SUPREME COURT OF MONTENEGRO

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BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Analysis of the Judgments of the European Court of Human Rights in Respect of Montenegro

Delivered in 2020

February 2021

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Analysis prepared by:

Miraš Radović, Supreme Court of Montenegro judge and Head of the Department Monitoring the Case-Law of the European Court of Human Rights and European Union Law

Dušanka Radović, Supreme Court of Montenegro judge and Deputy Head of the Case-Law and Legal IT Department

Valentina Pavličić, Montenegro's Agent before the European Court of Human Rights

Boško Bašović, Podgorica Basic Court judge

Vanja Radević, Adviser in the Office of the Agent before the European Court of Human Rights

Ivo Šoć, Adviser in the Office of the Agent before the European Court of Human Rights

Tijana Badnjar, Advisor in the Supreme Court of Montenegro

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Sadržaj

Introductory Remarks

Dear colleagues!

We have an exceptional opportunity to present this Analysis of the judgments the European Court of Human Rights delivered in respect of Montenegro in 2020. This is not the first such document. In early 2018, we published an analysis of the Court's judgments by the end of 2017 and, at the beginning of 2020, we published and presented an analysis of the Court's 2018 and 2019 judgments. Although our Analysis is quite extensive, we were not motivated by the ambition to present material that would not be subject to critical thought and that would definitely be qualified as comprehensive. On the contrary, we aimed to contribute to dialogue at the national level, dialogue with the judiciaries of other countries, especially in the region, as well as to our dialogue with the European Court of Human Rights (hereinafter: ECtHR or Court). We also aimed to produce a document that would serve as reference for developing training programmes for holders of judicial offices and all those involved in human rights protection as a supreme civilisational value, to spark interest in the Court's relevant views in its judgments in respect of Montenegro, which are an integral part of Montenegro's legal order and a source of law. We bore in mind the affirmative assessments about the prior analyses, including that the offered materials "could be supplemented and transformed into a manual for judges".

You will be the ones who will assess the extent of our success. We remain open to critical views and willing to cooperate to develop our jurisdiction and jurisprudence..

The title of the Analysis includes the syntagm 'Judgments in Respect of Montenegro' rather than the commonplace one 'judgments against Montenegro'. Indeed, the Court's judgments should be considered well-meaning, because they reflect the view that the European Convention of Human Rights is a living organism, contribute to the understanding of minimum human rights (hereinafter: ECHR or Convention) standards and inspire law-makers and legal practitioners to continuously work on developing the national legal order. We have already witnessed changes in the national legislation and case-law in response to the Court's views. We should therefore acknowlege the contribution the applicants have made to improving the domestic legal order by filing their complaints with that Court.

The authors of the Analysis also usefully presented decisions in which the Court declared the applications inadmissible because these decisions can also be relevant to case-law.

The Analysis shows that, in 2020, the Court did not find Montenegro in violation of any absolute rights or rights indicating systemic problems with regard to respect for and protection of human rights.

The Analysis, however, also brings to the fore specific problems in applying international legal standards, particularly those arising from the legal lacunae in national law and leading to legal insecurity, issues concerning the right of access to a court and the reasonable length of proceedings on individuals' rights and obligations.

The Analysis reflects on the effects of the Court's judgments and decisions on the improvement of national law and case-law, providing an overview of the Montenegrin Supreme Court's legal opinions and judgments relying on the Court's case-law and aiming to improve the legal order. It also notes the open issues that need to be addressed to ensure the practical and effective protection of and respect for human rights and freedoms.

The Analysis also presents the individual and general measures Montenegro has undertaken to execute the Court's judgments in which it found the State in violation of the Convention. It also provides an extremely useful review of the other countries' execution of the Court's judgments closed in 2019, for which we are particularly grateful to Montenegro's Agent before the Court and her team.

The conclusions and recommendations informed by the Court's judgments and decisions in respect of Montenegro at the end of the Analysis aim to encourage and maintain continuous dialogue among the state authorities at the national level.

We are extremely proud of the involvement of our young team members in the development of the Analysis, who demonstrated their wholehearted commitment, interest and extensive knowledge of human rights protection issues.

We will also be grateful to all professionals who will take part in the debate and various precious forms of dialogue on both this and the prior Analyses.

We remain confident that the good cooperation between the Montenegrin judiciary and the European Court of Human Rights has helped raise general awareness among institutions and holders of judicial offices of the rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Last but not the least, we wish to express our sincere gratitude to our years-long partners, the London-based AIRE Centre and the British Embassy in Podgorica, for their long-standing support to our activities within the "Legal Forum of the Supreme Court of Montenegro" project, within which this Analysis was prepared.

Supreme Court of Montenegro judge

Miraš Radović

Introductory Address

Dear readers,

This third edition of the "Analysis of Judgments of the European Court of Human Rights in Respect of Montenegro" discusses the judgments the Court delivered in respect of Montenegro in 2020 and cases closed by a final resolution of the Council of Europe (CoE) Committee of Ministers during the reporting period.

Like its predecessors, this Analysis was prepared and published by the Office of the State Agent before the European Court of Human Rights and the Supreme Court of Montenegro with the support of the British Embassy and the London-based AIRE Centre. Its authors aimed to share part of the standards developed within ample European jurisprudence and case-law with their peers - judges, state prosecutors and legal practitioners.

The development of the publication and analysis of the cases it discusses took place in an extremely sensitive period both in Montenegro and across the world. The COVID-19 pandemic inspired me to write this Introduction differently, in order to capture the times, we are living in.

Review of the Year Marked by the COVID-19 Pandemic and Its Impact on the National Legal System

We are witnessing the pandemic's direct impact on democracy and human rights protection as it continues to evolve and expand. The existing case-law and legal science are not offering responses to the new structural and substantial developments since a broad range of human rights and freedoms enshrined in the Convention are interfered with and the High Contracting Parties are addressing them in various ways. There are a few cases before the Court in which the applicants complained of measures taken in response to COVID-19 by the end of the reporting period for the simple reason that such cases have not yet been ruled on by domestic courts. On the other hand, the Court's case-law on cases involving infectious diseases and epidemics is extremely limited for the simple reason that these issues have either not arisen in Europe or have been limited to particular states.[1] All this indicates that, in their examinations of new legal situations, national judges should apply analogy and adequately refer to the valid case-law wherever possible and offer their legal answers.

The Convention allows High Contracting Parties to take measures derogating from their obligations under the Convention in time of public emergency and to restrict the enjoyment of specific rights, to the extent strictly required by the exigencies of the situation, to protect the lives of others or public interest. The year behind will be remembered as the year of the global ever-evolving COVID-19 pandemic caused by virus SARS-CoV-2, which has resulted in one of the world's gravest crises since WWII. Governments across Europe have been focusing on human health and lives and undertaking urgent measures to tackle the risks and challenges brought on by the transmission of this dangerous virus.

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1 *Enhorn v. Sweden*, App. no. 56529/00, judgment of 25 January 2005.

Montenegro is no exception. It has also faced an unprecedented and widespread health crisis that has impacted on respect for the fundamental values of democracy and rule of law, especially bringing into question the realisation of human rights and freedoms enshrined in the Convention. The emergency measures taken to contain the epidemic at the state level have posed a huge challenge to democratic resilience. States should, on the one hand, ensure that their measures do not undermine the importance of fundamental rights and freedoms and the rule of law, and, on the other, that they fulfil expectations and proactively predict all the relevant risks. Namely, the unforeseeable circumstances brought on by coronavirus have led to more frequent resort to human rights restrictions over a longer period of time than usual. This may result in changes in the protection of the rights of individuals and of the public in general, as priority is given to the protection of the rights to life and health, and may even jeopardise the broader status of human rights protection as a pillar of European democracy. In the year behind us, the most frequently used words in everyday life in included 'quarantine', 'social/physical distancing' and 'lockdown', while international legal jargon abounded with the term 'derogations from human rights'. That is why I will now try to clarify the issue of derogations from the Convention, a right it confers to the High Contracting Parties.

Concepts of Lockdown and Quarantine

All 47 High Contracting Parties, 27 of which are members of the European Union, have committed to complying with and applying the Convention "as an instrument of European public order".[2] Some human rights may, however, be derogated from in order to achieve a legitimate aim, such as the protection of the health of the nation, like in 2020. 'Lockdown' (once confined to prison jargon) and 'quarantine' were the terms used most frequently by government officials. Before 2020, the word 'lockdown' had mostly been used in the US prison system to refer to confining of prisoners to their cells, typically in emergencies. 'Lockdown', 'isolation' and 'lockdown measures' are now used to denote the confinement of people diagnosed with coronavirus in a specific area for a specific period of time, during which their freedom of movement and contacts with the outside world are restricted. The imposition of these measures has led to restrictions of fundamental human rights, notably the freedom of movement and the right to a family and social life. The word 'quarantine' was historically used to denote measures taken in respect of individuals or groups known to be suffering from an infectious disease. In the context of the COVID-19 pandemic, it denotes restrictions of the freedom of movement and of contacts with families and groups generally imposed on the population of a territory, city, region, or the entire state, with a view to containing the transmission of the virus. Lockdown applies to everyone, whether or not they are infected. Exceptions are possible but they are enumerated in laws or by-laws. In the context of socio-economic relations, 'lockdown' denotes restrictions of the individuals' freedom of movement and enjoyment of their family, social and economic life.

As opposed to 'lockdown', 'quarantine' denotes a set of measures taken vis-à-vis individuals or groups of individuals known to be or suspected of being infected by the virus, wherefore they are confined to specific locations, which they may not leave for any reason on threat of penalty. These terms are incorporated in the orders and measures adopted by the national authorities to protect the health of the nation. However, there were situations where people not infected by the virus were

2 *Loizidou v. Turkey* (preliminary objections), App. no. 15318/98, judgment of 25 March 1995, para 93.

ordered into "state quarantine" and they may file applications with the ECtHR alleging violations of their fundamental rights and freedoms. Almost all countries adopted various legitimate measures of varying intensity and scope that restricted specific fundamental human rights, primarily the freedom of movement, the right to a private and family life, and the freedom of assembly.

It needs to be noted that the Convention, which marked its 70th anniversary in 2020, was not conceived to present an obstacle to the implementation of national policies. On the contrary, it was conceived as a mechanism providing national authorities with a legal framework guiding them in applying national policies in any situation.

Main Principles of Derogation from Obligations under the Convention

The Convention allows High Contracting Parties to take measures derogating from their obligations under the Convention to the extent strictly required by the exigencies of the situation *in time of war or other public emergency threatening the life of the nation*.[3] Derogations from the Convention must be temporary, limited and controlled. The right to derogate and the possibility of derogating from the Convention does not automatically mean that the States can introduce restrictions; rather, they are expected to try and achieve their aim during the crisis without applying emergency measures. Having analysed the situations in which some countries derogated from specific provisions of the Convention, a group of legal experts/professors headed by Emilie Hafner–Burton argued that "derogations are a rational response to domestic political uncertainty. They enable governments facing serious threats to buy time and legal breathing space from voters, courts, and interest groups to confront crises while signaling to these audiences that rights deviations are temporary and lawful."[4] In the years following WWII, the authors of the Convention were aware of these risks and recognised that crises provided governments with a suitable excuse to strengthen their powers, deconstruct democratic institutions, while, on the other hand, they were responsible for protecting their citizens and national institutions. Precisely this balance, the *fil rouge* of the Convention, is visible in the provisions on derogation and demonstrates that the authors of the Convention wanted to strike a balance between two competing and opposing interests.

High Contracting Parties have the sovereign right to apply Article 15 of the Convention, in which case they must send notice of the measures they have taken and the reasons therefor to the CoE Secretary General. The following countries decided to apply Article 15 in response to the COVID-19 pandemic in 2020: Latvia,[5] Romania,[6] Armenia,[7] Estonia,[8] Moldova,[9] Georgia,[10] Albania,[11] North Macedonia,[12] Serbia[13] and San Marino.[14]

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3 Article 15 of the Convention, https://www.echr.coe.int/documents/convention_eng.pdf
4 Emilie M. Hafner-Burton and others "*Emergency and Escape: Explaining Derogations from Human Rights Treaties*".
5 Nota verbale of 16 March, https://rm.coe.int/09000016809ce9f2. Latvia sent a nota verbale on derogation from the ICCPR the same day, https://treaties.un.org/doc/Publication/CN/2020/CN.105.2020-Eng.pdf
6 Nota verbale of 18 March 2020, https://rm.coe.int/16809cee30
7 Nota verbale of 20 March 2020, https://rm.coe.int/09000016809cf885
8 Nota verbale of 20 March 2020, https://rm.coe.int/09000016809cfa87
9 Nota verbale of 20 March 2020, https://rm.coe.int/09000016809cf9a2
10 Nota verbale of 23 March 2020, https://rm.coe.int/09000016809cff20
11 Nota verbale of 1 April 2020, https://rm.coe.int/09000016809e0fe5
12 Nota verbale of 2 April 2020, https://rm.coe.int/09000016809e1288
13 Nota verbale of 7April 2020, https://rm.coe.int/09000016809e1d98
14 Nota verbale of 14 April 2020, https://rm.coe.int/09000016809e2770

This is not the first time a country decided to derogate from the Convention. Turkey did so on several occasions. The Republic of Ireland, Greece, the United Kingdom and Ukraine also derogated from the Convention in the past. However, the difference between their reasons and the current ones lie in the fact that the same cause – threat of the uncontrolled spread of coronavirus and risk to the health of the nation – lay at the heart of all 2020 derogations by all the States. Measures taken by nearly all European countries interfered with the freedom of movement, e.g. limited people's right to leave a country, travel to another country or return to their country of origin. This does not mean that travel restrictions may not be imposed to achieve a legitimate aim; however, they must be proportionate and limited in time. Apart from providing for the fulfilment of specific substantive derogation-related obligations, the Convention imposes on High Contracting Parties specific procedural obligations, to notify the Council of Europe Secretary General of their application of Article 15 and of their withdrawal of derogation i.e. end of the emergency.

The right to derogate from the Convention in time of public emergency is a sovereign albeit not absolute right and is scrutinised by the ECtHR to an extent. Its case-law shows that in any case where an applicant complains that his or her Convention rights had been violated during a period of derogation, the Court will first examine whether the measures taken can be justified under the substantive articles of the Convention; it is only if they cannot be so justified that the Court will go on to determine whether the derogation was valid, which entails a review of the requirements and prerequisites for derogation.

In its judgment in the case of *Lawless v. Ireland,*[15] the Court observed that in the general context of Article 15 of the Convention, the natural and customary meaning of the words "other public emergency threatening the life of the nation"[16] was sufficiently clear, whereas they referred to an exceptional situation of crisis or emergency which affected the whole population and constituted a threat to the organised life of the community of which the State is composed. In this case, the Court analysed several facts and factors underlying the measure, firstly, the existence in the territory of the Republic of Ireland of a secret army (IRA) engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957. The Court concluded that the Irish Government were justified in declaring that there was a public emergency threatening the life of the nation and were hence entitled to take measures derogating from their obligations under the Convention.

The Court's views on the derogation notice the United Kingdom sent the CoE Secretary General after the 2001 terrorist attacks in the USA in which it expressed its apprehension that UK national security may be at real risk due to its inability to deport foreign nationals to their countries of origin and held that detention provisions in the should be interpreted in the light of the terms of the derogation are interesting. Before sending a derogation notice, the UK adduced evidence to show the existence of a threat of serious terrorist attacks. All the national judges accepted that the danger was credible, although, at the time the derogation

15 *Lawless v. Ireland (No. 3)*, App. no. 332/57, judgment of 1 July 1961, para 28.

16 Article 15(1) of the ECHR https://www.echr.coe.int/documents/convention_eng.pdf.

was made, no al-Qaeda attack had taken place within the territory of the United Kingdom. The Court accepted the UK's arguments and said that the requirement of imminence could not be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it and that significant weight had to be accorded to the views of the national courts, which were better placed to assess the evidence relating to the existence of an emergency.[17]

It may be concluded that the Court recognises that Article 15 leaves the Contracting States an extremely broad margin of appreciation. Its approach is set out in *Ireland v. the United Kingdom,*[18] in which it stated that "[I]t falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 § 1 leaves those authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements […], is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis."[19]

In sum, Article 15 leaves a wide margin of appreciation to High Contracting Parties but their actions are under European supervision. When a Contracting State forwards a derogation notice to the CoE Secretary General, it does not necessarily need to declare a state of emergency to derogate from the Convention; rather, derogation from an obligation under the Convention in just one segment of the law under the explanation that a public emergency threatening the life of the nation is at issue suffices. All ten states that sent derogation notices to the CoE Secretary General because of the uncontrolled spread of COVID-19 had already proclaimed a state of emergency in their territories. The other 37 CoE Member States did not derogate from the Convention, although all of them introduced similar or analogous anti-pandemic measures interfering with human rights and disrupting the normal functioning of the state system and some of them even proclaimed a state of emergency.

Non-Derogable Human Rights

The Convention allows Contracting States to derogate from specific human rights to protect national interests and public health. However, paragraph 2 of Article 15 prohibits derogation from Article 2 (right to life), except in respect of deaths resulting from lawful acts of war, and from Article 3 (prohibition of torture and inhuman or degrading treatment or punishment), Article 4(1) (prohibition of slavery and forced labour) and Article 7 (no punishment without law) of the Convention.[20] Derogation from the prohibition of the death penalty under Protocols 6 and 13 to the Convention is also prohibited.[21]

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17 *A. and Others v. The United Kingdom*, App. no. 3455/05, 19 February 2009.
18 *Ireland v. The United Kingdom*, App. no. 5310/71, 18 January 1978.
19 *Ibid*., para 207.
20 Article 15 of the Convention, https://www.echr.coe.int/documents/convention_eng.pdf.
21 Article 3 of Protocol No. 6 and Article 2 of Protocol No. 13 to the Convention, https://www.echr.coe.int/documents/

The ECtHR has already developed a standard on non-derogable rights in its case-law. In *McCann and Others v. The United Kingdom,*[22] it found a violation of Article 2 of the Convention because of the killing of three members of the Provisional IRA in Gibraltar. Namely, the Court concluded that Article 2 did not only safeguard the right to life, but also set out the circumstances when the deprivation of life may be justified and that it ranked as one of the most fundamental provisions in the Convention admitting of no derogation in peacetime. It found a violation of Article 2 in this case, having examined whether the campaign conducted by the Special Air Service (SAS) could have been controlled and organised without killing the suspects.

Öcalan *v. Turkey*[23] is a very well-known case in which the ECtHR addressed the impossibility of commuting a death penalty to life imprisonment and the detention conditions (particularly the applicant's social isolation and restrictions of his freedom to maintain contact with his family and lawyers). It found a violation of the Article 3 rights of the applicant, the leader of the illegal organisation PKK, because the conditions of his detention until 2009 were inhuman. The Court found that Article 3 of the Convention enshrined one of the fundamental values of democratic societies and the Convention prohibited in absolute terms torture and inhuman or degrading treatment or punishment even in face of immense difficulties faced by States in modern times in protecting their populations from terrorist violence, specifying that Article 3 made no provision for exceptions and that no derogation from it was permissible even under Article 15 of the Convention in time of war or other national emergency threatening the life of the nation.[24]

States have an extremely clear and admittedly difficult obligation to protect the life and health of the nation. In order to achieve that, they are under the obligation to take all the measures reasonably expected of them, whilst carefully assessing the extent to which these measures interfere in the rights and freedoms of their citizens. They have to ensure that the measures are proportionate and necessary and do not extend beyond the emergency caused by the COVID-19 pandemic.

To derogate or not to derogate? This issue had been debated by the proponents and opponents of derogation even before the pandemic. Some in favour of derogation in time of public emergency threatening the life of the nation see an advantage in the clear distinction between restrictions allowed in ordinary circumstances and those allowed only to contain the COVID-19 pandemic. Derogation can reflect acceptance of the rule that any restriction of a right must be temporary, subject to review and applied only to achieve a legitimate goal. Rights may be restricted to the extent dictated by the exceptional circumstances, while the principles of proportionality and lawfulness still apply. Given that the ECtHR has so far always assessed the validity of derogations always *post festum*, i.e. when the emergency had ceased to exist and the case was filed with the Court, everyone focusing on human rights will follow with interest which positions the Court will take to such different situations and reactions by individual States, some of which opted for derogation, while others relied on exceptions already pro-

convention_eng.pdf.

22 *McCann and Others v. The United Kingdom*, App. no. 18984/91, 27 September 1995.

23 *Öcalan v. Turkey (No. 2)*, App. nos. 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014.

24 *Ibid*., para. 97-98.

vided for by the Convention. The situation is very similar in most European countries. The COVID-19 pandemic is obviously unpredictable and subject to change, wherefore the issues of the character and necessity of the restrictive measures and their effectiveness are also subject to change. Indeed, the principle the Court has developed in its case-law of the Convention as a *living instrument*[25] will come to the fore in this situation that has befallen not only Europe, but the entire world as well, requiring a **courageous heart, decisiveness and wisdom** of all of us safeguarding the Convention**.**

Dear judges, state prosecutors and other legal practitioners in the judiciary, it is precisely at times like these marked by the unpredictable and evolving pandemic that we must prove that rule of law is not an empty concept (because it would be devoid of purpose if it were) and that independent and credible judges are part of it. The binding character of ECtHR's judgments and the legal certainty emanating from their execution are the fundamental elements of the rule of law, the principle underlying the Montenegrin Constitution and the entire Convention system. The national judiciary is an important link in that precious democratic and independent legal chain.

Valentina Pavličić

Montenegro's Agent before the European Court of Human Rights

25 *Tyrer v. The United Kingdom*, App. no. 5856/72, 2 April 1978.

Introduction

The ECHR came into being 70 years ago. Although the Council of Europe adopted a large number of international treaties, the Convention has remained the most important instrument for the protection of human rights. It clearly draws its success from the moment it was created and the promise it then gave to Europe to create peace, democracy and respect for human rights. However, the Convention and its success are inseparable from the Court. By applying the teleological interpretation of the Convention, accompanying its object and purpose, the Court enabled it to be "a living instrument which […] must be interpreted in the light of present-day conditions", [26] wherefore it has become the mirror of social changes and national systems, as well as their catalyst.

International human rights law was changed when the Convention entered into force in 1953. For the first time, sovereign states assumed international obligations to protect human rights and allowed their citizens, as well as everyone else in their jurisdictions, to complain to an international court if their guaranteed rights were violated. This was a revolutionary step for national legal systems, which had for centuries been based on the idea of protecting citizens within their national jurisdictions, without the rights conferred upon them and protected by an international legal document.[27]

The Convention and ECtHR case-law have led to substantial changes in the national legal orders, prompting amendments of existing and adoption of new laws and the development of new legal interpretations and practices. This and the fact that Montenegro ranks first on the list of countries by the number of applications filed with the Court per capita, imposes upon the relevant national institutions the obligation to continuously promote Convention standards and, in particular, alert to the Court's judgments in respect of Montenegro, which reveal the weaknesses in the work of the national institutions.

It is with that aim that the Supreme Court and the Office of Montenegro's State Agent before the Court in Strasbourg have, in cooperation with the AIRE Centre, already prepared two documents analysing ECtHR's judgments against Montenegro. The "Analysis of the Judgments of the European Court of Human Rights in Respect of Montenegro" published in November 2018 focused on 37 judgments delivered from 3 March 2004 to December 2017, in which the Court found a violation of one or more Convention rights. The second Analysis, published in December 2019, focused on 16 judgments and one decision the ECtHR delivered in respect of Montenegro in 2018 and 2019. The value added of these documents, which laid out the Court's standards on specific Convention rights and their application to cases against Montenegro, was that they provided an overview of the judgment execution procedure. Furthermore, the Analyses examined the impact of the Court's judgments on national case-law and identified major changes in the domestic legal system. The Analysis offered a number of conclusions, notably: that Montenegro was found in violation of the right to a fair trial the most often; that Article 3 of the Convention imposed upon the State the positive obligation to ensure that people were detained in conditions that *were compatible with respect for human dignity;* that Montenegro had a good track record in executing the Court's judgments; and that it

26 *Tyrer v. The United Kingdom*, App. no. 5856/72, judgment of 25 April 1978, para. 31.
27 Harris, O' Boyle and Warbick, *Law of the European Convention on Human Rights*, 4th edition.

has made substantial progress in implementing freedom of expression standards. The Analyses, *inter alia*, recommended that the relevant institutions apply both national law and the Convention, that the State ensure continuous advanced professional development of the judges and prosecutors in that field of law, and that rulings ordering and extending pre-trial detention be in compliance with ECHR case-law. They also underlined the importance of conducting effective investigations and noted the need to apply the so-called three-tier test when ruling on alleged violations of rights enshrined in Articles 8, 9, 10 and 11 of the Convention.

This is the third Analysis of the Court's 2020 judgments in respect of Montenegro. It provides an overview of the ten judgments the Court delivered in respect of Montenegro and its four decisions declaring the applications inadmissible. Seven of the 2020 judgments found violations of the right to a fair trial, an issue the Court has ample case-law on. Three cases were identified by the Court as so-called "leading cases" because they revealed new structural and/or systemic problems to which the Convention legal standards were applied. In these cases, the Court found a violation of the right of access to a court, right to respect for private and family life, and the right to peaceful enjoyment of possessions.

The Analysis relies on the methodology of its predecessors, wherefore it includes statistical data on the ECtHR's work and a review of applications against Montenegro, a detailed analysis of the judgments delivered in the three leading cases, the execution of judgments and the importance these judgments may have for national case-law. The Analysis also recalls the main admissibility principles and standards related to the Convention rights Montenegro was found in violation of in 2020, providing the Analysis with additional educational importance.

The following professionals took part in the development of this document: Supreme Court of Montenegro judges Miraš Radović and Dušanka Radović, Montenegro's State Agent before the European Court of Human Rights Valentina Pavličić, Podgorica Basic Court judge Boško Bašović, Office of the State Agent advisers Vanja Radević and Ivo Šoć, and consultant Tijana Badnjar.

The authors of the Analysis hereby express their profound gratitude to Her Majesty's Ambassador to Montenegro Karen Maddocks and the AIRE Centre's Programme Director Biljana Braithwaite.

1. Structure of the Analysis

The Introduction provides a brief recap of the prior Analyses, their topics, goals, importance and some of their conclusions and recommendations. It also presents the methodology, scope and object of this Analysis. The Analysis consists of six parts.

Part 1 presents the general statistical data on the ECtHR's work in 2020. It also provides an overview of ECtHR 2020 statistics in respect of Montenegro and compares them with the 2017-2019 statistics provided in the prior Analyses.

Part 2 provides a review of Court decisions in which it did not find a violation of the Convention. Specifically, it reviews the four decisions on applications concerning the right to a

trial within a reasonable time which the Court declared inadmissible. This part also provides an overview of the admissibility criteria, on which the Court has well-developed case-law. Familiarity with the admissibility criteria is extremely important, because these standards are the initial step towards seeking protection from the Court. The description of the admissibility criteria and their legal interpretations are provided to deepen the professionals' knowledge of the Convention system and assist individuals in assessing whether their applications to the Court will be reviewed on the merits.

Part 3 of the Analysis focuses on the Court's judgments in which it found Montenegro in violation of one or more Convention rights. It provides summaries of the judgments and their execution, by applying the methodological approach used in the prior Analyses; the judgments are systematised by Article, rather than by the time of adoption. The Analysis goes on to review the execution of the judgments and measures taken to that end. In order to present the broad impact of the Court's judgments, the section "Relevance to Case-Law" analyses the effect they have had or may have on legal views and the case-law of the domestic courts.

Part 4 of the Analysis focuses on the execution of judgments discussed in the 2019 Analysis, specifically, the execution of the judgments in the cases of *Bigović v. Montenegro* and Šaranović *v. Montenegro*. The execution of these judgments began in 2020, in compliance with the set timeframes.

Part 5 of the Analysis provides an overview of cases in the CoE Committee of Ministers' 2019 annual report "Supervision of the Execution of the Judgments and Decisions of the European Court of Human Rights Court", which were successfully closed that year. The comparative case-law provided in this part reflects on the successful execution of the Court's judgments as one of the indicators of the reforms States have been undertaking to bring their national legal systems into compliance with the Convention standards.

Part 6 of the Analysis presents the general conclusions and recommendations, providing a clear overview of the headway made in the national legal system and identifying room for improvement.

1.1. Statistical Overview

A total of 62,000 applications were pending before the Court at the end of 2020; 41,700 applications were allocated to a judicial formation in 2020, an overall decrease of 6% compared with 2019 (44,500).

The Court disposed of 39,190 applications judicially during the reporting period, delivering judgments on 1,901 applications. A large proportion of these applications were joined, with the result that the number of judgments actually delivered was 871. A total of 27,289 applications were dismissed as inadmissible or struck out of the list of cases.

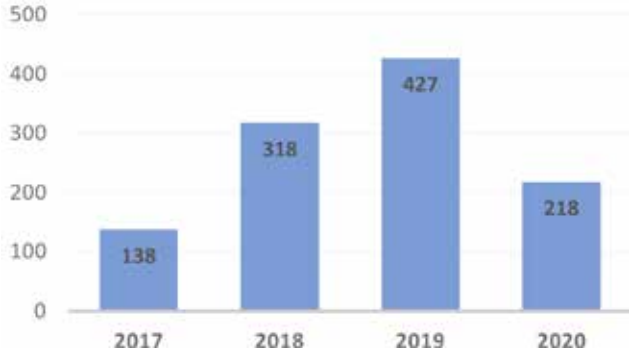
Violations of Article 6, the right to a fair trial, were found in most of the Court's 2020 judgments – 287 of them. Next came violations of Article 5 (208 judgments) and Article 3 (194 applications), followed by violations of Article 1 of Protocol No. 1 (122 judgments), and vio-

lations of Article 2 (85) and Article 13 (85). The Court found violations of other Convention rights in a total of 286 cases.[28]

A total of 218 applications against Montenegro were allocated to the Court's judicial formations in 2020. It, however, needs to be noted that the applications are adjudicated by single judges, committees of three judges, Chambers of seven judges and the Grand Chamber, comprising 17 judges. In nearly 90% of the cases, the applications are dismissed already in the first stage, by the single judges, who are tasked with ruling on their admissibility. The number of allocated applications against Montenegro decreased substantially over 2019, when it stood at 427.

According to the Court's statistics, the average number of applications lodged against a Contracting State per 10,000 citizens stood at 0.50 in 2020. That number was much higher in case of Montenegro, where it stood at 3.50. According to this methodology, Montenegro topped the list of countries against which applications were filed with the ECtHR.

Review of Allocated Applications against Montenegro by Year



1.1.1. Number of Decided Applications against Montenegro

28 See: https://www.echr.coe.int/Documents/Annual_report_2020_ENG.pdf.

◊ Of the 280 applications the Court adjudicated in 2020, 266 were declared inadmissible[29] or struck out of the list of cases[30] by single judges or committees of three judges. The Court delivered 10 judgments against Montenegro, finding violations of one Article of the Convention in each of them. It also delivered decisions on five cases in 2020.[31] It adopted four decisions declaring the applications inadmissible. In its fifth decision, it struck the application out of the list of cases because a friendly settlement had been reached. Thirty-seven applications against Montenegro were pending before the Court on 31 December 2020.

◊ Of the 445 applications decided in 2019, 442 were declared inadmissible or struck out of the list of cases by single judges of committees of three judges. The Court delivered three judgments[32] and four decisions[33] on applications against Montenegro in 2019.

◊ Of the 277 applications decided in 2018, 264 were declared inadmissible or struck out of the list of cases by single judges, committees of three judges or a Chamber. In 2018, the Court delivered 13 judgments[34] in respect of Montenegro, finding a violation of one or more Convention rights in 11 of them; it also adopted decisions on 10 applications in 2018.[35]

◊ Of the 170 applications decided in 2017, 140 were declared inadmissible or struck out of the list of cases by single judges, 12 were declared inadmissible or struck out of the list of cases by committees, while two applications were declared inadmissible or struck out of the list of cases by Chambers. The Court delivered judgments in 13 cases[36] and adopted decisions on 13 cases.[37]

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29 More on the admissibility criteria on page 21 of the Analysis.

30 Article 37 of the Convention reads as follows: "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that (a) the applicant does not intend to pursue his application; or (b) the matter has been resolved; or (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires. 2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course."

31 *Dalmatin v. Montenegro*, App. no. 47116/17 and *Bujković v. Montenegro*, App. no. 53223/14, were adjudicated by a committee on 12 December 2019, but its decisions were published on 16 January 2020, wherefore the cases are covered by the 2020 statistics.

32 *Bigović v. Montenegro*, App. no. 48343/16, *Šaranović v. Montenegro*, App. no. 31775/16, *KIPS d.o.o. and Drekalović v. Montenegro*, App. no. 28766/06 (judgment on just satisfaction of 22 October 2019).

33 *Puhalo v. Montenegro*, App. no. 24818/12, *Dragović v. Montenegro*, App. no.35056/17, *Kićović v. Montenegro*, App. no. 44295/1 and *Vidaković v. Montenegro*, App. no.21551/15.

34 *Vujović v. Montenegro*, App. no. 75139/10, *Petrović and Others v. Montenegro*, App. no. 18116/15, *Rajak v. Montenegro*, App. no. 71998/11, *Montemlin Šajo v. Montenegro*, App. no. 61976/10, *Novaković and Others v. Montenegro*, App. no. 44143/11, *Arčon and Others v. Montenegro*, App. no. 15495/10, *Jasavić v. Montenegro*, App. no. 32655/11, *Lekić v. Montenegro*, App. no. 37726/11, *KIPS d.o.o. and Drekalović v. Montenegro*, App. no. 28766/06, *Kešelj and Others v. Montenegro*, App. no. 33264/11, *Brajović and Others v. Montenegro*, App. no. 52529/12, *Vujović and Lipa d.o.o. v. Montenegro*, App. no. 18912/15 and *Milićević v. Montenegro*, App. no. 27821/16.

35 *Bulatović v. Montenegro*, App. no. 46600/12, *Srdanović v. Montenegro*, App. no. 76592/14, *Backović v. Montenegro*, App. no. 65191/16, *Zogović v. Montenegro*, 60117/10, *Radomir Šikmanović v. Montenegro*, App. no. 57715/13, *Bakić v. Montenegro*, App. no.50419/07, *Vujisić v. Montenegro*, App. no. 21712/16, *Ivanović and Daily press v. Montenegro*, App. no.24387/10, *Bogojević v. Montenegro,* App. no. 1409/13, and *Romanjoli v. Montenegro*, App. no. 11200/15.

36 *Ranđelović and Others v. Montenegro*, App. no. 66641/10, *Stanka Mirković and Others v. Montenegro*, App. no. 33781/15 and three others, *Sinex d.o.o. v. Montenegro*, App. no. 44554/08, *Nedić v. Montenegro*, App. no. 15612/16, *Svorcan v. Montenegro*, App. no. 1253/08, *Tomašević v. Montenegro*, App. no. 7096/08, *Vučinić v. Montenegro*, App. no. 44533/10, *Đuković v. Montenegro*, App. no.38419/08, *Dimitrijević v. Montenegro*, App. no. 17016/16, *Jovović v. Montenegro*, App. no. 46689/12, *Tripcovici v. Montenegro*, App. no. 80104/13, *Antović and Mirković v. Montenegro*, App. no. 70838/13, and *Alković v. Montenegro*, App. no. 66895/10.

37 *Magyar v. Montenegro*, App. no. 45372/13, *Minić v. Montenegro*, App. no.23644/12, *Pavlović v. Montenegro*, App. no.

1.1.2. Statistical Overview of ECtHR's Decisions on Cases against Montenegro

According to the Court's Annual Report,[38] it delivered 63 judgments in respect of Montenegro from 3 March 2004[39] to end December 2020. The first Analysis, covering the 3 March 2004 - 1 January 2018 period, presented 37 judgments[40] in which the Court found a violation of one or more Convention rights.[41]

The second Analysis covered the Court's decisions in respect of Montenegro from 1 January 2018 to end December 2019. In this period, the Court delivered 16 judgments[42] and one decision. It found a violation of one or more Convention rights in 13 cases; one judgment concerned just satisfaction, while the ECtHR did not find any violations in two judgments. In its decision rendered in this period, it dismissed the application as manifestly ill-founded.

This, third Analysis covers 10 judgments and four decisions the Court rendered in 2020. It found violations of one Convention right in each of them. It rendered four decisions dismissing the applications as manifestly ill-founded i.e. because it found abuse of the right of application.

In sum, the Court has to date found Montenegro in violation of the following Articles[43]: Article 2 of the Convention in one case; Article 3 of the Convention in four cases; Article 5 of the Convention in five cases; Article 6 of the Convention in 42 cases; Article 8 of the Convention in four cases; Article 10 of the Convention in two cases, Article 1 of Protocol No. 1 in seven cases, Article 13 of the Convention (in conjunction with Article 6 of the Convention) in five cases; and, Article 14 of the Convention (in conjunction with Article 8 of the Convention) in one case. The ECtHR also delivered two judgments on just satisfaction.

58861/11, *Bulatović v. Montenegro*, App. no. 32557/11, *Rakočević and Minić v. Montenegro*, App. nos.68938/12 and 31745/13, *Petrović v. Montenegro*, App. no. 59049/11, *Darmanović v. Montenegro*, App. no. 13822/12, *Ćorović v. Montenegro*, App. no. 16901/11, *Jovićević v. Montenegro*, App. no. 45469/13, *Ćalović v. Montenegro*, App. no. 18667/11, *Jović v. Montenegro*, App. no. 51147/06, *Kolosov v. Montenegro*, App. no.13039/11 and *Kljajević v. Montenegro*, App. no.32645/11.

38 https://www.echr.coe.int/Documents/Annual_report_2020_ENG.pdf

39 The date when the ECHR entered into force in respect of Montenegro, see the ECtHR's judgment in *Bijelić v. Montenegro and Serbia*, App. no. 11890/05, of 28 April 2009.

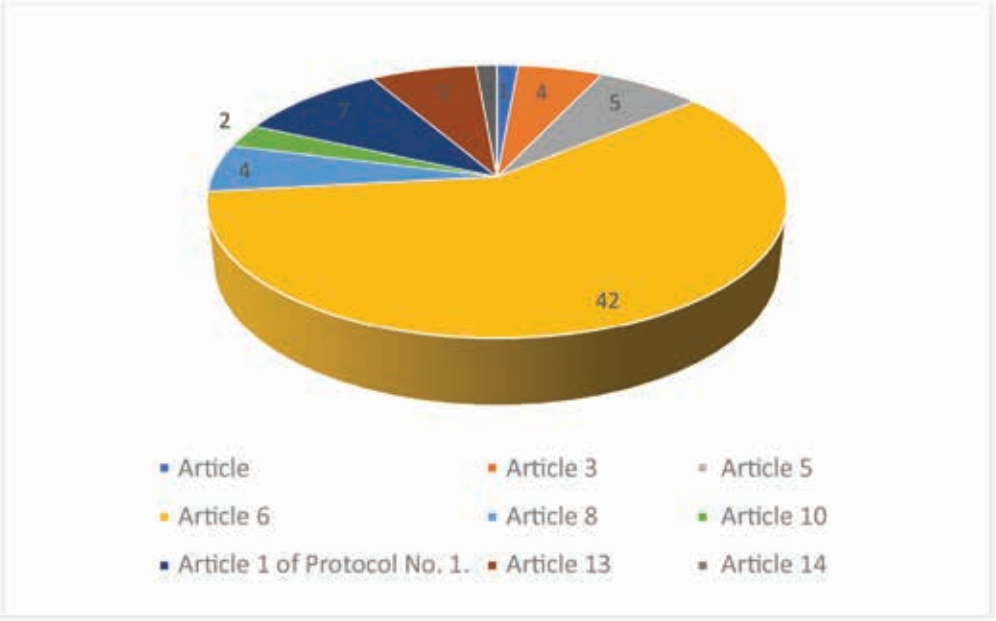
40 The judgments on the merits and on just satisfaction in the case of *Koprivica v. Montenegro*, App. no. 41158/09, are considered two separate cases.

41 The Court found the following breaches: Article 2 in one case; Article 3 in three cases; Article 5 in two cases; Article 6 in 22 cases; Article 8 in three cases; Article 10 in two cases; Article 13 in conjunction with Article 6 in four cases; Article 14 in conjunction with Article 8 in one case; and Article 1 of Protocol No. 1 in three cases.

42 A total of 16 judgments were delivered in the relevant period. However, the Court rendered two judgments in the case of *KIPS DOO and Drekalović v. Montenegro*, App. no. 28766/06, one on the merits on 26 June 2018 and another on just satisfaction on 22 October 2019, which are analysed as one case for practical purposes.

43 The number of violations is greater than the number of judgments, because, in some of them the Court found a violation of more than one Convention Article.

Violations of Convention Rights by Montenegro



The pie chart shows that the Court found violations of the right to a fair trial under Article 6 of the Convention in most of its judgments in respect of Montenegro. Specifically, it found violations of the right to a trial within a reasonable time in 27 cases, breach of Article 6 because of the non-enforcement of judgments in eight cases, and violations of the right of access to a court in five cases. It found a violation of the right to a reasoned judgment, of the presumption of innocence and of the principle of fairness in three cases.

2. Analysis of ECtHR Decisions Declaring Applications against Montenegro Inadmissible

2.1. Admissibility Criteria

Article 35

Admissibility Criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
   (a) is anonymous; or
   (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
   (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
   (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

The principle of subsidiarity is one of the main principles on which the Convention is based. According to this principle, the primary obligation to protect human rights and freedoms enshrined in the Convention rests with the national authorities. The Court should intervene only where States have failed in their obligations.

The European protection mechanism is triggered by individual or inter-state applications. The requirements set out in Article 35 of the Convention must be fulfilled for the Court to rule on them. Most of the admissibility criteria e.g. the six-month rule and the exhaustion of

national legal remedies,[44] are procedural in character, wherefore nearly 95% of the applications are rejected without being examined on the merits for failure to satisfy one of the admissibility criteria laid down in this Article.[45] However, some criteria, such as whether the application is "manifestly ill-founded" and the existence of "significant disadvantage" require of the Court to review the merits of the case in the preliminary stage.[46]

The Court has held in its case-law that the admissibility criteria should be applied with a degree of flexibility and without excessive formalism, and that their goal, as well as the general goal of the ECHR, must be taken into account.[47]

For an application to be admissible, it must be filed after the applicant has exhausted all national legal remedies, within six months from the day the final decision was rendered at the national level. It may not be anonymous or substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contain no relevant new information. It may not be incompatible with the provisions of the Convention and may not amount to abuse of the right of application. In order to reduce the Court's caseload, Protocol No. 14 introduced an additional admissibility criterion: an application will be declared inadmissible in the event the Court finds that the applicant has not suffered a significant disadvantage.[48] In its ample case-law, the Court provided important interpretations of each of the above admissibility criteria, as well as the admissibility criteria permeating the principles of *ratione temporis*, *ratione loci* and *ratione materiae*. Compatibility *ratione personae* requires the alleged violation of the Convention to have been committed by a Contracting State or to be in some way attributable to it, when the applicant can be considered a victim of a human rights violation. The *ratione loci* admissibility criterion led to a more thorough definition of the concept of territory in which a State is responsible for the state of human rights, while jurisdiction *ratione temporis* covers only the period after the ratification of the Convention or the Protocols thereto by the respondent State.

Admissibility criteria may be reviewed at any stage of the procedure. The Court rejects applications as inadmissible in the event it finds that any of the admissibility criteria have not been fulfilled.[49] The Court reviews the admissibility of an application as soon as it receives it, without notifying the respondent State of it.[50] The respondent State may also contest the admissibility of the application against it.[51]

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44 Harris, O' Boyle and Warbick, *Law of the European Convention on Human Rights*, 4th edition.
45 *Practical Guide on Admissibility Criteria*, Council of Europe, European Court of Human Rights, 2014.
46 Harris, O' Boyle and Warbick, *Law of the European Convention on Human Rights*, 4th edition.
47 *Ibid*.
48 Dimitrijević et al, *Comment of the European Convention on Human Rights*.
49 *Practical Guide on Admissibility Criteria*, Council of Europe, European Court of Human Rights, 2014.
50 Harris, O' Boyle and Warbick, *Law of the European Convention on Human Rights*, 4th edition.
51 *Ibid*.

ECtHR's 2020 Decisions in Respect of Montenegro

The Court adopted four decisions declaring applications against Montenegro inadmissible in 2020. In all these cases, the applicants complained of the excessive length of civil proceedings.

Dalmatin v. Montenegro

Application no. 47116/17

Decision of 16 January 2020

The applicant relied on Article 6(1) of the Convention, complaining of the excessive length of civil proceedings.

Having examined all the material before it, the Court considered that the respondent Government could not be held liable for the excessive length of civil proceedings.

The Court noted that the applicant essentially referred to the excessive length of the first-instance proceedings which, according to him, had lasted for almost 5 years, from 22 June 2007 until 26 April 2012. However, the Government submitted that the first-instance court gave a judgment on 22 April 2010 which was quashed on 28 January 2011 following the applicant's appeal and the case was remitted for re-hearing. The Government therefore invited the Court to reject the application as an abuse of the right of individual application.

The applicant neither disputed the facts submitted by the Government nor provided any explanation for the failure to inform the Court about them.

The Court reiterated that an application could be rejected as an abuse of the right of individual application within the meaning of Article 35(3(a)) of the Convention if, among other reasons, it was knowingly based on false information or if significant information and documents were deliberately omitted, either where they were known from the outset or where new significant developments occurred during the proceedings. It went on to say that incomplete and therefore misleading information could amount to an abuse of the right of application, especially if the information in question concerned the very core of the case and no sufficient explanation was given for the failure to disclose that information. The Court referred to its judgments in cases *Gross v. Switzerland* [GC], App. no. 67810/10, para. 28, ECHR 2014, and *S.A.S. v. France* [GC], App. no. 43835/11, para. 67, ECHR 2014.

Having regard to the fact that the information withheld in the present case concerned the very core of the application and that the applicant had not provided any explanation as to why it was omitted in the application and his later submissions, the Court found that such conduct was contrary to the purpose of the right of individual application.

In view of the above, the Court found that the present application constituted an abuse of the right of individual application and had to be rejected in accordance with Article 35, paragraphs 3(a) and 4 of the Convention.

Bujković v. Montenegro

Application no. 53223/14

Decision of 16 January 2020

The applicant complained of the excessive length of civil proceedings under Article 6(1) of the Convention.

Having examined all the material before it, the Court considered that the application was inadmissible.

The Government submitted that the proceedings had been suspended for almost five years at the applicant's initiative and that the remaining length had therefore not been excessive. The applicant did not dispute that information.

The Court noted that the proceedings were initiated on 22 May 2003. On 9 September 2003, the applicant proposed that the proceedings be suspended until another set of civil proceedings, which he had initiated in 2000 and which concerned a preliminary issue, were concluded. After the resolution of the preliminary issue in June 2008, the impugned proceedings were continued in January 2009 and finished in October 2010, less than two years later. During this time the case was considered by three levels of jurisdiction.

In these circumstances, the Court considered that the length of the proceedings were not excessive and, consequently, that the application was manifestly ill-founded and had to be rejected in accordance with Article 35, paragraphs 3(a) and 4 of the Convention.

Kuljić v. Montenegro

Application no. 24431/11

Decision of 5 March 2020

The applicant complained of the excessive length of civil proceedings under Article 6(1) of the Convention.

Having examined all the material before it, the Court considered that the respondent Government could not be held liable for excessive length of civil proceedings.

The Court noted that the applicant and his former wife separated in 2003. Pending the divorce and custody proceedings, their two children were entrusted to the applicant's former wife and the applicant was granted contact rights. However, in January 2005, the applicant took the children for a winter holiday and subsequently refused to return them to their mother. On 5 January 2006 the domestic court granted custody of the children to the applicant's former wife. That judgment became final on 5 May 2006.

In September 2006 the applicant applied to the court for sole custody of the children. The length of these proceedings was the subject of the present case. They lasted six years, six months and 13 days at three levels of jurisdiction. Seven decisions were rendered during that period. Moreover, several social services and an expert team of child psychologists were involved in the proceedings.

While the impugned custody proceedings were ongoing, several sets of enforcement proceedings, as well as criminal proceedings, were initiated against the applicant in connection with his refusal to comply with the final judgment of 5 January 2006 to return the children to his former wife. On 30 September 2010, the applicant was found guilty of child abduction and sentenced to six months' imprisonment suspended for two years. Those proceedings were examined by the Court in the case of *Mijušković v. Montenegro*[52] brought by the applicant's former wife. In that case, the Court held that there had been a violation of Article 8 of the Convention concerning, *inter alia*, the belated enforcement of the final custody judgment.

In view of the above and, notably, considering the applicant's contribution to the duration of the impugned proceedings, as well as their complexity, the Court found that the length in the present case could not be considered excessive.

Consequently, the Court found that the application was manifestly ill-founded and had to be rejected in accordance with Article 35, paragraphs 3(a) and 4 of the Convention.

Crkva Svetog Đorđa v. Montenegro

App. no. 15346/15

Decision of 9 April 2020

The applicant complained of the excessive length of civil proceedings under Article 6(1) of the Convention.

Having examined all the material before it, the Court considered that the application was inadmissible. In particular, the Court noted that the proceedings in question were terminated on 14 March 2007 when the Supreme Court rendered its decision. They therefore lasted three years and eleven days within the Court's temporal jurisdiction.[53] The Court further noted that the case involved complex factual and legal issues, in particular, issues concerning the nationalisation of property which took place in 1959 and 1965 in the former Yugoslavia. In these circumstances, the Court found that the length of the proceedings in the present case could not be considered excessive.

Consequently, the Court found that the application was manifestly ill-founded and had to be rejected in accordance with Article 35, paragraphs 3(a) and 4 of the Convention.

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52 The ECtHR's judgment in *Mijušković v. Montenegro*, App. no. 49337/07, is presented in the 2018 Analysis, page 81, available at: https://sudovi.me/static/vrhs/doc/9670.pdf

53 Montenegro ratified the Convention on 3 March 2004.

Relevance to Case-Law

The above decisions draw attention to well-established principles the Court has applied in assessing whether the length of proceedings exceeded reasonable time. The *ratione temporis* jurisdiction of the Court may arise in some cases. In case of Montenegro, the Court held in *Bijelić v. Montenegro and Serbia* that it had jurisdiction to assess the length of proceedings as of 3 March 2004, when the Convention and its Protocols entered into force in respect of Montenegro. Where the domestic proceedings began after that date, there is no dilemma from which date reasonable time is reckoned. Once the Court establishes the duration of the national proceedings, it assesses the other criteria it has established in practice: complexity of the case, the conduct of the applicant and the relevant authorities, and what is at stake for the applicant in the dispute.

Furthermore, during its assessment of the length of proceedings and depending on the circumstances of the case, the Court also assesses the parties' contribution to the length of proceedings, as it noted in *Kuljić v. Montenegro.* Namely, in that case, the Court took into account the applicant's conduct, noting that several sets of enforcement proceedings, as well as criminal proceedings, had been initiated against him for child abduction and in connection with his refusal to return the children to his former wife, which led to the prolongation of the proceedings. The proceedings lasted six years, six months and 13 days at three levels of jurisdiction, which, from the legal point of view, may at first glance indicate that they substantially exceeded reasonable time. However, their excessive prolongation was caused by the applicant. This decision indicates how domestic courts should assess the parties' contribution to the prolongation of the court proceedings.

A more thorough overview of the reasonable time standards and the Montenegrin Supreme Court's case-law on fair redress claims is provided in the following section of this publication on Article 6 of the ECHR.

3. Analysis of Judgments against Montenegro in Which the ECtHR Found Violations of Convention Rights

3.1. 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 interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The right to a fair trial is essential to the rule of law concept, as well as the Convention system. The rights enshrined in this Article safeguard the fairness of proceedings. The numerous applications complaining of violations of this Article have provided the Court with the opportunity to expand its scope and improve the legal protection of individuals.

The importance of Article 6 of the Convention is illustrated, *inter alia*, by the Court's view set out in the Grand Chamber's judgment in *Perez v. France*[54], in which it held that the right to a fair trial held so prominent a place in a democratic society that there could be no justification for interpreting Article 6(1) restrictively. Therefore, the importance of the rights enshrined in this Article, in conjunction with the teleological interpretation of the rights, has enabled the Court to develop ample case-law on Article 6 and include in it the protection of rights not explicitly mentioned in its text – the right of access to a court,[55] the right to the enforcement of a judgment[56] and the right to a final court decision.[57]

In its interpretation of Article 6 and reviews of applications complaining of violations of the right to a fair trial, the Court has had to bear in mind the delicate issue of control over the work of national courts. The Court has repeatedly underlined that it should not act as a court of fourth instance and that it was not its task to substitute its own assessment of the facts and the evidence for that of the domestic courts. It explained that its task was to ascertain whether the proceedings considered as a whole, including the way in which the evidence had was taken, were fair.[58] Consequently, it has held that it was not for the Court to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention.[59] Furthermore, the Court will not question under Article 6(1) the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable.[60]

Furthermore, the Court found that Article 6 applied to criminal, civil and administrative proceedings, and not only to the proceedings before courts, but to stages preceding and following them as well. The terms "'civil rights and obligations' and 'criminal charge' are autonomous Convention concepts and have to be interpreted in accordance with the Court's case-law. Application of Article 6 to preliminary and appeals proceedings, as well as other stages of supervision of judgments, depends to a great extent on the availability of legal remedies under national law.[61]

As regards the rights enshrined in Article 6, most Court judgments regarded violations of the right to a trial within a reasonable time. The Court's 1959-2020 statistics show that it delivered a total of 19,739 judgments finding a violation of at least one Convention right in that period and that most of them – 5,950 – concerned breaches of the right to a trial within a reasonable time.[62] They were followed by 5,276 judgments in which the Court found a violation of the right to a fair trial, as one of the aspects of Article 6 of the Convention and 4,190 judgments finding breaches of the right to liberty and security.

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54 *Perez v. France* [GC], App. no. 47287/99, para 64, ECHR 2004-I.
55 *Golder v. The United Kingdom*, App. no. 4451/70, paras. 26-40, ECHR 1975.
56 *Hornsby v. Greece*, App. no. 18357/91, paras. 40−45, Reports 1997 – II.
57 *Brumărescu v. Romania*, App. no. 28342/95, paras. 60-65, Reports of Judgments and Decisions 1999-VII.
58 *Bernard v. France*, App. no. 22885/93, paras. 37-41, ECHR 1998.
59 D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckey, *Law of the European Convention on Human Rights*, Oxford University press, 2018.
60 *Bochan v. Ukraine* (No. 2) [GC], App. no. 22251/08, para. 61, Reports of Judgments and Decisions 2015.
61 *Delcourt v. Belgium*, App. no. 2689/65, paras. 23-26, ECHR 1970.
62 https://www.echr.coe.int/Documents/Annual_report_2020_ENG.pdf

As already noted, most of the Court's judgments in which it found Montenegro in violation of the Convention concerned the right to a trial within a reasonable time. It delivered a total of 27 such judgments from 3 March 2004 to end December 2019. In 2020, the ECtHR delivered seven judgments finding Montenegro in violation of this right. These are so-called repetitive cases on which the Court has ample case-law. The judgments in such cases are brief and refer to well-established legal principles, and they do not set out the facts of the case in detail.

3.1.1. Article 6(1) – Right to a Fair and Public Hearing within a Reasonable Time

This purpose of this right is to guarantee an end to an individual's insecurity regarding their status under civil law or criminal charges against them within a reasonable time. However, the purpose of this requirement of a fair trial within a reasonable time exceeds the specific legal status of the individual, because it affects overall legal certainty in the judicial system.

In 2020, the Court delivered a total of seven judgments finding Montenegro in violation of the right to a fair trial within a reasonable time in civil proceedings: *Despotović v. Montenegro, Glušica and Đurović v. Montenegro, Marković v. Montenegro, Piletić v. Montenegro, Raspopović and Others v. Montenegro, Sinanović and Others v. Montenegro*, and *Mercur System AD and Others v. Montenegro*.

All these judgments were delivered by a committee of three judges. Since the Court has well-established case-law on the matter, the judgments do not specify the facts of the case in detail and they focus on recalling the main principles of a trial within a reasonable time.

In its assessment of whether the length of the proceedings was reasonable, the Court took into account the status of the cases on the day Montenegro ratified the Convention, specifically on 3 March 2004, when the Convention and its Protocols entered into force in respect of the then State Union of Serbia and Montenegro. The Court took this view for the first time in *Bijelić v. Montenegro and Serbia.*[63] Its judgment in *Marković v. Montenegro*, where the impugned proceedings opened after the Convention was ratified, on 30 April 2004, was the exception.

In all its judgments, the Court reiterated that the reasonableness of the length of proceedings had to be assessed in the 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 the relevant authorities and what was at stake for the applicant in the dispute. Having examined all the material submitted to it, the Court did not find any fact or argument capable of persuading it to reach a different conclusion on the admissibility and merits of these complaints. Having regard to its case-law on the subject, the Court considered that in these cases, the length of the proceedings had been excessive and failed to meet the "reasonable time" requirement. The Court also referred to *Stakić v. Montenegro,*[64] the leading case in which it found Montenegro in breach of the right to a trial within a reasonable time.

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63 *Bijelić v. Montenegro and Serbia*, App. no. 1189/05, para. 68, ECHR 2009.

64 *Stakić v. Montenegro*, App. no. 49320/07, paras. 45-51, ECHR 2012.

(a) Facts

On 21 February 1977, the Podgorica District Court found X, Y and Z guilty of participating in a fight on 14 July 1973. On 18 December 1978, the applicant instituted civil proceedings against X, Y and Z, seeking compensation for an eye injury he had suffered in the fight and the subsequent loss of sight in his right eye and for loss of income caused by his reduced working capacity.

On 18 March 1980, the Podgorica Municipal Court found partly in favour of the applicant and its judgment was partly upheld by the Podgorica District Court on 30 December 1980. On 10 May 1983, the Supreme Court in Podgorica quashed the prior judgments and ordered a retrial.

During the retrial, the proceedings were stayed between 23 September 1985 and 6 January 1986 due to the applicant's absence. Five hearings were adjourned and one was held between 10 May and 21 June 1990.

On 21 June 1990, the Podgorica Basic Court again ruled partly in favour of the applicant. Its judgment was based on the evidence previously adduced and on further documents relating to the applicant's health and employment and another three expert witnesses' opinions. On 14 May 1991, the Podgorica High Court quashed the first-instance judgment and again ordered a retrial.

Seven hearings were adjourned and one was held between 14 May 1991 and 16 October 2008. On 16 October 2008, the Podgorica Basic Court ruled partly in favour of the applicant. Its judgment relied on: the opinions of four court experts given by November 1986, documents obtained by May 1993, statements of four witnesses provided between March 1997 and April 2002, and the statements of the applicant, X and another court expert made between 6 November 2005 and 19 November 2007.

On 18 September 2009, the Podgorica High Court again quashed the first-instance judgment and ordered a retrial. On 13 September 2020, the Basic Court ruled that the case should be decided afresh given that it had been assigned to a new judge. The court requested another opinion of a financial expert. As for the remaining evidence, the parties agreed that the minutes from the previous hearings could be read. The next hearing was scheduled for 2 November 2010. There was no information in the case file whether it had taken place or whether there were any further developments in the case.

(b) Arguments of the parties

The applicant complained that his right to a trial within a reasonable time had been violated and submitted that he had had to ask that some hearings be adjourned on account of his health.

The Government maintained that the impugned proceedings were both factually and legally complex, requiring a number of witnesses and expert witnesses to be heard. In particular, five expert opinions had been given during the period of the Court's competence *ratione temporis*, all of them upon the applicant's proposal. Secondly, the applicant himself had been mainly responsible for the length of the proceedings. In particular, he had amended and further particularised his claim on a number of occasions, two of which after the Convention had entered into force in respect of Montenegro; several hearings scheduled between 1983 and 2002 had been adjourned because of him; and the impugned proceedings had been stayed between 23 September 1985 and 6 January 1986 due to his absence. Thirdly, Y and Z had passed away in the meantime, which required that their legal successors be identified, which added to the overall length of the proceedings. Lastly, the impugned proceedings were of no vital importance to the applicant and, as such, did not require priority or any urgent action on the part of the courts. The courts issued seven decisions in total, two of which were rendered at two instances after the ratification of the Convention. It could not therefore be said that they were not active. The Government concluded that there was no violation of Article 6 of the Convention.

(c) Relevant principles

The Court reiterated that the reasonableness of the length of proceedings had to be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute.[65]

In order to determine the reasonableness of the delay at issue, regard must be had to the state of the case on the date of ratification of the Convention.[66]

(d) The Court's assessment

The period to be taken into account began on 3 March 2004, which is when the Convention entered into force in respect of Montenegro. The impugned proceedings were thus within the Court's competence *ratione temporis* for a period of more than eight years and six months and were still pending at first instance, another twenty-four years having already elapsed before that date.

The Court observed that the present case concerned compensation for the injuries the applicant had suffered in a fight. The Court noted that four witnesses and five expert witnesses had been heard. However, contrary to the Government's submissions, it was clear from the case file that most of this evidence had been obtained before the Convention entered into force in respect of the respondent State. While it could be accepted that some compensation claims may be more complex than others, the Court did not consider the present one to be of such complexity as to justify proceedings of this length. Nor did the fact that the impugned proceedings do not require priority or urgent action justify a procedural delay of such length, which length may even be considered a de facto denial of justice.

65 *Frydlender v. France* [GC], App. no. 30979/96, para. 43, ECHR 2000-VII.
66 *Styranowski v. Poland*, judgment of 30 October 1998, Reports of Judgments and Decisions 1998-VIII.

The Court noted that the applicant had indeed amended the exact amount of compensation he sought on two occasions after the ratification of the Convention by Montenegro. It, however, did not consider that this could have significantly contributed to the length of the proceedings as the claim was not amended in its substance. While some of the hearings scheduled before 3 March 2004 had been postponed at the request of the applicant, there was nothing in the case file to suggest that the procedural delay after the date of ratification resulted from his conduct but rather was caused by the failure of the authorities to act diligently.

The Court noted that the first decision after Montenegro's ratification of the Convention was given on 16 October 2008, which was more than four years and seven months later. After this decision had been quashed on 18 September 2009, the case had been pending before the first-instance court for almost three years, with only one hearing having taken place in the meantime.

In view of the criteria laid down in its jurisprudence and the relevant facts of the present case, the Court held that the length of the proceedings complained of had failed to satisfy the reasonable time requirement and that Article 6(1) of the Convention had been violated. It awarded the applicant €5,000 in respect of pecuniary damage.

Length of Proceedings and Relevant Decisions of National Courts in Judgments in Which the ECtHR Found Violations of the Right to a Trial Within a Reasonable Time

Case/Application Number	Length of Proceedings	Relevant Domestic Decisions	Just Satisfaction for Non-Pecuniary Damage
Despotović v. Montenegro, App. no 36225/11	6 years, 3 months and 28 dana 3 levels of jurisdiction	Supreme Court of Montenegro Rev. No. 945/10 of 1 July 2010	Applicant did not file a claim
Glušica and Đurović v. Montenegro, App. no. 34882/12	7 years, 9 months and 19 days 3 levels of jurisdiction	Supreme Court of Montenegro Rev. No. 1049/11 of 22 December 2011	€2,100
Marković v. Montenegro, App no. 6978/13	7 years, 7 months and 9 days 2 levels of jurisdiction	Podgorica High Court Gž. 5174/11-04 of 9 December 2011	€2,100

Piletić v. Montenegro, App. no. 53044/13	7 years, 7 months and 15 days 3 levels of jurisdiction	Supreme Court of Montenegro Rev.U. No. xxx of 18 October 2011	€1,200
Raspopović and Others v. Montenegro, 1. App. no. 58942/11 2. App. no. 14361/13 3. App. no. 71006/13	7 years, 3 months and 6 days at 3 levels of jurisdiction 8 years, 2 months and 6 days at 3 levels of jurisdiction 8 years, 7 months at 21 days at 3 levels of jurisdiction	Supreme Court of Montenegro Rev. No.569/11 Supreme Court of Montenegro Rev. No.366/12 Supreme Court of Montenegro Rev. No. 79/12	€900 €1,200 €1,000
Sinanović and Others v. Montenegro, App. no.. 45028/13	10 years and 2 days 1 level of jurisdiction	Podgorica Basic Court O. No. 391/13 of 5 March 2014	€2,900
Mercur System A.D. and Others v. Montenegro 1. App. no. 5862/11 2. App. no. 70851/13	7 years, 11 months and five days at 3 levels of jurisdiction 9 years, 2 months and 6 days at 3 levels of jurisdiction	Supreme Court of Montenegro Už. xxx of 8 February 2012 xxx	€500 €500

i. Execution of ECtHR Judgments

The above cases are categorised as clones of the *Stakić group*[67] of cases.

(a) Action Plan/Report

The State communicated to the Committee of Ministers its Action report of 29 June 2020 covering the six cases in which the ECtHR found violations of the right to a fair trial i.e. Article 6(1) of the Convention.

(b) Individual Measures

The Agent's Office reminded the Committee of Ministers in its Action report that the Court had found in its judgments that the national courts had completed the impugned proceedings in the *Despotović, Glušica and* Đurović*, Sinanović and Others, Piletić, Marković and Raspopović and Others,* wherefore there was no apprehension that the right to a trial within a reasonable time under Article 6 of the ECHR would be violated further.

As per the payment of damages, the applicant in the *Despotović* case had not filed a claim for just satisfaction, wherefore the Court had not ordered the State to pay it any compensation in respect of pecuniary or non-pecuniary damage. In the other cases, the Court had specified the amounts the State was to pay the applicants in respect of non-pecuniary damage and the just satisfaction was paid them within the specified deadline.

(c) General Measures

The general measures in the above-mentioned cases were undertaken within the *Stakić* group of cases. Namely, in its judgments against Montenegro on excessively long proceedings, the European Court noted the existence of effective legal remedies. Notably, it listed the request for review, which it qualified as an effective legal remedy on 4 September 2013 (*Vukelić v. Montenegro* judgment); the action for fair redress which it qualified as an effective legal remedy on 18 October 2016 (*Vučeljić v. Montenegro* decision) and the constitutional appeal which it qualified as an effective legal remedy on 20 March 2015 (*Siništaj and Others v. Montenegro* judgment). These legal remedies had not been available to the applicants at the time they were pursuing their cases before the national authorities. However, they are now legal remedies the effectiveness of which has been recognised by the Court, and they must be exhausted at the national level before filing an application with the ECtHR.

The Agent published a Guide to Article 6 – Right to a Fair Trial together with the Deputy Ombudsman and with the support of the NGO Centre for Democracy and Human Rights (CEDEM). She also organised and lectured at a large number of seminars, trainings and workshops, at which she discussed and reflected on the right to a fair trial and on excessively long proceedings.

All the judgments have been translated and published in the Official Journal of Montenegro, and on the websites of the Agent and the Supreme Court of Montenegro. They are also available in the database of regulations "Catalogue of Regulations". Furthermore, the texts of the

67 *Stakić v. Montenegro*, App. no.49320/07, judgment of 2 October 2012.

judgments and their brief analyses have been communicated to all the authorities whose actions contributed to the finding of the violations. The judgments are used in judicial training activities conducted by the Judicial and Prosecutorial Training Centre.

Resolution of the Committee of Ministers

At the 1383rd meeting of the Ministers' Deputies on 1 October 2020, the Committee of Ministers adopted Resolution CM/ResDH(2020)190 closing the examination of these cases.[68]

ii. Relevance to Case-Law

The Supreme Court of Montenegro, which is competent for ruling on fair redress claims, continued applying ECtHR standards on the right to a trial within a reasonable time. It has also been taking into account its landmark judgments in this area, as well judgments finding Montenegro in violation of the Convention. In its judgments, the Supreme Court of Montenegro has been setting out the general principles of a trial within a reasonable time, which it has been applying to the facts of the cases at issue, indicating that it has been guided by the comprehensive principle. It has thus applied the Court's practice of taking into account all the criteria developed in its case-law, which are decisive for determining the existence of a violation of the right to a trial within a reasonable time: complexity of the case, what is at stake for the party, conduct of state authorities and the parties. Its assessments of all the individual criteria are followed by a comprehensive assessment.

Fair redress for a violation of the right to a trial within a reasonable time shall entail the payment of pecuniary compensation for the violation of the right to a trial within a reasonable time and/or the publication of the judgment confirming that the party's right to a trial within a reasonable time has been violated.

In case ***Tpz. No. 4/20***, the Supreme Court partly upheld the claim, and specified:

> "Under Article 37(3) of the Act on the Protection of the Right to a Trial within a Reasonable Time, the Supreme Court shall deliver a judgment awarding fair redress for a violation of the right to a trial within a reasonable time where a final ruling confirms the validity of the request for review or the court has notified the party in the meaning of Article 17 of the Act.
>
> Given that, in his ruling IV-2 Su. No. 73/19 of 23 December 2019, the Podgorica High Court President upheld the claimant's request for review and ordered the priority adjudication of Podgorica Basic Court case P. no.7688/16, pursuant to Article 37(3) of the Act on the Protection of the Right to a Trial within a Reasonable Time, the Supreme Court is called upon to decide on the fair redress to be awarded to the claimant and assess whether the amount in the claim is justified.
>
> In its assessment of the amount of the claim, the Supreme Court departed from Article 4 of the Act on the Protection of the Right to a Trial within a Reasonable Time, under which, when deciding on a fair redress claim (not only on the merits but on the amount sought as well), the Supreme Court shall take into account, in

68 https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22001-205880%22]}

particular, the complexity of the case, the conduct of the claimant, the conduct of the court and other state authorities, and what is stake for the claimant. Such an approach is in accordance with the case-law of the European Court of Human Rights (hereinafter: the Court), which has noted in its judgments, including in *Arčon and Others v. Montenegro* (App. no. 1495/10, judgment of 3 April 2018, para. 16), that the reasonableness of the length of proceedings has to be "assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute ((see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, para. 43, ECHR 2000-VII)."

Departing from the above criteria and in accordance with the Court's more recent case-law (*Arčon and Others v. Montenegro* and *Montemlin Šajo v. Montenegro* (App. no. 61976/10, judgment of 20 March 2018), the Supreme Court applied the comprehensive approach in the instant case.

This Court bore in mind that the claimant's claim for compensation of damages is the subject matter of the civil proceedings in case P. No. 7688/16 conducted before the Podgorica Basic Court. The case file indicates that the claimant filed a claim against Montenegro on 1 December 2016, seeking compensation of damages because he had not been granted Montenegrin citizenship for a long period of time, wherefore he had lost the opportunity to find employment abroad. The main hearing before the first-instance court was concluded on 5 February 2020 and the judgment was delivered in writing on 3 March 2020. The court rejected the claimant's claim. Therefore, the proceedings before the first-instance court lasted three years, three months and two days and are still pending.

This was not a complex case in terms of the legal grounds the claimant relied on. According to the case file, the scheduling of the preliminary hearing was delayed around six months. Non-compliance with the statutory deadline and delays in holding the adjourned main hearings, which were, indeed, continuously rescheduled, coupled with the nearly seven-month delay in hearing the opinion of the financial expert, led to an unjustified prolongation of the proceedings by one year and three months. Furthermore, no final decision in the civil proceedings has been rendered, wherefore the claimant's right to a trial within a reasonable time has been violated, through no particular fault of his own.

As per what is at stake for the claimant, i.e. the claimant's interest, it is immanent to other cases regarding damage claims and does not fall in the domain of particular or special interests."

In case ***Tpz. No. 1/20***, the Supreme Court of Montenegro found a violation of the claimants' right to a trial within a reasonable time, but decided that there was no reason to award them the claimed damages and that the purpose of fair redress would be fulfilled by the finding of the violation and the publication of the judgment on the Courts of Montenegro website:

"Pursuant to Article 4 of the Act on the Protection of the Right to a Trial within a Reasonable Time, under which when deciding on a fair redress claim, the Supreme Court shall take into account, in particular, the complexity of the case, the conduct of the claimant, the conduct of the court and other state authorities, and what is stake for the claimant, which is in accordance with the case-law of the European Court of Human Rights (*Camasso v. Croatia,* App. no.15733/02, judgment of 13 January 2005, para. 32; *Frydlender v. France,* App. no. 30979/96, para. 43, ECHR 2000–VII; *Kaić v. Croatia,* App. no. 22014/04, judgment of 17 July 2008, para. 24; and *Novović v. Montenegro*, App. no. 13210, judgment of 23 October 2012, para. 49).

In its interpretation of the guarantee of the right to a trial within a reasonable time under Article 6 of the ECHR, the European Court of Human Rights said that the Convention "underlines the importance of rendering justice without delays which might jeopardise its effectiveness and credibility" (*H. v. France*, 1989). The Court reiterated that only delays for which the State could be held responsible could justify a finding that a "reasonable time" has been exceeded (*Napijalo v. Croatia,* App. no..66485/01, judgment of 13 November 2003, para. 61). Delays which the Convention bodies believe can be attributed to the State include, *inter alia*, delays in hearings on civil cases (*Zimmermann and Steiner v. Switzerland,* 1983).

Under Article 37(3) of the Act on the Protection of the Right to a Trial within a Reasonable Time, the Supreme Court shall deliver a judgment awarding fair redress for a violation of the right to a trial within a reasonable time where a final ruling confirms the validity of the request for review or the court has notified the party in the meaning of Article 17 of the Act.

Under Article 31 of this Act, fair redress shall entail the payment of pecuniary compensation for the violation of the right to a trial within a reasonable time and/or the publication of the judgment confirming that the party's right to a trial within a reasonable time has been violated.

Pursuant to Article 38(1) of the Act on the Protection of the Right to a Trial within a Reasonable Time, taking into account all the circumstances of the case, particularly the conduct of the parties to the proceedings, the court may in exceptional cases deliver a judgment finding only a violation of the right to a trial within a reasonable time.

In its application of the above provisions, this Court has taken into account the case-law of the European Court of Human Rights. When the ECtHR finds a breach of the right to a trial within a reasonable time, it, as a rule, awards the applicant just satisfaction in the form of non-pecuniary damage. The Court has assumed that there is a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage (see *Apicella v. Italy*, App. no. 64890/01, judgment of 29 March 2006, para. 93) and has held that reparation should be made for the state of distress, inconvenience and uncertainty about the outcome of the trial (see *Arvanitaki–Roboti and Others v. Greece*, App. no. 27278/03, judgment of 15 February 2008, para. 27). The Court has also accepted that, in some cases, the length of pro-

ceedings may result in only minimal non-pecuniary damage or no non-pecuniary damage at all, in which case the domestic courts will have to justify their decision by giving sufficient reasons. (*Scordino v. Italy*, App. no. 36813/97, judgment of 29 March 2006, paras. 203-204).

Based on the information in the case file, the Court notes that the civil proceedings that led the claimants to seek fair redress because of the violation of their right to a trial within a reasonable time were initiated on 21 March 2017 by their action for fair redress against the Agency for Electronic Communications and Postal Services seeking compensation of non-pecuniary damage, that the value of the matter under dispute was set at €100, that the judgment in case P. No. 450/17 was delivered on 6 December 2019, i.e. one year, eight months and 15 days from the day the claim was filed and that the proceedings are still pending. Furthermore, this Court notes that the preliminary hearing was held on 19 December 2017, eight months after the claim was filed, which is in contravention of Article 284(3) of the Civil Procedure Act, and that the main hearings were scheduled continuously, albeit after the deadlines prescribed in Article 319(2) of the Civil Procedure Act.

In this case, it is appropriate to apply Article 38(1) of the Act on the Right to a Trial within a Reasonable Time and deliver a judgment merely determining a violation of the claimants' right to a trial within a reasonable time, the violation of which has also been determined in the notice of the Cetinje Basic Court President, adopted in accordance with Article 17 of the Act on the Protection of the Right to a Trial within a Reasonable Time in Cetinje Basic Court case P. No..450/17, wherefore the Court has rendered the decision in para 1 of the operative part of this judgment.

The Court bore in mind that the Cetinje Basic Court case P. No. 450/17 did not raise any complex issues of fact or law, and that the court had failed to undertake the adequate procedural steps and hold the preliminary hearing within the deadline laid down in Article 248(3) of the Civil Procedure Act. In the view of this Court, that period, as well as the fact that the main hearings had been scheduled later than prescribed in Article 319(2) of the above Act, do not indicate that the court proceedings were excessively long.

The length of the proceedings cannot be attributed to the claimants. However, in the light of all of the above considerations, the fact that the first-instance judgment was delivered after one year, eight months and 15 days, that what was at stake for the claimants was not great since the appeal put the value of the dispute at €100, it would be disproportionate to award €300 to each of the claimants in respect of non-pecuniary damage, i.e. more than double the amount claimed by the individual claimants.

Therefore, this Court holds that the purpose of fair redress will be achieved by its finding of a breach of the right to a trial within a reasonable time and the publication of the judgment on the Courts of Montenegro website, wherefore it does not consider it justified to award the amount of non-pecuniary damage requested in the

claim. It has therefore rendered its decision in paragraph two of the operative part of the judgment."

In case ***Tpz. No. 7/20***, the Supreme Court of Montenegro dismissed the claim for compensation of non-pecuniary damages caused by the violation of the right to a trial within a reasonable time, explaining:

"Under Article 4 of the Act [on the Protection of the Right to a Trial within a Reasonable Time], when deciding on a fair redress claim, the Supreme Court shall take into account, in particular, the complexity of the case, the conduct of the claimant, the conduct of the court and other state authorities, and what is stake for the claimant, which is in accordance with the case-law of the European Court of Human Rights (*Frydlender v. France* [GC], App. no. 30979/96, para. 43-2000/VII).

Furthermore, in its judgment in the case of *Novović v. Montenegro* (App. no. 13210/05, 23 October 2012, para. 49), the ECtHR reiterated that the reasonableness of the length of proceedings had to be assessed in the light of the circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case, the conduct of the parties and of the relevant authorities, and the importance of what was at stake for the applicant.

In its interpretation of the guarantee of the right to a trial within a reasonable time under Article 6(1) of the ECHR, the European Court of Human Rights said that the Convention "underlines the importance of rendering justice without delays which might jeopardise its effectiveness and credibility" and that only delays for which the State could be held responsible may justify a finding that a "reasonable time" has been exceeded (see *H. v. France*, App. no. 10073/82, of 24 October 1989, para 55, and *Napijalo v. Croatia,* App. no. 66485/01, judgment of 13 November 2003, para. 61).

Therefore, when assessing a potential breach of the right to a trial within a reasonable time, the delays in procedural actions attributable to the court and other state authorities are relevant.

Having reviewed the case file of the Montenegrin Commercial Court Mal. No. 118/20, this Court finds that the right to a trial within a reasonable time has not been violated. First, it notes that one year, seven months and three days passed from the filing of the lawsuit (2 August 2018) to the initiation of the fair redress proceedings (5 March 2020), which in and of itself does not give rise to a conclusion about the violation of the right, especially given that the civil proceedings concerned contestation of a third party claim in bankruptcy proceedings and a compensation claim, which do not fall under urgent labour-related disputes, as the fair redress claim argues. The Montenegrin Commercial Court initially faced difficulties in taking action because the claimant had not specified defendant A.A.'s address in the claim, saying it was known to the bankruptcy manager appointed for the Nikšić joint-stock company Bauxite Mines. However, the case file demonstrates that the defendant, a foreign national, had registered as a resident in Podgorica and that

his residence permit in Montenegro expired on 6 July 2012, before the lawsuit was filed. The above submission clearly indicates that the Commercial Court had continuously undertaken numerous steps to ascertain the address of the defendant, which it finally succeeded in obtaining in July 2019, when the relevant department of the Ministry of the Interior notified it that the plaintiff's temporary residence permit in Podgorica, i.e. in Montenegro, had expired, whereupon the Court took steps to contact the defendant through international legal aid and involve him in the civil proceedings. The Commercial Court has had to resort to international legal aid in this case as indicated by the ruling of the Montenegrin Court of Appeal of 13 February 2020, albeit the procedure is neither simple nor rapid. Therefore, it cannot be said that the Commercial Court has been ineffective or failed to take adequate procedural steps.

Therefore, there were no delays in the civil proceedings in the Mal. No. 118/20 case before the Commercial Court which could be attributed to that court, wherefore this Court finds ill-founded the claim for the compensation of non-pecuniary damage caused by the breach of the right to a trial within a reasonable time."

In case ***Tpz. No. 13/20,*** the Supreme Court of Montenegro applied the ECtHR standards and concluded that judicial protection of the right to a trial within a reasonable time extended also to administrative proceedings, i.e. actions of the relevant administrative authorities in response to the claimants' requests for the adoption of forest planning documents and forest protection measures:

"In its assessment of the claimant's right to judicial protection in the meaning of Article 2 of the Act on the Protection of the Right to a Trial within a Reasonable Time, considering that the claim concerned inspectorial supervision related to the adoption of planning documents and protection measures before the relevant state administrative authority, this Court took into account the case-law of the European Court of Human Rights, which said, in paragraph 79 of its judgment in the case of *Sporrong and Lonnroth v. Sweden* of 23 September 1982, that Article 6(1) of the Convention applied to proceedings in the field of public law if they affected the applicant's private property rights.

These administrative proceedings concerned the claimants' request for the adoption of planning documents on forests they own, on which the legal regime on forest management depends, especially given that timber may be felled only in accordance with the private forest management plans, as provided for in Article 53 of the Act on Forests (Official Journal of Montenegro, Nos.74/10, 40/11 and 47/15). Therefore, the subject matter of the administrative proceedings is relevant to the private property rights of the claimants.

In accordance with Article 2(2) of the Act on the Protection of the Right to a Trial within a Reasonable Time, under which the right to judicial protection and duration of a reasonable time shall be ascertained in accordance with the case-law of the European Court of Human Rights, this Court considers decisive the ECtHR's views on the beginning of the period to be taken into account when assessing

whether there has been a violation of the right to a trial within a reasonable time. In particular, it has borne in mind the following views of the European Court of Human Rights:

"It is noted that the period to be taken into account began on 29 October 1996, the date on which the applicants lodged their appeal against the decision rendered at first instance" (*Živaljević v. Montenegro,* App. no. 17229/04, para. 75, of 8 March 2011).

"As regards the period to be taken into consideration, the Court firstly observes that the administrative proceedings were instituted on 23 June 1998. However, the period to be taken into consideration began only on 25 August 1998 when the applicant lodged his appeal for failure to respond. It was then that a "dispute" within the meaning of Article 6(1) arose." (*Počuča v. Croatia,* App. no. 38550/02, para. 30, of 29 June 2006).

"As regards the period to be taken into consideration, the Court firstly observes that the administrative proceedings were instituted on 18 September 1997, and that on 14 June 1999 the Sisak Office gave decision dismissing the applicant's request. However, the period to be taken into consideration began only on 9 July 1999, when the applicant appealed against that decision since it was then that a "dispute" within the meaning of Article 6(1) arose (*Božić v. Croatia,* App. no. 22457/02, para. 26, of 29 June 2006)."

Pursuant to Article 4 of the Act on the Protection of the Right to a Trial within a Reasonable Time, under which when deciding on a fair redress claim, the Supreme Court shall take into account, in particular, the complexity of the case, the conduct of the claimant, the conduct of the court and other state authorities, and what is stake for the claimant, which is in accordance with the case-law of the European Court of Human Rights (*Camasso v. Croatia,* App. no.15733/02, judgment of 13 January 2005, para. 32; *Frydlender v. France,* App. no. 30979/96, para. 43 ECHR 2000–VII; *Kaić v. Croatia,* App. no. 22014/04, judgment of 17 July 2008, para. 24 and *Novović v. Montenegro* App. no. 13210, judgment of 23 October 2012, para. 49).

In its interpretation of the guarantee of the right to a trial within a reasonable time under Article 6 of the ECHR, the European Court of Human Rights said that the Convention "underlines the importance of rendering justice without delays which might jeopardise its effectiveness and credibility" (*H. v. France*, 1989). The Court reiterated that only delays for which the State could be held responsible could justify a finding that a "reasonable time" has been exceeded (*Napijalo v. Croatia,* App. no..66485/01, judgment of 13 November 2003, para. 61). Delays which the Convention bodies believe can be attributed to the State include, *inter alia*, delays in hearings on civil cases (*Zimmermann and Steiner v. Switzerland,* 1983).

In the light of the European Court's views, reasonable time should be reckoned as of 1 February 2018, when the claimants filed an appeal against "the silence of the administration" to their request of 5 January 2018.

Based on the case file, the Supreme Court ascertained that the case concerns an administrative issue and the request of the claimants, owners of a private forest in Cadastral Municipality K.G. - the R. strip for inspectorial oversight with a view to the adoption of forest planning documents and measures of protection against fire and pests, and that the proceedings were initiated on 1 February 2018, when the claimants filed an appeal against "the silence of the administration". The administrative proceedings have not been completed yet, although two years, three months and three days have passed from 1 February 2018, the day they were initiated, to 4 May 2020, when the claim for fair redress was filed, given that the case Uvp. No. 351/20 is still pending before the Supreme Court. The state administration authorities evidently did not take any actions in response to the claimants' request for the adoption of forest planning documents and protection measures.

The Court therefore finds a violation of the claimants' right to a trial within a reasonable time under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In the view of this Court, this case does not raise complex issues of fact or law. On the other hand, the delay cannot be attributed to the claimants, who have an interest in the effective conclusion of this case in order to end the uncertainty about the outcome of the proceedings."

In case ***Tpz. No. 30/20***, the Supreme Court of Montenegro dismissed the claim, finding that the length of proceedings did not justify an award of fair redress:

"In the view of this Court, the civil case at issue was complex to an extent. Namely, the case file indicates that the claimant had already claimed non-pecuniary damage before the Podgorica Basic Court (case P. No. 4695/14), which rendered a final decision awarding the claimant non-pecuniary damage for the violation of his rights occasioned by torture and inhuman and degrading treatment; that the claimant filed a new claim with the Podgorica Basic Court (case P. No. 1371/17) on 24 February 2017, in which he elaborated the claim during the main hearing, again seeking compensation of non-pecuniary damage for the spiritual and physical anguish he has and would continue to suffer due to his diminished ability to engage in physical activities and the fear he has suffered. The new proceedings opened the issue whether the matter had been adjudicated and to what extent.

As per the conduct of the court in this civil case, there is no dispute that the preliminary hearing was held nine months and 16 days after the defendant submitted their response to the claim, although Article 284(3) of the Civil Procedure Act sets out that a preliminary hearing shall as a rule be held within 30 days from the day the defendant submits their written response to the claim, as the claimant properly indicated in the fair redress claim. However, the open issue of whether the matter had been adjudicated contributed to the delay of the preliminary hearing. Due to inconsistent case-law on the issue, the matter had to be addressed by a higher court, as the claimant's counsel indicated in the application to appeal the second-instance judgment on points of law, to which he attached the judgment of the Podgorica

High Court in case Gž. No. 4256/18 of 16 October 2018. The Podgorica High Court clearly failed to eliminate the inconsistencies in case-law, wherefore the Supreme Court of Montenegro on 6 May 2020 issued ruling P-Rev. No. 65/20 with a view to harmonising the case-law and ensuring consistent application of the law. The deadline under Article 319(2) of the Civil Procedure Code was not substantially exceeded by the postponement of the hearings from 10 April 2018 to 4 June 2018 and from 26 June 2018 for 27 September 2020, complained of in the claim, and the delay did not substantially contribute to the length of the court proceedings.

The claimant's counsel had not contributed to the length of the proceedings but he could have sped them up by submitting a request for review earlier.

What was at stake for the claimant in the dispute was not such as to impose on the court a duty to deal with his case as a matter of very great urgency and was commonplace for cases regarding compensation of non-pecuniary damage that are not urgent in character.

Having reviewed all the above-mentioned criteria and the Podgorica Basic Court P. No. 1371/17 case file, the Court finds no violation of the right to a trial within a reasonable time in this case.

Namely, according to the case-law of the European Court of Human Rights, the proceedings complained of should be considered as one single procedure (*Kostovska v. the former Yugoslav Republic of Macedonia,* App. no..44353/02, judgment of 15 June 2006, para. 43), and the number of levels of jurisdiction at which the case was reviewed is relevant (admissibility decision in case of *Stefanovski v. the former Yugoslav Republic of Macedonia,* App. no. 21252/04, judgment of 20 January 2009). For an unjustified delay in the proceedings to amount to a violation of the right to a trial within a reasonable time, it must be serious enough to exceed the threshold of admissibility (*H. v. France*, para. 57).

In Podgorica Basic Court case P. No. 1371/17, the proceedings before the first-instance court lasted one year, seven months and 28 days. Although the claimant's objection about the court's failure to schedule the preliminary hearing can be partly upheld, the case file indicates that, once the preliminary hearing was held, the court attached importance to the efficiency of the proceedings and delivered its judgment after slightly more than nine months. The first-instance judgment was appealed by both the claimant and the defendant in November 2018 and the second-instance judgment was delivered after one year and four months. The first- and second-instance proceedings lasted three years and 21 days altogether, which cannot be considered unreasonably long when a case is heard at two levels of jurisdiction. Therefore, in the view of this Court, there has been no breach of the right to a trial within a reasonable time for now, wherefore it is not awarding fair redress to compensate the claimant's non-pecuniary damage sustained due to the violation of this right.

Having perused the judgment in the case of Tpz. No. 6/14 of 18 March 2014, relied on by the claimant in the instant case, the Supreme Court notes that the facts of this case differ from the facts of that case because the Tpz. No. 6/14 case concerned a fair redress claim where the first-instance proceedings had been pending for over three years. In contrast, the proceedings in this case, conducted at two levels of jurisdiction, were completed in three years and 17 days."

3.1.2. Article 6(1) – Right of Access to a Court

It is quite difficult to imagine a democratic society that does not guarantee the right of access to a court, which is prerequisite for the realisation and protection of other human rights and freedoms. However, this right is not explicitly listed in the text of Article 6 of the Convention. The Court established it in its case-law, through its teleological interpretation of the Convention and its approach to the Convention as a "living instrument" which must be interpreted in the light of the present-day conditions and whilst taking into account the dominant economic and social circumstances.[69]

The right of access to a court was first mentioned in the ECtHR's judgment in the case of *Golder v. The United Kingdom,*[70] in which, in the opinion of some authors, it provided the most creative interpretation of any Convention Article.[71] Namely, in that case, the applicant, Mr. Golder, a prisoner suspected of participating in a disturbance in which a prison guard was injured, addressed a petition to the Secretary of State for the Home Department, requesting of him permission to consult a solicitor with a view to taking civil action for libel. His petition was rejected and the applicant complained of a violation of his right of access to a court. The Court said that Article 6(1) of the Convention did not explicitly guarantee the right of access to a court or tribunal, but that the right of access constituted an element which was inherent in the right stated by Article 6(1) and that this was "not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 § 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty". Therefore, the Court concluded that Article 6(1) secured to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. "In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only," it said.

However, both in the *Golder* case and a number of other cases thereinafter, the Court emphasised that the right of access to the courts was "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, regulation which may vary in time and in place according to the needs and resources of the community and of individuals […]. In laying down such regulation, the

69 *Marckx v. Belgium*, App. no. 683/74, para. 41, ECHR 1979; *Tyrer v. The United Kingdom*, App. no.5856/72, para. 31, Series A No. 126.

70 *Golder v. The United Kingdom*, App. no. 4451/70, ECHR 1975.

71 D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckey, *Law of the European Convention on Human Rights*, Oxford University press, 2018.

Contracting States enjoy a certain margin of appreciation. […] Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired."[72] Furthermore, a limitation will not be compatible with Article 6(1) "if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

By the end of 2019, the ECtHR delivered four judgments finding Montenegro in violation of the right of access to a court. The judgments - *Garzičić v. Montenegro, Radunović and Others v. Montenegro, Brajović and Others v. Montenegro* and *Vujović and Lipa d.o.o. v. Montenegro* – were presented in the prior two Analyses, together with an overview of their execution and their relevance to case-law. The Court found Montenegro in violation of the right of access to a court in one case in 2020.

Madžarović and Others v. Montenegro

Application nos. 54839/17 and 71093/17

Judgment of 5 May 2020

i. Analysis of the Judgment

The case originated from two applications (nos. 54839/17 and 71093/17) lodged against Montenegro with the Court by Mr. Mihailo Madžarović (hereinafter: the first applicant) and two companies registered in Montenegro - Zetmont d.o.o. (hereinafter: the second applicant) and Bermont d.o.o. (hereinafter: the third applicant). The applicants complained under Articles 6 and 13 of the Convention that they had been deprived of access to a court and an effective domestic remedy given that their appeals of Commercial Court decisions of 8 and 25 November 2013 had been rejected after having been withdrawn by a person who had never been the debtor's lawful representative. They also claimed a violation of Article 1 of Protocol No. 1. Having regard to the similar subject matter of the applications, the Court found it appropriate to examine them jointly in a single judgment. The Court found a violation of the right of access to a court concerning Application no. 71093/17, wherefore it did not consider it necessary to rule on the applicants' complaint under Article 1 of Protocol No. 1. As per Application no. 54839/17, the Court found that the complaints under Article 6 and Article 1 of Protocol No. 1 were manifestly ill-founded.

(a) Facts

The first applicant was the sole founder, executive director and owner of the second and third applicants. The second and third applicants were the founders and, at the relevant time, the sole shareholders of company T. The first applicant was a legal representative of the second and third applicants, and company T.

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72 *Ashingdane v. The United Kingdom*, App. no. 8225/78, para. 57, ECHR 1985.

On 28 December 2006, company T. ("the debtor") took a loan of €7,500,000 from Hypo Alpe-Adria-Bank International AG ("the creditor"), which was based in Austria. The loan agreement provided that the bank, as the creditor, had the right to unilaterally terminate the loan agreement before the expiry of the envisaged time-limit for repayment of the debt in the event that the debtor was more than thirty days late in paying the interest owed and/or an instalment. The creditor was also entitled to seek repayment by virtue of a pledge

Application no. 54839/17

In November 2011, the debtor, represented by the first applicant, concluded three contracts of pledge with the creditor, thereby securing the bank loan by a specified number of its shares which it held in another entity (the Joint Investment Fund "Trend", hereafter "the Fund").

On 10 October 2013, following an application on the part of the creditor to that effect, the Commercial Court in Podgorica established that the debtor had not honoured its obligations, and that the outstanding debt was €3,459,273.81 in total (the main debt being €3,254,604.59, and the rest of the sum made up of interest and costs). It further established that there were three legally valid contracts of pledge of November 2011, and it ordered the seizure and transfer of the shares specified therein to the creditor. In doing so, it relied on Article 20 of the Pledge Act. The court noted that the first applicant, as the debtor's legal representative, had sought that the hearing be adjourned so that the debtor and the creditor could establish the exact amount of the debt, "which undoubtedly existed in respect of the main debt, but ... the interest had not been properly calculated".

On 25 November 2013, this decision was rectified in respect of the date when the said shares had been registered in the Central Depository Agency (hereinafter: the CDA) in Podgorica and the number of shares, so that they corresponded to the number of shares specified in the contracts of pledge.

The debtor appealed against both decisions on 2 and 24 December 2013 respectively. It submitted, in substance, that the court had not referred to any of the provisions of the Enforcement Act, only to the Pledge Act, that it had not had seen any of the originals of the contracts of pledge, and that the total debt had remained "legally undefined", in particular given that the courts had had no mechanisms to establish the accuracy of the calculated interest. The appeals were substantially the same, and neither of them challenged the rectifications specified in the decision of 25 November 2013.

On 9 January 2014, the creditor sold the transferred shares to a company called O.B. On 16 January 2014, the debtor's new Board of Directors issued a decision on changes to the company officers. I.P. was appointed the new executive director, replacing the first applicant. On 20 January 2014, the Tax Administration – Companies Central Registry (hereinafter: the CRPS) issued a decision to register these changes. The applicants appealed against this decision.

On 5 February 2014 I.P., on behalf of the debtor, withdrew the debtor's appeal lodged against the decision of 25 November 2013 and cancelled the power of attorney previously given to a lawyer by the first applicant. On the same date the applicants informed the court that they had appealed against the decision of 20 January 2014 on I.P.'s registration as the debtor's executive

director and that, pursuant to Article 225 of the General Administrative Procedure Act, an appeal had suspensive effect.

Between 5 and 18 February 2014, the applicants addressed the Commercial Court and the Court of Appeal on several occasions, submitting that I.P. did not have standing to withdraw the debtor's appeal and urging that it be examined on the merits.

On 18 February 2014, the Court of Appeal dismissed the debtor's appeal against the decision of 10 October 2013. The court found that the parties had concluded three contracts of pledge and that the debtor had failed to meet the obligations arising from the bank loan, which had been secured by the pledges. In doing so the court relied on Article 20 of the Pledge Act. It also found that the pledges had been lawful and duly registered. It was further noted that following an enforcement application on the part of the creditor, a hearing had been held only in order to establish if the pledge had been in order and if the debtor had failed to meet its obligations. It was up to the debtor to prove the opposite. The court observed that the debtor had not denied the creditor's allegations but had rather asked for additional time to meet them. The court further considered that the debtor's submissions as regards the exact amount of the debt were irrelevant at this stage of the proceedings, given the undisputed fact that the debtor had failed to meet the obligations arising from the loan agreement secured by the pledges. The debtor's submission that the court had not seen any of the originals of the submitted evidence was adjudged to be unfounded, given that the authenticity thereof had not been disputed. The court considered other submissions but found them to be irrelevant.

The debtor's appeal against the decision of 25 November 2013 was rejected the same day as having been withdrawn.

On 7 March 2014, the Ministry of Finance annulled the decision of 20 January 2014 as the applicants had not been allowed to take part in the proceedings. On 23 April 2014, the CRPS terminated the proceedings on company officers registration in the debtor owing to O.B.'s withdrawal of its request in that regard.

On 17 April 2014, the first applicant lodged a constitutional appeal on behalf of the debtor. He complained, in substance, of a lack of access to court given that an unauthorised person had withdrawn the appeal, a lack of an effective legal remedy, and a deprivation of property caused primarily "by abuses on the part of [the creditor's] officials ... enabled by unlawful actions on the part of the courts".

On 18 November 2016 the Constitutional Court dismissed the constitutional appeal. As regards access to court, the court held, *inter alia*, that the debtor had withdrawn its appeal on 5 February 2014 and at the same time had cancelled the power of attorney previously given to a lawyer, and that thus the appeal had been duly rejected. As regards an effective domestic remedy, the court found that the debtor had had at its disposal legal remedies which it had used. It also held that the proceedings in their entirety had been fair. The court did not deal with the debtor's property rights. This decision was served on the first applicant on 6 February 2017.

Application no. 71093/17

In July 2010, the debtor, represented by the first applicant, concluded a contract of pledge with the creditor, thereby securing the bank loan by a specified number of its shares in the Fund.

On 8 November 2013, following an application by the creditor to that effect, the Commercial Court ordered the transfer of these shares to the creditor. Relying on Article 20 of the Pledge Act, the court found that the pledge was in order, and that the debtor had failed to meet the obligations arising from the loan agreement. The court noted that the first applicant, as the legal representative of the debtor, had acknowledged that the debtor had been late with payments, that it had made no payments as of May 2013, and that he had disputed the amount of interest calculated by the creditor, which had also increased the amount of the principal. The decision specified that an appeal did not have suspensive effect. On 26 November 2013, this decision was rectified in respect of the exact debtor's name and certain registration codes. The debtor appealed against both decisions on 2 and 24 December 2013 respectively.

On 9 January 2014, the creditor sold the transferred shares to the company O.B. This was followed by the registration of the changes of the company officers in the debtor on 20 January 2014, a decision against which the applicants appealed.

On 5 February 2014, I.P. filed a submission with the Commercial Court, withdrawing the debtor's appeal against that court's decision of 8 November 2013, and cancelling the power of attorney previously given to a lawyer by the first applicant.

Between 5 and 18 February 2014, the debtor and the applicants lodged several submissions with the Commercial Court and the Court of Appeal maintaining that I.P. did not have standing to withdraw the debtor's appeal and urging it to rule on the merits. At the same time, they informed the courts that they had appealed against the decision of 20 January 2014.

On 18 February 2014, the Court of Appeal rejected the debtor's appeal against the decision of 8 November 2013 as having been withdrawn. The same day, it dismissed the appeal lodged against the decision of 26 November 2013, considering that the decision had been duly rectified in accordance with the relevant provisions of the Civil Procedure Act. It considered that it could not examine the rest of the submissions contained therein, as in substance they related to the decision of 8 November 2013.

On 7 March 2014, the Ministry of Finance annulled the decision of 20 January 2014. On 23 April 2014, the CRPS terminated the proceedings on company officers registration in the debtor owing to O.B.'s withdrawal of its request in that regard.

On 17 April 2014, the first applicant lodged a constitutional appeal on behalf of the debtor. It complained, in substance, of a lack of access to court given that an unauthorised person had withdrawn the appeal, lack of an effective domestic remedy and a deprivation of property caused by all these irregularities.

On 15 November 2016, the Constitutional Court dismissed the constitutional appeal. It found no violation of Article 13 as it had been found that the debtor had withdrawn its appeal on

5 February 2014 and had cancelled the power of attorney previously given to a lawyer, and that the appeal had been duly rejected. The court further found that the debtor had had at its disposal legal remedies which it had used. It also held that the proceedings in their entirety had been fair. The court did not deal with the debtor's property rights.

Other relevant facts

On 16 July 2013, the creditor informed the debtor that it was unilaterally cancelling the bank loan as the latter had not been paying the instalments due, despite warnings and the additional time granted to it.

On 14 January 2014, the Commercial Court ordered the CDA to stay processing the transaction until the applicants' appeals were decided on. The same day the CDA transferred the shares to the buyer – it apparently received the court decision only after the transfer had already been completed. On 17 January 2014, the Securities Commission issued a decision temporarily forbidding the buyer to dispose of the shares at issue, and the creditor to dispose of the proceeds obtained by the sale. On 26 February 2014, the Securities Commission found that company O.B. had unlawfully obtained the shares. Notably, in order to purchase more than 10% of shares it was necessary to obtain the prior consent of the Securities Commission, which had not been done in this case. O.B. was thus ordered to dispose of the shares beyond 10%.

On 28 January 2014, the debtor filed additional observations on its appeals. On the following day, the Commercial Court dismissed an application for rectifying irregularities on the part of the debtor in the above proceedings. The debtor lodged objections against these decisions. They were dismissed by the Commercial Court on 21 July 2014 and 19 January 2015 respectively.

On 24 March 2014, the applicants lodged appeals on points of law, which were rejected by the Supreme Court on 16 May 2014 on the grounds that Article 36 of the Enforcement Act provided for no appeal on points of law in the enforcement proceedings.

On 29 April 2014, the CRPS issued a decision removing the first applicant as the debtor's legal representative and registering Lj.A. instead. It would appear that, following appeals by the applicants in that regard, the procedure of registering Lj.A. in CRPS had not been finalised by June 2019.

On 19 February 2016, the Commercial Court stayed the proceedings involving the debtor and another bank until the Ministry of Finance had terminated the proceedings relating to the changes of the debtor's name and its company officers, which had taken place in November 2014. The court held that that decision was to resolve who was authorised to represent the debtor. The Commercial Court's decision was upheld by the Court of Appeal on 5 May 2016.

(b) Admissibility

Before reviewing the merits, the Court examined the admissibility of the applications.

1. Compatibility ratione personae (relating to both applications)

The Government submitted that the applications were incompatible *ratione personae* as none of the applicants had been parties to the proceedings before the Commercial Court or the Court of Appeal. Also, the contracts of pledge had been concluded with the debtor, and all the relevant proceedings concerned the debtor's rights.

The applicants maintained that the application was compatible *ratione personae* as the first applicant was the sole owner of the debtor through the second and third applicants, and managed its shares. As all the losses directly affected them all, they all had victim status.

The Court reiterated that the relevant principles in this regard were set out in, for example, *Ankarcrona v. Sweden* ((dec.), no. 35178/97, 27 June 2000).

The Court noted that the first applicant was the sole owner of the second and third applicants, who were jointly the debtor's sole owners at the relevant time. Consequently, and contrary to what the situation was in, for example, *Agrotexim and Others v. Greece* (24 October 1995, para. 65, Series A no. 330A, where the applicant companies owned only about half of the shares in the company in question), there was no risk of differences of opinion among shareholders or between shareholders and a Board of Directors as to the reality of infringements of the rights protected under the Convention and its Protocols or concerning the most appropriate way of reacting to such infringements.

Having regard to the absence of competing interests which could create difficulties, and in the light of the circumstances of the case as a whole, the Court considered that the applicants were so closely identified with the debtor that it would be artificial to distinguish between them in this context, and that even though the party to the domestic proceedings was the debtor only, the applicants can also reasonably claim to be a victim within the meaning of Article 34 of the Convention (see *KIPS DOO and Drekalović v. Montenegro*, no. 28766/06, para. 87, 26 June 2018; *Vujović and Lipa D.O.O. v. Montenegro*, no. 18912/15, paras. 29-30, 20 February 2018; *Kin-Stib and Majkić v. Serbia*, no. 12312/05, para. 74, 20 April 2010; *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey*, no. 16163/90, para. 21, 31 July 2003; and *Ankarcrona* (dec.), cited above). The Government's objection in this regard therefore had to be dismissed.

2. Other grounds for inadmissibility

(a) Application no. 54839/17

The Government contested the applicants' complaint. In particular, the Court of Appeal had ruled on the merits of the first appeal, which had related to the main decision. Therefore, there had been no violation of the right of access to court. The fact that the court had not ruled on the appeal against the decision rectifying obvious errors in writing was of no relevance in that regard. In any event, that appeal had been withdrawn by I.P., who had been an authorised person to do so at the time, and therefore accordingly rejected by the Court of Appeal pursuant to the Civil Procedure Act.

The applicants reaffirmed their complaint. The rectifying decision had been an integral part of the main one, and thus could not be considered separately. In addition, the rectifying decision

had not dealt with technical issues only but with substantial errors given that it had changed the object of the enforcement. Moreover, the procedure of I.P.'s appointment could not have legal effect as, firstly, it had never been finalised, and, secondly, it had lacked the necessary consent of the Securities Commission.

The Court noted that the relevant principles with respect to the right of access to a court were set out in a long line of case-law such as *Golder v. the United Kingdom* (21 February 1975, para. 36, Series A no. 18), *Baka v. Hungary* ([GC], no. 20261/12, para. 120, 23 June 2016) and *Lupeni Greek Catholic Parish and Others v. Romania* ([GC], no. 76943/11, paras. 84-90, 29 November 2016).

In particular, the Convention does not compel the Contracting States to set up courts of appeal in civil cases. However, where such courts do exist, the guarantees of Article 6 must be complied with by, *inter alia*, ensuring to litigants effective access to the courts for the determination of their "civil rights and obligations" (see, among many other authorities, *Levages Prestations Services v. France*, 23 October 1996, para. 44, *Reports of Judgments and Decisions* 1996V, and *Poitrimol v. France*, 23 November 1993, paras 13-15, Series A no. 277A).

The right of access to the courts 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, regulation which may vary in time and in place according to the needs and resources of the community and of individuals (see *Stanev v. Bulgaria* [GC], no. 36760/06, para. 230, ECHR 2012). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*ibid*., para. 230; see also *Cordova v. Italy (no. 1)*, no. 40877/98, para. 54, ECHR 2003I; the recapitulation of the relevant principles in *Fayed v. the United Kingdom*, 21 September 1994, para. 65, Series A no. 294B; and *Lupeni Greek Catholic Parish and Others*, cited above, para. 89).

Turning to the present case, the Court noted that there were two Commercial Court decisions: the first one ordering the transfer of the shares to the creditor, and the second decision rectifying the first one. The debtor appealed against both of them. While the applicants submitted that the rectifying decision had dealt with substantial errors of the first one and could not be considered separately, the Court noted that the debtor's second appeal had not challenged any of the rectifications contained in the second decision, but substantially related to the main decision of 10 October 2013. Regardless of the fact that I.P. had withdrawn the debtor's second appeal, it must be noted that the Court of Appeal did examine on the merits the debtor's first appeal and dismissed it, giving a reasoned decision. As the two appeals were substantially the same, and in fact related to the contents of the first decision, the court thus addressed all the arguments, including those from the second appeal too. In other words, the limitation applied

in respect of the second appeal did not restrict the applicants' access to a court in such a way or to such an extent that the very essence of the right was impaired. Accordingly, the Court considered that this part of the application was manifestly ill-founded and had to be rejected in accordance with Article 35, paras 3 (a) and 4 of the Convention.

Application no. 71093/17

The Court noted that this part of the application was not manifestly ill-founded within the meaning of Article 35, para 3 (a) of the Convention and that it was not inadmissible on any other grounds, wherefore it had to be declared admissible.

(c) Relevant principles – Application no. 71093/17

The Court noted that the relevant principles with respect to the right of access to a court were set out in, for example, *Golder* (para. 36), *Baka* (para. 120) and *Lupeni Greek Catholic Parish and Others* (paras. 84-90).

The Convention does not compel the Contracting States to set up courts of appeal in civil cases. However, where such courts do exist, the guarantees of Article 6 must be complied with by, *inter alia*, ensuring to litigants effective access to the courts for the determination of their "civil rights and obligations" (*Levages Prestations Services v. France*, 23 October 1996, para. 44, *Reports of Judgments and Decisions* 1996V, and *Poitrimol v. France*, 23 November 1993, paras. 13-15, Series A no. 277A).

The right of access to the courts 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, regulation which may vary in time and in place according to the needs and resources of the community and of individuals (see *Stanev v. Bulgaria* [GC], no. 36760/06, para. 230, ECHR 2012). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*ibid*., para. 230; see also *Cordova v. Italy (no. 1)*, no. 40877/98, para. 54, ECHR 2003I; the recapitulation of the relevant principles in *Fayed v. the United Kingdom*, 21 September 1994, para. 65, Series A no. 294B; and *Lupeni Greek Catholic Parish and Others*, cited above, para. 89).

(d) The Court's assessment

The Court observed that, in the present case, there were also two decisions of the Commercial Court: the main one, ordering the transfer of the shares, and the second one, rectifying the main one. The debtor appealed against both of them, the two appeals being substantially the same, and both relating in substance to the main decision. While these appeals were pending, the creditor sold the transferred shares to a third party, the company O.B. Following this

sale and O.B.'s request in that regard, the CRPS issued a decision registering the new company officers in the debtor, including a new executive director, I.P.

I.P. had withdrawn the debtor's appeal against the main decision, and the Court of Appeal rejected the appeal. While the court examined on the merits the second appeal, which had not been withdrawn, it limited itself to finding that the rectification had been duly done pursuant to the relevant provisions of the Civil Procedure Act. It explicitly held that it could not examine the rest of the debtor's submissions as in substance they related to the main decision. In other words, the Court of Appeal never examined on the merits the debtor's arguments relating to the main decision, either those from the first appeal or from the second one.

The Court reiterated that the right of access to a court as enshrined in Article 6 implied, among other things, the possibility for a person whose civil rights have been interfered with to bring proceedings directly and independently (see *Capital Bank AD v. Bulgaria*, no. 49429/99, para. 118, ECHR 2005XII (extracts)). It also observed that Article 20 of the Constitution provided that everyone was entitled to a legal remedy against a decision on their rights or a legally based interest. Section 20(9) of the Pledge Act provides that an appeal can be lodged against the enforcement decision issued in the proceedings relating to a pledge (see paragraph 43 above). The Court noted in this regard that the applicants had a legally based interest given that the Commercial Court's decision affected both them and the debtor. In addition, the appeals were duly submitted while the debtor was still represented by the first applicant, and before I.P. was registered. While the Court noted that it was unclear how the sale of shares owned by the debtor in the Fund led to the changes of the debtor's Board of Directors, it nevertheless observed that this was the case.

As regarded I.P.'s registration, the Court noted that the applicants appealed against this decision and informed the domestic courts that they had done so. It also noted in this regard that the national legislation provided that an appeal had suspensive effect with regard to the execution of the impugned decision. Furthermore, after the Court of Appeal rejected the appeal as inadmissible, the Ministry of Finance, in response to the applicants' appeal, annulled the decision on the new company officers registration, including I.P.'s registration. In this regard, the Court noted that pursuant to the relevant legislation, and contrary to the Government's submission, the annulment had retroactive effect. The proceedings in this connection were eventually stayed as O.B. had withdrawn its request for registration. Therefore, the decision on I.P.'s appointment had indeed never become final as it had never been upheld by a second-instance body. In addition, the Securities Commission itself found that O.B.'s purchase of more than 10% of the shares had not been in accordance with the law as it had lacked that Commission's consent.

The Court lastly observed that in a subsequent case involving the debtor, the same domestic courts did, indeed, stay the proceedings until it was established who the debtor's legal representative was.

In view of the above, the Court had serious doubts as to whether the impugned limitation was lawful. However, even assuming that it was, the Government offered no argument whatsoever as regarded the aim thereof or as to the proportionality between the means employed and the aim pursued, whatever it might have been. The Court therefore considered that the

applicants' loss of the possibility of using a remedy which they had reasonably believed to be available amounted to a disproportionate hindrance (*Maširević v. Serbia*, no. 30671/08, para. 50, 11 February 2014, and *Vujović and Lipa D.O.O.*, para. 44). Accordingly, it found a violation of Article 6(1) of the Convention.

The Court awarded €3,600 to the applicants in respect of non-pecuniary damage.

ii. Execution of the Judgment

The Government is under the obligation to forward an Action Plan/Report, in which it will present all the undertaken individual and general measures to execute the judgment, to the Committee of Ministers Department for the Execution of Judgments of the European Court of Human Rights by 7 March 2021.

iii. Relevance to Case-Law

The Court's judgment in the case of *Madžarović and Others v. Montenegro* is of relevance to case-law for two reasons:

First, it clearly states that the right of access to a court entitles everyone whose rights are interfered with to bring proceedings directly and independently. It also emphasises that, in the case at issue, the applicants had a legally based interest to dispute decisions given that they affected their rights and obligations, which implies that such an interest is a general requirement for filing a legal remedy and which is also laid down in Montenegrin law.

Second, a company or its legal representative cannot be denied the right of access to a court by the dismissal of the legal remedy lodged by the authorised representative upon the appointment of the new representative – the executive director of the company before the decision registering the change of the representative becomes final. Such a view is based also on the positive regulations in national law, because it is up to the court to assess throughout the proceedings whether a party was represented by an authorised person. Otherwise, when the court dismisses the legal remedy of the person authorised to represent the company, its decision is in breach of the right of access to a court.

3.2. 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 or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 is often described as the least specific Article of the Convention. None of the four rights protected under this Article – private and family life, home and correspondence – are defined in the Convention. The Court developed their scope in its case-law.[73]

First, the Court determines whether the applicant's claim falls within the scope of Article 8. It needs to be borne in mind that each of the rights protected by this Article are autonomous concepts and that the Court will not be bound by the findings of the national courts. Next, the Court examines whether there has been an interference with that right or whether the State's positive obligations to protect the right have been engaged. Limitations are allowed if they are "in accordance with the law" or "prescribed by law" and "necessary in a democratic society" for the protection of one of the enumerated objectives. In the assessment of the test of necessity in a democratic society, the Court often needs to balance the applicant's interests protected by Article 8 and a third party's interests.[74]

The ECtHR had found Montenegro in breach of Article 8 of the Convention in four cases before 2020. Its judgments in cases of *Mijušković v. Montenegro, Antović and Mirković v. Montenegro, Alković v. Montenegro*[75] *and Milićević v. Montenegro,*[76] were presented in the two prior Analyses, which also provided an overview of their execution and relevance to case-law.

The scope of Article 8 has been substantially expanded in the Court's case-law and includes various issues concerning gender identity, child protection and even environmental issues.

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73 Harris, O' Boyle and Warbick, *Law of the European Convention on Human Rights*, 4th edition.

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

75 Overviews of the Court's judgments in *Mijušković v. Montenegro*, *Antović and Mirković v. Montenegro* and *Alković v. Montenegro* are provided on pages 81, 83 and 101 of the Analysis of the Judgments of the European Court of Human Rights in Respect of Montenegro, available at: https://sudovi.me/static/vrhs/doc/9670.pdf_

76 An overview of the Court's judgment in *Milićević v. Montenegro* is available on page 95 of the Analysis of the Judgments of the European Court of Human Rights in Respect of Montenegro in 2018 and 2019, available in Montenegrin at: https://sudovi.me/static//vrhs/doc/Analysis_of_judgments_of_the_ECHR_2018_and_2019_Judgments_in_respect_of_Montenegro.pdf

Furthermore, in a recent case, *Solska and Rybicka v. Poland,*[77] the Grand Chamber held that the exhumation of deceased family members fell within the scope of Article 8 of the Convention.

The ECtHR in 2020 delivered one judgment, in the case of *Drašković v. Montenegro,* in which it found Montenegro in violation of the right to private life.

Drašković v. Montenegro

Application no. 40597/17

Judgment of 9 June 2020

i. Analysis of the Judgment

The applicant complained of a violation of her rights under Articles 8 and 6 of the Convention because the domestic courts refused to review the merits of her claim about the exhumation and transfer of the remains of her deceased husband from one burial plot to another.

(a) Facts

The applicant's husband died in Belgrade, Serbia, in 1995. The applicant submitted that, owing to the ongoing armed conflict in BIH at the time, it had not been possible for him to be buried in Trebinje, where they had lived and had a family burial plot. Instead, he was buried in a burial plot in Montenegro, owned by his nephew. On 1 June 2014, the applicant contacted her husband's nephew, seeking his consent for the exhumation of her husband's remains. On 6 June 2014, the nephew refused to give his consent.

On 19 September 2014, the applicant instituted civil proceedings against her husband's nephew. She lodged a claim with the courts, asking for it to be established that she had the right to carry out an exhumation of her husband's remains and to transfer them to their burial plot in BIH. She proposed that the identification and separation of her husband's remains be carried out by court experts, at her expense. In his response to the applicant's claim, the nephew submitted that the applicant's husband – his uncle – had never lived in Trebinje, but had lived in Belgrade. He submitted, as evidence, a number of his uncle's personal documents. He also maintained that his uncle's last wish, as witnessed by his sister, had been that he be buried in Montenegro, close to the house of his birth. Furthermore, his uncle's remains were not in a separate bag, but were at the bottom of the grave, mingled with the remains of other family members buried there. Notably, his uncle's father had been buried there prior to his uncle, as well as – after his uncle – his uncle's brother and sister-in-law (the nephew's parents) and another relative (the nephew's daughter). The nephew considered that it would be inhumane to sift through their remains and to act in contravention of his uncle's last wish. The applicant also relied on a decision delivered by the Supreme Court of Montenegro in 1994 (Rev. No. 153/94), which had found that giving a ruling on the transfer of mortal remains from one grave to another was within the competence of the ordinary courts.

77 *Solska and Rybicka v. Poland*, App. nos. 30491/17 and 3108/17, ECHR 2018.

On 2 February 2015, the Herceg Novi Basic Court rejected the applicant's claim, holding that the applicant had no legal interest in lodging such a claim, given that she did not have – nor could she have – any rights to the mortal remains, in the sense of property-related relationships, regardless of whose remains were at stake, and nor could she have any rights arising from their place of burial, be they property-related or status-related or in any other sense. On 20 April 2015, the Podgorica High Court upheld the decision of the first-instance court, endorsing its reasoning. It also held that the procedure for exhuming and transferring mortal remains was regulated by special Rules on the Conditions and Methods of Exhuming and Transferring Deceased Persons. In particular, the administrative body in charge of sanitary monitoring (sanitary inspectorate) issued special permits for exhumation and transfer, and established conditions in respect thereof, but acquiring such a permit required opening special proceedings. On 26 June 2015, the applicant lodged a constitutional appeal citing Articles 32 and 40 of the Constitution. She submitted, in particular, that the basis for her claim was to obtain the nephew's consent, as without it no permission for exhumation could be issued or transfer carried out. She had therefore no other way to exercise her right except through the courts. On 14 February 2017, the Constitutional Court dismissed the applicant's constitutional appeal, considering that, under Article 32 of the Constitution, the reasoning of the ordinary courts had not been arbitrary and that the applicant should have initiated proceedings before the relevant administrative body.

On 21 August 2019, the sanitary inspectorate informed the applicant by letter that the sanitary inspector was in charge of issuing exhumation and transfer permits. The relevant regulations did not stipulate whether in such cases the consent of the owner of the burial plot in question was necessary or not; nevertheless, the sanitary inspectorate verified whether there were any disputes in that regard. If there was such a dispute, the parties were to be instructed first to resolve the issue in question and only then to lodge a request for exhumation and transfer with the inspectorate. The letter furthermore stated that the inspectorate did not know who had authority to resolve disputes but assumed that it was the courts.

(b) Admissibility

The Court noted that there were no positive regulations explicitly setting out procedures to be followed in cases where no consent has been given by the owner of the burial plot from which the exhumation was to be carried out. As regards general practice, the relevant administrative body (the sanitary inspectorate), to which the Government referred, informed the applicant that it was in charge of issuing permits for exhumations, but that it did not deal with cases when there was any dispute in that regard. It explicitly stated that the parties in such cases were instructed first to resolve the dispute; however, resolving disputes did not fall within the authority of the administrative body in charge of issuing permits for exhumation. In view of that fact, the Court considered that the existence of the legal remedy advanced by the Government was not sufficiently certain either in theory or in practice, and thus lacked the requisite accessibility and effectiveness. Therefore, the applicant was absolved from having to make use of it.

(c) Relevant principles

The concepts of "private and family life" are broad terms not susceptible to exhaustive definition (see *Pretty v. the United Kingdom*, App. no. 2346/02, para. 61, ECHR 2002III; *Para-*

diso and Campanelli v. Italy [GC], App. no. 25358/12, paras. 140-141, 24 January 2017). the Court has in its case-law proceeded on the basis that private and family life may, in principle, be invoked by relatives in relation to disputes that arise regarding burials and other funeral arrangements of deceased family members. Moreover, in the case of *Znamenskaya v. Russia* (App. no. 77785/01, 2 June 2005), the Court considered the private life aspect of Article 8 to be applicable to the question of whether a mother had the right to change the family name on the tombstone of her stillborn child. Finally, the burial of a still-born baby in a common grave without consulting or informing the mother, together with the transport of the body in an ordinary van, constituted an interference with the mother's respect for private and family life which had no domestic legal basis (see *Hadri-Vionnet v. Switzerland*, App. no. 55525/00, 14 February 2008). In the case of *Elli Poluhas Dödsbo v. Sweden* (App. no. 61564/00, para. 23, ECHR 2006I) it proceeded on the "assumption" that the refusal to allow the removal of a burial urn to a new resting place was an interference with the widow's private life.

(d) The Court's assessment

The Court recalled that the scope of the applicant's complaint before this Court was directed at the national court's refusal to rule on her claim on the merits. The substance of the applicant's complaint was directed at the lack of a substantive examination by the national courts of her claim in civil proceedings against a third party. Therefore, the present case concerned an issue of the State's positive obligations in the sphere of relations between individuals and required primarily an examination by the Court of whether an appropriate legal framework to regulate the situation at issue was in place and the Court's assessment of the conduct of the domestic authorities in that respect. Even though the domestic legislation did not explicitly provide that the nephew's consent was necessary for the exhumation, this was in fact the case. Tampering with graves and cadavers without a permit constitutes a criminal offence. The applicant's interest in the exhumation and transfer of her husband's remains therefore had to be weighed not only against society's role in ensuring the sanctity of graves, but also against the rights of her husband's nephew. As regards the present case, apart from considering whether the exhumation and removal, in practical terms, were possible and/or easy and whether there were any public-health interests involved, there were a number of other issues that required clarification. In particular, it was not clarified whether the applicant's husband had lived in BiH and whether the burial plot there was the applicant's alone or if they had acquired it jointly with the aim of them both being buried there one day. It also appeared that there was a dispute as to whether the applicant's husband had been buried in Montenegro pursuant to his own wish or not. It was not clarified either whether there was anything preventing the applicant from having her final resting place in the same burial spot as her husband in the event that the exhumation was not undertaken. As regards the appropriate legal framework, the Court firstly noted that the domestic legislation appeared not to regulate situations such as the one in the present case – that is to say that it did not provide a mechanism by which to review the proportionality of the restrictions on the relevant Article 8 rights of the applicant. The domestic courts took the standpoint that the applicant needed to lodge a request with the administrative body, which in turn could not follow any such request in the absence of the third party's consent. In the event of a dispute, the administrative bodies instructed the parties first to resolve the matter and only then to lodge a request for exhumation. Such proceedings, in the Court's view, clearly lacked the ability to balance the competing interests. The civil

courts, however, failed to recognise any legal interest on behalf of the applicant by holding that the applicant had not had any "property-related, status-related and any other interests in her claim", a view which was confirmed at the later stages of the proceedings. Thereby, the domestic courts' dealing with the applicant's claim failed to recognise existence of her rights under Article 8 and, consequently, to properly balance them against the competing interests of her husband's nephew.

ii. Execution of the Judgment

The Government is under the obligation to communicate an Action Plan/Report in which it will present all the undertaken individual and general measures to execute the judgment to the Committee of Ministers Department for the Execution of Judgments of the European Court of Human Rights by 9 March 2021.

iii. Relevance to Case-Law

In its judgment in the case of *Drašković v. Montenegro*, the European Court of Human Rights noted that national law apparently did not regulate situations like the one in this case. Therefore, the Analysis authors are of the opinion that a view, which need not be a general legal opinion, but a view of the Supreme Court's Civil Law Department, should be adopted to address this and other disputable issues in practice.

In the light of the *Drašković* judgment and although national law does not regulate situations like this one, or at least not fully, the authors of the Analysis are of the opinion that there is a possibility to establish the jurisdiction of civil courts for exhumation disputes. The starting point should be Article 1 of the Civil Procedure Act, specifying that this law defines rules of procedure on the basis of which the court deliberates and decides on personal and family disputes, labour disputes, property and other civil disputes between natural and legal persons, unless some of them are placed under the jurisdiction of another public authority in accordance with a separate law. Therefore, civil courts are entitled to review and rule on family-related disputes. Given that the *Drašković* case regards a dispute between the applicant and her late husband's nephew about the exhumation of her late husband's remains, the facts of the case can fall under the scope of Article 1 of the Civil Procedure Act and engage the jurisdiction of the civil court, given that a family relationship is at issue, especially since, for the purposes of Article 8 of the Convention, family life does not include only social, moral or cultural relations, but also comprises interests of a material kind, such as maintenance, inheritance rights and restrictions and disposal by close relatives. Given that, in case of the transfer of the remains, there is an interest to regulate the relations (at least a moral or cultural one), the court would be competent to render a decision on exhumation in accordance with civil procedure rules. Individuals who cannot themselves realise their subjective rights are entitled to seek legal protection from the court. Given that there may be an interest in the transfer of remains, then the individual is entitled to initiate and pursue civil proceedings. Thus, the court is under the obligation to review a request for legal protection, especially where an individual could not achieve it otherwise.

The applicant in the *Drašković v. Montenegro* case was entitled to seek a change of the decision violating her right. Under Article 428 of the Civil Procedure Act, in the event the European

Court of Human Rights finds a violation of a human right or fundamental freedom enshrined in the ECHR, the party may, within the following three months, file a request with the first-instance court in Montenegro that rendered the decision violating their right or fundamental freedom to change the decision in the event the breach cannot be eliminated in any other way except by reopening the proceedings. The court is bound by the final ECtHR judgment finding a violation of the right or fundamental freedom.

In the view of the authors of the Analysis, parties that have a legal interest are entitled to judicial protection in all disputes concerning the right to respect for private and family life. The *locus standi* issue may arise in the context of such disputes. The Supreme Court's judgment in case ***Rev.No. 868/20*** is interesting in that respect*:*

> "During the first- and second-instance proceedings, there was no substantial violation of the civil procedure provisions in Article 367(2) of the CPA, which are monitored *ex officio* by the Supreme Court; nor had the other violations alleged in the appeal occurred.
>
> However, the applicant correctly alerts to the errors of law in the impugned and first-instance judgments.
>
> The subject matter of this legal dispute concerns the applicant's request that the defendant continue supplying electricity to the meter registered in the name of M.Č. and ensure unimpeded supply of electricity to the applicant.
>
> The case file shows that Municipality B., the lessor, and the applicant, the lessee, concluded lease agreement no. 01-031-1952 on 11 June 2019 on the lease of apartment no. 43 in the R. II – B. settlement, cadastral plot no. No.994/1, which is registered in the cadastral municipality Budimlja as state property, 25 m^2 in area, with an electricity meter reg. no. 11325201. The defendant suspended electricity supply to this meter on 11 March 2016 because of the debt in the amount of €6,167.91 incurred by the prior lessee M. Č. On the applicant's motion, the Berane Basic Court issued a ruling on a provisional measure I. No. 122/19 on 18 September 2019, ordering the defendant to immediately ensure the applicant unimpeded use of electricity via the meter in M.Č.'s name by connecting it to the electricity distribution network. The ruling on the provisional measure ordered the applicant to initiate civil proceedings within 15 days from the day of receipt of the ruling. The defendant complied with ruling I. No. 122/19 of 18 September 2019 and reconnected the apartment leased to the applicant to the distribution network via the electrical meter. The case file also shows that the applicant falls in the category of socially vulnerable citizens and that both he and his wife are at an advanced age (82 and 84 years old respectively) and that he had filed a request with the defendant to change the name of the consumer, but that a decision on his request has not been rendered yet.
>
> In view of the above, the first-instance court rejected the applicant's request because he does not have a contract on electricity supply with the defendant, since elec-

tric meter no. 11325201 is registered in the name of M. Č., the prior lessee of the apartment. Therefore, the first-instance court concluded that the applicant did not have *locus standi* to request continued electricity supply via that meter. The court relied also on Article 7 of the General Electricity Supply Requirements (Official Journal of Montenegro, No. 70/16 of 9 November 2016), under which suppliers may conclude electricity supply contracts with legal or natural persons with which they have concluded a permanent or temporary connection agreement in accordance with the law; since the applicant had not concluded such a contract with the defendant, the first-instance court ruled that he did not have *locus standi* in this legal matter. The second-instance court fully endorsed the reasoning of the first-instance court.

However, in the view of this Court, the described reasoning of the lower courts on the lack of *locus standi* was based on an error of law.

Namely, the applicant's request has to be assessed also in the light of the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms since this Convention has been binding on Montenegro since 4 March 2003 and, pursuant to Article 9 of the Montenegrin Constitution, is an integral part of the national legal order, has supremacy over national law and shall be directly applicable when it regulates relations differently from national law.

In addition, the subsidiarity principle, as one of the fundamental principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, imposes upon the courts of the Contracting States the obligation to ensure the proper application of the Convention standards, including the case-law of the European Court of Human Rights, at the national level.

According to the case-law of the European Court of Human Rights, an individual's living conditions fall within the scope of Article 8 of the Convention (*Hudorović and Others v. Slovenia*, App. nos. 24816/14 and 25140/14, judgment of 10 March 2020, para. 112). Accordingly, this Court considers that delivery and use of electricity are an essential element of basic living conditions and an indispensable prerequisite for life in modern-day times, and, thus, for the enjoyment of the right to a private life and the right to a home. Denial of electricity over a longer period of time may amount to a violation of human dignity and jeopardise enjoyment of the right to a private life and the right to a home.

The three-tier test developed within the case-law of the European Court of Human Rights is applied to ascertain whether there has been a breach of the right to a private life and a home. It entails answering the following questions: whether the applicant's right to a private life was interfered with and, if it has, whether the interference was in accordance with the law; whether the interference pursued a legitimate aim; and, whether it was necessary in a democratic society.

This Court holds that denial of electricity to the applicant in the circumstances of the case and the decisions of the lower courts endorsing it amount to interference

with the applicant's private life, given that use of electricity in everyday life is indispensable for quality living conditions in modern-day times.

The next issue is whether the interference was in accordance with the law, given that the lower courts rejected the applicant's request claiming he did not have *locus standi*, a conclusion they arrived at after ascertaining that the applicant had a legal relationship with the Berane Municipality but not with the defendant.

However, the lower courts lost sight of the fact that the applicant was the legal resident of the apartment and had entered into its possession in accordance with the lease agreement he signed with its owner. The lease agreement was drawn up to accommodate a family in need of welfare. Electricity was denied to a person falling in the category of "vulnerable consumers", who are vulnerable on account of their health and social standing, a category recognised and protected under Article 198 of the Energy Act, who was granted the right to use (lease) the apartment in accordance with the law in exchange for paying rent (€5 a month) and for paying the electricity he spent, obligations he fulfilled after his electricity was connected in accordance with the court ruling. The apartment (building) is located in the city/suburban settlement (Rudeš 2) in Berane, in which electricity supply is an elementary prerequisite for a higher quality of living conditions in present-day circumstances. The Berane Basic Court's ruling I. No. 122/19 of 18 September 2019 ordering the defendant to provide the applicant with unimpeded access to electricity and the fact that the defendant has since been sending him monthly electricity bills which he has been paying are also relevant to the applicant's *locus standi*. Therefore, the applicant has acquired the status of electricity consumer in the meaning of the Energy Act (Official Journal of Montenegro Nos. 5/16 and 51/17) and the General Electricity Supply Requirements (Official Journal of Montenegro, No. 70/16 of 9 November 2016), since he filed a request for electricity supply via the electricity meter in the apartment leased to him, and a motion with the first-instance court requesting a temporary measure, which can, in the circumstances of the case, be considered to have the character of a request in the meaning of the General Electricity Supply Requirements, whereas the ruling on the temporary measure and the defendant's compliance with it and forwarding of monthly electricity bills to the applicant have the character of access, while the applicant's payment of the electricity bills can be considered as his acceptance of the defendant's terms and conditions.

In view of all of the above considerations, the Court finds that there is a legal relationship between the applicant and the defendant and that denial of electricity in the particular circumstances of the case is not in accordance with the law. Relying on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, this Court finds that the denial of electricity to the applicant - a lawful resident of the apartment - because of an outstanding debt incurred by a third party, has brought into question the dignity and health of the applicant and violated the essence of his private life and enjoyment of his right to a home.

This Court, therefore, finds it unnecessary to examine the remaining elements of the three-tier test used to assess whether an interference with private life was justified, i.e. whether the denial of electricity pursued a legitimate aim and whether the interference was proportionate."

3.3. Article 1 of Protocol No. 1 – Right to Property

Article 1 of Protocol No. 1

Right to Property

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

It was difficult to reach an agreement on the definition of Article 1 of Protocol No. 1 due to the major differences in which the Contracting States regulated the issue at the time the text of the Convention and the Additional Protocol were drafted.[78] In result of these differences and search for a compromise, the Convention protects the right to peaceful enjoyment of possessions, but this right may be subject to substantial restrictions by the States.

The concept of "possessions" in Article 1 has an autonomous meaning which is independent from the formal classification in domestic law, wherefore the Court has gradually defined the concept of possessions in its case-law. It is not limited to the ownership of physical goods and entails also company shares,[79] bank account deposits,[80] contractual rights,[81] intellectual property rights,[82] welfare benefits,[83] as well as so-called legitimate expectations.[84]

However, the right to peaceful enjoyment of possessions is not absolute and may be restricted under specific circumstances. In its examination of an interference with this right, the ECtHR focuses on: the legitimacy of the aim, a fair balance and proportionality.[85]

78 D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckey, *Law of the European Convention on Human Rights*, Oxford University press, 2018.
79 *Bramelid and Malmstrom v. Sweden*, App. nos. 8588/79 and 8589/79, 29 DR 64 (1982).
80 *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, App. no. 60642/08, Reports of Judgments and Decisions 2014.
81 *Gasus Dosier- und Fördertechnik GmbH v. The Netherlands*, App. no. 15375/89, A 306-B (1995).
82 *Smith Kline and French laboratories v. The Netherlands*, App. no. 12633/87.
83 *Stec and Others v. The United Kingdom*, App. nos. 65731/01 and 65900/01, Reports of Judgments and Decisions 2006-VI.
84 Popović et al, *Comment on the Convention for the Protection of Human Rights and Fundamental Freedoms*, PC "Službeni glasnik", 2017.
85 *Ibid*.

Before 2020, the ECtHR found Montenegro in violation of Article 1 of Protocol No. 1 in six cases, while one of its judgments related to the violation of this Article concerned just satisfaction. The Court's judgments in *Bijelić v. Montenegro and Serbia*, *Lakićević and Others v. Montenegro and Srbije, A. and B. v. Montenegro, Mijanović v. Montenegro, Kešelj v. Montenegro and Kips D.O.O. and Drekalović v. Montenegro* (merits and just satisfaction), their execution and relevance to case-law were presented in the prior two Analyses. The Court reviewed the alleged violation of this right also in the case of *Petrović v. Montenegro*, but declared that part of the application inadmissible.

In 2020, the ECtHR found Montenegro in violation of the right to property in one case.

Nešić v. Montenegro

Application no. 12131/18

Judgment of 9 June 2020

i. Analysis of the Judgment

The applicant relied on Article 1 of Protocol No. 1, complaining he had been deprived of his property without any prior individual decision having been delivered to that effect and without his being awarded any compensation for that deprivation.

(a) Facts

On 21 October 1980, the applicant bought two plots of land, registered as nos. 697/1 and 698/1, from a private person. On 22 October 1980, pursuant to the relevant decision to that effect, the applicant was registered as their owner in the Real Estate Register. Over time the numbering and sizes of the plots of land changed. Thus plot no. 698/1 was divided into several plots of land, including plots nos. 955/3 and 955/4.

On 17 October 2006, the State instituted civil proceedings against the applicant seeking that it be recognised as the owner of plots nos. 955/3 and 955/4. In the course of the proceedings, on 1 October 2014, the Kotor Basic Court went to the site and established that the plots of land at issue were on the seashore.

In December that year, that court ruled in favour of the State. It found that it was not in dispute that the applicant had become the owner of the land at issue in a lawful manner, under the sale contract concluded in 1980. It also found that the said land was in the coastal zone – specifically, on the seacoast, it comprised partly a concrete beach and partly a marina. Hence it was State property under Articles 2 and 4 of the Coastal Zone Act and Articles 11 and 13 of the State Property Act. Furthermore, under Articles 10 and 11 of the State Property Act, the seacoast and the coastal zone constituted a common resource that no one could possess, as otherwise the coastal zone could not be used for exploiting the sea, for maritime transport and for fishing, which was its basic purpose. The court specified that the applicant's rights ceased with the establishment of the coastal zone – that is to say, the plots at issue had become State property by virtue of the said Acts entering into force.

The Podgorica High Court upheld the first-instance judgment, in substance endorsing its reasoning. The High Court also specified that the applicant would retain the right to use the property at issue "until dispossession". The Supreme Court upheld the High Court's judgment, endorsing its reasoning and the Constitutional Court rejected the constitutional appeal. As regards the applicant's complaint in so far as it fell under Article 1 of Protocol No. 1, the Constitutional Court held as follows: "The Constitutional Court protects the right to property by prohibiting the State authorities from restricting or depriving [anyone] of that right, unless such restriction or the deprivation is based on law. ... Having regard to the contents of the right to property ..., the findings expressed in the reasoning of this decision and the object of the dispute preceding the proceedings before the Constitutional Court, the [court] finds that there was no violation of ... Article 1 of Protocol No. 1."

In October 2016, the applicant instituted proceedings against the State seeking that he be registered as the user of the two plots of land until dispossession. In April 2017, the Kotor Basic Court ruled in favour of the applicant, finding that he had a pre-emptive right to use the land at issue until dispossession. The court repeated the wording of its findings in the judgment of 19 December 2014 and, referring to Article 30 of the Coastal Zone Act, noted that former lawful owners were entitled to compensation under the relevant provisions on expropriation. That judgment was upheld by the High Court and the Supreme Court, which endorsed the reasoning of the first-instance court. According to the relevant excerpt from the Real Estate Register dated 13 June 2019, the State was registered as the sole owner of the land at issue, and the applicant was registered as the user.

(b) Admissibility

Before ruling on the merits, the Court examined the admissibility of the application.

The Government submitted that the land at issue had become State property by virtue of the 1992 Coastal Zone Act. As the relevant statute had entered into force before the Convention did in respect of Montenegro, and as the deprivation of the property had been an instantaneous act, the application was incompatible *ratione temporis*.

The applicant maintained that the actual breach had taken place in September 2015, when the first-instance judgment, which had deprived him of his property, had become final. The application was, therefore, compatible *ratione temporis*.

The Court noted that the relevant principles in this regard were set out, for example, in *Broniowski v. Poland* (dec.) [GC], App. no. 31443/96, paras. 74-77, judgment of 19 December 2002. It reiterated, in particular, that in order to establish its temporal jurisdiction it was essential to identify, in each specific case, the exact time of the alleged interference. In doing so, the Court had to take into account both the facts of which the applicant complained and the scope of the Convention right alleged to have been violated (see *Blečić v. Croatia* [GC], App. no. 59532/00, para. 82, ECHR 2006III).

The Court firstly noted that the applicant had lawfully obtained the land at issue in 1980 and remained its registered owner until well after 3 March 2004, which is when the Convention entered into force in respect of Montenegro (contrast *Petrović and Others v. Montenegro*, App.

no. 18116/15, para. 31, judgment of 17 July 2018, in which the applicants' predecessor was by 1997 no longer registered as the owner of the property in dispute already).

The State had not been registered as the owner of the land automatically, simply on the basis of the Coastal Zone Act and the State Property Act; rather, it had to institute proceedings to that end against the applicant in order to establish its right in that regard. It was only after the courts had ruled in its favour that the State was declared the owner of the plots at issue, and on the basis of that ruling it was registered as such in the Real Estate Register. The Court said that it was clear from the case file that the domestic courts' decisions were the only decisions delivered that related to the ownership of the plots of land, and that they were all issued well after the Convention had entered into force in respect of the respondent State.

The applicant also complained about the State's failure to pay compensation for the said land – a failure that had yet to be rectified, which meant that his situation was of a continuous nature (see *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, App. nos. 29813/96 and 30229/96, paras. 41-43, ECHR 2000I, and *Broniowski*, para. 76). The Court therefore dismissed the Government's objection.

(c) Relevant principles

The Court said that the relevant principles had been set out in *Vistiņš and Perepjolkins v. Latvia* [GC] (App. no. 71243/01, paras. 93, 95-99 and 108-114, judgment of 25 October 2012) and *Hutten-Czapska v. Poland* [GC] (App. no. 35014/97, paras. 163-168, ECHR 2006VIII).

Any interference by a public authority with the peaceful enjoyment of possessions must be lawful. However, the existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal principles upon which the deprivation of property is based should be sufficiently accessible, precise and foreseeable in their application (see the above-cited cases of *Vistiņš and Perepjolkins*, paras. 96-97, and *Hutten-Czapska*, para. 163). Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue that concerns the general interest is at stake, it is incumbent on the public authorities to act in good time, and in an appropriate and consistent manner (see *Hutten-Czapska*, cited above, para. 168 *in fine*; *Fleri Soler and Camilleri v. Malta*, App. no. 35349/05, para. 70 *in fine*, ECHR 2006X; *Broniowski v. Poland* [GC], App. no. 31443/96, para. 151, ECHR 2004-V; and, *mutatis mutandis*, *Belvedere Alberghiera S.r.l. v. Italy*, App. no. 31524/96, para. 58, ECHR 2000VI).

Even if it has taken place "subject to the conditions provided for by law" – implying the absence of arbitrariness – and in the public interest, an interference with the right to the peaceful enjoyment of possessions must always strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see *Vistiņš and Perepjolkins*, cited above, para. 108). Compensation terms under the relevant legislation are material to an assessment of whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate

burden on the applicants. The Court has already held that the taking of property without the payment of an amount reasonably related to its value would normally constitute a disproportionate interference (*ibid*., para. 110).

(d) The Court's assessment

The Court noted that the applicant had been the lawful owner of the land at issue and had been registered as such until the domestic courts ruled in favour of the State, after which the State was registered as its owner. The Court therefore considered that the applicant had been deprived of his property by virtue of the domestic courts' decisions and the registration of the State's title. His continued right to use the land at issue did not change this, given the fact that he had lost his ownership. Therefore, it found that there was therefore an interference with the applicant's right to the peaceful enjoyment of his possessions, amounting to a "deprivation" of property within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1.

The 2007 Constitution provides that natural resources and resources in public use are the property of the State. The 1992 Coastal Zone Act provided that the coastal zone, including the seacoast, was the property of the State, which was also provided by the 2009 State Property Act. Therefore, there was a legal basis in domestic law for the State becoming the owner of the land at issue.

The Court, however, noted that the 1992 and 2007 Constitutions consistently provided that property rights could be limited only in return for compensation. The Property Acts also provided, either indirectly or directly, for the payment of just compensation when owners were deprived of their property. Notably, the 1980 Property Act referred back to the Constitution in this regard, whereas the 2009 Property Act itself explicitly provides for just compensation when the owners are deprived of their property. The 2000 Expropriation Act also provides for compensation. Lastly, the Coastal Zone Act also provides that lawful private owners of land in the coastal zone should be afforded compensation in the event of dispossession pursuant to the provisions on expropriation. Therefore, while the relevant legislation allows for the State to become the owner of the land at issue, it also provides for the applicant's right to compensation in return. In the instant case, the State never contested the applicant's submission, either in the domestic proceedings or before this Court, that he had never received any compensation.

The existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal principles upon which the deprivation of property is based should be sufficiently accessible, precise and foreseeable in their application. The Court noted in this regard that the Government submitted that if the applicant was dispossessed he would be entitled to compensation pursuant to the provisions on expropriation, in accordance with the Coastal Zone Act. It was unclear, however, what expropriation actually meant in this context: the courts suggested that the applicant lost title *ex lege*, but it was also clear that further procedure was necessary to formalise the State's title, as well as to determine the compensation, and even after the court decisions it was suggested that dispossession through formal expropriation had not yet taken place. The Government's submission in this regard and the Coastal Zone Act provision also seemed to imply that it could also be the case that no formal expropriation at all occurs, in which case the applicant would not receive any compensation,

which runs contrary to all the other pieces of legislation providing for compensation in cases of deprivation of property. The Court noted that Coastal Zone Act itself provided no details as to when, and if at all, the formal expropriation of land in the coastal zone was obligatory. Therefore, it was unclear if and when formal expropriation would take place. Furthermore, it was unclear in the instant case in respect of whom such expropriation would be undertaken, given that the applicant was no longer the owner of the land at issue.

In view of the above, the Court found that the said interference was not in accordance with the law and, therefore, that there has been a violation of Article 1 of Protocol No. 1.

The applicant made no claim in respect of pecuniary or non-pecuniary damage, wherefore the Court made no award in that regard.

ii. Execution of the Judgment

The Government is under the obligation to communicate its Action Plan/Report in which it will present all the undertaken individual and general measures to execute the judgment to the Committee of Ministers Department for the Execution of Judgments of the European Court of Human Rights by 9 March 2021.

iii. Relevance to Case-Law

The right to property and other property entitlements in the coastal zone are a complex legal issue, involving the examination of numerous national regulations and the application of the ECHR. They have been in the focus of legal professionals for a long time now.

The *Nešić v. Montenegro* is the ECtHR's second judgment on Article 1 of Protocol No. 1 and real estate in the Montenegrin coastal zone. However, as opposed to the *Petrović* case, where it declared that part of the application inadmissible because it was incompatible *ratione temporis*, the Court ruled on the merits of the *Nešić* case.

The Analysis of ECtHR judgments in respect of Montenegro covering 2018 and 2019[86] reviewed the effect the *Petrović v. Montenegro* judgment could have on national case-law on real estate in the coastal zone.

To recall, the Court declared inadmissible the part of the *Petrović* application regarding the applicants' complaint under Article 1 of Protocol No. 1 submitted because of the factual expropriation of their plot of land in the coastal zone for which they had not been paid compensation. The Court said that it could only examine complaints to the extent to which they regarded the events that occurred after the Convention entered into force in respect of the respondent State. Furthermore, it reiterated that a deprivation of ownership or of another right *in rem* was in principle an instantaneous act and did not produce a continuing situation of "deprivation of a right". The Court thus considered that the applicants' complaint under Article 1 of Protocol No. 1 was incompatible *ratione temporis* with the provisions of the Convention and declared that part of the application inadmissible.

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86 Available in Montenegrin at: https://sudovi.me/static//vrhs/doc/Analysis_of_judgments_of_the_ECHR_2018_and_2019_Judgments_in_respect_of_Montenegro.pdf

In their comment of the judgment, the authors of the prior Analysis emphasised that the Court's views in the *Petrović v. Montenegro* judgment could not be applied extensively to disputes on real estate in the coastal zone, because they regarded a situation in which ownership of real estate in the coastal zone was terminated before the Coastal Zone Act entered into force. Namely, they do not address the issue of the rights of persons who owned real estate in the coastal zone at the time the Coastal Zone Act entered into force. The authors of the prior Analysis also noted that the regulation of these owners' rights in a clear and predictable manner until their potential dispossession in accordance with Article 30 of the Coastal Zone Act remained a challenge for the Montenegrin state authorities. The Analysis added that inconsistent legal provisions opened the issues of the property entitlements of the prior owners or users of the real estate after the Coastal Zone Act entered into force, notably, whether the prior real estate owners also had the right to dispose of their property, not just to be in its possession and use it, and what the scope of the restriction was given the meaning of the concept of "disposal" in the context of the State Property Act. The vague legal provisions appear to hardly provide a basis for the theoretical interpretation that the State has merely bare ownership (*nudum conceptum)* vis-à-vis the prior owners and that the right of ownership may be equated with the current rights of the prior owners of land in the coastal zone.

Furthermore, the Analysis said that case-law could hardly be expected to render foreseeable the rights of the prior owners of land in the coastal zone, regardless of the courts' task to apply hermeneutics to explain the content of the legal regulations. In case of vague legal provisions, that would mean that the courts should assume the role of lawmaker, which does not belong to them.

The authors of the Analysis also expressed their conviction that answers to these issues could give rise to numerous proceedings on the right to peaceful enjoyment of possessions, and that it was primarily up to the legislator to preclude this by defining the rights of the prior owners from the day the Zonal Coast Act entered into force to the day of expropriation in a clear and predictable manner.

After the judgment in the *Nešić v. Montenegro* case became final, the plenary session of the Montenegrin Supreme Court adopted a general legal opinion Su. I. 343-2/20 on 15 December 2020.

General Legal Opinion

1. Owners of land declared a coastal zone under the law, who had legally acquired the right of ownership before the entry into force of the Coastal Zone Act (Official Journal of the Republic of Montenegro Nos. 14/92 and 27/94 and Official Journal of Montenegro Nos. 51/2008, 21/2009 and 40/2011) and their legal successors shall maintain the right of ownership until dispossession and payment of compensation in accordance with the regulations on expropriation.

2. The State may register as the owner of land declared a coastal zone under the law after it pays the compensation to its prior owner in accordance with the Expropriation Act.

3. Owners of land referred to in paragraph 1, who are registered in the cadastral records as the users of the land, are entitled to register as its owners provided they fulfil the requirements under Articles 419 and 420 of the Property Act.

Reasoning

Respecting the supremacy of ratified and published international treaties and generally recognised rules of international law over national law, pursuant to Article 9 of the Constitution of Montenegro (Official Journal of Montenegro Nos, 1/07 and 38/13) and bearing in mind that the case-law of the European Court of Human Rights in Strasbourg is an integral part of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that the Court's judgments in respect of Montenegro are legally binding, as well as the fact that in its judgment in the case of *Nešić v. Montenegro*, App. no. 2131/18, of 9 June 2020, the European Court of Human Rights found a violation of the right to peaceful enjoyment of possessions in proceedings before the Montenegrin courts regarding a claim for the recognition of the rights of the prior owner of land declared a coastal zone under the law, the Supreme Court of Montenegro is called upon to revise its hitherto case-law and its legal opinions on the issue within the fulfilment of its constitutional rule to ensure the uniform application of the law.

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The complexity of the issue of ownership of land declared a coastal zone requires the presentation of the relevant legal framework, comprising:

- 1992 Constitution of the Republic of Montenegro (Official Journal of the Republic of Montenegro, No. 48/92);
- 2007 Constitution of Montenegro (Official Journal of Montenegro, Nos. 1/07 and 38/13);
- 1980 Property Act (Official Journal of the SFRY, Nos. 6/80 and 36/90, Official Journal of the FRY, No. 29/96 and Official Journal of the Republic of Montenegro, No. 52/04);
- 2009 Property Act (Official Journal of Montenegro, No. 19/09);
- 1978 Coastal Zone Act (Official Journal of Serbia and Montenegro, Nos. 9/78 and 2/89);
- 1992 Coastal Zone Act as amended (Official Journal of the Republic of Montenegro, Nos. 14/92 and 27/94, Official Journal of Montenegro, Nos. 51/08, 21/09, 73/10 and 40/11);
- 1999 State Property Act (Official Journal of the Republic of Montenegro, No. 44/99);
- 2009 State Property Act (Official Journal of Montenegro, Nos. 21/09 and 40/11);
- 2000 Expropriation Act (Official Journal of the Republic of Montenegro, Nos. 55/00, 12/02 and 28/06 and Official Journal of Montenegro, No. 21/08);

- European Convention for the Protection of Human Rights and Fundamental Freedoms;
- Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 45 of the **1982 Constitution of the Republic of Montenegro** prohibited the deprivation or restriction of property rights except in public interest determined by law or in accordance with the law, and in return for compensation at market value.

Paras 1 and 2 of Article 58 of the 2007 Constitution of Montenegro guarantee the right to property and prohibit deprivation or restriction of the right, except in public interest and in return for just compensation. This Article also provides (in paragraph 3) that natural resources and resources in public use are the property of the State.

Article 3 of the **1980 Property Act** entitled owners to hold, use and dispose of their property within the statutory limits and provided that everyone had a duty to refrain from violating the property rights of others. Article 8 of this law provided for deprivation or restriction of the right to property only under conditions prescribed by law in accordance with the Constitution. Article 20 of the law provided that property could be acquired *ex lege*, through a legal transaction, by means of inheritance, or on the basis of a decision issued by a state authority in accordance with the law.

The **2009 Property Act** regulates (in Article 6) the rights of owners practically identically as its predecessor. Article 10 of this law lays down that property rights may be restricted in accordance with the law and that no one may be deprived of their property except in public interest and in return for just compensation. Article 20(1) affords special protection to goods of common interest - natural resources, resources in public use, cultural goods, the coastal zone, national parks, et al. Goods of common interest – construction land, agricultural land, forests and forest land, protected parks of nature, **exceptional coastal zone**, flora and fauna, items of cultural, historic and ecological importance and other such assets **may be subject to private ownership** and other real rights. Owners and holders of other property rights on goods of common interest are obliged to exercise their rights in accordance with separate laws. Article 22(3) of the Act lays down that natural resources (seacoast, waters, ores, wildlife, et al) and resources in public use (roads, railroads, airports, squares, airspace, ports, cultural-historical monuments, et al) may not be subject to private ownership

Therefore, the Property Act regulates the property legal regime of the coastal zone. As a rule, the coastal zone is the property of the State and may only exceptionally be in private ownership, whereas the seacoast cannot be privately owned. Furthermore, this law provides special protection to "goods of public interest" (natural resources, resources in public use and the coastal zone) in accordance with the law.

The transitional and final provisions of the Property Act regulate the conversion of the rights related to state-owned (formerly socially-owned) land. Under Article 419, holders of the rights to manage, use or permanently use state-owned (formerly socially-owned)

land shall acquire the right of ownership of the land when this law enters into force unless otherwise provided for by another law or an interested party proves that they have acquired ownership of the land before this law entered into force. Paragraph 3 of this Article sets out that paragraph 1 shall not prejudice the rights of the former owners under the Property Restitution and Compensation Act.

Article 420 regulates the registration of property. Under paragraph 1 of this Article, on the request of a person whose rights under Article 419 are registered in the Real Estate Register, the administrative authority charged with maintaining the Register shall allow the deletion of social, now state ownership rights and rights to manage, use or permanently use and dispose of the land under Article 419 of this Law, and register the ownership right for the benefit of the holder of these rights. Under paragraph 3 of this Article, a person who claims that social, now state ownership i.e. the right to manage, use, permanently use and dispose of property not registered in the Real Estate Register has ceased, must prove as much before the court, in order to delete that right on the basis of a court decision and then register their property right.

The coastal zone is defined and its management, use, improvement and protection are governed by the Coastal Zone Act. The valid Coastal Zone Act contains an identical definition of the coastal zone as the **1978 Coastal Zone Act.** The coastal zone comprises the seacoast, ports, breakwaters, slipways, rifts, sand-banks, swimming areas, cliffs, bayous, crag, submarine springs, springs and wells on the shore, mouths of the rivers flowing into sea, channels connected with sea, submarine resources, sea bed and subsoil resources. as well as internal sea waters and territorial waters, biotic and abiotic resources in the internal sea waters, territorial waters and the epicontinental belt, as well as the banks of the Bojana River in the territory of Montenegro.

The seacoast is defined as a strip of coast up to the line reached by the biggest waves in the stormiest weather, as well as part of the land used for maritime transportation and fishing and other marine-related purposes, which is at least six metres beyond the line reached by the biggest waves in the stormiest weather.

Article 4 of the **1978 Coastal Zone Act** set out that the coastal zone was socially owned and could not be dispossessed and that the municipalities managed it. This law had not governed the issue of legally acquired property rights in the coastal zone in a clear and comprehensive manner. It did regulate acquired rights to permanent buildings owned by natural and physical persons, built in the coastal zone with the approval of the relevant authorities or built at a time when such approval was not required. The owners retained the acquired rights and the buildings could become socially-owned property in common interest or removed, in which case their owners were entitled to compensation in accordance with expropriation law. The law did not regulate the issue of legally acquired real rights to land constituting the coastal zone.

According to Article 2 of the **1992 Coastal Zone Act** as amended, the coastal zone denotes the seacoast, which is defined in Article 3 of the law as a strip of coast up to

the line reached by the biggest waves in the stormiest weather and at least six metres beyond that. The Montenegrin Assembly is entitled to declare land beyond that strip seacoast in specific areas. Article 4 of the law sets out that the coastal zone is owned by the state but that, exceptionally, land beyond the six-metre strip declared seacoast can be privately owned in accordance with a decision of the Assembly. Under Article 30 of the law, owners of land within the coastal zone, who obtained such property lawfully before this law entered into force and which is duly registered in the Real Estate Register as private property, are entitled to compensation in the event of dispossession, pursuant to the provisions on expropriation. They also have a pre-emptive right to use the coastal zone, under the same conditions, in accordance with the spatial or urban plan. Under Article 7 of the valid Coastal Zone Act, the coastal zone may be ceded for use to a legal or natural person to perform commercial or other lawful activities or moor vessels. Contracts on the use of the coastal zone shall be concluded between the public company managing the coastal zone and the user of the coastal zone (Article 8) in accordance with a Government decision on the conditions and time of use of the coastal zone and on compensation. However, the valid Coastal Zone Act does not regulate the property legal regime of the coastal zone, since the provision governing this issue in Article 4 ceased to have effect when the State Property Act entered into force.

Therefore, in addition to the Property Act, the property legal regime of the coastal zone in Montenegro is also governed by the State Property Act.

The State Property Act, which entered into effect on 28 March 2009, replaced Article 4 of the 1992 Coastal Zone Act. However, Articles 10, 11 and 13 of this law lay down that the coastal zone, including plots of land, the seacoast and beaches owned by the State therein, constitute common resources managed by Montenegro. Article 9 of the law provides that natural resources and resources in public use cannot be private property.

The 2000 Expropriation Act as amended defines (in Article 1) expropriation as the deprivation or restriction of the right to property when this is required in the public interest, in return for just compensation. Public interest in the expropriation of a piece of real estate is "established by law, or on the basis of law". Article 7 provides that expropriation may be undertaken for the benefit of the State, municipalities, State funds, and companies in which the State owns a majority stake and which undertake activities in the public interest.

Article14 defines in greater detail public interest. In particular, if a public interest in the expropriation of certain real estate was not established in a separate law, it can otherwise be established by the Government of Montenegro. A proposal for establishing the public interest in the expropriation of certain real estate is submitted by a person who, pursuant to this law, would be the beneficiary of that expropriation. The proposal must contain, *inter alia*, the amount to be paid by way of just compensation. The Government must decide on that proposal within thirty days and, in the same decision, determine the beneficiary of the expropriation. Article 19 provides that an expropriation proposal may be

submitted by the beneficiary of that expropriation only after the public interest in the expropriation of the real estate in question has been established. Under Article 25, the ruling on expropriation must identify the beneficiary of the expropriation, the real estate subject to expropriation and the owner of the real estate, while Articles 35-60 govern in detail the types and amounts of just compensation.

Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:

"1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

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Prior Legal Opinions of the Supreme Court of Montenegro:

Legal Opinion of the Civil Law Department of the Supreme Court of Montenegro Su. VI No. 74/13 of 7 October 2013;

General Legal Opinion of the Plenary Session of the Supreme Court of Montenegro Su. I No. 124/15-III of 27 May 2015;

Judgment of the Supreme Court of Montenegro Rev. No. 532/20 of 27 October 2020.

At the session of its Civil Law Department held on 7 October 2013, the Supreme Court of Montenegro adopted **Legal Opinion Su. VI No.74/13,** which reads as follows:

"Former owners of land constituting the coastal zone may exercise the right to use such land only provided they conclude a contract with the public company managing the coastal zone, in which case they have the pre-emptive right to bid for that right."

Almost two years later, the Supreme Court decided to revise the opinion to respond to the shortcomings and challenges identified during its application.

Therefore, at its plenary session held on 27 May 2015, the Supreme Court adopted **General Legal Position Su. I No.124/15 – III, which reads as follows:**

"Owners of land in the coastal zone, who had obtained such property lawfully before the Coastal Zone Act law entered into force and which property was duly registered in the land or Real Estate Registers as private property, are legally entitled to use it under the same conditions in accordance with the spatial or urban plans pending its dispossession, wherefore they are not under the obligation to conclude a contract on its use with the public company managing the coastal zone."

★★★

The ECtHR's judgment in the case of

Nešić v. Montenegro, App. no. 2131/18, delivered on 9 June 2020, became final on 9 September 2020

In its judgment in the case of *Nešić v. Montenegro,* the European Court of Human Rights (hereinafter: Court) found a violation of the applicant's right to peaceful enjoyment of possessions enshrined in Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms in proceedings before Montenegrin courts, specifically in civil cases P. No. 588/14-06 and P. No. 1411/16 ruled on by the Kotor Basic Court.

Namely, during the first civil proceedings, the Kotor Basic Court delivered a final judgment endorsing the State's claim that it was the owner of two plots of land in the coastal zone, specifically on the seacoast.

During the second civil proceedings, the court delivered a final judgment upholding the claim of Ilija Nešić and finding he had a pre-emptive right to use the land at issue.

In both cases, first-instance judgments were confirmed by the second-instance court, while the Supreme Court of Montenegro dismissed as ill-founded the appeals on points of law.

It was not disputed during the civil proceedings that Ilija Nešić had obtained the land lawfully, before the entry into force of the Coastal Zone Act (Official Gazette of the Republic of Montenegro No.14/92).

Relevant paragraphs on admissibility in the Court's judgment in Nešić v. Montenegro

"47. The relevant principles are set out in *Vistiņš and Perepjolkins v. Latvia* [GC] (no. 71243/01, § 93, §§ 95-99 and §§ 108-114, 25 October 2012) and *Hutten-Czapska v. Poland* [GC] (no. 35014/97, §§ 163-168, ECHR 2006VIII).

48. In particular, any interference by a public authority with the peaceful enjoyment of possessions must be lawful. However, the existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal principles upon which the deprivation of property is based should be sufficiently accessible, precise and foreseeable in their application (see the above-cited cases of *Vistiņš and Perepjolkins*, §§ 96-97, and *Hutten-Czapska*, § 163). Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue that concerns the general interest is at stake, it is incumbent on the public authorities to act in good time, and in an appro-

priate and consistent manner (see *Hutten-Czapska*, cited above, § 168 *in fine*; *Fleri* Soler and Camilleri v. Malta, no. 35349/05, § 70 *in fine*, ECHR 2006X; *Broniowski v. Poland* [GC], 31443/96, § 151, ECHR 2004-V; and, *mutatis mutandis*, *Belvedere Alberghiera S.r.l. v. Italy*, no. 31524/96, § 58, ECHR 2000VI).

49. Even if it has taken place "subject to the conditions provided for by law" – implying the absence of arbitrariness – and in the public interest, an interference with the right to the peaceful enjoyment of possessions must always strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see *Vistiņš and Perepjolkins*, cited above, § 108). Compensation terms under the relevant legislation are material to an assessment of whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. The Court has already held that the taking of property without the payment of an amount reasonably related to its value would normally constitute a disproportionate interference (*ibid*., § 110).

(b) The Court's assessment

50. The Court notes that the applicant was the lawful owner of the land at issue and was registered as such until the domestic courts ruled in favour of the State, after which the State was registered as its owner. The Court therefore considers that by virtue of the domestic courts' decisions and the registration of the State's title the applicant was deprived of his property. His continued right to use the land at issue does not change this, given the fact that he lost his ownership. In the present case there was therefore an interference with the applicant's right to the peaceful enjoyment of his possessions, amounting to a "deprivation" of property within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1.

51. It is furthermore observed that the 2007 Constitution provides that natural resources and resources in public use are the property of the State. The 1992 Coastal Zone Act provided that the coastal zone, including the seacoast, was the property of the State, which was also provided by the 2009 State Property Act. Therefore, there was a legal basis in domestic law for the State becoming the owner of the land at issue.

52. It is also noted, however, that the Constitutions consistently provided that property rights could be limited only in return for compensation (see paragraphs 17-18 above). The Property Acts also provide, either indirectly or directly, for the payment of just compensation when owners are deprived of their property. Notably, the 1980 Property Act referred back to the Constitution in this regard, whereas the 2009 Property Act itself explicitly provides for just compensation when the owners are deprived of their property (see paragraphs 19-20 above). The 2000 Expropriation Act also provides for compensation (see paragraph 26 above). Lastly, the Coastal Zone Act also provided that lawful private owners of land in the coastal zone should be afforded compensation in

the event of dispossession pursuant to the provisions on expropriation (see paragraph 23 above). Therefore, while the relevant legislation allows for the State to become the owner of the land at issue, it also provides for the applicant's right to compensation in return. In the instant case, the State never contested the applicant's submission, either in the domestic proceedings or before this Court, that he had never received any compensation.

53. Furthermore, as noted above, the existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal principles upon which the deprivation of property is based should be sufficiently accessible, precise and foreseeable in their application (see paragraph 48 above). The Court notes in this regard that the Government submitted that if the applicant was dispossessed he would be entitled to compensation pursuant to the provisions on expropriation, in accordance with the Coastal Zone Act. It is unclear, however, what expropriation actually means in this context: the courts suggested that the applicant lost title *ex lege*, but it is also clear that further procedure was necessary to formalise the State's title, as well as to determine the compensation, and even after the court decisions it is suggested that dispossession through formal expropriation has not yet taken place. The Government's submission in this regard and the Coastal Zone Act provision also seem to imply that it could also be the case that no formal expropriation at all occurs, in which case the applicant would not receive any compensation, which runs contrary to all the other pieces of legislation providing for compensation in cases of deprivation of property. The Coastal Zone Act itself provides no details as to when, and if at all, the formal expropriation of land in the coastal zone is obligatory. Therefore, it is unclear if and when formal expropriation will take place. Furthermore, it is unclear in the instant case in respect of whom such expropriation would be undertaken, given that the applicant is no longer the owner of the land at issue.

54. In view of the above, the Court finds that the said interference was not in accordance with the law. Therefore, there has been a violation of Article 1 of Protocol No. 1."

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After the Court delivered its judgment in the case of *Nešić v. Montenegro*, the **Supreme Court of Montenegro** delivered its **judgment in case Rev. No. 532/20 on 27 October 2020,** rejecting as ill-founded the appeal on points of law the respondent State lodged against the Bijelo Polje High Court's judgment of 22 January 2020 in case Gž. No. 970/19, upholding the judgment of the Kotor Basic Court P.No.1467/17 of 26 November 2018 regarding a dispute about the prior owner's right to use his land declared a coastal zone under the law. The first-instance court had upheld the applicant's claim and found that he had the right to use part of the plot of land within the coastal zone. Given that, like in this case, the Kotor Basic Court upheld Ilija Nešić's claim in its final judgment in case P. No. 1411/16 of 13 April 2017, confirming that he had the right to use the land in the coastal zone until dispossession and that the European Court of Human Rights nevertheless found in its above-mentioned judgment a violation of the right to peaceful enjoyment of possessions, the following question legitimately arises in this case:

Where real estate in the coastal zone is concerned, can the claim concern determination of the right to use the land, or must it concern determination of property rights? This issue needs to be addressed to preclude future violations of the right to peaceful enjoyment of possessions.

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Given the presented Montenegrin regulations and the ECtHR's relevant views and assessments in its judgment in the case of *Nešić v. Montenegro,* the question arises whether the owners of land in the coastal zone can still have the right to own it or whether it has *ex lege* become state property, and which rights do the owners of land in the coastal zone, who had obtained the right of ownership before the entry into force of the Coastal Zone Act, have now, i.e. what is the relevance of the right to use the land under the Coastal Zone Act of Montenegro.

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In the light of all of the above considerations, the Supreme Court holds that:

- Article 58(3) of the Montenegrin Constitution, which stipulates that resources in public use and natural resources are owned by the State, cannot be interpreted in isolation in case of owners of land who had obtained property rights before the entry into force of the Coastal Zone Act; rather, it should be interpreted in conjunction with paragraphs 1 and 2 of that Article, prohibiting deprivation of property except when public interest so requires and in return for just compensation.

- Public interest in depriving or restricting property rights may be prescribed by law or a decision of the Government of Montenegro.

- Legal certainty, and the inherent legitimate expectations of holders of property rights, in conjunction with the cited constitutional and legal provisions and the ECtHR's views in *Nešić v. Montenegro,* impose upon the State the obligation to pay just compensation to owners of land who had obtained it lawfully before the entry into force of the Coastal Zone Act, before it registers as its owner in the Real Estate Register, because the conversion of private property into state property in accordance with the law entails the State's obligation to pay just compensation to the prior owners. This obligation unquestionably arises from the duty to strike a balance between public and private interests.

- The Supreme Court of Montenegro observes that the State's obligation to simultaneously pay compensation to all prior owners of land in the coastal zone would impose an excessive burden on its budget and that it can hardly be expected to fulfil it. On the other hand, the State is obligated to pay compensation to the prior owners. This is precisely why the State is under the obligation to respect the property rights of the prior owners until it dispossesses them of their real estate and pays them just compensation, whereby the requirements will have been met to fully comply with the principle of proportionality in respect of the right to peaceful enjoyment of possessions. Opposite conduct would

amount to a breach of this right, because no-one may be deprived of their property without receiving just compensation in return under both international standards and national law.

- Precisely for this reason, the issue of expropriation of land and payment of just compensation should be a matter of continuity over a specific period of time, to ensure the achievement of the public interest, on the one hand, and, the achievement of the prior owners' interest to be adequately compensated, on the other.

In view of all of the above considerations, the Supreme Court has deemed appropriate to issue a new general legal opinion that owners of land declared a coastal zone under the law, which they had lawfully obtained before the entry into force of the Coastal Zone Act (Official Journal of the Republic of Montenegro, Nos. 14/92 and 27/94 and Official Journal of Montenegro, Nos. 51/2008, 21/2009 and 40/2011), and their legal successors retain the right of ownership until dispossession and the right to be compensated for it in accordance with expropriation law.

Furthermore, the law should provide the State with the possibility of registering ownership of land declared a coastal zone upon payment of compensation to the prior owner in accordance with the Expropriation Act.

Consequently, the Supreme Court holds that it also needs to adopt the following legal opinion: owners of land declared a coastal zone under the law, who had obtained it lawfully before the entry into force of the Coastal Zone Act, and their successors, whose right to use the land has been recognised in the meantime, are entitled to register as the holders of property rights under the terms of Articles 419 and 420 of the Property Act."

It needs to be noted that, even before the adoption of this General Legal Opinion and with a view to addressing this complex legal issue, the editors of this and the prior Analyses, Montenegrin Supreme Court judges Miraš Radović and Dušanka Radović posed the following questions at an event attended by Council of Europe experts and several ECtHR judges: Does the judgment in the *Nešić* case deviate from the judgment in the *Petrović* case and how should Montenegro proceed with the execution of the *Nešić* judgment.

Former ECtHR judge Dragoljub Popović communicated his opinion in response, which reads as follows:

"1. The landmark judgment on this issue is the one the Court delivered in the case of *Turgut and Others v. Turkey* (1411/03 - 2008). It concerned forestland, whereas the *Nešić v. Montenegro* case (1213/18 – 2020) concerned coastal land. The Turkish and Montenegrin national laws essentially have an identical approach to the problem.

2. The rule in the *Turgut* case is the same as in the *Nešić* case. That rule says that the Convention will have been violated if the administration registers the State as the owner of private plots of land but does not pay any compensation in return for it (see *Turgut and Others*, para. 92; *Nešić*, para. 50-54).

3. For a violation of the Convention to exist, it is irrelevant whether the administration has entered into possession of the plot of land or whether it has, on behalf of the prior owner, constituted a sectoral right on the plot that has become State property by virtue of its registration in the Real Estate Register. The very registration of state property without the payment of compensation for it amounts to a violation of the Convention.

4. This is why first-instance court should reject requests from the administration to approve the registration of the State ownership of a private plot of land if just compensation for its expropriation has not been paid.

5. Argumentation is the most important element during deliberation. The administration will rely on the Montenegrin Coastal Zone Act, indicating that, once it enters into possession of the land, it will pay the prior owner compensation for the already expropriated land in accordance with the Expropriation Act.

6. The court should dismiss the administration's arguments for the following three reasons:

(1) The administration cannot rely on its potential future actions and promise the application of a law in order to win the dispute.

(2) A national court's judgment allowing the administration to register the land as State property in the Real Estate Register without paying the owner just compensation in return is in contravention of Article 58 of the Montenegrin Constitution.

(3) A national court's judgment allowing the administration to register the land as State property in the Real Estate Register without paying the owner just compensation in return is in contravention of the rule in the *Nešić* judgment."

Having examined national law, international standards, the cited ECtHR judgments and the relevant legal opinions, the authors of this Analysis note that there is still a dilemma whether the adopted General Legal Opinion will suffice to eliminate any open issues that may arise in terms of property rights regarding real estate in the coastal zone, or whether legislative activities will have to be undertaken. In the view of the authors of this Analysis, the principle of legal certainty requires substantial amendments to the Coastal Zone Act or the adoption of a new law.

4. Execution of 2019 and 2020 Judgments

Bigović v. Montenegro

App. no. 48343/16

Judgment of 19 March 2019

The judgment in the case of *Bigović v. Montenegro* was discussed in the Analysis covering the ECtHR's 2018 and 2019 judgments in respect of Montenegro. In that case, the Court found that detention conditions in Montenegro were in breach of Article 3 of the Convention. It also found a violation of Article 5 of the Convention because of irregular reviews of the lawfulness of detention, insufficient reasoning in the decisions extending detention, length of detention and the lack of a speedy decision on the applicant's release.

(a) Action Plan/Report Action Plan

The Government communicated its Action Plan of 19 December 2019 to the Committee of Ministers.[87]

(b) Individual Measures

On 25 June 2019, the Constitutional Court ruled on the constitutional appeal and quashed the Supreme Court's ruling on detention of 20 December 2016 and its judgment of 20 October 2015 and ordered the Supreme Court to reopen the proceedings. Following the decision of the Constitutional Court, the Special State Prosecutor proposed the applicant be detained on remand. In its decision of 26 September 2019, the Podgorica High Court ordered the applicant's detention "pending a final decision of the court, but no longer than for the duration of the first-instance sentence."[88]

The applicant is detained in conditions fully in compliance with the Convention standards, in a one-bed cell measuring 9 m^2.

The €7,500 the Court awarded in respect of non-pecuniary damages were fully paid within the specified timeframe.

(c) General Measures

The Court found violations of Articles 3 and 5 of the Convention, wherefore the Montenegrin Government presented the general measures the State had undertaken in the context of both Articles.

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87 http://hudoc.exec.coe.int/eng?i=DH-DD(2020)19E.

88 During the fresh proceedings, the Montenegrin Supreme Court on 4 December 2019 rendered a decision quashing the judgment of the Montenegrin Court of Appeals of 20 February 2015 and remitted the case for a retrial. These proceedings are still pending and the applicant is in pre-trial detention.

- *Article 3 of the Convention*

The State recalled that the measures aimed at improving conditions of detention in prisons had been taken within the framework of the *Bulatović c*ase.[89]

The Court found that the violations in this case resulted from the degrading treatment of the applicant on account of poor conditions of his detention in an overcrowded remand prison between February 2006 and August 2009. Thus, the facts of this case took place before the relevant measures had been taken within the context of the *Bulatović* case.

Between 5 August 2009 and 8 February 2016 the applicant had at least 5m^2 at his disposal and was thereinafter in a cell measuring more than 15 m^2 in a newly-built pavilion. He was also entitled to daily exercise, both indoors and outdoors, as corroborated by CPT reports. In its reports, the CPT noted the continuing commitment of the Government of Montenegro to improve conditions of detention in prisons, by renovating the existing and building new pavilions in the Institution for the Execution of Criminal Sanctions to address prison overcrowding. These measures guarantee that similar violations will not occur in the future and that the State will continue taking measures to ensure that the conditions in remand units fulfil the requisite standards.

- *Article 5 of the Convention*

The Court found violations of Article 5 of the Convention because the lawfulness of the applicant's detention was not re-examined regularly and because the detention orders were insufficiently reasoned.

The Court already ruled on the lack of precision on the duration of detention in rulings ordering and extending detention and irregular court re-examination of the lawfulness of detention in its judgment in the case of *Mugoša v. Montenegro*.[90] During its execution of this judgment, the State took adequate steps to prevent similar violations. In January 2017, the Supreme Court of Montenegro adopted a legal opinion that, when extending detention, all courts must consistently comply with the statutory deadlines in Articles 179(2) and 198(1) of the Criminal Procedure Code. Any failure to respect these mandatory time-limits shall be considered a violation of the right to liberty and security of person. Since the rulings ordering and extending the applicant's detention had been issued before the adoption of this legal opinion and at a time when the domestic courts' practice concerning this issue was in contravention of ECtHR standards, it was unnecessary to take further measures, given the measures undertaken during the execution of the *Mugoša* judgment and the above-mentioned legal opinion.

The Court found a violation of Article 5 of the Convention also because it considered that the authorities extended the applicant's detention on grounds which could not be regarded as "sufficient", thereby failing to justify his continued deprivation of liberty for a period of over five years.[91] In the context of this violation, the Supreme Court aligned its case-law with the

89 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)1149E More in the Analysis of European Court of Human Rights Judgments in 2018 and 2019 (December 2019), https://sudovi.me/static//vrhs/doc/Analysis_of_judgments_of_the_ECHR_2018_and_2019_Judgments_in_respect_of_Montenegro.pdf, pp. 37-38.

90 *Mugoša v. Montenegro*, App. no. 76522/12, judgment of 21 June 2016.

91 *Bigović* judgment, para. 213.

Court's views in the *Bigović* judgment and indicated the adequacy of grounds for extending detention in several detention cases, in which it also referred to the Court's case-law.[92]

Finally, the judgment was used in a number of trainings and workshops organised within the Judicial and Prosecutorial Training Centre. The judgment was translated and published on the website of the Montenegrin Supreme Court and in the Official Journal of Montenegro. It was disseminated to all authorities involved in the proceedings resulting in these violations of the Convention.

Šaranović v. Montenegro

App. no. 31775/16

Judgment of 5 March 2019

The judgment in the case of Šaranović *v. Montenegro* was discussed in the Analysis of the judgments in respect of Montenegro the ECtHR delivered in 2018 and 2019. In this judgment, the Court found a violation of Article 5 of the Convention, because the applicant's detention from 16 November to 15 December was unlawful, given that the relevant court had failed to re-examine it *ex officio* within the 30-day statutory time-limit.

(a) Action Plan/Report

The Government communicated its Action Report of 5 February 2020 to the Committee of Ministers.[93]

(b) Individual Measures

The applicant was released in December 2016, before the Court delivered its judgment. In March 2017, he was killed by unidentified perpetrators in front of his house.

The €1,500 the Court awarded the applicant in respect of non-pecuniary damage was paid to his family within the prescribed time-frame.

(c) General Measures

Like in *Bigović v. Montenegro*, the Court in this judgment found identical violations of Article 5 due to the lack of precision regarding the duration of detention in the decisions ordering and extending detention and irregular re-examination of the lawfulness of detention by the competent court. The Government noted the measures taken during the execution of the *Mugoša v. Montenegro*[94] judgment and the Supreme Court's legal opinion that when extending detention, all courts must consistently comply with the statutory deadlines in Articles 179(2) and 198(1) of the Criminal Procedure Code and that any failure to respect these mandatory time-limits shall be considered a violation of the right to liberty and security of person.

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92 See Supreme Court decisions: Kr. No. 33/19 of 31 July 2019, Kr. No. 45/19 of 24 October 2019, Kr. No. 53/19 of 19 November 2019, and Kr-s. No. 10/19 of 19 November 2019.

93 http://hudoc.exec.coe.int/eng?i=DH-DD(2020)109E.

94 Mugoša v. Montenegro, App. no. 76522/12, judgment of 21 June 2016.

Finally, the judgment was used in a number of trainings and workshops in the Judicial and Prosecutorial Training Centre. It was also analysed during trainings within the joint Council of Europe/EU project "Horizontal Facility for the Western Balkans and Turkey".

The judgment was translated and published on the website of the Montenegrin Supreme Court and in the Official Journal of Montenegro, It was also disseminated to all the courts ruling on detention cases.

(d) Committee of Ministers Resolution

At the 1377th meeting of the Ministers' Deputies on 4 June 2020, the Committee of Ministers adopted Resolution CM/ResDH(2020)71 closing the case.[95]

95 http://hudoc.exec.coe.int/eng?i=001-203443;

5. Execution of ECtHR Judgments and Cases Closed in 2019 – Comparative Practice

In its 13th annual report "Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights," the Committee of Ministers recognised the "main recent achievements" in a variety of cases closed in 2019.

This part of the document, like the prior Analysis on ECtHR's judgments in respect of Montenegro delivered in 2018 and 2019, analyses successful measures undertaken by other States to execute ECtHR judgments against them. It focuses on the cases that may be of relevance to pending and future applications against Montenegro.

5.1. Bulgaria

Effective investigations into actions of security forces

Hristovi v. Bulgaria (App. no. 42697/05, judgment of 11 November 2011)

The applicants (three Bulgarian nationals) relied on Articles 3 and 13 of the Convention, complaining of police ill-treatment on 17 February 2004, the failure of the relevant authorities to conduct an effective investigation into their allegations and lack of effective legal remedies to protect their rights.

The first applicant also complained of violations of his rights under Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention in regard to criminal proceedings against him.

The Court did not find a violation of Article 3 in respect of the first applicant and the alleged beating, but it did find a violation of Article 3 in respect of all three applicants because the relevant authorities had failed to effectively investigate their claims that they had been subjected to fear, intimidation and threats during their arrest.

The Committee of Ministers supervised the execution of the judgment within the *Velikov v. Bulgaria* and the *S.Z./Kolevi v. Bulgaria* groups of cases.

Execution of the Judgment:

The European Court considered that masked police officers deployed in police operations should display anonymous means of identification to permit their identification by the investigative authorities. In order to execute the judgment, the Bulgarian authorities undertook specific individual and general measures. They fulfilled the individual measures by paying just satisfaction. They also opened a new investigation, but the relevant domestic courts ascertained that the case was out of time.

One of the general measures the Bulgarian authorities took involved the adoption of an amendment to the Ministry of Interior Act, which entered into force on 1 January 2019 and which provides that police officers taking part in special police operations, such as search and seizure, must wear individual identification numbers. When special forces officers are involved, the requirement to visibly display some anonymous form of identification aims at preventing impunity even when legitimate security concerns require confidentiality.

5.2. Czech Republic

Protection of family life - filiation

Novotný v. the Czech Republic (App. no.16314/13, judgment of 7 June 2018)

The applicant, a Czech national, complained of the inability to challenge his paternity after he found out in 2012 that he was not Z.'s biological father. He relied on Article 8 of the Convention. The Court found a violation of the applicant's right to respect for family life under Article 8 of the Convention, because of his impossibility to challenge his legal paternity on the grounds of new biological evidence.

Execution of the Judgment:

As per individual measures, the applicant had made no claim in respect of pecuniary or non-pecuniary damage. The applicant did not avail himself of the possibility to request the reopening of the proceedings before the Constitutional Court or the possibility provided under the legislative amendment presented below among the general measures the Czech Government had undertook to execute the judgment.

As per general measures, the Special Judicial Proceedings Act was amended on 30 September 2017 and now includes a new Article 425a which, in cases similar to that of the applicant, provides the possibility to file an action for reopening the proceedings on declaration or denial of paternity even after the expiry of the statutory three-year time-limit after the contested decision became final. In particular, such a possibility is provided if "new evidence which relates to new scientific methods that could not have been used in the original proceedings exists" The new Article lays down that the decision on declaration or denial of paternity does not affect the validity of any legal acts carried out in relation to the execution of parental rights and obligations before the decision became final.

5.3. Greece

Protection of property – Length of judicial proceedings

Papastavrou and Others v. Greece Group

The *Papastavrou and Others* group includes two applications[96] filed against Greece by multiple applicants, who complained about the years-long court proceedings regarding a plot of land near Athens.[97] The applications were lodged for identical reasons.

In 1994, the Athens Prefect decided that an area including the disputed plot of land should be reforested. The applicants in both cases disputed the Prefect's decision, claiming that they owned the plot of land at issue and that its reforestation would deprive them of their property rights. In its decisions of 1998[98] and 2000[99] , the Council of State (Supreme Administrative Court) declared the applicants' appeals inadmissible on the ground that the Prefect's decision was not an operative one, since it simply confirmed the decision that had been issued by the Minister of Agriculture in 1934.

In its judgments on the merits, the Court said that it was not called upon to settle the issue of ownership of the disputed land. On the other hand, it noted that the Council of State was also not called upon to determine the issue of ownership, but that it had accepted that the applicants had *locus standi*. Therefore, the Court concluded that, for the purposes of the proceedings before it, the applicants could be regarded as the owners of the land in issue or at least as having an interest that would normally be protected by Article 1 of Protocol No. 1.

The Court noted that there was a large amount of conflicting evidence as to the nature of the land in issue and that it was not called upon to decide such a technical matter. It, however, also noted that the Prefect's decision was based on a ministerial decision of 1934 and opined that the authorities had been under the obligation to perform a fresh assessment of the situation as depicted in a decision taken 60 years that affected the position of the applicants. However, the Council of State rejected the applicants' appeal on the sole ground that the Prefect's decision was not an operative one, since it simply confirmed the decision that had been issued by the Minister of Agriculture in 1934. The Court said: "Such a manner of proceeding in such a complex situation in which any administrative decision could weigh heavily on the property rights of a large number of people cannot be considered consistent with the right enshrined in Article 1 of Protocol No. 1 and does not provide adequate protection to people such as the applicants who bona fide possess or own property, in particular, when it is borne in mind that there is no possibility of obtaining compensation under Greek law." The Court concluded that no reasonable balance had been struck between the public interest and the requirements of the protection of the applicants' rights.

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96 The group comprises the following judgments: *Papastavrou and Others v. Greece*, App. no. 46372/99, judgment (merits) of 10 April 2003, *Papastavrou and Others v. Greece*, App. no. 46372/99, judgment (just satisfaction) of 18 November 2004,, *Katsoulis and Others v. Greece*, App. no. 66742/01, judgment (merits) of 8 July 2004, and *Katsoulis and Others v. Greece*, App. no. 66742/01, judgment (just satisfaction) of 24 November 2005.

97 The plot of land known as "Omorphokklisia" in the Athens suburb of Galatsi.

98 Case *Papastavrou and Others*.

99 Case *Katsoulis and Others*.

The Court delivered judgments on just satisfaction in both cases. In *Papastavrou and Others,* it awarded the applicants jointly €250,000, while, in *Katsoulis and Others,* it awarded the applicants jointly €380,000 in respect of pecuniary damage.

Execution of the Judgment:

The respondent State paid the applicants the awarded compensation. The judgments did not specify the need to take individual measures in respect of the pending proceedings, wherefore the State took appropriate general measures sufficient to rectify the violations found by the court.

Following the issuance of the above mentioned judgments, the Council of State has changed its case-law in line with the ECtHR's findings. In its subsequent judgments on complaints of identical decisions, the Council of State said that the 1934 ministerial decision was extremely outdated, wherefore, before rendering decisions on reforestation, the national authorities should take into account the existing situation, either by perusing the documents or taking active measures (e.g. air surveys of the land, et al).

As per just compensation, the Government said that compensation may always be awarded to individuals after their land ownership has been recognised by courts. This compensation may cover any potential damage that individuals may have suffered in the period during which they have been unable to use their property due to pending proceedings. It also said that the alleged owners could also ask the State to redeem or to expropriate their properties, paying in this case compensation that corresponded to the value of the land.

Greece has undertaken special measures to register state property. The National Cadastre Organisation has been tasked with the registration of the real property in Greece (public property included) in order to create a complete and consistent real estate property database. The law governing this area has also been amended. The new system of land registration will contain reliable and detailed legal and technical information to simplify future property transactions. Cadastral surveys were first implemented on a regional basis and the remaining regions, mainly island, rural, mountain and forestry areas, will soon be incorporated. Once completed, each individual property will be assigned a unique 12-digit code number which will guarantee the accuracy of the data. Once the process is completed, bureaucracy will be limited and the country's forestry areas and coastal zones will be defined.

In case of an inaccurate initial registration, the Greek law provides for the possibility to dispute and correct it partially or entirely within, in principle, seven years following the above registration, except in cases within court jurisdiction, where the time-frame is not limited.

Nastou and Others v. Greece Group

The *Nastou and Others* group includes three applications[100] filed against Greece by multiple applicants regarding their property disputes with the State.

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100 The group comprises the following judgments: *Nastou and Others v. Greece (No.1)*, App. no. 51356/99, judgment of 16 January 2003, *Nastou and Others v. Greece (No. 2)*, App. no. 16163/02, judgment of 15 July 2005, *Anastasiadis and Others v. Greece*, App. no. 39725/03, judgment of 10 May 2007 and *Bibi v. Greece*, App. no.15643/10, judgment of 13 November 2014.

The *Nastou and Others* case concerned expropriation of land in 1973 and the subsequent disputes about its ownership. The State registered as its owner after long court proceedings. The ECtHR found that the applicants, who were in possession of the land, were to be considered its owners but only for the purposes of the court proceedings at issue. It found a violation of Article 1 of Protocol No. 1 because of the lengthy court proceedings and the State's failure to pay the applicants just compensation for the expropriated land. The Court awarded the applicants €450,000 in respect of pecuniary damage in the first judgment and €600,000 in respect of pecuniary damage in the second judgment.

The applicants in the *Anastasiadis and Others* case owned land near the town of Kalamati, which the State declared part of the public shore land in 1981. This declaration was, according to the applicable legislation, equivalent to expropriation. Accordingly, the applicants brought proceedings before the domestic courts, seeking to obtain the compensation for this expropriation which was fixed in 1987. In subsequent proceedings, the courts first rejected the applicants' application for their recognition as beneficiaries of the compensation. In 1989, the applicants filed an action in order to be recognised as beneficiaries of the compensation, which was first rejected by the national courts, which finally ruled in the applicants' favour in 2003. In 2005, the applicants filed an application seeking the redefinition of the compensation for the expropriation. These proceedings were pending at the time the Court delivered its judgment. The Court found a violation of Article 1 of Protocol No. 1 in this case as well, because of the lengthy court proceedings and the fact that the applicants were not paid just compensation for the expropriated land. It awarded them €85,000 in respect of pecuniary damage.

Finally, the *Bibi* case concerned the expropriation, in 1976, of land allegedly belonging to the first applicant and her husband. The second applicant was their daughter who inherited ownership of the disputed land when her father died. In 1978, the relevant administrative court fixed the amount of just compensation to be paid out to the applicants. However, the compensation was not paid since, during repeated proceedings, the courts refused to recognise their right to compensation because the State claimed that it owned the land. The applicants then took proceedings in the civil courts seeking recognition of their ownership rights. The proceedings began in 1984 and ended in 2003 with the recognition of the first applicant as the owner of part of the land. In 2005, the applicants brought proceedings in the competent court of appeal seeking to have the expropriation compensation reassessed or to obtain compensation for the loss of the use of their property during the proceedings. In a judgment of 28 February 2007, which was confirmed by the Court of Cassation, the court of appeal declined jurisdiction on the grounds that the applicants' claims in tact amounted to claims for damages, which were within the jurisdiction of the administrative court. The ECtHR found a violation of Article 1 of Protocol No. 1 to the Convention because the domestic courts' refusal to consider the applicants' claim to correct the depreciation of the compensation for expropriation between the time of its definitive fixing and the time at which they could have received it, as well as the referral of the case to another jurisdiction, altered the adequacy of the compensation and, as a result, disrupted the fair balance between the general interest and the interest of the individual. The Court awarded €10,000 to the applicants in respect of pecuniary damage.

Execution of the Judgment:

In this group of cases, the Court found violations of the Convention because of the lengthy court proceedings against the State regarding the applicants' right of ownership of the expropriated land. Under relevant domestic law, land is publicly owned mainly through its classification as a forest or shore land. Such disputes are extremely specific and each case is approached with caution.

The State took adequate individual measures to execute the judgments.

In the *Nastou and Others* judgments, the Court did not ascertain that the applicants were actual owners of the disputed land, but merely treated them as such in the context of the proceedings conducted before the relevant domestic courts. The national courts ultimately found that the State was the owner of the land at issue. As regards criminal liability, the criminal courts found those who possessed the land innocent of the charge of deceit.

In the *Anastasiadis and Others* case, the relevant courts in 2013 adopted a decision rejecting the applicant's request for redefinition of the compensation for the expropriation. The final amount of the compensation for expropriation became available to the applicants and was deposited by the competent authority in their name with the relevant depositary institution in 2016.[101] The applicants' appeal of the decision was still pending before the Supreme Administrative Court.

The awarded just compensation was also deposited in the *Bibi* case and it became available to the applicants in 2003. The applicants did not file any requests for the payment of the compensation.

As regards the general measures, the State presented identical measures as the ones in the *Papastavrou and Others* group of cases discussed above. Specifically, the State set out the special measures that the National Cadastre Organisaton would take to register state property.

5.4. Croatia

Access to a court and disproportionate interference with property rights

Klauz v. Croatia Group

The *Klauz* group includes judgments in two cases[102] concerning the payment of the costs of civil proceedings, which were disproportionately higher than the damages awarded to the applicants. The legal costs were paid under the "loser pays" principle, according to which the costs of proceedings are paid by the party that lost the dispute.

The applicant in the *Klauz* case was arrested and taken to a police station, where officer M.B. beat him up during the four-hour interrogation. The doctor who examined the applicant after

101 *Caisse des Depots et Consignations.*

102 This group comprises judgments in the following cases: *Klauz v. Croatia*, App. no. 28963/10, judgment of 18 July 2013, and *Cindrić and Bešlić v. Croatia*, App. no.72152/13, judgment of 6 September 2016.

the incident filed a criminal report with the relevant police authority. The police officer was sentenced to a three-month prison sentence suspended for one year. The applicant then filed a claim against the State seeking damages for the ill-treatment he had suffered.

The central issue in the present case concerned the fact that the applicant was ordered to reimburse the costs of the representation of the State in the civil proceedings by the State Attorney's Office, which amounted to approximately 79% of the (principal amount of) compensation the State was ordered to pay him for the ill-treatment he had sustained at the hands of the police officer, who had already been found guilty of the criminal offence of ill-treatment in the exercise of an official duty. In result, the compensation paid to the applicant was significantly reduced by him having to reimburse those costs, despite the fact that the Croatian courts unequivocally accepted that he was entitled to compensation from the State for the non-pecuniary damage occasioned by his ill-treatment by the police.

Since the "loser pays" rule and the related rule requiring one party to pay the other party's costs (including advocate's fees) in proportion to their success in the proceedings, the value of which costs will depend on the value of the claim, discourages potential litigants from bringing (inflated) claims before the courts, the Court considered that it may be viewed as a restriction hindering the right of access to court.

The Court found that the domestic courts' decisions in this case were not proportionate to the legitimate aim pursued by the rule enunciated in Article 154(2) of the Civil Procedure Act, which required one party to pay the opposing party's costs depending on their success in the proceedings, which costs were determined in proportion to the value of the claim. Its application in the present case resulted in a restriction that impaired the very essence of the applicant's right of access to a court.

Therefore, the Court found a violation of Article 6(1) of the Convention.

The Court considered that a substantial reduction of the amount of that claim resulting from the duty to pay the costs of proceedings constituted an interference with the applicant's right to peacefully enjoy his possessions. It held that the interference in question was provided for by law and was in the general interest, but that it did not strike the requisite fair balance between the general interest involved and the applicant's right to peaceful enjoyment of his possessions, that is to say, that it was not proportionate. Therefore, it found a violation of Article 1 of Protocol No. 1 to the Convention.

Execution of the Judgment:

As per individual measures in the *Klauz* case, the applicant was entitled to seek the reopening of the proceedings under Article 428a of the Civil Procedure Act but did not avail himself of the opportunity. In the *Cindrić a Bešlić* case, the applicants did request the reopening of the civil proceedings, the relevant court granted their request, quashed the impugned decision regarding the costs of the proceedings and ordered each party to the proceedings to bear their own costs. That court entirely accepted the ECtHR's findings and carried out a proportionality test taking into account the applicants' individual financial situation. The applicants were exempted from paying the costs of the State's representation and only needed to bear the costs

of their own legal representation. Croatia paid the awarded damages to the applicants in both cases within the specified time-frame.

As per the general measures taken in response to the Court's findings in these two judgments, the domestic courts, including the Supreme Court, have since 2013 aligned their case-law with the Convention standards, explicitly referring to the ECtHR's views in the *Klauz* judgment. The Constitutional Court in 2017 changed its approach and started examining complaints regarding the payment of costs and expenses in civil proceedings, notably in cases against the State represented by state attorney's offices. The impugned provision of the Civil Procedure Act was amended in July 2019 and now ensures that when evaluating the parties' success and deciding upon the reimbursement of costs in similar cases, the domestic courts take into account only the final value of the claim whilst bearing in mind the success in proving the substance of the claim. Therefore, the domestic courts apply both the quantitative and the qualitative approach as regards apportionment of the costs in cases of partial success in proceedings.

5.5. Armenia

Excessive length of criminal proceedings

Aganikyan v. Armenia (App. no. 21791/12, judgment of 5 April 2018)

The *Aganikyan* case concerned the excessive length of criminal proceedings against the applicant charged with a number of usury offences. The proceedings lasted six years and 11 months at three levels of jurisdiction.

The Court found that the duration of the investigation and appeal stages of the proceedings was reasonable in terms of Article 6 of the Convention. However, the trial stage lasted four years and six months, during which the hearings were adjourned 136 times, half of them because the witnesses, prosecutor or lawyer did not appear, as well as for other reasons that were attributable solely to the State. Therefore, the Court found a violation of Article 6(1) of the Convention.

Execution of the Judgment:

In addition to the payment of €865 the Court awarded the applicant in respect of non-pecuniary damage, the Council of Justice initiated disciplinary proceedings against the trial judge even before the Court delivered its judgment. The Disciplinary Commission found that the judge had not undertaken all the measures prescribed by law to preclude the delays, resulting in the violation of the right to a fair trial within a reasonable time.

The Government said that, in the light of the Court's findings, nothing suggested that the violation found in the instant case was somehow linked to the policy, legislation or some kind of widespread practice but that the existence of a legal and judicial system capable of ensuring effective protection of human rights and fundamental freedoms guaranteed by the Constitution and ratified international treaties, and, in this context, administration of justice without delay

has been and still was one of the main priorities of the Government of Armenia. The Council of Court Presidents tasked the presidents of the courts to monitor whether judges respected the "reasonable time" requirement, as well as whether judicial proceedings were conducted in an organised manner. It also ordered them to report any violations of this requirement to the Council. Furthermore, the Council may initiate disciplinary proceedings against judges violating this Convention right.

The Armenian President approved the legal and judicial reform strategic programme and the following measures to ensure the efficiency of the court system were implemented: grounds for postponing court hearings were defined as comprehensively as possible and effective domestic remedies for violations of the "reasonable time" requirement were defined.

As per legislative reform, a new Judicial Code was adopted. As opposed to its predecessor, this Code clearly prescribes the following criteria for assessing the reasonableness of the length of proceedings: (a) the circumstances of the case, including its complexity, the conduct of the parties, as well as the consequences of the lengthy examination of the case for a party to the proceedings; (b) the actions the court took to examine and rule on the case within the shortest time possible; (c) the cumulative length of the proceedings; and (d) the average recommended duration of proceedings defined by the Supreme Judicial Council. The new Code also lays down additional criteria for evaluating the performance of judges, including their examination of cases and adoption of decisions within a reasonable time. The Code also allows judges handling particularly complex cases to apply to the Supreme Judicial Council to temporarily remove their names from the case allocation list.

The Government's Action Plan envisages the development and introduction of an e-justice system that will provide for an electronic platform for court cases, digital communication among judicial authorities and for monitoring the effectiveness of the relevant authorities.

The General Prosecutor's Office has also undertaken adequate measures to improve the prosecutors' performance in the context of compliance with the "reasonable time" standard. The Prosecutor General issued an order to the heads of the corresponding divisions, to ascertain and report on the reasons for delays in criminal court trials exceeding four months in cases concerning minor crimes and those exceeding six months in cases concerning serious crimes. Violations of the rights under Article 6 of the Convention must be reported to the Prosecutor General.

Finally, the relevant law entitles victims of human rights violations to claim damages before regular courts. On the other hand, the State or the Community that paid the damage is entitled to file a regressive action against the state or local self-government authority or official whose decision, action or inaction resulted in the violation of an individual's fundamental rights and freedoms, and thus, compensation. The ground for this action is the presence of guilt. The preventive policy behind this provision is to increase the responsibility of the competent state and local self-government authorities and officials for their decisions, actions or inactions concerning an individual's human rights and freedoms.

5.6. Malta

Freedom of expression

Falzon v. Malta (App. no. 45791/13, judgment of 20 March 2018)

The applicant had been found guilty of libel after writing an opinion piece in the form of questions in which he criticised Parliament and was ordered to pay €2,500 in damages.

Relying on Article 10 of the Convention, the applicant complained that the courts had failed to distinguish between facts and value judgments and submitted that his criticism had been directed towards a politician and had concerned a matter of public interest and that a fair balance had not been achieved in the case.

The Court found a violation of the freedom of expression enshrined in Article 10 of the Convention, noting that, in the defamation proceedings, the domestic courts had not appropriately performed a balancing exercise between the need to protect the plaintiff's reputation and the Convention standard, which required very strong reasons for justifying restrictions on debates on questions of public interest.

Execution of the Judgment:

As per individual measures, the respondent Government paid the applicant the awarded pecuniary and non-pecuniary damages. As regards general measures, it undertook a number of legislative amendments to execute the judgment.

The new Act on Media and Defamation entered into force on 14 May 2018. The Act repealed and replaced the Press Act and updated Maltese law on libel and slander with the main aim of strengthening the right to freedom of expression. The law introduced the concept of 'serious harm' to the reputation of a person in the definition of defamation. Prior to the introduction of this Act, there was no specific definition in the law of the term 'defamation'. The Act makes an important distinction between "libel" ('defamation by publication') and "slander" ('defamation by spoken statements uttered with malice') and provides a definition for the terms "author", "publisher" and "editor". The term "printed matter", which was used in the Press Act, was replaced by the term "written media" which takes into account technological advances and covers all forms of digital publications. Individuals aggrieved by defamatory words used against them in written media may apply to the civil courts for redress. Actions for criminal libel are no longer possible under the Act. An action for defamatory libel may be instituted within one year from the publication of the statement in question.

5.7. North Macedonia

Fairness of court proceedings

Mitkova v. the former Yugoslav Republic of Macedonia (App. no. 48386/09, judgment of 15 October 2015)

The case concerned a violation of the right to a fair trial due to the lack of an oral hearing before the Administrative Court on the reimbursement of expenses for medical treatment abroad in 2009.

The Court noted that the applicant had explicitly requested an oral hearing at which the Administrative Court would examine the witnesses. The latter, however, did not explain why it thought their examination was unnecessary.

This case also concerned a violation of the applicant's right to a fair trial within a reasonable time, because the administrative proceedings lasted from 1995 to 2009.

The Court found a violation of Article 6(1) of the Convention because of the length of the administrative proceedings and lack of an oral hearing.

Execution of the Judgment:

As per individual measures, the Government paid the applicant the awarded non-pecuniary damage. However, his request to reopen the impugned proceedings was rejected as out of time in 2016. Namely, at the material time, the statutory time-limit for filing such a request was five years following the date of the final domestic decision, regardless of the time the ECtHR delivered its judgment. The North Macedonian Government referred to Committee of Ministers Resolution No. R(2000)2 on the reopening of proceedings in specific cases at the domestic level, where the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of. The new Administrative Disputes Act adopted in 2019 prescribes a time limit of 90 days following the date when the judgment or the decision of the European Court becomes final.

The 2019 Administrative Disputes Act also establishes oral hearings among its core principles. The Administrative Court is therefore explicitly under the obligation to hold an oral and public hearing before rendering its decision. Measures aimed at preventing excessively long administrative proceedings have been taken within the framework of the *Dumanovski* group of cases (see Resolution CM/ResDH (2011)81). Furthermore, the new Act establishes the principle of efficiency as one of the main principles in administrative disputes.

6. Conclusions and Recommendations

6.1. Conclusions:

The following conclusions emanated from the Analysis:

1. The ECtHR delivered 63 judgments against Montenegro from 3 March 2004, when the Convention entered into force in respect of Montenegro, to 31 December 2020.

2. The Analysis discusses ten judgments and four decisions in respect of Montenegro the Court delivered from 1 January to 31 December 2020.

3. The Court found Montenegro in violation of Article 6 in eight of the ten judgments. Seven of the ten judgments concerned excessively long proceedings, while one concerned violation of the right of access to a court under Article 6. In the remaining two judgments, the Court found violations of the right to respect for family and private life and of the right to peaceful enjoyment of possessions.

4. The Analysis shows that most of the judgments in which the Court found Montenegro in violation of the Convention (eight) again concerned the right to a fair trial enshrined in Article 6, notably the right to a fair trial within a reasonable time and the right of access to a court.

5. The Supreme Court of Montenegro continued with the good practice of applying standards on the protection of the right to a trial within a reasonable time, as corroborated by its numerous decisions on fair redress claims.

6. In the case in which it found a breach of the right of access to a court under Article 6 of the Convention during the reporting period (*Madžarović and Others v. Montenegro*), the Court noted, *inter alia*, that the right of access to a court entitled everyone whose rights were interfered with to bring proceedings directly and independently.

7. During the reporting period, the ECtHR found a violation of Article 8 of the Convention in one case (*Drašković v. Montenegro*), noting that a request by a close family relative, like the applicant in the present case, to exhume the remains of a deceased family member for transfer to a new resting place fell in principle to be examined under both aspects of this provision of the Convention.

8. During the reporting period, the ECtHR found a violation of Article 1 of Protocol No. 1 in one case (*Nešić v. Montenegro*). In its judgment, it recalled that any interference by public authorities with peaceful enjoyment of possessions had to be lawful, but that the existence of a legal basis in domestic law did not suffice, in itself, to satisfy the principle of lawfulness. It went on to say that the legal principles upon which the deprivation of property was based should be sufficiently accessible, precise and foreseeable in their application. The Court noted that in this case, the Coastal Zone Act

itself provided no details as to when, and if at all, the formal expropriation of land in the coastal zone was obligatory, wherefore it was unclear if and when formal expropriation would take place. Furthermore, it was unclear in respect of whom such expropriation would be undertaken, given that the applicant was no longer the owner of the land at issue, which was registered as State property.

9. Montenegro continued to ensure a good level of cooperation with the ECtHR and the Department for the Execution of the Judgments of the European Court of Human Rights. Montenegro still had the best track record in executing the Court's judgments in the region. The Council of Ministers has not yet placed the execution of any judgments against Montenegro under enhanced supervision. This has been recognised also by the European Commission, which commended Montenegro's cooperation with the ECtHR in its report of 6 October 2020, specifying that none of the cases against Montenegro were under enhanced supervision of execution by the Committee of Ministers.

6.2. Recommendations:

The following recommendations have emanated from the Analysis:

1. Advanced professional development of judges, state prosecutors and judicial advisers and dialogue with human rights experts should continue to stay abreast with the Court's evolving case-law. More efforts should be invested in promoting legal remedies for protecting the right to a trial within a reasonable time.

2. With a view to facilitating the monitoring of the implementation of the Convention at the national level, judges should promptly enter data on the application of specific Convention Articles and references to the Court's case-law in the judicial information system - PRIS.

3. In order to ensure respect for the guarantees of the right to a trial within a reasonable time, court presidents should organise the courts' operations in a manner ensuring continued and consistent adjudication of "old" cases in accordance with the backlog reduction programmes. They should demonstrate special diligence in ruling on cases in which requests based on legal remedies for the protection of the right to a trial within a reasonable time have been upheld. Note also needs to be taken that non-pecuniary damage for violations of the right to a trial within a reasonable time should be sought by lodging fair redress claims, not in civil proceedings.

4. In the context of ruling on requests for review, court presidents should assess all facts and circumstances in each individual case with particular diligence and in keeping with the standards set out in national law and the Court's case-law. They should also examine the merits of the requests for review in situations where a violation of the right to a trial within a reasonable time has occurred or is likely to occur.

5. A company or its legal representative cannot be denied the right of access to a court by the dismissal of the legal remedy lodged by the company's authorised representative upon the appointment of the new representative – the executive director of the legal person before the decision registering the change of the representative becomes final.

6. Where the State interferes with the right to respect for private and family life, the courts should accept jurisdiction and rule in accordance with the civil procedure rules.

7. In all situations in which property rights in the coastal zone are restricted, the prior owners are entitled to fair compensation.

8. When ruling on coastal zone cases, the courts should comply with the Court's case-law; they should also bring their case-law into compliance with the Montenegrin Supreme Court's Opinion No. Su. I 343-2/20 of 15 December 2020.

9. National law on the rights of prior owners of real estate in the coastal zone should be amended since other legal issues may also arise in these cases.

Supreme Court of Montenegro

The Supreme Court is the highest court in Montenegro. The Montenegrin Constitution entrusts it with ensuring consistent implementation of the law by the courts. It is precisely in this area that the Supreme Court both ensures harmonisation of national case-law and promotes the implementation of the European Convention on Human Rights and the standards the European Court of Human Rights has developed in its case-law. The Supreme Court's decision to form a separate Department for Monitoring the Case-Law of the European Court of Human Rights and EU Law testifies to its commitment to the protection of human rights and Convention values. With the support of the London-based AIRE Centre, this Department and the Supreme Court of Montenegro have been developing analytic documents and reports on specific issues of Convention law and its implementation by national courts. The Department has also organised a number of round tables providing judges and legal practitioners with opportunities to discuss relevant human rights protection issues and the exercise of these rights at the national and international levels.

The Supreme Court of Montenegro has other powers under the law as well. It, inter alia, acts as a third-instance court, ruling on extraordinary legal remedies filed against the decisions of the national courts. It is also charged with issuing general legal opinions and reviewing issues concerning the courts' work, implementation of laws and other regulations, and exercise of judicial powers.

Office of the Agent of Montenegro before the European Court of Human Rights

The Office of the Agent of Montenegro before the European Court of Human Rights (Office) is a professional service of the Montenegrin Government charged with representing state interests in proceedings initiated against Montenegro before the European Court of Human Rights (ECtHR). The Office is headed by the Agent, Mrs. Valentina Pavličić, who was appointed by the Government of Montenegro in 2015.

The remit of the Office and the Agent are defined by the Convention and its Protocols, the ECtHR Rules of Court and the Decree on the Office of the Agent of Montenegro before the European Court of Human Rights.

Given the character of its professional and administrative duties, the Office has de facto specialised in representing all Montenegrin state authorities in all proceedings against Montenegro before the ECtHR. The Office is also entrusted with coordinating the execution of ECtHR judgments and decisions, which entails its cooperation with the state authorities the ECtHR judgments and decisions concern. The Office is also tasked with monitoring developments in the case-law of the ECtHR and other international bodies focusing on human rights, familiarising the relevant state authorities with them, the translation and publication of ECtHR decisions and judgments, and with initiating the taking of specific general and individual measures to ensure the best and most widespread implementation of the Convention and its standards.

The AIRE Centre

The AIRE Centre (Advice on Individual Rights in Europe) is a non-government organisation that promotes awareness of European law rights and provides support for victims of human rights violations. Its team of international lawyers provides information, support and advice on European Union and Council of Europe legal standards. It has ample experience in litigation before the European Court of Human Rights and has participated in over 150 cases before those courts.

Over the past 20 years, the AIRE Centre has built an unprecedented reputation in the Western Balkans, where it has been cooperating with the region's judicial systems at all levels. It has been closely collaborating with the Ministries of Justice, judicial training centres and Supreme and Constitutional Courts in the region on the implementation of reform projects and extending support and assistance in the long-term development of the rule of law. The AIRE Centre has also been cooperating with NGOs across the Western Balkans on encouraging legal reforms and respect for fundamental rights. Its work has from the start been based on the endeavour to ensure that everyone can exercise their legal rights practically and effectively. In practice, this entails promoting and facilitating the proper implementation of the European Convention on Human Rights, assisting the EU integration process by strengthening the rule of law and the full recognition of human rights, and encouraging regional cooperation amongst judges and legal professionals across the region.