail: the safety at work measures and their implementation, particularly the rights, duties and responsibilities of all staff, performance of professional duties regarding safety at work, medical check-ups of staff performing jobs in special working conditions and other staff, training of staff in occupational safety, use of personal protection equipment and tools and testing their knowledge, and other issues of relevance to safety at work.

Under the Act, employers shall adopt enactments assessing the risk every job poses and setting measures for eliminating these risks (Art. 15). Article 51 provides the employers with a three-year deadline from the day this Act comes into effect to adopt this enactment. However, according to USSCG's data, a negligible number of employers have adopted such enactments and hardly any of those who have not have been penalised.

The 2010 amendments to the Act place the employers under the obligation to ensure preventive safety at work measures, departing from the principle of risk avoidance; to identify unavoidable risks and eliminate them at the source by the application of contemporary technical solutions; adjust the work and jobs to the workers, particularly with respect to the layout of the workplaces, selection of the work tools and the work and production methods particularly with the view to avoiding monotonous work or work at a specific speed and reducing their impact on health; to replace dangerous technological processes, work tools and methods by harmless or less dangerous ones; to give advantage to collective over individual safety at work measures; provide the staff with adequate training and work instructions and notifications (Art. 13a). Pursuant to the Act, workers are entitled to select one or more of their representatives for safety at work issues, who may establish a staff Safety at Work Board, which must comprise at least one representative of

the employer. The election and work of the staff representatives on the Board and of the Board, the number of staff representatives within the company and their relationship with the trade union shall be regulated by a collective agreement with the employer. This norm is, however, not applied in practice, partly because most employers do not have collective agreements with their staff and partly because the trade unions are unable to force the employers during collective bargaining to oblige themselves to the establishment of the Safety at Work Boards.¹⁵⁴³

Unless otherwise specified by the law, the implementation of the Act, related by-laws and technical and other measures regarding safety at work is supervised by the Labour Inspectorate within the Labour and Social Welfare Ministry. Currently, there are 12 safety at work inspectors active for around 212,000 employed persons, which constitutes an approximate ratio of 1 inspector per 17,600 workers (ILO recommendations are 1 inspector per 10,000 workers).¹⁵⁴⁴ This led the European Commission to conclude that the inspection capacities needed to be significantly strengthened in order to allow effective enforcement.

The Act Amending the Safety at Work Act lays down high fines for non-abidance by the safety at work norms, standards, rulebooks and instructions, ranging from 10 to 300 times the minimum wage. The Criminal Code¹⁵⁴⁵ lays down penalties for responsible persons not abiding by safety at work measures.

More on the practical enforcement of safety at work measures in the chapter Right to Life, p. 148.

Right to Rest, Leisure and Limited Working Hours

Montenegro acceded by succession ILO Convention No. 14 Concerning Weekly Rest (Industry), Convention No. 91 Concerning Paid Vacations for Seafarers (Revised), Convention No. 106 Concerning Weekly Rest (Commerce and Offices), Convention No. 132 Concerning Holidays with Pay Convention (Revised) and Convention No. 140 Concerning Paid Educational Leave.

The Constitution guarantees workers the rights to limited working hours and paid vacation (Art. 64(2)).

Under the Labour Act, full-time work as a rule lasts 40 hours a week (Art. 44), while overtime hours shall be paid 40% more (under Art. 18 of the GCA). The employers are duty bound to notify the labour inspectors of the

¹⁵⁴³ USSCG data, May 2011.

¹⁵⁴⁴ Analytical Report accompanying the Commission Opinion on Montenegro's application for membership of the European Union, 9 November 2010, 3.19: Chapter 19, *Social Policy and Employment*.

¹⁵⁴⁵ Art. 232, Criminal Code of Montenegro (*Sl. list CG* 40/2008, 25/2010).

introduction of overtime work within three days from the day they rendered a decision to that effect. The employers in practice avoid and abuse this legal obligation. The case of cab drivers of some cab companies in Podgorica is particularly concerning: it is common knowledge that they work in 12-hour shifts, have only two days off a month, and that their employers do not pay their social and health insurance contributions.¹⁵⁴⁶ Inspectors need to increase their checks in this field as well.

Under the Act on State and Other Holidays (*Sl. list RCG*, 27/07) and the Act on the Observance of Religious Holidays (*Sl. list RCG*, 56/93, 27/94), a worker is entitled to paid leave on state and religious holidays. Workers who work on a state or religious holiday must be paid a per diem at 150% of the hourly rate (Art. 18, GCA) The right to leave and paid overtime is, however, often violated in practice. USSCG launched a campaign in May 2009 to draw public attention to the increasingly widespread violation of this right and protect the workers from these indirectly illegal forms of work.¹⁵⁴⁷ USSCG representatives are of the view that the Labour and Social Welfare Ministry, notably the Labour Inspectorate, is still not supporting this campaign actively, which is corroborated by the fact that there have been no visible results with respect to abidance by the right to weekly and annual leaves, given that, apart from the state administration and public companies, most private employers force their workers to work on Sundays and during holidays without paying them for the overtime. The employers are encouraged by the ambiguous statements issued by the Labour and Social Welfare Ministry, which declares that it does not have the remit to monitor the enforcement of the Act on State and Religious Holidays, which leads to the conclusion that no one monitors the enforcement of this law.¹⁵⁴⁸

The Labour and Social Welfare Ministry labour inspectors conducted field checks on 21 May 2011, Montenegro's Statehood Day, and found that 971 workers working for 95 employers were working that day. In 35 cases, the inspectors ordered the employers to pay higher wages for May i.e. 150% of the hourly rate for 21 May to the workers who worked that day. Given that the inspectorate was unable to control all the employers, it called on all the workers, who had worked on 21 May, to report that to the inspection in order to realise their rights.¹⁵⁴⁹ To USSCG's knowledge, this call will not yield sig-

¹⁵⁴⁶ Interview conducted by HRA researcher, January 2011. The weekly *Monitor* also wrote about this issue in its 25 March 2011 issue.

¹⁵⁴⁷ "They Will Monitor Who Works during Holidays", *Vijesti*, 21 May 2011; "Holiday Per Diems Must be 250% Higher", *Pobjeda*, 20 May 2010. "They Spoiled the Workers' State Holidays, Too", *Dan*, 20–21 May 2009.

¹⁵⁴⁸ "No legal provision explicitly prohibits work during state and religious holidays, wherefore it is not within the remit of the Labour and Social Welfare Ministry to monitor the implementation of this law or to provide an interpretation on which undertakings may perform activities during state and religious holidays" ("No Legal Provision Prohibits Work during Holidays", *Pobjeda*, 7 May 2011).

¹⁵⁴⁹ *Vijesti*, 24 May 2011, p. 5.

nificant results in combating this phenomenon, because workers do not dare report their employers in fear of dismissal.

Under the Labour Act, night shifts shall last from 22:00 to 06:00.

A full-time worker is entitled to a daily break of at least 30 minutes, while workers working more than four but less than six hours are entitled to at least 15-minute daily breaks. A worker working overtime, at least ten hours a day, is entitled to a 45-minute daily break.

Under the law, workers are also entitled to daily, weekly and annual leaves. Pursuant to the Labour Act, annual leave shall last at least 18 days. Workers under 18 years of age are entitled to minimum 24-day annual leaves. The duration of annual leave is set by increasing the number of working days of leave pursuant to the criteria in the collective agreements and the employment contracts. A worker is entitled to paid leave of absence if s/he is getting married, his wife is having a baby, s/he is taking the state exam, in case of a grave illness of an immediate family member, and in other events laid down in the collective agreement and employment contract. The duration of paid leave shall also be set in the collective agreement and employment contract. A worker is entitled to 7 days of paid leave in the event of the death of an immediate family member.

Annual leaves are paid and workers are paid their full salaries, as stipulated in the collective agreements and the employment contracts. During annual leave, a worker is entitled to pay equalling the wage s/he would earn the month s/he is using his annual leave. However, trade union data indicate that a large number of workers, particularly in commerce, are deprived of their rights to weekly and annual leave given that the workers do not dare report the violations of their rights and the Labour Inspectorate does not control or adequately penalise the employers.

Trade Union Freedoms

Article 8 ICESCR

1. The States Parties to the present Covenant undertake to ensure:
 - a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
 - c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 5 ESC

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

Article 6 ESC

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

1. to promote joint consultation between workers and employers;
2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:
4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

Freedom to Associate in Trade Unions

Part from the three general international human rights treaties binding on Montenegro – the ICCPR (Art. 22), the ECHR (Art. 11) and the ICESCR (Art. 8) – the freedom to associate in a trade union is also guaranteed by the following International Labor Organization (ILO) Conventions binding on Montenegro: Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively and Convention No. 135 Concerning Workers' Representatives and revised European Social Charter (ESP).¹⁵⁵⁰ The practice of the ILO Committee on Freedom of Association (CFA) is of particular relevance to the interpretation of these conventions.¹⁵⁵¹

The Montenegrin Labour Act guarantees workers the freedom to organise in a trade union and conduct trade union activities without prior consent (Art. 155). The Act on the Representativity of Trade Unions in Montenegro¹⁵⁵² which came into force in May 2010, states that workers shall freely associate in trade unions (Art. 1). A trade union shall acquire the status of a legal person on the day it is entered in the Register of Trade Unions, kept by the state administration authority charged with labour issues i.e. the Labour and Social Welfare Ministry (Art. 3). Under the Act, the Ministry shall lay down regulations on the deletion of a trade union or a representative trade union from the Register (Art. 4).

¹⁵⁵⁰ Ratification of revised European Social Charter Act (*Sl. list CG*, 6/2009)

¹⁵⁵¹ <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm>

¹⁵⁵² Act on the Representativity of Trade Unions in Montenegro (*Sl. list CG*, 26/2010).

Article 4 of the ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise explicitly prohibits the dissolution and suspension of the work of a trade union by administrative authority.

Pursuant to the Rulebook on the Registration of Trade Unions¹⁵⁵³ adopted by the Ministry, a trade union shall be deleted from the Register on the day a final decision is rendered in an administrative procedure if 1) a decision on the termination of the work of a trade union has been taken, 2) the work of a trade union is prohibited by a final court decision in accordance with the law, 3) the trade union provided incorrect information in its application or the application was submitted by a person not authorised thereto. This provision is not aligned with the ILO Convention because it allows an administrative authority to dissolve a trade union by deleting it from the Register before the court renders a decision to that effect in an administrative dispute.

According to the standard established in ECtHR case law, trade-union organisation in state authorities cannot be prohibited absolutely and can be restricted only exceptionally, if necessary in a democratic society, for the reasons laid down in Art. 11(2) of the ECHR (*Tum Haber Sen and Cinar v. Turkey*, 2006; *Demir and Baykara v. Turkey*, 2008.). The Montenegrin Constitution and laws accordingly do not prohibit state administration staff, army staff, judges and prosecutors from associating in trade unions. Associating in trade unions the Army is allowed only since January 2010 by the amendments to the Army of Montenegro Act (*Sl. list CG*, 88/09, of 31 December 2009). More on practice of associating in trade unions in the Army on page. 504.

Collective Bargaining and Trade Union Representativity

There is little in ECtHR case law on the right to form and join trade unions and the set standards are, indeed, minimal, due to the different approaches CoE member states have on this issue. The ECtHR, however, upheld protection of the right to collective bargaining but found that the state is free to itself lay down the representativity requirements the trade unions must satisfy (*Demir and Baykara v. Turkey*, 2008, paragraph. 154). Montenegro ratified ILO Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively but not Convention No. 154 on Collective Bargaining.

The European Commission has concluded in November 2010 that the bipartite social dialogue (employers – workers) in Montenegro is underdeveloped and that the number of collective agreements concluded in recent years is in decline. It was pointed out that this dialogue must be enhanced, especially at the level of individual employers.¹⁵⁵⁴

¹⁵⁵³ Rulebook on the Registration of Trade Unions (*Sl. list CG*, 33/2010).

¹⁵⁵⁴ Analytical report to the Commission's opinion on Montenegro's application for membership in the European Union (COM (2010) 670) of 9 November 2010, item 3.19, Chapter 19: Social policy and employment.

The Confederation of Trade Unions of Montenegro, which was founded in 1991, split up into the Union of Free Trade Unions (USSCG) and the Confederation of Autonomous Trade Unions of Montenegro (SSSCG) in 2008, whereby now Montenegro has trade union pluralism for the first time.¹⁵⁵⁵

The Act on the Representativity of Trade Unions lays down the requirements a trade union must fulfil to be representative and thus be entitled to collective bargaining and the conclusion of a collective agreement at the appropriate level, to participate in the resolution of collective labour disputes, the work of the Social Council and other tripartite and multipartite bodies, and to exercise other rights granted an authorised trade union organisation under other laws (Art. 5). However, the right to participate in social dialogue, which is given to a trade union representative, has been stultified by reducing the number of representatives in tripartite and multipartite bodies (such as the Pension Fund Boards, Employment Service, Agency for the peaceful settlement of labor disputes, the RTCG Council), i.e. by formulation that the employee representative is elected from among the trade unions with more members. First, the law did not define the obligation of determining who has the most members, but only the obligation of determining the threshold for gaining representation. Second, this again introduces a monopoly of majority unions and breaks the concept of the union “pluralism” in representing the interests of employees.

A trade union has to fulfil the following general requirements to be representative: it has to be entered in the Register in accordance with the law; independent from the state authorities, employers and political parties; and predominantly funded through membership fees and other sources of its own (Art. 8). The Act lays down specific requirements a trade union has to fulfil to be deemed representative in a company (Art. 9), sector (Art. 10) and at the national level (Art. 11).

At least 20% of all company workers have to be members of a trade union for that trade union to be considered representative in that company. A trade union rallying at least 15% of all workers in a specific economic sector shall be representative in that sector. A trade union that fulfils the general requirements and rallies at least five trade unions at the economic sector, group or sub-group level and at least 10% of all workers in Montenegro shall be considered representative at the national level.

The Act lays down the procedure in which the representativity of a trade union in a company, sector and at the national level is established. In companies, a trade union is declared representative by the company director at the proposal of a commission set up by the director on a parity basis and comprising two representatives of the employer, two representatives of the representative trade union (if it exists) and two representatives of the trade union at issue (Art. 15). A trade union shall be declared representative at the

¹⁵⁵⁵ “Establishing New Headquarters”, *Dan*, 19 September 2008.

sectoral or national level by the minister charged with labour affairs at the proposal of a committee comprising representatives of the government, employers, representative trade union(s) and the trade union at issue (Art. 19). The Act provides for court protection if the trade union at issue believes that the representativity was not established lawfully (Art. 18(4) and Art. 25(2)) and envisages a procedure for a review of the established representativity (Arts. 26–28).

After the Act on Representativity of Trade Union was adopted, the Union of Free Trade Unions (USSCG) protested, underlining that employers often ignored trade union applications for representativity and failed to set up the commissions to establish the number of their members within five days, as laid down in the law. However, the employer often simply avoids to establish the commission and obstructs the process by not recognizing the applications for the voluntary admission to a union with the signatures of employees (case of the KAP Union¹⁵⁵⁶). The Act does not include penal provisions for such violations or legal remedies against the management's failure to act. The USSCG claims that the employers can and indeed are in this way intentionally obstructing the determination of the representativity of a trade union¹⁵⁵⁷.

It also happens that trade unions try to exercise their right to representation for months. An example is the case of the Podgorica Office for Protection where the trade union, on several occasions starting 29 June 2010, addressed the Chief with the request to determine the representativity. The union received an answer that the Mayor of the Capital is the one responsible, though he failed to act on the request filed in June 2010 until June 2011. The process of protection initiated with the Protector of the Human Rights and the Ministry of Labour¹⁵⁵⁸ did not provide any results, so the only remaining protection is the conduct of litigation.

A Rulebook on the Registration of Representative Trade Unions (*Sl. list CG*, 36/2010), governing entry in and keeping of the Register of Representative Trade Unions, was adopted in Montenegro after long negotiations. When applying for entry in the Register of Representative Trade Unions, a trade union shall submit a decision establishing its representativity, the decision on the appointment of the trade union representative and authorisation of the trade union representative. The competent Ministry must enter the representative trade union in the Register within 30 days from the day the application and required documentation are submitted.

The trade unions questioned the accuracy of the Montenegrin Statistical Office (MONSTAT) data on the number of workers in Montenegro, on

¹⁵⁵⁶ Letter of the KAP Trade Union to the Ministry of Labour and Social Welfare, no. 3468 from 6 May 2011, "Calling for help the Government and inspectors", *Vijesti*, 7 May 2011.

¹⁵⁵⁷ "Masoničić Hiding Workers' Signatures", *Dan*, 13 August 2010.

¹⁵⁵⁸ USSCG Address to the Protector of Human Rights and Freedoms no. 28/1, of 27 January 2011; USSCG Address to the Ministry of Labour and Social Affairs no. 470 of 27 January 2011.

the basis of which the TU headquarters are to prove their representativity. USSCG representatives claim that the actual number of 175,000 workers is too high and is inflated by 40,000, because MONSTAT also included non-resident and seasonal workers.¹⁵⁵⁹

Protection of Workers' Representatives and Trade Union Members

The 1971 ILO Convention No. 135 introduced special treatment of workers' representatives, as a special category of workers.

The Labour Act devotes specific provisions to the protection of trade union representatives and the requirement to enable them to simultaneously engage in union activities without suffering any consequences for such engagement. During the performance of trade union activities and six months upon termination of trade union activities, a trade union or workers' representative may not be held accountable with respect to the performance of trade union activities, declared redundant, assigned to another job with the same or another employer or suffer any disadvantage in any other way as long as s/he has acted in accordance with the law and the collective agreement (Art. 160). An employer may not place a trade union representative or a workers' representative at an advantage or a disadvantage because of his/her membership in a trade union or his/her trade union activities (Art. 160(2)).

However, there are examples of drastic violations of these norms in practice, both in terms of protecting trade union representatives and union members. Well known is the case of the "Steelworks" AD Nikšić Trade Union President, who, without previous disciplinary action, received a ruling on termination of employment because he supposedly "transmitted false information on the work and operations of the Steelworks, as well as data representing a trade secret", while the employer did not specify the legal basis (Regulation of trade secret). In fact, the termination of employment is a punishment because of the publicly voiced position that the union will strike if the employer implements the announced reduction of wages to employees in "Steelworks". In this case the Labour Inspection did not exercise the right under Article 122 of the Labour Act to defer execution of the decision on termination of employment until a final court decision because of the apparent violation of the employee's rights. Thus, the Steelworks Union president did not receive salary for more than one year and was unable to enter the factory or perform trade union activities until the court has ruled in his favour¹⁵⁶⁰ (similar situation happened to the president of the Transport and Storage of

¹⁵⁵⁹ "MONSTAT Counting Foreigners and Seasonal Workers", *Dan*, 10 September 2010.

¹⁵⁶⁰ "The hungry can not wait", *Vijesti*, 6 November 2009. Letter from the USSCG no. 64 of 15 December 2008.

KAP Union¹⁵⁶¹, president of the Union of Telecom CG,¹⁵⁶² president of Luk-oil Union, etc.). Ineffective protection of trade union representatives by the competent authorities, in particular the Labour Inspection, encourages employers to violate the norms that protect trade union representatives and thus intimidate union members.

Furthermore, the employer must afford a trade union such reasonable facilities as will enable it to efficiently carry out union activities that protect interests and rights of the employees, in accordance with the collective agreement (Art. 159(2)). A union representative is entitled to paid leave to perform trade union activities, in accordance with the collective agreement (Art. 159(3)). In practice, only bigger trade unions and union organizations are entitled to adequate working conditions.

The ECtHR established that the employer may not offer financial incentives to workers to induce them to surrender important union rights (*Wilson, National Union of Journalists and Others v. the United Kingdom*, 2002.). The Montenegrin Labour Act¹⁵⁶³ prohibits in detail direct and indirect discrimination against workers, *inter alia*, on grounds of membership in a political party or a trade union, with respect to the working conditions and all employment-related rights (Arts. 5 and 7).

In practice, there were several cases of pressure on employees – union members, especially female members of the USSCG, to withdraw from the union, under threat of dismissal or redeploy to other jobs, reducing wages and the like. One of the most prominent examples of union discrimination is the denial of union dues, where the employer refused to deduct union dues from the wages of members of the trade unions in the Podgorica Protection Organization and Carapidis Bross – Žabljak, as required by Article 65 of the General Collective Agreement, because they are members of the USSCG. Addressing the Labour Inspection and Administrative Inspection was unproductive. Another example is the denial of trade union activity to the Trade Union members of the Army of Montenegro by the employer, while the same employer provided logistical support for the membership to another, later founded trade union, the Trade Union of the Army of Montenegro.¹⁵⁶⁴

The case of the Trade Union of the Army of Montenegro. – The founding assembly of the first union of the Army of Montenegro was held on 5 October 2010 and Lt. Nenad Čobeljić was elected the union president.¹⁵⁶⁵ The Ministry of Labour and Social Welfare on 15 October 2010 confirmed entry of

¹⁵⁶¹ “Call to parties and the media to tackle the issue of workers’ rights”, *IN TV*, 7 April 2011.

¹⁵⁶² “Accusing instead of the agreement”, *Vijesti*, 26 March 2011.

¹⁵⁶³ *Sl. list CG*, 49/2008 and 26/2009.

¹⁵⁶⁴ The trade union organization of the Army of Montenegro (VCG) was established on 5 October 2010. (<http://www.sovcg.me/o-nama.html>), and VCG Union in early November 2010 (<http://www.vijesti.me/vijesti/sindikato-vojske-se-uzda-samardzica-clanak-4921>).

¹⁵⁶⁵ “Čobeljić leading army union”, *Vijesti*, 6 October 2010.

union organization of the Army in Central Registry, which made this organization an equal partner in social negotiation with the employer. Shortly after its establishment, union representatives said that its members were subjected to pressures, threats and blackmail to give up their union membership, that their demands for the provision of minimum working conditions for union leaders are rejected and the use of premises for meetings in the military facilities banned.¹⁵⁶⁶ Čobeljić has repeatedly pointed to the low salaries of employees in the military and violations of labor rights,¹⁵⁶⁷ while the Ministry of Defence denied that partially and accused Čobeljić of using the union in order to express personal dissatisfaction for not getting an apartment, or promotion.¹⁵⁶⁸ After correspondence between Čobeljić and the Ministry it turned out that, according to the verdict by Čobeljić's complaint, the Ministry shall again make the distribution of housing, while Čobeljić's statements regarding the denied right to compensation for overtime, night work and holidays, duty, visiting family and transportation of the employees in the military have not been confuted.¹⁵⁶⁹ After hundreds of soldiers sued the Army of Montenegro and the Ministry of Defense asking that they pay fees owed for transport to the workplace, overtime, unpaid duty, work weekends, holidays, night work, reduced personal income etc., Čobeljić said that the Ministry of Defense and the Army of Montenegro leaders pressure employees to make them withdraw lawsuits over unpaid fees.¹⁵⁷⁰ Minister of Defense in late February 2011 refused to meet with union representatives, including Čobeljić, because of his alleged violation of the Army Act.¹⁵⁷¹ In February 2011 the Regulations on disciplinary proceedings in the Army of Montenegro was adopted. Its adoption (envisaged in the 2008 Act) coincided with statements by ministry officials and army who warned Čobeljić about violating the Army Act by public statements. The Regulations prescribe for more severe measures for disciplinary offenses in the Army compared to the previous.¹⁵⁷² After claiming that they suffer tremendous pressure from the Ministry, not only the union leaders whose work is impossible, but also the pressure to withdraw from the union, in mid-March the union filed a criminal complaint against Colonel Z.L. and responsible persons in the Army, for prevention of union association and activities, coercion, prevention of printing and distributing printed material and broadcasting programs, prevention of public

¹⁵⁶⁶ "Boot stepping on human rights", *Dan*, 4 November 2010.

¹⁵⁶⁷ "Five euros per diem in the military," *Dan*, 26 December 2010; "Officers forced to do physical work", *Dan*, 18 January 2011; "Reduced wages to soldiers", *Vijesti*, 18 January 2011.

¹⁵⁶⁸ "The employed do not have to work extra", *Dan*, 20 January 2011.

¹⁵⁶⁹ "On which grounds and who obtains apartments", *Vijesti*, 23 January 2011, "Seeking an apartment, and has a two story house", *Vijesti*, 24 January 2011; "Army Officer's wage 370 Euros", *Dan*, 26 January 2011.

¹⁵⁷⁰ "The elders are pressing", *Vijesti*, 19 February 2011.

¹⁵⁷¹ "Minister remains silent", *Dan*, 26 February 2011.

¹⁵⁷² "Minister sues and tries", *Dan*, 3 March 2011.

assembly, discrimination and abuse of a subordinate.¹⁵⁷³ In late May infringement proceeding have been initiated against Čobeljić for failure to act on orders of the elders and speaking publicly on the situation in the military.¹⁵⁷⁴ Čobeljić requested an exemption of the Commission for conducting infringement proceedings and exemption of the Minister. He has recently received the Ministry of Defence decision refusing his request for exemption of the Commission members, as well as the Government of Montenegro decision rejecting his request for exemption of the Minister. The proceeding is expected to be continued soon.

Right to Strike

The right to strike is guaranteed by Article 8 (1.d) of the ICESCR and Article 6 (4) of the European Social Charter.

The right to strike is enshrined in Article 66 of the Montenegrin Constitution. The Strike Act¹⁵⁷⁵ defines strike as work stoppage organised by employees with the aim of protecting their professional and economic interests (Art. 1) According to the CFA, the occupational and economic interests which workers defend through the exercise of the right to strike also concern the seeking of solutions to economic and social policy questions and problems.¹⁵⁷⁶ In the view of the CFA, a general prohibition of sympathy strikes could lead to abuse and workers should be able to take such action provided the initial strike they are supporting is itself lawful.¹⁵⁷⁷

The strike committee and employees participating in a strike shall be obliged to organise and conduct a strike in a manner which will not jeopardise human health and safety and safety of property, which will prevent infliction of immediate material damage and enable continuation of work after the strike. The strike committee and employees participating in the strike may not prevent the employer from using and disposing of machinery and equipment used for performing the activity or prevent workers not on strike from working.

A special strike regime applies to strikes in activities of public interest or an activity where work stoppage may jeopardise human life or health or incur large-scale damage (Art. 9) In terms of this Article, such activities are performed in the following areas: electric power industry, water management, traffic, PTT services, information (radio and TV), public utility services (water production and supply, waste disposal, production, distribution and supply of energy-generation products, etc), fire protection, production of basic

¹⁵⁷³ “Čobeljić sent away from the headquarters”, *Vijesti*, 19 March 2011.

¹⁵⁷⁴ “Without Vučinić’s amen one must not talk to media”, *Vijesti*, 6 June 2011.

¹⁵⁷⁵ Strike Act, *Sl. list RCG*, 43/2003, *Sl. list CG*, 49/2008.

¹⁵⁷⁶ ILO, Digest of Decisions, 1996, Document 0902, para. 479.

¹⁵⁷⁷ *Ibid*, para. 486.

foodstuffs, health and veterinary care, education, culture, childcare and social welfare. In terms of this Act, activities of public interest also entail activities of particular relevance to the defence and security of Montenegro established in accordance with the law; activities instrumental for the fulfilment of international obligations; and activities defined in a separate law the interruption of which may endanger human life or health or incur large-scale damage. Workers in these areas may launch a strike, if minimum service is established to ensure the safety of people and property or is essential to the life and work of citizens or work of other employer, i.e. legal entity or entrepreneur carrying out an economic or other activity or providing services (Art. 10). The list of activities of public interest is identical to the one in the FRY 1996 Strike Act, criticised by the CESCR in its Concluding Observations on Serbia and Montenegro.¹⁵⁷⁸ A special strike regime definitely has to be provided for in areas of particular relevance to the normal functioning of the state but this requirement has to be fulfilled in another manner. Minimum services must be established in vital facilities, but only in specific areas. The regulations defining this minimum need to be very restrictive, but with respect to the employers, not the workers. The definition of the special regime in the legislation on strikes is so extensive that the question arises whether a strike can be staged at all, i.e. whether it can be effective at all. Moreover, broad formulations, such as “fulfilment of international obligations” allow for the prohibition of strikes in specific situations, e.g. if a company is fully export-oriented. The current strike regime abjures the sense of the right to strike.

The founder i.e. employer defines the minimum services and the way in which they are ensured and is duty-bound to take into account the opinion of the competent authority of the authorised trade union or over 50% of the workers with a view to concluding an agreement (Art. 10). If they fail to reach an agreement, the minimum services are defined by the founder i.e. director of the employer (Art. 10a).

This enables employers to mitigate the negative effects of a strike. As a rule, they subsume the minimum work process under the maximum amount of work that enables them to maintain continuity of normal business. In such circumstances it is impossible to organize a strike, because while strikers suffer consequences due to non-payment of wages and various sanctions, the employer maintains the continuity of work and does not suffer economic consequences. There is a case in practice where the employer issued the document on minimum work process which demanded that the strikers during the strike attain production of more than 20% of installed capacity, which was approved by the Labour Inspectorate (Example: a strike of employees in the Aluminum Plant Podgorica). Or, the case of a strike in the Montenegrin Telecom when the employer claimed that during a strike in March 2010 he does not suffer any consequences,¹⁵⁷⁹ which was true, because the minimum

¹⁵⁷⁸ CESCR, Concluding Observations, doc. UN E/C.12/1/Add.108, of 23 June 2005.

¹⁵⁷⁹ “The consequences to be felt next week”, *Vijesti*, 18 March.2010.

work process encompassed all functions of the company.¹⁵⁸⁰ For these reasons the USSCG on several occasions appealed to the competent authorities and submitted the initiative to review the constitutionality of Article 10 and 10a of the Strike Act, which was rejected by the Constitutional Court.¹⁵⁸¹

With respect to the complaint the Confederation of Trade Unions of Montenegro filed with the ILO regarding its dispute with the management of the Podgorica Aluminium Complex (KAP) over minimum services, the CFA in 2006 criticised these provisions and called for their amendment in agreement with social partners.¹⁵⁸² The amendment of Article 10 of the Strike Act has been specifically required in order to ensure that the minimum work process be established with the participation of the relevant trade unions, and that in case of disagreement, an independent body decides on the matter.

Restrictions of the right to strike of army, police and state administration staff. – Article 8 (2) of ICESCR allows countries to restrict by law the right to strike of members of the armed forces, the police or of the state administration. The Montenegrin Constitution lays down that the right to strike of army, police, state administration and public service staff may be restricted in order to protect public interest (Art. 66(2)).

The Act Amending the Strike Act¹⁵⁸³ lays down that, for the purpose of protecting public interests, persons employed in the Army of Montenegro, Police and state authorities may not organise a strike if they would thus jeopardise general public interest, national security, safety of people and property or the functioning of the authorities. The employment of an army, police or state administration employee shall terminate in the event it is established that s/he organised or participated in a strike in contravention of the cited protected interests (Art. 16(1)). The provisions on minimum services and on strike in other activities of public interest apply to strikes in these state authorities. The greatest discrimination of the constitutionally protected right to strike provided in the Act is directed towards employees in the Montenegrin Army, police and state authorities, because the definition in Article 8a, for the protection of public interest, actually prohibits organization of a strike if it endangers the general interests of citizens, national security, security of persons and property, as well as the functioning of government. The legislator thereby avoided to specify what is meant by the public interest and left the employer (government) to interpret himself, thus directly preventing persons employed in the Army, Police and state authorities to protect their professional and economic interests by the constitutionally guaranteed right to strike.

¹⁵⁸⁰ *Ibid.*

¹⁵⁸¹ The decision of the Constitutional Court U. no. 30.9 of 26 February 2010.

¹⁵⁸² *Complaint against the Government of Montenegro presented by the Confederation of Trade Unions of Montenegro, supported by the International Trade Union Confederation (ITUC) Report No. 346, Case(s) No(s). 2525, paragraph 1240, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_gb_299_4_1_en.pdf.*

¹⁵⁸³ Art. 8a, Act Amending the Strike Act (*Sl. list CG*, 49/2008).

Strikes in Montenegro

U 2010 there were a total of 57 protests or strikes in 13 municipalities. Out of that number, 28 companies are closed, and seven of them are bankrupt. The reasons for dissatisfaction of workers are unpaid wages, severance payments and failed privatization. The largest number of strikes and protests is in northern Montenegro, in 33 companies, then in Podgorica, Nikšić and Cetinje – in 18 companies, and 6 companies in the south of Montenegro.¹⁵⁸⁴

There were several strikes in 2011 as well. In early March began a strike of the Nikšić Steelworks workers – *Radvent* and *Tehnostil* workers. The strikers were demanding payment of back wages, starting production, subsidy, payment of debts from 2008 on behalf of housing needs, the relevant social programs, as well as payment of debts to workers who were performing additional tasks while installing a new furnace in 2010.¹⁵⁸⁵ The strike was not ended until June 2011. Employees of *Radio Cetinje*, founded by the capital Cetinje, demonstrated again in March 2011 because they have not received a total of 56 wages.¹⁵⁸⁶ The strike of employees in *Budva Television* started in May 2011 over unpaid wages by the founder, the Municipality of Budva. The hunger strike of workers employed in *Lenka AD Bijelo Polje* started at the beginning of June 2011 over unpaid wages, connectioning years of service and solving the employment status as workers were between 50 and 60 years of age. Employees in the *Novi prvoborac* in Herceg Novi also started a hunger strike in the beginning of June, demanding payment of back wages, connecting years of service, payment of meals and transportation, and the employer to comply with the ruling on legal employment dispute, issued by the Superior Court in favor of the workers. Former workers employed in *Duvankomerc* – Podgorica were on hunger strike for seven days in May 2011. Their demands, access to contract for the sale of land, connectioning years of service and implementing social programs, for the most part are met.¹⁵⁸⁷

¹⁵⁸⁴ Data obtained from the USSCG.

¹⁵⁸⁵ “If the Government fails to help, the workers will clench their fists”, *Vijesti*, 2 March 2011.

¹⁵⁸⁶ “Radio Cetinje employees with burek in front of the Old Capital”, *Vijesti*, 24 March 2011.

¹⁵⁸⁷ “Strike in Duvankomerc is over”, *IN TV*, 16 May 2011.

Right to Social Security

Article 9, ICESCR:

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 12, ESC:

With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

1. to establish or maintain a system of social security;
2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
3. to endeavour to raise progressively the system of social security to a higher level;
4. to take steps, by the conclusion of appropriate bilateral and multi-lateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
 - a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;
 - b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

General

The right to social security comprises the rights to social insurance and to social welfare. In its General Comment No. 19, the European Committee on Economic, Social and Cultural Rights found that the right to social security includes: access to social assistance without discrimination; providing social assistance in cash or services; providing social assistance to protect those who have lost income due to illness, disability, maternity, employment injury, unemployment, old age or death of a family member; financial assistance when the cost of treatment can not be covered by income, and in case of insufficient financial support, especially for children and the elderly.¹⁵⁸⁸ The

¹⁵⁸⁸ General Comment No. 19, UN doc. E/C.12/GC/19, 4 February 2008.

social protection system must cover at least nine primary branches of social security: 1) health care, 2) compensation in case of illness, 3) protection for the elderly (pensions), 4) unemployment benefits, 5) compensation for injury at work, 6) protection of family and child, 7) paid maternity and parental leave, 8) compensation for disability and 9) compensation for the guardian's death (family pension).

The state has a basic, minimal obligation to provide social protection system that provides a minimum basic benefits to all individuals and families to enable them to acquire basic health care, basic accommodation, water and hygiene, food and basic education.¹⁵⁸⁹ Thereby, one should bear in mind the key principle of preserving human dignity which is based on the ICESCR.

Social Insurance. – Article 67 of the Montenegrin Constitution guarantees the right to social security in the form of mandatory insurance of employed persons.

Social insurance comprises pension, disability, health and unemployment insurance. A number of laws govern the field of social security.

Pursuant to the Pension and Disability Insurance Act of Montenegro¹⁵⁹⁰, social security against old age and disability (pension and disability insurance) in Montenegro comprises: mandatory pension and disability insurance funded from current revenues, mandatory pension insurance based on individual capitalised savings and voluntary pension insurance based on individual capitalised savings. This Act governs mandatory pension and disability insurance from current revenues. Mandatory and voluntary pension insurance based on individual capitalised savings is to be regulated by separate legislation; the Montenegrin Assembly consequently passed the Voluntary Pension Funds Act (*Sl. list RCG*, 78/06 and 14/07).

Mandatory insurance from current revenues covers all employed workers, independent contractors and farmers, who are insured against old age, disability, death or bodily damage caused by a work-related injury or occupational disease. The funds for this form of insurance are secured from contributions paid by all employed persons and employers.

The Voluntary Pension Funds Act governs voluntary insurance of persons not covered by mandatory insurance, who may enter and pay contributions into voluntary pension funds, i.e. via individual capitalised savings. Persons covered by mandatory insurance may also join voluntary pension funds and thus secure themselves and their families a wider scope or other form of rights for themselves and their families, other than those prescribed by the Pension and Disability Insurance Act. Under the law, voluntary pension funds are merely a *supplemental form* of social insurance against old age, given that state insurance is still mandatory for all categories of workers without exception (Arts. 4 and 9, Pension and Disability Act).

¹⁵⁸⁹ *Ibid*, item 59.

¹⁵⁹⁰ *Sl. list RCG* 54/03 and 39/04 and *Sl. list CG* 79/08, 14/10 and 78/10.

Increased limits for retirement. – Insurance against old age implies the right to an old-age pension. An insuree becomes eligible for an old-age pension when s/he has cumulatively fulfilled the requirements in terms of age and years of service. The 2010 amendments to the Pension and Disability (*Sl. list CG*, 78/10) raised the age and years of service requirements that have to be fulfilled. Whereas men used to retire at the age of 65 and women at the age of 60 if they had at least 15 years of service, i.e. at the age of 55 if they had 40 or 35 years of service respectively, both men and women now retire at the age of 67 provided that they have at least 15 years of service or 40 years of service. Retirement at the age of 67 will apply from the year 2025 for men and from 2041 women, with the transitional provisions introduced to allow employees who have come close to retirement to exercise this right before they reach the age of 67. The amendments also introduce early retirement at the age of 62 for insurees with at least 15 years of service; their pensions may be as many as 21% lower than old age pensions.

The amendments provoked criticism among the public and, notably, the trade unions,¹⁵⁹¹ but did not lead to large-scale protests like, e.g. in France, when the authorities also pushed the retirement age to 67. It should be borne in mind that the ICESCR generally prohibits measures to reduce the vested rights to social protection.¹⁵⁹² In assessing whether the level of reduction was justified, the Committee will consider whether there was reasonable justification for the reduction of rights, whether the alternatives were assessed, whether the vulnerable groups of population were involved in the analysis of the proposed measures and alternatives, whether the measure are directly or directly discriminatory, and so on.

Calculation of Pension. – Amendments to the Act in December 2010 changed the calculation of pensions, so that this amount is adjusted annually (according to the old system twice a year) based on statistical data, according to consumer prices and average earnings of employees in the territory of Montenegro in the previous year compared to the year that precedes it. Consequently, the income of pension beneficiaries are potentially reduced, due to the possible inflation.

Given that the amount of pensions of civil pensioners was not harmonized with the growth of the retail price (or wage growth) from July 2002 until November 2007, thus damaging pensioners, the Pension and Disability Compensation Insurance Law (*Sl. list CG*, 40/08, 42/08 i 78/10) has been passed, stipulating that Montenegro shall pay affected pensioners compensation in six equal instalments, in accordance with the findings of financial experts¹⁵⁹³, ending

¹⁵⁹¹ “Government Wants to Have a State of Old People – Confederation and Union of Autonomous Trade Unions Demand Withdrawal of Amendments to the Pension and Disability Act from Parliament Procedure”, *Dan*, 2 November 2010.

¹⁵⁹² CESCR, General Comment no. 19, item 42.

¹⁵⁹³ Art. 2, Pension and Disability Compensation Insurance Law.

with 20 April 2011.¹⁵⁹⁴ However, the Party of Pensioners, Invalids and Social Justice emphasized in the press that the state does not comply with the payment of compensation as required by law.¹⁵⁹⁵

On the other hand, since military pensioners were damaged due to improper calculation of dinar and euro exchange rate in the period from 1 August 2005 until 15 August 2007 (given that the military pensions have been funded from the budget of the State Union of Serbia and Montenegro until 1 August 2005, and afterwards from Montenegrin Ministry of Finance), the amendments to the Pension and Disability Compensation Insurance Law from 2010 provide that the compensation shall be paid from the budget of Montenegro in two equal semi-annual instalments.¹⁵⁹⁶ The payment of the first instalment started on 6 April 2011.¹⁵⁹⁷ This is considered a deposit for the amount belonging to pensioners under the Law on the Yugoslav Army in the period from 1 August 2005 until 15 August 2007.¹⁵⁹⁸ However, the Party of Pensioners, Invalids and Social Justice pointed out that this solution denied military pensioners any increase in pensions that civil pensioners were entitled to starting 1 August 2005.¹⁵⁹⁹

Insurance against disability implies the right to a disability pension. The cause of the disability has no significance in the determination of the disability itself but does have an effect on eligibility for certain rights and their scope.

Minimum Pension. – The Pension and Disability Insurance Act includes provisions on the minimum old age and disability pensions, which are protective in character and aim at securing minimum livelihood to those who did not accumulate many years of service and/or had low wages (Arts. 29 and 41). A minimum old age or disability pension may not fall under 45 Euros. The minimum old age or disability pension is further aligned in accordance with the pension alignment provisions. However, such low amount of the pension itself certainly can not provide a livelihood.

The Reduction of the Right to Family Pension. – The members of the family of a beneficiary of an old age or disability pension or of a person insured for at least five years, or with at least ten years of service, or who has fulfilled the disability pension requirements, are entitled to a family pension in the event of his/her death (Arts. 42–51, Pension and Disability Insurance Act). If the death of an insuree or a person exercising rights on grounds of disability or bodily damage in Arts. 14 and 15 was caused by a work-related injury or occupational disease, the members of his/her family are entitled to a family pension notwithstanding the years of service of the deceased.

¹⁵⁹⁴ Art. 6, Pension and Disability Compensation Insurance Law.

¹⁵⁹⁵ *Vijesti*, 6 June 2010, Politika (p. 2).

¹⁵⁹⁶ Art. 215v, Pension and Disability Compensation Insurance Law.

¹⁵⁹⁷ Official website of the Pension and Disability Insurance Fund of Montenegro, <http://www.rfondpio.co.me/OpsirnijeOpst.asp?ID=181>.

¹⁵⁹⁸ Art. 12(3), Pension and Disability Compensation Insurance Law.

¹⁵⁹⁹ *Dan*, 10 March 2011, Regioni (p. 20).

The amendments to the Act of December 2010 cut the period in which beneficiaries of family pensions are entitled to them. A widow(er) is entitled to a family pension if s/he was at least 52 (originally 50) years of age at the time of death of his/her spouse, while his/her children are entitled to a family pension until they turn 24 (originally 26) if they are in college. The above remark that the ICESCR generally prohibits the reduction of the level of social protection applies here as well.

Financial Compensation for Bodily Injury. – The Pension and Disability Insurance Act also envisages financial compensation for bodily damage caused by a work-related injury or occupational disease, if it resulted in at least 50% of damage. Bodily damage entails the loss, severe injury or considerable disability of an organ or body part, rendering difficult the normal activity of the body and exacting greater efforts to satisfy living needs, regardless of any disability it caused (Art. 52). The concept of a work-related injury is defined quite broadly and is in conformity with international standards. In 2011 the compensation ranged from 55 Euros for 50% damage to 99 Euros for 100% damage.¹⁶⁰⁰

Unemployment insurance is governed by the Employment and Unemployment Insurance Act (*Sl. list* CG, 14/10), adopted in March 2010. The Montenegrin Constitution guarantees the right to protection during unemployment (Art. 62).

Financial Compensation in Case of Unemployment. – The right to financial compensation in case of unemployment, provided by law, is extremely limited. It is exercised in case of termination of employment, provided that the person has insurance for at least 12 months continuously or intermittently over the past 18 months (Art. 47). Any termination of employment does not entitle to compensation and the law prescribes situations when an unemployed person is not entitled to compensation (Art. 49). Generally, s/he shall not be entitled to compensation if the termination of employment occurred by employee's will or fault. This right is provided for unemployed people who fall into the category called redundancy. While receiving compensation, the unemployed are also entitled to health insurance and pension and disability insurance (Art. 46). The compensation is payable up to three months to a person who has one to five years of service, up to twelve months to a person who has over 25 years of service, and until employment to women with 30 or men with 35 years of service and a parent with 25 years of service, whose child is receiving disability allowance (Art. 51). The compensation per month is 40% of the minimum wage under the general collective agreement. In June 2011 the compensation amounted to 33 Euros plus years of service in the

¹⁶⁰⁰ Under Art. 56 of the Pension and Disability Insurance Act and the Decision on the approximation of the basis for determining compensation for bodily injury from 1 January 2011 (*Sl. list* CG, 11/11 from 18 February 2011).

amount of 24 Euros (regardless of length of service), therefore, a total of 57 Euros, which is certainly not enough to get through the month.

Right to Welfare Benefits

As opposed to social insurance, where workers allocate part of their incomes to ensure specific rights for themselves and their families against old age, sickness, disability or death, welfare entails payment of benefits from public funds derived from state public revenues. Article 67(2) of the Constitution lays down that the state shall provide financial security to citizens unable to work and/or without a livelihood. Welfare is governed by the Social and Child Protection Act (*Sl. list CG*, 78/05). Social protection rights entail the rights to family allowance, personal disability allowance, personal care and assistance, placement in an institution or another family, assistance in the care for and education of children and youths with special needs, health care, coverage of funeral costs and one-off financial assistance. The state may also provide for other rights and forms of social protection in accordance with its financial capacity. The Social Welfare Center, with branch offices in municipalities, is charged with the realisation of social protection rights.

According to the Montenegrin Statistical Office (Monstat), there were 54,557 beneficiaries of welfare benefits in Montenegro in 2009¹⁶⁰¹. In January 2011, as many as 13,714 families with 41,832 members exercised the right to family allowances,¹⁶⁰² while the number of families that use this right grew by 106 until the end of April 2011.¹⁶⁰³

The Labour and Social Welfare Ministry passes decisions setting the allowances in accordance with the criteria in the Social and Child Protection Act and after hearing the opinion of the Finance Ministry.¹⁶⁰⁴ Family allowances range from 60.5 Euros for single-member families to 114.95 Euros for families with five or more members. These allowances are extremely low, especially given the fact that the right to a family allowance may be exercised only by families with no income or valuable property and the fact that the minimum consumer basket cost as many as 755.42 Euros in December 2010.¹⁶⁰⁵

The state does not implement the necessary control in order to establish the exact number of people who have a real need for family allowances, so a number of users who work illegally and whose income exceeds the actual amount of the statutory requirements for the use of family allowance go un-

¹⁶⁰¹ Monstat's 2010 Statistical Yearbook.

¹⁶⁰² Statement by the Montenegrin Labour and Social Welfare Ministry <http://www.min-radiss.gov.me/pretraga/100315/S-A-O-P-s-T-E-NJ-E.html>.

¹⁶⁰³ Press release of the Ministry of Labour and Social Welfare, available at: <http://www.min-radiss.gov.me/pretraga/105348/SAOPsTENJE.html>.

¹⁶⁰⁴ Decision on the Family, Personal Disability, Personal Care and Assistance Allowances and Child Benefits (*Sl. list CG*, 3/09).

¹⁶⁰⁵ <http://www.monstat.org/cg/page.php?id=341&pageid=31>.

noticed.¹⁶⁰⁶ This situation contributes to improper spending of the social welfare funds, which significantly reduces the amount received by persons who are in real need of social assistance and live exclusively on those funds.

Aliens residing in Montenegro may also exercise the right to welfare benefits, health and social insurance if they are granted permanent residence in Montenegro and if there is a bilateral agreement with the country of their origin.¹⁶⁰⁷

Montenegro has concluded bilateral agreements related to social security and equal treatment of nationals of states parties in respect of social security rights, with a number of countries in the region and Europe, including Serbia, Luxembourg, and in 2011 the Republic of Macedonia, Switzerland, Austria and Slovenia.¹⁶⁰⁸

¹⁶⁰⁶ “Both employees and state lose due to illegal work”, *Pobjeda*, 11 January 2011; “Instead of a legal country, Montenegro is a country of miracles”, *Dan*, 20 February 2011.

¹⁶⁰⁷ Art. 55 of the Aliens Act (*Sl. list CG*, 82/08 and 72/09). This is not necessarily in line with the practice of the ECHR, see *Koua Poirrez v. France*, 2003, more details on page 99.

¹⁶⁰⁸ Source of information www.skupstina.me; agreement with Slovenia was still in parliamentary procedure at the time of completion of work on this report at the end of June 2011.

Right to an Adequate Standard of Living

Article 11, ICSECR:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
 - b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 31, ESC:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.

Right to Housing

Numerous international documents guarantee the right to adequate housing, as an aspect of the right to an adequate standard of living. This right is enshrined notably in the Universal Declaration of Human Rights (Art. 25

(1)), the Convention on the Rights of the Child (Art. 27) and the Convention on the Elimination of All Forms of Discrimination against Women (Art. 14). The Constitution does not guarantee the right to housing, adequate standard of living and protection against hunger, as guaranteed by the ICESCR. The Constitution prescribes that the state is to provide financial security to a person who is incapable of work and can not provide for living (Art. 67(2)). The most comprehensive provision is the one in Article 11 of the ICESCR. The ICESCR stipulates that a States party shall undertake to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. This obligation pertains to all economic, social and cultural rights, including the right to housing.

According to the Committee for Economic, Social and Cultural Rights, the right to housing is of central importance for the enjoyment of all economic, social and cultural rights.¹⁶⁰⁹ The Committee established that the right to housing should not be interpreted narrowly, that it should not imply merely the provision of any kind of shelter or “a roof over one’s head”.¹⁶¹⁰ This right should be viewed as an individual’s right to “live somewhere in security, peace and dignity”.¹⁶¹¹ The right to housing implies the legal security of tenure (ownership and tenancy rights, right to rent, etc.). Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. Moreover, the right to housing also entails availability of services, materials, facilities and infrastructure essential for health, security, comfort and nutrition (energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage, et al), affordability of both attainment and maintenance (rent, public utility costs, etc), habitability, accessibility to disadvantaged groups, especially children, the disabled and the ill (lifts, ramps, et al), the location of which allows access to employment options, and cultural and social life, as well as cultural adequacy (the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing).¹⁶¹²

States parties should establish housing subsidies for those unable to obtain affordable housing.¹⁶¹³

¹⁶⁰⁹ General Comment No. 4, UN doc. E/192/23, *The right to adequate housing (Art.11 (1))*, 12/13/1991) paragraph. 1.

¹⁶¹⁰ *Ibid*, paragraph 7.

¹⁶¹¹ *Ibid*.

¹⁶¹² *Ibid*, paragraph 8.

¹⁶¹³ *Ibid*.

In its Comment on Article 11 of the ICESCR, the CESCR took the view that forced evictions are *prima facie* incompatible with the ICESCR and that they may be justified only in exceptional circumstances in accordance with relevant principles of international law.¹⁶¹⁴ The fact that the ICESCR issued a General Comment focusing on forced evictions corroborates the relevance of the issue.¹⁶¹⁵ The Commission on Human Rights also focused on forced evictions and took the stand that “the practice of forced eviction constitutes a gross violation of human rights”.¹⁶¹⁶

States parties to the ICESCR are to use “all appropriate means”, including adoption of regulations, to promote all rights protected by the Covenant. As regards protection from forced evictions, such legislation should include measures which provide the greatest possible security of tenure to occupiers of houses and land, conform to the Covenant and are designed to control strictly the circumstances under which evictions may be carried out.¹⁶¹⁷ In addition, given that particularly vulnerable groups, above all women, children, the elderly, ethnic and other minorities, all suffer disproportionately from the practice of forced eviction, Governments have an additional obligation to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved. The Constitution does not guarantee the right to housing, adequate standard of living and protection against hunger, as guaranteed under the ICESCR. The Constitution stipulates that the state provides financial security to a person who is unable to work and has no means of subsistence (Art. 67(2)).

In Montenegro, housing and housing relations are governed by the Ownership Rights Act (*Sl. list CG, 19/09*), the Strata Titles Act (*Sl. list RCG, 71/04*), also regulating the purchase of leftover socially-owned apartments, and by the Housing Cooperatives Act (*Sl. list CG, 73/10*). A new Housing and Residential Buildings Maintenance Act, replacing the Strata Titles Act, is currently in the parliamentary procedure.

Montenegrin legislation does not define minimum housing standards or provide an appropriate definition of a dwelling which would allow for a statistical determination of the number of substandard dwellings.¹⁶¹⁸ On the other hand, the Montenegrin Poverty Reduction Strategy adopted in 2003 states that people living in dwellings without running water/bathroom or at least 10 m² per dweller shall be deemed “poor in terms of housing”; refugees, displaced persons and Roma living in unhygienic and unsuitable circumstances account for most of the people falling within this category.

¹⁶¹⁴ *Ibid*, paragraph 18.

¹⁶¹⁵ General Comment No. 7 *The right to adequate housing (Art.11.1): forced evictions* 05/20/1997

¹⁶¹⁶ Commission on Human Rights, Resolution 1993/77, p. 1.

¹⁶¹⁷ General Comment No. 7, p. 9.

¹⁶¹⁸ The Ownership Rights Act defines a dwelling in the following manner: “A dwelling shall denote a group of rooms *intended for dwelling purposes*, which constitute a functional construction unit and as a rule have a separate entrance” (Art. 165).

Pursuant to the Strategy, the municipalities began addressing the housing problems of the vulnerable groups, including pensioners and family allowance beneficiaries, by allocating them solidarity flats.¹⁶¹⁹

The 2007 Strategy for Combating Poverty and Social Exclusion in Montenegro¹⁶²⁰ provides for measures intended to reduce the rate of economically vulnerable people and ensure social stability in the period 2007 – 2011, especially for groups that are extremely poor and socially excluded, starting from housing. The Information on the implementation of the Strategy for Combating Poverty and Social Exclusion published in June 2010¹⁶²¹ states that in order to achieve better protection for persons without sufficient funds, housing construction activities have been undertaken over the past year for the users of the right to family care. Twelve residential units were built in Tivat, forty-two residential units in Kolašin are almost completed, in Petnjica – Berane the construction of 12 residential units is in progress, as well as in Bijelo Polje, and in Mojkovac the construction of a facility intended for the vulnerable categories of citizens is almost completed.¹⁶²² On the other hand, the Roma Scholarship Foundation indicated that the amount of 390,000 Euros, which was intended for social housing by the individual municipalities (Nikšić, Bijelo Polje, Berane), was not used as intended and within contracted deadline, which is why many Roma and Egyptian households are left homeless.¹⁶²³

Notwithstanding the absence of a law on social housing, some progress was made in this field by the adoption of the Housing Cooperatives Act governing the establishment and work of housing cooperatives, in which legal and natural persons associate to address the housing issues of the members of the cooperatives, i.e. natural persons employed in cooperatives which are legal persons. All funds raised from the shares of the cooperative members, loans et al. are used for the construction, maintenance and reconstruction of apartments allocated to the cooperative members. Cooperatives may operate in accordance with the principle of private public partnerships and conclude contracts with the state authorities on the fulfilment of social housing needs i.e. the resolution of the housing problems of vulnerable groups. The state and the local self-governments may encourage the realisation of the goals of housing cooperatives through land, social, loan and fiscal policy measures (by lowering public utility costs, offering tax relief, allocating free land...). Given that housing cooperatives were introduced recently, the upcoming period will demonstrate whether they are effective in achieving the declared goals.

¹⁶¹⁹ 2007–2010 Podgorica Housing Policy Programme.

¹⁶²⁰ The Strategy is available at: <http://www.minradiss.gov.me/biblioteka?query=strategija%20za%20smanjivanje%20siroma%u0161tva&sortDirection=desc> .

¹⁶²¹ Information available at: <http://www.minradiss.gov.me/biblioteka?query=strategija%20za%20smanjivanje%20siroma%u0161tva&sortDirection=desc> .

¹⁶²² The construction was not complete by June 2011.

¹⁶²³ Request from Biljana Alković, coordinator of the National DW Team, to the Minister for Human and Minority Rights the return funds from municipalities which spend it inappropriately, Podgorica, 17 February 2011, RSF Documentation; “Alković: Dinoša to terminate the contract”, *Vijesti*, 18 February 2011.

Montenegrin workers can resolve their housing problems also via the Montenegrin Solidarity Housing Development Fund, a commercial entity founded by the Government of Montenegro, the Confederation of Trade Unions and the Employers' Union. In cooperation with the municipalities (which provide land and public utility services free of charge), the Fund develops residential buildings for Montenegrin state institutions, organisations and companies, i.e. their employees, at prices lower than the going market rates. These institutions, organisations and companies invest money in the Fund on a voluntary basis; the funds are used to build the apartments which are allocated to the employees of the investors.¹⁶²⁴

Domicile and displaced Roma, Ashkali and Egyptians (RAE) are as a rule particularly vulnerable with respect to adequate housing. Around 5,000 displaced and internally displaced RAE are still living in informal settlements or extremely destitute circumstances, in facilities built for temporary accommodation.¹⁶²⁵ Although a large number of apartment buildings were built over the years thanks to the financial assistance of international donors on land donated by municipalities, many still lack a decent roof over their heads. Camps Konik 1 and 2 in Podgorica are specific inasmuch as they are the biggest Roma settlements in Montenegro. Around 250 families live in barracks erected years ago to provide temporary shelter to the displaced people, most of them from Kosovo. The UNHCR has for years been assisting the camps in cooperation with the Red Cross, but the living conditions in them are far from adequate. Several children perished in the fires that had broken out in the settlement on a number of occasions in the past decade.¹⁶²⁶

During the 2009 visit by the Head of Operations of the EU Delegation to Montenegro, Nicola Bertolini, the European Commission took the view that it is not acceptable to see such conditions in Montenegro which aims to become the EU member,¹⁶²⁷ and later confirmed it in its Opinion on the readiness of Montenegro for the EU membership published on 9 November 2010. In the opinion the EC recommended guaranteeing legal status to displaced persons, particularly Roma, Ashkali and Egyptian communities, and ensuring respect for their rights, including adoption and implementation of sustainable strategy for closing the Konik camp. At its meeting held on 17 February 2011, the Government of Montenegro reviewed and adopted the Action Plan for Monitoring the Implementation of Recommendations from the EC Opinion, which encompasses permanent measures to resolve issues of internally displaced persons in camps Konik I and II.

¹⁶²⁴ Official website of the Montenegrin Solidarity Housing Development Fund, www.cfssi.me.

¹⁶²⁵ Data UNHCR Representative in Montenegro Katja Saha presented in the article "Some Are So Poor They Can't Even Register", *Dan*, 10 November 2010.

¹⁶²⁶ "Government Not Concerned about Lives", *Vijesti*, "State Should Prevent Tragedies – Human Rights Action Appeals for Urgent Provision of Adequate Housing for Roma", *Dan*, 20 October 2010.

¹⁶²⁷ "The situation is worrying", *Pobjeda*, 24 October 2009.

According to the Third Monthly Report on implementation of commitments under the Action Plan for Monitoring the Implementation of Recommendations from the EC Opinion, published on 26 May,¹⁶²⁸ the Government of Montenegro has participated in presenting the Draft Study on durable solutions for refugees, displaced persons and residents in Konik camp, which will serve as the basis for future strategy to permanently resolve these issues. A working group has been formed with the task to collect data on internally displaced persons who do not have documents or are not entered in the Register. This working group started its operation on 25 February, and preliminary data of this research have been published.¹⁶²⁹ The Capital decided to develop a single plan for Zone A and part of Zone B in the total area of 130,000 m², so as to create legal conditions for rational urban quality solution, in accordance with prescribed norms. The deadline for developing the relevant planning document is IV quarter of 2011.

Right to Adequate Nutrition

Certain members of the Committee for Economic, Social and Cultural Rights have emphasised that Article 11 of the Covenant contains two different and thereby two independent provisions on the right to nutrition. The first is expressed in paragraph 1 of the Article as “right to adequate food” and the second in paragraph 2 as “the right to protection (freedom) from hunger”. The first right implies progressive realisation as it requires a specific quantity and quality of food, while the other right is “not to die of hunger”, wherefore some interpret it as a fundamental right and therefore immediately applicable¹⁶³⁰, all the more as the realisation of this right is prerequisite for the realisation of the very right to live.¹⁶³¹

The Food Safety Act (*Sl. list CG*, 14/2007) lays down the standards that must be abided by during food production and marketing. Food shall be deemed safe if it is not detrimental to human health and is fit for human consumption when used in the appropriate manner. Supervision of food safety is governed by the Act on the Health Supervision of Foodstuffs and Objects of General Use¹⁶³² and conducted by the Montenegrin Health Ministry, notably its sanitary inspectors.

¹⁶²⁸ The Third Monthly Report available at: <http://www.gov.me/biblioteka?query=tre%u0107i%20mjese%u010Dni%20izvje%u0161taj&sortDirection=desc>.

¹⁶²⁹ From the Third Monthly Report on implementation of commitments under the Action Plan for Monitoring the Implementation of Recommendations from the Opinion of the EC.

¹⁶³⁰ Doc. UN E/C.12/1989/SR.20, para. 26.

¹⁶³¹ Doc. UN E/C.12/1989/SR.20, para. 18.

¹⁶³² *Sl. glasnik SRCG*, 26/73, 32/84, 12/86, 4/88.

Veterinary inspector Mirjana Drašković was suspended from work for one year after publicly warning of the uncontrolled and unlawful import of potentially unsafe chicken meat from Latin America in July 2009. Imports of chicken meat were not halted and the authorities did not react to her criminal reports against her superiors by the end of the year.¹⁶³³

According to the latest available data, the absolute poverty line in Montenegro stood at around 170 Euros per capita in 2009 and 6.8% of the population was beneath that line.¹⁶³⁴

The Podgorica Directorate secured funds for the construction of a soup kitchen after several years of promises. The soup kitchen is to open in July 2011.¹⁶³⁵ Apart from providing 500 free meals a day to the most vulnerable families on welfare, the soup kitchen will also operate as a restaurant for others.¹⁶³⁶

¹⁶³³ HRA Archives, "Well, You Just Keep on Blowing Your Whistle", *Monitor*, 30 July 2010.

¹⁶³⁴ Statement by Labour and Social Welfare Minister Suad Numanović, 3 February 2011.

¹⁶³⁵ "More and More Homeless and People on the Dole on the Streets of the Capital", *Inpuls*, TVIN, 30 January 2011.

¹⁶³⁶ *Ibid.em.*

Right to Highest Attainable Standard of Physical and Mental Health¹⁶³⁷

Article 12 of the ICSECR:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - b) The improvement of all aspects of environmental and industrial hygiene;
 - c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

General

Health is a basic human right, necessary for the realization of other human rights. Every human being has the right to enjoy the highest attainable standard of health.¹⁶³⁸ Right to highest attainable standard of physical and mental health implies the right to freedom in terms of controlling one's own health and body, including sexual and reproductive freedom, freedom from physical and psychological torture and injuries, freedom of decision on medical treatment, prohibition of performing experiments for medical purposes, etc. On the other hand, the state has an obligation to establish a health care system so as to provide health care of equal quality for all citizens.¹⁶³⁹ This system should be aimed at meeting the objectives from para. 2 Art. 12 ICESCR.

¹⁶³⁷ *Sl. list SFRJ*, 7/71

¹⁶³⁸ General Comment No. 14, doc. UN E/C.12/2000/4 (The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)).

¹⁶³⁹ *Ibid.*

Montenegrin Constitution guarantees the right to health care (Art. 69). The Constitution also stipulates that children, pregnant women, elderly and persons with disabilities have the right to health care from public revenues, if this right is not exercised on any other basis (Art. 69(2)). This actually means that these groups of persons are entitled to free health care, although they are not covered by the health insurance fund.

The right to medical insurance is included in the rights of employees and their families on the basis of the compulsory medical insurance.

Health Care and Medical Insurance

Issues of health care and medical insurance are regulated by separate laws: the Law on Health Care (LHC), *Sl. list RCG*, 39/2004 and *Sl. list CG*, 14/2010 and the Law on Medical Insurance (LMI), *Sl. list RCG*, 39/2004. Health care in Montenegro includes preventive, control and rehabilitative care and is financed from contributions paid by employers, employees and other groups¹⁶⁴⁰. LHC also provides for medical insurance funded from the state budget for the existentially vulnerable groups (unemployed, refugees, displaced persons). Based on the LMI, entire population has mandatory health insurance. Nearly 70% of contributions come from employees, 25% from retirees, 3% from the unemployed (Institute for Employment) and 0.1% from farmers.¹⁶⁴¹

Health care can be funded completely out of the insurance, or with the participation of insured persons (Art. 59(1) LMI and Art. 61 LMI). Ministry of Health decides on the level of participation and cases in which participation is mandatory, on the basis of annual health care programs of the Health Insurance Fund and the Fund's annual financial plan, without the previously established legal limits (Art. 59(2) LMI). Certain persons are exempt from payment of participation (persons with disabilities, women during pregnancy, childbirth and one year after giving birth, persons over 65 years of age, persons in the immediate life-threatening situation due to illness or injury, etc.).¹⁶⁴²

Medical Treatment Abroad. – Mandatory insurance also covers medical treatment abroad (Art. 16(1(4)) LMI). Article 52 LMI provides that the insured person is referred to treatment abroad at the expense of the Fund for the

¹⁶⁴⁰ The contribution rate for health insurance of employees is 9%, out of which the employer pays 5% and the person insured 4%. The contribution rate for health insurance of the farmers is 9%, while the base is 12% of average gross monthly wage in Montenegro in the previous year. For retired persons contribution rate is 19% and the base is the amount of pension. Employment Institute pays contributions for the unemployed who receive unemployment compensation at the rate of 5% of the amount of financial compensation.

¹⁶⁴¹ "Master Plan for Health Care for the period 2010–2013", page 21, available at: <http://www.mzdravlja.gov.me/biblioteka?query=master%20plan&sortDirection=desc>

¹⁶⁴² Article 61 LMI

compulsory health insurance, if s/he suffers from the disease which cannot successfully be treated in Montenegro. It is prescribed that the Fund does not provide funding for health care in the following cases: cosmetic reconstructive surgery, except for aesthetic reconstruction of congenital anomalies in children, breast reconstruction after mastectomy, cosmetic reconstruction after severe injury in order to prevent disability, procedures of artificial insemination, including in vitro fertilization after the second trial, the surgical treatment of obesity, treatment of medical complications that arise as a result of health care outside the acceptable standards of health care, for specific health care of employees, which is realized on the basis of contracts between an employer and healthcare institution (Art. 20 LMI). The decision on the exercise of the right to compulsory insurance shall be adopted by Fund Commission in the first instance, and in the second instance by the Commission at the Ministry level (Art. 56–57). Administrative dispute may be initiated against the second instance decision of the Ministry (Art. 57).

The decision of the Medical Insurance Fund Commission not to fund Vladimir Vukcevic's treatment abroad was almost fatal for this patient, even though his case was not encompassed by the above article 20 LMI. His problems began in 2007 when he suddenly fell ill and his condition only worsened since then. As local experts failed to make a diagnosis, the council of physicians from Montenegro and Serbia suggested referring him to an institution abroad, as a patient without a diagnosis. Near the end of 2009, after spending nearly three years with the intestines displaced outside the body, and after being repeatedly rejected by the Fund on the grounds that the diagnostic tests planned in England have already been completed at the Clinical Centre of Montenegro, the journalist Darko Ivanovic, editor of the TV show "Robin Hood", began following Vukcevic's case¹⁶⁴³. Only after two months of media efforts of this journalist, the Fund Commission changed its earlier decision¹⁶⁴⁴, enabling Vukcevic to travel to London, get the right diagnosis and begin the treatment, which was eventually successfully completed.

Sex Change. – The sex change operation and following hormonal treatment are not available in Montenegro¹⁶⁴⁵, and the Medical Insurance Fund does not cover the cost of this type of treatment abroad, considering it not a treatment, but only "aesthetic reconstructive surgery" that is not a part of a compulsory health insurance.¹⁶⁴⁶ However, in the International Classification of Diseases and Related Health Problems¹⁶⁴⁷ of the World Health Organization

¹⁶⁴³ "Only a number to them", *Vijesti*, 18 December 2009.

¹⁶⁴⁴ "Inpuls 2", *IN TV*, 29 January 2010.

¹⁶⁴⁵ Clinical Centre of Montenegro, response to a request for information of public importance, no. 03/01–18056/1, 30 December 2009.

¹⁶⁴⁶ Response of the Republic Health Insurance Fund of 14 January 2010, no. 02–66

¹⁶⁴⁷ International Classification of Diseases and Related Health Problems, 10 Revision (ICD–10) is a classification and coding of diseases, signs and symptoms, abnormal findings,

(WHO), transsexuality¹⁶⁴⁸ is listed in Chapter V among the disorders of gender identity. By the WHO definition, the above disorder is usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex. In 2010, the Council of Europe Parliamentary Assembly called the member states of this organization to provide access to sex change treatment to transgender persons.¹⁶⁴⁹

Medical Insurance Fund is continuously faced with a delay of employers to pay contributions for employees.¹⁶⁵⁰

Patients' rights. – According to the LHC (*Sl. list CG*, 39/2004, 14/2010), the citizen has the right to equality in the overall treatment when receiving health care (Art. 18(1)), as well as the confidentiality of all data relating to his/her health (Art. 18(1(7))). A fine ranging from twenty to three hundred times the minimum wage shall be imposed on a health care institution, if it denies rights under this law.

The Law on Patients' Rights (*Sl. list CG*, 40/2010) was adopted in 2010, which has expanded and clarified patients' rights and obligations of health care institutions, physicians and medical staff. Patients are guaranteed an equal right to quality treatment, according to their medical condition, modern medical standards and ethical principles. The Law provides for the right to a second opinion, i.e. the opinion of another doctor (Art. 25). The law specifically provides for the patient's right to damages (Art. 34), in cases of health damage due to improper and negligent treatment of health workers or associates, the right to information and notification (Art. 7), and the right to independently decide on medical treatment based on information about the diagnosis, treatment options, prognosis and disease outcome, and possible risks and complications (Art. 14). The law also defines the right to free choice of a doctor (Art. 6), to privacy (Art. 27), voluntarily leave from the health institution (Art. 35), and a patient may also refuse to be the subject of scientific investigation and research (Art. 22). The law stipulates that a physician, in extreme cases, has a right to keep quiet about the diagnosis, proposed course of medical intervention and its risks, but only in circumstances where it is estimated that this could be detrimental to the patient (Art. 12). The patient has the right to access to his/her medical records at all stages of treatment, and the right to copy it (Art. 21). The health institution shall determine the date and make it available to the patient and his family members to talk to a doctor who provides health services (Art. 10). Also, the information that the

complaints, social circumstances and external causes of injury or diseases, as classified by the World Health Organization

¹⁶⁴⁸ <http://apps.who.int/classifications/apps/icd/icd10online/>

¹⁶⁴⁹ Resolution No. 1728 (2010) 1, "Discrimination on the basis of sexual orientation and gender identity", item 16.11.3.

¹⁶⁵⁰ "No pay without contributions", *Vijesti*, 18 September 2010.

health worker is entitled to provide to the patient (diagnosis and prognosis, a brief description and purpose of the proposed medical intervention, duration and possible consequences of taking or not taking the proposed medical intervention, etc.) can be provided to family members, too (Art. 11). When estimated that it is better for the patient's health not to get this information, it can be given to a family member (Art. 12(3)). A family member has a right of access to patient's medical records (Art. 21(4)). The provision under which the patient is entitled to select persons who may be informed of his/her illness and the expected outcome is of particular importance to respect for privacy of the patient (Art. 29(1)). Health facility is to notify selected persons about patient's admission to the health facility and regularly inform them of changes in patient's health (Art. 29(4)).

New Laws for Improving Medical Treatment, Strategies, Plans and Practice

Law on Transfusion. – Law on providing blood (*Sl. list CG*, 11/2007) from 2007, regulates the organization and jurisdiction of the Blood Transfusion Institute of Montenegro, which provides the required number of voluntary blood donors; initiates and encourages voluntary blood donation; collects, tests, processes, stores, distributes and provides the blood; controls blood quality; keeps records; conducts research, development and training of employees; supervises and monitors the effects of blood transfusion (Art. 5). The Institute is obliged to inform the population about the importance of blood donation, and to support promotional activities organized for the collection of blood (Art. 9). Blood collection is done at the Institute and on site by mobile teams (Art. 7), and blood donors can be all healthy persons from 18 to 65 years of age, for whom the medical, laboratory and epidemiological tests showed that they can give blood without any danger to their health and that their blood would not endanger the health of the recipient (Art. 10). Each unit of blood or blood component intended for the treatment is subject to testing and must be tested for markers of infectious diseases (Art. 14). Blood sampling can be done only after obtaining written consent by a blood donor (Art. 12), and in all blood collection procedures donor's privacy is ensured (Art. 27). However, if a doctor finds or reasonably suspects that a blood donor is infected with a disease transmitted by blood, the doctor is obliged to immediately inform the donor about the detected infection, infectious disease or that s/he is a carrier of an infectious disease, and to inform him/her on the identified health disorder and advise on future behaviour regarding the treatment and avoidance of risky behaviour (Art. 15). In this case, a medical doctor is obliged to check how many times the donor donated blood by then, re-test stored samples of his/her blood and determine who has received his/her previously given

blood. Collection, testing, processing, storing, distributing and providing blood and blood components must be monitored and recorded from donor to recipient and vice versa (Art. 17), and during blood collection, the Institute takes and records the data of each donor and each unit of blood in electronic or written form (Art. 18). The Law prescribes the establishment of the Committee for a blood transfusion in medical institutions which use the blood, for monitoring rational use of blood, side effects and other issues related to the blood use in medical treatment (Art. 22). Prior to receiving the blood, the patient must give written consent that s/he has been previously notified of the transfusion procedure and possible adverse effects (Art. 24). The Law provides for fines in case of its violation (Art. 34).

Law on Transplantation. – Law on removal and transplantation of human body parts for treatment purposes (*Sl. list*, 76/2009) from 2009, regulates the manner and procedure of taking human body parts (organs and tissues) from a living or deceased donor for transplantation into the body of another person for the purposes of treatment; the conditions under which the actions of taking and transplanting body parts are carried out in medical institutions; the conditions that medical institutions must meet in order to perform these procedures, and other. The provisions of this Law relating to tissues shall apply to the cells as well, including hematopoietic stem cells, and shall not apply to organs and tissues for reproduction, parts and tissues of the embryo or fetus, the blood, blood components and blood derivatives. This Law prescribes that the process of taking and transplanting body parts is done after conducting medical examinations and other methods of treatment, based on which it was determined that this procedure is a benefit to the recipient, and, according to medical criteria, acceptable risk to health of a donor, and that there is a possibility for successful intervention (Art. 4). In the procedures of taking and transplanting body parts, donor and recipient are granted protection of their identity, dignity and other personal rights and freedoms (Art. 5). Giving and receiving compensation for body parts is prohibited (Art. 6), as well as trafficking in body parts, advertising needs and supply of body parts in the media or by other means, or mediation in these matters (Art. 7). Ethics Committee decides on every case of taking body parts from a living donor for the purpose of transplantation (Art.14). Taking body parts from a living donor is allowed if the donor provided written consent certified by the competent authority, which may be revoked by the beginning of the procedure (Art. 16), and taking body parts from a deceased donor can be done only if that person gave a written voluntary consent for this procedure to his/her selected doctor as an adult, able to work and make reasonable decisions (Art. 24). Analysis of body parts, before use, must be performed in a laboratory that meets the requirements regarding the application of the optimal level of accepted medical standards, facilities, professional staff, technical and other conditions, and the Ministry of Health decides on fulfilment of these conditions (Art. 35).

The Ministry also keeps a register of persons who gave consent to donate body parts in case death for transplantation into the body of another person for treatment in accordance with this Law (Art. 37), while health facilities keep records of personal data of donors and recipients, each removal and transplantation of any body parts, exchange of body parts, performance of procedures, possible complications, health condition of donors and recipients after the procedure, the measures taken to ensure quality performance of interventions and other data, in accordance with the law (Art. 38). Violation of the provisions of this Law shall be punished by a fine of two hundred to three hundred times the minimum wage in Montenegro (Art. 40).

Although this Law is in force for almost two years, Montenegro has not yet provided the conditions for organ transplantation.¹⁶⁵¹ Also, a register of persons who have given consent to donate body parts in case of death for transplantation into the body of another person for treatment in accordance with this law has not been established yet, which will be done only after the passing by-laws.¹⁶⁵²

Law on biological samples. – Law on taking and using biological samples (*Sl. list*, 14/2010), adopted in March 2010, governs the taking, use, storage, preservation, transportation and destruction of biological samples of human origin, taken for medical purposes and for scientific research; requirements that health care facilities must meet in order to perform these tasks, and issues of importance for the protection of privacy, respect for human dignity and the inviolability of physical and mental integrity. The biological sample is any organic material taken from a living or deceased human being, based on which it is possible to obtain biological data on that human being, and the provisions of this Law shall not apply to sex cells, embryos, fetuses and donated organs, in terms of a separate law. The biological sample is used in medical and scientific research (Art. 6). Exceptionally, a biological sample can be used to further diagnose a disease, for quality control, as well as for scientific research, provided it is not personally identified, and if granted permission from the sample donor, opinion of the medical board and ethical committee of the authorized medical institution, and consent of an advisory panel – Commission for establishing criteria and conditions for the taking, use, storage, transportation and destruction of biological samples (Art. 7). Where the biological sample is taken and used in accordance with medical indications, there is not need for special approval from the donor of that sample, and if the sample is taken and used for scientific research or being stored more than provided in medical practice, a prior written consent of the donor is required (Art. 8). Consent may be revoked at any time, and recall must also be in writing (Art. 9). Biological samples can be transported out of Montenegro for further diagnostics and quality control to an institution that provides an adequate level

¹⁶⁵¹ “Montenegro is the only not performing transplantations”, *Dan*, 17 October 2010.

¹⁶⁵² Response of the Ministry of Health of 30 March 2011, no. 01–139/UPI.

of protection in accordance with modern biomedical and technical standards (Art.14). Health workers and associates who have knowledge of the biological sample data are required to keep it confidential, in accordance with the law (Art. 16). Taking, use, transport and storage of biological samples up to five years is performed by authorized health institutions or parts of the health institutions that have the decision of the Ministry on fulfilling the conditions regarding space, equipment and personnel (Art. 17). Storage of biological, research and medical samples, which are to be stored for more than five years, may be carried out by a health facility (biobank) which has a decision of the Ministry on meeting the requirements regarding space, equipment and personnel (Art. 18). Biobank is responsible for the storage and preservation of biological samples and can not give them to another biobank (Art. 21 and 22). The Ministry keeps a register of authorized health care institutions and biobanks registered in Montenegro, as well as medical institutions outside of Montenegro, where biological samples are transported (Art. 24). The register is public. For violation of this Law, a fine is provided in Art. 27 – 28.

There are still no registered biobanks in Montenegro. According to the Ministry of Health, the Law on taking and using biological samples provides a normative framework for carrying out health activities in this field, and its implementation will be ensured only after passing a series of by-laws and creating other conditions.¹⁶⁵³

Law on DNA. – Law on protection of genetic data (*Sl. list*, 25/2010), adopted in May 2010, regulates the collection, use, processing and storage of genetic data obtained by genetic testing and analysis of genetic samples performed for medical purposes; types of genetic testing; genetic information and counselling, as well as other issues of importance for genetic research, preservation and use of data obtained in these researches (Art. 1). In the process of genetic testing, everyone is granted the right to dignity, identity protection, respect for personal integrity, fairness, equality, free decision making and self-determination, including the right to genetic information before and after conducting tests, and the protection of other personal rights and freedoms (Art. 3). Genetic researches and the collection of genetic data and samples is conducted by authorized medical institutions that have a decision from the competent Ministry to storage, preserve and transport genetic samples (Art. 8). Genetic testing can be performed by a medical institution outside of Montenegro, that the Ministry concluded a contract with (Art. 9). Genetic testing and the collection of genetic data and samples can be done only after obtaining a written consent obtained by the person subject of testing, and the written consent may be revoked at any time (Art. 16). The law also provides for the genetic informing and genetic counselling, performed by a responsible doctor, in an understandable, neutral and non-suggestive form (Art. 17 and 19). Results of genetic tests are professional secret and are kept as personal

¹⁶⁵³ Response of the Ministry of Health of 30 March 2011, no. 01–138/UPI

data, in accordance with the law (Art. 25). Ministry of Health establishes the Committee, whose task is to give an opinion on compliance with the requirements of health institutions to carry out genetic tests, on the introduction of new genetic tests, on the necessity and medical and ethical justification of the mass genetic testing, on meeting the requirements for the implementation of recognized scientific and practical experiences for genetic testing; to evaluate and consider the reports of medical institutions, participate in drafting regulations adopted pursuant to this Law and initiate their amending, give expert advice to health institutions, etc. (Art. 28). Monitoring of implementation of this Law and regulations made under this Act is conducted by the Ministry through health inspections (Art. 32) The Commission has not been formed yet, the Law provides just a normative framework for the performance of health care in this area, and only after passing a series of by-laws and creating other conditions, its full implementation shall be ensured.¹⁶⁵⁴

Master Plan and strategies for health care improvement in Montenegro. – On 6 May 2010, the Government of Montenegro adopted Master Plan for Health Care in Montenegro for the period from 2010 – 2013,¹⁶⁵⁵ which contains an analysis of existing capacities, human, facility and equipment resources in Montenegrin health care system, as well as an action plan for achieving objectives, including: completion of the reform of primary health care level; establishing a Network of health institutions; defining the mandatory package of services in hospitals and the Clinical Centre; introduction of transparent system of classification of patients, as a basis for changing the system of financing and charging according to the complexity of disease; strengthening of specialist outpatient services; expanding the offer of voluntary health insurance and public-private partnership; the use of the program for palliative care development; the introduction of national and international clinical guidelines and establishment of clinical standards based on scientific evidence; planning the number of staff in hospitals and the Clinical Centre according to the needs of the population.¹⁶⁵⁶

In order to improve health and prevent disease in Montenegro, the following strategies have been adopted to date: National Strategic Response to Drugs (2008–2012); Strategy for HIV/AIDS 2010–2014; National Program for Violence Prevention; Strategy for Preserving and Improving Reproductive Health; Safe Blood Strategy; Strategy of Prevention and Control of Chronic Non-communicable Diseases; National Strategy for Combating and Preventing Drug Abuse, with the Action Plan for its Implementation; Strategy for Improving Employees Health and Safety at Work in Montenegro 2010–2014, with the Action Plan for its Implementation.

¹⁶⁵⁴ *Ibid.*

¹⁶⁵⁵ <http://www.mzdravlja.gov.me/rubrike/strategija-razvoja-zdravstva-crne-gore/97487/MAS-TER-PLAN-RAZVOJA-ZDRAVSTVA-CRNE-GORE-ZA-PERIOD-2010-2013.html>

¹⁶⁵⁶ <http://www.mzdravlja.gov.me/rubrike/strategija-razvoja-zdravstva-crne-gore/97487/MAS-TER-PLAN-RAZVOJA-ZDRAVSTVA-CRNE-GORE-ZA-PERIOD-2010-2013.html>

Infant mortality. – According to “Maternal index” developed by organization “Save the Children”, Montenegro, Slovakia and the United States (USA) have the same rate of infant mortality. In these countries, which share the 28th place on the list of 98 countries, five babies die for every 1,000 births.¹⁶⁵⁷ In the Index, compiled by this organization based on the analysis of various factors that affect the health and welfare of women and children, including access to health care, education and economic opportunities, Montenegro, Slovakia and the U.S. are behind the Baltic states, Estonia, Latvia and Lithuania, but also behind the Balkan countries, Croatia and Slovenia.¹⁶⁵⁸ As stated in the index, Norway is at the top because women are well paid, have easy access to contraception and “generous maternity leave policy”. The report also recommends that more attention should be paid to women’s education and better access to health care for mothers and children.¹⁶⁵⁹ According to the most recent data of the Statistics Institute, there was a significant increase in the number of live births in 2009 in Montenegro in comparison to the previous year.¹⁶⁶⁰ In 2009 there were 8,642 live born children, while 43 children were stillborn; the birth rate was 13.7.¹⁶⁶¹

Prevention and treatment of infectious diseases. – Law on Protection of Population from Infectious Diseases (*Sl. list RCG*, 32/2005, *Sl. list CG*, 14/2010), establishes the infectious diseases that threaten the health of the population of Montenegro and infections that occur as a consequence of carrying out health service, and measures for their prevention and control (Article 1). If there be any danger of contagious disease that is not prescribed by law and which may endanger the health of the population of Montenegro, at the proposal of the Ministry of Health, the Government may decide to protect the population from that disease by implementing all or some of the measures provided for in this Law, other measures to protect population from infectious diseases and other measures that nature of such disease requires, as well as measures prescribed by international health and sanitary conventions and other international instruments (Art. 2(2)). Proposal of a competent government authority shall be made in line with the opinion of the Institute of Public Health and include the name of the disease, measures to prevent and fight the disease, the method of implementation and the resources necessary for implementing such measures (Art. 3(2)). Protecting the population from infectious diseases consists of planning, programming, organization, implementation and monitoring of the implementation of measures for the prevention, suppression, elimination and eradication of infectious diseases, as well as providing financial and other resources to protect the population from in-

¹⁶⁵⁷ “Five dead babies per 1,000 births”, *Dan*, 10 May 2010.

¹⁶⁵⁸ *Ibid.*

¹⁶⁵⁹ *Ibid.*

¹⁶⁶⁰ <http://www.monstat.org/cg/page.php?id=275&pageid=49>

¹⁶⁶¹ *Ibid.*

fectious diseases, and has precedence over other health care measures (Art. 3(1)). Everyone has the right to protection against infectious diseases and hospital infections, and the obligation to protect their health and health of others from these diseases (Art. 3(2)). Providing and implementing protection for the population from infectious diseases involves: local government bodies and state administration, health institutions and other entities engaged in health activities in accordance with the law, health workers and associates, health insurance organizations, educational, sports and other institutions and organizations providing services, legal entities and entrepreneurs, humanitarian, religious and other organizations, associations and citizens (Article 6). Protecting the population from infectious diseases is done by implementing general, special and other measures (Art. 11). General measures include: health education of population, providing sanitary and technical conditions in the facilities under the sanitary supervision and other facilities that provide public service and in public places, providing safe healthy food, water and goods, removing human and animal excreta, carcasses, organs and tissues, sewage and other waste matter in a manner and under conditions that do not endanger the health of the population, implementation of measures of preventive disinfection and pest and rodent control in populated areas, on public land, in buildings, public transportation, facilities under sanitary supervision and in their immediate environment (Art. 12(1)). Local government bodies, government bodies, health institutions, companies, entrepreneurs, other legal entities and citizens, in accordance with this and special laws are responsible for the implementation of these measures. Special measures for the prevention and control of infectious diseases are: immunoprophylaxis and haemio-prophylaxis; medical examinations of certain population groups, germ carriers and employees in buildings under sanitary supervision with counselling; health monitoring and quarantine; laboratory testing for identifying infectious diseases and causes of outbreaks of communicable diseases; early detection and reporting of infectious diseases and epidemiological surveillance; transportation, isolation and treatment of the diseased; epidemiological research; health education of patients, their families and other persons who are at risk of developing a disease; disinfection, pest and rodent control, according to epidemiological indications (Art. 13(1)). Supervision of the implementation of this Law and other regulations made under this Act is conducted by the Ministry, and sanitary inspectors conduct inspections, in accordance with the law (Art. 37(1 and 2)).

On 2 December 2010, the Government adopted the Proposed strategy for HIV and AIDS from 2010 to 2014 with an action plan, aimed at ensuring universal prevention, as well as improvement of the quality of life of those living with the virus.¹⁶⁶² Health Minister, Mr. Miodrag Radunovic, said that the previous national strategy from 2005 to 2009 provided a good foundation

¹⁶⁶² “15 million for fighting AIDS”, *Dan*, 3 December 2010.

for HIV prevention, and focused on people who are at risk and living with the virus.¹⁶⁶³ According to his words, the new strategy is based on the successes, results and identified weaknesses of the previous. The strategy covers eight strategic areas, and about 15 million euro is planned for its implementation.¹⁶⁶⁴

According to the Institute of Public Health of Montenegro, during the period from 1989 until the end of 2010, a total of 119 persons living with HIV/AIDS were registered in Montenegro, out of which 33 persons died of AIDS. The number of persons living with HIV/AIDS at end of 2010 totaled 86, out of which 32 have AIDS.¹⁶⁶⁵

In order to prevent HIV / AIDS and sexually transmitted diseases in the past six years over 1,200 health professionals has been trained, including dentists employed in private practice, part of the employees in the Ministry of Internal Affairs and Public Administration and students of the high medical school. SOS hotline of the Podgorica Health Centre provides information on HIV / AIDS and sexually transmitted diseases every day from 8 am to 4 pm.¹⁶⁶⁶

In 2010, as regards crimes against public health, a few changes have been made.¹⁶⁶⁷ Among other things, the criminal act Transmitting HIV infection, Article 289 of the Criminal Code (*Sl. list RCG*, 70/2003), was decriminalized. This criminal act prohibited bringing other persons at risk of HIV infection, non-compliance with regulations and measures regarding the prevention of HIV infection and thus transmission of HIV by negligence, and knowingly transmitting HIV.

The explanation for the deletion of the article states that this crime is covered by other crimes, and that today some forms of this crime have become outdated, since the development of medicine and the discovery of new drugs implies that HIV infection does not always mean death.¹⁶⁶⁸

Upon declaring an epidemic of influenza A (H1N1) in late 2009, Minister of Health Miodrag Radunovic said that the health care system is fully prepared to meet the challenges.¹⁶⁶⁹ However, in January 2011, Minister Radunović ordered austerity measures as the Institute for Public Health has a limited number of PCR tests to confirm the H1N1 virus.¹⁶⁷⁰ In mid-February 2011, 30-year-old Ivana Šoć was admitted to the Institute of Infectious Diseases in the Clinical Centre in Podgorica, for flu symptoms, and discharged

¹⁶⁶³ *Ibid.*

¹⁶⁶⁴ *Ibid.*

¹⁶⁶⁵ Response of the Institute of Public Health is available in the archive of the HRA upon request.

¹⁶⁶⁶ "Half less than last year", *Vijesti*, 4 December 2010.

¹⁶⁶⁷ http://www.skupstina.me/cms/site_data/AKTI%202010/obrazlozenje%20iymjena%20krivcnog%20zakona.pdf

¹⁶⁶⁸ *Ibid.*

¹⁶⁶⁹ "Middle-aged man from Herceg-Novi in critical condition", *Vijesti*, 19 December 2009.

¹⁶⁷⁰ "Police questioned doctors who treated the girl", *Vijesti*, 24 March 2011.

six days later. During this time she was not tested for the virus H1N1, nor given adequate antiviral therapy.¹⁶⁷¹ A day later the patient died, and autopsy showed she had died from suffocation due to severe lung edema, caused by infection with the virus A H1N1.¹⁶⁷²

Law on the restriction of the use of tobacco products. – According to the interpretation of the Committee on Economic, Social and Cultural Rights, the right to health includes not only health insurance and care in medical institutions, but also the state's obligation to provide a healthy living environment.¹⁶⁷³

Although it came into force in August 2004, the Law on the restriction of the use of tobacco products (*Sl. list RCG*, 52/2004) is still not implemented in 2010. National coordinator for tobacco control, Agima Ljaljević, says that the essential problem in monitoring the application of the law, entrusted with inspections, is the fact that there are only about 100 inspectors, who “could not be consistent to the situation on site because they had a number of other activities”.¹⁶⁷⁴ Educational inspectors are supposed to monitor the implementation in the educational institutions, sanitary inspectors in health institutions, and travel inspectors in restaurants, bars, etc.

According to her, this task must be performed by inspectors who would be engaged solely in monitoring the implementation of the law. She further stated that the law is consistently applied as regards the prohibition of advertising and promotion of tobacco products – warnings about dangerous consequences of tobacco use on cigarette packs, and prohibition to sell cigarettes to minors. Ljaljević added that the inspectors have not imposed many penalties for violation of the restriction of the use of tobacco products, while the Deputy Minister of Health, Jadranka Lakicević, in November 2010 said that 18 fines have been issued in 2010 for violation of the restriction of the use of tobacco, including two on citizen's reports and the other during the regular control of the Health – Sanitary Inspection.¹⁶⁷⁵

Last year, the Minister of Health noted that the application of the Law on the restriction of the use of tobacco products proved ineffective and inefficient regarding the smoking ban in public places, announcing the introduction of an absolute ban on smoking in public places and closed spaces.¹⁶⁷⁶ He also said that few penalties have been imposed for violating this Law, and added that it is not quite clear whether the tobacco products are still being sold to minors.¹⁶⁷⁷

¹⁶⁷¹ *Ibid.*

¹⁶⁷² *Ibid.*

¹⁶⁷³ General Comment No. 4, doc. UN E/C.12/2000/4.

¹⁶⁷⁴ “Smokers stronger than the inspectors”, *Dan*, 22 February 2010.

¹⁶⁷⁵ “195.000 citizens are smokers”, *Dan*, 12 November 2010.

¹⁶⁷⁶ “Smoking wherever they want”, *Vijesti*, 1 June 2010.

¹⁶⁷⁷ *Ibid.*

Since the implementation of the current law did not provide expected results, the parliament adopted the Law on Amendments to the Law on Restriction of the use of tobacco products (*Sl. list CG*, 32/2011, of 1 July 2011), which expands and specifies the concept of open and closed public places where smoking is banned, provides for more severe penalties and punishments for employers, responsible persons and natural persons who violate the smoking ban.

Cancer prevention. – *Master Plan for Health Care in Montenegro for the period 2010 – 2013* provides that the prevention of cancer shall begin with early detection of conditions in primary health care and continue with treatment at secondary and tertiary level, and prevention shall be achieved by detection of early stages of illness and their timely treatment, especially breast cancer, cervical cancer, colon cancer.¹⁶⁷⁸

In the Health Centre in Danilovgrad, where pilot projects for prevention and early detection of most common cancers in women covered about 80 percent of women in that town, in 42 patients the cancer was detected on time.¹⁶⁷⁹

Psychiatric treatment. – Strategy for Mental Health Improvement in Montenegro, adopted by the Government in 2004, is based on the recommendations of the World Health Organization, and its main tasks are: providing support for primary health care (health centres); availability of psychiatric medications; providing medical treatment in the community; adopting a national policy and law on the rights of the mentally ill; professional staff training; research support; monitoring mental health in the community; ensuring the participation of the community, patients and their families in the organization of mental health care; education of the population.¹⁶⁸⁰ The Strategy is mostly implemented, especially regarding mental health centres, which are an integral part of primary health care, but the reorganization of stationary mental health services is yet to be completed.¹⁶⁸¹

Montenegro does not have enough hospital capacity to treat patients with mental disorders. Capacities of the Special Hospital in Kotor (Dobrota) are filled, while the Department of Psychiatry in Podgorica has only twenty beds. In the hospital in Niksic six beds are provided to accommodate patients with mental disorders, and a few in Bijelo Polje. Minister of Health announced that a new psychiatric clinic shall be built in 2011, most likely within the Clinical Centre of Montenegro, and added that the objective of the

¹⁶⁷⁸ <http://www.mzd.gov.me/rubrike/strategija-razvoja-zdravstva-crne-gore/97487/MAS-TER-PLAN-RAZVOJA-ZDRAVSTVA-CRNE-GORE-ZA-PERIOD-2010-2013.html>

¹⁶⁷⁹ “At the health centre in Danilovgrad 42 women with breast cancer saved”, *Vijesti*, 8 March 2011.

¹⁶⁸⁰ “Strategy for Mental Health Improvement in Montenegro”, available at: <http://www.mzdravlja.gov.me/pretraga?query=strategija+unapredjenja+mentalnog+zdravlja&siteId=50&contentType=2&searchType=4&sortDirection=desc&pageIndex=10>

¹⁶⁸¹ “Helsinki Declaration”, *Dan*, 1 September 2010.

Ministry of Health is not just to build new psychiatric hospitals, but to reduce pressure on inpatient facilities through mental health counselling, established in all health centres, in accordance with the Strategy.¹⁶⁸² Minister Radunović also pointed out that stigma and discrimination against people with mental disorders still exists in Montenegro, and that about 100 patients are residents of the Special hospital in Dobrota for years and decades because the family abandoned them. Another cause of lack of capacity is the fact that the Special hospital treats patients who were imposed a measure of compulsory psychiatric treatment in a closed institution by the courts.

Representatives of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited the Special psychiatric hospital in Dobrota in September 2008.¹⁶⁸³ They noted that the staff number is unacceptably low. They were informed about occasional physical confrontations between patients, because of lack of staff. They noted that the multidisciplinary work and clinical records have improved, but that there is still not enough information on the inclusion of patients in the psycho-social rehabilitation activities. The Committee reiterated the recommendation made in a report on the 2004 visit about the necessity to establish individual treatment plans for each patient, i.e. increase the choice of therapeutic and rehabilitative activities (occupational therapy, individual and group psychotherapy, education, sports) and include more patients in activities tailored to their needs, all of which include recruitment of additional staff.

Malpractice. – Although there are many on-going court proceedings regarding malpractice, Montenegro seems to have just one final criminal verdict where a doctor was found guilty of medical error, and that verdict was passed in proceedings conducted in the absence of the defendant.¹⁶⁸⁴

End of 2010 marked the two years since filing the indictment against the three doctors of the Clinical Centre, who are accused of malpractice and fatal outcome in the case of pregnant women Almera Fetić and her baby. According to reports from the courtroom, where the testimonies about the death of eminent experts from Belgrade and Podgorica do not match, the case is becoming yet another lengthy process with uncertain outcome. The trial in this case was not over until the end of June 2011.¹⁶⁸⁵ Proceedings against doctors last too long, some even more than a decade, which, according to the law of the European Court of Human Rights, could mean a violation of the proce-

¹⁶⁸² “Asylum instead of hospital”, *Dan*, 28 April 2010.

¹⁶⁸³ Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 22 September 2008, available at <http://www.cpt.coe.int/documents/mne/2010-03-inf-eng.htm>

¹⁶⁸⁴ K273/08 of 13 March 2009. In this case the procedure has been repeated and is still in progress.

¹⁶⁸⁵ “In the courtroom on June 30”, *Dan*, 16 June 2011.

dural aspect of the right to life, which requires efficient determination of the cause of death and responsibility for the death (*Šilih v. Slovenia*, 2009).¹⁶⁸⁶

Criminal Code of Montenegro contains the crime Negligent provision of medical help (Article 290) and thus provides that the physician who applied apparently inadequate means or methods of treatment and thereby caused the deterioration of the health condition of a person, commits this criminal act. However, one of the problems is that the doctors who provide expert opinion at the court are usually work colleagues with the defendant, and they generally do not want to accuse a colleague. Also, sometimes court experts do not have enough expertise in that area, so it happens that the expert doctor makes a mistake during an autopsy and does not properly determine the cause of death or fails to provide all that is needed to determine the cause. The problem of medical errors is not just a job for the regular courts. Court of the Medical Association of Montenegro may conduct an independent proceeding, and, if found guilty, may punish a doctor by a fine, suspension, or, in severe cases, permanent revocation of medical license, but not before the final verdict. Since such judgments do not exist yet, there has been no revocation of medical license in Montenegro.

In recent years, more and more families and patients turn to the police, prosecutors and the media suspecting that doctors “treated them with negligence”. During the previous summer the media often reported about an affair regarding unexplained deaths of five patients who were treated in “Vaso Ćuković” hospital in Risan.¹⁶⁸⁷ That case has not yet been completely clarified. In mid-May 2010, the public was informed about the drama which took place at the Clinical Centre when pregnant Maja Besović waited for two and a half hours to be examined due to extensive bleeding.¹⁶⁸⁸ When she was finally admitted, doctors diagnosed “spontaneous miscarriage”, which is why the proceeding has been initiated. In 2009 the family of the late Emil Šahmanović from Plav accused the Clinical Centre for malpractice, and a doctor of “bribery”.¹⁶⁸⁹ Brother of the deceased holds the doctors responsible for

¹⁶⁸⁶ In the case *Šilih*, the European Court of Human Rights found the state’s liability for violation of the procedural aspect of Article 2 ECHR (right to life), because even after 12 years, the responsibilities for the death of a patient in hospital has not been established, since the criminal proceedings in the meantime became time-barred, and litigation for damages has not been completed. The court ruled that in addition to requirements of respect for the right to life in the specific case, reasons of a general nature also require immediate investigation of all deaths in health institutions. “Knowledge of the facts and of possible errors committed in the course of medical care are essential to enable the institutions concerned and medical staff to remedy the potential deficiencies and prevent the repetition of similar errors. The prompt examination of such cases is therefore important for the safety of users of all health services” (*Šilih v. Slovenia*, 2007 Chamber Judgement, para. 133).

¹⁶⁸⁷ “Sometimes even the autopsy does not help”, *Vijesti*, 27 August 2010.

¹⁶⁸⁸ “White coats accused again”, *Monitor*, 21 May 2010.

¹⁶⁸⁹ “Orthopedists charged for receiving an 800 euro bribe”, *Vijesti*, 10 June 2009.

the death of his brother, while the orthopaedist responded to the accusations claiming that everything was done “professionally”. The case still has no epilogue. In July 2009, the family of the late Dragan Marković (51) from Cetinje initiated a proceeding against the personnel of the Emergency block of the Clinical Centre in Podgorica, claiming that he did not receive “adequate medical treatment when admitted with serious injuries after an accident”.¹⁶⁹⁰ The Clinical Centre then suspended two doctors, three nurses and one technician of the Emergency block. With regard to lengthy court proceedings, the most prominent case is certainly the one against the two doctors of the Clinical Centre regarding the death of Alen Petrović (19).¹⁶⁹¹ The tragedy occurred 12 years ago when this young man sought medical help because of a swollen tooth, but died from sepsis six days after. One accused doctor has died since, and for the other doctor the judgment has been carried out twice. However, even after 12 years the final verdict has not been passed in this case.¹⁶⁹²

During the last three years, 17 lawsuits for compensation have been filed against the Clinical Centre.¹⁶⁹³ Most complaints relate to the treatment prior to 2007, while six lawsuits were filed in 2010. Out of all running disputes the claim was retired in three cases, one has been terminated because treatment is not completed, in one case the compensation of 7,500 Euros has been awarded for non-pecuniary damages, while other disputes are still pending at first instance court.

Corruption in health care. – According to a survey of the Medical Association of Montenegro, which relate to the period from November 2009 until November 2010, every third citizen believes that there is corruption in the health sector.¹⁶⁹⁴

In 2010 the citizens filed three reports to the Ministry of Health, and in January 2011 five anonymous corruption reports.¹⁶⁹⁵ Director of the Clinical Centre stated that only one report for corruption has been filed until the end of May 2010.¹⁶⁹⁶ Minister of Health said that filing a report is the only way to stop corruption in health care system, and that every report, even anonymous, shall be processed.¹⁶⁹⁷

In March 2011, the Supreme Public Prosecutor’s Office filed an indictment against A. Mikulić, physicians of the Clinical Centre in Podgorica, for the criminal offense of accepting bribes in an extended duration, M. Filipović,

¹⁶⁹⁰ “Doctors Radulović and Burzan suspended”, *Dan*, 29 July 2009.

¹⁶⁹¹ “Not healthy when white coats go to court”, *Vijesti*, 12 September 2010.

¹⁶⁹² *Ibid.* See also the judgment of the European Court of Human Rights, *Šilih v. Slovenia*, footnote 14

¹⁶⁹³ “Doctor does not testify against doctor”, *Vijesti*, 20 March 2011.

¹⁶⁹⁴ “Patients to point at doctors”, *Dan*, 14 November 2010.

¹⁶⁹⁵ “Minister filed eight reports”, *Dan*, 13 February 2011.

¹⁶⁹⁶ “Little corruption, big shame”, *Dan*, 24 May 2010.

¹⁶⁹⁷ “Minister waiting for reports”, *Dan*, 21 June 2010.

director of the clinic “Filipović” in Podgorica, B. Blagojević, judge of the Basic Court in Nikšić and Z. Drakulović, lawyer from Podgorica, for the criminal offense of bribery, and B. Janjušević, police officer, for the criminal offense of accepting bribes through helping. Mikulić is charged with repeatedly demanding and receiving money as a gift starting 2 December 2010 until 15 January 2011, in order to perform activities within his official powers he is not supposed to. Janjušević helped by connecting him with a person who gave him a bribe, while the defendants Filipović, Drakulović and Blagojević, bribed Mikulić during the same period.¹⁶⁹⁸

As the defendant Dr. Filipović performed magnetic resonance imaging examination, the affaire was publicly known as “The Magnet”. At the trial, which began in June 2011, the defendants denied the allegations in the indictment.¹⁶⁹⁹ Interestingly, Dr. Mikulić stated at the trial that he had examined many public figures without prior referral from general practitioner, including the President of the Supreme Court Vesna Medenica, many ministers, the son of Deputy Minister of Health, and that his Director was aware of this practice. He also stated that he was present when the Montenegrin president’s wife and the Judge of the Appellate Court, Svetlana Vujanović, asked for the MRI without the referral from general practitioner. Her request was approved.¹⁷⁰⁰ The trial is to be continued in September 2011.

¹⁶⁹⁸ Statement of the Supreme Public Prosecutor’s Office is available at: <http://www.tuzilastvocg.co.me/aktuelnosti/saopstenja%20za%20javnost.htm>.

¹⁶⁹⁹ “Mikulić claims he has been helping people”, *Dan*, 28 June 2011.

¹⁷⁰⁰ *Ibid.*

Right to Education

Article 13, ICESCR:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - a) Primary education shall be compulsory and available free to all;
 - b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 15, ICESCR:

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

Article 2, Protocol 1 to the ECHR:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

General

Education is both a human right in itself and an indispensable means of realizing other human rights.¹⁷⁰¹ As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and participate in their communities. The Committee notes that states are increasingly recognising education as one of the best financial investments they can make, but underlines that the importance of education is not just practical: “a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”¹⁷⁰²

Like other human rights, education, too, has to be made accessible to all without discrimination on any prohibited grounds.¹⁷⁰³

In its case law on Article 2 of Protocol 1 to the ECHR, the ECtHR reviewed the following issues: discrimination (segregation) of Roma with respect to the right to primary education (*Oršuš and Others v. Croatia*, 2010); rights of parents to provide their children with education in keeping with their agnostic beliefs (*Folgerø and Others v. Norway*, 2007), the right of children to compulsory sex education notwithstanding their parents’ religious convictions (*Kjeldsen, Busk, Madsen and Pedersen v. Denmark*, 1980); prohibition of corporal punishment in schools (*Campbell and Cosans v. The United Kingdom*, 1982; *Tyrer v. The United Kingdom*, 1978), etc.

The Convention on the Rights of the Child *inter alia* binds the member states to take measures to encourage regular attendance at schools and the reduction of drop-out rates (Art. 28(1.e)), take all appropriate measures to

¹⁷⁰¹ *The Right to Education (Article 13 of the Covenant)*, Committee on Economic, Social and Cultural Rights, E/C.12/1999/10 8 December 1999.

¹⁷⁰² *Ibid*, para 1.

¹⁷⁰³ That is the main prerequisite pursuant to Article 2 of the ICESCR, mentioned in para 6 b) in the CESCR’s above-mentioned Comment of Article 13.

ensure that school discipline is administered in a manner consistent with the child's human dignity (Art. 28(2)), that the education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential and the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations (Art. 29(1(a) and (b))).

The Constitution of Montenegro guarantees the right to education under equal conditions and lays down that primary education shall be free and compulsory (Art. 75). Mainstream secondary and tertiary education is also free, whereby the constitutional provision approximates the requirement in Article 13(2(b) and (c)) of the ICESCR under which states shall make secondary and tertiary education available and accessible by the progressive introduction of free education.

The General Education Act (*Sl. list RCG* 64/02, 45/10) regulates pre-school, primary, general and vocational secondary education, education of persons with special needs and adult education. The Act lays down the goals of education, which include "development of the awareness, need and ability to preserve and advance human rights, rule of law, the natural and social environment, multi-ethnicity and diversity" (Art. 4(4)).

The Act allows for the establishment of private educational institutions (Art. 3(1)).

The Act prohibits discrimination in the realisation of the right to education (Art. 9) and lays down that the locations of the schools across state territory shall ensure that the citizens have equal access to education (Art. 8).

Religious instruction is not provided in Montenegrin schools. The Constitution lays down that religious communities shall be separate from the state, while the General Education Act prohibits public education institutions from involvement in religious activities or use of the institutions' premises for religious purposes (Art. 5).

Articles 97 and 98 on the rights and duties of students *inter alia* entitle the students to voice their opinions about the work of their teachers, to submit complaints about their grades and ask that a commission test their knowledge during the school year. Students are also entitled to protection from all forms of violence in school. Under Article 111, a teacher shall be dismissed and prohibited from working thereafter in a school in the event s/he engaged students and school staff in political or religious activities (paragraph 2), induced a student or staff member to engage in sexual intercourse or sodomy (para. 5), humiliated, insulted or applied corporal punishment against a student (para. 9), incited ethnic or religious intolerance (para. 10). The Act thus applies the provisions in the Convention on the Rights of the Child on non-discrimination, prohibition from abuse and school discipline in terms of the respect of a child's dignity.

Controversial Amendments to the General Education Act Adopted in 2010

The 2010 amendments to the General Education Act (*Sl. list CG*, 45/10) lay down that instruction in private and public educational institutions in Montenegro shall be conducted in Montenegrin, instead of the language “officially used in the Republic”, which had earlier been the case (Art. 11). The amendment provoked fierce protests from political and other organisations of Serb citizens of Montenegro, who, according to the 2011 census, account for 28.7% of the population, while 43% of population speak Serbian (according to 2003 census, 63.5% of Montenegro’s population spoke Serbian).¹⁷⁰⁴ Political party New Serbian Democracy filed a motion for the review of the constitutionality of this provision. The Constitutional Court rejected the motion and found that the Act did not jeopardise the constitutional right to equality in education and did not deprive the minorities of their right to education in their own languages.¹⁷⁰⁵ The Education and Sports Ministry said in April 2011 that instruction in Montenegrin schools would be conducted in Montenegrin, while the children whose native language is not Montenegrin would be provided with instruction in their native languages.¹⁷⁰⁶ The announcement met with concern that the children would be assigned to classes by their ethnicity and thus segregated. Prime Minister Igor Lukšić said he was against the forming of such classes but that he was for entitling everyone to be schooled in their native languages.¹⁷⁰⁷

In April 2011 the Ministry of Education announced that teaching in all schools in Montenegro shall be conducted in Montenegrin language, while the children of citizens who are not native speakers of Montenegrin language will be provided teaching in their native languages.¹⁷⁰⁸ This information raised concerns as regards the segregation of children in the fall by forming mono-national classes. Prime Minister Igor Lukšić stated that he does not support national classes, but that he supports teaching in native language.¹⁷⁰⁹

The 2010 amendments to the General Education Act fully centralised the procedure for the appointment of school principals. Principals are now appointed exclusively by the Minister, and the school board is now entitled only to advertise the vacancy and forward the documentation to the Minister (Art. 80). The principal was originally appointed by the school board and his/

¹⁷⁰⁴ 2003 Census results, Montenegrin Statistical Office (www.monstat.org).

¹⁷⁰⁵ Statement issued after the 5th session of the Constitutional Court, 24 March 2011, available in Montenegrin at: <http://www.ustavnisudcg.co.me/aktuelnosti.htm>; “Montenegro: Nova’s Language Initiative Rejected,” Radio Free Europe, 24 March 2011, available at: <http://www.slobodnaevropa.org/content/news/2348595.html>.

¹⁷⁰⁶ “Don’t Tell Me They Will Form Ethnic Classes,” *Vijesti*, 30 April 2011.

¹⁷⁰⁷ “Who Greased Palms to Invest,” *Vijesti*, 28 May 2011.

¹⁷⁰⁸ “Is it possible that they will introduce national classes,” *Vijesti*, 30 April 2011.

¹⁷⁰⁹ “Who gave a bribe to make an investment,” *Vijesti*, 28 May 2011.

her appointment was confirmed by the Minister. The solution allowed for political appointments regardless of the needs and wishes of the school staff and students and resulted in months-long protests and suspension of regular schooling in the Cetinje High School in 2009.¹⁷¹⁰ This experience prompted the deputies of the Movement for Changes to propose an amendment which, had it been adopted, would have ensured a greater number of school staff and parents on the school board. The retrograde amendment that was ultimately adopted, however, fully disenfranchised the school board. The structure of the school board is changed as well. The board now comprises: three representatives of the Ministry, three representatives of the municipality in the event the school was established by a municipality, one representative of staff and one representative of the parents (Art. 73); it used to be made up of two Ministry representatives, two representatives of the Bureau for Educational Services, two representatives of the staff and one representative of the parents.

The issue of who will be the school principal has always concerned the school staff the most. This is why the appointment of principals should have been fully or at least predominantly vested with the teachers' councils and the parents. This would have helped the schools truly become democratic, depoliticised institutions, which is still not the case in Montenegro.

The 2010 amendments to the General Education Act for the first time introduce the obligation of the Bureau for Educational Services and the Vocational Education Centre to appraise the schools' performance every four years. Furthermore, the former three professional councils, for general, vocational and adult education, have been dissolved and replaced by the new National Ed-

¹⁷¹⁰ M. Đurišić was appointed principal by a 4:3 vote of the Cetinje High School School Board. The Education and Science Minister refused to endorse the appointment. Two weeks later, the Bureau for Educational Services forwarded to the School Board the decision on the dismissal of their member in the School Board and a complaint against the appointment of Đurišić by the member of the local board of the ruling SDP and Đurišić's counter candidate. On 24 August, two other members of the Board tendered their irrevocable resignations, while one member notified the Board in person that he could no longer participate in the work of the Board.

The school-year did not begin on 1 September 2009 as scheduled because around 70% of the students, supported by their teachers and parents, boycotted class in protest of the Minister's decision and demanded of the Education and Sports and Science Ministry to endorse the initial School Board decision. The new School Board, chaired by the chairman of the ruling DPS in the local parliament, who was appointed on 9 September, upheld the complaint filed by his coalition partner Grbović and published a new vacancy notice. The students continued their protest.

Cetinje Mayor M. Janković said that the Education Minister had told him on the phone that he did not endorse Đurišić's appointment because the latter frequently met with Serbian Orthodox Church Metropolitan Amfilohije. Prime Minister M. Đukanović held a meeting with the students and the representatives of the parents on 9 October 2009. He proposed that a new School Board, comprising eminent Cetinje citizens, be constituted. The students were satisfied with the outcome of the talks and went back to school after their 42-day protest.

Đurišić applied again for the post and the School Board appointed him principal. The Minister soon endorsed the appointment.

ucation Council. The amendments also allow for the establishment of schools in accordance with the public-private partnership model and introduce the institute of pupils' parliament, which replaces the hitherto pupils' community.

Civic Education

In accordance with the CoE Declaration and Programme of Education for Democratic Citizenship¹⁷¹¹, the Strategy of Civic Education in Primary and Secondary Schools in Montenegro in 2007–2010 was adopted and new subjects introduced to Primary and Secondary Schools.¹⁷¹² Civic education is a compulsory elective subject in all four grades of high school. Civic education is a compulsory subject in 6th and 7th grades of primary school. The curriculum builds on the knowledge and skills acquired in the lower grades: Nature and Society (1st–3rd grades), Nature and Technology (4th grade) and Society (4th and 5th grades).

The status of the new subject depends on the overall atmosphere in the school: from the degree of democracy in education and the autonomy of the school and teachers, the students' status in school, to the teachers' attitude toward the subject. The NGO Centre for Civic Education (CCE), which took part in the design of the Strategy, thinks that the envisaged activities have not been fully implemented due to lack of an enabling school environment, of relevant literature, technical tools and links with other school subjects.¹⁷¹³

A new elective subject, Humanitarian Law Studies, was also introduced in 8th and 9th grades of primary school.

Right to Compulsory Primary Education

Pursuant to the Constitution, the obligation in Article 13 of the ICE-SCR and the Convention on the Rights of the Child, the Primary Education Act (*Sl. list RCG*, 64/02, 64/04, *Sl. list CG*, 45/10) obliges parents to ensure that their children regularly attend the nine-year primary school from the age of 6 to 15 (Art. 4). The state administration authority charged with the birth records is obliged to submit to the schools lists of children in the school catchment area who are old enough to start school in September by end February of the calendar year (Art. 35). The school is duty-bound to file a report with the competent Education and Sports/Science Ministry inspectorate against the parents of a child who has not been enrolled in school or has not been attending school (Art. 36).

¹⁷¹¹ *Declaration and Programme on Education for Democratic Citizenship, based on the Rights and Responsibilities of Citizens*, adopted on 7 May 1999. See also: All-European Study on Education for Democratic Citizenship Policies, César Birzúa et al, 2004.

¹⁷¹² Strategy for Civic Education in Primary and Secondary Schools in Montenegro, 2007–2010.

¹⁷¹³ Information obtained from Centre for Civic Education, May 2011.

The Act envisages only penalties against parents in the event they fail to ensure their child's school attendance but no sanctions against the municipal authorities or the ministry charged with education (Art. 81).¹⁷¹⁴

Hardly any of the parents, who have failed to ensure that their children regularly attend school, have been penalised in practice. Although it is common knowledge that Roma children in particular are either not enrolled in school at all or attend it irregularly,¹⁷¹⁵ HRA was told by the Education and Sports/Science Ministry that only one Roma parent was penalised in the May 2007-May 2009 period because his child did not attend school. The Ministry confirmed that the education inspectorate had not visited the Konik camps, where the displaced Roma live, to check whether all the children living in them attend primary school. The Ministry quoted the imprecise permanent and temporary residence data, particularly regarding displaced persons, to justify the fact that the parents of Roma children are not sanctioned because their children do not attend school.¹⁷¹⁶ The Ministry said that the children not covered by primary education can be identified by "establishing protocols with clear duties, defined roles, obligations and responsibilities of all competent authorities and institutions that need to be undertaken to ensure that all children are included in compulsory primary education".¹⁷¹⁷

The Education and Sports/Science Ministry visited the Konik 1 and 2 camps at the beginning of the 2010/2011 school-year and identified the children who had not been going to school together with the Red Cross of Montenegro. Fifty five children were consequently enrolled in the city schools and provided with the textbooks, school supplies, the clothing they needed, transportation et al.¹⁷¹⁸ It remained unclear whether the above-mentioned "protocol" has been established to ensure that similar campaigns are continuously conducted across Montenegro.

Education has been singled out as a priority in the Strategy for the Improvement of the Status of the Roma, Ashkali and Egyptian (RAE) Population in Montenegro. The Strategy comprises a set of 19 measures for increasing the inclusion of Roma in the education system. Most of these measures have not been implemented yet or their implementation has just begun. The emphasis is

¹⁷¹⁴ "A fine ranging from one half to ten times the lowest wage in Montenegro shall be imposed against a parent who did not enroll his/her child in school or ensured s/he attend school (Arts. 4, 31, 36 and 37). Additional penalties may be imposed on the parent in the event the parent does not enroll the child or ensure his/her school attendance after the imposition of the initial penalty (Art. 81, Primary Education Act).

¹⁷¹⁵ According to official data, over 50% of Roma and Egyptian children of school age are not covered by compulsory primary education. According to international agencies and local NGOs, only around 10% of Roma and Egyptian children complete school. The primary school drop-out rate is particularly high in Podgorica.

¹⁷¹⁶ Letter by Ministry of Education, Sports and Science Ref No 01-3418/3 of 27 July 2009, sent to HRA by Assistant Minister Marko Jokić.

¹⁷¹⁷ *Ibid.*

¹⁷¹⁸ Interview with Ministry of Education and Sports adviser Tamara Milić, 24 December 2010. "Assistance for 55 Roma Kids Enrolled Late in School," *Vijesti*, 27 September 2010; "Textbooks and Clothes for 55 Children," *Dan*, 28 September 2010.

on preschool education and the Strategy envisages the opening of new preschool groups and the engagement of Roma teachers. There are, however, still preschool institutions in Montenegro attended exclusively by Roma children. Such segregation, particularly at the preschool level, is detrimental, because these children already form a group identity before starting primary school, which distances them even more from their peers, one of the chief causes of the unfavourable and discriminatory status of the RAE population in Montenegro.¹⁷¹⁹

The Strategy envisages the distribution of free textbooks and school supplies to Roma primary school students, scholarships, and full-time employment of a specific number of Roma teachers. The scholarships for Roma and Egyptian school and university students are, however, paid out with several-month delays, which defeats the purpose because they are supposed to facilitate the students' regular attendance.¹⁷²⁰ There is also a problem regarding the quality of education provided by primary schools.¹⁷²¹ Although steadily increasingly, the number of RAE students who finish high school is still very small (around 2%).¹⁷²² Another problem is the drop-out rate of Roma children, who as a rule enter into unofficial marriages in the senior grades of primary school, or need to work on a part-time or full-time basis to help their parents support their families. The Ministry of Education and Sports, however, says that its inspectors had not received any reports from schools that any of their students were not attending school in the April 2009–November 2010 period.¹⁷²³ Furthermore, the inspectorate had not conducted checks of the refugee camps in Montenegro until 12 November 2010, and had received no reports of non-attendance by Roma students in the period.¹⁷²⁴ All this indicates that the state is not taking active measures to prevent dropping out, particularly by the Roma children, who are under pressure from poverty and a specific traditional culture.¹⁷²⁵ A large number of these children are essentially not provided with equal opportunities to attend primary school because they do not know the language and live in inadequate conditions.

¹⁷¹⁹ Policy Brief “From Integrative to Inclusive Education: in Pace with Needs”, group of authors (CEMI, CCE, Pedagogical Centre), available at: http://www.cemi.org.me/images/dokumenti/brief/brief_education.pdf.

¹⁷²⁰ Roma Scholarship Foundation data, interview with Executive Director Aleksandar Zeković, April 2011.

¹⁷²¹ *Ibid.* The Roma Scholarship Foundation noted that many of the children are illiterate, even in 5th grade.

¹⁷²² *Ibid.*

¹⁷²³ Decision No.12–63/2 of 19 November 2010.

¹⁷²⁴ Decision No.12–63/2 of 19 November 2010 Ministry of Education and Sports – Education Inspectorate.

¹⁷²⁵ See para 177 of the ECtHR judgment in the case of *Oršuš and Others v. Croatia*, 2010, in which the Court found that the authorities had not taken sufficient measures to prevent high drop out rates of Roma primary school pupils. The Court found that the authorities should do more “to raise awareness of the importance of education among the Roma population and to assist the applicants with any difficulties they encountered in following the school curriculum”.

Education in Roma is still not available in mainstream education and there are no textbooks in that language. Another measure envisaged by the Strategy is the involvement of the children's parents in programmes to help them realise the importance of educating their children and of providing them with the adequate support in the process.

The project entitled "Roma Education Initiative" of the Foundation for Open Society Representative Office Montenegro and UNICEF, which was implemented in the 2003–2008 period in cooperation with the Education and Sports/Science, *inter alia* introduced Roma teaching assistants to continuously help Roma primary school children and their families in overcoming linguistic and cultural barriers. However, the Montenegrin Government had not earmarked funds to remunerate the teaching assistants, despite their excellent results and generally small monthly outlays for their salaries, since the completion of the project until 1 June 2011.

The trend of inclusion and retention of RAE children in education was analysed on the basis of data of the primary school Božidar Vuković Podgoričanin, which enrolls the greatest number of RAE pupils in Montenegro.¹⁷²⁶

¹⁷²⁶ Božidar Vuković Podgoričanin school data forwarded in response to a request for access to information of 18 November 2010

Roma Students – Main School Building – Primary School Božidar Vuković Podgoričanin in Podgorica

School-year	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11
No of enrolled students	133	267	295	298	306	344	391	453
No of students at the end of the school-year	100	255	284	292	287	302	322	
Dropped out	33	12	11	6	23	25	11	
Finished 8th grade	-	1	4	2	4	5	9	

Most of the drop-outs leave school at the age of 14 or 15. The school does not have the precise details and addresses of the students which it could specify in the reports on non-attendance.

School rooms at Camp Konik, "Kamp Konik 2" – started working in the 2000/01 school-year.

No of enrolled students	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11
No of students at the end of the school-year	84	180	207	286	292	266	269	265	267
Dropped out	81	156	174	245	258	250	211	234	
Finished 8th grade	3	24	33	41	34	16	17	31	

A number of parents and their children returned to Kosovo or Serbia during the 2009/10 school-year

Inclusive Education

Article 23 of the Convention on the Rights of the Child recognises the right of the disabled child to special care and encouragement, assistance free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

The Government adopted the Strategy of Inclusive Education in Montenegro 2008–2012 based on the principle of *quality education for all, for children and youths with special educational needs in accordance with their interests, capacities and needs*. The Strategy goals comprise: 1) alignment of national regulations with domestic and international documents, 2) systemic support to the teaching staff's professional development, 3) realisation of horizontal and vertical mobility between educational institutions by linking mainstream and special curricula, 4) organisation of a professional support network, 5) ensuring quality education and monitoring of education, and 6) affirmation of positive attitudes towards the philosophy of inclusive education.

Under the Preschool Education Act (*Sl. list CG*, 49/07, 80/10), children from the most vulnerable categories of the population, including children with disabilities and developmental difficulties, children with difficulties caused by social, linguistic and cultural barriers, i.e. children living in poverty and remote rural areas, shall attend preschool institutions on a regular and everyday basis together with other children and separate groups of children with any of the mentioned problems shall not be formed.

Depending on the type of education programme and the duration of attendance, preschool education may be provided by preschool institutions (nurseries and kindergartens), education centres, resource centres and day centres (hereinafter: institutions) and by the families, and may also be provided by primary schools and other legal persons.

The provisions and the name of the 2004 Act on the Education of Children with Special Needs (*Sl. list RCG*, 80/04) were amended in 2010. The law now in force is called the Act on the Education of Children with Special Educational Needs (*Sl. list CG*, 45/10) and stipulates education tailored to the child's special educational needs from the moment the child's difficulty is detected. The amendments allow the parents to take part in the design of the curriculum (under the 2004 law, the parents had a greater role and were entitled to select the curriculum). The amendments also expand the goals of education and oblige the institutions to provide additional teaching aids (material in larger fonts, Braille, et al).

Particularly relevant are the provisions enabling inclusive education of children with special educational needs in the mainstream school system and the resource centres (for children with moderate, grave, severe and combined developmental difficulties who cannot attend mainstream schools, when placement in a resource centre is in their best interest due to the support they require and the close inter-relationship among education, habilitation and rehabilitation) and day centres. The Act also commendably provides for additional support of the teachers and other assistants to children with special needs to master the curriculum. However, although it lays down that the teachers shall work one on one with such children, the Act also envisages the existence of special classes in eight mainstream schools for now. The latter solution, although an improvement over totally isolated classes, does not correspond to the idea of inclusive education. The implementation of a project entitled “Inclusive Education Support Network” was under way at the time this report went into print¹⁷²⁷. This project aims at increasing the number of children with developmental difficulties in mainstream classes and establishing cooperation between mainstream and special classes in schools to strengthen inclusion.¹⁷²⁸

Under the Act, children with special needs shall enroll in school on the basis of a decision on their orientation rendered by the Assessment and Orientation Commission. These decisions specify the volume and manner of additional professional support to be provided to children with special educational needs in accordance with the educational programme.

Commissions for the assessment and orientation of children with special educational needs work within the local administration authority charged with education and comprise a paediatrician, relevant medical specialists, a psychologist, pedagogue, special needs teacher and social worker; parents, school and kindergarten teachers may also take part in its work. The Act also envisages the establishment of mobile teams comprising experts from resource centres or special classes in schools. Other professionals may also be engaged if so required by the child’s special educational needs.

Individual Developmental Educational Programmes (IDEPs) are designed for children with disabilities and developmental difficulties pursuant to a special plan. The Assessment and Orientation Commissions design the support plans and the data in these plans are used by the experts designing the IDEPs. The plans specify when the IDEPs should be reviewed and, if necessary, amended.¹⁷²⁹ An IDEP needs to be designed for every single child

¹⁷²⁷ Ministry of Education and Sports “Inclusive Education Support Network” project, in partnership with UNICEF, press release available in Montenegrin at <http://www.mpin.gov.me/vijesti>.

¹⁷²⁸ For instance, between 7 and 10 autistic children attend the Podgorica primary school Savo Pejanović, one in each grade.

¹⁷²⁹ Act on Education of Children with Special Educational Needs and interview with Education and Science Ministry adviser Tamara Milić conducted on 24 Dec 2010.

and tailored to his/her specific needs and comprise all the information of relevance to the child's learning abilities.

According to the conclusions of the analysis of non-governmental organizations, the current procedure for designing IDEPs falls short of international standards, does not comprise enough information and the Commissions tend to copy paste the plans for all children suffering from the same developmental difficulty.¹⁷³⁰ Furthermore, such plans are rarely reviewed i.e. the progress the children are making is not monitored, which cannot but impact negatively on their overall development.

Under the Act, a commission, comprising a psychologist, kindergarten teacher and grade teacher, may recommend that a child's enrolment in school be postponed for objective reasons.

The Ministry of Education and Science designed an information booklet on the Assessment and Orientation Commission, which is to be published and distributed to the parents. Eighteen such commissions, each comprising six members, have been established at the local level. Although this is an improvement over the initial five pilot Commissions, the number of these Commissions is still insufficient, wherefore they are unable to perform the duties within their remit well and efficiently.

Furthermore, they do not ensure the coverage of all of Montenegro, wherefore they often fail to detect the children's difficulties on time or improperly categorise the children, all of which forestalls their early rehabilitation. The Commissions submit their data to the Ministry of Education and Science, which enters them in its internal database of students with special educational needs.¹⁷³¹

The NGOs identified the following shortcomings in practice: inadequate design and review of IDEPs; deficiencies in the work of the mobile teams (there are four mobile teams, for Podgorica, Nikšić, northern Montenegro and the coast, whose work in the field is qualified as sporadic; furthermore, the parents are unaware of their existence or functions); poor coordination among institutions charged with inclusive education; underdeveloped system for educating wards of special institutions; non-inclusion of a large number of RAE children in the education system and their high drop-out rates; lack of knowledge and information, which fosters stereotypes and prejudices within various groups (peers, families, schools, communities, professional staff), segregation of RAE children of preschool age; insufficient training and awareness of teaching staff, etc.¹⁷³²

¹⁷³⁰ Policy Brief "From Integrative to Inclusive Education: in Pace with Needs", group of authors (CEMI, CCE, Pedagogical Centre) with the financial support of the EU, available at: http://www.cemi.org.me/images/dokumenti/brief/brief_education.pdf, published on 10 February 2011.

¹⁷³¹ Interview with Education and Sports Ministry adviser Tamara Milić, 24 December 2010.

¹⁷³² Policy Brief "From Integrative to Inclusive Education: in Pace with Needs", group of authors (CEMI, CCE, Pedagogical Centre) with the financial support of the EU, available

The European Commission in November 2010 concluded that the legislation on ensuring inclusive education of vulnerable groups and children with special needs remained to be “enforced more vigorously”.¹⁷³³

Adult Education

The Adult Education Act (*Sl. list RCG*, 64/02, 49/07) defines lifelong adult education and states that adults may educate themselves and professionally advance themselves, specialise and complement their knowledge, skills and competences by completing parts of the formal education curricula (modules) or specific programmes for acquiring knowledge, skills and competences. Adult education conducted in accordance with primary, secondary general and vocational school curricula shall be provided in accordance with this Act and laws regulating those fields of education. Tertiary education of adults is provided in accordance with the law on high education.

Financial Status of Teachers

Under the ICESCR, “the material conditions of teaching staff shall be continuously improved” (Art. 13(2.e)).

Teachers’ salaries were 3.5% lower in 2010 than in 2009.¹⁷³⁴ Salaries of teaching staff have consistently been lower than the state average in the past four years. The average national net wage stood at 479 Euros and the average teachers’ net wage stood at 432 Euros in 2010.¹⁷³⁵

In late February 2011, the Podgorica Municipal Board of the Education Trade Union recalled that teachers on average earned 15% less than the state average and filed an initiative with the members of the Trade Union’s Main Board to initiate an increase of teacher salaries.¹⁷³⁶ The Finance Ministry said in March 2011 that “increasing the salaries of school staff and others

at: http://www.cemi.org.me/images/dokumenti/brief/brief_education.pdf, published on 10 February 2011.

¹⁷³³ Analytical Report accompanying the Commission Opinion on Montenegro’s application for membership of the European Union the European Commission. 3.26 Chapter 26: Education and Culture (http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_rapport_2010_en.pdf).

¹⁷³⁴ Finance Ministry’s Reply to the University of Montenegro Trade Union (Union of Free Trade Unions) of 10 February 2010, explaining that the cut in wages was the result of amendments to the laws on personal incomes and mandatory social insurance (HRA archives).

¹⁷³⁵ Montenegrin Statistical Office (MONSTAT), breakdown of April 2011 wages in Montenegro: <http://www.monstat.org/userfiles/file/zarade/2011/April%202011%20zarade%20za%20sajt.pdf>.

¹⁷³⁶ “Advocate an Increase in Wages”, *Dan*, 26 February 2011.

paid from the budget would be a step backward in implementing the policy of stabilising public finance, which has been applauded by the international community".¹⁷³⁷

Autonomy of the University

Article 15(3) of the ICESCR obliges states to undertake to respect the freedom indispensable for scientific research and creative activity.

The CESCR underlined the importance of academic freedoms and the autonomy of tertiary educational institutions, which implies that members of the academic community are free to independently or collectively pursue, develop and transmit knowledge and ideas, express freely their opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the state or any other actor.¹⁷³⁸

The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.¹⁷³⁹ Autonomy of an institution of higher education is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State.¹⁷⁴⁰

The Constitution of Montenegro guarantees the autonomy of the university, higher education and scientific institutions (Art. 75). It also guarantees the freedom of scientific, cultural and creative activity, the freedom to publish works of art or science, scientific discoveries, technical inventions, and the moral and property rights of their authors (Art. 76).

Under the Higher Education Act (*Sl. list RCG*, 60/2003 and 45/2010), the institution shall itself recruit its academic staff (Art. 19(7)) and is duty-bound to guarantee to its academic staff the freedom of thought, ideas, testing of acquired knowledge and ensure its freedom of organisation and association and its protection from discrimination on any grounds (Art. 23(1)).

The state university shall be managed by its Governing Board, comprising academic and non-academic staff, students and representatives of the founder and public as external members (Art. 46). External members may not account for more than one-third of the Governing Board. The Rector of

¹⁷³⁷ "Wage Increase Would be a Step Backwards", *Vijesti*, 16 March 2011.

¹⁷³⁸ CESCR, *General Comment No. 13, The Right to Education (Article 13 of the Covenant)*, E/C.12/1999/10 8 December 1999, para 38.

¹⁷³⁹ *Ibid*, para 39.

¹⁷⁴⁰ *Ibid*, para 40.

the state university, who manages the university, is appointed by the Governing Board from among full-tenured university professors. The candidates are nominated by a professional university body – the Senate – comprising the Rector, Vice Rectors, representatives of the academic staff and the students (Art. 49(3), Art. 51(2)). The university statute regulates in detail the procedure for the appointment of the Rector, his/her remit, term of office and other issues regarding the Rector (Art. 49(4)). The procedure for appointing college deans is also regulated in detail by the university statute (Art. 50(3)). Under the Statute of the University of Montenegro (UCG),¹⁷⁴¹ the deans are appointed by the UCG Governing Board at the proposal of their college/academy or vocational college councils provided that the candidacy has been endorsed by the Rector. All college, academy or vocational college staff with academic titles are eligible to run for dean. A dean is appointed to a three-year term of office and is eligible for one consecutive reappointment (Art. 55(1) of the Statute).

The procedure and manner of appointment of the UCG Rector and Law College Dean in the first half of 2011 sparked some controversy. Both were appointed pursuant to a Rulebook,¹⁷⁴² adopted by the UCG Governing Board on 26 November 2010. The Rulebook centralised the dean and rector appointment procedure; the NGOs claimed that the procedure was in contravention of Art. 28 of the UCG Statute, with which it had to have been aligned on time. The NGO Centre for Civic Education (CCE) submitted a request to the Education Inspectorate asking it to review the case and said it would launch an administrative dispute.¹⁷⁴³ The competent inspector in the meantime prevented the CCE from undertaking further procedural steps by avoiding to render a decision.¹⁷⁴⁴

Rector Predrag Miranović, who was the only candidate for the post, was re-elected in early 2011. The UCG Governing Board initially did not endorse the Law College Council's candidate, Professor Drago Radulović, and asked the Rector in April 2011 to state whether the appointment procedure was in accordance with the regulations.¹⁷⁴⁵ Radulović's appointment was subsequently endorsed by the Governing Board.¹⁷⁴⁶

¹⁷⁴¹ The Statute is available in Montenegrin at: <http://www.ucg.ac.me/zakti/Statut.pdf>

¹⁷⁴² Rulebook on UCG Rector Appointment Procedure, Deadlines, Termination of Office and Dismissal, of 26 November 2010.

¹⁷⁴³ "Miranović Should Not Accept the Nomination", *Dan*, 5 March 2011; "Former Dean Ranko Mujović Does not Recognise the Yesterday's Appointment of a New Law College Dean by a Majority of Votes", *Vijesti*, 8 March 2011.

¹⁷⁴⁴ Interview with CCE Executive Director Daliborka Uljarević, 1 June 2011.

¹⁷⁴⁵ "Demanding the Dean's Dismissal Again", *Vijesti*, "Professors Ignoring the Dean", *Dan*, 5 April 2011.

¹⁷⁴⁶ At its session on 28 April 2011, the UCG Governing Board appointed Drago Radulović the next Dean of Law College (UCG Bulletin, No 270 of 29 April 2011, available at: <http://www.ucg.ac.me>)

A number of incidents between the students and outgoing Dean Ranko Mujović and between him and a number of the college professors and associates preceded the vote on the new Law College Dean.

The state prosecution office rejected an anonymous criminal report filed against Dean Mujović, accusing him of corruption and abuse of post.¹⁷⁴⁷ The Dean then brought libel charges against journalist Slavko Radulović and the *Daily Press*, the publisher of the daily *Vijesti*, which had run articles about the subject of the anonymous criminal report – forgery of the grades of Mujović's Assistant Professor. The Podgorica Basic Court acquitted the journalist in February after finding that the presented evidence confirmed the allegations in the articles “Better Grade without the Professor's Signature”, “Their Fees were a Poke in the State's Eye, Too” and “Mujović Knows Better than I that He Pushed up His Assistant's Grade Average”.¹⁷⁴⁸ Suspicions about the negligent conduct by the state prosecution office, which rejected the criminal report against Mujović, are fuelled by the fact that Mujović is a member of the Prosecutorial Council.¹⁷⁴⁹

Six members of the Law College Council and two professors, who are not members of this body, accused Mujović of various unlawful activities, discrimination, pressures and blackmail and submitted an initiative for his dismissal to the UCG Senate and Governing Board in December 2010.¹⁷⁵⁰ It was not until late March 2011 that the UCG Governing Board assessed that the College Council was competent to rule on the initiative after its submission by the Nomination Commission, which had not existed in December 2010. Dean Mujović scheduled a College Council session at which his dismissal would be discussed for 12 May 2011, but prevented a vote on his dismissal by walking out of the session together with other seven professors because he claimed that the procedure was violated.¹⁷⁵¹ Dean Mujović term of office expires in August 2011, when he will be replaced by the newly-appointed Dean Professor Drago Radulović.

The general impression is that the competent UCG authorities hesitated to react for too long and address on time the blockade of the work of the Law College, the Council of which was unable to render any decisions for a full six months in 2010. Moreover, the prosecution office's rejection of the criminal

¹⁷⁴⁷ *Dan*, 6 April 2010, p. 11, *Monitor*, 16 April 2011, p. 24–25.

¹⁷⁴⁸ “Superior Court Decision Awaited”, *Vijesti*, 21 May 2011.

¹⁷⁴⁹ Apart from that, Dean Mujović also mentored Education and Sports Minister Slavoljub Stijepović, Police Director Veselin Veljović and former senior National Security Agency official Zoran Lazović, who were completing their master studies in international law. Mujović was also a deputy of the ruling DPS in the Montenegrin parliament. (“Politics and Conflict of Interest”, *Dan*, 11 February 2011)

¹⁷⁵⁰ *Dan*, 28 May 2011, p. 11 (The initiative *inter alia* states that the Dean has “jeopardised fundamental academic freedoms and attacked not only the reputation and dignity of the professors, but also prohibited “unsuitable” professors from accessing the Deanery...”).

¹⁷⁵¹ “It's All Opposition”, *Vijesti*, 13 May 2011.

report against the Dean does not contribute to the public trust in the impartiality of this state authority.

The reform of tertiary education in accordance with the Bologna Declaration principles was launched with the adoption of the Higher Education Act in 2003 (*Sl. list RCG*, 60/03). The Act was amended in 2010 to align it with EU regulations and recommendations.¹⁷⁵²

The Youth Group of the CCE compiled the criticisms of students of various colleges about the application of the Bologna Declaration. Rather than bringing new quality, the reform, in their view, has resulted in lack of coordination and alignment, the students are insufficiently informed of the new rules, regulations are enforced selectively, colleges lack equipment, teaching staff and funds are lacking for the adequate implementation of the reform.¹⁷⁵³

The Higher Education Act allows for the establishment of private universities and colleges. In 2011, apart from the UCG, Montenegro had two private universities (Mediterranean University and Donja Gorica University) and seven independent private colleges.

The 2010 amendments to the Higher Education Act (*Sl. list CG*, 45/10), *inter alia* regulate in greater detail the funding of tertiary education institutions. After hearing the opinion of the High Education Council, the Government shall establish the number of students and amount of funds for funding the tuition of students attending study programmes of public interest at private universities (Art. 69). Given that the Government appoints the members of the High Education Council, the provision may be used to unfairly favour the Donja Gorica University, established by DPS leader and former Prime Minister Milo Đukanović and at which the current Prime Minister Igor Lukšić also taught. On the other hand, such a solution may help improve the quality of education and its accessibility in Montenegro if it actually gives a specific number of talented students, regardless of their financial standing, the opportunity to choose between universities and study programmes.

The Act envisages the establishment of a student parliament in which university students may associate. Such parliaments are established in accordance with the institutions' statutes as autonomous bodies entitled to represent and protect the rights and interests of students (Art. 106).

There were complaints about the regularity of the elections of student representatives to the student parliament of the UCG at some of its colleges.

¹⁷⁵² Council Recommendation of 24 September 1998 on European cooperation in quality assurance in higher education. (98/561/EC), European Parliament and Council Recommendation of 15 February 2006 on further European cooperation in quality assurance in higher education, Decision No 1298/2008/EC of the European Parliament and Council of 16 December 2008.

¹⁷⁵³ "Students Are Not Free and Bold", *Dan*, 4 April 2011 (See also YGCCE press release <http://www.cgo-cce.org/en/press/STUDENTS%20DAY%20IN%20MNE%2004042011.pdf>).

After the students protested against the irregularities, the elections for the student parliament were repeated at the College of Philosophy.¹⁷⁵⁴

Representatives of several student organisations agree that students in Montenegro are not sufficiently engaged in the life of Montenegrin society. Representative of the UCG Law College students Zoran Rakočević doubts that the atmosphere in the state is conducive for students to really freely express their opinions.¹⁷⁵⁵

After analysing the situation at the Montenegrin universities, CCE launched the initiative for the establishment of a university Ombudsman, who would monitor the work of all three universities and comment on activities that have or may have negative impact on the rights of the students and academic staff.¹⁷⁵⁶ The initiative was backed by the UCG Rector, the representatives of student organisations and the Human Rights and Freedoms Protector.

Nikšić College of Philosophy students staged a strike under the slogan “We Didn’t Have 1968 but We Will Have 2011” in early April 2011, demanding of the Minister and Prime Minister to cut the huge college tuition fees, let them retake their mid-term tests, cut the price of transportation, pay for their apprenticeship after graduation, et al.¹⁷⁵⁷ They were also dissatisfied with the third reappointment of Prof. Dr. Blagoje Cerović to the post of Dean.

Corruption in Education

CCE and CEMI’s second annual public opinion survey on corruption in 2009 shows that over half of the respondents (54.2%) think that corruption is present in Montenegro to a greater or lesser degree; 6.7% think that the education system is rife with corruption, while 21.8% think that there is a lot of it in this walk of life: 60.01% singled out private and 57.8% state colleges and universities. The fewest respondents, 22.4%, thought that there was corruption in primary schools.¹⁷⁵⁸ The survey indicates a mild decline of public trust in private colleges over 2008.

UCG Rector Predrag Miranović said in March 2011 that several reports of corruption had been submitted to the Rectorate, that one professor was

¹⁷⁵⁴ “Batričević Supported by 680 Colleagues”, *Dan*, 22 December 2011.

¹⁷⁵⁵ “Students are not Free or Bold”, *Dan*, 4 April 2011.

¹⁷⁵⁶ “Universities Should Get Their Own Ombudsman”, *Vijesti*, “Miranović Wants Everyone to Have Their Own Protector”, *Dan*, 19 March 2011. “Student Ombudsman Should be Introduced in Montenegro”, published on CCE’s website on 18 March 2011 <http://cgo-cce.org/>.

¹⁷⁵⁷ “Nikšić Students Out in the Streets: Time of Silence is Behind Us”, *Vijesti*, 11 April 2011.

¹⁷⁵⁸ “Fight against Corruption in Education: How to Make a Step Forward?” Montenegro: Report published together with the 2009 Report – Podgorica; Centre for Monitoring (CEMI) – Centre for Civic Education, published in February 2010 at <http://www.cemi.org.me/me/programi/borba-protiv-korupcije/499.html>

accused of taking bribes in exchange for giving students passing grades and that another was selling his textbook published by the UCG.¹⁷⁵⁹ He said he was tipped off several times in 2010 that “that a professor was taking money in exchange for giving students passing grades, but that none of this information came from a ‘first-hand’ source”.¹⁷⁶⁰ He subsequently said he had filed a criminal report against one of the professors.¹⁷⁶¹

CCE sought access to information on UCG’s public procurements, its contracts with third parties the value of which ranged between ten and one hundred thousand Euros, on the professors’ wages and fees and on revenues from tuition fees paid by self-funding students. CCE was not given access to any such contracts and only a few colleges provided it with information on the teachers’ wages and fees; most of the approached colleges did forward it information on revenues from tuition fees paid by self-funding students.¹⁷⁶²

The process of gaining access to the 23 commercial contracts the UCG concluded with third parties has been ongoing since 27 November 2007. UCG denied access to them notwithstanding the Administrative Court decisions and the Education and Sports Ministry’s decision upholding the request for access to such information.

The CCE has also noted the concerning proportions of plagiarism and the sale of college reports, graduation and other papers on order, which is even publicly advertised. No one has apparently been penalised for these offences by the end of the reporting period.¹⁷⁶³

¹⁷⁵⁹ “Professors Accepting Bribes for Exams”, *Dan* (MINA Agency), 16 March 2011.

¹⁷⁶⁰ *Ibid.*

¹⁷⁶¹ Show “Clearly”, *TV Vijesti*, 17 March 2011.

¹⁷⁶² Interview with Daliborka Uljarević, CCE Executive Director, 10 June 2011.

¹⁷⁶³ *Ibid.* See CCE press release in Montenegrin of 15 January 2010, www.cgo-cce.org “Your Title is Worth Nothing if You Don’t Have the Knowledge”.

The Right of Everyone to Take Part in Cultural Life, to Enjoy the Benefits of Scientific Progress, to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which he is the Author

Article 15, ICESCR:

1. The States parties to the present Covenant recognize the right of everyone:
 - a) To take part in cultural life;
 - b) To enjoy the benefits of scientific progress and its applications;
 - c) To benefit from the protection of the moral and material interests resulting from any scientific literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

General

The States Parties to the ICESCR shall guarantee the right of „everyone“ – not merely their own citizens – to take part in cultural life, to enjoy the benefits of scientific progress and the protection of authors' rights along with freedom of research and creative activity.

The right to take part in cultural life can be characterised as a freedom.¹⁷⁶⁴ Cultural life encompasses, *inter alia*, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.¹⁷⁶⁵ The state is under the obligation to refrain from interfering in the right to the enjoyment and development of cultural identity while ensuring conditions for the enjoyment of that right, taking steps to preserve cultural goods on its territory and the cultural heritage of minorities.¹⁷⁶⁶ Enjoyment of this freedom is linked to freedom of scientific research and other creative activity, international contacts and co-operation, all envisaged by this Article of the Covenant.

The Covenant emphasises the particular right of the author to protection of the moral and material rights resulting from his or her production as an inalienable human right, and makes it incumbent on the states parties to provide legislation that will adequately protect authors' rights to all persons within their jurisdiction, without discrimination.¹⁷⁶⁷ The property aspect of authors' rights is protected by Art. 1, Protocol 1 to the ECHR as the right to possessions.

Art. 15 (2) of the ICESCR requires continuous investment on the part of the states in science and culture, while striving to ensure to all without discrimination, including discrimination based on financial status, the enjoyment of the rights envisaged in paragraph 1/of states to take steps to achieve the full realisation of this right, including those necessary for the conservation, development and diffusion of science and culture.

The Constitution in principle guarantees the freedom of scientific, cultural and artistic creativity, the freedom to publish scientific and artistic works, scientific discoveries and technological inventions, and guarantees the moral and property rights of their authors (Art. 76). Furthermore, the Constitution sets out the duty of the state to encourage and assist in the development of education, science, culture and art, while protecting scientific, cultural, artistic and historical values (Art. 77).

¹⁷⁶⁴ Committee for Economic, Social and Cultural Rights, General Comment No. 21 (2009) Right of everyone to take part in cultural life, E/C.12/GC/21.

¹⁷⁶⁵ *Ibid.*

¹⁷⁶⁶ *Ibid.*

¹⁷⁶⁷ Committee for Economic, Social and Cultural Rights, General Comment no. 17, 2005: *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author* E/C.12/GC/17).

Culture and Cultural Property Protection Acts

The Culture Act (*Sl. list CG*, 49/08) from 2008, is the first of its kind in Montenegro. The Act defines culture as an activity of public interest and defines the public interest of culture, governs cultural institutions, the status and rights of artists, funding of culture and envisages the adoption of a National Cultural Development Programme, etc. The Act has been criticised for its centralist provisions charging the ministry with appointing members to the National Council for Culture, and for appointing and selecting the management bodies of public cultural institutions.¹⁷⁶⁸ Pursuant to this Act, the Government in March 2011 adopted the 2011–2016 Cultural Development National Programme,¹⁷⁶⁹ a strategic document establishing long-term objectives and priorities in cultural development (Art. 7).

Its main aim is “to strengthen the regulatory and institutional infrastructure, uniform cultural development, enhance human resources, achieve stable sources of funding, assess and reassess the value of cultural goods, ensure full and effective integral protection of cultural heritage, the popularisation and presentation of culture, and the development and promotion of international cooperation in culture”.¹⁷⁷⁰

The Cultural Property Protection Act passed in July 2010 (*Sl. list CG* 49/2010), defines types and categories of cultural goods, their protection, protective measures and systems, the rights and duties of owners and managers of cultural goods and other issues of relevance to the protection and preservation of cultural goods (Art. 1). The Act provides for the registration of all cultural monuments, both movable and immovable cultural heritage objects.

Protection of Copyright

The Copyright and Neighbouring Rights Act, adopted by the state community of Serbia and Montenegro in 2004, still applies in Montenegro.¹⁷⁷¹ The Act does not state precisely which institutions deal with intellectual property, nor what their tasks are, particularly regarding procedure in cases of violation of these rights. A significant number of its provisions have not been aligned with EU standards. The European Commission stated in its report that: “In the area of copyright and neighbouring rights, (...) the current relevant national legislation presents some important gaps and incompatibilities with

¹⁷⁶⁸ “Fatal for Culture – statement by the Liberal Party”, *Vijesti*, 6 February 2009; “Culture Act Introducing Receivership – statement by Montenegrin National Museum Trade Union Executive Board”, *Vijesti*, 29 July 2008.

¹⁷⁶⁹ Available at: www.mku.gov.me/biblioteka/strategije

¹⁷⁷⁰ According to Assistant Culture Minister Dragica Milić, “Culture Requires More Money”, *Dan*, 17 July 2010.

¹⁷⁷¹ Copyright and Neighbouring Rights Act, *Sl. list CG*, 61/2004.

the *acquis*”,¹⁷⁷² but that a revised law was expected to be passed by the end of 2010 which would address some of the divergences. In October 2010, the Ministry of the Economy moved a new Copyright and Neighbouring Rights Bill. The Bill was still in parliamentary procedure in June 2011.

The Act on the Enforcement of Legislation Regulating the Protection of Intellectual Property Rights (*Sl. list CG*, 45/05) has been in force in Montenegro since 1 January 2006. It governs the procedures and measures to be taken by state authorities in cases of violation of the rights of intellectual property by the production, trade or use of certain goods.

In practice, the Act has not led to any substantial suppression of piracy, which is visible at every step, particularly in the continued existence of numerous video clubs that rent out pirated editions. In its report, the World Bank noted that “the pirated sale of optical media (DVDs, CDs, software) and counterfeit trademarked goods, particularly sneakers and clothing, is widespread”.¹⁷⁷³ The European Commission noted that an essential part of this Act too had not been reconciled with EU law, and concluded that Montenegro could take on the commitments of EU membership in the next five years provided that “considerable and sustained further efforts are made to ensure the implementation and enforcement of legislation. Particular attention needs to be paid to ...intellectual property law”.¹⁷⁷⁴

In Montenegro, the rights of composers, song-writers and arrangers from all over the world are protected by the Music Copyrights Agency (PAM). According to Assistant Director Momčilo Zeković, most Montenegrin music authors under PAM auspices are satisfied with the way in which the Agency safeguards their copyright and the payment they receive for works broadcast.¹⁷⁷⁵ This is not corroborated by the fact that their music continues to be sold on pirated CDs, that not all TV and radio stations regularly pay fees for items broadcast on their frequencies and indeed do not possess the software which would automatically register all items as they are broadcast. In its absence, statements by programme editors and the reports sent in by the TV stations have to be taken at their word.

Throughout 2010, the Broadcasting Agency continued reminding broadcasters of their duty to conclude contracts regulating the mutual rights of broadcasters and owners of copyright on programming before their airing on radio and/or television channels, warning that it would “take more vigorous steps to prevent unauthorised broadcasts of radio and TV programmes, including revoking their licences”.¹⁷⁷⁶

¹⁷⁷² EC Analytical Report, 3.7 Chapter 7 Intellectual Property Law, Brussels, 9 November 2010.

¹⁷⁷³ World Bank Report: Doing Business, November 2010.

¹⁷⁷⁴ EC Analytical Report 3.7 Chapter 7 Intellectual Property Law, 9 November 2010.

¹⁷⁷⁵ “Musical Tit for Tat”, *Dan*, 26 January 2010.

¹⁷⁷⁶ TV IN, Impuls, 23 February 2010.

Investment in Science and Culture

The Constitution and Art. 15 of the ICESCR require of the state to take steps to encourage creativity and the preservation, development and diffusion of science and culture.

Art. 93 of the Culture Act states that it is the duty of the state to annually set aside for culture at least 2.5 per cent of the budget, or at least 3 per cent if the GDP is greater than 8 per cent. However, media warned that even in 2009, the first year after the adoption of the Act, the allocation for culture stood at 14 million Euros, or just under 1% of the state budget.¹⁷⁷⁷ Still less – 11 million, or 1.7% of the budget – was planned for 2010, and 7.5 million Euros, or 1.2% were designated in 2011.¹⁷⁷⁸

According to the replies to the European Commission questionnaire, 0.4 per cent of the GDP was set aside for scientific research in 2009, of which the state supplied 0.1 and the commercial sector 0.3 per cent.¹⁷⁷⁹ Interestingly, only 176 of the 186,166 people employed in Montenegro are engaged in research, according to MONSTAT – Bureau of Statistics.¹⁷⁸⁰

It would seem that Montenegro does not invest sufficiently in scientific development, and that the sums invested are negligible (estimated at 0.13% of GDP in 2007),¹⁷⁸¹ far below both the average European percentage and the target to be achieved by all EU members within the next ten to fifteen years. At the root of the problem lies Montenegro's inadequate infrastructure for scientific research. This continues to lead to the brain drain which has dogged Montenegro since the 1990s, as the young and talented take their knowledge to where they can be sure they will be provided with appropriate conditions in which to carry out research.

In July 2008, the Government adopted the 2008–2016 Scientific Research Strategy and Action Plan. The Strategy laid down increased collaboration with the EU and reform of the national research community as leading priorities for integration into the European research area. The Action Plan includes a road map for increasing investment in science and research from both the public and private sectors so as to ensure investment of 1.4% of Montenegro's GDP in research.¹⁷⁸² The NGO Centre for Civic Education has criticised the fact that Montenegro in 2010 allocated only 0.26% of its GDP for science, while the European standard is 3%.¹⁷⁸³

¹⁷⁷⁷ "Fatal for Culture – statement by the Liberal Party", *Vijesti*, 6 February 2009.

¹⁷⁷⁸ 2011 Budget Act (*Sl.list CG*, 78/2010).

¹⁷⁷⁹ "More Money for Science", *Vijesti*, 9 April 2010. .

¹⁷⁸⁰ *Ibid.*

¹⁷⁸¹ EC Analytical Report, op.cit. p.107.

¹⁷⁸² EC Analytical Report, Chapter 25: Science and Research, November 2010.

¹⁷⁸³ "More money For Science, Less for Administration", *Dan*, 25 December 2010.

War Crime Trials in Montenegro

Legislation

Montenegro is bound by all international humanitarian law conventions that were binding on the SFRY, FRY and the State Union of Serbia and Montenegro.¹⁷⁸⁴ Much of the humanitarian international law had been incorporated in the SFRY and FRY laws, which incriminated war crimes against the civilian population, war crimes against prisoners of war, etc, even before the armed conflicts broke out in the former Yugoslavia.

The Criminal Code (CC) of Montenegro was amended in 2003¹⁷⁸⁵ in order to fulfil all the obligations in the ratified conventions and two new offences were introduced: crimes against humanity (Art. 427) and the failure to take measures to prevent crimes against humanity and other values protected under international law (Art. 440). The latter offence incriminates command responsibility as a separate offence. Given that both crimes were prohibited pursuant to ratified international treaties during the conflicts in the 1990s, the exemption from the rule *nulla crimen sine lege, nulla poena sine lege* under Art. 15(2) of the ICCPR and Art. 7(2) of the ECHR applies; the Bijelo Polje Superior Court, for instance, applied it in its trials for crimes against humanity in the Bukovica Case (see below). No-one has, however, been indicted for this crime, for the failure to prevent or punish the commission of crimes of his subordinates.¹⁷⁸⁶

¹⁷⁸⁴ “Bearing in mind the nature and types of the crimes committed, the international legal basis for the punishment of these crimes perpetrated in the territory of the former Yugoslavia, which are mostly the Geneva Conventions for the Protection of War Victims (1949) and the Protocols I and II Additional to the Geneva Conventions (1977), should be supplemented by the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention against the Taking of Hostages (1979) and the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954). All these Conventions have been ratified by the former SFR of Yugoslavia.” (Federal Government of the Federal Republic of Yugoslavia, Report Submitted to the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Belgrade, 1992 (<http://www.ess.uwe.ac.uk/documents/repjug1.htm>).

¹⁷⁸⁵ *Sl. list RCG*, 70/2003

¹⁷⁸⁶ See more on the institute of command responsibility in international law and SFRY and FRY criminal law in: Command Responsibility – Towards Clear Answers and Precise Positions,” Siniša Važić, judge, Justice in Transition, <http://www.pravdautranziciji.com/pages/article.php?pf=1&id=1477>; “Command Responsibility: Contemporary Law,” Iavor Rangelov and Jovan Nicić, Humanitarian Law Centre, 2004 (<http://www.hlc-rdc.org/uploads/editor/Command%20Responsibility.pdf>); “Justice at Risk: War Crimes Trials in Bosnia and Herzegovina, Croatia and Serbia and Montenegro”, Human Rights Watch, Vol. 16, No. 7, October 2004, p. 24.

The April 2010 amendment to Art. 370 of the Criminal Code (Incitement of National, Racial and Religious Hate, Dissension or Intolerance) envisages imprisonment ranging from six months to five years even for condoning, denying or considerably diminishing the gravity of the crimes of genocide, crimes against humanity and war crimes committed against a group of people or a member of a group distinguished by its race, colour, religion, origin, citizenship or nationality, in a manner which may lead to violence or incite hatred of the group of people or a member of such a group in the event a Montenegrin or an international criminal tribunal has rendered a final decision establishing that such a crime had been committed.

The Department for the Suppression of Organised Crime, Corruption, Terrorism and War Crimes was established within the Supreme State Prosecution Office in 2008. It is headed by a Special Prosecutor.¹⁷⁸⁷ The Special Prosecutor (Đurđina Nina Ivanović) has five deputies.¹⁷⁸⁸ She accounts for her work and the work of the Department to the Supreme State Prosecutor.¹⁷⁸⁹

Specialised departments for the suppression of organised crime, corruption, terrorism and war crimes – comprising eight specialised judges and three investigation judges – were established within the Podgorica and Bijelo Polje Superior Courts in 2008.¹⁷⁹⁰ Both the special prosecutor and her deputies and the judges in the specialised departments are stimulated by additional remuneration.¹⁷⁹¹

General Overview of War Crime Trials

Four war crime trials were under way in Montenegro in 2010 and early 2011: 1) the trial for war crimes against POWs and civilians in the Morinj camp in 1991; 2) the trial for war crimes against the civilian population – refugees from Bosnia-Herzegovina, the so-called Deportation of Refugees case, in May 1992; 3) the trial for war crimes against the civilian population in the Bukovica region in 1992 and 1993; and 4) the trial for war crimes against the civilian population at Kaluđerski laz in 1999.¹⁷⁹²

¹⁷⁸⁷ Article 66, State Prosecution Office Act (*Sl. list RCG* 69/2003, *Sl. list CG* 40/2008).

¹⁷⁸⁸ The official website of the State Prosecution Office of Montenegro (accessed on 12 June 2011): <http://www.tuzilastvosc.co.me/tuzilacka%20organizacija/drzavni%20tuzioci.htm>

¹⁷⁸⁹ Article 70, State Prosecution Office Act (*Sl. list RCG* 69/2003, *Sl. list CG* 40/2008).

¹⁷⁹⁰ Act Amending the Act on Courts (*Sl. list CG* 22/08); Montenegrin Government Answers to the EC Questionnaire, Chapter 23, Judiciary and Fundamental Rights, 10 November 2009.

¹⁷⁹¹ Montenegrin Government Answers to the EC Questionnaire, Chapter 23, Judiciary and Fundamental Rights, 10 November 2009 (http://www.esiweb.org/pdf/montenegro_answers-to-the-ec-questionnaire/Chapters%2022-33/Chapter%2023%20%20Judiciary%20and%20fundamental%20rights/Answers%20I.pdf)

¹⁷⁹² In the Supreme State Prosecutor's report on the work of the State Prosecution Office in 2010, Supreme State Prosecutor Ranka Čarapić stated that not one criminal report for crimes against humanity and values guaranteed under international law was filed in 2010. Twenty three people had earlier been indicted for this crime: the appellate court

In all these cases, only the immediate perpetrators of the war crimes have been indicted, while those who had ordered them have as a rule remained unindicted. Furthermore, the state prosecution office has not applied the institute of command responsibility, under which superiors, who were or should have been aware of a crime committed by their subordinates but did nothing to prevent or punish it, are held liable for the crime (commission of a crime by the failure to act).¹⁷⁹³

The Montenegrin State Prosecution Office does not publish integral texts of the war crime indictments on its website¹⁷⁹⁴. The Podgorica Superior Court (Specialised Department for the Crimes of Organised Crime, Corruption, Terrorism and War Crimes) published some war crime judgments on its website, notably the first-instance judgment in the Deportation of Refugees case¹⁷⁹⁵, but not the judgment in the Morinj case. The Bijelo Polje Superior Court had not filed the first instance judgment in the Bukovica case by mid June 2011.

State prosecutors practice seeking pre-trial detention when they submit motions for the investigation of people suspected of committing even much lighter criminal offences than war crimes. However, in all the war crimes proceedings, they sought detention for the defendants only after the investigations were completed, when they filed the indictments. In result, half of the defendants in the Deportation of Refugees case, the main defendant in the Kaluđerski laz case and one of the Morinj co-defendants have been tried *in absentio*.

The defendants in the Bukovica case spent around 8 months in detention. The indictees in the Morinj case spent a total of 21 months in detention, while the four defendants in the Deportation of Refugees case, who had been arrested in Montenegro, spent 27 months in detention. The other four indictees in the latter case, who were subsequently arrested in Belgrade, spent around four months in extradition detention. The indictees in the Kaluđerski laz case spent the most time in detention, 34 months, 8 of which pending trial.

Three first instance judgments in war crime trials were rendered in 2010 and by June 2011 – the Morinj trial ended in convictions while everyone in-

overturned acquittals of six of them in the first instance, while the proceedings against the other 17 were under way in 2010. (<http://www.tuzilastvocg.co.me/Izvjestaj%20za%202010.%20godinu.pdf>).

¹⁷⁹³ More on this institute in international humanitarian law and the SFRY and FRY Criminal Codes above, in footnote 7.

¹⁷⁹⁴ *Ibid.* In the chapter on Transparency, the Supreme State Prosecutor reported that the public was informed about the work of the Prosecution Office (including the work of the Special Prosecutor – Department for the Suppression of Organised Crime, Corruption, Terrorism and War Crimes) through press releases, participation in TV shows, and through one interview to a newspaper and one news conference in 2010.

¹⁷⁹⁵ Ref. No. 3/09: http://www.visisudpg.gov.me/LinkClick.aspx?fileticket=uvaX_HzrIIo%3d&-tabid=86

dicted in the Bukovica and Deportation of Refugees cases was acquitted. The main hearing in the Kaluđerski laz case was still ongoing at the time this Report went into print.

No one was indicted for war crimes during the siege of Dubrovnik (from 1 October 1991 until end June 1992) by the end of the reporting period¹⁷⁹⁶ although, if nothing less, the state officials accepted responsibility for the organised plundering in the territory of the Republic of Croatia which the Montenegrin nationals had taken part in.¹⁷⁹⁷ Only former General of the Yugoslav People's Army Pavle Strugar¹⁷⁹⁸ and his subordinate Miodrag Jokić¹⁷⁹⁹ had been indicted by the ICTY for war crimes during the attack on Dubrovnik. Retired Admiral Milan Zec had also been indicted by the ICTY, but he was acquitted in 2002¹⁸⁰⁰, while JNA First Class Captain Vladimir Kovačević –

¹⁷⁹⁶ On 29 December 2009, the Montenegrin Supreme State Prosecution Office said that, apart from the Morinj camp case, no other case had been opened about the events in the Dubrovnik region in 1991 and 1992, because no criminal reports against Montenegrin nationals had been filed by that date (Reply to a request for access to information, HRA archives).

¹⁷⁹⁷ Montenegrin Agriculture Minister Milutin Simović said in 2005 that Montenegro would pay 375,000 Euros to the Konavle municipality to compensate for the 268 milk cows and a number of calves and bullocks taken from a farm in Gruda in 1991. The Presidents of Croatia and Montenegro confirmed that talks were under way about returning the assets of the Dubrovnik airport that was seized and moved to Tivat Airport during the war. According to the data of the Croatian state authorities, in the Dubrovnik area alone, 336 larger and smaller sea vessels were destroyed, damaged or stolen during the war, in the 1991–1992 period (“No-One is Guilty”, *Monitor*, 20 August 2010).

¹⁷⁹⁸ Pavle Strugar, former JNA General, who commanded the attack on Dubrovnik (Commander of the JNA 2nd Operational Group), and residing in Montenegro, turned himself in to the ICTY in October 2001. On 31 January 2005, Strugar was found guilty on 2 of 6 counts of violations of the laws and customs of war under the 1949 Geneva Convention and the 1977 Additional Protocols and common law, and punishable under the articles of the International Tribunal's Statute, for attacks on civilians and destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science. He was initially sentenced to eight years' imprisonment and the Appeals Chamber partly upheld the prosecutor's appeal and convicted him to seven and a half years imprisonment due to his impaired health. Strugar was released earlier, on 20 February 2009, because of his age and poor health after having served over two-thirds of his sentence (Dubrovnik Case, No IT-01-42, “Prosecutor v. Pavle Strugar”, <http://www.un.org/icty/bhs/cases/strugar/judgements/050131/str-tj050131b.pdf>).

¹⁷⁹⁹ Miodrag Jokić, the commander of the JNA 9th Military Naval Sector (VPS) and subordinate to Pavle Strugar, reached a plea agreement with the ICTY Prosecutor on 27 August 2003 and pled guilty to 6 counts of the indictment for murder, cruel treatment, attack on civilians, devastation, unlawful attacks on civilian objects and destruction or wilful damage done to civilian institutions. He was convicted to 7 years imprisonment on 18 March 2004, and the judgment was upheld on 30 August 2005. He served his sentence in Denmark until 3 September, when he was released after having served two-thirds of the sentence (http://www.icty.org/x/cases/miodrag_jokic/cis/en/cis_jokic_en.pdf).

¹⁸⁰⁰ “Milan Zec Acquitted”, B92, 26 July 2002. (http://www.b92.net/info/vesti/index.php?yyyy=2002&mm=07&dd=26&nav_category=16&nav_id=6127)

Rambo was granted provisional release for medical treatment.¹⁸⁰¹ One issue that has frequently been raised regards the command responsibility of Momir Bulatović, former Montenegrin Presidency President (December 1990 – December 1992), who was legally vested with the power to render decisions on the use of the Montenegrin Territorial Defence – the largest component of the JNA 2nd Operational Group made up of mobilised Montenegrin reservists in the attack on Dubrovnik. Another issue regards the involvement of Montenegrin police officers in the Dubrovnik operations.¹⁸⁰²

The Dubrovnik county state prosecutor in late 2009 filed indictments (Ref. No. 46/09) against 10 former JNA officers¹⁸⁰³ accused of “not even trying to prevent conduct in contravention of the Geneva Conventions by their subordinate units during JNA’s aggression on the Dubrovnik area in 1991 and 1992.”¹⁸⁰⁴ The indictment says that the units they commanded randomly shelled settlements; killed the civilian population, imprisoned, abused it and forced it to flee. According to the indictment, JNA units under their command entered the settlements, demolished civilian, cultural, religious buildings and industrial facilities, plundered them and set them on fire, “killing 116 and wounding hundreds of civilians, destroying cultural and historic

¹⁸⁰¹ The Belgrade Special Court in December 2007 rejected the indictment against Vladimir Kovačević for war crimes against the civilian population of Dubrovnik, under the explanation that the indictee was seriously ill and unable to follow the trial (“Belgrade Court Dismisses Indictment against Rambo”, *Radio Free Europe*, 5 December 2007, <http://www.slobodnaevropa.org/content/article/765255.html>).

¹⁸⁰² The documentary “Attack on Dubrovnik: War for Peace” by Kočo Pavlović, Obala Productions, 2004. The film carries a TV statement made in 1991 by Montenegrin Assistant Minister of Internal Affairs Milisav Marković about the armed campaigns by the Montenegrin police on the Dubrovnik battlefield. The MIA was part of the Government of Prime Minister Milo Đukanović. Montenegrin MIA forces were mobilised to the Dubrovnik battlefield pursuant to a *Strictly Confidential Order of Presidency President Momir Bulatović Ref No. 01–14 of 1 October 1991 on the mobilisation of the Special Militia Unit the size of an enhanced infantry company*, Titograd, 1 October 1991.

¹⁸⁰³ General Jevrem Cokić (Commander of the JNA 2nd Operational Group until 5 October 1991), General Mile Ružinovski (Commander of the JNA 2nd Operational Group on 7–12 October 1991), General Pavle Strugar (Commander of the JNA 2nd Operational Group as of 13 October 1991), Vice Admiral Miodrag Jokić (Commander of the JNA 9th Military Navy Sector JNA), battleship Captain, Navy Colonel Milan Zec (Head of the JNA 9th Military Navy Sector Headquarters), General Branko Stanković (Commander of the 2nd Tactical Group within the JNA 2nd Operational Group), Colonel Obrad Vičić (Commander of the JNA 472nd Motorised Brigade) and Colonel Radovan Komar (Head of the JNA 472nd Motorised Brigade Headquarters). Two other JNA officers, 1st Class Captain Vladimir Kovačević (Commander of the JNA 472nd Brigade 3rd Battalion) and battleship Lieutenant Captain Zoran Gvozdenović (Commander of JNA Navy Gunboat 403), were also charged with issuing direct orders for the shelling of the “historic nucleus of the Dubrovnik Old City, which has been under UNESCO protection since 1979 and has been classified as a zero category heritage site” and for shelling the settlements of “Cavtat, Župa Dubrovačka, Zaton, Trsteno, Hotels Croatia, Belvedere, Plakir, Tirena and Minčeta”, which resulted “in the deaths of a number of civilians”.

¹⁸⁰⁴ “Dubrovnik Indictments”, *Monitor*, 7 May 2010.

monuments and incurring damage of major proportions”.¹⁸⁰⁵ If it transpires that three of the indictees, Strugar, Jokić and Zec, have already been tried for these crimes before the ICTY, prosecuting them for the same crimes would constitute a violation of the *ne bis in idem* principle. Two of the indictees, Pavle Strugar and Radovan Komar, are living in Montenegro. Given that the extradition agreement Montenegro and Croatia signed on 1 October 2010 does not extend to war crime indictees¹⁸⁰⁶ (as opposed to the extradition agreement with Serbia)¹⁸⁰⁷, Strugar and Komar may be tried for these crimes only in Montenegro.¹⁸⁰⁸

Although it is common knowledge that “weekend warriors” from Montenegro, particularly from Nikšić, participated in the plundering of civilian facilities and the commission of other war crimes in the territory of Foča and other towns in eastern Bosnia-Herzegovina (BiH) near the border with Montenegro in the 1992–1993 period¹⁸⁰⁹, no one was prosecuted for these crimes in Montenegro until May 2011.¹⁸¹⁰

Morinj Case

Over 160 Croats, mostly civilians from the Dubrovnik area, were held and tortured in the Morinj camp (called Collection Centre Morinj in the in-

¹⁸⁰⁵ *Ibid.*

¹⁸⁰⁶ Act Ratifying the Extradition Agreement between Montenegro and the Republic of Croatia (*Sl. list CG – Međunarodni ugovori* 1/2011). A group of Montenegrin and Croatian human rights NGOs on 15 September 2010 called for the agreement also to extend to war crime indictees (<http://www.hraction.org/?p=397>).

¹⁸⁰⁷ Act Ratifying the Extradition Agreement between Montenegro and the Republic of Serbia, (*Sl. list CG – Međunarodni ugovori*, 04/09 and 4/2011 – Agreement between Montenegro and the Republic of Serbia Amending the Extradition Agreement between Montenegro and the Republic of Serbia was concluded in Belgrade on 30 October 2010).

¹⁸⁰⁸ Information on the proceedings was last released in May 2010, when it was published that the Dubrovnik prosecutors called for the detention and issue of arrest warrants against all the indictees and the County Court appointed *ex officio* counsels to the defendants and forwarded them the indictments with instructions on the right of rejoinder. Four rejoinders have to date been filed by the legal counsels and one by one of the indictees himself (“Dubrovnik Indictments”, *Monitor*, 7 May 2010).

¹⁸⁰⁹ For example, these crimes were last mentioned by Assistant Human Rights Minister Sabahudin Delić in the *TV Vijesti* show *Prizma* on 25 May 2011.

¹⁸¹⁰ Chairwoman of the BiH Women Victims of War Association Bakira Hasečić sent an open letter to Montenegrin Assembly Speaker Ranko Krivokapić on 11 March 2011 in which she expressed the willingness of “a delegation of raped men and women, camp inmates, ill-treated and beaten citizens and the families of the deceased to testify in the Montenegrin Assembly about the conduct and actions of Montenegrin reservists and specifically about specific perpetrators and information on where some of them are hiding in Montenegro” (see “Official Montenegro Must Apologise”, *Republika*, 12 March 2008). It remains unknown whether the Assembly Speaker has ever replied to the letter or whether the prosecutors acted on it.

dictment) near Kotor, which the JNA ran from October 1991 to August 1992. Two inmates died in the camp.¹⁸¹¹

In late March 2007, the Croatian State Prosecution Office (DORH) forwarded to the Montenegrin Supreme State Prosecutor evidence against ten Montenegrin nationals suspected of war crimes against civilians and POWs in Morinj in the 3 October 1991–2 July 1992 period.¹⁸¹²

Superior State Prosecutor Ranka Čarapić on 7 July 2007 filed a motion with the Podgorica Superior Court for the investigation of six people on the reasonable suspicion of having committed war crimes against the civilian population and against prisoners of war in the Morinj Collection Centre.¹⁸¹³ Čarapić said that year that the list of suspects was not final, that one of the other four people DORH sent evidence about had died and that the Montenegrin authorities could not assess whether reasonable suspicion existed with respect to the other three people.¹⁸¹⁴

The following six former reservists of the JNA were indicted on 15 August 2008: Head of the Security Unit of the Navy Base Administrative Command and interrogator Mladen Govedarica, interrogator Zlatko Tarle, reserve officer charged with administrative and quartermaster duties Ivo Gojnić, MP Špiro Lučić, cook Ivo Menzalin and guard Bora Gligić.¹⁸¹⁵ All of them were detained in custody, except for Menzalin, who was at large and tried *in absentio*.

The following superior army commanders were mentioned as responsible for the Morinj camp in that period: JNA Naval Commander Admiral Mile Kandić; Commanders of the 9th VPS Navy Colonel Krsto Đurović (killed on 5 October 1991) and his successor Vice Admiral Miodrag Jokić; head of the 9th VPS Navy Colonel Milan Zec; commander of the 2nd operational group Lieutenant Colonel Pavle Strugar; heads of the Security Directorate of the Federal National Defence Secretariat – JNA at the time the camp existed: Generals Marko Negovanović, Aleksandar Vasiljević and Neđeljko Bošković; Mirsad Krluč was said to have headed the special military counter-intelligence interrogation group in Morinj.¹⁸¹⁶ Supreme State Prosecutor Ranka Čarapić said that the prosecutors did not have evidence incriminating the persons in the command echelons.¹⁸¹⁷ Zec, Jokić and Strugar were accused and Jokić and

¹⁸¹¹ One prisoner died of a heart attack and the other committed suicide (“No One Was Killed in Morinj”, *Dan*, 2 March 2007).

¹⁸¹² “Ten Montenegrin Nationals under Suspicion”, *Vijesti*, 29 March 2007.

¹⁸¹³ “Morinj Troubling Sixsome”, *Dan*, 08 July 2007. “Suspected of Crime in Morinj”, *Vijesti*, 08 July 2007.

¹⁸¹⁴ “Morinj List Not Final”, *Dan*, 16 November 2007.

¹⁸¹⁵ “Indictment for Morinj Filed”, *Pobjeda*, 16 August 2008.

¹⁸¹⁶ “Who Set up ‘Morinj?’” *Monitor*, 20 March 2009, “Long Way to Go to Obtain Justice”, *Monitor*, 28 May 2010.

¹⁸¹⁷ “Medenica: We are not Sparing People Close to Government”, *Vijesti*, 16 November 2007. On the other hand, the Montenegrin prosecutors did not go into how the JNA set the camp up in the first place and on what grounds and why the Montenegrin authorities

Strugar were convicted by the ICTY for war crimes during the siege of Dubrovnik, but this indictment had not covered the events in Morinj as well.

The trial opened before the Superior Court in Podgorica on 12 March 2010. A total of 58 witnesses were heard. Retired JNA Colonel Radomir Goranović from Nikšić, who appeared only as a witness, said he had interrogated as many as 49 prisoners in Morinj and that it was “definitely one of the most humane camps in the former Yugoslavia”.¹⁸¹⁸ The injured parties, former inmates, whose testimonies mostly coincided, described the physical and psychological ill-treatment they had been subjected to. They named three other men, who had ill-treated them but had not been indicted.¹⁸¹⁹

The Podgorica Superior Court rendered its judgment on 15 May 2010. The following were found guilty and sentenced for war crimes against prisoners of war: Mladen Govedarica to two years’ imprisonment, Zlatko Tarle to 18 months’ imprisonment, Ivo Gojnić to two and a half years’ imprisonment and Ivo Menzalin to four years’ imprisonment and released them from detention. The Podgorica Superior Court chamber upheld the judgment on 28 May 2010.¹⁸²⁰ The court ordered the detention of Menzalin, who had been at large, as soon as he was arrested.¹⁸²¹

In the explanation of the verdict, judge Milenka Žižić emphasised that this criminal trial was specific inasmuch as it dealt with crimes committed 18 years ago and that the testimonies of the victims were one of the main means of evidence. “It is impossible to expect that the testimonies of all witnesses would coincide fully given that they are 18 years later talking about all the people who made them suffer, obviously a lot and much of that suffering has not been prosecuted in court. In the court’s view, identicalness of their statements would have indicated that they had agreed on what to say. This is not the case. They clearly cannot give the same accounts and the same details, given the time that has elapsed since the events and the strong emotional reactions provoked by the horrible scenes they were exposed to day in and day out. It would be impossible to expect of the witnesses to remember the height of the person who had beaten them up as they were dealt blows,

tolerated its existence. “A state of war was not declared under the SFRY Constitution and laws in 1991, nor did the SFRY or Montenegro officially declare a war against Croatia. Croatian prisoners in Morinj were still SFRY nationals from 3 October 1991 onwards. Lawful courts, prosecution offices, prisons and detention units existed in the territory of Montenegro at the time. Pursuant to the then state legal order, the JNA had the powers to enforce army regulations and state laws in war-torn territories, but Morinj at Kotor was not a ‘war-torn territory’” (“Who Set up ‘Morinj’?”, *Monitor*, 20 March 2009).

¹⁸¹⁸ “Disheartening Indictment”, *Dan*, 9 July 2007.

¹⁸¹⁹ “Imprisoned in Camp when He was only 16”, *Pobjeda*, 1 July 2009; “‘Hungarian’ Truncheoned Them”, *Dan*, 27 June 2009; “Conditions in Camp were Horrible”, *Dan*, 25 June 2009.

¹⁸²⁰ “Convicts Remain at Liberty”, *Dan*, 29 May 2010.

¹⁸²¹ “Sixsome Convicted to 16.5 Years in Jail Altogether”, *Vijesti*, 16 May 2010; “Menzalin Turns Himself in”, *Vijesti*, 4 March 2011.

overwhelmed with panic terror after 18 years. They recognised the voices of some of those who had done them evil...”¹⁸²²

The defence counsels were dissatisfied with the judgment, saying it had been rendered in advance, that it was a political verdict, a farce designed to appease the EU. Attorney Goran Rodić said that the convictions were a compromise to cover the time the defendants had spent in detention, while lawyer Vesna Gačević-Rogova claimed that not one piece of evidence corroborated the judgment.¹⁸²³

The judgment met with bitterness in Dubrovnik, because the defendants were sentenced to mild penalties “as if they had been tried for traffic offences, not for crimes committed during the defence of the SFRY”.¹⁸²⁴ The injured parties perceived the judgment as shameless ridicule of the POWs and civilians, who had been beaten, ill-treated and humiliated by the six former JNA members on a daily basis.¹⁸²⁵ HRA asked why the prosecutors have not yet charged all the people, whom the former prisoners claimed had participated in their systematic ill-treatment and the superiors of the torturers, who had been under the obligation to prevent and punish their crimes.¹⁸²⁶

The appellate court overturned the first-instance verdict due to a series of errors of law or fact in December 2010 and ordered a retrial.¹⁸²⁷ It found that the verdict was wrongfully based on uncertified copies of witness testimonies during the investigation before the Croatian courts and uncertified copies of the injured parties’ medical documentation and ordered that all these documents be excluded from the evidence at the retrial.¹⁸²⁸ The court found the defendants guilty only of war crimes against POWs but not for war crimes against the civilian population, for which they were also charged, because it upheld the argument that the defendants considered all the injured parties prisoners of war. The state prosecutor failed to appeal the verdict on these grounds, too, wherefore the defendants will be retried only for war crimes against prisoners of war.¹⁸²⁹ The retrial opened on 12 April 2011. Apart from Menzalin, who has been detained since his arrest on 2 March 2011¹⁸³⁰, the other defendants have been released from detention.¹⁸³¹

¹⁸²² “Sixsome Convicted to 16.5 Years in Jail Altogether”, *Vijesti*, 16 May 2010.

¹⁸²³ “Penalties Set in Advance”, *Dan*, 16 May 2010.

¹⁸²⁴ “War Crime Warranting Same Penalty as Traffic Offence”, *Vijesti*, 17 May 2010.

¹⁸²⁵ *Ibid.*

¹⁸²⁶ The HRA statement is available at: <http://www.hracion.org/?p=356>.

¹⁸²⁷ “Morinj Judgment Overturned”, *Vijesti*, 7 December 2010, “Morinj Judgment Quashed”, *Dan*, 7 December 2010. “Prosecutor Forgot Crimes against Civilians”, *Vijesti*, 9 December 2010.

¹⁸²⁸ “Prosecutor Forgot Crimes against Civilians”, *Vijesti*, 9 December 2010.

¹⁸²⁹ *Ibid.*

¹⁸³⁰ “Menzalin Turns Himself in”, *Vijesti*, 4 March 2011; “Menzalin Gives Himself up”, *Dan*, 4 March 2011.

¹⁸³¹ “New Trial for Morinj on 12 April”, *Vijesti*, 11 March 2011.

Bukovica Case

Bukovica is a mountainous area in northern Montenegro, in the Pljevlja municipality, bordering with Bosnia-Herzegovina and comprising 37 villages, which had been populated predominantly by Moslems until 1993. During the war in BiH, a large number of Yugoslav Army reservists, paramilitaries and Montenegrin policemen were deployed in the Bukovica area. They tortured, searched, plundered, abused and ill-treated the Bukovica Bosniaks under the pretext of looking for illegal weapons. According to the data of the Association of Exiled Bukovica Residents, six people were killed, two committed suicide after they were tortured, 11 were abducted and 70 or so people were subjected to physical torture in this area in the 1992–1995 period. At least eight homes and a mosque in the village of Planjsko were set on fire, while 90 families, around 270 people altogether, were driven out of their homes. Most of the homes were plundered. Only one murder committed in this period has been prosecuted by the judicial authorities, while the others, which the Association claims had happened as well, were not even mentioned in the indictment.¹⁸³²

In the period from June 1992 to February 1994, if not longer, Yugoslav Army forces shipped ammunition and fuel to the Bosnian Serb Army across the border crossing at Pljevlja, with the knowledge and/or consent of the Federal Republic of Yugoslavia (FRY) Supreme Defence Council, the supreme command comprising the Presidents of the FRY, Serbia and Montenegro.¹⁸³³

The Belgrade-based Humanitarian Law Centre documented and in 2003 published the accounts of the persecution of the Moslem population from the Bukovica area.¹⁸³⁴

It was only on 11 December 2007 that the Superior State Prosecutor filed a motion for the investigation of the crimes committed in Bukovica to the Bijelo Polje Superior Court. The investigation was declared an official secret as soon as it was opened.¹⁸³⁵ It focused on seven former police and Yugoslav army reservists, suspected of crimes against humanity.¹⁸³⁶ The prosecutor did not seek the detention of the suspects during the investigation.

Over 40 witnesses and injured parties testified during the investigation.¹⁸³⁷

¹⁸³² “Golubović: Trial is a Kind of Trade Off”, *Vijesti*, 26 April 2010, “Mocking the Public”, *Monitor*, 30 April 2010.

¹⁸³³ See the transcripts of the Supreme Defence Council 5th session on 7 August 1992 and 18th session on 7 February 1994 (http://www.bosniafacts.info/sessions_of_the_fry_supreme_defense_council/5th_Session_of_the_FRY_Supreme_Defense_Council_5.8.1992.pdf, and http://www.bosniafacts.info/sessions_of_the_fry_supreme_defense_council/18th_Session_of_the_FRY_Supreme_Defense_Council_7.2.1994.pdf).

¹⁸³⁴ Bukovica, edited by Biljana Mitrinović, Humanitarian Law Centre, Belgrade, 2003: <http://www.hlc-rdc.org/uploads/editor/Bukovica-engleski.pdf>

¹⁸³⁵ Nansen Dialogue Centre, Watchdog Report IV, 25 November 2008.

¹⁸³⁶ “Prosecutor Charging Seven People”, *Vijesti*, 12 December 2008.

¹⁸³⁷ Data of Belgrade-based HLC, 23 March 2008.

Although the law states that witnesses must be served with a subpoena at least eight days in advance, the witnesses, most of whom live in BiH, were summoned to testify one day before the hearing. Some were even brought in although the authorities may bring in a person who failed to appear before the court as summoned only if there is confirmation that the witness had been duly served with the subpoena.¹⁸³⁸

The investigation was slowed down because of the difficulties in obtaining the testimonies of persons living in BiH. Their questioning began only in 2009.¹⁸³⁹

The investigation was finally completed on 26 March 2010, and an indictment was filed on 21 April 2010 charging brothers Radmilo and Radiša Đuković, Slobodan Cvetković, Milorad Brković and Đorđije Gogić, Yugoslav Army (VJ) reservists, and Slaviša Svrkota and Radoman Šubarić, Montenegrin police reservists, of war crimes against humanity.¹⁸⁴⁰ The representatives of the Bosniak Party, the NGO sector and victims' association said that the persons who had ordered the crime had not been indicted. Some political party representatives and journalists noted that it was filed ahead of local elections in a number of Montenegrin municipalities, including Pljevlja.¹⁸⁴¹ The Bijelo Polje Superior Court ordered the detention of the defendants on 22 April 2010¹⁸⁴² and their trial opened on 28 June 2010.

As the Special Prosecutor for Organised Crime, Corruption and War Crimes Đurdina Ivanović explained in the indictment, which even misquotes the names of some of the defendants, they are suspected of "having committed systematic ill-treatment of the Moslem population in Bukovica, thus forcing them to leave their homes".¹⁸⁴³ The defendants are charged with ill-treating the Moslem population, subjecting them to grave suffering, jeopardising their health and physical integrity, applying measures of intimidation and creating a psychosis to force them to move out from the villages gravitating towards Bukovica, which resulted in the migration of the Moslem population.¹⁸⁴⁴

Osman Tahirbegović testified on 26 October 2010 in the capacity of an injured party. He accused Milovan Soković and Bane Borović, who are not even indicted, as the main perpetrators of the crime.¹⁸⁴⁵

The testimony of head of the Montenegrin Police Directorate Veselin Veljović, who was the chief of the Pljevlja militia station at the time covered by the indictment and, according to some witnesses, led the search of the

¹⁸³⁸ *Ibid.*

¹⁸³⁹ Nansen Dialogue Centre, Watchdog, Report IV, 25 November 2008.

¹⁸⁴⁰ "He Intimidated Moslems to Drive Them out of Bukovica", *Vijesti*, 22 April 2010.

¹⁸⁴¹ "Bukovica Indictees Detained", *Vijesti* 23 April 2010.

¹⁸⁴² *Ibid.*

¹⁸⁴³ "Only the Accused Are Suspected", *Vijesti*, 27 April 2010.

¹⁸⁴⁴ "All of Them Denied Guilt", *Dan*, 20 September 2010.

¹⁸⁴⁵ "Svrkota Did No Evil", *Dan*, 27 October 2010, "Citizens Harassed by Reservists", *Vijesti*, 27 October 2010.

homes in Bukovica, attracted particular interest.¹⁸⁴⁶ One of those who testified of his involvement was Jakub Durgut, who in his book entitled *Bukovica* quoted a witness as saying that Veljović had threatened to tear his ears out.¹⁸⁴⁷ Defendant reserve policeman Slaviša Svrkota said in court that “nearly 100 of his colleagues, headed by Veselin Veljović and Vuk Bošković” took part in the search of three homes in the Bukovica area.¹⁸⁴⁸

Veljović testified at the main hearing on 7 December 2010 and said that no war crimes had been committed in the Bukovica region during the war and that everything was done by the book. He said he knew policemen Svrkota and Šubarić and that he never heard any complaints about their work at the time of the events.¹⁸⁴⁹

The main hearing ended with the closing arguments on 25 December 2010. Deputy Special Prosecutor reiterated the charges in the indictment and called for the conviction of the defendants in accordance with the law. The legal representatives of the injured parties agreed. The defendants’ counsels asked for the acquittal of their clients, their immediate release from detention claiming that there was no evidence proving that they had committed the crime they were accused of. They said that the defendants were army and police members who had acted in accordance with the regulations and that there was no proof that they had harassed or ill-treated the Moslem population; rather, they protected them from the paramilitaries and helped preserve public peace and order in the area and the physical integrity of the citizens and their possessions.¹⁸⁵⁰

The Bijelo Polje Superior Court acquitted the defendants due to lack of evidence and released them from detention on 31 December 2010.¹⁸⁵¹ Presiding judge Đešević explained that the presented evidence proposed in the indictment and that the testimonies of the injured parties and other witnesses

¹⁸⁴⁶ Veselin Veljović has been running the Police Directorate since 2005. He began his career as a JNA officer and joined the Montenegrin police in October 1992, when he was appointed chief of the militia station in Pljevlja. From December 1995 to October 2005, he commanded the Special Anti-Terrorist Unit of the Montenegrin MIA (official CV, available at <http://www.upravapolicije.com/navigacija.php?IDSP=43>).

¹⁸⁴⁷ “Durgut: I Kept a Gun out of Fear”, *Vijesti*, 22 September 2010. “Victims not Blaming Defendants”, *Dan*, 22 September 2010.

¹⁸⁴⁸ “Denied Crime Had Been Committed in Bukovica”, *Dan*, 29 June 2010. Vuk Bošković was Assistant Minister of Internal Affairs charged with the police in the late 1990s and the Montenegrin President’s national security adviser in the 2002–2011 period. He was relieved of duty in early 2011 “to assume another office” (“Vuk Bošković Dismissed”, *Dan*, 11 January 2011).

¹⁸⁴⁹ “Veljović: No Crime Was Committed in Bukovica”, *Dan*, 8 December 2010; “Montenegrin Police Director Veselin Veljović Heard in Bijelo Polje Superior Court”, *Vijesti*, 07 December 2010.

¹⁸⁵⁰ “Judgment will be Rendered on 31 December”, *Vijesti*, 26 December 2010; “Judgment on Friday”, *Dan*, 26 December 2010.

¹⁸⁵¹ The judgment had not been published on the website of the Bijelo Polje Superior Court by 1 June 2011.

did not prove that the defendants committed crimes against humanity.¹⁸⁵² In the explanation of the verdict, the judge said that the injured parties' testimonies had not corroborated the charges and that the testimonies of others in court differed from the statements they made during investigation.¹⁸⁵³

Chairman of the Bukovica association of deported victims Jakub Durgut qualified the acquittal as the "state's institutional cover-up of the crime", saying that his testimony had not been taken into account because he hadn't gotten a receipt that he was beaten up from the person who had beaten him.¹⁸⁵⁴ He, however, said the verdict could have been expected given that the proceedings took place eighteen years after the crime "when most of the victims are no longer alive" and that the defendants "could not have been responsible for all the events in the Bukovica area, maybe just for individual cases".¹⁸⁵⁵ The representative of the NGO Behar from Pljevlja, Rifat Vesković, qualified the verdict as shameful, claiming that the defendants' arrests were part of the pre-election calculations, that the court based its verdict on a statement given by the then Pljevlja chief of police, Veselin Veljović, and that its publication several hours before the start of the New Year holidays was timed to avoid media attention.¹⁸⁵⁶ Boris Raonić, the Programme Director of the Youth Initiative for Human Rights and one of the authors of the documentary on Bukovica, said that both the investigation and indictment were slapdash and did not cover command responsibility but that the trial was not problematic.¹⁸⁵⁷

In June 2011 the judgment was quashed by the Appellate court for procedural reasons and the case had been returned for a retrial.

Compensation Claim Judgments

The first final verdict awarding damages to a resident of Bukovica was rendered in September 2008, when the Podgorica Basic Court ruled that Mušan Bungur be paid 8,133 Euros in compensation for the destruction of his log house. Bungur had initiated the proceedings more than ten years earlier. The state of Montenegro paid the sum and interest rates in 2009.¹⁸⁵⁸ In March 2010, the Podgorica Basic Court ruled that Montenegro pay 10,000 Euros to Šaban Rizvanović and the same amount to his wife Arifa Rizvanović for the physical and mental anguish they suffered at the hands of the Yugoslav Army members in Bukovica in 1992. The Rizvanović couple left Bukovica and has

¹⁸⁵² "No Proof of Bukovica", *Vijesti*, 3 January 2011; "Freedom for All", *Dan*, 3 January 2011.

¹⁸⁵³ "Svrkota Did No Evil", *Dan*, 27 October 2010; "They Accepted a Lie for Truth for a Fistful of Drug Euros", *Vijesti*, 5 January 2011; "No Proof of Bukovica", *Vijesti*, 3 January 2011, "Henchmen Acquitted – Bosniak Victims Humiliated", Bošnjaci net: <http://www.bosnjaci.net/prilog.php?pid=40119>.

¹⁸⁵⁴ "Seed of a New Crime", *Monitor*, 14 January 2011.

¹⁸⁵⁵ "Court Unaware of what Everyone has been Aware of for Years", *Vijesti*, 4 January 2011.

¹⁸⁵⁶ "Collateral Damage", *Vijesti*, 3 January 2011.

¹⁸⁵⁷ "Jakub Durgut: Bukovica Verdict Unsurprising", www.portalanalitika.me, 11 January 2011.

¹⁸⁵⁸ *Ibid.*

been living in Sarajevo for years now.¹⁸⁵⁹ The Superior Court overturned the verdict and ordered a retrial.¹⁸⁶⁰ Apart from the Rizvanović couple, who were awarded 20,000 Euros for the torture and the fear they lived through, the Podgorica Basic Court in April 2010 awarded 1,500 Euros to Zlatija Stovrag, whose husband Himzo committed suicide by hanging in 1992 out of fear of the police.¹⁸⁶¹ This verdict, too, was overturned by the Superior Court, which ordered a retrial. The same fate befell the case of Osman Ramović. Zlatija, Alema and Amela Bungur in April 2010 sued the Ministries of Defence, Internal Affairs and the Police Directorate. Each of them sought 20,000 Euros for the mental anguish they sustained and unlawful imprisonment. This is one of the twenty or so lawsuits, which have been filed by the victims or the members of their families.¹⁸⁶²

Deportation of Refugees Case

At least 66 Bosnian Moslem refugees¹⁸⁶³ were unlawfully arrested in Montenegro and then handed over to the army of their enemy, the Bosnian Serbs, in May and June 1992. Most of them were executed; only twelve survived the concentration camps. The 33 Bosnian Serb refugees¹⁸⁶⁴ arrested by the Montenegrin authorities were also deported back to the Bosnian Serb Republic to be mobilised into the army. As opposed to the Bosnian Moslem refugees, the deported Bosnian Serb refugees were not treated as hostages. It remains unknown whether any of them died due to deportation.¹⁸⁶⁵

Most of the arrested refugees were taken to the Herceg Novi Security Centre which served as a collection centre; they were then transported on 25 and 27 May by buses to the concentration camp in the Foča penitentiary,¹⁸⁶⁶ or to unidentified locations in eastern BiH (Bosnian Serb Republic). All the

¹⁸⁵⁹ "Only the Court Doesn't Know what Everyone Else has Known for Years", *Vijesti*, 4 January 2011.

¹⁸⁶⁰ Information obtained from the lawyer of the Rizvanović family.

¹⁸⁶¹ "They Were Maintaining Peace, Not Intimidating", *Dan*, 14 May 2010.

¹⁸⁶² "Who Was in Command?", *Vijesti*, 9 April 2010.

¹⁸⁶³ The trial in Montenegro concerns the deportation of 52 persons. The other deportees were listed by Interior Minister Nikola Pejaković in his reply to a parliamentary query in 1993, i.e. by the survivors, who mentioned people, who were not on the list, in their statements before the Podgorica Basic Court. Journalist Šeki Radončić, who investigated this crime, established that 105 Moslems refugees were deported ("Ominous Freedom – Deportation of Bosnian Refugees from Montenegro", Šeki Radončić, Humanitarian Law Centre, Belgrade, 2005, p. 145).

¹⁸⁶⁴ This number is mentioned in Minister Nikola Pejaković's reply to a parliamentary query in 1993 and the indictment.

¹⁸⁶⁵ See also Šeki Radončić, in his book "Ominous Freedom – Deportation of Bosnian Refugees from Montenegro", Šeki Radončić, Humanitarian Law Centre, Belgrade, 2005, p. 145.

¹⁸⁶⁶ Apart from the Podgorica Basic Court, this fact was also established by the ICTY in its final judgement in the case of *Prosecutor v. Milorad Krnojelac* IT-97-25-T.

Moslems deported on 27 May 1992 were probably killed the same or the following day and their bodies were thrown into the Drina River¹⁸⁶⁷; the remains of all the victims have not been found to date. The other Moslem refugees were arrested in Bar, Podgorica and near the border with BiH and were also deported in late May 1992 to the camp in Foča and other locations in the Bosnian Serb Republic, where they were handed over to Bosnian Serb agents and never seen again.

As of December 2004, 196 members of the families of most of the deported Moslems who had died and several survivors of the concentration camps in the Bosnian Serb Republic filed 42 civil lawsuits against the state of Montenegro and the Montenegrin MIA seeking reparations for damages. The Podgorica Basic Court rendered 28 decisions upholding the victims' claims in which it found that the statute of limitations does not apply to damages inflicted by the consequences of war crimes. After contesting the legal and factual grounds for four years, the Montenegrin Government in December 2008 rendered a decision on court settlement and paid a total of 4.13 million Euros to the injured parties: 30,000 Euros to each child of the victims, 25,000 Euros to the parents and spouses of each victim, 10,000 Euros to the brothers and sisters of each victim, and 8,000 Euros per month of imprisonment to the surviving victims.¹⁸⁶⁸

State Prosecution Office

Although both the state authorities and the public were aware of the police campaign conducted in 1992 "with the consent of the competent prosecution office"¹⁸⁶⁹, the state prosecution office did not initiate a criminal investigation until 19 October 2005, when it filed a motion for the investigation of five lower-ranked former MIA officers suspected of war crimes against the civilian population. The public learned about the motion when the state prosecutor mentioned it in court as an argument corroborating his motion that the court discontinue the reparations proceedings the families of the victims had initiated.¹⁸⁷⁰

¹⁸⁶⁷ Conclusion drawn after the autopsies of bodies found in June 1992 and buried at the cemetery in Sremska Mitrovica, Serbia, where they were washed up by the Sava River (See: Ominous Freedom, *op. cit.*, p. 92).

¹⁸⁶⁸ See more in the statement of the attorneys that represented the victims at: http://www.prelevic.com/Documents/Deportation_Public_Announcement.pdf.

¹⁸⁶⁹ Reply to the parliamentary query by Montenegrin Minister of the Interior Nikola Pejaković, Ref No 278/2 of 8 April 1993. The scanned document is available at: <http://www.prelevic.com/Documents/Odgovor%20na%20poslanicko%20pitanje.doc>

¹⁸⁷⁰ At the time, the state prosecution office represented the state in all property proceedings. Therefore, this authority was obviously in conflict of interest given that it represented the state in reparation proceedings, while, in the criminal proceedings, it was to prosecute the authorities (on behalf of the victims) and insist on the accountability of (all) state agents and officials for this crime. The Council of Europe subsequently required of Mon-

Although Montenegrin state prosecutors are in the habit of seeking the detention of the suspects when they submit motions for their investigation to prevent them from influencing the witnesses, tampering with the evidence or from absconding, even for much lighter crimes, the prosecutor proposed the detention of the suspects only when they were indicted and cited only the gravity of the crime and the penalty it warrants in support of his motion.

The investigation did not open before February 2006 and not one action was undertaken during the first six months. Scores of witnesses were subsequently heard and the investigation was initially completed on 26 June 2008. It resumed on 3 November 2008, when the list of suspects was expanded to include the following three men: former State Security (SDB) Chief Boško Bojović; former SDB Deputy Chief Radoje Radunović and senior official of the Ulcinj Security Centre Sreten Glendža.

The following leading state officials also testified during the investigation: former Montenegrin Presidency President Momir Bulatović, the then Montenegrin Prime Minister Milo Đukanović and the then Montenegrin Presidency member Svetozar Marović.¹⁸⁷¹ Nikola Pejaković, who was Deputy to the Minister of the Interior Pavle Bulatović at the time of the deportation and subsequently became the Minister of the Interior, testified in Belgrade during the investigation. All of them denied they had known anything about the arrests of the refugees at the time.

In January 2009, Deputy Special Prosecutor of the Department for the Suppression of Organised Crime, Corruption, Terrorism and War Crimes within the Montenegrin Supreme State Prosecution Office Lidija Vukčević filed an indictment with the Podgorica Superior Court¹⁸⁷² and the motion for the detention of the following nine former and current MIA officers: Bojović Boško – Assistant MIA charged with the State Security Service (SDB); Marković Milisav – Assistant MIA charged with the police; Radunović Radoje, chief of the SDB Sector in Herceg Novi; Bakrač Duško – SDB operations agent in Herceg Novi; Stojović Božidar – head of the SDB Sector in Ulcinj; Ivanović Milorad – chief of the Herceg Novi Security Centre; Šljivančanin Milorad – commander of the Herceg Novi militia station; Bujić Branko – Bar Security Centre chief and Glendža Sreten – chief of the Ulcinj Security Centre.

They are charged with unlawfully transferring civilian population – BiH nationals, Moslem and Serb refugees with the status of refugees under the Convention Relating to the Status of Refugees and Protocol Relating to the

tenegro to reform the system and ensure that state prosecutors are exclusively involved in criminal prosecution.

¹⁸⁷¹ The lawyer of one of the defendants, Branimir Lutovac, said that Đukanović's and Marović's statements were 'monologues, because the investigating judge did not ask them a single question', "Đukanović and Marović Will Not Testify", *Vijesti*, 9 February 2011.

¹⁸⁷² KTS Ref No 17/08, of 19 January 2009.

Status of Refugees – whereby they violated the international law during and relating to armed conflicts in the territory of BiH laid down in the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War and Additional Protocol II, Article 5 of the ECHR amended pursuant to Protocol No. 11 (sic!)¹⁸⁷³. They are charged with war crimes against the civilian population, because they unlawfully deprived of liberty 79 nationals of BiH and turned them over to the Sokolac police, the Foča police and prison and Srebrenica police officers, at the order of the then Montenegrin Interior Minister Pavle Bulatović (now deceased) to act on the requests by the MIA of the Bosnian Serb Republic (then officially called the Serb Republic of BiH), to deprive of liberty and return to BiH persons who had come to Montenegro from BiH territory.

The questions – why none of the superior state officials were indicted and why none of them, apart from Momir Bulatović, were summoned to testify – have been publicly raised a number of times. At the time of the deportations, Momir Bulatović was the President of Montenegro, Milo Đukanović was its Prime Minister, Zoran Žižić was the Deputy Prime Minister charged with internal affairs and directly with overseeing the work of the MIA, while Nikola Pejaković was the Deputy to the then Minister of Internal Affairs Pavle Bulatović.

Furthermore, the indictment did not even propose that the then Supreme State Prosecutor Vladimir Šušović appear as a witness¹⁸⁷⁴, although an MIA 1993 document states that the arrest and deportation of refugees was conducted “with the consent of the competent prosecution office”.¹⁸⁷⁵ Notwithstanding this piece of evidence, prosecutor Vukčević in her closing words qualified as untrue Momir Bulatović’s allegation that the police continuously consulted with the Supreme State Prosecutor during the deportations.¹⁸⁷⁶

The Prosecution Office *inter alia* presented the following evidence in the indictment: a) Interior Minister Nikola Pejaković’s reply to a parliamentary query in 1993, in which he says that the police arrested refugees, classified by their ethnicity, Moslems and Serbs, and handed them over to the Bosnian

¹⁸⁷³ This Convention was not binding on the FRY at the time. It has been binding on Montenegro since the end of 2003, i.e. 3 March 2004, when the ratification instruments were submitted to the Council of Europe.

¹⁸⁷⁴ Vladimir Šušović is now a member of the Prosecutorial Council and thus nominates prosecutors and renders decisions on their accountability in disciplinary proceedings and on motions for their dismissals, wherefore “the career of prosecutor Vukčević (prosecuting the deportation case), *nolens volens*, depends also on Šušović’s vote” (“Medenica Suing, Medenica Adjudicating”, *Monitor*, 25 February 2011).

¹⁸⁷⁵ Office of the Montenegrin Minister of Internal Affairs Nikola Pejaković, Ref No 278/2, of 8 April 1993, Reply to a parliamentary query. The scanned document is available at: <http://www.prelevic.com/Documents/Odgovor%20na%20poslanicko%20pitanje.doc>.

¹⁸⁷⁶ “Prosecutor Says Guilt Proven without Doubt”, *Pobjeda*, 23 February 2011; (“Medenica Suing, Medenica Adjudicating”, *Monitor*, 25 February 2011; “State to Blame”, *Dan*, 13 November 2010.

Serb MIA,¹⁸⁷⁷ and b) letter to Danijela Stupar in response to her query addressed to Prime Minister Milo Đukanović and also signed by MIA Nikola Pejaković, confirming that her husband Alenko Titorić was deported from Montenegro to the Serb Republic of BiH “to join the group of Moslems to be exchanged for the captured Serb territorial defence troops”.¹⁸⁷⁸ However, notwithstanding this and other evidence corroborating that civilians – refugees were used as hostages to assist the war efforts of the enemy, the indictment charges the defendants only with “unlawful transfer”. Furthermore, the description of the facts and the evidence on which the indictment is based obviously corroborates that the refugees were also “unlawfully imprisoned”, that some of the Moslem refugees were “unlawfully taken to a concentration camp”, all of which constitute elements of a war crime. However, given that the court need not limit itself to the legal qualification in the indictment, just the factual description of the offence¹⁸⁷⁹, this omission by the Special Prosecutor need not have prevented the Court from properly qualifying the crime.

At the very end of the trial, Prosecutor Vukčević changed the qualification of the conflict in BiH from international to internal¹⁸⁸⁰, and cut the number of injured parties, but retained the legal qualification of the criminal offence.¹⁸⁸¹ The amendment of the legal qualification of the conflict in the indictment was also not binding on the court.

¹⁸⁷⁷ Office of the Montenegrin Minister of Internal Affairs Nikola Pejaković, Ref No 278/2, of 8 April 1993, Reply to a parliamentary query, p. 2. The scanned document is available at: <http://www.prelevic.com/Documents/Odgovor%20na%20poslanicko%20pitanje.doc>;

¹⁸⁷⁸ The translation of the letter is available at: http://www.prelevic.com/deportation_ministry.htm

¹⁸⁷⁹ Article 359, Montenegrin: “(1) The verdict shall refer only to the accused and to the offence the accused is charged with as specified in the indictment that has been filed, amended or extended during the main hearing. (2) The court shall not be bound by the prosecutor’s legal qualification of the offence.”

¹⁸⁸⁰ In the amended indictment, Prosecutor Vukčević claims that the rules of “international law were violated during and in relation to an armed conflict which did not have the character of an international conflict in the territory of Bosnia-Herzegovina” (Ref No Ks 3/09, <http://www.visisudpg.gov.me>). At the time of the deportations, FRY (Serbia and Montenegro) and Bosnia-Herzegovina were two separate states. “Bosnia-Herzegovina’s independence was recognised by the European Community (now the EU) member states on 6 April and by the USA on 7 April 1992. BiH became a full member of the United Nations on 19 May 1992. In the meantime, Serbia and Montenegro proclaimed a new state on 27 April 1992 – the Federal Republic of Yugoslavia. UN Security Council Resolution 752 of 15 May 1992 called on the FRY and Croatia “to take swift action” to end interference and “respect the territorial integrity of Bosnia-Herzegovina (...)”. The FRY did not abide by the UN request in Resolution 752 and the UNSC adopted a new Resolution 757 on 30 May by which it introduced economic, cultural and sports sanctions against the FRY. UNSC Resolutions are international legal documents, under which an “international conflict” was waged in BiH in 1992 and the Montenegrin authorities actively participated in it”, “Medenica Suing, Medenica Adjudicating”, *Monitor*, 25 February 2011.

¹⁸⁸¹ “Waiting for the Indictment”, *Dan*, 1 March 2011, “Gravity of Indictment under Question”, *Dan*, 23 February 2011.

Podgorica Superior Court

The trial before Podgorica Superior Court judge Milenka Žižić and two jurors opened on 26 November 2009.¹⁸⁸²

Duško Bakrač, Boško Bojović, Milorad Ivanović, Milisav Marković and Radoje Radunović, who were at large, in Serbia, were tried *in absentio*. After Serbia and Montenegro signed the Extradition Agreement on 29 October 2010, the Belgrade court ordered that Milorad Ivanović, Boško Bojović, Radoje Radunović and Milisav Mića Marković be placed in extradition detention not to exceed one year. Duško Bakrač was not arrested.¹⁸⁸³ All the defendants were released from detention after their acquittal in the first instance.

A large number of witnesses, including the injured parties who had survived the deportations, the relatives of the killed victims, and Montenegrin police officers, testified at the trial.

Nikola Pejaković, the then Deputy Interior Minister, was subsequently summoned to testify but did not appear in court because he was ill. Pejaković himself asked to be heard in court after Momir Bulatović's testimony, but the judge no longer thought it necessary to question him. The judge also dismissed the defence motions to call to the stand Milo Đukanović, Zoran Žižić and Vladimir Šušović, as well as Svetozar Marović and Milica Pejanović – Đurišić, who were members of the Montenegrin Presidency headed by Bulatović at the time of the deportations.¹⁸⁸⁴

The defendants pleaded not guilty,¹⁸⁸⁵ saying they had only been following orders and acting in accordance with the order in telegram No. 14–101 of 23 May 1992, to act in accordance with the Bosnian Serb MIA request and bring in all BiH nationals aged 18–65 and have them returned to BiH.

The defence is of the view that those who had ordered the deportation and not those who had carried it out should be held accountable for this crime.

Momir Bulatović, the then President of Montenegro, asked the Superior Court to request of the competent institutions to relieve him from the obligation to preserve the confidentiality of official documents so that he could present the key evidence in this case.¹⁸⁸⁶ Given that Bulatović did not specify which document was at issue, it was impossible to establish which state

¹⁸⁸² "Šljivančanin: I Don't Expect Absolution", *Pobjeda*, 27 November 2009.

¹⁸⁸³ "Men Arrested for Deportation to Spend up to One Year in Prison", *Vijesti*, 17 December 2010.

¹⁸⁸⁴ "Medenica Suing, Medenica Adjudicating", *Monitor*, 25 February 2011.

¹⁸⁸⁵ "SDB Operating without Leaving Written Traces", *Vijesti*, 4 December 2010; "They Feel Sorry for the Victims but Claim They are not Responsible"; *Vijesti*, 27 November 2009; "Šljivančanin: I Don't Expect Absolution", *Pobjeda*, 27 November 2009.

¹⁸⁸⁶ *Vijesti*; "Momir Bulatović: I Asked Milo What Was at Issue"; 27 September 2010.; *Vijesti*; "Assembly or Government to Draw the Next Move"; 28 September 2010.; *Dan*; "State Secrets Puts off Testimony"; 28 September 2010.

authority was to relieve him of the obligation to preserve its confidentiality. The Montenegrin Assembly¹⁸⁸⁷ and the Government of Montenegro relieved Bulatović from the obligation to preserve the confidentiality of the documents within their remits.¹⁸⁸⁸

Bulatović testified on 12 November 2010 and said that the deportation was not a one-off action, but a regular activity of the police. He handed over to the court ten or so documents, including an original cable ordering the arrest of 161 people from BiH suspected of terrorism.¹⁸⁸⁹ He said that the “extradition of the refugees was the mistake of the state, not of an individual” and confirmed that the police and Supreme State Prosecutor were “non-stop” in touch at the time.¹⁸⁹⁰

The proceedings closed on 2 March with the closing remarks of the defendants. They said they were not guilty and that they were merely the victims in this trial.¹⁸⁹¹ The defendants also underlined that they made the arrests under orders from the prosecution office, not at their own discretion.¹⁸⁹²

The verdict was rendered on 29 March 2011. All nine defendants were acquitted because, as the judgment explained, they could not have committed a war crime against the civilian population given the conflict in BiH was not international in character.¹⁸⁹³ The acquittal prompted an avalanche of public criticism by the representatives of some political parties and NGOs.¹⁸⁹⁴

The judgment¹⁸⁹⁵ is contradictory, its legal qualification confusing and not based on international law or relevant interpretations of it. For instance, the finding on page 72, where the court establishes that “an armed conflict between nations living in BiH, Serbs, Croats and Moslems, was at issue wherefore the conflict did not have the character of an international armed conflict,” is in contravention with its view on page 90: “In the period after 19 May 1992, when the FRY forces as such withdrew from the territory of BiH, the Bosnian Serb Republic armed forces operated under the general control of and on behalf of the FRY, the facts established also in the judgments of the

¹⁸⁸⁷ “Momir Relieved of Preserving Non-Existent Secret”, *Dan*, 15 October 2010; “Bulatović Relieved of Keeping Secrets within Assembly’s Remit”, *Dan*, 15 October 2010; “Court to Submit a Precise Request”, *Dan*, 12 October 2010.

¹⁸⁸⁸ “Momir May Testify”, *Dan*, 05 November 2010; “Government, Too, Relieves Momir of Preserving Confidentiality”, *Vijesti*, 05 November 2010.

¹⁸⁸⁹ “Deportations Were the State’s Task and the State’s Mistake”, *Vijesti*, 13 November 2010; “Deportations Were the State’s Mistake”, *Pobjeda*, 13 November 2010; “State to Blame”, *Dan*, 13 November 2010.

¹⁸⁹⁰ *Ibid.*

¹⁸⁹¹ “Defendants Claim that They are Innocent Victims”, *Pobjeda*, 2 March 2011.

¹⁸⁹² “Arrests Ordered by Prosecution Office”, *Dan*, 2 March 2011.

¹⁸⁹³ “Acquitted due to Lack of Evidence”, *Pobjeda*, 30 March 2011, “Refugee Deportation Defendants Acquitted”, *Vijesti*, 30 March 2011.

¹⁸⁹⁴ “Recurrent Crime of Those Advocating War for Peace”, *Vijesti*, 30 March 2011.

¹⁸⁹⁵ Judgment Ref No 3/09 is available on the website of the Podgorica Superior Court: <http://www.visisudpg.gov.me>.

ICTY, wherefore the FRY, too, *was in an armed conflict with the BiH Government forces, in contravention of the defence counsels' view.*" Namely, if the Bosnian Serb armed forces "operated under the general control and on behalf of the FRY", the conflict in BiH was international per se, although the court ultimately concluded the opposite.

The judgment improperly applies international law on several points. It, for instance, incorrectly states that Article 17 of the Protocol Additional to the Geneva Conventions of 12 August 1949 on the Protection of Victims of Non-International Armed Conflicts (Protocol II) does not prohibit deportation beyond state borders – on the contrary, paragraph 2 refers exactly to such situations.¹⁸⁹⁶ Furthermore, the court stated that "the perpetrator (of forced transfer and deportation) had to have had the intent ... to conduct the transfer on discriminatory grounds". Actually, international law, including ICTY case law, does not require discriminatory intent for an act to be punishable.¹⁸⁹⁷

The most problematic is the conclusion which the acquittal is based on – that there was no war crime because the defendants did not have the necessary capacity to commit it – *they were not members of the armed formations or in the service of a party to the conflict.*¹⁸⁹⁸ Although it was established that the accused police and state security officers unlawfully arrested the refugees and turned them over to the Bosnian Serb Republic agents to use them as hostages and exchange them for POWs, the court found that this did not mean that they acted "in the service of a party to the conflict", because the FRY, which comprised Montenegro, had not declared a state of war.¹⁸⁹⁹ The judicial panel

¹⁸⁹⁶ See p. 92 of the judgment: "The FRY was created on 27 April 1992. The injured parties were thus returned to the territory of another state which is why the provisions of Article 17 of Additional Protocol II, the violation of which the defendants are charged with, cannot apply to displacement beyond the valid state borders (which is the case in deportation), but to displacement within the valid state borders (which is the case in forcible transfer)." What is not taken into account here is that paragraph 2 of Article 17 of Protocol II precisely refers to forcible transfer beyond state boundaries (see the ICRC comment of this provision at: <http://www.icrc.org/ihl.nsf/COM/475-760023?OpenDocument>).

¹⁸⁹⁷ "There is nothing in the undoubtedly grave nature of the crimes falling within Article 3 of the Statute, nor in the Statute generally, which leads to a conclusion that those offences are punishable only if they are committed with discriminatory intent." ICTY, Appeals Judgement in the case of *Prosecutor v. Zlatko Aleksovski*, 24 March 2000, para 20.

¹⁸⁹⁸ "The defendants' actions, as well as the order itself, were unlawful from the viewpoint of international law. However, given that it has not been proven that the defendants, who were police officers, were part of the FRY armed forces or in the service of any party to the conflict and thus active participants in an armed conflict, in which case they would have been bound by international law, their actions thus cannot be perceived or assessed in terms of the commission of the offences incriminated by Article 142 of the FRY in violation of international law, because they did not have the specific capacity for that – they were not members of the armed forces or in the service of a party to the conflict" (p. 94 of the judgment Ref No Ks. 3/09).

¹⁸⁹⁹ The court appears not to have even considered the possibility that the obvious support Montenegrin state agents extended to the military efforts of the Bosnian Serb agents meant that the Montenegrin agents were "in the service" of Bosnian Serbs, clearly a party to the conflict in BiH.

thus demonstrated a fundamental lack of understanding of the essence of international humanitarian law – the protection of victims of armed conflicts, not the protection of states. States would never declare a state of war if the non-declaration of a state of war could protect them or their agents from responsibility for crimes committed during war conflicts.

HRA is of the view that a war crime against the civilian population regarding the armed conflict in BiH was undoubtedly committed in this case and recalls that this legal position – that a war crime against civilians regarding the armed conflict in BiH had been committed in Montenegro – was taken also by the Montenegrin Supreme Court in its judgment in the case of the Bosnian Moslem Klapuh family (that fled BiH to Montenegro, where it was killed in July 1992).¹⁹⁰⁰

The appeals were filed in June 2011 by the state prosecutor and Sejda Krdžalića and Hikmeta Prelo, mothers who lost their sons Sanin (21) and Amer (18) to this crime.

It remains yet to be seen whether the Superior Court will order a retrial and whether the Special Prosecutor will make the necessary amendments to the indictment and take into account all facts established in the first-instance proceedings.

Kaluđerski laz Case

Kaluđerski laz is a village in the Montenegrin municipality of Rožaje near Kosovo. During the NATO air strikes on the FRY in 1999, provoked by the escalation of violations of human rights and rules of war and threat to civilians in Kosovo, Yugoslav Army (VJ) members killed 21 ethnic Albanians, who had fled to Montenegro from Kosovo, in Kaluđerski laz and the nearby villages, where there were no clashes.¹⁹⁰¹ This crime is publicly known as Kaluđerski laz, although it was only one of the villages in which crimes were committed. A trial for the murder of 18 civilians, six of whom were killed in Kaluđerski laz and the others at other locations, was under way at the Bijelo Polje Superior Court at the end of the reporting period. The charges do not include the deaths of four victims of the crime.¹⁹⁰²

It took the Bijelo Polje Superior Prosecutor eighteen months to act on the criminal report the Montenegrin Committee of Lawyers for the Protection of Human Rights (CKP) submitted in June 2005 and file a motion for the investigation of 12 persons suspected of war crimes against the civilian

¹⁹⁰⁰ The judgment is filed under the reference number Kž. 141/94. HRA's statement on the judgment is available at: <http://www.hracion.org/wp-content/uploads/DEPORTATION-FIRST-INSTANCE-RULING-1.pdf>

¹⁹⁰¹ "What Are the Army Archives Concealing", *Monitor*, 16 February 2007; *Ibid*, information obtained from the attorney of the injured parties, Velija Murić.

¹⁹⁰² Information obtained from the attorney of the injured parties, Velija Murić, chairman of the Montenegrin Committee of Lawyers for the Protection of Human Rights.

population in Kaluđerski laz and the nearby villages from mid-April to early June 1999.¹⁹⁰³

The investigation opened in early March 2007 against active Belgrade-born VJ officer Predrag Strugar residing in Podgorica and 10 members of the VJ Podgorica Corps reservists from the Berane municipality.¹⁹⁰⁴ The investigation unnecessarily dragged on. It was immediately clear that there were no grounds for suspecting four of the men the prosecutor named in the motion for investigation of such a grave crime and the prosecutor subsequently abandoned their prosecution.¹⁹⁰⁵ Lawyer Velija Murić, CKP chairman and legal representative of the injured parties, who had filed the criminal report, tried to take an active part in the investigation by offering and obtaining the evidence. He claims that both the state prosecutor and investigating judge lacked the will to conduct an effective investigation and that this was why the prosecutor's indictment did not include all the perpetrators of the crime. The prosecutor also failed to seek the detention of the suspects until after they were indicted. In result, the main defendant Predrag Strugar fled and the other defendants have been detained since May 2008; furthermore, the investigation was conducted simultaneously with the marathon trial, which was not completed by end May 2011.

Indictee Predrag Strugar, son of General Pavle Strugar, convicted for the siege of Dubrovnik by the ICTY, is charged with command responsibility, given that he was the only active VJ officer, while the other seven VJ Podgorica Corps reservists are charged with committing the crime in Kaluđerski laz.¹⁹⁰⁶ The territory in which the crimes were committed was in the jurisdiction of the VJ Second Army, headed by Milorad Obradović at the time. The command responsibility involved him, Podgorica Corps commander Savo Obradović, down to Battalion commander Predrag Strugar, who was charged with Kaluđerski laz area.¹⁹⁰⁷ Milorad Obradović and Savo Obradović were mentioned only as witnesses in the investigation, although they were Strugar's superiors. Their testimonies have not been obtained to this day, as the Bijelo Polje Superior Court claims that is unable to establish the whereabouts of these two senior VJ officers because they are living in the Republic of Serbia.¹⁹⁰⁸

The military authorities, charged with the investigation of the crime scene in Kaluđerski laz, admitted they went to the scene of the crime with a day's delay, while the Montenegrin police were prohibited from accessing

¹⁹⁰³ "Stojanka Taking over War Crime Cases", *Dan*, 23 May 2007.

¹⁹⁰⁴ Momčilo Barjaktarović, Petar Labudović, Aco Knežević, Branislav Radnić, Ranko Radnić, Veselin Čukić, Vesko Lončar, Zoran Knežević, Boro Novaković, Miro Bojović and Radomir Đurašković.

¹⁹⁰⁵ Ranko Radnić, Veselin Čukić, Vesko Lončar and Zoran Knežević.

¹⁹⁰⁶ "What Are the Army Archives Concealing", *Monitor*, 16 February 2007.

¹⁹⁰⁷ *Ibid.*

¹⁹⁰⁸ Data provided by Sead Sadiković, journalist and author of a number of articles on war crimes in Montenegro, 14 March 2008, and the attorney of the injured parties Velija Murić, May 2011.

it, according to the then police chief Šemso Dedeić¹⁹⁰⁹. Zahit Camić, President of the Rožaje Basic Court, and his colleagues Milosav Zekić and Rafet Suljević, investigated the scenes of ten murders in the Rožaje municipality on the border with Kosovo. The army let him access the scene of the crime at Kaludjerski laz only three days after it occurred, when it found the body of Selim Kelmendi from the village of Čuška (Qyshk) at Peć on the road to Gornji Bukelj.

The injured parties' attorney claims that the bodies of the six civilians killed at Kaludjerski laz were taken to Andrijevisa (Montenegro) the next day for an autopsy, and then transported to Novo Selo at Peć, where they were buried naked in a mass grave. Their bodies were exhumed after the war in Kosovo ended and UNMIK was deployed.

Immediately after the incident at Kaludjerski laz, the then military prosecutor Miroslav Samardžić abandoned the criminal prosecution of the VJ troops suspected of crimes against civilians and archived the case.¹⁹¹⁰ None of the competent authorities either in Montenegro or Serbia have demonstrated the will to call him to account for doing so notwithstanding the obvious existence of grounds for his criminal prosecution.

The trial opened on 19 March 2009.¹⁹¹¹ Over ten witnesses have been heard by the end of the reporting period but none of them were able to give any details about the Kaludjerski laz crime. All of them claimed that they had not seen the defendants and that they knew hardly anything about the events.¹⁹¹² The defence counsels insist that their clients be acquitted given that the injured parties did not see them at the time of the shooting. The perpetrators shot at the column of civilians from a trench at the edge of the forest, at a distance of over 100 metres. They were uniformed and resembled each other at that distance and the victims and eyewitnesses in the column were unable to make out any details by which they could recognise them. Furthermore, there were no eyewitnesses to a number of other crimes. Moreover, the judicial authorities are neglecting the fact that the VJ was exclusively in charge of all the events in that area at the time and that it was the only one that could have committed these crimes.

The parties were still presenting evidence and hearing the witnesses in this case in late May 2011.

Civil Compensation Proceedings

The families of the victims have to date filed 12 civil lawsuits seeking compensation for non-material damages with the Podgorica Basic Court. They qualified the VJ as the perpetrator of the crimes and the Montenegrin

¹⁹⁰⁹ "What Are the Army Archives Concealing", *Monitor*, 16 February 2007.

¹⁹¹⁰ *Ibid.*

¹⁹¹¹ "Summons to Strugar Sent to Serbia", *Vijesti*, 3 February 2009; "Strugar Summons Sent to Serbia", *Vijesti*, 4 February 2009.

¹⁹¹² "No-one Saw the Defendants", *Dan*, 1 September 2009.

MIA as the state institution responsible for the protection of people and their possessions. The Court rendered the first verdict in December 2009, ordering Montenegro to pay 15,000 Euros to Hadži Ahmeti from Novo Selo at Peć for the mental anguish he suffered as a victim of a war crime committed near Rožaje in April 1999 (Ahmeti had sought 45,000 Euros in damages).¹⁹¹³ The verdict was overturned and Ahmeti was awarded 12,000 Euros at a retrial. This is the only final decision. The attorney of the injured parties, Velija Murić, told HRA that the other compensation trials were under way.¹⁹¹⁴ What is characteristic of these trials is that they are not directly linked to the killings of victims by the army troops, that they are reduced to extraordinary events for which Montenegro, as a legal successor of the FRY, is liable. This thesis benefits the victims because they need not prove the facts of the crime, but it is unrealistic, because it covers up the fact that army members killed innocent citizens of their own state for no reason.

Compensation Claims for Deaths of Civilians during the 1999 NATO Air Strike on Murino

Six civilians, three of whom children, were killed and eight were wounded during the NATO air strikes on Murino, a town near Plav in north-east Montenegro, on 30 April 1999.¹⁹¹⁵

The Podgorica Basic Court on 8 May 2009 opened a trial based on four lawsuits for the compensation of non-material damages and the sustained mental anguish filed by the Murino families, whose members were killed during the air strikes.¹⁹¹⁶ One more lawsuit was filed in the meantime.¹⁹¹⁷ The Court rendered a first-instance verdict in September 2010 under which Montenegro is to pay 69,000 Euros in damages and the court expenses to the family of victim M.K.¹⁹¹⁸ The Court also rendered a first instance decision in November 2010 ordering Montenegro to pay the Vuletić family 82,000 Euros.¹⁹¹⁹ It rejected one lawsuit due to lack of evidence in the first instance.¹⁹²⁰ None of the decisions became final by the end of June 2011, when this report went into print.

¹⁹¹³ “Ahmeti Awarded 15 Thousand Euros for Mental Anguish”, *Vijesti*, 7 December 2009.

¹⁹¹⁴ Interview with attorney Murić on 28 May 2011.

¹⁹¹⁵ Portal In4S: <http://in4s.net/stari/crna-gora/58-cg/6510-in4s-poeo-kampanju-ne-u-nato>.

¹⁹¹⁶ “Families of People Killed in NATO Strike Suing Montenegro”, Radio Free Europe, 9 May 2009, <http://www.slobodnaevropa.org/content/article/1622034.html>

¹⁹¹⁷ Information obtained from the plaintiffs’ attorney Velija Murić, May 2011.

¹⁹¹⁸ “Montenegro Must Compensate Families of NATO Air Strike Victims”, Radio Free Europe Radio 16 September 2010: <http://www.slobodnaevropa.org/content/article/2159720.html>.

¹⁹¹⁹ “Family from Murino Awarded 82 Thousand”, *Dan*, 25 November 2010.

¹⁹²⁰ Information obtained from the plaintiffs’ attorney Velija Murić, May 2011.

The Most Important Human Rights Treaties Binding on Montenegro

- Act Amending the Act on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Sl. list CG*, 5/2005 and 7/2005.
- Additional Protocol to the Convention on Cybercrime concerning the criminalization of acts of a racist and xenophobic nature and committed through computer systems, *Sl. list CG*, 4/2009.
- Additional Protocol to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data regarding Supervisory Authorities and Transborder Data Flows, *Sl. list CG*, 6/2009.
- Additional Protocol to the Criminal Law Convention on Corruption, *Sl. list CG*, 11/2007.
- Agreement between the Republic of Montenegro and the European Community on the Readmission of Persons Residing without Authorisation, *Sl. list CG*, 7/2007.
- Agreement between the Republic of Montenegro and the European Community on Visa Facilitation, *Sl. list CG*, 7/2007.
- Civil Law Convention on Corruption, *Sl. list CG*, 1/2008.
- CoE Convention on Action against Trafficking in Human Beings, *Sl. list CG*, 4/2008.
- CoE Convention on Laundering, Search, Seizure and Confiscation of of the Proceeds from Crime and on the Financing of Terrorism, *Sl. list CG*, 5/2008.
- CoE Convention on the Avoidance of the Statelessness in relation to State Succession, *Sl. list CG*, 2/2010.
- Convention against Discrimination in Education (UNESCO), *Sl. list SFRJ*, 4/64.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Sl. list SFRJ*, 9/91.
- Convention against Transnational Organized Crime, *Sl. list SRJ*, 6/01.
- Convention Concerning Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, *Sl. list SFRJ*, 13/64.
- Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, *Sl. list SRJ*, 1/92 and *Sl. list SCG*, 11/05.
- Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *Sl. list SFRJ*, 3/2009.

- Convention on the Elimination of All Forms of Discrimination against Women, *Sl. list SFRJ*, 11/81.
- Convention on the High Seas, *Sl. list SFRJ*, 1/86.
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, *Sl. list SRJ*, 7/02 and 18/05.
- Convention on the Nationality of Married Women, *Sl. list FNRJ*, 7/58.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, *Sl. list SFRJ*, 50/70.
- Convention on Police Cooperation in South East Europe, *Sl. list CG*, 1/2008.
- Convention on the Political Rights of Women, *Sl. list FNRJ*, 7/54.
- Convention on the Prevention and Punishment of the Crime of the Genocide, *Sl. list FNRJ*, 2/50.
- Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, *Sl. list CG*, 7/2009.
- Convention relating to the Status of Refugees, *Sl. list FNRJ*, 7/60.
- Convention relating to the Status of Stateless Persons and Final Act of the UN Conference Relating to the Status of Stateless Persons, *Sl. list FNRJ*, 9/59 and 7/60 and *Sl. list SFRJ*, 2/64.
- Convention on the Rights of the Child, *Sl. list SFRJ*, 15/90 and *Sl. list SRJ*, 4/96 and 2/97.
- Convention on the Suppression of Trade in Adult Women, *Sl. list FNRJ*, 41/50.
- Convention for the Suppression on the Trafficking in Persons and of the Exploitation of the Prostitution of Others, *Sl. list FNRJ*, 2/51.
- Criminal Law Convention on Corruption, *Sl. list SCG*, 18/05.
- European Charter of Local Self-Government with Additional Protocol on the Right to participate in the Affairs of Local Authority, *Sl. list CG*, 5/2008.
- European Convention on the International Validity of Criminal Judgments, with appendices, *Sl. list SCG*, 18/05.
- European Convention on Extradition with additional protocols, *Sl. list SRJ*, 10/01.
- European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, *Sl. list CG*, 11/2010.
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Sl. list SCG*, 9/03.
- European Convention for the Protection of Human Rights and Fundamental Freedoms, *Sl. list SCG*, 9/03.

- Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *Sl. list CG*, 12/2010.
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, *Sl. list SRJ*, 1/02.
- European Convention on Nationality, *Sl. list CG*, 2/2010.
- European Convention on the Suppression of Terrorism, *Sl. list CG*, 2/2010.
- European Convention on the Exercise of Children's Rights, *Sl. list CG*, 8/2010.
- European Charter on Regional and Minority Languages, *Sl. list SCG*, 18/05.
- Framework Convention for the Protection of National Minorities, *Sl. list SRJ*, 6/1998.
- ILO Convention No. 3 Concerning Maternity Protection, *Sl. list Kraljevine Srba, Hrvata i Slovenaca*, 95-XXII/27.
- ILO Convention No. 11 Concerning Right of Association (Agriculture), *Sl. list Kraljevine Srba, Hrvata i Slovenaca*, 44-XVI/30.
- ILO Convention No. 14 Concerning Weekly Rest (Industry), *Sl. list Kraljevine Srba, Hrvata i Slovenaca*, 95-XXII/27.
- ILO Convention No. 16 Concerning Medical Examination of Young Persons (Sea), *Sl. list Kraljevine Srba, Hrvata i Slovenaca*, 95-XXII/27.
- ILO Convention No. 17 Concerning Workmen's Compensation (Accidents), *Sl. list Kraljevine Srba, Hrvata i Slovenaca*, 95-XXII/27.
- ILO Convention No. 18 Concerning Workmen's Compensation (Occupational Diseases), *Sl. list Kraljevine Srba, Hrvata i Slovenaca*, 95-XXII/27.
- ILO Convention No. 19 Concerning Equality of Treatment (Accident Compensation), *Sl. list Kraljevine Srba, Hrvata i Slovenaca*, 95-XXII/27.
- ILO Convention No. 29 Concerning Forced Labour, *Sl. list Kraljevine Jugoslavije*, 297/32.
- ILO Convention No. 45 Concerning Underground Work (Women), *Sl. list Predsjedništva Skupštine Federativne Narodne Republike Jugoslavije (FNRJ)*, 12/52.
- ILO Convention No. 81 Concerning Labour Inspection, *Sl. list FNRJ (Addendum)*, 5/56.
- ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, *Sl. list FNRJ*, 8/58.
- ILO Convention No. 89 Concerning Night Work of Women (revised), *Sl. list FNRJ*, 12/56.
- ILO Convention No. 90 Concerning Night Work of Young Persons in Industry (Revised) *Sl. list FNRJ*, 12/56.
- ILO Convention No. 91 Concerning Paid Vacations for Seafarers (Revised), *Sl. list SFRJ*, 7/67.

- ILO Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, *Sl. list FNRJ*, 11/58.
- ILO Convention No. 100 Concerning Equal Remuneration, *Sl. list FNRJ*, 11/52.
- ILO Convention No. 103 Concerning Maternity Protection (Revised), *Sl. list FNRJ*, 9/55.
- ILO Convention No. 105 Concerning Abolition of Forced Labour, *Sl. list SRJ*, 13/02.
- ILO Convention No. 106 Concerning Weekly Rest (Commerce and Offices), *Sl. list FNRJ*, 12/58.
- ILO Convention No. 109 Concerning Wages, Hours of Work and Manning (Sea), (Revised), *Sl. list FNRJ*, 10/65.
- ILO Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, *Sl. list FNRJ*, 3/61.
- ILO Convention No. 121 Concerning Employment Injury Benefits, *Sl. list SFRJ*, 27/70.
- ILO Convention No. 122 Concerning Employment Policy, *Sl. list SFRJ*, 34/71.
- ILO Convention No. 129 Concerning Labour Inspection (Agriculture), *Sl. list SFRJ*, 22/75.
- ILO Convention No. 131 Concerning Minimum Wage Fixing, *Sl. list SFRJ*, 14/82.
- ILO Convention No. 132 Concerning Holidays with Pay Convention (Revised), *Sl. list SFRJ*, 52/73.
- ILO Convention No. 135 Concerning Workers' Representatives, *Sl. list SFRJ*, 14/82.
- ILO Convention No. 138 Concerning Minimum Age for employment, *Sl. list SFRJ*, 14/82.
- ILO Convention No. 140 Concerning Paid Educational Leave *Sl. list SFRJ*, 14/82.
- ILO Convention No. 144 Concerning Tripartite Consultation (International Labour Standards), *Sl. list SFRJ*, 1/05.
- ILO Convention No. 155 Concerning Occupational Safety and Health *Sl. list SFRJ*, 7/87.
- ILO Convention No. 156 Concerning Workers with Family Responsibilities, *Sl. list SFRJ*, 7/87.
- ILO Convention No. 161 Concerning Occupational Health Services Convention, *Sl. list SFRJ*, 14/89.
- ILO Convention No. 167 concerning safety and health in construction, *Sl. list FNRJ*, 16/1947, 18/1947 and 36/1950.

- ILO Convention No. 182 Concerning the Worst Forms of Child Labour, *Sl. list SRJ*, 2/03.
- ILO Convention No. 183 of the Maternity Protection, *Sl. list CG*, 1/2011.
- International Covenant on Civil and Political Rights, *Sl. list SFRJ*, 7/71.
- International Covenant on Economic, Social and Cultural Rights, *Sl. list SFRJ*, 7/71.
- International Criminal Court Statute, *Sl. list SRJ*, 5/01.
- International Convention on the Elimination of All Forms of Racial Discrimination, *Sl. list SFRJ*, 6/67.
- International Convention on the Suppression and Punishment of the Crime of Apartheid, *Sl. list SFRJ*, 14/75.
- International Convention for the Protection of All Persons from Enforced Disappearance, *Sl. list CG*, 8/2011.
- Kyoto Protocol to the UN Framework Convention on Climate Change, *Sl. list RCG*, 17/2007.
- Optional Protocol to the International Covenant on Civil and Political Rights, *Sl. list SRJ*, 4/01.
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *Sl. list SFRJ*, 13/02.
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Sl. list SCG*, 16/05.
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *Sl. list SRJ*, 7/02.
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, *Sl. list SRJ*, 7/02.
- Optional Protocol to the UN Convention on the Rights of Persons with Disabilities, *Sl. list CG*, 2/2009.
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, *Sl. list SRJ*, 6/01.
- Protocol Amending the Slavery Convention Signed at Geneva 25 September 1926, *Sl. list FNRJ*, 6/55.
- Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Sl. list SCG*, 5/05 and 7/05.
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, *Sl. list SRJ*, 6/01.
- Protocol on Relating to the Status of Refugees, *Sl. list SFRJ*, 15/67.
- Revised European Social Charter, *Sl. list CG*, 6/2009.

- Second Optional Protocol to the International Covenant on Civil and Political Rights, *Sl. list SRJ*, 4/01.
- Slavery Convention, *Sl. list Kraljevine Jugoslavije*, XI–1929, 234.
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *Sl. list SFRJ*, 7/58.
- UN Convention against Corruption, *Sl. list SCG*, 18/05.
- UN Convention on the Rights of Persons with Disabilities, *Sl. list CG*, 2/2009.



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