



# International Convention for the Protection of All Persons from Enforced Disappearance

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## Committee on Enforced Disappearances

### Concluding observations on the report submitted by Montenegro under article 29 (1) of the Convention\*

1. The Committee on Enforced Disappearances considered the report submitted by Montenegro under article 29 (1) of the Convention (CED/C/MNE/1) at its 142nd and 143rd meetings (see CED/C/SR.142 and 143), held on 8 and 9 September 2015. At its 152nd meeting, held on 16 September 2015, it adopted the following concluding observations.

#### A. Introduction

2. The Committee welcomes the report submitted by Montenegro under article 29 (1) of the Convention, which was prepared in accordance with the reporting guidelines, and the information contained therein. The Committee appreciates the frank and constructive dialogue held with the high-level delegation from the State party on the measures taken to implement the provisions of the Convention, which has dispelled many of its concerns. In addition, the Committee thanks the State party for its written replies (CED/C/MNE/Q/1/Add.1) to the list of issues (CED/C/MNE/Q/1), which were supplemented by the delegation's detailed responses.

#### B. Positive aspects

3. The Committee commends the State party for having ratified almost all of the United Nations core human rights instruments and their optional protocols, as well as the Rome Statute of the International Criminal Court.

4. The Committee welcomes the fact that the State party has recognized the competence of the Committee, under articles 31 and 32 of the Convention, in respect of individual and inter-State communications.

5. The Committee commends the State party on the measures adopted in areas related to the Convention, including:

- (a) The establishment of a commission on missing persons;
- (b) The signing of the Protocol on Cooperation in Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide between the prosecutors of

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\* Adopted by the Committee at its ninth session (7-18 September 2015).



Montenegro and the prosecutors of Bosnia and Herzegovina (in 2014), Croatia (2006) and Serbia (2007), and the adoption of a law on international legal assistance in criminal matters in July 2014;

(c) The entry into force of the Law on Free Access to Information in 2013, which introduces obligations to proactively disclose information and establishes a public entity mandated to process information requests;

(d) The compensation awarded to several victims and the implicit recognition of State responsibility in the case of the deportation of Muslim refugees from Herceg Novi, as well as the construction of a memorial to the victims of the civil war between 1991 and 1995.

6. The Committee notes with satisfaction that the State party has extended an open invitation to all special procedures mandate holders of the Human Rights Council to visit the country. In that connection, the Committee welcomes the visit to Montenegro of the Working Group on Enforced or Involuntary Disappearances in June 2014, and encourages the State party to continue cooperating with that body under its mandate and to implement its recommendations.

### **C. Principal subjects of concern and recommendations**

7. The Committee considers that, at the time of adoption of the present concluding observations, the legislation in force in the State party to prevent and punish enforced disappearances is not in full compliance with the obligations incumbent on the States that have ratified the Convention. The Committee encourages the State party to implement its recommendations, which have been made in a constructive and helpful spirit, with the aim of ensuring that the existing legal framework and the way it is implemented by State authorities are fully consistent with the rights and obligations contained in the Convention.

#### **Definition and criminalization of enforced disappearance (arts. 1-7)**

##### **The offence of enforced disappearance**

8. The Committee takes note of the fact that a number of articles in the Criminal Code of Montenegro contain elements which may correspond to some elements in the definition of enforced disappearance under the Convention. It nevertheless remains concerned that these articles are not sufficient to adequately encompass all the constituent elements of enforced disappearance, as defined in article 2 of the Convention, and thereby comply with the obligation arising under article 4. The Committee regrets that enforced disappearance is not defined as an autonomous crime in national legislation. In this respect, the Committee considers that only the criminalization of enforced disappearance as a separate crime would enable the State party to comply with the obligation under article 4, which is closely related to other treaty obligations concerning legislation, such as those contained in articles 6, 7 and 8 of the Convention (arts. 2, 4, 6, 7 and 8).

9. **The Committee recommends that the State party adopt the measures necessary to make enforced disappearance an autonomous offence in line with the definition contained in article 2 of the Convention. It further recommends that the offence be punishable by appropriate penalties which take into account its extreme seriousness, and that a system of superior responsibility that is in accordance with article 6 (1) (b) of the Convention be applicable to this offence.**

### **Continuous nature of the offence of enforced disappearance**

10. While taking note of the fact that a continued criminal offence is defined in article 49 of the Criminal Code, the Committee wishes to draw the attention of the State party to the fact that enforced disappearance is a unique and consolidated series of acts which continues during the entire time until the victim's fate or whereabouts are established, and is not a series of single acts. The continuous nature of the crime of enforced disappearance is addressed by the Convention, in particular to ensure that the period of limitation shall not begin until the crime of enforced disappearance has ended (art. 8).

11. **The Committee recommends that the State party ensure that the continuous nature of the crime of enforced disappearance is recognized in its system of criminal law. In line with article 8 of the Convention, it also recommends that the State party ensure that, if a statute of limitations applies in respect of enforced disappearance, it is of a long duration and proportionate to the extreme seriousness of the offence, and that it commences from the moment when the offence ceases.**

### **Criminal responsibility and judicial cooperation in relation to enforced disappearance (arts. 8-15)**

#### **Investigation of enforced disappearances committed in the context of armed conflicts in the former Yugoslavia**

12. The Committee notes that the fate and whereabouts of 61 out of the 72 individuals reported missing in the State party as a result of the conflicts in the former Yugoslavia remain unknown and welcomes the firm commitment of the State party to determining their fate and whereabouts. In this regard, the Committee notes with satisfaction the establishment of a new commission on missing persons in February 2015, which since its establishment seems to have been more active and resolute with regard to searching for missing persons. The Committee welcomes the various steps taken to foster cooperation at the regional level to search for missing persons, including the signature in August 2014 by Bosnia and Herzegovina, Croatia, Montenegro and Serbia of the Declaration on the Role of the State in Addressing the Issue of Persons Missing as a Consequence of Armed Conflict and Human Rights Abuses, and the signature in 2012 of an agreement on mutual cooperation in the process of locating missing persons between the commissions on missing persons of Montenegro and Serbia (arts. 12 and 24).

13. **The Committee encourages the State party to continue its efforts in order to establish the truth and determine the fate and whereabouts of all the individuals who have been reported as missing following the armed conflicts in the former Yugoslavia. It recommends that the new commission on missing persons continue its efforts to search for missing persons and take a proactive approach in this regard. The State party should enhance its cooperation with other parties in the region, including through cooperation agreements among the commissions on missing persons of Bosnia and Herzegovina, Croatia and Kosovo,<sup>1</sup> in order to urgently speed up the identification process.**

#### **Judicial cooperation in criminal matters**

14. The Committee welcomes the reinforcement of the legal framework for judicial cooperation and notes the position of the State party that article 10 of the Convention is

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<sup>1</sup> All references to Kosovo in the present document should be understood to be in compliance with Security Council resolution 1244 (1999).

applicable in its legal order. It remains concerned, however, at the reciprocity requirement for the provision of international legal assistance contained in the Law on Mutual Legal Assistance in Criminal Matters (arts. 10 and 14).

**15. The Committee recommends that the State party ensure that the reciprocity requirement contained in the Law on Mutual Legal Assistance in Criminal Matters does not prevent the State party from fully implementing article 10 of the Convention. It also recommends that the State party actively contribute in strengthening cooperation between the judicial authorities of the countries in the region with a view to facilitating the sharing of information and evidence, searching for and identifying disappeared and missing persons, conducting investigations and bringing those responsible for war crimes to justice.**

#### **Prosecution of war crime cases**

16. While noting that six war crime cases related to acts committed in the past in the context of the armed conflicts in the former Yugoslavia have been prosecuted and tried in Montenegro, the Committee expresses concern about information from several sources pointing to shortcomings in the proceedings that led to the acquittal of most of the defendants in the cases tried more recently, which may raise questions about the adequacy of measures taken by the State party to fight impunity. The Committee notes in particular information about the absence of investigation into the matter of command responsibility, co-perpetration, aiding and abetting, which resulted in few of the high-level perpetrators being held accountable, and the leniency of the sentences imposed on the defendants, which in some cases were shorter than the statutory minimum based on mitigating factors. In this context, the Committee welcomes the adoption by the State party of the Strategy for Investigating War Crimes in May 2015 and the establishment of specialized bodies to investigate and prosecute war crime cases, including a new special prosecutor's office and a special department for war crimes, established within the Higher Court of Podgorica (arts. 8, 12 and 24).

**17. The Committee, recalling the continuous nature of the offence of enforced disappearance, recommends that the State party ensure that all cases of enforced disappearance that may have been committed by State officials or by persons or groups of persons acting with their authorization, support or acquiescence in the context of the armed conflicts in the former Yugoslavia, are investigated thoroughly and impartially without delay, and that those found responsible, including the commanders and civilian superiors, are punished in accordance with the gravity of their acts. The State party should also ensure that the special prosecutor's office is competent to investigate and prosecute all cases of enforced disappearance, including those covered under article 2 of the Convention. The special prosecutor's office and any other competent authorities should also be provided with adequate training and sufficient personnel, technical and financial resources to discharge their duties promptly and effectively.**

#### **Suspension from duties**

18. The Committee notes that individuals suspected of having committed an offence may be temporarily suspended on the basis of article 130 of the Labour Law, which applies on a subsidiary basis to civil servants and employees. It regrets, however, the absence of specific legislation that expressly provides for the suspension, for the duration of an investigation, of State agents, civilian or military, suspected of having committed an offence of enforced disappearance (art. 12).

**19. In order to strengthen the existing legal framework and ensure the adequate application of article 12 (4) of the Convention, the Committee recommends that the**

**State party adopt explicit legal provisions that expressly establish: (a) the suspension, for the duration of an investigation, of any State agents, civilian or military, suspected of having committed an offence of enforced disappearance; (b) a mechanism that ensures that law enforcement or security forces, whether civilian or military, whose members are suspected of having committed an enforced disappearance do not take part in such an investigation.**

#### **Protection of persons participating in an investigation**

20. The Committee welcomes the amendments to the law on witness protection adopted in June 2014 and aimed at improving the witness protection system in the State party. However, the Committee echoes the concern of the Committee against Torture (see CAT/C/MNE/CO/2, para. 15) regarding a lack of effective measures to provide protection for victims and witnesses from ill-treatment or intimidation as a consequence of filing a complaint or providing evidence (arts. 12 and 18).

**21. The Committee recommends that the State party ensure the effective implementation of existing protective measures and make them applicable to all persons referred to in article 12 (1) of the Convention. It further recommends that the State party ensure that all potential allegations of threats or intimidation against witnesses in war crimes trials are promptly, thoroughly and impartially investigated, even if there has been no formal complaint, and that the alleged perpetrators are prosecuted and, if found guilty, punished with appropriate penalties.**

#### **Measures to prevent enforced disappearances (arts. 16-23)**

##### **Non-refoulement**

22. The Committee, while welcoming the fact that an appeal postpones the execution of an order of extradition, notes that it has not received information in this respect concerning decisions of expulsion or deportation. The Committee also notes that it has not received information on the criteria applied in the framework of procedures of expulsion, return, surrender or extradition or on whether the appeals procedure for rejected asylum applications provides for a substantive review of the facts. In addition, the Committee observes that domestic law does not provide for a specific legal prohibition of refoulement when there are substantial grounds for believing that a person would be in danger of being subjected to enforced disappearance (art. 16).

**23. The State party should ensure that the appeals procedure for extradition also applies to cases of expulsion or deportation. The State party should consider explicitly incorporating into its domestic legislation a prohibition on carrying out an expulsion, return, surrender or extradition when there are substantial grounds for believing that the person involved would be in danger of being subjected to enforced disappearance.**

##### **Fundamental legal safeguards**

24. The Committee welcomes the amendment of the Criminal Procedure Code, which now stipulates that persons deprived of their liberty are entitled to have a person of their choice “immediately” informed of their situation. Nevertheless, it echoes the concerns expressed by the Committee against Torture (see CAT/C/MNE/CO/2, para. 7) that in practice persons deprived of their liberty are not systematically afforded all fundamental legal safeguards from the very outset of their deprivation of liberty. The Committee also regrets that the right to challenge the lawfulness of a detention before an independent court is not specifically mentioned in the list of rights that cannot be limited during a state of war or emergency (arts. 17 and 18).

25. **The Committee recommends that the State party take the measures necessary to ensure that, in practice, all persons deprived of their liberty can communicate without delay with their families or any person of their choosing and have access to an independent lawyer from the very outset of the deprivation of liberty. It also recommends incorporating the right to challenge the legality of a detention into the list of rights that cannot be limited during a state of war or emergency. The State party should also ensure that the information on all persons deprived of their liberty is effectively entered in registers and/or records in accordance with standard protocols and that the information contained therein includes, as a minimum, that required under article 17 (3) of the Convention.**

#### **Training on the Convention**

26. While noting that training on human rights and other subjects that are linked to the Convention are given to various State actors, the Committee regrets the absence of specific and regular training on the Convention (art. 23).

27. **The Committee recommends that the State party ensure that all law enforcement personnel, whether civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty, as well as other officials responsible for the administration of justice or the investigation and prosecution of cases of enforced disappearance, receive appropriate and regular training on the provisions of the Convention.**

#### **Measures to provide reparation and to protect children against enforced disappearance (arts. 24 and 25)**

##### **Definition of victim**

28. While welcoming the introduction of a definition of victim in the Criminal Code and in the new law on compensation for damage to the victims of violent criminal offences, the Committee regrets that the definition is narrower than the notion of a victim within the meaning of article 24 of the Convention. It is further concerned that the existing legal framework does not grant victim status when criminal proceedings against a perpetrator have not been initiated (art. 24).

29. **The State party should consider introducing the legislative amendments necessary to establish a definition of victim that conforms to that contained in article 24 (1) of the Convention in order to ensure the full enjoyment by any individual who has suffered harm as the direct result of an enforced disappearance of the rights set forth in the Convention, in particular the rights to the truth and reparation enshrined in its article 24 (2), 24 (4) and 24 (5).**

##### **The right to receive reparation and prompt, fair and adequate compensation**

30. The Committee notes that the right to compensation is guaranteed by article 38 of the Constitution, but it regrets that the legal system of the State party does not provide for a statutory right to obtain adequate reparation that includes all the reparatory measures provided for under article 24 (5) of the Convention. In addition, the Committee is concerned that compensation can be achieved only through civil procedure under the Law on Contracts and Torts and that relatives have to initiate proceedings to declare a missing person dead in order to receive pension rights or compensation. With regard to the conflicts in the former Yugoslavia, the Committee welcomes the fact that several victims have received compensation, but it notes that many are still awaiting adequate and effective reparation (art. 24).

31. **The State party should guarantee the right to reparation (including medical and psychological rehabilitation, restitution and satisfaction, including restoration of dignity and reputation) and to prompt, fair and adequate compensation of all persons who have suffered harm as a direct result of an enforced disappearance, regardless of when it was perpetrated and even if no criminal proceedings have been opened against the potential perpetrators or the latter have not been identified.**

#### **Legal situation of disappeared persons and their relatives**

32. The Committee notes with concern that the legislation of the State party neither recognizes the relatives of disappeared persons as victims of enforced disappearance nor regulates their rights in fields such as social welfare, financial matters, family law and property rights. It is of particular concern to the Committee that a proceeding to declare a missing person dead must be initiated in order for relatives to benefit from their pension rights. In view of the continuous nature of enforced disappearance, the Committee considers there to be, in principle, no reason to presume that a disappeared person has died so long as his or her fate has not been determined (art. 24).

33. **In the light of article 24 (6) of the Convention, the Committee recommends that the State party adopt the measures necessary to ensure that the legal situation of disappeared persons and that of their relatives in areas such as social welfare, financial matters, family law and property rights is appropriately addressed without the need to declare the disappeared person dead. In this respect, the Committee encourages the State party to set up a procedure to obtain a declaration of absence as a result of enforced disappearance.**

#### **Legislation concerning the wrongful removal of children**

34. The Committee notes with concern that the State party's criminal laws do not include provisions that specifically penalize conduct relating to the wrongful removal of children referred to in article 25 (1) of the Convention.

35. **The Committee recommends that the State party adopt the legislative measures necessary to make the actions referred to in article 25 (1) of the Convention specific offences and that it establish penalties for such actions that are commensurate with their extreme gravity.**

### **D. Dissemination and follow-up**

36. The Committee wishes to recall the obligations undertaken by States when becoming parties to the Convention and, in this connection, urges the State party to ensure that all the measures it adopts, irrespective of their nature or the authority from which they emanate, are in full accordance with the obligations it assumed when becoming party to the Convention and other relevant international instruments. The Committee particularly urges the State party to ensure the effective investigation of all enforced disappearances and the full satisfaction of the rights of victims as set forth in the Convention.

37. The Committee also wishes to emphasize the particularly cruel effect of enforced disappearance on the human rights of women and children. Women who are subjected to enforced disappearance are particularly vulnerable to sexual and other forms of gender violence. Women who are relatives of a disappeared person are particularly likely to suffer serious social and economic disadvantages and to be subjected to violence, persecution and reprisals as a result of their efforts to locate their loved ones. Children who are victims of enforced disappearance, either because they themselves were subjected to disappearance or because they suffer the consequences of the disappearance of their relatives, are especially

vulnerable to numerous human rights violations, including identity substitution. In this context, the Committee places special emphasis on the need for the State party to ensure that gender perspectives and child-sensitive approaches are used in implementing the rights and obligations set out in the Convention.

38. The State party is encouraged to widely disseminate the Convention, its report submitted under article 29 (1) of the Convention, the written replies to the list of issues drawn up by the Committee and the present concluding observations, in order to raise awareness among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the State party, and the general public. The Committee also encourages the State party to promote the participation of civil society, in particular organizations of relatives of victims, in the actions taken in line with the present concluding observations.

39. In accordance with the Committee's rules of procedure, by 18 September 2016 at the latest the State party should provide relevant information on its implementation of the Committee's recommendations as contained in paragraphs 9, 25 and 29.

40. Under article 29 (4) of the Convention, the Committee requests the State party to submit, no later than 18 September 2021, specific and updated information on the implementation of all its recommendations and any other new information on the fulfilment of the obligations contained in the Convention, in a document prepared in accordance with paragraph 39 of the guidelines on the form and content of reports under article 29 to be submitted by States parties to the Convention (CED/C/2). The Committee encourages the State party to promote and facilitate the participation of civil society, in particular organizations of relatives of victims, in the preparation of this information.

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