



ANALYSIS OF FINAL JUDGMENT ACCORDING TO WHICH SVETLANA ČABOTARENKO (alias „S.Č.“, „THE MOLDOVAN VICTIM OF SEX-TRAFFICKING”) WAS CONVICTED FOR CRIMINAL OFFENCE PERJURY (FALSE TESTIMONY) (Art. 389 of the CC of Montenegro)

MOLDOVAN VICTIM S. Č. DID NOT HAVE FAIR TRIAL

CONTEXT

Mr. Goran Đuković, judge of the Basic Court in Podgorica, rendered a judgment on 30 June 2014 pronouncing Mrs. Svetlana Čabotarenko (”S.Č.”) guilty of the crime of Perjury (Providing False Testimony) and sentenced her to a suspended sentence due to her testimony in the widely known investigation of trafficking in human beings and enabling prostitution in Montenegro, which took place from November 2002 to 25 January 2003.

The first instance judgment of judge Đuković was largely confirmed by the panel of judges of the High Court in Podgorica composed of Mrs. Miljana Pavličević, Mrs. Hasnija Simonović and Mrs. Evica Durutović on 21 October 2014, but they reversed S.Č.'s punishment from suspended sentence to one-year prison term. This resulted in an international warrant for arrest of S.Č.

S.Č. became known to the Montenegrin and broader public in 2002, when she testified as a victim in the proceedings led by the Basic State Prosecutor in Podgorica against the then Deputy Supreme Public Prosecutor of the Republic of Montenegro, Mr. Zoran Piperović, and three other suspects, for enabling prostitution and trafficking in human beings. A large number of persons have been mentioned during the investigation, some of them holding high political, police and judicial functions.¹

It is important to note that investigation has been suspended in 2003 following a controversial decision of the then Basic State Prosecutor in Podgorica, Mr. Zoran Radonjić, not to indict anyone, i.e. to suspend criminal prosecution of the four suspects who were under investigation.

Judge Ana Vukovic, who led the investigation, disagreed with this decision. Also, it was not praised by the members of the expert mission of the Council of Europe and the OSCE who analyzed the investigation or by Mrs. Vesna Medenica, who had been appointed the Supreme

¹ Zoran Piperović, former Deputy State Prosecutor, Irfan Kurpejović and Bajram Orahovac were accused of committing the crime of Enabling prostitution, and Ekrem Jasavić for criminal offense of Enabling prostitution in concurrence with the criminal offense of Trafficking in human beings. The Supreme State Prosecutor Božidar Vukčević and Prime Minister Milo Đukanović also provided statements in the investigation.

State Prosecutor immediately following the investigation, and who also considered the case should have been clarified at trial. The Basic State Prosecutor Radonjić was dismissed afterwards due to incompetence.² The Supreme State Prosecutor Božidar Vukčević, who was mentioned in the investigation, retired, and the Deputy State Prosecutor Zoran Piperović, who was under the investigation, was dismissed due to indignity.

S.Č. left Montenegro on 25 January 2003, upon the permission of the court.

Two out of four suspects, Zoran Piperović and Ekrem Jasavić, pressed criminal charges against the witness S.Č. for perjury. The criminal complaint against S.Č. was initially rejected by the Basic State Prosecutor in Podgorica. Piperović then took over the prosecution as subsidiary (private) prosecutor. The Panel of the Basic Court in Podgorica rejected his indictment at first, but eventually the Panel of the High Court in Podgorica decided to accept it and the proceeding was initiated. Jasavić later joined him as a subsidiary prosecutor.

In the first trial of S.Č. for perjury, the judge of the Basic Court in Podgorica, Mrs. Nada Rabrenović, acquitted the defendant twice, because, as the media reported,³ she could not determine any premeditation (*mens rea*) of the defendant to commit the crime. When the High Court revoked the second acquittal of judge Rabrenović, the case was assigned to Judge Goran Đuković, who convicted the accused. His judgment was confirmed by the High Court, except that the suspended sentence was reversed to one year prison term.

SUMMARY ANALYSIS OF JUDGEMENT REGARDING S.Č.

S.Č. was tried *in absentia*. Based on international standards of human rights, the state can organize a trial *in absentia*, only if it provides for the right to a fair trial.⁴

Analysis of the final judgment convicting S.Č. shows that judge Goran Đuković conducted the procedure in a biased manner, not providing equal treatment for the accused. Judges of second-instance Court Miljana Pavličević, Hasnija Simonovic and Evica Durutović supported his decision and additionally imposed a prison term.

Although the principle of truth and fairness of the Criminal Procedure Code of Montenegro obliges the court to "examine and establish with equal attention facts that incriminate the

² Vesna Medenica, Supreme State Prosecutor at the time, explained the reasons for the dismissal of Radonjić and Piperović in the text "Vesna Medenica claimes she would resigne if the Government did not suspend Piperović and Radonjić: a Prosecutor can not visit night clubs", *Vijesti*, 7.11.2003.

³ "S.Č. affair: Moldovan acquitted again" *Pobjeda*, 13 July 2013. ", *Vijesti*, 13.7.2013. HRA has failed to obtain judgment of the Basic Court through requests for free access to information; the court simply remained silent. We filed a complaint with the Agency.

⁴ See Report of the Committee of Experts of the Council of Europe on the Operation of the European Convention in criminal justice, "the right to a fair trial can be ensured without the presence of the defendant, if the State takes measures to ensure the right to a fair trial"

http://www.coe.int/t/dghl/standardsetting/pc-oc/Standards_extradition_en_files/07E.98%20trial%20absentia.pdf, page 10.

accused as well as the ones in his/her favour”⁵, judge Đuković has not brought any evidence in favor of the defendant, although some were apparently available, nor did he take care of adequate defense of the defendant, contrary to national and international fair trial standards.

The judge based his opinion of the defendant lying "both in objective and subjective sense", on two pieces of evidence, found on the records of the controversially closed investigation in 2003, which credibility and importance the judge did not critically examine, but interpreted exclusively as the subsidiary (private) prosecutors suggested. **The type of evidence presented is notorious for covering of trafficking in human beings.**

The first evidence was the agreement of transfer of S.Č. to work as a dancer ("performer of ensemble") from Novi Sad (Serbia) to the nightclub "Oscar" in Podgorica in 1999. The other evidence were letters of the Ministry of Interior of Serbia and Montenegro stating that S.Č. did not cross the border of Bosnia and Herzegovina, and that the vehicle of Piperović was not registered at border crossing points either. Bearing in mind that the usual methods used by criminals in trafficking of women for purposes of prostitution recorded also in the jurisprudence of the European Court of Human Rights⁶ include making false contractual engagements for "dancers", and that their border crossing is usually either not registered at all, or registered with false documents, of which S.Č. testified as well,⁷ the court should have considered these evidence with scepticism rather than accepting them blindly.

The text of the judgment contains scandalous observations of the judge, such as that it was "illogical" that any Montenegrin statesman would lead a debauched life (participating in parties involving prostitutes), to the fact that someone who does not speak well the local language (Serbian-Montenegrin) cannot learn local terms - the names of locations in that language. While the first observation draws attention to the apparent inability of the judge to think objectively – and regard nationals of Montenegro, including statesmen, in the same manner as foreign citizens, the second claim challenges the ability of the judge to make common sense conclusions on generally known facts, such as that a person who does not speak a language well would still be able to first adopt local terms, especially if spending time with the "locals", as explained in detail by S.Č. in her testimony (included in the judgement).

On the other hand, **the judge was responsible for entering into the text of the judgment insulting and disparaging statements** of the prosecutor to the detriment of his colleague, judge of the High Court in Podgorica, Ana Vuković, who was the investigating judge in the case in which S.Č. made the controversial statement, as well as regarding other actors of this process (S.Č.'s attorney in that investigative proceeding, Dragan Prelević, and Director of NGO Women's Safe House Ljiljana Raičević, in whose shelter S.Č. was placed). None of them were invited to testify, i.e. to provide their opinion on the claims of the prosecutors, although they were all available to the court.

⁵ Art. 16, para. 1 CPC: "The Court, State Prosecutor and other state authorities participating in the criminal proceedings are required to truthfully and completely establish the facts which are important for reaching a lawful and fair decisions, and with the same care examine and establish the facts incriminating the defendant and those who speak in his favor."

⁶ RANTSEV v. CYPRUS AND RUSSIA, 2010.

⁷ Pages 22 and 31 of the judgment of the Basic Court in Podgorica K. no. 199/14.

Given the fact that the judge was bound by the law to protect the reputation of the court and the parties in the court proceedings, and that there was no obligation to enter insulting statements on the record and text of the judgment⁸, the fact that the judge himself chose to do so, further enhances the impression of his partiality in favor of the private prosecutors.

Especially concerning is the unprofessional conduct of the attorney "B.L."⁹, legal counsel assigned *ex officio* to S.Č., who was paid for his services from the state budget (although S.Č. would be eventually required to pay his costs). He acted only as a figure in the proceedings, offering no defense at all – not even lodging an appeal on behalf of the defendant. Neither judge Đuković, nor the Panel of the High Court reacted to the lack of adequate defense. The judge refused to disclose the identity of the attorney although the trial was public.

Below is a more detailed analysis of the disputed judgment.

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DETAILED ANALYSIS

Partiality and prejudice of the judges, lack of equal treatment of defendants

International minimum standards on fair trial require the court to be "impartial", which at least means that the judge should leave an impression of objectivity. Also, one of the fundamental principles of fair trial implies equality of the parties. Both principles were clearly violated in the proceedings against the accused S.Č, which will be explained in detail below.

1) It is obvious from the text of the judgment that all judges involved never considered the possibility that the defendant could be a victim of either human trafficking, or enforced prostitution, drug abuse and other ill-treatment. This can be confirmed by at least two facts.

The first fact is that judge when evaluating that the testimony of the accused was "contradictory and selective", did not take into account that at the victims of trafficking in human beings "confusion is a usual state, particularly if the testimony is covering a period of several years," as concluded by experts of the Council of Europe and OSCE, commenting on the same argument of "contradictory" testimony of S.Č, which former Basic State Prosecutor in 2003 pointed out in support of his decision not to press charges against the four suspects.¹⁰

⁸ Art. 320, para. 1 CPC: "The Court is bound to protect its reputation, the reputation of the parties and other participants in the proceedings from insults, threats and any other attacks." Art. 333, para. 3 CPC: "The statements of the accused, witnesses and experts shall be entered in the record so their essential content is presented." Art. 331, para. 4 CPC: "The judge may, upon request of a party or ex officio, order a literally statement, that it considers particularly important to be entered in the record."

⁹ Originally we were unaware of the full identity of the lawyer, as the judge Djukovic refused to inform us, but a journalist in the meantime provided the information that his name is Boško Laličić.

¹⁰ 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, SG/Inf(2003) 42,

Although this experts' report was made public and is still easily available on the internet, the fact that the judge made no efforts to obtain it and take it into account further indicates unprofessional approach to establishing the facts.¹¹

The second fact is that although the judge noted scars from injuries which S.Č. had at the time of the investigation, he did not reflect on their possible cause, although the quoted case file contained expert's opinion that part of the injuries "could have resulted from the tip of a burning cigarette".¹² The judge without further reasoning accepted the position of prosecutor Piperović that injuries were not incurred for the reasons stated by S.Č.

Judges of the High Court generally confirmed the reasoning of judge Đuković, except in respect of sentencing, where they found that the defendant needed to be punished more severely and sentenced to prison. Bearing in mind that when considering a conditional sentence all the "circumstances under which the offense was committed" should be taken into account, the judges in this case have not at all considered the possibility of the defendant actually being a victim of abuse, trafficking, forced prostitution, etc. even by persons other than private prosecutors, and therefore did not even explain the rejection of that possibility. They never even considered the possibility that the trauma she suffered may have caused making perjury statements in relation to the subsidiary prosecutors.

11.12.2003: "65. The prosecutor's decision to dismiss the case rests on the following basic premises: -The witness S.C. was not a credible witness, due to certain conflicting statements made by her, regarding the time and place of the events described by her. The TIE is of the opinion that such a conclusion overlooks the fact that such confusion is a common condition of victims of trafficking in human beings, especially if the testimony covers a period of several years (page 16, para. 65). See also "Politics and legal recommendations for the effective implementation of the provisions of impunity of victims of trafficking", the OSCE Office of the Special Representative and Coordinator for Combating Human Trafficking, 2013, items. 63, p. 25 "Even when it becomes apparent that the alleged offender is a victim of human trafficking, the application of clause of impunity may be complicated by challenges posed by working with traumatized victim whose story can often be changed and for which the Prosecution can estimate that is not authentic...". In addition, by browsing the internet we came across an explanation Australian Institute of Criminology who says – „It is common for individuals who have suffered trauma to provide inconsistent statements when they are first identified. Trauma can impact significantly on the memory and behaviour of a trafficked person and can lead to loss of memory, hostility, confusion regarding the chronology of events, or even an inability to recall events (David 2008a; ICMPD 2006; UNODC 2009a). Moreover, as noted above, trafficked persons may simply lack trust in law enforcement and may be reluctant to provide a complete statement.“. Hannah Andreovski, Jacqueline Joudo Larsen & Samantha Lyneham, „Barriers to trafficked persons' involvement in criminal justice proceedings: An Indonesian case study“, page 6, Australian Institute of Criminology, may 2013: http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi451.pdf

¹¹ Council of Europe experts report, quoted above (FN12), was published in a daily newspaper in Montenegro: "EXCLUSIVE: The report of experts of the OSCE and CoE about the sex trafficking affair: There was enough reasons for affair to go to court," News, 23.11.2003 .

¹² "The judgment of the Basic Court K.br.199 / 14 from 30 June 2014, p. 34, citing the findings and opinion of the medical expert in 2002: "From the findings and opinions of medical expert D.Č. from 10 December 2002, in the case Ki. no. 02/5585, it follows that at S.Č. has been established the following injuries: abrasions to the right side of her nose, round shaped with a diameter of 8 mm, 14 hematoma, dotted abrasions with slight swelling on the front part of the right knee, five circular scars with diameter of 8 mm, 2 of them on the front part of the abdomen, 2 on the back of the root of the neck and one on the front of the left thigh, one scar on the front part of the abdominal wall on the right side, sized 5 x 4 mm, several dotted scars in the right cubital fosa, two circular scars in the exterior genital area with a diameter of 8 mm, a scar in the exterior genital area of the diameter of 5 x 8 mm, external hemorrhoids without signs of inflammation. Abrasions and bruises were caused by a blunt object for about two weeks before the examination (she was examined on 28 November 2002). The scars may have been caused by burning tip of a cigarette and they incurred during a period longer than two months before the examination. Dotted scars in the right cubital fosa were probably caused by stabbing small pointed objects (possibly injection needle) within a period longer than one month from the date of the examination. Scars in the external genital area were made in the period longer than two months and could have been caused by a peak of burning cigarettes. The scar in the external genital area is of a more recent date than these two, and it was made in the same way. External hemorrhoids could have been caused by mechanical or other stimuli.

2) Judge's conclusion that the defendant had lied, as she could not have known the local names of parts of the city because she said she did not speak Serbian language well is irrational and unfounded.¹³ Taking into account that in her statement the defendant explained that she had heard about the places in the first place in our language and spent time there, and that she had been learning Serbian (Montenegrin) language along the way, in the company of persons mentioned in detail in the statement, and not in some language school abroad, we believe that her knowledge of "localisms" in no way suggests that her testimony is false. On the contrary, such conclusion of the judge represents further evidence of his bias in favour of the plaintiffs and to the detriment of the defendant.

3) Citing the testimony of private prosecutor Zoran Piperović, judge Đuković in his verdict first noted that in 2003 Piperović had been removed from his position with the state prosecutor's office, and then found that it was **"exceptionally illogical that (Piperović), who performed a public function of Deputy Supreme State Prosecutor, could have committed such a serious offense against the then damaged party, especially as the said function, in addition to professional references, required high reputation - both professional and personal."**¹⁴ When presenting the cited conclusion, defying even common sense, the judge did not at all observe the fact that Piperović had been removed from office, or determine the reason for his dismissal. The then Supreme State Prosecutor, Vesna Medenica, publicly announced that she had proposed Piperović's dismissal on grounds of **being unworthy of the office**, because, amongst other things, he himself stated before the investigating prosecutor that he had been visiting *Oskar* nightclub, which, according to Medenica, "undermined him as the holder of this function."¹⁵

4) Stating part of the testimony of S.Č., where she described how she had been taken to the Montenegrin coast and there, according to the judge, "sexually exploited", stating that in one car "there was one Montenegrin statesman who she identified, and then immediately said that she did not know who he was", **the judge concluded that her testimony "appears to be untrue and, above all, illogical, especially that any Montenegrin statesman would live such a lifestyle, as the then damaged party"¹⁶ wished to wrongfully present.**¹⁷ Founding his decision that the defendant was lying, even incidentally, on the assumption that it is "illogical" that any statesman of Montenegro could live a debauched lifestyle, the judge demonstrated prejudice unfitting for a responsible position of a judge in a democratic society.

5) Reference to the alleged motive of the defendant for committing the offense with a very confusing explanation also creates the impression of bias. The judge stated the following in the judgment:

"... we reach the crucial question: the damaged party's motive for giving such testimony. Truth should be told, the motive is not an essential element of this criminal offense, however, when taking into consideration her lengthy testimony, it could be clearly

¹³ The judgment of the Basic Court K.br.199/14, of 30 June 2014, p. 40.

¹⁴ *Ibid*, p. 41.

¹⁵ Vesna Medenica, Supreme State Prosecutor, "Vesna Medenica claims that she would have resigned if the Government had not dismissed Piperović and Radonjić: A prosecutor cannot visit nightclubs", *Vijesti*, 7 November 2003.

¹⁶ "The then damaged party" refers to the role S.Č. had in the 2002-2003 investigation proceeding, where she gave a statement in her capacity of a victim.

¹⁷ The judgment of the Basic Court K.br.199/14, of 30 June 2014, p. 41.

concluded that the persons mentioned firstly include subsidiary prosecutor P., who at that time held the position of Deputy Supreme Prosecutor, and later a senior state official, thus, the motive of the then damaged party during the testimony is quite apparent - the motive which could not have been established in this procedure, nor was this the duty of the court, bearing in mind the essential element of the offense the defendant was charged with."¹⁸

It is obvious that the judge wanted to impose his subjective opinion at all costs - that the defendant had a dishonest motive, although this was not supported by any evidence.

6) The judge did not make an effort to bring forth any evidence in support of the defendant. He did not call witnesses who could have shed a different light on her personality or events which were the subject of the proceedings. On the contrary, he permitted insulting of some of the potential witnesses not only during the procedure, but also in the text of the judgment, including: Judge of the High Court Ana Vuković, the then investigative judge in the case in which S.Č. gave her testimony as the damaged party, Dragan Prelević, legal representative of S.Č. during the 2002-2003 investigation, and Ljiljana Raičević, Director of NGO Women's Safe House, in whose shelter for women victims of violence S.Č. stayed during the investigation.¹⁹

Instead, the judge heard only the former suspects against whom S.Č. witnessed, as well as their family members. (Please note that he also used the statements of two witnesses from the 2002 investigation he should have summoned for hearing in the current proceedings, see point 11).

7) The judgment is based on the defendant's testimony given during the investigation, which was rejected as contradictory, based mainly on two pieces of evidence: (1) the contract on the alleged transfer of S.Č. as a dancer from Novi Sad to Oskar nightclub in Podgorica in 1999, (2) letters from the Ministry of Internal Affairs stating that S.Č. did not cross the border and that Piperović's vehicle was not recorded on the border crossing during a given time frame. Given that the "dancer" contract engagement is a common cover for trafficking in women for the

¹⁸ The judgment of the Basic Court K.br.199/14, of 30 June 2014, p. 41.

¹⁹ Citing Piperović's statement from the investigative case file, the judge included the following statements in his judgment: "When A.V. together with M.P., Lj.R, T.G., attorney P. ... saw that the case file included absolutely nothing and that everything was complete nonsense and a huge scam, she resorted to the most heinous thing, which disqualifies her as a professional and a human..." (p. 5 of the judgment). "On 27 December 2002, 20 days after his arrest, and after all daily newspapers in the country kept publishing his photo on a daily basis, the investigating judge arranged for suspect identification, having him wear glasses, as in the photographs he had glasses on his face, and after that, in the premises of the Security Centre, she placed him among Podgorica Security Centre inspectors, none of whom had glasses, and then she asked M.: Which one of them is Z.P. One of the records of the hearing in this case also proves that she defended the lies knowingly - when at the suggestion of attorney P. she covered the face of M. S.Č. in the photograph and asked one of the witnesses from B. whether he knows who was in the picture, and the witness was supposedly able to recognize S.Č. by her stockings or shoes, which was explained by the investigating judge in the record that this might lead to identification and that before that the witness should not see the person he was describing, because A.V. at all costs wanted to discredit the testimony of this witness, in that he did not know at all who M. S.Č. was, and failed to remember to say that no one has been covering his face for a month." (p. 5 of the judgment) "...F.E. told him that A.V. did not want to hear anything about his hearing and that she only took his address, and that he remembered a call for a hearing after having read in the newspaper that M. had left." (p. 5 of the judgment) "...It is clear why she said that, because if the doctor's findings were to be published, everything would have been clear to everybody and then A. would not travel to A., giving lectures..., US marines would not line up in K. in her honour..." (p. 15 of the judgment). "...After that, he was in the hands of A.J., M.P. and T.G., with the help of Lj.R., Director of the Safe Women's House, who is his relative, because his grandfather and her grandmother on her father's side were siblings, and that since there was none and there is not any evidence relating to him, the goal was to manipulate the public. The main manipulator was the son of R.P., D.P., who has been doing all this for the money, of which two days after his arrest he bought an apartment in S. street." (p. 13-14 of the judgment). Jasavić and attorney Lj.N. claimed that "the defendant as the injured party had ... dishonourable, privileged position in the court..." (p. 13 of the judgment).

purpose of prostitution recorded also in the jurisprudence of the European Court of Human Rights²⁰, and that the crossing of the border by trafficking victims and vehicles used for their transport are often not recorded or recorded in false documents, as S.Č. testified,²¹ the court should have verified the above evidence, or at least taken them with a degree of scepticism, rather than accepting them uncritically. It is particularly disturbing that the judge casually ignored the well-known porosity of the border between the then Federal Republic of Yugoslavia and Republika Srpska in Bosnia & Herzegovina, the high levels of corruption, as well as the influence of persons with official ID cards in relation to the departments in charge of the border and stay of foreigners during the relevant period.

8) Another conclusion of the judge calls into question his ability to objectively conduct this procedure. Namely, the judge stated the following as an argument that the defendant had lied: "Furthermore, she pointed out that in the tavern at B.'s above the top shelf with drinks there were photographs in which she was naked, next to the half-naked prosecutor Z.B., and that during the long previous procedure these photographs have not been found and admitted into evidence, which was easy to do, since they had been in the mentioned tavern in a visible place. That evidence could have then certainly helped the state prosecutor as material evidence to prove the guilt of the then suspects, here subsidiary prosecutors."²² **It is inconceivable that the judge could not guess that the said photographs could have been removed without a trace before being found and included in evidence during the investigation.**

9) Judges of the High Court also demonstrated prejudice in relation to the defendant, explaining reversal of the judgment to a one-year prison sentence as a punishment "appropriate for the committed criminal offence and personality of the accused as the perpetrator."²³ It is questionable on what basis personality of the accused, tried *in absentia*, has been assessed, since only the damaged as complainants in this procedure (and their family members) testified about her personality, but not other people in Montenegro who knew her, as stated above, and who could have helped assess her personality in a more objective manner.²⁴ It is particularly unusual that in this case the judges did not even comment on the fact that this person had no prior convictions and was a mother of two small children - facts otherwise treated in Montenegro as extenuating circumstances (e.g. in the case of persons convicted for war crimes in Morinj), especially when deciding on a conditional sentence.²⁵

10) Regarding the reversal of the judgment by the High Court, it has been pointed out that in this case the conditional sentence "could not meet the general purpose of prescribing and imposing criminal sanctions, and that the offence could not be treated as lighter."²⁶ **It is**

²⁰ *Rantsev v. Cyprus and Russia*, 2010.

²¹ P. 22 and 31 of the judgment of the Basic Court in Podgorica K.br. 199/14.

²² P. 41 of the judgment of the Basic Court in Podgorica K.br. 199/14.

²³ The judgment of the High Court in Podgorica, Kž 1214/2014, p. 4.

²⁴ Experts of the Council of Europe and the OSCE have noticed that during the 2002-2003 investigation the witnesses who testified were "almost all reportedly linked to S.Č. in a questionable, if not criminal way, which is why their credibility could be regarded as questionable" and thus commented on the attitude of the Basic Prosecutor that further prosecution should have been discontinued because none of the witnesses confirmed the testimony of the injured S.Č. The same happened in this procedure. For the report see above FN 12.

²⁵ "In deciding whether to impose a suspended sentence, the court shall, taking into account the purpose of the suspended sentence, particularly take into account the personality of the offender, his past, his behaviour after committing the offense, degree of culpability and other circumstances under which the offense was committed." (Art. 54, para 4 of the CC of Montenegro "Conditions for imposing a suspended sentence").

²⁶ The judgment of the High Court in Podgorica, Kž 1214/2014, p. 4.

interesting to note that in the cases of prosecution of ill-treatment of citizens by the police, the understanding of Podgorica High Court was different, i.e. that the purpose of the prevention of torture (which requires zero tolerance) in cases of police officers convicted of ill-treatment or Grievous bodily injuries could be achieved by a suspended sentence,²⁷ while in the mentioned case it was assessed that a prison sentence is needed for a crime of Perjury.

11) Additionally, the Hight Court in Podgorica judges did not pay attention to another important breach of procedure by judge Djuković. Namely, the judge based his verdict also on the statements of witnesses (for example, B.N. i F.E. page 35) from another case file (Ki. Br. 02/5585 from 2003), although the Criminal Procedure Code does not provide for such exercise (Art. 347, exceptions provided by Art. 356). In such a manner, the judge exercised a significant breach of procedure from Art. 386, para. 1, point 7 “judgment based on evidence on which according to this law a judgment may not be based...”, which the second instance court should have regarded *ex-officio* (čl. 398, st. 1, tač. 1 ZKP) but failed to do so.

The lack of the defence of the accused S.Č.

Based on the first and second instance judgments it can be concluded that the defendant did not have an adequate defence in accordance with the standards of a fair trial which is required under Article 6 of the European Convention on Human Rights. The European Court of Human Rights has repeatedly stressed that the obligation of the state to ensure a fair trial does not end with assigning, or funding the lawyer, because then the free legal assistance in many cases would appear worthless.²⁸ Legal aid provided by appointed lawyer has to be effective, not theoretical and illusory. In the case of *Sannino v Italy*, the European Court of Human Rights estimated that if the lawyer’s failures manifest objectively, that the defendant does not have to actively complain or to indicate for the state to have an obligation to take measures to guarantee his effective defence.²⁹ Keeping silent and not taking basic actions (such as lodging an appeal) are evidence of failures which require intervention of the state.³⁰

²⁷ For example, in relation to ill-treatment of V.K. in the remand prison in AECS, the High Court upheld a suspended sentence against AECS officers S.B. and V.V., who had tied and beaten her (TU.br. 312/10 of 20 March 2012); police officer O.B. for abusing A.L. was also legally sanctioned by a suspended sentence (K.br. 237/09); police officers S.Š. and D.K. for abuse of M.D. (br. Kz-257/2001 of 28 May 2001); A.F. and R.L. received a suspended sentence for causing serious bodily injury to N.I. (Kz.br. 1325/12 of 13 November 2012), etc. See “The Prosecution of Torture and Ill-treatment in Montenegro”, Human Rights Action, Podgorica, 2013.

²⁸ *Artico v Italy*, ECtHR, Judgment of May 13 1980, par. 33 – “The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive. As the Commission’s Delegates correctly emphasised, Article 6 par. 3 (c) (art. 6-3-c) speaks of “assistance” and not of “nomination”. Again, mere nomination does not ensure effective assistance...”

²⁹ „However, the Court considers that the applicant’s conduct could not of itself relieve the authorities of their obligation to take steps to guarantee the effectiveness of the accused’s defence. The above-mentioned shortcomings of the court-appointed lawyers were manifest, which put the onus on the domestic authorities to intervene. However, there is nothing to suggest that the latter took measures to guarantee the accused an effective defence and representation.” *Sannino v Italy*, ECtHR, Judgment of April 27 2006, par. 51.

³⁰ *Falcao dos Santos v Portugal*, July 3 2012.

The defence attorney of the accused "B.L."³¹ who was appointed *ex officio* during the proceedings, **did not propose any evidence nor called into question any evidence** presented against his client, and in the form of closing arguments cited "that the defendant was tried in absence, with specificity of acts she was charged with, and that he **leaves to the court to assess and make a legal decision**".³²

Judge Đuković did not react to the lack of defense, the situation was accepted as normal, concluding: "The defense of the accused is absent, as she was unreachable to the state authorities of Montenegro and the decision of the non-contentious panel of this court determined trial in absence."³³

Taking into account the abovementioned closing speech, and that the defence counsel did not propose presentation of any evidence or state any argument in favour of the defence of the accused, it could be concluded that he took quite a passive role in the procedure, solely fulfilling the procedural requirement to conduct a trial. Although even after two acquittals, the defendant received a sentence of imprisonment suspended for one year, **the defence counsel did not lodge an appeal!** In response to a complaint filed by the plaintiffs (who demanded that the defendant receive stricter sentence), attorney B.L. laconically stated that he sought "justice and legality". The High Court in its judgment quoted these words of the attorney and stated that based on these words it reached its conclusion that the attorney suggested dismissal of the complaint as unfounded, which means that **S.Č.'s attorney failed to even propose himself "the dismissal of the complaint"**.³⁴

Taking all into consideration, that neither judge Đuković of the Basic Court in Podgorica, nor judges of the High Court Panel responded to the apparent misconduct of counsel B.L., the right of S.Č. to a fair trial in this case has been infringed, in relation to the minimum European standard of fair trial binding Montenegro on the basis of Art. 6 of the European Convention on Human Rights.

CONCLUSION

The final judgment may be observed as the continuous persecution by the state of Montenegro of Moldovan citizen S.Č., as indicated by the following:

a) 2003 decision of the then Basic State Prosecutor in Podgorica, Zoran Radonjić, to suspend prosecution of suspects (although Radonjić was dismissed immediately afterwards due to incompetence, the procedure was never reopened);

³¹ As noted above, we could not reliably determine the identity of the SC defended in this process. The lawyer whose initials on the list of the Bar Association are as stated said she had not participated in the proceedings. Judge Đuković did not want to reveal the identity of the lawyer, although the trial was open to the public. We later found out that his name was Boško Laličić.

³² The judgment of the Basic Court K.no.199 / 14 of 30.06.2014, p. 16

³³ Ibid, page 38

³⁴ The judgment of the High Court, p. 3.

- b) opinion of the State Commission for the assessment of the case, stating offending claims in relation to the defendant, for example that she was "a person of questionable moral values"³⁵;
- c) statement by the Prime Minister of Montenegro, Milo Đukanović, in 2005, that the case was "rigged by the counter-intelligence service working against the interests of Montenegro from the time of King Nikola,"³⁶ without offering any evidence to confirm such a claim.

We expect the Judicial Council to analyse the conduct of judge Đuković and judges Pavličević, Simonović and Durutović in this case, and the Bar Association the conduct of its member B.L.

Epilogue: the Judicial Council declared itself incompetent for the case without legal foundation. The Bar Chamber also rejected to review the conduct of its member Boško Laličić from ethical perspective stating that they are not to "assess suitability of actions undertaken by their members". A detailed analysis of both responses is available on the website www.hraction.org.

We invite international organizations that are evaluating the capability of Montenegrin institutions to ensure the rule of law and protection of human rights - the European Union, the Organization for Security and Cooperation in Europe (OSCE) and the Council of Europe - to examine the judgments of Podgorica Basic Court and Podgorica High Court, submitted in the attachment, and verify our conclusions.

Epilogue: EU and GRECO of the Council of Europe expressed particular interest in the case.

It is particularly important to analyse this case also due to an adverse effect that the prosecution of S.Č. and her sentencing to prison for perjury may have on combating international trafficking in human beings. Specifically, such developments may only deter victims from attempting to break the criminal chain and seek refuge in the state authorities of Montenegro, and also other countries in the region.³⁷

³⁵ Mr. Maurizio Massari, at the time chief of OSCE Mission to Serbia and Montenegro, especially criticized such statements of the state Commission's report ("Vlada žrtve tretira kao kriminalce – šef OEBS u Beogradu razočaran izvještajem komisije o aferi S.Č. (*The Government treats victims as criminals – OSCE chief of mission in Belgrade disappointed by the report of the commission of the S.Č. affair*), daily Vijesti, 1 December 2004.

³⁶ RTCG, 19 May 2005.

³⁷ "...The criminalization of trafficked victims may be tantamount to persecution of victims by the State: not only does it fail to take into account the serious crimes committed against the victim by the traffickers, which should be investigated, it fails to recognize trafficked persons as victims and witnesses of those serious crimes and exacerbates their victimization and/or trauma by imposing on such persons State-imposed, unjust punishment. Instead of being treated as victims, they are treated as criminals. This practice furthermore promotes trafficking in human beings by failing to confront the real offenders, by dissuading trafficked victims from giving evidence against their traffickers and by enabling traffickers to exert even further control over their victims by threatening exposure to punishment by the State. Traffickers will favour the punishment of victims as it simply plays into their hands: it ensures that their victims are the ones to bear the criminal penalties while the real offenders can operate with impunity." (*Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2013, p. 10, available at: <http://www.osce.org/secretariat/101002?download=true>).