THE SUPREME COURT OF MONTENEGRO

Government of Montenegro
THE OFFICE OF THE REPRESENTATIVE OF MONTENEGRO
BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

ANALYSIS OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN RESPECT OF MONTENEGRO

November 2018

The AIRE Centre
Advice on Individual Rights in Europe

British Embassy
Podgorica

The preparation of this Analysis has been supported by the AIRE Centre (London, UK) under the auspices of the project - "Implementation of the European Convention in Montenegro".

Analysis prepared by:

Miraš Radović, judge of the Supreme Court of Montenegro, President of the Department for following case-law of the European Court of Human Rights and European Union Law developments

Dušanka Radović, judge of the Supreme Court of Montenegro, President of the Department for court practice and legal IT

Valentina Pavličić, Representative of Montenegro before the European Court of Human Rights

Bojana Bandović, Advisor in the Supreme Court of Montenegro

Boško Bašović, Advisor in the Supreme Court of Montenegro

Ksenija Jovićević, Advisor in the Supreme Court of Montenegro

Tijana Badnjar, Advisor in the Supreme Court of Montenegro

Vanja Radević, Advisor in the Office of Representative of Montenegro before the European Court of Human Rights

Ivo Šoć, Advisor in the Office of Representative of Montenegro before the European Court of Human Rights

The report has been translated by Ana Raičević, The Office of the Representative of Montenegro before the European Court of Human Rights.

November, 2018

Publishing this document has been supported by the British Embassy in Podgorica. The views expressed in this document do not necessarily represent official views of the British Embassy in Podgorica.

ANALYSIS OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN RESPECT OF MONTENEGRO

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Content

Introduction

Honored readers,

It is my pleasure to bring to your attention this Analysis on the execution of judgments by the European Court of Human Rights in respect of Montenegro. It has been prepared by the Supreme Court of Montenegro in cooperation with the Office of the Representative of Montenegro Before the European Court of Human Rights, with the support of the British Embassy in Podgorica and the AIRE Centre in London.

The last months in the year provide an opportunity to look back on the work of our institution and what we have achieved towards our purpose to respect and protect human rights and fundamental freedoms. Indeed, we can state with certainty that over the course of this year we have made significant ground in our efforts to implement the standards provided by the European Convention on the Protection of Human Rights and Fundamental Freedoms in our national case-law.

Appreciating the importance that the Convention enjoys in our legal order, the Supreme Court of Montenegro stands with the European Court of Human Rights at the front line of the battle to protect human rights and freedoms.

After the publication of the Report on the Implementation of the Convention in the case-law of the Supreme Court in February, we began with due responsibility to prepare our Analysis on the Execution of the Judgments of the European Court of Human Rights in respect of Montenegro. As the judgments of the European Court of Human Rights, and the views expressed therein, are a source of law in Montenegro, the Supreme Court has respected its constitutional obligation to ensure their direct implementation at the national level.

The aim of this Analysis is to collect the case-law of the Court with regard to the judgments delivered in respect of Montenegro, to point out through analysis of those judgments any deficiencies found, and to consider their influence on domestic case-law. While maintaining an understanding that the principles guaranteed by Convention are a special challenge for practitioners, this Analysis presents a manual that will contribute to the further education of judges and the further harmonization Montenegrin case-law.

We would like to emphasise that we recognise that the procedure for the execution of the judgments of the European Court is a challenge, and therefore special attention is dedicated to this area. We would like to draw your attention to the conclusions and recommendations of this Analysis, through which it will contribute to the improvement of the protection of human rights and fundamental freedoms and the prevention of violations of accepted international legal obligations.

On the behalf of the Supreme Court of Montenegro, I would like to reiterate our commitment to this unique system of protecting human rights and fundamental freedoms, which is grounded in the rule of law. The rule of law is, likewise, a part of our historical inheritance

and is to be strengthened by further judicial steps towards building common understanding and unconditional respect.

I would like to mention, with special pleasure, that this Analysis has been prepared by our experienced and recognized experts in the field of human rights and fundamental freedoms – judge Miraš Radović, judge Dušanka Radović and Representative Valentina Pavličić. It has been signed, as well, by members of the younger generation, and this offers great encouragement for the future of the protection of human rights in Montenegro.

We would like to express our gratitude for the cooperation of the Office of the Representative of Montenegro before the European Court of Human Rights, as well as the sincere support of the British Embassy, and the AIRE Centre in London. I am sure that our cooperation with international partners, which has yesterday been formalized in the form of Memorandum, shall be successfully developed in the future.

Finally, I would like to conclude that there are challenges before us in applying the standards of European law, but there exists also a strong wish for their full implementation, and I can think of no reason for us not to succeed.

With respect,

PRESIDENT

Vesna Medenica

Introductory speech of Vice-President of the Government and Minister of Justice Zoran Pažin at the presentation of the Analysis of judgments of the European Court in respect of Montenegro

Honored President,

Honored ladies and gentlemen,

Dear colleagues,

There is a wide consensus in Montenegrin society about the need to accept and respect human rights and freedoms. This is a fundamental part, I would say *conditio sine qua non,* of Montenegro's European perspective.

The values of the Council of Europe, the oldest pan-European international organization, are recorded in the preamble of the Statute of the Council of Europe. These values, such as true democracy, human rights and freedoms, and the rule of law, are, actually, an expression of the common European identity of the 47 member States of the Council of Europe. The legal framework of European identity is provided by the case-law of the European Court of Human Rights, often described as the conscience of Europe. The case-law of the European Court of Human Rights, in its unity of differences, today exemplifies the European legal order.

The right to individual application, established by Article 34 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, has been a revolutionary change in international relations and international law, with the citizen as an individual, becoming the subject of international law. Not only did the citizen become the subject of international law, but he became, before the European Court, an equal to even the richest of countries and those with the strongest of governments. This has been, indeed, a revolution in international relations and a revolution in international law.

In the nine and a half years since the first judgment in respect of Montenegro was delivered, there have been 36 further judgments. This is a real treasure trove of legal knowledge, which can guide the legal system of Montenegro as it develops. Therefore, I always say that none of the judgments that find a violation of human rights and freedoms is against Montenegro, rather, each of them is to the benefit of Montenegro as they help us to root out the deficiencies within our legal system, eliminate those deficiencies, and develop our own legal system to the benefit of our citizens.

That is the reason why this Analysis, in front of us today, is a precious document. I would like to use this opportunity to express my gratitude to, and to congratulate, the authors on their dedicated and committed work, in which they showed not only expertise in the case-law of the European Court, but national law as well. We must not forget that only good knowledge of the national law will enable us to meet international legal standards. The need to constantly develop our knowledge of the law is a crucial aspect of the education of lawyers and this

would not be possible without our faithful and reliable partnership with the AIRE Centre in London. I would like to use this opportunity to express my gratitude to our dear friend and Director for the West Balkans, Mrs Biljana Braithwaite, who has become the "trademark" of all our activities regarding the development of Montenegrin law.

This Analysis has illustrated the four main routes the development of the legal order in Montenegro must take. It showed that we must be always aware that certain concepts in the case-law of the European Court of Human Rights are different from those of national law. The former Serbian judge in the European Court, professor Dragoljub Popović, wrote on this subject in his excellent book "Autonomous concepts of the European law on human rights", which I recommend to everyone.

This Analysis has also illustrated that States can be brought before the European Court of Human Rights not only through the actions of public authorities, but also by their failure to act when they had a duty to do so. This issue is of especial relevance to the so-called absolute rights such as the right to life and the prohibition of torture and inhuman and degrading treatment. Here States have been brought before the Court due to the fact that they did not implement a timely and effective investigation. Such procedural rights are of special importance, and are a focus of this Analysis

The third point raised by this Analysis is the implementation of rights in practice. From this Analysis we can conclude that we have a traditionally good legal framework for implementation, and in some categories, such as criminal law, the legal system of Montenegro surpasses many of the requirements of the Convention. However, the problem is the effective implementation of the law that exists. This is an issue we should approach with especial diligence as the value of law rests in its effective implementation.

Finally, the fourth point raised by this Analysis is in relation to the conditional rights and freedoms contained in the Convention. These rights are sometimes the most demanding for practitioners as they often require the balancing of competing rights. It is perhaps the greatest challenge for our future work and our efforts to improve our legal order, as this balance requires excellent knowledge and professional competence to implement effectively. In many of the 36 judgments involving Montenegro, you can see that the European Court of Human Rights made this judgment of balance before it found that an infringement of Convention rights was in accordance with the case-law of the European Court of Human Rights.

The first issue that arises in any case is whether the facts of a case point to any particular Convention right. The Convention does not cover every human right and freedom, as it mainly covers civil and political rights, with exceptions being the right to education and to peaceful enjoyment of property. The second issue that arises is whether the infringement was provided for by law. Here we can see the autonomous meaning of the terms of the European Court, as 'provided for by law' does not simply mean that such encroachment is regulated by the national law, but that both the right and the law must meet certain conditions. Accordingly, it is not enough that the infringement be written in the law, one has to know why that law was written, what is the value of such a law, and whether the law is clear, precise and foreseeable. If these requirements are not met then mere compliance with the letter of the law will not determine whether European legal standards have been met. The following question is then

whether the infringement of human rights pursues a legitimate aim. With the list of legitimate aims contained in the Convention itself.

Following the path set out above leads to the answer of the crucial question, whether the limitation of the conditional human right by a national law which is clear, precise and foreseeable is necessary in a democratic society, i.e. whether the legitimate aim of the infringement is part of a wider legal culture, systematically recognized across all of Europe, including by the Constitution of Montenegro.

Therefore, looking into the past, I can conclude that the font of knowledge contained in this Analysis is solid ground on which we can, with certain faith, turn to the future.

Thank you for your attention.

Introductory speech of Biljana Braithwaite at the presentation of the Analysis of judgments of the European Court of Human Rights in respect of Montenegro

Honored President of the Supreme Court of Montenegro, vice-president of the Government, ministers, judges, prosecutors, honored heads of institutions, ladies and gentlemen,

It is my pleasure to welcome you on behalf of the AIRE Centre to this meeting, organized as part of the Supreme Court of Montenegro and AIRE Centre's project to harmonize the case-law of Montenegro and European legal standards.

The project is especially focused on the implementation of the Convention on Human Rights at national level. The agenda of our activities has been defined by the needs of the judiciary in Montenegro, which the Supreme Court of Montenegro has defined in consultation with representatives of other courts. In cooperation with the Supreme Court of Montenegro, we have developed a methodology that allows us to follow changes in domestic case-law. Not only will this methodology be useful to us, in order to keep track of what we have designed and applied, but hopefully, this project will also contribute to the strengthening of the rule of law and the implementation of the case-law of the European Court at domestic level, which represents an important challenge to Montenegro in the context of EU integration.

Today's conference has been organized to introduce an Analysis on the execution of judgments of the European Court of Human Rights involving Montenegro. This Analysis is the product of the collective effort of the Supreme Court of Montenegro and the Office of the Representative of Montenegro before the European Court of Human Rights, supported by our organization. This Analysis reviews all the judgments of the European Court of Human Rights concerning Montenegro delivered until the end of 2017 and considers both the individual and general measures taken by Montenegro's public authorities in response to those judgments. Finally, this Analysis identifies further steps that could be taken in order to comprehensively implement the European Convention on Human Rights at domestic level.

Improving the implementation of the Convention at the national level is in the common interest. It is in the interest of individual citizens, who would like prompt protection of their violated rights, especially when delays have irreversible consequences, for example in family issues when belated justice is an injustice. Secondly, it is in the interest of States to avoid projecting a negative image of their human rights protections as well as to avoid the expenses they are exposed to when they lose before the Court in Strasbourg. Finally, it is in the interest of the Court in Strasbourg itself, which would have to deal with fewer cases if the implementation of its judgments by States was more effective.

Today's Analysis shall, I am convinced, provide an essential contribution to the strengthening of public and professional consciousness regarding the implication of the Court's judgments with regard to Montenegro, and the role of State institutions in their execution. For us and our common project with the Supreme Court of Montenegro it will establish the areas on which we shall focus in the future. Our common goal in this matter is to, as the European Court of

Human Rights often states in its judgments, ensure that the rights guaranteed by the European Convention are practical and effective, not theoretical and illusory.

I would like to express my especial gratitude for the preparation of such a detailed and quality Analysis to, first of all, the judges of the Supreme Court of Montenegro, Miraš Radović and Dušanka Radović, the Representative of Montenegro before the European Court of Human Rights, Valentina Pavličić, as well as their great legal advisors. Likewise, I would like to express my gratitude to professor Nebojša Vučinić, a former judge of the European Court for their useful comments on the Analysis, as well as to Ana Vilfan Vospernik from the office of the Jurisconsult of the European Court who joins us today to give her view of the challenges faced by States in their execution of European Court judgments and the importance of this Analysis.

Finally, I would like to thank everyone who has helped us to be here today, our partners, the Supreme Court of Montenegro and President Vesna Medenica on their extremely constructive long-term cooperation, to the Government of Britain and the Embassy of Great Britain in Podgorica for their continuous support for our work, without which this cooperation would be impossible. And finally, I would like to thank all of you for joining us today with commitment for the success of the Conference.

Thank you.

Presentation by professor of law, Nebojša Vučinić, former judge of the European Court of Human Rights, at the presentation of the Analysis of the judgments of the European Court of Human Rights in respect of Montenegro

With the publishing of the study *"Analysis of judgments of the European Court of Human Rights in respect to Montenegro"*, not only the judicial and academic community, but also wider professional and general public, gained access to what they, legitimately, have been expecting for a long time: a concise and meritorious "analysis" of the judgments involving Montenegro before the Court in Strasbourg within the first ten years of the State's membership.

While the analyses and studies published so far have mainly referred to quantitative issues, such as the number and nature of applications before the Court, this study presents a synthesis of analysis dealing mostly with the content and nature of cases before the Court. Therefore, the study contains precise statistical data about applications considered by the Court, as well as legal analysis of judgments and decisions that covers facts, issues of implementation, and measures and procedures of execution, especially problems concerning the implementation of general measures and the execution of judgments.

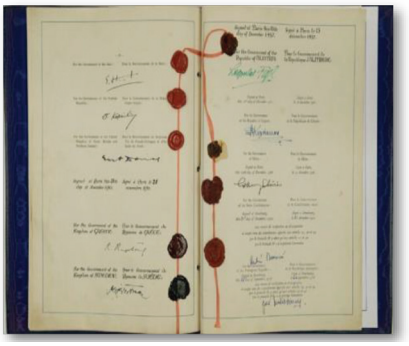
I would like to thank the authors, who have provided deep analysis on often complicated issues. With few words, the authors have said a lot of essential things about the judgments and decisions involving Montenegro during the ten-year period. Many essential things have also been said "between the lines", for which reason the study rewards deep reading and interpretation.

This study is not limited to presenting the individual violations of the Convention that make up the majority of judgments against Montenegro, which is normal for the youngest member of the Council of Europe and European Convention, but also directs us to systematic issues in relation to the judiciary and other authorities including the executive. Within that context, it can be concluded that this study has great educational and practical importance for the functioning of the judiciary in preventing violations of the Convention.

The study requires the careful analysis and interpretation of everyone within the judiciary, from practitioners in Basic courts to the judges of the Supreme and the Constitutional Court. The study, likewise, presents an excellent legal basis for more effective cooperation and dialogue between the Supreme and the Constitutional Courts. Finally, the study is a dynamic and functional reference point for our judges in their use of case-law as precedence, as only through precedence can full legal certainty and the rule of law be provided.

Introduction

The European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter: "the Convention"), signed on 4 November 1950 in Rome, is amongst the most important international agreements for the protection of human rights and fundamental freedoms.



The Convention is the cornerstone of the protection of human rights and fundamental freedoms for the 47 states of the Council of Europe. The agreement of the High Contracting Parties has contributed to the adoption of the common values declared in the Convention and their spread across the Continent. However, the Convention is only a "frame", and the legal interpretation of its principles is provided by the European Court of Human Rights (hereinafter: "the Court" or "European Court") in its judgments.

Montenegro has been bound to respect the rights and freedoms set forth in the Convention, as well as those in the Protocols to the Convention, since 3 March 2004, this being the date when those instruments entered into force with respect to the State of the Union of Serbia and Montenegro.[1]

Montenegro is fully committed to the implementation of the Convention standards at the national level and to this end it closely follows the developments of the case-law of the European Court, which constantly evolves, reminding us that the Convention is a "living instrument", and that human rights and fundamental freedoms are not "theoretical and illusory, but practical and effective".[2]

State signatories to the Convention are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention. Starting from the aforementioned,[3] it is understood that the human rights and fundamental freedoms guaranteed by the Convention shall be primarily protected at national level, by national authorities, using domestic legal procedures and mechanisms. When deciding on matters related to respect for human rights, national authorities are, in principle, better placed to make decisions than international judges due to their direct and continued contact with, and understanding of, the context of their countries.[4]

Besides, Article 35 of the Convention provides that the Court may only deal with a matter after all domestic remedies have been exhausted, in accordance with generally recognized rules of international law. Therefore, the Convention first gives the State the opportunity to prevent every violation of its international legal obligations at the national level, thus recognising

1 *Bijelić v. Montenegro*, application no. 11890/05, of 28 April 2009, page. 68, ECHR
2 *Airey v. Ireland*, application no. 6289/73, of 9 October 1979, Seria A no. 32, page 24, ECHR
3 Obligation to respect Human Rights from Article 1 of the Convention
4 *Handyside v. the United Kingdom* (5493/72), of 7 December 1976, § 48, ECHR

the sovereignty of the State, but it also provides a subsidiary mechanism for protecting human rights and fundamental freedoms through the European Court as an international guarantee of human rights protection.

The principle of subsidiarity led to the development of the doctrine of "margin of appreciation", according to which Contracting States have a certain margin of appreciation in the exercise of their responsibility to protect the human rights and freedoms guaranteed by the Convention. The scope of this margin of appreciation depends on the consensus between State signatories to the Convention, the nature of the Convention right, and the aim of the measure in question. However, supervision of this "margin of appreciation" at State level rests with the Court.

Bearing in mind everything that has been stated above, the implementation of the Convention is clearly a challenge for national law-making authorities and for the State bodies in charge of the implementation of national laws, especially the domestic courts. This is due especially to the fact that the European Court made its first judgment in respect of Montenegro on 28 April 2009, *Bijelić v. Montenegro*, and so we directly implement the Convention in Montenegro for a bit longer that eight years.

Judgments of the European Court in respect of Montenegro are a source of law and views stated in these judgments have direct implementation at the national level. However, State bodies should also take into account findings of the European Court in judgments involving other states as the Court interprets the Convention authoritatively, taking into consideration common legal ground between the member states of the Council of Europe. If they are taken into consideration, these findings can contribute to the prevention of similar violations in Montenegro.

In the 2018 Report on the Progress of Montenegro, it is stated that Montenegro continued to secure a good level of cooperation with the European Court, with no judgment against Montenegro under enhanced supervision. However, it is still necessary to raise further awareness in state institutions and courts of the Convention rights, and strengthen their readiness to implement the Convention standards in every-day practice and improve the reasoning of their decisions, including the decisions of the Constitutional Court. In this area, there are a couple of activities in progress, including the building of the capacities of judiciaries and the publishing of selected cases of the European Court on the website of the Supreme Court of Montenegro.

The Supreme Court of Montenegro, in cooperation with the AIRE Centre in London, and with the support of the British Embassy, has implemented from 2015 the project, "The Implementation of the European Convention on Human Rights in Courts in Montenegro". The aim of this project is to train judges in Montenegro in the field of human rights, the adoption of European standards, and their full implementation in the national system. The ultimate aim of the project is to secure to all people under the jurisdiction of Montenegro the enjoyment of their Convention rights and freedoms.

Round table meetings organised under this project are interactive meetings at which participants can identify the challenges faced by judges in their effort to fully and continuously implement the Convention in their national case-law. Likewise, round tables are a forum for the exchange of views between judges and experts in particular areas of the Convention.

Under the auspices of this project, the Report on the Implementation of the Convention in the case-law of the Supreme Court of Montenegro has been prepared and was presented to all courts. The Report analysed the compliance of national practice with the case-law of the European Court and it concluded that there has been clear progress in the courts in Montenegro regarding the implementation of the Convention, especially with respect to detention orders, deciding on requests for review, freedom of expression, and guarantees of access to court. The core value of the Report is in the recommendations it has given, which will help judges to better implement the relevant standards from the case-law of the European Court in their everyday work.

After the above Report, efforts were focused on the preparation of the present Analysis, the aim of which was to consolidate the case-law of the European Court regarding the judgments delivered in respect of Montenegro, and, through the analysis of those judgments, point out how, where violations have been found, they have impacted domestic case-law. One must bear in mind that understanding the principles guaranteed by the Convention is a special challenge for practitioners, and that the Analysis is a manual which will contribute to the further training of judges and the harmonisation of court practice in Montenegro.[5] The procedure for the execution of judgments of the European Court represents a particular challenge, and therefore it is thoroughly covered in this Analysis.

This Analysis reviews the judgments of the European Court delivered in respect of Montenegro from the date at which the Convention entered into force up until 1 January 2018, and information about their implementation at national level up to 1 November 2018.

This Analysis is a result of cooperation between the Supreme Court of Montenegro and the Office of the Representative of Montenegro Before the European Court of Human Rights, with the support of the AIRE Centre in London, within the ambit of the project "Implementation of the European Convention in Montenegro" which is supported by the British Embassy in Podgorica. With this document the Supreme Court of Montenegro confirms, once again, its deep belief in human rights and fundamental freedoms, which are the foundations of the rule of law, and decisively aspires towards taking further judicial steps towards common understanding and unconditional respect.

On behalf of the Supreme Court of Montenegro, judge Miraš Radović and judge Dušanka Radović participated in the preparation of this analysis. They were assisted by advisors Bojana Bandović, Boško Bašović, Ksenija Jovićević and Tijana Badnjar.

On behalf of the Office of the Representative, work on the analysis was conducted by Representative Valentina Pavličić and advisors Vanja Radević and Ivo Šoć.

These participants in the preparation of the Analysis express their special gratitude to the Ambassador of Great Britain, H.E., Mrs Alison Kemp and the Programme Manager of the AIRE Centre in London, Mrs Biljana Braithwaite for their support.

Likewise, participants express their gratitude to professor Nebojša Vučinić, the former judge from Montenegro on the European Court of Human Rights, on his positive marks for the Analysis.

5 Action Plan for implementation of the Strategy of the reform of 2017-2018, measure 4.1.1.

Structure of the Analysis

The Introduction has stated the main aims of the Analysis, which constituted the starting points for the preparation of the document. As the European Court in some cases has found violations of more than one Convention right in cases involving Montenegro, as well as the fact that judgments are considerably varied in respect of the violations found, this Analysis has been prepared according to the articles of the Convention, and not according to the chronological order of the delivery of judgments. The reason for this is the need to, through each individual article, introduce a systematic structure that will present the intention of the participants in preparing the Analysis.

The Analysis is divided into three parts, the first part contains an explanation of the methodology of the work, introducing the manner by which it processes individual judgments, the procedure for the execution of the judgments of the European Court and an explanation of how the judgments of that Court affect national legal systems. Statistical data has been collated for the purpose of supplementing the findings of this Analysis.

The second part contains the main bulk of the document, and, as already stated, presents analysis of the judgments of the European Court against Montenegro, organised according to the articles of the Convention. After a short introduction on each individual Convention right, case facts are presented in a summarized form, followed by the relevant principles and the Court's assessment for each individual judgment. There is also an overview of the procedure for the execution of those judgments, as this is the final phase of closing cases before the competent European institutions. Finally, the part titled "Impact on the case-law", sets out the changes in legislation, and the legal opinions of the Supreme Court, after the judgments were delivered by the European Court. This last part will also give examples of the direct implementation of the case-law of the Court by domestic courts, strong evidence of the importance of European jurisprudence for the Montenegrin judiciary.

Bearing in mind that in some judgments of the European Court there have been violations of more than one Article of the Convention (i.e. *Bulatović v. Montenegro*, *Mugoša v. Montenegro* etc.), and that certain cases have been defined by the Court itself as "repetitive" (i.e. multiple violations of the right to reasonable length of proceedings in cases from the *Stakić* group), during the preparation of the Analysis particular care was taken to avoid repeating the same information, as well as those judgments which are essentially identical, with these judgments analysed as a whole, rather than separately.

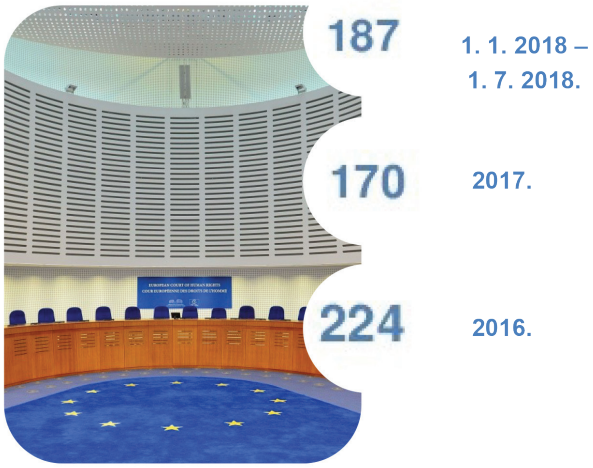
The last part of the Analysis contains general conclusions and recommendations.

I Statistic Overview

Number of solved applications against Montenegro

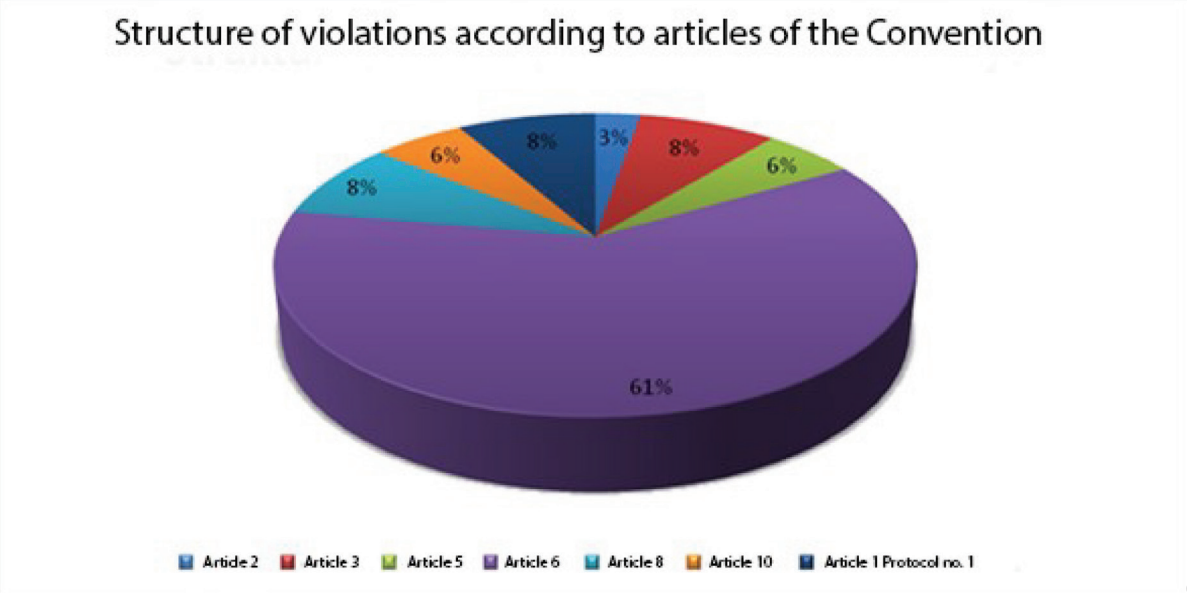
(1 January 2016 – 1 July 2018)

On 1 January 2018 there were 56,016 applications pending before the Court. Montenegro, with 77 lodged applications is in 32nd place out of 47 states. In 2017, Montenegro was in 33rd place.



- Out of 187 total applications solved within the period 1 January 2018 to 1 July 2018, 169 applications were found to be inadmissible or were struck out from the list by a single judge, 7 applications were found to be inadmissible or were struck out from the list of cases by the Committee, and 1 application was found to be inadmissible or struck out from the list of cases by the Chamber. 10 applications were decided by judgment.
- Out 170 total applications in 2017, 140 applications were found to be inadmissible or struck out from the list of cases by a single judge, 12 applications were found to be inadmissible or struck out from list of cases by the Committee, and 2 applications were found to be inadmissible or struck out from the list of cases by the Chamber. 16 applications were decided by judgment.
- Out of 224 total applications solved in 2016, 185 applications were found to be inadmissible or struck out of the list of cases by a single judge, 32 applications were found to be inadmissible or struck out of the list of cases by the Committee, and 3 applications were found to be inadmissible or struck out of the list of cases by the Chamber. 4 applications were decided by judgment.

Number of cases in which a violation of a right is found



6

The subject of this Analysis is the 36[7] judgments in which the European Court found a violation in respect of Montenegro.

In these cases violations have been found as follows: in one case a violation of Article 2 of the Convention; in three cases a violation of Article 3 of the Convention; in two cases a violation of Article 5 of the Convention; in 22 cases a violation of Article 6 of the Convention; in three cases a violation of Article 8 of the Convention; in two cases a violation of Article 10 of the Convention; in three cases a violation of Article 1 Protocol 1 of the Convention; in four cases a violation of Article 13 of the Convention (in conjunction with Article 6 of the Convention), and in one case a violation of Article 14 of the Convention (in conjunction with Article 8 of the Convention).

The table demonstrates that with regard to the case law of the European Court in respect of Montenegro, the greatest number of judgments involve violations of Article 6 of the Convention, the right to a fair trial.

Generally the case-law of the European Court is extremely extensive with all State signatories under Article 6 of the Convention. In 2017 the European Court found violations of Article 6 of the Convention in 28.03% of pending cases.[8]

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6 In total structure of cases, a violation of Article 13 was found in 11.1% cases and Article 14 in 2.7% cases.

7 Total number of judgments delivered in the analyzed period is 37. However, as in the case *Koprivica v. Montenegro* the European Court delivered two judgments no. 41158/09 of 22 November 2011 (merits) and no. 41158/09 of 23 June 2015 (just satisfaction), from practical reasons, this case is analyzed as unique, therefore stated figure is 36, not 37 judgments.

8 Annual Report, European Court of Human Rights, 2017

II Facts, relevant principles and assessment of the Court

Unlike the bodies which concern themselves with the implementation of certain universal agreements on human rights and, by their rules, produce non-binding statements and opinions (i.e. the United Nations Human Rights Committee), the European Court delivers judgments which are legally binding for parties. Compliance with the Court's judgments is obligatory both for all state bodies and for all other legal entities possessing rights and obligations at the national level.

Judgments of the European Court of Human Rights contain: the dates at which the judgment has been lodged and delivered; data about the parties; the names of the agents, attorneys or advisors of the parties; descriptions of procedure; statements of fact; relevant domestic law and legal practice; decisions on the admissibility of the application; a summary of the parties' submissions; legal arguments; wording, the eventual decision in respect of costs; the number of judges making the majority; and, if necessary, a statement that the text is authentic.

For the procedure for deciding on the merits of an allegation that there has been a violation of a human right, the Court uses relevant general principles which are established in its case-law. After stating general principles, which are relevant for an assessment of the particular issues, the European Court will apply a logical method and derive relevant principles from the general principles and come to a conclusion in the case, or, it makes the Court's assessment. If the Court finds that the State has violated the Convention, the Representative must take care of the execution of the judgment.

III Execution of judgments

If the Court judgment finds that there has been a violation of one or more provisions of the Convention, further steps must be taken in order to provide for the regular implementation of the judgment at the national level. However, in accordance with the Convention, the Court has no competence to execute its own judgments, even though last years in its judgments it took certain steps towards pointing out individual and general measures which might assist with execution at the national level. According to Article 46(2) of the Convention, the execution and enforcement of the judgments of the Court falls within the competence of the Committee of Ministers of the Council of Europe (hereinafter: "the Committee of Ministers"), which has a defined rulebook and methods in performing its duties.[9]

The execution of the judgments of the Court necessitates individual and general measures to be taken at the national level. As part of the individual measures, the payment of just satisfaction, awarded by the Court, is usually required. Sates shall inform the Committee of Ministers of any steps they take towards the execution of judgments in the form of an Action Plan or Action Report.

9 https://www.coe.int/en/web/execution/rules-and-working-methods

In order to better understand the impact of the jurisprudence of the European Court on national law, it is particularly important to understand what the relevant terms mean, for instance 'just satisfaction', or 'general and individual measures'. Likewise, it is important to explain the Action Plan/Report, as it is the document through which the Committee of Ministers is informed of all measures taken towards the execution of a Court judgment.

After Montenegro's declaration of independence, the Decree on the Representative of Montenegro Before the European Court of Human Rights[10] (hereinafter: "the Decree") was announced, under which a special Office was formed, headed by the Representative. The Representative has competency to represent the State of Montenegro in cases before the European Court. Besides representing the State, the provisions of Article 12 § 2 of the Decree stipulate that *"if by the judgment of the European Court it is found that Montenegro has violated provisions of the Convention, the Representative shall take care to execute the judgment and inform the Committee of Ministers of Council of Europe on the matter"*. Even though the Decree does not strictly determine which actions the Representative must take while executing the judgments of the Court, the provisions give the Representative a wide range of competences in that respect, and they are obliged to submit a report about their work to the Government every six months.

Since the first judgment against Montenegro, the procedure of execution has required taking different measures from case to case, from simple cases where the payment of just satisfaction was sufficient to redress the violation found, to cases where it was necessary to coordinate the cooperation of the highest State institutions. The Committee of Ministers has accepted 35 of 36 Action Reports delivered by the Representative of Montenegro, after which execution is complete, and this points to the high degree of dedication of all relevant State agencies to the protection of human rights, the rule of law, and the improvement of democratic standards

i. Action Plans/Reports

During the procedure of execution, the respondent State may, in the form of the Action Plan or Report, point out the progress achieved in respect of the execution of the judgment. It is of extreme importance for the respondent State to, as soon as possible after the judgment becomes final, present its plans in respect of taking necessary measures for the execution of the judgment. The respondent state, when possible, must submit to the Committee of Ministers, through the Department for the Execution of Judgments of the European Court of Human Rights, within 6 months from the day when judgment becomes final, data on any actions taken and/or actions expected or intended to be taken towards the aim of executing the judgment. This information should suffice for the Committee of Ministers to be able to assess if the judgment has been executed in a satisfying manner and if suitable steps have been taken

10 Published in „Official Gazette of Montenegro", no. 56/06 of 7 September 2006, 79/06 of 26 December 2006, „Official Gazette of Montenegro", no. 04/08 of 17 January 2008, 81/08 of 26 December 2008, 28/14 of 4 July 2014, 36/14 of 22 August 2014

or are to be taken to execute the judgment. If within 6 months the respondent State has still failed to define the necessary measures for execution then it becomes necessary to prepare and present an Action Plan which contains the steps intended to be taken in order to define those measures.

The Action Plan is the plan which lays out the measures which the respondent state plans to take, and includes the predicted time frame for taking those measures. Alternatively, when it is not possible to define which measures are necessary to be taken, the plan shall contain the steps needed to define which measures are necessary, including the time frame within which they shall be taken. The Action Plan is not a binding legal instrument, it expresses the intention (which is not obligatory) of the domestic authorities with regard to the execution of the judgments of the Court.

The Action Report contains information and data from the respondent State regarding measures taken to implement a judgment of the European Court of Human Rights and/or an explanation as to why it is not necessary to take further actions. The Action Plan and Action Report are not mutually exclusive, and they can be submitted together when necessary. Furthermore, the respondent State may submit an Action Report even from the point of initial consideration of a case, describing the measures which it took and adopted, while, at the same time, submitting an Action Plan to present additional measures which it intends to take.

The time limits for submitting an Action Plan/Report are instructive, and in certain and justified cases a respondent state can request an extension of the time limits. All submitted Action Plans and Reports are published,[11] except in when there is a justified request for discretion by the State.[12]

Regarding the execution of the judgments which the Court delivered against Montenegro, this Analysis shall present all the measures which the State of Montenegro has taken to execute its international legal obligations. It shall also provide an insight into the manner by which certain judgments influenced change in national legislation and the case-law of national courts, and how individual measures have been taken depending on the circumstances of violations and what amounts were paid to applicants in response to the finding of a violation.

ii. Just Satisfaction

Article 41 of the Convention states *"if the Court finds that there has been a violation of the Convention or Protocols thereto, and if the international law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."* Just satisfaction means the obligation of payment of a certain amount of money to the applicant on the basis of a violation found by the Court. Just satisfaction can be paid as compensation for pecuniary and/or non-pecuniary damage

11 See the website of the Department for the Execution of Judgments of the European Court: https://www.coe.int/en/web/execution

12 See paragraph 5 of Decision of Committee of Ministers from 1100 meeting as stated in CM/Inf/DH(2010)45

The payment of just satisfaction is rarely a problem, as respondent Governments are required to, without delay, execute payment of any amount awarded. The respondent state must then confirm to the Committee of Ministers that the payment has been made through standard a form available on the internet. The Committee of Ministers shall only be involved in the process of payment of just satisfaction if the applicant contests the payment. If the applicant does not contest the payment within 2 months from the date at which it was made, the Committee of Ministers shall, usually, automatically consider just satisfaction to be paid.

The payment of just satisfaction has no decisive impact on the Committee of Ministers and it will, regardless of the result of the payment, continue with the material examination of the case, as the payment itself does not mean that the necessary individual and general measures have been fulfilled. Even though this part is considered to be the most simple, there still can appear disputable issues in certain cases, especially when the Court has awarded significant amounts for just satisfaction.[13]

iii. Individual Measures

Rule 6(2)(b) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and the conditions for friendly settlements states that the Committee shall recognise the discretion of the high Contracting Party in choosing the means with which to comply with the judgment. On the other hand, the Committee of Ministers is the body responsible for examining if all the necessary individual measures have been taken to ensure that the violation has ceased and the injured party is put, as far as possible, in the same situation as they enjoyed prior to the violation - *restitutio in integrum*. Rule 6(2)(b) itself gives examples of which individual measures may be requested, including the striking out of an unjustified criminal conviction from a criminal record, the granting of a residence permit (if the Court considers that the deportation of the victim would lead to a violation of the Convention), the reopening of impugned domestic proceedings or the release of those who are found to have been unlawfully deprived of liberty. In extraordinary circumstances the Court itself in its judgment may point out certain individual measures to be taken, and in these cases the Committee of Ministers will closely follow the statements made in the judgment of the Court.

The Individual measures which have to be taken into account differ from case to case and depend on the nature of the violation found and the circumstances of each individual case. There are groups of cases with common characteristics such as where the Court finds that domestic proceedings have not been fair and so the individual measure must be to reopen the case. In situations where domestic legislation does not allow for such a possibility, the Committee of Ministers may request that the state adopt the necessary laws. Likewise, when such legal regulations do exist, but are not applicable to the specific case, the Committee of Ministers

13 See procedure of execution of judgment *Stran Greek Refineries and Stratis Andreadis v. Greece* ,A 301-B(1994); 19 EHRR 293 or *Loizidou v. Turkey* (Article 50),no. 15318/89, judgment (just satisfaction) of 28 July 1998, ECHR 1998-IV.

will determine whether *ad hoc* measures may be taken, which would have the same effect of annulling the consequences of the violation.[14]

One more group of cases in which difficulties have appeared (and continue to appear), is in relation to judgments concerning Article 2 of the Convention, specifically where the Court finds that the State did not conduct an effective investigation and so violated its positive obligations under that Article. The Committee of Ministers has taken the view that State authorities have an absolute obligation to conduct an effective investigation and that this is part of their obligation to take suitable individual measures to execute the judgments of the Court. To this end, States have an obligation to take effective investigative actions if the Court found deficiencies in the original investigation.

Finally, it is worth noting the so-called repetitive cases, which can also present a problem for the supervision of the Committee of Ministers over individual measures. One group of repetitive cases includes those initiated against a great number of Eastern-European countries referring to the failure or the delay in implementing the final decisions of domestic courts by State authorities or State agencies, especially when these decision involve significant funds.[15] After the judgment of the Court in these cases, the Committee of Ministers has an obligation to examine whether any further steps have been taken at the domestic level, for example: if orders have been issued for execution, or if the payment amount can be secured and transferred to the party to whom it has been awarded.

iv. General Measures

The most important part of the procedure of execution is the taking of so-called general measures, which prevent new violations or put an end to continuing violations (Rule 6(2) (b) (ii)). The Committee of Ministers will inspect how general measures are implemented from the very beginning, their analysis will not depend on the adoption of individual measures. Sometimes the situation requires general measures to be adopted in order for individual measures to be taken. For example when a new remedy is created by a general measure that the applicant can then benefit from. The need for the adoption of general measures flows from the requirement of international law that contracting parties are obliged to ensure that their laws

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14 See, for example, cases *Hulki Gunes v. Turkey*, 2003-VII; 43 EHRR 263, which was the issue of temporary resolutions of the Committee ResDH(2005)113, ResDH(2007)26 and ResDH(2007)150; *Gocmen v. Turkey*, (2006); and *Soylemez v. Turkey*, (2006). Actually, the court found violations in respect of fairness of criminal proceedings according to which applicants were convicted to long-term prison sentences. Relevant legislation in Turkey upon reopening of the proceedings was not applicable to judgments of the Court which became final before 4 February 2003 or judgments delivered in applications lodged to the Court after that date. Applicants who lodged applications to the Court in 1995, 1999 and 2000 were not included in this law. Adoption of the last abovementioned temporary resolution in the case *HulkiGunes* (ResDH(2007)150) (and regarding cases *Gocmen and Soylemez*), the Committee found that continuance of current situation would lead to obvious violation of obligations of Turkey and strongly urged on Turkish authorities to „immediately remove legal emptiness that prevent reopening of cases". In June 2013 offorts of the Committee finally gave results with adoption of the new law that alow reopening for all cases before the Committee of Ministers.

15 See, for example., *Timofeyev v. Russia*, (2003); 40 EHRR 901 (and 97 similar cases) and *Zhovner v. Ukraine*, (2004) (and 231 similar cases).

and practice are in compliance with their obligations. The committee rules mentioned above give examples of general measures that can be taken: amending laws and regulations, developing the domestic court or administration's case-law, or publishing the judgments of the Court in the language of the respondent State and disseminating these judgments to relevant State bodies. Over the last few years, one of the general measures taken by States has been training employees of State bodies. The evaluation of the general measures introduced by a State is usually the main reason why some cases have been held up at the request of the Committee of Ministers, despite just satisfaction having been awarded, and individual measures taken.

From the practical point of view, even though there is almost always compliance with the payment of just satisfaction, there are often serious issues concerning delay in the implementation of general measures due to a lack of will, often attributed to political reasons, in a certain number of States to act in accordance with the judgment. Likewise, changes in national legislation may require significant time and may be affected by variations in national politics. Another issue appears when a violation refers to the established case-law of domestic courts. In such cases, some States will circulate a letter from the competent bodies to inform courts and relevant officials about the judgment of the European Court. This would not be sufficient to satisfy the Committee of Ministers and so it would wait until receiving clear evidence that domestic courts have adopted a more "Convention-like" approach to the complaint.[16] After the reforms adopted since the Conferences in Interlaken, Izmir and Brighton, States and the Committee of Ministers have committed to being more decisive in dealing with these failures and attempting to make the system more efficient.[17]

IV Impact on national legal order

The execution of judgments has had a clearly visible impact on the legal system as a whole. For this reason, part of the Analysis has been dedicated to that impact. The impact is firstly visible through legislative reform and the direct implementation of the standards of the European Court of Human Rights in domestic court decisions.

When implementing those standards, there is a particular requirement to implement the standards derived from the judgments against Montenegro, as they are a source of law for the national legal system. This means that national courts are obliged to apply standards from those judgments in situations when those standards are applicable to the cases before them.

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16 For example, the issue raised in the context of execution of the judgment of the Court by the Committee in respect to freedom of expression in Turkey, especially in judgments of state security courts for insult of the state or nation, which, until recent, was always confirmed by the Cassation Court. The Court noted that after delivering the judgment of the European Court a couple of provisions from which followed violations were changed with adoption of the Criminal Code in June 2005. Information delivered by the Government pointed out that even though the practice of prosecution was improved, it could not be said that courts in Turkey and higher instances compliance their practice with judgments of the Court.

17 See CM/Rec (2008) 2, reccommendation which suggests more practical national measures for faster execution of judgments.

The parts of this Analysis called "Impact on the National Legal Order", "Impact on legislation and case-law", and "Impact on the case-law" include the presentation of judgments by the Montenegrin courts which have been issued to implement the standards derived from the judgments of the Court against Montenegro. These judgments aim to show that domestic courts respect the decisions of the Court and have changed their own case-law to conform with its standards. The publication of these domestic court decisions also serves to demonstrate how the standards of the Court have been applied in domestic judgments, in order to serve as an example for future cases. Furthermore, the following part of the Analysis presents legal opinions regarding judgments delivered by the Court in respect of Montenegro.

In some of the domestic decisions there are no explicit references to the judgments of the Court involving Montenegro, instead these decisions will reference similar views articulated by judgments in respect of other States.

The impact of the judgments made by the Court can be seen in the reform of legislation, through which legal practice has been improved. One must bear in mind that continental legal systems, to which Montenegro belongs, accept change more easily through changes in the letter of the law than through the effect of precedence. The case-law of the European Court of Human Rights has also had an impact on the interpretation of existing legal provisions, serving as a guideline for the improvement in the implementation of the law, and thereby the protection of human rights and freedoms.

II

Analysis of judgments of the European Court in respect of Montenegro, procedure of execution and impact on the national legal order

I Article 2 – Right to life

Article 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in 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

It has been stated that Article 2 of the Convention protects the fundamental value of the Convention – human life. The Article contains two substantive obligations: the general obligation to protect life through the law and the obligation to prohibit any intentional deprivation of life, which are limited by specifically stated exceptions. This Article also contains a procedural obligation to carrying out an effective investigation into alleged breaches of its substantive limb.[18]

The European Court of Human Rights found a violation of Article 2 of the Convention in one case involving Montenegro

18 Guide on Article 2 of the Convention – Right to life, Council of Europe.

1. Judgment in respect of Article 2

Ranđelović and Others v. Montengro

no. 66641/10

judgment of 19 September 2017

i. Analysis of the judgment:

This judgment is the only one against Montenegro in which a violation of the procedural limb of Article 2 of the Convention has been found. The application lodged by 13 applicants refers to lack of an effective investigation into the disappearance of family members of the applicants after the sinking of a boat in August 1999, specifically due to the excessive length of criminal proceedings.

(a) Facts

On the night of 15 August 1999, around seventy Roma boarded the boat "Miss Patt" on the Montenegrin coast with the intention of reaching Italy. The boat sank owing to the large number of passengers, and in that occasion tenths of persons Roma nationality perished. The applicants are the next-of-kin of Roma who died or disappeared. They pointed out violation of right to life, guaranteed in article 2 of the Convention, violation of Article 3 of the Convention, by which the torture or inhuman or degrading treatment or punishment is prohibited, violation of Article 6 of the Convention, i.e. right to a fair trial within a reasonable time, Article 3 of the Convention, which secure right to effective remedy and Article 14 of the Convention, which prohibits discrimination on any ground in exercising of Convention rights.

The eleventh Applicant submitted that the State had failed to conduct an effective investigation as more than fifteen years since the impugned event the relevant authorities had only identified thirteen bodies and still had not found those responsible for deaths of her brother and sister-in-law. She also maintained that the criminal proceedings had been neither speedy nor effective, which had been the result of a lack of willingness on the part of the court to act speedily and a strategy by the defence to prolong the proceedings.

(b) Relevant principles

The European Court reiterated that the obligation in Article 2 to protect the right imposes a procedural obligation upon the State to investigate deaths, not only when occur at the hands of State agents, but also at the hands of unknown individuals.[19] The essential purpose of an investigation is to "secure the effective implementation of the domestic laws which protect right to life" and ensure the accountability of those responsible. In order to be effective, an investigation must be capable of leading to the identification and punishment of those respon-

19 *Branko Tomašić and Others v. Croatia*, no. 46598/06, § 62, 15 January 2009; *Toğcu v. Turkey*, no. 27601/95, § 109 in fine, 31 May 2005; and *Menson v. The United Kingdom* (dec.), no. 47916/99, 6 May 2003).

sible. Although it is not an obligation of result but of means, any deficiency in the investigation which undermines its ability to establish the circumstances of the case or the person responsible will risk falling foul of the required standard of effectiveness.[20]

Where an official investigation leads to the institution of proceedings in the national courts, the proceedings in a whole, including the trial case, must satisfy requirements of the positive obligation to protect lives through the law. It should in no way be interfered from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence. On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished[21].

(c) the Court's assessment

The Court in its judgment stated that, given that the criminal trial is still under way[22], the issue to be assessed is not whether the judicial authorities were determined to sanction those responsible, if appropriate, but whether they had proceeded with exemplary diligence and promptness.

While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating an alleged infringement of the right to life 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.

The Court observed that more than ten years and seven months after the impugned event, the criminal proceedings in question were still pending at second instance, the defendants having been acquitted by the first-instance court in July 2014 for lack of evidence. Likewise, the Court reiterated that the passage of time inevitably erodes the amount and quality of evidences available and appearance of a lack of diligence casts doubt on the good faith of the investigative efforts.

The Court stressed that in Article 2 cases concerning proceedings instituted to elucidate the circumstances of an individual's death, lengthy proceedings are a strong indication that the proceedings were defective to the point of constituting a violation of the respondent State's procedural obligations under the Convention unless the State has provided highly convincing and plausible reasons to justify such a course of the proceedings.

In view of the above, the Court considers that the delays cannot be regarded as compatible with the State's obligation under Article 2, and that the investigation and the subsequent criminal proceedings have not complied with the requirements of promptness and effectiveness. There has accordingly been a violation of Article 2 of the Convention.

The Court stroke out the Application from the case list in so far as it concerns the complaints of the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and twelfth

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20 *El-Masriv. Former Yugoslav Republic of Macedonia [GC],* no. 39630/09, § 183, ECHR 2012).
21 *Öneryıldız v. Turkey[GC],*no. 48939/99, §§ 95-96, ECHR 2004-XII.
22 At the time of delivering the judgment, the case "Miss Pat still was in progress before national courts.

applicant, as after the initial communication, found that these applicants have no intention to pursue the application, within the meaning of Article 37 § 1(a) of the Convention. Likewise, the Court did not found that there are special circumstances within the meaning of respect of human rights, as defined by the Convention and Protocols, which require the examination of their complaints to be continued.

ii. The Procedure for the execution of the judgment

(a) Action Plan/Report

The Government submitted to the Committee of Ministers an Action Report on 19 June 2018.[23]

(b) Individual measures

Prior to the delivery of the judgment of the European Court, the criminal proceedings at issue were finalized by a judgment of the Appellate Court of Montenegro in May 2017 which found four of the accused guilty of criminal offences relating to the tragic event. Just satisfaction has since been paid to the Applicant for non-pecuniary damage, as well as costs and expenses, the amount in total being EUR 12,500. With regard to pecuniary damage, the European Court did not find any causal link between the violation found and pecuniary damage requested, and in that respect rejected the request of the applicant in that part.

(c) General measures

Prior to issuing the judgment in question, in August 2009 the new Criminal Procedure Code entered into force in Montenegro, the aim of which was to further strengthen the discipline of criminal courts and increase the effectiveness of criminal procedures. The most important change was the introduction of the *"prosecutorial investigation"*. In contrast to the previous Code, which had been implemented in the criminal proceedings at issue, the new Criminal Procedure Code states that prosecutors should conduct an investigation and be obliged to obtain all the evidence necessary for issuing an indictment or the termination of the investigation. Likewise, the ability of the accused to plead guilty was introduced for the first time, which has helped to lessen the work of the criminal courts. The effectiveness of these changes has already been recognized by the European Commission for Efficient Justice (CEPEJ) in their latest Report.[24] In the Action Report, the Government presented this information to the Committee of Ministers, which accepted its findings. This Report stated that the length of criminal proceedings was not a significant problem in Montenegro, and that the *Ranđelović* case should be considered an isolated one. The judgment has been translated and published in the "Official Gazette of Montenegro".

(d) Resolution of Committee of Ministers

The Committee of Ministers, on 20 September 2018, at 1324 meeting of the Deputies of Ministers issued Resolution CM/ResDH(2018)331 by which the case was closed.[25]

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23 http://hudoc.exec.coe.int/eng?i=DH-DD(2018)646E
24 See page. 227 Study CEPEJ no. 23, Edition 2016 –data for 2014.
25 http://hudoc.exec.coe.int/eng?i=001-186814

2. The Impact on the case-law

Ranđelović and Others v. Montenegro was the first judgment delivered by the European Court of Human Rights over a violation of the procedural limb of Article 2 of the Convention. Hence, even though it was an isolated case, this judgment is a strong warning for State authorities over the need to conduct an effective investigation and expedite criminal proceedings with the aim of protecting the right to life. It should be stressed that the case at issue was finally decided by the judgment of the Supreme Court of Montenegro Kž. I br. 21/17 of 22 November 2017, by which the complaints of attorneys representing the accused were dismissed as unfounded, and the judgment of the Appellate Court of Montenegro was upheld, by which the accused were pronounced guilty for criminal offences against general safety under Article 388 § 2 in line with Article 327 §§ 1 and 3 in line with Article 23 of Criminal Code of Montenegro.

II Article 3 – Prohibition of Torture

Article 3

Prohibition of Torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment..

The shortest provision in the Convention stipulates the absolute prohibition of torture. This prohibition cannot be derogated from, even in wartime or during any other public danger that threatens the survival of the nation.[26]

Article 3 may be divided into five concepts: torture, inhuman, degrading, treatment, and punishment. For each of these elements, the European Court of Human Rights has developed rich case-law.

Three judgments have been delivered involving Montenegro that have found a violation of the prohibition of torture: *Bulatović v. Montenegro, Milić and Nikezić v. Montenegro*, and *Siništaj and Others v. Montenegro*.

1. Judgments in respect of Article 3

Bulatović v. Montenegro

no. 67320/10

judgment of 22 July 2014

i. Analysis of the judgment

This was the first judgment against Montenegro in which a violation of Article 3 was found for ill-treatment of the Applicant. At the same time, it was the first judgment in which a violation of Article 5 § 3 of the Convention, excessive length of detention (over 5 years), was found.[27]

(a) Facts

Regarding Article 3 of the Convention, the Applicant complained over his detention conditions and the lack of medical care he received while in detention. The Applicant maintained that the cell in which he had been detained had been overcrowded, and that he had been

26 Popović and group of authors, Comments of the Convention on Human Rights and Fundamental Freedoms, 2017.

27 For complaints of the Applicant in respect of Article 5 in this case and Decision of the Court in that part, see part of the Analysis for Article 5.

denied drinking water and daily exercise. He submitted that this had been witnessed and recorded in 2008 by a delegation from the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment (CPT) in 2008, which had visited his cell. Likewise, he complained about the length of time for which he was deprived of liberty, between 27 June 2002 and 21 March 2011, before the decision of the domestic court became final.

(b) Relevant principles

The Court has already held that severe overcrowding raises in itself an issue under Article 3 of the Convention.[28] In particular, Article 3 was breached case where an applicant had been detained for almost nine months in extremely overcrowded conditions (10 m^2 for four inmates) with little access to daylight, limited availability of running water, especially during the night, and strong smells from the toilet, and with insufficient and poor quality food and inadequate bed linen.[29] The Court reiterated that Article 3 requires the State to ensure that prisoners are detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured.[30]

(c) Court's assessment

The Court found that there had been a violation of Article 3 of the Convention in respect of conditions in detention, and that there had been no violation of Article 3 in respect of medical care in detention. The Court also found a violation of Article 5 § 3 of the Convention.

Supervision of detention: The Court observed that the relevant domestic provisions and legislation provided for supervision of the execution of detention orders to be conducted by the president of the competent court. However, the relevant legislation did not provide for a complaints procedure – before a court or an administrative authority – that could satisfy the effectiveness requirement in respect of the applicant's complaints.[31] In addition, the CPT also noted the lack of a systematic approach to the handling of prisoners' complaints. It had also observed that visits to prisons, established by judges, the Ombudsman, and NGOs, had been rather infrequent and limited in scope.

In view of the above, the Court considered that the supervision of detention by the president of the competent court could not be considered an effective domestic remedy.

Conditions in detention: In this part the Court found that the cell in which the applicant had been detained, which had closets, sanitary facilities and a dinning table, measured 25 m^2 and housed fourteen detainees, sleeping on three-tier beds.

The Court stated that this finding had been supported by the CPT, which in its report noted "the alarming level of overcrowding" in the remand prison at that particular time. In particular

28 *Kadiķis v. Latvia* (no. 2), no. 62393/00, § 52, 4 May 2006.
29 *Modarca v. Moldova*, no. 14437/05, §§ 60-69, 10 May 2007.
30 *Kudła v. Poland [GC]*, no. 30210/96, §§ 92-94, ECHR 2000-XI, and *Melnītis v. Latvia*, no. 30779/05, § 69, 28 February 2012.
31 *Đermanović v. Serbia*, no. 48497/06, § 41, 23 February 2010.

it had described a cell of 28 m^2 with fifteen sleeping places, holding twenty-one male prisoners. This had been significantly under the standard of 4 m^2 per person recommended by the CPT. The majority of cells had been stuffy and humid, despite the presence of large windows and air conditioners. Remand prisoners had remained for twenty-three hours or more a day inside their cells, in some cases for several years.

ii. Procedure for the execution of the judgment:

(a) Action Plan/Report

The Government submitted an Action Report to the Committee of Ministers, on 17 October 2016.[32]

(b) Individual measures

On 10 April 2009 the High Court in Podgorica had found the Applicant guilty and had sentenced him to fourteen years of imprisonment. In August 2013 the Applicant's sentence had been reduced in view of an amnesty and he had been released before the European Court had delivered its judgment. The above stated measures, in the context of the conditions of detention, secured the cessation of the violations of Article 3 of the Convention at issue as the Applicant was no longer in conditions in detention that were in collision with Convention standards. The Applicant requested just satisfaction for pecuniary damage, however, the Court found no link between the violation found and compensation requested and therefore did not award compensation in that respect. On the other hand, the Applicant did not request non-pecuniary damage or costs and expenses.

(c) General measures

Measures had been taken in order to improve conditions in the prison in Spuž, in accordance with the standards of the CPT. Special measures had been taken in respect of: the prevention of overcrowding in cells, securing two hours of daily exercise for prisoners, and solving the problem of lack of water in prisons. With changes to the Criminal Procedure Code, the possibility of applying alternative sanctions for minor criminal offences and misdemeanours was introduced (bail, a duty to report to public authorities, the provisional seizure of travel documents, etc), which resulted in fewer prison sentences being implemented. The judgment has been translated and published in the "Official Gazette of Montenegro". The Representative delivered the Court's judgment to the High Court in Podgorica, the Appellate Court of Montenegro, the Supreme Court of Montenegro and the Ministry of Justice with a short analysis of the violations found.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 1 February 2017 at 1276 meeting of the Deputies of Ministers issued Resolution CM/ResDH(2017)35 by which the case was closed.[33]

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32 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)1149E

33 http://hudoc.exec.coe.int/eng?i=001-171286

Milić and Nikezić v. Montenegro

no. 54999/10 and 10609/11

judgment of 28 April 2015

i. Analysis of the judgment:

This judgment found violations of both aspects of Article 3 of the Convention – substantive and procedural.

(a) The facts

The applicants complained, under Article 3 of the Convention, that they had been tortured and ill-treated by prison-guards and that there had been no effective investigation into their allegations of mistreatment.

(b) Relevant principles

The substantive aspect: The Court had already held that persons in custody are in a vulnerable position and that authorities are under a duty to protect their physical well-being. The use of force may be necessary on occasion to ensure prison security, to maintain order and to prevent crime in such facilities. Such force may be used only if it is indispensable and it must not be excessive. Any recourse to physical force which is not strictly necessitated by the detainee's own conduct diminishes human dignity and is in principle an infringement of Article 3 of the Convention.[34]

The Court further held that where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, a strong presumption of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation of these injuries.[35]

The procedural aspect: According to the Court's established case-law, when an individual makes a credible assertion that he has suffered treatment at the hands of the police, or other similar agents of the State, which violates Article 3 it is the duty of national authorities to carry out an effective official investigation.[36]

(c) the Court's assessment

Taking into account the specific acts described and established in the domestic proceedings, as well as the injuries noted in the medical reports, the Court found that the threshold of Article 3 had been reached and considered that there had been a violation of the substantive limb of Article 3 of the Convention in respect of both applicants.

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34 *Kopylov v. Russia*, no. 3933/04, § 157, 29July 2010, ECHR.

35 *Salman v. Turkey [GC]*, no. 21986/93, §. 100, ECHR 2000-VII, and *Vladimir Romanov v. Russia*, no. 41461/02, §. 58, 24 July 2008.

36 *Labita v. Italy [GC]*, no. 26772/95, § 131 ECHR 2000-IV.

Likewise, the Court considered that it had not been convincingly established that the decision by the State Prosecutor to discontinue the criminal proceedings had been based on an adequate assessment of all the relevant factual elements in the case, or taken into account the findings of fact established by the Ombudsman in their disciplinary proceedings. In view of the above, the Court considered that there had been a violation of the procedural limb of Article 3 of the Convention in respect of both applicants.

ii. Procedure for the execution of the judgment:

(a) Action Plan/Report

The Government submitted an Action Report to the Committee of Ministers on 21 April 2016.[37]

(b) Individual measures

Prior to the judgment of the European Court, one of the applicants had been released while the other remained in prison treated completely according to the standards of the Convention. In 2009, disciplinary proceedings were initiated against three prison guards who were found to be responsible for abuse of office and acting beyond their authority. They were fined with a 20% decrease in salary. Due to the Montenegrin statute of repose, the competent Prosecutor could not initiate a further criminal investigation. The applicants were each awarded EUR 4,350 for non-pecuniary damage, as well as a further EUR 4,680 for costs and expenses. Compensation for pecuniary damage was not requested by the applicants.

(c) General measures

Measures have been taken in order to prevent similar cases, especially abuse by prison guards. After the delivery of the judgment, training sessions for prison officers were organised by relevant domestic and foreign institutions. In 2014, the Institute for the Execution of Criminal Sanctions (IECS), in cooperation with the NGO "Initiative of Youth for Human Rights", held a workshop on the effective implementation of national and international regulations for the prevention of torture. The Ministry of Justice and the Police Academy, in cooperation with TAIEX and the European Commission, held a set of training sessions intended for prison staff. IECS and the Police Academy signed a Memorandum to train prison staff on the practical use of violence, including the use of rubber truncheons, while meeting the standards of human rights. The Centre for the Training of the Judiciary and State Prosecution also organized two workshops with a special focus on the facts of this case which were attended by state prosecutors and prison guards.

After the judgment of the Court in this case, the State Prosecutor initiated unrelated criminal proceedings against five prison guards for the torture and ill-treatment of detainees. Four have so far been found guilty. The practice of the State Prosecutor sends a clear message to prison guards that physical and verbal torture of detainees is not acceptable and that it will be adequately punished. The judgment has also been translated and published in the "Official Gazette of Montenegro". The Representative conducted special analysis on the violations found

37 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)511E

in this case and, together with the translation of the judgment, delivered it to the IECS, the Supreme State Prosecutor's Office of Montenegro, the Basic Court in Danilovgrad, the Supreme Court of Montenegro, the Constitutional Court of Montenegro, and the Ombudsman.

(d) The Resolution of the Committee of Ministers

The Committee of Ministers, on 6 September 2016, at 1263 meeting of the Deputies of Ministers, issued Resolution CM/ResDH(2016)200 by which the case was closed.[38]

Siništaj and Others v. Montenegro

no. 1451/10, 7260/10 and 7382/10

judgment of 24 November 2015

i. Analysis of the judgment

The applications had been lodged by seven applicants over alleged violations of Article 3 of the Convention. All the applicants complained that they had been tortured and ill-treated by police officers between 9 and 15 September 2006, and that there had been no effective investigation into their mistreatment. In addition, the sixth applicant complained of an alleged lack of medical care while in detention. This case saw violations of Article 3 of the Convention, substantially and procedurally, only in respect of the third applicant.

(a) Facts

The applicants complained of torture and ill-treatment by prison officers and security staff, and a lack of effective investigation in their allegations.[39] In addition, the sixth applicant complained of a lack of medical care while in detention.

(b) Relevant principles

Procedural aspect of the Article 3 of the Convention: the Court reiterated that where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, a strong presumption of fact will arise in respect of any injuries sustained during such a situation. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation of those injuries.

38 http://hudoc.exec.coe.int/eng?i=001-166811

39 The sixth and seventh applicant complained that they are convicted according to the statement extorted from the first applicant. Besides, the applicant complained in respect of convictionaccording the diary of the first applicant, obtained in unlawwful search and later inadequate translation of that diary. Likewise they complained that they were convicted at the first instance by three member instead of the five member panel. The Court did not find violation of Article 6 of the Convention, but appreciated that complaints of applicants were manifestly ill-founded and rejected them in accordance with Article 35 of the Convention.

Effectiveness of the investigation: According to the Court's established case-law, when an individual makes a credible assertion that he has suffered ill-treatment at the hands of the police, or other similar agents of the State, which violates Article 3, it is the duty of the national authorities to carry out an effective official investigation.[40]

The Court stated that a lack of conclusions arising from any given investigation does not, by itself, mean that it was ineffective: an obligation to investigate is not an obligation of results, but of means. Not every investigation should necessarily be successful or come to a conclusion that coincides with the claimant's account of events. However, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible.[41] Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity. The investigation must also be thorough, prompt and independent.

(c) the Court's assessment

The Court noted that after the third applicant had been arrested, both the investigating judge and the prison doctor noted that he had suffered physical injuries. The investigating judge noted that he had a bandage on his head under which there was a visible cut, as well as haematoma on the upper part of his left cheekbone. The same injuries were observed by the prison doctor, who described the injuries in more detail: there was a 5 cm long scratch on top of his head, and a dark blue haematoma on the left cheekbone measuring 4x0.3 cm. In addition, the prison doctor noted a dark blue haematoma stretching from his left nipple to his armpit measuring 25x3cm and a large haematoma above the left elbow.

The Court noted that the Government neither contested the existence of the injuries on the third applicant nor provided an explanation as to the origin thereof, but merely stated that they did not reach the necessary threshold to be considered torture or inhuman or degrading treatment. The only action undertaken was apparently an investigation by the Internal Police Control, which could neither be considered independent, given that it was an internal investigation, nor thorough, given that the visible injuries and complaints third applicant were completely ignored. There was nothing in the case file that would indicate that any other action was undertaken to clarify the origin of the third applicant's injuries and identify the person responsible, let alone to prosecute them.

In view of the above, the Court found that the threshold of Article 3 was reached and considers that there had been a violation of both the substantive and procedural limbs of Article 3 of the Convention in respect of the third applicant.

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40 *Labita v. Italy [GC]*, no. 26772/95, § 131, ECHR 2000-IV.

41 *Mikheyev v. Russia*, no. 77617/01, § 107, 26 January 2006.

ii. The Procedure for the execution of the judgment

(a) Action Plan/Report

The case has still not been closed by the Committee of Ministers, with the last Action Plan submitted by the Government on 1 June 2018.[42]

(b) Individual measures

The Court found that there had not been an effective investigation in respect of the events of the case. Consequently the Supreme State Prosecutor ordered the competent State Prosecutor's Office to reopen the investigation into the criminal complaint of the Applicant. The Applicant was released in August 2009, and currently lives in Canada. The State Prosecutor's Office sent a letter to the applicant in Canada requesting their presence at a hearing in their position as witness/the injured party. Further persons were heard as part of the investigation in 2017 and those proceedings remain pending.

Compensation for non-pecuniary damage and costs and expenses worth EUR 6,500 has been paid to the Applicant. The Applicant did not request compensation for pecuniary damage, therefore it was not awarded by the European Court.

(c) General measures

In order to execute the judgment of this case, a set of training and awareness building measures were implemented to prevent further ill-treatment by the police and secure effective investigations in similar cases. More specifically in 2014 and 2015 the Police Academy, in cooperation with the Council of Europe, organised three workshops on the implementation of the standards of the Convention which referred to detention in police institutions. These were attended by 80 police officers. In 2015 and 2016 the Office of the Ombudsman organised an additional five training sessions with the aim of ensuring respect for the relevant CPT standards (attended by around 100 police officers). Likewise, training was conducted in order to draw the attention of State prosecutors to the findings of the European Court in this judgment. This judgment also recognised the effectiveness of a constitutional complaint as legal remedy (see § 123 of the judgment *Siništaj and Others*), which means that similar cases shall, in future, be examined duly and effectively and sanctioned by the Constitutional Court. The judgment has been translated and published in the "Official Gazette of Montenegro". The Representative, with a special analysis on the violations found, delivered the judgment to the Supreme State Prosecutor's Office, the Basic Court in Podgorica, the High Court in Podgorica, the High Court in Bijelo Polje, The Supreme Court of Montenegro, and the Ministry of the Interior.

2. The impact on national legal order

In the case Siništaj and Others v. Montenegro, the European Court established the principle that a constitutional complaint in Montenegro can, in principle, be considered to be effective legal remedy as of 20 March 2015.[43]

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42 http://hudoc.exec.coe.int/eng?i=DH-DD(2017)628E

43 On effectiveness of remedies see the Analysis in the part of Article 13..

The Court in its judgment referred to certain relevant principles, pointing out that an effective remedy must be capable of directly remedying the impugned state of affairs and offer reasonable prospects of success.[44] However, the existence of mere doubts as to the prospects of the success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress. New legislation, however, explicitly allows for the possibility of filing a constitutional complaint, not only regarding domestic decisions, but regarding actions or omissions. This allows for, inter alia, the possibility of awarding just satisfaction, limited to all cases heard before the Constitutional Court after a constitutional complaint after no more than 18 months. After reform of the procedure of constitutional complaints,[45] the Court found that constitutional complaints were an effective remedy as of 20 March 2015, this being the date when the new legislation entered into force.

Bearing in mind that the Law on Constitutional Court referred to above entered into force before the delivery of the judgment in *Siništaj*, it cannot be said that this judgment had an "impact" on legislation. However, the importance of this judgment lies in the fact that remedies provided by this Law have been recognised as available and effective by the Court. For this reason the judgment in *Siništaj*, in a certain manner, has "guaranteed" the effectiveness of a constitutional complaint as a remedy which must be exhausted before addressing the European Court.

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44 *Balogh v. Hungary*, no.47940/99, § 30, 20 July2004 and *Sejdovic v. Italy [GC]*, no. 56581/00, § 46.

45 See articles 68 - 78 of the Law on Constitutional Court of Montenegro ("Official Gazette MN",nor. 11/2015 of 12 March 2015).

III Article 5 – Right to Liberty and Security

Article 5

Right to Liberty and Security

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 noncompliance 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 and 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 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 authorised 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.

The purpose of Article 5 is to prevent arbitrary or unjustified deprivations of liberty.[46] Therefore, deprivation of liberty must be in accordance with the principle of legality. Lawfulness is understood in accordance with definitions in national legislation as well as international law.[47]

The European Court delivered two judgments against Montenegro in which a violation of Article 5 § 1 (c) of the Convention was found: *Bulatović v. Montenegro* and *Mugoša v. Montenegro*.

1. Judgments in respect of Article 5

Bulatović v. Montenegro

no. 67320/10

judgment of 22 July 2014

i. Analysis of the judgment:

a) Note: As in this case had been found violation of Article 3 as well, the facts and procedure of execution of this judgment are given within the part of Analysis for Article 3.

The Applicant, likewise complained to violation of the Article 5 § 3 of the Convention for continuous deprivation of liberty between 27 June 2002 and 21 March 2011, when the relevant court's decision became final.

(b) Relevant principles

The Court reiterated that the persistence of reasonable suspicion that an arrested person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings. The complexity and special characteristics of the investigation are factors to be considered in this respect.[48]

46 *McKay v. the United Kingdom [GC]*, § 30.
47 *Medvedyev and Others v. Russia [GC]*, §. 79; *Toniolo v. San Marino and Italy*, §. 46.
48 *Solmaz v. Turkey*, no. 27561/02, § 40, 16 January 2007.

While previous absconding is a factor to be taken into account,[49]the Court reiterates that the risk that the accused might flee cannot be evaluated in isolation. Other factors, especially those relating to his or her character, morals, home, occupation, assets, family ties and all kinds of links with the country in which he or she is being prosecuted may either confirm the existence of a risk of absconding, or make it appear so small that it cannot justify detention pending trial. However, the risk of absconding necessarily decreases as the time spent in detention passes by, because the likelihood that the period spent in custody will be deducted from the prison sentence which the detainee may expect if convicted is likely to make the prospect of prison less daunting and reduce his temptation to flee [50]Even if detention is justified under Article 5 § 3, that provision may still be infringed if the accused's detention is prolonged beyond a reasonable time because the proceedings have not been conducted with the required expedition, as Article 5 § 3 requires that in respect of a detained person the authorities show "special diligence in the conduct of the proceedings".[51] While very long periods of detention do not automatically violate Article 5 § 3, the Court notes that it is usually exceptional circumstances that justify such long periods of detention.

(c) The Court's assessment

The Court reiterates that in determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance[52]. Accordingly, the period to be taken into consideration in the applicant's case consisted of two separate terms: (1) from 3 March 2004, when the Convention entered into force in respect of the respondent State[53], until his conviction on 10 April 2009; and (2) from 29 January 2010, when the applicant's conviction was quashed on appeal, until his subsequent conviction on 4 October 2010.

As the Court should make a global evaluation of the accumulated periods of detention under Article 5 § 3 of the Convention when assessing the reasonableness of the length of the applicant's pre-trial detention[54], the period to be taken into consideration in the applicant's case amounts to five years eight months and fifteen days.

The Court considered that the reasons advanced by the domestic authorities were certainly relevant. However, in the specific circumstances of the case, it does not consider it necessary to examine whether they were also sufficient or whether the domestic authorities should have considered in addition alternative measures to secure the applicant's presence at trial as in any event the criminal proceedings in question were not conducted with the required expedition, as acknowledged by the domestic courts themselves and as required by Article 5 § 3. As there were no exceptional circumstances in the present case that could justify such lengthy proceedings, the Court considers that the applicant's detention exceeding five years exceeded a

49 *Punzelt v. Czech Republic*, no. 31315/96, § 76, 25 April 2000.
50 *Neumeister v. Austria*, 27 June 1968, §10, Seria A no. 8.
51 *Herczegfalvy v. Austria*, 24 September 1992, §71, Seria A no. 244.
52 *Panchenko v. Russia*, no. 33492/96, 21 December 2000, § 90.
53 *Jablonski v. Poland*, no. 33492/96, 21 December 2000, §§ 65-66.
54 *Solmaz v. Turkey*, 27561/02, 16 January 2007, §§ 36-37

reasonable time.[55] Accordingly, the Court found that there had been violation of Article 5 § 3 of the Convention.

Mugoša v. Montenegro

no. 76522/12

judgment of 21 June 2016

i. Analysis of the judgment

In this case is found violation of Article 5 § 1 of the Convention, as decision on extension of detention had been rendered after expiration of legal time-limit for supervision of detention. Likewise it had been found violation of the Article 6 § 2, because the court in its decision on extension of detention declared on the guilt of the Applicant prior to his final conviction[56]

(a) Facts

The reason for lodging the Application was the criminal proceedings conducted before the High Court in Podgorica against the Applicant for criminal offence aggravated murder. The Applicant complained on violation of Articles 5 and 6 of the Convention, particularly that: (a) he had been unlawfully detained between 18 and 22 September 2011, (b) the Constitutional Court's decision lacked reasoning, and (c) the presumption of innocence had been breached.[57]

(b) Relevant principles

The Court reiterated that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof [58]. It is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed.

However, the "lawfulness" of detention under domestic law is the primary but not always a decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein.[59]

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55 *Korchuganova v. Russia*, no. 75039/01, §§ 71 in limine and 77, 8 June 2006; *I.A. v. France*, 23 September 1998, §§ 98 and 112, Reports on Judgments and Decisions 1998-VII; and *Khudoyorov v. Russia*, no. 6847/02, §§ 175 and 189, ECHR 2005-X (extracts).

56 As regards violation of Article 6 § 2 of the Convention, see part of the Analysis for Article 6.

57 As regards violation of Article 6 of the Convention, see part of the analysis for Article 6.

58 *Mooren v. Germany [GC]*, br. 11364/03, § 72, 9 July 2009.

59 *X v. Finland*, no. 34806/04, § 148 ECHR 2012 (extracts); *Bik v. Russia*, no. 26321/03 § 30, 22 April 2010; and *Win-*

(c) The Court's assessment

The Court considers that, in the present case, the relevant legislation itself seems to be sufficiently clearly formulated. However, the lack of precision in detention orders in respect of the duration of detention extension and the lack of consistency on whether the statutory time-limits for re-examination of detention grounds are mandatory or not, make it unforeseeable in its application. In view of the above, the Court considers that the applicant's detention between 18 and 22 September 2011 was not "lawful" within the meaning of Article 5 § 1 of the Convention within which time limit domestic court did not render an order on extension of detention. Consequently, there has been a breach of that provision.

ii. Procedure for the execution of the judgment

(a) Action plan/report

The Government submitted to the Committee of Ministers an Action Report on 24 March 2017.[60]

(b) Individual measures

On 11 March 2015 the High Court in Podgorica sentenced the Applicant to a prison sentence of 13 years, which he is currently serving. The Applicant was paid non-pecuniary damages and costs and expenses to the amount of EUR 7,150. The Applicant did not request just satisfaction for pecuniary damage and so was not awarded any.

(c) General measures

Measures to harmonize the practice of national courts have been taken in relation to detention orders and the supervision of detention. In 2017, the Supreme Court of Montenegro adopted two obligatory legal opinions: the first, obliged national courts to consistently adhere to time-limits for the supervision of detention under Article 179 § 2 and Article 198 § 1 of the Criminal Procedure Code, with the exceeding of these defined limits consequently amounting to a violation of the right to liberty and security. Under the second opinion, concerning decisions to order or extend detention, the court must now clearly emphasize the existence of reasonable doubt that the accused committed the criminal offence and must avoid expressions that imply that the accused is perpetrator of the criminal offence.[61] The judgment was translated, published and distributed, and is used in training activities for judges at the Centre for the Training of the Judiciary and State Prosecution.

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terwerp v. Netherlands, 24 October 1979, § 45, Seria A, no 33.

60 http://hudoc.exec.coe.int/eng?i=DH-DD(2017)363E

61 Legal opinion of the Supreme Court, Su.V.br. 6/17, see below in the Analysis.

(d) Resolution of Committee of Ministers

The Committee of Ministers, on 10 May 2017, at 1286 meeting of the Deputies of Ministers issued Resolution CM/ResDH(2017)141 by which the case was closed.[62]

2. Impact on the case-law

In accordance with Article 9 of the Constitution of Montenegro these judgments are a source of law in the legal system of Montenegro. The aim of the judgments delivered by the Court is to, in accordance with the obligations which the State took on when it ratified the European Convention on Human Rights, prevent further violations of the rights that had been established in those judgments. In order to execute the judgment of the Court in this situation, the Criminal Department of the Supreme Court of Montenegro published the legal opinion Su.V.br. 7/17 of 17 January 2017, in which it is stated that *the Court is obliged to consistently respect time-limits for the supervision of detention under Article 179 § 2 and Article 198 § 1 of the CPC. Exceeding the stated time-limits consequently violates the right to liberty and security*.

62 http://hudoc.exec.coe.int/eng?i=001-173897

IV Article 6 –Right to a Fair Trial

Article 6

Right to a Fair Trial

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 society in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to 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.

The concept of the fair trial is essential for the principle of the rule of law. The Court has developed extremely rich case-law under this Article, and it is the provision to which Applicants most commonly refer.[63]

Article 6 refers both to criminal and civil proceedings, not only to the court proceedings but also to the prior and following phases.[64] The complexity of the Article is reflected in the fact that it includes a number of guarantees: a right to appear before a court, an independent and

63 Article 6 of the European Convention on Human Rights – Right to a Fair Trial – Manual for lawyers, Interights.
64 A guide to the implementation of the Article 6, Nuala Moule.

impartial court established by law, fair proceedings, a trial within reasonable time, the presumption of innocence, right to defence, right to reasoned decision, etc.

The Court must examine whether the proceedings as a whole have been fair and in accordance with the guarantees provided under this provision.[65]

i. Article 6 § 1 –Right to a fair hearing

"The right to a fair hearing" within the meaning of Article 6 § 1 of the Convention, in contrast with other aspects of the right to a fair trial, is not strictly defined, but includes the wide spectrum of different rights recognized by the European Court through its case-law as necessary for a "fair trial". The formulation of this principle in the English language is the "*right to a fair hearing*", while Article 6 itself in English is titled the "*right to a fair trial*". When translated into Montenegrin, these terms are synonyms and both can be translated as "pravo na pravično suđenje"*("right to a fair trial")*⋆, which refers to the "principle of fairness" and incorporates more elements than are necessary for certain procedures, both criminal or civil, to be accepted as fair.

Some of elements of the "right to a fair trial" defined through the case-law of the European Court are: right to effective participation in proceedings,[66] right to equality of arms,[67] right to adversarial proceedings,[68] the presumption of innocence,[69] right to regular examination of the case,[70] etc. It follows from the above that this principle protects the right to a fair trial in all cases which can be recognised as violating Article 6, i.e. when the proceedings were not "fair".

The European Court has delivered one judgment regarding Montenegro involving a violation of the principle of fairness under Article 6 § 1.

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65 ⋆ "Right to a fair hearing" is translated as "princip pravičnosti" – which in English can also be translated as "principle of fairness".

Bernard v. France, 1998.

66 *Stanford v. The United Kingdom*, A 282-A (1994), § 26.

67 *Neumeister v. Austria*, A 8 (1986); 1 EHRR 91. For implementation of „equality of arms" on criminal and civil proceedings see: *Dombo Beheer v. Netherland*, A 274 (1993); 18 EHRR 213, § 33.

68 This right means "the right to an adversarial proceedings", which means right of the parties to be introduced with all relevant facts of the proceedings, and to have the possibility to declare themselves on all evidences: *Vermeulen v. Belgium[GC]*, 1996-I; 32 EHRR 313, § 33. See also: *Barbera, Messegue and Jabardo v. Spain*, A 146 (1988); 11 EHRR 360, §78 (The Court found violation partly for the fact that numerous statements of witnesses and other documentation from the investigation were only read on the records), *Feldbrugge v. Netherland*, A 99 (1986); 8 EHRR 425 (approach to the case files) and *Sofri v. Italy*, (2003) (evidences destroyed).

69 This right is guaranteed with Article 6 § 2, but likewise considered within „the general notion of faireness" from Article 6 § 1. In that respect see: *Phillips v. The United Kingdom*, 2001-VII, § 39.

70 *Dulaurans v. France*, no. 34553/97, § 33, 21 March 2000.

1. Judgment in respect of Article 6 § 1 (right to a fair hearing)

Barać and Others v. Montenegro

no. 47974/96

judgment of 13December 2011

i. Analysis of the judgment

The European Court in this judgment found violation of Article 6 § 1 of the Convention, as decision in the case had been issued according to the law which had not been on force at the relevant time (right to a reasoned decision). Particularly, in the judgment had been found that the final judgment issued by the High Court against the Applicants relies only on the Law which had previously been found as unconstitutional, which decision had already been published in the Official Gazette of Montenegro.

(a) Facts

The Applicants complained upon the Article 6 § 1 alleging that the domestic civil proceedings had been unfair since the final judgment rendered against them had been based on an Act which was no longer in force at the relevant time.

(b) Relevant principles

No fair trial could be considered to be held where the reason given in the relevant domestic decision was not envisaged by the domestic legislation and, therefore, was not a legally valid one.[71]

(c) The Court's Assessment

The Court observed that the final decision rendered by the High Court against the Applicants relied solely on an Act which had previously been declared unconstitutional and a relevant decision to that effect already published in the Official Gazette. Thus the Labour Amendments Act 2004[72], had ceased to be in force and, as such, was not applicable in the applicants' case, as provided by Article 69 § 1 of the Constitution in force at the time. Therefore, the only legal basis for the High Court's decision was not valid at the relevant time. It is irrelevant in this connection whether the impugned piece of legislation was declared unconstitutional for formal or substantial reasons.

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71 *De Moor v. Belgium*, 23 June 1994, § 55 in fine, Seria A no. 292-A, where competent domestic body refused to put the applicant on the list of „lawyers practitiants" refering to theground which was not provided by relevant laws; *Dulaurans v. France*, no. 34553/97,§ 33-39, 21 March 2000

72 Law on Changes and Amendments of the Labor Act ("Official Gazette RMN", no. 79/2004 of 23December 2004).

ii. Procedure of execution of judgment:

(a) The Action Plan/Report

The Government submitted to the Committee of Ministers an Action Report on 5 February 2013.[73]

(b) Individual measures

The Court awarded just satisfaction to the Applicants as compensation for non-pecuniary damage to the amount EUR 7,035.42. Under provision Article 482a of the amended Law on Civil Procedure[74] it has become possible for a retrial to occur after the delivery of a judgment of the European Court. There will then be a retrial before the court in Montenegro that tried the victim in the first instance and violated the Convention in order to change the decision by which the right or fundamental freedom had been violated. The Applicant did not submit a request for a retrial within the time-limit prescribed in the provisions of this Article (3 months from the final judgment of the European Court).

(c) General measures

The Government of Montenegro considered that the translation, publication and dissemination of the judgment of the European Court in this case would be sufficient to prevent similar violations. This was accepted by the Committee of Ministers.

(d) Resolution of the Committee of Ministers

On 30 April 2013 the Committee of Ministers, at 1169 meeting of the Deputies of Ministers, issued Resolution CM/ResDH(2013)64 by which the case was closed.[75]

2. Impact on the case-law

The nature of the judgment in ***Barać and Others*** was such that there has been no need for specific legislative measures to be taken for its execution, or for the Supreme Court to produce a legal opinion to elaborate on the conclusions of the European Court. Judgments like this are defined as isolated cases, which do not point out to the existence of any systematic problem. However, this judgment serves to reiterate to all courts that the principle of the right to a fair hearing is a general guarantee that must be followed in all proceedings.

ii. Article 6 § 1 –right to a fair and public trial within reasonable time

The European Court of Human Rights found violations of Article 6 § 1 of the Convention in **eight civil and four administrative cases**, with all these applications lodged with the Court due to the length of the proceedings before national courts.

To assess whether the length of the proceedings were reasonable, the Court took into consideration the status of the case on the day of the ratification of the Convention. The Court was

73 http://hudoc.exec.coe.int/eng?i=DH-DD(2013)105E

74 Law on Changes and Amendments of the Law on Civil Procedure ("Official Gazette MN", no. 76/2006 of 12 December 2006).

75 http://hudoc.exec.coe.int/eng?i=001-121706

of the opinion that Montenegro was bound by the Convention and the Protocols thereto as of 3 March 2004, that being the date on which these instruments entered into force in respect of the State of the Union of Serbia and Montenegro. The Court took this opinion for the first time in the judgment *Bijelićv. Montenegro* (application no. 11890/05, §. 68, ECHR).

In all the judgments under this heading the Court pointed out that as it was the ***relevant principle***, the length of the proceedings must be assessed in light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities, and what was at stake for the applicant in the dispute.[76]

Having in mind the case-law of the Court, and appreciating that the proceedings were not particularly complex, the Court in each individual case considered that when the length of proceedings lasted longer than two years[77] at one or more level of jurisdiction, the length would be excessive and fail to meet the requirement of "reasonable time".

Given that the Department for the Execution of Judgments of the European Court in their execution of the Court's judgments produced Action Reports which were mainly identical, these cases have formed so-called case groups where after the first case involving such a violation each following case's Action Report would have the Government referring to the general measures adopted in the first Action Report. In Montenegro there have been two such groups of cases: the ***Živaljević group*** (length of administrative proceedings) and the ***Stakić group*** (length of civil proceedings).

As these are the most numerous type of judgment against Montenegro, better transparency requires the analysis of these judgments exactly within their stated groups. For this reason, in the first part (**1.a**) we have provided analysis of the cases and procedures for execution in the ***Živaljević group***, and in the second part (**1.b**) for the ***Stakić group***.

1.a. Judgments in respect of violation of the right to reasonable length of administrative proceedings (*Živaljević* group)

This group of cases refers to the violation of Article 6 § 1 of the Convention over the excessive length of administrative proceedings, i.e. the failure of authorities to act in accordance with relevant domestic legislation and time-limits.

i. Analysis of judgments

Živaljević v. Montenegro (no. 17229/04, judgment of8 March 2011) – Public Construction Fund requested the expropriation of a plot of land belonging to the applicants in order to build a road, after which the applicants requested that their houses and the remainder of their land also be expropriated. The road which had been planned was built over the plot at issue, but the request had not been considered.

The Court found that the proceedings in question have been within the Court's competence *ratione temporis* for a period of more than six years and eleven months. In addition,

76 *Frydlender v. France [GC]*, no. 30979/96, ECHR 2000-VII, § 43.

77 Period includes time of duration of proceedings from three years and seven months up to 12 years.

they had already been pending for more than seven years and four months before that date. While it can be accepted that some expropriation cases may be more complex than others, the Court did not consider the present one of such complexity as to justify proceedings of this length. The domestic legislation specifies periods within which administrative bodies need to give their decisions, these periods being one month or two months at one level of jurisdiction. The Court noted that the special diligence requirement is of particular relevance in respect of States where the domestic law provides that cases must be terminated with particular urgency.

Stanka Mirković and Others v. Montenegro (no. 33781/15 and 3 Others, judgment of 7 March 2017) –The Applicants complained regarding the overall length of administrative proceedings which had been delayed by repeated remittals of the case, and the lack of an effective remedy in that regard.

The Court especially pointed out that over the course of ten years, six months and eleven days the domestic bodies issued twenty-one decisions (including two decisions of the Constitutional Court) and remitted the case nine times, and once again the case is before the first-instance administrative body awaiting a decision. The Court gave its special view to the effectiveness of the request for review in proceedings before different administrative bodies.

Namely, the Court in § 49 of this judgment stated that "similarly to the remedies provided for in the General Administrative Proceedings Act and the Administrative Dispute Act, the Court considers that the request for review could have been of little use to the applicants given that the Administrative Court in principle ruled within the statutory time-limits. While a request for review could have perhaps slightly expedited only that particular part of the proceedings on those few occasions when the Administrative Court failed to rule within the said limits, in any event it could not have expedited the proceedings ongoing before various administrative bodies beforehand, nor could it have prevented the repeated remittals of the case and the consequent overall delay, which is the issue in the present case (...)In view of that, the Court cannot but conclude that, whereas the said remedy could be used in order to expedite only the proceedings before the Administrative Court itself, that is an administrative dispute (see *Vukelić v. Montenegro*, no. 58258/09, § 85, 4 June 2013), it cannot be used and hence considered an effective domestic remedy in respect of the part of the proceedings that are ongoing before various administrative bodies beforehand".

Sinex DOO v. Montenegro (no.44554/08, judgment of 5 September 2017) - The Applicant complained under Article 6 § 1 of the Convention about the length of the administrative proceedings concerning the registration of its fiduciary rights, which, at the time of lodging the application were pending and to violation of Article 13 of the Convention.

The first set of administrative proceedings was initiated on 5 November 2004, when the Applicant lodged an appeal with the Real Estate Department, and lasted overall twelve years and eight months. As regards the second set of administrative proceedings, it lasted for over ten years and four months. In accordance with established case-law of the Court, when there are more different proceedings referring to the same issue, these proceedings are considered as a whole with purpose of analysis of Article 6 § 1 of the Convention.

In line with aforementioned, the period to be taken into account in the specific case began on 5 November 2004, being the date when the Applicant lodged an appeal to the Real Estate Department in the first set of proceedings and was still pending at the moment of delivering the judgment of the European Court. The Court considered that the length of proceedings was excessive and that it did not meet the "reasonable time" requirement.

Nedić v. Montenegro (no.15612/16, judgment of 10 October 2017) –The Applicant lodged an application with the Commission for Restitution requesting restitution of the property expropriated from his father in 1969. The Applicant complained that the length of proceedings in the specific case had been incompatible with "reasonable time" requirement. The Court stated, as regards the period to be taken into consideration, according to the Court's settled case-law, in administrative proceedings that period begins only when a claimant appeals against the decision of the administrative body, since it is only then that a "dispute" within the meaning of Article 6 § 1 of the Convention arises..

In the specific case this period began on 4 September 2009 and has been finalized on 23 April 2015.

The Court does not consider the present case one of such complexity as to justify proceedings of this length. Furthermore, there is nothing in the case file to suggest that the excessive length has been caused by the conduct of the applicant. The delay was caused mainly by the Commissions' inactivity and it is therefore primarily attributable to the authorities.

The Court concluded that, in the absence of any justification, the length of the proceedings of more than five years and four months at one level of jurisdiction was excessive and failed to meet the "reasonable time" requirement.

ii. Procedure of execution

(a) Action Plans/Reports

The Government submitted to the Committee of Ministers an Action Report for each of stated judgments: for the ***Živaljević*** case on 15 November 2016,[78] for ***Stanka Mirković and Others*** on 5 December 2017,[79] and for ***Nedić*** and ***Sineks DOO*** on 21 March 2018.[80]

(b) Individual measures

Živaljević v. Montenegro – The European Court awarded just satisfaction to compensate for non-pecuniary damage suffered by the applicants totalling EUR 2,400, plus any chargeable taxes. Payment was made within three months in accordance with the judgment of the Court. The proceedings over which the application had been lodged were accelerated and finalized with a judgment of the Supreme Court of Montenegro on 18 November 2016. With this judgment the Supreme Court of Montenegro rejected the request of the Applicants for an extraordinary examination of a prior court decision, the judgment of the Administrative Court of 30 June 2016.

78 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)1273E
79 http://hudoc.exec.coe.int/eng?i=DH-DD(2017)1394E
80 http://hudoc.exec.coe.int/eng?i=DH-DD(2018)320E

***Stanka Mirković and Others v. Montenegro* –** In the execution of this judgment, individual measures to finalize the relevant administrative proceedings were taken. After addressing the Commission for Restitution and the Ministry of Finance and pointing out to the findings of the judgment of the Court, the administrative proceedings were finalized on 29 November 2017. The Compensation for non-pecuniary damage and costs and expenses was paid to the Applicants, totalling EUR 3,745. Regarding pecuniary damage, the Applicants submitted a request for just satisfaction on this ground, however, the European Court rejected their request, finding that it was not adequately proven that the Applicants suffered pecuniary damage for the violation of Article 6 § 1 and Article 13 of the Convention.

Sineks DOO v. Montenegro – As the administrative proceedings in this case were still pending upon the delivery of the Court's judgment, the Representative addressed the administrative body before which the proceedings were conducted, the Real Estate Department in Berane, to inform it of the need to take all necessary steps to finalize the case without further delay. Accordingly, on 11 April 2016, the impugned administrative proceedings were finalized. Compensation for non-pecuniary damage and costs and expenses totalling EUR 6,000 was paid to the Applicant.

Nedić v. Montenegro –The European Court awarded the Applicant EUR 2,000 for non-pecuniary damages. The proceedings before the national court were finalized before the Court's delivery of the judgment.

(c) General measures

In executing these judgments, the Government pointed out that measures had already been taken, introducing legal remedies in relation to the excessive length of proceedings, including administrative proceedings. Specifically, in 2007 it issued the Law on the Protection of the Right to a Trial Within a Reasonable Time.[81] This law allowed long-lasting proceedings to be accelerated after a request for review, as well as for the possibility of compensation to be awarded to applicants after a claim for just satisfaction. This law has been applied to all proceedings initiated after 3 March 2004. In the case *Vukelić v. Montenegro*, the European Court found that this remedy was an effective remedy[82] and that it was applicable to cases involving the excessive length of administrative proceedings.

In response to the judgment in ***Stanka Mirković and Others***, besides aiming to increase the effectiveness of administrative proceedings, taken in the context of the *Živaljević* case (final Resolution CM/ResDH(2017)37), and bearing in mind the findings of the European Court in this case, the Government stated that additional measures to solve the issue of the excessive length of administrative proceedings were necessary. New laws in this area, the Law on Administrative Procedure[83] and the Law on Administrative Disputes,[84] were implemented from 1 July 2017 and provided a new set of solutions for accelerating administrative proceedings and increasing their efficiency.

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81 Law on Protection of Right to a Trial Within a Reasonable Time ("Official Gazette MN", no. 11/2007 of 13 December 2007).

82 *Vukelić v. Motenegro*, no 58258/09, 4 June 2013, § 85.

83 Law on Administrative Proceedings ("Official Gazette MN", no. 56/14, 20/15, 40/16 i 37/17).

84 Law on Administrative Dispute ("Official Gazette MN", no. 54/16 of 15.08.2016).

All the judgments were translated and published in the Official Gazette of Montenegro. The Representative analysed the violations and delivered the judgment to all the State bodies before which the impugned proceedings were conducted.

(d) Resolutions of the Committee of Ministers

The Committee of Ministers, on 1 February 2017, at 1276 meeting of the Deputy of Ministers issued Resolution CM/ResDH(2017)37 by which the case ***Živaljević*** was closed,[85] case ***Stanka Mirković and Others*** was closed on 14 February 2018 at 1307 meeting of Deputy of Ministers with Resolution CM/ResDH(2018)51,[86] while on 18 April 2018, at 1314 meeting of Deputy of Ministers, Resolution CM/ResDH(2018)165 was issued which closed cases ***Sineks DOO*** and ***Nedić***.[87]

1.b. Judgments regarding violation of right to reasonable length of civil proceedings (*Stakić* group)

Stakić group is certainly the most varied group of cases and refers to the violation of Article 6 § 1 of the Convention for both the excessive length of civil proceedings and, under Article 13, the lack of an effective domestic remedy in that regard.

i. Analysis of judgments

Stakić v. Montenegro (no.49320/07, judgment of 2 October 2012) - The Applicant initiated civil proceedings against more persons seeking compensation of non-pecuniary and pecuniary damage.

The proceedings at issue was under jurisdiction of the European Court *ratione temporis* more than eight years and six months and was still open at the first instance, and before that date had already passed 24 years. The Court considered that the length of proceedings did not meet reasonable time requirement and found violation of Article 6 § 1.

Novović v. Montenegro (no.13210/05, judgment of 23 October 2012) -The Applicant was made redundant, after which he filed the claim to the court seeking reinstatement and compensation.

The proceedings at issue lasted five years and three months after Montenegro has ratified the Convention. The Court recalled that reinstatement proceedings are of "crucial importance to plaintiffs and that, as such, they must be dealt with "expeditiously". This requirement is reinforced additionally in respect of States where domestic law provides that such cases must be resolved with particular urgency.

Bujković v. Montenegro (no.40080/08, judgment of 10 March 2015) –The Applicant instituted a civil proceedings against the Municipality of Bar concerning a plot of land.

Since the Convention entered into force in respect of Montenegro on 3 March 2004, the proceedings fall within the Court's competence for a period of more than eight years and eleven

85 http://hudoc.exec.coe.int/eng?i=001-171290
86 http://hudoc.exec.coe.int/eng?i=001-181244
87 http://hudoc.exec.coe.int/eng?i=001-182711

months. In addition, they had already been pending for more than three years and ten months before that date. The Court recalled that repeated re-examination of a single case following remittal may in itself disclose a serious deficiency in a given State's judicial system.

After the Convention had entered into force in respect of Montenegro, the first instance judgment was quashed three times, and it was only after three remittals that the case was finally adjudicated.

Svorcan v. Montenegro (no.1253/08, judgment of 13 June 2017) –The Applicant and her family members instituted proceedings seeking division of their joint property. The Court of First Instance discontinued these proceedings and instructed the parties to initiate a separate civil case given a number of contentious issues.

The proceedings in question lasted for more than twelve years and five months at three levels of jurisdiction, but the European Court can only examine the period from 3 March 2004, that being more than for years for two levels of jurisdiction. Unreasonable delay, especially before the Supreme Court, which amounted to almost three years and seven months, as well as the lack of any explanation justifying such a delay, demonstrate that the domestic authorities failed to act with required diligence under Article 6 § 1 of the Convention.

Tomašević v. Montenegro (no.7096/08, judgment of 13 June 2017) –The Applicant lodged a civil claim concerning a property issue against eleven other persons.

The period to be taken into consideration began on 9 August 2004 and has not yet ended. The impugned proceedings have thus already lasted more than twelve years at two levels of jurisdiction. The Court considers that the proceedings in question were not particularly complex. The Government failed to provide any justification for the period between 9 August 2004 and 15 March 2011, as well as the other periods of inactivity before domestic courts.

Vučinić v. Montenegro (no.44533/10, judgment of 5 September 2017) –The Applicant lodged a civil claim seeking compensation for the pecuniary damage suffered while he was waiting the certificate which would make it possible for his new company to continue providing its services.

The period at issue, which had to be considered lasted for six years and one month at three levels of jurisdiction. The Court considered that in the absence of any justification the length of the proceedings of more than six years was excessive and failed to meet the "reasonable time" requirement.

Đuković v. Montenegro (no.38419/08,judgment of 13 June 2017) –The Applicant brought a compensation claim for damages suffered as a consequence of an expropriation of his property. Afterwards, he informed the competent court that he had initiated a separate set of civil proceedings to determine value of abovementioned damages.

Having examined all the material submitted to it and in view of its case-law on the subject, the Court considered that, in the absence of any justification, the length of the proceedings of more that twelve years was excessive and failed to meet the "reasonable time" requirement.

Dimitrijević v. Montenegro (no.17016/16, judgment of 12 December 2017) –On 2005 the Applicant instituted civil proceedings before the First Instance Court, seeking redress regard-

ing various contractual issues. After the Supreme Court quashed previous judgments and ordered re-trial, in August 2011 the First Instance Court ruled against the Applicant, which judgment has been upheld during 2012 by the High Court in Podgorica and the Supreme Court of Montenegro.

The impugned proceedings lasted seven years, one month and thirteen days at three instances. The Court considered that neither the complexity of the case nor the applicant's conduct explains the length of proceedings. The Government did not supply any explanation for the delay or provide any comment on this matter.

ii. Procedure of execution

(a) Action Plans/Reports

The Government submitted Action Reports to the Committee of Ministers for each of these judgments: ***Stakić***, ***Bujković*** and ***Novović*** on 4 November 2006,[88] ***Svorcan*** and ***Tomašević*** on 4 October 2017,[89] ***Đuković*** on 10 October 2017,[90] and ***Dimitrijević*** and ***Vučinić*** on 1 March 2018.[91]

(b) Individual measures

Stakić v. Montenegro – The Basic Court in Podgorica in June 2015 issued the initial decision in this case, while the High Court in Podgorica reversed that decision and in October 2016 issued the final decision. The Representative pointed out in the Action Report the existence of an effective remedy, introduced in 2007, regarding the length of court proceedings, which was not available to the Applicant at the relevant time. For compensation for non-pecuniary damage the Applicant was awarded EUR 5,017.50 which was paid within 3 months of the Court's final judgment.

Novović v. Montenegro – The Court found that the impugned proceedings had been finalized in 2009 (§ 15 of the judgment *Novović*). The request for just satisfaction of the Applicant was rejected, as it was submitted after the expiration of the time-limit.

Bujković v. Montenegro –The Court found that the proceedings at issue were finalized in 2013 (§ 19 of the judgment *Bujković*). The Applicant did not request compensation for non-pecuniary damage, and his request for compensation for pecuniary damage was dismissed. However, the European Court awarded the Applicant EUR 1,020 for costs and expenses.

Svorcan v. Montenegro – Compensation for non-pecuniary damage and costs and expenses totalling EUR 1,300 was paid to the Applicant. The Court did not award just satisfaction for pecuniary damages. The proceedings conducted before domestic court were finalized before the delivery of the judgment of the Court.

Tomašević v. Montenegro – Compensation for non-pecuniary damage and costs and expenses totalling EUR 4,300 were paid to the Applicant. The Court did not award just satisfaction

88 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)1252E
89 http://hudoc.exec.coe.int/eng?i=DH-DD(2017)986E
90 http://hudoc.exec.coe.int/eng?i=DH-DD(2017)1149E
91 http://hudoc.exec.coe.int/eng?i=DH-DD(2018)225E

for pecuniary damages. Measures to finalize the proceedings in dispute were taken and the proceedings were finalized on 2 February 2016.

Vučinić v. Montenegro – EUR 1,000 was paid to compensate for non-pecuniary damages and costs and expenses. The Court did not award just satisfaction for pecuniary damages. The proceedings conducted before the national court were finalized before the delivery of the judgment of the Court.

Đuković v. Montenegro – In the execution of the judgment, the Representative informed the relevant Basic Court of the views of the European Court and emphasised the importance of quickly finalizing the proceedings in question. As one of the proceedings was terminated at the request of the Applicant, in accordance with domestic law, the Applicant had an effective possibility to continue the proceedings whenever he wanted. Compensation for non-pecuniary damages and costs and expenses was awarded to the Applicant to the amount of EUR 5,500. As the Applicant did not submit records of their account for the payment of the stated funds, they were disposed of via a payment of a deposit to the Basic Court in Podgorica.

Dimitrijević v. Montenegro – The Applicant requested compensation for pecuniary and non-pecuniary damage, as well as for costs and expenses incurred before the domestic courts and the European Court. After the Government's response to the application, the applicant did not repeat her request, therefore, the European Court did not find that there were special circumstances in which to award just satisfaction. The proceedings before the national court were finalized before the delivery of the judgment by the European Court.

(c) General measures

In 2015 the Law on Civil Procedure was modified to improve the efficiency of civil proceedings. Changes included the prevention of multiple appeals, strict procedural time-limits, and the introduction of alternative possibilities to solving disputes.

With regard to labour disputes, especially those relating to the termination of labour contracts, domestic courts must now schedule hearings within 30 days of the preliminary hearing. First instance proceedings must be finalized within 6 months of the day the appeal is lodged. The modified Labour Act[92] founded the Agency for Peaceful Settlement of Labour Disputes, which offered the possibility of out-of-court settlements. In 2015, 3,679 labour disputes were referred to the Agency. The Agency solved 1,961 cases, 53.30% of all cases referred. This greatly contributed to the freeing of the domestic courts from ruling on labour disputes.

General measures to build capacity to ensure that civil proceedings complied with the standards of Convention were taken. In order to reduce a back log of cases, the Judicial Council set out certain capacity building measures: the referring of judges from efficient courts to courts with a greater inflow of cases; the transferring of cases from overloaded courts to less busy courts; the introduction of overtime; the presentation of awards to judges with greatest number of cases; and the assessment of the work of all courts and the individual work of judges. In 2015 57,874 cases were solved in total, 20,845 of which were backlog cases. In the higher courts 15,036 cases were closed in 2015, 3,125 of which were backlog cases. At the end of

92 Labour Act ("Official Gazette MN", no. 49/2008, 26/2009, 59/2011, 66/2012, 31/2014).

2015 there remained in the higher courts 2,947 cases, 113 of which were backlog cases. These figures show the progress that has been made in decreasing the number of backlog cases. In 2014 and 2015 the average length of proceedings at the first instance was 158 and 161 days respectively. The average length of proceedings at the second instance in 2014 and 2015 was 79 and 71 days respectively. The strategy for the reform of the judiciary, 2014-2018, was adopted in March 2014, and aims to increase the efficiency of the judiciary.

The Law on the Protection of the Right to a Trial Within a Reasonable Time in 2007 has enabled long-lasting proceedings to be accelerated on request for review, and provided for the possibility of awards of just satisfaction. The Law has been applied to court proceedings initiated after 3 March 2004. The legal remedies regulated by this Law will be analysed in detail in the part of this Analysis referring to Article 13 of the Convention.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 1 February 2017, at 1276 meeting of the Deputy of Ministers issued Resolution CM/ResDH(2017)38 by which cases ***Stakić, Bujković*** and ***Novović*** were closed.[93] On 7 December 2017, at 1302 meeting, the Deputy of Ministers issued Resolution CM/ResDH(2017)411 by which cases ***Svorcan*** and ***Tomašević*** were closed,[94] and Resolution CM/ResDH(2017)412 by which ***Đuković*** was closed,[95] and on 4 April 2018, at 1312 meeting of the Deputy of Ministers, with Resolution CM/ResDH(2018)132, cases ***Dimitrijević*** and ***Vučinić***[96] were closed.

2. Impact on the case-law

The above judgments of the European Court of Human Rights had an impact on national law. In its decision in the case ***Tpz. br. 8/17***, the Supreme Court referred to the judgment of the Court in the case of Živaljević v. Montenegro by stating: "In that regard, this court considered the following views of the European Court of Human Rights in judgments *Živaljević v. Montenegro* no.17229/04, § 72, 8 March 2011, *Počuča v. Croatia* no. 38550/02, § 30, 29 June 2006 , *Božićv. Croatia,* no 22457/02, § 26, 29 June 2006, according to which 'reasonable time' in administrative issues starts to run just after the lodging of the appeal against the decision of the first instance body which has decided on the administrative issue. Starting with this principle, and having in mind the relevant views of the European Court of Human Rights, this court appreciates that in this specific case the time did not start to run from the period which is normally to be taken into account in evaluating the reasonableness of the time within the meaning of Article 2 § 2 of the Law on the Protection of the Right to a Trial Within Reasonable Time and within the meaning of Article 6 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms".

Beside the criteria for assessing reasonable length in proceedings (the complexity of the case, the conduct of the applicant and of the relevant authorities, and what was at stake for the applicant in the dispute) mentioned in the judgment *Živaljević v. Montenegro*, the judgment in

93 http://hudoc.exec.coe.int/eng?i=001-171292
94 http://hudoc.exec.coe.int/eng?i=001-179747
95 http://hudoc.exec.coe.int/eng?i=001-179749
96 http://hudoc.exec.coe.int/eng?i=001-182349

Frydlender v. France [GC] (no. 30979/96, § 43, ECHR 2000-VII) is regularly referenced in the practice of the Supreme Court of Montenegro when deciding on requests for just satisfaction over violations of the right to a trial within reasonable time.

In the case ***Tpz. br. 16/17*** the applicant submitted requests for review which were dismissed as unfounded, even though the appeal in the labour dispute was submitted 27 years ago. After implementing the standards of the European Court, the Supreme Court of Montenegro found that the request for just satisfaction was timely even though the civil proceedings dependant upon an appeal on points of law were still not finalized and "in accordance with the case-law of the European Court of Human Rights, the proceedings are concurrent, and are a wholeness which cannot be considered partially". Furthermore, in that case, the Supreme Court of Montenegro assessed the reasonableness of the time not only according to the Article 4 of Law on Protection of Right Trial Within a Reasonable Time, but also starting from relevant principles from the aforementioned judgment *Frydlender v. France*, pointing out that the guarantee of reasonable time "emphasized the importance of executing the issuing court's decisions without delay, in order not to endanger the effectiveness and credibility of those decisions".[97]

The Supreme Court also referenced the views of the Court in ***Novović v. Montenegro***, in numerous other cases (see, in example ***Tpz. br. 18/17***, ***Tpz. br. 20/17***, ***Tpz. br. 22/17***, ***Tpz. br. 26/17***, etc.)

As already stated, in the Action Plans for judgments concerning violations of Article 6 for the length of the proceedings, general measures were introduced as part of the special Law which themselves introduced efficient and effective remedies aimed at protecting the right to a trial within reasonable time. Analysis of these remedies has been done under the analysis of Article 13 of the Convention.

iii. Article 6 § 1–execution of judgment

The right to the execution of a judgment, even if it is not explicitly stated as limb of Article 6 § 1 of the Convention, flows from the very meaning of the term "trial". The implementation of a judgment issued by any court has to be considered as an integral part of any "trial" for the purpose of Article 6 of the Convention. The Court elaborated on this rule in the judgment of *Hornsby v. Greece,*[98] pointing out that execution proceedings before national courts are included in the field of protection offered by Article 6 § 1 of the Convention.

The Court "justified" this "widening" of the right to a fair trial on the basis that the Article 6 right would be "illusory" if it was allowed for final decisions to remain unexecuted to the detriment of the applicant, and such a failure would also be in conflict with the principle of the Rule of Law. This interpretation has been very important, as a great number of violations of Article 6 § 1 have been found in cases before the European Court.

97 *H. v. France* - 1989

98 *Hornsby v. Greece*, 1997-II; 24 EHRR 250, § 40.

1. Judgments in respect of violation of right to a fair trial due to non-execution of judgment

In the cases ***Mijušković***, ***Boucke***, ***Velimirović***, ***Milić***, ***Vukelić***, ***Mijanović*** and ***Jovović***, the Applicants complained under Article 6 § 1 of the non-execution of judgments issued by national courts in their favour.

i. Analysis of judgments

(a) Relevant principles

In judgments delivered in respect of Montenegro, the Court reiterated that Article 6 § 1 of the Convention, *inter alia*, protects execution of final, obligatory court decisions, which, in the states which accept the Rule of Law, cannot remain non-executed at the damage of one party. According to that, execution of court judgments cannot be prevented, quashed or excessively long delayed.

The Court considered that unreasonably long delay of execution of obligatory judgments may lead to violation of the Convention.[99]Furthermore, executive proceedings in their own nature should be conducted expeditiously[100]and the state is obliged to organize system of execution of judgments which is efficient both in law and in practice.[101]

(b) the Court's assessment

As regards the issue of protection of the best interests of children, in the case ***Mijušković v. Montenegro*** (no.49337/07 of 21September 2010)[102]the Court especially pointed out that adequacy of a measure is to be judged by the swiftness of its implementation as the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them.

In the case ***Boucke v. Montenegro*** (*no. 26945/06,* of 21 February 2012)the Court noted that, irrespective whether enforcement is to be carried out against a private or State actor, it is up to the State to take all necessary steps, within its competence, to execute a final court judgment and, in doing so, to ensure the effective participation of its entire apparatus, failing which it will fall short of the requirements contained in Article 6 § 1.[103]

In the case ***Velimirović v. Montenegro*** (no. 20979/07 of2 October 2012)the Court noted that the judgment at issue had not been enforced until 13 November 2006 and would appear to remain unenforced, as the debtor has apparently never rendered a final decision. The Government neither contested this nor provided any evidence to the contrary.

The Court noted that impugned enforcement proceedings in the case ***Milić v. Montenegro and Serbia***[104] (no. 28359/05 of 11 December 2012)concerned the applicant's reinstatement. While

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99 *Burdov v. Russia*, no. 59498/00, ECHR 2002-III.
100 *Comingersoll S.A. v. Portugal [GC]*, no. 35382/97, ECHR 2000-IV, § 23.
101 *Fuklev v. Ukraine*, no. 71186/01, 7 June 2005,§ 84.
102 As regards violation of Article 8 also found in this case, see the part of the Analysis for that Article.
103 *Felbabv. Serbia*, no. 14011/07, 14 April 2009, § 62.
104 For violation of Article 13 in this case see part of the Analysis for that Article.

it can be accepted that some such cases may be more complex than others, the Court does not considers the present one to be of such complexity as to justify enforcement proceedings of this length. The issue was clearly of great importance to the applicant, the Convention itself requiring exceptional diligence in employment disputes.

In the case ***Vukelić v. Montenegro*** (no.58258/09 of 4 June 2013) the Court stated that the present case concerns the enforcement of a judgment against other private person. While it can be accepted that some such case may be more complex than others, the Court does not consider the present one to be of such complexity as to justify the enforcement proceedings of this length.

In the case ***Mijanović v. Montenegro***(no. 19588/06 of 17 September 2013), the Court stated that, given the finding of State liability for the debt owed to the applicant in the present case, it is noted that the State cannot cite either the lack of its own funds or the indigence of the debtor as an excuse for non-enforcement in question.

In the case ***Jovović v. Montenegro*** (no. 46689/12 of 18 July 2017)the Court in accordance with settled case-law pointed out that non-enforcement of a judgment because of a private debtor's indigence cannot be held against the State unless and to the extent that it is imputable to the domestic authorities, for example, to their errors or delay in proceedings with the enforcement.

ii. Procedure of execution

(a) Action Plans/Reports

The Government submitted Action Reports to the Committee of Ministers for each of the judgments. That for case ***Mijušković*** was submitted on 29 June 2016,[105] ***Boucke*** on 20 April 2016,[106] ***Milić*** on 29 June 2016,[107] ***Velimirović*** on 7 September 2016,[108] ***Vukelić*** on 4 November 2016,[109] ***Mijanović*** on 13 June 2016,[110] and ***Jovović*** on 29 September 2017.[111]

(b) Individual measures

Mijušković v. Montenegro - While proceedings were still pending before the European Court, the applicant was able to execute their parental rights in relation to their children and so the final judgment in question was executed. The European Court awarded just satisfaction, compensation for non-pecuniary damage to the applicant to the amount of EUR 10,000. Payment was made within the 3 months required by the Court.

Boucke v. Montenegro - The Basic Court in Herceg Novi executed the domestic judgment in accordance with the requirements of the Court, on a monthly basis the salary of the debtor was docked as necessary for payment. The Applicant did not submit a request for just satisfaction in the proceedings before the Court.

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105 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)805E
106 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)508E
107 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)806E
108 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)1041E
109 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)1253E
110 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)757E
111 http://hudoc.exec.coe.int/eng?i=DH-DD(2017)1119E

Velimirović v. Montenegro – The company ("*Marko Radović*"), which was obliged by a domestic decision to allocate a number of flats, ceased to exist. The Representative informed the legal successor to the company of the judgment of the Court, and its obligations under it. On 11 July 2016 the legal successor issued a decision on flat-allocation by which the domestic judgment was executed and the case finalized. The European Court awarded just satisfaction for non-pecuniary damage to the amount of EUR 3,600, with EUR 725 for costs and expenses, which was paid to the applicant.

Milić v. Montenegro and Serbia – The Court awarded just satisfaction to the applicant for non-pecuniary damage to the amount of EUR 7,000, which was paid within 3 months in accordance with the judgment. The decision of the domestic court ordered a State-run medical institution to pay the applicant their salary arrears has been executed, and the case was finalized.

Vukelić v. Montenegro – The Basic Court in Bar ordered the execution of the judgment through the sale of the debtor's property. The Action Report stated that this was the only available way to execute the domestic judgment in this case. The sale of the property was completed on 20 May 2014. As there were no other bidders, the Basic Court in Bar transferred the flat to the applicant. The applicant himself stated before the Basic Court in Bar that his request according to domestic judgment was thereby completely solved. In respect of non-pecuniary damage, EUR 3,600 was paid to the Applicant.

Mijanović v. Montenegro – In the execution of the judgment of the Court, individual measures were taken to pay the applicant the amount awarded by the judgment of the Basic Court in Podgorica of 24 September 2003. With this judgment, the defendant company ("Radoje Dakić") was obliged to pay EUR 159,879,33, with interest, and EUR 6,216.26 for costs and expenses. This judgment was upheld by the High Court in Podgorica on 6 July 2004. As the applicant died during the proceedings, the European Court found that his daughter had procedural legitimacy in the case (se §§ 51-56 of the judgment *Mijanović*). In the execution of the Court's judgment the Government paid EUR 319,026.60 to the daughter of the Applicant as compensation for pecuniary damage. Compensation for non-pecuniary damage was not requested by the Applicant, nor awarded by the Court.

Jovović v. Montenegro – During the proceedings before the European Court**,** the execution of the national judgment was finalised. Just satisfaction for pecuniary or non-pecuniary damage was not awarded to the Applicant.

(c) General measures

In order to implement general and preventative measures, the procedure of execution was reformed, with a more effective system introduced, including the dissemination of judgments. The Law on Enforcement and the Securing of Claims[112] was adopted in July 2011, with that law defining the rights and obligations of public enforcement officers, who are primarily responsible for execution procedure (except when the domestic courts have exclusive jurisdiction). The law also ordered the appointment of 29 Public Enforcement Officers from the

112 Law on Enforcement and Security of Claims("Official Gazette MN", no. 36/11 of 27.July 2011).

Ministry of Justice of Montenegro by 11 March 2016. In March 2014 the Ministry of Justice began implementation of the Strategy for the Reform of Judiciary 2014-2018. One of the goals of the Strategy was to improve the effectiveness of execution procedures. It has led to the establishment of an IT system and data base gathered from across different State bodies that Public Enforcement Officers will be able to use to aid their execution of judgments.

With regard to the cases mentioned above, and the prior frequency of non-enforcement of the final judgments of domestic courts, certain Action Plans have been particularly focussed on the effectiveness of legal changes in relation to the execution of judgments. For example, in the Action Reports of ***Mijušković*** and ***Boucke*** it was emphasised that the Law contained special provisions referring to the execution of decisions on child custody as well as decisions on disputes over child support. These provisions were focussed on protecting the interests of the child and preventing similar situations from occurring in the future. In the Action Report for ***Milić***, it was pointed out that the Law on Enforcement and Security of Claims involved special provisions referring to the execution of decisions in respect of the reinstatement of employees, in which it was emphasized that such proceedings should be carried out with the necessary due diligence.

The Centre for the Education of the Judiciary and State Prosecutors also held a number of workshops focussed on the training of Public Enforcement Officers, in which, among other things, special analysis was conducted of the relevant judgments as well as the case-law of the European Court. The result of these measures has been the shortening of the length of execution proceedings.

All the judgments have been translated, published in the Official Gazette of Montenegro, and delivered to relevant State institutions.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 29 June 2016, with CM/ResDH(2016)165, as the first in this group of cases, closed the case ***Boucke.***[113] At 1236 meeting of the Deputies of Ministers, on 6 September 2016, Resolution CM/ResDH(2016)201 was issued by which the case ***Mijanović*** was closed,[114] and on 14 September 2016 the 1264 meeting of the Deputy of Ministers issued ResolutionCM/ResDH(2016)225 by which the case ***Mijušković*** was closed[115] and Resolution CM/ResDH(2016)223 by which the case ***Milić*** was closed.[116] At 1286 meeting of 18 October 2016, with Resolution CM/ResDH(2016)292 the case ***Velimirović*** was closed,[117] while the case ***Vukelić*** was closed on 1 February 2017 with Resolution CM/ResDH(2017)36.[118] Finally, the case ***Jovović*** was closed on 25 October 2017 with Resolution CM/ResDH(2017)370.[119]

113 http://hudoc.exec.coe.int/eng?i=001-164899
114 http://hudoc.exec.coe.int/eng?i=001-166809
115 http://hudoc.exec.coe.int/eng?i=001-167239
116 http://hudoc.exec.coe.int/eng?i=001-167235
117 http://hudoc.exec.coe.int/eng?i=001-168359
118 http://hudoc.exec.coe.int/eng?i=001-171288
119 http://hudoc.exec.coe.int/eng?i=001-178791

2. Impact on case-law

The importance of the judgments and views of the Court considered above have been recognised by the Supreme Court of Montenegro, which has made direct references to these judgments in certain cases (i.e.***Tpz. 28/17***and***Tpz. 38/17*)**.

These judgments of the Court have also had an impact on the legislation. Namely, reform of the enforcement system was undertaken through the adoption of the new Law on Enforcement and Security of Claims and the introduction of Public Enforcement Officers, who are regulated by the Law on Public Enforcement Officers. The reform of the execution system has meant that the process of deciding on proposals for execution, except where courts have exclusive jurisdiction, has been delegated by domestic courts to Public Enforcement Officers. The new system has led to fewer cases of execution arising before the courts and an improvement in effectiveness.

iv. Article 6 § 1 - right to access to court

Similar to the execution of judgments, this aspect of Article 6 is not explicit in the text, but has been established in the case-law of the Court. Thus in the case of *Golder v. the United Kingdom*, 21 February 1975, the Court took the view that Article 6 § 1 "secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal".

The European Court found a violation of this right in two cases involving Montenegro: *Garzičić v. Montenegro* and *Radunović v. Montenegro*.

1. Judgments in respect of right to access to court

Garzičić v. Montenegro

no.17931/07

judgment of 21 September 2010

i. Analysis of the judgment

In this case, the European Court of Human Rights found a violation of the right of access to court (Article 6 § 1 of the Convention). According to the findings of this judgment, the applicant should not have suffered any detriment on account of the domestic court's failure to order the applicant to pay the difference between the court fees that had been paid and the fees that corresponded to the established values of the claim.

(a) Facts

In this case, the Applicant complained that her right to access to court had been violated by the Supreme Court's refusal to consider her appeal on points of law on its merits (appeal on points of law rejected due to value of the claim in question). Complaints also referred to violation

of Article 1 Protocol 1 and alleged discrimination by domestic courts due to disability of the applicant and failure of domestic courts to include Centre for Social Work in the proceedings.

(b) Relevant principles

Article 6 of the Convention does not impose to the contracting parties obligation to found appeal or cassation courts. Where such courts exist, guarantees from Article 6 have to be respected. For example, such court must guarantee to the parties in proceedings effective right to access to courts to found their "civil rights and obligations".[120]

"Right to a court", however, is not absolute, it is subject to limitations permitted by implication, in particular where the "conditions of admissibility of an appeal are concerned", since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation.[121]However, these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. Moreover, those limitations shall be compatible with Article 6 § 1 only if they are in accordance with relevant domestic laws and other regulations, pursue to a legitimate aim and if there is a reasonable proportionality between the means employed and the aim sought to be achieved.[122]

(c) Court's assessment

In this case the Court noted that the Civil Proceedings Act requires the plaintiff to indicate the value of the claim in dispute. When this value is set at an unrealistic level, either too low or too high, the first-instance court shall check the accuracy thereof. However, the Court considers that, even though the domestic courts have no obligation in that respect, there is no provision in the Civil Proceedings Act that would prohibit the courts from establishing the value when the plaintiff has failed to indicate it in the statement of claim. In the present case the domestic courts established the value of the claim in both the first and second remittal, taking into account the expert's findings as well as the value specified by the parties themselves. Although these values differed, the Court does not consider it necessary to determine which of the two was more accurate as both of them allowed for the appeal on points of law in accordance with Article 382 § 2 of the Civil Proceedings Act 1977. In any event, the applicant should not suffer any detriment on account of the court's failure to order the applicant to pay the difference between the court fees that had been paid and the fees that corresponded to the established values of the claim. Therefore, the Court found that there had been a breach of the applicant's right of access to the Supreme Court.

In part of Article 1 Protocol 1, the Court observed that it did not concern the regulation of civil law rights between parties under private law. In the instant case, therefore, the court's decisions against the applicant, according to the rules of private law, cannot be seen as an unjustified State interference with the property rights of the loosing party. Indeed, it is the very function of the courts to determine such disputes, the regulation of which falls within the province of domestic law and outside the scope of the Convention.[123]Therefore, this complaint

120 *Levages Prestations Services v. France*, 23 October 1996, §. 44, Report on Judgments and Decisions 1996-V.
121 *García Manibardo v. Spain*, no. 38695/97, §.36, ECHR 2000-II, and *Mortier v. France*, no. 42195/98, §. 33, 31 July 2001.
122 *Guérin v. France*, 29 July 1998, § 37, Report on Judgments and Decisions 1998-V.
123 *mutatis mutandis*, *Kuchar and Stis v. Chezch Republic* (dec.), no. 37527/97, 21 October 1998; see also *S.Ö., A.K., Ar.K. and Y.S.P.E.H.V. v. Turkey* (dec.) 31138/96, 14 September 1999; *H. V. The United Kingdom*, no. 10000/82, Decision of

is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4 thereof.

As regards discrimination, the Court noted that there is no evidence in the case files that there had been any discrimination against the applicant on any grounds. As for the involvement of the Social Care Centre, the relevant sections of the Family Law Act 1989 which was in force at the time when the proceedings were conducted, provided for legal guardianship only in respect of persons not capable of managing their own rights and interests. However, this was not the case with the applicant, whose disability was physical not mental, and who was, in addition, represented by a lawyer throughout the proceedings. Hence, this complaint must also be rejected as manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

ii. Procedure for the execution of the judgment:

(a) Action plan/report

The Government submitted an Action Report to the Committee of Ministers, on 20 June 2011.[124]

(b) Individual measures

The Supreme Court of Montenegro, in accordance with a request for the reopening of proceedings under Article 428a of the Law on Civil Procedure, reopened the proceedings which had been the subject of this application. The case was appealed on points of law and the Supreme Court decided on its merits. The Court awarded EUR 1,500 plus any taxes that might have been chargeable to the applicant. This payment was made within 3 months as required by the Court.

(c) General measures

The Supreme Court of Montenegro complied with the requirements of the case-law of the Court before this judgment had been finalized. The case-law required an appeal on points of law to the Supreme Court be an extraordinary remedy available when assessing the proper amount to be charged as a fee if the value of the dispute was not properly established in the first-instance civil proceedings. The Supreme Court of Montenegro issued a legal opinion allowing such appeals on points of law. The judgment was translated, published on the web page of the Supreme Court of Montenegro and in the Official Gazette of Montenegro, and so has been disseminated.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 14 September 2011, issued Resolution CM/ResDH(2011)136 by which the case was closed.[125]

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the Commission of 4 July 1983, DR 33 p.247 at p.257; and *Bramelind and Malmström v. Sweeden*, no.8588/79, Decision of the Commission of 12 October 1982, DR 29, p.64 at p. 82.

124 http://hudoc.exec.coe.int/eng?i=DH-DD(2011)486E

125 http://hudoc.exec.coe.int/eng?i=001-106928

Radunović and Others v. Montenegro

no.45197/13, 53000/13 and 73404/13

judgment of 24 October 2016

i. Analysis of the judgment

The case referred to a violation of the right of access to a court as the domestic courts had refused to decide on the Applicant's claim for loss of earnings lodged against the USA Embassy in Montenegro, the courts relying on the respondent party's immunity.

(a) The Facts

The case originated in three applications and reason for lodging the applications are civil proceedings conducted before the Basic Court in Podgorica, upon claims of the applicants against respondent USA – Embassy of the United States Podgorica, for finding existence of recruitment and compensation. Proceedings before national court are finalized so that claims were dismissed, and national courts declared that they lacked competence according to Vienna Convention on State Immunity. The Applicants considered that with decisions of national courts were violated their rights from Article 6 § 1 and Article 1 Protocol 12 (general prohibition of discrimination).

On the occasion of considering whether, within the meaning of Article 6 § 1, was respected right to access to court, the Court took into account that neither Montenegro nor USA ratified United Nations on Jurisdictional Immunities of States and their Property of 2 December 2004. However, neither the State Union of Serbia and Montenegro, nor the USA, at the time, opposed it.

(b) Relevant principles

Right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the principle of the rule of law, one of the fundamental aspects of which is the principle of legal certainty, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights.[126]Everyone has the right to have any claim relating to his civil rights and obligations brought before the court or tribunal. In this way Article 6 § 1 embodies the "right to a court", of which the right to access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only.

The right of access to a court secured by Article 6 § 1 is not absolute, but may be subject to limitations, these are permitted by implication since the right of access by its very nature calls for regulation by the State. The Convention has to be interpreted in the light of the rules set out in Vienna Convention of 23 May 1969 on the Law on Treaties, Article 31 § 3 (c) of which indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in

126 *Běleš and Others v. Czech Republic*, no. 47273/99, § 49, ECHR 2002-IX.

a vacuum.[127]The Court must therefore be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account, including those relating to the grant of State immunity.[128]

Measures taken by a High Contracting Parties which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the rule of State immunity.[129]It should be remembered that the Convention is intended to guarantee, not rights are theoretical or illusory but that rights are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons.[130]

In cases where the application of the rule of State immunity from jurisdiction restricts the exercise of the right of access to a court, the Court must ascertain whether the circumstances of the case justified such restriction. Such limitation must pursue a legitimate aim and that State immunity was developed in international law out of the principle *par in parem non habet imperium*, (equals do not have authority over one another) by virtue of which one State could not be subject to the jurisdiction of another. It has taken the view that the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.[131]In addition, the impugned restriction must also be proportionate to the aim pursued. In this connection, the Court observes that the application of absolute State immunity has, for many years, clearly been eroded, in particular with the adoption of the Convention on Jurisdictional Immunities of States and their Property by the United Nations General Assembly in 2004. This convention is based on Draft Articles adopted in 1991, of which Article 11 concerned contracts of employment and created a significant exception in matters of State immunity, the principle being that the immunity rule does not apply to a State's employment contracts with the staff of its diplomatic missions abroad, except in the situations that are exhaustively enumerated in paragraph 2 of Article 11. Furthermore, it is a well-established principle of international law that a treaty provision may, in addition to the obligations it creates for the Contracting Parties, also be binding on States that have not ratified it in so far as that provision reflects customary international law, either "codifying" it or forming a new customary rule. Consequently, Article 11 of the In-

127 *Fogarty v. the United Kingdom [GC]*, no. 37112/97, § 35, ECHR 2001-XI (extracts).
128 *Sabeh El Leilv. France [GC]*, no. 34869/05, § 48, 29 June 2011.
129 *Aït-Mouhoub v. France*, 28 October 1998, § 52, Report on Judgments and Decisions 1998-VIII.
130 *Fayed v. the United Kingdom*, 21 September 1994,§ 65, Seria A no. 294-B.
131 See *Sabeh El Leil*, above cited, § 52.

ternational Law Commission's 1991 Draft Articles, as now enshrined in the 2004 Convention, applies under customary international law, even if the State in question has not ratified that convention, provided it has not opposed it either.[132]

(c) the Court's assessment

In the specific case, while deciding on request of the first Applicant, the Basic Court only generally considered that work in embassies may be "very sensitive or of a confidential nature", without further assessment whether the job of the applicant really was of sensitive or confidential nature. While the court confirmed that, generally, there are limitations in State immunities in labour disputes, neither this, nor any other domestic court which acted upon requests of Applicants, took into account provisions from Article 11 of the Convention 2004, especially exceptions stated therein, which must be strictly interpreted.

The Court found that there had been violation of Article 6 § 1 of the Convention, considering that by rejecting applicant's claim for compensation relying on State immunity without giving relevant and sufficient reasons, and notwithstanding the applicable provisions of international law, as well as section 28 of the Civil Procedure Act and Resolution on Conflict of Laws and Regulations of other States Act, the Montenegrin courts failed to preserve a reasonable relationship of proportionality. They thus impaired the very essence of the applicants' tight of access to a court.

ii. Procedure for the execution of the judgment

(a) Action Report

The Government submitted to the Committee of Ministers an Action Report on 19 June 2017.[133]

(b) Individual measures

The applicants did not submit a request for the reopening of the case under Article 428a of the Law on Civil Procedure within the time-limit established by this Article (3 months from the final judgment of the European Court). With regards to just satisfaction, the Court found that in the present case, an award of just satisfaction could only be based on the fact that the applicants did not have the benefit of the guarantees provided by Article 6. The Court ruled that the applicants suffered the loss of real possibilities, except for the first applicant who did not submit their claim for pecuniary damages before the domestic courts (see § 86, judgment *Radunović and Others*). EUR 3,600 was paid to the first applicant for non-pecuniary damage, EUR 19,000 was paid to the second applicant for pecuniary and non-pecuniary damage, and EUR 22,000 was paid for pecuniary and non-pecuniary damage to third applicant. For costs and expenses EUR 9,623.50 was paid to the parties jointly.

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132 See *Sabeh El Leil*, above cited, § 54.

133 http://hudoc.exec.coe.int/eng?i=DH-DD(2017)719E

(c) General measures

In order to execute the judgment, a set of training sessions were implemented by the Centre for the Training of the Judiciary and State Prosecution, the Supreme Court of Montenegro, the AIRE Centre in London, and the "Horizontal Programme for the Western Balkans and Turkey" implemented by the Council of Europe. These trainings emphasized the conclusions of the European Court in this judgment, especially that in labour disputes with elements of state immunity, is necessary to examine whether the job of the relevant person was really of a sensitive or confidential nature. The judgment was translated, published and distributed, and it is used for the education of the judiciary.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 21 February 2018, at 1308 meeting of the Deputies of Ministers issued Resolution CM/ResDH(2018)64 by which the case was closed.[134]

2. Impact on the case-law

The judgment in ***Garzičić*** has had a great impact on national case-law, especially the judgments of the Supreme Court of Montenegro.

Specifically, the Supreme Court of Montenegro in its judgments Rev. br. 941/16 and Rev. br. 598/17 changed its approach in assessing the admissibility of appeals on points of law, as before this judgment such appeals were dismissed as inadmissible.

The Supreme Court, in its judgment ***Rev. br. 941/16***, stated that "in the claim is not stated the value of the dispute", and at the hearing of 27 January 2016 the court stated that the plaintiff defined the value of the dispute at EUR 3,000. The Defendants did not contest this valuation of the dispute, nor did they determine the value of the dispute otherwise. Nor did the court, *ex officio*, before beginning discussions of the main issue, verify the accuracy of the defined value of dispute. Therefore, the present issue remained valued at EUR 3,000 as defined in the first instance judgment, which, in accordance with Article 397 § 2 of Law on Civil Procedure which was in force at the time of submitting the claim in this dispute, did not allow appeals on points of law nor access by the plaintiff to the Supreme Court. According to the findings of this court, the formalistic interpretation of procedure in relation to the allowing of appeals on points of law would be to the detriment of the parties and lead to a violation of the right to a fair trial by denying the Supreme Court access all statements filed in relation to appeals on points of law. This court found that failures of the first instance court to assess the accuracy of the defined value of the dispute in a manner provided for by law would lead to a denial of the rights of the plaintiff to a fair trial as it would prevent access to a remedy (an appeal on points of law), diminishing and weakening the very essence of the right.

The Supreme Court of Montenegro, in its decision in the case ***Rev. br. 598/17***, assessed the allowance of an appeal on points of law "according to the law which was in force at the time at which the value of the dispute in the claim was established. According to Article 397 § 3 ("Official Gazette RMN", no. 22/04), an appeal on points of law is not allowed in property

134 http://hudoc.exec.coe.int/eng?i=001-181714

disputes when the claim does not relate to the amount of money, the delivery of an object, or the committing some other action if the value of the disputed matter does not exceed EUR 5,000. As the value of the dispute in this claim is EUR 5,000, it follows that it does not exceed the relevant value for the assessment of allowing appeals on points of law. However, as the first-instance court did not assess the value of the dispute, which it was obliged to do, and having in mind that the location, structure and area of the immobility indicate that the value of the dispute in the claim had been set unrealistically and undervalued the properties at issue, this court finds that the value of the dispute quite certainly exceeds the relevant value for allowing an appeal on points of law, this being the reason why it is allowed".

Even though it is not directly linked to the issue of defining the value of a dispute, a representative example can be taken from the judgment of the Supreme Court of Montenegro in ***Rev. br. 1166/15*** which refers to the right of access to court and the direct implementation of the standards of the European Court of Human Rights: "the interests of the parties are not regularly assessed in the proceedings and priority should be given to the interests of the plaintiff, which would go beyond the limitations of national legislation, with the aim of meeting the requirements of Article 6 of the Convention, enabling the plaintiff to contest the procedure of finding paternity".

The Administrative Court of Montenegro gave similar reasoning in its decision in ***U br. 4134/2016*** when it stated: "In order to enable the public authorities to intervene in the execution of judgments in relation to the right to family life, it is necessary, in accordance with Article 8 § 2 of the Convention, for the action to be provided for by law, even if it is a necessary measure in democratic society in the interest of national security. However, according to the opinion of the European Court of Human Rights, the first condition - to be provided for by law - was not met, as while there was a relevant law which regulated limits to the right to a private life, the quality of law must also be taken into consideration in an assessment of its compatibility with the rule of law. Even though it refers to national security, and principles of legality and rule of law, the Court requires that measures which have an impact on fundamental human rights must be the subject of adversarial proceedings before an independent body, competent to examine evidence and the reasons for decisions, and the party must have the possibility of contesting allegations that national security is endangered."

Domestic courts have been attempting to eliminate excessive formalism in relation to the right of access to a court. An example is the decision of the High Court in Podgorica in ***Gž. br. 3987/17***, which stated that "the appendixes which the proposer submitted with their proposal for the recognition of a foreign court decision, enabled the first instance court to act upon the submitted proposal, and that the limitation imposed by the first instance court, by rejecting the proposal solely due to the failure to state in that proposal his name and family name, address and residence, would limit the proposer's right of access to a court."

v. Article 6 § 1 - Right to a reasoned decision

The right to a reasoned decision means that courts are obliged to publish the reasoning for their decisions in civil and criminal proceedings. However, this rule should not be understood as requiring a detailed answer for every argument,[135] but only the key issues relevant to the outcome of the case.

The right to a reasoned decision is applied to both appellate and first instance decisions, however decisions on appeal do not require reasoning in such great detail. It is sufficient in appellate courts, if said court agrees with the reasoning of the basic or lower appellate courts, to simply endorse the reasoning of those courts, or to point out compliance with it in another manner.[136] The key requirement in such cases is for the appellate court to show that they did not merely endorse without further ado the findings reached by a lower court,[137] or that they refused the appeal without any real consideration of the issue.[138] In other cases, the dismissal of appeals by the appellate courts due to the appeal being manifestly ill-founded, is not considered to be in violation of Article 6.[139]

The European Court delivered one judgment against Montenegro in which it found a violation of the right to a reasoned judgment: *Tripcovici v. Montenegro*.

1. Judgments in respect of the right to a reasoned judgment

Tripcovici v. Montenegro

no. 80104/13,

judgment of 7 November 2017

i. Analysis of the judgment

In this case the European Court found violation of Article 6 § 1 of the Convention, i.e. violation of the right to a reasoned judgment, as the decision of the High Court in Podgorica by which the applicants' claim is rejected as submitted out of time, was not based on law provisions, domestic case-law or other justified reason.

(a) Facts

The Applicants complained on violation of Article 6 § 1 of the Convention due to inability to access to court, considering decision of the High Court in Podgorica as arbitrary. Likewise, they complained about violation of Article 1 Protocol 1 for interference with their property rights.

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135 *Van de Hurk v. Netherlands*, 19 April 1994 § 61.
136 *Garcia Ruiz v. Spain [GC]*, 1999-I, 31 EHRR 589;
137 *Helle v. Finland*, 1997-VII
138 *Lindner and Hammermayer v. Romania*, (2002).
139 See *X protiv Germany*, no.8769/79, 25 DR 240 (1981); Sentences for „abusive" complaints do not request more detailed reasoning: *Les Travaux du Midi v. France* no.12275/86, 70 DR 47 (1991) and *GL v. Italy*, no.15384/89, 77-A DR 5 (1994);

The Applicants instituted the civil proceedings before the court for trespass, after they noticed trespass at issue on 13 June 2009. They had a right to institute the proceedings for trespass within 30 days, the last day of which, in their case, fell on days of national holidays. They filed their claim on 15 July 2009, which was the first day after holidays. The Basic Court accepted as filed in a due time, contrary, the High Court in Podgorica considered that provided time-limit was mandatory, which means that it could not be shifted, and dismissed the claim of the Applicant as submitted out of time. However, on that occasion the High Court in Podgorica did not refer to any law provision as support for the conclusion or to any case-law in that respect.

(b) Relevant principles

The Court reiterated that in principle it is not its role to question the national courts' interpretation of domestic law[140]or to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention[141]. Unless the interpretation of domestic law is arbitrary or manifestly unreasonable the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention.

(c) The Court's assessment

In the present case the Court considered that section 108 of the Civil Procedure Act provided in most clear terms that the time-limit for filing a claim expired on the first working day after the national holiday. The Court noted that there is nothing in the decision of the High Court or in the observations of the Government that would justify why this rule, which was drafted in general terms and which was not contradicted by any relevant case-law, should not be applicable. In particular, the High Court did not cite any provision whatsoever or any relevant domestic case-law, or even any reason, in order to explain why section 108 (of the Civil Procedure Act) was not applicable.

The Court therefore considered that the High Court's decision to declare the applicants' claim out of time was manifestly unreasonable. In view of the above, the Court considered that the applicants did not have a fair hearing and finds accordingly that there had been a violation of Article 6 § 1 of the Convention

In respect to allegations on violation of Article 1 Protocol 1, the claim is rejected according to the Article 35 § 1 of the Convention, due to non-exhausting of domestic remedies.

Decision of the Court does not mean that there are no substantive-legal time-limits, but that decision should be reasoned in details in respect of difference between substantive-legal and procedural time-limits.

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140 *Adamsons v. Latvia*, no. 3669/03, 24 June 2008, § 118.

141 *García Ruiz*, § 28.

ii. Procedure for the execution of the judgment

a) Action Plan/Report

The Government submitted an Action Report on 4 September 2018 to the Committee of Ministers.142

(b) Individual measures

The Applicant, in accordance with Article 428a of the Civil Procedure Act had the possibility of filing a request for the reopening of the case, which he did not do within the provided time-limit. The European Court rejected their request for compensation for non-pecuniary damage after the expiration of the provided time-limit.

(c) General measures

With the aim of "increasing awareness" of which measures are necessary for domestic courts in applying the relevant law in accordance with Convention standards, the Centre for Education of the Judiciary and State Prosecution held a number of education and training sessions in 2017 and 2018. These were particularly focussed on issuing reasonings for decisions. In that respect, the Supreme Court of Montenegro, in cooperation with the AIRE Centre and the British Embassy, in February 2018 presented the publication "Overview of the case-law of the European Court of Human Rights in Respect of the Right to a reasoned Court Decision". The judgment has also been translated, published and disseminated.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 17 October 2018, at 1327 meeting of Deputies of Ministers issued Resolution CM/ResDH(2018)386 by which the case was closed.[143]

2. Impact on the case-law

The issuing of the reasoning of a judgment is an inevitable part of every proceeding and is an issue that courts of higher instance are particularly engaged with, especially when deciding on a claim or appeal on points of law. The existence of reasoning is inevitable when deciding on someone's rights or obligations, whether it is an order, decision or judgment. The judgment in *Tripcovici* shows that a failure of the court to *"adequately"* state the reasoning by which they formed their judgment leads to violation of the right to a fair trial. A special obligation also lies on second instance courts which are obliged to examine, in every claim, whether the initial judgment was reasoned, not only in accordance with national law, but also in accordance with the standards of the European Court of Human Rights. In such reasonings it is not enough (in the majority of cases) just to refer to certain provisions and make an impression of lawfulness, instead it must explain certain law provisions, their interpretation, and why they are relevant to that specific legal issue.

142 http://hudoc.exec.coe.int/eng?i=DH-DD(2018)835E
143 http://hudoc.exec.coe.int/eng?i=001-187390

vi. Article 6 § 2 - presumption of innocence

This provision of the Convention, *inter alia*, requires judges not to begin, when carrying out their duties, with the preconceived notion that the accused has committed the offence with which they are charged. The burden of proof must be on the prosecution and any doubt should benefit the accused.[144]

The European Court has delivered one judgment against Montenegro in which it found a violation of the presumption of innocence. The judgment had an important impact on national case-law.

1. Judgments in respect of right to presumption of innocence

Mugoša v. Montenegro

no.76522/12

judgment of 21 June 2016

i. Analysis of the judgment

As already stated in the part of the Analysis for Article 5, the judgment refers to violation Applicant's right to freedom due to detention in the period from 18 to 22 September 2011, as Order on extension of detention is issued four days after expiration of the legal time-limit for supervising detention (violation of Article 5 of the Convention), as well as to the violation of the principle of presumption of innocence of the Applicant by the High Court, which declared itself on the quilt of the Applicant before he was finally convicted (violation of Article 6 of the Convention).

(a) Facts

The Applicant complained on violation of Articles 5 and 6 of the Convention, especially: (a) that his detention between 18 and 22 September 2011 had been unlawful, (b) the Constitutional Court's decision lacked reasoning and (c) the presumption of innocence had been breached

(b) Relevant principles

Presumption of innocence from Article 6 § 2 will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty. A premature expression of such an opinion by the tribunal itself will inevitably run foul of the said presumption.[145]

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144 *Barabera, Messegue and Jabardo v. Spain*, 6 December 1988 § 77.

145 *Garycki v. Poland*, no. 14348/02, § 66, 6 February 2007; *Perica Oreb v. Croatia*, no. 20824/09, §140, 31 October 2013;

(c) The Court's Assessment

The High Court stated, in its order on extension of detention that the applicant "in an insidious manner and for material gain, deprived X of his life [...] by shooting him [...]".Thereby, it had pronounced the applicant's guilt before it was proved according to law. Moreover, subsequent courts failed to rectify this on appeal, including the Constitutional Court itself.

In view of the above, the Court found that there had been violation of Article 6 § 2 of the Convention in the present case.

ii. Procedure for the execution of the judgment

(a) Action Plan/Report

The Government submitted to the Committee of Ministers an Action Report on 24 March 2017.[146]

(b) Individual measures

On 11 March 2015 the High Court in Podgorica found the Applicant guilty, for which he is currently serving a prison sentence. The Applicant was paid compensation for non-pecuniary damage and for costs and expenses to the total amount of EUR 7,150. The Applicant did not request just satisfaction for pecuniary damage and so was not awarded any.

(c) General measures

Measures were taken to harmonize the case-law of national courts in respect of detention orders and detention supervision. In 2017 the Supreme Court of Montenegro adopted two obligatory legal opinions: under the first opinion, the courts were obliged to consistently adhere to time-limits for the supervision of detention under Article 179 § 2 and Article 198 § 1 of the Criminal Procedure Code, transgression of these limits violating the right to freedom and safety of persons. The second opinion established that in ordering or extending detention the court has to clearly state the existence of reasonable doubt that the accused committed the criminal offence and must avoid terms which imply certainty that accused is the perpetrator of the criminal offence. The judgment was translated, published and distributed, and it is used in activities for the education of judges at the Centre for the Education of the Judiciary and State Prosecution.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 10 May 2017, at 1286 meeting of Deputies of Ministers issued Resolution CM/ResDH(2017)141 by which the case was closed.[147]

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and *Karaman v. Germany*, no 17103/10, § 63, 27 February 2014

146 http://hudoc.exec.coe.int/eng?i=DH-DD(2017)363E

147 http://hudoc.exec.coe.int/eng?i=001-173897

2. Impact on the case-law

The European Court pointed out that the domestic court, in issuing their decision to order detention, used terms which suggested that the accused was guilty even before his guilt was established by the judgment.

The Court's judgment, in accordance with Article 9 of the Constitution of Montenegro, is a source of law in Montenegro, and the aim of the judgment was to, in accordance with the obligations taken on by the State in ratifying the Convention, prevent further violations of that right. This requires therefore the adequate execution of the Court's judgments. The Criminal Department of the Supreme Court of Montenegro consequently published the legal opinion **Su.V.br. 6/17** on 17 January 2017: "*In decisions on ordering or extending detention, the court has to clearly state the existence of reasonable doubt that the accused committed the criminal offence and must avoid terms that imply any certainty that the accused is the perpetrator of the criminal offence*".

In the above stated legal opinion, the Supreme Court of Montenegro reiterated that the presumption of innocence in criminal proceedings is established as a constitutional principle and provided by article 35 § 1 of the Constitution of Montenegro. The opinion also pointed out that for ordering and extending the detention for the accused, under Article 30 § 1 of the Constitution of Montenegro, Article 5 § 1 (c) of the European Convention, and Article 175 § 1 of the Criminal Procedure Code, it is necessary to emphasise the existence of reasonable doubt that the accused committed the criminal offence.

V Article 8 –Right to Respect for Private and Family Life

Article 8

Right to respect for private and family life

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 wellbeing of the country, for the prevention of disorder of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 protects the right to a private and family life, home, and correspondence. In considering whether this right has indeed been violated the Court, first of all, must examine if there was interference with the right, and whether there was a positive obligation on the State to protect that right. the limitation of rights is allowed only if such a limitation is in accordance with the law, regulated by law and necessary in democratic society, in order to accomplish a legitimate aim. In assessing whether an interference is necessary in a democratic society, the Court often has to balance the rights of the applicant which are guaranteed by Article 8 with the interests of third parties.[148]

The European Court has delivered three judgments against Montenegro in which they found a violation of the right to private life: *Mijušković v. Montenegro*, *Antović and Others v. Montenegro*, and *Alković v. Montenegro*. In the judgment of *Alković* a violation of Article 8 was found in conjunction with Article 14, therefore the analysis of that judgment has been organised under Article 14, as being a representative example of a violation of the prohibition of discrimination.

148 Guide on Article 8 of the Convention – Right to respect for private and family life, Council of Europe Human Rights Handbooks Series.

1. Judgments in respect of Article 8

Mijušković v. Montenegro

no. 49337/07

judgment of 21 September 2010

i. Analysis of the judgment

The first judgment against Montenegro in which is found violation of Article 8 of the Convention, for failure of Montenegrin authorities due to which the Applicant was unable to exercise her parental rights.

(a) Facts

The Applicant complained of the belated enforcement of a final custody judgment, as well as the respondent State's prior failure to enforce an interim order of exercising that right.

(b) Relevant principles

The Court repeatedly held that Article 8 includes a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such action.[149]

Therefore, the Court should be convinced that state authorities took all necessary steps to facilitate reunion of children and parents within reasonable limits of each individual case.

The adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them.

(c) The Court's assessment

The impugned situation lasted nearly four years and nine months after the decision of Social Care Centre in Nikšić was rendered, that is three years and seven months after the court judgment to the same effect became final. During this time the competent national authorities had: (a) attempted only once to enforce the Social Care Centre in Nikšić decision, (b) fined V.K. only once, two years and nine months after the applicant had sought the enforcement of the judgment, (c) attempted the forcible transfer only after the case had been communicated to the respondent Government, and (d) enforced the judgment within less than three months from the communication of the case.

Having regard to the facts of the case, including the passage of time, the best interests of A and B, the criteria laid down in its own case-law and the Government's submissions, notwithstand-

149 *Ignaccolo-Zenidev. Romania*, no. 31679/96, §. 94, ECHR 2000-I; *Nuutinen v. Finland*, no. 32842/96, §. 127, ECHR 2000-VIII; and *Sylvester v. Austria*, no. 36812/97 and 40104/98, §. 58, 24 April 2003.

ing the State's margin of appreciation as well as the fact that A and B were eventually surrendered to the applicant, the Court concluded that the Montenegrin authorities have failed to make adequate and effective efforts to execute the Social Care Centre in Nikšić decision and the final court judgment in a timely manner.

ii. Procedure for the execution of the judgment:

(a) Action Plan/Report

The Government submitted to the Committee of Ministers an Action Report on 29 June 2016.[150]

(b) Individual measures

While the proceedings before the European Court were still pending, the Applicant was able to exercise their parental rights, and so the judgment at issue was executed and the necessary individual measure carried out (§§ 34 and 86 of the judgment *Mijušković*)**.** The European Court awarded just satisfaction for non-pecuniary damage to the applicant to the amount of EUR 10,000. The payment was made within three months as required by the judgment of the European Court.

(c) General measures

In response to this case, the same general measures were presented to the Committee of Ministers as in the case of *Bijelić v. Montenegro*. Most notably the adoption of the Law on Enforcement and the Securing of Claims. However, special emphasis was given to the fact that the new Law on Enforcement and the Securing of Claims included special provisions referring to the execution of decisions on the exercising of parental rights, particularly concerning the protection of the interests of children and the prevention of similar cases in the future. To increase awareness, the Centre for the Training of the Judiciary and State Prosecution held a number of workshops to educate prosecutors and judges to pay special attention to the lessons of the present judgment in order to avoid similar mistakes. The result of these measures has been decreases in the length of execution proceedings, especially in cases concerning the interests of children.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 14 September 2016, at 1264 meeting of Deputies of Ministers issued Resolution CM/ResDH(2016)225 by which the case was closed.[151]

150 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)805E
151 http://hudoc.exec.coe.int/eng?i=001-167239

Antović and Mirković v. Montenegro

no. 70838/13

judgment of 28 November 2017

i. Analysis of the judgment

The case refers to violation of the right to respect of private life of professors due to unlawful installation and use of video surveillance equipment in university auditoriums.

(a) The facts

The Applicants are professors at the School of Mathematics of the University of Montenegro, where was introduced video surveillance in amphitheatres where classes were held, with the aim to be provided safety of property and people and surveillance of teaching. The applicants complained to the Personal Data Protection Agency about the video surveillance and the collection of data on them without their consent. Agency inspectors found that the video surveillance is in accordance with the Personal Protection Data Act. However, the Agency Council, upon objection, held that the reasons for introduction of video surveillance provided by the Act had not been met, given that there was no evidence that there was any danger to the safety of people and property in the auditoriums, still less to confidential data, and that the surveillance of teaching was not among the legitimate grounds for video surveillance.

The Basic Court in Podgorica dismissed the claim for compensation for violation of the right to respect of private life, finding that the university was a public institution performing activities of public interest, teaching being one of them, and that it was thus not possible for video surveillance of the auditoriums as public places to violate the applicants' right to respect for their private life. The High Court in Podgorica upheld the first instance judgment.

(b) Relevant principles

"Private life" is a broad term which is not susceptible to exhaustive definition and it would be too restrictive to limit this notion only to the "inner circle" in which the applicant may live his own personal life as he chooses, and exclude therefrom entirely the outside world not encompassed within. Thus, article 8 guarantees a right to "private life" in a broad sense, including right to "private social life", that is possibility for the individual to develop his or her social identity. The Court already found that the notion of "private life" may include professional activities or activities taking place in public context. In order to ascertain whether the notion "private life" is applicable, the Court on several occasions examined if individuals had a reasonable expectations that their privacy would be respected and protected. In that context, it is stated that reasonable expectation of privacy is significant, though not necessarily conclusive factor.

(c) The Court's assessment

The Court noted that the domestic courts did not examine the question of the acts being in accordance with the law given that they did not consider the impugned video surveillance to be an interference with the applicants' private life in the first place.

Furthermore, the Agency explicitly held that there was no evidence that either property or people had been in jeopardy, one of the reasons to justify the introduction of video surveillance, and the domestic courts did not deal with that issue at all. The Government, for their part, neither provided any evidence to the contrary in that regard nor showed that they had even considered any other measure as an alternative beforehand.

Given that the relevant legislation explicitly provides for certain conditions to be met before camera surveillance is resorted to, and that in the present case those conditions have not been met, and taking into account the decision of the Agency in this regard (in the absence of any examination of the question by the domestic courts), the Court cannot but conclude that the interference in question was not in accordance with the law, a fact that suffices to constitute a violation of Article 8.

ii. Procedure for the execution of the judgment

a) Action plan/report

The Government submitted to the Committee of Ministers an Action Report on 28 August 2018.[152]

(b) Individual measures

Prior to the delivery of the judgment of the European Court of Human Rights, the impugned video surveillance apparatus was removed from the auditoriums on 27 January 2012, and the data that had been collected was erased. Before the initiation of proceedings before the European Court the applicants' claim before the Basic Court in Podgorica was dismissed on the basis that they did not prove a violation of their right to privacy (see §§ 13-17 of the judgment *Antović and Mirković*). This was considered a violation by the Court and so the applicants had the possibility of reopening the proceedings under Article 428a of Law on Civil Procedure. In accordance with these provisions, the proceedings could be reopened before the first instance court in Montenegro which had issued the violating decision in order decision by which the right or fundamental freedom was violated to be amended. The applicants did not submit a request for the reopening of the procedure within the time-limit prescribed by the provisions of this article (3 months from the final judgment of the European Court). EUR 3,669.50 was paid to the applicants for non-pecuniary damages and costs and expenses.

(c) General measures

According to the findings of the Court, the violation occurred through the unlawful video surveillance of the applicants as well as the non-compliance of domestic law with the Convention. Even though the Basic Court in Podgorica did not find a violation of the applicants' right

152 http://hudoc.exec.coe.int/eng?i=DH-DD(2018)833E

to privacy, the national Agency for the Protection of Personal Data found that the installation of the impugned video surveillance was contrary to the Personal Protection Data Act, especially Articles 10, 35, and 36, and ordered its removal. In that respect, the Personal Protection Data Act under consideration was in accordance with Convention standards and therefore its reform was unnecessary. To execute the Court's judgment, between 2017 and 2018 the Centre for Education of the Judiciary and State Prosecution organised judicial training sessions to aid the implementation of Article 8 of the Convention. These training sessions put a special emphasis on the conclusions of the European Court in this judgment and the consistent application of domestic legislation in similar cases. They particularly emphasised that that every instance of video surveillance of an employee at his/her work place is a significant interference in their private life, which can be justified only if it is in accordance with provisions of Article 8 § 2 of the Convention, i.e. if it is in accordance with the law, it has one or more legitimate aims, and if it is necessary in democratic society in order to achieve those aims. The judgment was translated, published and distributed and it is used in activities for the education of judges in the Centre for Education of the Judiciary and State Prosecution.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 17 October 2018, at 1327 meeting of Deputy of Ministers issued Resolution CM/ResDH(2018)385 by which the case was closed.[153]

2. The impact on the case-law

Montenegrin courts have not referred directly to the judgment in ***Mijušković***. However, they have applied the same principles derived from judgments of the Court involving other States in which non-execution of the judgment usually led not only to a violation of the right to a fair trial, but also to the violation of some substantive rights. In the case of the Basic Court in *Nikšić* ***I.br.56/13*****,** involving the determination of child custody, the party referred to this judgment and the domestic court took it into consideration insomuch as it took all the actions established in the Law on the Enforcement and Securing of Claims for execution to be effective. The proceedings in this case were terminated as the court considered the judgment of the European Court in the case of *Damnjanovićv. Serbia* (no.5222/07, §§ 80-81 of 18 November 2008) in which is stated that "children [were] handed over to the applicant, but the applicant had been unable to physically assume custody of them as they had started crying and refused to leave the respondent ... The Court found that the State has taken the necessary steps to enforce the interim custody order in question". Therefore, even though the child was not handed over to the mother, the domestic court took all the actions necessary for the judgment be executed. The violation of Article 8 in *Mijušković* referred to the fact that "the Montenegrin authorities have failed to make adequate and effective efforts to execute the decision". However, the Basic Court in Nikšić did make these efforts and so, although the judgment could not be executed, the applicant's rights had not been violated. The relevant courts must continuously take all actions possible to finalize execution of judgments, as to do the contrary could result in a violation of the substantive law.

153 http://hudoc.exec.coe.int/eng?i=001-187388

Similarly, domestic courts have not made explicit reference to the judgment in ***Antović and Mirković***, but they have stated that when a question of privacy is raised before them, they must, in accordance with the requirements of the European Court, examine the legality, legitimacy and proportionality of the interference. They should also examine whether that interference with the right to privacy is in accordance with the law, and that law meets the standards of the Court.

This report should shortly mention that the views of the European Court in its judgment in ***Alković***, point out that violence, as well as threats which could cause justified fear that violence could really be used, require an effective investigation, in order to protect the physical and psychological integrity of the individual within the meaning of Article 8 of the Convention. This obligation is even greater if there are elements that point to racially motivated violence.

VI Article 10 –Freedom of Expression

Article 10

Freedom of Expression

1. Everyone has the right to freedom of expression. The 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 and 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.

Freedom of expression, a key value of any democratic society, is protected by the courts. Article 10 § 2 defines the values that are protected, but also regulates the circumstances that can lead to legitimate interferences with this freedom. The components of the right to freedom of expression are the freedom to have an opinion, and the freedom to receive and impart information and ideas.[154] The obligations of the State under this article are positive and negative. The negative obligation obliges States to refrain from any unlawful interference with the exercising of this right, while the positive obligation obliges States to provide an environment conducive for respect for freedom of expression and to offer protection to individuals from unlawful interference by others. The Court uses the triple test to establish whether there has been a violation of this Article. It examines if the interference was regulated by law, whether it had a legitimate aim, and if the limitation was necessary in a democratic society.

The European Court of Human Rights has issued 2 judgments in which a violation of Article 10 has been found: *Šabanović v. Montenegro* and *Koprivica v. Montenegro*.

154 Freedom of expression – Guide for implementation of Article 10 of the European Convention on Human Rights

1. Judgments in respect of Article 10

Šabanović v. Montenegro

no.5995/06

judgment of 31 May 2011

i. Analysis of the judgment

With this judgment is found violation of the right to freedom of expression of the applicant who was convicted to suspended prison sentence for defamation- Even though interference in the freedom of expression was legal and had legitimate aim, according to the finding of the European Court *"it was not necessary in democratic society"*.

(a) Facts

The Applicant complained for breach of his right to freedom of expression in the proceedings in which it is pronounced suspended sentence with surveillance period of two years, for defamation.

Namely a Montenegrin daily newspaper published an article about the quality of the water in the Herceg-Novi area in which was stated that all of the current water sources contained various bacteria. These assertions were based on a report produced by the Institute for Health of Montenegro, which had been requested by the Chief State Water Inspector, apparently with a view to exploring the possibility of connecting additional sources to the water-supply grid. At that time the Applicant was Director of a public corporation "The Water Supply and Sewage Systems" and a member of an opposition political party, on the same day, regarding the article, held a press conference where he stated that water is safe for citizens, and that the Chief State Water Inspector promote interests of two private legal entities, ordered by governing party. After that, the Head Inspector lodged a private criminal action against the applicant for defamation, claiming that the latter's statements were untrue and, therefore, harmful to his honour and reputation. The Basic Court in Podgorica found the applicant guilty and sentenced him to three months of imprisonment with supervision period of two years. The High Court in Podgorica upheld this judgment, after which the application is lodged to the European Court.

(b) Relevant principles

As the Court has often observed, the freedom of expression enshrined in Article 10 constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of that Article, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb.[155]

155 *Castells v. Spain*, 23 April 1992, § 42, Seria A no. 236, and *Vogt v. Germany*, 26 September 1995, § 52, Seria A no. 323.

The Court has also already upheld the right to impart, in good faith, information on matters of public interest even where the statements in question involved untrue and damaging statements about private individuals[156]and has emphasised that it has to be taken into account whether the expressions at issue concern a person's private life or their behaviour and attitudes in the capacity of an official[157].

The Court notes that the nature and severity of the penalty imposed, as well as the "relevance" and "sufficiency" of the national courts' reasoning, are matters of particular significance when it comes to assessing the proportionality of an interference under Article 10 § 2[158]and reiterates that Governments should always display restraint in resorting to criminal sanctions, particularly where there are other means of redress available.

(c) The Court's assessment

The Court notes that both member States of the then State Union of Serbia and Montenegro were responsible for the protection of human rights in its territory. Given the fact that the entire criminal proceedings have been conducted solely within the competence of the Montenegrin courts, the Court finds the applicant's complaint in respect of Montenegro compatible *ratione personae* with the provisions of the Convention. For the same reason, however, his complaint in respect of Serbia is incompatible *ratione personae*, within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4 of the Convention.

Turning to the present case, the Court noted that the final criminal judgment at issue obviously amounts to an interference with the applicant's right to freedom of expression. Since the conviction was based on the Criminal Code, this interference must be deemed as "prescribed by law" within the meaning of Article 10 § 2. Further, the judgment at issue was adopted in pursuit of a legitimate aim, that is, "for the protection of the reputation of others".

While evaluating proportionality of interference of the state in the freedom of expression, he Court had in mind that the applicant criticized the Chief Inspector and that criticism concerned his behaviour and attitudes in his capacity as an official, rather than his private life. As noted earlier in the text of the judgment, senior civil servants acting in an official capacity are subject to wider limits of acceptable criticism than private individuals.

For the Court, the applicant's remarks, even if it is accepted that they were a statement of fact rather than a value judgment, were not a gratuitous attack on the Chief Inspector but rather, from the applicant's perspective, a robust clarification of a matter under discussion which was of great public interest.

Further, the Court notes that the domestic courts, notwithstanding the applicant's encouragement to do so, failed to situate his remarks in a broader context, namely the debate generated by the quality of the drinking water in the area concerned. In view of this rather restricted approach to the matter, it can scarcely be said that the reasons given by the domestic courts can be considered relevant and sufficient.

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156 *Bladet Tromsø and Stensaas v. Norwey [GC]*, no. 21980/93, ECHR 1999-III.

157 *Dalban v. Romania [GC]*,no. 28114/95, § 50, ECHR 1999-VI.

158 *Cumpănă and Mazăre v. Romania [GC]*, no. 33348/96, § 111, ECHR 2004, and *Zana v. Turkey*, 25 November 1997, § 51, Report on Judgments and Decisions 1997-VII.

In the present case, the Court noted with concern that applicant is convicted to suspended conviction which under certain conditions could be changed to prison sentence.

ii. Procedure of execution of judgment

(a) Action plan/report

The Government submitted to the Committee of Ministers an Action Report on 4 December 2015.[159]

(b) Individual measures

The Basic Court in Podgorica allowed for the reopening of criminal proceedings in accordance with the Court's judgment. The Criminal proceedings were reopened, and the applicant was released according to changes in the criminal legislation as defamation was no longer a criminal offence in the Criminal Code of Montenegro. Just satisfaction was not awarded to the applicant as he did not request it within the time-limit provided by the Court.

(c) General measures

Resolution 1577 (2007), issued by the Parliamentary Assembly of the Council of Europe on 4 October 2007, requested Member States that still provide for prison sentences for defamation revoke such provisions without delay. After the findings of the present judgment, Montenegro took legal measures to decriminalization insults and defamation. On 22 June 2011 changes in the Criminal Code erased insults and defamation as offences. Beside the above stated measures, the judgment was translated, disseminated, and published in the Official Gazette of Montenegro and put on the web site of the Supreme Court of Montenegro.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 30 March 2016, at 1252 meeting, the Deputy of Ministers issued Resolution CM/ResDH(2016)44 by which the case was closed.[160]

Koprivica v. Montenegro

no. 41158/09

Judgment of 22 November 2011 (Merits)

and judgment of 23 June 2015 (just satisfaction)

i. Analysis of the judgment:

According to the finding of the European Court of Human Rights, interference with the applicant's right to freedom of expression was not *"necessary in a democratic society"*.

159 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)221E
160 http://hudoc.exec.coe.int/eng?i=001-162076

(a) Facts

The applicant complained that his right to freedom of expression had been breached as a result of the final civil court judgment rendered against him. It is found violation of the right to freedom of expression as domestic court obliged the applicant to pay, for defamation, the amount of EUR 5,000 for compensation and costs and expenses, which was 25 times higher than his monthly incomes.

(b) Relevant principles

The Court emphasises the essential function fulfilled by the press in a democratic society. Although the press must not overstep certain bounds, particularly in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[161]

It is in the first place for the national authorities to assess whether there is a "pressing social need" for a restriction on freedom of expression and, in making that assessment, they enjoy a certain margin of appreciation.[162]

The Court's task in exercising its supervisory function is to look at the interference complained of in the light of the case as a whole and to determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether the measure taken was proportionate to the legitimate aim pursued.[163]

A careful distinction needs also to be made between facts and value-judgments.

By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the provision that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.

The amount of compensation awarded must "bear a reasonable relationship of proportionality to the moral injury suffered" by the plaintiff in question.[164]

(c) The Court's assessment

Turning to the present case, the Court considered that the final civil court judgment undoubtedly constituted an interference with the applicant's right to freedom of expression. In view of the relevant law, the Court is satisfied that the interference was "prescribed by law" within the meaning of Article 10 § 2 of the Convention. The Court further accepts that the impugned judgment was adopted in pursuit of a legitimate aim, namely "for the protection of the reputation" of another.

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161 *Dalban v. Romania [GC]*, no. 28114/95, § 49, ECHR 1999-VI

162 *Lindon, Otchakovsky-Laurens and July v. France [GC]*, no. 21279/02 and 36448/02, § 45, ECHR 2007.

163 *Vogt v. Germany*, 26 September 1995, § 52, Seria A no. 323; and *Jerusalem v. Austria*, no. 26958/95, § 33, ECHR 2001-II.

164 *Tolstoy Miloslavsky v. The United Kingdom*, 13 July 1995, § 49, Seria A no. 316-B; *Steeli Morris v. The United Kingdom*, no. 68416/01, § 96, ECHR 2005 – II.

The Court is aware that news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[165]However, in the present case, the article was not published in a daily newspaper, but in a weekly magazine, which gave the applicant more time for double-checking. In addition, the applicant's statement made during the domestic proceedings clearly implies that he was not concerned with verifying the truth or reliability of the information before publishing it.

The Court found that the damages and costs awarded were very substantial when compared to the applicant's income at the time, being roughly twenty-five times greater than the applicant's pension.[166]While the Government contested that the applicant's pension was his only income, they failed to submit any evidence to the contrary. The Court noted that the enforcement order of 17 November 2009 implies that the applicant at that time worked for another magazine. However, there is no information in the case file that he was also working at the time when the domestic judgments were rendered.

In any event, the Court considered that the damages and costs he was ordered to pay to the plaintiff were very substantial even when compared to the highest incomes in the respondent State in general.

The Court found that the question of just satisfaction is not ready for decision and accordingly the Court postponed in, stating that it will decide depending on the agreement that parties may reach.

ii. Procedure for the execution of the judgment

(a) Action Plan/Report

The Government submitted to the Committee of Ministers an Action Report on 11 December 2015.[167]

(b) Individual measures:

In accordance with Article 428a of the Law on Civil Procedure, the applicant submitted to the Basic Court in Podgorica a request to reopen proceedings. The proceedings were reopened before the first instance court in Montenegro which had issued the initial decision that violated the Convention, to allow for the modification of that decision. The Basic Court in Podgorica reopened the case and quashed the impugned judgment that was not in accordance with Convention standards. In the reopened proceedings the prosecutor, after a payment of pecuniary damages awarded by the second judgment of the Court (just satisfaction), withdrew its claim, whereby the proceedings were closed. In the proceedings before the European Court the Applicant was awarded EUR 1,726.31 in pecuniary damages.

(c) General measures

Steps were taken to ensure that domestic courts complied with the standards of the Convention. In that regard, the Supreme Court of Montenegro published a general legal opinion on

165 *Bozhkov v. Bulgary*, no. 3316/04 § 49, 19 April 2011 .
166 *Tolstoy Miloslavsky v. The United Kingdom* and *Lepojić v. Serbia*.
167 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)222E

29 March 2011 on the obligations imposed by the right to freedom of expression and how the award of non-pecuniary damages should be in accordance with the case-law of the European Court. The judgment was translated, published in the Official Gazette of Montenegro and on the web site of the Supreme Court of Montenegro in order to disseminate the judgment.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 30 March 2016, at 1252 meeting of the Deputies of Ministers issued Resolution CM/ResDH(2016)45 by which the case was closed.[168]

2. The impact on the legality and the case-law

The judgment in ***Šabanović*** has had an important impact on the case-law of national courts, as well as on legislation.

With the Law on Changes and Amendments of the Criminal Code ("Official Gazette MN", no. 32/2011 of 1 July 2011) insult and defamation were removed as criminal offences.

Such conduct has been subsequently considered exclusively in civil proceedings and as the subject of civil cases. In respect of civil-law protection, i.e. compensation of non-pecuniary damage, the Law on Obligations provides, *inter alia*, that the court, for the sufferance of mental anguish, and especially for violations of reputation, honour, freedom or personal rights, if it finds that the circumstances of the case, especially the intensity and duration of any suffering, justify such action, will award pecuniary satisfaction independent from compensation for pecuniary damage.

Consequently, the General Assembly of the Supreme Court of Montenegro, at the assembly held on 29 March 2011, issued the general legal opinion: *"If it finds that there are grounds of responsibility for journalists and the media, the court must weigh the amount of the just satisfaction for the violation of personal rights (reputation, honour, etc) by taking into account all the circumstances of the specific case, especially the importance of the violation and following consequences: the duration of mental anguish, the aim of any compensation for non-pecuniary damage. The amount of awarded compensation, by a rule, should comply with the case-law of the European Court of Human Rights, and any awarded compensation should not be in such an amount as to discourage journalists and the media in the performance of their role in preserving the democratic values of society."*

Domestic courts have referenced the judgment in ***Šabanović*** while deciding in several cases.

The Supreme Court of Montenegro in its judgment in the case ***Rev. no. 718/16***, pointed out: "In this specific case, the publication of information by the respondent that the spouse of the plaintiff owed her EUR 50,000 in printed media was an exercising of freedom of expression, in which case there was no right to respect privacy or any other right of the plaintiff, as it was the spouse of the person to whom the information directly referred to. As the spouse of the plaintiff, when she was married to the plaintiff, had a business that was proved on many occasions to have been involved with fraud, and the publishing of the information had a legitimate aim, informing the public that there were persons to which the plaintiff had debts, especially

168 http://hudoc.exec.coe.int/eng?i=001-162074

since his spouse had on many occasions conducted fraud by taking money from others and failing to fulfil the legal obligations of entity which she represented in transactions with third parties, (...) as (...) the public interest could not be served without publishing the information, which in this case prevails over the interests of the plaintiff, and since the plaintiff himself announced a public invitation for all debtors to come forward, it can be considered that he gave his consent for such information to be published, and it cannot be considered that his rights and honour, privacy, or anything else, are violated. However, in situations like these, when the interests of the public to be informed prevail over the interests of the individual, consent was not necessary for the relevant information to be published."

Likewise, the judgment of the Supreme Court of Montenegro in **Rev.br. 147/18** stated: "in this specific case the plaintiff could not know that the allegations in the texts were not correct, and after considering [the context of the case] the interest of the public to know the information prevailed over the interest of the person to whom the information refers, therefore it was of no significance that the texts were published without the consent of the plaintiff, following the view of the European Court in the case of "Šabanović", and in the case of *Krone*, in which the Court found that while the applicant did not request the opinion of the previously criticized person, it was not a decisive factor in the case".

The judgment in ***Koprivica*** had an impact on domestic case-law, especially in respect of the application of the triple-test.

The creation of consistent case-law imposes the requirement that courts, while deciding on compensation for damage caused by the media, use the triple-test derived from the case-law of the European Court. The triple-test poses the following questions: 1) was there an interference with freedom of expression (which exists if compensation was awarded), 2) if the interference was regulated by law, which legitimate aim was protected, and 3) if the interference was necessary in a democratic society was it proportionate to the legitimate aim. Judges must bear in mind that after accepting the claim to be an interference with freedom of expression, which may be in accordance with the law, the key question is whether the interference was necessary in a democratic society and if it was proportionate to a legitimate aim. The views of the European Court should be used to answer this question, taking into account the under-developed state of national law in this area.

Some of judgments in which domestic courts have applied this test are the judgments of the High Court in Podgorica **Gž. br. 6793/17**, and the Decisions of the Basic Court and High Court in Podgorica **P.br. 3230/14** and **Gž. br. 2358/17**.

The High Court in Podgorica in the judgment ***Gž.br. 6793/17*** applied the triple-test as follows: "(...) Whereby they should have in mind three conditions for the limitation of freedom of expression... awarding compensation for the damage of someone's dignity or respect, in principle, is an obvious interference with rights to freedom of expression. Further (...) the aim of this interference is legitimate, i.e. it is about the protection of the reputation of the prosecutor (...). The prosecutor is a public person, and, accordingly, must show a higher degree of tolerance. However, in the specific case the issues were not comments on public issues given by public persons, or by any other acceptable critics that would enjoy higher protection".

Likewise, the same judgment applied the standard from the judgment in ***Koprivica***- "*compensation for damage to someone's dignity or reputation, in principle, represents an obvious interference in exercising the right to freedom of expression, which may be applied to the present case".*

Similarly, in the decisions of the Basic and the High Court in Podgorica ***P.br. 3230/14 and Gž. br. 2358/17*** it was stated: "(...) the court found that the amount of EUR 5,000 is an adequate amount of compensation for non-pecuniary damage. Awarding the amount of EUR 5,000, according to the opinion of this court, will achieve just satisfaction, as the aim of this type of damages is not that the plaintiff shall go bankrupt or enter into difficult financial situations. The court is of the opinion that the decision stated above does not disturb the balance of freedom of expression of the media in Montenegro (...) and the need for the protection of the honour and reputation of the plaintiff. On the other hand, the court finds that the claim for an additional EUR 15,000 with default interest is a high demand, so considering the importance of the violation and the aim the compensation pursues, the demand is not compatible with the nature and social purpose of awarding non-pecuniary damage, and considering past case-law, it dismisses this part of the claim (...)".

In a positive example of domestic courts referring to the standards of the European Court in relation to freedom of expression, we can refer to the judgment of the Supreme Court of Montenegro ***Rev. br. 320/16***. In this judgment the Supreme Court of Montenegro stated that cases for compensation over defamation cannot be solved only through the implementation of domestic regulations, national courts must also appreciate and apply the standards of freedom of expression established in the case-law of the European Court. Thus, in this judgment, the Supreme Court of Montenegro applied Article 10 of the Convention and cited relevant statements from judgments of the European Court. Namely, the Supreme Court referred to the European Court's decision in the case of *Lingens v. Austria*,[169] which took the view: "In the Court's view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible to proof [...]". In the case of *Rumyana Ivanova v. Bulgaria*[170] the European Court found that it is generally accepted that the burden of proof is on the person who gave a defamatory statement: *"a requirement for defendants in defamation proceedings to prove to a reasonable standard that the allegations made by them were substantially true does not, as such, contravene the Convention."* According to the view of the European Court stated in the case of *Dalban v. Romania*[171] this is not a strong request, considering that in that case the Court noted: "*There is no proof that the description of events given in the articles was totally untrue and was designed to fuel a defamation campaign against G.S. and Senator R.T.".*

Applying these standards in the present case, the domestic court concluded that "it is not necessary that the respondent prove the veracity of what she said, it is sufficient that they justifiably believed that their statement was the truth and what she stated [...] having in mind that the statement of the respondent is given as a response to unsuitable attacks, does not represent an unreasoned attack on the prosecutor, but was given in the belief that she stated the truth. The status of the prosecutor as a public person, with a higher level of tolerance than ordinary

169 *Lingens v. Austria*, no. 9815/82, ECHR, §. 46.
170 *RumyanaIvanova v. Bulgaria*, no. 36207/03, ECHR, §. 39.
171 *Dalban v. Romania*, no. 28114/95, ECHR, §. 50.

individuals, impacted the importance of the rights of the parties, especially in relation to the motive of the prosecutor in "pursuing the truth." As such this court considers that the protection requested does not belong to the prosecutor."

It was the conclusion of the court in the present case, that it was an "unacceptable opinion of the second-instance court that the case-law of the European Court of Human Rights in the present case should not be considered. Especially having in mind that the statement of the respondent was made in a press conference, the results of which were intended for the media. Therefore, as such, the statement should be appreciated in accordance with accepted standards in the area of freedom of expression".

The European Court homogenises standards on the limitation of freedom of expression, stating that the "limitation of freedom of expression for the benefit of protection, honour and reputation shall be appreciated only when the endangering of honour and reputation achieves a certain degree of seriousness and gravity and impacts on the social status of the victim and their status in certain communities.[172] Article 10 of the Convention protects journalists' rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with journalistic ethics.[173] A fair balance has to be struck between the general interests of the community and the interests of the individual[174] and the duty of the media is nevertheless to impart, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest.[175] Photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution"[176]

172 *Karakov v. Hungary*, no. 39311/05, ECHR, §. 21.
173 *Fressoz and Roirev. France*, no. 29183/95, ECHR, §. 54.
174 *Ozgur Gundem v. Turkey*, no. 23144/93, ECHR, §. 43.
175 *Flinkkila and Others v. Finland*, no. 25576/04, ECHR, §. 73.
176 *Von Hannover v. Germany*, no. 59320/00, ECHR, §. 59.

VII Article 13 –Right to an effective remedy

Article 13

Right to an effective remedy

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.

The primary goal of establishing the right to an effective remedy is to strengthen the Court's protection of those who consider that their human rights have been violated. In that respect, this Article contains the basic precondition for an effective politics of human rights. At the same time, this provision is tightly connected with the principle of subsidiary, as the European Court may only decide on an application after all domestic remedies provided for by domestic legislation have been exhausted.[177]

The European Court found a violation of Article 13 in four cases involving Montenegro. Those cases are: *Stakić v. Montenegro, Milić v. Montenegro and Serbia, Stanka Mirković and Others v. Montenegro*, *and Sinex d.o.o. v. Montenegro.* As these cases involved a violation of Article 6 § 1, their facts have been stated in that part of the Analysis. The procedure of execution has likewise been analysed within Article 6.

i. Analysis of judgments

(a) Relevant principles

In all cases, the European Court pointed out the same principles.

Namely, it is stated that Article 13 guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time.[178]

A remedy is effective if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred.[179]

Likewise, the Court emphasised that the best solution, in absolute terms, is indisputably - prevention. Where the judicial system is deficient with regard to the reasonable-time requirement in Article 6 § 1 of the Convention, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy. Some States have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation.

177 Effective Remedies as a Fundamental Right, Martin Kuijer.
178 *Kudła v. Poland [GC]*, no. 30210/96, ECHR 2000-XI, § 156.
179 *Sürmeli v. Germany [GC]*, no. 75529/01, ECHR 2006-VII, § 99.

(b) The Court's Assessment

The Court's assessment was the same in all cases. Namely, the Court concluded that there had been violation of Article 13 in conjunction with Article 6 § 1 of the Convention, for non-existence of effective remedy according the domestic law for complaints of the applicant referring to the length of the relevant proceedings (civil, administrative and execution procedure).

2. The impact on the national legal order

Assessment of the effectiveness of national legal remedies, within the meaning of Article 13 of the European Convention and in the case-law of the European Court

The protection of the right to a trial within reasonable time, as well as the right to just satisfaction for any violation of this right, is regulated in domestic courts under the Law on the Protection of the Right to a Trial Within Reasonable Time, which has been in force since 2007 and has been applied to court proceedings initiated before this Law entered into force, as well as after 3 March 2004.

This law provides for two legal remedies in response to violations of the right to a trial within reasonable time: a request for review, and an action for fair redress. The Court has recognised both of these remedies to be effective, the request for review from 4 September 2013, and the action for fair redress from 18 October 2016. Their effectiveness is preconditioned by their practical application by the regular courts.

Referring to the ***request for review***, the European Court, in its judgment in ***Vukelić v. Montenegro*** (no. 58258/09, 4 June 2013, § 85) stated as follows: "*the Court considers that, in view of the considerable development of the relevant domestic case-law on this issue, a request for review must, in principle and whenever available in accordance with the relevant legislation, be considered an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced against Montenegro after the date when this judgment becomes final.*"

Referring to the ***action for fair redress*** i.e. the claim for compensation for a violation of the right to a trial within a reasonable time, the Court, in its Decision of ***Vučeljić v. Montenegro*****,** ((dec.), no. 5912 9/15, 18 October 2016, § 30) stated as follows: *"…it proved capable of providing adequate compensation for a violation of the right to a trial within a reasonable time (…). The Court, therefore, considers it an effective domestic remedy."*

However, in administrative proceedings before administrative bodies, the Court's case-law has determined that a request for review cannot be considered to be an effective remedy. In that respect the Court in its judgment in ***Stanka Mirković and Others v. Montenegro***, (no. 33781/15 and 3 others, 7 March 2017, § 49) stated: *"the Court cannot but conclude that, whereas the said remedy could be used in order to expedite only the proceedings before the Administrative Court itself, that is an administrative dispute (…), it cannot be used and hence considered an effective domestic remedy in respect of the part of the proceedings that are ongoing before various administrative bodies beforehand.*"

Consequently, in July 2017, the new Law on Administrative Procedure and the Law on Administrative Disputes were introduced, containing solutions whose aim was to expedite administrative proceedings and prevent the so-called "ping-pong" effect.

The new Law on Administrative Procedure has simplified the procedure of the second-instance body in circumstances when the administrative proceedings are initiated at the request of party acting *ex officio*. The public authority is then obliged to render a decision within 30 days of the day of initiation of the proceedings, unless otherwise regulated by law.

When a decision is not rendered within the time-limit prescribed by law, the party has a right to make a complaint over the "silence of the administration". If a complaint is filed for this reason, and the first-instance public authority does not render a decision within seven days from the receipt of this complaint, it is obliged to produce case-files and a written explanation as to why such a decision has not been rendered within the prescribed time, and to transfer the dispute to the second-instance body without delay. If the second-instance body finds that the first-instance public authority had a justified reason for not rendering a decision within the time-limit prescribed by Law, it will, with a ruling, order the first-instance public authority to render a decision within 30 days. If the second-instance body finds that the reasons the first-instance body did not render a decision within the time-limit are not justified, it shall, on its own, decide on the request of the party within 45 days from the receipt of the complaint, or with a ruling, order the first-instance body to decide on the request of the party within 15 days of the ruling.

Similarly, the Law on Administrative Procedure establishes a duty on the second-instance body to, if the first-instance decision is quashed upon appeal and the party files a complaint over the new decision of the first-instance body, to quash that decision and make its own ruling.

Above stated legal means may appear as effective in practical implementation.

The Law on Administrative Disputes is also, *inter alia*, concerned with expediting administrative decision making. Namely, it has introduced an obligation on the Administrative Court to make decisions in administrative issue in cases that concern the Law. Thus, if the Administrative Court quashes an impugned act, and the nature of the administrative issue allows it, the Administrative Court can decide on the administrative issue, but only if in the same dispute the act was already quashed and the respondent public authority did not act upon the judgment, or if a competent public authority did not issue the act within the time-limit prescribed by law. The public authority being required to act within 30 days or within any other time-limit defined by the Administrative Court or if the competent authority did not render the act within the time-limit provided by the law.

The obligation on the Administrative Court to solve disputes arising through complaints against the acts of public authorities, shall also exist in situations where the Administrative Court has already once quashed the impugned act, and the nature of the issue allows it.

The European Court of Human Rights passed judgment on the following legal remedies and their effectiveness: a request for protection of legality, a request for reinstatement, a compensation claim in civil proceedings, and a constitutional complaint.

The Court found, in its judgment in ***Alković v. Montenegro*** (no. 66895/10, 5 December 2017, § 50), that the ***request for protection of legality*** was not effective. It is important to note that this assessment was of the remedy as it was regulated by previous Criminal Procedure Code, which ceased have effect on 26 August 2010. The European Court based its reasoning on the fact that only the public prosecutor could issue the request. According to the new Criminal Procedure Code which is now in force, a request for protection of legality is a remedy that can be issued only by the Supreme State Prosecutor's Office. However, any person sentenced to an unconditional prison sentence of one year, or a more severe punishment, or sentenced as a minor, can submit in certain cases regulated by the law, through their attorney, a written or oral request for the State Prosecutor's Office to issue a request for a protection of legality to be issued against the final judgment against them.

In relation to the ***procedure for reinstatement***, a legal remedy contained in the Law on Civil Procedure, the European Court in its judgment in ***Tripcovici v. Montenegro*** (no. 80104/13, 7 November 2017, § 36) stated that: "The Court considers that in the circumstances of the present case the said request could not be considered an effective domestic remedy..." However, this assessment refers only to this case. In numerous other cases, a request for remittal has appeared to be successful. This remedy can be used if the party fails to appear at the hearing or has missed the deadline for taking an action and therefore loses their right to take that action. The domestic court shall, on the request of a party, allow them bring an action if there were justified reasons for their failure to do so within the procedural rules which could not have been predicted or avoided. When a request for reinstatement is allowed, the proceedings shall return to the phase at which it broke down and any subsequent decisions should be quashed.

In relation to the ***compensation claim*** in civil procedure, the European Court in its judgment in ***Ranđelović v. Montenegro*** (no. 66641/10, 19 September 2017, § 105) stated: "*The Court, for its part, has already found in an earlier cases in which applicants had brought a compensation claim against the State on the basis of the provisions of the Obligations Act that the domestic courts neither acknowledged the breach as clearly as should have been necessary in the circumstances of that case nor afforded the applicants appropriate redress…*" Even beyond this statement, the effectiveness of a regular claim in civil proceedings, in principle, has not been brought into question by the European Court. The claim in civil proceedings is indisputably an effective remedy as it is available to everyone and allows for the party to obtain a direct remedy which offers reasonable prospects of success. However, as it can be seen from this judgment, the European Court shall, in every individual case, examine if the remedy available led to a correction of violations of human rights.[180]

180 Assessment of constitutionality of the constitutional complaint is given in the case *Siništaj and Others v. Montenegro.*

VIII Article 14 –Prohibition of discrimination

Article 14

Prohibition of discrimination

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 14 establishes a general ban on discrimination. On the one hand, Article 14 has the limited scope of being an accessory right applicable only in relation to the enjoyment of the rights and freedoms otherwise protected by the Convention. On the other hand it has a very wide range as it is an open-model non-discrimination clause, which is not limited to an exhaustive list of discrimination grounds.[181]

The European Court found, in one case, a violation of Article 8 in conjunction with Article 14: *Alković v. Montenegro*.

1. Judgments in relation to the Article 14

Alković v. Montenegro

no. 66895/10

judgment of 5 December 2017

i. Analysis of the judgment

The European Court in its judgment *Alković* found violation of the right to respect private and family life (violation of Article 8 of the Convention), due to failure of the State to properly conduct mechanisms of protection, due to which, at the same time, had been violated Article 14 of the Convention (prohibition of discrimination). Through this judgment is pointed out o positive obligations in protection of discrimination – effectiveness of investigation at individual from racist views and violent actions.

(a) Facts

The Applicant, a Roma and of Muslim nationality, in the period May – September 2009 participated in three incidents which involved his neighbours as well. Following the attack in which were destroyed his apartment and a car, he installed cameras. He lodged a criminal

181 Oddný Mjöll Arnardóttir: Non-discrimination Under Article 14 ECHR.

complaint for incitement of ethnic, racial and religious hatred, discontent and intolerance. He enclosed relevant video material from cameras installed by himself. The Prosecutor's Office rejected the complaint on the grounds that there were no elements of a criminal offence committed from hatred or other criminal offence for public prosecution.

In December 2009 he filled an application for investigation to the High Court in Podgorica, whereby he enclosed relevant video material and proposed hearing of his neighbours. In March 2010, the High Court dismissed an application for investigation for lack of evidence. It is stated that submitted video material is inadmissible, having been obtained without a prior court order, and the applicant had not submitted any evidence in relation to the incident of 22 September 2009, nor had Alković called the police at the time to come to the scene and collect the necessary material for further analysis in order to verify his suspicions. The Appellate Court dismissed the complaint of Alković, accepting reasons of the High Court.

Likewise, the Constitutional Court dismissed the Alković's constitutional complaint in which he maintained that because of the failure of the domestic authorities to protect him and his family, they had had to move out of the apartment whereby were violated his right to private life, right to an effective domestic remedy, and prohibition of discrimination.

On April 2016, as regards the incident of September 2009, the police informed the State prosecutor's Office that they had acted in accordance with their authority upon the criminal complaint of Alković, having dedicated a significant amount of time and they had not found evidences which would undoubtedly indicate the perpetrator of this criminal offence.

(b) Relevant principles

The concept of private life, within the meaning of Article 8 of the Convention, includes physical and psychological integrity as well as ethnical identity of the individual.

While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in effective respect for private life, which may involve the adoption of measures in the sphere of relations between individuals. Moreover, the State's positive obligation under Article 8 to safeguard the individual's physical integrity may also extend to questions relating to the effectiveness of a criminal investigation. For an investigation to be regarded as 'effective', it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible.

Part of the authorities' responsibilities under Article 14, taken in conjunction with Articles 2, 3 or 8, is to investigate the existence of a possible link between racist attitudes and acts of violence. Accordingly, where any evidence of racist verbal abuse comes to light in an investigation of violent acts, it must be checked and, if confirmed, a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives for the violence. Admittedly, in practice it is often extremely difficult to prove a racist motive. The obligation on the respondent State to investigate possible racist overtones to an act of violence is, however, an obligation which concerns the means employed rather than the specific result achieved. The authorities must do what is reasonable in the circumstances to collect and secure the evidence,

explore all practical means of discovering the truth, and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence.

(c) The Court's assessment

In these particular circumstances, the Court found that the above-mentioned course of action in itself was not capable of leading to the establishment of the facts of the case, and did not constitute a sufficient response to the situation complained of. The cumulative effect of those shortcomings in the investigations was that the shooting, and the threat of 22 September 2009 remained virtually without legal consequences, and the Applicant was not provided with the required protection of his right to psychological integrity. He could not have the benefit of the implementation of a legal framework affording effective protection. This applies all the more, given the fact that the Applicant is Roma as well as Muslim, and that there was not one, isolated incident directed against him, but many, and in view of the nature of these other incidents. The Court is mindful of the ongoing conflict relationship between the Applicant and his neighbours, as well as his own contribution to that conflict. However, it does not consider that these factors justify the authorities' lack of sufficient response in respect of the applicant's complaints regarding the shooting and the threat.

In view of the above, the Court considered that the manner in which the criminal-law mechanisms were implemented in the present case by the judicial authorities was defective to the point of constituting a violation of the respondent State's obligations under Article 8 of the Convention.

ii. Procedure of the execution of the judgment

(a) Action Plan/Report

The Government submitted to the Committee of Ministers an Action Report on 5 September 2018.[182]

(b) Individual measures

The European court awarded just satisfaction for non-pecuniary damage to the amount of EUR 6,000 as well as EUR 5,000 for costs and expenses. This amount was paid to the Applicant within the time-limit required by the European Court. The Applicant, in accordance with Article 428a of the Law on Civil Procedure, had the possibility of submitting a request for the reopening of the relevant proceedings, which he did not use. Bearing in mind the finding of the Court in this judgment, the Representative addressed the competent Prosecutor regarding the reopening of the proceedings. He submitted information that, after an examination of the case files, established that there was no legal possibility of opening investigative actions due to the absolute statute of limitations on criminal prosecutions. The Government of Montenegro stated their regret for the incidents of 26 May 2009 and 22 September 2009 and the statute of limitations on the initiation of criminal procedure in that respect.

182 http://hudoc.exec.coe.int/eng?i=DH-DD(2018)838E

(c) General measures

Considering that the judgment in *Alković* found a failure of the competent authorities to adequately establish a mechanism of protection, and that the incident occurred in relation to the ethnicity and religious belief of the Applicant, the Government pointed out from the available statistical data that it was an isolated incident. In 2014, the competent State Prosecutor's Office lodged two criminal complaints referring to incitements of violence and hatred towards a group or member of a group because of their race, skin colour, religion, national origin or ethnicity. Both of these proceedings were finalized and the accused found guilty. In 2015, the State Prosecutor's Office initiated 16 criminal proceedings for criminal offences in this area. The outcome of these 16 investigations was as follows: eight accusations were rejected, the accused were found guilty in three cases, and six cases remain under investigation.

To complement the previously stated actions, a number of seminars and training sessions for judges and prosecutors were held during 2017 and 2018, where the views of the European Court found in this judgment were emphasised. The judgment was translated, published and delivered to all the bodies which participated in the proceedings before the domestic judicial institutions and these measures, according to the finding of the Government, were sufficient to prevent similar violations.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 17 October 2018, at 1327 meeting of the Deputy of Ministers, issued Resolution CM/ResDH(2018)384 by which the case was closed.[183]

2. The impact on the case-law:

As this is a relatively new judgment, there has not been time for it to have had a particularly significant impact on national case-law. However, it has been recommended that competent bodies investigating violent actions should investigate any possible racist elements to these actions as well. It is also necessary for these investigations to collect and provide evidence, and to use all practical means for finding the truth, and to issue reasoned, impartial and objective decisions, without omissions of facts that may point to abuse being racially motivated.

While conducting an investigation where the injured party is a member of an ethnic or religious minority, special attention should be given to the motives of the attack if they are ethnic and/or religious in nature. In that respect, Article 42a § 1 of the Criminal Code of Montenegro is especially important as this Article stipulates that if the criminal offence was committed out of hatred towards another person on national or ethnic grounds, racist or religious grounds, or on grounds of disability, sex, sexual orientation or gender identity, the circumstances of the offence shall be considered to be aggravated unless specifically regulated as a basic or aggravated criminal offence.

183 http://hudoc.exec.coe.int/eng?i=001-187386

IX Article 1 Protocol no.1 –Protection of property

Article 1 Protocol no. 1

Protection of property

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 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 payment of taxes or other contributions or penalties.

Article 1 of Protocol No. 1 secures the right to the peaceful enjoyment of property. Property is an autonomous term within the meaning of this Article, meaning that its definition is dependent on the interpretation of the term in the domestic law of the contracting States. Instead the term *property* has been gradually defined through the case-law of the Court. Thus, property does not only involve things, but also certain rights, such as, for example, rights in intellectual property,[184]social allowances, as well as legitimate expectations.[185]

However, the right to peaceful enjoyment of property is not absolute, it can be limited under certain conditions. When examining any limitations, the Court focuses on three conditions: a legitimate aim, a fair balance, and proportionality.[186]

The European Court has delivered four judgments involving Montenegro in which it found a violation of Article 1 of Protocol No. 1: *Bijelić v. Montenegro and Serbia, Lakićević and Others v. Montenegro and Serbia, A and B v. Montenegro, and Mijanović v. Montenegro*.

184 *Smith Kline and French Laboratories v. Netherlands*, no. 12633/87.

185 Comments on the Convention on Protection of Human Rights and Fundamental Freedoms, group of authors, Official Gazette, 2017

186 Ibid, 71.

1. Judgments in respect of Article 1 protocol 1

Bijelić v. Montenegro and Serbia

no. 11890/05

judgment of 28April 2009

i. Analysis of the judgment

This is the first judgment delivered against Montenegro in which is found violation of Article 1 Protocol 1 of the Convention (protection of property). The European Court found that the State failed to meet its positive obligation to use all legal means on its disposal to execute the final court decision (regardless the fact that it is rendered against the natural person), as well as to provide regular approach upon all relevant procedures in domestic law, due to which it was violated right of the Applicants on the peaceful enjoyment of their property, and right to disposal on their property.

(a) Facts

Three applicants complained about the non-enforcement of a final eviction order and the consequence of the non-enforcement, i.e. their inability to live in the flat at issue.

The first applicant, her husband and the other two applicants were holders of a specially protected tenancy right concerning a flat in Podgorica, where they lived. In 1989 the first applicant and her husband divorced and the former was granted custody of the other two applicants. On 26 January 1994 the first applicant obtained a decision from the Court of First Instance declaring her the sole holder of the specially protected tenancy on the family's flat. In addition, her former husband ("the respondent") was ordered to vacate the flat within fifteen days from the date when the decision became final. On April 1994 the decision of the Court of First Instance was upheld on appeal by the High Court in Podgorica and thereby it became final. Given that the respondent did not comply with the court order to vacate the flat, on 31 May 1994 the first applicant instituted a formal judicial enforcement procedure before the Basic Court, and the enforcement order was issued on the same date. It followed a set of unsuccessful attempts of eviction of the respondent from the apartment at issue. In the meantime, the first Applicant donated the flat to the second and third applicant, and in August 1999, the Real Estate Directorate issued a formal decision recognising the second and the third applicants as the new owners of the flat in question.

(b) Relevant principles

In the context of Article 1 of Protocol No. 1, positive obligations may require the State to take the measures necessary to protect the right of property,[187] particularly where there is a

187 *Broniowski v. Polland [GC]*, no. 31443/96, § 143, ECHR 2004-V.

direct link between the measures which an applicant may legitimately expect the authorities to undertake and the effective enjoyment of his or her possession.[188]

It is thus the State's responsibility to make use of all available legal means at its disposal in order to enforce a final court decision, notwithstanding the fact that it has been issued against a private party, as well as to make sure that all relevant domestic procedures are duly complied with.

(c) The Court's assessment

The Court firstly noted that the inability of the second and third applicants to have the respondent evicted from the flat in question amounts to an interference with their property rights. Secondly, the judgment at issue had become final by 27 April 1994, its enforcement had been upheld on 31 May 1994, and Protocol No. 1 had entered into force in respect of Montenegro on 3 March 2004, meaning that the impugned non-enforcement has been within the Court's competence *ratione temporis* for a period of almost five years, another ten years having already elapsed before that date. Lastly, but most importantly, 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 have failed to fulfil their positive obligation, within the meaning of Article 1 of Protocol No. 1, to enforce the judgment of 31 May 1994. There has, accordingly, been a violation of the said provision.

Having regard to its findings in relation to Article 1 Protocol No. 1 and the fact that it was the non-enforcement which was at the heart of the applicants complaints, the Court considered that, whilst this complaint is admissible, it is not necessary to examine separately the merits of whether, in this case, there has also been a violation of Article 6 § 1[189]

The Court observes that on 26 March 2004 the second applicant, on her own behalf and on behalf of the third applicant, authorised the first applicant to sell the flat in question. It follows that from then on, at the latest, the applicants, who now all appear to be residents of Belgrade, clearly had no intention of returning to live in the flat. They thus cut the family's connection to the property. Accordingly, the Court finds that by the time the applicants lodged their case with the Court, that property could no longer be considered to have been their "home" for the purposes of Article 8. The Court therefore found that the applicants' complaints in respect of Montenegro must be rejected as being incompatible *ratione materiae* with the Convention, pursuant to Article 35 §§ 3 and 4.

Likwise, as this is the first judgment against Montenegro, it has additional meaning, as in ***it is taken the view from which date Montenegro is considered to be bound by the Convention***. It should be considered that Montenegro is bounded by the Convention and Protocols thereto as of 3 March 2004, that being the date when those instruments had entered into force in respect of the State Union of Serbia and Montenegro. The Court was of the opinion that it should be considered that the Convention and Protocol 1 were constantly on force in respect of Montenegro as of 3 March 2004, between 3 March 2004 and 5 July 2006, and later on.

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188 *Öneryıldız v. Turkey [GC]*, no. 48939/99, § 134, ECHR 2004-XII.
189 *Davidescuv. Romania*, no. 2252/02, § 57, 16 November 2006.

ii. Procedure for the execution of the judgment:

a) Action plan/report

The Government submitted to the Committee of Ministers an Action Report on 3 June 2006.[190]

(b) Individual measures

The European Court jointly awarded EUR 4,500 to the second and the third Applicants, as well as EUR 700 for costs and expenses. The competent state authorities took all the necessary measures to execute the Order of the Basic Court in Podgorica on 26 January 1994. After the eviction from the flat and the emptying of its contents was conducted, the flat was given into the possession of the first Applicant within 3 months, the time-limit set by the European Court.

(c) General measures

Montenegro also acted to reform its procedures of execution, introduced an effective remedy relating to enforcement proceedings, and disseminated the judgment. In July 2011 the new Law on Enforcement and the Securing of Claims was adopted and in the period until 11 March 2016 29 public bailiffs were appointed by the Ministry of Justice of Montenegro. This Law includes special provisions referring to the execution of judgments in respect of eviction, allowing for public bailiffs to start with the process of eviction only after the expiration of a time-limit of eight days from the submission of the enforcement order. Likewise, in accordance with this Law, the Police are obliged to provide all necessary assistance for enforcement procedures.

The Centre for the Training of the Judiciary and Public Prosecution held a number of workshops to train public bailiffs, which included, *inter alia*, special analysis of this judgment and the case-law of the European Court in this area. The result of these conducted measures can be seen in the decreasing length of execution procedures, especially in regard to eviction.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 14 September 2016, at its 1264 meeting of Deputies of Ministers issued Resolution CM/ResDH(2016)224 by which the case was closed.[191]

190 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)730E
191 http://hudoc.exec.coe.int/eng?i=001-167237

Lakićević and Others v. Montenegro and Serbia

no. 27458/06

judgment of 13December 2011

i. Analysis of the judgment

The European Court in this case found the violation of the right to protection of property as rights of the Applicants on pension constituted the property within the meaning of the Article 1 Protocol 1 to the Convention. In this judgment is stated that, as natural persons, the applicants were forced to bear excessive and inappropriate burden, due to which it is found that suspension of pensions by the Pension Fund obviously represented encroachment in the peaceful enjoyment of their property.

(a) Facts

The Applicants – retired owners of lawyer offices, complained as their pensions were suspended as they reopened their lawyer offices and continued to work on a part-time basis.

(b) Relevant principles

According to the Court's case-law, the national authorities, because of their direct knowledge of their society and its needs, are in principle better placed than the international judge to decide what is "in the public interest". However, any such measures must be implemented in a non-discriminatory manner and comply with the requirements of proportionality. Therefore, the margin of appreciation available to the legislature in implementing such policies should be a wide one, and its judgment as to what is "in the public interest" should be respected unless that judgment is manifestly without reasonable foundation.[192]

Any interference must also be reasonably proportionate to the aim sought to be realised. In other words, a "fair balance" must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden.

While it must not be overlooked that Article 1 of Protocol No. 1 does not restrict a State's freedom to choose the type or amount of benefits that it provides under a social security scheme it is also important to verify whether an applicant's right to derive benefits from the social security scheme in question has been infringed in a manner resulting in the impairment of the essence of his pension rights.

(c) the Court's assessment

The Court considers that the applicants' pension entitlements constituted a possession within the meaning of Article 1 of Protocol No. 1 to the Convention. Further, the Pension Fund's

192 *Carson and Others v. The United Kingdom [VV]*, no. 42184/05, § 61, 16 March 2010; *Andrejeva v. Latvia [VV]*, no. 55707/00, § 83, 18 February 2009; and *Moskal v. Polland*, no. 10373/05, § 61, 15 September 2009.

suspension of payment of the applicants' pensions clearly amounted to an interference with the peaceful enjoyment of their property.

As regards the requirement of "lawfulness", the Court noted that the payment of pensions was suspended on the basis of Section 112 of the Pension Act 2003, which seems to imply that it was in accordance with the law. Certainly, the interpretation of this provision given by the domestic courts favours such a conclusion.

In that context, the Court finds that, as individuals, the applicants were made to bear an excessive and disproportionate burden. Even having regard to the wide margin of appreciation enjoyed by the State in the area of social legislation, the impact of the impugned measure on the applicants' rights, even assuming its lawfulness, "cannot be justified by the legitimate public interest relied on by the Government. It could have been otherwise had the applicants been obliged to endure a reasonable and commensurate reduction rather than the total suspension of their entitlements or if the legislature had afforded them a transitional period within which to adjust themselves to the new scheme. Furthermore, they were required to pay back the pensions they had received as of 1 January 2004 onwards, which must also be considered a relevant factor to be weighed in the balance.

ii. Procedure for the execution of the judgment:

a) Action Plan/Report

The Government submitted to the Committee of Ministers an Action Report on 5 February 2013.[193]

(b) Individual measures

The European Court awarded the Applicants just satisfaction to the amount of EUR 42,679.80 for pecuniary and non-pecuniary damages. This was paid within the three month time-limit set by the Court.

(c) General measures

The payment of pensions in relation to all the applicants continued from January 2009. Article 112 § 1 of the Pension and Disability Insurance Act,[194] by which it was stipulated that pensions should be suspended if their recipient resumed working or established a private practice, was quashed by a Decision of the Federal Constitutional Court. In accordance with subsequent changes and amendments to the Pension and Disability Insurance Act, acquired benefits cannot be quashed or limited by additional measures, especially in relation to continuing professional activities. In accordance with amendments to the Pension and Disability Insurance Act proclaimed in 2008,[195] the administrative practices of the competent bodies in administrative proceedings were altered, especially the practices of the Pension Fund as the first-instance body, and Ministry of Work and Social Welfare as the second-instance body, as well as in the case-law of the courts in Montenegro. Their decisions are now completely in accordance with

193 http://hudoc.exec.coe.int/eng?i=DH-DD(2013)106E
194 Pension and Disability Insurance Act („Officail Gazette RMN", no. 54/03).
195 Amendments to the Pension and Disability Insurance Act („Official Gazette MN",no. 79/08 of 23 December 2008).

the amendments made to the Pension and Disability Insurance Act. The judgment was translated, published and distributed.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 29 May 2013, at 1171 meeting of Deputy of Ministers issued Resolution CM/ResDH(2013)91 by which the case was closed.[196]

A and B v. Montenegro

no. 37571/05

judgment of 5 March 2013

i. Analysis of the judgment

The judgment refers to unlawful interference in property – contrary to domestic law, due to administrative failure, the foreign-currency savings of the Applicants was never registered and converted into States public dept (violation of Article 1 Protocol no. 1).

(a) Facts

The applicants complained about violation of Article 1 Protocol 1, about the continued non-enforcement of the final civil judgment concerning the re-payment of the old foreign-currency savings deposited by their late mother and inherited by them. In the alternative, they complained about the failure of the Podgorička banka and/or the Central Bank of Montenegro to register the savings at issue and thus have them converted into the respondent State's public debt, in accordance with the relevant domestic legislation. Namely, following the financial crisis in the former Socialist Federal Republic of Yugoslavia, as well as the subsequent collapse of the banking system in the 1990s, in 1998, 2002, and 2003 the Federal Republic of Yugoslavia, as well as Montenegro itself adopted specific legislation accepting the conversion of foreign currency deposits in certain banks, including the *Podgorička banka*, into a public debt. The legislation197 set the time-frame (2017) and the amounts, including interest, to be paid back to the banks' former clients.

(b) Relevant principles

The Court recalled that foreign currency savings constitute a possession within the meaning of Article 1 of Protocol No. 1 to the Convention.[198] The Court also reiterated that any interference by a public authority with the peaceful enjoyment of possessions should be lawful[199]

196 http://hudoc.exec.coe.int/eng?i=001-122064

197 Law on Regulation of Obligations and Claims upon ino-dept and foreign-currency savings of citizens („Official Gazette RMN"), no. 55/03 and 11/04

198 *Kovačić and Others v. Slovenia (dec.)*, no. 44574-98 etal., 9 October 2003, and *Trajkovsk v. Former Yugoslav Republic of Macedonia (dec.)*, no. 53320/99, ECHR 2002 IV.

199 See *Former King of Greece and Others v. Greece (GC)*, no. 25701/94, § 79, ECHR 2000-XII.

and that it should pursue to a legitimate aim "in the public interest". According to the Court's established case-law, the expression "in accordance with the law" requires that the impugned measure should have some basis in domestic law, and it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects.

(c) The Court's assessment

The Court notes that the foreign-currency savings deposited by the applicants' late mother constituted a possession, which possession was inherited by the applicants by virtue of the decision of the Court of First Instance of 5 May 2007. As the relevant domestic legislation clearly provided that the State would take these savings over as a public debt and pay them back gradually by 2017, the Court considered that the applicants' mother and later the applicants themselves had a legitimate expectation that they would re-obtain the savings in question.

Having in mind all above stated, the Court considered that there had been an evident interference by the respondent State with the applicants' possessions and their legitimate expectation to gradually re-obtain the savings at issue, which interference was clearly contrary to the law. This conclusion makes it unnecessary for the Court to ascertain whether a fair balance had been struck between the demands of the general interest of the community on the one hand, and the requirements of the protection of the individual's fundamental rights on the other.

The Court found that there had been violation of Article 1 Protocol 1 to the Convention due to failure be registered and converted into respondent State's public debt the savings and issue.

ii. Procedure for the execution of the judgment

(a) Action report

The Government submitted to the Committee of Ministers an Action Report on 27 January 2014.[200]

(b) Individual measures

The European Court awarded the applicants just satisfaction for both pecuniary and non-pecuniary damage. The Government paid EUR 106,217 in respect of pecuniary damage, paid EUR 3,000 in respect of non-pecuniary damage, and paid EUR 6,500 for costs and expenses. Furthermore, all suitable measures were taken to secure the application of legislation by competent bodies to provide payment to the applicants of all future instalments under the same conditions and in the same way as applied to all users under the relevant laws. The Ministry of Finance acted in accordance with the judgments of the Basic Court in Podgorica and delivered the correct amount of foreign-currency savings to the applicants. The applicants exercised their right to payment on 9 September 2013 when the bank (Societe Generale Banka Montenegro AD) paid rents owed up to 2013 and issued a certificate which confirmed the conversion of their foreign-currency savings into Montenegrin securities. A copy of the certificate was submitted to the Central Deposit Agency (CDA), which transferred the relevant securities from the account of the State of Montenegro to the securities accounts named in

200 http://hudoc.exec.coe.int/eng?i=DH-DD(2014)162E

the certificate. In this way the applicants achieved equal legal status with other owners of old foreign-currency savings whose claims were converted into public dept.

(c) General measures

The violation of Article 1 of Protocol No. 1 in this case was due to administrative failure, i.e. the lack of precision and regularity in domestic legislation on who was responsible for the conversion of old foreign-currency savings into public dept (the Central Bank or the bank of debtor), in the context of the contradiction within the relevant domestic legislature (see § 70 of the judgment *A. and B.*). With the aim of preventing similar proceedings before the European Court, the Governor of the Central Bank of Montenegro, within his competences, notified all banks and financial institutions in Montenegro with a circular letter of this judgment and gave them instructions on how to act in similar situations in future to prevent further violations of human rights. The Governor requested that all banks and financial institutions in Montenegro, before deciding on possible requests from citizens for payments of old foreign-currency savings, inform the Central Bank of the merits of the case, so that the Central Bank can act pre-emptively. The judgment was translated, published in the Official Gazette of Montenegro, and delivered to the relevant state institutions.

(d) Resolution of the Committee of Ministers

The Committee of Ministers, on 11 June 2015, at 1230 meeting of Deputies of Ministers issued Resolution CM/ResDH(2015)90 by which the case was closed.[201]

Mijanović v. Montenegro

no. 19580/06

judgment of 17 September 2013

i. Analysis of the judgment

The judgment refers to the violation of the right to a fair trial, for non-execution of the judgment issued on the benefit of the Applicant against the state company (Article 6 § 1 of the Convention) and violation of the right to the peaceful enjoyment of property (Article 1 Protocol no. 1).

a) Facts

The applicant complained about the non-enforcement of the judgment rendered in his favour[202] and a violation of his property rights thereby.

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201 http://hudoc.exec.coe.int/eng?i=001-155682

202 The Court found the violation of Article 6 of the Convention – see that part of the Analysis for that Article, in respect of relevant principles and procedure of execution of the judgment.

b) Relevant Principles

The Court reiterated that the failure of the State to enforce the final judgment rendered in favour of the applicant's father and subsequently inherited by the applicant constitutes an interference with her right to the peaceful enjoyment of possessions, as provided in the first sentence of the first paragraph of Article 1 of Protocol No. 1[203]

c) The Court's assessment

The Court considered that the said interference was not justified in the present case. There had, accordingly, been a separate violation of Article 1 of Protocol No. 1.

2. The impact on the case-law

The Supreme Court referred to the judgment in ***Bijelić v. Montenegro and Serbia*** in its cases ***Tpz. 13/15*** and ***Tpz.20/15***, stating that "The period from which court proceedings should be considered while assessing if there had been a violation of the right to a trial within a reasonable time began on 3 March 2004, when the Convention entered into force in respect of Montenegro (judgment Bijelić v. Montenegro – 2009), and from the application of the Law on the Protection of the Right to a Trial Within a Reasonable Time on domestic court proceedings".

Likewise, the Supreme Court of Montenegro in its Decision in ***Tpz. br. 10/16*** referred to judgments of the European Court against Montenegro and other states of the region and stated: "According to the case-law of the European Court, the execution of court decisions is considered an integral part of the trial, and the non-execution of judgments within a reasonable time is specially qualified as a violation of the "right to a court" under Article 6 § 1 of the Convention (judgment *Jankulovska v. Macedonia*, 2007). Non-execution of a judgment often leads not only to a violation of the right to a trial within reasonable time, but also to a violation of substantive rights. Specifically, the right to peaceful enjoyment of property from Article 1 of Protocol No. 1 to the Convention (judgment *Kačapor v. Serbia*– 2008 and *Mijanović v. Montenegro* - 2013), as according to the European Court, successful claims found through the Court's final judgments are considered to be property within the meaning of this Protocol, as there is a legitimate expectation that the property will be effectively distributed through execution proceedings."

The Basic Court in Nikšić, in its decision in the case **P. br. 1754/15** stated: "With insight into the case-law of the European Court, especially the case of *Lakićević and Others* against the State of Montenegro of 13 December 2011 (applications no. 27458/06; 37205/06; 37207/06 and 33604/07), the application of Article 112 § 1 of the Pension and Disability Insurance Act from 2003 violated Article 1 of Protocol No. 1 to the Convention. Specifically, this court considers that suspending pension payments to the applicants for resuming the performance of their activities, by applying the above cited Pension and Disability Insurance Act that was in force at the relevant time, was in conflict with the right to the peaceful enjoyment of property, or the acquired right to a pension in this specific case which was guaranteed by Article 1 of Protocol No. 1 to the Convention. As in that case the decision was delivered on the same factual and legal grounds as in this case, this court considers that according to Article 9 of the Constitution of Montenegro, the judgments of the European Court directly applies in this case and has priority over domestic legislation."

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203 *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III.

III

Importance of the Analysis, Conclusions and Recommendations

I Importance of the Analysis

Judgments which the European Court have delivered in respect of Montenegro are a source of national, in accordance with Article 9 of the Constitution of Montenegro.

The European Court delivered its first judgment against Montenegro in 2009. Since then, until the end of 2017, it has delivered 36 judgments in total.[204] Even though this number is not particularly high, it demonstrates the need for detailed analysis into the work of national authorities, insight into the actions which led to violations of rights guaranteed by the Convention, and also insight into systematic issues, both during the proceedings and during the execution of the judgments of the Court. Therefore, it is especially encouraging to see that the results of the analysis did not point to the existence of any such systemic issues.

This Analysis is the first overview of the case-law of the European Court in respect of Montenegro, with short statements of fact, descriptions of the relevant principles which the European Court has developed in its case-law, and analysis of the Court's assessment for each individual case. Particularly valuable is the overview of the execution of the judgments of the Court, which often remains "invisible" for national courts. Such an overview, through which the relationship between the State and the Supreme Court, as well as the relationship between the State and its citizens, can be seen, reminds the domestic courts that proceedings are not simply finished once a judgment has been delivered, by a national, or international court.

The importance of this Analysis is also in its review of a number of specific judgments made by the courts in Montenegro which recognized and emphasized the impact of judgments made by the European Court on national case-law. Regarding Montenegrin legislation, judgments of the European Court have, directly or indirectly, led to changes in the Law of Civil Procedure and the Criminal Procedure Code. The aim being to strengthen the effectiveness of these proceedings. Likewise, reforms of execution and administrative procedures are a direct consequence of the judgments made by the Court which recognized the problem of the non-enforcement of final decisions, especially the problem of the so-called "ping-pong" effect in administrative proceedings. With the aim of protecting the right to a trial within reasonable time, the new Law on the Protection of the Right to a Trial Within Reasonable Time has been introduced to provide effective remedies at the national level. It must also be emphasized that the proclamation of the new Law on the Constitutional Court 2015 has led to a constitutional complaint being recognized as an effective remedy in the Montenegrin legal system that must be exhausted before appealing to the European Court.

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204 See the footnote no. 7.

The domestic reforms mentioned above show that the judgments of the European Court involving Montenegro should not be considered as solely a negative indicator of the violations of human rights and freedoms in our State. They should also be seen as helping to improve the protection of fundamental rights, a process that occurs across the legal systems of developed democratic societies. Every such judgment is a lesson, but also a warning for all State bodies that they are obliged to comply with the standards of the Convention as defined by the Court.

In proceedings before the European Court, including judgments, friendly-settlements, and unilateral declarations, until 31 December 2017, Montenegro paid out to applicants the total amount of EUR 1,148,763.33. This demonstrates that there is an real incentive to take all the necessary measures to minimise any future violations.

Finally, one further aim of this Analysis is to introduce all citizens to the procedure of execution, so that they know how their rights are protected by the European Court of Human Rights and what to expect after a judgment is delivered. Perfect systems do not exist and therefore it is realistic to expect that the Court will deliver judgments against Montenegro in the future and find violations of Convention rights. However, it can be guaranteed, as we can see from this Analysis, that after any violation has been found, all the relevant bodies, from the Office of the Representative of Montenegro Before the European Court of Human Rights, through to the Ministry of Justice of the Government of Montenegro and the Supreme Court of Montenegro will take all the necessary measures to prevent similar violations of human rights and fundamental freedoms occurring in the future.

II Conclusions

The following conclusions can be drawn from this Analysis:

1. In total 36 judgments have been delivered by the European Court involving Montenegro, with the following violations being found: one case involving a violation of Article 2 of the Convention; three cases involving a violation of the Article 3 of the Convention; two cases involving a violation of Article 5 of the Convention; twenty two cases involving a violation of Article 6 of the Convention; three cases involving a violation of Article 8 of the Convention, two cases involving a violation of Article 10 of the Convention, and three cases involving a violation of Article 1 Protocol No. 1 to the Convention. There have also been four cases involving a violation of Article 13 of the Convention (in conjunction with Article 6 of the Convention), and one case involving a violation of Article 14 of the Convention (in conjunction with Article 8 of the Convention).

2. Of the judgments delivered in respect of Montenegro, most, 22, of the violations found have been in relation to Article 6 of the Convention. 12 violations have been found in relation to the right to a trial within reasonable time, one particular aspect of Article 6.

3. 35 out of the 36 judgments considered in the Analysis, have been successfully closed. Montenegro is highly rated by the Court in respect of its execution of the Court's judgments, and these good results are recognized by the Committee of Ministers of the Council of Europe.

4. Montenegro has no systematic problem with violations of Article 3, which stipulates an absolute prohibition of torture. However, the European Court in two judgments delivered against Montenegro reiterated the obligation of the State to conduct an investigation, which does not require certain results but certain means. In that respect, the view of the Court is that every investigation does not have to be necessarily successful, nor to lead to a conclusion coinciding with the claimant's view of facts, instead the investigation has to be detailed, prompt, and independent.

5. Article 3 of the Convention imposes a positive obligation on the State to ensure that detainees are detained in conditions which are in compliance with respect for human dignity, and that the manner and execution of detention measures do not subject them to pain and difficulties of an intensity above that which is unavoidable and inherent to a deprivation of liberty and that, considering the practical difficulties inherent in a deprivation of liberty, their health and wellbeing are adequately provided for.

6. The need to ensure the right to a trial within reasonable time is a common theme across numerous decisions of the Supreme Court of Montenegro in cases involving a claim for just satisfaction ("Tpz cases").

7. Violations of the right to respect for private and family life were found in three judgments delivered in respect of Montenegro, implying that the Montenegrin judiciary has no continuous failures in this area.

8. It should be borne in mind that respect for private and family life may include professional activities conducted within the public context, as well as the ethnic identity of the individual.

9. Regarding freedom of expression, protected by Article 10 of the Convention, it is noted that there has been visible progress in the implementation of the Convention at the national level in this area. This is the consequence of the prompt introduction of judges to the judgments of the European Court in respect of Montenegro, as well as with other relevant judgments.

10. The creation of consistent case-law requires courts, while deciding cases for compensation of damage suffered through the media, be led by the triple test set out in the case-law of the European Court. The triple test requires an answer to three questions: 1) was there an interference with freedom of expression (which exists if compensation was awarded), 2) was the interference regulated by law and was the aim protected by that law legitimate, and 3) was the interference necessary in a democratic society and was it proportionate to the legitimate aim.

11. According to the opinion of the European Court, in order to be effective a remedy must be able to prevent, as well compensate for, any damage if there was a delay in proceedings. The Court, in its judgments in *Vukelić v. Montenegro* and *Vučeljić v. Mon-*

tenegro recognized the effectiveness of the remedies provided by the Law on the Protection of the Right to a Trial Within Reasonable Time. This effectiveness was the result of increasing the speed of court proceedings and introducing a more adequate approach in using these remedies. In the case of *Siništaj and Others v. Montenegro*, the European Court found that a constitutional complaint can be, in principle, considered an effective remedy from 2015 onwards.

III Recommendations

The following recommendations can be drawn from the Analysis:

1. Beside national law, it is also necessary to apply the Convention. In that regard, courts and other state authorities are encouraged to apply the standards of the Court as stated in judgments with regard to Montenegro as they are a source of law in accordance with Article 9 of the Constitution. Likewise, it is recommended that courts and other state authorities apply the authoritative views of the European Court made in judgments delivered in cases involving other states in order to provide adequate protection and prevent the violation of human rights and fundamental freedoms.

2. While referring to the standards of the Convention, it is necessary to comply with the rules stated in the Instructions on the Form of Refereeing of Judgments of the European Court of Human Rights in Strasbourg.[205]

3. Considering the development of the case-law of the European Court, continuous professional training for judges and prosecutors is recommended, as is continuous dialogue with experts in the area of human rights and fundamental freedoms.

4. A proposal for an order or extension of an order of detention has to clearly demonstrate the existence of reasonable doubt that the defendant committed the criminal offence. It must state the most important facts and circumstances related to the criminal-legal event as well as any data and evidence from which the conclusion of the existence of reasonable doubt follows as well as the relevant grounds according to which detention has been ordered or extended.

5. In deciding on the ordering or extension of detention, the domestic court has to clearly emphasize the existence of reasonable doubt that the accused committed the criminal offence and avoid expressions that imply certainty that accused is the offender and to state relevant and sufficient reasons for grounds for detention on which is based detention order and for evaluation of principles of subsidiarity and proportionality.[206]

6. The court is obliged to consistently adhere to time limits for the supervision of detention under Article 179 § 2 and Article 198 § 1 of the Criminal Procedure Code, as

205 http://sudovi.me/vrhs/evropski-sud-esljp/uputstvo-sudijama-u-crnoj-gori/
206 See the Legal Opinion of the Supreme Court, Su V br 6/17.

the consequence of exceeding these time-limits is a violation of the right to freedom and safety of personality.[207]

7. It is necessary to conduct surveillance on the execution of detention in accordance with Article 185 of the Criminal Procedure Code, and in that respect, the legislator should consider introducing an effective remedy that is available to detainees.

8. With the aim of decreasing the number of applications before the European Court for possible violations of Article 6 of the Convention, it is necessary to make additional efforts towards improving the efficiency of administrative proceedings and administrative disputes, with an emphasis on the need to implement the decisions made in these proceedings.

9. It is recommended that the Human Resources Management Authority, while conducting trainings, gives its special attention to the education of the authorized officials who conduct administrative proceedings and issue administrative acts, with a focus on the right to a trial within a reasonable time.

10. It is recommended that the Presidents of a domestic court, while examining requests for review, with the aim of speeding court proceedings, be led in their reasoning by the views and criteria of the Court.

11. When claims refer to the limitation of rights provided under Articles 8, 9, 10 and 11 of the Convention, it is necessary to conduct the Court's triple test mentioned above. With the aim of preventing violations of the right to family life, decisions on exercising parental rights must be executed in reasonable time, as the adequacy of a measure relating to parents and children depends on the speediness of its realization.

12. The introduction of video surveillance must not violate the right to privacy, therefore it must be based on respect for the rule of law.

13. In relation to the right to respect for private life, when problems involve elements of ethnic identity, the obligation of the State is to investigate possible racist elements in violent behaviour.

14. It is recommended that the State Prosecutor's Office of Montenegro contribute to the execution of judgments delivered by the Court in respect of Montenegro, involving violations of Articles 2 and 3 (right to life and prohibition of torture). The Committee of Ministers has stated that it is necessary to, immediately after the judgment in which the violation has been found becomes final, conduct, *ex officio*, an effective investigation and take all necessary steps for the investigation to be concluded.

15. Bearing in mind the importance that the execution of judgments made by the Court has for an applicant who has suffered a violation, as well as the international reputation of the State, it is recommended that State authorities prioritise the need for effective cooperation with the Office of the Representative of Montenegro Before the European Court.

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207 See the Legal Opinion of the Supreme Court, Su V br 7/17.