SUPREME COURT OF MONTENEGRO

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BEFORE EUROPEAN COURT OF HUMAN RIGHTS

Analysis of European Court of Human Rights 2018 and 2019 Judgments in Respect of Montenegro

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The AIRE Centre
Advice on Individual Rights in Europe

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Content

Dear readers,

The Analysis of 2018 and 2019 European Court of Human Rights judgments in respect of Montenegro before you was prepared by the Supreme Court of Montenegro in cooperation with the Office of Montenegro's Agent before the European Court of Human Rights, with the strong support of the British Embassy in Podgorica and the London-based AIRE Centre. The Analysis builds on the initial analysis of the Court's judgments in respect of Montenegro prepared by the Supreme Court's Department monitoring the case law of the Strasbourg Court and EU law, which was successfully presented in November 2018. That document, the first of its kind in the region, raised the Supreme Court's analytical endeavors in the field of human rights and fundamental freedoms to a new level.

Montenegro has consistently been championing respect for and protection and advancement of human rights and fundamental freedoms in the national system. The Supreme Court of Montenegro, which enjoys the status of the highest court in the judicial hierarchy, has continuously and successfully been implementing major activities aimed at strengthening the implementation of European Convention on Human Rights standards by national courts. The authors of the Analysis carefully selected national case law reflecting the influence of the European Court's jurisprudence, highlighting the domestic courts' conclusions emanating from the Court's views in its judgments in respect of Montenegro. The effectiveness of the conclusions remains to be seen in the domestic courts' case law, given that judges, as the key actors, are under the duty to apply the standards the European Court developed in its case law and reflected in its judgments in respect of Montenegro.

Therefore, this Analysis is not merely another of the many documents produced by the Supreme Court of Montenegro. It is a fragment of the heritage of civilizational values shared by Montenegro and the Council of Europe. Our thematic analyses and reports facilitating judicial and public access to the European Court's case law simultaneously strengthen our dialogue with that Court, an achievement of our partnership geared at promoting and protecting the realization of and respect for human rights and fundamental freedoms.

Recognizing the Convention's position in our legal system, the Analysis aims to systematize the European Court's case law over the past two years. The analysis of the Court's judgments points to the identified shortcomings and shows the influence of those judgments on domestic case law. Bearing in mind the challenge practitioners have been facing in understanding the Convention principles, the authors endeavored to develop a new manual that will help improve the quality of judicial training and the harmonization of case law in Montenegro. The execution of the Strasbourg Court's judgments remains a challenge, wherefore the authors of the Analysis again devoted attention to this area as well, enriching it with examples of practices in other Council of Europe Member States.

The Court judgments in respect of Montenegro presented in the Analysis demonstrate that life can transcend the law and inform the authors' recommendations to courts and state

authorities, whilst respecting the principle of subsidiarity, under which States have a margin of appreciation in terms of how they execute the Court's judgments. Therefore, Montenegro enjoys a margin of appreciation regarding the way in which it fulfils its positive obligations with a view to preventing human rights violations; these obligations include, inter alia, provision of information and advice on breaches of Convention rights and effective investigations of such violations.

On behalf of the Supreme Court of Montenegro, I take this opportunity to extend my warmest gratitude to our international partners for their loyal support to our endeavors to continue developing the system of protection of human rights and fundamental freedoms lying at the heart of the rule of law.

I am sure our fruitful cooperation will continue in all areas of crucial relevance to the Montenegrin judiciary.

With respect,

PRESIDENT
Vesna Medenica

Honorable colleagues,
Respected readers,

It is with great honour and pleasure that I and my dear colleagues, Supreme Court of Montenegro judges Mr. Miraš Radović and Mrs. Dušanka Radović, present our *Analysis of Judgments of the European Court of Human Rights in Respect of Montenegro*.

This important Analysis builds on the consolidated Analysis of the Court's judgments, the fruit of successful cooperation between the Office of the Montenegrin Agent before the European Court of Human Rights and the Supreme Court of Montenegro, which was presented to you, Montenegrin legal professionals, and international experts in 2018.We are deeply grateful for the selfless support extended in the accomplishment of this challenging task by the British Embassy and the London-based AIRE Centre, reflecting their recognition of the importance of applying the European Convention on Human Rights at the national level.

Furthering one's education and self-improvement are the only stable fulcrums in this rapidly evolving era of transition. In that sense, we, as an EU candidate country, must devote particular attention to the implementation of international law standards, particularly those set by the European Court of Human Rights in its abundant case-law. I hope that this comprehensive *Analysis*will supplement and expand your knowledge of human rights and be of use in your work.

The *Analysis* provides a review not only of standards set by the European Court of Human Rights in its judgments and decisions in respect of Montenegro from the beginning of 2018 until the end of 2019, but also of how these standards are implemented at the national level. It also providesa comparative overview of the results achieved by other High Contracting Parties in the execution of the Court's judgments.These results can serve as educational guidelines for Montenegrin national authorities in terms of preventive actions and strengthening human rights protection mechanisms at the national level, particularly given the fact that the Court's judgments are declaratory in character and leave the States a broad margin of appreciation to remedy and reverse the violations identified by the Court. In that respect, every decision of the European Court of Human Rights should serve as valuable guidance in the process of harmonizing national caselaw,which will result in greater public trust in the judiciary and the legal system.

Finally, I would like to point out that this document aims to remind all judicial professionals and others engaged in the *„art of goodness and equality*", that a new era of the Montenegrin legal system and legal thoughtbegan with the application and implementation of the European Convention on Human Rights. We are no longer, nor can we ever be, a closed system outside the framework of legal standards applicable to other members of the large European family, the family of 47 High Contracting Parties and their 830 million citizens.

When we acceded to the Convention system, we began standardizing our national law with the legacies of modern and developed democracies, the legaciesthat we must pursue both

formally and substantively, in order to work together on accomplishing the noble goal of protecting the human rights and fundamental freedoms of all our citizens, and anyone else seeking such protection within the borders of our country.

Yours faithfully,

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

Introduction

Respect for and protection of human rights are essential tasks of every democratic country. The exercise of these tasks is a responsibility shared by a number of institutions with various competences. The Montenegrin judiciary has been going through a reform that identified among its goals the need to enhance the knowledge of the holders of judicial offices of the case law of the European Court of Human Rights (hereinafter referred to as: "European Court" or "Court") and to harmonize the national case law with that of the Court.

In pursuit of this goal and aware of the need for concerted action by various institutions towards its achievement, the Supreme Court of Montenegro published the "Analysis of the European Court of Human Rights Judgments in Respect of Montenegro" in November 2018 in cooperation with the Office of the State Agent before the European Court of Human Rights, with precious support offered by the AIRE Centre from London.[1] The Analysis, which represents a unique document in the region, was compiled as a multipurpose manual. The primary goal was to collect all European Court of Human Rights judgments delivered in respect of Montenegro, from the entry into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as: "Convention") until 1 January 2018. The systematic overview and analysis of the judgments provided insight into the general principles of Convention law and pointed out specific shortcomings in the work of the national authorities. It was concluded that, although there were no systemic issues, particular attention should be paid to the most numerous violations, namely those related to the length of proceedings and protection of the right to liberty and security.

The Analysis also aimed to describe the procedure of enforcement of the European Court judgments, in order to familiarise professionals and the public at large with the measures taken by the State to comply with its international commitments undertaken when it signed and ratified the Convention. The value added of the Analysis is reflected in the very fact that it lays out the entire path of a judgment, from the moment it is delivered by the Court until its execution and closure of the case by the Council of Europe Committee of Ministers.

Following the successful reception of and positive reactions to the 2018 Analysis, the Montenegrin Supreme Court and the Office of the State Agent before the European Court in Strasbourg continued collaborating and, with the support of an important partner –the AIRE Centre in London, prepared this Analysis within "Legal Forum of the Supreme Court of Montenegro" project, which is supported by the British Embassy to Podgorica.

This Analysis builds on its predecessor and scrutinises the European Court judgments delivered during 2018 and 2019. However, as opposed to the prior Analysis, this document also describes two judgments and a decision in which no violations of Convention rights were found. It also provides information about other decisions striking applications off the list in the reference

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http://sudovi.me/files/L3ZyaHMvZG9jLzk2NzAucGRm= (English)

period and the reasons for such decisions. The Analysis thus touches upon the admissibility requirements, which are exceptionally important for procedures before the European Court, but have not been discussed with thus far. Also, the decisions in which no violations were found are examples of proper actions taken by the national authorities that inform learning, just like the European Court judgments.

The importance of the European Court judgments can be understood solely if one is familiar with the procedure of their execution. This procedure reveals that a judgment effects not only a specific applicant, but sometimes even the entire legal system, resulting in amendments of the legislation, adoption of legal views and references to the principles in the individual judgments delivered by the national courts. Therefore, this Analysis continues familiarizing the public with the judgment execution process, which is elaborated in a separate chapter dedicated to the reform of the execution procedure and the "Interlaken" process that is to end in 2019. The Analysis also includes a separate chapter on comparative practice of the enforcement of the European Court judgments and the cases which were closed by the Committee of Ministers as a result of successfully implemented national reforms.

Given the importance of the Convention for the development of legislation and jurisprudence, the Analysis also provides an overview of the way the courts have been interpreting the views of the European Court until the moment it was published. Although European Court judgments in respect of Montenegro constitute a source of law, the Analysis also provides examples of references to judgments delivered in respect of other countries, since the views expressed in them are authoritative; by following them, the national authorities can prevent future violations.

The following professionals participated in the development of this document: Supreme Court of Montenegro judges Miraš Radović and Dušanka Radović, Montenegrin State Agent before the European Court of Human Rights Valentina Pavličić, Podgorica Basic Court judge Boško Bašović, Basic Court judge candidate Tijana Badnjar, Montenegrin Supreme Court Secretary Ksenija Jovićević, Supreme Court of Montenegro advisor Bojana Bandović, and Office of the State Agent advisors Vanja Radević and Ivo Šoć.

The authors of this Analysis hereby express their special gratitude to Her Majesty's Ambassador Mrs. Alison Kemp and AIRE Centre Programme Manager Mrs. Biljana Braithwaite. The Montenegrin Supreme Court signed a Memorandum of Cooperation with its important partner in the promotion and protection of human rights – AIRE Centre, in November 2018, thus extending joint action through the project "Legal Forum of the Supreme Court of Montenegro" project. The production of documents such as this one is merely one of the many diverse activities in which the Supreme Court has been relying on the AIRE Centre's support.

1. Structure of the Analysis

The introductory section provides a brief reminder of the preceding Analysis, its subject matter, objective, importance and some of its recommendations. It also presents the subject matter and the objective of this document and highlights the novelties in its content. The Analysis is comprised of five parts:

Part One describes the structure of the document, drafting methodology, provides a statistical overview of the work of the European Court in the reference period, and aims to present a summary of the Analysis to facilitate the reader's understanding of its other parts.

Part Two of the Analysis deals with selected decisions and judgments of the European Court in respect of Montenegro, in which no violations of the Convention were found. This approach is a novelty in relation to the preceding document, and in addition to pointing out the standards of the European Court, it aims to draw attention to procedures before the national authorities that were in accordance with these standards.

Part Three is dedicated to the analysis of the European Court judgments in which violations were found of one or more Convention rights. The same methodological approach applied in the previous Analysis is used again to present the judgments and their enforcement: the European Court judgments are grouped by the Articles of the Convention, not by date of adoption. A brief introduction to the individual Convention rights is followed by a presentation of the facts, as well as the relevant principles and the Court's assessments, i.e. application of these principles to the case at hand. This is followed by an overview of the judgment enforcement procedures and measures undertaken to that end. In order to show the broad effects of the Court judgments, the section "Relevance to Case Law" provides an analysis of the judgments' actual and potential impact on legal views, as well as the case law of the domestic courts.

Part Four represents a novelty in relation to the preceding methodology, and it aims to familiarize the readers with the most significant reforms in the Court's work, with focus on the judgment execution system. Its objective is to offer additional, analytical and comparative value to the document, but also to draw attention to some of the common issues in the countries of the region with regards to the enforcement of the judgments.

Part Five, the last section, contains general conclusions and recommendations, providing a clear overview of the achievements in the national legal system and identifying room for improvement.

1.1. Statistical overview

On 31 October 2019, there were 60,150 pending applications before the European Court. In 2018, Montenegro was ranked 32nd of 47 countries with 77 applications lodged. In 2017, Montenegro was ranked 33rd.

According to the Court's statistics, the average number of applications lodged in a member state per 10,000 citizens stood at 0.52 in 2018. As for Montenegro, that figure is a lot higher, standing at 5.11 in 2018 and at 2.22 in 2017[2].

1.1.1. Number of applications decided against Montenegro, by year

- Out of the total of 277 applications decided in 2018, 264 were declared inadmissible[3] or struck out of the list of cases.[4] In 2018, the Court delivered 13 judgments against Montenegro, finding violations of one or more Convention articles in 11 of them. On 1 July 2019, there were 163 applications against Montenegro pending before the European Court.[5]
- Out of the total of 170 applications decided in 2017, 140 applications were declared inadmissible or struck off the list of cases by a single judge, 12 applications were declared inadmissible or struck out of the list of cases by a Committee, and two applications were declared inadmissible or struck out of the list of cases by a Chamber. The Court delivered judgments in 16 cases.
- Out of the total of 224 applications decided in 2016, 185 applications were declared inadmissible or struck out of the list of cases by a single judge, 32 applications were declared inadmissible or struck out of the list of cases by a Committee, and three applications were declared inadmissible or struck out of the list of cases by a Chamber. The Court delivered judgments in four cases.

1.1.2. Statistical overview of the decisions of the European Court in cases against Montenegro

In the period from 3 March 2004[6] to December 2019, the European Court delivered a total of 52 judgments[7] against Montenegro. The preceding Analysis, which covered the judgments

2 https://www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf

3 On the admissibility conditions, see page 15 herein.

4 According to Article 37 of the Convention,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.

5 https://www.echr.coe.int/Documents/CP_Montenegro_ENG.pdf

6 Date when the European Convention came into force in respect of Montenegro – see the judgment in the case *Bijelić v. Montenegro and Serbia*, 11890/05 of 28 April 2009

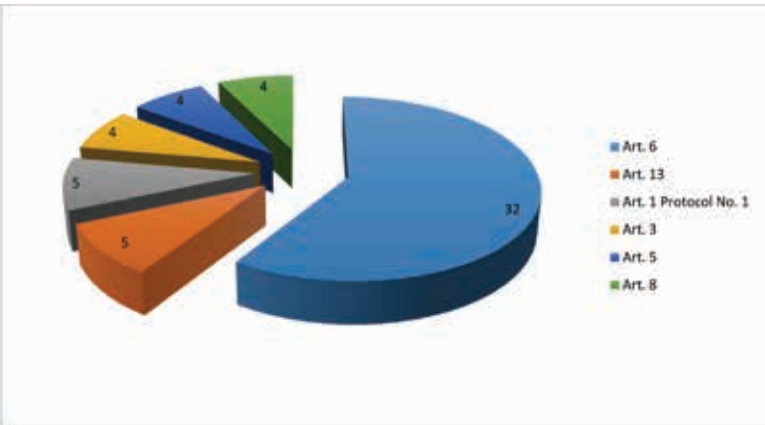
7 The total number of judgments minus the judgments on just satisfaction in the cases of *Koprivica v. Montenegro,* 41158/09

delivered until 1 January 2018, presented 36 judgments[8] in which the European Court had found a violation of one or more Convention rights.[9]

This Analysis deals with 15[10] cases and one decision delivered by the European Court in the period from 1 January 2018 to December 2019. In 13 judgments, the European Court found a violation of one or more rights enshrined in the Convention, and no violation in two judgments. The Court delivered one decision in which it declared the application inadmissible as manifestly ill-founded.

Altogether, in all the cases, the following violations were found: in one case – of Article 2 of the Convention; in four cases – of Article 3 of the Convention; in four cases – of Article 5 of the Convention; in 32 cases – of Article 6 of the Convention; in four cases – of Article 8 of the Convention; in two cases – of Article 10 of the Convention and in five cases – of Article 1 of Protocol No. 1; in five cases – of Article 13 of the Convention (in conjunction with Article 6 of the Convention), and in one case – of Article 14 of the Convention (in conjunction with Article 8 of the Convention). The European Court also delivered two judgments in which it ruled separately on just satisfaction.[11]

Graphic representation of the violations of the Convention rights in the cases against Montenegro (3 March 2004 – December 2019)



of 23 June 2015 and *KIPS DOO and Drekalović v. Montenegro*, 28766/06.

8 The total number of judgments delivered in the period covered by the preceding Analysis is 37. However, since the European Court delivered two judgments in the case *Koprivica v. Montenegro*, 41158/09, one on 22 November 2011 (merits) and one on 23 June 2015 (just satisfaction), for practical reasons, this case was analysed as a single case. Hence 36 and not 37 judgments.

9 A violation of Article 2 was found in one case; violations of Article 3 were found in three cases;violations of Article 5 were found in two cases; violations of Article 6 were found in 22 cases;violations of Article 8 were found in three cases; violations of Article 10 were found in two cases; violations of Article 13 in conjunction with Article 6 were found in four cases; a violation of Article 14 in conjunction with Article 8 was found in one case, and violations of Article 1 of Protocol no. 1 were found in three cases.

10 The total number of judgments delivered in the relevant period is 16. However,since the European Court delivered two judgments in the case *KIPS and Drekalović v. Montenegro*, one on 26 June 2018 (merits) and one on 22 October 2019 (just satisfaction), this case was for practical reasons analysed as one case. Hence 15 and not 16 judgments.

11 *Supra* 7.

The above table on the Court's case law in respect of Montenegro shows that it found Montenegro in violation of Article 6 enshrining the right to a fair trial in most cases.

Generally speaking, the jurisprudence of the European Court, is exceptionally abundant when it comes to Article 6 of the Conventionin respect of all the High Contracting Parties. In fact, in 2018, the European Court found violations of Article 6 of the Convention in 24.10% of the cases it ruled on that year.[12]

1.2. Judgments and decision in which no violation of the Convention was found

In addition to the analysis of the European Court judgments and the procedure of their enforcement, a part of this Analysis is dedicated to the decisions of the European Court delivered during 2018 and 2019. Decisions are normally delivered by a single judge, a Committee or a Chamber, and they pertain solely to admissibility, not to the merits of the cases.

Four different types of judicial formations deliberate the applications lodged with the European Court: a single judge, a three-member Committee, a seven-member Chamber and the Grand Chamber composed of 17 judges.

In the observed period, the European Court delivered 11 decisions in respect of Montenegro. These decisions were adopted by three-judge panels ("*Committee*") and seven-judge panels ("*Chamber*"). They declared some of the applications inadmissible and struck some out of the list of applications.

The Court declared the *Ivanović & DOO Daily Press v. Montenegro, Bogojević v. Montenegro, Romagnoli v. Montenegro* and *Bakić v. Montenegro* applications inadmissible.

The other cases were struck out of the list. In the case of *Srdanović v. Montenegro*, the Government reached amicable settlement with the applicant, while in the cases of *Zogović v. Montenegro* and *Šikmanović v. Montenegro,* the Government signed a unilateral declaration. The case of *Bulatović v. Montenegro* was struck out of the list since the applicant had offered no response during the hearings before the European Court, after having been served the response of the Government. Also, the case of *Vujisić v. Montenegro* was struck out of the list because the Court had in the meantime received proof that the case was resolved at the national level. In the case of *Backović v. Montenegro*, the applicant withdrew the application after he received the statement of the Government pertaining to the allegations stated in his application, while in the case of *Puhalo v. Montenegro,* the application was struck out of the list because the applicant had failed to report change of address, as well as change of lawyer, which he had been obliged to do.

12 Annual Report, European Court of Human Rights, 2018 https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf

All but one of these decisions were adopted by three-judge formations („*Committee*"). The decision in the case of *Ivanović & DOO Daily Press v. Montenegro* was adopted by a seven-judge panel ("*Chamber"*), wherefore it will be analysed separately.

Committees rule on the admissibility of applications, as well as on the merits when they concern an issue in relation to which there is established case law, whilst Chambers primarily rule on the admissibility and merits of applications raising the issues that have not been previously deliberated and for which case law is yet to be established.

Two 2018 European Court judgments in which no violation of the Convention was found will be analysed in this section.

Specifically, apart from finding no violation of the right to a trial within a reasonable time in the *Vujović v. Montenegro* judgment**,** the European Court declared inadmissible the complaints of violations of the right to a fair trial as manifestly ill-founded. In the *Petrović and Others v. Montenegro* judgment, the European Court found no violation of the right to a fair trial because of insufficiently reasoned decisions of the national courts, while it declared inadmissible complaints of violations of the right to property as incompatible *ratione temporis* with the provisions of the Convention.

1.3. Judgments in which the European Court found violations of the Convention

In the period covered by the Analysis, the European Court delivered a number of important judgments against Montenegro. Just as in the previous period, the majority of judgments are related to the violations of Article 6 § 1 of the Convention due to overly long civil proceedings. Nine of the 13 judgments in which violations were found concerned breaches of Article 6: six due to the excessive length of proceedings, two due to the breach of the right of access to a court and one due to the non-enforcement of the final court decision. In three judgments, the European Court found violations of Articles 3, 5 and 8 of the Convention. In one judgment, in addition to a violation of Article 1 of Protocol No. 1 to the Convention, the Court also found a violation of Article 6 of the Convention. In one judgment, the European Court subsequently decided on just satisfaction.

In two cases, the European Court found identical violations of Article 5 § 1 of the Convention as in the case of *Mugoša v. Montenegro,*[13] which was discussed in the preceding Analysis. In the given cases, the European Court reiterated the duty of the competent courts to exercise regular review of detention in terms of the relevant provisions of the Criminal Procedure Code, as well as that the decisions on detention and on the extension of detention have to be precise with regards to detention duration. In response to the *Mugoša v. Montenegro* judgment, the Criminal Department of the Supreme Court of Montenegro adopted its legal view Su.V. no.

13 *Mugoša v. Montenegro*, 76522/12, judgment of 21 June 2016.

7/17, of 17 January 2017, in which it stated that it was the *duty of the court to strictly comply with detention review deadlines under Article 179 § 2 and Article 198 § 1 of CPC. Non-compliance with the deadlines results in the violation of the right to liberty and security of person*. Due to the fact that findings of these violations concerned the period preceding the adoption of the above view, the European Court, in its recent judgments, referred to the new binding legal interpretation, as progress in the domestic courts' consideration of detention.

In respect of Article 8, the European Court delivered one judgment in which it examined the State's positive obligations in relation to respect for private life, and in the context of the protection of an individual from attacks by others.

Finally, the European Court examined in one case the actions of a local administration body in the procedure of issuing a construction permit for the erection of a shopping mall. It found a violation of Article 6 of the Convention because of the length of individual administrative procedures conducted before the competent authorities, as well as a violation of Article 1 of Protocol No.1. In this case, the European Court delivered two judgments – the principal judgment on the admissibility of the application, and another on the amount of just satisfaction, which was not final.

The relatively small number of judgments covered by this Analysis definitely does not affect the quality of the document, especially if one has in mind the factual and legal issues which the European Court dealt with in these cases. In this context, special attention is paid to the legal assessment of the activities of domestic courts and other authorities, in order to properly understand and reiterate the duty of compliance with and application of the Convention at all stages of domestic judicial and administrative proceedings, through the prism of interpretation of the factual substrate by that Court.

1.4. Overview of the reform of the enforcement of European Court judgments and comparative practice

The analysis of the judgments covered by this document indicates that Montenegro continues having no systemic issues from the viewpoint of the European Court case law. The problem of excessive length of proceedings continues to exist, but to an acceptable extent. The number of these cases has fallen considerably since the introduction of effective legal remedies in the context of the length of proceedings. It is important to emphasize that the domestic proceedings where the Court found a violation of this aspect of Article 6 § 1 of the Convention are of an older date, wherefore it may be concluded that significant progress has been achieved in this area.

Nevertheless, certain judgments pointed out the fact that there is still an obvious lack of awareness of the consequences of violations found by the European Court in every case which is within its remit. Many domestic civil servants conducting procedures and ruling

on the citizens' rights and duties are still unfamiliar with the importance of the procedure of enforcement of the European Court judgments. This is precisely why a separate section of this document is dedicated to the execution of the Court's judgments and the comparative practice in this respect.

The Annual Report of the Council of Europe Committee of Ministers (hereinafter referred to as: "Committee of Ministers") on the supervision of the execution of the Court's judgments and decisions contains an overview of the cases which were successfully closed in 2018. The authors of this Analysis scrutinised these cases and the measures successfully implemented by other countries to execute the Court's judgments.

The presentation of these measures is aimed at raising domestic awareness of the fact that direct implementation of the Convention in national procedures is the best way to protect human rights and freedoms and fulfil the State's commitments under the Convention. The responsibility of the State as an international law subject is assessed in the proceedings before the European Court, in which it examines the actions of individual state authorities. A violation found in a judgment of a court, an enactment of an administrative authority or an action or inaction of a civil servant is a violation committed by the State due to its failure to fulfil its commitments under Article 1 of the Convention[14]. The consequences of these violations, substantive or non-substantive alike, are borne solely by Montenegro.

Ever since the Convention came into force in respect of Montenegro, the European Court's case law has been the topic of numerous seminars, conferences and various manuals, through which Montenegrin judges, prosecutors and other civil servants have been instructed on the standards of the Convention. On the other hand, as the European Court itself does not deal with the execution of its judgments, this being the competence of the Committee of Ministers, the execution procedure has mostly remained in the background of all these trainings. Therefore, in order to describe the entire path of an application, special attention has been paid to this procedure, its reform at the level of the Council of Europe and to the comparative practice which can provide good guidance on the improvement of the Montenegrin legal system.

14 Article1 of the Convention reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

2. Analysis of selected European Court judgments and decisions in respect of Montenegro where no violation of the Convention was established

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 basic principles the Convention is based on. This principle implies that the primary obligation to protect human rights and freedoms contained in the Convention is in the hands of national authorities. The jurisdiction of the European Court is triggered only if the High Contracting Parties fail to meet this obligation.

The European protection mechanism is triggered by individual or inter-state applications. An application has to meet certain criteria contained in Article 35 of the Convention for the European Court to rule on it. Most of the admissibility criteria are procedural in character, e.g. the six-month rule and the rule of exhaustion of the national legal remedies[15]. Therefore almost 95% of the applications are dismissed without going into the merits, because they fail

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

to meet the criteria envisaged in this article.[16] However, some of the criteria, like e.g. being "manifestly ill-founded" or if the "applicant has not suffered significant disadvantage" require the European Court to judge the essence of the dispute in preliminary stages.[17]

In its case law, the European Court took the position that the admissibility criteria should apply with certain level of flexibility and without excessive formalism, and that their goal and the aim of the European Convention have to be taken into account.[18]

For an application to be admissible, it has to be lodged after the applicant had exhausted all national legal remedies; it has to be lodged within the period of six months from the day the final decision was rendered on the national level; the application may not be anonymous; it may not be substantially the same as a matter that has been examined by the Court or submitted to another international body; the application may not be manifestly ill-founded; and it may not be incompatible with the provisions of the Convention, nor may it constitute an abuse of the right to application. In order to reduce the large number of cases filed with the European Court, Protocol No. 14 introduced an additional admissibility criterion that stipulates that an application will be declared inadmissible if the European Court establishes that the applicant has not suffered significant damage.[19] In its abundant case law, the European Court gave significant interpretations of each of the admissibility criteria, as well as the admissibility criteria reflected in *ratione personae*, *ratione temporis*, *ratione loci* and *ratione materiae* principles. Jurisdiction *ratione personae* implies that the High Contracting Party to the European Convention is responsible for the alleged violation of a right protected by the Convention, or that the violation can in a way be attributed to it, where the applicant can be considered a victim of a human rights violation. The *ratione loci* admissibility criterion led to a more precise definition of the notion of territory where the state is responsible for human rights, while jurisdiction *ratione temporis* includes the period only after the ratification of the Convention or its Protocols by the state that the applicant is complaining against. To be compatible with the Convention *ratione materiae,* an application has to meet the criterion that the right that the applicant is relying on has to be protected by the Convention and its Protocols that are in effect.

Admissibility criteria can be examined in every stage of the proceedings, and if the European Court establishes that any of the criteria are not met it rejects the application.[20] Admissibility of the application is examined as soon as the European Court receives the application, and before it is communicated to the state against which it is lodged.[21] The state that the application was communicated to also has the right to file an objection claiming that the application is not admissible.[22]

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16 *Practical Guide on Admissibility Criteria*, Council of Europe, European Court of Human Rights, 2014
17 Harris, O' Boyle and Warbick, *Law of the European Convention on Human Rights*, 4th edition.
18 *Ibid*.
19 Dimitrijević et al, *Komentar Konvencije za zaštitu ljudskih prava i osnovnih sloboda*.
20 *Practical Guide on Admissibility Criteria*, Council of Europe, European Court of Human Rights, 2014
21 Harris, O' Boyle and Warbick, *Law of the European Convention on Human Rights*, 4th edition
22 *Ibid*.

Ivanović DOO and DAILY PRESS v. Montenegro

Application no. 24387/10
Decision of 5 June 2018

i. Analysis of the Decision

The applicants are the executive director of a daily (hereinafter referred to as: the first applicant) and the company publishing the newspaper (hereinafter referred to as: the second applicant). The applicants relied on Article 10 of the Convention, complaining that their right to freedom of expression was violated by a final judgment rendered against them by a civil court.

(a) Facts

1. Disputable newspaper articles and subsequent civil proceedings

The first applicant is a journalist and executive director of the daily "Vijesti" published by the second applicant. On 1 September 2007, after the celebration of the 10th anniversary of the establishment of the daily "Vijesti", the first applicant was attacked and beaten by three attackers. In the following couple of days (2 – 4 September 2007) the daily published several articles related to that attack, some of which contained the comments of the first applicant qualifying the then Prime Minister of Montenegro as, *inter alia,* the person who ordered the attack against him. These articles contained a number of accusations against the former Prime Minister and his family.

Procedure before the Basic Court

On 6 September 2007, the former Prime Minister of Montenegro (hereinafter referred to as: the plaintiff) initiated civil proceedings against the applicants claiming non-pecuniary damages in the amount of €1,000,000.00 for violation of honour and reputation caused by the articles and statements of the first applicant contained therein.

On 19 May 2008, the Basic Court in Podgorica rendered a judgment that was partly in favour of the plaintiff, concluding that his honour and reputation were harmed and ordered therefore the applicants to pay €20,000 to the plaintiff for the non-pecuniary damages and to publish the judgment in "Vijesti" at their own expense. To be more specific, the court established that the honour and reputation of the plaintiff were violated by the statements of the first applicant expressed in the Article "*A Club from Đukanović and the Family" ("Palica od Đukanovića i familije*") and by the contents of the article *"Even the Birds Know that He is the Boss"* ("*I vrapci znaju da je kapo*"), where the plaintiff and his family are described as criminals and where the plaintiff is connected with organized crime and criminal conspiracies. The Court referred to Articles 16, 20, 34, 35 and 36 of the Constitution that was in force at that time, Articles 1 and 20 of the Media Law and Articles 8 and 10 § 2 of the Convention.

Among other things, the Court held that the freedom of press and other forms of public information, and the right to dignity and personal rights have to be balanced. The Court established that parts of the above articles were not value judgments, but the factual information, subject to proofs, that were not checked beforehand or proven, and that they were aimed to discredit not only the plaintiff but also his personal and private life. Publishing the above articles containing the inaccurate, unproven information, without checking them first, or correcting them afterwards, accepting the mistake and without any public apology to the plaintiff, the applicant persisted in damaging the reputation of the plaintiff. The first applicant as the executive director of the media was particularly expected to comply with the rules when publishing the information, particularly those that can harm others. The articles harshly harmed the honour and reputation of the plaintiff, considerably overstepping the limits of criticism to be tolerated by politicians, especially given that the impugned articles did not criticise the plaintiff's public work but put the plaintiff and his family in a criminal context.

Proceedings before the High Court

Both the plaintiff and the applicants appealed this decision.

The High Court established that only the following statement harmed the honour and reputation of the plaintiff: "Đ sent his *hellhounds to beat (the first applicant) up", "those who rule Montenegro' had congratulated Vijesti on its tenth anniversary by these means and those are Đ and his family, the biological or the criminal one"; "boss who developed the criminal-financial octopus that strangles Montenegro" and "he is the boss of the family, either biological or the criminal one that rules Montenegro and decides about everything, even about the most valuable – human life".* The High Court further established that, instead of checking the accuracy of the information, the applicants repeated them, abusing thus their freedom of expression, since "using the freedom of expression nobody may insult others or harm their honour, reputation and dignity", which is provided for in Article 10 § 2 of the Convention. The High Court took into account the opinion of the European Court that the politicians should display a greater degree of tolerance to criticism, but held that the above statements overstep the limits envisaged by the freedom of expression and the duty of the plaintiff in this respect, particularly given the fact that the applicants did not restrain from mentioning the family of the plaintiff in the same offensive context. The High Court also held that the damages of €20,000.00 were too high and reduced them to the amount of €10,000.00.

In the end, the High Court established that other articles and statements, particularly the text *"We shall not be intimidated"* ("*Neće nas uplašiti*"), criticised the situation in Montenegrin society and that they constituted value judgments, so the damages could not be awarded.

Criminal Proceedings

On 31 October 2007 the Basic State Prosecutor brought the indictment against R.P. and M.B. for violent behaviour and inflicting grave bodily injuries on the first applicant. They were convicted on 15 January 2008 on the basis of their own confession and they were sentenced

to four years imprisonment each. The High Court in Podgorica reduced their sentences to one year imprisonment.

(b) Relevant Principles

Relevant general principles that are related to Article 10 are given, for example, in the judgment *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*.[23]

Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation[24].

In its case law the European Court drew a distinction between statements of facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes the freedom of opinion itself, which is a fundamental part of the right secured by Article 10.[25]In order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks, bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact.[26] The European Court reiterated, however, that the classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts.[27] In addition to this, even where a statement amounts to a value judgment, proportionality of interference may depend on whether there is a sufficient factual basis to support it, failing which it will be excessive.[28] Furthermore, where a value judgment leads to serious allegations that amount to accusations of criminal activity, the importance of the factual basis for such a judgment is of essence.[29]

The European Court reiterated that the right to freedom of expression is not absolute and that its exercise may not violate other rights protected by the Convention, as the right to respect for private life guaranteed in Article 8[30] or presumption of innocence contained in Article 6 § 2 of the Convention.

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23 *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], 17224/11, § 75, ECHR 2017.

24 *Bladet Tromsø and Stensaas v. Norway* [GC], 21980/93, § 59, ECHR 1999-III; *Dalban v. Romania* [GC], 28114/95, § 49, ECHR 1999-VI; and *Prager and Oberschlick v. Austria*, 26 April 1995, § 38 *in fine*, Series A No. 313.

25 *Lingens v. Austria*, 8 July 1986, § 46, Series A No. 103

26 *Moricev. France* [GC], 29369/10, § 126 in fine, ECHR 2015.

27 *Lindon, Otchakovsky-Laurens and July v. France* [GC], 21279/02 and 36448/02, § 55, ECHR 2007-IV.

28 Morice, quoted above, § 126; *Pedersen and Baadsgaard v. Denmark* [GC], 49017/99, § 76, ECHR 2004-XI; *Busuioc v. Moldova*, 61513/00, § 61, 21 December 2004, and sources quoted therein; and *Karpetas v. Greece*, 6086/10, § 69 and § 78, 30 October 2012.

29 *Pfeifer v. Austria*, 12556/03, §s 47- 48, 15 November 2007.

30 *Von Hannover v. Germany*, 59320/00, §§ 57-58, ECHR 2004-VI; *Pfeifer*, quoted above, §§ 35 and 38, and *Petrina v. Romania*, 78060/01, § 36, 14 October 2008.

In cases where the interest of "protecting reputation or rights of others" triggers the issue of the rights under Article 8, European Court may seek to check if national authorities have stricken a fair balance protecting these two values guaranteed by the Convention – freedom of expression guaranteed in Article 10 of the Convention on the one hand and right to respect for private life from Article 8 on the other.[31] Given the nature of the conflicted interests the states have to be given certain margin of appreciation in striking the appropriate balance between these rights.[32] Where state authorities did undertake this exercise of trying to strike a fair balance between two conflicted rights in line with the criteria of the Court's case law, the Court should have strong reasons to substitute its view for that of the national courts.[33]

The European Court reiterated that the boundaries of allowed criticism were broader for politicians than for private individuals. Unlike the latter, the former inevitably and with full awareness expose themselves, their words and deeds to the scrutiny of journalists and public and, as a consequence, they have to show a higher degree of tolerance.[34]

Article 10 of the Convention does not, however, guarantee wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern and of political figures. Under the terms of § 2 of the Article, the exercise of this freedom carries with it "duties and responsibilities", which assume significance when, as in the present case, there is a question of attacking the reputation of named individuals and undermining the "rights of others". By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.[35] in situations where on the one hand a statement of fact is made and insufficient evidence is adduced to prove it, and on the other the journalist is discussing an issue of genuine public interest, verifying whether the journalist acted professionally and in good faith becomes paramount.[36]

And finally, the nature and strictness of the imposed sanctions are also taken into account in the process of assessing the proportionality of interference on the basis of Article 10 of the Convention.

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31 *Medžlis Islamske Zajednice Brčko and Others*, § 77, and *Europapress Holding d.o.o. v. Croatia*, 25333/06, § 58, 22 October 2009.

32 *A. v. Norway*, 28070/06, § 66, 9 April 2009.

33 *Von Hannover v. Germany* (No.2) [GC], 40660/08 and 60641/08, § 107, ECHR 2012; *Couderc and Hachette Filipacchi Associés v. France* [GC], 40454/07, §§ 90-92, ECHR 2015 (excerpts); and *Verlagsgruppe Droemer Knaur GmbH & Co. KG v. Germany*, 35030/13, § 38, 19 October 2017.

34 *Ruusunen v. Finland*, 73579/10, § 41 in limine, 14 January 2014.

35 *Rumyana Ivanova v. Bulgaria*, 36207/03, § 61, 14 February 2008 and *Europapress Holding d.o.o.*, quoted above, § 58.

36 *Flux v. Moldova* (No. 7), 25367/05, § 41, 24 November 2009.

(c)The Court's assessment

The European Court held that the final decisions of the civil court undoubtedly led to the interference of the state into the applicants' right to freedom of expression. Since the judgments were based on the Constitution that was in force at that time and on the Media Law, both of which were accessible and predictable in application, this interference had to be considered "prescribed by law", in terms of Article 10 § 2. Furthermore, the judgments were rendered in pursuit of the legitimate aim to protect rights and reputation of others, which is consistent with the protection provided to the right to reputation on the basis of Article 8 of the Convention.[37] What remained to be decided is therefore whether the interference was "necessary in a democratic society", or, in other words, whether the judgment was proportionate to the legitimate aim it pursued to achieve.

The Court firstly noted that the domestic proceedings were civil proceedings and not criminal. It is also apparent from their judgments that the domestic courts fully recognised that the present case involved a conflict between the right to freedom of expression and protection of the reputation or rights of others, which they resolved by weighing the relevant considerations. In their reasoning, the domestic courts balanced the conflicting rights and considered that it was necessary to restrict the applicants' freedom of expression in order to protect the former Prime Minister's reputation. In particular, the High Court, while taking into account that politicians should display a greater degree of tolerance towards criticism, significantly narrowed down the scope of the problematic sentences in the articles. It enumerated only four of them which it considered facts and as being harmful to the plaintiff's reputation, and distinguished them from all the others which it considered value judgments and as such not meriting the award of compensation. To be more precise, the High Court explicitly established that the article "We shall not be intimidated" ("*Nećemo biti zaplašeni*"), published on 2 September 2007 criticised the situation in Montenegrin society and represented a value judgment in respect of which no damages should be awarded.

The Court noted that this text included some rather harsh criticism including, for example, that "the mafia and authorities are interwoven to such an extent that it is difficult to distinguish one from another", "smuggling is the backbone of the value system", and that "the objective responsibility for all that and for the assault against [the first applicant] lies with the regime headed for 17 years by M. Đ., who rules it even now, regardless of the form. He and his people, from the top to bottom, are responsible for an atmosphere in which journalists, writers, and all those who dare to think and speak differently, get hurt". The High Court, thus, was sensitive to allowing journalists to express criticism against the regime. In the light of these elements, the Court found that the national authorities had applied standards which were in conformity with the principles embodied in Article 10 and that they relied on an acceptable assessment of the relevant facts.Against that background, the Court considered that, having regard to the margin of appreciation accorded to decisions of national courts in this context, it would require strong reasons to substitute its view for that of the High Court.

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37 *Alithia Publishing Company Ltd and Constantinides v. Cyprus*, 17550/03, § 53, 22 May 2008, and the sources quoted therein.

In that connection, the European Court noted that the applicants were a journalist and founder of the daily newspaper *Vijesti*, as well as its publishing company. Following the assault against the first applicant, *Vijesti* published a number of articles related to the incident. In the articles the first applicant, *inter alia*, named the plaintiff, a senior politician and the Prime Minister for many years, and accused him of being directly responsible for the assault. He also mentioned his family and repeated these accusations over the next couple of days. The articles thus concerned a matter of public interest and involved a political figure. The Court also considered that the articles contained specific allegations of fact concerning a named individual, which were as such susceptible to proof. It therefore agreed with the assessment of the High Court in that regard.

The Court's case law is clear on the point that the more serious the allegation is, the more solid the factual basis should be.[38] The allegation in the instant case was very serious. There was nothing in the case file, however, to indicate that the applicants in the present case were concerned with verifying the truth or reliability of the allegations to a high standard at any moment. They failed to provide any evidence before the domestic courts in support of the first applicant's allegations. The second applicant, for its part, except for apparently unsuccessfully having attempted to contact the plaintiff, did not appear to have undertaken anything in order to verify the serious allegations made by the first applicant or, alternatively, to take a more cautious approach in conveying the impugned statements. Instead, the applicants argued that the impugned statements were value judgments and as such did not require proof, and that their aim was to emphasise the plaintiff's political responsibility for the climate where attacks against journalists remain unpunished. The Court considered, however, that a distinction should be drawn between stating that the plaintiff was politically responsible for such an environment and accusing him of personally of sending someone to physically attack the first applicant. Before the Court, the applicants referred to the unresolved murder of the editor-in-chief of another daily newspaper, to a number of other attacks related to *Vijesti*, and to various foreign reports. With the exception of the murder of the editor-in-chief of *Dan*, the Court noted that all the attacks referred to took place and the reports were published after the first applicant had been assaulted. More importantly, none of them indicated the plaintiff as being directly responsible for the assault against the first applicant.

The fact of directly accusing specific individuals by mentioning their names and positions placed the applicants under an obligation to provide a sufficient factual basis for their assertions.[39]

Having regard to the foregoing and to the margin of appreciation left to the Contracting States in such matters, the Court found in the circumstances of the present case that the conclusions reached by the High Court on the basis of its balancing exercise could not be regarded as unreasonable; consequently, thereasons adduced by the domestic courts for ordering the applicants to pay damages to the plaintiff were "relevant and sufficient" within the meaning of its caselaw. The Court therefore did not find any reason, let alone a strong reason, to substitute its view for that of the final decision of the High Court.

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38 *Pedersen and Baadsgaard*, § 78; *Rumyana Ivanova*, § 64; and *Europapress Holding d.o.o.*, § 66.

39 *Lešník v. Slovakia*, 35640/97, § 57, ECHR 2003-IV, and *Cumpaănaă and Mazaăre v. Romania* [GC], 33348/96, § 101, ECHR 2004-XI.

Lastly, the Court considered that the award of damages in the amount of EUR 10,000 was not, in the circumstances of the case, excessive. The Court attaches particular weight to the fact that the compensation was awarded against the applicants jointly. Also, when determining the amount of damages, already the Court of First Instance (Basic Court) took into account that the daily newspaper published by the second applicant had a high circulation. The High Court went further and significantly reduced, by half, the amount awarded taking into account, *inter alia*, the circumstances in which the texts had been written and the statements made. Their decisions were therefore in line with the Court's case law that an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.[40]

In view of the above, European Court considered that the applicants' complaint was manifestly ill-founded and had to be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. For these reasons, the Court, by a majority, d*eclared* the application inadmissible.

ii. Relevance to Montenegrin case law

The decision in the case of *Ivanović and DOO Daily Press* draws our attention to the successful application of the European Convention and the standards developed through the European Court case law by Montenegrin courts in respect of the freedom of expression. In the previous Analysis we dealt with two judgments where violation of the right to freedom of expression was established: *Šabanović v. Montenegro* and *Koprivica v. Montenegro.* These judgments had a significant impact on legislation. The Criminal Code of Montenegro was amended to decriminalize defamation and libel. These judgments also influenced our case law, primarily through the general legal opinion of the Supreme Court of Montenegro about the duty to comply with the case law of the European Court in cases dealing with freedom of expression and in deciding on the amount of non-pecuniary damages in line with the case law of the European Court.

In the last two years the courts continued to refer to the abundant case law of the European Court dealing with Article 10, so they took into account the "leading cases" like the judgment in the case *Handyside v. the United Kingdom,*[41] and other judgments, but also the judgments rendered against Montenegro.

The courts have been informed that the application of Article 10 of the Convention implies also the implementation of the so called "three-part test" and that in these cases balance has to be struck between the right to respect of privacy, contained in Article 8 of the Convention and the freedom of expression.

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40 *Verlagsgruppe Droemer Knaur GmbH & Co. KG*, § 60, and *Europapress Holding d.o.o.*, § 73.

41 *Handyside v. the United Kingdom*, Series A, No. 24, 7 December 1976.

Thus, for example, the High Court in Podgorica, in the case ***Gž. No. 165/19*** notes:

"Without any grounds the plaintiff relies on the freedom of expression in terms of Article 10 § 1 of the European Convention on Human Rights, since according to § 2 of Article 10, exercise of this freedom entails both duties and responsibilities. Due to the violation of these duties and responsibilities and for the protection of reputation and rights of others, the freedom can be restricted and subject to sanctions defined in the Law. Because, the balance between the right to the freedom of expression and the rights of the person to which such expression refers, was in this particular case seriously undermined to the detriment of the plaintiff. It was damaged by the defendant as the employer who, faced with the well-founded requests of the employees, expressed in public some opinions which cannot be deemed to be in of public interest (*Flinkkila and Others v. Finland*, 25576/04, of 6 April 2010, § 23).

Allegations of the defendant were not accurate, while the plaintiff and the other employees that the statement was directed to were a direct target of ill-meant criticism, which is why the circumstances of the specific case justified limitation of the freedom of expression in order to protect honour and reputation, since threatening honour and reputation reached a sufficient "degree of gravity that influences the social position of the victim and her status in certain community" (*Karakov v. Hungary*, 39311/05, § 21).

Therefore, in the opinion of this court, the interference with the defendant's freedom of expression was lawful. According at the provisions of Article 47 § 2 of the Constitution of Montenegro, Article 148 § 1 and 207 § 1 and 2 of the Law of Tort and Contract, it had a legitimate aim – protection of the threatened honour and reputation, which is why it is necessary in a democratic society."

In case ***Gž.979/19,***the High Court in BijeloPolje explained:

"In numerous judgments the European Court of Human Rights established that the freedom of expression is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, "but also to those that offend, shock or disturb, since such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". (See: *Handyside v. the United Kingdom*, 1976; *Lingens v. Austria*, 1986; *Oberschlick v. Austria*, 1991; *Jersild v. Denmark*, 1994, *Maronek v. Slovakia*, 2001. etc.). Freedom of expression is not an absolute right, and it may be derogated from or limited due to, inter alia, violation of reputation of others. (...) In the judgment *Šabanović v. Montenegro* (5995/06 of 31 May 2011, § 37) European Court reminded of the following:

"The Court has also already upheld the right to impart, in good faith, information on matters of public interest even where the statements in question involved untrue and damaging statements about private individuals" (*Bladet Tromsø and Stensaas v. Norway* [GC],

21980/93, ECHR 1999III). As for the scope of the freedom of expression, it is relevant here to refer to the principled position of the European Court of Human Rights that Article 10 is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, "but also to those that offend, shock or disturb". (See: *Handyside v. the United Kingdom*, 1976, § 49). In the process of balancing the freedom of expression against the right to privacy, the following criteria established in the case law of the European Court of Human Rights have to be assessed: if there is an interest of the public to know, to what extent is the person referred to known to the pubic and what is the subject of the information, circumstances under which the information was imparted and if the article that the defendant published contained fully or in part the allegations or facts that could violate personal rights of the plaintiff.

Having assessed the relevant criteria in the present case, both the first instance court and this court hold that the statements made by the parties were the statements where it is expected that the public is interested in all the developments and activities related to the present events, because they refer to serious accusations against the judges and public servants, i.e. Head of the Real Estate Administration. All the more so given the context of the circumstances in which the information were imparted, so that there was a legitimate aim – the interest of the public to find out if the judiciary is independent and impartial. The interest of the public could not have been met if the information were not imparted. This is the aim that prevails over the aim of the parties, so it cannot be considered that there was any violation of their honour and reputation, their privacy, or any other good, like e.g. personal rights. The interest of the public to know the impugned information prevails here over the interest to protect reputation and privacy as opposed to justified interest. The aim of publishing the texts was not to inflict an arbitrary personal insult, but a legitimate right to discuss independence and impartiality of the court as the issue of public interest. The freedom of expression did not exceed the permitted limits while the impugned texts do not include rude terms or overstep the boundaries of the freedom of expression. The parties used their freedom of opinion, which is one of the foundations of a democratic society (judgment in the case *Handyside v. The United Kingdom*, 1976, § 49) and the freedom of expression, that is in the essence of the functioning of a democratic society, according to the case law of the European Court of Human Rights (*Bowman v. The United Kingdom*, 1995, § 42). In this particular case, Article 207 of the Law of Tort and Contract cannot be applied. It would present the application of Article 10 of the European Convention for Human Rights and Article 19 § 2 of the International Covenant on Civil and Political Rights, because the allegations were not expressed with the malicious goal to insult the personality, dignity, reputation and honour, but they referred to the issues of public interest and importance. Thus the impugned statements made in the newspaper articles were not offensive and did not have intention to denigrate according to the ECtHR standards, but indicated to the alleged corruption in courts and Real Estate Administration. Freedom of expression is limited only if the sole goal of the text is to express offensive statements, which in the present case was not the case, since the contents of the impugned statements *inter alia* led to the

clear conclusion that the goal of the author was mainly to inform the public about the alleged corruption in state authorities. Therefore the articles were not arbitrary personal insults of the parties to the proceedings, but were aimed at opening a public debate, which is in the interest of the entire society. In this particular case we are not dealing with a violation that is of exceptional gravity that could cause a particularly intensive mental anguish to the injured party and therefore damages would not be justified."

In its judgment in the case of ***Gž.4432/19-13***, the High Court in Podgorica dealt with the balance between Article 8 and Article 10 of the Convention. It noted:

"This court agrees that public figures have to display a greater degree of tolerance to the published texts, but the contents of the impugned published texts lead to the conclusion that there was a trend, i.e. continuous efforts to present the plaintiffs in a negative light and to cause a negative attitude towards them, their work and their personalities in general, which renders the claim of the plaintiffs for non-pecuniary damages well-founded on all counts.

The protection afforded by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in relation to statements regarding issues of public interest is subject to the condition of acting in good faith on the basis of accurate facts and providing reliable and precise information in line with journalistic ethics. Limitations of the freedom of expression are contained in Article 10 § 2 of the Convention, which stipulates that exercise of the right of freedom expression entails duties and responsibilities and therefore may be subject to such formalities, conditions, restrictions or sanctions as are prescribed by law, *inter alia*, for the interest of protection of the reputation and rights of others. The duty to respect the Constitution, law and rules of journalistic ethics is stipulated inter alia in Article 4 of the Media Law in Montenegro.

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedom guarantees the right to respect for private and family life. Whoever inflicts damage on another person shall be obliged to compensate for such damage, unless they are able to prove that the damage was inflicted through no fault of their own. This is stipulated in Article 148 of the Law of Tort and Contract. Damage includes any violation of personal rights (non-pecuniary damages) according to Article 149 of the Law of Tort and Contract. Article 206 of the Law of Tort and Contract (Official Gazette of the Republic of Montenegro 47/08) stipulates that, if personal rights are violated, the court can order, that the judgment or correction is published at the expense of the perpetrator, or that the perpetrator withdraws the statement that inflicted the damage, or anything else that could achieve the purpose that is achieved by compensation. Article 151 § 2 of the Law Amending the Law of Tort and Contract (Official Gazette of Montenegro 22/2017 of 3 April 2017 that came into effect on 11 April 2017) stipulates that publication of a court judgment can be particularly requested in order to ensure protection of personal rights. Article 207 of this Law stipulates that personal rights include the right to psychological

(mental) integrity, right to honour, right to reputation and right to protection of private life, while Article 210a stipulates pecuniary damages if personal rights are violated. Under that article, when deciding on a claim for just satisfaction and its amount, the court has to take into account all the circumstances of the case and in particular those defined in more detail in that article.

Given the established case law of the European Court of Human Rights, it is worth noting here e.g. the judgment of this court in the case *Prager and Oberschlick v. Austria*, of 26 April 1995 (15974/90), where inter alia it was noted that the press in a state of the rule of law has to take into account personal and professional integrity and that criticism has to be in good faith and in line with the rules of journalistic ethics. Responsibility of the media to "weigh" their interests to publish the information against the protection of privacy of the person the information refers to is also contained in the judgments *Von Hannover v. Germany,* of 24 June 2004 (59320/00), and *Tammer v. Estonia*, of 6 February 2001 (41205/98). These judgments note that even when it comes to public figures of the "contemporary society" one has to take into account that reporting must contribute to an open debate and that the content does not go beyond the limits of serving the public interest, as well as that negative opinions can also be expressed without using any offensive speech.

In this particular case, it was clearly established that the reporting in the number of published texts, with the impugned contents, was motivated by efforts to create a negative impression among the readers and to discredit the personality of the plaintiffs. This went beyond the boundaries of acceptable speech and reporting."

An interesting example of the balancing exercise weighing the freedom of expression on the one hand and right to respect of privacy on the other can be found in the case of the Basic Court in Podgorica ***P.3198/17***. The final judgment contains the following observation of the court:

"Protection of personality in our legal order can be achieved only through civil law, which means that there is no other form of protection. Article 47 of Montenegrin Constitution stipulates that everyone has the right to freedom of expression, through written word, image or in any other way and that the right to freedom of expression may be limited only by the right of another to dignity, reputation and honour. Thus, the freedom of expression is one of the basic requirements for progress and development of a democratic society. However, the freedom of expression is not absolute and therefore it is the right and duty of the court to assess where freely expressed thought exceeds the boundaries of permitted and if the expressed thought constitutes an offensive or denigrating qualification.

Freedom of expression guaranteed by Article 10 of the European Convention on Human Rights is one of the foundations of a democratic society. According to § 2 of this Article, freedom of expression is not related only to "information" or "ideas" that are perceived

as favourable or considered inoffensive, but also to those that insult, shock or disturb. The right to impart in good faith the information about the issues of public interest even if they contain untrue or damaging statements about private persons is undisputed. However, it has to be considered if the impugned statement refers to personal life of the person or to the person's actions or opinions in their official capacity (*Dalban v. Romania* [GC], 28114/95, § 50, ECHR 1999-VI).

There is a difference between statement of facts and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement constitutes a value judgment, proportionality of interference into a right and the legitimate goal of such interference can depend on whether there is a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis that could support it can be excessive.

In this particular case, through its authorized representatives the defendant criticised the employees in public. To be more precise, he criticised the plaintiff, but in the opinion of the court, the criticism did not refer to her behaviour or the work she did as the defendant's employee, but to her private life, i.e. her personality traits. The court earlier analysed the impugned statements of the defendant in the newspaper article in a broader context, i.e. taking into account that in the impugned period there was a large number of court proceedings – labour disputes initiated against the defendant by his employees with the request to be paid the difference in wages and that those proceedings jeopardized the budget, i.e. the defendant's regular operation and servicing of regular liabilities. In that context it is understandable if the defendant felt the need to react to court proceedings initiated by his employees in form of an article in newspaper. However, in spite of such an approach to the whole situation the court is of the opinion that the statements that the defendant expressed in the impugned article were not aimed at opening a public debate about the need of his employees to conduct civil proceedings – labour disputes and to clarify things in this respect that were of strong public interest. The court is of the opinion that the statements constitute an ill-founded attack against the employee – the plaintiff. All the more so if we take into account that the impugned statements of the defendant referred to personal life and character of the plaintiff and not to her actions and opinions in the official capacity. This conclusion is also supported by the case law of the European Court of Human Rights (*Šabanović v. Montenegro and Serbia*, 5995/06. § 37, ECHR 2006-X).

The court held that part of the article published in the daily newspaper "Dan" titled "Classical racketeering of people with good salaries" was such as to violate personal rights – the honour and reputation of the plaintiff. The court took into account the objective gravity of the part of the impugned text where the defendant states that it was "dishonest, shameless and unworthy of serious people working or having worked in the local government to request something they were not entitled to at the expense of their colleagues." The defendant thus in these statements directly qualifies the actions of the

employees who have worked in the local government (to exercise their work-related rights), including the plaintiff, as "dishonest, shameless and unworthy of serious people". In that he neglects the fact that the plaintiff lodged a claim to protect her work-related right (payment of a part of the salary that she did not receive) from the defendant as an employer, which is a lawful method used in a lawful proceeding. This means that the employee did not request anything she was not entitled to and at the expense of her colleagues, as the article alleges, but that she requested something from the defendant that was her employer. Thus the defendant made a statement of facts the accuracy of which was not proven. The rest of the article also underlines that "all the employees collectively lost something that every person is to be proud of – their honour". This included the plaintiff.

The inappropriate statements of the defendant violated the plaintiff's personal rights, since the contents of his allegations constituted an objectively offensive, denigrating and unlawful qualification. To be more precise, there was no sufficient factual basis for the impugned statements, since this value judgment had no factual basis to support it and it was obviously excessive. The contents of the impugned text denigrated and insulted the plaintiff whose reputation and honour have to be protected from attacks that are not based on facts."

Vujović v. Montenegro

Application no. 75139/10
Judgment of 15 May 2018

i. Analysis of the Judgment

The applicant complained that the length of the criminal proceedings in his case was not in compliance with the requirement of "reasonable time" provided for in Article 6 § 1 of the Convention.

(a) Facts

On 26 April 2000, criminal proceedings were initiated against the applicant and another person in relation to a traffic accident that led to the death of a child.

The Basic Court in Podgorica convicted the applicant on 25 February 2003 for traffic offence and imposed on him and the other defendant the sentence of one year and six moths of prison. The High Court in Podgorica quashed this judgment in 2006 and remitted the case for retrial. The new judgment was rendered on 18 April 2007 sentencing the applicant and the other defendant to one year and four months imprisonment. On 13 November 2009 the High Court reduced the sentence of the second defendant but confirmed the judgment of the Basic Court against the applicant. The applicant's appeal of the High Court judgment was rejected on 14 June 2010, after which, on an unknown date, he lodged a request with the Supreme

Court for examining the legality of the final judgment against him. The Supreme Court rejected this request on 26 October 2010 and on 31 December 2010 it rejected the claim for just satisfaction where the applicant complained of the length of the criminal proceedings.

The applicant's constitutional complaint was rejected on 19 April 2013.

(b) Admissibility

Six-month rule

The Government claimed that the applicant's appeal was lodged with delay. To be more precise, the Government claimed that the appeal against the judgment of the second instance court was not a sufficient legal remedy in the circumstances of the applicant's case. In the opinion of the Government, the applicant should have lodged the application to the European Court at latest by 31 May 2010, i.e. six months after receiving the decision rendered in the second instance. However, the applicant claimed that in his case the appeal to the second instance judgment was an effective legal remedy.

The European Court noted that the Supreme Court did not reject the request for examining legality of the judgment on procedural grounds. The Supreme Court was deciding on whether the request of the applicant was well-founded. The European Court already established that the request for examining legality of a judgment in criminal proceedings was essentially an effective legal remedy in terms of Article 35 § 1 of the Convention.[42] On this basis, the European Court rejected the objections of the Government about the violation of the six-month rule.

Exhaustion of the domestic legal remedy

The Government claimed that the applicant did not exhaust domestic legal remedies properly, because he did not use the request for review (*kontrolnizahtjev)*. On the other hand, the applicant claimed that the impugned legal remedy was not effective at the relevant time.

The European Court reiterated that, at the time when the application was lodged, there were no legal remedies related to appeals regarding the length of proceedings: the request for review became effective on 4 September 2013,[43] the claim for just satisfaction became an effective legal remedy on 18 October 2016,[44] while the constitutional complaint became an effective legal remedy on 20 March 2015.[45] Therefore, the European Court dismissed the objections of the Government related to the exhaustion of domestic legal remedies and declared the Application admissible.

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42 *Lakićević and Others v. Montenegro and Serbia*, 27458/06 and 3 other, § 50, 13 December 2011.

43 *Vukelić v.Montenegro*, 58258/09, § 85, 4 June 2013.

44 *Vučeljić v.Montenegro* (dec.), 59129/15, § 30, 18 October 2016.

45 *Siništajand Others v.Montenegro*, 1451/10 and 2 dr, § 123, 24 November 2015. godine, and *Vučeljić v. Montenegro* (dec.), quoted above, § 31.

(c) Relevant principles and the Court's assessment

The Government claimed that there was no violation of Article 5 § 1 of the Convention, since the applicant also contributed to the length he complained of, by not appearing at the hearings scheduled in the period between 13 September 2006 and 13 April 2007 and by failing to inform the domestic court of his place of residence, i.e. that he moved to Norway.

The Court noted that the impugned procedure lasted from 26 April 2000 to 26 October 2010. However, the Court could only examine the period between 3 March 2004, which is when the Convention became effective in respect of Montenegro, and 26 October 2010, when the Supreme Court rendered its decision, which is the period of almost six years and eight months at three levels of jurisdiction.

Whether the length of the procedure is reasonable is established in the light of the case's circumstances and against the criteria contained in the case law of the Court: the complexity of the case, the conduct of the applicant and relevant bodies and what was at stake for the applicant.[46]

The Court noted that the applicant was absent without justified reasons from two hearings scheduled for 13 September 2006 and 30 November 2006. The second hearing was rescheduled for 13 April 2007. By failing to appear at these hearings, the applicant prolonged the impugned proceedings by almost seven months.

In terms of the above and the fact that the applicant did not manage to indicate to any period in which the national courts were inactive, the Court held that the remaining length of the proceedings of about six years at three levels of jurisdiction cannot be considered excessive or unreasonably long.[47]

Accordingly, no violation of Article 6 § 1 of the Convention was established.

The Alleged Violation of Article 6 §§ 2 and 3 of the Convention

The applicant further complained on the basis of Article 6 §§ 2 and 3 of the Convention that his right to presumption of innocence was violated because he was not allowed to examine witnesses. However, the applicant did not submit to the Court any proof to support such allegations. Furthermore, it was not clear to the Court how his right to presumption of innocence could be violated by the alleged rejection of the national courts to hear certain witnesses.

Complaints based on Article 6 §§ 2 and 3 of the Convention were therefore found manifestly ill-founded and dismissed according to Article 35 § 3 of the Convention.

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46 *Silva Pontes v. Portugal*, judgment of 23 March 1994, Series A No. 286-A, p. 15, § 39.

47 *Tyukov v. Russia*, 16609/05, §§ 33-35, 2 May 2013.

ii. Relevance to Montenegrin case law

This decision shows that when assessing if the right to a trial within a reasonable time was violated we have to bear in mind the following: the total length of the criminal proceedings (in this case the proceedings lasted for 6 years and 8 months at three levels of jurisdiction); if there are grounds to claim that the courts were inactive (the applicant did not manage to prove any period of inactivity) and the conduct of the defendant as the person lodging the legal remedy during the criminal proceedings (the applicant failed to appear at the main hearings thus extending the length of proceedings by almost 7 months). In the circumstances of this case, The Court held that the remaining length of the proceedings of about 6 years at all three levels of jurisdiction could not be considered excessive and unreasonable in terms of Article 6 § 1 of the Convention.

We should have in mind that in this particular case, which was discussed by the European Court, the applicant was not detained. If he were, it would have led to the issue of whether the length of the criminal proceedings was reasonable in terms of Article 5 § 3 of the Convention. In such a situation, the proceedings have to be conducted with increased efficiency and the detention period has to be reduced to the minimum. In its ***Tpz.54/19*** of 9 December 2019, the Supreme Court analysed the issue of reasonable time in the context of criminal proceedings where the defendant was remanded in custody and *inter alia* noted:

> "This court particularly refers to the judgment of the European Court of Human Rights in the case *Bulatović v. Montenegro* (67320/10 of 22 July 2014) where it discussed the issue of complying with obligations from Article 6 § 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Paragraph 141 of this judgment notes that, when it comes to the criminal proceedings in which the defendant is in detention, authorities have to show that they displayed "special diligence in the conduct of the proceedings. The complexity and special characteristics of the investigation are factors to be considered into account in this respect (see. e.g. *Solmaz v. Turkey*, 27561/02, § 40, 16 January 2007)."
>
> Going back to this particular case, this court had in mind that at the time when the first instance judgment was rendered in this case the detention already lasted for a very long time (totalling two years, five months and two days) and that it could be expected that the court would comply with the deadline for writing the judgment stipulated in Article 378 § 1, which even in complex cases cannot exceed two months. But contrary to that, the deadline was exceeded by more than four months. The court had the obligation to comply with the deadline for writing the judgment, particularly given the length of detention before the judgment was rendered and the fact that detention was extended after the judgment was rendered and that the exercise of the right to promptly lodge an appeal depended on the service of the judgment.

Given the above, this Court established a violation of the right of the defendant (the plaintiff here) to a trial within a reasonable time in the case of the High Court in Podgorica K.110/16, where the court concluded that the complexity of the proceedings and the conduct of the defendant and his defence counsel did not contribute to the unjustified delays of the proceedings.

There was an obvious interest of the plaintiff to have the written judgment timely served on him in the criminal proceedings conducted against him, so that he could promptly lodge an appeal against the first instance judgment, particularly since his detention was extended at the time the judgment was rendered."

Petrović and Others v. Montenegro

Application no. 18116/15
Judgment of 17 July 2018

i. Analysis of the judgment

The Application was lodged by four citizens of Montenegro due to the alleged violation of one aspect of Article 6 § 1 of the Convention (right to a reasoned judgment) and Article 1 of Protocol No. 1 to the Convention (peaceful enjoyment of possessions). The basis for lodging the application were the civil proceedings that the applicants conducted against the state requesting their right to property based on inheritance to be recognized for a land plot in the coastal zone.

By a tight majority (four votes to three), the European Court established no violation of Article 6 of the Convention. As for the violation of Article 1 of Protocol No. 1, it declared the Application inadmissible.

(a) Facts

The applicants complained under Article 1 of Protocol No. 1 to the Convention that their land plots were *de facto* expropriated and that they were paid no compensation.

The applicants complained also under Article 6 of the Convention that the decisions of the national courts were arbitrary in terms of the different status of the neighbouring land plot. In that respect, the national courts did not give any reasoning, which, in their opinion, led to legal uncertainty.

In September 2009 the first and second applicants and the father of the third and fourth applicants initiated civil proceedings against the state requesting recognition of their right to register ownership on the two land plots in the coastal zone. They claimed that the impugned land was in their father's ownership but that, without any legal basis, the state was registered as the owner in the Land Registry and that they should be declared owners since they were legal successors of their father.

In March 2010, the Real Estate Administration, acting upon a request of the first applicant, rendered a decision approving the split of the neighbouring land plot in two parts. It was the forest located in the coastal zone whose owner at that time was the Municipality. The Municipality remained registered as the owner of one part of the land plot, while the other part was registered in the name of the ancestors of the applicants (the father of the first and second applicants and the grandfather of the third and fourth applicants).

After the case was sent to a retrial, the Basic Court in Kotor adjudicated against the first and second applicants and the father of the third and fourth applicants.

The Court established that the impugned land indeed was in the ownership of their ancestors, precisely the applicants' father, grandfather and great-grandfather, but that they did not prove that they inherited the land after their last ancestor died in 1997. In particular, the Court considered that the impugned land was in the coastal zone and that on that basis it was the property of the state according to Article 4 of the Coastal Zone Act of 1992 and "Article 13 and other Articles" of the State Property Act and that the plaintiffs could not seek the right of ownership on such land. As for the claims of the state that the land was nationalized, the Court noted that the contents of the decisions that the state referred to could not be clarified. In the end the Court noted that the Decision of the Real Estate Administration from March 2010 was "without any special influence", since it referred to a different land plot that was not subject to these proceedings.

In their appeal, the first and second applicants and the third and fourth applicants' father confirmed that the said land had not been in their predecessor's estate when he died, which was exactly why they had initiated these proceedings. They also submitted that: (a) section 30 of the Coastal Zone Act had never been complied with even though it was indisputable that their predecessor had lawfully owned the land; and (b) the relevant legislation did not prohibit private ownership of land in the coastal zone, and referred to section 4 of the Coastal Zone Act and section 20 of the Property Act.They reiterated that the adjacent plot of land, also a forest in the coastal zone, was privately owned, by them, and submitted the decision of the Real Estate Administration of 2 March 2010. They maintained that the first-instance court's reasoning that the said decision was of no influence indicated legal uncertainty, given that the same legal issue was treated differently without any explanation in that regard.

The High Court (*Viši sud*) upheld the first-instance judgment. It found that the land at issue was indisputably forest in the coastal zone, that it was State property pursuant to section 13 of the State Property Act and that the claimants therefore could not claim ownership. The court further held that even assuming that the claimants had had ownership of these plots of land, they had lost it "in accordance with the State Property Act and the Coastal Zone Act. In support of this was also section 30 of the Coastal Zone Act, relied upon by the claimants, which provided that the owners of land in the coastal zone, who had obtained it in a lawful manner before that Act entered into force and which was duly registered in the Real Estate Register as private property, were entitled to compensation in case of an expropriation". The

High Court made no reference to the decision of March 2010 and the status of the adjacent plot of land, or as to whether the claimants could have inherited the land.

The Supreme Court (*Vrhovni sud*) upheld the previous judgments. The court made no explicit reference to the adjacent plot of land and the decision of March 2010. The court established that the lower courts correctly applied the substantive law when they ruled in the said way because pursuant to section 4 of the Coastal Zone Act, which had been in force until State Property Act entered into force (Official Gazette of Montenegro 21/20.), the coast is owned by the State and can not be private property.

The court held that the claimants were wrong to consider that the issue was to be resolved under of section 30 of the Coastal Zone Act because that provision regulated the rights of the owners of land in the coastal zone who had obtained the property thereof before that Act entered into force by providing that they were entitled to compensation in case of an expropriation. That means that the land did not remain in the private property regime, but became State property by the law itself.

Likewise, section 20(2) of the Property Act 2009 (Official Gazette of Montenegro 13/2009) is inapplicable to the present case as it cannot be retroactively applied to relations that had arisen before it came into force. Exceptionally, the right to property over a coastal zone can be acquired only after it entered into force.

Deciding upon the lodged constitutional complaint, the Constitutional Court rejected it in July 2014. It held that the lower courts' assessment was based on a correct application of substantive law and a constitutionally acceptable interpretation thereof, in accordance with Article 6 of the Convention. As regards Article 1 of Protocol No. 1 the court held that a claim, which had been dismissed because the claimants did not meet statutory conditions, was not considered a possession that could constitute property rights, and thus there could be no violation of such a right either.

Taking a general legal opinion, the Supreme Court analysed the relevant domestic legislation, including the Constitution, the Coastal Zone Act of 1992, the Property Act and the State Property Act. It found, *inter alia*, that section 20(2) of the Property Act provided that exceptionally coastal zone may be privately owned, while at the same time section 22(3) of the same Act provided that the coast cannot be privately owned. It also found that the conditions under which the coastal zone may be privately owned are not provided for by law (*nisu zakonom određeni*), "which leaves open numerous questions on practical implementation". The court concluded that "by analysing [the relevant legislation] it can be concluded that acquiring private property rights in respect of the coastal zone is not possible save in exceptional cases which are not defined by legislation. It can also be concluded that the issue of lawfully acquired rights in respect of the coastal zone is not regulated in a precise and clear manner...", but that it was a fact that there were lawfully acquired property rights over the coastal zone, as indicated by section 30 of the Coastal Zone Act.

(b) Relevant principles

The relevant principles with regard to the applicability of Article 6 are set out in, for example, *Lupeni Greek Catholic Parish and Others v. Romania*[48] In particular, "rights and obligations" in Article 6 mean rights and obligations which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether they are protected under the Convention.[49] The requirement, however, is only that the applicant has a "tenable" argument, not that he will necessarily win.[50]

The relevant principles concerning the provision of reasons by courts are set out in details in Perez v. France.[51] In particular, the Court reiterates that Article 6 § 1 obliges the courts to give reasons for their judgments but cannot be understood as requiring a detailed answer to every argument.[52] The extent to which this duty to give reasons applies may vary according to the nature of the decision.

The question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6, can only be determined in the light of the circumstances of the case. If, however, a submission would, if accepted, be decisive for the outcome of the case, it may require a specific and express reply by the court in its judgment.[53]

(c) The Court's assessment

As for the violation of Article 1 of Protocol No. 1

The relevant principles in this regard are set out, for example, in*Kopecký v. Slovakia*.[54]

The European Court reiterated that it could examine complaints only to the extent that they relate to events which occurred after the Convention entered into force with respect to the relevant Contracting Party. It also 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".[55]As a deprivation of ownership is an instantaneous act and does not produce a continuing situation of "deprivation of a right", the Court considered that the applicants' complaint under Article 1 of Protocol No. 1 was incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 (a). Therefore it declared the Application inadmissible in that part.

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48 *Lupeni Greek Catolic Parish and Others v. Romania* [GC], 76943/11, § 71, ECHR 2016 and *Károly Nagy v. Hungary* [GC], 56665/09, §§ 60-63, ECHR 2017.
49 *Boulois v. Luxembourg* [GC], 37575/04, § 90, ECHR 2012.
50 *Neves e Silva v. Portugal*, 27 April 1989, § 37, Series A No. 153-A.
51 *Perez v. France* [GC] (47287/99, §§ 80-83, ECHR 2004-I.
52 *Van de Hurk v. The Netherlands* 19 April 1994, § 61, Series A No. 288.
53 *Hiro Balani v. Spain*, 9 December 1994, §§ 27-28, Series A, No. 303-B and *Ruiz Torija v. Spain*, 9 December 1994, §§ 29- 30, Series A No. 303-A.
54 *Kopecký v. Slovakia* [GC], 44912/98, § 35, ECHR 2004- IX.
55 *Malhous v. The Czech Republic* (dec.), [GC], 33071/96, ECHR 2000- XII.

As for the violation of Article 6 § 1 of the Convention

Examining the circumstances of the case, the European Court noted that the applicants had sought in the first place to be recognised as the owners of the land at issue on the basis of inheritance. In this respect, as was duly explained by the Court of First Instance, according to the findings of the European Court, that the applicants' last predecessor was not registered as the owner of the property at issue at the time of his death in 1997. On the other side, the High Court, while not referring to the status of the adjacent plot of land, explained why the applicants could not claim ownership over the land at issue. It specified that, assuming that they had had ownership, they had in any event lost it in accordance with the Coastal Zone Act 1992 and the State Property Act 2009.

In view of the reasons given in the Fist Instance Court and High Court judgments, and in particular in light of the reasoning adopted by the Supreme Court, explaining that the applicants could not claim ownership because of the Coastal Zone Act 1992, the European Court considered that it was not necessary for the domestic courts to reply to the argument based on ownership that stemmed from a decision taken in 2010, after the entry into force of the Property Act 2009. In other words, the Court considered that the domestic courts provided in their judgments specific and explicit reasons for the dismissal of the applicants' claim, which rendered irrelevant the latter's argument based on the status of an adjacent plot. There has accordingly been no violation of Article 6 § 1 of the Convention.

In the present case, judges Vučinić, Griţco and Mourou-Vikström made a joint dissenting opinion.

Separate opinion

Judges Vučinić, Griţco and Mourou-Vikström did not agree with the majority's finding that there has been no violation of Article 6 § 1 of the Convention in the present case. They stated that the applicants' objection, if it had been accepted, could have been decisive for the outcome of their case, and as such required a specific and express reply of the domestic courts.

The domestic courts should have decided in a clear and explicit manner about the reasons why – and the conditions upon which – the disputed land did not benefit from the same legal status as the adjacent plot of land and why socalled "exceptional circumstances" could not be applied as regards the land in dispute.

In the opinion of the judges, the combined effects of the shortcomings in the judgments of the Montenegrin courts, the lack of a clear response to the applicants' main submissions, the absence of proper reasoning and the inability of the Supreme Court of Montenegro to establish legal security and clarity in the field of interpretation and implementation of the Coastal Zone Act 1992, have convinced us that the applicants' case was not heard in accordance with the

requirements of a fair trial, and that accordingly there has been a violation of Article 6 § 1 of the Convention.

ii. Relevance to Montenegrin case law

The views in the *Petrović v. Montenegro* judgment, cannot be broadly applied in the disputes on property within the coastal zone, because they refer to a situation where the ownership on the property in the coastal zone has ceased to exist before the Coastal Zone Act came into force. These views do not address the issues of the rights of persons who were the owners of the property at the time the Coastal Zone Act came into force. Montenegrin authorities continue facing the challenge to regulate the rights of the latter in a clear and predictable manner by the time of the potential expropriation of their property under Article 30 of the Coastal Zone Act.

We should underline that, when developing its general legal view Su I 124/15 – III of 27 May 2015, the Supreme Court noted:

"Article 58 § 3 of the Constitution of Montenegro stipulates that natural wealth and assets in general constitute state property.

The Coastal Zone Act regulates the notion of coastal zone, management of the coastal zone, its use, improvement and protection.

The Coastal Zone Act of 1978 and the Act that is in force now define the notion of the coastal zone in the same way.

The coastal zone is defined as coast of the sea, ports, piers, slips, dams, banks, bathing areas, reefs, undersea wells, wells and springs on the coast, deltas of rivers flowing into the sea, canals connected to the sea, underwater world, sea bed and underground, as well as internal sea water and territorial sea, live and still assets in the water and live and still assets of the epicontinental belt, as well as banks of the river Bojana in the territory of Montenegro.

The sea coast is defined as the belt of the land bordered by the line which the waves reach at the time of the strongest storms, as well as the part of the land that by its nature or purpose serves for the use of sea for maritime transport and sea fishery and for other purposes related to the use of the sea and is at least six meters wide from the line that is horizontally six meters away from the line which the largest waves reach during the strongest storm.

Article 4 of the Coastal Zone Act of 1978 used to stipulate that the coastal zone is public property and that it cannot be alienated, as well as that the coastal zone is managed by the municipality.

That law did not regulate clearly and comprehensively the issue of legally acquired ownership rights on the land in the coastal zone. It used to regulate the issue of the rights acquired for

the permanent buildings owned by citizens and legal entities. On the basis of the approval of a relevant authority these were built in the coastal zone, or were built at the time when such approval was not required. The owners retained their acquired rights, while the buildings could also become public property if it was established that the public interest is such, or they could be removed. In such a case the owner was entitled to compensation in line with the legislation on expropriation. The Act did not regulate the issue of legally acquired rights on the land in the coastal zone.

According to Article 7 of the current Coastal Zone Act, the coastal zone, or any of its parts can be given to a legal or physical entity to be used for economic or any other permitted activity or to berth vessels. Contract on the use of coastal zone is concluded between the public company and the user of the coastal zone (Article 8) on the basis of a Government decision regulating conditions, time of use of the coastal zone and the amount of the fee for use.

The current Coastal Zone Act did not regulate property-law regime of the coastal zone, since Article 4 of the Act that used to regulate that issue ceased to have effect after the State Property Act came into force.

The property-law regime of the coastal zone is regulated in the Property Act and the State Property Act.

Article 20 of the Property Act stipulates that goods of common interest enjoy particular protection according to the law. Goods of common interest include natural goods, goods in common use, cultural goods, the coastal zone, national parks and other goods of common interest. Goods of common interest – construction land, agricultural land, forests and forest land, protected parks of nature, exceptional coastal zone, flora and fauna, things of cultural, historic and ecological importance and other assets with such a purpose may be subject to private ownership and other property rights. Owners and holders of other property rights on goods of common interest are obliged to exercise their rights in line with the manner of using the goods stipulated in separate laws.

Article 22 § 3 of the Property Act lays down that natural goods (sea coast, water, ores, wildlife etc.) and goods in common use (roads, railways, airports, squares, airspace, ports, cultural and historic monuments etc.) may not be subject to private ownership.

Thus, Article 20 § 2 the Act stipulates that the coastal zone may exceptionally be subject to private ownership, while at the same time Article 22 § 3 stipulates that the coast may not be subject to private ownership. Given that, in terms of Article 2 of the Coastal Zone Act the term coastal zone is broader than the term coast, the question is whether everything that falls under the definition of the coastal zone according to the Act can be subject to private ownership. The conditions under which the coastal zone may be subject to private ownership are not defined in the Act which leaves numerous questions open in practice.

Article 10 sub-paragraphs 8, 9 and 10 of the State Property Act defines goods of common interest, public goods and goods in common use.

Goods of common interest are the natural assets, goods in common use and other goods of common interest (cultural goods, construction land, agricultural land, forests and forest land, coastal zone, particularly protected reserves and habitats of endangered or protected species of animals, plants and other goods according to the law).

Public goods are natural assets and goods in common use.

Goods in common use are the goods that are accessible to everyone under the same conditions and their use is possible without any special licence or approval of the authorities (roads, squares, streams, ports, airports, city parks, etc.)

The notion of public goods is defined in the same way in Article 21 of the Property Act. Special rights of use of public goods can be acquired in line with Article 21 § 3 of the Act (concession, B.O.T, lease and other contract models) under the conditions defined in the law.

Article 9 § 2 of the State Property Act stipulates that natural assets and goods in common use may not be subject to private ownership. According to Article 11 the coastal zone is disposed by Montenegro. Article 20 of this Act stipulates that ports and piers are goods in common use disposed by Montenegro.

Analysis of all these laws leads to the conclusion that acquiring the right of private property on the coastal zone is not possible except in certain exceptional cases that are not defined in the law. It also leads to the conclusion that the issue of legally acquired rights on the coastal zone is not regulated in a precise and clear manner, which is the essence of the legal matter at stake.

However, the fact is that properly acquired property rights in the coastal zone did exist. This is supported by the transitional and final provisions of the Coastal Zone Act that is currently in force. According to Article 30 of this Act, the owners of land in the coastal zone acquired in a lawful manner before the Act came into force and registered in land and other registers of property as private ownership, are entitled to compensation according to the legislation on expropriation if such land is expropriated. According to paragraph 2 of the same Article they have the right to priority right of use of the coastal zone, under the same conditions and in line with the zoning plan. This provision leads to the conclusion that it is possible to conduct the procedure of expropriation from the owners in line with the legislation on expropriation. Before expropriation the owners have the legal right of use under the same conditions as before in line with spatial i.e. zoning plan.

The Coastal Zone Act does not stipulate the duty of the owners referred to in Article 30 § 1 of the Act to conclude any contract on use of the coastal zone with the public company for coastal zone management. They have the right of use according to the law. Because, it is not

logical that the owners of the land that was acquired in a legally valid manner and registered in the register of property, pay any fee for the use of coastal zone before the expropriation procedure is conducted. In contemporary systems, the acquired rights have to be respected. The right to property is guaranteed in the Constitution of Montenegro and in Protocol No. 1 to the European Convention on Human Rights.

Article 31 indirectly leads to the conclusion that there is no obligation of the landowners to conclude any contract on the use of the coastal zone. This Article deals with the issue of acquired property rights on buildings built in the coastal zone. The owners retain the acquired rights on the buildings but they are obliged to conclude a contract on the use of the coastal zone within three months from the establishment of the public company. The legislator had in mind the buildings built on public, i.e. state land on which they had the right of permanent use.

If the land owners were obliged to conclude a contract on the use of the coastal zone, that obligation would be stipulated in the law, as for the owners of the buildings built in the coastal zone."

The legal provisions are not harmonized and open issues of the property entitlements of the prior owners of property, i.e. their users after the Coastal Zone Act came into force, in terms of whether the earlier owners of property, except for the right to hold and use, also have the right to dispose of the property and what is the scope of the restrictions, given the meaning of the notion of disposal in the context of the State Property Act.

It seems that the theoretical understanding that the state has only the bare property (*nudum conceptum*) in relation to earlier owners and that we can put an equality sign between the right of ownership and the current rights of earlier owners in the coastal zone, can hardly be based on the above unclear provisions of the laws.

Furthermore, when it comes to these provisions of the Act, it can hardly be expected that the case law will render the rights of earlier owners of the coastal zone predictable, regardless of the fact that it is the task of the court to apply hermeneutics to explain the contents of the legislation. If the provisions of the law are not clear, this would mean that the courts should take the role of law-makers, which is not their task.

Authors of this Analysis believe that the answers to the above questions can open numerous procedures based on the right to peaceful enjoyment of property, which above all should be prevented by the legislator by defining the rights of earlier owners in a clear and predictable way, starting from the day on when the Coastal Zone Act came into effect and concluding with the day of expropriation.

3. Analysis of the 2018 and 2019 European Court judgments in respect of Montenegro establishing violations of the Convention, their execution and relevance to the national legal order

3.1. Article 3 – Prohibition of torture

Article 3
Prohibition of Torture

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

Article 3 of the Convention enshrines one of the fundamental values of a democratic society[56] which is safeguarded by an absolute prohibition and may not be derogated under any conditions.[57]

It includes three separate categories of prohibited treatment or punishment: torture, inhuman treatment/punishment and degrading treatment/punishment,[58] and in respect of each of these categories the European Court has developed abundant case law assigning more detailed meanings to them.

In the reporting period, violation of Article 3 was found in the judgment *Bigović v. Montenegro.*

Bigović v. Montenegro
Application no. 48343/16
judgment of 19 March 2019

i. Analysis of the judgment

The applicant complained of violation of Article 3 of the Convention resulting from detention conditions and lack of medical care. Moreover, the application was filed also on the ground of alleged violation of Article 5 of the Convention due to "unlawful" detention since grounds for further detention were not regularly reviewed, decision on extension of detention was not sufficiently justified, detention was too long and the courts did not decide on his applications for release in due time.

56 *El Masri v. Fromer Yugoslav Republic of Macedonia*, 39630/09, judgment of 13 December 2012, § 195.
57 Popović et al, *Commentary on Convention for the Protection of Human Rights and Fundamental Freedoms*, 2017.
58 *A Guide to the Implementation of Article 3*, Erik Svanidzeand Graham Smith, https://rm.coe.int/handbook-on-article-3/168092d150

This part presents facts of the case and a part of judgment concerning Article 3 of the Convention. The procedure for judgment execution was presented in the section dedicated to Article 5 of the Convention.

(a) Facts

The applicant is serving a prison sentence in the Administration for Enforcement of Criminal Sanctions in Spuž (former ZIKS). In the criminal proceedings conducted before competent court, the applicant was convicted of having committed the following crimes: criminal enterprise, attempted extortion and aggravated murder to the detriment of a high police official.

Immediately after the murder, the applicant and several other persons were arrested by the police. On 19 February 2006, the investigating judge of the High Court in Podgorica issued a detention order against the applicant and several other persons for fear that they might abscond, taking into consideration gravity of criminal offences and length of the prescribed prison sentence. The decision specified that detention would last for a month starting on 16 February 2006.

Detention of the applicant

In the course of investigation, the applicant's detention was extended 5 times in 2006, every time by one month. From the day on which indictment was filed by the Supreme State Prosecutor' s Office – special prosecutor until issuance of the judgment, the applicant' s detention was extended three times by decisions of the High Court in Podgorica. Under these decisions, detention was extended for the same reason for which it had been originally imposed, whereas in the last two decisions consideration was given to the fact that the defendants were relatively young, three of them did not have jobs, two were not married, one was foreign national. All three decisions made a reference to Article 148 § 1 sub-paragraph 1 of the Criminal Procedure Code (hereinafter to: CPC) and none of them specified for how long detention was extended.

On 7 August 2009, the High Court found the applicant guilty of several criminal offences and sentenced him to thirty years in prison.

After judgments of the High Court in Podgorica had been quashed several times, the applicant was finally convicted by judgment of 09 October 2012 issued by the High Court in Podgorica. On 20 October 2015, the Supreme Court upheld the judgment of the Court of Appeal of 20 February 2015 and the applicant's sentence of thirty years in prison.

The applicant filed a constitutional complaint with the Constitutional Court of Montenegro which that court dismissed, finding that the impugned decisions had been rendered by competent courts, in the procedure prescribed by law, on the basis of the CPC, and that the reasons contained therein were not arbitrary.

As regards the length of detention, the court held that Article 5 distinguished between detention before and after conviction. It held that the lawfulness of detention could be assessed only until the firstinstance judgment, which did not have to be final. As regards medical care, the court considered that the applicant's health had been continuously monitored by a number of specialists in various institutions and that he had been provided in a timely manner with reasonable available medical care. The decision did not address the detention conditions, whether detention had been regularly reviewed and the failure to rule on the applicant's request for release.

Detention conditions

The applicant complained of detention conditions. He specifically indicated that the cell in which he was detained was overcrowded, with the toilet just partly separated from the rest of the room, which was contrary to CPT recommendations. All the improvements that the Government indicated were made after the CPT visit in 2013, whereas he stayed in prison since 2006.

Doctors also confirmed in 2015 that the conditions of his detention were inadequate and insufficiently hygienic and recommended that he was accommodated in the room with a shower, which is still not the case. The use of shower twice a week, due to his illness, fact that he was responsible for cleaning the cell and occasional lack of running water contributed as a whole to the degrading treatment he was exposed to.

He also claimed he did not have sufficient daily physical exercise and that in this case the relevant Rules were not complied with. To be specific, he spent maximum one hour outside, and during rainy days he had no outdoor activities.

Applicant's health condition

In September 2013, the applicant was diagnosed with ulcerous colitis and specialist in the Clinical Centre of Montenegro prescribed him intestinal diet. Once the consent had been granted by the High Court judge on 9 December 2013, special food was provided by the applicant's family at first once a day, and later once a week. The applicant refused surgery and decided to use the medicine (VDZ) which was procured several times abroad. ZIKS provided two doses of VDZ, costs of which were borne by the High Court (the price was EUR 4,457.85).

After the applicant had been hospitalised for deterioration of illness, he was recommended surgery and further treatment with VDZ was stopped. The applicant underwent cataract surgery and was also referred to the Rehabilitation Institute in Igalo where he treated serious injuries of the left knee. Costs of treatment were borne by the applicant's family, while the High Court paid for the costs of accommodation for ZIKS staff. Moreover, the doctor – psychologist established that he suffered from "prominent anxious and depressive psychopathology with vegetative expression" and prescribed him a therapy.

Between March 2013 and 04 December 2017, the applicant was hospitalised eight times (total of 128 days) and also underwent additional twenty-two treatments at the outpatient clinic. From September 2013 to January 2018, he was examined 151 times outside of ZIKS. Medical examinations were carried out in the presence of prison guards, including colonoscopy and psychiatric examinations. Colonoscopy was conducted without anaesthetics.

ZIKS informed the High Court, Court of Appeals, Supreme Court and the applicant that three types of medicines (not VDZ) which were unavailable in Montenegro were procured for the applicant. The Ombudsman' s report of December 2017 states that half of inmates suffer from some kind of mental disease or disorder and that prison health services do not operate with full capacity. There was a waiting list for psychiatric assessments and examinations. Recommendations were given to the Ministry of Justice and ZIKS to urgently consider the need to set up a psychiatric unit in prison, as well as to take steps to help patients suffering from depression and ensure that this kind of examination was carried out without the presence of prison guards (unless psychiatrist explicitly requires their presence).

The European Court upholds findings and recommendations contained in the report of the Council of Europe bodies and makes assessment bases on views expressed in these reports. Therefore, in this judgment the Court also focused on the report on Montenegro prepared by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which states that medical care in prisons should be provided, *inter alia*, in the form of appropriate diets. It was emphasised that all medical examinations of prisoners should be carried out without the presence of other persons and – unless the competent doctor requires otherwise - without the presence of prison guards.

The issue of detention conditions was also raised in the context of accession of Montenegro into the European Union. To be specific, European Commission noted in the 2011 and 2012 Progress Reports that even though prison conditions had improved, they were still not aligned with international standards, while overcrowding still remained at the level which raises concerns.

Article 3 of the Convention

(b) Relevant principles

Detention conditions

The European Court reiterated that Article 3 required the State to ensure that prisoners were detained in conditions which were compatible with respect for human dignity, that the manner and method of the execution of the measure did not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given

the practical demands of imprisonment, their health and well-being were adequately secured.[59]

The European Court has already established that huge overcrowding raises the issue set out in Article 3 of the Convention.[60]

To be specific, Article 3 was violated in the case when the applicant was detained for almost nine months in extremely overcrowded conditions (10 m^2 for four inmates), with low access to daily light, limited availability of running water, particularly during night, strong odours from toilets, with food which is insufficient and of poor quality and with inadequate bedlinen.[61]

Medical care

Relevant principles in this regard are outlined, for example, in the judgment *Labita v. Italy.*[62]

To be specific, Article 3 of the Convention imposes obligation on the state to protect physical well-being of the persons deprived of liberty, for instance by providing them with necessary medical care.[63] There cannot be deviations from this obligation. The Court accepts that medical care in prison hospitals does not always have to be at the level of care provided by the best public health institutions. Still, the state must ensure adequate health and well-being of detainees.

When establishing whether the applicant received necessary medical care while in detention, it is critically important to ascertain whether state authorities have provided him with a sufficient medical supervision for timely diagnosis and treatment of his disease.

(c) The Court's assessment

1) Detention conditions

Improvements made to detention, in 2008 and 2013, in light of CPT findings, are certainly to be complimented. However, the Court must draw a conclusion that detention conditions in which the applicant stayed in the period from February 2006 to August 2009 constituted violation of Article 3 of the Convention.

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59 *Kudła v. Poland* [GC], 30210/96, §§ 92-94, ECHR 2000 XI, and *Melnitis v. Latvia*, 30779/05, § 69, 28 February 2012.

60 *Kadiķis v. Latvia* (no. 2), 62393/00, § 52, 04 May 2006 and *Muršić v.Croatia* [GC], 7334/13, §§ 136-141, 20 October 2016.

61 *Modarca v. Moldova*, 14437/05, §§ 60-69, 10 May 2007

62 *Labita v. Italy* [GC], 26772/95, § 119, ECHR 2000 IV; *Kudła*, above-cited, §§ 92-94; *and Blokhin v. Russia* [GC], 47152/06, §§ 135-140, 23 March 2016.

63 *Mouisel v. France*, 67263/01, § 40, ECHR 2002 IX.

2) Medical care

The Court reiterated that state authorities are obligated to ensure health and general well-being of inmates including, *inter alia*, obligation to provide inmates with adequate meals. Still, the Court concluded that the applicant was not fully deprived of adequate meals, instead the respondent state took measures to overcome the situation, with assistance from the applicant's family. Furthermore, the Court noted that prison staff were present during medical examinations of the applicant including psychiatric examinations and colonoscopy.

In that regard, the Court recognised a security risk in the fact that at a specific time the applicant was imposed severe penalty for committing numerous criminal offences, including aggravated murder as mentioned above. On the other hand, the Court noted that when the consent was given to admit the applicant to the hospital, the prison administration did not provide a complete risk profile with the analysis of, for instance, whether he complied with the prison regime, whether he was impulsive, manipulative, violent, aggressive, and capable of attacking others or hurting himself.

Still, the Court reiterated that it did not believe, under special circumstances of the specific case, that it was justified to observe this aspect isolated from the overall medical care which was certainly provided to the applicant over a significant period.

Under these circumstances, based on evidence in front of it and assessing relevant facts as a whole, the Court concluded that presence of prison guards did not, in itself, constitute a sufficient level of gravity to be regarded as a violation of Article 3.

Therefore, the Court established there was no violation of Article 3 of the Convention.

ii. Impact on state authorities' practice

In the judgment *Bigović v. Montenegro,* the European Court once again reminded of the positive obligations of the state to ensure that detainees stay in conditions which are respectful of human dignity and that the manner and method of the execution of measure does not subject them to harassment or difficulties whose intensity exceeds inevitable level of distress that is inherent to the prison. This requires continuous care by state authorities in improving and maintaining the prison system in line with the standards achieved in the European Union.

Article 5
Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   a. the lawful detention of a person after conviction by a competent court;
   b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
   c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him committing an offence or fleeing after having done so;
   d. the detention of a minor by lawful order for the purpose of eductional supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
   e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
   f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation of extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of § 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

The purpose of Article 5 is to provide a safeguard against unjustified or arbitrary deprivations of liberty.[64] The notion of liberty here covers the physical liberty of a person.[65] The basic rule is that any deprivation of liberty must be compatible with the principle of lawfulness, as prescribed by the national, but also international law.[66] The right to liberty and security is not an absolute right, which means that its restrictions are allowed, though only in the cases prescribed by the Convention.

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64 *McKay v. the United Kingdom* [GC],§ 30
65 Harris, O' Boyle and Warbick, *Law of the European Convention on Human Rights*, 4th edition.
66 *Medvedyev and Others v. France* [GC],§ 79; *Toniolo v. San Marinoand Italy*, §46

In the reporting period, the European Court found violations of Article 5 of the Convention in two judgments: *Bigović v. Montenegro and Šaranović v. Montenegro.*

Bigović v. Montenegro

Application no. 48343/16
Judgment of 19 March, 2019

i. Analysis of the judgment

Given that Article 3 was also found to have been violated in this case, the facts of the case are presented above. With respect to the alleged violation of the right to liberty and security of person, the Court found violations of Article 5 § § 1 and 3.

Article 5 § 1 (c) of the Convention

(a) Relevant principles

Specific relevant principles were given in the *Mooren v. Germany* judgment.[67] More precisely, the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 of the Convention essentially refer to national law and the obligation to conform to the substantive and procedural rules thereof. It is in the first place for the national authorities, notably the courts, to interpret and apply the national law. However, given that under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, the Court can and should therefore exercise its authority to review whether such right was respected.

Still, the "lawfulness" of detention under national law is the primary, but not always the decisive element. The Court must further be satisfied that the detention in the period at issue was in keeping with the purpose of Article 5 § 1, which is to prevent arbitrary detention.

The Court must further ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein.

(b) The Court's assessment

The Court considered the relevant legislation to be sufficiently clearly defined in the specific case. However, the lack of precision in detention orders in respect of the duration of extensions and the lack of consistency at the time, before the Supreme Court had issued its ruling in 2017, as to whether the statutory time-limits for re-examination of the grounds for detention were mandatory or not made it unforeseeable in its application.

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

The Court therefore found a violation of Article 5 § 1 of the Convention with regard to periods where more than two months passed after the indictment was issued without new orders extending the applicant's detention.

Article 5 § 3

1) Period to be taken into consideration

The Court reiterates that, in determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance.

In view of the essential link between Article 5 § 3 of the Convention and § 1 (c) of that Article, a person convicted at first instance cannot be regarded as being detained "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence", as specified in the latter provision, but is in the position provided for by Article 5 § 1 (a), which authorises deprivation of liberty "after conviction by a competent court". However, when assessing the reasonableness of the length of the applicant's pre-trial detention, the Court made a global evaluation of the accumulated periods of detention under Article 5 § 3 of the Convention.

Making an overall assessment of the accumulated periods under Article 5 § 3 of the Convention, the Court concludes that the period to be taken into consideration in the instant case amounts to five years, five months, and twenty-four days.

(a) The relevant principles

Under the Court's case law, the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features.

Continued detention can be justified only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty, and references must be made to the specific facts and the applicant's personal circumstances justifying his detention. Quasiautomatic prolongation of detention contravenes the guarantees set forth in Article 5 § 3. The persistence of reasonable suspicion is a condition sine qua non for the validity of the continued detention, but does not suffice to justify the prolongation of the detention after a certain lapse of time.

The Court has clarified that the requirement on the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say

"promptly" after the arrest. In such cases the Court must establish whether the other grounds given by the judicial authorities continue to justify the deprivation of liberty.

Where such grounds are "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings. The complexity and special characteristics of the investigation are factors to be considered in this respect. The burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate the existence of reasons warranting release.

(b) The Court's assessment

The Court first noted that the applicant had been held in pre-trial detention for more than five years and five months. It is further noted that each periodic decision extending detention referred not only to the applicant but to at least one other defendant, and invoked the same reason – the risk of absconding, owing to the gravity and number of criminal offences the defendants were accused of and the sentences prescribed for those offences.

In the applicant's case, the risk of absconding was the only reason for his continued detention until 30 December 2011, i.e. for four years and seven months of his pre-trial detention. It was only then that the courts, in addition, considered that the release of the defendants, including the applicant, would breach public order and peace. Even then, however, the authorities used standardised formulae, and on several occasions merely specified that "the reasons for detention still persisted", without going into any detail whatsoever.

The Court further observed that, apart from the fact that the applicant was a relatively young person, the courts, when extending his detention, failed to consider his personal circumstances, such as his character and morals, home, occupation, assets, family ties and various links to the country in which he was being prosecuted. Those are all factors in the light of which the risk of absconding has to be assessed. Moreover, the Court observed that the domestic courts had not made any express assessments as to the proportionality of the applicant's continued detention, in particular in the light of his state of health and the lapse of time.

Finally, when deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial, which in the present case they failed to do.

For the foregoing reasons, the Court considered that the authorities had extended the applicant's detention on grounds which cannot be regarded as "sufficient", thereby failing to justify his continued deprivation of liberty for a period of over five years. It was therefore not necessary to examine whether the proceedings against him were conducted with due diligence.
There has accordingly been a violation of Article 5 § 3 of the Convention.

Article 5 § 4

The Court noted that on 9 October 2012 the High Court found the applicant guilty and sentenced him to thirty years in prison. That judgment was upheld by the Court of Appeal on 2 April 2013.

The Supreme Court, on 2 April 2014, quashed the judgment of the Court of Appeal, but it did not quash the judgment of the High Court convicting the applicant.

Therefore, his detention at the relevant time ensued from his "conviction by a competent court", notably the High Court on 9 October 2012. Accordingly, this complaint is manifestly ill-founded and is rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

ii. Execution of the judgment

(a) Action Plan/Report

The Government is to submit to the Committee of Ministers the Action Report/Plan by 19 December 2019, on all individual and general measures taken to implement the judgment.

Šaranović v. Montenegro

Application no. 31775/16
Judgment of 5 March 2019

i. Analysis of the judgment

A violation of Article 5 § 1 (c) of the Convention was found in the judgment in respect of the applicant's detention between 16 November and 15 December 2014. Apart from that, the Court held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. The applicant complained under Article 5 of the Convention. He submitted, in particular, that:

a) his detention between 15 November and 15 December 2014 had been unlawful as there had been no decision on detention for that period due to the failure of the domestic bodies to review his detention within the 30-day time-limit; in any event, detention could last six months at most without an indictment, but in his case it had lasted for more than two years without the indictment having entered into force;

b) the decisions extending his detention, which had lasted for more than two years, had been insufficiently reasoned. Notably, the courts had failed to really examine whether the reasons for his detention persisted but had rather copied the reasoning from one decision to another.

The applicant also complained under Article 6 of the Convention that the Constitutional Court's decision of 29 May 2015 had lacked reasoning in respect of his complaints and that thus he had no effective remedy at his disposal.

(a) The facts

On an unspecified date between 18 and 26 July 2013 the applicant was arrested in Montenegro, on reasonable suspicion that he had arranged the murder of X as he had considered X's brother responsible for the murder of his own brother, investigated by the Organised Crime Prosecution in Serbia. The Ministry of Justice of Serbia sought the applicant's extradition to Serbia on suspicion that he had committed an aggravated murder; such request was refused by the Montenegrin courts. In February 2014 the applicant was released from detention. On 4 April 2014 the Supreme State Prosecution of Montenegro authorised the applicant's prosecution in Montenegro.

On 8 April 2014 the applicant was arrested in Montenegro. The decision was based on the assessment that he could influence the witnesses and that his release could seriously disturb public peace and order. It also took into account the gravity of the offence he was suspected of and the severity of the penalty potentially faced.

The investigating judge ordered the applicant's detention as of 8 April 2014, for one month at most, on reasonable suspicion that he had committed an aggravated murder through incitement, the penalty for which was ten years of imprisonment or more. The decision specified that the applicant could influence witnesses. It also took into account the manner in which the offence had been committed, that the motive for it had been revenge and that the applicant's release could provoke an outcry among the people and could threaten public peace and order. In view of all that it was considered unacceptable that the applicant remains free during the proceedings.

The applicant's detention was further extended on 7 May, 6 June, 7 July, 4 August and 5 September 2014, each time for a month, relying on Article 175 § 1(2) and (4) of the Criminal Procedure Code. The reasoning was the same as before. On 7 October 2014 the High Court extended his detention "until a further decision of the court", after the High State Prosecutor had issued an indictment against the applicant for aggravated murder through incitement and for criminal association. The High Court's decision was quashed by the Court of Appeal, which was followed by the High Court's extension of the applicant's detention "until a further decision of the court", on the 17 October 2014. On 22 October 2014 the High Court returned the indictment, requiring further investigation in respect of the offence of criminal association.

After 13 November 2014, when the High State Prosecutor ordered further investigation, in particular in respect of criminal association, on 15 December 2014 the applicant approached the prison authorities and sought that he be released. He submitted that his detention had

not been reviewed after a 30-day period and that therefore it had been unlawful as of 15 November 2014. He relied on Article 179 § 2 of the CPC. On the same day, the High Court extended his detention "until a further decision was taken by a court" relying on Article 175§ 1(4) of the CPC. The applicant appealed against this decision, submitting that it was contrary to both national legislation and Article 5 of the Convention.

The Court of Appeals dismissed the appeal, holding that pursuant to Article 179 § 2 of the CPC the court had a duty to review whether the reasons for detention persisted and to issue a new decision extending or revoking it every 30 days before the indictment entered into force, and every two months after the indictment had come into force. However, the court's failure to do so within the said time-limits by no means meant that the detention had ceased. It also held that the applicant's detention had been lawful, as the indictment had been issued within six months. It was irrelevant that it had been returned and further investigation requested.

Between 25 December 2014 and 8 January 2015, the applicant lodged a constitutional appeal, which was dismissed by the Constitutional Court on 29 May 2015. The Constitutional Court held that the High Court and the Court of Appeals had examined the existence of reasonable suspicion, assessed the existing evidence and other circumstances justifying the extension of detention, indicated which evidence had been taken into account and given clear and precise explanations in accepting them.

The applicant's detention was further extended by court's decisions on 15 January, 30 January, 2 March, 2 April, 4 May, 4 June, 6 July, 6 August, 10 September, 9 October, 9 November and 9 December 2015, 11 January, 11 February, 11 March, 11 April, 11 May, 13 June, 15 July, 25 July, 1 September, 4 October and 4 November 2016.

On 25 July 2016 the applicant lodged a constitutional appeal against the High Court decision of 11 May 2016 extending his detention, and the Court of Appeals' decision of 30 May 2016 upholding it. He invoked, inter alia, Articles 5, 6 and 13 of the Convention. He submitted that the Court had found a violation of Article 5 in a case identical to his, and referred to the judgment rendered in *Mugoša v. Montenegro*.[68] He complained again about the unlawful detention, in particular between 15 November and 15 December 2014, and about all 25 decisions extending his detention being insufficiently reasoned, the reasoning having been copied from one decision to another.

On 9 December 2016 the applicant's detention was revoked and he was released. On 11 March 2017 the applicant was murdered in front of his house.

The Court accepted that the applicant's wife had a legitimate interest in pursuing the proceedings on his behalf.

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68 *Mugoša v. Montenegro*, 76522/12, 21 June 2016

The Court took into account the legal opinion of the Supreme Court issued in June 2013 that after the indictment had been returned and further investigation requested, further detention should be ruled on pursuant to Article 179 of the CPC. In January 2017, the Supreme Court issued a legal opinion that the national courts must consistently comply with the time-limits for reviewing detention provided for in Article 179 § 2 of the CPC and that failure to do so violates the right to liberty and security.

(b) The relevant principles

While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed.[69]

The "lawfulness" of detention under domestic law is the primary but not always a decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein.[70]

(c) The Court's assessment

The lawfulness of detention between 15 November and 15 December 2014

The Court considered that compliance with statutory time-limits for re-examination of the grounds for detention was of utmost importance, particularly when the domestic courts were not obliged to specify the exact duration of the detention.

The Court also reiterated that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[71]

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69 *Mooren v. Germany*[GC], 11364/03,§72, 9 July 2009, *Benham v. the United Kingdom*, 10 June 1996,§41, Reports of Judgments and Decisions 1996-III; *Douiyeb v. the Netherlands*[GC], 31464/96, §§44 and 45, 4 August 1999 and *Mooren v. Germany*, [GC], 11364/03, §73

70 *X v. Finland*, 34806/04, §148, ECHR 2012 (excerpts); *Bik v. Russia*, 26321/03, §30, 22 April 2010; *andWinterwerp v. the Netherlands*, 24 October 1979, §45, Series A 33.

71 *Steel and Others v. the United Kingdom*, 23 September 1998, §54, Report of judgments and decisions 1998-VII.

The Court considered that, in the specific case, the relevant legislation itself seemed to be sufficiently clearly formulated. However, the lack of precision in detention orders in respect of the duration of detention extension and the lack of consistency at the time, before the Supreme Court issued its legal opinion in 2017, on whether the statutory time-limits for reexamination of detention grounds were mandatory or not made it unforeseeable in its application.

Therefore, the applicant's detention between 16 November and 15 December 2014 was not "lawful" within the meaning of Article 5 § 1 of the Convention. Consequently, there has been a breach of that provision in that regard.

The lawfulness of detention after the six-month time limit

The Court considered that, in the specific case, the relevant legislation was both sufficiently precise and foreseeable in its application, and that extending the applicant's detention beyond six months had not been unlawful. It was further observed that the indictment had been returned and further investigation requested in respect of the criminal offence of criminal association, that the parties agreed that statutory time-limits in this regard were not mandatory and could be extended, that the time-limits for investigation had been each time extended in accordance with the prescribed statutory procedure, except for the above period of 16 November and 15 December 2014, that the applicant's detention during the entire period had been reviewed on a regular basis, and the statutory limit for detention was three years after the indictment had been issued and before the first-instance judgment was rendered. Accordingly, the Court found the complaint manifestly ill-founded and rejected it in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

Article 5 § 3

The Court here noted that the applicant's complaint about alleged insufficient reasoning in the decisions extending his detention for more than two years, and an implicit complaint about the length of detention, had been raised in his second constitutional appeal, which appeared to be still pending at the time of the Court's deliberation. Accordingly, the Court rejected these complaints as premature under Article 35 §§ 1 and 4 of the Convention.

Article 5 § 4

The Court noted that the Constitutional Court had explicitly and extensively examined the applicant's submissions relating to the alleged lacked of reasoning in the decisions extending his detention for the first eight months and dismissed them. It also examined his other complaints, relating to the indictment not having entered into force and his detention not having been reviewed regularly, and considered them unfounded.

The Court considered that the Constitutional Court thus had replied explicitly to the applicant's complaints. Accordingly, the applicant's complaint was found manifestly ill-founded and rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

ii. Execution of the judgment

(a) Action Plan/Report

The Government is to submit to the Committee of Ministers the Action Report/Plan by 8 April 2019on all individual and general measures taken in respect of the applicant.

iii. Relevance of the Bigović v. Montenegro and Šaranović v. Montenegro judgments to Montenegrin case law

Violation of Article 5 of the Convention was, *inter alia*, found in judgments delivered in the *Bigović* and Šaranović cases on account of failure to comply with the statutory time-limits for periodic re-examination of detention prescribed by the Criminal Procedure Code. The same violation was also found in the judgment in the *Mugoša v. Montenegro* case.[72]

In view of Article 9 of the Constitution of Montenegro, according to which the judgments of the European Court of Human Rights in cases brought against Montenegro constitute a source of law in the national legal system, and of their purpose of preventing further violation of rights established in the judgments of the European Court and thus properly implementing the judgments of this court in line with the country's obligations arising from ratification of the European Convention, after delivery of the judgment in the case of *Mugoša v. Montenegro,* on 17 January 2017, the Criminal Department of the Supreme Court of Montenegro issued its legal view Su.V No. 7/17, specifying that: "the courts shall consistently comply with the time-limits for re-examination of detention referred to in Articles 179 § 2 and 198 § 1 of CPC. Failure to comply with the said time-limits entails violation of the right to liberty and security of person."

It should be noted that violations found in the Šaranović and *Bigović* cases relate to the duration of detention before the above legal opinion was issued and that the courts have understood the need for the timely re-examination of detention in their future practice and thereby prevention of such breaches of the Convention.

In this respect, we would like to present case ***Kr-S.No.8/19*** where the Supreme Court took into account the time-limits for re-examination of the grounds for detention and stated the following in its decision:

> "The Special Prosecutor's Office has submitted to the Supreme Court of Montenegro motion Kti-S.No. 6/19 of 29 October 2019, requesting extension of detention of the accused persons by three months on account of the criminal offences they are charged with by an order for further investigation, a detention which, under the latest decision, was to expire on 30 October 2019, at 06:30h. The motion was submitted with two folders, however, they did not contain the order for further investigation against these

72 *Mugoša v. Montenegro*, 76522/12 of 21 June 2016.

accused persons so as to enable the Supreme Court to establish the criminal offences in respect of which further investigation was ordered, and the further investigation order could not be replaced by a special police report that the special prosecution referred to in the supporting letter which specified that such a report was in folder Kts.No.141-18 - part V. The order for further investigation for these accused persons could also not be replaced by the prosecutor's statement about the existence of such an order."

Having considered the above, the Supreme Court:

"...returned the motion to the Special State Prosecutor's Office, including the two accompanying folders, and requested that the case files be provided containing the order for further investigation in respect of the accused persons, along with the evidence collected in the course of the investigation regarding the criminal offences that these accused persons have been charged with."

However, given that the requested case files were not provided by 6:30h on 30 October 2019, when the accused persons' detention expired, nor was the motion supplemented, which instead was done on 30 October 2019 at 15:20, after close of play, the Supreme Court rejected the motion for extension of detention, specifying the following:

"The Special State Prosecutor's Office supplied the requested case files and modified the motion for extension of detention after the accused persons' detention had expired under the last decision and after they had been released. Competent courts may issue decisions on extension of detention only if such detention had not already expired. The Supreme Court, therefore, was not able to extend the detention of the accused persons who, at the time of submission of complete case files and modified motion of the Special State Prosecutor's Office, and thus at the time such motion was being decided by this court, were at liberty, due to which there was no need for this court to examine the grounds of untimely submitted (that is, modified) motion for extension of detention".

In addition to that, time-limits for extension of detention were also taken into account in the case ***Kv.No.1101/18*** ruled on by the Basic Court in Podgorica:

"Under the decision of an investigating judge of the Basic Court in Podgorica Kri. no. 587/18 of 25 October 2018, detention of the accused E.M. was ordered under Article 448 § 1 (1) of the Criminal Procedure Code, on reasonable suspicion that he had committed the criminal offence of unlawful sexual acts from Article 208 § 1 in connection with Article 206 § 1 of the Criminal Code of Montenegro, for up to 30 days starting from the day and hour of his deprivation of liberty, i.e. from 21:05h on 22 October 2018. The detention of the accused was extended by the decision of this court Kv. no. 1016/18 of 16 November 2018, for the same criminal offence and on the same grounds. Considering that the accused E. M. is in detention, within the meaning of Article 448 § 3 in conjunction with Article 179 § 2 of the Criminal Procedure Code, this Panel has examined *ex officio* the

reasons for further detention and found it should be extended on the grounds for detention specified in Article 448 § 1 (1) of CPC."

Examples of detention re-examination conducted within the time-limits in Article 179 § 2 can also be found in decisions of the Basic Court in Podgorica, as illustrated by its decisions in cases ***Kv.No.1088/18***, ***Kv.No.1106/18*** and ***Kv.No.624/18***.

In its judgment rendered in the case of *Bigović v. Montenegro,* the European Court referred to previously established important principles requiring courts to give relevant and sufficient reasons for detention, in addition to the persistence of reasonable suspicion. Apart from assessing whether these reasons are "relevant" and "sufficient", courts must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings. In the case law of Montenegrin courts there are decisions which are compatible with the case law of the European Court in this regard.

For instance, the Supreme Court in its decision ***Kr.No.33/19*** dated 31 July 2019, rejecting the motion for extension of detention, reminded of the following:

"...reasonable suspicion that a person has committed a criminal offence constitutes a substantive requirement for ordering detention and it must be based on facts and evidence indicating the probability that the person concerned has committed such a criminal offence. In addition to persistence of reasonable suspicion, assessment must also be made of whether there are relevant and sufficient reasons for detention which arise from the obtained facts and information. Motions for detention, therefore, must state the facts substantiating the ordering or extension of detention, rather than merely citing the provisions of the Code allowing the ordering or extension of detention. Consequently, motions for extension of detention must give reasoning about the grounds on which such detention should be extended", while in this case, the Supreme Court finds the motion lacking "individualisation of grounds for detention, due to complete absence of the facts and evidence creating reasonable suspicion that the accused persons have committed the criminal offences they are charged with, or of relevant and sufficient facts justifying the persistence of the said detention reasons, which the motion must give, considering that decisions on extension of detention must not simply repeat the same reasons and that abstract formulations must not be used in the motion for extension of detention or in the decisions accepting such motions."

The Supreme Court in its decisions further reminds of the duty to take urgent action in detention cases. In that regard, in the case ***Kr.No.3/19,*** the Supreme Court took into account "special diligence" in the conduct of the proceedings and rejected a motion under Article 174 § 2 of CPC on account of failure to conduct the proceedings with urgency, while finding that there were no important reasons for extension of detention, for which it gave the following reasoning:

"In the present case, not only did the state prosecutor fail to act with special diligence, but also a complete absence was observed of any activity aimed at ensuring timely expert analyses and opinions, which, according to the expectations of the state prosecutor, would have enabled identification of accomplices in the commission of the criminal offence concerned. The state prosecutor thus proposed extension of detention on three occasions on account of possible influence that the accused could have on yet unknown accomplices who, in his assessment, should be identified by means of an IT expert analysis, while failing to take any action whatsoever to bring such analysis, which in the opinion of the Supreme Court is not a complex one, to an end and thus complete the investigation (...). The accused, who is currently in detention, is not to suffer the damaging consequences of unjustified delays in the proceedings caused by the state prosecution (which during the investigation is the sole responsible body for undertaking urgent activities to collect evidence, including analyses and opinions of court experts), resulting in his detention being extended to the extent which is other than reasonable or necessary. "

Similarly, when considering the motion for extension of detention in the case ***Kr.No.53/19,*** the Supreme Court stated the following:

"...it follows from the case files that a detention order was issued against the accused on 22 August 2019; on the same day the state prosecution ordered investigation, DNA analysis and chemical expert analysis. In the first thirty days of detention, state prosecution failed to take a single action to further resolve this criminal offence or potentially ensure psychiatric analysis to verify whether the accused is addicted to heroin, which he claimed when first heard by the prosecutor, as per minutes of the hearing dated 21 August 2019. The state prosecutor also failed to take any action whatsoever after the first one-month extension of detention until the submission of a new motion for extension. After the High Court in Podgorica for the second time extended detention on 16 October 2019, the state prosecutor did not take a single action until 13 November 2019, except for the two experts findings and opinions being received in that period (DNA analysis and chemical analysis, ordered on 22 August 2019)." Accordingly, the Supreme Court held that there were no grounds for extension of detention, also in view of the case law of the European Court "which, in the judgment delivered in the case of *Stögmmüller v. Austria* (...) observes that under Article 5 § 3 of the Convention, duration of detention must not exceed a reasonable time. In that respect, § 4 of the judgment reads, *inter alia*, that the Court: "... is led necessarily, when examining the question of whether Article 5 (3) has been observed, to consider and assess the reasonableness...of detention and ...this serious departure from the rules of respect for individual liberty." This further means, as it was indicated in § 5 of the same judgment, that "...under Article 5 (3) ... duration of detention must not exceed a reasonable time...and implies that there must be special diligence in the conduct of the prosecution of cases concerning detained persons."

In assessing the fulfilment of requirements for extension of detention in the case ***Kr.No.46/19,*** Supreme Court observed the following:

> "State prosecution proposes that detention be extended on account of the fact that investigation is still ongoing due to DNA analysis and opinion which are yet to be obtained. It follows from the case files, in accordance with the order for this expert analysis, that the determination of potential existence of biological material of the accused is sought to further clarify the facts and circumstances pertaining to the criminal offence of falsifying a document from Article 412 § 2 in connection with § 1 of the Criminal Code of Montenegro, punishable by imprisonment of three months to five years. Under Article 177 § 3 of CPC, following a substantiated motion of the state prosecutor, the Supreme Court may extend detention by a maximum of three months (after expiry of three months of detention) only in the case of criminal offences punishable by imprisonment of over five years. Given such legal provisions, it was not possible for the Supreme Court to further extend detention for the criminal offence of falsifying documents from Article 412 § 2 in connection with § 1 of the Criminal Code of Montenegro, the investigation of which is yet to be completed. The fact that the accused is also charged with the criminal offence from Article 300 § 1 of CC, punishable by imprisonment of two to ten years, had no impact on a different decision of this Court. The reason is that investigation pertaining to this criminal offence has already ended, given that the accused confessed that he had been transporting the narcotic drug marijuana, and his confession was corroborated by the findings and opinions of an expert in chemistry, the photos taken, the documents certifying the seizure of items, and the crime scene examination report. Finally, the state prosecution's motion also does not indicate the need to obtain any evidence on the basis of which circumstances would be potentially established for the criminal offence from Article 300 § 1 of CC. Therefore, there are no grounds for extension of detention of the accused under Article 177 § 3 of CPC, in a situation when the evidence and data to be obtained do not relate to the criminal offence punishable by imprisonment of more than five years. "

However, the Supreme Court has also based its decisions extending detention on the European Court standards. For instance, in the case ***Kr.No.45/19***, the Supreme Court finds the following:

> "The investigation could not be completed during detention for objective reasons. More precisely, in the present case investigation was ordered in respect of 9 accused persons, and then further expanded a number of times to include other persons, thus rendering the investigation process more complex, due to the number of both accused persons and pieces of evidence necessary to collect, for which reason it was not possible to end this stage of the process within the last three months, which is how long the accused D.V. has been detained at this time. The criminal offence of aggravated murder from Article 144 § 1 (1) of CC, which the accused D. V. is charged with, is punishable by imprisonment of at least ten years or by a long-term sentence (between thirty and forty years of imprisonment). The accused D. V. has relatives living abroad, in the Republic of Serbia. These facts, in the

assessment of the Supreme Court, despite the fact that the accused D. V. has three children, are indicative of the danger of the accused absconding and thus obstructing the criminal proceedings, as his relatives abroad could provide him with the logistics, and for which he could be motivated by the most severe penalty in the criminal legislation prescribed for the criminal offence he is charged with. Having considered the above, the Supreme Court finds the motion of the high prosecution justified, and extends detention of the accused on the grounds for detention from Article 175 § 1 (1) of CPC, for the criminal offence of aggravated murder. In this respect, the Supreme Court has also given consideration to the case law of the European Court, notably that the nature and severity of the penalty which could be imposed in the specific case on the specific perpetrator (*De Jong, Baljet and Van Der Bring v. the Netherlands,* 8805/79, 8806/79, 9242/81, 22 May 1984) and the existence of social contacts (personal and business) abroad that could facilitate the flight (*Punzelt v. the Czech Republic*, 31315/96, 25 April 2002), are the facts indicative of danger of absconding."

In the *Bigović* case*,* the European Court reiterated the principle that, under the Court's case-law, the issue of whether a period of detention is reasonable, cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. On that point, referring to the judgment rendered in another case before the European Court (Šuput v. Croatia, 49905/07 of 31 January 2011, § 106, 107 and 108) which also states that the criterion of gravity of the offence cannot be assessed *in abstracto*, in its decision ***Kr.No.26/19*** the Supreme Court finds the following:

"Taking into consideration the gravity of the criminal offence that the accused persons are reasonably suspected of having committed, expressed through the severity of the penalty prescribed by the law, and particularly aggravating circumstances of the offence reflected in the manner of commission of such offence, that the accused M.B.1. used a wood stake and the accused M.B.2. a wood pole to repeatedly hit the victim R.B. in his head and body, thus inflicting serious bodily injuries resulting in his death, while demonstrating persistence and ruthlessness for the purpose of committing the criminal offence concerned. The Court has also considered the circumstances under which the criminal offence took place, that the accused persons and the victim were neighbours, that they had not been talking to each other for unresolved property issues, so the circumstances stated above, taken as a whole, constitute relevant and sufficient reasons indicating that their detention should be extended on grounds for detention from Article 175 § 1 (4) of CPC, given that it is necessary to ensure unobstructed criminal proceedings, as suggested in the substantiated motion of the High Prosecutor's Office in BijeloPolje."

Other courts, too, have been relying on the case law of the European Court in respect of validity of reasons. Court of Appeals of Montenegro, for instance, in the case ***Kvž.No.65/19,*** applied the European Court case law standards, by observing the following:

"More precisely, the presumption of innocence is violated only if a judicial decision concerning the appellant reflects an opinion that he is guilty, before his guilt has been

proved according to law, and particularly if he was not given the opportunity to exercise his right to a defence, which is the stance taken in the case law of ECtHR (*Matijašević v. Serbia*, 23037/04 of 19 September 2006 and *Mugoša v. Montenegro*, 76522/12 of 21 June 2016). Considering the content of the contested decision, the first-instance court without any doubt did not state that the accused M.T. was the perpetrator of the criminal offences concerned, but that he was reasonably suspected of having committed the criminal offences he is charged with. Therefore, given that the first-instance court by the contested decision extended detention of the accused M.T. on account of grounds to suspect that he has committed the criminal offence he is charged with by the indictment of High Prosecutor's Office Kt.No. 196/18 of 23 November 2018, and due to persistence of reasons rendering the extension of detention of the accused justified on relevant grounds for detention, which reasons this Court fully accepts as sufficient and clear, such decision (the contested decision) of the first-instance court is found to be in accordance with law in its entirety."

A detailed reasoning on reasonable suspicion can be found in the decision extending detention in the case ***Kv.No.58/19*** before the High Court in Podgorica:

"More precisely, in the opinion of this Panel, the accused Đ.A. is reasonably suspected of having committed the criminal offence of unauthorised production, keeping and releasing for circulation of narcotics from Article 300 § 1 of CC, that he is charged with by indictment of the High Prosecutor's Office in Podgorica Kt.No.199/18 of 23 November 2018, which reasonable suspicion can be inferred from the evidence that the indictment above is based on, and particularly from the official report of the Police Administration – Border Police Regional Office "Centre", OGBTuzi No.480/18 of 28 October 2018, according to which authorised police officers, on 28 October 2018 at approximately 19:00h, while acting upon information obtained, spotted and attempted to stop at the intersection of roads to Dubrava and Vuksanlekići a black "BMW" wagon missing the rear registration plate, with one person in it, and the vehicle did not stop, so the authorised police officers again attempted to stop the vehicle on the road between Tuzi and Mataguži, nearby the "Trend" shop, but the vehicle again continued moving through the Vranj village and towards Zbelj, where the authorised police officers lost sight of the vehicle, and in their later search of the area in Zbelj they found a black "BMW" wagon missing the rear registration plate, but the with front plate PG----, with the lights turned on, driver's door open, rear wiper broken and visible damage, i.e. freshly scratched hood and roof of the vehicle, while two black PVC bags were found not far from the vehicle, closed by a duck tape, containing 30 packages of a dark green herbal substance, assumed to be the narcotic "marijuana". Reasonable suspicion is also inferred from the document confirming the seizure of items, issued by the Police Administration – Crime Police Sector – Narcotics Division Ku.No.848/18 of 30 October 2018, according to which authorised police officers on 30 October 2018, seized from Đ.A. 2 larger PVC packages (sacks) containing 30 smaller PVC packages of a dark green herbal substance, as well as a black "BMW" wagon, registration plates PG -----, the chemical analysis report of the

Forensic Centre in Danilovgrad No.4787/18 of 16 November 2018, according to which the provided herbal substance of total net weight 29930 originates from a plant with botanical name cannabis sativa, having over 0.2% of tetrahydrocannabinol content, the part of the statement of the accused where he did not dispute that on the day concerned he was driving the "BMW" wagon with two sacks, which is the fact that constitutes the basic requirement for ordering and thus extending detention against a person."

With respect to assessment of existence of the reasons for ordering detention and the principle of subsidiarity and proportionality, an example of conformity with the case law of the European Court could be the Supreme Court's case ***Kr-S.No.10/19*** and a relevant decision issued to extend detention, which states the following:

"This Court has taken into account the gravity of the criminal offences that the accused is charged with, expressed through the severity of the penalty prescribed by law, severity of the penalty which could be imposed on him if found guilty and the fact the accused is a national of the Republic of Serbia with permanent residence in Belgrade and a national of the Republic of Croatia with permanent residence in Makarska and that one of his children resides in Switzerland, which implies that the accused has social and family contacts outside the territory of Montenegro, that he could seek and get help from such contacts in fleeing and hiding if at liberty, and thus obstruct the conduct of the proceedings. The Court holds that the circumstances above, taken in their entirety, are indicative of danger of absconding by the accused if he were to be at liberty, so the extension of detention of the accused appears to be justified on grounds from Article 175 §1 (1) of CPC, as suggested in the substantiated motion of the Special Prosecutor's Office in Podgorica.

When deciding on further detention, while adhering to the principles of proportionality and subsidiarity, this Court takes into account that the accused has been detained since 20 August 2019, that the investigation, which is the initial stage of the criminal proceedings, is still ongoing, and assesses that in view of these and the circumstances above, detention in the present case appears to be the necessary and proportionate measure to ensure unobstructed conduct of the criminal proceedings, given that the purpose for which detention is extended cannot be achieved by a more lenient measure. In that regard, the Court gives particular consideration to certain circumstances of the present case indicating the danger of absconding, on account of which detention should be extended, and particularly because the accused (...) holds the citizenship of both Republic of Serbia and Republic of Croatia, while the extradition agreements between Montenegro and these countries fail to allow extradition of own citizens on charges of abuse of authority in economy and tax and contribution evasion. Additionally, this Court also takes into account the course of the investigation, involving complex and demanding work to collect evidence as well as the remaining such work, and therefore concludes that detention should be extended by two more months, as suggested by the Special Prosecutor's Office, while expecting that investigation will be completed within the period of such extension.

This Court holds that detention cannot be extended also on grounds from Article 175 § 1 (4) of CPC, as it was indicated in the motion for extension of detention. More precisely, under this provision detention would have to be necessary to ensure unobstructed conduct of the proceedings in the case of a criminal offence punishable by imprisonment of a minimum of ten years, which is particularly grave due to the manner of commission or its consequences. Therefore, in addition to the severity of the possible penalty, the circumstances related to the commission of the offence or its consequences are decisive, rather than other circumstances which are not related to the manner of commission or the consequences of the offence. Decisions on ordering of detention and its length on grounds of obstruction of criminal proceedings must be based on extraordinary circumstances. These circumstances, as such, are not included in the motion for extension of detention, as this motion only presents the facts which cannot be brought into connection with the manner of commission or the consequences of the criminal offences in question. Consequently, detention cannot be extended on the said grounds.

The assessment above is consistent with the case law of the European Court, which in the judgment delivered in *Letellier v. France* concluded that by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time and that only in exceptional circumstances this factor may be taken into account in so far as domestic law recognises the notion of disturbance to public order caused by an offence. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public order (12369/86, judgment of 26 June 1991, § 50). In an effort to conform to this standard, the Court finds that apart from the gravity of the offence that the accused is charged with, the motion for extension of detention fails to specify any exceptional circumstances justifying the extension also on this ground, set out in Article 175 § 1(4) of CPC. "

3.3. Article 6 – Right to a fair trial

Article 6
Right to a fair trial

1. In 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.

Fair trial is essential for the rule of law principle. The Court has developed an exceptionally rich practice related to this Article, considering the fact that applicants most frequently refer to this provision.[73]

Article 6 is related to both criminal and civil proceedings, and not only to the proceedings before the court, but also to the preceding and succeeding phases.[74] The complexity of this Article is reflected in the fact that it entails a range of guarantees: right to the access to the tribunal, independent and impartial tribunal established by law, fair proceedings, trial within a reasonable time, presumption of innocence, right to a defence, right to explained judgment, etc.

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73 *Article 6 of the European Convention on Human Rights – Right to a fair trial*, Handbook for Legal Practitioners, Interights.
74 *A guide to the implementation of the Article 6*, Nuala Moule.

The task of the Court is to examine whether the proceeding as a whole was fair and in compliance with the guarantees envisaged by this provision.[75]

In the reporting period, the European Court adopted a total of 10 judgments finding violations of Article 6. In the cases of *Rajak, Montemlin Šajo, Novaković and Others, Arčon and Others, Jasavić and Lekić*, the Court found violations of the right to a fair and public hearing within a reasonable time, while in the judgment *KIPS DOO and Drekalović*, the Court found at violation of Article 6 § 1 due to an excessive length of administrative proceedings.[76] Violation of Article 6 was identified in the judgment *Kešelj and Others*, as the enforcement of a final court decision was not ensured, and this resulted in the violation of Article 1 of Protocol No. 1. The right to access to a court was identified as violated in the judgments *Brajović and Others, Vujović and Lipad.o.o.*

3.3.1. Article 6 § 1 – right to a fair and public hearing within a reasonable time

Judgments related to the violation of Article 6 § 1 of the Convention due to an excessive length of domestic court and administrative proceedings still represent the greatest percentage of all adopted judgments of the European Court on annual basis. Taking into account the fact that these cases are repeated, the analysis of these judgments has been provided within a context of a group, not individual cases. Regarding the judgment in the case of *KIPS DOO and Drekalović v. Montenegro*, which among others identified the violation of Article 6 due to the length of administrative proceedings, analysis is provided in the part related to Article 1 of Protocol No. 1.

Judgments related to the violation of rights to reasonable length of civil proceedings

i. Analyses of the judgments

Rajak v. Montenegro (71998/11, judgment of 27 February 2018) – The applicant complained on the grounds of Article 6 of the Convention due to the non-enforcement of final domestic judgment related to the re-allocation of plots for the construction of apartments, the length of administrative proceedings and the length of separate civil proceedings concerning the applicant's reinstatement and damages. The applicant had several comparative proceedings, as follows:

- The civil proceedings: On 1 March 2012 the Herceg Novi First Instance Court rendered a judgment in favour of the applicant and ordered the applicant's employer "VektraBoka" AD Herceg Novi to carry out a reallocation of plots for the construction of apartments. This judgment became final on 21 December 2012 and remained unenforced in the enforcement proceedings instituted by the applicant.
- The administrative proceedings: On 8 February 2013 the applicant instituted administrative proceedings seeking, on the basis of the above judgment, the removal of competing titles

75 *Bernard v. France*, 1998.
76 See page 70 of this Document.

from the Land Register. However, at the time of deciding upon this application, the proceeding was still ongoing.

- The civil proceedings: On an unspecified day in 2003, the applicant instituted separate civil proceedings against the debtor, as his former employer, seeking reinstatement and damages. Following three remittals, on 3 March 2014, the Herceg Novi First Instance Court rendered a judgment in the applicant's favour, which was also upheld by the High Court. The Herceg Novi First Instance Court transferred the case to the Commercial Court for further action due to the commencement of the insolvency proceedings in respect of the debtor. The Commercial Court ruled partly in favour of the applicant regarding the costs.

In this case, the European Court repeated previously stated principles that the rationality of the length of a proceeding has to be estimated in the light of the circumstances of the case and with regards to the following criteria: complexity of the case, conduct of the applicant and relevant authorities, as it was the questionable issue of the applicant.[77] Examining the circumstances of the case, and taking into account related case law, the European Court assessed that, due to the lack of any justification, the length of the proceeding for more than twelve years and eleven months at two instances, was excessive and did not fulfil the "reasonable time" requirement. Accordingly, the Court decided that Article 6 § 1 was violated.

Montemlin Šajo v. Montenegro (61976/10, judgment of 20 March 2018) – The applicant complained on the grounds of Articles 6 and 13 of the Convention that the length of a tendering procedure was incompatible with the "reasonable time" requirement. The European Court assessed that the application should be examined only pursuant to Article 6 § 1 of the Convention.

The applicant was a bidder in a tender procedure launched for "Otrant" hotel in Montenegro. When the tender was awarded to another bidder, the applicant submitted an objection to this procedure before the Commercial Court of Montenegro, in December 2004. The Commercial Court dismissed the applicant's objection at first, then after the decision on rejection was quashed by the Court of Appeal of Montenegro in June 2006, it ruled against the objection of the applicant. This decision was served on the applicant in September 2009. On 26 March 2010, the Court of Appeal upheld the decision of the Commercial Court. In addition to this, the applicant lodged an initiative urging the Supreme Public Prosecutor's Office to file a request for the protection of legality, but this motion was rejected on 21 July 2010. On 30 July 2010, the applicant lodged a constitutional appeal. On 14 October 2010, the Constitutional Court rejected this appeal as having been lodged out of time.

The European Court emphasized that the proceeding in question lasted around five years and four months with two instances, while the case was not particularly complex that such length of the proceeding could be justified. Besides this, it was particularly emphasized that the first instance judgment was served to the company – applicant, approximately three years and three

77 *Frydlender v. France* [VV], 30979/96, § 43, ECHR 2000-VII).

months following its adoption, for which the Government failed to serve any justification. According to the assessment of the European Court, such delay of serving was obviously excessive, thus the violation of Article 6 § 1 of the Convention was identified.

Novaković and Others v. Montenegro (44143/11, judgment of 20 March 2018) - On 3 April 2001, the applicants lodged a civil claim with the Court of First Instance in Kotor seeking compensation for the property nationalized from their parents in 1948. On 16 July 2008, the Court of First Instance ruled against the applicants. On 2 October 2009, the High Court in Podgorica upheld the decision of the first instance court on appeal. On 19 January 2011, the Supreme Court of Montenegro rejected the applicants' appeal on points of law, which decision was served on the applicants on 15 March 2011.

The applicants complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention.

The Court observed that the proceedings in question took place between 3 April 2001 and 15 March 2011. However, the Court could only examine the period between 3 March 2004, when the Convention had entered into force in respect of Montenegro, and 15 March 2011, when the Supreme Court's decision was served on the applicants, that being a period of seven years at three levels of jurisdiction.

Having examined all the material submitted to it, the Court considered that the Government had not put forward any fact or argument capable of persuading it to reach a different conclusion in such case. Having regard to its case law on the subject, the Court considered that in the instant case the length of seven years at three levels of jurisdiction was excessive and failed to meet the "reasonable time" requirement.There was accordingly a breach of Article 6 § 1. The request of the applicants for just satisfaction was dismissed.

Arčon and Others v. Montenegro (15495/10, judgment of 3 April 2018) - At the relevant time all applicants were employed in Aluminium Plant Podgorica. On 4 November 2003, 5 November 2003, and 28 January 2004 the applicants brought separate civil claims against their employer in the First Instance Court in Podgorica, seeking payments of the difference between the salaries which they had received and those which they had allegedly been entitled to on the basis of the Collective Labour Agreement. On 7 March 2009, the first instance court in Podgorica joined and dismissed the applicants' cases. On 25 September 2009, the High Court upheld the decision of the first instance court.

The applicants complained that the length of the proceedings had been incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention.

Having regard to its case law on the subject in relation to the allegations of the applicants,[78]the Court considered that in the instant case the length of five and a half years at two levels of

78 *Stanković v.Serbia*, 29907/05, § 35, 16 December 2008

jurisdiction was excessive and failed to meet the "reasonable time" requirement. There was accordingly a breach of Article 6 § 1 of the Convention. Each applicant was awarded EUR 1,500 in respect of non-pecuniary damage.

Jasavić v. Montenegro (32655/11, judgment of 19 June 2018) - Between 3 December 2002 and 15 September 2003, the daily newspaper Dan published several articles about a human trafficking case in Montenegro, in which the applicant's name was mentioned in various contexts. On 22 October 2004, the applicant instituted civil proceedings against the publisher of the said newspaper, seeking compensation for non-pecuniary damage due to violation of his honour and reputation caused by the publishing of untrue information about him.

On 4 June 2010, following a remittal, the Podgorica First Instance Court ruled partly in favour of the applicant, ordering the publisher to pay the applicant EUR 8,000 in non-pecuniary damages and to publish the judgment in Dan, the daily newspaper in question. On 22 October 2010, the Podgorica High Court amended this judgment by awarding the applicant EUR 4,000 as compensation for the non-pecuniary damage suffered. On 7 April 2011, the Constitutional Court dismissed the applicant's appeal.

The applicant complained that the length of the civil proceedings at issue had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention.

The period took into consideration began on 22 October 2004 and ended on 29 November 2010. The impugned proceedings thus lasted six years, one month and seven days at two instances.

The Court considered that neither the complexity of the case nor the applicant's conduct explained the length of proceedings. The Government did not supply any explanation for the delay or provide any comment on this matter. Having examined all the material submitted to it and in view of its case law on the subject, the Court considered that, in the absence of any justification, the length of proceedings of more than six years at two levels of jurisdiction was excessive and failed to meet the "reasonable time" requirement. There was accordingly a breach of Article 6 § 1. The applicant was awarded EUR 1,500 in respect of non-pecuniary damage, less any amounts which may have already been paid in that regard at the domestic level.

Lekić v. Montenegro, (37726/11,judgment of 8 October 2018)– On 25 July 2000, the applicants' mother instituted civil proceedings against *Podgorička banka Societe Generale Group ad Podgorica* seeking the payment of her savings, which she had deposited with the respondent›s legal predecessor *Titogradska osnovna banka Titograd*. The applicants continued the above-mentioned proceedings in their mother's stead as she had passed away in the meantime.

The applicants complained that the length of the civil proceedings at issue had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention.

Having examined the circumstances of the case, the Court considered that neither the complexity of the case nor the applicants' conduct explained the length of proceedings of six years and nine months at three levels of jurisdiction. The Government did not supply any explanation for the delay or provide any comment on this matter. The European Court finally concluded that, in the absence of any justification, the length of proceedings was excessive and failed to meet the "reasonable time" requirement.

Judgments related to the breach of the right to reasonable length of administrative proceedings

KIPS DOO and Drekalović v. Montenegro (28766/06, judgment of 26 June 2018) - The applicants complained about the length of administrative and enforcement proceedings, the subject of which was the finalization of an urban plot, which was, according to the decision of administrative authorities, a prerequisite for the issuance of a building permit.

The Government claimed that the proceedings were complex, that several state authorities were involved and that the first applicant contributed to the length of the court proceeding. While assessing the justifiability of the length of the proceedings, the European Court started from permanent criteria and reiterated that the examination of a case after its remittal to the lower court instance may discover serious shortages in a court system of a state.[79]

In accordance with the permanent case law, the Court took the moment when the applicants lodged the appeal in administrative procedure[80] as relevant time for the beginning of the reasonable time and concluded that the proceedings lasted more than 11 years and 10 months, during which time the domestic bodies remitted the case seven times, and at the time of deciding upon the application, there were no information whether administrative proceedings ended in the meantime.

The Court did not consider it to be an issue of any exceptional complexity, nor did it consider that the applicants' conduct contributed to the length of the proceedings and that either of these two facts is a justification for such a procedural delay. Therefore it concluded that the length of the proceeding did not satisfy the "reasonable time" requirement.

Similar positions were taken in earlier decisions against Montenegro, such as for example *Stanka Mirković and Others v. Montenegro*[81] and Živaljević v. Montenegro.[82]

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79 *Pavlyulynets v. Ukraine*, 70767/01, § 51, 6 September 2005
80 *Počuča v. Croatia*, 38550/02, § 30, 29 June 2006.
81 *Stanka Mirković and Others v. Montenegro*, application 33781/15 and three others of 7 March 2017
82 *Živaljević v. Montenegro*, application 17229/04, of 8 March 2011

ii. Enforcement procedure

(a) Action plans/reports

The Government submitted one Action Report of 28 August 2018 to the Committee of the Ministers related the following judgments: *Rajak*, *Montemlin Šajo*, *Novaković and Others* and *Arčonand Others*.[83]Action Report related to the judgment *Jasavić v. Montenegro* was submitted on 27 September 2018[84], and related to the judgment *Lekić v. Montenegro* – on 18 February 2019.[85]

(b) Individual measures

Rajak v. Montenegro– In § 33 of the judgment, the Court stated that the proceedings in question ended on 22 February 2017 and accordingly the found violation of the Convention was terminated.

The applicant claimed EUR 107,859 in respect of pecuniary damage. He also claimed non-pecuniary damage, but left it to the Court's discretion as to the exact amount.The Court did not discern any causal link between the violation found and the pecuniary damage alleged and it therefore rejected this claim. Regarding non-pecuniary loss, Court considered it reasonable to award the applicant EUR 4,800 for non-pecuniary damage, plus any tax that may be chargeable. Due to an error in account number submitted by the applicant, the payment was executed with the delay of two days with regards to the deadline specified by the judgment of the Court. Default interest was very small (EUR 0.85) due to this delay and the applicant did not complain to the Court for the late payment, nor did he require the payment of default interest, and consequently such minor delay does not represent a significant issue.[86]

Montemlin Šajo v. Montenegro – In § 21 of the judgment, the Court stated that the proceeding in question ended on 27 April 2010.

The applicant submitted a claim for just satisfaction with regards to pecuniary and non-pecuniary damage. The Court did not discern any causal link between the violation found and the pecuniary damage alleged and it therefore rejected this claim. Regarding non-pecuniary loss, Court considered it reasonable to award the applicant just satisfaction in the amount of EUR 1,200 and this amount was paid to the applicant within the envisaged deadline.

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83 http://hudoc.exec.coe.int/eng?i=DH-DD(2018)832E

84 http://hudoc.exec.coe.int/eng?i=DH-DD(2018)953E

85 http://hudoc.exec.coe.int/eng?i=DH-DD(2019)216E

86 In the procedure of disbursement of just satisfaction ruled by the judgment of the European Court, it is not rare that a state, by its own guilt or the guilt of the applicants, exceeds the prescribed deadline and delays the disbursement for a few days. Such cases are not considered an important issue and in this regard the Committee of the Ministers held a position in certain cases: see for example Resolution CM/ResDH(2014)298 in case *Ormanciand Others v. Turkey* and Resolution CM/ResDH(2016)35 in case *Atanasović and Others v. FYR Macedonia*.

Novaković and Others v. Montenegro – In § 12 of the judgment, the Court stated that the proceedings in question ended on 15 March 2011. The applicants submitted the request for the compensation of pecuniary and non-pecuniary damage, but following the submission of the application to the Government, they failed to specify the related amount. Consequently, the Court did not rule any compensation nor did it find the existence of exceptional circumstances for a different decision.

Arčon and 15 Others v. Montenegro – In § 15 of the judgment, the Court stated that the proceedings in question ended on 25 September 2009.

The applicants required a just satisfaction with regards to pecuniary and non-pecuniary damage. The Court did not discern any causal link between the violation found and the pecuniary damage alleged and it therefore rejected this claim. Regarding non-pecuniary loss, the Court awarded each of 15 applicants the amount of EUR 1,500.

Jasavić v. Montenegro –In § 23 of the judgment, the Court stated that the proceedings in question ended on 29 November 2010.

The applicant required the compensation of non-pecuniary damage, and left it to the Court to decide about its amount. On these grounds, the Court awarded the applicant EUR 1.500. The applicant did not require the compensation of pecuniary damage.

Lekić v. Montenegro – The proceeding in question which was the subject of the application ended on 5 December 2010 (§ 23 of the judgment *Lekić*).

The applicants submitted a request for just satisfaction in terms of pecuniary and non-pecuniary damage. The Court did not discern any causal link between the violation found and the pecuniary damage alleged and it therefore rejected this claim. However, the Court awarded another applicant (the widow of the first applicant who continued the proceedings before the Court following the death of the first applicant) only the compensation of non-pecuniary damage in the amount of EUR 900.

(c) General measures

In the enforcement of these judgments, the Government reminded of the measures taken with the aim of preventing excessive length of civil proceedings, and on the introduction of effective legal remedies within the enforcement of *Stakić group* cases.[87]

The Government emphasized that the circumstances which led to the violation of the Convention incurred before the effective domestic legal remedies became available to the applicants, i.e. before the European Court proclaimed them as effective, such as: request for review (of 4 September 2013), claim for just satisfaction (of 18 October 2016) and

87 http://hudoc.exec.coe.int/eng?i=DH-DD(2016)1252E

constitutional appeal (of 20 March 2015). These remedies were not available to the applicants in specific cases.

Taking into account the previous fact, the Government considered that additional general measures were not necessary.

All judgments were translated and published in the "Official Gazette of Montenegro". The representative submitted the judgment with a special analysis on found violations to competent courts before which the proceedings in question were conducted.

(d) Resolution of the Committee of Ministers

On 3 October 2018, the Committee of Ministers, at the 1326th meeting of the deputy ministers, adopted the Resolution CM/ResDH(2018)365[88] by which the cases *Rajak*, *Montemlin Šajo*, *Novaković and Others* and *Arčon and Others* were terminated. On 12 December 2018, the Committee of the Ministers adopted the Resolution CM/ResDH(2018)450[89] and terminated the case *Jasavić*, while the case of *Lekić* was terminated on 27 March 2019 by the Resolution CM/ResDH(2019)64.[90]

iii. Relevance to Montenegrin case law

One of the jurisdictions of the Supreme Court of Montenegro is to rule on claims for just satisfaction. In judgments in which these claims are decided upon, the Supreme Court of Montenegro applies the standards of the European Court in terms of the trial within a reasonable time, referring to the distinguished judgments in this area[91], but also to the recent practice of the Court, the one related to Montenegro. Thus, the Supreme Court of Montenegro in its judgments presents general principles, which are then applied to specific facts of the case, emphasizing that it took into account holistic approach during the decision-making process. In this way, it follows the practice of the European Court which considers all the criteria developed in its case law, which are decisive for assessing whether there is a violation of right to a trial within a reasonable time (complexity of the case, importance of the subject of the case, conduct of the parties and state authorities), which is followed by an overall assessment.

Thus, the Supreme Court said the following in its judgment in the case of ***Tpz. 37/19***:

> "Pursuant to Article 4 of the mentioned law, when deciding upon legal remedies for violations of the right to a trial within a reasonable time, what is particularly taken into account is the complexity of cases in terms of facts and law, conduct of the applicant, conduct of the court and other state authorities, as well as what is at stake for the

88 http://hudoc.exec.coe.int/eng?i=001-187044
89 http://hudoc.exec.coe.int/eng?i=001-188853
90 http://hudoc.exec.coe.int/eng?i=001-192435
91 *Frydlender v. France* (GC) 30979/96 § 43-2000/VII in cases Tpz.no. 16/17

applicant, pursuant to the case law of the European Court of Human Rights (judgment *Novović v. Montenegro,* 13210/05, 23/10/2012, p.49).

Starting from the mentioned criteria, and pursuant to recent case law of the European Court (*Arčon and Others v. Montenegro*, 15495/10; *Montemlin Šajo v. Montenegro*, 61976/10), the Supreme Court applied a holistic approach in the specific case.

The case files indicate that the plaintiff B. P., in the capacity of the injured party as the plaintiff, on 25/09/2017 submitted to the First Instance Court in Herceg Novi a claim against a foreign citizen T. E. E., due to the extended criminal offence of perjury referred to in Article 389 § 2 in conjunction with Article 49 of the Criminal Code of Montenegro, building a facility without a building permit referred to in Article 326a of the Criminal Code of Montenegro and destroying and damaging another's property referred to in Article 253 § 1 of the Criminal Code of Montenegro, and that in the meantime, by the motion of 22/10/2018, the attorney of the injured party as the plaintiff gave up the claim with regards to the first two criminal offences, and pursued the claim for the criminal offence referred to in Article 253 § 1 of the Criminal Code of Montenegro. The court scheduled the main hearing five times, starting from 19/02/2018 to 08/04/2019, and it is obvious that there were no assumptions satisfied to schedule any of the main hearings. Therefore, the main hearing did not begin until the submission of the bill of indictment in the mentioned criminal proceeding until the submission of the claim in this legal matter, i.e. for the period of one year and nine months. This means that in this period effective procedural actions were not taken, which may lead to the acceleration of the court proceedings, while the absence of the development of the court proceeding in the specific case is exclusively the responsibility of the court, as the plaintiff in no way contributed to the prolongation of the proceeding, and it cannot be said that the defendant avoided to attend the main hearings, as he appeared to the main hearings and was ready to attend the latest scheduled hearing, despite the fact that he is a foreign citizen.

Regarding the mentioned circumstances, the opinion of the Supreme Court is that the period from the submission of the bill of indictment of the injured party as the plaintiff up to the day of the respective claim is characterized by the lack of adequate activity of the court, which resulted in the prolongation of solving the case within the period of one year and nine months, and which led to the violation of the right of the plaintiff to trial within a reasonable time. It is worth reminding that the European Court in the case *Napijalo v. Croatia*, 66485/01, § 61, found that the lack of activity of the court in two periods of 20 months in total leads to the violation of rights to trial within a reasonable time.

The claim excessively emphasizes the importance of the mentioned criminal proceedings for the plaintiff, by stating that the "interest of the applicant is enormous, considering the fact that by the described action of the first-instance court, the applicant is rejected in the exercise of a legal protection, related to his property". The consequence of this is according to this court, the interest of the plaintiff for the termination of the criminal proceedings under no circumstances exceeds a regular interest of the injured party as the plaintiff when instituting

the procedure of criminal prosecution, and regarding the specific case it is certain that the plaintiff is neither prevented in taking over the measures of legal protection of his property, which rather belong to civil court proceedings, nor the claim contains detailed reasons about it, which was expected considering the fact that the injured party as the plaintiff, in the meantime, gave up criminal prosecution in significant part."

Similarly to this, in case ***Tpz. 34/19***, the Supreme Court of Montenegro referred to general principles further elaborated in the light of specific circumstances:

> "Deciding upon the amount of the claim, the Supreme Court started from the provision of Article 4 of the Law on the Protection of Right to Trial within a Reasonable Time, which prescribes that during the ruling about the claim for just satisfaction (not only about its justifiability, but also about the amount of the specified claim), the complexity of the case is particularly taken into account, as well as the conduct of the claimant, conduct of the court and other state authorities, and the interest of the claimant. Such approach is in compliance with the case law of the European Court of Human Rights (hereinafter: the Court) which in several decisions, as well as in the judgment *Arčon v. Montenegro*, 15495/10, § 16, emphasized that the rationality of the length of proceedings, and accordingly the just satisfaction are "assessed in the light of the circumstances of a case and with regards to the following criteria: complexity of a case, conduct of applicants and relevant state authorities, as it was disputable question for the applicant (see, among many other authorities *Frylender v. France* (GC) 30979/96, § 43, 2000/ VII)". Starting from the mentioned criteria, and in compliance with the recent case law of the Court (*Arčon and Others v. Montenegro*, 15495/10; *Montemlin Šajo v. Montenegro,* 61976/10), the Supreme Court had a holistic approach in this particular case."

Reference to the recent case law of the Court against Montenegro, i.e. judgments *Arčon v. Montenegro,* 15495/10 of 3 April 2018 and *Montemlin Šajo v. Montenegro*, 61976/10 of 20 March 2018, is also present in the following judgments: ***Tpz.14/19***, ***Tpz.31/19*** and ***Tpz.42/19***.

The Supreme Court of Montenegro, when deciding upon the claim for just satisfaction due to the violation of the right to a trial within a reasonable time, takes into account the positions stated in the case of *KIPS DOO and Drekalović v. Montenegro,* both regarding the criteria relevant for the assessment of the justification of the length of proceedings, and also for the time of the beginning of calculation of a reasonable time in administrative cases, in which a civil right or obligation are decided upon.

Thus, in the judgment ***Tpz.58/19***, the Supreme Court stated the following:

> "...The Supreme Court started from the provision of Article 4 of the Law on the Protection of the Right to Trial within a Reasonable Time which prescribes that during the ruling about the claim for just satisfaction (not only about its justifiability, but also about the amount of the specified claim), the complexity of the case is particularly taken into account, as well as the conduct of the claimant, conduct of the court and other state

authorities, and the interest of the claimant.Such an approach is in compliance with the case law of the European Court of Human Rights (hereinafter: the Court) which in several decisions, as well as in the judgment *Arčon v. Montenegro*, 15495/10, § 16, emphasized that the rationality of the length of proceedings, and accordingly the just satisfaction are "assessed in the light of the circumstances of a case and with regards to the following criteria: complexity of a case, conduct of applicants and relevant state authorities, as it was disputable question for the applicant (see, among many other authorities *Frydlender v. France* (GC) no. 30979/96, § 43, 2000/VII)".

Starting from the mentioned criteria, and pursuant the recent case law of the Court (*Arčon and Others v. Montenegro*, 15495/10; *Montemlin Šajo v. Montenegro,* 61976/10), the Supreme Court applied a holistic approach to this particular case.

In this respect, the Supreme Court took into account that the period that should be considered in the specific case, in compliance with the case law of the European Court, started on 03/01/2014, when the plaintiff for the first time lodged a claim against the conclusion of the first instance administrative authority No.954-109-UP/1-3100/1-2013 of 23/12/2013, since when it is considered that the dispute incurred in relation to the civil right of the plaintiff. Namely, in the judgment Živaljević v. Montenegro (17229/04, judgment of 08/03/2011), the European Court emphasized in § 72 *inter alia*: "The period that should be taken into account begins on the day when the applicants lodged an appeal against the decision made in the first instance."

3.3.2. Article 6 § 1 – Enforcement of the judgment

Kešelj and Others v. Montenegro

Application no. 33264/11
Judgment of 13 February 2018

i. Analysis of the judgment

In this judgment, the Court found that Article 6 of the Convention and Article 1 of Protocol 1 to the Convention were violated and clearly reiterated previously expressed position that the state was obliged to ensure the enforcement of final court decisions concerning companies undergoing restructuring, privatization and/or other forms of transition from a planned to a market economy.

(a) Facts

In this case, 10 applicants, the citizens of Bosnia and Herzegovina complained about the non-enforcement of final court settlement concluded in the favour of the applicants.

The applicants are the aggrieved passengers from a traffic accident caused by a driver of bus vehicle JSP "Tara" Cetinje in which they were at the time of the accident. On 28 February 1996, the applicants and the debtor (JSP "Tara" Cetinje) reached a court approved settlement before the Cetinje Municipal Court, whereby the debtor undertook to pay the applicants specified amounts in respect of pecuniary and non-pecuniary damage and such settlement became final on the same day. On 26 May 1997, the Podgorica Commercial Court opened insolvency proceedings against the debtor and acknowledged the submitted claims of the applicants. However, such settlement remained partially unenforced.

(b) Relevant principles

The Court reminded of its practice of identifying the violation of Article 6 of the Convention and/or Article 1 of Protocol No. 1 to the Convention in cases which initiate the issues similar to those from this case, particularly in cases related to the companies undergoing restructuring, privatization and/or other forms of transition from a planned to a market economy.[92]

(c) The Court's assessment

The Court found that Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention were violated and held that the respondent State was to pay the applicants, from its own funds and within three months from the date on which the judgment becomes final, the sums awarded in the court settlement of 28 February 1996.

ii. Judgment enforcement procedure

(a) Action plan/report

The Government submitted to the Committee of Ministers the Action Report of 12 September 2018.[93]

(b) Individual measures

Individual measures the Government was obliged to conduct concerning the applicants were specified in the judgment of the Court which found that Montenegro had to pay to the applicants the amount specified in the final court settlement of 28 February 1996, less any amounts which may had already been paid on this basis. As regards the claim for statutory interest, the Court noted that no statutory interest was awarded in the said settlement and it therefore rejected the applicants' claims in this respect (§ 33 of the judgment). In accordance with the above-mentioned, on 9 May 2018, the Ministry of Finance paid EUR 24.062,51 to

92 See *R. Kačaporand Others v. Serbia*, 2269/06 and 5 others, §§ 115-116 and 120, 15 January 2008, *Crnišanin and Others v. Serbia*, 35835/05 and 3 others, §§ 123-124 and 133-134, 13 January 2009 and *Mijanović v. Montenegro*, 19580/06, §§ 81-82 and 86-91, 17 September 2013

93 http://hudoc.exec.coe.int/eng?i=DH-DD(2018)886E

the applicants in relation to non-pecuniary damage and the amount specified by final court settlement of 28 February 1996. The applicants did not ask for the compensation of pecuniary damage, so it was not decided about.

(c) General measures

The measures taken with the aim to increase the efficiency of enforcement procedure regarding the decisions brought against social companies, were taken in the context of the case *Mijanović.*[94]The most important measure taken was reflected in the adoption of the new Law on Enforcement and Security in July 2011, i.e. appointment of public enforcement officers and check of enforcement of domestic court decisions, including those brought against social companies. The only exception in the procedures conducted by public enforcement officers are those with an exclusive court jurisdiction.

The Government took certain general measures conducted with the aim of preventive action, such as dissemination of the mentioned judgment to the authorities which took part in the proceedings implemented on the national level, and which led to the violation of rights specified in the judgment. The respective judgment was translated and published in the "Official Gazette of Montenegro", as well as on the website of the Supreme Court of Montenegro.

In addition to this, certain "raising awareness" measures were taken, particularly aimed at public enforcement officers, so as to make them pay attention to similar cases which they possibly may tackle in their further work. In 2017 and 2018, the Training Centre in Judiciary and State Prosecution conducted a certain number of trainings with the aim of training public enforcement officers with regards to the implementation of the Law on Enforcement and Security.

(d) Resolution of the Committee of Ministers

On 17 October 2018, the Committee of Ministers at its 1327th meeting of deputy of ministers adopted ResolutionCM/ResDH(2018)387, by which this case was closed.[95]

94 See Resolution CM/ResDH(2016)201

95 http://hudoc.exec.coe.int/eng?i=001-187493

3.3.3. Article 6 § 1 – Right of access to a court

Brajović and Others v. Montenegro

Application no. 52529/12
Judgment of 30 January 2018

i. Analysis of the judgment

In this case, the European Court found the violation of the right to access to a court as the applicants were deprived of the possibility that their civil claim would be considered.

(a) Facts

Six applicants complained on the basis of Article 6 of the Convention about the violation of the right to access to a court given that the Court of Appeal had not ruled on their appeal on costs in criminal proceedings. The applicants intervened, as injured party, in criminal proceedings against X, in the course of which they obtained EUR 2.705,70 as the compensation for legal costs.

On 14 October 2008, the High Court in Podgorica found X guilty and ordered him to pay the applicants EUR 505.70 for the costs of legal representation, without specifying what exactly was covered by this amount.

The applicants submitted appeals to the Court of Appeal related to the decision on the costs of the proceeding, however the Court of Appeal failed to decide upon these appeals.

(b) Relevant principles

The Court reiterated that the relevant principles in this regard were set out in a long line of case law starting with *Golder v. the United Kingdom,*[96] which specifies that Article 6 § 1 "*secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal.*"[97] This "right to a court", of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his or her civil rights is unlawful and complains that no possibility was afforded to submit that claim to a court meeting the requirements of Article 6 § 1.[98] The right to a court includes not only the right to institute proceedings, but also the right to obtain a determination of the dispute by a court.[99] Finally, the Court reiterates that Article 6 § 1 does not compel the States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is

96 *Golder v. United Kingdom*, 21 February 1975, § 36, Series A, no. 18
97 See Golder, cited above, § 36
98 See inter alia *Roche v. United Kingdom* [VV], 32555/96, § 117, ECHR 2005-X
99 See, for example *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 51, Series A, no. 43; *Kutić v. Croatia*, 48778/99, § 25, ECHR 2002-II; *Menshakova v. Ukraine*, 377/02, § 52, 8 April 2010; *Fălie v. Romania*, 23257/04, § 22, 19 May 2015; *Lupeni Greek Catholic Parish v. Romania* [VV], 76943/11, § 86, ECHR 2016 (excerpts); i *Kardoš v. Croatia*, 25782/11, § 48, 26 April 2016

required to ensure that persons amenable to the law shall enjoy before them the fundamental guarantees contained in Article 6 of the Convention.[100]

(c) The Court's assessment

Applying the mentioned principles to the present case, the Court firstly noted that the applicants' costs-related claim clearly fall within the scope of Article 6 § 1.[101]

It is further observed that the relevant provision of the Criminal Procedure Code in force at the time clearly entitled an injured party to lodge an appeal against the first-instance judgment relating to the costs, which included the costs and fees of their representative.The applicants claimed, and the Government did not contest, that the Court of Appeal had actually never ruled on such an appeal filed by the applicants as injured parties.

Lastly, no information had been submitted to the Court in which the Court of Appeal itself acknowledged that the applicants' appeal remained under consideration. In such circumstances, the Court considered that the applicants had been effectively deprived of having their civil claim determined by a tribunal, within the meaning of Article 6 § 1 of the Convention[102] and accordingly, there was a violation of Article 6 § 1 of the Convention.

ii. Enforcement procedure of the judgment

(a) Action plan/report

The Government submitted to the Committee of Ministers the Action Report of 28 September 2018.[103]

(b) Individual measures

During the proceedings before the European Court, the applicants failed to submit a claim for just satisfaction, so the Court did not award it to them. Besides this, the applicants had an opportunity to file a claim for the reopening of the proceedings in compliance with Article 428a of the Law on Civil Procedure, which they failed to use. In this respect, the Government was not bound to take over additional individual measures concerning the applicants.

(c) General measures

The Court observed in the present judgment that relevant provisions of the Criminal Procedure Code in force at the time clearly entitled an injured party to lodge an appealagainst the

100 See, among other auhtorities, *Delcourt v. Belgium*, 17 January 1970, § 25, in fine, Series A, no. 11, and *Kudla v. Poland* [VV], 30210/96, § 122, ECHR 2000-IX

101 See mutatis mutandis, *Editions Périscope v. France*, 26. March 1992, § 40, Series A, no. 234-B

102 See, mutatis mutandis, *Kardoš v. Croatia*, 25782/11, §§ 47-58

103 http://hudoc.exec.coe.int/eng?i=DH-DD(2018)952E

first-instance judgment relating to the costs, however the Court of Appeal had actually not ruled on such an appeal filed by the applicants as injured parties in the proceeding (§ 49 of the judgment). Consequently, the violation of the right of applicants stemmed from the lack of alignment of the case law of the Court of Appeal of Montenegro with clear legal regulations. Considering the fact that this situation is an isolate case, and similar applications are not the subject of the proceedings before the European Court, the Committee of Ministers accepted the argument of the Government submitted in the Action report that this is an isolate case, as well as the fact that the Criminal Procedure Code envisages relevant legal provisions in this respects, which facts were sufficient for the Committee of Ministers to close this case.

General measures taken in this case are reflected also through the procedure of judgment dissemination. Namely, this judgment was translated, sent to all authorities which participated in the proceedings which led to the identification of the violation of a right of the Convention, and it is published in the "Official Gazette of Montenegro", as well as on the website of the Supreme Court of Montenegro. In addition to this, through the Horizontal Facility of the Council of Europe for Western Balkans and Turkey and through the programmes of the Training Centre in Judiciary and State Prosecution, there were numerous trainings, workshops and seminars where the presenters had an opportunity to analyse the standards established by the European Court in this judgment.

(d) Resolution of the Committee of Ministers

On 6 December 2018, the Committee of Ministers at its 1331st meeting of the deputy ministers adopted Resolution CM/ResDH(2018)435 by which this case was closed.[104]

iii. Relevance to Montenegrin case law

The circumstances of the case of *Brajović and Others* represent an isolate case and similar applications were not the subject before the European Court. In favour of this is the previous case law of the Supreme Court of Montenegro in case ***Tpz.18/17***, in which the Supreme Court considered a claim for the compensation of costs in criminal proceedings a civil right to which the guarantees of a fair trial are applied. In that case, the Supreme Court ruled upon the claim for just satisfaction due to the violation of the right to a trial within a reasonable time and previously examining the admissibility of the claim in the judgment of 06/06/2017 stated the following:

> "...regarding the admissibility of the claim from the perspective of *ratione materiae*, i.e. the response to the question whether the plaintiff in the specific case has the right to court protection due to the violation of the right to a trial within a reasonable time, this court found that the position of the presidents of the first-instance and second-instance courts, expressed in the request for review, i.e. in the ruling upon the appeal against such ruling, that court protection of the right to a trial within a reasonable time

104 http://hudoc.exec.coe.int/eng?i=001-188830

belongs to the defendant in the criminal proceedings, but not in the situation when it is decided upon the claim for the compensation of the costs of proceedings, does not have valid justification in Article 2 of the Law on the Protection of Right to Trial within a Reasonable Time and Article 6 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The provision of Article 2 § 2 of the Law on the Protection of Right to Trial within a Reasonable Time prescribes that the right to a court protection and the length of the reasonable time shall be determined in compliance with the case law of the European Court of Human Rights.

In the judgment *Moreira de Azavedo v. Portugal,* 11296/84 of 23/10/1990, p. 66, the European Court stated that the guarantees referred to in Article 6 of the Convention shall be applied also to the proceedings for damages incurred in criminal proceedings. In this §, the Court stated that the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 § 1 of the Convention, and that particular case was related to the specification of a right and the result of the proceeding was decisive for such right.

In compliance with the case law of the European Court of Human Rights, the guarantees of a fair trial shall be applied also in the proceedings between an individual and the state, particularly when the subject of such proceedings is property.

Under the term property the European Court also entails the claim whose applicant may state that they have a "legitimate expectation" that such claim will be fulfilled - judgments *Presos company Naviera v. Belgium* A 332 (1995) and *Pine Valley Developments and Others v. Ireland* A 222 (1991). In this respect the claim is regarded as a property when it is sufficiently determined that it can be fulfilled.

Adhering to the mentioned position, this Court took into account that the claim of the defendant for the compensation of the costs of criminal proceeding, finalized by the judgment by which the accusation is rejected, is grounded in the provision of Article 230 § 1 of the Criminal Procedure Code and in the provisions of Attorneys' tariffs. Therefore the claim of the plaintiff in the specific case is determined to the extent that it can be fulfilled and it shall be regarded the property as the civil right, as a consequence of which the plaintiff was entitled to submit legal remedies for court protection due to the violation of the right to a trial within a reasonable time. Accordingly, the claim for just satisfaction of the plaintiff M. K. is allowed."

The same position was adhered to in the judgment of the Supreme Court of Montenegro ***Tpz.65/18*** of 29/01/2019.

Vujović and Lipad.o.o. v. Montenegro

Application no. 18912/15
Judgment of 20 February 2018

i. Analysis of the judgment

The applicants complained about the lack of access to court in that the Court of Appeal refused to examine on the merits of their appeal. They complained about the violation of the right to a fair trials referred to in Article 6 of the Convention and the lack of efficient legal remedy in terms of Article 13 of the Convention, as well as about the violation of Article 1 of Protocol No. 1, i.e. the violation of the right to property of the first applicant caused by it.

The Court found that the application shall be examined only on the basis of Article 6 § 1 of the Convention.

(a) Facts

The first applicant is the sole owner and the executive director of the second applicant.

In the proceedings opened in respect of the second applicant before the Commercial Court of Montenegro, insolvency proceedings were instituted to which decision the second applicant lodged an appeal.

The Court of Appeals in Podgorica rejected the appeal as having been submitted by an unauthorized person, given that the lawyer had not been appointed by the insolvency administrator. The court relied on Articles 75 and 76 of the Insolvency Act. This decision was served on the applicants on 17 April 2014. On this matter, allegedly, there was a different case law of the Court of Appeal. Thus in the period between June 2012 and September 2014, the Court of Appeal ruled on the merits of numerous appeals lodged by other insolvency debtors against the decisions on opening of insolvency proceeding, while in 2015, the Court of Appeal dismissed two appeals submitted by insolvency administrators based given that the lawyers had not been appointed by the insolvency administrator.

(b) Relevant principles

The Court reiterated that 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 have to be complied with, inter alia, by ensuring to litigants an effective access to the courts for the determination of their "civil rights and obligations".[105]The right of access to 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

105 See, among many other authorities, *Levages Prestations Services v. France*, 23 October 1996, § 44, Reports of Judgments and Decisions 1996-V, and *Poitrimol v. France*, 23 November 1993, §§ 13-15, Series A no. 277-A

time and in place according to the needs and resources of the community and of individuals.[106]

(c) The Court's assessment

Examining the circumstances of this case, the Court noticed that the Court of Appeal consistently examined the merits of the appeals lodged by insolvency debtors until the appeal of the applicants. Consequently, the Court observed that the fact that the applicants lost the possibility to use the legal remedy for which they reasonably believed to have been available, led to the non/proportionate obstacles, and accordingly it found the violation of Article 6 § 1 of the Convention.

The Court noticed that Article 33 of the Law on Insolvency does not explicitly envisage the duty of insolvency administrator to lodge an appeal.

Although the applicants complained that their property was endangered due to the action of the Court of Appeal, the European Court found that it cannot be predicted what the situation would have looked like if the applicants had had an effective access to court. Pursuant to this, the Court stated that it did not consider it necessary to rule about the appeal of the applicants based on Article 1 of Protocol No. 1.

ii. Enforcement procedure of the judgment

(a) Action plan/report

The Government submitted to the Committee of Ministers the Action Report of 20 December 2018.[107]

(b) Individual measures

Regarding individual measures taken in this case, the applicants submitted to the Court of Appeal, in compliance with Article 428a of the Law on Civil Procedure, a proposal for the reopening of the proceedings. Article 428a of the Law on Civil Procedure prescribes when the European Court of Human Rights establishes violation of basic human rights and fundamental freedoms guaranteed by the Convention, the party may, within three months from the final judgment of the European Court of Human Rights, submit a request to the court in the Republic of Montenegro, which judged in the first instance in the case where a decision that violates human rights and fundamental freedoms was made, to change the decision by which that right or fundamental freedoms were violated, if committed violation cannot be removed in any other way except by the reopening of proceedings.

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106 *Stanev v. Bulgaria* [GC], 36760/06, § 230, ECHR 2012.
107 http://hudoc.exec.coe.int/eng?i=DH-DD(2018)1258E

The Court of Appeal of Montenegro adopted the proposal for the reopening of the proceedings and cancelled disputable ruling of that court Pž. 209/14 of 18/03/2014. In the reopened proceedings, the Court of Appeal ruled on the appeal related to the ruling on the opening of insolvency proceedings over the company "Lipa" DOO Cetinje, in a way that the appeal was dismissed as ill-founded, while the first-instance ruling of the Commercial Court related to the opening of insolvency proceedings over the company "Lipa" DOO Cetinje St. 228/13 of 27 December 2013 was confirmed.

Just satisfaction in respect of non-pecuniary damage was paid to the applicants within the envisaged deadline. Their claim related to pecuniary damage was dismissed, as the Court did not find a causal link between the established violation and the alleged pecuniary damage.

(c) General measures

Starting from the fact that the applicants' right to the access to court was violated and that it was caused by the dismissal of their appeal by the Court of Appeal, the Court established in its judgment that Articles 32 and 776 of the Insolvency Act, in force at that time, provided that once the insolvency proceedings were opened all rights in respect of company representation were transferred to the insolvency administrator and that he or she represented the insolvency debtor (§ 41 of the judgment).

However, the Court noted that the legislator considered that Article 76 was not proportionate given that in 2016 it was amended so as to preserve the right of the executive director of the company and/or its representative to file an appeal against a decision to open insolvency proceedings (§ 43 of the judgment).

These facts, stated by the European Court, were used by the Government as an argument presented in the Action report submitted to the Committee of Ministers. Previously mentioned amendments to law were fully accepted and regarded as sufficient with the aim of preventive action and prevention of violations on similar grounds.

Good practice of dissemination of judgments was also continued in this case. The judgment was forwarded to all authorities which participated in the proceedings implemented on the national level, and it was translated and published on the website of the Supreme Court of Montenegro, as well as in the Official Gazette of Montenegro, and concerning preventive action, there were many trainings and workshops held for judges and prosecutors, at which, among others, attention was drawn to the statements of the European Court in the specific case.

(d) Resolution of the Committee of Ministers

On 30 January 2019, the Committee of Ministers at the 1335th meeting of the deputy ministers adopted Resolution CM/ResDH(2019)22, by which the case was closed.[108]

iii. Relevance to Montenegrin case law

Following the adoption of the judgment *Vujović and Lipa DOO v. Montenegro,* as mentioned above in the part related to enforcement procedure, the Court of Appeal of Montenegro adopted the proposal for the reopening of the proceedings and cancelled disputable ruling of that court Pž.209/14 of 18/03/2014. In the reopened proceedings, the appeal to the ruling on the opening of insolvency proceeding was dismissed as ill-founded, while the ruling of the Commercial Court related to the opening of insolvency proceedings over "Lipa" DOO Cetinje St.228/13 of 27 December 2013, was confirmed. The Supreme Court of Montenegro dismissed the request for review as, pursuant to the provision of Article 19 § 8 of Insolvency Act, a review cannot be lodged.

This judgment of the European Court is also interesting from the aspect of the access to a court, as the Court found that the dismissal of the appeal of one of the owners of the company undergoing insolvency, aimed against the ruling on the opening of insolvency proceedings, led to the violation of the right to access to a court. The issue of real legitimacy for the opening of the proceedings before courts and other state authorities in the cases of companies will be further considered within the analysis of the judgment *KIPS DOO and Drekalović v. Montenegro.*[109]

Adhering to the standards in the judgment of the case *Vujović and Lipa DOO v. Montenegro,* the Supreme Court of Montenegro, in the case ***Rev Ip.102/18*** indicated the following:

> "....to those who requested a review that it did not have importance on different decision making in terms of the principal matter, the reference to the judgment of the European Court of Human Rights *Vujović and Lipa DOO v. Montenegro*, 18912/15, 20 February 2018. The reason for this is the fact that the judgment is related to the right of lodging an appeal to the ruling by which insolvency proceedings were opened. As the subject of decision making in this civil proceeding is the secured right of the plaintiff and the cancellation of the Mortgage Contract and its Annex (as explained above), it is clear that this judgment of the European Court of Human Rights cannot be related with the specific dispute, and thus the allegations of the review in this respect are ill-founded."

It is important to emphasize that the Insolvency Act was amended in 2016, so its Article 76 which prescribed that the opening of insolvency proceedings shall terminate representative and managerial rights of executive director, legal representative and attorney, and these rights shall be transferred to insolvency administrator, was amended in a way that it prescribes that

108 http://hudoc.exec.coe.int/eng?i=001-189990

109 See page 108 of this Analasys.

on the day of the opening of insolvency proceedings, representative and managerial rights of executive director, representative and attorney shall cease to exist and shall be transferred to insolvency administrator, except the right of lodging an appeal related to the ruling on the opening of insolvency proceedings.

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The right to access to a court opens up numerous questions within various civil and criminal proceedings. Accordingly, the Supreme Court tackled the issue when the court declared absolutely incompetent and dismissed the claims for the payment of the fee for expropriated real estate after long action of the court in this case. By the ruling of 07/02/2019, in the case ***Rev.837/18***, the Supreme Court stated the following:

"...with reference to the claim filed on 12/01/2009, the court acted for more than eight years, calculating from the day of filing the claim until the adopting of the ruling on absolute lack of jurisdiction and dismissal of the claim. With this taken into account, as well as with the fact that the legal position of the Supreme Court of Montenegro referred to herein was adopted seven i.e. ten years after the Law on the Return of Deprived Ownership Rights and Indemnity entered into force, and this Law regulated in detail the manner of termination of ongoing civil proceedings, it is certain that the plaintiffs obtained legitimate expectation that the proceedings related to their claims will be terminated by the court, as it took it many years after the Law on the Return of Deprived Ownership Rights and Indemnity and its amendments entered into force to act upon their claims. Therefore, the ruling on absolute jurisdiction in the specific circumstances would be an excessive burden for the plaintiffs, particularly in the situation when the deadlines expired specified by the Law on the Return of Deprived Ownership Rights and Indemnity, so that they could exercise their right with administration bodies pursuant to the provisions of this Law. In this way, the plaintiffs would be deprived of the right to access to a court, which is one of the basic guarantees of the right to a fair trial pursuant to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as the European Court of Human Rights finds..." Procedural guarantees of Article 6 secure to everyone the right to have any claim relating to their civil rights and obligations brought before a court or tribunal; in this way it 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 (*Multiplex v. Croatia,* 58112/00, 10 July 2003, § 41). In addition to this, the position of the European Court of Human Rights is that "the right to access to a court in this regard shall be guaranteed by Article 6 § 1 of the Convention in order to obtain decision in a civil dispute. Such right to the access to a court does not only include the right to institute proceedings, but also the right to obtain a "determination" of the dispute by a court. It would be illusory if a Contracting State's domestic legal system allowed an individual to bring a civil action before a court without securing that the case would be determined by a final decision in the judicial proceedings. It would be inconceivable that Article 6 § 1 should describe

in detail procedural guarantees afforded to litigants - proceedings that are fair, public andexpeditious - without guaranteeing the parties to have their civil disputes finally determined (*Multiplex v. Croatia* no. 58112/00, 10 July 2003, § 45)... All of the above-mentioned certainly indicate that in the specific circumstances of a case where a regular court considered the claim aimed at the fee for a nationalized real estate and debated for a long time, even judged on its own merits (such decision was cancelled by a higher instance), lower instance courts could not declare as absolutely incompetent and dismiss the claim referring to the provision of Article 19 § 1 of the Law on Civil Proceedings, but they were obliged to ensure to the plaintiff to have the proceeding terminated by the court and to judge on its own merits upon the filed claim".

3.4. Article 8 – Right to respect for private and family life

Article 8
Right to respect for private and family life

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 protects one's private and family life, their home and correspondence. If a complaint alleges violation of the rights set out in this provision, the Court determines whether the applicant's claim falls within the scope of Article 8. 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 prescribed by law and are necessary in a democratic society for the protection of the clearly defined 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.[110]

Within the reporting period, The European Court has issued one judgment finding violation of the right to private life. This judgment was rendered in the case of *Milićević v. Montenegro.*

Case of Milićević v. Montenegro

Application No. 27821/16
Judgment of 6 November 2018

i. Analysis of the judgment

The applicant alleged that the State had failed to take preventive measures and thus protect him from an attack by a mentally ill person, a risk of which the authorities had been aware.

(a) Facts

The applicant complained under Article 2 of the Convention that by failing to undertake

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

necessary measures, the State had failed to prevent an attack on him by a mentally ill person, a risk of which the police had been aware.

By virtue of the *juranovit curia* principle the Court is not bound by the legal grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions of the Convention that are different from those relied upon by the applicant.[111]

The Court considered that the complaint in the present case fell to be examined under Article 8 of the Convention.[112]

1. Attack on the applicant and the ensuing criminal proceedings

On 29 or 30 January 2013 the applicant telephoned the police and reported X for threatening him. On 1 February 2013 X entered a coffee-bar owned by the applicant and asked him to come outside, and once outside X started punching the applicant. X then left the scene saying "I will bring a knife and a hammer to kill you". Shortly afterwards, the persons witnessing took the applicant for emergency treatment. The doctor in charge of the emergency ward noted that the applicant had suffered a head injury measuring 4 cm by 1 cm inflicted by a hammer.

The same day the applicant lodged a criminal complaint in written form against X, after which X was arrested. On 6 February 2013 X was charged with violent behaviour. In the processing of the indictment it transpired that there was another indictment pending against X, issued on 30 October 2012, in which he had been charged with stabbing V.J. and inflicting light bodily injuries on him. The proceedings on those two indictments were joined into a single set of proceedings.

On 30 May 2013 the Court of First Instance in Podgorica found X guilty of inflicting light bodily injuries on V.J. on 9 October 2012, and of violent behaviour against the applicant on 1 February 2013. The court ordered the mandatory psychiatric treatment of X in a hospital, and the confiscation of two knives and a kitchen hammer.

During the proceedings it transpired that X had been a long-term psychiatric patient, suffering from schizophrenia, and that he had been treated several times in a special psychiatric hospital. It also transpired that on several occasions he had attacked some of his neighbours, had set his flat on fire, and had caused a flood in the next-door flat. The court also established that X had stabbed V.J. without any reason.

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111 *Radomilja and Others v. Croatia* [GC], 37685/10 and 22768/12, § 126, ECHR 2018.

112 *Sandra Janković v. Croatia*, 38478/05, § 27, 5 March 2009 and A v. Croatia, 55164/08, § 57, 14 October 2010.

The court found that there was a direct causal link between X's mental state and the criminal offences he had committed, that there was a serious danger that he might commit a more serious offence and that he required psychiatric treatment in order to prevent that from happening.

That judgment became final in June 2013, and in November 2015 the Court of First Instance discontinued the enforcement of mandatory inpatient psychiatric treatment and replaced it with mandatory psychiatric treatment on an outpatient basis, as long as there was a need for treatment but no longer than three years. On 12 April 2016 the Court of First Instance issued an order directing X to undergo outpatient psychiatric treatment in a healthcare centre.

Civil proceedings

In May 2013 the applicant instituted civil proceedings against the State, seeking €1,700 in compensation for non-pecuniary damage. He submitted that X had already attacked other people before attacking him, including V.J. four months earlier. Moreover, the applicant had reported X to the police for threatening him before the attack. Owing to the failure of the State to undertake any preventive measure in respect of X, the applicant had been attacked by him and had suffered severe injuries.

On 19 February 2015 the Court of First Instance ruled against the applicant. The court held that the police had acted as required, notably by taking X's statements and forwarding them to the competent prosecutor for further processing. In addition, after the attack X had been criminally prosecuted and found guilty.

In April 2015 the High Court in Podgorica upheld the first-instance judgment, claiming there was no liability on the part of the State to compensate him for the said damage, in particular because there was no causal link between the State's actions and the damage caused, given that the applicant's injury was a result of an attack by a third person.

The applicant lodged a constitutional appeal, complaining of a violation of his rights in substance by challenging the established facts. In October 2015 the Constitutional Court rejected the applicant's constitutional appeal, holding that it is not competent to substitute the regular courts in assessing the facts and evidence, but that it is the task of the regular courts to do so. Namely, the task of the Constitutional Court is to examine whether the proceedings as a whole were fair within the meaning of Article 6 § 1 of the European Convention and whether the decisions of the regular courts violate constitutional rights. Therefore, the Constitutional Court is not competent to replace the assessment of the regular courts by its own assessment, as it is up to those courts to assess the evidence and establish the facts relevant for the outcome of the proceedings.

(b) Relevant principles

The relevant principles as regards Article 8 are set out, for example, in Aksu v. Turkey[113] and Sandra Janković v. Croatia[114].

The Court has previously held, in various contexts, that the concept of private life within the meaning of Article 8 of the Convention includes a person's physical and psychological integrity.[115]

While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in effective respect for private life, which may involve the adoption of measures in the sphere of relations between individuals[116]. To that end, States are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals[117].

(c) The Court's assessment

The Court firstly notes that the Montenegrin legal framework as such provides sufficient protection (the legislation provides for the criminal offence of jeopardising someone's personal security, it distinguishes between criminal offences to be prosecuted by a State prosecutor and criminal offences to be prosecuted by means of private prosecution, and it also provides for the injured party to act as a subsidiary prosecutor). The Court refers in this connection also to its conclusion in *Alković v. Montenegro*[118], and *Isaković and Vidović v. Serbia*[119].

The Court notes that the threat posed by X, which constitutes the basis of the applicant's complaint under Article 8 of the Convention, materialised into a concrete act of physical violence, resulting in the applicant's head injury.

The Court notes that: (a) the authorities were aware of the fact that X was a long-term psychiatric patient, that he had a history of violent behaviour, which included attacking his neighbours, setting his flat on fire, and causing a flood in a neighbour's flat, and that he always carried a knife or some other similar weapon; they were also aware of X's previous criminal record and that during those proceedings the domestic courts had established a causal link between X's mental state and the offences he had committed; (b) four months prior to attacking the applicant X had left the hospital of his own will and contrary to the doctor's

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113 *Aksu v. Turkey* [GC], 4149/09 and 41029/04, § 59, ECHR 12.

114 *Sandra Janković v. Croatia* [GC], 38478/05, § 44-45, 5 March 2009.

115 *Denisov v. Ukraine*, [GC], 76639/11, § 95, of 25 September 2018 and *Von Hannover v. Germany*, 59320/00, § 50, ECHR 2004- VI.

116 *Bărbulescu v. Romania* [GC], 61496/08, § 115, 5 September 2017 (citations); *Tavli v.Turkey*, 11449/02, § 28, 9 November 2006; and *Mikulić v. Croatia*, 53176/99, § 57, ECHR 2002-I.

117 *Söderman v. Sweden* [GC], 5786/08, § 80, ECHR 2013 and *Isaković Vidović v. Serbia*, 41694/07, § 59, 1 July 2014 and the sources cited therein.

118 *Alković v. Montenegro*, 66895/10, § 68, 5 December 2014.

119 *Isaković and Vidović v. Serbia*, 41694/07, § 62, 1 July 2014.

recommendation; (c) a few days after he had left the hospital he had stabbed V.J. without any reason; (d) there is no evidence that X was medically checked after attacking V.J. in order to ensure that he was taking his medication, which indicates a lack of cooperation between the police and the medical services; (e) the indictment for that attack had been issued but it had not been processed for more than three months, that is until after X attacked the applicant; and (f) the authorities were aware of X's threatening the applicant as the latter reported it to the police.

The Court considers that in these circumstances the authorities ought to have been aware of the real and imminent risk of violence against the applicant.

In the light of the foregoing, the Court finds that the lack of sufficient measures taken by the authorities in reaction to X's behaviour amounted to a breach of the State's positive obligations under Article 8 of the Convention to secure respect for the applicant's private life.

ii. Enforcement procedure

(a) Action plan/report

On 8 July 2019 the Government submitted its Action Plan to the Committee of Ministers.[120]

(b) Individual measures

As regards the individual measures that should have been undertaken towards the applicant in the particular case, the healthcare authorities would have provided him medical assistance had it been necessary. However, the applicant did not suffer any medical consequences as a result of the above-mentioned attack nor was he subject to any medical treatment on this account. In addition to the above, the Government informed the Committee of Ministers that X was under permanent medical supervision and was last checked on 1 July 2019 when he received his medication.

The applicant was awarded compensation in respect of non-pecuniary damage, whereas he sought no compensation for pecuniary damage, nor did he exercise his right to file a motion for a retrial which is provided for by Article 428a of the Law on Civil Procedure. The Committee of Ministers adopted the measures considering them adequate for fulfilling the requirements of individual measures.

(c) General measures

As regards the general measures undertaken in this case, the Committee of Ministers gladly acknowledged findings of the European Court noting that the Montenegrin legal framework provides for the criminal offence of jeopardising someone's personal security and that

120 http://hudoc.exec.coe.int/eng?i=DH-DD(2019)781E

Montenegrin criminal law distinguishes between criminal offences to be prosecuted by a State prosecutor *ex officio* and criminal offences to be prosecuted by means of private prosecution. It also provides for the injured party to act as a subsidiary prosecutor, based on which facts the European Court determined that the Montenegrin legal framework as such provides sufficient protection (§ 57 of the judgment). In view of the above, there was no need for any special general measures, since it was determined that this was an isolated case and no similar procedures were pending either before the national authorities or the European Court.

In the light of the foregoing, preventive measures were undertaken on a general scale, including organization of a number of trainings and workshops. Likewise, the Centre for Training of Judiciary and Public Prosecutors organized a number of trainings, which the Representative of Montenegro before the ECHR attended in the capacity of a lecturer and pointed out the European Court's findings with respect to this case. Even though the judgment was discussed during these trainings as one of the subjects, it was analysed at the Council of Europe's trainings organized as part of the *Horizontal Facility for Western Balkans and Turkey* project as well.

The judgment was translated and published on the website of the Supreme Court and in the *Official Gazette* of Montenegro. The judgment was widely disseminated to the competent authorities who were involved in the procedure resulting in violation of the Convention rights.The judgment along with a short analysis of it was also published in the 2018 annual newsletter of the London AIRE Centre.

(d) Resolution of the Committee of Ministers

On 4 September 2019, at the 1352nd meeting of Ministers' Deputies, the Committee of Ministers adopted the Resolution CM/ResDH(2019)189 by means of which they closed the case.[121]

ii. Relevance to Montenegrin case law

The *Milićević v. Montenegro* judgment is of particular relevance in the context of application of Article 166 of the Law on Contractual Relations of Montenegro, i.e. for the responsibility of the state to compensate the damage inflicted through violation of the right to respect for private life, defined by Article 8 of the Convention. The attitude emphasized in § 54 is important, stating that the concept of a private life within the meaning of the Article 8 of the Convention includes psychological and physical integrity of a person, that the basic objective of Article 8 of the Convention is the protection of an individual from the arbitrary interference by a public authority, but that there may be additional positive obligations inherent in the effective respect for private life, which may involve the adoption of measures in the area of relations between individuals and to that effect, the states must apply the appropriate legal framework in practice, which provides protection against violent acts of private entities. Also, the European Court pointed out in § 59 of the judgment, following the position it took in *Osman v. the United*

121 http://hudoc.exec.coe.int/eng?i=001-196046

Kingdom[122]*,* that the domestic authorities were under a duty to take reasonable preventive measures where they "knew or ought to have known at the time of the existence of a real and immediate risk" to the life or bodily integrity of an identifiable individual".

The provisions of Article 166 of the Law on Contractual Relations stipulate the accountability of a legal person for the damage incurred by its entity toward a third person while performing their functions.

The judgment of the High Court in Podgorica dated 20/04/2015, which was the subject of consideration of the European Court, contains the Court's assessment implying that there was no causal link between the act of the state and the incurred damage, having in mind that the injury of the plaintiff resulted from the attack by the third party. Due to the aforementioned, the High Court in Podgorica concluded that the State was not under an obligation to compensate for the damage inflicted on the claimant.

Hence, the mentioned interpretation of the national court is too narrow and is not aligned with the case law of the European Court in the situation when it comes to violation of the life or physical integrity of a person. In order to define whether the State bears any responsibility, the key question to be posed is whether the state authorities previously knew or ought to have known about the existence of a real and immediate risk. In case that the answer is positive, the following question is whether the State took the adequate preventive measures. In the situation when the state knew or ought to have known about the existence of the risk and did not take measures aimed at the protection of the physical and psychological integrity of a person, the State shall, in a substantive sense, be held responsible for violation of the right stipulated in Article 8 of the Convention. According to the aforementioned, it is within the responsibility of the courts to conclude, by establishing the facts, whether the state authorities knew or ought to have known about the existence of the immediate threats toward the physical integrity of a person and, depending on the fact whether the answer is positive or negative, to reach a conclusion whether it is within the responsibility of the State to compensate for the damage.

It is worth noting that the test "*whether the state knew or ought to have known of the existence of the risk*" is evident in the case law of the European Court, not only in the context of application of Article 8 of the Convention, but particularly of application of Article 2 (Right to life), Article 3 (Prohibition of torture) and Article 4 (Prohibition of slavery and forced labour).

Apart from the aforementioned situation, which was the subject of European Court's decision, there were hardly any similar cases before the national courts. It should be noted that the courts dealt with the violation of the right to privacy within a different factual context. Thus, in the annulment decision in case ***Gž.623/19***, the High Court in Podgorica instructs the lower instance court that in the repeated procedure it applies the standards contained in the judgment rendered in the case *Antović and Mirković v. Montenegro,* in which it is stated as follows:

122 *Osman v. the United Kingdom*, 28 October 1998, § 116, Reports of Judgments and Decisions 1998-VIII.

"The first-instance court did not consider in the valid manner the reasons for introducing cameras in the defendant school and whether the conditions defined by the Articles 35 and 36, § 1 of the Law on Protection of Personal Data were fulfilled ("Official Gazette of Montenegro", No. 79/08, 70/09 and 44/12), as well as whether any other measure had been previously contemplated as an alternative to installing the cameras. At the same time, it was indicated to the first-instance court that exactly the European Court of Human Rights in Strasbourg, in the judgment *Antović and Mirkovićv. Montenegro*, dated 28 November 2017 (application number 70838/13), *inter alia*, stated that the video surveillance equipment may be installed in the official or business premises, but solely if the objectives stipulated by Article 36 of the Law on Protection of Personal Data, particularly the safety of people and property, cannot be achieved in any other manner."

When it comes to application of the standards of the European Court regarding the right to privacy, the question of the right to privacy with the view to application of the secret surveillance measures in the criminal procedure has been raised in the case law of the courts in Montenegro, concerning the lack of explanations in the orders for imposing such measures. Thus, in the judgment of the Basic Court in Podgorica under the reference ***P.2417/17,*** by means of which the Court accepted the claim for the compensation of non-pecuniary damage caused by violation of the right to privacy, it is statedas follows:

"In the first-instance judgment of acquittal ... it is explicitly stated that such a manner of gathering evidence is not contrary to the conditions of fairness guaranteed in the Article 6 § 1, of the European Convention". However, having in mind that the claim was addressed to require a compensation due to violation of the right defined by the Article 8 of the Convention and not by the Article 6 of the Convention, the Court stated that the "courts limited themselves to examining the admissibility of evidence in the criminal procedure and did not make an assessment whether the secret surveillance measures breached the right to privacy", because "it was not open to" the courts, according to the position of the European Court in the case *Dragojevićv. Croatia* 68955/11, § 99, ECHR dated 15/01/2015, "to deal with the substance of the Convention complaint that the interference with the applicant's right to respect for his private life was not in accordance with the law, still less was it open to them to grant appropriate relief in connection with the complaint". By means of applying the standards from the judgment in the case *Dragojević* that „everyone must be convinced that the secret surveillance authorizations shall be subjected to the previous judicial control and exerted on the basis of the detailed court order, which correctly stipulates the necessity and proportionality of such a measure", the Montenegrin court accepted the claim due to lack of a specific explanation in the orders for imposing or extending the secret surveillance measures, deeming that "such acting implies in itself disproportionate interference, given the fact that the domestic law did not restrict the discretionary authorizations of the competent authorities and, hence, the secret surveillance measures which were imposed on the plaintiff were not in the procedure, which limited in the appropriate manner the interference with the right to

respect for private life and the correspondence to the extent necessary in the democratic society".

The judgment of the Appellate Court of Montenegro in the case under the reference ***Kž.71/19*** also represents an interesting example from the case law. In this judgment, the Court dealt with the question of balance between the right of the defendant to interrogate the witnesses, i.e. the right to a defence, on the one hand and the right to private life of the injured party, as a victim of the criminal offence against sexual freedom, on the other hand. Deciding upon the complaints of the defendants and one of the defence attorneys, who objected to the decision of the first-instance court not to interrogate the witness-the injured party, the Appellate Court stated the following:

„... as regards the injured party A.Ž, besides the aforementioned, the first-instance court also correctly took into account the fact that her statement was documented in audio-visual format, which enabled a direct insight in considering external manifestations of the injured party in the process of testifying and, having in mind the health condition of the injured party after the critical event, who was still undergoing certain psychological treatments, with the recommendation to continue such a treatment, as it might be concluded from the quoted medical documentation; all of the above mentioned, also, referred to the high risk implied in the repeated hearing and additional victimization of the injured party, which, according to the assessment of this court, represented significant reasons not to interrogate again the injured party, who had already testified in the described manner about all the particularities of the critical events. In relation to the above mentioned, observing the position of the European Court of Human Rights, stated in the judgment *S.N. v. Sweden*, 34209/96, 2002, ECHR, the Appellate Court concluded that it was not necessary to subject the injured party to the further victimization by means of a repeated testimony about the critical events, that in the concrete case the victim had to be protected against re-victimization, which takes place at the occasion of the first interrogation of a victim at the main hearing, that in the cases of sexual abuse, when a victim is a child, i.e. a minor, which are specific in their nature, as long as there are substantiated proofs which are prone to examination, a victim does not need to testify and be subjected to the interrogation by defendants at the main hearing, and a relatively low threshold procedure is allowed. Having in mind the seriousness and sensitive nature of such a case, the first-instance court acted in a correct manner by restricting the rights of the defendants in favour of the rights of the victim and, hence, the allegations in the complaint of the defence attorneys of the defendants that, by means of disallowing the direct interrogation of the injured party (and the witnesses mentioned above) and by denying them the right to pose questions, the defendants suffered the breach of their right to a defence, as well as the right to a fair and public trial, stipulated by Article 32 of the Constitution of Montenegro and guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, are not founded."

3.5. Article 1 of Protocol No. 1 – Protection of property

Article 1 of Protocol No. 1
Protection of property

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

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

Article 1 of Protocol No.1 guarantees the right to peaceful enjoyment of one's property. The concept of possessions has an autonomous meaning which is independent from the formal classification in domestic law of the Contracting States, but this concept of *property* was gradually formed though the case law of the Court. Thus the concept of possessions includes not only things, but certain rights as well, such as the rights related to intellectual property,[123] social security benefits, but also the so called legitimate expectations.[124]

However, the right to peaceful enjoyment of property is not an absolute right and can be limited under certain circumstances. When the alleged interference with the right is being examined, the Court is mainly focused on the following conditions: admissibility of its objective, fair balance and proportionality.[125]

KIPS DOO and Drekalović v. Montenegro

Application no. 28766/06
Judgment of 26 June 2018

i. Analysis of the judgment

The application was lodged by a company registered in Montenegro (''the first applicant'') and the owner of the company (''the second applicant''). The applicants complained under Articles 6, 8 and 13 of the Convention and Article 1 of Protocol No. 1 about an interference with their property rights, notably about not having been issued with a building permit for a shopping centre.

123 *Smith Kline and French laboratories v. the Netherlands*, 12633/87.
124 Commentary on the Conventionon Human Rights and Fundamental Freedoms, group of authors, Official Gazette, 2017
125 Ibid.

They also complained about: (a) the length of the administrative proceedings related to the completion of the urban plot of land and lack of an effective domestic remedy in that regard, and (b) the length of the enforcement proceedings pursuant to the Commercial Court's judgment of 7 April 2006 and lack of an effective domestic remedy in that regard. However, by virtue of the *juranovit curia* principle the European Court is not bound by the legal grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions of the Convention that are different from those relied upon by the applicant.[126]The Court considers that the complaints in the present case fall to be examined under Articles 6 and 13 of the Convention, and Article 1 of Protocol No. 1 thereto.

(a) The facts

The second applicant is the first applicant's founder, executive director, and the owner of 99.2698 % of its shares. The remaining 0.7302% is owned by the second applicant's wife and son.

On 3 August and 11 November 1998 respectively the first applicant concluded two contracts with the Development Land Social Fund. Under the first contract the first applicant obtained the right to use four plots of development land with a total surface of 11,443 m2, on which it planned to build a shopping centre and an office building. The second contract concerned the communal charges for the necessary infrastructure on the land at issue. On an unspecified date thereafter the four plots of land were joined into one, marked as no. 2090/1036. Pursuant to sections 419 and 420 of the Property Act 2009, the first applicant became the owner of the land at issue on 9 December 2011.

On 15 April 2005 the Property Administration issued a decision by which it divided the cadastral plot of land no. 2090/1036 into two, one of which kept the number 2090/1036 and had 11,365 m2, and another one which was registered as no. 2090/1220 and which had 77 m2 On 3 March 2016 the cadastral plot of land no. 2090/1036 was further split into two, the smaller part of 44 m2 becoming a cadastral plot of land no. 2090/1581. The bigger part kept the number 2090/1036 and measured 11,321 m2.

The Detailed Urban Plan and its changes

On an unspecified date in 2004 the first applicant's plan for the shopping centre and the office building was registered in a Detailed Urban Plan (''DUP''). In December 2004 the DUP for the relevant area was changed, one of the changes being that the cadastral plot of land no. 2090/1036 and an adjacent plot of land of 1,557 m2, owned by the Municipality, were joined into one urban plot.

In June and October 2005 the President of the Municipality decided to change the relevant DUP further. Construction in the area was prohibited thereby for the next 90 days, but

126 *Radomilja and Others v. Croatia* [GC], 37685/10 and 22768/12, § 126, ECHR 2018.

up to one year at most. The ban did not apply to the investors who had already obtained a building permit. On 20 January 2006 a new decision to change the DUP was issued, revoking the previous two decisions. As regards its contents it corresponded to the decision issued in October 2005. The new DUP entered into force on 29 July 2006. Thereby the adjacent plot of land that had previously been added to plot no. 2090/1036 was apparently split into three: two parts became parts of two newly-formed urban plots of land and the third part remained attached to the applicant's land and would appear to be part of a traffic route. It would also appear that in this urban plot of land the DUP planned the construction of two buildings instead of the shopping centre planned by the first applicant. The DUP was later changed twice: on 28 July 2010 and 16 May 2013, apparently providing for the construction of buildings similar to those initially planned to be built there by the applicants.

The ''completion'' of the urban plot

Following the changes of the DUP in December 2004, on 25 January 2005 the first applicant contacted the Property Secretariat (''the Secretariat'') in the Podgorica Municipality. It sought to ''complete'' the urban plot, that is to buy the adjacent cadastral plot of land which had been added to its own land, thus forming one urban plot of land; having received no reply it renewed its request twice during 2005.

On 27 January 2005 the Spatial Planning Secretariat of Podgorica Municipality issued Urban Technical Conditions, which stated that the cadastral plot of land no. 2090/1036 was smaller than the relevant urban plot and that it needed to be ''completed''. On 23 February 2005 the Ministry of Environmental Protection and Spatial Planning (''the Ministry'') granted the first applicant a location for the construction of business premises on plot no. 2090/1036, in accordance with the 2004 DUP. The decision specified that the Urban Technical Conditions of 27 January 2005 were a constituent part of this decision.

On 15 August 2005 the first applicant appealed, having received no reply from the Secretariat. The same day the Secretariat informed the first applicant that no completion of plots could be done given that the revision of the DUP was ongoing at the time, which meant ''urbanistic reconsideration of the area'' at issue.

By 6 April 2017 there had been at least seven remittals, either by the Municipality's Chief Administrator or the Administrative Court. In the course of these proceedings, on 2 September 2016 the Secretariat enquired at the Property Administration if the same urban plot of land, as it had existed at the time when the first applicant had first filed a request for completion, could be formed again.

On 23 September 2016 the Property Administration replied that the size of the said plot of land had been changed in the meantime and that there was no basis for re-forming the urban plot as it once had been. On 6 April 2017 the Secretariat dismissed the first applicant's request again, the Chief Administrator upheld this decision in May 2017. In June 2017 the first

applicant instituted an administrative dispute before the Administrative Court, which was still pending at the time when the European Court rendered its decision.

The calculation of the communal charges

On 11 July 2005 the first applicant requested the Agency for Construction and Development of Podgorica, a legal successor of the Development Land Social Fund, to calculate the final communal charges for the urban plot no. 2090/1036. A few days later the Agency replied that the calculation could not be made due to the construction ban.

The first applicant urged the Agency to make the necessary calculation, submitting that the ban applied only to construction and not to the calculation of charges. In September 2005 the first applicant made its own assessment of the communal charges in the amount of €131,324.65 and made the payment. The payment was returned the next day as it had been made "without cause"

In the course of the proceedings the applicant repeated its request to the Agency on several occasions, including between 5 and 14 October 2005, submitting that the construction ban as the basis for refusal was unlawful and/or the ban was not in force at the relevant time. By 1 December 2005 the applicant's request had been refused by the Agency at least four times on the grounds that construction was banned pursuant to either the decision to change the DUP of 6 June 2005 or the decision of 6 October 2005. The Agency also held that the calculation could not be done as the first applicant had no building permit.

The second-instance body rejected the first applicant's appeal on the grounds that this was not a matter for administrative proceedings. The first applicant initiated an administrative dispute before the Administrative Court in this regard but in view of the opinion of the second-instance body it withdrew that claim, and instead pursued the proceedings before the Commercial Court.

On 16 September 2005 the first applicant instituted proceedings before the Commercial Court in Podgorica against the Agency for refusing to calculate the communal charges.

On 7 April 2006 the Commercial Court ruled in favour of the first applicant and ordered the Agency to calculate the charges. The Commercial Court considered there had been no construction ban before 7 July 2005 or between 5 and 14 October 2005, when the first applicant requested the communal charges to be calculated and when the Agency was bound to calculate them. The court also noted that the Agency's reasoning for refusing the first applicant's request, notably that "the calculation [could] not be done as the first applicant had no building permit" was illogical, since the calculation of charges was a pre-condition for getting a building permit. The decision was upheld by the Court of Appeals and the Supreme Court which held, *inter alia*, that the first applicant had been granted the location for construction by the competent Ministry before it was decided that the DUP would be

changed and that a decision to change the DUP could not affect the investors who had already been granted a location.

In October 2008, after the Commercial Court issued an enforcement order, which provided that the Agency would calculate the charges within 30 days or it would face a penalty, the applicant received a calculation which specified that pursuant to the 1998 contract the applicant had already paid a certain amount and that the remaining amount to be paid was €269,309.83.

After the first applicant received the above calculation from the Agency, it requested that the contract specify in accordance with which DUP the construction would be undertaken. However, the Agency replied that the first applicant's request was outside the Agency's competence and that the first applicant should address bodies in charge of urban planning in that respect.

The Agency notified the Commercial Court that it had complied with its judgment and the enforcement order, but the first applicant informed the Commercial Court that it did not consider the relevant judgment enforced as it had "serious objections" to the documents submitted by the Agency due to which it had not signed them.

Proceedings for obtaining a building permit

On 8 July 2005 the first applicant requested a building permit for the shopping centre from the Ministry. On 23 September 2005 the Ministry dismissed the first applicant's request on the grounds that it had not paid the communal charges or completed the urban plot pursuant to the Urban Technical Conditions. On 18 November 2005 the first applicant instituted an administrative dispute before the Administrative Court. It submitted, *inter alia*, that the requirement to buy an adjacent plot of land had been introduced in addition and was unnecessary given that the shopping centre was planned entirely on the cadastral plot of land no. 2090/1036. It also maintained that the refusal to calculate the charges was groundless as the ban related to construction only and not to the calculation of the charges, and that it was a deliberate obstruction.

On 29 December 2005 the Administrative Court dismissed the first applicant's claim on the grounds that there was no contract between the first applicant and the Agency concerning the communal charges, that the first applicant had failed to submit all the evidence required by the relevant statutory provision in order to obtain a building permit, and it had failed to obtain an adjacent plot of land as required by the Urban Technical Condition.

On an unspecified date thereafter the first applicant lodged a request for judicial review before the Supreme Court, maintaining that there was a contract between itself and the Agency concluded in 1998. It also submitted that the courts had blamed the first applicant for not paying the charges and completing the plot, even though it had done everything it could to comply with these requests, and had actually complained about the unlawfulness of the relevant State bodies' refusal to cooperate in these matters.

On 2 March 2006 the Supreme Court upheld the previous decision, considering that the first applicant had indeed failed to submit proof that it had paid the communal charges and completed the urban plot as request.

Following the change of the DUP in 2013, the first applicant requested a building permit for "central activities building" .On 27 July 2017, after five remittals, the proceedings were still pending.

Proceedings before the Constitutional Court

The first applicant filed three motions with the Constitutional Court for the assessment of the constitutionality and legality of the decisions to change the DUP. The Constitutional Court discontinued the proceedings upon the first motion as the impugned decision was no longer in force.

(b) Relevant principles

Article 6 § 1 of the Convention

The applicants complained about the length of the proceedings for completion of the urban plot of land no. 2009/1036. They denied that they had contributed to the length of the proceedings. Notably, they had done everything they could to expedite the proceedings, which had been lengthy due to delays in the State bodies' work. While it was true that several administrative and judicial bodies were involved this was only because an unlawful action of one body was being justified by an unlawful action of another body, which complicated a matter that was, in essence, simple.

The relevant principles in this regard are set out in detail in, among many other authorities, *Frydlender v. France.*[127] In particular, the repeated re-examination of a single case following remittal may in itself disclose a serious deficiency in a State's judicial system.[128]

Turning to the present case, the Court notes that the proceedings at issue commenced on 15 August 2005, when the applicants lodged their administrative appeal[129] and that on 23 June 2017, when the first applicant instituted an administrative dispute, they were still pending. They had therefore been ongoing for more than 11 years and 10 months, during which time the domestic bodies remitted the case seven times. By 29 September 2017, which is when the Court received the final observations in the case, there was no information that the proceedings had ended in the meantime.

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127 *Frydlender v. France* [GC], 30979/96, § 43, ECHR 2000-VII.
128 *Pavlyulynets v. Ukraine*, 70767/01, § 51, 6 September 2005.
129 *Počuča v. Croatia*, 38550/02, § 30, 29 June 2006.

It is further observed that the proceedings related to the applicants' request to buy a plot of land belonging to the Municipality, which the Court does not consider to be an issue of any exceptional complexity, nor does it consider that the applicants' conduct contributed to the length of the proceedings in any way. While the relevant DUP indeed changed several times over the years and the proceedings as such were not a priority requiring urgent treatment, the Court did not consider that either of these two facts was a justification for such a procedural delay.

In view of the criteria laid down in its jurisprudence and the relevant facts of the present case, the Court is of the opinion that the length of the proceedings complained of failed to satisfy the reasonable time requirement. There has accordingly been a violation of Article 6 § 1 of the Convention.

Article 13 of the Convention

The applicants complained about the lack of an effective domestic remedy with respect to the duration of the proceedings for the completion of the urban plot of land.

The relevant principles in this regard are set out in *Sürmeli v. Germany*[130] and *McFarlane v. Ireland*[131].

The Court notes that the Government asserted in their objections that there were remedies available in respect of the applicants' complaint regarding the length of the proceedings. These objections were rejected because the effectiveness of a particular remedy is normally assessed with reference to the date on which the application was lodged. Since the request for review and the complaint for just satisfaction were not effective at the time or did not exist at all, the objections were rejected.

For the same reasons, the Court concludes that there has been a violation of Article 13 of the Convention, taken together with Article 6 § 1, on account of the lack of an effective remedy under domestic law at the relevant time for the applicants' complaints concerning the length of the proceedings.[132]

Article 1 of Protocol No. 1

The relevant principles in this regard are set out, for example, in Hutten-Czapska v. Poland.[133]

In particular, the Court reiterates that Article 1 of Protocol No.1 comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in

130 *Sürmeli v.Germany* [GC], 75529/01, §§ 99-100, ECHR 2006-VII,
131 *McFarlane v. Ireland* [GC], 31333/06, § 107, 10 September 2010.
132 See *Stevanović v. Serbia*, 26642/05, §§ 67-68, 9 October 2007; *Stakić v. Montenegro*, 49320/07, §§ 59-60, 2 October 2012; and *Stanka Mirković and Others v. Montenegro*, 33781/15 and3 others, §§ 61-63, 7 March 2017.
133 *Hutten-Czapska v. Poland* [GC], 35014/97, §§ 163-165 and §§ 167-168, ECHR 2006-VIII).

the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognises that Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not distinct in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to the peaceful enjoyment of property. They should therefore be construed in the light of the general principle enunciated in the first rule. They must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised. The requisite balance will not be struck where the person concerned bears an individual and excessive burden. In the area of land development and town planning, the Contracting States should enjoy a wide margin of appreciation in order to implement their town and country planning policies. Nevertheless, in the exercise of its power of review the Court must determine whether the requisite balance was maintained in a manner consonant with the applicant's right of property.[134]

Furthermore, 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 in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner[135], and the margin of appreciation that the authorities have in no way dispenses them from that duty.[136]

Turning to the present case, the Court notes that the complaint at issue concerns the refusal to issue a building permit. Thus the impugned measure must be considered as a control of the use of property, to be considered under the third rule, i.e. under the second paragraph of Article 1 of Protocol No. 1. The Court must therefore consider whether the authorities' refusal to issue a building permit was a lawful measure "necessary to control the use of property in accordance with the general interest". The task of the Court in this context is to examine the lawfulness, purpose and proportionality of the decisions taken by the domestic authorities.[137]

The Court reiterates, as noted above, that the refusal to issue a building permit must be regarded as an interference with the applicants' right to the peaceful enjoyment of its property.[138] It further notes that the request was refused due to the applicants' failure to meet two criteria: (a) to buy the adjacent plot of land which had been attached to the applicants' land by means of a newlyadopted DUP, and (b) to pay the communal charges.

As regards the first condition, to buy the adjacent plot of land, the Court notes that no statute required a "completion" of the land for a building permit. In addition, this requirement was introduced by the Municipality only after the applicants had obtained their cadastral plot of land and had their plans registered in the existing DUP for that particular plot. The applicants then failed to meet that condition. As regards the second condition, to pay the communal

134 *Ayangiland Others v. Turkey*, 33294/03, § 50, 6 December 2011, and *Lay Lay Company Limited*, cited above, § 83.
135 *Broniowski v. Poland* [GC], 31443/96, § 151, ECHR 2004-V, and *Hutten-Czapska*, cited above, § 168 in fine.
136 *Öneryıldız v. Turkey* [GC], 48939/99, § 128, ECHR 2004-XII.
137 *Lay Lay Company Limited*, cited above, § 84, and the sources cited therein.
138 *Lay Lay Company Limited*, cited above, § 81.

charges, it is a statutory condition, and the applicants indeed failed to meet it too.

The Court observes, however, that the failure to meet the conditions was not because the applicants failed to take the steps required in a timely manner, to safeguard their interests and conclude matters rapidly in this regard. On the contrary, the applicants failed to meet the first condition because the relevant DUP was undergoing a number of changes over time and, pursuant to the Government's own submission, the applicants could not complete the urban plot of land as long as the DUP changes were undergoing. In other words, the applicants were required to meet a condition additionally imposed by the Municipality, which the State itself made impossible for the applicants to fulfil.

As regards the charges, it was the relevant State authorities that refused to calculate them despite the applicants' numerous requests in that respect, and thus made it impossible for the applicants to fulfil that condition, too. In doing so, they relied on a construction ban even though the relevant request was re-submitted even at times when there was no construction ban and regardless of the Ministry's interpretation of the relevant statutory provision that the construction ban related only to granting a location for construction which interpretation was subsequently confirmed by the Supreme Court. It was only after the Commercial Court's judgment became final that the Agency calculated the charges. However, by that time the relevant bodies had long rejected the request for the building permit on account of lack of payment, and, in addition, the DUP had been changed and no longer provided for the constructions initially planned there by the applicants.

In view of the above, the Court has serious doubts as to whether the interference with the applicants' right to the peaceful enjoyment of their property was in accordance with the law. However, even assuming that it was in accordance with the law, the Court considers, in any event, that it was disproportionate, given that the respondent State's authorities failed to act in good time, in an appropriate manner and with utmost consistency[139], thus making it impossible for the applicants to meet the said conditions and obtain the building permit. The Court considered that the applicants had faced with the uncertainty arising from the practices applied by the authorities, reflected in constantly changing the DUPs, introducing new conditions, such as buying an additional cadastral plot of land in order to "complete" the newly-created urban plot, and by unlawfully refusing to calculate the relevant charges.

In view of the above, and notwithstanding the margin of appreciation afforded to the State, a fair balance was not preserved in the present case and the applicants were required to bear an individual and excessive burden, in violation of Article 1 of Protocol No.1.

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139 *Beyeler v. Italy* [GC], 33202/96, § 120, ECHR 2000-I, and *Megadat.com SRL v. Moldavia*, 21151/04, § 72, ECHR 2008.

The applicants also complained about the length of the civil proceedings related to the calculation of the communal charges. The Court noted that these proceedings lasted from 16 September 2005 until 29 December 2008, that was three years, three months and 13 days, during which time the domestic courts issued three decisions at three instances and brought the proceedings to a conclusion. The Court considered that this complaint was therefore manifestly ill-founded and had to be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

The Court awarded the second applicant €1,500 in respect of non-pecuniary damage.

It may be inferred from the aforementioned that in this judgment, the European Court decided about the merits, but not about the just satisfaction. This was also done in another judgment *KIPS DOO and Drekalovićv. Montenegro*, 28766/06[140], dated 22 October 2019, by means of which ECHR obliged Montenegro to disburse to the applicant, on behalf of the compensation of material damage, the sum amounting to €4,535,595.20. Passing of two separate judgments is explained by the fact that at the time of deciding upon the application no. 28766/06 dated 26 June 2018, the question of the application of the Article 41 of the Convention was not ready for decision-making in terms of the precise amount of the material damage, which is the reason why the Court withheld the mentioned question and called upon the Government and the first applicant to submit, within three months as of the validity of the principal judgment, their written statement about this question and, specifically, to inform the Court about any agreement they might reach. Given that the amicable settlement did not take place, the Court considered the statements of the applicant and the Government regarding the amount of the material damage. The applicant claimed that this amount was at least €39,558,137.18, which was the calculation based on the average annual income of TC "Cijevna" (the warehouse of the applicant for which the applicant gained the permit, and which was constructed in December 2007), for the period between 2008 and 2018. The Government disputed this amount and such a manner of estimation of the lost profit due to a number of factors, such as e.g. difference in the size and location of the planned and constructed facility. However, the position of the European Court was that it could not speculate at which location the business operations would be more favourable and where the higher profit would be realized. Therefore, the Court took into account the profit of TC "Cijevna" as the basis for the estimation of the lost profit of the planned shopping centre, without any reducing or increasing possible differences in their size or location. Taking into account that there were variations in the profit through the years, the Court considered that it was only fair to take the average amount as the assumed profit per year, specifically €2,267,797.60. Taking into account that the first applicant suffered the loss in profit for the period of two years, 2006 and 2007, the total amount in question is €4,535,595.20.

ii. Enforcement procedure

The case of *KIPS DOO and Drekalović* is concerned with the unjustified interference with the applicants' property rights, notably about not having been issued with a building permit for a shopping centre (violation of Article 1 of Protocol No.1).

140 This judgment was not final at the time this Analysis was written.

The case was also concerned with the length of the administrative proceedings initiated by the second applicant with respect to the completion of the urban plot of land and lack of an effective domestic remedy in that regard (violation of Article 6 § 1 and Article 13 of the Convention).

(a) Action plan

On 18 March 2019 the Government submitted its Action Plan to the Committee of Ministers.[141]

(b) Individual measures

Procedure for completion of the urban plot - On 23 June 2017 the first applicant (company KIPS DOO) instituted an administrative dispute before the Administrative Court concerning the "completion" of the urban plot, which was still pending at the time when the European Court rendered its judgment. In response to the Court's findings, the Administrative Court rendered its decision U.5209/17 on 20 December 2017.

In particular, the Administrative Court dismissed the claim of applicant company for "completion" of the urban plot in the area of urbanistic plan „Konik-Stariaerodrom" in Podgorica, as unfounded. Administrative Court found that from the date of lodging the applicants' company claim factual and legal changes appeared in the urbanistic plan. In particular, former urbanistic plan, which was in force when the claim was lodged, ceased to be valid. Land which was provided for "completion" of the urban plot is now divided as two newly formed urban plots, and one part of the land is planned to be used for a highway, which cannot be privately owned, according to the Article 2 of the State Property Act.

The first applicant lodged the request for reopening of the proceedings to the Supreme Court of Montenegro due to violation of substantive law and violation of the procedure in the administrative dispute which could have affected the final outcome of the procedure. On 3 May 2018, the Supreme Court rejected this request by means of its decision Uvp.111/18 and the judgment of Administrative Court thus became final, and the disputable procedure and the violation were brought to an end.

Procedure for issuing a building permit - The Government recalls that on 23 May 2016 the applicants informed the Court that they did not have further intention to build the shopping centre and the authorities therefore consider that the measures are not called for remedying the shortcomings in these proceedings.

Just satisfaction for damage sustained - The second applicant claimed just satisfaction in respect of non-pecuniary damage. The European Court awarded the second applicant €1,500 in respect of non-pecuniary damage. The first applicant did not claim just satisfaction under this head.

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

The first applicant claimed just satisfaction in respect of pecuniary damage sustained in the amount of over €30,764,542.22, notably: €30 million on account of loss of profit "since 2005 up to an indefinite period in the future" and the rest on account of costs for a building permit, preparatory works for construction, construction material, goods for the shopping centre, services of a public relations agency, the use of commercial space in daily newspapers and printing of brochures.

The Court noted that the relevant Ministry explicitly stated in its letter that in a case where the decision on location had been issued prior to the construction ban, the competent body had a duty to issue a building permit to an investor, provided that the conditions provided in the law were fulfilled, regardless of whether the construction ban in the relevant area was in force. The Court therefore considered that there is a causal link between the violations found and the pecuniary damage alleged by the first applicant.

In the circumstances of the case, the Court however considered that the question of pecuniary damage was not ready for decision at that stage and it therefore decided to reserve the matter, due regard being given to the possibility of an agreement between the respondent State and the applicants. In light of the above, the Court called on the parties to duly inform the European Court on the possible friendly settlement negotiations.

On 23 January 2019, the Government informed the Court that the negotiations carried out with the representatives of the first applicant were not successful. For this reason, the European Court issued a special decision concerning just satisfaction[142].

Eventually, the European Court awarded the applicants €7,500.00 in respect of court costs.

(c) General measures

The Government considers that the violations in this case resulted from the uncertainty arising from the practices applied by Municipal authorities, and excessive length of administrative proceedings. For that reason, a number of measures have been taken to prevent such violations in future.

Measures aimed at preventing violation of Article 1 of Protocol No.1 -The Government highlights that the European Court noted that in August 2006 the Ministry of Environmental Protection and Spatial Planning sent a letter to the mayors of all Municipalities. The letter stated, in substance, that that a decision on 'a construction ban' related exclusively to a ban on issuing a decision granting a location, and that in a case where the decision on location had been issued prior to the construction ban, the competent body had a duty to issue a building permit to an investor, provided that the conditions provided in section 34 of the Construction Act were fulfilled, regardless of whether the construction ban in the relevant area was in force.

142 See page 104 of this Analysis.

In view of the above, the Government considers that the practices applied by municipal authorities in this case represent isolated incident and, to their best knowledge, no similar cases relating to the facts or legal issues of this case are pending before the domestic administrative authorities. Likewise, no applications alleging similar violations are currently pending before the European Court, which is why there was no need for any specific general measures.

Measures aimed at bringing the length of administrative proceedings in compliance with Convention requirements - The Government recalls that the measures aimed at bringing the length of administrative proceedings in compliance with Convention requirements were taken within the context of the case *StankaMirković and Others v. Montenegro*.[143] The Committee of Ministers considered them adequate and effective.[144]

In particular, new pieces of legislation which reformed the administrative proceedings – the Law on Administrative Procedure[145] and the Law on Administrative Disputes[146] became applicable as of 1 July 2017 i.e. one year before the delivery of the current judgment of the European Court. The laws concerned introduced a number of novelties aimed at accelerating the administrative procedure and improving the efficiency of the legal framework so as to prevent similar violations from happening in future.

Training and awareness-raising measures – In response to the Court's judgment, in December 2018 the Centre for Training of Judiciary and Public Prosecutors carried out a regional conference "Protection of the right to a trial within a reasonable time and remedies in administrative disputes". The aim of the conference was to exchange experiences on mechanisms of protection of the right to a trial within a reasonable time in the administrative proceedings and administrative dispute, in the light of the European Court's jurisprudence.

In addition, in December 2018 the Human Resources Management Authority in coordination with the Council of Europe and EU Joint Programme "Horizontal Facility for Western Balkans and Turkey" carried out a training for civil servants on the right to a trial within a reasonable time in administrative proceedings. The training was attended by a number of representatives from the Ministry of Environmental Protection and Spatial Planning. Their attention was in particular drawn to the European Court's findings in this case

Dissemination measures - In October 2018 the judgment was published in the Official Gazette of Montenegro and was also made available electronically at the web page of the Supreme Court.

The European Court's judgment was also widely disseminated to municipal authorities, including the Agency for Construction and Development of Podgorica, as well as among the domestic courts in the country.

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143 http://hudoc.exec.coe.int/eng?i=DH-DD(2017)1394E
144 http://hudoc.exec.coe.int/eng?i=001-181244
145 The Law on Administrative Procedure (Official Gazette of MNE, No. 56/14, 20/15, 40/16 and 37/17).
146 The Law on Administrative Dispute (Official Gazette, No. 54/16, of 15/ 8/2016).

Measures aimed at introducing an effective remedy- In its previous decisions rendered in the cases brought against Montenegro the European Court has already found that there are effective legal remedies in place including the request for review (of 4 September 2013), the action for fair redress (18 October 2016) and a constitutional appeal (as of 20 March 2015).

Given that the applicants had not disposed of these measures before they lodged the application with the European Court, and the Court itself recognized them as effective remedies, the Government found that no general measures were required in this regard.

iii. Relevance to Montenegrin case law

The judgment *KIPS DOO and Drekalović v. Montenegro* is of relevance to case law for a number of reasons. It comprises the standards for three very relevant questions regarding the property rights of a company and its owner.

The first question relates to the real legitimacy for initiating the procedure before the courts and other state authorities, when it comes to for-profit companies, i.e. a joint-stock company or a limited liability company. Starting from the indisputable principle that the property of a for-profit company is separated from its founders, i.e. owner, one may often hear in a debate an interpretation that the founder or the owner of such a company is not legitimized to initiate the proceedings before the courts and other competent authorities, with the aim of the protection of the rights of the company, but that the company is exclusively actively legitimized. This was also the position of the Government of Montenegro in the mentioned case before the European Court, invoking the judgment *Agrotexim v. Greece*[147]and making the statement that the owners of the stocks in a company cannot be the victims of the alleged needs of the rights of the company, except in the exceptional circumstances, when the company itself cannot require the protection of its own rights.

In the answer provided in the §§ 86 and 87 of the mentioned judgment, the European Court deemed, having in mind that this concerned the owner of more than 99% of the share in the company, that there was no danger between various opinions among the owners, or between the owner and the Board of Directors regarding the reality of the violations of the rights of the company or concerning the most favourable manner to react to such violations. Taking into account such an absence of the competitive interests and the circumstances of the specific case, the European Court took the stance that the majority owner and the company "were closely identified one with another and, hence, it would be artificial to make differences among them in this sense", as well as that, together with the company, the majority owner might also claim to be the victim of the breach of the Convention.

Observing the mentioned position, it is completely certain that in the case when the action is denied due to the real legitimacy of the owner of the company, who is a qualified majority owner of the capital in the company, this will lead to the violation of the right to access to a

147 *Agrotexim v. Greece*, the judgment of24.10.1995, § 59-72, Series A no. 330-A.

court. This is also valid due to the fact that the European Court took the stance in the case *Vujović and Lipa DOO v. Montenegro*[148] that the rejection of the complaint of the only owner of the company on which a bankruptcy was declared, targeted against the decision on filing for the bankruptcy procedure, led to violation of the right to access to a court.

Secondly, the mentioned judgment is important from another point of view - whether a request for obtaining a construction permit, i.e. an application for construction according to the presently valid legislation, may be considered as a legitimate expectation in terms of the meaning of the property as defined by the Article 1 of Protocol No. 1 to the Convention. Regarding the aforementioned, the European Court repeated in the paragraph 90 of the mentioned judgment that the refusal to issue the construction permit should be perceived as the interference with the right of the applicant to the quiet enjoyment of property. Along with this, the European Court had in mind that the applicants in this concrete case, until it was decided to change the Detailed Urban Plan (DUP), had at least legitimate expectations that they might „*perform their planned development and this must be perceived, within the meaning of the Article 1 of Protocol No.1, as the integral part of the property in question*". Therefore, if the valid DUP which enables the owner of the land to construct a facility with development capacities, undergoes changes and restricts the owner's intention, along with introducing new conditions, the request of the owner merits to be considered within the regime of the application of the Article 1 of Protocol No.1 to the Convention, which stipulates the right to the quiet enjoyment of property.

Thirdly and finally, decision-making based on merits as to whether the right to quiet enjoyment of property was violated when it comes to the right to construction permit and changes to DUP, entails the need to consider three rules referred to in Article 1 of Protocol No.1 to the Convention. The European Court has considered the relevant case in the scope of the rule, which implies the authorization of the state to control the use of the property in accordance with the general interests and has emphasized that the interference of the state with the property must be aligned with the principle of legality, must aspire to the legitimate aim and the used resources must be reasonably proportionate to the objective, which is to be achieved. The Court has stated that the necessary balance will not be achieved if a person that the interference relates to, bears individual and excessive burden. The important factor that should be taken into account when estimating the proportionality is whether there was uncertainty of the legal or administrative nature or the one originating from the practice conducted by the state authorities. The European Court repeated in the mentioned case as well that, in the field of the land development and spatial planning, the state has a broad area of free assessment, in order to implement the planning policy in the towns and in the country.

However, in this specific case, the European Court expressed a serious doubt whether the interference with the right of the applicants to quiet enjoyment of property was in accordance with the law, but it still considered that the interference was not proportionate due to the fact that the state authorities did not act in a timely and utterly consistent manner, and therefore made

148 *Vujović and Lipa DOO v. Montenegro*, 18912/15, dated 20 February 2018.

it impossible for the applicants to fulfil the conditions for obtaining the construction permit. In relation to the aforementioned, it was underlined in the judgment that the applicants faced the uncertainty which originated from the practice applied by the government authorities, reflected in the constant changes of DUP, introducing new conditions, such as the purchase of the additional cadastre plots for the purpose of expanding new urban plots and illegal refusal to perform the calculation of the fees that the applicants were obliged to pay.

According to this, the issue of changes to DUP and restricting legitimate expectation of persons, who intend to carry out construction works, along with the introduction of additional conditions, poses a real danger that the right to the quiet enjoyment of property will be violated and property damage inflicted in the form of the lost profit, as concerns the development facilities.

KIPS DOO and Drekalovićv. Montenegro

Application no. 28766/06
Judgment on just satisfaction of 22 October 2019

In this case, the European Court did not award just satisfaction within its first judgment, but instead the Court decided thereupon by means of its judgment dated 22/10/2019. It may be perceived from this judgment that the applicants claimed damages for lost benefit, in the amount exceeding €39 million. The European Court adjudicated the amount of €4,535,595.20 to the mentioned company and the request of the applicants for the remaining amount was denied.

4. Procedure for the execution of European Court Judgments – Reforms and Comparative Practice

4.1. Interlaken Process – Relevance and Consequences

In the year that marks the 70th anniversary of the Council of Europe, what has been done so far most certainly instils huge optimism for both, overall continental system for the protection of human rights and freedoms and Montenegro, as one of member states of this large European family. It is hard to say whether stakeholders in establishment of this organisation and authors of the Convention which serves as its corner stone were able to foresee the importance of their actions at such historic moments. One may certainly argue that the first steps on that path were directed towards the right goal that entailed establishment of the system which would ensure permanent peace in Europe, the system founded on the obligation to respect human rights and fundamental freedoms. Such system has undergone a number of changes over the past decades, the aim of which was to reach and maintain faith in the achievement of this goal. Starting from the Convention itself, to which 16 protocols have been added so far, the Council of Europe and most of all the European Court are not the same organisations as they were back in mid-nineteenth century when they were set up. As the wheel of history turned, these institutions kept up with social and political trends and adapted to changes, whilst not losing the sight of their primary role. For this particular reason, their importance grew over time. Following the fall of the Berlin Wall and reintegration of the Eastern and Western Europe, the European Court became lighthouse offering protection to many citizens of the former Communist states and it has retained that role even 30 years after this happened. This role of the lighthouse, towards which an increasing number of ships is directed, created the need for increased dynamics of reforms aimed towards improving long-term effectiveness of the Convention system.

Upon entry of Protocol No. 11 into force in 1998, the European Court was shaped into the permanent court which it is today. In this way, applicants are given the possibility to address this institution directly. Work overload of the European Court highlighted the need for a new reform and upon adoption of Protocol No.14 (in 2010) the institute of individual judge was introduced and new criteria of admissibility of application were designed. Guidelines on further reform were established in four high-level conferences in which respective declarations were adopted (Interlaken, Izmir, Brighton and Copenhagen).

In parallel with reforming the work done by the European Court, one of the most problematic issues that was raised constantly referred to execution of judgments of this Court.

In case law of the European Court, the execution of national judgments in light of Article 6 and assurances of reasonable length of procedures has been recognised as one of the aspects of the "right to a court". Although this "right" is not explicitly mentioned in the Convention text, the European Court underlined in one of its most important judgments - *Hornsby v.*

Greece[149] that "right to a court" would be "illusory" if the final, binding decision would be allowed to remain inoperative to the detriment of one party and if "*Article 6 is construed as being concerned exclusively with access to a court and the conduct of procedures would likely lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention*". Starting from this standpoint, it becomes clear that what applies to national judgments issued by courts in the Contracting States of the Convention also applies to the judgments issued by the European Court.

Unlike the execution of domestic judgments and decisions in the context of the national system, where the state has almost unlimited powers, execution of judgments of the European Court entails a completely different system in which international aspect prevents any form of coercion. It is a system which rests on the principle of respect for state sovereignty, but which at the same time expects these same states to comply with international commitments, in this case particularly with Article 46 of the Convention. Experience has demonstrated that execution of certain judgments of the European Court, especially those with significant political connotation, may create challenges and obstacles which may prevent timely closing of these cases. Moreover, starting from the principle of subsidiarity, states have the right to freely choose the ways in which they will perform their obligations arising from the European Convention. The aforementioned principle in this context has been confirmed in numerous judgments of the European Court, in which it is stated that "*Contracting States… are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of restitutio in integrum, it is for respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate"*[150] For this reason, judgments of the European Court are often declaratory in nature containing guidelines on measures to be taken in order to scrutinise the breach that has been found. In exceptional cases, the European Court demanded that the states took direct steps to execute a specific judgment.[151] In practice, wide discretionary right of states in selection and implementation of measures for enforcing judgments of the European Court might raise issues regarding their adequacy and accurate interpretation of views expressed in the judgment.

The 2010 Interlaken Declaration, whose reform process comes to an end in 2019, stresses in the sub-paragraph on judgment execution the "urgent need" for the Committee of Ministers "to develop the means which render its supervision of the execution of the Court's judgments more

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

150 *Kurić and Others v. Slovenia* [GC], 26828/06, § 80, ECHR 2012.

151 For example, see judgments issued as a result of violation of Article 5 of the Convention: *Assanidze v. Georgia*, 71503/01, 2004; *Ilascu and Others v. Russia and Moldova*, 48787/99, 2004. Inmore recent case law, see the case *Ilgar Mammadov v. Azerbaijan* and procedure before the Grand Chamber which was finalised with judgment of 29 May 2019, which established violation of Article 46 § 1 of the Convention due to the failure to enforce judgment of the European Court.

effective and transparent" and to "review its working methods and its rules so that they are better adapted to present-day realities and more effective for dealing with the variety of questions that arise."[152] The 2018 annual report of the Committee of Ministers regarding supervision of the execution of judgments and decisions of the European Court of Human Rights[153] outlines results achieved so far in these reforms. In that regard, the Committee of Ministers adopted new working methods and **twin track** work procedure comprising better prioritisation of cases and enhanced dialogue and transparency. Specific measures include obligation of states to submit action plans or reports within six months of the judgment of the European Court becoming final, strengthening supervision by the Committee of Ministers over results achieved in execution of certain judgments, provision of guidelines, where necessary, and timely publication of all the relevant information on execution procedure. As for the latter, a separate webpage was created to post action plans and reports and other information relevant for execution procedures - https://hudoc.exec.coe.int.

It is particularly necessary to stress the importance of cooperation with and expertise of the Department for the Execution of Judgments of the European Court during the entire course of procedure. States are often invited to use the possibility of cooperation and availability of this expert assistance, particularly for the purpose of closing some problematic cases. Recognising importance of these reforms and possibilities given to the states, the agent of Montenegro who acts as national coordinator competent for execution of judgments of the European Court established cooperation with the Department for the Execution of Judgments of the European Court since the very beginning of this process in order to close cases before the Committee of Ministers in a timely manner. As a result, Montenegro has been recognised as regional leader in executing judgments of the European Court'.[154]

Since the introduction of the Convention into the national legal system, significant results have been achieved in the training of judges, state prosecutors and other civil servants regarding application of case law of the European Court and required Convention standards. Case law of that court has become an integral part of judgments and decisions on someone's rights and duties. In that context, future office holders in judiciary and state prosecution service receive initial training in order to prevent potential violations of human rights and fundamental freedoms. Unlike theoretical importance of judgments of the European Court, which is reflected in guidelines on implementation of the Convention in daily cases in civil, criminal, administrative and other areas of law, the practical importance of judgments of the European Court, predominantly reflected in consequences occurring after the execution, are still unknown to a large number of judges, state prosecutors and other civil servants. After the European Court renders judgments against Montenegro in individual cases, media almost always report that breach has been found and that the state is to pay a certain amount "due to errors" made by competent authorities. Nevertheless, execution procedures and their consequences are far more complicated.

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152 https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf

153 https://rm.coe.int/annual-report-2018/168093f3da.

154 See "Country Factsheets" of Contracting States which shows an outline of the main issues in judgments and decisions of the European Court in cases under supervision of the Committee of Ministers and a short outline of information on adopted reforms - https://www.coe.int/en/web/execution/country-factsheets. For Montenegro, see - https://rm.coe.int/168070975a.

In order to prevent violations of the Convention, besides training on case law of the European Court, it is also necessary to identify and understand all the consequences that such violations may have for citizens and state. For that purpose, below is an outline of specific representative cases from the region and beyond that are elaborated in the latest annual report on supervision of execution of judgments and decisions of the European Court, with emphasis on execution procedure. It is extremely important for all civil servants who are deciding on someone's rights and duties, and particularly judges and state prosecutors, to be familiarised with consequences of their decisions which may violate rights set out in the Convention. It makes no difference whether a violation of human rights and freedoms resulted from the lack of knowledge of the Convention or due to simply neglecting it and whether the party had grounds to invoke case law of the European Court; instead, there has to be awareness that each violation of that kind must, and ultimately will be, remedied.

In performing their functions, judges, state prosecutors and civil servants must act as main guardians of the law since in that way they, as citizens, will also be protected by law in the future.

4.2. Comparative Practice of Execution of European Court Judgments – Cases Closed in 2018

In the twelfth report on supervision of execution of judgments issued by the European Court, the Committee of Ministers recognised a number of cases closed in 2018 as "main recent achievements". With regard to Montenegro, it mentions reforms that resulted from enforcing judgments *Ranđelović and Others v. Montenegro* and *Alković v. Montenegro*, as cases closed in the year before. Since execution procedures for these judgments were elaborated in detail in the analysis that was previously prepared, this section will consider other comparative cases which might be interesting to practitioners.

Primary goal of consideration of these cases and execution procedures conducted by other states was to identify consequences the others suffered as a result of established violations of the Convention and to review successful measures by which these were remedied. In order to ensure preventive actions, in addition to the cases from the countries of the region the analysis also included cases in which certain issues were recognised as important for current and future cases that might be brought in respect of our state.

4.2.1. Albania

Expropriation and nationalisation – Article 6 of the Convention

Driza and Manushaqe Puto Group

In the group of cases initiated against Albania on the ground of systemic problem with establishment of an effective mechanism for execution of final domestic judicial and

administrative decisions, which recognise applicants' right to compensation for expropriation and nationalisation of land under the previous regime, the European Court issued several judgments in the group of cases *Driza*.[155] Since the number of cases significantly increased over the years, the European Court issued pilot judgment *Manushaqe Puto*[156] in which it "insisted" on establishment of an effective mechanism for payment of the compensation within 18 months from the day of the judgment becoming final, i.e. by 17 June 2014.

Execution procedure: In order to resolve a systematic problem that existed in Albania in respect of compensation cases, comprehensive reforms were launched to comply with judgments of the European Court. In its pilot judgment *Manushaqe Puto*, the European Court requested the following from the Albanian government:

- a list of final judicial and administrative decisions under which the property expropriated from previous owners is recognised, returned and/or compensated;
- financial account arising from that list;
- updated map of value of the claimed immovable property;
- adoption of the action plan for execution of the pilot judgment of the European Court; and
- final establishment of an efficient mechanism for execution of domestic decisions.

In response to this judgment of the European Court, the Government adopted an action plan to introduce an efficient compensation scheme and thus resolve years-long and systemic problem caused by expropriation of property by the former communist regime. In that context, the government drew up proposal for the Law on Treatment of the Property and Finalisation of the Property Compensation Process, in consultation with Department for the Execution of Judgments of the European Court and with support from experts of HELP programme of the Council of Europe. The Law was adopted in the Parliament of Albania in December 2015 and entered into force in February 2016. Besides this law, certain secondary legislation was adopted as well.

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155 *Driza* group includes the following judgments: *Driza v. Albania* (33771/02, judgment of 13 November 2007), *Beshirand Others v. Albania* (7352/03, judgment of 22 August 2006), *Bushati and Others v. Albania* (6397/04, judgment of 08 December 2009), *Caush Driza v. Albania* (10810/05, judgment of 15 March 2011), *Delvina v. Albania* (49106/06, judgment of 08 March 2011), *Eltari v. Albania* (16530/06, judgment of 08 March 2011), *Hamzaraj* 08 March 2011 (no.1) (45264/04, judgment of 03 February 2009), *Nuri* 08 March 2011 (12306/04, judgment of 03 February 2009), *Ramadhi and 5 others v. Albania* (38222/02, judgment of 13 November 2007), *Vrioni and Others v. Albania* (35720/04 and others, judgment of 29 September 2009) and *Siliqi and Others v. Albania* (37295/05 and others, judgment of 10 March 2015).

156 *Manushaqe Puto* includes the following judgments: *Manushaqe Puto and Others v. Albania*(604/07 and others, judgment of 31 July 2012), *Karagjozi and Others v. Albania* (25408/06 and others, judgment of 08 April 2014), *Luli v. Albania* (30601/08, judgment of 15 September 2015), *Metalla and Others v. Albania* (30264/08 and others, judgment of 16 July 2015), *Sharra and Others v. Albania* (25038/08 and others, judgment of 10 November 2015), *Aliçka and Others v. Albania* (33148/11 and others, judgment of 07 April 2016), *Karagjozi and Others v. Albania*, (32382/11, judgment of 07 April 2016), *Halimi and Others v. Albania* (33839/11, judgment of 07 April 2016), *Rista and Others v. Albania* (5207/10 and others, judgment of 17 March 2016) and *Qerimi and Canaj v. Albania* (12878/10 and others, judgment of 08 September 2016).

The law was assessed positively by the Committee of Ministers and Venice Commission. Particular emphasis was placed on the importance of measures adopted in order to conduct the reform, pass important secondary legislation and establish mechanisms for periodic supervision in which prime minister, minister of justice and Parliamentary Committee for Legal Affairs, Public Administration and Human Rights will be involved.

The law introduced a new mechanism which will be applied to award compensation for the property expropriated under the communist regime. Final evaluation method was established and will be used to determine specific amount of the compensation to be awarded for the expropriated property, while special Compensation Fund was set up (comprising financial fund and land fund) to ensure availability of necessary resources to be used to compensate previous owners. The law also lays down the obligation to annually allocate financial resources in state budget to the Fund mentioned above, while the entire payment process is to be finalised within 10 years. Binding deadlines were set for some phases of the procedure. Implementation of the law is primarily the responsibility of the Property Management Agency ("Agency").

Constitutionality of the law concerned was scrutinised by the Constitutional Court of Albania in the decision of 16 January 2017. The decision sets out that the new legal framework, which may result in the payment of a lower amount of compensation to previous owners, meets proportionality criteria laid down in Article 1 to Protocol No. 1 to the Convention. The Constitutional Court held it was reasonable for the law to rely on cadastral classification of property during expropriation, while not considering this to be a significant disproportion between current cadastral value of land and compensation which was to be paid to the previous owners. Taking into consideration positive analysis of the Venice Commission, the Constitutional Court established that the law was harmonised with the Albanian constitution even though it prescribed the new methodology for determining land and financial compensation to previous owners which resulted in interference with the property right. Two provisions of the law were abolished since certain details in respect of evaluation method were insufficiently clear.

In response to the decision issued by the Constitutional Court, amendments to the evaluation methods were adopted guaranteeing equal treatment of all previous owners and those who obtained final decisions in their favour, but have not yet instituted procedure.

In order to implement the law successfully, a domestic mechanism was established for supervision and evaluation conducted by competent authorities of executive power and competent parliamentary committee.

At the moment of closing this group of cases in September 2018, the Committee of Ministers established that the system worked well. Considerable progress was noticed in the work done by the Property Management Agency and in the number of resolved cases (out of 26,000 applications for the appraisal of property value, 18,000 were processed). The system is constantly supervised by domestic authorities, particularly in respect of adherence to the prescribed deadlines. Finally, just satisfaction, awarded by the European Court in these cases, was paid to the applicants.

Length of disciplinary procedure against judge and lack of legal remedy – Article 6 and Article 13 of the Convention

Mishgjoni v. Albania (18381/05, judgment of 07 December 2010)

The applicant was appointed a judge of the District Court in Vlora. In December 2001, disciplinary procedure was instituted against her by inspector of the High Council of Justice – VSP. Based on the results of disciplinary "investigation", the prosecutor was requested to start criminal investigation against her. The investigation was initiated on 12 January 2002 and the applicant was suspended on that same day. On 26 April 2002, the prosecutor suspended investigation due to the lack of evidence. On the other hand, during her absence due to illness, the VSP dismissed her on the ground of severe disciplinary offence. Disciplinary procedure was conducted in absence of the applicant even though she was summoned to the hearing several times. The applicant did not appear due to depressive neurosis.

The applicant appealed decision of the VSP and the appeal was rejected on 18 November 2002 by the Supreme Court. The applicant filed constitutional complaint in which she complained of the breach of right to a fair trial due to trial in absence. The constitutional complaint was upheld and Constitutional Court quashed decisions issued by the VSP and Supreme Court and reopened procedure for the case on 12 November 2004.

The applicant filed application for reinstatement with the president of the District Court who responded it was not his jurisdiction to decide on her application. After that, the same application was filed with the VSP and a request was made to reopen procedure in accordance with decision issued by the Constitutional Court. In the decision of 24 October 2008, the VSP again issued decision on dismissal on the ground of severe disciplinary offence which seriously harmed reputation of judicial office.

Following appeal to the Supreme Court, the subject decision was quashed. It was established that disciplinary procedure took too much time leading to the imposition of a disciplinary measure which no longer had any effect and which was invalid as such. Finally, the applicant was reinstated to the position of judge on 27 February 2009.

In deciding on the application, the European Court stated that disciplinary procedure lasted more than eight years in three instances and that facts of such procedure were not particularly complex. In the period from 12 November 2004 on which decision was issued by the Constitutional Court to 24 October 2008 on which decision was issued by the Supreme Court, merits of the application filed by the applicant were not considered, even though the VSP was deciding on identical disciplinary procedure during that same period. According to the finding of the European Court, the VSP took almost four years to again decide on the applicant's status which was contrary to the requirement for reasonable length of procedure referred to in Article 6.

In respect of Article 13 of the Convention, the European Court found that the applicant did not have at her disposal the effective legal remedy in respect of length of disciplinary procedure.

Execution procedure: Comprehensive reform of the Albanian justice system was conducted in 2016. One of the measures that was taken led to strengthening of rights and duties of office holders in the justice system, simplification of functioning of the system and establishment of the new governing institutions for state prosecution service and judiciary. Reforms were based on constitutional amendments. To be specific, the High Judicial Council was set up under the Law on Justice System Management as the main institution for administration and management of the justice system.

As for disciplinary procedures against judges, the office of the high justice inspector was set up under the new Law on Status of Judges and State Prosecutors and that inspector is responsible for supervision of the career and work of office holders in the justice system. If there is reasonable doubt that a judge committed a disciplinary offence, the high justice inspector institutes disciplinary procedure by filing report with the High Judicial Council which specifies explicit time-limits within which relevant institutions are to take action. In the event of excessive length of disciplinary procedure, the judge against whom disciplinary procedure have been initiated may file complaint with the High Judicial Council. Moreover, under amendments to the 2017 Law on Civil Procedure, the accelerating and compensatory legal remedies for excessive length of procedure were established and these give the possibility of compensating damage without excessive length of administrative procedures. The judgment was translated, published and distributed.

4.2.2. Belgium

Extradition in context of Article 3 of the Convention

Trabelsi v. Belgium (140/10, judgment of 04 September 2014, ECHR 2014 (excerpts))

The applicant, Tunisian national, was extradited from Belgium to the United States of America (USA) for the purpose of trial for the terrorist crimes. The Belgian competent authorities extradited him even though, under Article 39 of the Rules of Court, the European Court stressed that the state of Belgium should not extradite the applicant to the USA before procedure was finalised before the European Court.

In the procedure before US competent authorities, the applicant was charged with committing terrorist crimes and forging ties with Al-Qaida which carried maximum penalty, i.e. life sentence. This imprisonment sentence is discretionary which means that judge may impose a more lenient sentence and decide to sentence him to several years of prison. Application for extradition of the applicant was filed once the indictment became legally effective.

In the procedure that ensued, the competent US authorities confirmed by a diplomatic note

of 10 August 2010 that the applicant was not liable to death penalty and assured the Belgian authorities that he would not be extradited to any third country without the agreement of the Belgian government. The US authorities reiterated that maximum life prison sentence was not mandatory and that even if all the constituent elements of the criminal offence were proved, the court still had the discretion to impose a lighter sentence. In deciding on the application, the minister of justice adopted ministerial decree on 23 November 2011 granting the applicant' s extradition to the US government. Having noted that the applicant would in no case be liable to death penalty, the decree examined each of the other assurances provided by the competent US authorities, particularly assurances related to the irreducible statutory life sentence. The applicant filed application for judicial review to the State Council. His application was rejected.

On 06 December 2011, the applicant lodged a request with the European Court for the indication of an interim measure pursuant to Rule 39 of the Rules of Court with a view of suspending his extradition. On the same day, the European Court acceded to the applicant' s request and decided to indicate to the Government, in the interests of the parties and of the proper conduct of procedure before it, that it should not extradite the applicant to the United States of America.

The Belgian government appealed this decision several times in the period of almost two years. Interim measure still remained in force.

On 03 October 2013, the applicant was notified that he was transferred from the prison in Bruges to the prison in a place called Ittre. In fact, he was being taken to the military airport where Federal Bureau of Investigation agents were waiting for him. He was extradited to the USA at 11.30 o' clock. At 13.30 o' clock, the minister of justice issued a public statement announcing the applicant' s departure.

In examination of grounds of the application, the European Court considered proportionality of the statutory penalty. In line with the approach it took in the case *Babar Ahmad and Others,*[157]the European Court found that in this specific case the discretionary life sentence would not be grossly disproportional due to severity of terrorist crimes which the applicant was indicted of and the fact that penalty may be imposed only after the court takes into consideration, in criminal procedures, all the mitigating and aggravating circumstances.

Since the case *Soering,*[158] the European Court has had to conduct in extradition cases the *ex-ante* assessment of the risk which the applicant is exposed to in line with Article 3 – i.e. in this specific case assessment should be conducted before his potential conviction in the USA and not *ex-post*, i.e. after he is extradited and convicted.

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157 *Babar Ahmad and Others v. United Kingdom*, 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 243, judgment of 10 April 2012.

158 *Soering v. United Kingdom*, 14038/88, judgment of 07 July 1989, Series A no. 161.

The US legislation does not set out pardon in cases of life sentence, either mandatory or discretionary, but there are several potential ways to reduce such sentences. In any case, reasoning of the US competent authorities referring to determination of the sentence and their invoking of applicable provisions of the US law on the reduction of sentence and pardon granted by the president are quite general and unclear and may not be considered sufficiently precise. Finally, regardless of the given assurances, life imprisonment that might be imposed on the applicant may not be observed as a reducible sentence under Article 3 of the Convention. Putting the applicant at risk of the treatment which is contrary to this provision would under the Convention lead to accountability of the respondent state.

As for the imposed interim measure, the Belgian government admitted that the Belgian authorities violated interim measure imposed by the European Court. The Government believed that this was justified since it was established that the applicant would not be exposed to the treatment which was contrary to the Convention and because all possible efforts were to be made to ensure he was surrendered to the US authorities due to the risk of his escape and judicial decision under which he would be released. The procedure before the European Court jeopardised obligations of Belgium towards the USA and extension of such procedure increased the risk of the applicant escaping Belgian authorities.

The European Court stated that the respondent state deliberately and irreversibly lowered the level of protection of the rights set out in Article 3 of the Convention which the applicant endeavoured to uphold by lodging his application with the European Court. The extradition has, at the very least, rendered any finding of a violation of the Convention otiose, as the applicant has been removed to a country which is not a Party to that instrument, where he alleged that he would be exposed to treatment contrary to the Convention. The European Court believed that none of the arguments put forward by the Belgian government justified its non-compliance with the interim measure. Belgium particularly should not have construed assessment of the European Court regarding merits of the application and diplomatic assurances granted by US authorities in a different way and should not have neglected interim measure imposed by the European Court based on its own assessment of merits.

Effectiveness of exercising the right to application under Article 34 of the Convention, which insists that the European Court may consider application in line with its ordinary procedure at all levels in the procedures conducted before it, was hindered. The applicant who was being held in solitary confinement in a US prison was deprived of contact with his attorney. With its actions, the respondent state rendered it difficult for the applicant to exercise his right to application and the right guaranteed under Article 34 of the Convention was thus precluded. Therefore, with deliberate failure to comply with the interim measure imposed by the European Court in pursuance of Rule 39 of the Rules of Court, the respondent state failed to honour the obligations incumbent on it under Article 34 of the Convention.

Execution procedure: As for the applicants' status, Belgian authorities took all the possible measures to avoid or lower the risk for the applicant to be sentenced to an irreducible life

sentence. To be specific, in October 2015 the Belgian minister of justice requested from his US colleague the additional assurances that the applicant would not be imposed an irreducible life sentence in line with case law of the European Court. In the communication that ensued, the Belgian authorities were given consent by the US Department of Justice: 1) that they would enter negotiations with the applicant in order to conclude plea bargaining agreement, in which case the prosecutor in charge of the case would not be demanding life sentence; 2) in the event of refusal to conclude plea bargaining agreement, the prosecutor in charge of the case would be demanding such penalty in the context of a trial. However, the US authorities stressed that, regardless of the prosecutor's' standpoint, the positive outcome of efforts made by the Belgian authorities depended on final decision of independent US judges (who have discretionary right to either accept plea bargaining agreement or to determine penalty), but also on the applicant' s willingness to cooperate with competent authorities. In any case, the Belgian authorities undertook to intervene on his side as *amicus curiae* in the appropriate phase of procedure, i.e. once it became possible to determine penalty for the applicant.

The competent US authorities submitted information on possible extraordinary legal remedies for the reduction of life sentence and possibility of presidential pardon. Compared to the previous cases, in the event of a life sentence conviction, prospects of the applicant to be granted reduction or modification of penalty are better that it was originally presented to the European Court since the new information submitted by the US and Belgian competent authorities indicated a new practice reflected in an increasing number of cases of modification or reduction of life sentence and/or penalty for severe violent crimes and terrorist activities.

As for general measures, the Belgian authorities reminded that the national Law on Extradition already contained prohibition of extradition in the event of existence of a serious risk for a person whose extradition is requested to be subject to torture or inhumane or degrading treatment. Therefore, circumstances of the case were exceptional constituting an isolated incident. The judgment was made public and forwarded to the relevant administrative and judicial authorities, together with the reminder that extradition of the person threatened with death sentence was contrary to Article 3 of the Convention. As for violation of Article 34 of the Convention, the Belgian government reiterated to the Committee of Ministers its commitment to respect interim measures imposed by the European Court.

4.2.3. Croatia

Lawfulness and control of detention – Article 5 of the Convention

Krnjak group v. Croatia

The *Krnjak group* includes several cases[159] versus Croatia in which the European Court established violation of applicants' right to the review of lawfulness of detention referred to in Article 5 § 4 of the Convention due to:

- The Croatian Constitutional Court's failure to rule on the merits of the applicants' complaints. Namely, the Constitutional Court dismissed the constitutional appeals solely because the courts issued new detention extension orders in the meantime (see *Krnjak* § 54, *Trifković* § 139, *Perica Oreb* § 135, *Margaretić* § 120, *V.R.* § 32, *Jović* § 33 and *Oravec* § 74) or due to release of the applicant (*Osmanović* § 51);
- Violation of the "equality of arms" principle during the detention extension appeals proceeding because the applicant was not given the opportunity to respond to the arguments put forward by state prosecutor against the termination of his detention (*Oravec*, § 69);

Besides the aforementioned, violation of the right to freedom referred to in Article 5 § 3 of the Convention was found as well in these cases and it resulted from the domestic courts' failure to:

- present sufficient and/or adequate reasons for imposing detention. To be specific, domestic courts continuously relied on the same reasons for imposing and extending detention, while repeating almost the same sentences in decisions on extension of detention without considering any alternative, more lenient measures (*Margaretić* § 107, *Orban* § 62, *Perica Oreb* § 121, *Trifković* § 130, *Šoš* § 99);
- examine the possibility of imposing measures that are more lenient than detention of the applicant (*Perica Oreb* § 119, *Orban* § 60, *Šoš* § 96) and the failure to establish the exact amount of bail applicable in a specific case (*Margaretić* § 105).

Execution procedure: In a response to the established violations of Article 5 § 3 of the Convention, the amendments to the Criminal Procedure Code entered into force in July 2017 prescribing the following in Article 124 § 3: „reasoning of the decision on investigative detention shall specifically and completely outline facts and evidence which lead to existence of a reasonable doubt that the defendant committed criminal offence and existence of reasons referred to in Article 123 § 1 of this Code, reasons for which the court believes that the purpose of investigative

159 Cases included in *Krnjak group: Krnjak v. Croatia* (11228/10, judgment of 28 June 2011), *Jović v. Croatia* (45593/13, judgment of 13 October 2015), *Oravec v. Croatia* (51249/11, judgment of 11 July 2017), *Orban v. Croatia* (56111/12, judgment of 19 December 2013), *Osmanović v. Croatia* (67604/10, judgment of 06 February 2012), *Perica Oreb v. Croatia* (20824/09, judgment of 31 October 2013), *Šoš v. Croatia* (26211/13, judgment of 01 December 2015), *Trifković v. Croatia* (36653/09, judgment of 06 November 2012) and *V.R. v. Croatia* (55102/13, judgment of 13 October 2015).

detention may not be achieved by imposing another, lighter measure, reason related to the amount of bail and, in the course of extension of detention, existence of circumstances that justify its extension."[160] Compared to the previous provisions, another obligation was added regarding specification of special circumstances which justify extension of detention.

As for violations resulting from "repetitive" decisions on extension of detention, the case law of the Supreme Court of Croatia[161] and Constitutional Court of Croatia[162] was harmonised with findings of the European Court in respect of the aforementioned cases.

The case law of the Supreme Court of Croatia[163] and the Constitutional Court of Croatia[164] was also harmonised with standards of the European Court in respect of the domestic courts' failure to consider measures that are milder than detention.

The Constitutional Court abandoned its practice of declaring constitutional complaints inadmissible because a new decision on detention has been issued or the defendant has been released in the meantime. Furthermore, the Constitutional Court modified its practice, concluding that referral to other, pending criminal proceedings cannot justify extension of detention and amounts to violation of the presumption of innocence.

Finally, the new Rulebook on the work of state prosecutors has been prepared and it contains practical instructions in respect of detention cases. In order to guarantee exercise of the Convention rights to the defendants, state prosecutors are instructed to impose detention only when other measures are impossible, as well as to interrogate witnesses with due attention and to continuously examine reasons for detention or other measures.

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160 Article 124 paragraph 3 of the *Criminal Procedure Law of the Republic of Croatia*, published in Official Gazette 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, in force since 27 July 2017.

161 See decisions on website www.vshr.hr: II Kž 444/15-4 of 18 January 2016; II Kž 167/16-4 of 13 April 2016 and IIKž 303/2017-4 of 31 August 2017.

162 See decisions on website www.usud.hr: U-III-609/2016 of 29 February 2016 and U-III-1566/2016 of 05 April 2016.

163 See decisions on website www.vshr.hr: II Kž 61/16-4 of 19 February 2016, II Kž 327/2017-4 of 21 September 2017 and II Kž 338/2017-4 od 25 September 2017.

164 See decisions on website www.usud.hr: U-III-371/2016 of 23 February 2016 and U-III-891/2017 of 19 March 2017.

4.2.4. Latvia

Ill-treatment inflicted by police officers – Article 3 of the Convention

Holodenko v. Latvia (17215/07, judgment of 02 July 2013)

The applicant was arrested on 09 June 2006, as one of two burglars who broke into apartment of R.H. and attacked him with an axe. At the moment of arrest, the applicant made attempt to escape, but he was put on the ground by special police unit which was present on the site. Following his arrest, the applicant was taken to the main police station where narcotic substances were found on him during the search.

According to the applicant's statement, he did not break into apartment, instead he was visiting acquaintances and consuming alcohol. On that occasion, five or six police officers entered the apartment and handcuffed him. Following arrest, the applicant was taken to the police station where he was beaten by the police officers present there. The ill-treatment lasted for about half an hour, during which he lost consciousness several times. Afterwards he was put in a special cell where he asked for medical assistance. According to the medical records, he had traces of narcotic substances in his blood and he also sustained severe bodily injuries including, amongst others, a couple of broken ribs. After he was discharged from the hospital, he was imposed detention for alleged possession of narcotic drugs.

On 27 June 2006, the applicant lodged an appeal on the ground of ill-treatment by officers of the Internal Security Office. In the procedure that ensued, investigator of the Internal Security Office asked for medical assessment and interrogated police officers who denied allegations of the applicant. In essence, they stressed that the applicant behaved very aggressively because of which they were forced to restrain him with physical force and to handcuff him. In January 2007, the investigator finalised investigation and established that police officers applied force lawfully and proportionately as a result of the applicant' s aggressive behaviour.

The applicant appealed this decision before the competent prosecutor who upheld the appeal on 09 May 2007 and referred the criminal case to the Internal Security Office for an additional investigation.

In the period from April to July 2008, the applicant submitted various complaints concerning the course of the investigation. Investigation was finalised on 20 May 2009 and investigator established no causal link between the actions of the police officers and injuries he sustained as the applicant.

In deciding on the application, the European Court thoroughly examined circumstances of the case and noticed that the applicant complained of injuries he sustained after he was taken to the police station, and not during arrest. The European Court noted that certain testimonials of the police officers were contradictory and that other presented evidence indicated that the

applicant evidently suffered ill-treatment in this specific case. In that regard, the European Court established violation of the substantive aspect of Article 3 of the Convention.

As for investigation, the European Court stated that the facts that certain testimonials of the police officers were contradictory, that the applicant was first questioned only four months later and that medical assessment was not carried out properly indicate that the investigation was not thorough. Moreover, reopened investigation did not meet the required standards leading to the conclusion that procedural aspect of Article 3 of the Convention was violated.

Execution procedure: In the framework of legislative and institutional reforms, the Police Directorate of Latvia set up a special Internal Control Bureau in 2015 whose main task is to strengthen discipline and legality of services in structural units of the police and to analyse, plan, coordinate and implement measures aimed at preventing and detecting offences committed by police officers. This Bureau is institutionally and practically independent from the police and prison authorities and is organised so as to be able to be rapidly present on the location of any incident and to lead investigations.

In addition, the Prosecutor General issued the Decree on Duties of the Supervising Prosecutor in 2010, intensifying prosecutorial supervision of criminal investigations concerning alleged offences by police and other security officers. Since 2010, these criminal procedures have continuously been granted priority status ‘‘under intensified supervision.

4.2.5. Moldova

Unlawfulness of the decision on extension of detention – Article 5 of the Convention

Ialamov v. Moldova (65324/09, judgment of 12 December 2017)

The applicant was arrested on 06 April 2009 for murder and theft. On the same day, he was placed in detention until 21 January 2011 when he was acquitted of murder charges, but convicted for theft and sentenced to one year and six months of imprisonment.

During the trial his detention was extended periodically. One decision on extension of detention was valid from 01 to 30 September 2009. On 28 September, two days before expiry of the detention, the prosecutor in charge of the case applied for another extension of detention. The applicant appealed decision issued based on that application since relevant provisions of the Moldovan Criminal Procedure Code laid down obligation for the prosecutor to file application at the latest five days before expiry of the detention period. Nevertheless, the prosecutor’ s application was upheld and the applicant’ s detention was extended by twenty-five days. His appeal lodged with the Court of Appeals was rejected without any consideration being given to the arguments he presented in the submission.

In the procedure before the European Court, the government claimed that the time-limit

was not compulsory and that the prosecutor' s omission to file application within that time-limit did not have any preclusive effect. The European Court did not accept government' s allegations and it established that such interpretation was contrary to other provisions of the Criminal Procedure Code and opinion of the Plenary Supreme Court of Justice of Moldova (adopted on 15 April 2013) under which such application by the prosecutor must be dismissed as untimely and detainee must be released. For those reasons, the European Court found violation of Article 5 paragraph 1 of the Convention.

Execution procedure: The Criminal Procedure Code was amended in May 2006 and prescribes that investigative judge dismisses extension of detention by issuing a reasoned decision, without holding a hearing, if the prosecutor fails to submit application within the statutory time-limit, and at the latest 5 days before expiry of detention. In 2007, the Constitutional Court issued decision which stressed compulsory nature of the time-limit. The decision set out that failure to comply with this time-limit led to losing the right to file application for extension of detention.

4.2.6. Slovenia

Conditions in detention – Article 3 of the Convention

Mandić and Jović group v. Slovenia

The *Mandić and Jović group* includes several cases[165] against Slovenia in which the European Court addressed the issue of poor conditions in the Ljubljana prison. These cases are also related to the lack of an effective and accessible legal remedy in respect of applicants' complaints of detention conditions (violations of Article 13 of the Convention, in all cases except *Beljkaš* and *Arapović*).

The European Court established violation of Article 3 of the Convention due to poor detention conditions in closed and remand facilities of Ljubljana prison, particularly due to overcrowding, restrictions on out-of-cell time and high temperature in cells during summer.

Even though the European Court did not conclude that there was a systemic problem with poor conditions in Slovenia, it indicated that in line with Article 46 of the Convention the authorities should: "take steps to reduce number of prisoners in Ljubljana prison and thus to put an end to the existing situation which appeared to disregard the dignity of a considerable number of detainees held there" (judgment *Mandić and Jović*, § 127).

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165 Cases from *Mandić and Jović* group: *Mandić and Jović v. Slovenia* (5774/10, judgment of 20 October 2011), *Arapović v. Slovenia* (37927/12, judgment of 29 October 2015), *Beganović v. Slovenia* (6625/10, judgment of 03 April 2014), *Beljkaš v. Slovenia* (50844/12, judgment of 29 October 2015), *Brlek v. Slovenia* (6000/10, judgment of 06 November 2014), *Četić v. Slovenia* (7054/10, judgment of 27 February 2014), *Faganel v. Slovenia* (6687/10, judgment of 06 November 2014), *Jevšnik v. Slovenia* (5747/10, judgment of 09 January 2014), *Maselj v. Slovenia* (5773/10, judgment of 06 November 2014), *Petrović v. Slovenia* (5998/10, judgment of 06 November 2014), *Praznik v. Slovenia* (6234/10, judgment of 28 June 2012), *Puzin v. Slovenia* (29998/10, judgment of 06 November 2014), *Šabić v. Slovenia* (5738/10, judgment of 03 April 2014), *Šemić v. Slovenia* (5741/10, judgment of 05 June 2014), *Slemenšek v. Slovenia* (6120/10, judgment of 03 April 2014), *Štrucl and Others v. Slovenia* (5903/10, judgment of 20 October 2011) and *Štrukelj v. Slovenia* (6011/10, judgment of 27 February 2014).

In addition to measures to reduce overcrowding in Ljubljana Prison, the European Court held that existence of effective legal remedy was desirable as it would enable timely reaction to the complaints related to inadequate detention conditions and, where necessary, it would ensure transfer of detainees to another prison in accordance with the Convention (judgment *Mandić and Jović*, § 128).

Execution procedure: As a result of a comprehensive and multi-faceted approach to the fight against overcrowding in prisons, the operating occupancy of the facility was reduced from originally 210 inmates to 170 in 2016 and finally to 150 in 2017. Maximum occupancy of operating capacities was not exceeded at any moment. Once maximum operating capacity is exceeded, four inmates are closed in 18 m^2 cells, while two inmates are closed in 9 m^2 cells. In such conditions, each inmate is granted minimum 4.5 m^2 of personal space within the cell, which is in line with recommended standards for personal living space in prison establishments specified in the CPT document: "Living Space per Prisoner in Prison Establishments: CPT Standards" (CPT/Inf(2015) 44, published on 15 December 2015) which sets out that 4m^2 of living space per prisoner in a multi-occupancy cell is the minimum standard to be taken into consideration in the accommodation of inmates."

The procedure was also introduced for automatic initiation of transfer to other prison establishments if the number of inmates or detainees in Ljubljana Prison exceeds 150 (operating capacity based on CPT standards). As a result, 32 detainees and 50 convicted persons were transferred to the other prisons in 2016 and first half of 2017.

The new Law on Probation was adopted in 2017[166] introducing a separate body which carries out control of probation and aims to strengthen application of measures that are more lenient than detention.

Preventive remedy, which enables judicial protection in cases of poor detention conditions for convicted persons, was introduced in the period from 2015 to 2017, along with efficient compensatory remedy for acquitted inmates. For that purpose, relevant Rulebook on execution of criminal sanctions was amended in 2017.[167] Under these amendments, supervision of the treatment of inmates is carried out by president of the district court. The rules set out that president of the district court or judge appointed for that purpose visit prison every week and take necessary measures to correct the established irregularities. Amendments also set out that inmates have the right to lodge complaint with president of the district court or director general of the Prison Administration regarding poor detention conditions. In line with amendments to this Rulebook, these persons are obligated to decide on the complaint within 15 days at the latest. Decision on the complaint issued by president of the district court is binding on prison administration. If it has been established, following complaint lodged by detainees, that detention conditions are inappropriate, the competent authorities order transfer of the detainee who lodged complaint to another prison or impose other measures to make

166 *Law on Probation of the Republic of Slovenia*, published in Offical Gazette 27/17 of 02 June 2017.

167 *Pravilnik o spremembah in dopolnitvah Pravilnika o izvrševanju pripora*, published in Official Gazette 41/17 of 28 July 2017.

his detention compliant with the Convention standards. All inmates are familiarised with these amendments which are posted at shared premises of the prison in the form of notification.

Besides preventive legal remedies, compensatory legal remedies are also at disposal ensuring recognition of violation of detainees' rights and adequate compensation, where appropriate. To be specific, under provisions of the civil substantive law, i.e. Law of Tort and Contract[168] detainees have the possibility of starting an action for compensation of non-pecuniary damage on the ground of inadequate detention conditions. In February 2018, competent courts received 73 claims for compensation of damage on the ground of inadequate detention conditions (28 claims referred to detention conditions in both, detention facilities and prisons). Court settlement was reached in eight of these cases, while the court established violation referred to in Article 3 of the Convention in three of the cases, in one case the claim was rejected, in one case procedure was discontinued.

Interference with property rights on the ground of disproportionate measures in the procedure for enforcing minimum debt based on judgment – Article 1 of Protocol No.1 and Article 13 of the Convention

Vaskrsić v. Slovenia (31371/12, judgment of 25 April 2017)

Application was filed because the applicant's house (worth of around €140,000.00) was confiscated and sold at public auction for half the market value in order to collect debt on the basis of a judgment in the amount of around €124. Procedures were carried out after the applicant failed to respond several times to the demands to pay debt. In the procedure before the European Court, the applicant complained of violation of Article 1 of Protocol No. 1 to the Convention.

The European Court said in its judgment that, in this specific case, interference with the applicant' s right to peaceful enjoyment of possessions was prescribed by law and that it pursued the legitimate aim of protecting the creditor and buyer of the house. Still, the measure taken in pursuit of that aim was evidently disproportionate.

The European Court noted that debt collected by the creditor through the sale of the applicant' s house was small (around €500, together with interests and execution costs). The house was sold at half the market value, while domestic court did not take into consideration any alternative measures. This occurred even though the applicant was evidently employed and was earning a monthly income and despite the fact that the creditor demanded in the submission that execution be carried out through attachment of his salary and that the other creditor, to whom the applicant also owed debt, had immediately before that already collected a much higher debt through attachment of his salary.

Even though the European Court stressed huge importance of the existence of efficient execution procedures for creditors, in this case it has not been demonstrated that sale the of

168 Article179 of the *Law on Obligatios of the Republic of Slovenia*, published in Official Gazette of RS 97/07 – consolidated version, 64/16 – decision US in 20/18 – OROZ631.

the applicant's house was necessary. Having in mind particularly low value of debt and lack of consideration of other appropriate and less severe measures taken by domestic authorities, the respondent state did not manage to strike a proper balance between the goal it pursued and measures applied in execution procedure against the applicant.

The applicant was awarded €77,000.00 in respect of pecuniary damage, i.e. the amount of difference between market value of the house and price at which it was sold at the auction, plus 10% interest.

Execution procedure: The 2018 amendments to the Law on Execution lay down obligation for the courts to examine *ex officio*, before issuing decision on execution and prior to public auction, whether debtor has some other financial resources or immovable property which can be used to collect debt. In this way, courts are obligated by law to conduct execution by taking measures that are less burdening than the sale of property. Debtors may either propose other means of execution until issuance of the sale order or make a request for the execution to be postponed. Execution courts have the right to postpone execution by up to six months if the reasoned opinion of the social welfare centre indicates that immediate execution procedure would jeopardise existence of the debtor or his family. The court may, based on its own belief and without obtaining opinions from social services, postpone execution by up to three months if it believes that debtor's existence would be jeopardised.

Shortcomings in investigation through medical malpractice or death in hospital – Article 2 of the Convention

Šilih v. Slovenia [GC] (no. 71463/01, Grand Chamber judgment of 09 April 2009)

The application was filed by parents who complained that their son had died as a result of medical malpractice and that competent authorities omitted to establish responsibility for their son's death.

The applicants' son died in hospital in May 1993 following anaphylactic shock, as a result of allergic reaction to the drug administered to him by duty doctor. The applicants immediately filed criminal charges against the doctor, but these were rejected by the competent prosecutor due to the lack of evidence. The Convention entered into force in respect of Slovenia in 1994.

In August 1994, the applicants used their right under Slovenian law to start procedure upon private action and lodged a request for the opening of criminal investigation. The investigation was reopened in April 1996 and indictment was brought on 28 February 1997. The case was twice remitted for further investigation before criminal procedure was discontinued in October 2000 due to the lack of evidence. The applicants appealed, but in vain.

In the meantime, in July 1995 the applicants also instituted civil procedure against the hospital and the doctor. The first-instance procedure was discontinued from October 1997 to May 2001, until finalisation of the criminal procedure, and ended with rejection of the claim in August 2006. Relying on expert witness' findings and opinion the court concluded in the

judgment, by which the applicant's claim was rejected, that the doctor could not have foreseen the applicants' son reaction to the drugs that she administered and that she and the hospital staff had acted in accordance with the required standard of care. Moreover, the court rejected as unsubstantiated the applicants' claim that the hospital was not properly equipped. Six different judges worked on the case at the time. After that, the applicants lodged complaint and an appeal on points of law to the higher instance courts, however these were rejected. When the Grand Chamber issued judgment, the case was still pending before the Constitutional Court.

In the judgment of 28 June 2007, the Chamber of the European Court established that it had no jurisdiction to consider complaints concerning substantive aspect of Article 2 of the Convention since the applicants' son died prior to Convention' s entry into force in respect of Slovenia. However, in respect of procedural aspect, it declared applicants' appeal admissible. Examining temporal jurisdiction in the subject case, the European Court noted that the applicants' son died a little more than a year before the entry into force of the Convention in respect of Slovenia while, with the exception of the preliminary investigation, all the criminal and civil procedures were instituted and conducted after that date. Therefore, the court had temporal jurisdiction to decide on procedural appeal in respect of events that occurred after the critical date.

As for merits of the application, the European Court reiterated that procedural obligations of Article 2 of the Convention require the state to set up an effective and independent justice system so that the cause of death could be determined and those responsible made accountable. The applicants used two legal remedies, i.e. commencement of criminal and civil procedures. Excessive length of criminal procedures, and of investigation in particular, could not have been justified by applicants' conduct nor by complexity of the case. Criminal procedures lasted more than 13 years.

Even though procedures were to some extent delayed due to applicants' requests to change courts and withdrawal of certain judges, many delays that occurred after the discontinuance of civil procedures were not justified. The European Court considered it unsatisfactory for the applicants' case to have been dealt with by at least six different judges in a single set of first-instance procedures and stated that a frequent change of the sitting judge would undoubtedly impede the effective processing of the case. It was finally established that the domestic authorities failed to deal with the applicants' claim arising out of their son's death with the level of diligence required by Article 2 of the Convention.

Execution procedures: Besides measures to expedite judicial procedures which were taken in execution of the judgment *Lukenda v. Slovenia*[169]in 2017, the Law on Patient Rights[170] was

169 This refers to the so-called *Lukenda project* implemented by Slovenia as a response to the judgment *Lukenda v. Slovenia* (23032/02, judgment of 06 October 2005) issued by the European Court. The project "Lukenda" was an expanding plan that aimed to resolve the problem with backlog cases by 2010. The project involved a number of stakeholders, starting from the highest state institutions, through courts, Bar Association and NGO sector. In addition to legislative reforms, some measures entailed employment of a significant number of ancillary staff, improvement of working conditions for judges and court clerks, bonuses for judges who successfully eliminated backlogs and improvement of technology in court rooms. Moreover, the system for accelerated and simplified resolution of small value disputes was introduced, single statistical database was created and a mechanism was established for coordination between the Ministry of Justice, Judicial Council and Supreme Court for the purpose of enabling better monitoring of the work done by justice system.

170 *Law on Patient Rights of the Republic of Slovenia*, published in Official Gazette of the Republic of Slovenia 55/11 of 06

amended and these amendments set out that courts give advantage to the cases in which patients sustained severe bodily injuries during treatment or in which death occurred. In the case of criminal procedures instituted as a result of severe bodily injury or death during treatment, the competent authorities must act in a particularly expeditious manner.

The project "Šilih" was initiated in January 2007 and it was approved by the government in October that year. Two main goals of the project were to design measures which enable efficient exercise of the right to adequate, quality and safe medical treatment and to ensure the conduct of efficient judicial procedures for the purpose of establishing accountability of the providers of health services or medical staffin the event of death or severe bodily injuries sustained during medical treatment. This project consists of health and judicial aspects and for that reason the Ministry of Justice, Ministry of Health, Supreme Court and State Prosecution Service are involved in its implementation. Therefore, the project goes beyond judgment of the European Court and omissions established in the specific judicial procedures and addresses the root of the problem resulting from medical malpractice and mechanisms for prevention, recognition and resolution of such malpractice, while the ultimate goal is to avoid court.

One of the measures is preparation of the new Law on Quality and Safety in Healthcare by the Ministry of Health in order to prevent malpractice in medical treatments. In that regard, the plan is to create a centralised database of judicial procedures for medical malpractice cases, so as to intensify supervision of violations of patient rights.

Moreover, the 2008 Law on Patient Rights regulates procedures conducted for the purpose of protecting patient rights in the event of violation. In these procedures, parties may reach settlement, decide to continue procedures through mediation or through hearing before the panel. Medical chamber may issue various decisions at the end of procedures such as those which bind hospitals to publish apology, correct violations and institute disciplinary procedures before medical or some other professional supervisory board.

October 2017.

5. Conclusions and Recommendations

5.1. Conclusions

The Analysis led to the following conclusions:

1. The European Court delivered a total of 52 judgments against Montenegro from the day the Convention entered into force in respect of Montenegro to December 2019.
2. The Analysis focuses on 15 judgments and one decision issued by the European Court from 1 January 2018 to December 2019. The Court found a violation of one or more Convention rights in 13 judgments and no violation in two judgments. It delivered one decision, dismissing the application as inadmissible as it was manifestly ill-founded.
3. Nine of the 13 judgments in which violations were found concerned breaches of Article 6: six due to the excessive length of proceedings, two due to the breach of the right of access to a court and one due to the non-enforcement of the final court decision. In three judgments, the European Court found violations of Articles 3, 5 and 8 of the Convention. In one judgment, in addition to a violation of Article 1 of Protocol No. 1 to the Convention, the Court also found a violation of Article 6 of the Convention. In one judgment, in the case *KIPS DOO and Drekalović v. Montenegro 28766/06, of 22 October 2019,* the European Court ruled on just satisfaction.
4. The Analysis reveals that the majority of violations of the Convention rights are still related to Article 6 of the Convention – such violations of Article 6 of the Convention, committed in respect of various elements of this Article, were found in 9 out of 13 judgments.
5. In the reference period, the European Court found a violation of Article 3 of the Convention and recalled the State's positive obligation to ensure that prisoners were detained in conditions which were compatible with respect for human dignity, that the manner and method of the execution of the measure did not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being were adequately secured.
6. In two judgments that are subject of the Analysis, and in which violations of the right to liberty and security of person under Article 5 of the Convention werefound, the judicial authorities were again reminded of the duty to consistently comply with the provisions of the Criminal Procedure Code in respect of time-limits set for reviewing detention.
7. 7. In respect of Article 8, the European Court issued one judgment in which it examined the State's positive obligations regarding respect for private life, in the context of protecting individuals against attacks by other mentally ill persons.

- The key question that needs to be answered in respect of accountability of the state is whether state authorities previously knew and ought to have known of the existence of a real and immediate risk. If the answer is affirmative, there is a question as to whether

the state took proper preventive measures. In the situation in which the state knew and ought to have known about the existence of the risk and it failed to take measures to safeguard the physical and mental integrity of a person, the state is held accountable for a violation of Article 8 of the Convention in the substantive sense.

8. The recent Court decisions in the cases of *Vujović and Lipa DOO v. Montenegro Drekalović v. Montenegro* are important for assessing the procedural capacity of the majority shareholders in business organisations and understanding of the notion of "legitimate expectation" in terms of the right to peaceful enjoyment of possessions.
9. The national courts' case law indisputably led to the Court's finding that all legal remedies prescribed by the Law on Protection of the Right to Trial within a Reasonable Time are effective.
10. The Supreme Court of Montenegro continued the good practice of applying standards in the field of safeguarding the right to a trial within a reasonable time and the right of access to a court, which can be seen in numerous decisions issued by the Supreme Court in cases initiated based on the claim for just satisfaction and appeal on points of law.
11. As for the freedom of expression enshrined in Article 10 of the Convention, there has been a more intensive application of case law of the European Court by national courts since such courts have been increasingly referring to the Court's abundant case law, including judgments issued in respect of Montenegro.

5.2. Recommendations

The Analysis led to the following recommendations:

1. Having in mind the development of case law of the European Court, judges, state prosecutors and advisors in the justice system need to continuously advance their skills and knowledge and continue their dialogue with experts in the field of human rights and fundamental freedoms.
2. With a view to facilitating the monitoring of the application of the Convention at the national level, judges must regularly enter into the judicial information system (JIS) information about the specific articles of the Convention they have applied and the Court case law they have referred to.
3. Since huge overcrowding of prison facilities raises issues under Article 3 of the Convention, the state must take pre-emptive steps to ensure that persons deprived of liberty are held in conditions compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured.
4. The relevant state prosecutors need to fully comply with the Supreme State Prosecutor's binding General Instructions of 27 June 2019 concerning cases where there isreasonable suspicionthat public officials violated Article 3 prohibiting torture and ill-treatment.

5. When deciding on the imposition and extension of detention on remand, courts must provide relevant and sufficient reasons corroboratingthe existence of reasonable suspicion and grounds for detention. Moreover, when extending detention, courts must assess whether the relevant state authorities demonstrated "particular diligence" in the conduct of criminal proceedings. Once the indictment is brought, the court should precisely and clearly indicate the duration of detention in the decision extending it.
6. In order to ensure compliance with the guarantees of the right to a trial within a reasonable time, court presidents should organise work in the courts to ensure continuation of the practice of consistent resolution of "old" cases in line with the backlog reduction programmes.

    a. As per appeals on points of law, court presidents should employ due diligence in assessing all facts and circumstances in every individual case, in line with standards set out in national legislation and the European Court's case law and to assess the admissibility of such appeals where a violation of the right to a trial within a reasonable time was or is likely to be violated.

7. Public administration authorities and the Administrative Court of Montenegro shouldaddress the problem of the protection of the right to a trial within a reasonable time by putting an end to consecutive quashing of decisions and ordering retrials.
8. Courts should re-examine the existing case law in respect of the procedural capacity of majority shareholders of business organisations.
9. Proper implementation of Article 166 of the Montenegrin Law of Tort and Contract on the state's responsibility for the compensation of damage is relevant when assessing whether the rights under Article 8 of the Convention have been violated. Once they establish all the relevant facts, the courts should draw a conclusion on whether the state authorities knew or ought to have known about existence of an immediate threat to the physical and mental integrity of a person and, depending on whether the response is affirmative or negative, proceed to assess whether the state is responsible for the compensation of damages.
10. With a view to ensuring the conformity of the national case law on rights that may be subject to restrictions, courts should consistently apply the three-part test established in the Court's case law and requiring the answers to the following three questions: whether the interference with a right 1) is prescribed by law, 2) which legitimate aim it pursues, and 3) whetherit the interference was necessary in a democratic society and proportionate to the legitimate aim.
11. An initiative should be launched to amend the national legislation in respect of the rights of previous owners concerning real estate in the coastal zone.
12. Courts should assess the notion of "legitimate expectation" in line with case law of the European Court in cases concerning property rights.
13. The relevant public administration authorities should apply not only domestic laws and secondary legislation, but also the Convention and standards of the European Court, in administrative procedures, particularly in cases in which they are ruling on the parties' property rights in the meaning of Article 1 of Protocol No. 1 to the Convention.

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