



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

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## Committee on Enforced Disappearances

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### Consideration of reports of States parties to the Convention

## List of issues in relation to the report submitted by Montenegro under article 29 (1) of the Convention

### Addendum

## Replies of Montenegro to the list of issues\*

[Date received: 23 June 2015]

## I. General information

### Reply to paragraph 1 of the list of issues

1. This Initial Report on the implementation of the International Convention for the Protection of All Persons from Enforced Disappearances has been prepared in accordance with the Guidelines on the form and content of reports under Article 29 (CED/C/2). The Report was prepared by the Ministry of Justice in cooperation with the Supreme Court of Montenegro, Ministry of Interior, Ministry of Defence, Ministry of Health, Ministry of Labour and Social Welfare, Ministry of Foreign Affairs and European Integration, Police Administration and Judicial Training Centre. Civil society organisations active in the field of judiciary were consulted. No consultations were held with the Protector of Human Rights and Freedoms.

### Reply to paragraph 2 of the list of issues

2. The appellants in four war crime cases, namely Bukovica, Deportation, Morinj and Kaludjerski laz and competent courts did not invoke the provisions of the International Convention for the Protection of All Persons from Enforced Disappearance in their decisions. These cases invoked the provisions of the Geneva Conventions, Additional

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\* The present document is being issued without formal editing.



Protocols thereto, the Rome Statute and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

### **Reply to paragraph 3 of the list of issues**

3. All court cases of war crimes have ended in final and binding decisions. Four criminal proceedings were conducted for war crimes in Montenegro, but neither of these involved enforced disappearances within the meaning of enforced disappearance from Article 2 of Part I of the International Convention for the Protection of All Persons from Enforced Disappearance.

**(a) Morinj case**

4. Four persons were found guilty of the criminal offence of war crime against prisoners of war from Article 144 of the Criminal Code of the Socialist Republic of Yugoslavia by way of final and binding decision of the Higher Court in Podgorica No. Ks.br.19/12. Prison penalties ranging from two years (one person) through three years (two persons) to 4 years (one person) were imposed.

**(b) Muslims' Deportation case**

5. Nine persons were found not guilty of war crime against civilian population from Article 142 of the Criminal Code of the Socialist Republic of Yugoslavia on the basis of Article 373 paragraph 1 item 2 of the Criminal Procedure Code by way of final and binding judgment of the Higher Court in Podgorica No. Ks.br.6/12 of 22 November 2012, because there was no evidence that the accused had committed the criminal offence they had been charged with. After the judgment became final and binding the State Prosecution Service filled a motion for protection of legality with the Supreme Court of Montenegro on 31 March 2015. The proceedings are pending.

**(c) Bukovica case**

6. Higher Court in Bijelo Polje passed judgment No. Ks 6/11-10 on 3 October 2011 and acquitted all the accused from charges that they had committed the criminal offence of crime against humanity on the basis of Article 373, paragraph 2 of the Criminal Procedure Code, since it had not been proved they had committed the criminal offence they had been charged with. The Appellate Court of Montenegro by way of judgment no Ksz.1/12 of 22nd 2012 regarding appeals of the Chief State Prosecutor's Office – Department for Suppression of Organised Crime, Corruption, Terrorism and War Crimes and victims' lawyers reversed the judgement of Higher Court in Bijelo Polje No. 6/11-10 of 3 October 2011 acting *ex officio*. The Appellate Court also acquitted the accused from charges that they had committed the criminal offence of crime against humanity, but on the grounds of Article 373 paragraph 1 of the Criminal Code of Montenegro, because the act the accused were charged with did not constitute a criminal offence. After the judgment became final and binding, the Chief State Prosecutor's Office filed a motion for protection of legality to the Supreme Court of Montenegro citing violation of criminal procedure provisions – Article 386 paragraph 1 item 8 and Article 387 paragraph 1 item 1 and asked the court to grant the motion without affecting the final and binding decision by holding that the law had been violated to the benefit of the accused. The Supreme Court denied the motion for protection of legality as unfounded by way of decision No. Kzz.11/12 of 21 January 2013.

**(d) Kaludjerski laz case**

7. The Higher Court in Bijelo Polje passed judgment No. Ks 1/08 of 30 December 2013 and acquitted eight persons from charges for criminal offence of crime against

humanity from Article 142 of the Criminal Code of Socialist Republic of Yugoslavia, on the basis of Article 373, paragraph 2 of the Criminal Procedure Code, since it had not been proved that the accused had committed the criminal offence they had been charged with. The Appellate Court of Montenegro by way of judgment No. Ksz. 20/2014 of 8 December 2014 rejected as unfounded the appeal of the Chief State Prosecutor's Office – Department for Suppression of Organised Crime, Corruption, Terrorism and War Crimes in Bijelo Polje and the appeal filed by victims' representative, lawyer V.M. from Rozaje and upheld the judgement No. Ks 1/08 of 30 December 2013 of the Higher Court in Bijelo Polje.

## II. Definition and criminalization of enforced disappearance (arts. 1–7)

### Reply to paragraph 4 of the list of issues

8. Articles 24 and 25 of the Constitution of Montenegro<sup>1</sup> provide that guaranteed human rights and freedoms may be restricted only by law, within the limits prescribed by the Constitution and to such an extent as is necessary to attain the purpose for which the restriction is allowed in an open and democratic society. During the declared state of war or emergency, the exercise of specific human rights and freedoms may be derogated from, to a necessary extent. The restrictions may not be applied on the grounds of sex, national origin, race, religion, language, ethnic or social origin, political or other beliefs, property or any other personal status and no restrictions may be applied to the following rights: the right to life, right to legal remedy and legal aid; right to dignity and respect of a person; right to a fair and public trial and the principle of legality; presumption of innocence; right to defence; right to compensation for illegal or wrongful deprivation of liberty and wrongful conviction; freedom of thought, conscience and religion; right to marry. Furthermore, the following prohibitions may not be derogated from: the prohibition of provoking or encouraging hatred or intolerance; prohibition of discrimination; prohibition of possibility of a defendant being tried and convicted repeatedly on the basis of the same criminal offence (*ne bis in idem*); forced assimilation. Measures of restriction may not operate beyond the state of war or emergency.

9. Constitutional guarantees of human rights and freedoms and defined conditions under which they can be restricted are covered by paragraphs 12-18 of the Initial Report. Under Article 1 of the Constitution, rights and freedoms are exercised on the basis of Constitution and ratified international agreements. The provisions of the Convention are in line with the Constitution of Montenegro, particularly in view of the fact that the Convention reflects constitutional guarantees, primarily those contained in general and human rights and freedoms provisions of the Constitution. The protection of such rights and freedoms is also offered by preventive and repressive legislation, particularly criminal legislation, which is aimed at protection of citizens from unconstitutional and unlawful restrictions of rights and freedoms. Clear regulations and procedure in relevant state structures and strict criminal law policy prevent any derogations from the right of persons not to be exposed to enforced disappearance under extraordinary circumstances, be it in the case of war or threat of war, internal political instability or any other public danger.

10. Guaranteed human rights and freedoms may be restricted only by law, within the limits prescribed by the Constitution and to such an extent as is necessary to attain the purpose for which the restriction is allowed in an open and democratic society. During the declared state of war or emergency, the exercise of specific human rights and freedoms may

<sup>1</sup> Official Gazette of Montenegro 1/2007 and 38/2013.

be derogated from, to a necessary extent. The restrictions may not be applied on the grounds of sex, national origin, race, religion, language, ethnic or social origin, political or other beliefs, property or any other personal status and no restrictions may be applied to the following rights: the right to life, right to legal remedy and legal aid; right to dignity and respect of a person; right to a fair and public trial and the principle of legality; presumption of innocence; right to defence; right to compensation for illegal or wrongful deprivation of liberty and wrongful conviction; freedom of thought, conscience and religion; right to marry.

11. The International Convention for the Protection of All Persons from Enforced Disappearance, as well as other ratified and published international treaties make an integral part of national law, take precedence over national legislation and apply directly where their provisions govern relations differently than national legislation (Art. 9 of the Constitution). In accordance with the principle of *pacta sunt servanda* and the provisions of the Vienna Convention on the Law of Treaties, Montenegro cannot invoke the provisions of its national legislation in order to justify non-execution of a treaty.

12. The Law on Defence<sup>2</sup> provides that natural persons may be restricted in their freedom of movement, stay or taking up residence in specific location or zones during time of war or time of emergency if so required by their security or needs of defence (Art. 42). Provisions provided by this law do not affect efficient implementation of the International Convention for the Protection of All Persons from Enforced Disappearance.

### **Reply to paragraph 5 of the list of issues**

13. Although Montenegro does not criminalise criminal offence described in Articles 2 and 4 of the Convention as such, this criminal offence is nevertheless incorporated in criminal offences of: unlawful deprivation of liberty from Article 162; abduction from Article 164; crime against humanity from Article 427 and war crime against civilian population from Article 428. The criminal offence from Article 162 has as its object of protection freedom of man and the right to freedoms of movement, and the action that constitutes criminal offence is imprisonment, holding imprisoned or unlawful deprivation or restriction of freedom of movement in another manner.

14. The action that constitutes the basic form of the criminal offence from Article 164 is taking away or holding a person with the use of force, threat, deceit or in another manner. This criminal offence includes elements of criminal offence of unlawful deprivation of liberty, coercion and extortion. One of the actions that constitute criminal offence from Article 427 is “imprisonment or abduction of persons without giving information thereof in order to deny them legal protection”, whereas one of the actions that constitute criminal offence from Article 428 is “unlawful deprivation of liberty and imprisonment”.

15. In view of the fact that the actions described in the Convention are covered by the above noted criminal offences, we believe there is no need for a separate criminal offence. Our view is based on the fact that legislation in force does not in any way hamper practical implementation and the fact that criminalisation of separate criminal offence would not mean a substantial change.

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<sup>2</sup> Official Gazette of the Republic of Montenegro 47/07 and Official Gazette of Montenegro 86/09, 88/09, 25/10, 40/11 and 14/12.

### Reply to paragraph 6 of the list of issues

16. Ordering, enticing, attempt, joint commission and complicity are institutes set out in Articles 20-27 of the Criminal Code of Montenegro. These are general provisions which apply to all criminal offences, including those that relate to enforced disappearances. Attempt to commit criminal offence is governed in Article 20, commission and joint commission in Article 23, enticement in Article 24 and aiding and abetting in Article 25.

17. The following are criminalised as separate criminal offences: Failure to report preparation of criminal offence in Article 385; Failure to report criminal offence and perpetrator from Article 386 and Assisting perpetrator after the commission of criminal offence from Article 387 of the Criminal Code.

18. Article 128 of the Law on the Army of Montenegro<sup>3</sup> provides that non-execution or refusal to execute an order, command or decision of the superior and untimely, wrongful and neglectful performance of duty or obligations in duty amounts to a disciplinary offence. However, Article 42 of the Law provides that persons serving in the Army are under a duty to execute commands of the superior, except where this would amount to a criminal offence. In this way, failure to execute a command of the superior the execution of which would amount to a criminal offence exempts persons in Army service from disciplinary responsibility. In addition, Article 42 paragraph 2 of the Law provides that a person in Army service who has received a command the execution of which would amount to criminal offence is under a duty to inform the officer who is superior to the officer who issued the command and the Minister.

## III. Judicial procedure and cooperation in criminal matters (arts. 8–15)

### Reply to paragraph 7 of the list of issues

19. Criminal Code of Montenegro<sup>4</sup> defines extended criminal offence in Article 49.<sup>5</sup>

20. Lapse of specific period of time from the commission of criminal offence, i.e. of the limitation period, leads to barring of prosecution. Statute of limitations is covered by

<sup>3</sup> Official Gazette of Montenegro 88/09, 75/10, 40/11 and 32/12.

<sup>4</sup> Official Gazette of the Republic of Montenegro 70/03, 13/04, 47/06 and Official Gazette of Montenegro 40/08, 25/10, 32/11, 40/13, 56/13 and 14/15.

<sup>5</sup> Article 49 of the Criminal Code provides: (1) Extended criminal offence comprises several same or criminal offences of the kind committed in temporal continuity by the same offender and they represent a whole per se due to the existence of at least two of the following circumstances: the same injured party, the same object of an offence, use of the same situation or the same permanent relationship, the same places or spaces on which the offence was committed or the single intent of the perpetrator. (2) The criminal offences against a person can represent an extended criminal offence only provided that they were committed against the same person. (3) Those offences that by their nature do not allow to be combined in one offence cannot represent an extended criminal offence. (4) If a an extended criminal offence comprises less and more serious forms of the same offence, the most serious form out of the committed offences shall be considered the extended criminal offence. (5) For extended criminal offence the court may impose a sentence more severe that the one set by the law if the extended criminal offence is made up of at least three criminal offences which meet the requirements referred to in paragraph 1 of this Article 6) Such punishment may not be more than double the punishment set out in the law nor longer than 20 years.(7) A criminal offence not covered by an extended criminal offence in a final and binding court decision constitutes a separate criminal offence unless it makes part of a separate extended criminal offence.

Chapter X of the Criminal Code. With regards to extended criminal offence, the period of limitations starts to run from the moment of commission of the last offence that makes part of the extended criminal offence. For criminal offences of failure to act, the period of limitation starts to run at the moment when duty to act has ceased.

21. Statute of limitations in Montenegro is a general one and therefore it is irrelevant what criminal offence, perpetrator and penalty are in question. Periods of limitation of prosecution of perpetrators of criminal offences depend on the severity of penalty carried by the committed criminal offence. An exception to the rule that the statute of limitations is a general one is provided in Article 129, which reads as follows. "Prosecution and enforcement of penalty are not subject to statute of limitations in respect of criminal offences laid down in 264 to 276b, 401, 401a, 422 through 424 and 426 through 431 of this Code and criminal offences for which no statute of limitations applies under ratified international treaties".

22. In civil contentious proceedings, brought by victims of war crimes who seek compensation for nonmaterial and/or material damages, the courts apply the provisions of the Law on Contracts and Torts and Law on Civil Contentious Proceedings.<sup>6</sup> The Law on Contracts and Torts lays down periods of limitation. Article 385 provides that claim for compensation of damages is time barred after three years from the moment the person who suffered damage learned of damage and of the person who inflicted damage. The absolute period of limitations is five years from the moment damage was inflicted. In addition, request for compensation of damages for sexual abuse of a child is time barred 15 years after the victim came of age. Article 386 of this Law lays out rules for claims for compensation of damages inflicted by criminal offences. Namely, where damage is inflicted by a criminal offence and period of limitation for prosecution is longer, claim for compensation of damages toward the responsible person is time barred after the lapse of period of limitations for prosecution. Termination and suspension of statute of limitations of prosecution leads to termination of statute of limitation for claims for compensation of damages.

### **Reply to paragraph 8 of the list of issues**

23. Article 137 of the Criminal Code of Montenegro lays our rules for application of criminal legislation of Montenegro. In accordance with Article 137, Article 137 criminal legislation of Montenegro is also applicable to a foreigner who, outside the territory of Montenegro, commits a criminal offence against it or its national for criminal offences other than those referred to in Article 135<sup>7</sup> of the Criminal Code or commits a criminal offence from Articles 276a, 276b, 422, 422a, 423 and 424 of the Criminal Code of Montenegro in the commission of which a Montenegrin national is involved in any capacity, should he be apprehended in the territory of Montenegro or extradited to it. In addition, criminal legislation of Montenegro also applies to a foreigner who commits abroad, against a foreign country or a foreigner, a criminal offence for which under the law of the country it was committed in, a prison penalty may be pronounced in duration of four years or more, should he be caught in the territory of Montenegro but not extradited to a foreign country.

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<sup>6</sup> Official Gazette of Montenegro 22/04 and 76/06.

<sup>7</sup> Article 135 of the Criminal Code of Montenegro – Application of criminal legislation of Montenegro for perpetrators of certain offences committed abroad: "version of Article 70/2003, 25/2010 Criminal legislation of Montenegro applies to anyone to commits outside of Montenegro the criminal offence from Article 357-369, Article 371 to 374 and Article 447 to 449 of this Code or from Article 258 and 268 of this Code, if counterfeiting concerns the currency than was the legal tender in Montenegro at the time of commission of the criminal offence.

24. However, where criminal offence is not punishable under the law of the country in which it was committed, Article 138 of the Criminal Code, which lays out special conditions for prosecution, in paragraph 5 provides for an exemption to the condition laid out in Article 137, paragraph 2 that criminal offence must be punishable under the law of the country in which it was committed.

25. Criminal legislation of Montenegro applies also to criminal offences which at the time of commission were considered criminal offences under general legal principles recognised in international law. In such case, prosecution may be brought in Montenegro with the approval of the Chief State Prosecutor, regardless of the law of the country in which the criminal offence was committed. In such case, it is not that international law applies directly to the criminal offence, but rather it is Montenegrin law that applies to the perpetrator. In accordance with Article 138, paragraph 5, for double criminalisation requirement to be met it is sufficient that criminal offence is considered a criminal offence under general principles of international law.

26. When deciding whether to approve prosecution in Montenegro, the Chief State Prosecutor takes account of all ratified and published international treaties and generally recognised rules of international law, as well as of the provisions of national law. In accordance with Article 4 of the Convention and Article 7 of the Rome Statute of International Criminal Court, Article 427 of the Criminal Code criminalises crime against humanity and Article 428 criminalises crime against civilian population. Therefore, by incorporating binding international law Montenegro has reaffirmed the generally recognised rule of international law that widespread and systemic commission of enforced disappearances amounts to a crime against humanity and is accompanied by consequences provided for by international law and by national legislation, regardless of law of the country in which the criminal offence was committed.

27. Article 9 of the Constitution provides that ratified and published international treaties and generally accepted rules of international law are integral parts of national law, take precedence over national legislation and apply directly where their provisions govern relations differently than national legislation. Montenegro ratified the International Convention for the Protection of All Persons from Enforced Disappearance in 2009. Pursuant to the above noted provision of the Constitution, Article 9 of the Convention may serve as a basis for jurisdiction for prosecution in Montenegro.

### **Reply to paragraph 9 of the list of issues**

28. The principle of legality of prosecution (Art. 19 of the Criminal Procedure Code) imposes a duty on the State Prosecutor to launch prosecution where there are reasonable grounds to believe that a specific person has committed a criminal offence prosecuted *ex officio*, if otherwise not provided by the Code. The principle of truth and fairness (Art. 16) imposes a duty on the Court, State Prosecutor and other authorities to make a truthful and complete determination of facts which have a bearing on passing of a lawful and fair decision and to examine and determine the facts that are in favour of the accused with equal attention as those that are not.

29. Provisions of Article 10 of the Convention are applicable in the legal order of Montenegro. Although the Criminal Code does not envisage enforced disappearance as an autonomous criminal offence, enforced disappearance is covered by the body of criminal offences against humanity and other values protected under international law – criminal offences against humanity (Art. 427) and war crimes against civilian population (Art. 428). If we analyse these criminal offences we can conclude that imprisonment or abduction without giving of information thereof in order to deny legal protection amounts to the criminal offence of crime against humanity. An order or direct enforcement of unlawful

deprivation of liberty and imprisonment during the time of war, armed conflict or occupation amount to the criminal offence of war crime against civilian population referred to in Article 428 of the Criminal Code.

30. Furthermore, from the vantage point of international cooperation in criminal matters it should be noted that, in addition to the provision of the Law on International Legal Assistance in Criminal Matters<sup>8</sup> to the effect that international legal assistance may be rendered if the offence for which legal assistance is requested constitutes a criminal offence both under national law and the law of the state whose judicial authority has issued the letter of rogatory for international legal assistance, Montenegro is a signatory to the Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters<sup>9</sup>, which broadens the scope of legal assistance in comparison to the provisions of the Law itself.

31. As regards reciprocity, Article 2, paragraph 2 of the Law on International Legal Assistance in Criminal Matters applies to rendering of international assistance. This Article provides that if there is no international treaty or if specific questions are not covered by an international treaty, international legal assistance is rendered in accordance with the Law, provided there is reciprocity or provided it can be expected that the foreign state would execute a letter rogatory for international legal assistance issued by a national judicial authority.

### **Reply to paragraph 10 of the list of issues**

32. A special Department for Suppression of Organised Crime, Corruption, Terrorism and War Crimes was set up within the Chief State Prosecutor's Office. This Department has jurisdiction to investigate and prosecute perpetrators of criminal offences from Articles 427 and Articles 428 of the Criminal Code. As part of judicial reform, the special prosecutor's office is in the process of being established in order to prosecute *inter alia* war crimes (the Law on Special State Prosecutor's Office was passed by the Parliament in February 2015, Official Gazette of the Republic of Montenegro 10/2015). The new State Prosecutor's Office will take over the jurisdiction and cases of the existing Department.

33. The rights and duties of the state prosecutor are set out in Article 44 of the Law on Criminal Procedure. In accordance with this Article, the basic right and the main duty of the State Prosecutor is prosecution of criminal offenders. For criminal offences prosecuted by virtue of office, the State Prosecutor is competent to: 1) issue binding orders or directly manage the activities of the administrative authority competent for police affairs (hereinafter: the police authorities) in the preliminary investigation; 2) render decisions on the postponement of criminal prosecution, when envisaged so by the present Code and reject criminal charges for reasons of fairness; 3) order the investigation to be conducted, conduct the investigation and perform urgent evidentiary actions during the preliminary investigation; 4) conclude agreements on the admission of guilt with accused persons, in line with the present Code, after having collected evidence in line with the present Code; 5) present and represent indictments, i.e. bills of indictment before competent courts; 6) lodge legal remedies against judgments and 7) undertake other actions provided for by this Code. In order to ensure exercise powers referred to in paragraph 2, item 1 of this Article, police and other public authorities have a duty to notify the competent State Prosecutor before taking any action, except in cases of emergency. The police and other public authorities in charge of revealing criminal offences must proceed upon the request of

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<sup>8</sup> Official Gazette of Montenegro 4/08 and 36/13.

<sup>9</sup> The Law on Ratification was published in the Official Gazette of Montenegro – International Treaties 5/08.

the competent State Prosecutor. During the investigation the State Prosecutor must establish with equal attention the facts which are exculpatory and exculpatory for the accused.

34. The Department for Suppression of Organised Crime, Corruption, Terrorism and War Crimes has at its disposal all necessary instruments and mechanisms for investigation of all alleged cases of enforced disappearance and is not subject to any restrictions for access to places of detention for which there is probable cause to believe a missing person is located in such places.

### **Reply to paragraph 11 of the list of issues**

35. All court cases have ended in final and binding decisions. Please see under answer to question No. 3.

36. In the process of implementation of measures envisaged by the Action Plan for Chapter 23 (Judiciary and Fundamental Rights) of negotiations with the European Union the Chief State Prosecutor's office adopted the Strategy for investigation of war crimes. A special prosecutor's office<sup>10</sup> in the process of being established in order to *inter alia* prosecute war crimes and be responsible for implementation of the above noted Strategy.

37. The Department for Suppression of Organised Crime, Corruption, Terrorism and War Crimes dealt with one criminal report filed by a citizen who expressed suspicion that two of his family members disappeared enforcedly at the territory of Kosovo. However, these allegations have not been confirmed after examination was carried out.

38. Information on measures taken in order to reveal the date and location of 61 persons who are reported missing in Montenegro can be found in answer to question No. 17.

### **Reply to paragraph 12 of the list of issues**

39. As noted in paragraph 67 of the report, regarding the possibility of prosecuting persons who are suspected of having committed a criminal offence of enforced disappearance in a state party which does not extradite such persons before competent authorities in Montenegro, Article 137, paragraph 2 of the Criminal Code of Montenegro provides that criminal legislation of Montenegro applies also to non-nationals who have committed a criminal offence against another country or a foreigner outside of Montenegro punishable by imprisonment for four years or a more severe penalty under the law of the country in which the criminal offence was committed, provided that the alleged perpetrator is present in the territory of Montenegro and is not extradited to another state. If otherwise not provided by this Code, the court may not in this case impose a more severe penalty than the one provided for by the law of country in which the criminal offence was committed. Article 138 of the Code provides that in the case referred to in Article 137, paragraph 2, if the criminal offence under consideration is the one considered a criminal offence under general legal principles recognised in international law at the time of commission, prosecution may be undertaken in Montenegro with the approval of the Chief State Prosecutor, regardless of law of the country in which the criminal offence was committed.

40. Reasons for refusal of extradition are set out in Article 13 of the Law on International Legal Assistance<sup>11</sup>, whereas assistance may be refused if the reasons for

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<sup>10</sup> The Law on Special Prosecutors' Office, Official Gazette of Montenegro 10/2015.

<sup>11</sup> Article 13 of the Law: "(1) The extradition shall not be granted for the criminal offence punishable under the domestic law and the law of the requesting state by imprisonment for a term of up to six months or a fine. (2) If the extradition of the sentenced person is requested to serve the sentence, his

extradition set out in Article 11<sup>12</sup> of the Law have not been met. In addition, Article 12 of this Law provides that extradition may not be granted for a political criminal offence, criminal offence connected with a political criminal offence or a military criminal offence. Since Montenegro has signed the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention applies to the extradition process in the sense that the criminal offence of enforced disappearance is not considered a political criminal offence nor a criminal offence connected with a political criminal offence or a politically motivated criminal offence (Art. 13).

### **Reply to paragraph 13 of the list of issues**

41. Article 130 of the Labour Law<sup>13</sup> which applies on a subsidiary basis to civil servants and employees, governs temporary removal of an employee from work (suspension), *inter alia*, in a situation where the employee is prosecuted for a criminal offence prosecuted *ex officio* at work or in relation to work, as well for a corruptive criminal offence.

42. With regards to responsibility of police officers, Article 104 of the Law on Interior Affairs<sup>14</sup> provides that a police officer is disciplinarily accountable for breaches of duty, which might be light and severe. Severe breaches of duty (Art. 106) *inter alia* include:

- Issuing or executing orders which constitute unlawful threat to security of persons and property;
- Issuing orders the execution of which would constitute a criminal offence;
- Concealing severe breaches of duty committed by an immediate superior.

43. An authorised police officer may deprive a person of liberty under the conditions set out in the Criminal Procedure Code (Art. 264), and in such case he has a duty to make an official note, observing the mandatory content thereof (the time and place of deprivation of liberty). A person deprived of liberty must immediately be informed of the rights set out in Article 5 of the Criminal Code, which include: the right to be informed of reasons for deprivation of liberty in his own language, the right to a defence attorney, the right to request that a person of his choosing as well as a diplomatic and consular representative of

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extradition shall not be granted if the duration of the imposed imprisonment sentence or the remaining portion thereof which is yet to be served does not exceed four months”.

<sup>12</sup> Conditions for extradition are as follows: that the person claimed is not a national of Montenegro; that the offence for which extradition is requested was not committed in the territory of Montenegro, against Montenegro or its national; that the offence motivating the request for extradition is a criminal offence both under the domestic law and under the law of the country in which it was committed; that the criminal prosecution or enforcement of criminal sanction has not been barred by the lapse of time under the domestic law before the person claimed has been detained or examined as an accused; that the person claimed has not been already convicted by a domestic court for the same offence or he has not been acquitted of the same offence by the domestic court in a final and legally binding manner, except if the requirements prescribed by the Criminal Procedure Code for retrial have been met; or criminal proceedings have not been instituted in Montenegro for the same offence committed against Montenegro or a national of Montenegro; or the security for the fulfilment of property law claim of the victim has been provided if the proceedings have been instituted for the offence committed against a national of Montenegro; that the identity of the person claimed has been established; that the requesting state presented facts and sufficient evidence for a grounded suspicion that the person claimed committed the criminal offence or there is a final and legally binding judicial decision; that it does not concern a minor offence, in accordance with the Criminal Code.

<sup>13</sup> Official Gazette of Montenegro 49/08, 26/09, 88/09, 26/10, 59/11, 66/12 and 31/14.

<sup>14</sup> Official Gazette of Montenegro 44/12, 36/13 i 1/15.

his home state or a representative of an international organisation be informed of the deprivation of liberty.

44. The Criminal Procedure Code of Montenegro in Chapter thirty one criminalises criminal offence against the judiciary, including criminal offence of preventing taking of evidence (Art. 390) and obstruction of justice (Art. 396).

45. A more severe form of the criminal offence established by Article 162 exists if it was committed by an official person through abuse of position or powers. As noted in the Report, the Criminal Code of Montenegro does not criminalise criminal offence which would be called “enforced disappearance”, instead the elements included in the definition of enforced disappearance are covered by Articles, unlawful deprivation of Liberty — Article 162, abduction — Article 164 and coercion — Article 165; as well as by criminal offences from Chapter thirty five which establishes criminal offences against humanity and other values protected under international law.

46. The Law on Witness Protection<sup>15</sup> governs conditions and procedures for provision out-of-court protection and assistance to a witness, where reasonable fear exists that testifying for the purpose of giving evidence about criminal offences, in connection with which the protection may be provided under this Law, would expose the witness to actual and severe danger to life, health, corporal inviolability, freedom or property of large scale, and other measures of protection are not sufficient. At the request of the witness, protection and assistance may also be provided to a person close to him. Article 4 provides that “witness” means any person, whatever his or her status in criminal procedural law, who possesses information about the criminal offence and the perpetrator and other important circumstances, or intelligence or information crucial and necessary for proving the criminal offence, when the divulgence thereof would expose such person to severe danger to life, health, corporal inviolability, freedom or property of large scale. “Close person” means the spouse or a relative of the witness as well as another person close to the witness who he or she designates as such, and requests to be included in the Protection Program.

47. The Criminal Procedure Code provides for in-court witness protection in Article 120 – protection of witnesses from intimidation. Special ways of participation and hearing of protected witnesses are set out in Article 121, whereas Article 124 provides that the provisions on in-court witness protection apply *mutatis mutandis* to participation and hearing of victims in criminal proceedings.

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

##### **Reply to paragraph 14 of the list of issues**

48. Please see the following information:

(a) Competent authorities: for deportation and return – Ministry of Interior; for surrender within the meaning of the Law on Cooperation with the International Criminal Code – Higher Courts, for extradition – Courts and the Ministry of Justice. The competent authority for enforcement of extradition on the basis of a final decision of the Ministry of Justice is the Police Directorate – Ministry of Interior.

(b) Mechanisms in the extradition procedure are set out in the Law on International Legal Assistance in Criminal Matters, Articles 10 – 33. Article 22, paragraph 1 is particularly significant as it provides as follows: “The Minister will not grant extradition of a person enjoying the right of asylum in Montenegro or if there are

<sup>15</sup> Official Gazette of Montenegro 65/04 i 31/14.

reasonable grounds to assume that, if extradited, the person whose extradition is sought would be subjected to persecution or punishment because of his race, religion, nationality, belonging to a specific social group or because of his political convictions or that his position would be made worse because of any of these reasons”.

(c) First instance decision on extradition may be appealed. The Appellate Court decides on the appeal by applying provisions of chapter II of the Law on International Legal Assistance in Criminal Matters, which govern extradition of accused and sentenced persons.

49. The provisions of the Law on International Legal Assistance in Criminal Matters which govern extradition of accused and sentenced persons, Article 23, paragraph 3 provide that the Declaration to renounce is given on record before the competent court in accordance with the Criminal Procedure Code in a manner that guarantees that the person whose extradition is sought has given such statement voluntarily and was aware of its consequences. Once given, the Statement to renounce may not be revoked.

50. In the case of summary extradition procedure, Article 29, paragraph 2 of the Law on International Legal Assistance in Criminal Matters provides that the consent given by the person is to be entered into records before the competent court in accordance with the Criminal Procedure Code in a manner that guarantees that the person whose extradition is sought has given such consent voluntarily and was aware of its consequences. Once given, the consent may not be revoked. A referral to Article 100 of the Criminal Procedure Code is made here (Instruction about rights and the manner of hearing of the accused).

### **Reply to paragraph 15 of the list of issues**

51. As noted in paragraph 91 of the Report, the Constitution of Montenegro guarantees personal freedom and allows deprivation of liberty only for such reasons and in accordance with such procedure as prescribed by law. *Inter alia*, Article 29, paragraph 7 of the Constitution provides: “Unlawful deprivation of liberty shall be punishable”.

52. As noted in paragraph 94 of the Report, Articles 174–180 of the Criminal Procedure Code govern the grounds, reasons and procedure for ordering detention, as one of the measures for securing the presence of the defendant and for smooth conduct of criminal proceedings. Detention may be ordered only under the conditions set forth in this Code and only if the same purpose cannot be achieved by another measure, with detention being necessary for smooth conduct of proceedings. In addition, when reasonable suspicion exists that a certain person has committed a criminal offence, detention may be ordered against that person, if such person hides or his identity cannot be established, or if other circumstances exist indicating a risk of flight; circumstances exist that indicate that he would destroy, hide, modify or fabricate evidence or traces of a criminal offence or indicate that he would hinder the procedure by influencing witnesses, accomplices or accessories by virtue of concealment; circumstances exist that indicate that the criminal offence would be repeated or attempted criminal offence completed or that he would commit the criminal offence he threatens to commit; in the case of the criminal offence punishable by imprisonment of ten years or a more severe punishment and especially grave due to the manner of commission and consequences and exceptional circumstances exist indicating that liberation would lead to a serious threat to the preservation of public order and peace and/or if duly summoned defendant obviously evades appearing at the main hearing. The ruling ordering detention must be served on persons to whom it relates immediately after it is rendered. Detainees and their defence attorneys may file an appeal against the ruling ordering detention to a court panel within a term of 24 hours from the moment of the delivery of the ruling.

53. The guarantee from Article 29, paragraph 7 of the Constitution has been transposed into the Criminal Code through Article 162, which criminalises unlawful deprivation of liberty. The object of protection of this criminal offence is the freedom of man, specifically the right to freedom of movement. The criminal offence has its basic form and its more severe forms. It can be committed either through acting or a failure to act. Indeed, holding someone imprisoned primarily means a failure to free the imprisoned person. A more severe form of this criminal offence exists where the offender is an official person who has committed the offence through abuse of his position or powers. Qualified forms of this criminal offence are as follows: that deprivation of liberty lasted over 30 days, that it was committed in a cruel manner, that the health of the person who was deprived of liberty severely deteriorated or that other grave consequences occurred. The most severe form involves the death of the person unlawfully deprived of liberty.

54. The Bill on Amendments to the Criminal Procedure Code is under Parliament's consideration.<sup>16</sup> The Bill provides for an amendment of Article 180 as suggested by the Committee in its comments.

55. There is no discrepancy between Articles 29 of the Constitution and Article 180 of the Criminal Procedure Code. On the contrary, the provisions of the Criminal Procedure Code lay down in more detail the duty to provide information about deprivation of liberty by providing that: "Immediately after a person has been deprived of liberty and within a term of 24 hours at the latest, police authority, the State Prosecutor or the court shall inform the family of the detained persons or their extra-marital partner thereon, unless the detained persons expressly object thereto". This provision further guarantees the right of the person deprived of liberty and strengthens the duty of the police, the state prosecutor's office and the court to inform the family or extra-marital partner of the deprivation of liberty. The practice has shown that the persons who are being informed are not immediately available and the 24-hour time period actually means that the competent authorities will continue with attempts to reach such persons and notify them.

56. There are no conditions or limitations that apply in relation to measures referred to in Article 17, paragraph 2(d) of the Convention.

57. In relation to the implementation of regulations – the existence of a protocol guaranteeing the provision of information without delay, access to lawyers, physicians and family members, it should be noted there are two detention units within the Institute for Enforcement of Criminal Sanctions: Podgorica Investigative Prison and detention unit within Bijelo Polje Prison. The schedule and timing of visits is governed by the House Rules. Article 48 of the Rulebook on detailed rules for enforcement of detention provides that defence attorney may visit a detained person and exchange correspondence with him in accordance with the Criminal Procedure Code. Accordingly, visits of defence lawyers take place on Mondays, Wednesdays and Fridays, whereas family members may visit on Tuesdays, Thursdays and Fridays.

58. Article 16 of the above mentioned Rulebook provides that healthcare to detained persons is provided in out-patient facility of the prison and special hospital of the Institute. It also provides that if successful treatment may not be provided within the Institute for Enforcement of Criminal Sanctions, the physician refers the detained person to a public health facility that offers possibilities for adequate treatment.

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<sup>16</sup> Montenegro is convinced that by the time of submission of this Report, the Law on Amendments to the Criminal Procedure Code will be adopted by the Parliament and that more detailed information on amendments of this and other relevant provisions will be presented at the next session of the Committee in September 2015.

59. The *Rulebook on detailed rules for enforcement of detention* defines the issue of exchange of correspondence. Article 43 provides that a detained person may exchange correspondence with a person from the outside of prison with the approval of the investigative judge, in accordance with the Criminal Procedure Code. The same provision provides that the Institute is under a duty, if the detained person has no means, to provide the detained person with possibility to get in touch with his family or next of kin and to file petitions (pleas, appeals, applications) for protection of his rights and interests protected under the law.

60. It should be noted that the detained person may use phone but only in accordance with established procedure which involves prior consent of the investigative judge, who must be informed of the name and number of the person the detained person wishes to communicate to.

### **Reply to paragraph 16 of the list of issues**

61. Paragraph 12 of the Report refers to Articles 5 and 180 of the Criminal Procedure Code. Article 5, paragraph 1 of the Criminal Procedure Code provides: “Persons deprived of liberty by a competent public authority shall be immediately informed in their language or in a language they understand about the grounds for their apprehension and, at the same time, informed that they are not obliged to make a statement, that they have a right to a defence attorney of their own choice and to request that a person of their choosing be informed on their deprivation of liberty as well as a diplomatic consular representative of a state whose nationals they are or a representative of appropriate international organization if they are stateless persons or refugees”. The afore noted rights of the persons deprived of liberty are also guaranteed by Article 29 of the Constitution of Montenegro. Article 180 of the Criminal Procedure Code provides that immediately after a person has been deprived of liberty and within a term of 24 hours at the latest, police authority, the State Prosecutor or the court must inform the family of the detained persons or their extra-marital partner thereon, unless the detained persons expressly object thereto. A competent authority for social care is to be informed about the deprivation of liberty if necessary to take measures for the care of children and other family members under the care of the person deprived of liberty.

62. The Government of Montenegro adopted the Bill on Amendments to the Criminal Procedure Code on 23rd April 2015. The Bill provides for amendment of Article 180 to the effect that the 24-hour time limit for notification of persons referred to in Article 180 by the police, state prosecutor or court will be deleted from the legal provision.

63. Article 264 of the Criminal Procedure Code provides: “(1) Authorized police officers may deprive a person of liberty if any of the grounds for detention from Article 175 of the present Code exists, but they shall inform the State Prosecutor thereon without delay, draw up an official annotation that has to contain the time and the place of the deprivation of liberty and to bring that person before the State Prosecutor without delay. On the occasion of the liberty deprived person’s appearance before the State Prosecutor, an authorized police officer shall submit the official annotation to the State Prosecutor and the State Prosecutor shall also enter in the record the deposition of the liberty-deprived person as to the time and place of his/her deprivation of liberty. (2) The person deprived of liberty shall be advised on the rights referred to in Article 5 of the present Code. (3) If a person deprived of liberty is not escorted before the State Prosecutor within 12 hours from the deprivation of liberty, the police shall release the person. (4) A person deprived of liberty in compliance with paragraph 1 of this Article may not be deprived of liberty again for the same criminal offence.”

64. The Law provides that the person deprived of liberty must be brought before the state prosecutor by the police within 12 hours. The Bill on Amendments Criminal Procedure Code has extended this time limit to 24 hours.

65. The Code provides that the person caught in the commission of a criminal offence prosecuted ex officio may be deprived of liberty by anyone. The person deprived of liberty must immediately be brought to the State Prosecutor or police, and if this is not possible, one of the abovementioned authorities must immediately be informed thereon. The police proceeds pursuant to Article 264 of the Code.

66. With regards to the guarantees of the right to access to information, the Law on Protection of Personal Data<sup>17</sup> governs in detail the right to protection of personal data, which is guaranteed by Article 43 of the Constitution of Montenegro. The Constitution prohibits the use of personal data for purposes other than those for which they were collected and provides that everyone has the right to be informed of the data collected about his person and the right to court protection in case of abuse. Protection of personal data is provided under the conditions and in the way laid down by this law, in accordance with the principles and standards contained in the ratified international human rights treaties and generally recognized rules of international law. In accordance with Article 2, paragraph 1 of the Law on Protection of Personal Data, personal data must be processed in a fair and lawful manner. This means that data filing systems controllers – the Police Directorate, competent prosecutor's offices and courts are under a duty to process data that make an integral part of case files in a lawful manner and that in accordance with Article 2, paragraph 2 of the Law on Personal Data Protection, personal data may be processed only to the extent necessary to achieve the purpose of processing and in a way compatible with the purpose for which they were collected.

67. Article 4 of the Law provides that protection of personal data is to be provided to every individual, regardless of nationality, domicile, race, skin colour, sex, language, religion, political or other belief ethnicity, social origin, property, education, social position or other personal attributes. In accordance with Article 14 of the Law, the processing of personal data relating to criminal offences, criminal or misdemeanour penalties or security measures may be carried out only by or under the supervision of the competent state authority, provided that measures to safeguard personal data are ensured in accordance with the law. Where personal data are requested for the needs of defence, national and public security nor in pre-trial and criminal proceedings, the request may contain the time until which the data subject may not know his data have been used. The duty of the data filing system controller to inform persons about processing is laid down in Article 20 of the Law. The case in which data are not collected directly from data subjects is governed in detail by Article 22 of the Law.

68. National legislation is in line with the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Council of Europe, CETS No. 108), specifically its Article 8. Namely, Article 43 of the Law sets out rights of individuals relating to personal data protection – it provides for the duty of the personal data filing system controller to notify at a written request of the data subject or his legal representative or attorney, if any, the data subject whether his personal data are subject to processing no later than 15 days from the day when the request was submitted must. In accordance with Article 45 of the Law, the rights of data subjects set out in Articles 43 and 44 of this law may be restricted when such a restriction is required for the purpose of defence, national and public security, detection and prosecution of criminal offenders, safeguarding economic or financial interest or cultural assets of importance for the state, as well for protection of the data subject or of human right and freedoms, to the extent necessary to

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<sup>17</sup> Official Gazette of Montenegro 79/08, 70/09 and 44/12.

achieve the purpose for which the restriction was established, in accordance with a separate law. On the basis of Article 47 of the Law, any person who alleges a breach of his rights set forth in this Law may submit a request for protection of rights to the supervisory authority, namely the Agency for Personal Data Protection and Free Access to Information.<sup>18</sup> The supervisory authority must decide on the request within 60 days from the day of submission of the request. The supervisory authority may, at a written request of the person who submitted a request for protection of rights, temporarily ban further processing of personal data, if a breach of the rights established by this law exists or is established as likely. Administrative dispute proceedings may be initiated against such decision of the supervisory authority.

69. With regards to the request to comment on compliance with Article 20 of the Convention and other relevant international human rights standards, we note that despite the guaranteed right of the data subject to be informed of data processing by the personal data filing system controller (Art. 43 of the Law), Article 45 allows restriction of the right if so required by needs of national and public security, prevention of criminal offences, detection and prosecution of offenders. Article 17 of the Law provides that where personal data are requested for the needs of defence, national and public security nor in pre-trial and criminal proceedings, the request may contain the time until which the data subject may not know his data have been used. These restrictions are in line with Article 20 of the Convention. In the context of protection of privacy of personal correspondence, there is a clear right to secrecy of written correspondence, telephone conversations and other means of communication, which may be restricted only on the basis of court decision, if so required for conduct of criminal proceedings or for reasons of security of Montenegro. The above noted restrictions of access to data are in line with the exceptions and restrictions from Article 13 of the Directive of the European Parliament 95/46/EC.

### **Reply to paragraph 17 of the list of issues**

70. With a view to facilitating international and regional efforts to resolve the issues of missing persons, a Government Commission for Missing Persons has been set up. The Commission is tasked with resolving the problem of persons missing in armed conflicts in ex-Yugoslavia. The Commission monitors, studies and puts forward proposals for resolution of issues of missing persons from the territory of Montenegro in armed conflicts in ex SFRY; performs obligations from international treaties and agreements relating to the issue of missing persons; coordinates the work of competent authorities and organisations in the process of searching for missing persons, exhumation and identification; cooperates with competent authorities, families and associations of missing persons in order to resolve the issues their families face.

71. With a view to implementing the tasks entrusted by the Government of Montenegro, and taking in account the graveness, complexity and the specificity of the issues, as well as political sensitivity of the problem of missing persons, the Commission cooperates with the competent ministries and relevant experts in order to ensure systemic and professional resolution of the issue. Furthermore, the Commission cooperates with relevant international organisations and institutions (International Commission on Missing Persons and International Committee of the Red Cross), in accordance with their mandate and signed

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<sup>18</sup> The Agency for Personal Data Protection and Free Access to Information as an independent authority for protection of personal data of all persons whose data are subject to processing is a second-instance body in administrative proceedings initiated by appeals. It promotes rights to free access to information of persons seeking access to information and affirms international best practices and standards in these areas while fighting for the rule of law and protection of rights and freedoms in Montenegrin democratic community.

international documents for the purpose of swifter resolution of the issue of missing persons, as well as for the purpose of preventing the abuse of the issue for political aims.

72. The Commission is set to be active for as long as the process of searching for persons reported as missing in armed conflicts in ex-Yugoslavia is on-going, and the manner of work of the Commission is governed by the Rules of procedure, passed by the Commission.

73. The Commission has contacts with families of missing persons for the purpose of providing information about the current status of missing persons cases and collecting new information and facts, which might help resolve the fate of their missing members. The Commission keeps the families abreast of facts relating to finding of remains of their members, provides assistance in organising taking over of the remains, provision of documentation and bears transport and funeral expenses. The Commission also cooperates with associations of families of missing persons, implements part of its activities through them and provides them with financial and other support.

74. In November 2008, the Red Cross of Montenegro took over case files and documentation from the Regional Mission of the International Committee of the Red Cross – seated in Belgrade, Republic of Serbia for 66 persons (ante mortem data) who went missing during armed conflicts in ex-Yugoslavia. Since the International Committee of the Red Cross created a database on the basis of the seat or permanent residence of the applicant, the documentation relates to persons who were citizens of Montenegro at the time they went missing or the applicants were citizens of Montenegro when they reported them missing. All documentation was surrendered to the Commission for Missing Persons of the Government of Montenegro on 22<sup>nd</sup> April 2013.

75. In order to bring the system of work in line with the standards applied in humanitarian law, the Commission cooperates with associations dealing with humanitarian law, particularly those dealing with this issue for the territory of ex-Yugoslavia. In this context, with the aim of contributing to the easing of grave, humanitarian consequences of the conflict in ex-Yugoslavia, and recognising the right of families to know complete truth about their missing members, the Commission for Missing Persons of the Government of Montenegro and Commission for Missing Persons of the Government of the Republic of Serbia signed the Protocol on cooperation between Commission for Missing Persons of the Government of Montenegro and Commission for Missing Persons of the Government of the Republic of Serbia on 25<sup>th</sup> April 2012.

76. In cooperation with commissions and other associations of countries of the region dealing with the same problem area, the Commission resolved and executed taking over of remains of 14 persons who were nationals on Montenegro at the time they went missing or the applicants were citizens of Montenegro when they reported them missing.

77. Persons who went missing in armed conflicts in ex-Yugoslavia sought by the Commission for Missing Persons of the Government of Montenegro include 61 Montenegrin citizens and applicants who reported them missing and had permanent place of residence in Montenegro. Of this number, 43 persons are sought at the territory of Kosovo, 12 at the territory of Bosnia and Herzegovina and 8 persons at the territory of the Republic of Croatia.

78. Acting in line with recommendations of the Working Group on Enforced or Involuntary Disappearances (WGEID), and with the aim of reaching an agreement on forms of future cooperation and coordination of activities between the Commission for Missing Persons of the Government of Montenegro and other competent commissions and associations from the region, in December 2014 the Commission sent invitation letters for the initial meeting to the Ministry of Defenders – Directorate for Imprisoned and Missing

of the Republic of Croatia, the Institute for Missing Persons of Bosnia and Herzegovina and the Commission for Missing Persons of the Government of the Republic of Kosovo.

79. In the beginning of February 2015 a meeting with representatives of the Commission for Missing Persons of the Government of the Republic of Kosovo was held. The meeting served not only to exchange information about the work and dedication of the commissions, in cooperation with local and international stakeholders, in joint efforts to reveal the fate of missing persons, but it was also agreed that the process of development and signing of a Protocol for cooperation between the two Commissions should be signed. In accordance with this, the Montenegrin side prepared and on 18<sup>th</sup> February sent to the Kosovo side a Draft Protocol.

80. The Directorate for Imprisoned and Missing of the Republic of Croatia has accepted an invitation for the meeting. The meeting will be held in the near future. A reply from the Institute for Missing Persons of Bosnia and Herzegovina is pending.

81. On 7<sup>th</sup> and 8<sup>th</sup> May 2015, the International Commission on Missing Persons (ICMP) organised a regional meeting dedicated to finding of missing persons in the Western Balkans. In addition to representatives of the Commission for Missing Persons of the Government of Montenegro, the meeting was attended by government institutions responsible for resolution of the fate of missing persons from Bosnia and Herzegovina, Croatia, Serbia and Kosovo.

82. The health system of Montenegro does not keep a national database of DNA and other ante mortem information.

### **Reply to paragraph 18 of the list of issues**

83. Article 51 of the Constitution of Montenegro provides that everybody has the right to access information in possession of state authorities and organisations performing public powers. The Law on Free Access to Information<sup>19</sup> governs the manner and procedure for exercise of the right of citizens to seek, receive and use information in possession of the authorities.<sup>20</sup>

84. Under the Criminal Procedure Code and the Law on Protection of Personal Data a person deprived of liberty has constitutionally guaranteed right to get access to personal information, whereas other persons have the right to access information under the Law on Free Access to Information without having to prove a legal interest. The Law on Free Access to information provides for a restriction in Article 14 paragraph 1 item 3. Namely a public authority may restrict access to information or to part thereof if this is in the interest

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<sup>19</sup> Official Gazette of Montenegro 44/12.

<sup>20</sup> The right to access to information belongs to all national and foreign natural and legal persons without discrimination. Access to information in possession of public authorities is based on the principles of free access to information, transparency of work of public authorities, the right of the public to know and equality in accordance with the standards set out in ratified international human rights treaties and generally recognised rules of international law. Article 5 of the Law on Free Access to Information provides that access to information ensures that the public knows information in possession of public authorities for the purpose of democratic control of government and realisation of human rights and freedoms. All natural and legal persons from and outside of Montenegro is entitled to access information without having to state the reasons and explain the interest behind his request. Article 10 paragraph 2 of the Law on Free Access to Information provides that access to information includes the right to seek and receive information regardless of purpose and data contained therein. In accordance with Article 13 of the Law on Free Access to Information, the public authority is under a duty to provide the applicant with access to information or part thereof, unless otherwise provided by this Law.

of prevention of investigation and criminal prosecution, in order to protect from disclosure data referring to following: — to prevent committing the criminal act, — on reporting criminal act and perpetrator of it, - on content of actions undertaken in pre-trial and criminal procedure;— data collected through observation and investigation, — on secret surveillance measures;— on protected witness and collaborators of justice; — efficient conducting of procedure. Under Article 15 of the Law in Free Access to Information, a restriction of access to information requested for the purpose of investigation and prosecution of offenders may last no longer than proceedings. First-instance authorities which invoke the above noted exceptions regarding access to requested information must apply a harm test of disclosing information laid out in Article 16 of the Law on Free Access to Information. Namely, if disclosure of information would significantly jeopardize interests referred to in Article 14 of the Law, or if there is a possibility that disclosure of information would cause harm to interest that is greater than the interest of the public to know such information, unless there is prevailing public interest prescribed by the Article 17 of the Law on Free Access to Information. Prevailing public interest for disclosure of information, or a part thereof, exists when the requested information contains data that evidently refers to the following: 1) corruption, non-observance of regulations, unauthorised use of public funds, or abuse of authority in exercising public function; 2) the existence of grounds to believe that a criminal offence has been committed or existence of reasons to challenge a court decision. The public authority is under a duty to grant the access to information or part of information referred to in Article 14 of the Law in cases when there is prevailing public interest for disclosure of information.

85. Under Article 31 the Law on Free Access to Information, the public authority must make a decision on the request for access to information and deliver it to the applicant within 15 working days following day on with an adequate request has been submitted. If access to information is requested for the purpose of protecting the life or freedom of an individual, the public authority must make a decision and deliver it to the applicant within 48 hours as of the hour of submission of the request. The right to appeal is guaranteed by Article 34 of the said Law. Namely, the applicant, or another individual having an interest, may make a complaint against the decision of the public authority on the request for access to information to an independent supervisory authority responsible for protection of personal data and access to information, the Agency for Personal Data Protection and Free Access to Information, through the authority that decided upon request in first instance. Notwithstanding paragraph 1 of this Article, complaint may not be filed against decision denying access to information containing data marked as classified, but it is possible to initiate administrative dispute proceeding against the decision. The complaint against a decision granting access to information does not stay the execution of the decision. Under Article 38 of the Law on Free Access to Information, the Agency is under a duty to make a decision on the appeal to decision on request for access to information and deliver it to the applicant within 15 working from the day on which the appeal was filed. The complaint against a decision to the request for access to information is to be decided upon by the Council of the Agency. The Council of the Agency must make a decision *in meritum* about the complaint. This means that the Council may not vacate the decision and sent the case back to the first instance authority but must decide the case *in meritum* in second-instance proceedings. In accordance with Article 40 of the Law on Free Access to Information, for the purpose of resolving complaints and performing supervision over the legality of decisions made in relation to requests for access to information, the Council of the Agency has the right to request following: 1) that the public authority submit to it the complete information to which access is requested, or a part thereof and other information and data that are required for decision making; 2) that the inspection responsible for control of office operations establishes whether the public authority is in possession of the requested information. Court protection is governed by Article 44 of the Law on Free Access to Information. In accordance with this Article, the applicant and third interested party are

entitled to court protection, in accordance with the law governing administrative dispute proceedings. The court has the right to decide if the public authority properly marked data in requested information as classified, in accordance with the law governing the area of data secrecy. Procedure of adjudicating a legal action in relation to access to information is urgent.

86. All final and binding decisions are published on webpages of Montenegrin courts within the *www.sudovi.me* Portal and are available to the public and professionals. The courts also publish all important court activities on the Portal, as well as the list of pending cases, press releases, internal court regulations, information on cooperation with the non-governmental sector, as well all other important information for which there is a duty of publication under the Law on Free Access to Information.<sup>21</sup>

87. Information on high-profile cases, particularly earlier war crime cases are published in a timely manner by court spokespersons, including information on detention ordered by the court.

88. Montenegrin courts fully observe the Law on Free Access to Information and pass decisions within statutory time limits. First-instance court decision passed in proceeding concerning a request for access to information may be appealed with the Agency for Personal Data Protection and Free Access to Information, as the second-instance authority.

89. The courts developed guides for access to information in their possession and appointed persons authorised to deal with requests. The guides were developed in order to facilitate the exercise of rights in accordance with the said Law. The development of guides raised the level of court transparency. The guides are published on webpages of each court within the *sudovi.me* Portal, and thus anyone who is interested is able to learn at any moment what sort of information is in possession of the court, what is the procedure to get access to information and who are the persons authorised to deal with applications.

90. The key novelty is that the number of persons authorised to deal with applications has been increased from one court officers two. The publication of their names and contact details facilitates identification of responsible persons in courts, who can be addressed by the interested public timely. In this way, timely handling of applications for free access at any moment by educated court officials is ensured.

91. The time limit for resolving requests for access to information is now 15 instead of 8 days, except in case of protection of lives and freedoms of persons where applications are dealt with within 48 hours.

### **Reply to paragraph 19 of the list of issues**

92. With regards to education of holders of judicial office, the Training curriculum of the Judicial Training Centre for 2014 and 2014 includes trainings on human rights as a separate area. At these trainings judges and prosecutors learn and improve their knowledge of the practical application of the European Convention on Human Rights standards and the case-law of the European Court of Human Rights.

93. Possible training topic *inter alia* include the right to life (Article 2), prevention of torture (Article 3), right to freedom and security of the person (Article 5) and the right to a fair trial within a reasonable time (Article 6). Training materials include the text of the European Convention on Human Rights, judgements and summaries of the judgments of the European Court of Human Rights, legal bulletins and the existing databases, whereas

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<sup>21</sup> Official Gazette of Montenegro 44/12.

the methodology of work includes seminars/conferences with classical lectures, discussions, case studies, group work, e-learning (distance learning courses).

94. In 2014, the Centre delivered continuous human rights education and organised a total of 9 activities as follows:

- 5 education activities on the following topics: Freedom of expression and the right to privacy (3); Right to personal freedom and security – ECHR standards and Montenegrin legislation and practice (1); Right to efficient defence in criminal proceedings (1);
- 2 training of trainers on ECHR;
- 2 distance learning courses (on anti-discrimination (1) and community measures and sanctions that are a response to overcrowding of prisons (1)).

95. A total of 78 representatives of the judiciary attended the above noted events on ECHR and case-law of the European Court of Human Rights. Of these 78, 54 were representatives of the courts and 24 representatives of the Prosecution Service.

96. In February 2015, in cooperation with the Centre for Democracy and Human Rights (CEDEM) and London-based AIRE Centre, the Judicial Training Centre of Montenegro organised a seminar on “Presumption of innocence in the European Convention on Human Rights with focus on the role of the media and public officials”. The event was supported by the German foundation Konrad Adenauer, through the Rule of Law in the South-East Europe Programme, OSCE Mission to Montenegro and the British Embassy in Podgorica. The seminar was attended by 11 representatives of the judiciary, who included 3 representatives of the Prosecution Service and 8 representatives of courts.

97. Aware of the importance of continuous human rights education, and having in mind the provisions of Article 23, paragraph 1 of the Convention, the management of the Institute for Enforcement of Criminal Sanctions makes sure that its officers attend trainings organised by the Human Resources Management Authority in accordance with the Curriculum adopted by this authority, which is *inter alia* responsible for management, education and training of human resources.

98. The health system did not organise any trainings from this field.

99. The Police Academy has not so far delivered trainings relating to enforced disappearances. This topic is covered by the Basic curriculum for education of police officers. Expert and specialist training may be delivered to police officers, on a needs basis. The Basic curriculum for education of police officers includes a course on human rights, with two classes and four additional classes on deportation.

## **V. Measures for reparation and the protection of children against enforced disappearance (arts. 24–25)**

### **Reply to paragraph 20 of the list of issues**

100. Article 22 paragraph 5 of the Criminal Procedure Code provides that the injured person is a person whose personal or property-related right violated or put at risk. The term injured party ensures the status of victim in the case that no criminal proceedings are brought against the offender, having in mind that definition of victim of the Criminal Code of Montenegro covers the person considered the injured party under the Criminal Procedure Code.

101. In accordance with Article 142 paragraph 11 Criminal Code of Montenegro “victim” means a person who has been inflicted physical or mental pain and suffering or property damage or whose human rights and freedoms have been violated by an offence defined in the law as criminal offence. Having in mind the definition of victim from Article 24 paragraph 1 of the Convention, which reads as follows “victim” means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance”, it can be concluded that the definition of victim from the Criminal Code of Montenegro covers all persons who have been inflicted physical or mental pain and suffering or property damage or whose human rights and freedoms have been violated, including the disappeared person who has suffered harm as the direct result of an enforced disappearance.

### **Reply to paragraph 21 of the list of issues**

102. Injured party/victim (hereinafter “the injured party”) has specific rights and duties in criminal proceedings. The rights of the injured party are associated with his status as well as the fact that the injured party is most often the victim of the criminal offence. The 2013 amendments to the Criminal Code introduced the concept of victim in Article 142 paragraph 11: “victim” means the person who has been inflicted physical or mental pain and suffering or property damage or whose human rights and freedoms have been violated.

103. The injured party has the right to report the criminal offence by filing a criminal report. If the state prosecutor dismisses the criminal report, he must deliver his decision to the person who reported the crime or the injured party if this is not the same person. The Bill on Amendments to Criminal Procedure Code (link with answer to question No. 5), strengthens the provisions relating to dismissal of crime report by allowing the persons who reported the crime or the injured party to file a complaint to the decision on dismissal of criminal report. In case the state prosecutor fails to bring or withdraws from prosecution, the injured party has the right to assume or continue prosecution as a subsidiary prosecutor and in such case has all the rights as the state prosecutor. If the subsidiary prosecutor dies pending the term for assuming prosecution or pending the proceedings, his spouse, extramarital partner, children, parents, adopted children, adoptive parents, siblings may within three months after his death assume prosecution by making statement that they are continuing the proceedings.

104. The injured party may propose to the court to order supervision measures against the defendant. This is a special type of measures aimed at ensuring the presence of the defendant.

105. In cases where criminal proceeding are conducted for a criminal offence punishable by an imprisonment sentence exceeding three years and the injured party cannot bear representation expenses according to his financial standing, he may be appointed a proxy at his request if the representation of the injured party by the proxy is in the interest of fairness. If the injured party is a minor, during the entire criminal procedure the court must by virtue of office assess whether he needs to be appointed a proxy.

106. In the course of investigation, the injured party is entitled to call attention to all facts and to offer evidence important for the criminal case and for their claim under property law. In addition, the injured party may put forward proposals to the state prosecutor to take specific actions. Having in mind the principle of openness of investigation, the injured party has the right to attend the interrogation of the accused person, hearing of witnesses and expert witnesses, crime scene investigation, reconstruction and search of dwellings. The injured party who attends these actions may suggest that the State Prosecutor poses certain questions to the accused person, witness or expert witness for the purpose of clarification, and, upon the permission of the State Prosecutor, may pose questions personally and may

request that his objections as to carrying out certain actions be entered in the records and may propose that certain evidence be examined. If the state prosecutor discontinues the investigation, he is under a duty to deliver the decision to the injured party and instruct him of the right to assume prosecution (as a subsidiary prosecutor).

107. In the indictment stage of proceedings the injured party has the right to appeal the decision of the panel discontinuing proceedings or dismissing the indictment. The interests of the injured party are taken into account also in the plea bargaining process. Plea bargaining is a new institute in criminal legislation of Montenegro and injured party has the right to be present during the negotiations and to appeal the plea bargaining agreement.

108. The injured party may exercise his rights at the main hearing as well. The right of the injured party to attend the main hearing may not be restricted (in the case of exclusion of the public). At the very beginning of the main hearing the injured party is instructed he can file a claim under property law if he has not done so earlier and that he can provide a statement of reasons for such a claim. Until the end of the main hearing, the injured party may propose that new facts be established and may attend the presentation of evidence. The hearing of the injured party is governed by the general provisions on hearing of witnesses. Once evidentiary procedure is finalised, the injured party is entitled to provide a statement of reasons behind his claim under property law and to underline evidence against the accused in his closing words.

109. The injured party is also entitled to file an appeal against the judgement.

### **Reply to paragraph 22 of the list of issues**

110. All victims of war crimes and their families in Montenegro are guaranteed access to justice, compensation and reparation.

111. In civil contentious proceedings, initiated by actions of victims of war crimes for compensation of material and/or non-material damage, the courts apply the Law on Contracts and Torts and the Law on Civil Contentious Proceedings. Articles 207, 208, 209, 210, 211 and 212 of the Law on Contracts and Torts set out detailed rules on compensation of non-material damage, whereas compensation of material damage suffered as result of death, bodily harm or deteriorated health is governed by Articles 200, 201, 202, 203 and 204 of the Law.

112. In 2014, there were 152 cases for compensation of damage to victims of war crimes were handled. The courts resolved 37 cases. In 34 cases the actions were successful and the plaintiffs we awarded a total of €420 710.45. In one case the action was rejected, whereas in two cases the plaintiffs withdrew the actions.

### **Reply to paragraph 23 of the list of issues**

113. The area of social and child protection is governed by the Law on Social and Child Protection.<sup>22</sup> Article 5 of the said Law provides that the rights set out in the Law may be exercised by Montenegrin nationals with permanent residence in Montenegro. The rights set out in this Law and international treaties may also be exercised by persons having the status of aliens with approved temporary residence or permanent stay in the country in accordance with a separate Law. In this context, the exercise of social and child protection rights by the disappeared persons and members of their families depends on the

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<sup>22</sup> Official Gazette of Montenegro 27 /13 and 1/15.

determination of their status (declaration of death or assumption of death and statement on absence due to enforced disappearance).

### **Reply to paragraph 24 of the list of issues**

114. Chapter XXXV of the Criminal Code of Montenegro criminalises crimes against humanity and other values protected under international law. Forcible moving of children constitutes a form of the criminal offence of genocide from Article 426 of the Criminal Code of Montenegro. Forcible moving is also a form of the criminal offence of crime against humanity from Article 427 and war crime against civilian population from Article 428 of the Criminal Code, but these criminal offences do not specify that children are victims of such criminal offences. All the above noted criminal offences carry a prison sentence ranging from five to forty years.

115. Article 10 of the Constitution of Montenegro provides that in Montenegro, anything not prohibited by the Constitution and the law is free, as well as that everyone has the duty to abide by the Constitution and the law. Except in line with conditions laid down in the law, the right of the child to know who his parents are may not be restricted. In addition, Article 19 guarantees to everyone equal protection of right and freedoms. The Constitution also provides for protection of the dignity and inviolability of personality through Article 28, which *inter alia* provides: “The dignity and security of a man shall be guaranteed. The inviolability of the physical and mental integrity of a man, and privacy and individual rights thereof shall be guaranteed.”

116. The legal order aims to ensure legal security and access to justice by all citizens - the right the right to free access to information and the right of everyone to address international organisations and state authorities and organisations performing public duties are guaranteed by the Constitution. The Constitution of Montenegro provides that everyone has the right to access information in possession of state authorities and organisations performing public duties (Article 51). The Constitution also guarantees the right to address international organisations for the purpose of protecting one’s rights and freedoms guaranteed by the Constitution (Article 56). Article 57 provides that everyone has the right to address the state authority or organisation performing public duties either alone or with someone else and to get an answer. For a more detailed overview of the procedure for realisation of the right to free access to information please see answer to question 18.

117. In the context of rights of the disappeared children to establish their true identity, it should be noted that in addition to being protected by legislation in force, this right may not be restricted in practice. Violation of the right of children in this context is possible only through the commission of a criminal offence, including the criminal offences of Violation of the right to file a legal remedy (Art. 1 of the Criminal Code of Montenegro), Preventing evidence presentation (Art. 390), Forging of documents (Art. 412) and Forging official identity documents (Art. 414).

### **Reply to paragraph 25 of the list of issues**

118. One of the fundamental principles of family law in Montenegro as set out in the Family Law of Montenegro<sup>23</sup> is that everyone has a duty to consider the best interest of the child in all activities concerning the child. This Law provides for the duty of the state to respect and promote the rights of the child and to take all necessary measures to protect children from neglect, abuse and exploitation. The guardianship authority, court and

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<sup>23</sup> Official Gazette of Montenegro 1/07.

mediator are responsible for provision of expert assistance and protection of the rights and interests of the child and other family members, for resolution of disputes between family members and in all cases of disturbed family relations.

119. One of the fundamental rights of the child under the law is the right to know who his parents are and to live with them and be taken care of by them before anyone else. This right may be restricted only by a court decision and in the best interest of the child.

120. Adoption is a form of protection of children without parents or adequate parental care, which results in establishment parental relations and kinship. One of the restrictions in relation to adoption is the age of the child – a child under three months may not be adopted. Also, children whose parents are unknown may be adopted only three months after abandonment. The Family Law also contains rules on adoption procedure, which is conducted by the guardianship authority covers the place of the child's permanent residence or temporary residence if the permanent residence cannot be established.

121. Procedure of revision/annulment of adoption is governed by the Family Law. Adoption terminates by way of annulment. The adoption is null and void if condition for its validity were not met at the time it was established. Also, adoption to which consent was given under coercion or by a person who was misled is also null and void. Adopters, the adoptee, the parent or the custodian of the adoptee and other persons having legal interest in adoption being annulled, as well as the state prosecutor have the right to file bring an action for annulment of adoption. The person who gave a statement on consent to adoption under coercion or misled may file a complaint for annulment of adoption within one year from the day when coercion ceased to exist or after the misleading was noticed. The court delivers the decision on annulment of adoption to the guardianship authority before which the adoption was established. Based on this decision the guardianship authority makes a decision on annulment of the decision pertinent to the new registration of the adoptee. Based on this decision the first registration of adoptee's birth becomes legally valid.

122. Placement of children is governed by the Law on Social and Child Protection. Article 64 governs the issue of placement in an institution, whereas Article 64 governs the issue of family placement – foster care. Placement is a service involving stay of the beneficiary: in family placement – foster care, family placement, an institution, shelter and other types of placement. Placement may be temporary, occasional and long-term. In accordance with Article 5 of the Law, placement is provided to nationals of Montenegro with the permanent place of residence at the territory of the state. Placement may also be provided to a person who has the status of an alien with granted temporary stay or permanent stay in the state, in accordance with a separate law. The above noted types of placement are governed in more detail by the Rulebook on detailed rules for provision and use of services of family placement-foster care and family placement<sup>24</sup>, Rulebook on detailed rules for provision and use of services, norms and minimal standards of the service of placement in s shelter<sup>25</sup> and Rulebook on detailed rules for provision and use of services, norms and minimal standards of the service of placement of children and young people in an institution and a small group home.<sup>26</sup>

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<sup>24</sup> Official Gazette of Montenegro 19/14.

<sup>25</sup> Official Gazette of Montenegro 26 /14.

<sup>26</sup> Official Gazette of Montenegro 43 /14.