

***Proposal for introduction of two new criminal offenses
and amendments to criminal offenses Grave types of murder (Article 144) and Serious bodily
injury (Article 151) with the aim of increased protection of journalists in performing
professional duties***

This document represents the proposal for amendments to the Criminal Code of Montenegro that NGO Human Rights Action (HRA) published and submitted to the Government of Montenegro and the parliamentary parties in November 2010¹, which we offer as a basis for discussion on how the amendments to the Criminal Code can provide increased protection of journalists in performing their professional duties of particular public interest, considering the fact that they are under increased security risk in Montenegro.

Also, bearing in mind the efforts of associations of lawyers and health workers aimed at increasing the criminal-law protection of these professions in the Criminal Code, the HRA proposal can be modified to encompass members of other professions of public concern who, like journalists, are not state officials – who already enjoy a special protection by the Criminal Code. In this regard, within the comparative review of legal solutions from criminal laws of countries that provide increased protection of journalists², the attention should be paid to Serbia and Croatia, which provide increased criminal-law protection to journalists, as well as to other persons performing “duties of public interest” (Serbia) or “responsible persons” (Croatia).

In Serbia, “working in public interest” includes “performing a profession or duty with increased security risk for persons who perform it, which refers to professions of interest for public informing, people’s health, education, public transport, legal and expert assistance before judicial and other state bodies” (Criminal Code, Art. 112 Item 32, Official Gazzete of RS, no. 85/2005,... 104/2013). In Croatia, “responsible person” is “a person who is entrusted with particular tasks from the field of activities of a legal entity” (Criminal Law, Article 87, Item 6, NN 144/12). More information in the text below.

¹ The proposal initially referred only to prescription of new criminal offenses, before the aggravated criminal offences Grave types of murder and Serious bodily injury were included by an additional proposal in 2014. The proposal was originally published in 2010, in the publication „Proposed reform of liability for breach of honour and reputation in Montenegro – defamation and insult law reform“, whose authors were members of NGO Human Rights Action working group: Ana Vuković, judge of High Court in Podgorica, Dušan Stojković, lawyer and media law expert from Belgrade, Tamara Durutović, lawyer from Podgorica, Veselin Radulović, lawyer from Podgorica, Peter Noorlander, lawyer and director of London-based Media Legal Defence Initiative, advisor, and LL.M. Tea Gorjanc-Prelević, executive director of Human Rights Action. In addition to proposing new crimes aimed at increasing protection of journalists, the proposal also proposed decriminalization of all criminal offences against honour and reputation from Chapter 17 of the Criminal Code (two offenses from this Chapter, Defamation and Insult, have subsequently been decriminalized), as well as, alternatively, a change in formulations of these offences, and also the reform proposal of the Media Law with the aim of updating it with the standards of practice of the European Court of Human Rights, still omitted in law texts adopted in Montenegro. This proposal was discussed at the round table held on 26 November 2010, though the main attention was paid to issues of decriminalization of Defamation and Insult. The whole proposal is available on the link: http://www.hracion.org/wpcontent/uploads/predlog_reforme-zakon_o_kleveti_i_uvredi.pdf.

² This part of the reasoning for the proposal was also amended in January 2014.

Proposal for amendments to the Criminal Code

Under Chapter XV of the CC (Criminal offenses against freedoms and rights of man and the citizen), after Article 179, Prevention of printing and distributing printed material and program broadcasting, two new articles are added:

Obstructing journalists in performing their professional duties

Article 179a

- (1) Anyone who prevents journalists in performing their professional duty which is within the scope of their powers or by the same means forces journalists to perform their professional duty, by force or threat of immediate use of force, shall be punished with imprisonment from three months to three years.
- (2) If during the execution of acts referred to in Paragraph 1 of this Article, the offender offends or abuses a journalist or inflicts light bodily injury or threatens with the use of weapons, shall be punished with imprisonment from three months to five years.
- (3) If the act referred to in Paragraph 1 of this Article is committed in a group or in an organized way, the offender shall be punished with imprisonment from six months to five years.
- (4) An attempted act referred to in Para. 1, 2 and 3 of this Article shall be punished.

Assaulting journalists in performing their professional duties

Article 179b

- (1) Whoever assaults or threatens to assault journalists in the exercise of professional duties shall be sentenced to three years of imprisonment.
- (2) If during the execution of acts referred to in Paragraph 1 of this Article a journalist suffered light bodily injury or has been threatened with the use of weapons, the offender shall be punished with imprisonment from three months to five years.
- (3) If the act referred to in Paragraph 1 of this Article is committed in a group or in an organized way, the offender shall be punished with imprisonment from six months to five years.
- (4) An attempted act referred to in Para. 1, 2 and 3 of this Article shall be punished.

Grave types of murder

Article 144

Sentenced to imprisonment of at least ten years or a forty-year prison penalty shall be anyone who:

...

5) deprives of life a person acting in an official capacity or a military person while serving or related to serving an official duty;

6) deprives of life a journalist while serving or related to serving an official duty;

Item 6, "deprives of life a child or a pregnant woman", becomes Item 7;

Item 7, "deprives of life a member of own family or a family community after molestation", becomes Item 8;

8) Item 8, “intentionally deprives of life several persons, such offences being not regarded as a murder committed while in the state of strong excitation, an infanticide or a homicide from compassion”, becomes Item 9.

We also propose adding a qualified form as Paragraph 6 of Article 151, Serious bodily injury:

Serious bodily injury

Article 151

- 1) Anyone who inflicts heavy bodily harm to other person or impairs seriously his/her health, shall be sentenced to six months to five years of imprisonment.
- 2) Anyone who inflicts heavy bodily harm to other person or impairs his/her health so seriously that the injured person’s life is endangered or any vital part of his body destroyed or permanently or considerably damaged or weakened, or the injured person’s permanent ability to work or permanent and serious impairment of his health or deformation is caused, shall be sentenced to one to eight years of imprisonment.
- 3) Should it happen that, due to the acts referred to in paragraphs 1 and 2 of this Article, the injured person has died, the perpetrator shall be sentenced to two to twelve years of imprisonment.
- 4) Anyone who commits the act referred to in paragraphs 1 and 2 of this Article through negligence, shall be sentenced to imprisonment not exceeding three years.
- 5) Anyone who commits the act referred to in paragraphs 1 to 3 of this Article, while in the state of strong excitation caused without his own guilt by an attack, an assault or a heavy insult by the injured, shall be sentenced to imprisonment not exceeding three years for the act referred to in Paragraph 1, three months to four years for the act referred to in Paragraph 2, and six months to five years for the act referred to in Paragraph 3.
- 6) Anyone who commits the act from Paragraph 1 to 3 of this Article against a minor, pregnant woman, state official or journalist, shall be punished for the act from Paragraph 1 to imprisonment of one to eight years, for the act from Paragraph 2 to imprisonment of two to twelve years and for the act from Paragraph 3 to imprisonment of five to fifteen years.**

Reasoning

Reasons for proposed amendments to the Criminal Code

Bearing in mind the frequent attacks on journalists in performing their professional duties in Montenegro, we find justified the proposals emphasized in public to ensure their increased criminal protection³ to prevent such attacks or interference in future and provide social environment for the freedom of expression. Although the best form of prevention is an efficient and effective prosecution and punishment of existing cases of attacks on journalists, we believe that the introduction of proposed criminal offenses – Preventing journalists in performing professional duties and Attack of journalists in performing professional duties, i.e. amendments to existing criminal offenses Grave types of murder and Serious bodily injury, could contribute to the deterrence of potential perpetrators of the attack.

³ Similar initiatives were introduced by the Socialist People’s Party of Montenegro and the Movement for Changes, as well as the NGO Network for Affirmation of the NGO Sector (MANS).

In this way, the journalists would get the same protection in performing their professional duties, as officials in performing official duties⁴. Also, such protection would be in line with European standards and practice of the European Court of Human Rights, emphasizing many times “a positive obligation” of the state under Article 10 of the European Convention on Human Rights to provide safe environment for the enjoyment of freedom of expression (*Özgür Gündem v. Turkey* - 2000, *Dink v. Turkey* - 2010), and prescribing these crimes would certainly meet this requirement⁵.

Results of a public opinion poll in Montenegro

Results of a poll on the opinion of citizens on media freedom, conducted by the Organization for Security and Cooperation in Europe (OSCE) – Mission to Montenegro and NGO Centre for Democracy and Human Rights (CEDEM), were published in Montenegro in July 2012.⁶ Among other things, the citizens were asked to assess the seriousness of the problem of attacks on journalists. Of total 1030 poll respondents, over 30% percent considered it was a very serious problem, while 37% of them considered it was a quite significant problem. Absolute majority (52%) thought that the State should adopt special measures to additionally protect journalists (26.9% respondents thought it was not necessary, while 21.15% did not have an opinion on the issue). *As much as 54% of all respondents said that they would support the proposal to amend the Criminal Code in order to punish the attacks on journalists with the same sentence as for the attacks on state officials in performing official duties (19.4% said they would not support it, while 26.4% did not have an opinion on the issue).*

Reasons why providing state official status to journalists is not a good solution

With the aim of increased protection of journalists in relation to performing their professional duties, the prescription of separate criminal offenses would be a better solution than to provide the state official status to journalists because the prescription of criminal offenses against state bodies – state officials – protects the lawful performance of official activities or duties. Official activities or duties, performed by state officials, generally include the application of regulations and other decisions of competent state bodies. Professional tasks of journalists are not the same as official activities. Social and individual interest for undisturbed performance of journalistic profession, as a profession of public interest obviously having an increased security risk in Montenegro, should be additionally protected by adoption of special criminal offenses or amendment of existing offenses Grave types of murder and Serious bodily injury. This prevents the unnecessary and impossible equalization of journalists with state officials in other situations provided by the Criminal Code, which, for example, also prescribe stricter punishment for state officials who commit certain criminal acts.

⁴ Enhanced protection of both journalists and state officials, as proposed, should be included in the criminal act Serious bodily injury.

⁵ For international standards at the level of the United Nations, see Art. 2, Para 2, Items 2 and 19 of the International Covenant on Civil and Political Rights, on the basis of which the State has a positive obligation to provide enjoyment of the freedom of expression by adopting appropriate laws and measures – see General Comment No. 31 of the Human Rights Committee, item 80, “The Nature of the General Legal Obligations Imposed on States Parties to the Covenant”, from 2004. Also see The UN Plan of Action on the Safety of Journalists and the Issue of Impunity. Also see the recommendations of the international conference on the safety of journalists, Warsaw, 23 – 24 April 2013 on How to improve the safety of journalists, item 4: “Authorities should provide conditions for a safe media environment to enable journalists to perform their work independently and without any interference by, among others, strengthening the national legal frameworks in this regard and by implementing this framework”.

⁶ Public opinion on media freedom in Montenegro, July 2012, available at: <http://www.osce.org/me/montenegro/97479>.

Proposed amendments were developed on the model of criminal offenses that protect state officials

The proposed criminal acts aimed at protecting journalists are based on the description of criminal offenses Prevention of a person acting in an official capacity from performance of an official act (Article 375 of the CC)⁷ and Attack on a person acting in an official capacity while performing official duties (Article 376 of the CC)⁸, as well as on punishments prescribed for those offenses.

Exceptionally, in contrast to the punishment prescribed for the aggravated form of the offense in Art. 375, Para. 2 of CC, our proposed Article 179a Para. 2 prescribes a stricter punishment – ranging from 3 months to 5 years (we believe there has been a mistake in Art. 375, Para. 2 of CC because it illogically prescribes the same punishment for the aggravated form of offense as for its basic form).

We had in mind that the mentioned criminal offenses differentiate punishment in relation to cases when the offense was committed against a “state official”, i.e. a “judge or a state prosecutor while performing their judicial and prosecutorial duties respectively or to an official in performing the duty related to public or state security or the duty of preserving public peace and order, preventing and detecting a criminal offense and capture of the perpetrator of a criminal offense or safeguarding persons deprived of their liberty” and the judges and public prosecutors, police and prison officers are protected with stricter punishment of imprisonment from six months to five years, which correspond to those prescribed in Serbia for endangering safety, i.e. threats against journalists. We believe that all public officials, including judges, prosecutors, police and prison officers, as well as journalists, should be protected with the same, stricter punishment of imprisonment from six months to five years. For now, our proposal in relation to journalists is harmonized with the punishment prescribed for “state officials” and corresponds to the punishment for the existing aggravated form of criminal offense Threat to security from Art. 168, Para. 2.⁹

⁷ Article 375

(1) Anyone who by force or threat to use force prevents a person acting in an official capacity performance of an official act undertaken within his/her regular powers, or forces such a person in the same manner into performance of an official act, shall be liable to imprisonment for a term not exceeding three years.

(2) If during commission of an offence referred to in Paragraph 1 of this Article, the offender insults or maltreats an official or causes him/her a light bodily injury or threats to use weapons, s/he shall be liable to imprisonment of three months to three years.

(3) Anyone who commits an offence referred to in Paragraphs 1 and 2 of this Article to a judge or a state prosecutor during performance of their judicial and prosecutorial duties respectively or to an official in performing the duty related to public or state security or the duty of preserving public peace and order, preventing and detecting a criminal offence and capture of the perpetrator of a criminal offence or safeguarding persons deprived of their liberty, shall be liable to imprisonment of six months to five years.

(4) An attempt of criminal offences referred to in Paragraphs 1 and 2 of this Article shall be subject to punishment.

(5) If a perpetrator of criminal offences referred to in Paragraphs 1 to 3 of this Article was provoked by unlawful or rude acting of an official, s/he can be acquitted from punishment.

⁸ Article 376

(1) Anyone who attacks or threatens to attack an official in the performance of his official duty, shall be punished by imprisonment for a term not exceeding three years.

(2) If during the commission of criminal offences referred to in Paragraph 1 of this Article, an official suffers a light bodily injury or is threatened by use of weapons, the perpetrator shall be punished by imprisonment for a term of three months to three years.

(3) If a criminal offence referred to in Paragraphs 1 and 2 of this Article is committed to a judge or a state prosecutor, in relation to their judicial or prosecutorial duty or to an official in performance of his duty of public or state security, the perpetrator shall be liable to imprisonment for a term of six months to five years.

(4) An attempt of criminal offences referred to in Paragraphs 1 and 2 of this Article shall be subject to punishment.

(5) A perpetrator of crimes referred to in Paragraphs 1 to 3 of this Article who was provoked by unlawful or rude acting of a person acting in an official capacity can be acquitted from punishment.

⁹ Article 168

(1) Anyone who endangers security of other person under threat of an attack to his life or body or to a person close to him, shall be sentenced to a fine or imprisonment not exceeding one year.

In relation to criminal offense Grave types of murder (Article 144), we proposed adding a new item that would prescribe a stricter punishment for murder of a journalist, like in the case of murder of a state official or military person.

In relation to criminal offense Serious bodily injury (Article 151), we proposed adding another aggravated form when the offense was committed against a journalist, a state official, a minor or a pregnant woman. (We noted that the CC does not prescribe an aggravated form of this offense when it is committed by a state official, so this is an opportunity to correct this oversight).

Comparative legal solutions

Serbia

The Criminal Code of the Republic of Serbia¹⁰ prescribes special protection for journalists and other persons performing “professions of public importance” within the criminal offense Endangerment of safety (Art. 138, Para. 3), Aggravated murder (Article 114, Item. 8) and Serious bodily harm (Art. 121, Para. 6). As stated in the introduction, “a profession of public interest is considered to be the profession or duties of an increased risk for the safety of the person who performs it, and refers to occupations that are of importance for public informing, people’s health, education, public transportation, legal and technical assistance before judicial and other government bodies” (Article 112, Item 32, Definitions, CC Serbia).

As an aggravated form of the criminal offense Endangerment of safety, punishable by imprisonment from six months to five years, the Criminal Code prescribes acts committed against “a person who performs duties of public interest in the field of informing related to the activities he/she performs”. The same punishment is prescribed for endangering safety of the President of the Republic, the Prime Minister, members of the Government, judges of the Constitutional Court, judges, public prosecutors and deputy public prosecutors, lawyers and police officers (Art. 138, Para. 3).

In Serbia, the “murder of a person who performs duties of public interest in relation to activities he/she performs” is prescribed as a form of aggravated murder (Article 114, item 8) and is punishable by imprisonment of at least ten years or thirty to forty years. Also, criminal offenses Serious bodily harm against “a minor or a pregnant woman or a person who performs the duties of public interest” (Art. 121, Para. 6), are strictly punished by imprisonment of one to eight years, or two to ten years, or five to fifteen years, depending on whether it is the basic form of the offense or more serious consequences.

Croatia

The Criminal Code of Croatia (Official Gazette 144/12) prescribes the criminal offense Threat, whose aggravated form involves the committing the act against an “official or responsible person in relation to his/her work or position or against a journalist in relation to his/her work...” and the

(2) Anyone who commits the act referred to in Paragraph 1 of this Article against more than one person, or the act that have caused anxiety of citizens or other serious consequences, shall be punished to three months to three years of imprisonment.

¹⁰ “Official Gazette of RS”, no. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012 and 104/2013.

punishment from six months to five years.¹¹ This criminal offense corresponds to our criminal offense Endangering safety, provided that the punishment for aggravated form is higher than that prescribed by the Criminal Code of Montenegro (for the text of this article see footnote 8).

Within the offense Violation of opinion and freedom of expression (Article 127), it is prescribed that anyone “who illegally denies or limits the freedom of expression of a journalist” will be punished by imprisonment of up to one year. Similarly, CC of Montenegro in Art. 179 prescribes criminal offense Infringement of freedom of speech and public appearance, and prescribes a fine or imprisonment up to one year for “anyone who denies or restricts freedom of speech or public appearance of other persons in an unlawful manner”.

Russia

The Criminal Code of Russian Federation (Art. 144) prescribes the criminal offense Obstruction of the Lawful Professional Activity of Journalists¹²:

1. Obstruction of the lawful professional activity of journalists by compelling them to give out information or to refuse to give it out – shall be punishable with a fine in the amount of up to 80 thousand roubles, or in the amount of the wage or salary, or any other income of the convicted person for a period of up to six months, or by compulsory works for a term of up to 360 hours, or by corrective labour for a term of up to one year.

2. The same act committed by a person through his official position shall be punishable with a fine in an amount of 100 thousand to 300 thousand roubles or in the amount of a wage/salary or any other income of the convicted person for a period of one year to two years, or by obligatory labour for a term of up to four hundred and eighty hours, or by corrective labour for a term of up to two years, or by compulsory labour for a term of up to two years, or by deprivation of liberty for a term of up to two years with deprivation of the right to hold specified offices or to engage in specified activities for a term of up to three years or without such.

Kazakhstan and Kyrgyzstan

The Criminal Code of Kazakhstan in Art 155¹³, and the Criminal Code of Kyrgyzstan¹⁴, as in the case of Russia, both prescribe the criminal offense Interference in the Legal Professional Activity of a Journalist:

¹¹ Threat, Art. 139

(1) Anyone who threatens another person with harm in order to intimidate or upset them shall be punished by imprisonment of up to one year.

(2) Anyone who seriously threatens another person or persons close to them to deprive them of life or cause serious bodily harm, kidnap, or deprive them of their freedom, or harm by arson, explosion, ionizing radiation, weapons, dangerous tools or other dangerous means, or destroy social position or material existence, shall be punished by imprisonment of up to three years.

(3) If the criminal offense from Paragraph 1 and 2 are committed by an official or responsible person in connection with its work or position or against a journalist in performing their professional duties, or against more than one person, or if the threatened person has been disturbed for a long time, shall be punished by imprisonment of six months to five years.

(4) The offense from Paragraph 1 of this article shall be prosecuted upon private charges, and criminal offense from Paragraph 2 of this article shall be prosecuted upon proposal, unless the offense from Paragraph 1 or 2 is committed out of hatred, against a child or a person with a severe disability or close persons.

¹² The Criminal Code of the Russian Federation 13.06.1996. N 63-Φ3: http://www.consultant.ru/popular/ukrf/10_27.html#p2075 or <http://legislationline.org/documents/section/criminal-codes/country/7>.

¹³ The Criminal Code of Kazakhstan, available at: <http://legislationline.org/download/action/download/id/1681/file/ca1cfb8a67f8a1c2ffe8de6554a3.htm/preview>.

1. The creation of impediments to the conduct of the legal professional activity of a journalist, by way of coercing him to distribute, or to refuse to distribute information, - shall be punished by a fine in an amount from fifty up to one hundred monthly assessment indices, or in an amount of wages or other income of a given convict for a period up to one month, or by engagement in public works for a period up to one hundred eighty hours, or by correctional labour for a period up to one year.

2. The same act committed by a person with the use of his official position, as well as with violence or a threat to apply it, - shall be punished by correctional labour for a period up to two years, or by imprisonment for a period up to three years with deprivation of the right to hold certain positions or to engage in certain types of activity for a period up to three years or without it.

Tajikistan

The Criminal Code of Tajikistan, in Art. 162 prescribes the criminal offense Impeding a Journalist's Legal Professional Activity, in more detail than CC of Russia, Kazakhstan and Kyrgyzstan:

1) Impeding a journalist's legal professional activity in any form, as well as forcing him to distribute an information or refuse it along with the threat of violence, destroying or damaging property, distributing slandering fabrications or making public other information, which a victim to keep as a secret, as well as by threat of infringement of rights and lawful interests of a journalist are punishable by a fine in the amount of 500 to 800 times the minimum monthly wage or up to 2 years of correctional labor, or up to 6 months of confinement.

2) The same actions committed along with:

- a) use of force;
- b) destroying and damaging property;
- c) using by an individual of his official position,

are punishable by up to 3 years of restriction of liberty, or up to 5 years of imprisonment with deprivation of the right to hold specific positions or be engaged in a specific activity for up to 3 years or without it.

Belarus

The Criminal Code of Belarus, in Art. 198 prescribes the criminal offense Preventing a journalist in performing professional duties¹⁵:

Preventing journalists in performing their professional duties in any way, as well as forcing journalists to disseminate specific information or preventing them to disseminate information, committed with violence or threats, destruction or damage to their property, violation of their rights and legitimate interests – is punishable by a fine, or suspension from office or deprivation of the right to perform certain activities, or restriction of liberty for up to three years or imprisonment for the same duration.

Georgia

The Criminal Code of Georgia, in Art. 154 prescribes the criminal offense Illegal Interference into Professional Activity of Journalists¹⁶:

¹⁴ The Criminal Code of Kyrgyzstan, available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=248664

¹⁵ The Criminal Code of Belarus, available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=230038

¹⁶ http://www.wipo.int/wipolex/en/text.jsp?file_id=209028

1. Illegally preventing a journalists from carrying out his/her professional activities, i.e. his/her coercion into spreading or not spreading information, - shall be punishable by fine or socially useful labour from one hundred and twenty to one hundred and eighty hours in length or by corrective labour for up to a two-year term.
2. The same action perpetrated under violence, threat of violence or by using one's official position, - shall be punishable by fine or jail sentence for up to a two-month term or by imprisonment for up to two years in length, by deprivation of the right to occupy a position or pursue a particular activity for the term up to three years or without it.

Mexico

One of the most dangerous countries for journalists in the world is Mexico. Journalists who point out the problems of organized crime, drug trafficking and corruption, are regularly attacked and killed. Since 2000, more than 72 journalists have been killed, and many of them were kidnapped or have disappeared. Under pressure from civil society organizations, the Special Prosecutor's Office for Crimes against Journalists was established in 2006, and a special protective mechanism in 2010. However, these efforts were not successful as expected, and in June 2012 the Law on the Protection of Human Rights Defenders and Journalists was adopted, introducing a new protection mechanism for journalists and human rights activists, which established the competence of federal authorities to prosecute crimes committed against journalists and prescribed special safeguards for those whose safety is compromised.¹⁷

¹⁷ Report: "Protecting Journalists and Human Rights Defenders in Mexico", author Viviana Giacaman, director of Latin America programs and Mariclaire Acosta, Mexico project director (information available at: <http://www.freedomhouse.org/article/protecting-journalists-and-human-rights-defenders-mexico>).