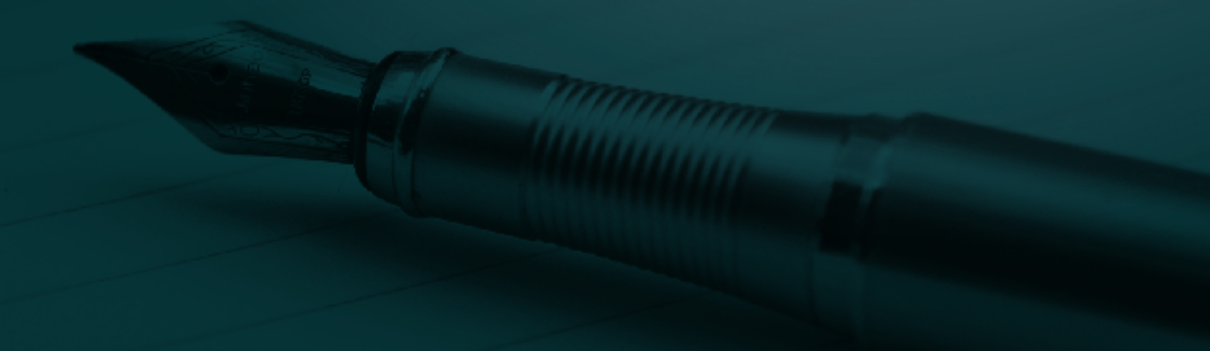
SUPREME COURT OF MONTENEGRO

GOVERNMENT OF MONTENEGRO
OFFICE OF THE REPRESENTATIVE OF MONTENEGRO
BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

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

Delivered in 2021



THE AIRE CENTRE
Advice on Individual Rights in Europe

British Embassy
Podgorica

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Introductory Remarks

Dear readers,

As you have already become accustomed to receiving, in the first quarter of the current year, publications analysing judgments of the European Court of Human Rights (hereinafter "the ECtHR" or "the Court") in respect of Montenegro, prepared by us, the authors, thanks to the support of our international partners, the London-based AIRE Centre and the British Embassy in Podgorica, we did not wish to disappoint you and we have prepared a comprehensive and interesting Analysis of both judgments and the decisions the ECtHR delivered in respect of Montenegro during 2021. With a view to strengthening the rule of law and the principle of legal certainty, we are therefore generously sharing with you, our colleagues, part of the Court's case-law in order to effectively contribute to the transition of the Montenegrin judicial system from "moderately prepared" [1] to fully prepared for the direct application of European law and international standards. The previous year was significant for the Convention, and, consequently for the Court in the light of the reform of Convention law. We will first familiarise you more extensively with the effects of the entry into force of Protocol No. 15 to the Convention.

Convention Reform – Protocol No. 15 to the Convention

Entry into Force

As you are well aware, the fourth decade of the 20th century was characterised by genocide, dictatorship, large-scale destruction, and social and economic poverty. All this led Western European politicians and intellectuals to draw on the mistakes from the past, and to commit to providing individuals with protection from unlawful State interferences with their fundamental human rights. The well-established ideas of The Hague Congress inspired the establishment of the Council of Europe (hereinafter: "the CoE") in 1949 and the development of an innovative agreement on human rights and freedoms, the European Convention on Human Rights (hereinafter: "the Convention" or "the ECHR"), which was signed in the Barberini Palace in Rome on 4 November 1950.

1 European Commission, Montenegro 2021 Report, available at: https://ec.europa.eu/neighbourhood-enlargement/montenegro-report-2021_en

Together with its Protocols, the Convention is an imperative and one of the main **international and European instruments for the protection of human rights and fundamental freedoms in Europe**, because it established a system based on two pillars – the right to an individual application and the binding character of the Court's decisions. The Convention established the main safeguards of both the protection and the respect for human rights in procedural and substantive terms.

The Montenegrin legal order is governed by Article 9 of the Constitution of Montenegro, under which "ratified and published international treaties and generally recognised rules of international law shall be an integral part of the domestic legal order, have supremacy over domestic law and apply directly where they regulate relations differently than domestic law."[2] Precisely this constitutional provision lays down the primacy of the Convention over national law and, at the same time, the obligation and duty of domestic courts to apply it.

Presented as a mechanism ensuring respect for human rights, which contributes to stability, security and peace, the Convention reflects the fundamental values of **European civilisation in the 21st century: democracy, rule of law, freedom and human dignity**, whereby it has contributed to the creation of a legal and political culture across Europe. It has reunited Europe and has for 70 years now been the cornerstone of and the most effective mechanism for human rights protection, on which European law has developed under the auspices of the Court. The Court was established under Convention law, specifically **Protocol 11 to the Convention** in 1998, as a Court functioning on a permanent basis, which, through its successive interpretation of the Convention provisions, enriches the content of all the guarantees it provides and extends their scope. The Court has, *inter alia*, been enriching them by developing new standards and principles, such as the **principle of proportionality,** from unwritten principles deriving from its case-law. The Court, with its international reputation, plays a crucial role in the harmonisation of domestic law of European states and national case-law and, by applying rights at the European level, does not deviate from the established standards, except in cases when it accepts the States' so-called ***margin of appreciation***[3].

As per the margin of appreciation and its scope recognised by the Court in some of its decisions, it needs to be noted that the principle gave rise to some

2 Constitution of Montenegro (Official Gazette of Montenegro Nos. 1/2007 and 38/2013 - Amendments I-XVI)

3 *Handyside v. the United Kingdom*, no. 5493/72, 7 December 1976

dilemmas in practice and was the topic of various legal debates and conferences.[4] Namely, this issue and its interpretation has on a number of occasions led to a "legal conflict" between the Court and the national courts, specifically regarding the legal views taken by the highest courts of the High Contracting Parties. It is sometimes very difficult to explain to the national courts and judges (in most cases the highest courts of the High Contracting Parties) why their decisions have not been approved and acknowledged by the international mechanism operating outside national territories, wherefore the establishment of an ongoing dialogue between the Court's judges and the national judges of the High Contracting Parties is aimed at familiarising the latter with the Court's case-law and educating the national judges, in order to strengthen the national courts' direct application of the Convention and the Court's case-law.

The text of the Convention appears simple at first glance. However, the Convention has been amended by its Protocols in order to maintain its status of a *living instrument*[5] and respond to the needs and development of society. Sixteen Protocols have been adopted to that end. Some of them have introduced substantive changes in the functioning of the Court.

The Court has undergone major reforms since it was established. Some of them were prompted by the large number of submitted and registered individual applications, which, at one point, exceeded the number of 100,000 pending cases. The Court's reform continued at high-level conferences from Interlaken to Copenhagen. A major reform of the Court ensued with the entry into force of Protocol 14 on 1 June 2010, establishing the single judge formation, introducing a new admissibility criterion, that of a significant disadvantage, and extending the Court judges' term of office to nine years. The reform of the Court continued in order to ensure the long-term effectiveness of the Convention system. The guidelines for further reform were set at five high-level conferences, which ended with the adoption of Declarations (the Interlaken Declaration[6], the Izmir Declaration[7], the Brighton Declaration[8], the Brussels Declaration[9]

4 Christos Rozakis, Conference in: Symposium of the Movement of citizens for an open society, The Greek courts and the case-law of the ECtHR, Kinisi politon, 2011, p.12, http://www.kinisipoliton.gr/wp-content/uploads/2014/03/125219_APEDDA1.pdf.

5 *Tyrer v. the United Kingdom*, no. 5856/72, 25 April 1978

6 Interlaken Declaration of 19 February 2010.

7 Izmir Declaration of 27 April 2011.

8 Brighton Declaration of 20 April 2012.

9 Brussels Declaration of 27 March 2015.

and the Copenhagen Declaration[10]). All the reform processes prompted by these Declarations were developed by the political, executive and regulatory bodies of the Council of Europe.

By accepting and signing these Declarations (Montenegro took part in all the conferences and signed all the Declarations), the High Contracting Parties expressed their full commitment to the Convention system and the Court's subsidiarity in human rights protection. Under the subsidiarity principle, High Contracting Parties are obligated to ensure that all rights and freedoms enshrined in the Convention are fully enforced at the national level in ways the States themselves consider adequate, from raising awareness of both the public and all national institutions of Convention standards, ensuring the application of those standards, under Article 46 of the Convention, which provides for the unconditional and full execution of Court judgments and prevention of future violations of the Convention by the national authorities, reviews of legal standards and conclusions deriving from the judgments finding other States in violation of the Convention, if the same general problem exists in the national legal system, to ensuring **effective legal remedies** for Convention violations before the national authorities that are **practical and applicable, rather than theoretical or illusory**.[11]

Ensuring the implementation of the CoE Committee of Ministers' Recommendations at the national level is a very important mechanism for providing human rights protection at the national level. For instance, in its Recommendation CM/Rec(2021)4[12], the Committee of Ministers reminds the Contracting Parties of the essential role of the Convention system for the effective protection of human rights and the need to ensure the publication and dissemination of both the Convention and the case-law and other relevant documents.

Ever since it was established, the Court has been called upon to continue improving its internal system and work methods to enhance its efficiency. With a view to maintaining the Court's effectiveness, the CoE Committee of Ministers adopted at its 123rd session in Strasbourg in 2013 the Draft Protocol No. 15 to the Convention, which was opened for signing by the High Contracting Parties to the Convention in June the same year. The instruments of ratification, acceptance or approval of Protocol No. 15 to the Convention are deposited with the CoE Secretary General. All High Contracting Parties[13], including the last one,

10 Copenhagen Declaration of 13 April 2018.

11 *Airey v. Ireland*, no. 6289/73, 9 October 1979, Series A no. 32, pp. 12-14, § 24.

12 https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a3f00e.

13 https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=213.

Italy, on 21 April 2021 have signed the Protocol acknowledging its importance for strengthening the efficiency and effectiveness of the Court, wherefore the conditions were put in place for its entry into force on 1 August 2021. Given that Montenegro's accession to Protocol No. 15 to the Convention does not require the adoption of new or amendment of existing law, Montenegro used the opportunity provided by Article 6 of Protocol No. 1 to the Convention and signed it in 2013. Namely, under this Article, High Contracting Parties are entitled to express their consent to be bound by the Protocol by signature without reservation as to ratification, acceptance or approval.

Protocol No. 15 is not long. In addition to the Preamble, it includes eight Articles. The amendments are mostly of procedural nature and do not introduce any changes in the very essence of human rights defined in the text of the Convention.

The first amendment is introduced in the very text of the Preamble to the Convention, which now includes a new recital, which reads as follows:

> "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."[14]

Namely, High Contracting Parties agree that the Convention is a positive legal heritage, a valuable instrument for ensuring peace and stability, wherefore its application should be continuously reinforced through two separate, but at the same time complementary reform "directions". Protocol No. 15 introduces in the text of the Convention the **principle of subsidiarity**[15], which is very much present in the Court's case-law. The primary responsibility for effectively implementing the Convention is on the States themselves, while the Court acts as the ultimate authority that establishes violations at the national level. The reason and justification for the intervention in the Preamble, through the explicit introduction of this doctrine, the practical application of which has already been ensured in the Court's case-law, lies in the fact that "national institutions are generally in a better position than an international court to assess the local needs and circumstances". Although the States have primary responsibility for enforcing

14 https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf.

15 *Scordino v. Italy (No. 1)* [GC], no. 36813/97, ECHR 2006-V, 26 March 2006, § 140.

the Convention at the national level and they enjoy a margin of appreciation in that respect, the right to an individual application and thus access to the Court is reaffirmed as the cornerstone of the Convention human rights protection system and the High Contracting Parties are under the obligation to comply with the Court's decisions. The **margin of appreciation**, a doctrine long applied by the Court (it was first defined in its judgment in the case of *Handyside v. The United Kingdom*[16]) provides the States with a degree of latitude to select themselves how they will implement Convention human rights standards, especially those under Articles 8-11 of the Convention, whereas it is up to the Court to assess whether the decisions of the States' national courts are in accordance with the Convention, bearing in mind the margin of appreciation of each individual State.

The next amendment introduced by Protocol No. 15 concerns the age of candidates applying for the position of national judge in the Court, in order to enable highly qualified judges to serve the full nine-year term of office and thereby reinforce the consistency of the judges' work. Candidates *shall be less than 65 years of age* at the date by which the list of three candidates has been requested by the CoE Parliamentary Assembly.

The Protocol also made interventions in Article 30 of the Convention, concerning **relinquishment of cases to the Grand Chamber**. The parties may no longer object to the relinquishment of cases to the Grand Chamber. This measure is intended to contribute to consistency in the case-law of the Court. Furthermore, the removal of the right to object also aims at accelerating proceedings before the Court in cases raising important issues affecting the interpretation of the Convention or the Protocols thereto or potentially departing from existing case-law.

As I have already noted, the future reform of the Convention, on which the High Contracting Parties agreed, should be aimed at increasing the legitimacy of the Court's decisions. This goal can be achieved only by improving the quality of the Court's decisions and the timeliness of their adoption. How can that be achieved?

First of all, the number of individual applications before the Court needs to be reduced, the process the Court has been intensively working on over the past few years. Changes in the Court's procedures also aim to ensure that it reviews only applications which, owing to their importance, require the examination of their merits. For such applications to be reviewed by the Court as soon as

16 *Handyside v. the United Kingdom*, no. 5493/72, 7 December 1976.

possible, the national courts need to apply the Convention as well as possible, the ill-founded applications need to be promptly rejected, and the entire decision-making procedure before this international judicial body needs to be accelerated.

To that end, Protocol No. 15 to the Convention amends Article 35 of the Convention concerning the **admissibility criteria**. These changes are the greatest novelty brought by Protocol No. 15, both from the perspective of individuals, as potential applicants, and from the perspective of States (as potential respondents in cases before the Court).

The first change involves **the reduction from six months to four the period following the date of the final domestic decision within which an application must be lodged with the Court**. However, this rule will not have retroactive effect, i.e. it will not apply to cases in which the final domestic decision was taken before Protocol No. 15 entered into force, that is, before 1 August 2021. Therefore, the introduction of the non-retroactivity provision ensures the legal certainty of individuals who want to file an individual application to the Court. Furthermore, this provision shall apply **only as of 1 February 2022**, upon the expiry of six months from the day of entry into force of the Protocol, in order to allow potential applicants to become fully aware of the new time-limit.

The second change in this Article of the Convention concerns the **absolute inadmissibility of "trivial" individual applications**, i.e. applications lodged by applicants who had not suffered a significant disadvantage. Therefore, for the purpose of clarity, I will cite the text of Article 35(3), which now reads as follows:

"3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits."

This Article sets out exceptions when the Court will examine an individual application although it does not satisfy the **"significant" disadvantage** criterion. Thus, the Court is obligated to review an application if so required by the interests of protection of and respect for human rights.

This amendment has also drawn the attention of legal practitioners, because it indicates that the Court is now making efforts to reject a greater number of applications based on the fact that the violations of applicant's rights are not significant enough, wherefore a number of individuals may be deprived of the right to have their complaints reviewed by an international court, whereas, on the other hand, it imposes upon the national courts the obligation to apply the Convention at the national level as consistently as possible.

Specifically, the amendment of the significant disadvantage admissibility criterion entered into force at the same time as Protocol No. 15. Therefore, this criterion applies to all pending applications in respect of which an admissibility decision has not been taken. This will soon produce the desired result – increase in the effectiveness of the Convention system.

It is also worth recalling that over 20,000 judgments of the ECtHR, executed by CoE States Parties, have improved the lives of people across the continent in a variety of ways. The Convention also inspired numerous positive changes made by the national authorities, as well as the promotion and improvement of human rights protection standards. The Convention is a living instrument that has repeatedly proven capable of adjusting to new human rights challenges, in areas including privacy, data protection and biomedicine.

The Convention system is valuable for more than 800 million people across Europe and, in these challenging times, the importance of this instrument of peace and stability has never been greater.

In Lieu of a Conclusion

Dear colleagues,

The changes brought by Protocol No. 15 to the Convention are of major importance for everyday case-law and will substantively contribute to putting in place conditions for even clearer and more consistent rendering of quality judgments by the Court, whilst imposing upon you, judges of the national courts of the High Contracting Parties, the additional obligation to ensure the protection of Convention rights and freedoms within your jurisdictions.

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

Introduction

The ongoing health crisis brought on by the COVID-19 pandemic meant that numerous human rights continued to be restricted in 2021. The measures undertaken by the health authorities to preserve public health posed challenges to the judiciary. On the one hand, the judiciary had to remain accessible and efficient, whilst, on the other, it had to acquire new skills and knowledge, both in terms of how it organised its work and how it dealt with specific cases.

Although the health crisis was unprecedented and, thus, the European Court of Human Rights (hereinafter: "the Court" or "the ECtHR") had not developed any case-law on it, the European Convention on Human Rights (hereinafter: "the Convention" or "the ECHR") again provided key guidance on addressing the issues the national systems faced. This was possible thanks to its fluid character of a "living instrument" which must be interpreted in the light of ever changing present conditions.

Articles 5, 6 and 8 of the Convention were engaged in 2021, due to the COVID-19 situation. One of the Court's 2021 judgments that is likely to have major impact on the case-law of both the national courts and the ECtHR regarded precisely Article 8 - the one in the *Vavřička and Others v. the Czech Republic*[17] case - concerned the mandatory vaccination of children against common infections. In its judgment, the Court emphasised that mandatory vaccination amounted to interference with the right to private life but that the measure was proportionate to the State's legitimate aim of protecting public health from life-threatening diseases. The Court did not find a violation of Article 8, concluding that the impugned measure was necessary in a democratic society.

Montenegrin courts also ruled on cases concerning respect for the right to private life in the context of the measures the relevant authorities were undertaking to fight coronavirus. On 23 July 2020, the Constitutional Court of Montenegro delivered its Decision U-II No. 22/20 voiding the Decision of the National Coordination Body for the Suppression of Infectious Diseases (NCB) on the publication of the names of individuals ordered into self-isolation, since it was incompatible, *inter alia*, with Article 8 of the Convention. The Constitutional Court's Decision led to the filing of a large number of claims by individuals, whose right to respect for private life had been violated. The courts of general jurisdiction ruled on these claims by reference to the Montenegrin Constitutional Court's Decision, as well as to the standards the ECtHR has developed in its case-law.

17 *Vavřička and Others v. the Czech Republic* [GC], no. 47621/13 and five others, ECHR 2021.

These complex times call for deepening knowledge of the ECHR. This is why the Supreme Court of Montenegro continued studying the ECtHR's case-law on Montenegro, with the support of the AIRE Centre and the British Embassy. The continuous monitoring of the Court's case-law resulted in this fourth Analysis of ECtHR's Case-Law on Montenegro (the Analysis) covering 2021. The Analysis discusses two ECtHR decisions declaring applications against Montenegro inadmissible and five judgments in which the ECtHR found Montenegro in violation of the Convention. There has been a visible change, both in the number of cases and in the structure of the identified violations. Namely, the number of Court judgments finding Montenegro in violation of the Convention was never smaller than in 2021. Furthermore, a violation of Article 6 of the Convention due to the unreasonable length of proceedings before ordinary courts is no longer the most frequent reason why the Court found Montenegro in violation of the Convention.

The 2021 Analysis follows the same methodology as the prior Analyses to facilitate its reading and create recognisability - it provides statistical data on the ECtHR's case-law and decisions on applications against Montenegro, a detailed analysis of the judgments and execution procedure, as well as their potential relevance to national case-law. The sections on the judgments' relevance to case-law include references to judgments of national courts concerning individual Articles of the Convention that may serve as good practice examples and as examples of factual and legal situations in which ECHR standards are to be applied. The Analysis also provides an overview of two decisions in which the Court did not find Montenegro in violation of the Convention, specifically Articles 3 and 11.

This Analysis was prepared by Montenegrin Supreme Court judge, Miraš Radović, Montenegro's Representative before the ECtHR, Valentina Pavličić, judges of the Court of First Instance in Podgorica Boško Bašović and Tijana Badnjar, and Jelena Rašović and Simona Jovanović, advisers in the Office of Montenegro's Representative before the ECtHR.

The authors of the Analysis hereby express their gratitude to Her Majesty's Ambassador to Montenegro, Mrs. Karen Maddocks and the Director of the AIRE Centre's Western Balkans Programme, Mrs. Biljana Braithwaite, for their continuous support.

1. Structure of the Analysis

The Analysis consists of six parts. It starts with a text authored by the Representative of Montenegro before the ECtHR, providing a comprehensive overview and explanation of the reform of the Convention – entry into force of Protocol No. 15 to the Convention, aiming to ensure the application of principles of subsidiarity and the doctrine of the margin of appreciation. The Introduction, which discusses the importance of studying the Convention in the context of the challenges brought by contemporary society and recent Article 8 cases ruled on by the ECtHR and national courts, is followed by an overview of general statistical data on the ECtHR's work in 2021. It also provides an overview of ECtHR 2021 statistics in respect of Montenegro and compares them with the 2017-2020 statistics provided in the prior Analyses.

Part 2 of the Analysis is devoted to the Court's decisions in which it did not find Montenegro in violation of the Convention. It discusses two cases in which the ECtHR declared the applications inadmissible. Namely, in the case of *Martinović v. Montenegro,* the Court held that the applicant had lost his status of victim, wherefore it did not find a violation of Article 3 of the Convention he had complained of. In order to shed more light on the notion of "victim status", on which the Court's examination of a case depends, the Analysis provides an overview of admissibility criteria, including "victim status". The second decision concerns the case of *Knežević v. Montenegro*, in which the Court did not find a violation of Article 11 of the Convention. Since this is the first case in which the applicant complained of a violation of this right by Montenegro, the analysis of the decision is preceded by an overview of the main rules and leading ECtHR case-law on the freedom of assembly.

Part 3 of the Analysis provides an insight into the five judgments in which the Court found Montenegro in violation of the Convention in 2021. As noted, this is the first Analysis in which most of the identified violations did not concern the unreasonable length of proceedings before ordinary courts. Actually, the Court did not deliver any judgments finding Montenegro in violation of the right to a trial within a reasonable time in 2021. Rather, in its 2021 judgments, it found Montenegro had breached various Articles of the Convention, specifically Articles 2, 3, 5, 6 and 8 of the Convention. The Court's judgment in the case of *Siništaj v. Montenegro* is particularly noteworthy since this is the first time the Court found a violation of the right to a trial within a reasonable time in proceedings before the Montenegrin Constitutional Court. The Court's judgment in the case of *Špadijer v. Montenegro* is also crucial for the national courts' future case-law, because this is the first case in which the Court ruled on workplace harassment (bullying).

Like its predecessors, this Analysis provides summaries of the judgments and their execution and measures taken to that end. After a review of the main facts and relevant principles of each judgment, the section "Relevance to Case-Law" sets out examples of national case-law that may be associated with the Convention Article the judgment concerns, in order to highlight the national courts' good practices, as well as specific issues that may arise before them which should be re-examined in accordance with the Court's relevant case-law.

Part 4 of the Analysis provides an overview of the execution of the Court's judgments in the *Drašković v. Montenegro* and *Nešić v. Montenegro* cases, discussed in the 2020 Analysis of ECtHR's Judgments in respect of Montenegro. In its judgment in the case of *Drašković v. Montenegro*, the Court found a violation of the right to private life under Article 8 of the Convention, while in the *Nešić* case, the Court found a violation of right to peaceful enjoyment of property under Article 1 of Protocol No. 1 to the Convention.

Part 5 of the Analysis contains an overview of selected cases from the CoE Committee of Ministers' Annual Report, on its surveillance of the execution of ECtHR judgments and decisions in 2020 and 2021, which were closed by resolution of the Committee of Ministers upon the implementation of a set of individual and general measures. The focus was on cases that may be relevant to current and future cases before the ECtHR in respect of Montenegro.

The last, sixth part of the Analysis offers general conclusions and recommendations stemmed from each of the Court's 2021 decisions and judgments with respect to Montenegro.

1.1. Statistical Overview

According to the ECtHR's 2021 Annual Report, a total of 70,150 applications were pending before the ECtHR at the end of 2021, i.e. 13% more than at the end of 2020, when the number of pending applications stood at 62,000 applications.

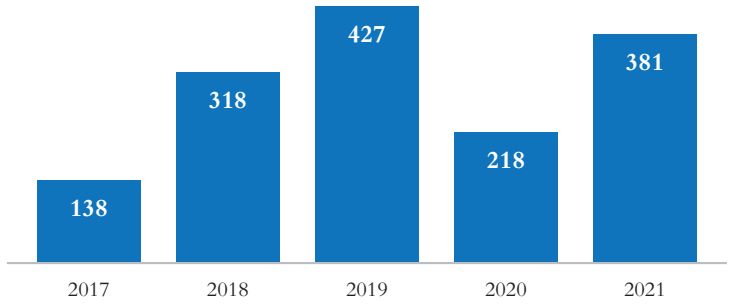
The ECtHR ruled on 36,092 applications in the reporting period, 3,131 of which were decided by judgment, while the number of applications it declared inadmissible or struck out from its list of cases stood at 32,961.[18]

18 The statistical data are taken from the ECtHR's 2021 Annual Report, available at: https://www.echr.coe.int/Documents/Annual_report_2021_ENG.pdf.

In this period, the most frequent violations of human rights found by the ECtHR were those enshrined in Article 6 of the Convention (Right to a fair trial) - 344 applications, Article 3 (Prohibition of torture) - 331 applications, while it delivered judgments finding a breach of Article 5 of the Convention (Right to liberty and security) in 306 cases.

Next came violations of Article 13 of the Convention (Right to an effective remedy) - 159 cases, Article 1 of Protocol No. 1 to the Convention (Protection of property) – 114 cases, and Article 2 of the Convention (Right to life) - 101 cases.

Review of the Number of Allocated Applications against Montenegro by Year



A total of 381 applications against Montenegro were allocated to one of the ECtHR's judicial formations in 2021. However, it is important to point out that 89% of applications were allocated to single-judge formations or three-judge Committees, which decide on the preliminary admissibility of the applications, and, in most cases, reject them due to non-compliance with the admissibility criteria. Eight percent of the applications passed the initial stage of examinations and were allocated to a Chamber of seven judges or a three-judge Committee, examining the merits of the applications.

According to ECtHR's statistics, the average number of applications lodged per 10,000 citizens of a Contracting Party in 2021 was 0.53. This number stood at 6.14 in respect of Montenegro, indicating that Montenegro is still one of the leading countries when it comes to the index of applications lodged with the ECtHR.

1.1.1. Number of Decided Applications against Montenegro

Of the 195 applications against Montenegro decided from 1 January to 31 December 2021, 189 applications were declared inadmissible[19] or struck out from the list of cases by single judges or three-judge Committees,[20], while the remaining six applications were decided by the ECtHR by judgment; in four of them, the Court found a violation of at least one Convention right.[21] The ECtHR did not find a violation of the Convention in one judgment.[22]

Furthermore, the ECtHR delivered decisions in two cases in respect of Montenegro, in which it declared the applications inadmissible and rejected them because they did not fulfil all the formal admissibility criteria.[23]

19 See: The European Court of Human Rights in facts & figures 2021, available at: https://www.echr.coe.int/Documents/Facts_Figures_2021_ENG.pdf

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

21 *Baranin and Vukčević v. Montenegro*, nos. 24655/18 and 24656/18, *Asanović v. Montenegro*, no. 52415/18, *Siništaj v. Montenegro*, no. 31529/15, *Špadijer v. Montenegro*, no. 31549/18.

22 *Ražnatović v. Montenegro*, no. 14742/18.

23 *Knežević v. Montenegro*, no. 54228/18, *Martinović v. Montenegro*, no. 44993/18.

Another 224 applications against Montenegro were pending before the ECtHR on 31 December 2021.[24]

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

According to ECtHR's statistics presented in its 2021 Annual Report, this Court decided 68 cases against Montenegro by judgment and 69 cases against Montenegro by decision from 3 March 2004, when the Convention entered into force in respect of Montenegro, to 31 December 2021.

In the cases decided by decision, the ECtHR either found that the applications were inadmissible or struck them off the list because a friendly settlement had been reached or a unilateral declaration had been made by the respondent Government. The Court found violations of at least one Convention right in 62 cases against Montenegro it decided by judgment; it ruled on just satisfaction in two judgments, while, in four cases, it established that Montenegro had not breached any Convention rights.

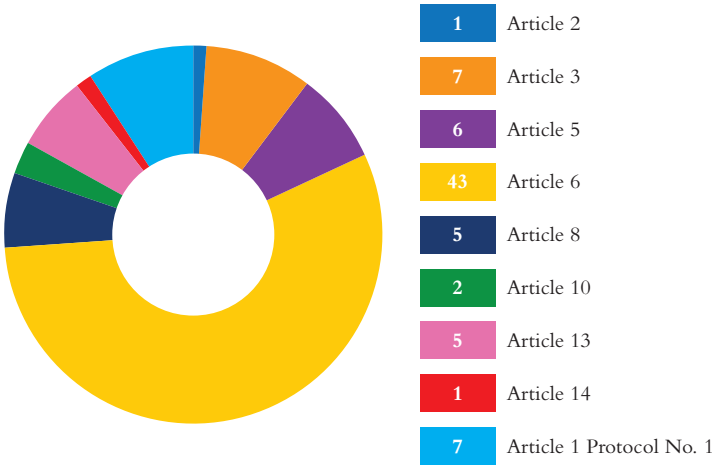
The Court found a violation of the procedural aspect of Article 2 of the Convention (Right to life) in one case because the Montenegrin authorities had failed to conduct an effective investigation. It ruled that Montenegro breached Article 3 in seven cases – in four cases because of inhuman and degrading treatment and in three cases because of the lack of an effective investigation. The ECtHR found Montenegro in violation of Article 5 of the Convention (Right to liberty and security) in six cases.

Most of the cases in which the Court found Montenegro in violation of the Convention concerned Article 6 of the Convention (right to a fair trial). The Court found a breach of this right in 43 judgments: it found a violation of the right to a fair trial in nine cases, a violation of the right to a trial within a reasonable time in 28 cases, and a violation of Article 6 because the domestic authorities failed to execute the court decisions in six cases.

The ECtHR has to date found Montenegro in violation of Article 8 of the Convention (Right to respect for private and family life) in five cases and in violation of Article 10 of the Convention (Freedom of expression) in two cases. It found a breach of Article 13 of the Convention (Right to an effective legal

24 The statistical data are available at the following link: https://www.echr.coe.int/Documents/Stats_analysis_2021_ENG.pdf.

remedy) in five cases and a breach of Article 14 of the Convention (prohibition of discrimination) in one case. Finally, the Court found Montenegro in violation of Article 1 of Protocol No. 1 to the Convention (protection of property) in seven cases.



2. Analysis of ECtHR Decisions Declaring Applications against Montenegro Inadmissible

2.1. Review of Admissibility Criteria and Explanation of the Notion of "Victim Status"

The 2020 Analysis of ECtHR Judgments with Respect to Montenegro discussed the admissibility criteria.[25] It noted that the existence of requirements applications had to fulfil for the Court to review them on the merits reflected the principle of subsidiarity, under which the primary obligation to protect Convention rights and freedoms rests on the national authorities.

The admissibility criteria may concern the procedure, the Court's jurisdiction and, in specific cases, the very merits of the case. The admissibility criteria **associated with the procedure** include the exhaustion of domestic legal remedies, the submission of an application within a specific time-frame, the ban on the submission of anonymous and identical applications, and the prohibition of abuse of the right to an application. The initial six-month period for submitting an application from the day of the domestic courts' final decision on the case is now cut to four months under Protocol No. 15,[26] after the relevant provision entered into force on 1 February 2022. The new deadline applies to applications where the national authorities issued their final decision as of 1 February 2022. Anonymous applications are inadmissible under the ECHR and the ECtHR's Rules of Court; an application is deemed anonymous when there are no indications or elements in the case file enabling the Court to identify the applicant.[27] Furthermore, an application shall be declared inadmissible in the event it is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

The admissibility criteria concerning the **ECtHR's jurisdiction** include: compatibility *ratione materiae*, *ratione personae*, *ratione loci* and *ratione temporis*. Each of them is a complex legal issue the Court has developed broad case-law on. For

25 The Analysis is available at: https://sudovi.me/static//vrhs/doc/Analysis_of_MNE_judgments_before_the_ECHR_-_FINAL.pdf.

26 Protocol No. 15 to the Convention is available at: https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf.

27 *"Blondje" v. the Netherlands* (dec.), no. 7245/09, 15 September 2009.

the purposes of this Analysis, we will provide an overview of the main rules, and, since the Court declared inadmissible the application in the case of *Martinović v. Montenegro* because the applicant had lost his status of victim, we will devote particular attention to clarifying that notion.

For a complaint to be compatible *ratione materiae* with the Convention, the right relied on by the applicant must be protected by the Convention and the Protocols thereto.

Compatibility *ratione personae* requires the alleged violation of the Convention to have been committed by a Contracting Party or to be in some way attributable to it. Under Article 34 of the Convention, the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The issue of "victim" status is linked to this jurisdiction. Therefore, applications filed by natural or legal persons shall be declared admissible in the event they have the status of a "victim", i.e. they must be able to claim their Convention rights have been violated. The notion of "victim" is autonomous, which means that it is interpreted independently of national law and case-law and that it is determined exclusively by the ECtHR. Under the Court's case-law, "victims" can be direct and indirect. Direct victims are applicants directly affected by the impugned measure,[28] and, if they die, their next of kin can claim to be indirect victims of the alleged violation.[29] An applicant may lose the status of victim if the national authorities acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention.[30] A decision or measure favourable to an applicant is not in principle sufficient to deprive him or her of his or her status as a "victim". Only if all of the enumerated criteria are fulfilled can the State prevent the initiation of the European control mechanism. Whether the criteria are fulfilled depends on the circumstances of the case; for instance in Article 3 cases, such as the case of *Martinović v. Montenegro*, the Court assesses whether the relevant authorities had conducted a thorough and effective investigation capable of leading to the identification and punishment of those responsible.[31]

In the *Martinović v. Montenegro* case, the Court noted that the State had expressly acknowledged the violation of the applicant's rights since the

28 *Tănase v. Moldova* [GC], no. 7/08, 27 April 2010, § 104, ECHR 2010.

29 *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, 15 May 2007, ECHR 2007.

30 *Rotaru v. Romania* [GC], no. 28341/95, 4 May 2000, § 35, ECHR 2000.

31 *Jevtović v. Serbia*, no. 29896/14, 3. decembar 2019., § 61, ECHR 2019.

Constitutional Court found a violation of Article 3 of the Convention; that the applicant was awarded redress in the amount of €130,000[32] for all the existing and future damage; that the national authorities had conducted an investigation resulting in the identification of the perpetrators and the criminal prosecution of the individual for aiding them after they had committed the crime. The Court therefore concluded that the applicant had lost the status of a "victim" and declared the application inadmissible.

However, not all afforded redress, together with the fulfilment of all other admissibility criteria, will suffice to deprive an applicant of the status of "victim" or relieve the State of responsibility before the Court. The redress afforded must be appropriate and sufficient. In Article 3 cases, it cannot be the only fulfilled criterion, because that would mean that financial redress can replace all other State obligations concerning the violation of this non-derogable right and result in the culture of impunity for ill-treatment. As it clarified in its decision in the case of *Martinović v. Montenegro*, the Court held that the redress was sufficient in the circumstances of the case. However, in its judgment in the case of *Baranin and Vukčević v. Montenegro*,[33] although the domestic courts awarded each of the applicants €5,000 in respect of non-pecuniary damages, the Court found that the other criteria had not been fulfilled and that the applicants could continue claiming that they were victims of Convention violations.

Simply put, *ratione loci* jurisdiction is related to the territory of the Contracting State. The Court has the competence to rule on an application in the event the alleged breach occurred in a place under the jurisdiction of the Contracting State.[34] The Court has over time developed its case-law under which jurisdiction is related not only to the territory of a state but that there are also two exceptions to this rule. First, the jurisdiction of a Contracting Party may extend to the actions of its authorities producing effects outside its territory. Second, a Contracting Party to the Convention exercises effective control over an area outside its national territory as a consequence of lawful or unlawful military action.[35]

The general principle of non-retroactivity of law applies also to international treaties, such as the ECHR. That is precisely what jurisdiction *ratione temporis*

32 The applicant and the State reached an out-of-court settlement. The State paid the applicant €130,000 for all the existing and future damage related to the incident, both pecuniary and non-pecuniary.

33 The judgment in the case of *Baranin and Vukčević v. Montenegro* is reviewed on p. 51 of this document.

34 Linos-Alexandre Sicilianos, Maria-Andriani Kostopoulou, *The individual application under the European Convention on Human Rights*, Council of Europe, 2020.

35 *Al-Skeini v. the United Kingdom* [GC], no. 55721/07, § 131, Reports of Judgments and Decisions 2011.

guarantees –the Court will review only applications concerning facts, acts, situations or relationships that occurred after the Contracting Party ratified the Convention and its Protocols. The key date is the day of entry into force of the Convention and its Protocols in respect of the respondent State. To recall, the ECHR has been binding on Montenegro since 3 March 2004, as the Court first noted in its judgment in the case of *Bijelić v. Montenegro*.[36] However, the Court also takes into account so-called "continuing situations", where the alleged violation of a Convention right occurred before the entry into force of the Convention and its Protocols and continued afterwards. Such cases usually concern continuing unlawful occupation of land, failure to pay final compensation for nationalised property, the lawfulness and conditions of a person's continued detention, or excessive length of proceedings.[37]

The admissibility criteria concerning the **merits of the case** regard the manifest inadmissibility of an application and non-existence of a significant disadvantage. Most applications are declared inadmissible by single judges and three-judge committees, although there have been cases in which the Grand Chamber ruled on admissibility.[38] Manifestly ill-founded complaints can be divided into four categories: "fourth-instance" complaints, complaints where there has clearly or apparently been no violation, unsubstantiated complaints and, finally, confused or far-fetched complaints.[39]

Each of these categories is a complex legal issue – a consequence of the doctrines developed by the Court or a result of its procedural rules. It is well-established that the ECtHR is not a court of appeal or a court which can quash rulings given by the courts in the States Parties to the Convention or retry cases heard by them. Therefore, the Court may not, as a general rule, question the findings and conclusions of the domestic courts as regards: the establishment of the facts of the case; the interpretation and application of domestic law; or the admissibility and assessment of evidence at the trial.[40] Furthermore, a complaint will be declared manifestly ill-founded although it fulfils all the admissibility

36 The judgment in the case of *Bijelić v. Montenegro*, no. 11890/05, was presented in the 2018 Analysis of ECtHR Judgments in Respect of Montenegro, p. 131, available in Montenegrin at: https://sudovi.me/static/vrhs/doc/11233.pdf

37 Linos-Alexandre Sicilianos, Maria-Andriani Kostopoulou, *The individual application under the European Convention on Human Rights*, Council of Europe, 2019.

38 *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, ECHR 2002-VII .

39 *Practical Guide on Admissibility Criteria*, Council of Europe, 2022, available at: https://www.echr.coe.int/pages/home.aspx?p=caselaw/analysis/admi_guide.

40 *Ibid*.

criteria in the event it does not disclose any appearance of a violation of the rights guaranteed by the Convention.[41] That will be the case, for instance, if the impugned decision-making procedure was fair and was not arbitrary. The Rules of Court set out detailed rules on conditions in which applications are declared admissible and examined. Under these Rules, an application may be declared manifestly ill-founded in the event it is not reasoned or substantiated by evidence, i.e. if the applicant has failed to propose evidence or communicate all the requisite information.[42]

The absence of a significant disadvantage as the reason for declaring an application inadmissible was introduced under Protocol No. 14 in order to cut down the number of applications filed with the Court. Under this provision, the Court shall declare inadmissible any individual application submitted under Article 34 if it considers that the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits.[43] For the Court to examine a complaint of a violation of a Convention right, the violation needs to be sufficiently serious, which will depend on the specific circumstances of the case. The Court takes into account the applicant's subjective perception, as well as what the application objectively concerns. The Court bears in mind also the financial equivalent of the damage. As far as insignificant financial impact is concerned, the Court has thus far found a lack of "significant disadvantage" in cases where the amount in question was equal or inferior to roughly €500.[44]

Abuse of the right of application under Article 35(3(a)) of the Convention is another reason why the Court may declare an application inadmissible. The concept of "abuse" within the meaning of Article 35(3)(a) must be understood in its ordinary sense according to general legal theory – namely, the harmful exercise of a right for purposes other than those for which it is designed.[45] The Court has found an abuse of the right of application in the following cases: misleading

41 *Ibid*.

42 ECtHR Rules of Court, available at: https://www.echr.coe.int/pages/home.aspx?p=basictexts/rules&c.

43 Protocols Nos. 14 and 15 to the ECHR, available at: https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c.

44 Linos-Alexandre Sicilianos, Maria-Andriani Kostopoulou, *The individual application under the European Convention on Human Rights*, Council of Europe, 2020; *Kiousi v. Greece* (dec.), no. 52036/09, 20 September 2011, ECHR 2011.

45 *Practical Guide on Admissibility Criteria*, Council of Europe, 2022, available at: https://www.echr.coe.int/pages/home.aspx?p=caselaw/analysis/admi_guide.

information,[46] violation of the obligation to keep friendly settlement proceedings confidential,[47] use of offensive language,[48] the application was manifestly vexatious or devoid of any real purpose, et al.

In line with the ECtHR's s reasoning and referring to the relevant case-law, the Montenegrin Supreme Court dismissed just satisfaction claims due to the claimants' abuse of the right of application, since, for instance, the claimants had already filed just satisfaction claims in the same case that had already been ruled on, left out facts on which the outcome of proceedings depended or lied to ensure a more favourable status in the proceedings (Tpz. No. 10/21, Tpz. No.14/20, Tpz. No.11/20 and Tpz. No. 50/18, et al).

The Montenegro Supreme Court also referred to national law in its explanations of its decisions. Namely, under Article 10 of the Civil Procedure Law, which applies to reviews of just satisfaction claims under Article 8 of the Act on the Protection of the Right to a Trial within a Reasonable Time, parties, interveners and their legal representatives are under the duty to tell the truth in court and exercise conscientiously their rights recognised by law. Given this provision, the Montenegro Supreme Court assesses in each individual case whether the claimant abused the right to a just satisfaction claim by concealing decisive facts and dismisses the claim if that is the case.

2.2. ECtHR's 2021 Decisions in Respect of Montenegro

The Court adopted two decisions declaring applications against Montenegro inadmissible in 2021. It adopted such decisions in the cases of *Martinović v. Montenegro* and *Knežević v. Montenegro.*

In the case of *Knežević v. Montenegro*, the applicant complained of a violation of his right to freedom of assembly, while in the case of *Martinović v. Montenegro*, the applicant complained of a violation of the prohibition of torture, lack of an effective investigation of police torture and lack of an effective legal remedy in that respect. The Court, however, declared the application inadmissible, concluding that the applicant had lost the status of victim because the national authorities had taken measures fulfilling the effective investigation standards.

46 *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000; *Drijfhout v. the Netherlands* (dec.), no. 51721/09, § 27-29, ECHR 2011; *Jian v. Romania* (dec.), no. 46640/99, ECHR 2004.

47 *Popov v. Moldova*, no. 74153/01, ECHR 2005.

48 *Řehák v. the Czech Republic* (dec.), no. 67208/01, ECHR 2004; *Di Salvo v. Italy* (dec.), no. 16098/05, ECHR 2007.

Martinović v. Montenegro

Application No. 44993/18
Decision of 1 April 2021

The applicant complained that the torture he had been subjected to, and the lack of an effective investigation of police torture and an effective domestic legal remedy in that regard amounted to violations of his rights under Articles 3 and 13 of the Convention.

Namely, between 15 and 20 police officers beat up the applicant on the street on 24 October 2015. He sustained grave physical injuries. The Basic State Prosecutor's Office instituted an investigation the following day. After two police officers, X and Y, confessed to having beaten the applicant, the State and the applicant concluded an out-of-court settlement in December 2015 and he was awarded €130,000 for all the existing and future damage related to the incident, both pecuniary and non-pecuniary. The settlement specified that the parties thereby resolved "the entire disputable relation arising from the incident".

On 23 January 2017, the Court of First Instance in Podgorica found the commander of the relevant police unit (SAU) guilty of aiding a perpetrator following the commission of a crime, and sentenced him to five months in prison. The Constitutional Court found a violation of both the substantive and procedural aspects of Article 3 of the Convention in the applicant's case in 2017.

In October 2019, after a remittal, the Court of First Instance in Podgorica found X and Y guilty of torture and inflicting serious bodily injury, and sentenced each of them to one year and five months in prison. Their appeal was pending at the time the ECtHR adopted its decision.

In their submission, the Government expressed deep regret over the incident at issue, pointing out that the relevant state authorities were under the obligation by implication to take all the requisite measures to conduct a prompt, independent and effective investigation of any conduct in violation of Article 3 of the Convention, especially when perpetrated by police officers.

The Montenegrin Government claimed that the applicant had lost his status of "victim" due to the fact that the Constitutional Court of Montenegro had found a violation of the substantive and procedural aspects of Article 3 of the Convention. The applicant maintained that he was still a victim, that the out-of-court settlement had not provided redress for the ineffective investigation, and

that such a violation could not be remedied only by an award of compensation. As regards the applicant's complaints about the ineffectiveness of the investigation of police torture, the Government of Montenegro stressed that the investigation conducted by the Podgorica Basic Prosecutor's Office had yielded results, specifically, that it led to the identification and prosecution of two SAU officers, the conviction of the Special Anti-Terrorist Unit (SAU) commander and the dissolution of that unit.

The Court recalled that the relevant principles as regarded the victim status in the context of Article 3 complaints were set out in, for example, *Jevtović v. Serbia*.[49]

The Constitutional Court had explicitly found a violation of both the substantive and procedural aspects of Article 3 in the applicant's case – thereby expressly acknowledging the breach complained of and, effectively, satisfying the first condition laid down in the Court's case-law. Secondly, the applicant reached a settlement with the State and thereby obtained a compensation of €130,000 for all the existing and future damage related to the incident, both pecuniary and non-pecuniary, which satisfied the second condition. Thirdly and finally, the conducted investigation resulted in: (a) identifying two direct perpetrators, X and Y, who were currently being prosecuted for torture and inflicting serious bodily injuries, and (b) prosecuting and sentencing the commander of the relevant police unit for aiding a perpetrator following the commission of a crime.

In such circumstances, the Court considered that the applicant could no longer claim to be a "victim" within the meaning of Article 34 of the Convention and that his complaints had to be rejected in accordance with Article 35, paras. 3(a) and 4 of the Convention. The Court found that applicant's complaints in respect of Article 13 of the Convention were manifestly ill-founded (see *Osmayev v. Ukraine*, (dec.) no. 50609/12, para. 57, 30 June 2015) and dismissed the application in this part.

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

49 *Jevtović v. Serbia*, no. 29896/14, § 61, ECHR 2019.

2.3. Article 11 – Freedom of Assembly and Association

The ECtHR had not adopted any decisions or judgments in respect of Montenegro concerning the freedom of assembly and association enshrined in Article 11 of the Convention before 2021. Therefore, the overview of its decision in the case of *Knežević v. Montenegro* will be preceded by a review of the main rules on Article 11 of the Convention developed in the ECtHR's case-law, which the national courts may find useful.

Article 11
Freedom of Assembly and Association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 11 of the Convention protects two distinct rights: the right to freedom of assembly and the right to freedom of association. Their regulation in one article is explained by the collective character of both rights, as well as the fact that the freedom of assembly is at times prerequisite for exercising the freedom of association.[50]

Article 11 of the Convention protects various forms of assembly – private assemblies, assemblies organised at public venues, demonstrations and marches, regardless of their nature – political, religious, cultural, etc.[51] What all these assemblies have in common is that they must be peaceful to enjoy protection under the Convention. The ECtHR has specified the meaning of the notion of

50 Popović et al, Comment of the Convention for the Protection of Human Rights and Fundamental Freedoms (*Komentar Konvencije za zaštitu ljudskih prava i osnovnih sloboda*), JP "Službeni glasnik", 2017.

51 *Ibid*.

"peaceful assembly" in its case-law; assemblies resulting in violence with lethal consequences are not considered "peaceful" in the meaning of Article 11.[52] States have positive and negative obligations concerning the freedom of assembly. They must take reasonable and adequate measures to secure the effective enjoyment of the freedom of assembly.[53] As per the States' positive obligations, the Court has stressed the importance of taking preventive security measures such as, for example, ensuring the presence of first-aid services at the site of demonstrations, as well as the States' duty to communicate with the leaders of a protest demonstration.[54]

By their very definition, the States' negative obligations include their obligation not to interfere in the enjoyment of Convention rights. However, the right to freedom of assembly is not absolute and States are allowed to restrict them in specific cases. The freedom of assembly is an important feature of a democratic society, wherefore the ECtHR deems that Article 11 of the Convention must also be considered in the light of Article 10, where the aim of the exercise of freedom of assembly is the expression of personal opinions.[55] Both of these two rights are qualified, wherefore the same test is applied to establish whether an interference with them is in compliance with the Convention. An interference with the exercise of that right does not need to amount to an outright ban, legal or de facto, but can consist in various other measures taken by the authorities.[56]

Therefore, like in the case of other qualified rights, the ECtHR will examine whether there was an interference, whether it was prescribed by law, whether it pursued a legitimate aim under paragraph 2 of Article 11 of the Convention and whether it was necessary in a democratic society.

The right to freedom of association is the second segment of Article 11 of the Convention. Like in the case of freedom of assembly, the Court has on numerous occasions affirmed the direct relationship between democracy, pluralism and the freedom of association. The concept of "association" in the meaning of this provision of the Convention is also autonomous, wherefore the Court has defined it broadly, specifying that it presupposes a voluntary grouping

52 *Osmani and Others v. the Former Yugoslav Republic of Macedonia*, no. 50841/99, Reports of Judgments and Decisions 2001-X.

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

54 Guide on Article 11 of the Convention – Freedom of assembly and association, Council of Europe/European Court of Human Rights, 2021, available at: https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf.

55 *Ezelin v. France*, no. 11800/85, § 37, A202

56 *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 100, Reports of Judgments and Decisions 2015.

for a common goal.[57] Various forms of association fall under the protection of this Article – from political and non-government organisations, to associations protecting cultural and spiritual heritage or pursuing various socio-economic goals.[58] However, for an association to fall under the protection of Article 11 of the Convention, it needs to have a private-law character.[59] Under the case-law of the Court, elements in determining whether an association is to be considered as private or public are: whether it was founded by individuals or by the legislature; whether it remained integrated within the structures of the State; whether it was invested with administrative, rule-making and disciplinary power; and whether it pursued an aim which was in the general interest. [60]

The ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be deprived of any meaning. A refusal by the domestic authorities to grant legal-entity status to an association of individuals and register it amounts to an interference with the exercise of their right to freedom of association.[61] For associations to genuinely be able to pursue their aim, they must enjoy autonomy and the freedom to draw up their own rules, including membership rules.[62] The ECtHR accepts that religious bodies and political parties can generally regulate their membership to include only those who share their beliefs and ideals.[63] However, expulsion from an association could constitute a violation of the freedom of association of the member concerned if it is in breach of the association's rules, arbitrary or entails exceptional hardship for the individual.[64] As in the case of freedom of assembly, the same test is applied to ascertain whether an interference with the freedom of association is in compliance with the Convention.

57 *Young, James and Webster v. the United Kingdom*, nos. 7601/76 and 7806/77, 1979, § 167, Series B, no. 39, ECHR 1979.

58 Guide on Article 11 of the Convention – Freedom of assembly and association, Council of Europe/European Court of Human Rights, 2021, available at: https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf.

59 *Ibid*.

60 *Ibid*.

61 *Özbek and Others v. Turkey*, no. 25327/04, § 35, ECHR 2010.

62 Guide on Article 11 of the Convention – Freedom of assembly and association, Council of Europe/European Court of Human Rights, 2021, available at: https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf.

63 *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, § 39, ECHR 2007.

64 *Lovrić v. Croatia*, no. 38458/152017, § 54 and 72, ECHR 2017.

As noted, the Court has not adopted any decisions or judgments in respect of Montenegro concerning violations of the right to freedom of assembly or association since 2009. The first case on freedom of assembly it has ruled on is the case of *Knežević v. Montenegro,* where it adopted a decision declaring it manifestly ill-founded.

Knežević v. Montenegro

Application No. 54228/18
Decision of 11 March 2021

i. Analysis of the Decision

The applicant complained of a violation of Article 11 of the Convention, because the police had removed the tents and stage during the protests he was participating in and dispersed the protesters and arrested him, whereupon he was convicted for assaulting a public official. The Court recalled the basic principles of the right to freedom of assembly and underlined that only peaceful assemblies enjoyed protection under Article 11. The ECtHR proceeded to examine whether the public assembly the applicant had taken part in was peaceful; having ascertained that it was, it noted that the applicant had been arrested, prosecuted or convicted not for partaking in the protest, but for assaulting a public official performing his duties. The Court held that all the undertaken measures were lawful and pursued a legitimate aim, wherefore it declared the application manifestly ill-founded.

(a) The facts

At the relevant time, the applicant was a leader of an opposition party and member of parliament. His party was part of the Democratic Front (DF) opposition political coalition, which organised a protest rally in front of the Montenegrin Assembly in September 2015. The purpose of the gathering was to publicly protest and express dissatisfaction with the citizens' living standards and to request the formation of a transitional government whose task would be to prepare, organise and hold free, democratic and fair elections.

The Secretariat for Municipal Affairs and Traffic (the Secretariat) approved the installation of mobile toilets and food and water stalls, as well as a stage in the park across from the Assembly in the 27 September - 3 October 2015 period. The protest began in front of the Assembly on 27 September 2015. The following day, the Police Directorate Security Centre reported to the municipal police that about 300 tents had been set up in the traffic lanes of the boulevard in front of the

Assembly and alongside the neighbouring buildings. A municipal police inspector made an on-site inspection. She noted the tents and observed that metal hooks damaging the asphalt had been used to install them.

On 30 September 2015 the DF requested a prolongation of the authorisation for the installation of mobile objects, including the tents, for at least seven more days. The Secretariat rejected the request concerning the tents in front of parliament, on the grounds that they were not mobile objects under the relevant law. The Secretariat authorised the DF to set up the stage, food stands and toilets in the park opposite the Assembly between 4 and 10 October 2015, after which they had to be removed.

On 3 October 2015 the Security Centre informed the municipal police that about 300 tents and the stage had been installed in the traffic lanes in front of the parliament. The same day the municipal police invited M.Đ. (the protest leader) to come and give a statement concerning the setting up of tents. V.Č., a person authorised by M.Đ., stated that the stage and the tents "[were] going to remain until further notice, but [they had] taken all the measures in accordance with the regulations to extend the permission". The municipal police inspector issued a decision requesting the DF and M.Đ. to remove the stage and the tents from the traffic lanes within a day. Since they did not comply, two municipal inspectors unsuccessfully attempted to enforce the decision on 10 October 2015. The decision was enforced on 17 October 2015, with the help of Security Centre officers.

There were about fifty protesters sleeping in the tents at the time. The police first warned them through megaphones, and then invited them to step away so that the stage and the tents could be removed. The protesters, including the applicant, formed a human shield and put up resistance. In particular, the applicant, according to his own submission to the Court, attempted first to push back one of the police officers with his shoulders and body, but to no avail. After seeing that the tents were being removed, the applicant attempted to go in that direction, but one of the police officers stood in front of him. The applicant pushed the police officer in the chest with his palms and shoulders, and grabbed his shoulders in order to move him, but was "bounced back as if from a wall". The applicant also submitted that the police officer had been "relaxed, had kept his arms by his side, and had smiled ironically" at the applicant, telling him "feel free to hit me, you cannot hurt me". At that point the applicant removed the police officer's hat from his head and took it away. A few moments later, the applicant was punched by another person not wearing a uniform, and pepper-sprayed by yet another person. In response to all this, the police officer in command informed those present that the gathering was terminated.

The Security Centre filed a criminal complaint with the Podgorica State Prosecutor's Office against the applicant on account of a reasonable suspicion that he had assaulted an official performing his duties. The applicant was found guilty and convicted to seven months' imprisonment. The Podgorica High Court modified the first-instance judgment on appeal, reducing the applicant's sentence to four months.

The applicant's constitutional appeal was rejected by the Constitutional Court, which held that the applicant had lost his right to protection of his freedom to peaceful assembly by acting violently against a police officer.

Applicability of Article 11

The applicant pointed out in his application that the State's intervention, aimed at interrupting the peaceful assembly, had been illegal and violent and that it had not been proportionate to the legal aim pursued. He likewise stated that there had been no pressing social need for it. In addition, he pointed out that he had suffered torture by the police when he tried to prevent the interruption of a peaceful assembly. The respondent Government submitted that the State's interference, both when it took steps to disperse the protesters and its prosecution and conviction of the applicant had been lawful, pursued a legitimate aim, and necessary in a democratic society. They, therefore, concluded that the applicant's complaint was manifestly ill-founded and that there had been no violation of Article 11 of the Convention.

The Court noted that Article 11 of the Convention only protected the right to "peaceful assembly", a notion which did not cover a demonstration where the organisers and participants had violent intentions. The guarantees of Article 11 therefore apply to all gatherings except those where the organisers and participants have such intentions, incite violence or otherwise reject the foundations of a democratic society.[65] An assembly tarnished with isolated acts of violence is not automatically considered non-peaceful so as to forfeit the protection of Article 11. In a number of cases where demonstrators had engaged in acts of violence, the Court has held that the demonstrations in question were within the scope of Article 11 of the Convention, but that the interferences with the right guaranteed by that Article were justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others.[66]

65 *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 92, ECHR 2015.

66 *Gülcü v. Turkey*, no. 17526/10, § 93, ECHR 2016.

In order to establish whether the applicant may claim the protection of Article 11, the Court took into account: (i) whether the assembly intended to be peaceful and whether the organisers had violent intentions; (ii) whether the applicant had demonstrated violent intentions when joining the assembly; and (iii) whether the applicant had inflicted bodily harm on anyone. An individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.[67]

The Court accepted that the applicant enjoyed the protection of Article 11 of the Convention during the events of 17 October 2015. It noted that there was nothing in the case file to suggest that the protests were not intended to be peaceful or that the organisers, including the applicant, had violent intentions. While it was true that he was convicted for having assaulted a police officer, this conviction concerned an incident between the applicant and one police officer during the tense moments when the police moved to disperse the protesters and did not appear indicative of any initial violent intention on the part of the applicant.

(b) The relevant principles

The relevant principles in relation to Article 11 are set out in *Kudrevičius and Others v. Lithuania*[68] and in *Primov and Others v. Russia*.[69]

The freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of its foundations. Thus, it should not be interpreted restrictively.[70]

An interference with the right to freedom of peaceful assembly will constitute a breach of Article 11 unless it is "prescribed by law", pursues one or more legitimate aims under paragraph 2, and is "necessary in a democratic society" for the achievement of the aim or aims in question.[71]

Although a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic, it is important for the public

67 *Frumkin v. Russia*, no. 74568/12, § 99, ECHR 2016.

68 *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 91, 92, 100, 108-110 and 142-160, ECHR 2015.

69 *Primov and Others v. Russia*, no. 17391/06, § 116-119, ECHR 2014.

70 *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, § 110, ECHR 2011 (excerpts).

71 *Vyerentsov v. Ukraine*, no. 20372/11, § 51, ECHR 2013.

authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of its substance. The appropriate "degree of tolerance" cannot be defined *in abstracto*: the Court must look at the particular circumstances of the case, and in particular the extent of the "disruption of ordinary life". That being so, it is important for associations and others organising demonstrations, as actors in the democratic process, to abide by the rules governing that process by complying with the regulations in force.

The intentional failure by the organisers to abide by these rules and the structuring of a demonstration, or of part of it, in such a way as to cause disruption to ordinary life and other activities to a degree exceeding that which is inevitable in the circumstances constitutes conduct which cannot enjoy the same privileged protection under the Convention as political speech or debate on questions of public interest or the peaceful manifestation of opinions on such matters. The Contracting States enjoy a wide margin of appreciation in their assessment of the necessity in taking measures to restrict such conduct.

The limits of tolerance expected towards an unlawful assembly depend on the specific circumstances, including the duration and the extent of public disturbance caused by it, and on whether its participants had been given sufficient opportunity to manifest their views. [72] The intentional serious disruption, by demonstrators, to ordinary life and to the activities lawfully carried out by others, to a more significant extent than that caused by the normal exercise of the right of peaceful assembly in a public place, might be considered a "reprehensible act". Such behaviour might therefore justify the imposition of penalties, even of a criminal nature.[73]

Restrictions on freedom of peaceful assembly in public places may serve to protect the rights of others with a view to preventing disorder and maintaining an orderly flow of traffic.[74] In considering the proportionality of the measure, account must also be taken of its chilling effect. Subsequent enforcement measures, such as the use of force to disperse the assembly and the arrests, detention and/or ensuing administrative convictions of participants, may have the effect of discouraging them and others from participating in similar assemblies in future. [75] The very essence of the right to freedom of peaceful assembly would be impaired if the State

72 *Frumkin v. Russia*, no. 74568/12, § 97, ECHR.

73 *Kudrevičius and Others v. Lithuania*, no. 37553/05, § 173, ECHR 2014.

74 *Éva Molnár v. Hungary*, no. 10346/05, § 34, ECHR 2008.

75 *Balçık and Others v. Turkey*, no. 25/02, § 41, ECHR 2007.

did not prohibit a demonstration but imposed sanctions on its participants for the mere fact of attending it without engaging in reprehensible conduct.[76] The nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference in relation to the aim pursued. The Court has already held that a lengthy prison sentence for throwing a stone or another small object at the police at the height of clashes was a disproportionate penalty in violation of Article 11.[77]

(c) The Court's assessment

The Court first noted that the actions of the authorities which, according to the applicant, constituted unlawful and disproportionate interferences with his right to peaceful assembly were: the removal of the tents and the stage, the dispersal of the gathering, and his arrest and conviction. It then went on to examine each of the alleged interferences in turn.

As regards the removal of the tents and stage, the Court first noted that the organisers of the protest, including the applicant, duly submitted prior notification for the protest rally. They also requested authorisation to set up a number of temporary objects, including a stage, in the park opposite the parliament building for a period of twenty days. This request was allowed at first for the period between 27 September and 3 October, and then it was further extended until 10 October 2015. The latter decision specified that the objects, the stage included, were to be removed on that date.

Since overcrowding during a public event is fraught with danger, it is not uncommon for State authorities in various countries to impose restrictions on the location, date, time, form or manner of conduct of a planned public gathering. In the present case, the relevant legislation of the respondent State provided that public assemblies could not be held within fifty metres of certain buildings and institutions, including the parliament. Even though that particular provision was declared unconstitutional in 2017, it was in force at the relevant time. However, the organisers set up the stage not in the park opposite the parliament but in the traffic lanes in front of it. In addition, they also set up about 300 tents on the road, for which there was no authorisation at all, and which did not come within the scope of the relevant rules. The first request as regards the setting up of tents was submitted on 30 September 2015, that is, after the tents had already been installed

76 *Galstyan v. Armenia*, no. 26986/03, § 117, ECHR 2007, *Ashughyan v. Armenia*, no. 33268/03, § 93, ECHR 2008.

77 *Gülcü v. Turkey*, no. 17526/10, § 110-117, ECHR 2016.

in that location for at least two days, and the request was rejected as being outside the competence of the body in question. Even though the decision on the matter was subject to appeal, the organisers neither appealed against it nor in any other way pursued their request for authorisation to set up tents.

The Court considered that by acting in this way, the organisers, including the applicant, intentionally failed to abide by their own request, the rules, and the terms of the authorisation issued by the authorities. At the same time, they caused disruption to ordinary life and other activities to a degree exceeding that which is inevitable, thus engaging in conduct which cannot enjoy the same privileged protection under the Convention. In particular, the applicant did not contest the Government's submission that the boulevard in question was the busiest road in the city and that blocking it had obstructed the normal activities of other people and services, such as the police, the emergency medical services and firefighters. The Court considered that the complete obstruction of a major boulevard and traffic route in the city for twenty days, in disregard of municipal police orders and of the needs and rights of road users, constituted conduct which, even though less serious than recourse to physical violence, could be described as "reprehensible".[78]

The municipal police inspector issued a decision ordering that the objects in question be removed from the traffic lanes. The organisers, however, refused to sign the delivery slip accompanying that decision, failed to comply with it, and ultimately did not allow the two municipal police inspectors to enforce it. The Court further noted that the decision in question had in no way interfered with the holding of the protest rally itself but was limited to ordering the removal of the stage and the tents from the road.

As regards the circumstances leading to the dispersal of the gathering, the Court observed that even though the relevant legislation provided for fines for non-compliance with the relevant provisions of the Public Assembly Law, there was nothing in the case file to indicate that the authorities had imposed any such fine on the organisers and/or protesters. In addition, the relevant police authorities prohibited traffic until 10 October 2015 in the boulevard in question in order to further facilitate the gathering. The objects were ultimately removed on 17 October 2015, that is, twenty days after they had been installed. In other words, the authorities tolerated the disturbance and obstruction in question for twenty days in total. The organisers themselves requested authorisation to set up the temporary objects – in the park – for twenty days starting until 16 October 2015 inclusive.

78 *Barraco v. France*, no. 31684/05, § 46- 47, ECHR 2009.

The Court observed that during those twenty days the organisers, including the applicant, had been able to freely manifest their views. It said that the authorities' view that this period was sufficient, and that the major disruption caused could no longer be allowed to continue, did not appear per se to have been unreasonable. Yet on 17 October 2015, when the police asked the protesters who were present at the time to step away so that the stage and the tents could be removed, the participants, including the applicant, refused to comply with that request. Instead, they formed a human shield and put up resistance, even though there was nothing in the case file to suggest that removing the stage and the tents from the road would have prevented them from continuing to demonstrate in front of the parliament. It was only after the participants put up resistance to the police actions, including by breaking the police cordon and driving into the boulevard, that the police officer in command ordered that the gathering be dispersed. The Court considered that in such circumstances, the intervention by the police had not overstepped the margin of appreciation of the national authorities.

As regards, finally, the applicant's arrest and conviction, the Court further noted that he had not been prosecuted and convicted for organising and/or participating in the protest, but for his reprehensible conduct, notably for assaulting an official performing his duties. According to the applicant's own submission, he kept pushing the police officer in the chest and shoulders, and finally removed the officer's hat and took it away. All the while the police officer in question remained calm and applied no force whatsoever in respect of the applicant. The Court reiterated that Article 11 does not give immunity against prosecution for violent actions during public gatherings. In addition, when individuals are involved in acts of violence, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of assembly, and the imposition of a sanction for such reprehensible acts may be considered to be compatible with the guarantees of Article 11 of the Convention.

The Court was very attentive when assessing proportionality as regards the chilling effect of criminal sanctions. The application of enforcement measures, such as the use of force to disperse the assembly, the participants' arrests, detention and/or ensuing convictions may have the effect of discouraging them and others from participating in similar assemblies in future, and more generally in open political debate.[79] However, the sanction in the present case, as noted above, was not for the applicant's organising and/or participating in the protests, but for him having assaulted the police officer. Assaulting an official was a criminal

79 *Balçık and Others v. Turkey*, no. 25/02, § 41, ECHR 2007. godine; *Navalnyy and Yashin v. Russia*, no. 76204/11, § 74, ECHR 2014, *Shmorgunov and others v. Ukraine*, no. 15367/14 and 13 others, § 493, ECHR 2021.

offence, which was formulated with sufficient precision and the interpretation of which was not unforeseeable. The applicant's sentence of four months was below the statutory minimum provided for this offence, of which he served less than three months. In the particular circumstances of the present case, the Court found that this sentence, although not insignificant, was not contrary to Article 11 of the Convention, wherefore it considered that the applicant's prosecution and conviction in the present case was in accordance with the law, pursued legitimate aims, notably "prevention of disorder or crime" and "protection of the rights and freedoms of others" [80] and that it was necessary in a democratic society.

In view of all of the above, the Court found that the applicant's complaint that the removal of the tents and stage, dispersal of the assembly and his prosecution and conviction for assaulting an official constituted an unlawful and disproportionate interference with his Article 11 rights was manifestly ill-founded and had to be rejected.

As regards the complaint concerning the alleged unfairness of the criminal proceedings against the applicant, the Court considered, in the light of all the material in its possession, and in so far as the matter complained of was within its competence, that it was manifestly ill-founded and had to be rejected in accordance with Article 35, paragraphs 3 (a) and 4 of the Convention. For these reasons, the Court, by a majority, declared the application inadmissible.

ii. Relevance to Case-Law

The prohibition of a public assembly may lead to an administrative dispute. The Public Assembly Law provides for temporary restrictions of public assemblies that are necessary in a democratic society in order to prevent disruption of public law and order, commission of crimes, violations of human rights and freedoms and special minority rights and freedoms of others, safety of people and property, or at the request of a state administration authority charged with health in case they pose a risk to health. The restrictions must be necessary and proportionate to the aim pursued. The rulings prohibiting public assemblies are issued by the police. The assembly organisers may challenge the rulings before the Montenegrin Administrative Court.

The Montenegrin Administrative Court did not rule on any cases concerning alleged interferences in the freedom of assembly in 2021.

80 *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 251, ECHR 2011 (excerpts).

However, the Montenegrin Administrative Court ruled on freedom of assembly cases in the past. For instance, in case U.No. 4271/19, the Administrative Court ruled on a claim challenging the prohibition of a public assembly characterised as religious. In such cases, this court needs to bear in mind that the freedom of assembly is closely related to the freedom of religion enshrined in Article 9 of the ECHR, which means that both of these rights may be violated and that the case needs to be examined in the light of the Convention standards on both Article 9 and Article 11.

In the reasoning of its judgment, the Administrative Court specified:

> "Article 15 of the Law on the Legal Status of Religious Communities (Official Gazette of Montenegro No. 52/16) allows the relevant state authority to prohibit religious assemblies and processions in order to protect health, public law and order or for security reasons, for as long as the reason for the prohibition persists. Article 14(1) of the Public Assembly Law (…) allows temporary restrictions by the police of public assemblies that are necessary in a democratic society in order to prevent disruption of public law and order, commission of crimes, violations of human rights and freedoms and special minority rights and freedoms of others, safety of people and property, or at the request of a state administration authority charged with health in case they pose a risk to health.
>
> Based on the content of the impugned ruling and the case file, this Court finds that the respondent had properly established the facts and rendered a lawful decision following a security assessment. This Court agrees that the holding of the religious events on the same day and at the same venue by two different organisers, specifically two confronting churches, might result in a larger-scale disruption of public law and order, i.e. incident situations between the believers and supporters of the two churches, wherefore it concludes that the respondent rightly prohibited the public assembly, the religious event scheduled for 19 August 2019, at 9 am in front of the Holy Transfiguration of God Church in Ivanova korita, in the light of the events in the past, when the believers and supporters of the two churches physically clashed during the celebrations of religious holidays. The respondent had rightly concluded - in accordance with Article 15 of the Law on the Legal Status of Religious Communities, Article 14, paragraphs 1 and 8, of the Public Assembly Law, and Article 9 of the European Convention on Human Rights - that, given

the number of participants in both events and the character of the assemblies, the holding of the religious assemblies organised by the two confronting churches on the same day and at the same venue would result in violations of guaranteed human rights and freedoms, incitement to violence and national, racial, religious and other hate, wherefore there was a real risk that the holding of the assembly would endanger the safety of people or property or result in a larger-scale disruption of public law and order.

This Court finds that this case concerns exercise of the right to freedom of assembly and association under Article 11 of the ECHR, as well as of the freedom of thought, conscience and religion and the freedom of expression, also enshrined in the ECHR, in its Articles 9 and 10. However, a balance has to be struck both between these rights individually and collectively and they may not override all fundamental human rights and freedoms, i.e. run counter to the idea of human rights and freedoms the Convention is based on, which, in turns, means that they cannot be applied absolutely, without any limitations. All the enumerated rights are subject to restrictions set out in the ECHR (paragraphs 2 of Articles 9, 10 and 11), which are elaborated in national law in the above-mentioned provisions – Article 15 of the Law on the Legal Status of Religious Communities and Article 14(1) of the Public Assembly Law. Any decision restricting the above rights must be based on an acceptable assessment of the relevant facts. The respondent had properly assessed the risks to the safety of the participants in the events and to public law and order and found that the extent of the risks warranted a drastic measure – the temporary prohibition of the assembly. In other words, when the security assessment indicates that the real risk of disorder cannot be prevented by other, less stringent measures, the prohibition is necessary if there is a risk to the peaceful holding of the assembly and the safety of people and property and it is warranted to protect public interests and prevent larger-scale disruption of public law and order. The Court's assessment is in accordance with the ECtHR's view that the control of the scope of the margin of appreciation granted Contracting Parties is based on the test of a fair balance between the standards of safeguards of Convention rights, on the one hand, and the aim of the restrictions of human rights protection falling in the category of the States' margin of appreciation, on the other. This view is corroborated in the ECtHR's decision in the case of *Christians against Racism and Fascism v. the United Kingdom* of 16 July 1980, no.

8440/78, in which it explained the meaning of the notion of necessary prohibition in the meaning of Article 11(2) of the Convention. Therefore, having assessed the reasons set out in the impugned ruling, this Court holds that they are based on an acceptable assessment of the relevant facts. Finally, the case file includes also the respondent's ruling 17/6-1 No. 222/2019-1874 of 14 August 2019, prohibiting the holding of a public assembly – a religious event organised by the Montenegrin Orthodox Church, scheduled at the same venue on the same day, at 10 am.

Having assessed the other allegations in the claim, the Court finds that they are irrelevant to the lawfulness of the impugned ruling and its decision. The Court notes, in particular, that, under Article 15(4) of the Public Assembly Law, a claim must be decided on within 48 hours from the hour of submission, wherefore the Court ruled on this matter at a non-public session, without holding the requested oral hearing."

3. Analysis of ECtHR Judgments Finding Montenegro in Violation of the Convention

3.1. Article 2 – Right to Life

Article 2
Right to Life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2 protects a basic human right – the right to life, which is a fundamental value of the Council of Europe, together with the prohibition of torture. Protocol No. 13 abolished the death penalty. Paragraph 2 of Article 2 enumerates exceptions, when deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary.[81]

81 Popović et al, *Comment of the Convention for the Protection of Human Rights and Fundamental Freedoms*, JP "Službeni glasnik", 2017.

As in the case of other Convention rights, States have both positive and negative obligations in regard to the right to life. The ECtHR's case-law on these obligations has gradually evolved since 1995, when it first ruled on an alleged violation of Article 2 in the case of *McCann and Others v. the United Kingdom*.[82] The Court has since developed broad case-law and clarified the content of Article 2, including the States' negative obligation to refrain from unlawful deprivation of life and their positive obligation to take measures to protect life and investigate suspicions of unlawful deprivation of life.[83]

However, the Court has repeatedly underlined that Article 2 of the Convention cannot be interpreted as guaranteeing to every individual an absolute level of security in any activity in which the right to life may be at stake, in particular when the person concerned bears a degree of responsibility for the accident having exposed himself or herself to unjustified danger.[84] (*Molie v. Romania* (dec.), 13754/02, para. 44; *Koseva v. Bulgaria* (dec.), 6414/02; *Gokdemir v. Turkey* (dec.), 66309/09, para. 17).[85]

Article 2(1) of the Convention also contains a procedural obligation to carry out an effective investigation into alleged breaches of its substantive limb where an individual lost their life due to force applied by state agents. Such an investigation must result in the identification of the perpetrators and their punishment. The main goal of the investigation has to involve the effective implementation of domestic law protecting the right to life and ensuring that state agents responsible for someone's death are called to account.

Given the broad application and interpretation of the right to life, the ECtHR has examined a variety of issues falling under Article 2, such as protection of the life of journalists and victims of domestic violence, rights of "unborn" children, the States' obligation to take measures to prevent suicide, the right to an adequate level of health care, the right to die, etc.[86]

82 *McCann and Others v. the United Kingdom*, no.18984/91, A324, ECHR 1995.

83 Popović et al, *Comment of the Convention for the Protection of Human Rights and Fundamental Freedoms*, JP "Službeni glasnik", 2017.

84 *Molie v. Romania* (dec.), 13754/02, § 44; *Koseva v. Bulgaria* (dec.), 6414/02; *Gokdemir v. Turkey* (dec.), 66309/09, § 17; Guide on Article 2 of the Convention – Right to life, Council of Europe, Human Rights Handbook Series.

85 Guide on Article 2 of the European Convention on Human Rights – Right to life, Council of Europe, Human Rights Handbook Series.

86 Popović et al, *Comment of the Convention for the Protection of Human Rights and Fundamental Freedoms*, JP "Službeni glasnik", 2017, p. 36.

The ECtHR found Montenegro in violation of the right to life in two judgments in the 2009-2021 period. In the *Ranđelović v. Montenegro*[87] case, it found Montenegro in violation of the procedural aspect of the right to life, because the investigation and the subsequent criminal proceedings concerning the sinking of the boat and the deaths of the applicants' family members have not complied with the requirements of promptness and efficiency.

In 2021, the ECtHR found no violation of the right to life in its judgment in the case of *Ražnatović v. Montenegro.*

Ražnatović v. Montenegro

Application No. 14742/18
Judgment of 2 September 2021

i. Analysis of the Judgment

The applicants complained under the substantive aspect of Article 2 of the Convention that their mother and spouse, M.R., had been able to commit suicide as a result of the negligence of the Psychiatric Hospital of the Clinical Centre of Montenegro where she had been voluntarily hospitalised. The applicants claimed that the hospital had known or ought to have known, that M.R. posed a real and immediate risk of suicide and had not taken measures to prevent that risk from materialising. Since the respondent Government claimed that the applicants had not exhausted all domestic remedies, the Court first ruled on the admissibility of the application and, once it found it admissible, examined the complaint of a violation of the substantive aspect of Article 2 of the Convention.

(a) The facts

The applicants' mother and wife, M.R., was diagnosed with depression in 1999. In the 2000-2003 period, she was admitted as a voluntary in-patient to the Podgorica Psychiatric Clinic, the Dobrota Psychiatric Hospital and the Belgrade Mental Health Institute on a number of occasions. During that period, she attempted to commit suicide once (on 31 December 2001), while she was at home. In the 2003-2006 period, she saw a doctor at the Podgorica Psychiatric Clinic as an out-patient, though not on a regular basis. On 6 December 2006

87 The judgment in the case of *Ranđelović v. Montenegro*, no. 66641/10, was presented in the 2018 Analysis of ECtHR's judgments in respect of Montenegro, p. 29, available in Montenegrin at: https://sudovi.me/static/vrhs/doc/11233.pdf.

she was admitted as a voluntary in-patient to the same hospital because she had attempted to commit suicide. In December the same year, M.R. was allowed to spend a religious holiday at home with her family. During her short stay at home, she again attempted to commit suicide and immediately returned to hospital. On the occasion of the birth of her grandchild in February 2007, M.R. was again authorised to spend several days at home with her family. She returned to hospital two days later at 11 am. She told her psychiatrist V.G. that she was nervous, but denied having suicidal thoughts. She added that she had been taking regular therapy at home. V.G. decided to give her a strong sedative and, about half an hour later, M.R. fell asleep. When V.G. checked on her at 1.30 pm, M.R. was still sleeping. Around 3 pm, M.R. received regular therapy and told a psychiatrist on duty that she would go out into the hospital grounds, together with another patient, for a walk. However, the two of them left the hospital grounds without permission, jumped off a nearby bridge and drowned.

After obtaining statements from the Podgorica Psychiatric Hospital staff during the investigation, the state prosecutor decided not to prosecute. The applicants did not avail themselves of the opportunity to bring subsidiary prosecution. They brought a civil action for damages against the Podgorica Psychiatric Clinic. During the proceedings, the court heard, *inter alia*, the then director of the Podgorica Psychiatric Clinic, Ž.G. and psychiatrist V.G. The director said that closed wards were not a conducive environment for patients with depression such as M.R. and that it would be inhuman to place such a patient in a closed ward. V.G. said that she had seen M.R. immediately after her return to the hospital on the morning of 14 February 2007. On that occasion, M.R. had told her that she had not slept well and that she had been nervous, but had denied having suicidal thoughts. M.R. had also told her that she had been taking regular therapy at home. V.G. had therefore decided that M.R. should be given the strongest sedative available in order to allow her to sleep for a couple of hours and prepare her for regular therapy. She said that the Podgorica Psychiatric Clinic did not have closed wards and that, in any event, M.R.'s state of health had not been such as to justify her placement in a closed ward. She explained that all patients had unrestricted access to the external grounds of the hospital during visiting hours and that they usually availed themselves of that opportunity. The Court of First Instance in Podgorica admitted two expert opinions in evidence. The first expert report indicated M.R. should have been placed in a closed ward on 14 February, given her earlier suicide attempts. Conversely, the other expert report said that M.R.'s state on 14 February 2007 had not been such as to justify her placement in a closed ward or the use of mechanical restraints (such as leather straps). In view of the contradictory reports, the court invited the applicants to submit a third expert report. They failed to do so.

The Court of First Instance in Podgorica dismissed the applicants' claim, specifying that they had not proven M.R. had not received adequate care. It said in its judgment that M.R. had displayed no signs of suicidal thoughts on 14 February 2007. Therefore, her state of health on that date had not been such as to justify her placement in a closed ward or the use of mechanical restraints. In that connection, it considered the latter expert report to be more in line with domestic law and the international standards which had been developed in recent years. The court also accepted V.G.'s assessment that the use of the strongest sedative in order to allow M.R. to sleep for a couple of hours and prepare her for regular therapy, had been appropriate and proportionate in the circumstances. The Podgorica High Court upheld the judgment and the Supreme Court dismissed the applicants' appeal on points of law. The Constitutional Court dismissed the constitutional appeal, discerning no reason to disagree with the decisions of the lower courts.

(b) Admissibility

Given that the respondent Government claimed that the applicants had not exhausted all legal remedies, i.e. had not filed a criminal report concerning M.R.'s death or undertaken subsidiary prosecution after the State prosecutor decided not to prosecute the case, the Court first examined the admissibility of the application.

At the outset, the Court stressed that determining whether a domestic procedure constituted an effective remedy within the meaning of Article 35(1), which an applicant had to exhaust, depended on a number of factors, notably the applicant's complaint, the scope of the obligations of the State under that particular Convention provision, the available remedies in the respondent State and the specific circumstances of the case. For example, the Court has held that, in the area of unlawful use of force by State agents – and not mere fault, omission or negligence – civil or administrative proceedings aimed solely at awarding damages, rather than ensuring the identification and punishment of those responsible, were not adequate and effective remedies capable of providing redress for complaints based on the substantive aspect of Articles 2 and 3 of the Convention.[88] By contrast, in medical negligence cases, the Court has considered that the procedural obligation imposed by Article 2, which concerns the requirement to set up an effective judicial system, will be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility of the doctors concerned to be established and any appropriate civil redress to be obtained.[89] In the event of there being a number

88 *Jeronovičs v. Latvia* [GC], no. 44898/10, § 76, Reports of Judgments and Decisions, 2016.

89 *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII.

of remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required.[90]

The Court noted that the present case concerned an alleged act of medical negligence within the context of a suicide during a period of voluntary hospitalisation in a psychiatric institution. Since the Government have not contested the effectiveness of a civil action for damages in this context, the Court considered that the applicants had not been required to use the criminal avenue in addition to, or instead of, the civil avenue. Therefore, the objection of non-exhaustion of domestic remedies raised by the Government had to be dismissed.

(c) The merits

The present case is very similar to *Fernandes de Oliveira v. Portugal*, in which the Court held that the authorities had a general operational duty (the so-called *Osman* duty) [91] with respect to a voluntary psychiatric patient to take reasonable measures to protect him or her from a real and immediate risk of suicide. The specific measures required will depend on the particular circumstances of the case, and those specific circumstances will often differ depending on whether the patient is hospitalised voluntarily or involuntarily. A stricter standard of scrutiny may be applied in the case of involuntary patients.

Accordingly, the key issue the Court examined was whether the authorities knew, or ought to have known, that M.R. posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent that risk by putting in place the restrictive measures available.[92] The Court bore in mind the operational choices which had to be made in terms of priorities and resources in providing public healthcare and certain other public services in the same way as it bore in mind the difficulties involved in policing modern societies.

The Court reiterated that the very essence of the Convention was respect for human dignity and human freedom. In this regard, the authorities must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned and in such a way as to diminish the opportunities for

90 *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, ECHR 2005-XII (excerpts).

91 *Osman v. the United Kingdom*, no. 23452/94, § 116, Reports 1998-VIII.

92 *Keenan v. the United Kingdom*, no. 27229/95, § 93, ECHR 2001-III.

self-harm, without infringing personal autonomy. Excessively restrictive measures may give rise to issues under Articles 3, 5 and 8 of the Convention.

In order to establish whether the authorities knew or ought to have known that the life of a particular individual was subject to a real and immediate risk, triggering the duty to take appropriate preventive measures, the Court takes into account a number of factors, such as a history of mental health problems, the gravity of the mental condition, previous attempts to commit suicide or self-harm, suicidal thoughts or threats and signs of physical or mental distress.

Turning first to M.R.'s history of mental health problems, it is common ground that she had suffered from depression over a long period and that she had been hospitalised at different psychiatric institutions, on a voluntary basis, on many occasions. As to suicidal thoughts or threats, the Court noted that the parties to the national proceedings did not dispute the fact that M.R. had attempted to commit suicide on three occasions. It was further established that, during her last stay at the Podgorica Psychiatric Clinic, M.R. had been allowed to return home to spend time with her family on two occasions because the hospital considered that the risk she might pose to herself had diminished. Lastly, relying on the testimony of the psychiatric doctor treating M.R., the domestic courts found that M.R. had not displayed signs of suicidal thoughts on the last day of her life. As to signs of physical or mental distress, on the basis of the clinical records for 14 February 2007, the domestic courts found that no worrying signs in M.R.'s behaviour had been noted. Notably, after having slept a couple of hours, she had received regular therapy at around 3 pm and had gone out for a walk, together with another patient. The psychiatric doctor treating her explained that all patients had unrestricted access to the external grounds of the hospital during the visiting hours and that they usually availed themselves of that opportunity. That assessment was accepted by the domestic courts.

After assessing the written submissions of the Representative of Montenegro before the European Court of Human Rights in the light of domestic law and established international standards, the Court found no violation of Article 2 of the Convention.

In its judgment, the Court concluded that there had not been cogent elements that could lead it to depart from the conclusion reached by the domestic courts that the Psychiatric Clinic knew or ought to have known about the immediate risk to the life of M.R. who was treated at this clinic on a voluntary basis. Accordingly, the Court did not find it necessary to assess the second part of the *Osman/Keenan* test, i.e. to assess whether the competent authorities had taken

all measures that could have been reasonably expected of them.[93] In the light of the foregoing, the Court found no violation of Article 2 of the Convention.

ii. Judgment Execution Procedure

The judgment is not subject to execution since the Court concluded that Montenegro had not violated any of the applicants' rights and freedoms under the Convention.

iii. Relevance to Case-Law

The *Ražnatović v. Montenegro* case concerned the protection of the rights of an individual undergoing voluntary in-patient treatment at the Psychiatric Clinic. The standards explained and applied in this case are applicable not only to individuals undergoing voluntary or involuntary medical treatment, but also to other individuals under State control, such as, e.g. persons deprived of liberty in the context of criminal proceedings. Article 2 requires of States to not only refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within their jurisdiction. Therefore, in addition to negative obligations, the States also have positive obligations including, above all, to safeguard the right to life by establishing a legislative and administrative framework ensuring effective deterrence of threats to this right. States are required to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives and to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable.[94]

Montenegrin courts have ruled on claims seeking compensation from the State for the death of individuals under its control. One such case, P. No. 593/18, was ruled on by the Court of First Instance in Herceg Novi. The claim was filed by the parents and brother of J.M. who died on 23 September 2008. On that day, J.M. fled the car in which the police were transferring him, albeit uncuffed as provided by law, ran into a nearby building and jumped off the roof.

The Court of First Instance found that the respondent had initiated disciplinary proceedings against the three police officers and that one of them was found guilty, in January 2009, of a grave disciplinary offence (failure to take sufficient measures to

93 *Fernandes de Oliveira v. Portugal*, no. 78103/14, § 132, ECHR 2019.

94 *Dodov v. Bulgaria*, no. 59548/00, § 80, ECHR 2008.

ensure the safety of individuals, property and goods entrusted for safekeeping) and fined, while the other two police officers were found not guilty.

However, the Court of First Instance upheld the objection that the statute of limitations had expired and dismissed the claim, whilst specifying:

> "(…) Article 385 of the Law of Contract and Torts lays down that the statute of limitations for filing a claim for damages for loss caused shall expire three years after the party that sustained injury or loss became aware of the injury and loss and of the party that inflicted the damage. Paragraph 2 of this Article sets out that the statute of limitations for filing such a claim shall in any event expire five years after the occurrence of injury or loss. As established in this case, J.M. died on 23 September 2008 by committing suicide by jumping off a building as he was fleeing from the police. Since the ruling of 28 January 2009 found deficiencies in the actions of the Police Directorate officers, the respondent is responsible for inflicting the damage. Therefore, the claimants became aware of the party that inflicted the damage on 28 January 2009 at the latest, wherefore the objective deadline under Article 385(2) of the Law of Contract and Torts is to be reckoned as of that day.
>
> In view of the above and the fact that the claim was filed on 20 September 2018, both the subjective and objective deadlines by which the claimants could have sought the compensation of damages have obviously expired."

Although the claim was rejected as out of time, this case is an example of an event engaging the State's responsibility for violating Article 2 of the Convention and its need to fulfil its positive obligations. Not only courts, but other state authorities as well, are obligated to protect the right to life under Article 2 of the Convention, wherefore the disciplinary proceedings the respondent initiated against the police officers implicated in the event should be assessed in that light. It should also be borne in mind that the right to life involves the State's positive obligations, *inter alia*, the obligation to conduct an investigation. The question of the date from which the statute of limitations should be reckoned thus arises. Apparently, it should not be reckoned from the day of the event at issue, but from the moment of violation of the above-mentioned procedural obligation.

The judgment was upheld by the Podgorica High Court, in its judgment No. 6642/20.

This case echoes the case *Petrović v. Serbia*[95], in which the ECtHR found a violation of Article 2 of the Convention due to the ineffective investigation of the death of Dejan Petrović, who was arrested and brought to the police station for interrogation. Although handcuffed and in the company of three police officers, he jumped head first through a closed window, breaking a window pane, and fell out into the courtyard. He died a month later in hospital.

The ECtHR said that, where the allegations raised issues of negligence, the procedural obligation may come into play upon the institution of proceedings by the deceased's relatives and that a civil, administrative or even disciplinary remedy may be sufficient. Since often, in practice, the true circumstances of the death in such cases are largely confined within the knowledge of State officials or authorities, the bringing of appropriate domestic proceedings will be conditioned by an adequate official investigation, which must be independent and impartial.

The ECtHR said that in cases in which a detainee died while in the custody of State authorities, whatever mode of investigation was employed, the mere fact that the authorities had been informed of the death would give rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death, irrespective of whether the alleged perpetrators were State agents, or were unknown, or even that the harm had been self-inflicted. It went on to say that the State authorities could not leave it to the initiative of the next-of-kin to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.

The Court reiterated in this case that, in order to be "effective", an investigation into a death had to firstly be adequate, that is, it had to be capable of the establishment of the relevant facts and the identification and punishment of those responsible. Although this is not an obligation of result, but of means only, the investigation into a detainee's death must be thorough and the authorities must take the reasonable steps available to them to secure the evidence concerning the incident. For an investigation to be effective, it may generally be regarded as necessary for the persons responsible for it and carrying it out to be independent from those implicated in the events.

It is essential that the facts, and any unlawfulness, are established promptly and with reasonable diligence**.** The investigation's purpose in such situations serves not only to secure the effective implementation of the domestic laws protecting the right to life, but to maintain public confidence in the authorities' adherence to the

95 *Petrović v. Serbia*, no. 40485/08, § 73, ECHR 2014.

rule of law, to prevent any appearance of collusion in or tolerance of unlawful acts and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. For the same reasons, there must be a sufficient element of public scrutiny of the investigation, and, in all cases, involvement of the next-of-kin to the extent necessary to safeguard his or her legitimate interests.

Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual[96] or, in specific circumstances, protect them even against actions by which they endanger their own lives.[97] The positive obligation in question must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, as the Court emphasised in, e.g. its judgment in the case of *Kukhalashvili and Others v. Georgia*.[98] In that case, the ECtHR found a violation of Article 2 because of the lack of an independent and impartial investigation of police operation in prison and their excessive use of force. Explaining the relevant principles concerning the positive obligations under Article 2 of the Convention, the Court noted that it should not be forgotten that the positive obligations under Article 2 of the Convention were not unqualified: not every presumed threat to life obliges the authorities to take specific measures to avoid the risk. A duty to take specific measures arises only if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to life, and if the authorities retained a certain degree of control over the situation. Since a respondent State is only required to take such measures which are "feasible" in the circumstances, the positive obligation in question must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct, and the operational choices which must be made in terms of priorities and resources. In that context, as the ECtHR noted, it should also be remembered that the use of force by State agents in pursuit of one of the aims set out in Article 2(2) may be justified under that provision where it is based on an honest and genuine belief that the use of force was necessary.[99]

Therefore, in order to establish the State's responsibility for harm an individual has inflicted on themselves or others whilst under State control, all

96 *Osman v. the United Kingdom*, no. 23452/94, § 115, Reports 1998-VIII.

97 *Haas v. Switzerland*, no. 31322/07, § 54, ECHR 2011.

98 *Kukhalashvili and Others v. Georgia*, nos. 8938/07 and 41891/07, ECHR 2020.

99 *Ibid*., § 146.

circumstances of the case should be assessed, as well as whether the state authorities knew or ought to have known that an individual was at real and immediate risk of suicide, and, if so whether they had done everything they reasonably could have been expected to in order to prevent it.

Cases of involuntary hospitalisation for psychiatric treatment dealt with in non-contentious proceedings are the ones in which the above-mentioned Article 2 standards need to be borne in mind. By reacting in such situations, the State is fulfilling its positive obligations in order to protect individuals with mental health problems known to be a risk to themselves and/or others. The Court of First Instance in Kotor ruling Os. No. 10/21 of 1 February 2021 ordering V.N.'s 30-day involuntary hospitalisation in a psychiatric establishment is a good example.

Having reviewed the appeal of The Court of First Instance ruling, the Podgorica High Court issued its ruling Gž. No. 3885/21 on 7 September 2021, upholding the first-instance ruling and specifying:

> "Since the respondent's lawyer did not dispute the findings and opinion of court medical expert Dr M.R. or his statement before the first-instance court on 1 September 2021 nor recommended an additional psychiatric examination by a court expert, the Court cannot accept the claims in the respondent's counsel's appeal that the data on the respondent's state of health are meagre and require additional psychiatric examinations of her personality, especially since she had not committed any crimes in the past, given that the court expert's examination, medical documentation, treatment to date and mental health of the respondent justify the conclusion to extend her involuntary hospitalisation in the institution, because she is a threat to herself and those around her, given her mental illness described in detail in the findings and opinion of neuropsychiatrist M.R. at the hearing at issue.
>
> Both in his findings and opinion and in his responses to the respondent's counsel's questions during the hearing before the first-instance court on 1 September 2021, Dr M.R., a court expert in neuropsychiatry, said that he had concluded after examining the respondent that she was conscious at the time of the examination, but had difficulty establishing, deepening and maintaining verbal contact; that she was totally disoriented, tense, negativistic and hostile; that her chain of thought was disorganised; that she suffered from auditory and visual hallucinations and probably felt threatened by the court and those present at the hearing; that she was totally uncritical of her illness

and refused treatment because she believed she was not ill; that the respondent was suffering from residual schizophrenia (code F20.5), which is a grave psychological disorder, i.e. the sequences of the gravest psychiatric illness which literally devastate a personality; that she need not be involuntarily hospitalised for further treatment and could attempt to fully return to the real world and live in the community; that the illness could only deteriorate over time; that it could be held in check for years with a balanced therapy and the patient's cooperation; that the respondent's outpatient treatment was out of the question, because of her family situation and lack of its assistance and support; and that he finally concluded that the respondent's involuntary hospitalisation was justified and necessary because, owing to her psychological problems, the respondent was putting at risk her own health, other people and her community; that she had already been hospitalised once because she tried to commit suicide; that paranoid schizophrenia (code F20.0), one of the gravest psychiatric disorders, was at issue, wherefore she was above all a risk to herself; that her behaviour was erratic and might easily result in suicide; and that she was ultimately a threat also to others and the community.

Therefore, the allegations to the contrary set out in the respondent counsel's appeal are not based on any facts or law."

3.2. Article 3 – Prohibition of Torture

Article 3
Prohibition of Torture

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

Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. It is an absolute right that may not be derogated from in any situation. This shortest provision of the Convention has raised a number of problems in interpretation, precisely because its conciseness and generality. On the other hand, as such, it has enabled the ECtHR to be creative and clarify its content in its ample case-law.[100] Each category of prohibited treatment under this

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

Article – torture, inhuman treatment and punishment and degrading treatment and punishment – is elaborated in the Court's decisions and judgments. Such conduct amounts to ill-treatment.[101] Although the authors of the Convention drafted amendments defining these categories of treatment more precisely, they ultimately abandoned them, having concluded that they might jeopardise the absolute prohibition of ill-treatment.[102]

According to the Court's case-law, torture is deliberate inhuman treatment causing very serious and cruel suffering.[103] In its judgment in the case of *Aksoy v. Turkey*[104], the Court added that torture was a severe form of inhuman treatment inflicted for a particular purpose, such as extracting information or a confession or punishment.[105] Therefore, three elements distinguish torture from other categories of ill-treatment: higher degree of suffering, intention and purpose.

Inhuman treatment is characterised by intensive physical or mental suffering as its consequence.[106] The ECtHR has rarely distinguished between inhuman punishment and inhuman treatment, and separately examined whether such treatment was in violation of Article 3.[107] The notion of "punishment" should be construed in its general meaning, as concerning the enforcement of court and all other types of sanctions.[108] *The Chember v. Russia*[109] case concerned inhuman punishment, because the applicant, a soldier known to have knee problems, was punished by doing 350 knee bends because he had failed to perform his duties. The applicant collapsed, and was later discharged from the army on account of his disability.

101 Popović and et al, *Comment of the Convention for the Protection of Human Rights and Fundamental Freedoms*, JP "Službeni glasnik", 2017.

102 Maria Pleić – paper on Article 3 and decisions against Croatia.

103 *Ireland v. the United Kingdom*, no. 5310/71, § 167, Series A no. 25, p. 66.

104 *Aksoy v. Turkey*, no. 21987/93, 1996-VI; 23 EHRR 553.

105 *Ibid*.

106 Popović and et al, *Comment of the Convention for the Protection of Human Rights and Fundamental Freedoms*, JP "Službeni glasnik", 2017.

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

108 Popović and et al, *Comment of the Convention for the Protection of Human Rights and Fundamental Freedoms*, JP "Službeni glasnik", 2017; Eric Svanidze, Graham Smith, Training Manual on the Prohibition of Torture and Inhuman and Degrading Treatment and Punishment, Council of Europe, 2018, available at: https://rm.coe.int/training-manual-prohibiton-torture-eng/1680933627.

109 *Chember v. Russia*, no. 7188/03, § 56, ECHR 2008.

The clarification of the concept of "degrading treatment" developed over time. In one of its more recent judgments, the ECtHR has described it as treatment that humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.[110] Whereas for inhuman treatment stress is placed on physical and mental suffering, for degrading treatment humiliation or debasement are important.[111]

The ECtHR's judgment in the case of *Tyrer v. the United Kingdom*[112] is commonly referred to as an example of degrading punishment. In this case, the Court found a violation of Article 3 because of the corporal punishment of boys in school. A ordinary court convicted a 15-year-old boy for assaulting his classmate by corporal punishment - three strokes of the birch administered over his bare posterior. The punishment was administered by the police in the presence of the boy's father and a doctor. The ECtHR stated that the boy had been humiliated and degraded, that a specific interval (of several weeks) had passed between the conviction and the execution of the punishment, that he had been whipped by a person he did not know and that the manner in which the punishment was administered compounded the boy's plight.[113]

Article 3 also imposes positive and negative obligations on States. On the one hand, States are prohibited from ill-treating anyone in their jurisdiction, while, on the other, they must ensure that everyone in their jurisdiction is protected from ill-treatment and they must effectively investigate complaints of ill-treatment.[114]

The state authorities will convey a clear message that there is zero tolerance for torture and other forms of ill-treatment only if they prosecute and punish those responsible.

110 *Pretty v. the United Kingdom*, no. 2346/02, § 52, ECHR 2002.

111 Eric Svanidze, Graham Smith, Training Manual on the Prohibition of Torture and Inhuman and Degrading Treatment and Punishment, Council of Europe, 2018, available at: https://rm.coe.int/training-manual-prohibiton-torture-eng/1680933627.

112 *Tyrer v. the United Kingdom*, no. 5856/72, A26, ECHR 1978.

113 Popović et al, *Comment of the Convention for the Protection of Human Rights and Fundamental Freedoms*, JP "Službeni glasnik", 2017.

114 *Ibid*.

The Court earlier found Montenegro in violation of Article 3 of the Convention in four cases. In *Bulatović v. Montenegro*[115] and *Bigović v. Montenegro*[116], the Court found violations of this Article because of inadequate detention conditions, while, in *Milić and Nikezić v. Montenegro*[117] and *Siništaj and Others v. Montenegro*[118], it found violations of the prohibition of torture due to police torture and ineffective investigations.

In 2021, the Court delivered one judgment - in the case of *Baranin and Vukčević v. Montenegro* - finding Montenegro in violation of the procedural aspect of the prohibition of torture.

Baranin and Vukčević v. Montenegro

Application Nos. 24655/18 and 24656/18
Judgment of 11 March 2021

i. Analysis of the Judgment

The applicants complained under Articles 3 and 13 of the Convention of their ill-treatment by unidentified police officers on 24 October 2015, and specifically the alleged lack of an effective investigation into the incident, and lack of an effective domestic remedy in that regard.

The Court examined the admissibility of the application before ruling on its merits.

The Government submitted that the applications were inadmissible as the applicants had lost their victim status. Notably, the Constitutional Court had

115 The ECtHR's judgment in the case of *Bulatović v. Montenegro*, no. 67320/10, is presented in the Analysis of ECtHR's Judgments in Respect of Montenegro, p. 32. The Analysis is available in Montenegrin at: https://sudovi.me/static/vrhs/doc/11233.pdf

116 The ECtHR's judgment in the case of *Bigović v. Montenegro*, no. 48343/16, is presented in the Analysis of ECtHR's Judgments in Respect of Montenegro delivered in 2018 and 2019, pp. 48 and 54. The Analysis is available in Montenegrin at: https://sudovi.me/static//vrhs/doc/16_II_-_Dopuna_Analize_-_MNE.pdf

117 The ECtHR's judgment in the case of *Milić and Nikezić v. Montenegro*, nos. 54999/10 and 10609/11, is presented in the Analysis of ECtHR's Judgments in Respect of Montenegro, p. 35. The Analysis is available in Montenegrin at: https://sudovi.me/static/vrhs/doc/11233.pdf.

118 The ECtHR's judgment in the case of *Siništaj and others v. Montenegro*, nos. 1451/10, 7260/10 and 7382/10, is presented in the Analysis of ECtHR's Judgments in Respect of Montenegro, p. 38. The Analysis is available in Montenegrin at: https://sudovi.me/static/vrhs/doc/11233.pdf

explicitly found a violation of both the substantive and procedural aspects of Article 3, and the applicants had been awarded € 5,000 each in civil proceedings. They also submitted that the applicants had failed to inform the Court of these civil proceedings even though they had been initiated before the application had been lodged with the Court, and that incomplete submissions could be considered abuse of the right of application.

The applicants submitted that they could still claim to be the victims of a violation of Article 3 in view of the ineffective investigation as the civil proceedings, which were still ongoing at the moment when the applicants submitted their observations in reply, had only related to the substantive aspect of Article 3.

The Court considered that the question of whether the applicants had preserved their victim status was closely linked to the substance of their complaint about the State's alleged failure to conduct a thorough and effective investigation, and should therefore be joined to the merits of the complaint under the procedural aspect of Article 3 of the Convention.

In its judgment, the Court recalled the main principles of an effective investigation and, having applied them to the circumstances of the case, concluded that the procedural aspect of Article 3 of the Convention had been violated because the investigation had not been prompt, thorough or independent and had not afforded sufficient public scrutiny.

(a) The facts

An opposition political coalition organised protests in front of the parliament in Podgorica on 24 October 2015. A large number of police officers were deployed to ensure security at the gathering, including members of the Special Police Unit (the SPU) and the Special Anti-Terrorist Unit (the SAU). At some point the protests turned violent. Some of the protesters tried to force their way into the parliament, and started throwing stones and Molotov cocktails at the police. The head of the Security Centre (the SC) in Podgorica, who had been in charge of ensuring safety at the protests, ordered that the gathering be terminated. A number of related incidents followed in the city that night, such as the looting of shops and breaking of windows, including those of banks. The total number of injured was fifty-four, of whom twenty-nine were police officers and twenty-five protesters.

That evening, at around 10:30 pm, the applicants were in the vicinity of the protests, but did not participate in them. They headed towards police in a side street, who let them pass. A few metres further on, several masked police officers

approached the applicants, ordered them to lie on the ground, verbally insulted them and kicked them. One of the police officers pressed the second applicant's head to the ground with his foot. A SAU Hummer vehicle was at the scene, as well as a few other vehicles. The event was recorded from a window of a nearby office and put on YouTube by the editor-in-chief of the daily newspaper *Vijesti*. The following day, the SAU issued a single report on the events and the use of force the previous night. The incident involving the applicants was not mentioned. After seeing the video footage, the Podgorica Basic State Prosecutor's Office (the BSPO) opened a case file against unknown SAU officers for ill-treatment.

The applicants sought medical assistance and were diagnosed with light bodily injuries. They reported the incident to the police.

The BSPO took a number of steps concerning the incident in the next year and a half, including requesting of the Police Directorate information as to what had been done in order to identify the SAU officers involved and requesting from SAU information about the GPS position of all official vehicles. The BSPO also questioned the applicants, asked the SC to provide video footage from the pharmacy in the vicinity of where the incident had taken place. It also obtained the findings and opinions of court medical experts on the applicants' injuries, etc. However, the police officers who had used force against the applicants were not identified.

The applicants filed constitutional appeals, complaining of torture, inhuman and degrading treatment and lack of an effective investigation. On 21 June 2017, the Constitutional Court found a violation of both the substantive and procedural aspects of Article 3. It also found that the BSPO's investigation had not been thorough, independent or prompt. It therefore instructed the BSPO to conduct a prompt, thorough and independent investigation to ensure the identification and criminal prosecution of the police officers in relation to whom there was a reasonable suspicion that they had committed ill-treatment against the applicants. The court ordered that these decisions be enforced within three months of the date of their publication in the Official Gazette. The decisions were published on 3 August 2017.

Between 18 September and 3 November 2017, after the Constitutional Court's decision, the BSPO interviewed the editor-in-chief of daily *Vijesti*, the director of *TV Vijesti*, the owner of the pharmacy, the SPU commander and fifty-four SAU officers. During the same period, it urged the Police Directorate and the Minister of the Interior to inform it of the measures taken to identify the perpetrators. It also requested the head of the SC in Podgorica to inform it

if members of other intervening units had been deployed to the scene and, if so, to inform it of their identity. On 3 November 2017, the BSPO issued its report, indicating all of the above measures that had been taken and their results, and stating that one of the SAU officers had not been interviewed as he had been on a peace mission abroad. It also indicated that the Minister of the Interior and the Director of Police had been asked twice to identify the police officers involved, but to no avail. The report concluded that some police officers had indisputably committed the criminal offence in question, but that it was impossible to identify them on the basis of all the newly collected and earlier evidence. The investigation appeared to still be ongoing at the time the ECtHR delivered its judgment.

Other relevant facts

On 31 May 2016, the Podgorica BSPO issued an indictment against the SAU commander for aiding a perpetrator following the commission of a crime. The indictment indicated that he had knowingly helped to conceal the identity of the SAU officers who had committed torture and ill-treatment. Even though he had known that they had unlawfully used force and inflicted bodily injuries on the applicants and others, he had given false information about the circumstances of the commission of these criminal offences. On 23 January 2017, the Court of First Instance in Podgorica found the SAU commander guilty and sentenced him to five months in prison. In its judgment, the court found that the SAU officers had unlawfully used force in three locations in Podgorica on 24 October 2015.

In September 2017, the applicants instituted civil proceedings against the State – the Ministry of the Interior, seeking compensation in respect of non-pecuniary damage for physical pain and mental anguish suffered as a result of the beating. In June 2019, the Court of First Instance in Podgorica ruled partly in their favour and awarded them €5,000 each in respect of non-pecuniary damage. The Podgorica High Court upheld this judgment. In particular, the courts found that the applicants had been subjected to excessive and unnecessary use of force, and had been physically ill-treated. This had caused a violation of their right to personal dignity, freedom, honour and reputation and had been contrary to Article 3 of the Convention. The courts also found that the applicants had not provoked the use of force.

(b) Admissibility

The Court found the applications acceptable and underlined that the national authorities were under the obligation to redress all alleged violations of the Convention. With respect to complaints under Article 3, such as those at issue in the present case, in addition to acknowledging the violation, it stated that the

national authorities had to: (i) afford compensation, or at least provide the person with the possibility of applying for and obtaining compensation for the damage sustained as a result of the ill-treatment in question; [119] and (ii) conduct a thorough and effective investigation capable of leading to the identification and punishment of those responsible.[120]

A breach of Article 3 cannot therefore be remedied only by an award of compensation to the victim because if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity. The general legal prohibition on torture and inhuman and degrading treatment, despite its fundamental importance, would thus be ineffective in practice.[121] That is why awarding compensation to an applicant for the damage which he or she sustained as a result of the ill-treatment is only part of the overall action required.[122] The fact that domestic authorities may not have carried out an effective investigation would, however, be decisive for the purposes of the assessment of an applicant's victim status.

The Court considered that the question of whether the applicants have preserved their victim status was closely linked to the substance of their complaint and should therefore be joined to the merits of the complaint under the procedural aspect of Article 3.

As per claims that the applicants had abused the right of application because they failed to inform the Court that they had instituted civil proceedings ending in their favour, the Court observed that the civil proceedings only related to the ill-treatment itself and that even if the applicants had informed the Court at the outset about the civil proceedings which were ongoing at the time, the Court would still have to proceed and examine if there was an effective investigation in the present case, which was the applicants' main complaint. In view of all above, the Court considered that the circumstances of the present case were not those that would justify a decision to declare the applications inadmissible as an abuse of the right of application.

119 *Shestopalov v. Russia*, no. 46248/07, § 56, ECHR 2017, and *Gjini v. Serbia*, no. 1128/16, § 54, ECHR 2019.

120 *Jevtović v. Serbia*, no. 29896/14, § 61, ECHR 2019.

121 *Vladimir Romanov v. Russia*, no. 41461/02, § 78, ECHR 2008, and *Gäfgen v. Germany* [GC], no. 22978/05, § 116 and 119, ECHR 2010.

122 *Cestaro v. Italy*, no. 6884/11, § 231, ECHR 2015.

(c) Relevant principles – ineffective investigation

Where a person makes a credible assertion that he or she has suffered treatment contrary to Article 3 at the hands of State agents, that provision, read in conjunction with the States' general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation.[123]

The lack of conclusions arising from any given investigation does not, by itself, mean that it was ineffective: an obligation to investigate "is not an obligation of results, but of means". Not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events. However, any deficiency in the investigation which undermines its ability to establish the circumstances of the case or the person responsible will risk falling foul of the required standard of effectiveness.[124] There are several criteria an investigation has to satisfy for the purposes of the procedural obligation under Articles 2 and 3 of the Convention.[125] These elements are inter-related and each of them, taken separately, does not amount to an end in itself, as is the case in respect of the requirements for a fair trial under Article 6. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues must be assessed.[126]

An effective investigation is one which is adequate, that is, it should be capable of leading to the identification and, if appropriate, punishment of those responsible. [127] The general legal prohibition of torture and inhuman and degrading treatment and punishment would otherwise, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for State agents to abuse the rights of those within their control with virtual impunity.

123 *Assenov and Others v. Bulgaria*, no. 24760/94, § 102, Reports of Judgments and Decisions 1998-VIII; *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV; and *Bouyid v. Belgium* [GC], no. 23380/09, § 124, ECHR 2015.

124 *Mocanu and Others v. Romania* [GC], no. 10865/09 and two others, § 322, ECHR 2014 (excerpts); *El-Masri v. the Former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 183, ECHR 2012.

125 *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 323-346, ECHR 2007-II.

126 *Mustafa Tunç and Fecire Tunç v. Turkey*, [GC], no. 24014/05, § 225, ECHR 2015, and *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 171, ECHR 2019.

127 *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 233 and 243, ECHR 2016; *Boicenco v. Moldova*, no. 41088/05, § 120, ECHR 2006 and *Stanimirović v. Serbia*, no. 26088/06, § 40, ECHR 2011.

Secondly, for an investigation to be considered effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events.[128] This means not only a lack of hierarchical or institutional connection, but also a practical independence.[129]

Thirdly, the investigation has to be thorough, which means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions.

Fourthly, a requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. This obligation to react promptly means action should be taken as soon as an official complaint has been lodged. Even when strictly speaking no complaint has been made, an investigation must be started if there are sufficiently clear indications that there has been ill-treatment.

Fifthly, an effective investigation is one which affords a sufficient element of public scrutiny to secure accountability. While the degree of public scrutiny may vary, the complainant must be afforded effective access to the investigatory procedure at all stages.[130]

(d) Application of those principles

The Court firstly noted that there was no dispute between the parties that the applicants were ill-treated on the night in question. Their allegations were confirmed by video footage, and their ill-treatment established by the Council for Civic Control of the Police, the Ombudsman, the Constitutional Court and the

128 *Barbu Anghelescu v. Romania*, no. 46430/99, § 66, ECHR 2004; and *Kurnaz and Others v. Turkey*, no. 36672/97, § 56, ECHR 2007.

129 *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 110, ECHR 2005-VII; see also *Ergi v. Turkey*, judgment of 28 July 1998, § 83 and 84, Reports 1998-IV, where the public prosecutor's investigation showed a lack of independence through his heavy reliance on information provided by the gendarmes implicated in the incident.

130 *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 137, ECHR 2004-IV (excerpts).

civil courts, and acknowledged by the Government. They were credible and as such required an effective official investigation.

The investigation conducted in the present case resulted in clarifying some of the facts, in particular that the applicants had been indeed ill-treated by police officers and the injuries they had sustained thereby. It also resulted in the prosecution and conviction of the SAU commander for aiding a perpetrator following the commission of a crime.

In view of the Constitutional Court's findings that the investigation prior to the court's decisions had not met the Article 3 requirements, the Court examined the investigation which took place after these decisions had been published in August 2017, having regard to the Constitutional Court's factual findings which led it to its conclusion.

The investigation into the applicants' ill-treatment had been and apparently still was being carried out by the State prosecutor's office, which is institutionally and hierarchically totally independent from the Police Directorate and the Ministry of the Interior. The State prosecutor took a number of investigative steps. In particular, in the months following the incident, she had interviewed the applicants, obtained the medical reports, the medical expert report, inspected the available video footage, and established the position of the SAU vehicles involved. She had not, however, interviewed any of the SAU officers engaged on the night of the incident, other witnesses and potential witnesses, as the Constitutional Court rightly observed. The State prosecutor took these measures only between September and November 2017, after the Constitutional Court's decisions had been published, that is two years after the incident. In other words, even though the State prosecutor eventually pursued most of the lines of enquiry and most of the traceable witnesses were interviewed, this was not done promptly, promptness being one of the elements of an effective investigation.

Furthermore, the State prosecutor had not pursued all lines of enquiry. Notably, as the applicants pointed out, not everybody was questioned – one SAU member, the owner of the nearby bakery and, potentially, the customer who was at the bakery at the time. It had also never been clarified if there were only SAU members on the scene that night. The Forensic Centre had apparently not been contacted either. While it was certainly possible that none of these lines of enquiry would have shed any additional light on the incident in question either, the Court did not consider that this sufficiently justified not having pursued them, especially in a situation where other collected evidence did not ensure the identification of the perpetrators.

Moreover, as the collected evidence did not ensure the identification of the perpetrators, the State prosecutor depended heavily on the police in that regard. More specifically, the BSPO requested the assistance of the Security Centre and the Police Directorate. The Court noted in this regard that the SAU was under the command of the head of the very same Security Centre on the night in question. In addition, both the Security Centre and the SAU were parts of the same Police Directorate. In other words, those whose assistance was requested were subject to the same chain of command as the officers under investigation and thus lacked independence,[131] as the Constitutional Court rightly observed. This conclusion must in no way be interpreted as preventing police officers from performing any tasks in investigations into the use of force by other police officers,[132] but if the police participate in such investigations, sufficient safeguards should be introduced in order to satisfy the requirement of independence. In the present case, there were no such safeguards.

The Court also observed, however, that under national law the applicants, as injured parties, and their representative, could attend the questioning of, inter alia, witnesses so that they could propose questions or even put them directly, but that they did not appear to have been informed of the place and time of the questioning.

The Court acknowledged that there were a number of incidents and clashes that same evening, including attacks against the police, and that security considerations required police interventions. The Court has already held, however, that the procedural obligation under Articles 2 and 3 of the Convention continued to apply in difficult security conditions. Even where the events leading to the duty to investigate occur in a context of generalised violence and investigators are confronted with obstacles and constraints which compel the use of less effective measures of investigation or cause an investigation to be delayed, the fact remains that Articles 2 and 3 entail that all reasonable steps must be taken to ensure that an effective and independent investigation is conducted.[133]

The essential purpose of an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and prohibiting torture and inhuman or degrading treatment and punishment in cases involving State agents or bodies, and to ensure their accountability for deaths and ill-treatment

131 *Oğur v. Turkey* [GC], no. 21594/93, § 91, ECHR 1999-III; *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 120, ECHR 2001.

132 *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 322, ECHR 2011 (excerpts).

133 *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 164, ECHR 2011.

occurring under their responsibility. An obligation to investigate, as indicated above, is not an obligation of results, but of means. However, any deficiency in the investigation which undermines its ability to establish the circumstances of the case or the person responsible will risk falling foul of the required standard of effectiveness.

In view of the above, the Court considered that the investigation in the present case, conducted both by the prosecutor and the police, had not been prompt, thorough, or independent, and did not afford sufficient public scrutiny. It had deficiencies, which undermined its ability to identify the persons responsible, and insufficient efforts were made, following the Constitutional Court's decision, to remedy those deficiencies or comply with the Constitutional Court's instructions. In these circumstances, the fact that the facts concerning the actions of the SAU commander were established and that he was sanctioned could not lead to the conclusion that the respondent State had discharged their procedural duty under Article 3 to conduct an effective investigation. The Court therefore found a violation of the procedural aspect of Article 3 of the Convention. In view of its finding of a violation of the procedural aspect of Article 3, the Court considered that the closely related complaint under Article 13 did not need to be examined separately on its merits.

The applicants' victim status

After examining the application on its merits, the Court also examined whether the applicants had lost their victim status. In that regard, it said that the fact that domestic authorities may not have carried out an effective investigation was, however, decisive for the purposes of the assessment of an applicant's victim status. The Court observed in the present case that the SAU commander had been prosecuted and convicted for aiding a perpetrator after the commission of a crime, and that the domestic courts had awarded the applicants €5,000 each for non-pecuniary damage. Regardless of whether the amount awarded was appropriate or not, the Court's finding above regarding the continuing ineffectiveness of the investigation even after the Constitutional Court's ruling led it to conclude that the applicants have not lost their victim status.

Finally, the Court awarded each of the applicants €7,500 in respect of non-pecuniary damages.

ii. Judgment Execution Procedure

The Government submitted to the Committee of Ministers - Department for the Execution of Judgments of the European Court of Human Rights their Action Plan of 7 December 2021[134] in which they presented all the individual and general measures undertaken to execute the judgment.

(a) Individual Measures

The just satisfaction in respect of non-pecuniary damages totalling €15,000 and awarded by the Court was paid within the set timeframe.

The Podgorica BSPO will continue, through its binding orders and direct management, to guide actions of the police in the preliminary investigation, in order to take the necessary measures to find and identify the perpetrators, find and secure traces of the criminal offence and objects that may serve as evidence, as well as collect all the information that may be beneficial for the successful implementation of criminal proceedings.

(b) General Measures

In response to the Court's views, the Government has undertaken all the requisite measures to prevent similar violations in the context of police ill-treatment and lack of an effective investigation. These measures concern, in particular, training and awareness raising of both the judiciary and the police at numerous conferences, seminars, round tables and trainings at the national level to ensure that the message of zero tolerance of ill-treatment reaches law enforcement officials at all levels. Finally, the judgment was analysed at numerous trainings and workshops organised both by the Judicial and Prosecutorial Training Centre and international partners.

The judgment has been translated and published on the websites of the Supreme Court of Montenegro, the Office of Montenegro's Representative before the ECtHR and in the Official Gazette of Montenegro. It has also been included in the "Catalogue of Regulations", the software for monitoring regulations in Montenegro. Given its particular importance, the judgment has been disseminated, *inter alia*, to the Constitutional Court of Montenegro, the Supreme Court of Montenegro, the Podgorica and Bijelo Polje High Courts, the Judicial and Prosecutorial Councils and the Judicial and Prosecutorial Training Centre.

134 https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2021)1335E%22]}.

iii. Relevance to Case-Law

Montenegrin courts have ruled on claims for compensation of past and future non-pecuniary damage for violations of the applicants' personal right to an effective investigation. The Court of First Instance in Podgorica ruled on one such case - P. No. 5528/18 - on 16 July 2020. This case is important for several reasons. First of all, the Court properly referred to ECtHR's case-law and reviewed all the effective investigation standards. However, the ECtHR's view in its judgment in the case of *Baranin and Vukčević v. Montenegro* – that a breach of Article 3 could not be remedied only by an award of compensation to the victim because it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity - also needs to be borne in mind.

In the P. No. 5528/18 case, the Court of First Instance in Podgorica ruled on a claim filed by B.N., who claimed non-pecuniary damage for the violation of his personal right to an effective investigation of police torture he had been subjected to while he was deprived of liberty. The Court of First Instance had earlier ruled on another claim brought by B.N., in case P. No. 6802/17, and awarded him non-pecuniary damage for the violation of his personal right to an effective investigation of his ill-treatment by the relevant authorities. Although there was an objection to the decision in this latter case, the Court of First Instance drew a distinction between the procedural and substantive aspects of Article 3, specifying:

> "However, although the judgment clearly concerns the same incident, the Court is of the view that this case does not concern the same issue. Namely, case P. No.6802/17 concerned compensation for damage caused by the police officers who had overstepped their authority, while this claim concerns compensation for damage allegedly sustained due to the relevant authorities' failure to conduct an effective investigation.
>
> Such distinction emanates also from Article 3 of the ECHR which, pursuant to Article 9 of the Montenegrin Constitution, is an integral part of the national legal order, has supremacy over national law and is directly applicable when it regulates relations differently from national law. Namely, Article 3 enshrines one of the most fundamental values of democratic societies (*El-Masri v. the Former Yugoslav Republic of Macedonia,* no. 39630/09, para. 195, ECHR-2012), which is an absolute and non-derogable right irrespective of the conduct of the person concerned and the nature of the offence

at issue (*Gäfgen v. Germany* [GC], no. 22978/05, para. 107, ECHR - 2010). States have negative and positive obligations under this Article that were developed in the case-law of the European Court of Human Rights (the ECtHR). The States' negative obligations include their duty not to interfere with the enjoyment of human rights enshrined in the Convention, i.e. in terms of Article 3, state authorities are prohibited from ill-treating anyone under their control. The States have a positive obligation to conduct an effective investigation when an individual makes a credible assertion that he has suffered treatment at the hands of the police or other similar agents of the State that violates Article 3 (*Siništaj and Others v. Montenegro*, nos. 1451/10, 7260/10 and 7382/10, para. 143, ECHR-2015)."

In its examination of the effectiveness of the investigation and the claimant's complaint that the ineffective investigation was in violation of his personal right, the Court of First Instance specified:

"The presented evidence shows that the Podgorica Basic State Prosecutor's Office had taken the following steps to identify the officers who had used excessive force against the claimant: it interviewed the claimant in his capacity of witness on 19 October 2015, i.e. before opening case Ktn. No. 28/16 against unidentified Police Directorate officers for the crime of ill-treatment of the claimant under Article 166a, paragraph 2 in conjunction with paragraph 1 of that Article of the Criminal Code of Montenegro; ordered reports from court medical and traffic experts; sent four letters to the Police Directorate requiring the identification of the individuals who had beaten the claimant, the footage of the event, the security plan and the list of deployed officers by cordon; requested of the Police Internal Control Department to take steps and measures to identify the officers who had taken action against the claimant; sent a letter to Radio Television of Montenegro requesting it forward footage of the event on 17 October 2015; and questioned specific individuals as citizens.

Under the above standards of the ECtHR, an effective investigation must be prompt. When assessing this criterion, the Court has taken into consideration when the authorities started the investigations, delays in taking statements, and the length of time taken during the initial investigation (*Mikheyev v. Russia*, no. 77617/01, para. 109, ECHR-2006). Whatever the method of investigation, the authorities must act as soon as an official complaint has been lodged. Even when, strictly

speaking, no complaint has been made, an investigation must be started if there are sufficiently clear indications that ill-treatment has occurred (*Stanimirović v. Serbia*, no. 26088/06, para. 39, ECHR - 2011). In the case at hand, there were clear indications that the claimant had been a victim of ill-treatment, as corroborated by his statement to the Podgorica Basic State Prosecutor's Office, the Conclusion of the Council for Civic Control of the Police of 19 November 2015, the Montenegrin Ombudsman's opinion of 21 June 2016, the findings and opinion of the court medical expert Ktr.No.1191/15 of 9 November 2015, and the video footage of the incident of 17 October 2015. The State Prosecutor's Office was not totally passive in 2015 and 2016, and it undertook the above-mentioned actions. However, in the opinion of this Court, these actions did not suffice given that they failed to identify who had used excessive force against the claimant although nearly five years have passed since the incident. Although the obligation to investigate is not an obligation of results but of means, the passage of such a long period of time since the incident and the passivity of the state prosecutors after 2016 have rendered the chance of collecting any evidence of alleged ill-treatment almost illusory (*Premininy v. Russia*, no. 44973/04, para. 109, ECHR - 2011).

The investigation of ill-treatment claims must be thorough, which means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions (*Assenov and Others v. Bulgaria*, no. 24760/94, para. 103 *et seq*, Reports 1998 VIII). Evidence cannot be accepted uncritically, especially when statements of police officers are at issue (*Virabyan v. Armenia*, no. 40094/05, para. 175, ECHR-2012). However, the Court is of the view that the State Prosecutor's Office had uncritically accepted the conclusions of the Police Directorate and the Internal Control Department that it was impossible to conclude from the video footage and the statements of the Special Unit officers which police officers had used excessive force against the claimant, wherefore the State Prosecutor's Office's activities boiled down to sending follow-up requests to the Police Directorate to take measures and actions to that end, although these were obviously futile. Furthermore, the State Prosecutor's Office had not questioned any of the police officers involved in the removal of the provisional facilities or deprivation of liberty of the claimant, although both the notice of the Special Police Unit Commander of 26 October 2017 and the Report on Use of

Force of 17 October 2015 include information that two members of that Unit approached the claimant after he was taken out of the vehicle, used physical force and means of restraint against him and handed him over to the Podgorica Security Centre officers for further processing. The State Prosecutor's Office did not question these police officers although the allegations in the above-mentioned Report and Commander's notice – that the police had not used excessive force or truncheons – were in contravention of the findings and opinion of the court medical and traffic experts. Even if the claims that it was impossible to identify the police officers because of the equipment they were wearing are accepted, this does not relieve the respondent of responsibility since the ECtHR held in its judgment in the case of *Cestaro v. Italy* (no. 6884/11, para. 217, ECHR-2015) that States needed to ensure that police officers involved in operations could be identified, otherwise there was a risk that the State would be in violation of its obligation to conduct an effective investigation. Performance of actions by police in equipment precluding their identification renders the investigation meaningless and facilitates the impunity of those responsible.

An effective investigation must be independent (*Öğur v. Turkey*, [GC], no. 21954/93, paras. 91-92, ECHR 1999-III). Independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms (*El-Masri v. the Former Yugoslav Republic of Macedonia*, no. 39630/09, para. 184, ECHR-2012). As noted above, the State Prosecutor's Office required of the Police Directorate and the Internal Control Department to identify the individuals who had ill-treated the claimant. However, this action is not in accordance with the standard of independence, because the same authority whose officers had allegedly been involved in the ill-treatment was expected to take steps to identify them. In that respect, the Court also draws attention to the ECtHR's judgment in the case of *Siništaj and Others v. Montenegro* (nos. 1451/10, 7260/10 and 7382/10, para. 148, ECHR-2015), in which it found a violation of Article 3 of the ECHR, specifying that: "(...) the investigation of the Internal Police Control, which can be neither considered independent, given that it was done by the police themselves".

Therefore, having applied Article 3 of the ECHR to the facts of the case, the Court of First Instance found that the relevant authorities

had not fulfilled the effective investigation requirements, because the undertaken actions had not been prompt, thorough or independent and had failed to result in the identification and punishment of those responsible, plus, the relevant authorities failed to provide an adequate explanation for the length of the proceedings.

The Court of First Instance further examined whether the claimant has suffered non-pecuniary damage due to such actions by the relevant authorities, i.e. whether his personal right has been violated. Under Article 207 of the Law of Contract and Torts, the right to psychological (mental) integrity is one of the personal rights provided by the Constitution, ratified and published international treaties and generally recognised rules of international law and individual laws.

The Court concluded that the described failures of the state authorities resulting in an ineffective investigation violated the psychological integrity of the claimant based on the findings and opinions of court medical expert Prof Dr M. S. of 31 January 2020, and during his questioning at the main hearing on 1 June 2020. (…)

When deciding on the amount of the award for non-pecuniary damage, the Court took into consideration all the circumstances of the case, in particular the type, manner of infliction and consequences of the injury, the purpose to be achieved by such redress, and that it does not favour ends otherwise incompatible with its nature and social purpose, pursuant to Article 210a of the Law of Contract and Torts (Official Gazette of Montenegro No. 22/17) and in the meaning of Article 207 of the Law of Contract and Torts (Official Gazette of Montenegro No. 47/08). The Court is of the view that the awarded amount is not compensation for the violation of the claimant's personal right, but satisfaction that should contribute to the reduction of his psychological imbalance caused by the ineffective investigation and to the elimination of his subjective feelings of helplessness and injustice he had suffered due to the inadequate actions of the relevant authorities. The Court fixed the amount of damages in accordance with Article 220 of the Civil Procedure Law, whilst bearing in mind, in particular, that the violation of the claimant's personal right, i.e. his mental anguish, was mild rather than strong in intensity and that it will recur in the future, that it will be occasional and persist until the conclusion of the proceedings."

The above judgment was upheld by the Podgorica High Court in its judgment Gž. No. 4741/20 of 9 October 2020.

This case may also open the complex issue of the jurisdiction of the Courts of First Instance to rule on the effectiveness of investigations in cases concerning damage claims for violations of personal rights due to the ineffectiveness of investigations. Specifically, in such cases, the court is to decide whether a state authority has violated a right enshrined in the Constitution, which is the substance of constitutional appeals complaining of violations of human rights by state authorities. If such cases are decided on by both the Constitutional Court and the Courts of First Instance, the problem of parallel legal avenues for protecting human rights arises and may result in a violation of the legal principle of *res judicata*.

One such example is the Montenegrin Constitutional Court's decision U-III No. 6/16 of 29 November 2017 upholding the constitutional appeal and finding that the procedural aspect of Article 2 of the ECHR had been violated due to the ineffective investigation in the Berane Basic State Prosecutor's Office's case Ktn. No. 124/2007 and the Bijelo Polje High State Prosecutor's Office's case Kti. No. 20/14, concerning events of 1 November 2007. The Constitutional Court ordered the State to pay the applicant just satisfaction in the amount of €7,000.

The proceedings were initiated with respect to the same event before the Court of First Instance in Podgorica. In its decision P. No. 6930/16 of 20 October 2017, which it obviously adopted before the Constitutional Court ruled on the matter, the Court of First Instance partly upheld the claim and ordered the State to pay the claimant €7,000 in respect of present and future non-pecuniary damage because of its failure to conduct an effective investigation and the claimant's present and future fear of another attempt on his life. During its examination of the merits of the complaint, the Court of First Instance said that it had to assess the effectiveness of the investigation of the crime against the claimant, and that it found that: "for an assessment of the effectiveness of the investigation in the case at hand, it sufficed to consider the already noted deficiencies, primarily those concerning the length of the proceedings and the promptness with which steps were taken to identify the perpetrator of the offence, and that it found that the listed deficiencies sufficed to characterise the investigation as ineffective."

Therefore both the Montenegrin Constitutional Court and the Court of First Instance adopted decisions in this case concerning the same individual and the same event, upholding the constitutional appeal/claim and ordering the State to pay the applicant/claimant €7,000 for the violation of his right to an effective investigation. In order to avoid such situations in the future, the system has to be

clearly established and the courts' jurisdictions distinguished. This would require a broader debate in which both the Constitutional Court of Montenegro and courts of general jurisdiction ought to take part.

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As already noted, Article 3 has both a procedural and a substantive aspect. The substantive aspect concerns the prohibition of torture and inhuman treatment or punishment, while the procedural aspect concerns the State's positive obligation to conduct an effective investigation in accordance with the standards the ECtHR has developed in its case-law with respect to violations of the substantive aspect of Article 3. In criminal cases, the defendants may claim in court that they had confessed because the police tortured them. This issue was addressed by the Court of First Instance in Podgorica in case K. No. 199/20:

> "The Court will now rule on the allegations heard during the proceedings that some defendants and witnesses had been ill-treated by the police and that a judicial decision cannot be based on statements obtained in this fashion.
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> Namely, since the defendants I. B. and E. D. claim that they had been ill-treated by the authorised police officers and that their initial statements (which they subsequently retracted in court) to the prosecutor were the result of such ill-treatment, this Court has examined their allegations in detail. The Court first recalls that torture is prohibited both under national law and international instruments. One of them is, notably, the European Convention on Human Rights, Article 3 of which lays down that no one shall be subjected to torture or inhuman or degrading punishment. The importance of this prohibition is manifested in the fact that the State may not derogate from it under any circumstances, even temporarily. The Court thus deems it appropriate to summarise the relevant principles established by the ECtHR with respect to Article 3 violations. Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention (*Selmouni v. France* [GC], no. 25803/94, para. 87, *Tadić v. Croatia*, no. 10633/15, para. 53). The same principle applies to alleged ill-treatment during arrest that resulted in an injury (*Klass v. Germany*, paras. 23-24, Series A no. 269, *Rehboch v. Slovenia*,

no. 29462/95, paras. 68-78, ECHR 2000-XII). Article 3 does not prohibit the use of force for effecting an arrest. Nevertheless, such force may be used only if it is indispensable and it must never be excessive (*Izci v. Turkey*, no. 42606/05, para. 54). Allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the ECtHR adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (*Ireland v. the United Kingdom*, 18 January 1978, para. 161 *in fine*, Series A no. 25, *Labita v. Italy* [GC], no. 26772/95, para. 121, ECHR 2000-IV, *Jalloh v. Germany* [GC], no. 54810/00, para. 67, ECHR 2006-IX).

Namely, during his interrogation by the prosecutor on 26 February 2020, the defendant, I.B., confessed that he had committed the crime against P.J. He gave an account of all the relevant details of the event, where, how and at what time he had planted the fire. As the Court already noted, his statement corresponded with all the material evidence in the case file. Soon afterwards, on 11 March 2020, the defendant denied in his statement to the prosecutor that he had committed any crime. He added that he had not committed the offences at issue (he had confessed to some other offences that are not the subject of these proceedings) because he was not in the country at the time. He claimed that he lived and worked in Hannover from early 2015 to 26 July 2017 (but he did not submit any evidence to corroborate his claim or propose to the court to obtain any evidence thereof, although he was defended by a legal professional). He added that he had been ill-treated while he was held in custody in the Podgorica Security Centre, that the officers had hit him on the head with their notebooks, kicked him in the groin and had hit his left toes with an object and that all of that happened in the holding cell. The defendant then showed the prosecutor his injury and she noted that his middle left toe was red. He claimed that the police put him in an unmarked police car and took him to the Zelenika settlement on the same day, on 22 February 2020; he alleged that they showed him a building and said: "Confess who threw the explosive", and that the two officers who escorted him in the car kicked him in the thighs, while one of them was hitting him in the neck with his gun. He reiterated his statement of 11 March 2020 before the court, claiming that the foot injury he had shown the prosecutor, which, as he alleged, was on the "right fourth toe" had been caused by a taser.

Furthermore, in his statement to the prosecutor of 4 March 2020, defendant D.E. said that the B. brothers came and picked him up several times, that he was playing games every time they were riding in the car and when they were parked, that he heard something "resembling an explosion" every time but that he did not know what had happened. When the prosecutor asked him whether he recognised the car on photograph no. 3 in the Police Directorate's photo documentation of 16 May 2020, he said that he may have seen such a jeep near the place they had parked. However, at the main hearing, he denied that he had committed the crime. He said that none of what he told the prosecutor was true, that he had given all his statements under the torture of the police, who beat him. The inspectors applied the taser (all over his body) and punched him in the neck. They beat him up not only in the interrogation office, but in the basement as well. The police wrote what they wanted and he just signed the statement. He said that he had wanted to tell his lawyer about the ill-treatment before he saw the prosecutor but that the police officer standing next to the lawyer waved his hand, warning him not to. Therefore, the defendant made the impugned statement to the prosecutor in the presence of his lawyer.

In order to verify the accuracy of the defendants' allegations, the Court read the findings and opinions of court medical expert Dr N. R. of 24 March and 15 April 2020 and questioned him to clarify matters. Based on the presented evidence, the Court concluded that the defendants' statements in their defence that they had been tortured into confessing were ill-founded and that they had given them only to avoid both their own and the other defendants' liability for the crimes. The Court had also requested the video footage from the Police Directorate – Podgorica Security Centre, which, however, notified it that the footage was no longer available due to the passage of time.

Namely, witnesses D.Lj., I. Č., M. Đ. and B. V. (witness V.L. had questioned B.S. and M.M., witness D.G. had not questioned any of the defendants, while A.R. had no knowledge of the event, wherefore the Court considered their statements irrelevant) denied they had tortured the defendants. They also denied that they had taken defendant I. B. out of the Podgorica Security Centre. Furthermore, court expert N.R. gave a detailed account both in his findings and opinions and in his statement to the Court that he had examined defendant I.B. on 11 March 2020 and diagnosed: a) a haematoma

two cm in diameter immediately above the nail of the middle left toe, the consequence of a blunt mechanical force and that such haematoma were typically the result of stubbing one's toe on a blunt hard surface. Given that the haematoma is located in a place subject to the compressive effect of uncomfortable footwear, this cause cannot be ruled out either. As per the day it appeared, the doctor said it could not have appeared on 22 February 2020; and a b) whitish-purple scar around 1 x 0.3 cm in size on the wrist above the defendant's right palm. The court expert said that the scar was the consequence of a deep abrasion and a more superficial injury that the defendant had sustained at least several months before the examination. The court expert did not identify any physical injuries on other parts of the body where the defendant alleged he had been hit. At the main hearing, the court expert clarified that on 11 March 2020 (when he examined defendant B.), the haematoma on the third left toe was recent, wherefore he concluded that it could not have been sustained more than three days before the examination. He explained that in terms of medicine, a swelling localised on the skin was considered the mildest physical injury and there was an additional description of it as 'discreet' in the medical documentation, corroborating that a very small swelling was at issue. Light bodily injuries are injuries that disappear the most rapidly, they are usually present on the skin for only a few hours and are very rarely visible after 24 hours, which is another reason why he ruled out the possibility that the swelling had appeared two days before the medical examinations. Even if a swelling that disappears were at issue, again, it is an injury sustained within the past 24 hours at most; if the injury were larger and visible at least two days, there would definitely be haematoma, which are not described as such in the medical documentation. The duration of the swelling of a skin injury like this one depends on the anatomic characteristics of the tissue, i.e. its location on the body, initially, and its size, some other personal features and, possibly, use of medications. Pain is a subjective category and does not constitute a physical injury; it can definitely accompany a swelling or any other physical injury, but it itself does not testify to any intensity of relevance to criminal proceedings. Moreover, considering the fact that the defendant named not only the wrong foot, but also the wrong toe at the main hearing (he said at the hearing that his fourth right toe was injured, whereas his middle left toe was actually at issue), it may be concluded that the defendant's claims of ill-treatment in the police station and outside it are not corroborated by any of the presented evidence.

Therefore, bearing in mind the results of the court expert's examination and the questioning of the above-mentioned witnesses, and in the light of the ECtHR's standard in the cases of *Ireland v. the United Kingdom,* para. 161, *Labita v. Italy* [GC], para. 121, and *Jalloh v. Germany* [GC], para. 67, this Court concludes that defendant I.B.'s allegations of torture by the police are unsubstantiated and therefore ill-founded."

In its judgment in case K. No. 505/20 of 10 November 2020, the Court of First Instance in Podgorica acquitted the defendant, who had been charged with general endangerment under Article 327(1) of the Criminal Code of Montenegro and two counts of unlawful possession of weapons and explosives under Article 403(2) of the Criminal Code, because it had not been proven that he had committed the crimes he was accused of. Namely, in this case, the Court of First Instance did not accept defendant J.G.'s confession due to the existence of reasonable suspicion that it had been coerced by torture.

The Basic Court specified the following in the reasoning of its judgment:

"Defendant J.G.'s statement at the time of indictment was partly consistent only with the statement witness M.B. had also given to the prosecutor's office, as regards actions to the detriment of injured party D.G. However, the Court finds that such a statement is unacceptable and that a conviction cannot be based on it as a "confession" since his confession has been refuted by numerous pieces of evidence presented during the proceedings and has therefore been brought into serious doubt, particularly in view of Article 340 of the Criminal Procedure Code, under which a defendant's confession must be clear and complete and the defendant must clearly explain all the decisive facts concerning both the offence and his/her guilt, the confession must be made voluntarily and consciously, it must be in accordance with the evidence in the indictment and that there is no evidence indicating that the admission of guilt is false. (…).

The defendant claimed that the police officers had tortured him with a taser, which they placed on his genitals, legs and loins, that they hit the palms of his feet with baseball bats and punched his head and body with boxing gloves on, whereupon he agreed to learn by heart the statement prepared by the police and make it before the prosecutor and that he had told the prosecutor that he had been properly treated by the police out of fear, since they threatened to hold him for 15 days

and deny him the above-mentioned medical therapy, which he was in dire need of. Grounds for suspicion that defendant J.G. had been tortured, which is the subject of separate proceedings, arise also from the findings and opinion of court medical expert N. R. of 25 June 2020 based on the medical documentation drawn up at the time the defendant was admitted to the Institute for the Execution of Criminal Sanctions in Podgorica (…). Furthermore, witness M.B. also refuted, at the main hearing, the statement he had made before the prosecutor in which he qualified the defendant as the perpetrator of the crime against injured party D.G; the witness described to the court the torture he had allegedly suffered at the hands of the police officers, which lasted until he was questioned by the prosecutor and which had permanently damaged his health; this is also the subject of separate proceedings before the Podgorica Basic State Prosecutor's Office; it is worth noting here that this witness said that he was taken from Tivat to the Podgorica Security Centre at 7 am and held there until 10 pm, when he was brought before the prosecutor, wherefore the question legitimately arises why and on which grounds he was held in the police during that period and brought before the prosecutor late that evening to give a statement in the capacity of witness (if this witness's allegations are confirmed), especially in view of the fact that Article 259(2) of the Criminal Procedure Code sets out that the police may not hold individuals they are interviewing as witnesses for more than six hours (…).

Finally, it has to be noted that, given that the Podgorica Basic State Prosecutor's Office has opened three cases in response to police ill-treatment reports filed by J.G., B.M. and M.B., this Court has not examined these facts, i.e. whether or not those parts of these individuals' statements are true, and that it exclusively examined whether the defendant's confession before the Basic State Prosecutor's Office in Podgorica was clear, complete and in line with other presented evidence."

As opposed to the former case, in which the court examined the allegations of torture, in this case, the Court of First Instance did not examine whether the defendant had been tortured since the relevant authority has opened separate cases about the event. However, existence of reasons for suspicion that torture had been committed, along with other circumstances, did affect the Court's assessment of the defendant's confession to the Basic State Prosecutor's Office. In that respect, the Court of First Instance said the following:

"The Court found that the defendant's confession has been brought into serious doubt and that a conviction cannot be based on it, wherefore it was superfluous to examine the issue of alleged ill-treatment in these proceedings, because the relevant authority has already opened three cases in which all the relevant evidence will be obtained and the facts will be established. If this Court were to examine these matters, it would assume the role of prosecutor and its decision would definitely prejudice the outcome of these proceedings. Such an examination would also result in a substantial prolongation of the proceedings, whilst it would not be of relevance to the Court's decision, in view of all of the above.

Finally, it has to be noted that for a defendant to be convicted for the crimes he is charged with, his guilt must be established beyond all doubt during the criminal proceedings. Given that the facts ascertained during these criminal proceedings do not show beyond any doubt that the events at issue occurred as described by the Podgorica Basic State Prosecutor's Office in the indictment, the Court has acted in accordance with the *in dubio pro reo* principle laid down in Article 3(3) of the Criminal Procedure Code, under which the court shall assess each fact on which the application of the Montenegrin Criminal Code or Criminal Procedure Code depends to the benefit of the defendant, because it is not up to the defendant to prove his innocence; on the contrary, it is up to the prosecution to provide evidence of the allegations in the indictment."

The Podgorica High Court upheld this judgment in its judgment Kž. No. 189/21 of 23 November 2021. According to its reasoning of its judgment, the High Court also took into account the allegations of torture when it examined whether the defendant's confession fulfilled the requirements under Article 340 of the Criminal Procedure Code:

"Therefore, due to all of the above, the defendant's confession of 26 May 2020 has seriously been brought into doubt and cannot be considered clear, complete or concordant with the other presented evidence (due to B.M.'s questionable involvement as an accomplice, the described contradictions concerning the activation of the explosive device, existence of grounds for suspicion that defendant G, and M.B. and B.M. had been subjected to ill-treatment, and because the defendant's presence in Podgorica at the time the crimes were committed has been brought into question given the statements by

witnesses S. and B.R., as well as the defendant's parents, N.G. and B.G., who said that the defendant was in his father B.G.'s family home in Sutomore at the time of the impugned events.

As opposed to the prosecutor's claims in the appeal, this Court agrees with the first -instance court's conclusion that a conviction cannot be based only on such a confession by the defendant, in particular since it has not been substantiated by other presented evidence."

3.3. Article 5 – Right to Liberty and Security

Article 5
Right to Liberty and Security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

   (a) the lawful detention of a person after conviction by a competent court;

   (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

   (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Liberty and security are prerequisite for the exercise of all human rights. Article 5 of the Convention aims to ensure that no one is arbitrarily deprived of liberty. Although the Convention system attaches fundamental value to this right, Contracting Parties have frequently been held responsible for a violation of this right. Violations of Article 5 have been ranked third among all violations of the Convention since 1959.[135]

135 European Court of Human Rights Annual Report 2021, available at: https://www.echr.coe.int/Documents/Annual_report_2021_ENG.pdf.

The notion of "liberty" concerns the physical liberty of people, while "deprivation" of liberty has two elements: confinement in a particular place for a non-negligible length of time, and lack of consent by the detainee. Various forms of confinement by the State fall under Article 5 of the Convention, including arrest and detention in criminal proceedings, detention of minors, institutionalisation of persons of unsound mind, placement in a social care institution, and detention pending extradition or deportation.[136] On the other hand, crowd control for security reasons as, e.g. at sports events and as imposition of police cordons containing demonstrators for several hours in face of violence, do not amount to deprivation of liberty.[137] The Court is not bound by the legal conclusions of the domestic authorities when examining whether an individual has been deprived of liberty under Article 5 and it takes into account a whole range of factors, such as the type, duration, effects and manner of implementation of the measure in question.[138]

Although it represents foundation of a democratic society, this right is not absolute. There are legitimate reasons why a society may require that individuals be deprived of liberty in general interest, especially if they pose a risk to others or themselves. This is why this right is subject to exceptions enumerated in paragraph 1 of Article 5 of the Convention. Deprivation of liberty must be lawful, both under national and international law.[139]

States have the obligation to refrain from actively violating Article 5, as well as to take appropriate measures to secure protection from unlawful interference with these rights to all individuals within their jurisdiction.

Article 5 of the Convention guarantees not only protection from arbitrary deprivation of liberty, but also extends safeguards to individuals deprived of liberty enabling them to defend themselves more easily. Pursuantly, everyone who is arrested shall be: informed promptly of the reasons for his deprivation of liberty and of any charge against him in a language he understands; brought promptly before a court and entitled to a trial within a reasonable time or to release pending trial; entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court; and, finally, everyone who has been the victim of arrest or detention in contravention of the provisions of Article 5 of the Convention shall have an enforceable right to compensation.

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

137 *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, ECHR 2012.

138 *De Tommaso v. Italy* [GC], no. 43395/09, § 80, Reports of Judgments and Decisions 2017 (excerpts).

139 *Medvedyev and Others v. France* [GC], no. 3394/03, § 79, Reports of Judgments and Decisions 2010.

Each of these rights is a complex legal issue on which the ECtHR has developed broad case-law. Since its review exceeds the goal and scope of this Analysis, we recommend that readers further research Article 5 of the Convention by perusing the sources in the footnotes.

The four cases in which the ECtHR earlier found Montenegro in violation of Article 5 of the Convention were presented in the prior Analyses. To recall, in its judgment in the case of *Bulatović v. Montenegro*,[140] the Court found a violation because the applicant had been held in detention over five years. The ruling extending detention issued after the statutory deadline was the reason why the Court found a violation of Article 5 in the case of *Mugoša v. Montenegro*.[141] In the case of *Bigović v. Montenegro*,[142] the Court concluded that the grounds for extending the applicant's detention were insufficient and that the courts failed to justify detention that lasted over five years. Finally, in the case of *Šaranović v. Montenegro*,[143] the ECtHR found that the applicant's pre-trial detention had not been lawful because the grounds for it had not been re-examined within the statutory deadline in one period.

The ECtHR found Montenegro in violation of Article 5(1) in one case in 2021.

140 The ECtHR's judgment in the case of *Bulatović v. Montenegro*, no. 67320/10, is presented in the Analysis of ECtHR's Judgments in Respect of Montenegro, pp. 32 and 41. The Analysis is available in Montenegrin at: https://sudovi.me/static/vrhs/doc/11233.pdf.

141 The ECtHR's judgment in the case of *Mugoša v. Montenegro*, no. 76522/12, is presented in the Analysis of ECtHR's Judgments in Respect of Montenegro, pp. 43 and 75. The Analysis is available in Montenegrin at: https://sudovi.me/static/vrhs/doc/11233.pdf.

142 The ECtHR's judgment in the case of *Bigović v. Montenegro*, no. 48343/16, is presented in the Analysis of ECtHR's Judgments in Respect of Montenegro delivered in 2018 and 2019, pp. 48 and 54. The Analysis is available in Montenegrin at: https://sudovi.me/static//vrhs/doc/16_II_-_Dopuna_Analize_-_MNE.pdf.

143 The ECtHR's judgment in the case of *Šaranović v. Montenegro*, no. 31775/16, is presented in the Analysis of ECtHR's Judgments in Respect of Montenegro delivered in 2018 and 2019, p. 58. The Analysis is available in Montenegrin at: https://sudovi.me/static//vrhs/doc/16_II_-_Dopuna_Analize_-_MNE.pdf.

Asanović v. Montenegro

Application no. 52415/18
Judgment of 20 May 2021

i. Analysis of the Judgment

The applicant complained of unlawful deprivation of liberty in the absence of a decision of the relevant court. Before ruling on the merits, the Court examined the admissibility of the application since the respondent Government claimed that the applicant had not exhausted all domestic remedies and had abused of the right of application. Having found that the application was admissible, the Court found a violation of Article 5(1) of the Convention because the applicant had been deprived of liberty based on a official report and at the order of the state prosecutor, who had not specified the legal grounds. Furthermore, since the applicant is a practicing attorney, the relevant authorities failed to take into account the relevant provisions of the Bar Act explicitly providing that practicing attorneys could be deprived of liberty for criminal offences related to their practice only pursuant to a relevant court's decision.

(a) The facts

The applicant is a practicing attorney and at the time of lodging the application with the Court he had been a representative of an opposition media outlet for more than twelve years.

In December 2016, the Tax Administration reported to the Police Directorate that there were indications that the applicant had committed a criminal offence of tax evasion in relation to his professional activities. The case was transmitted to the Basic State Prosecutor's Office ("the SPO") and the prosecutor apparently requested orally police officer G.M. to gather information from the applicant in his capacity "as a citizen". On 13 September 2017, in the early morning hours, G.M. informed the state prosecutor that the applicant had not been found at his address and that his phone had been switched off. Apparently considering that the applicant was hiding, the state prosecutor requested the police officers to find him and "deprive him of liberty".

At 9h30 the same day G.M. and three other officers approached the applicant in front of the Court of First Instance in Podgorica and served him summons. It specified that the applicant was summoned to the Police Directorate "at once" in order to provide information "as a citizen". It also specified that he would

be brought in by force if he did not comply with it. The applicant submitted to the Court that he had been put in a vehicle and taken to the police station. The Government submitted that he had been offered, without any verbal or physical force, to be taken by an official vehicle with civilian registration plates to the police station, so that he could give his statement.

After the applicant gave the statement, G.M. served him the minutes thereof and an official report. The official report stated that the applicant had been deprived of liberty that day at 10h40 on the order of the state prosecutor, in relation to Article 264(1) of the Criminal Code and that he would be brought before the state prosecutor that same day. It further noted that no means of force had been used and that he had been duly informed of his rights and the reasons for his deprivation of liberty. The report was signed by police officers G.M. and S.L. The applicant's fingerprints were taken, he was photographed and his personal belongings were taken, including his glasses, and he was put in a cell with no windows. At 12h10 he was handcuffed and taken in a police vehicle to the state prosecutor. The state prosecutor questioned him from 12h30 to 13h54, after which he was released. During the questioning, the applicant denied having committed the said criminal offence. He also stated that earlier that morning he had been visiting a client in prison, where there was no telephone signal and the use of telephones was prohibited, all of which could be easily verified. After leaving the prison he had switched the phone on, contacted the police officer who had told him to come in front of the court building, where he had been deprived of liberty.

The same day, the Division for Economic Crime Suppression filed a criminal complaint against the applicant with the SPO for a reasonable suspicion of tax evasion. The SPO issued an indictment in April 2019. The proceedings were still pending at the time the ECtHR delivered its judgment.

The Constitutional Court dismissed the applicant's constitutional appeal because of his unlawful deprivation of liberty. The Council for Civic Control of Police issued its findings in reaction to the applicant's complaint. It considered that the police inspectors had acted unlawfully, in particular because the applicant, as a lawyer, could not have been deprived of liberty without the relevant court's decision in that regard. Furthermore, in his opinion of 2 October 2018, the Ombudsperson found violations of the applicant's rights under Article 29 of the Constitution and Article 5 (1) (c) of the Convention. In particular, he had not been first given an opportunity to comply with the summons on his own, but had been told to go "at once" with police officers, which was contrary to Article 259(1) of the Criminal Procedure Code ("the CPC"). This had constituted *de*

facto deprivation of liberty as of 9h30, as of that moment he had been under the control of police officers. There had been no legal grounds for it at the time, given that none of the reasons for detention, as stipulated in Article 175 of CPC, had been indicated. In May 2018, the Ombudsman found that the applicant had been discriminated against by the Tax Administration on account of his presumed political affiliation as it had not proved that it had treated the applicant in the same manner as other practicing attorneys - tax payers.

In October 2018, the applicant instituted civil proceedings against the State, for unlawful deprivation of liberty. The proceedings were stayed pending the termination of the criminal proceedings. At a hearing, the applicant clarified that the object of his claim was not compensation of non-pecuniary damage for unlawful deprivation of liberty, but for a violation of his honour and reputation, and the right to liberty.

In October 2018, the applicant instituted civil proceedings against the State – SPO, for violating his right to defence in connection with his questioning following his deprivation of liberty. The Court of First Instance in Podgorica ruled partly in favour of the applicant and awarded him 1,500 euros, and ordered the respondent party to have this judgment published in all printed and electronic Montenegrin media. The court found, *inter alia*, that before having been brought before the state prosecutor the applicant had not been informed that he was to be questioned. It also found that even though he had explained to the police officers that he had two hearings in court that day, the police officers had taken him by the arms and into their vehicle, and had taken him to the police station.

(b) Admissibility

Before ruling on the merits, the Court examined the admissibility of the application because the Government maintained that the applicant had not exhausted all available domestic remedies. Notably, shortly before lodging an application with the Court, he had instituted civil proceedings for unlawful deprivation of liberty. This was an effective domestic remedy, as demonstrated by the relevant domestic case-law. The applicant's attempt to differentiate between an "unlawful deprivation of liberty" and a "violation of the right to liberty" was confusing. The domestic court's ruling in favour of the applicant in respect of his right to defence proved that the civil proceedings were an effective domestic remedy. The Government also submitted that the applicant's failure to inform the Court about the ongoing civil proceedings amounted to an abuse of the right to petition.

Exhaustion of domestic legal remedies

As per the Government's argument that the applicant had not exhausted domestic legal remedies, the Court recalled that the purpose of this rule was to exempt Contracting States from answering for their acts before an international body until they have had an opportunity to put matters right through their own legal system and that those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system.

In the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose, for the purpose of fulfilling the requirement of exhaustion of domestic remedies, a remedy which addresses his or her essential grievance. When one remedy has been pursued, the use of another remedy which has essentially the same objective is not required.[144] In addition, domestic remedies have not been exhausted when an appeal is not accepted for examination because of a procedural mistake by the applicant.

Turning to the present case, the Court firstly reiterated that in principle the Ombudsperson could not be considered as an effective remedy, in particular due to the non-binding nature of the advice given. The applicant had instituted civil proceedings alleging a violation of his right to liberty and claiming damages in that respect, whilst referring to the same evidence as before this Court. However, before filing his civil claim the applicant had made use of a constitutional appeal, the latter being an effective legal remedy in Montenegro.[145] A constitutional appeal can be lodged only after all other effective legal remedies have been exhausted, unless the appellant proves that a particular remedy is not or would not be effective in the particular case. The Constitutional Court, however, did not examine the issue of existence and/or prior exhaustion of other effective domestic legal remedies but proceeded to the merits of his constitutional appeal and found that his deprivation of liberty had been lawful. In these circumstances, the Court considered that it would be unduly formalistic to require the applicant to exercise a remedy which even the highest court of the country concerned had not obliged him to use.[146] In a situation when the Constitutional Court already examined the merits of the complaint concerning the lawfulness of the applicant's deprivation of liberty, it could not be said that the national authorities had not been given the opportunity to put matters right through the national legal system. The fact

144 *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 177, ECHR 2019.

145 *Siništaj and Others v. Montenegro*, no. 1451/10 and two others, § 123, ECHR 2015.

146 *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 28 and 117-118, ECHR 2007-IV.

that the civil proceedings were still pending could not affect this conclusion. The Court therefore concluded that the application could not be declared inadmissible due to the non-exhaustion of legal remedies.

Abuse of the right of application

The relevant principles as regards the abuse of the right of application are set out, for example, in the ECtHR's judgment in the case of *Gross v. Switzerland* [GC].[147] In particular, the submission of incomplete and therefore misleading information may amount to abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation is given for the failure to disclose that information. The applicant had not informed the Court in his application that he had instituted civil proceedings but acknowledged it only in his observations in reply to those of the Government. However, given its conclusion as regards the exhaustion of domestic remedies, the Court considered that the information in question did not concern the very core of the case.

(c) The Court's assessment

Article 5 (1) of the Convention may also apply to deprivations of liberty of a very short length.[148] Any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5(1), be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of that law.[149]

In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 (1) of the Convention primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law. They also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. Where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its

147 *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014.

148 *M.A. v. Cyprus*, no. 41872/10, § 190, ECHR 2013.

149 *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, §135, ECHR 2018; see also *S., V. and A. v. Denmark* [GC], no. 35553/12 and two others, § 74, ECHR 2018.

application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[150]

Turning to the present case, the Court noted that Article 259 of the CPC provided, *inter alia*, that a person who did not comply with the summons could be brought in by force only if he or she had been warned in that regard in the summons. While the summons in the applicant's case contained the said warning, it also indicated that the applicant had to come "at once". The Court considered that such wording did not give the applicant a prior opportunity to comply with the summons on his own. The domestic court found that the police officers had taken him by his arms into their vehicle and then to the police station. The Court thus found it established that the applicant had been brought to the police by force contrary to Article 259(1) of the CPC, which constituted his *de facto* deprivation of liberty.

The applicant was officially deprived of liberty at 10h40 by the official report issued by the police following the state prosecutor's request to that effect. Pursuant to Article 264(1) of CPC, police officers can deprive a person of liberty if there are reasons for detention set out in Article 175 of CPC. However, the said report referred only to the criminal offence the applicant was suspected of, without indicating any of the legal grounds specified in Article 175 of the CPC for deprivation of liberty. The Court also noted that the applicant was a practicing attorney and that the Bar Act explicitly provided that a practicing attorney could be deprived of liberty for criminal offences related to his or her practice only pursuant to a relevant court's decision. It was undisputed by the Government that such a decision did not exist in the applicant's case. Therefore, even if the police had indicated one of the grounds listed in Article 175 of the CPC, the applicant's deprivation of liberty would still have been unlawful.

In view of the above, the Court found that the applicant's deprivation of liberty had not been in compliance with Articles 259 and 264 of the CPC and section 23 of the Bar Act, and had thus been unlawful. The foregoing considerations were sufficient to enable the Court to conclude that there had been a violation of Article 5(1) (c) of the Convention.

150 *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 91-92, ECHR 2016. *Del Río Prada v. Spain* [GC], no. 42750/09, § 125, ECHR 2013.

Alleged violation of Article 13 of the Convention

The applicant also complained that he had no effective domestic remedy for his unlawful deprivation of liberty.

A constitutional appeal is an effective domestic remedy in Montenegro and the applicant made use of it, explicitly complaining about the lawfulness of his deprivation of liberty. The Constitutional Court decided it had jurisdiction to rule on this complaint and it duly examined it on the merits. Article 13 does not require the certainty of a favourable outcome in respect of any proceedings made use of domestically,[151] including before the Constitutional Court, wherefore the Court held that the applicant's complaint was manifestly ill-founded.

The applicant did not claim pecuniary or non-pecuniary damage, wherefore the Court did not award it.

ii. Judgment Execution Procedure

The Government submitted to the Committee of Ministers – Department for the Execution of Judgments of the European Court their Action Report of 7 February 2022, in which they set out all the individual and general measures with a view to executing the judgment.

(a) Individual Measures

Given the nature of the violation of Article 5(1) of the Convention in this case, the Government highlighted in its Action Report that the effects of the violation have ceased to exist since the applicant had been released immediately after being questioned by the state prosecutor.

The applicant submitted no claims for just satisfaction in respect of pecuniary or non-pecuniary damage. The Court therefore did not award applicant any sum in that regard.

However, the Court of First Instance in Podgorica ruled partly in favour of the applicant and ordered the State to pay the applicant 1,500 euros in respect of non-pecuniary damages due to the violation of his personal rights – right to defence guaranteed by the Montenegrin Constitution and the Convention.

151 *Amann v. Switzerland* [GC], no. 27798/95, § 88, ECHR 2000-II.

(b) General Measures

The State has undertaken a number of measures to train the judiciary and raise awareness of the importance of the judgment and the relevant standards applied in it. Representative of Montenegro before the ECtHR held a large number of lectures at seminars and trainings organised both by the Training Centre of Judiciary and State Prosecutor's Office and by international partners, at which the judgment and the relevant Court standards were analysed.

The judgment has been translated and published on the websites of the Supreme Court of Montenegro and the Office of the Representative, as well as in the Official Gazette of Montenegro. The Office of the Representative has prepared an analysis of the judgment, which has been disseminated together with the translation of the judgment to all authorities involved in proceedings resulting in the violation of Convention law.

(c) Resolution of the Committee of Ministers

At the 1433rd meeting of the Ministers' Deputies on 4 May 2022, the Committee of Ministers adopted Resolution CM/ResDH(2022)109, closing the examination of the case.[152]

iii. Relevance to Case-Law

The ECtHR noted in its judgment in the case of *Asanović v. Montenegro* that the civil proceedings instituted in May 2018 by the applicant against the State – the Tax Administration for discrimination against him were pending.

In the meantime, in November 2020, the Court of First Instance in Podgorica delivered a judgment in this case, finding that the Tax Administration's report against the plaintiff to the Police Directorate had been discriminatory, given that it had not treated him, a practicing attorney, equally as other tax payers practicing law in analogous or relevantly similar situations. The Court of First Instance found that the respondent had failed to prove that its treatment of the plaintiff had been equal to its treatment of other tax payers practicing law in analogous or relevantly similar situations and that it had discriminated against the plaintiff on grounds of assumed political affiliation or membership of a social group or the organisation JU M., the founder of the daily "D.", of which the plaintiff was the only representative. The court ordered the respondent to refrain from any potentially discriminatory

152 https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22001-217390%22]}

actions against the plaintiff in the future and awarded the plaintiff 1,500 euros in respect of non-pecuniary damage for discrimination violating his personal right.

In the reasoning of its judgment P. no. 2604/19, the Court of First Instance referred not only to national law – the Constitution of Montenegro, the Anti-Discrimination Law, the Tax Administration Law, the Inspection Law and the Administrative Procedure Law – but to the European Convention on Human Rights and its Protocol No. 12 as well. During the examination of evidence, the Court applied the "reversal of the burden of proof" rule provided for by the Anti-Discrimination Law, under which a victim of alleged discrimination is not under the obligation to prove discrimination with a sufficient degree of certainty, but to make sufficiently probable that discrimination occurred, and, if this requirement is fulfilled, the alleged discriminator is under the obligation to prove that it had not violated the principle of equal treatment.

In that context, in the light of the above-mentioned relevant law and findings of fact, the Court of First Instance found that the plaintiff had presented proof making it sufficiently probable that the respondent had discriminated against him by action and omission and had failed to prove that it had not violated the principle of equal treatment.

The Court of First Instance stated the following in the reasoning of its judgment:

> "The so-called full control of the plaintiff's operations, entailing the control of both his operations and those of his clients, was conducted. The Court established beyond doubt that the Montenegrin Tax Administration, an authority of the respondent, had conducted such a control of solely the plaintiff, a practicing attorney and tax payer, and had filed a report only against him with the Police Directorate stating that there were indications that he had committed the criminal offence of tax evasion. The Tax Administration did not take such steps against any other lawyers who had not paid their taxes (…).
>
> Acting on a complaint filed by lawyer Nebojša Asanović, the Montenegrin Ombudsperson issued his Opinion No. 318/17 of 9 May 2017, essentially stating that the lawyer had filed a complaint of discrimination on grounds of his assumed political affiliation in proceedings before public authorities, specifying that he had officially found out that the Tax Administration reported to the police that it had reasons to suspect that he had committed the criminal offence of tax evasion under Article 264 of the Criminal Code on 15 May

2017, whereas, on 6 June 2017, he learned that a criminal report on these grounds had never been filed against any other lawyer. However, although the Tax Administration denied it had discriminated against the complainant, it never forwarded the required documents to the Ombudsperson until the end of the proceedings. As the Ombudsperson stated in paragraph 74 of this Opinion, the Tax Administration's letters demonstrate "its lack of understanding of the reversal of the burden of proof or its avoidance to provide complete answers to issues concerning the key facts under dispute in the discrimination determination procedure". In paragraph 76 of his Opinion, the Ombudsperson said that "the Tax Administration's responses do not include objectively well-founded replies to the asked questions." (…) [H]aving applied the relevant law, the provisions of which he enumerated in his Opinion and after conducting the usual discrimination test (paragraph 66 of the Opinion) and in the light of all pieces of evidence, taken both individually and together, and the ECtHR's view that the enjoyment of Convention rights and freedoms without discrimination is violated when States treat differently people in analogous situations (…), the Court concluded that the Tax Administration failed to prove that it had treated the plaintiff the same as it did other tax payers practicing law in an analogous or relevantly similar situation. (…).

In view of information forwarded by the Tax Administration in its submission No. 03/8-2-3878/1 of 16 April 2019 on the number of lawyers in Montenegro who had not filed their tax returns or who had failed to calculate their income tax over the past five years (2012-2017), and bearing in mind that it failed to forward to the Court information on control measures taken against them, and that it remained unclear until the end of the main hearing how these lawyers on the Montenegrin Central Bank's list of frozen accounts of legal persons in the Montenegrin Central Register of Legal Entities on 31 December 2016 operated and performed their activities if their accounts were frozen over a longer period of time, as well as the statements of the plaintiff and the witnesses that the Tax Administration had filed a report on indications of tax evasion under Article 264 of the Montenegrin Criminal Code only against the plaintiff, the Court draws the logical conclusion about the inertia of the Tax Administration vis-à-vis all other lawyers except in the case of the plaintiff, against whom it had filed a report with the Police Directorate and whose income and transactions on a number of accounts it had checked. Furthermore, the Police Directorate stated

in its letter Ref. No. 241/17-32866/2 of 5 June 2017 that the Police Directorate – Crime Police Sector, Division for Economic Crime Suppression had filed 16 criminal reports against 28 people for the criminal offence under Article 264 of the Criminal Code over the past three years and that none of them were lawyers.

The Court therefore concludes that the plaintiff had proven probable that the public authority of the respondent had treated him differently than other tax payers practicing law who were in an analogous or relevantly similar situation when it filed the enactment No. 03/7-71660/1-16 of 23 December 2016, entitled "notice of indications that the criminal offence of tax evasion has been committed", which was drawn up and signed by the then Chief Tax Inspector of Montenegro, S.K. The Court finds that the respondent had not proven that it had not violated the principle of equal treatment. The Ministry of Finance – Tax Administration of Montenegro did not provide any evidence refuting this presumption. Nor did it present valid reasons for its different treatment of the plaintiff vis-à-vis the analogous group.

Furthermore, the plaintiff proved probable that discrimination had occurred also with respect to the respondent's application of the method of "lateral control, full control or the so-called control package" covering also the legal persons – the plaintiff's clients whom he had extended legal services to and charged fees, only in respect of the plaintiff in order to ascertain his outstanding taxes, but not with respect to any other tax payers practicing law. The respondent did not prove that there was a justified and reasonable explanation for such unequal treatment by the tax authority, wherefore the Court holds that the respondent had violated the principle of equal treatment in this case as well. It therefore cannot accept the reasons the respondent put forward in the attempt to justify such treatment by its authority.

The above factual findings are based on the statements of the plaintiff and witnesses Đ.N. and S.K., Montenegrin Ombudsperson's Opinion No. 318/17, and the evidence submitted in writing.

Bearing in mind the factual findings, the Court holds that the described actions of the respondent's tax authority amount to discriminatory, unequal treatment of the plaintiff vis-à-vis other tax payers practicing law in analogous or relevantly similar situations,

and that the respondent, which bears the burden of proof, failed to prove that there was an objective and justified reason for its treatment of the plaintiff that is unrelated to his assumed political affiliation, membership of a social group or the organisation "Jumedia Mont", the founder of the daily newspaper "Dan", of which the plaintiff was the only representative. The conclusion that the plaintiff had been discriminated against by the respondent's tax authority on these grounds clearly derives from the plaintiff's statement, which the Court deems objective; the burden of proving that the plaintiff had not been discriminated against on these grounds was on the respondent, but the respondent absolutely failed to prove that during the proceedings.

The Court bore in mind the ECtHR's view that discrimination can also be based on assumed characteristics. Such a view was expressed in its judgment in the case of *Timishev v. Russia*, nos. 55762/00 and 55974/00, ECHR, 13 December 2005, where (in paragraph 54) the Court noted that Article 14 prohibited discrimination against not only people who belong to a discriminated group but also those "perceived as belonging to that […] group.".

Furthermore, in its judgment in the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, no. 15/1983 and two others, 1985, the ECtHR said the following (in paragraph 82): "Article 14 is concerned with the avoidance of discrimination in the enjoyment of the Convention rights in so far as the requirements of the Convention as to those rights can be complied with in different ways. The notion of discrimination within the meaning of Article 14 includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention."

Furthermore, in its judgment in the case of *Thlimmenos v. Greece*, no. 34369/97, 6 April 2000, the ECtHR held (in paragraph 44) that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention was also violated when States treated differently persons in analogous situations without providing an objective and reasonable justification.

In the light of the above findings and the ECtHR's case-law referred to above, this court finds that the plaintiff had been discriminated against on grounds of his assumed political affiliation

and membership of a social group or the organisation "Jumedia Mont", the founder of the daily newspaper "Dan", in contravention of Article 14 of the Anti-Discrimination Law. The Court therefore rendered this decision in accordance with Article 26, sub-paragraphs 1, 2, 3 and 4 of that Law.

Upholding the plaintiff's requests to declare the respondent's conduct discriminatory and prohibit it from discriminating against the plaintiff in the future, requests which are of prejudicial character vis-à-vis the claim for the compensation of non-pecuniary damages, the court finds that the requirements for applying Article 207 of the Obligations Act have been fulfilled. This Article allows the court to award just satisfaction in respect of non-pecuniary damages if it deems such redress warranted by the circumstances of the case and the seriousness of the violation. The respondent's responsibility for redressing these forms of non-pecuniary damages in accordance with the principle of objective responsibility is based on Article 166(1) of the Obligations Act, given that, as explained, the court concluded beyond doubt that the act of discrimination had been committed by the respondent's authority.

The court agrees with the plaintiff that his personal rights (dignity, moral integrity, honour) had been violated by his discriminatory treatment by the respondent, these rights enjoying particular protection by the highest law of the land – the Constitution, as well as all other relevant international regulations on the protection of human rights and freedoms. In the case at hand, the violation of the plaintiff's personal rights undoubtedly caused him psychological suffering the intensity and duration of which justify the award of non-pecuniary damage."

The Court of First Instance judgment was upheld by the High Court in Podgorica, in its judgment in the case of Gž. no. 86/21.

Article 5 of the ECHR and standards developed in the ECtHR's case law in respect of ordering and extending pre-trial detention were discussed in the prior Analyses, as well as in the Report on the Application of the European Convention on Human Rights in the Case-Law of the Supreme Court of Montenegro.[153]

153 The Report is available in Montenegrin at: https://rm.coe.int/report-on-application-of-the-echr-in-supreme-court-of-montenegro-/168092d14f

It is worth noting that civil courts ruling on damage claims for unlawful detention do not distinguish between groundless and unlawful detention. They qualify detention as groundless if the proceedings were discontinued by a final ruling or completed by a final exculpatory judgment or a judgment rejecting the charges. Groundless detention may result in pecuniary and non-pecuniary damages. The redress procedure is laid down in the Criminal Procedure Code. When ruling on such cases, the courts often refer to the ECtHR's case-law, including the cases in which it found a violation of the Convention due to unlawful detention. It therefore needs to be noted that unlawful detention in the broadest terms is detention ordered and extended in contravention of national law and ECHR standards. Therefore, the issue of unlawful detention opens before the end of the proceedings and may exist irrespective of the outcome – a conviction or acquittal.

To recall, as noted also in the Report on the Application of the European Convention on Human Rights in the Case-Law of the Supreme Court of Montenegro, the first necessary element for the lawfulness of detention is "reasonable suspicion" that the defendant has committed a crime, which entails listing reasonable grounds for such suspicion in the decision ordering detention. Furthermore, there must be "relevant and sufficient" reasons justifying the extension of detention. According to ECtHR's case-law, these reasons include the risk that the defendant: 1) will abscond, 2) obstruct the proceedings, 3) reoffend and 4) the need to maintain public order. In the ECtHR's view, the court deciding on detention must examine all the facts in the case at hand and refer to objective, lawfully prescribed grounds, while the detention orders must be clear and precise. The ECtHR has often emphasised, including in its judgments against Montenegro,[154] that courts should not reiterate the same reasons or use the same or abstract formulae to explain their decisions to extend detention.[155] Furthermore, when deciding to extend detention, the courts need to comply with the statutory deadlines for reviewing them.

154 *Bigović v. Montenegro*, no. 16026/90, ECHR 2019.

155 The Report is available in Montenegrin at: https://rm.coe.int/report-on-application-of-the-echr-in-supreme-court-of-montenegro-/168092d14f

3.4. Article 6 – Right to a Fair Trial

Article 6
Right to a Fair Trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The Analysis of the Judgments of the European Court of Human Rights in Respect of Montenegro Delivered in 2020 sets out some of the main standards concerning Article 6.[156] Inter alia, it states that the ECtHR broadly interprets the right to a fair trial because of the exceptional importance of this right. The Court's broad case-law "supplements" the text of the Convention with the right of access to a court, the right to the enforcement of a judgment and the right to a final court decision. Furthermore, its case-law shows that Article 6 applies to criminal, civil and administrative court proceedings, as well as the stages preceding and following them, such as, e.g. the enforcement procedure.

The terms "civil rights and obligations' and 'criminal charge' are autonomous Convention concepts and have to be interpreted in accordance with the Court's case-law.

For civil proceedings to enjoy the protection of Article 6 of the Convention, there must be a serious and genuine dispute as to a particular civil right that can be said to be recognised under national law, whether or not it is protected by the Convention, and the outcome of the proceedings must be directly decisive for that civil right.[157] In its decision on the case of *Alaverdyan v. Armenia*,[158] the Court held that Article 6 of the Convention did not apply to a non-contentious or unilateral procedure which did not involve opposing parties and which was available only where there was no dispute over rights. Whether or not a right or an obligation is to be regarded as civil in the light of the Convention must be determined by reference to its substantive content and effects – and not its legal classification – under the domestic law of the State concerned. In its case-law, the Court has held that rights enshrined in Article 6 of the Convention were applicable to construction licencing procedures,[159] a licence for serving alcoholic beverages,[160] or a dispute concerning the payment of compensation for a work-related illness or accident.[161] The ECtHR has over time extended the applicability of Article 6 of the Convention also to some

156 2020 Analysis of ECtHR Judgments in Respect of Montenegro, p. 29, available at: https://sudovi.me/static//vrhs/doc/Analysis_of_MNE_judgments_before_the_ECHR_-_FINAL.pdf

157 Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb), Council of Europe/European Court of Human Rights, 2019.

158 *Alaverdyan v. Armenia*, no. 4523/04, ECHR 2010.

159 *Sporrong and Lönnroth v. Sweden*, nos. 7151/75 and 7152/75, § 79, A88 ECHR 1984.

160 *Tre Traktörer Aktiebolag v. Sweden*, no. 10873/84, § 43, A159, ECHR 1989.

161 *Chaudet v. France*, no. 49037/06, § 30, ECHR 2009.

disciplinary proceedings,[162] proceedings concerning social-security benefits,[163] and work-related disputes concerning civil servants.[164]

A charge may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence".[165] Various situations fulfilled the requirements of a criminal charge defined in this manner, e.g. arrest of an individual suspected of having committed a crime,[166] as well as questioning of an individual concerning suspicion of his or her implication in a crime,[167] whether or not she or he is formally treated as a witness.[168]

The starting-point for the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the following criteria the Court outlined in its judgment in the case of *Engel and Others v. the Netherlands*:[169] classification in domestic law; nature of the offence; and severity of the penalty that the person concerned risks incurring. These criteria enabled a broad interpretation of Article 6, wherefore the Court has concluded in its case-law that misdemeanour,[170] customs,[171] and tax surcharges procedures,[172] can also fall under the criminal limb of this Article depending on the circumstances of the case at hand.

Article 6(1) is applicable throughout the entirety of proceedings for the determination of any "criminal charge", including the investigation procedure conducted by an investigating judge[173] and the sentencing process.[174] On the

162 *Le Compte, Van Leuven and De Meyere v. Belgium*, nos. 6878/75 and 7238/75, A54 ECHR 1982; *Philis v. Greece* (No. 2), no. 19773/92, § 45, Reports 1997-IV; *Marušić v Croatia* (dec.), no. 79821/12, § 72–73, ECHR 2017.

163 *Feldbrugge v. the Netherlands*, no. 8562/79, A99 ECHR 1986.

164 *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 50–62, Reports of Judgments and Decisions 2007-II.

165 Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb), Council of Europe/European Court of Human Rights, 2019; *Deweer v. Belgium*, no. 6903/75, § 44, A35 ECHR 1980.

166 *Heaney and McGuinness v. Ireland*, no. 34720/97, § 42, Reports of Judgments and Decisions 2000-XII.

167 *Stirmanov v. Russia*, no. 31816/08, § 39, ECHR 2019.

168 *Kalēja v. Latvia*, no. 22059/08, § 36-41, ECHR 2017.

169 *Engel v. the Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, A22 ECHR 1976.

170 *Marčan v. Croatia*, no. 40820/12, § 33, ECHR 2014; *Lutz v. Germany*, no. 9912/82, § 182, A123 1987.

171 *Salabiaku v. France*, no. 10519/83, A141-A ECHR 1988.

172 *Jussila v. Finland* [GC], no. 73053/01, § 38, Reports of Judgments and Decisions 2006-XIV.

173 *Vera Fernández- Huidobro v. Spain*, no.74181/01, § 108-114, ECHR 2010.

174 *Phillips v. the United Kingdom*, no. 41087/98, § 39, Reports of Judgments and Decisions 2001-VII.

other hand, amnesty[175] and parole proceedings do not fall within the scope of the criminal limb of Article 6 of the Convention.

Violations of the right to a trial within a reasonable time accounted for most ECtHR judgments in which it found breaches of Article 6 of the Convention. The Court's statistics[176] show that it had delivered a total of 20,725 judgments in the 1959-2021 period in which it had found the violation of at least one Convention right, and that most of these judgments - 6,052 of them - concerned breaches of the right to a trial within a reasonable time. Violations of the right to a fair trial, as one of the aspects of Article 6 of the Convention, came next – the ECtHR found breaches of this right in 5,480 cases. Violations of the right to liberty and security ranked third – the Court found violations of Article 5 in 4,496 judgments.

The greatest number of cases in which the ECtHR found Montenegro in violation of the Convention concerned the right to a fair trial. Article 6 of the Convention comprises various procedural safeguards and rights, including the right to a trial within a reasonable time. Most of the Article 6 violations Montenegro committed concerned the right to a trial within a reasonable time. The leading case in this group is *Stakić v. Montenegro*,[177] where the ECtHR said that the reasonableness of the length of proceedings had to be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities, and what was at stake for the applicants in the dispute.

The other Article 6 violations by Montenegro concerned violations of the right to a fair trial due to the non-enforcement of the judgments (eight cases) and violations of the right of access to a court (five cases). In three cases, the Court found Montenegro in violation of the right to a reasoned judgment, of the presumption of innocence and of the principle of fairness, respectively.

The ECtHR delivered only one judgment finding Montenegro in violation of the right to a trial within a reasonable time, specifically before the Constitutional Court. This is the first time the Court examined whether the criminal limb of Article 6(1) applied to the length of proceedings before the Constitutional Court and whether this provision of the Convention had been violated.

175 *Montcornet de Caumont v. France* (dec.), no. 59290/00, Reports of Judgments and Decisions 2003-VII.

176 www.echr.coe.int/Documents/Annual_report_2021_ENG.pdf

177 The judgment in the case of *Stakić v. Montenegro*, no. 49320/07, is presented in the 2020 Analysis of ECtHR Judgments in Respect of Montenegro, p. 32. The Analysis is available at: https://sudovi.me/static//vrhs/doc/Analysis_of_MNE_judgments_before_the_ECHR_-_FINAL.pdf

However, given that the right to a trial within a reasonable time is the most frequenty violated right, both at international and national levels, the following text will present the standards of a trial within a reasonable time, developed by the European Court in its case-law.

3.4.1. Article 6(1) – Right to a Trial within a Reasonable Time

The purpose of this right is to ensure that an uncertainty individuals are in concerning their civil status or criminal charge against them ends within a reasonable time. However, the reasonable time requirement extends beyond an individual's legal situation because it affects overall legal certainty in the justice system.

The Court has found in its case-law that the reasonableness of the length of proceedings must be assessed in each case according to the particular circumstances, against the following criteria: complexity of the case, the conduct of the applicant and the relevant authorities, and what is at stake for the applicant.[178]

Furthermore, the Court has repeatedly stated that Article 6(1) of the Convention imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time.[179] Where the judicial system is deficient in this respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution.[180] The Court has repeatedly admitted that a remedy is 'effective' if it can be used to expedite a decision by the courts dealing with the case at hand.[181] Furthermore, it is clear that a legal remedy aimed at speeding up proceedings may not be sufficient in countries in which the reasonableness requirement has already been violated for remedying a situation in which the proceedings are already apparently excessively long.[182]

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

179 *Süßmann v. Germany*, no. 20024/92, § 55, Reports 1996-IV

180 *Scordino v. Italy* (No. 1), no. 36813/97, § 183.

181 *Ibid*, § 184.

182 *Ibid*, § 185.

Regarding violations of the reasonable-time requirement, the Court has already noted that one of the characteristics of sufficient redress, which may remove a litigant's victim status, relates to the amount awarded as a result of using the domestic remedy.[183] The Court can also perfectly well accept that a State which has introduced a number of remedies, one of which is designed to expedite proceedings and one to afford compensation, will award amounts which – while being lower than those awarded by the Court – are not unreasonable, on condition that the relevant decisions, which must be consonant with the legal tradition and the standard of living in the country concerned, are speedy, reasoned and executed very quickly. [184]

Given that Article 6 of the Convention guarantees the right to a trial within a reasonable time as an integral part of the right to a fair trial, respect of this right is a reflection of an efficient judiciary and greatly contributes to strengthening public confidence in the judiciary. Domestic courts are the "guardians" in the protection of human rights at the national level and should ensure the full, effective and direct application of the Convention in the light of the Court's broad case-law.

The ECtHR has already examined the applicability of Article 6(1) of the Convention to proceedings before the Constitutional Court. For instance, in the case of *Süßmann v. Germany*[185], the Court examined only the length of the proceedings before the Federal Constitutional Court of Germany, while, in *Šikić v. Croatia*[186], it stressed that although it accepted that its role of guardian of the Constitution made it particularly necessary for a Constitutional Court sometimes to take into account considerations other than the mere chronological order in which cases were entered on the list, such as the nature of a case and its importance in political and social terms, the Court found a violation of Article 6(1) of the Convention due to the excessive length of the proceedings.

Therefore, in extending protection to the rights enshrined in the Constitution, the Montenegrin Constitutional Court is also under the duty to respect the constitutional right to a fair trial in case these rights are violated or denied by any State body or authority, lest it end up in the paradoxical situation of violating the right to a trial within a reasonable time the respect of which it itself is protecting and defending from violation by the national authorities. Furthermore, neither the Montenegrin Constitution nor the Law on the Constitutional Court

183 *Cocchiarella v. Italy* [GC], no. 64886/01, § 93, ECHR 2006-V

184 *Ibid*, § 97.

185 *Süßmann v. Germany*, no. 20024/92, § 55, Reports 1996-IV

186 *Šikić v. Croatia*, no. 9143/08, § 37

of Montenegro lay down a deadline by which the Constitutional Court must rule on a constitutional appeal.[187]

Any future applications to the Court complaining of the length of proceedings before the Constitutional Court may reflect on the Court's opinion of the effectiveness of constitutional appeals as a legal remedy and undermine the status of the State of Montenegro, which is aspiring to join the family of democratic European countries sharing the same European values and standards, such as democracy, rule of law and the protection of human rights and fundamental freedoms.

This Siništaj judgment is exceptionally important in terms of Montenegro's obligation to comply with Convention and European standards, because it poses a challenge to its national authorities, specifically the Constitutional Court of Montenegro, to find solutions to effectively rule on constitutional appeals to preclude the recurrence of the violation of Article 6 of the Convention by the Constitutional Court in cases of other applicants.

Siništaj v. Montenegro

Application no. 31529/15
Judgment of 23 September 2021

i. Analysis of the Judgment

The applicant complained that the length of proceedings before the Constitutional Court was excessive, in breach of Article 6(1) of the Convention. Before ruling on the merits, the ECtHR examined whether this Article was applicable to proceedings before the Constitutional Court. It concluded that standards concerning a trial within a reasonable time applied to the proceedings before the Constitutional Court because its decision in the case at hand could affect the outcome of the dispute before the ordinary courts. The ECtHR examined the case against its well-established criteria: complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant and found a violation of Article 6(1). It concluded that the case was not exceptionally complex, especially since the ordinary courts had completed the proceedings at three levels of jurisdiction in three years and one month. It also concluded that the applicant's conduct had not contributed to the length of proceedings and that the case was important for the applicant because a decision in his favour would result

187 https://www.ombudsman.co.me/docs/1603718086_061020202-inicijativa.pdf

in the re-examination of the case concerning a grave crime he had been charged with. Nevertheless, the ECtHR noted the specificities of the proceedings before the Constitutional Court, emphasising that it was particularly necessary that it take into account other considerations other than the mere chronological order in which cases are entered on the list, such as the importance of the case in political and social terms.

(a) The facts

On 5 August 2008, the applicant was found guilty of associating with others for the purposes of anti-constitutional activities and preparing actions against the constitutional order and security of Montenegro, and sentenced to six years' imprisonment. That judgment of the High Court in Podgorica was upheld by the Court of Appeal and the Supreme Court on 18 June 2009 and 25 December 2009 respectively. The proceedings involved sixteen other defendants.

In March 2010, the applicant and one co-defendant lodged a constitutional appeal, complaining of a violation of the presumption of innocence, the right to a defence and the inviolability of the home, and of having been convicted on the basis of unlawfully obtained evidence. In April 2011, the applicant urged the Constitutional Court to rule on his constitutional appeal.

Two years later, the Constitutional Court did not adopt a draft judgment prepared by the judge rapporteur serving at the time. That judge died 8 August 2013 and the case was assigned to another judge.

In December 2013, the Parliament elected seven new judges to the Constitutional Court. On 23 July 2014, the Constitutional Court dismissed the applicant's constitutional appeal. That decision was served on the applicant's representative on 18 December 2014.

Admissibility

Before ruling on the merits, the Court examined the admissibility of the application given that the Government had submitted that the application had been lodged outside the six-month time-limit. They noted specifically that a constitutional appeal had not been an effective domestic remedy for length-of-proceedings complaints at the relevant time and that the applicant should have lodged his application within six months of the date when the Supreme Court's decision had been served on him.

The Court, however, noted that the applicant's constitutional appeal did not concern the length of the proceedings before the ordinary courts, and that the Constitutional Court ruled on the merits. It thus held that the six-month time-limit should be calculated as of the date of a decision of the Constitutional Court.

Applicability of Article 6(1)

The Court also examined whether Article 6(1) was applicable to proceedings before the Constitutional Court under its criminal limb.

The relevant test in determining whether Constitutional Court proceedings may be taken into account in assessing the reasonableness of the length of proceedings is whether the result of the Constitutional Court proceedings is capable of affecting the outcome of the dispute before the ordinary courts. It follows that Constitutional Court proceedings do not in principle fall outside the scope of Article 6(1) of the Convention.[188]

Turning to the present case, the Court noted that, in the event of a successful outcome of a constitutional appeal, the Montenegro Constitutional Court did not confine itself to identifying the provision that had been breached; it would also quash the impugned decision and refer the matter back to the competent court for a re-examination. The consequences of the proceedings could thus be decisive for the convicted persons. It concluded that in these circumstances, Article 6(1) was applicable to the proceedings in issue.

(b) The Court's assessment

The Court noted that reasonableness of the length of proceedings had to be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute.[189]

The Court noted that the period to be taken into consideration began on 26 March 2010, when the applicant lodged his constitutional appeal, and ended on 18 December 2014, when the Constitutional Court's decision was served on his representative. It thus lasted four years, eight months and twenty-two days.

188 *Gast and Popp v. Germany*, no. 29357/95, § 64, ECHR 2000-II.

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

As regards the complexity of the case, the Court said it could accept that the applicant's case was somewhat complex on account of the issues that it raised. However, the Court did not consider that these issues were exceptionally complex, or that the impact of the Constitutional Court's judgment went beyond the individual application,[190] such as to justify the protracted character of the proceedings before that court, all the more so given that it took the ordinary courts less than three years and one month to conduct the entire criminal proceedings involving seventeen defendants at three levels of jurisdiction.

As regards the conduct of the relevant authorities, the Court observed that the Constitutional Court appeared to have performed only one procedural activity, which was to obtain the case file from the relevant ordinary court. The Government did not argue that a public hearing had been held, that there had been a need to obtain expert reports or observations from various authorities or third parties, or that any other procedural steps had been taken; nor did they argue that several sets of deliberations had been held.

The Court took due note of the arguments raised by the Government – the change of the judge rapporteur, a number of important constitutional and legislative changes in that period and the election of new Constitutional Court judges. However, it considered that they could not sufficiently explain the delay in the proceedings at issue. In particular, the constitutional changes referred to by the Government did not relate to the issues raised by the applicant in his constitutional appeal, but rather to the election, mandate and dismissal of the Constitutional Court judges and its president. In addition, further legislative changes explicitly provided that the judges in office at the time would continue their work until the new judges were elected, thereby ensuring the continuous functioning of the Constitutional Court. Moreover, these changes entered into force on 10 October 2013, by which time the applicant's constitutional appeal had already been pending for more than three years and six months. Also, the applicant's case was assigned to another judge in August 2013 at the earliest, by which time it had already been pending for three years and four months.

With regard to the conduct of the applicant, the Court observed that the Government had not submitted that he had contributed to the length of the Constitutional Court proceedings in any way. The Court had no reason to hold otherwise.

190 *Contrast Von Maltzan and Others v. Germany* (dec.) [GC], no. 71916/01 and two others, § 131 and 133-134, ECHR 2005-V.

As regards what was at stake for the applicant, this concerned, *inter alia*, his right to a defence in the criminal proceedings and, ultimately, his conviction for serious criminal offences. Had the Constitutional Court ruled in his favour, it would have quashed the final decision given in the criminal proceedings and would have ordered that the case be re-examined.

Article 6(1) imposes on Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time. While this obligation also applies to a constitutional court, it cannot be construed in the same way as for an ordinary court.[191] Although the Court accepted that its role as guardian of the Constitution sometimes made it particularly necessary for a constitutional court to take into account considerations other than the mere chronological order in which cases were entered on the list, such as the nature of a case and its importance in political and social terms, the Court found that a period exceeding four years and three months to decide on a case such as the applicant's, and in particular in view of what was at stake for him, was excessive and failed to meet the "reasonable time" requirement.[192] Accordingly, the Court found a violation of Article 6(1) of the Convention on account of the excessive length of the proceedings before the Constitutional Court.

The Court awarded the applicant a total of 1,950 euros in respect of non-pecuniary damages and costs and expenses.

ii. Judgment Execution Procedure

The Government submitted their Action Plan of 22 February 2022[193] to the Committee of Ministers – Department for the Execution of Judgments of the European Court of Human Rights in which they set out all the individual and general measures undertaken to execute the judgment.

191 *Süßmann v. Germany*, no. 20024/92, § 56 in limine, Reports of Judgments and Decisions 1996-IV.

192 See, mutatis mutandis, *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 108-10, where proceedings before the Constitutional Court regarding the education of Roma children lasted four years and one month; see also *Nikolac v. Croatia*, no. 17117/06, § 17-18; *Butković v. Croatia*, no. 32264/03, § 27; and *Šikić v. Croatia*, no. 9143/08, § 36-38, where the Court found violations of the reasonable-time requirement set forth in Article 6(1) of the Convention in cases involving labour-related and housing issues; the constitutional proceedings in those cases lasted approximately three years and four months, three years and six months, and three years and nine months, respectively.

193 https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22DH-DD(2022)235E%22]}

(a) Individual Measures

Just satisfaction for non-pecuniary damages in the amount of 1,500 euros awarded by the Court was paid to the applicant.

(b) General Measures

The Government has taken all the necessary measures in response to the Court's views and notified the Committee of Ministers that the Constitutional Court was not fully operational at the moment since the terms of office of three of the seven judges have officially expired because they reached retirement age.

The Government thus noted that the Constitutional Court, as the highest court the citizens must apply to before lodging an application with the Court, had to make additional efforts to ensure the efficient, adequate and effective protection of human rights and fundamental freedoms of Montenegro's citizens.

In this respect, after the Constitutional Court of Montenegro submitted the relevant documents, the Government notified the Committee of Ministers of the entire constitutional appeal procedure, the structure and number of judicial panels ruling on constitutional appeals, the number of advisers and other professional associates working on constitutional appeal cases and the total number of constitutional appeals ruled on by year.

The judgment has been translated and published on the websites of the Supreme Court of Montenegro and the Office of the Representative of Montenegro before the European Court of Human Rights, as well as in the Official Gazette of Montenegro. The judgment is also in the Catalogue of Regulations, the software for monitoring Montenegro's regulations. Because of its exceptional importance, the judgment has been disseminated, *inter alia*, to the Constitutional Court of Montenegro, the Supreme Court of Montenegro, the Parliament of Montenegro – the Committee on the Political System, the Judiciary and the Administration, and the Centre for Training in Judiciary and State Prosecutor's Office.

iii. Relevance to Case-Law

Back in 2018, the Supreme Court of Montenegro ruled on a violation of the right to a trial within a reasonable time before the Constitutional Court of Montenegro, bearing in mind the standards set out in the ECtHR's judgment in the case of *Siništaj v. Montenegro.*

In its judgment in the case of Tpz. 26/2018, the Supreme Court partly upheld the claim and awarded the claimant non-pecuniary damages for the violation of his right to a trial within a reasonable time before the Constitutional Court. It explained that the proceedings fell under the scope of Article 6(1) of the Convention even when they were conducted by the Constitutional Court if their outcome was decisive for civil rights and obligations.

As the Supreme Court specified in the reasoning of its judgment:

> "1) The claimant had filed a constitutional appeal with the Constitutional Court of Montenegro, complaining of a violation of his human right enshrined in the Constitution by the Supreme Court's decision Už-Tpz. no. 1/15 of 16 November 2015 and acquired the status of a party to proceedings on a constitutional appeal in accordance with Article 70 of the Law on the Constitutional Court.
>
> Article 2(1) of the Law on the Protection of the Right to a Trial within a Reasonable Time does not recognise parties to proceedings on constitutional appeals as eligible for court protection against violations of the right to a trial within a reasonable time. However, paragraph 2 of that Article lays down*, inter alia*, that the right to court protection against violations of the right to a trial within a reasonable time shall be determined in accordance with the case-law of the European Court of Human Rights.
>
> The ECtHR has repeatedly held that the Contracting States' obligation to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time, applied also to the Constitutional Courts (Grand Chamber, First Division, Decision as to the admissibility of the application in the case of *Strahinja Đuričić v. Croatia*, no. 67399/01, 2003). This ECtHR view applies to all constitutional proceedings preceded by proceedings before ordinary courts that had ended with a final decision. However, the ECtHR went further and found that an "autonomous" violation of the civil limb of Article 6(1) could take place in proceedings before Constitutional Courts, which means that such violations can occur when the proceedings before the Constitutional Court had not been preceded by proceedings before ordinary courts and that it is only necessary that a "civil right" in the meaning of Article 6(1) is at issue. The leading judgment in that respect was delivered by the ECtHR's Grand Chamber in the

case of *Süßmann v. Germany* (1996). The respondent Government in that case claimed that Article 6(1) was not applicable to the length of proceedings before the Federal Constitutional Court. The ECtHR, however, came to the opposite conclusion after conducting a test of the applicability of Article 6(1) of the Convention from the aspect of the decisiveness of the proceedings before the Constitutional Court for civil rights and obligations. The ECtHR said the following in paragraph 41 of its judgment in this case:

"The Court recalls that proceedings come within the scope of Article 6 para. 1 of the Convention, even if they are conducted before a Constitutional Court, where their outcome is decisive for civil rights and obligations (see, *inter alia*, the *Kraska v. Switzerland,* judgment of 19 April 1993, Series A no. 254-B, p. 48, § 26)."

Bearing in mind the relevant case-law of the European Court of Human Rights, the Supreme Court dismisses as ill-founded the arguments of the Protector of Property and Legal Interests of Montenegro, who said in his response to the claim that parties to proceedings on constitutional appeals were not entitled to claim court protection against violations of the right to a trial within a reasonable time. Therefore, the Supreme Court holds that the claimant is entitled to court protection against a violation of his right to a trial within a reasonable time that may have occurred before the Constitutional Court during the proceedings on the constitutional appeal he had filed against Montenegrin Supreme Court's ruling Už-Tpz.no.1/15 of 16 November 2015."

After concluding that the claimant was entitled to court protection against a violation of his right to a trial within a reasonable time in constitutional appeal proceedings, the Supreme Court examined the reasonableness of the length of proceedings, bearing in mind the circumstances of the case at hand and the criteria the ECtHR developed in its case-law:

"The Supreme Court has determined the following:

1. Complexity of the case

The Supreme Court notes that the proceedings the claimant initiated by filing a just satisfaction claim on 15 February 2012 (due to his belief that his right to a trial within a reasonable time had been violated in

administrative proceedings and the administrative dispute he had instituted over the request for inspection and prohibition of construction), which preceded the proceedings before the Constitutional Court of Montenegro initiated by the submission of a constitutional appeal, was not complex either in terms of facts or law. Specifically, the Constitutional Court was to decide whether the claimant's right to a fair trial under Article 32 of the Montenegrin Constitution and Article 6(1) of the ECHR had been violated because of the Supreme Court's decision to dismiss the claimant's just satisfaction claim (of 15 February 2012). The documents in the Constitutional Court's case file show that the Constitutional Court felt no need to require of the applicant to eliminate any deficiencies that might preclude it from ruling on the constitutional appeal, which would have affected the length of proceedings before that court. Furthermore, the Constitutional Court did not communicate the constitutional appeal to the other party to the proceedings, i.e. the Supreme Court; nor did it require of the latter to communicate any documents, data or information or, for that matter, provide a reply to or opinion on the allegations in the constitutional appeal (as prescribed by Article 33 of the Law on the Constitutional Court), wherefore the proceedings could have only been shorter, rather than prolonged, given the absence of that part of the proceedings. Therefore, the Supreme Court finds that the constitutional law proceedings in the case at hand were not complex.

2. Applicant's conduct

Having perused the case file of the Constitutional Court and the case file of the Supreme Court, which was formed in the proceedings that preceded the proceedings before the Constitutional Court, the Supreme Court finds that the claimant's actions or omissions had not contributed to the unreasonable prolongation of the proceedings concerning the claim for just satisfaction of 15 February 2012.

3. Conduct of the court and other state authorities

The Supreme Court notes that the claimant filed an action for fair redress to the Supreme Court of Montenegro on 15 February 2012 (concerning the action that refers to an action in connection with the proceedings which have been initiated by the claimant who claims a violation of his right to a trial within a reasonable time). The Supreme Court issued decision Tpz. no. 6/12 rejecting the action on 6 March 2012.

The claimant filed a constitutional appeal against the Supreme Court's decision on 28 May 2012. The Constitutional Court issued its decision on the appeal, Už-III. no. 259/12 on 29 May 2015, quashing the Supreme Court's decision no. 6/12 of 6 March 2012 and remitting the case to it for a new examination. The Constitutional Court's decision Už-III. no. 259/12 of 29 May 2015 was submitted to the Supreme Court on 8 October 2015. Therefore, the first proceedings before the Constitutional Court lasted three years, four months and nine days.

During the re-examined proceedings, the Supreme Court issued decision Už-Tpz. no.1/15 on 16 November 2015, rejecting the action for fair redress (filed on 15 February 2015). Therefore, the re-examined proceedings before the Supreme Court lasted one month and eight days.

On 8 February 2016, the claimant filed a constitutional appeal against the Supreme Court's decision Už-Tpz. no. 1/15 of 16 November 2015. The Constitutional Court ruled on the constitutional appeal on 1 June 2018, but forwarded its decision Už-III. no. 116/16 after editorial revisions to the claimant on 21 July 2018. It transpires that the second proceedings before the Constitutional Court lasted two years, five months and 13 days, reckoned from the day the constitutional appeal was filed with the Constitutional Court (8 February 2016) to the day the latter served its decision on the appelant (21 July 2018).

Under Article 39(2) of the Law on the Constitutional Court (Official Gazette of Montenegro no. 11/2015 of 12 March 2015, entered into force on 20 March 2015), the Constitutional Court must rule on each case within 18 months from the day the proceedings before that court are instituted. This Law was valid at the time the second proceedings before the Constitutional Court were pending. Therefore, the Constitutional Court was under the obligation to rule on the claimant's constitutional appeal by 8 August 2017 at the latest (the deadline started running on 8 February 2016, when the claimant lodged the constitutional appeal). However, the proceedings before the Constitutional Court exceeded the deadline set out in Article 39(2) of the Law on the Constitutional Court by almost a year, more precisely by 11 months and 12 days (reckoned from 8 August 2017, when the proceedings should have been completed under the law, to 21 August 2018, when the Constitutional Court's decision was served on the appellant).

In sum, the Supreme Court notes that the first proceedings before the Constitutional Court lasted three years, four months and nine days and that the second proceedings lasted two years, five months and 13 days, i.e. a total of five years, nine months and 22 days. The preceding two proceedings before the ordinary court – the Supreme Court of Montenegro – lasted one month and 26 days. The Supreme Court bore in mind that although the obligation to rule on cases within a reasonable time applied also to the Constitutional Court, when so applied it could not be construed in the same way as for an ordinary court and that its role as guardian of the Constitution made it particularly necessary for a Constitutional Court sometimes to take into account considerations other than the mere chronological order in which cases were entered on the list, such as the nature of a case and its importance in political and social terms (see the Grand Chamber's final decision as to the admissibility of the application in the case of *Strahinja Đuričić v. Croatia*, no. 67399/1, 2003). However, in view of the fact that the length of the second proceedings before the Constitutional Court exceeded the statutory deadline by nearly one year, as well as that the first proceedings before the Constitutional Court lasted three years, four months and nine days, the Supreme Court finds that the proceedings before the Constitutional Court fall short of the reasonable time requirement and that the claimant's right to a trial within a reasonable time enshrined in Article 6(1) of the ECHR has been violated.

4. What is at stake for the claimant

It is in the interest of all parties, especially claimants, that proceedings before the relevant courts are completed as soon as possible, i.e. within a reasonable time. However, in this particular case, given that the proceedings violating the right to a trial within a reasonable time concerned a claim for the compensation of non-pecuniary damages due to the mental anguish, frustration and uncertainty caused, as the claimant alleged, by the unreasonable length of the administrative proceedings and the administrative dispute, the Supreme Court considers that the proceedings were ordinary and, as such, did not affect the amount of claimant's claim.

Departing from the above criteria in deciding on the merits of the amount of the claimant's claim, the Supreme Court notes that the purpose of awarding non-pecuniary damages for violations of the right

to a trial within a reasonable time is to provide the parties with adequate pecuniary compensation for the frustration and uncertainty they have faced because of the unreasonable length of the court proceedings. In the case at hand, bearing in mind the above-mentioned purpose of just satisfaction in the context of the above facts, the Supreme Court holds that redress in the amount of 300,00 euros constitutes sufficient compensation for the frustration and uncertainty the claimant felt because of the length of the constitutional appeal proceedings. The awarded sum is just satisfaction for the degree of violation of the claimant's right enshrined in Article 6(1) of the ECHR."

However, the Supreme Court had to deviate from such an approach due to the Montenegrin Constitutional Court's legal opinion and now holds that it has absolutely no jurisdiction for such cases and rejects the claims. Consequently, the question remains whether there is a domestic legal remedy providing protection of the right to a trial within a reasonable time before the Montenegrin Constitutional Court.

In its legal opinion, the Constitutional Court stated the following:

"The Constitutional Court's legal status vis-à-vis all three branches of government (legislative, executive and judicial) is fully and clearly defined in the Montenegrin Constitution – it is a *sui generis* authority that protects constitutionality and legality (Article 11(6) of the Constitution). The Constitutional Court's jurisdiction and powers directly emanate from the Constitution and render it the highest authority of constitutional guarantees. Article 149(3) of the Constitution lays down, *inter alia*, that the Constitutional Court is competent to rule on constitutional appeals of violations of human rights and freedoms enshrined in the Constitution once all effective remedies have been exhausted. This legal remedy provides all persons (both natural and legal) with institutional protection of their human rights and fundamental freedoms at the national level, including protection of the right to a fair and public trial within a reasonable time enshrined in Article 32 of the Constitution, before they complain to the European Court of Human Rights in Strasbourg.

The Law on the Constitutional Court (Official Gazette of Montenegro no. 11/15) governs, *inter alia*, the proceedings before the Constitutional Court and other issues of relevance to the work of the Constitutional Court. Article 23(1) of the Law on the Constitutional Court entitles the Constitutional Court to regulate, in its Rules of Procedure, its work and decision-making, its public relations, international cooperation, professional development, and other issues of relevance to its work in greater detail.

In addition to the issues set out in the Law on the Constitutional Court, the Constitutional Court's Rules of Procedure (Official Gazette of Montenegro no. 7/16) govern in greater detail the organisation, the proceedings before the Constitutional Court and other issues of relevance to its work. Article 103(4) of the Rules of Procedure sets out that documents in its case files, with the exception of written responses and opinions of state authorities received during the proceedings and certified decisions and rulings, shall not be available to courts and other state authorities.

The Law on the Protection of the Right to a Trial within a Reasonable Time entitles parties to civil court proceedings, administrative disputes and to criminal proceedings to protection of their right to a trial within a reasonable time if the proceedings concern the protection of their rights under the European Convention on Human Rights (Article 2(1)); and specifies that the legal means for protecting the right to a trial within a reasonable time include: 1) requests for review and 2) actions for fair redress (Article 3); that supervisory appeal proceedings are ruled on by court presidents and that courts with over 10 judges can designate in their annual schedules a judge who will rule on such requests for review, in addition to the court presidents (Article 10) and that actions for fair redress may be filed by a party that had previously filed a request for review with the relevant court, and that such actions shall be filed with the Supreme Court within six months from the day of receiving of the final decision adopted in proceedings referred to in Article 2 of this Law, and within six months from the day of receiving of the final decision on the request for review concerning the decision enforcement procedure (Article 33, paragraphs 1 and 2).

The above provisions of the Law on the Protection of the Right to a Trial within a Reasonable Time clearly demonstrate that this Law secures protection of the right to a trial within a reasonable time in proceedings before ordinary courts, specifically in: civil proceedings, in administrative disputes and in criminal proceedings (within six months from the day of receiving of the final decision rendered in proceedings referred to in Article 2 of this Law, and within six months from the day of receiving of the final decision on the request for review) but not in proceedings before the Constitutional Court.

Departing from the Constitutional Court's status and role in the Montenegrin constitutional law system and the above-mentioned provisions of the Law *in fine*, it follows that the Supreme Court of Montenegro is not entitled to review parties' complaints of violations of the right to a trial within a reasonable time in proceedings before the Constitutional Court or to establish such violations."

3.5. Article 8 – Right to Respect for Private and Family Life

Article 8
Right to Respect for Private and Family Life

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

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

Article 8 of the Convention, which protects the right to respect for family and private life, became particularly topical during the COVID-19 pandemic, both at the national and the European levels given that some of the measures the relevant authorities adopted in response to the pandemic were in violation of standards developed to ensure protection of and respect for private life. On 23 July 2020, the Constitutional Court of Montenegro adopted decision U-II no. 22/20 quashing the Decision of the National Coordination Body for the Suppression of Infectious Diseases (the NCB) on the publication of the names of individuals in self-isolation, since it was incompatible, *inter alia*, with Article 8 of the Convention. The Constitutional Court's Decision led to the filing of a large number of claims by individuals seeking non-pecuniary damages for violations of their right to respect for their private life, which the basic courts ruled on in 2021.

Article 283b of the Civil Procedure Law was applied in these cases. After the completion of one case, the other proceedings were stayed until the decision in the first case became final. In this so-called pilot judgment in case P. no. 3757/20, the Court of First Instance in Podgorica upheld the claim and ordered the State to pay the claimant 500,00 euros in respect of the non-pecuniary damage she had sustained because of a violation of her personal right – the right to the protection of her private life due to the publication of data on her self-isolation. In its judgment Gž.no.4741/21, the High Court in Podgorica upheld the first-instance decision, but modified the amount of the award to 300,00 euros.

When the judgment became final, the Montenegrin Government approved the conclusion of settlements with the other claimants whose names had been published on the Government website pursuant to the NCB's Decision on the publication of the names of individuals ordered into self-isolation. The Protector of Property and Legal Interests of Montenegro was tasked with reaching settlements with 2,720 individuals awarding each of them 300 euros in respect of non-pecuniary damage for violations of their personal rights caused by the publication of their personal data.[194]

Application of Article 283b of the Civil Procedure Law is an example of good practice when a large number of claims based on identical or similar facts and the same legal grounds have been filed with the court. It has resulted in alignment of case-law, legal certainty, as well as in lower costs of proceedings.

Cases engaging Article 8 of the Convention drew a lot of attention in 2021 at the European level as well. For instance, in its judgment in the case of *Vavřička and Others v. the Czech Republic* [GC],[195] which concerned the mandatory vaccination of children against common infections, the Court emphasised that mandatory vaccination amounted to interference with the right to private life but that the measure was proportionate to the State's legitimate aim of protecting public health from life-threatening diseases. The Court did not find a violation of Article 8, concluding that the impugned measure was necessary in a democratic society.

Article 8 of the Convention provides protection to a variety of rights and relationships. The main categorisation of the protected rights is reflected in the very name of the Article - Right to Respect for Private Life and Family Life. Through its broad case-law, the Court has included in the respect for private life also the right to physical, psychological and moral integrity, the right to privacy and the right to identity and autonomy.[196] Attempting to produce a comprehensive list of all the aspects of an individual's life that constitute "private life" under Article 8 is both impossible and unhelpful, given that the Convention is a living instrument which must be interpreted in the light of present-day conditions. A detailed overview of Article 8 case-law and standards is available in the Guide to Article 8 ECHR and the Right for Respect of Private Life, prepared

194 The Montenegrin Government press release is available at: https://www.gov.me/en/article/the-52nd-cabinet-session-23-december-2021.

195 *Vavřička and Others v. the Czech Republic*, no. 47621/13 and 5 others, ECHR 2021.

196 Guide to Article 8 ECHR and the Right to Respect for Private Life, the AIRE Centre, the Supreme Court of Montenegro and the Montenegrin Ombudsman, 2021. Available in Montenegrin at: https://sudovi.me/static//vrhs/doc/Pravo_na_postovanje_privatnog_zivota.pdf.

by the AIRE Centre, the Supreme Court of Montenegro and the Montenegrin Ombudsman. On the other hand, the concept of family life includes relationships going beyond the traditional understanding of family, wherefore the standards apply also to unmarried partners who have been cohabiting for a long period of time, raising children together or have demonstrated their commitment to each other by any other means,[197] as well as homosexual partners.[198]

The States' negative obligations under Article 8 include their duty to refrain from arbitrary interference with respect for private and family life, the home and correspondence, where they enjoy a specific margin of appreciation.[199] Therefore, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, the State has positive obligations, which may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. [200]

Like in the case of other qualified rights, when examining whether Article 8 of the Convention has been violated, the ECtHR shall, above all, examine whether there was an interference with the protected right; whether the interference was prescribed by law; whether it pursued a legitimate aim and whether the interference was necessary in a democratic society.[201]

The five judgments in which the Court had earlier found Montenegro in violation of Article 8 were presented in the prior Analyses. The facts of these cases and the legal issues that arose in them varied, reflecting the breadth of the rights regulated by this Article of the Convention. Some of these judgments are of relevance not only to the national legal system, but to the ECtHR's jurisprudence as well. For instance, in its judgment in the case of *Drašković v. Montenegro*,[202] the ECtHR for the first time explicitly found that a request to exhume the remains of a close family member and transfer them to another grave fell within the scope of the right to respect for private and family life.

197 *Van der Heijden v. the Netherlands* [GC], no. 42857/05, ECHR 2012.

198 *Schalk and Kopf v. Austria*, no. 30141/04, Reports of Judgments and Decisions 2010.

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

200 *X and Y v. the Netherlands*, no. 8978/80, § 23, A91 ECHR 1985; *Marckx v. Belgium*, no. 6833/74, A31 ECHR 1979.

201 Guide to Article 8 ECHR and the Right to Respect for Private Life, the AIRE Centre, the Supreme Court of Montenegro and the Montenegrin Ombudsman, 2021. Available in Montenegrin at: https://sudovi.me/static//vrhs/doc/Pravo_na_postovanje_privatnog_zivota.pdf.

202 The ECtHR's judgment in the case of *Drašković v. Montenegro*, no. 40597/17 is presented in the 2020 Analysis of ECtHR Judgments in Respect of Montenegro, p. 56. The Analysis is available at: https://sudovi.me/static//vrhs/doc/Analysis_of_MNE_judgments_before_the_ECHR_-_FINAL.pdf.

In its judgment in the case of *Mijušković v. Montenegro*,[203] the Court found a violation of the right to respect for family life because the final judgment on parental rights had not been enforced for over three years. The *Antović and Mirković v. Montenegro* case concerned a violation of the right to private life of university professors, because of the video surveillance installed in the university amphitheater. In its judgment in the case of *Alković v. Montenegro*, the ECtHR stated that an individual's ethnic identity also fell under the scope of Article 8 of the Convention and found a violation of this right taken in conjunction with Article 14 of the Convention, because the relevant authorities had not examined the links between the racist views and violent actions against the applicant forcing him to move out of his home. The ECtHR's judgment in the case of *Milićević v. Montenegro*[204] also concerns an interesting issue – the State's responsibility for an assault on the applicant by a person of unsound mind. The Court found a violation of Article 8 of the Convention, because the relevant authorities should have been aware of and prevent the real and immediate risk of violence.

In 2021, the ECtHR delivered one judgment finding Montenegro in violation of Article 8 of the Convention. In *Špadijer v. Montenegro*, it found a violation of the applicant's right to respect for private life, because the State had not fulfilled its positive obligations and protected her from workplace harassment (bullying).

This is the first judgment related to ill-treatment at work in which the ECtHR found Montenegro in violation of the Convention and it provides the national courts with valuable guidance on how to proceed in similar cases.

203 The ECtHR's judgments in the cases of *Mijušković v. Montenegro*, no. 49337/07, *Antović and Mirković v. Montenegro*, no. 70838/13 and *Alković v. Montenegro*, no. 66895/10, are presented in the Analysis of ECtHR's Judgments in Respect of Montenegro, pp. 78, 80 and 97 respectively. The Analysis is available in Montenegrin at: https://sudovi.me/static/vrhs/doc/11233.pdf.

204 The ECtHR's judgment in the case of *Milićević v. Montenegro*, no. 27821/16 is presented in the Analysis of ECtHR Judgments in Respect of Montenegro in 2018 and 2019, p. 94. The Analysis is available in Montenegrin at: https://sudovi.me/static//vrhs/doc/16_II_-_Dopuna_Analize_-_MNE.pdf

Špadijer v. Montenegro

Application no. 31549/18
Judgment of 9 November 2021

i. Analysis of the Judgment

The applicant complained of workplace harassment in violation of her dignity, honour and reputation, as well as her personal and professional integrity, resulting in psychological problems and complete loss of working capacity and retirement at the age of 37. The ECtHR said that the issue of workplace harassment fell under the scope of Article 8 of the Convention, that the relevant authorities should have taken into account all the circumstances of the case when they were ruling on the existence of bullying, in particular the potential whistle-blowing context.

(a) The facts

The applicant worked as head of shift in the women's prison in the Institute for the Execution of Criminal Sanctions (IECS). In January 2013, the applicant reported five of her colleagues for indecent behaviour at work on New Year's Eve. As established later in disciplinary proceedings, some of the male guards had entered the women's prison and one of them had had "physical contact" with two inmates there.

On 12 January 2013 the applicant had a telephone conversation with another colleague, N.R. He told her that she should not have reported the other colleagues unless they had killed somebody, and that it was her fault that they would get fired. He also said that a large number of colleagues were against her, that from then on she should be prepared for anything and that she should take care of what she was doing. The following day, her vehicle was damaged in front of the building where she lived. An on-site inspection took place and the State prosecutor was informed. She filed a criminal complaint with the police about her conversation with N.R. and the damage to her vehicle, but the prosecutor considered that the elements of a criminal offence subject to public prosecution or of a misdemeanour were lacking in the situation involving N.R.

Between January and August 2013, the applicant was forbidden from organising duty shifts; some of her colleagues failed to perform specific tasks allocated by her; her report on the illicit actions of one of the prisoners had never been dealt with; the same prisoner had said that she was not worried about

the report as she had been told that the applicant would soon be "out of there"; she had been ordered to make coffee twice a day for one of the prisoners, and had complained about it to the assistant governor, whereupon the governor asked her what had given her the right to complain to the assistant governor about that.

In August 2013, the applicant requested her employer to initiate proceedings for her protection against bullying, complaining of continuous insults and humiliation at work which were causing health problems. The mediator dismissed her request as unfounded, considering that even assuming that her allegations were true, the conduct complained of had not been continuous. The incidents with N.R. and the damage to her car had taken place outside of the workplace and thus were not within the IECS's sphere of responsibility, and her transfer to another position had been due to her failing to do her job properly.

The applicant instituted civil proceedings against her employer. She maintained that her personal and professional integrity had been violated. She also submitted that no decision on her appointment had been issued as of November 2013 and that her salary was being calculated on the basis of a lower coefficient. During the proceedings, an expert witness found that the applicant had psychological problems related to conflict at work and that her capacity to function was permanently reduced by 20%. A week before the domestic court was due to rule in the ongoing civil proceedings, the applicant was assaulted in a car park. The attacker approached her from behind and inflicted several blows, telling her: "Be careful what you're doing". She reported the incident but the investigation did not yield any results.

The Court of First Instance in Podgorica ruled against the applicant in civil proceedings. The court considered her submissions to be true, and observed that the respondent party had offered no evidence to the contrary. It found that the applicant's psychological problems were related to conflict at work. However, it considered, in substance, that the events complained of did not amount to bullying as they had lacked the necessary frequency. In particular, bullying was a form of systematic psychological ill-treatment, rather than being sporadic and individual, and as such required repetition of the actions over a certain period. According to most academics in this field, that meant at least once a week for at least six months. That position was also accepted in the domestic case-law. In addition, the Court of First Instance held that the fact that no decision had been made on the applicant's appointment after November 2013, and the fact that her salary was calculated on the basis of a different coefficient, did not constitute bullying either.

In May 2016, the applicant retired owing to a complete loss of working capacity caused by illness. The Pension Fund Disability Commission specified in its findings that the applicant's psychological problems had appeared for the first time during 2013 after a stressful situation at work, after which she had received continuous outpatient psychiatric treatment.

(b) Relevant principles

While the essential object of Article 8 of the Convention is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in effective respect for private life, which may involve the adoption of measures in the sphere of the relations of individuals between themselves.[205]

The concept of private life includes a person's physical and psychological integrity. States have a duty to protect the physical and moral integrity of an individual from other persons and, to that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals,[206] including harassment at work.[207]

In the context of attacks on the physical integrity of a person, such protection should be ensured through efficient criminal-law mechanisms.[208] Under Convention principles, the prosecution may be pursued by the state prosecutor, as well as the injured party in the role of a subsidiary prosecutor.[209] In each case, however, irrespective of who pursued prosecution, the Court must examine the relevant criminal-law mechanisms and the manner in which they were implemented.

As regards less serious acts between individuals which may violate psychological integrity, an adequate legal framework affording protection does not always require that an efficient criminal-law provision covering the specific act be in place. The legal framework could also consist of civil-law remedies capable of affording sufficient protection.[210]

205 *Söderman v. Sweden* [GC], no. 5786/08, § 78, ECHR 2013.

206 *Isaković Vidović v. Serbia*, no. 41694/07, § 59, ECHR 2014.

207 *Dolopoulos v. Greece* (dec.), no. 36656/14, § 56-57, ECHR 2015.

208 *Remetin v. Croatia* (No. 2), no. 7446/12, § 70 *in fine*, ECHR 2014.

209 *M.S. v. Croatia*, no. 36337/10, § 75, ECHR 2013.

210 *X and Y v. the Netherlands*, 26 March 1985, § 24 and 27, Series A No. 91; *Tolić v. Croatia* (dec.), no. 13482/15, § 94-95, ECHR 2019; and *Noveski v. the Former Yugoslav Republic of Macedonia* (dec.), no. 25163/08 and two

The Court also considered, albeit in the context of Article 10 of the Convention, that whistle-blowing by an applicant regarding alleged unlawful conduct on the part of his or her employer required special protection in certain circumstances.[211]

(c) The Court's assessment

In the Court's view, the issue before it was not whether the remedies used by the applicant led to a result favourable to her but whether they were sufficient and accessible and applied a standard of protection that secured in principle effective defence of the applicant's rights guaranteed by Article 8 of the Convention.

As the Court noted, the domestic law provided for possibilities for the applicant to seek protection against harassment at work. In her particular case, those possibilities included mediation, administrative complaints to her managers and the authorities responsible for managing the prison system, and civil proceedings for damages. There was no indication that those possibilities, as set out under the relevant law, were inherently inadequate or insufficient to provide the requisite protection against incidents of harassment. It is also important, however, that the available remedies should function in practice.

The applicant first initiated proceedings before her employer and then before the civil courts. The mediation proceedings before the applicant's employer were not in compliance with the relevant legislation in that they were neither initiated nor completed within the statutory time-limits. More importantly, the mediator examined whether the applicant's request was well-founded, thereby overstepping his statutory competence since there was nothing in the legislation authorising him to do so.

After the mediation proceedings, the applicant lodged a civil claim. It is undisputed that the civil courts considered the applicant's submissions in respect of the incidents at work to be true and found that there was at least some causal link between those incidents and the applicant's illness and psychological suffering. Regardless of that, however, the applicant did not receive protection because the courts required proof of incidents occurring every week for six months. Despite the margin of appreciation enjoyed by Contracting States in devising protection mechanisms in respect of acts of harassment at work, the Court found it difficult to

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others, § 61, ECHR 2016.

211 *Guja v. Moldova* [GC], no. 14277/04, § 72 and 77, ECHR 2008; *Langner v. Germany*, no. 14464/11, § 47, ECHR 2015; *Heinisch v. Germany*, no. 28274/08, § 63, ECHR 2011 (excerpts).

accept the adequacy of such an approach in the instant case. The Court considered that complaints about bullying should be thoroughly examined on a case-by-case basis, in the light of the particular circumstances of each case and taking into account the entire context. In other words, there may be circumstances in which such incidents are less frequent than once a week over a period of six months and still amount to bullying, or circumstances in which such incidents are more frequent and yet do not amount to bullying.

The Court also noted that the relevant case-law in Montenegro was scarce and not settled in relation to, in particular, the element of frequency of occurrence of bullying needed to trigger the application of the Prohibition of Ill-treatment at Work Act. Only four domestic judgments have been provided by the Government. Two of them found in favour of the claimants and two against the claimants, and only the latter two required bullying to occur at least once a week for a period of six months.

The courts examined only some of the workplace incidents and made no attempt to establish how often these other incidents had been repeated and over what period, or to examine them individually and taken together with the other incidents. They also failed to consider the context and the alleged background to the incidents, notably the applicant's reporting some of her colleagues for their conduct on the New Year's Eve, conduct which led to disciplinary proceedings and sanctions. The Court could not overlook the applicant's allegation that the acts of harassment to which she had been subjected were in reaction to her reporting the alleged illegal activities of some of her colleagues and were aimed at silencing and "punishing" her. In the Court's view, the States' positive duty under Article 8 to effectively apply in practice laws against serious harassment takes on a particular importance in circumstances where such harassment may have been triggered by "whistle-blowing" activities.

As per the damage to the applicant's car and the physical assault on her, the Court said that the national criminal law framework provided sufficient protection from such attacks. However, the State prosecutor did not issue any official decision whatsoever for more than eight and six years respectively in response to the applicant's complaints, thereby effectively preventing her from taking over the investigation as a private prosecutor.

In view of the above the Court considered that the authorities' failure to assess all the incidents in question and failure to take account of the overall context, including the potential whistle-blowing context, was defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention.

The Court awarded the applicant 4,500 euros in respect of non-pecuniary damage.

ii. Judgment Execution Procedure

The Government are under the obligation to submit, by 9 August 2022, to the Committee of Ministers – Department for the Execution of Judgments of the European Court of Human Rights an Action Plan/Report specifying all the individual and general measures undertaken to execute this judgment.

iii. Relevance to Case-Law

In its judgment in the case of *Špadijer v. Montenegro*, the Court noted that the Montenegrin courts' case-law on workplace harassment was scarce and not settled in relation to, in particular, the element of frequency of occurrence of bullying needed to trigger the application of the Prohibition of Ill-treatment at Work Act.

There are, however, examples of judgments delivered by Montenegrin courts illustrating that they had reviewed Court standards and drawn attention to them even before the national courts ruled in proceedings initiated by applicant Špadijer. One such case was Gž. no. 5382/12-11 ruled on by the High Court in Podgorica. It had dismissed the claimant's appeal as ill-founded and upheld the first-instance judgment dismissing the claim of discrimination and workplace harassment. Although the High Court found the appeal ill-founded, it nevertheless instructed the lower court to hereinafter apply the standard on reversal of the burden of proving conduct amounting to bullying.

The High Court stated the following in its judgment:

> "The first-instance court found, and the parties did not dispute, that the claimant had been employed for a fixed period of time with the respondent, as a salesperson in the story XYZ in the Delta City Shopping Centre in Podgorica, that she had been offered an amended work contract on 14 May 2011, to work in the Esprit store, which she agreed to, and that her employment with the respondent ended on 28 May 2011. The claimant has instituted separate civil proceedings in regard to that decision.
>
> The first-instance court rightly dismissed the claims in the appeal and found that the claimant had not been discriminated against by the

respondent or that she had been treated differently than other workers, as shown by the statements of witnesses A.K., V.B., K.V., M. B. and N. P., which the court rightly qualified as objective, honest and clear.

Namely, the questioned witnesses gave identical statements denying that any employee's treatment of the claimant had amounted to or aimed at violating her dignity, reputation or personal and professional integrity, or at causing fear or a hostile, degrading or humiliating environment. The statements made by A.K. and V.B. showed that the claimant had not been discriminated against, insulted or humiliated in any way by the respondent's management or her other co-workers.

This Court also dismisses as ill-founded the claimant's assertions in the appeal that the first-instance court incorrectly concluded that the findings and statements of psychologist Dr N.P. and psychiatrists Dr G. and Dr R. were irrelevant in this legal matter. The first-instance court qualified their reports as expert, issued in accordance with medical and scientific rules. It rendered a correct decision because psychologist Dr N.P., who was questioned at the hearing in her capacity of witness, said that she had come to the conclusion that the claimant's illness had been caused by workplace harassment exclusively based on her interview of the latter and that she had no other sources corroborating her conclusion.

This Court considers ill-founded the claimant's allegations in the appeal that the first-instance court had not properly assessed the presented evidence (…).

Namely, for discrimination to exist, both requirements set out in Article 2(2) of the Anti-Discrimination Act (…) have to be fulfilled: that the discriminator had engaged or failed to engage in specific treatment, and that such treatment or non-treatment is based on a personal characteristic of the individual discriminated against. Given that such treatment by the respondent had not been proven during the proceedings, the Court decided to dismiss the appeal and upheld the first-instance judgment.

Irrespective of this Court's decision-making, it considers well-founded the allegation in the claimant's appeal that the burden of proving that there had been no bullying rests with the respondent under Article

28 of the Prohibition of Ill-Treatment at Work Act. Namely, under the European standard concerning proof of equal treatment, an individual claiming she or he has been discriminated against must make out an arguable case that unequal treatment may have led to discrimination (reasonable doubt), in which case the burden of proving (*onus probandi*) that there has not been unequal treatment due to discrimination shifts to the respondent party. It is precisely for this reason that the claimant is under the obligation to prove her allegations probable by indicating the possibility of obtaining relevant information proving her allegations. Given that the court found during the proceedings that the claimant had not been harassed at work by the respondent's managers or executive director and that they had not discriminated against her in any other fashion, it found that the claimant had not proven probable her allegations. The fact that the first-instance court referred to the rule on the burden of proof borne by the claimant in the meaning of Article 219 of the Civil Procedure Law does not prejudice the lawfulness and correctness of the first-instance judgment."

One of the messages in the *Špadijer v. Montenegro* judgment is that complaints about bullying should be thoroughly examined on a case-by-case basis, in the light of the particular circumstances of each case and taking into account the entire context. The incidents the applicant had been subjected to and which she complained of as bullying, included harassment by her co-workers, damage to her car, prohibition to perform her regular duties, failure of her colleagues to perform the duties she had allocated them, and calculation of her salary on the basis of a lower coefficient.

In case Gž. no. 4145/20-17, the High Court in Podgorica upheld the first-instance court's judgment, finding that the claimant had been subjected to bullying - workplace harassment by the respondent from 16 March 2016 to 26 November 2018 and obligating the respondent to pay him 3,000 euros in respect of non-pecuniary damages for the mental anguish he had suffered due to violation of his dignity, reputation and personal and professional integrity, as well as 1,000 euros for the fear he had suffered. The High Court found that the first-instance court had correctly applied the provision on the burden of proof, listing the actions amounting to workplace harassment and examining them together rather than separately, which could serve as guidance for future court decisions on similar cases. This case concerned a longer period of time – one year and eight months – wherefore the courts had not insisted that the actions had to have repeatedly occurred over a specific period of time as they had in their judgments in the *Špadijer* case.

The High Court said the following in the reasoning of its judgment:

> "As per the former, the first-instance court was correct to conclude that the evidence presented by the claimant confirmed that the measures and actions taken with respect to him had been motivated by commander Č.'s ill intentions to sabotage and discredit him; for proving bullying, it suffices that the victim presents evidence that bullying probably occurred, while the burden of proof that no treatment amounting to bullying had occurred rests on the respondent (the employer), which failed to prove as much. It was ascertained that the respondent's actions had placed the claimant in a position unequal to that of other workers with the same qualifications and performing the same job; that his working conditions had continuously deteriorated, facilitating workplace harassment, in the absence of lawful and prompt protection; that the claimant had been disparaged since his performance had been appraised by individuals who were not formally or legally his superiors; that he had unjustifiably been denied the opportunity to attend regular trainings, seminars and other activities fully available to all employees; and that he had been subjected to other treatment aimed at disparaging and isolating him, placing him in a blatantly unequal position vis-à-vis other workers, especially in the light of the constant unlawful endeavours to have his employment with the respondent terminated."

A number of various actions that may amount to workplace harassment depending on the circumstances may also be found in the Supreme Court's judgment in case Rev. no. 600/20 of 25 November 2020 in which it dismissed the appeal on points of law:

> "According to the case file, the claimant had been employed by the respondent since 2005, and as a communal police officer since 2010. Ruling on the claimant's claim of harassment at work and her request to prohibit the further commission or recurrence of workplace harassment and award her non-pecuniary damages for the damage she had suffered due to such harassment, the first-instance court on 15 September 2017 decided on the merits of the claim by an interim judgment, finding that the claimant had suffered workplace harassment from 1 June 2012 to 1 June 2015 and prohibiting the respondent from persisting with such conduct, comprising: yelling at, threatening and insulting the claimant; her unjustified physical isolation from the workplace; unwarranted failure to invite the claimant to joint meetings;

verbal assaults; spreading lies about her in general and in relation to her private life; negative comments of her personal characteristics; use of offensive and disparaging language humiliating her; non-allocation of duties unjustified by the work process requirements; continuing unwarranted threats (e.g. to terminate her employment or other work contracts) and pressures keeping the claimant in constant fear; and degrading and inappropriate comments and actions with sexual innuendos. The respondent's appeal of the interim judgment was dismissed as ill-founded by the second-instance court."

Article 2 of the Prohibition of Ill-Treatment at Work Act, which has been applied since June 2012, defines bullying as any active or passive repetitive conduct at work or related to work towards employees or groups of employees, which is aimed at or actually amounts to a violation of their dignity, reputation, personal and professional integrity, and causes fear or creates a hostile, humiliating or offensive environment, aggravates working conditions or leads the employees to isolate themselves or terminate their employment contract or another contract on their own initiative. Bullying also includes inciting or inducing others to engage in such conduct. Therefore, understanding bullying as systemic, repetitive psychological ill-treatment occurring over a longer period of time and violating personal and professional integrity at least once a week over a period of at least six months, an understanding criticised also by the ECtHR in the *Špadijer* case, is the consequence of case-law rather than an explicit legal provision.

Montenegrin courts continued interpreting bullying in the described way in their recent case-law. The High Court in Podgorica issued a ruling in case Gž no. 2727/20 quashing the first-instance judgment accepting the above definition of bullying. However, the High Court failed to specify in the reasoning of its decision that such an interpretation of bullying was not in accordance with European standards; it quashed the judgment because the first-instance court had failed to properly establish all the decisive facts on which a correct and lawful decision depends.

The High Court stated the following in its decision:

"The dispute concerns the claim that the respondent harassed the claimant by illegally prohibiting her from working and ordering her to leave the workplace on 28 October 2016, whereupon he deactivated her authorisation codes thus preventing her from entering, on 2 November 2016, the offices of the Department for International Search and Extradition and from working on her computer; the

claimant also requested of the court to prohibit the respondent from performing actions amounting to bullying and award her 5,000 euros in non-pecuniary damages plus any statutory interest for the bullying she had suffered.

The first-instance court dismissed the claims as ill-founded. It departed from the definition of bullying as systemic (not individual or sporadic) psychological harassment occurring over a longer period of time, under which, for an employee to be a victim of bullying, the following two requirements need to be fulfilled cumulatively: frequency of conduct violating the claimant's personal and professional integrity, i.e. a specific period of time during which the actions of disparagement and harassment are repeated, where such psychological harassment must occur at least once a week over a period of at least six months; therefore, the court found that, in this specific case, the actions of the respondent were not continuous, that the described behaviour did not amount to a violation of legally protected goods in legal provisions on workplace harassment (bullying), which the claimant sought protection from in her claim. Having found that the facts have been sufficiently clarified, the first-instance court dismissed the parties' attorney's motions to obtain evidence by questioning witness R.S. and by confronting witness R.V. and J.V. The first-instance court found that the claimant had failed during the proceedings to properly prove that the respondent had discriminated against her, i.e. that she had been ill-treated at work by the respondent, that there were no grounds to uphold her request to prohibit him from performing actions amounting to bullying, wherefore there was no reason to award her the requested non-pecuniary damages in the amount of 5,000 euros on those grounds.

The above conclusion of the first-instance court is unacceptable for now, given that it had failed to properly establish during the proceedings all the decisive facts on which a lawful and correct decision depends.

The first-instance court did not properly examine whether the claimant had suffered ill-treatment at work – bullying over a longer period of time, not only in regard to the specific dates, but also during the period when she had not been provided with the possibility of attending training and when her overtime had not been treated the same as the overtime of other employees.

Given that the claimant alleged that ill-treatment harassment – bullying in this case included placing her in an unequal position vis-à-vis other workers with the same qualifications and performing the same jobs – by allocating her more tasks than other employees, by unjustifiably denying her the opportunity to attend trainings, seminars and other activities available to all employees, by treating her differently than other workers with regard to overtime, the first-instance court was under the obligation to – but did not - properly ascertain all the decisive facts on which decisions on the claimant's requests depend, and to set out valid and clear reasons for its decisions in its judgment.

Moreover, the first-instance court failed to conduct a proper assessment of all the adduced evidence, specifically the statements of witnesses with first-hand knowledge of the respondent's attitude towards the claimant; the respondent's denial of the claimant's possibility to enter the workplace, or to ascertain whether the claimant had been ill-treated and discriminated against by the respondent at the time at issue, including the respondent's allocation of more cases to her than the other co-workers, its different treatment of her with regard to her overtime, and whether the respondent enabled the claimant to attend regular trainings, seminars and other activities, as well as the respondent's treatment of the claimant in the context of substantive law to be applied in the case at hand.

The impugned judgment does not include clear, specific and valid reasons for any of the above, wherefore it could not have been reviewed in their absence."

The national courts' case-law indicates that they had not clearly distinguished between discrimination and bullying, i.e. workplace harassment in the past. This may be potentially the consequence of the prior Anti-Discrimination Law (Official Gazette of Montenegro no. 46/10), which defined bullying as a form of discrimination, i.e. as "behaviour in the workplace where one or more persons systematically psychologically abuse or humiliate another person by way of insults, disparagement, harassment and other activities over a longer period of time, bringing that person in an unequal position on any ground referred to in Article 2(2) of this Law, with the aim of violating his/her reputation, honour, human dignity or integrity and where such behaviour may have adverse effects of mental, psychosomatic or social character or compromise the professional future of the person who is the victim of bullying". However, the Law Amending the

Anti-Discrimination Law (Official Gazette of Montenegro no. 18/14) deleted Article 8 containing the above definition of bullying and its categorisation as a separate form of discrimination.

The concept of bullying, as well as the rights, obligations and responsibilities of employers and employees concerning the prevention of ill-treatment at work or in relation to work, are now governed by a separate law – the Prohibition of Ill-Treatment at Work Act (Official Gazette of Montenegro nos. 30/12 and 54/16). Under this law, bullying or ill-treatment at work is any active or passive repetitive conduct at work or related to work towards employees or groups of employees, which is aimed at or actually amounts to a violation of their dignity, reputation, personal and professional integrity, and causes fear or creates a hostile, humiliating or offensive environment, aggravates working conditions or leads the employees to isolate themselves or terminate their employment contract or another contract on their own initiative. Bullying also includes inciting or inducing others to engage in such conduct. Bullying is perpetrated by employers – natural persons, responsible persons of employers – legal persons, employees or groups of employees of an employer or third parties with whom the employees or employers are in contact during the performance of their jobs at the workplace.

The valid Anti-Discrimination Law (Official Gazette of Montenegro nos. 46/10, 18/14 and 42/17) defines discrimination as any legal or actual distinction or unequal treatment or lack of treatment of a person or a group of persons, as well as their exclusion, restriction or preferential treatment based on race, colour, national affiliation, social or ethnic origin, affiliation with a minority nation or minority national community, language, religion or belief, political or other opinion, gender, sex change, gender identity, sexual orientation and/or intersexual characteristics, health, disability, age, material status, marital or family status, actual or presumed membership of a group, political party or another organisation, as well as other personal characteristics.

Discrimination can be direct and indirect. Direct discrimination exists if an act, action or non-action brings or may bring an individual or a group of individuals in the same or similar situation in an unequal position vis-à-vis another individual or group of individuals on one of the enumerated grounds. Indirect discrimination exists if an apparently neutral provision of a law, regulation or another enactment, criterion or practice brings or may bring an individual or a group of individuals in an unequal position vis-à-vis other individuals or group of individuals on any of the enumerated grounds, unless the provision, criterion or practice is objectively and reasonably justified by a legitimate aim and the means employed are appropriate and necessary to achieve that aim i.e. proportionate to

the aim pursued. Inciting, aiding and abetting, instructing and announcing the intention to discriminate against a specific individual or group of individuals on one of the enumerated grounds also constitute discrimination.

Therefore, it transpires from the very provisions of the law that discrimination and bullying are violations of human rights but that they are nevertheless different phenomena with different motives and regulated by separate laws. The motive is the main criterion for distinguishing between these two forms of unlawful conduct.[212] Motives for discriminatory conduct arise from the very definition of discrimination, which may be caused by various personal characteristics, such as, e.g. race, colour, national affiliation, social or ethnic origin, sexual orientation, disability, etc. Therefore, discrimination can occur in all walks of life and it is a much broader concept than bullying.

On the other hand, bullying is associated with work and is not based on an employee's personal characteristics; it aims, *inter alia*, to violate the dignity, reputation or personal and professional integrity of the employee, aggravate their working conditions, which may prompt them to terminate their employment contract. The perpetrator of bullying may be motivated, *inter alia*, by economic interests, jealousy, intolerance, etc.[213] Recurrence is another criterion for distinguishing between discrimination and bullying – one-time commission of the action suffices for the existence of discrimination, while bullying denotes repetitive behaviour at work or related to work towards an employee or a group of employees. However, when assessing this requirement, account needs to be taken of the ECtHR's case-law, especially its recommendations in its judgment in the case of *Špadijer v. Montenegro*. In addition, the legal protection afforded in case of bullying differs slightly from the one afforded in discrimination cases. Employees are entitled to initiate proceedings for protection from bullying with their employer (mediation proceedings). Employees dissatisfied with the outcome of such proceedings may initiate proceedings for protection from bullying with the Agency for Peaceful Settlement of Labour Disputes or with the relevant court.

212 Problems of Distinguishing between Discrimination and Workplace Harassment in Legal Theory and Practice of the Republic of Serbia (*Problemi razlikovanja diskriminacije i zlostavljanja na radu u pravnoj teoriji i praksi Republike Srbije*), Aleksandra K. Petrović, Pravni vjesnik Year 30, No. 2, 2014. Available in Serbian at: https://hrcak.srce.hr/file/193291

213 *Ibid*.

4. Execution of ECtHR Judgments in 2021

Drašković v. Montenegro

Application no. 40597/17
Judgment of 9 June 2020

The Court's judgment in the case of *Drašković v. Montenegro* was reviewed in the Analysis of the Judgments of the European Court of Human Rights in Respect of Montenegro Delivered in 2020. The applicant in this case complained about the national courts' refusal to consider the merits of her claim, related to the exhumation and transfer of the exhumed remains of her husband from one grave to another. In that case, the Court found a violation of Article 8 of the Convention because the domestic court's ruling on the applicant's claim failed to recognise the existence of her rights under Article 8 and subsequently properly balance her interests against the competing interests of her late husband's nephew.

(a) Action Plan/Report

The Government submitted to the Committee of Ministers their Action Report of 24 February 2021[214] and their revised Action Plan of 9 July 2021.[215]

(b) Individual Measures

Under Article 428a of the Civil Procedure Law, the applicant was entitled to seek the reopening of the impugned proceedings within three months from the day the Court's judgment became final.

On 15 February 2021, the applicant sent a letter to the Government, notifying them that she had not filed a request to reopen the impugned proceedings and that she and her late husband's nephew agreed to settle the dispute out-of-court.

In addition, the Government paid 4,500 euros in non-pecuniary damages awarded by the Court to the applicant within the prescribed time limit.

214 https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22DH-DD(2021)243E%22]}

215 https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22DH-DD(2021)704E%22]}

(c) General Measures

The Court noted that the domestic legislation appeared not to regulate situations such as the one in the present case – that is to say that it did not provide a mechanism by which to review the proportionality of the restrictions on the relevant Article 8 rights of the applicant.

Furthermore, the authority charged with resolving such disputes was not defined. Specifically, the domestic courts took the view that the applicant should file the claim with an administrative authority, which, in turn, was unable to process any claim without the consent of the third party (i.e. the nephew of her deceased husband). As already noted, administrative authorities essentially do not deal with such issues. In case of a dispute, administrative authorities issue instructions to the parties to first resolve the matter and then file a request for exhumation. In the Court's view, such proceedings clearly lacked the ability to balance the competing interests, and such interests could perhaps be properly balanced in civil contentious proceedings that the applicant actually initiated.

The Government emphasised in their Report that the applicant's case was a rare and isolated incident, given that similar cases were not to be found in the domestic court's case-law in the last 20 years. To the Government's best knowledge, no similar cases relating to the facts of this case were pending before the domestic courts. Likewise, no applications alleging similar violations were currently pending before the European Court.

On 11 February 2021, the Supreme Court of Montenegro sent a circular letter to the presidents of all courts in Montenegro stating the obligation to apply the standards of the *Draškovi*ć judgment in cases similar to the applicant's. In particular, the courts are obliged to pay special attention to the existence of rights under Article 8 in dealing with such cases. The Supreme Court instructed domestic courts to resolve disputes among family members regarding the exhumation, or the final resting place, of the remains of a late relative, if Article 8 is applicable.

Finally, the judgment was discussed at a number of trainings and workshops of the Centre for Training in Judiciary and State Prosecutor's Office. It was also analysed at trainings within the co-operation initiative of the European Union and Council of Europe the Horizontal Facility for the Western Balkans and Turkey (Horizontal Facility II). The judgment has been translated and published on the websites of the Supreme Court of Montenegro and the Office of the Representative of Montenegro before the European Court of Human Rights, as well as in the Official Gazette of Montenegro and in the Catalogue of Regulations,

and it has been disseminated to all courts that had taken part in the procedure that had resulted in the violation of Convention law.

(d) Committee of Ministers Resolution

At the 1411th meeting of its Deputies, on 16 September 2021, the Committee of Ministers adopted Resolution CM/ResDH(2021)158 closing the case.[216]

Nešić v. Montenegro

Application no. 12131/18
Judgment of 9 June 2020

The Court's judgment in the case of *Nešić v. Montenegro* was reviewed in the Analysis of the Judgments of the European Court of Human Rights in Respect of Montenegro Delivered in 2020. In that case, the Court found the Montenegrin State in violation of the applicant's right to peaceful enjoyment of possessions under Article 1 of Protocol no. 1 to the Convention with respect to property in the coastal zone.

(a) Action Plan/Report

The Government submitted to the Committee of Ministers their Action Plan of 28 January 2021[217] and the updated Action Plan of 22 June 2021.[218]

(b) Individual Measures

The applicant filed a request to reopen the case with the first-instance court following the Court's judgment in this case, pursuant to Article 428a of the Civil Procedure Law. The case is pending before the Court of First Instance in Kotor.

The applicant had not filed a just satisfaction claim in respect of pecuniary or non-pecuniary damages, wherefore the Court did not award any damages.

(c) General Measures

216 https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22001-212518%22]}

217 https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22DH-DD(2021)109E%22]}

218 https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22DH-DD(2021)647E%22]}

The Court found a violation of the right to peaceful enjoyment of possessions because the legal principles upon which the deprivation of property was based were not sufficiently accessible, precise or foreseeable.

Therefore, when the judgment in this case became final, the Supreme Court adopted at its plenary session on 15 December 2020 a legal opinion Su. I. 343-2/20, defining in a clear and foreseeable manner the right of the prior owners of real estate in the coastal zone, since the Coastal Zone Law was adopted, until their dispossession.

The Office of the Representative submitted to the Committee of Ministers a number of judgments delivered by the national first-instance courts actively applying the legal opinion in similar cases, with a view to aligning case-law and effectively applying European and Convention standards on this matter.

Finally, the judgment was discussed at a number of trainings and workshops of the Centre for Training in Judiciary and State Prosecutor's Office. It has been translated and published on the websites of the Supreme Court of Montenegro, the Office of the Representative of Montenegro and the Official Gazette of Montenegro. The judgment has been disseminated to all authorities involved in the proceedings resulting in the violation of Convention law.

5. Execution of ECtHR Judgments and Cases Closed in 2020 and 2021 – Comparative Practice

Like the 2020 Analysis, this part of the Analysis provides an overview of the successful measures other States took to execute the Court's judgments against them. It focuses on cases that may be of relevance to ongoing or future issues that may be raised with respect to Montenegro.

5.1. Croatia

1. ***Mađer v. Croatia*** (no. 56185/07, judgment of 21 June 2011)

Alleged police beating of the applicant during his transfer to the Zagreb Police Department; ill-treatment during police questioning; effective investigation of ill-treatment allegations; grounds for and length of the applicant's detention, absence of legal aid during the police questioning of the applicant

Article 3 of the Convention

The applicant complained under Article 3 of the Convention, claiming that the police beat him both while they were transferring him to the Zagreb Police Department and during questioning. The applicant submitted that, on his arrival at the Zagreb Police Department, shortly after 6 am on 1 June 2004, he was taken to an interview room and kept there until 1 am on 4 June 2004. Throughout that time he was forced to sit on a chair without sleep, food or treatment for his medical conditions such as diabetes, cardiac problems and high blood pressure. During questioning, the police officers continually slapped him in the face, hit him on the head with a heavy notebook and once, when he had fallen to the floor, kicked him all over his body, causing him injuries including a permanent injury to the coccyx. The applicant alleged that on 1 June 2004, as he was getting out of the police vehicle, he was suddenly hit on the back of the neck by a police officer, causing him to fall to the ground and bruise the knuckles of his fingers, his left elbow and his forehead. He had received no medical assistance but was able to wash the blood off in a toilet.

The Court concluded that the complaints concerning the applicant's alleged beatings by the police during his transport to the Zagreb Police Department were

manifestly ill-founded and had to be rejected in accordance with Article 35 paragraphs 3(a) and 4 of the Convention. Furthermore, the Court concluded that the applicant's treatment in the Police Department had caused him physical and mental suffering to a degree incompatible with the prohibition of ill-treatment under Article 3 of the Convention. On the other hand, the Court did not find sufficient evidence to establish the veracity of the applicant's allegations that he was also beaten by the police during his questioning. The Court considered that the treatment described by the applicant constituted inhuman treatment and that there had therefore been a violation of the substantive aspect of Article 3 of the Convention.

The Court also noted that an official investigation of the applicant's claims of ill-treatment had never been opened, wherefore it concluded that there had also been a violation of the procedural aspect of Article 3 of the Convention.

Article 5 of the Convention

The applicant complained that his detention had not been lawful and had not followed the procedure prescribed by law and that he had not been promptly informed of the reasons for his arrest and of the charges against him. He also complained about the duration of and the reasons relied on for his pre-trial detention, and that he had not been brought promptly before a judge authorised to order his release.

As regards the reasons for and duration of the applicant's detention, the Court noted that his detention was ordered and then extended by numerous decisions of the national judicial authorities. Each of these decisions was served on the applicant and each was accompanied by instructions on how to lodge an appeal. However, with the exception of the decision of 20 July 2005, the applicant did not lodge an appeal against any of the decisions concerning his detention. By failing to use these remedies, the applicant did not give the national authorities an opportunity to prevent or put right the violations alleged against him before he submitted these allegations to the Court. The Court thus concluded that this part of the application also had to be rejected under Article 35 paragraphs 1 and 4 of the Convention for non-exhaustion of domestic remedies.

Article 6 of the Convention

The applicant complained that his trial had been unfair because he had not been afforded adequate time and facilities to prepare his defence; that he had been questioned by the police without the presence of a defence lawyer; that the services of his officially assigned defence lawyer had fallen short of the

requirements of a fair trial; and that his requests for witnesses to be called had been denied without good reason.

Against this background, the Court found a violation of Article 6(3)(c) of the Convention in conjunction with Article 6(1) in the present case, because, irrespective of the quality of this assistance, the fact remained that the applicant had been questioned by the police and made his confession without consulting with a lawyer or having one present.

Viewing the proceedings as a whole, the Court considered that the lack of contact between the applicant and his officially appointed defence lawyer had not prejudiced the applicant's defence rights to a degree incompatible with the requirements of a fair trial. It therefore did not find a violation of Article 6(3)(c) of the Convention in conjunction with Article 6(1) in respect of the applicant's representation by officially appointed defence lawyer during the trial before the Velika Gorica County Court.

Judgment Execution Procedure

The Croatian authorities undertook both individual and general measures to execute the judgment. Namely the Court noted that the applicants' complaints under Article 5 were declared inadmissible and that the applicant had not sought pecuniary or non-pecuniary damages with respect to his other complaints wherefore the Court made no award of just satisfaction in the present case. The Croatian Government said that the applicant had not submitted any claim for pecuniary or non-pecuniary damages in connection with the violations found. Therefore, the Croatian authorities held that the applicant had at his disposal a practical and effective legal remedy to exercise his right to compensation for the sustained harm, but had not availed himself of it.

On 1 February 2021, the applicant filed a request to reopen the impugned criminal proceedings. In the course of the reopened criminal proceedings, the Velika Gorica County Court examined the case taking into account the applicant's allegations of police ill-treatment. The Velika Gorica County Court thus established that the applicant's confession before the police was coerced and constituted illegally obtained evidence, which could not be used in criminal proceedings against him. It thus issued a ruling removing from the case file the records of the applicant's police questioning as illegally obtained evidence. ln the appellate proceedings, the Supreme Court, being mindful of the ECtHR's findings, rendered its decision upholding the reasoning of the lower court regarding the removal of illegal evidence from the case file.

Following the above-mentioned decisions, the Velika Gorica County Court conducted criminal proceedings anew and examined the relevant evidence in accordance with the Convention standards. ln addition to the records of the applicant's questioning before the police, the trial court removed from the case file other illegally obtained evidence. Relying on the remaining evidence, the trial court found the applicant guilty of aggravated murder and sentenced him to 25 years' imprisonment. The applicant appealed.

During the appellate proceedings, the Supreme Court once again examined the applicant's case. lt found that all illegal evidence had been removed from the case file and that the contested judgment was based only on evidence obtained legally. On 27 November 2020, the Supreme Court dismissed the applicant's appeal. The judgment was not yet final. The Government noted that the domestic authorities ensured that the applicant was represented by a defence lawyer during the reopened first and second instance criminal proceedings.

With regard to allegations of police misconduct, fresh investigatory steps could not be taken for practical and legal reasons. ln particular, the State Attorney General's Office sent a letter on 22 March 2021 to the Office of the Representative of the Republic of Croatia before the ECtHR notifying it that prosecution regarding allegations of misconduct in public service had become time-barred in June 2010. Moreover, pursuant to the applicable Rules of Procedure of the State Attorney's Office, the case file was extracted from the archives of the Velika Gorica Municipal State Attorney's Office in 2013 and destroyed in accordance with the applicable legal provisions. Thus, objective reasons precluded the possibility of carrying out further investigatory steps by the prosecuting authorities. Such reasons have been recognised by the ECtHR as *de iure* obstacles for reopening an investigation and conducting it in an effective fashion.

As per the general measures, in response to the Court's findings, the Croatian authorities changed the criminal investigation concept by introducing prosecutorial investigations in 2011. The role of state prosecutors was further strengthened by the amendments to the Criminal Procedure Code in 2013. Furthermore, the Ministry of the Interior established an IT system for the purpose of keeping records of everyone brought in for questioning to the police, arrested or detained. The system allows keeping track of the exact time spent in a police station, reasons for detention, whether police officers used force and, if they did, whether a person was injured. With a view to ensuring the protection of individuals' rights under the Convention, police interrogations are conducted in accordance with the Convention, since, under the 2017 amendments to the Criminal Procedure Code, police officers are no longer authorised to question

suspects/arrestees through informal questioning. Individuals may exercise the right to a lawyer from the moment they are considered suspects. Furthermore, in cases of mandatory defence, the interview of a suspect must be recorded with an audiovisual device.

Committee of Ministers Resolution

At the 1419th meeting of its Deputies on 2 December 2021, the Committee of Ministers adopted Resolution CM/ResDH(2021)322 closing the examination of the case.[219]

2. Šikić v. Croatia Group

Length of Proceedings before the Constitutional Court

The *Šikić* group comprises four cases[220] concerning a violation of the applicants' right to a fair trial due to the excessive length of proceedings before the Constitutional Court of the Republic of Croatia conducted in the 2003-2012 period.

The applicants lodged constitutional complaints with the Constitutional Court complaining of violations of their constitutional rights and freedoms. In *Aleksić* they lasted three years and four months, in *Bečeheli* three years and five months, in *Šikić* three years and nine months and in Keko four years and two months.

In *Šikić v. Croatia*, the Court reiterated that the reasonableness of the length of those proceedings was to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and that of the competent authorities, and the importance of what was at stake for the applicant in the litigation. Although the Court accepted that its role of guardian of the Constitution made it particularly necessary for a Constitutional Court sometimes to take into account considerations other than the mere chronological order in which cases were entered on the list, such as the nature of a case and its importance in political and social terms, the Court found that a period exceeding three years

219 https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22001-214803%22]}

220 The group comprises judgments in the following cases: *Šikić v. Croatia*, no. 9143/08, 15 July 2010, *Aleksić v. Croatia*, no. 12422/10, 5 December 2013, *Bečeheli v. Croatia*, no. 8855/08, 2 May 2013 and *Keko v. Croatia*, no. 21497/12, 5 December 2013.

and nine months to decide on the applicant's case and in particular in view of what was at stake for the applicant, namely his dismissal from work, and the global length which amounted to some five years, was excessive.

Judgment Execution Procedure

As per individual measures, the proceedings before the Constitutional Court have been completed and the applicants in the *Keko* and *Šikić* cases were paid 2,000 euros and 3,100 euros respectively in respect of non-pecuniary damages. Therefore, at its 1318th session on 7 June 2018, the Committee of Ministers decided to close the examination of these cases in respect of individual measures.[221]

As per general measures, the Government said in their Action Report that the amendments to the Constitutional Court's Rules of Procedure entered into force in late 2010. Their purpose was to put in place adequate structural measures ensuring that the Constitutional Court decides on constitutional complaints in a swift and an effective manner. The amendments envisaged setting up three new committees, each composed of three judges vested with powers to rule on the requirements on deciding on constitutional complaints. In 2018, the Constitutional Court moreover carried out an extensive survey with a view to singling out cases pending longer than three years to accelerate their completion. They are flagged as high-importance cases and prioritised with fixed deadlines for their completion. The Constitutional Court also built its HR capacity and hired 41 advisers in the 2015-2018 period. It also established nine thematic working groups with a view to raising the advisers' awareness of the importance of aligning the practice of the Constitutional Court with the European Court's standards. During the same year, the Constitutional Court seconded one of its advisers to the ECtHR to provide a two-way flow of information and the exchange of the necessary knowledge and expertise. The statistics on the average length of proceedings before the Constitutional Court forwarded by the Government attest to the efficiency of the general measures taken - the average length of these proceedings has more than halved, from 465 in 2010 to 196 days in 2020.

221 The Committee of Ministers' Final Resolution is available at the following link: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)397E%22]}.

3. Sandra Janković v. Croatia Group

Protection of physical integrity – right to a private life – State's positive obligations

The *Sandra Janković* group comprises three cases[222] concerning violations of the applicants' right to respect for their private lives because the state authorities failed to protect them from attacks on their physical integrity and threats.

In the *Sandra Janković v. Croatia* case, the Court found a violation of Article 8 of the Convention because the domestic authorities had failed to implement domestic criminal-law mechanisms in response to the applicant's allegations of physical violence by specific individuals and thus provide her with adequate protection from attacks on her physical integrity. The Court also found a violation of Article 6(1) of the Convention because of the excessive length of the civil and enforcement proceedings.

In the *Remetin v. Croatia (No. 2)* case, the Court found a violation of the procedural aspect of Article 8 of the Convention with respect to the applicant's right to a private life because of the relevant state authorities' failure to conduct an effective investigation into the circumstances of the physical assaults against the applicant.

In the *Vojnović v. Croatia* case, the Court found a violation of Article 8 of the Convention, because the relevant state authorities failed to conduct an effective investigation into two arsons in the building the applicant was living in, especially her allegations of the harassment and threats against her by the owner of the building, who wanted her to move out.

Judgment Execution Procedure

(a) Individual Measures

The applicant in the *Sandra Janković* case was provided under the Criminal Procedure Code with a possibility to request the reopening of the impugned criminal proceedings, which had ended with a rejection of her request for an investigation filed in the capacity of subsidiary prosecutor. She, however, failed to avail herself of this opportunity. At the relevant time, the law did not specify the time limit by which proceedings were to be reopened. Bearing in mind that the

222 The group comprises judgments in the following cases: *Sandra Janković v. Croatia*, no. 38478/05, 5 March 2009, *Remetin v. Croatia (No. 2)*, no. 7446/12, 24 July 2014, and *Vojnović v. Croatia*, no. 5151/15, 4 October 2018.

present judgment became final more than 12 years ago, the Government deemed that the applicant had at her disposal a practical and effective legal avenue capable of bringing the violation to an end which she, however, failed to use. As per the excessive length of the impugned criminal proceedings, the Supreme Court on 2 February 2009 upheld the applicant's claim and awarded her around 513 euros in respect of non-pecuniary damages. The impugned enforcement proceedings were brought to an end on 8 January 2008.

In the *Remetin (No. 2)* case, the criminal investigation of the incident of 4 March 2008 was still pending due to lack of new leads. Following the Court's judgment, the Dubrovnik Municipal Court delivered a judgment in 2015 finding the defendant guilty of threatening the applicant and convicting him to five months' imprisonment. The judgment became final in 2016.

In the *Vojnović* case, following the Court's judgment, the Zagreb Municipal State Prosecution Office joined the impugned investigations to ensure that the complaints made by the applicant were investigated and examined in the context of the entire situation. After interviewing 12 individuals, commissioning an expert report and cross-referencing the DNA, the authorities concluded that the fire had been caused by faulty electrical wiring and that there was no evidence indicating that it had been planted. All these steps excluded O. Č .'s liability for threats against the applicant and for setting the impugned fires and resulted in the rejection of the applicant's criminal complaint against him regarding the fire of 22 December 2010. The applicant subsequently took over the prosecution but her report was dismissed due to lack of evidence. The applicant did not appeal, and thus the proceedings were brought to an end. As per the fire that broke out in 2011, the County State Prosecution Office decided to dismiss the applicant's criminal report due to lack of evidence of O.Č.'s involvement in the fire. The report was therefore reclassified as a criminal report against an unknown perpetrator. The case remains open until new leads are discovered.

Just satisfaction in respect of non-pecuniary damages was paid to the applicants in the *Sandra Janković* and *Vojnović* cases, while the applicant in the *Remetin (No. 2)* case failed to file a claim, wherefore the Court did not award him any just satisfaction.

(b) General Measures

With a view to rectifying the established violations, the state authorities undertook the requisite measures for the purpose of ensuring prompt and adequate preliminary criminal proceedings. Prosecutorial investigations introduced in 2011

strengthened the role of the prosecutors and the police in investigations. The transparency of criminal investigations was increased through the empowerment and greater involvement of the victims in investigation. A six-month time-limit by which state prosecutors are to decide on criminal complaints was also introduced. ln order to strengthen the procedural deadlines for bringing the investigation to an end and prevent procrastination, a case-tracking system ("CTS") was set up within the state prosecution offices in 2015. The state prosecution offices' HR capacity was raised by the appointment of 116 new state prosecutors and 13 trainees by the end of 2018. Further legislative measures were introduced to enhance police diligence and disciplinary liability for negligence. Individuals are now entitled to file complaints about the work of specific police officers, which the Ministry of the Interior must review within 30 days. If not satisfied with the Ministry's answer, the applicant may pursue the complaint before the second-instance body within the Ministry and subsequently before the Complaints Board appointed by the Parliament. In addition, the national courts' case-law has been aligned with the Court's finding that in similar cases domestic courts specify exactly what formal requirements had not been met when declaring requests for investigation incomplete. Constitutional appeals have become an effective legal remedy concerning complaints about ineffective investigations. On 14 July 2020, the Constitutional Court delivered its first decision (no. U-III Bi- 1732/2019) in which it examined whether the manner in which the criminal-law mechanisms were implemented was defective to the point of constituting a violation of the Article 8 of the Convention.

As per measures ensuring prompt and adequate criminal proceedings in the trial stage, the Integrated Court Case Management System (ICMS) introduced in courts in 2013 became fully operational in all courts, including the Supreme Court, by 2018. The ICMS provides, *inter alia*, daily statistical reports, including data on the length of proceedings, deadlines, legal remedies filed to expedite the proceedings and other relevant data enabling the court presidents and the Justice Ministry to monitor the cases and rapidly and efficiently identify those in which the deadlines have been missed, eliminate any shortcomings and punish the judges responsible. Following the lnspection's findings on the backlog, the court presidents have an obligation to submit their response within eight days after receiving the lnspection's report and to eliminate the irregularities identified in the lnspection's report within the deadlines set therein.

In order to ensure efficient and prompt conduct of civil and enforcement proceedings, the Civil Procedure Law was amended and now includes specific deadlines to prevent dilatoriness. Under the amendments, any deadline set by a court may be extended only once and the courts are under an obligation to

render and issue a judgment within 45 days from closing the final hearing. The amendments also increased the scope of civil proceedings that can be conducted by a court adviser. The courts are now under the obligation to notify and encourage parties to the proceedings to resolve the dispute by mediation. Preparatory hearings may be adjourned only once.

The Judicial Academy conducted a number of trainings and workshops for state prosecutors on the conduct of prompt and effective investigations in accordance with Convention standards and the relevant case-law, and on enhancing the victim's procedural rights in criminal proceedings. Trainings, round tables and workshops for judges on strengthening the right to a trial within a reasonable time in civil and enforcement cases as part of the right to a fair trial under Article 6 of the Convention were also organised.

The judgments have been translated and published on the websites of the Office of the Representative of the Republic of Croatia before the European Court of Human Rights and the Constitutional Court of Croatia and forwarded to the Council of Experts for the Execution of the European Court's judgments to ensure that all the relevant state authorities are familiarised with the Court's findings in these judgments.

5.2. Italy

Khlaifia and Others v. Italy (no. 16483/12, judgment of 15 December 2016)

Prohibition of Collective Expulsion of Aliens

The application was filed by three Tunisian nationals, who left Tunisia during the "Jasmine Revolution" in September 2011 with others on board rudimentary vessels heading for the Italian coast. The Italian coast guard intercepted the vessels and escorted them to the island of Lampedusa. On arrival, the applicants were transferred to a reception centre where they were extended first aid and identified. The applicants claimed that the part of the reception centre they were held in was overcrowded and dirty and that they were forced to sleep and eat on the ground, under permanent police surveillance. They remained in the reception centre until 20 September 2011 when a violent riot broke out among the migrants. On 21 September 2011, the applicants and another 1,800 migrants managed to evade the police surveillance and joined the protests on the island streets. After the police stopped them, the applicants were returned to the reception centre and subsequently escorted to the airport.

On 22 September 2011, the applicants were taken to Palermo and were transferred to ships that were moored in the harbour there. The applicants claimed that they had been denied access to the cabins and had to sleep on the floor. They also claimed that they had been under constant police supervision and alleged that the officers had insulted them. The applicants spent several days on the ships and were then transferred to the Palermo airport. Before they left Italy, the migrants were received by the Tunisian Consul who, as the applicants claimed, merely recorded their identity. The applicants claimed that they had never been issued any documents whilst in Italy. However, the respondent Government attached three entry refusal-of-entry orders to its written submission, noting that they concerned individuals who had refused to sign or take copies of the documents. The applicants were released on return to Tunisia. Two other migrants in respect of whom refusal-of-entry orders had been issued challenged those orders before the Justice of the Peace of Agrigento, who ultimately annulled them.

The applicants complained that they had been deprived of liberty in violation of Article 5(1) of the Convention. Relying on Article 5(2) of the Convention, the applicants complained that they had not had any kind of communication with the Italian authorities throughout their stay in Italy, wherefore, as they alleged, their right to be promptly notified of the grounds of deprivation of liberty had been breached. They also complained of a violation of Article 5(4) of the Convention, claiming that at no time had they been able to challenge the lawfulness of their deprivation of liberty. Relying on Article 3 of the Convention, the applicants complained of the conditions in the Lampedusa reception centre and the ships in Palermo, claiming they amounted to inhuman and degrading treatment. They also complained of a violation of Article 4 of Protocol no. 4 to the Convention, claiming that they and the other migrants had been expelled from Italy in contravention of the prohibition of collective expulsion of aliens. Finally, relying on Article 13 of the Convention, they complained that they had not been afforded an effective remedy under Italian law by which to raise their complaints under Articles 3 and 5 of the Convention and under Article 4 of Protocol no. 4.

On 1 September 2015, the Court found a violation of Article 5, paragraphs 1, 2 and 4 of the Convention but found no violation of Article 3 of the Convention concerning the applicants' accommodation conditions on the ships. The Court also found a violation of Article 3 of the Convention with respect to the accommodation conditions in the reception centre, of Article 4 of Protocol No. 4 to the Convention and of Article 13 of the Convention. On 1 December 2015, the Italian Government requested the referral of the case to the Grand Chamber.

Article 5 of the Convention

The Grand Chamber reiterated that Article 5 (1) (f) permitted States to control the liberty of aliens in an immigration context. However, any deprivation of liberty in such circumstances must be provided by law. Although Article 14 of Decree no. 286 of 1998 permitted the detention of migrants "as long as is strictly necessary", the Grand Chamber noted that the provision was applied only where removal by escorting the person to the border or a refusal-of-entry measure could not be implemented immediately, because it was necessary to provide assistance to the alien, to conduct additional identity checks, or to wait for travel documents or the availability of a carrier. As a result, migrants in this category are placed in an Identification and Removal Centre (CIE). However, since the legal conditions for placement of the applicants in a CIE had not been fulfilled and they were referred to a reception centre, the Grand Chamber held that the legal basis for holding the applicants on the island of Lampedusa was the bilateral agreement between Italy and Tunisia of April 2011. It, however, established that the text of the agreement had not been available to the applicants since it had not been published and that they had been unable to foresee the consequences of its enforcement. The Grand Chamber thus concluded that such an agreement did not constitute a clear and foreseeable legal basis for the applicants' detention. Furthermore, the Grand Chamber assessed that the provisions of the bilateral agreement between Italy and Tunisia applying to the detention of irregular migrants were lacking in precision, resulting in the arbitrary deprivation of liberty of the applicants and the violation of the principle of legal certainty. The Grand Chamber thus concluded that the applicants' deprivation of liberty had not been lawful and that Article 5(1) of the Convention had been breached.

Given its finding that the applicants' detention had no clear and foreseeable legal basis in Italian law, the Grand Chamber also concluded that the Italian authorities had not notified the applicants of the reasons for their deprivation of liberty or provided them with sufficient information to enable them to challenge the grounds for the measure before a court. Having reviewed the denial-of-entry orders prohibiting the applicants from entering Italy, the Grand Chamber noted that the orders had not included any reference in them to the applicants' detention or to the legal and factual reasons for such a measure. Moreover, the applicants had been made aware of the very existence of the order with delay. Consequently, the Grand Chamber concluded that the applicants' right to be informed promptly of the legal reasons for deprivation of liberty under Article 5(2) of the Convention had been breached.

Given its finding of a breach of Article 5(2) of the Convention because the applicants had not been informed of the legal reasons for their deprivation of liberty, the Grand Chamber concluded that the Italian legal system had not provided the applicants with a remedy whereby they could obtain a judicial decision on the lawfulness of their deprivation of liberty, wherefore it was unnecessary for the Court to determine whether the remedies available under Italian law could have afforded the applicants sufficient guarantees for the purposes of Article 5(4) of the Convention. It therefore concluded that Article 5(4) of the Convention had been violated.

Article 3 of the Convention

As per the conditions in the reception centre the applicants had been held in, the Grand Chamber found that it was unsuitable for stays over several days. Despite the riot in the centre, it could not, however, be presumed that the Italian authorities remained inactive and negligent; nor could it be maintained that the transfer of the migrants should have been organised and carried out in less than two or three days. Given the turbulences in North Africa in 2011, the Italian authorities could not have been expected to foresee the scale and timeframe of an influx of migrants. The Grand Chamber concluded that the applicants' conditions of detention in the reception centre had not amounted to inhuman or degrading treatment and a violation of Article 3 of the Convention. Furthermore, the Grand Chamber concluded that the conditions on the ships had not amounted to inhuman or degrading treatment and a violation of Article 3 of the Convention.

Article 4 of Protocol No. 4 to the Convention

Although the refusal-of-entry orders differed only in the migrants' personal data and a large number of migrants were expelled at the time, these facts did not suffice for a conclusion on the collective expulsion of aliens. Namely, the applicants did not have valid travel documents; nor did they claim that they would be subjected to any ill-treatment on return to their country of origin. Given these considerations, the simultaneous removal of the three applicants to their country of origin did not result in a conclusion that their expulsion had been collective. Finally, the Grand Chamber found that, since they had undergone the identification procedure twice, the applicants had had a genuine and effective possibility of submitting arguments against their expulsion. The Grand Chamber thus concluded that Article 4 of Protocol no. 4 to the Convention had not been violated.

Article 13 taken together with Article 3 of the Convention

The Government have not indicated any remedies by which the applicants could have complained about the conditions in which they were held in the reception centre or on the ships. Therefore, the Grand Chamber found a violation of Article 13 taken together with Article 3 of the Convention.

Article 13 of the Convention taken together with Article 4 of Protocol No. 4 to the Convention

The refusal-of-entry orders indicated expressly that the individuals concerned could appeal against them to the Justice of the Peace of Agrigento within a period of sixty days. The appeal did not have suspensive effect. However, the Convention does not impose an absolute obligation on a State to guarantee an automatically suspensive remedy, but merely requires that the person concerned should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum. The Grand Chamber concluded that the Justice of the Peace of Agrigento had fulfilled these requirements. The fact that the remedy available to the applicant does not have automatic suspensive effect is not a decisive consideration for the conclusion that there had been a violation of Article 13 of the Convention where, like in this case, the applicants are not claiming that there is a genuine risk of a violation of their rights under Articles 2 and 3 of the Convention. The Grand Chamber therefore concluded that there had been no violation of Article 13 of the Convention taken together with Article 4 of Protocol no. 4 to the Convention

Judgment Execution Procedure

As per individual measures, the applicants were paid just satisfaction in respect of non-pecuniary damages awarded by the Court.

As per the general measures, the legal framework governing the administrative detention of migrants in reception centres sets out a clear and available legal basis and requires of the relevant state authorities to inform the individuals at issue of their rights and reasons for their deprivation of liberty. It also entitles courts to review the lawfulness of any decision ordering detention.

The Government submitted copies of court decisions, indicating with a sufficient degree of certainty that the combination of preventive and compensatory civil law remedies under the Code of Civil Procedure and the Civil Code may

allow migrants in administrative detention to bring before a competent national judicial authority arguable complaints related to their living conditions and obtain adequate redress, should these conditions reach the threshold of gravity required to qualify as inhuman or degrading treatment. Furthermore, the National Guarantor of the rights of persons detained or deprived of their liberty has access to the reception centres at issue and monitors compliance with regulations.

The Committee of Ministers expressed its strong expectation that the authorities would consider the concerns raised by civil society in this case and take every necessary measure to guarantee that the new legal framework was rigorously and consistently applied in full compliance with the relevant Convention requirements, and underlined in this context the importance of a continuing dialogue with the relevant civil society actors and with the National Guarantor of the rights of persons detained or deprived of their liberty.

Committee of Ministers Resolution

At the 1419th meeting of its Deputies on 2 December 2021, the Committee of Ministers adopted Resolution CM/ResDH(2021)424 closing the case.[223]

5.3. Poland

Janulis v. Poland and three other cases[224]

Excessive length of criminal proceedings and lack of an effective legal remedy

In these judgments, the Court emphasised that that the reasonableness of the length of proceedings had to be assessed in the light of the particular circumstances of the case and taking into account the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities.

In the case of *Janulis v. Poland,* the Court found a violation of Articles 6(1) and 13 of the Convention. The Court observed that that the redress provided to the applicant at the domestic level was insufficient in the light of Court's jurisprudence. Thus the Government's argument that the applicant has lost his

223 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a4b405

224 The Action Report concerns the following judgments: *Janulis v. Poland*, no. 31792/15, 16 January 2020, *Zborowski v. Poland*, no. 72950/13, 26 March 2020, *Lewandowski v. Poland*, no. 29848/17, 18 March 2021, and *Sławiński v. Poland*, no. 61039/16, 15 April 2021.

victim status could not be upheld. The Court endorsed the domestic court's critical assessment of the prosecutor's inactivity in the applicant's case, which did not involve complex issues of facts and law. The Court thus concluded that there was no justification for the overall length (four years and nine months at one level of jurisdiction) of the criminal proceedings against the applicant and that a complaint under the 2004 Act failed to provide the applicant with "appropriate and sufficient redress" in terms of adequate compensation for the excessive length of the proceedings in the applicant's case.

In its judgment in the case of *Zborowski v. Poland*, the Court found a violation of Article 6(1) of the Convention and concluded that there was no justification for the length of the criminal proceedings (nearly 13 years at three levels of jurisdiction) against the applicant. Furthermore, in its judgment in the case of *Lewandowski v. Poland,* the Court found a violation of Articles 6(1) and 13 of the Convention, noting that the domestic court had not reviewed the applicant's appeal under the 2004 Act. The impugned decision fully reflected the domestic practice of fragmentation of the proceedings criticised by the Court on multiple occasions. The Court therefore concluded that there was no justification for the length of the criminal proceedings (eight years and nearly five months at three levels of jurisdiction) against the applicant and that the appeal he had filed under the 2004 Act had failed to provide him with "appropriate and sufficient redress" in terms of adequate compensation for the excessive length of the proceedings in his case.

Finally, in its judgment in the case of *Sławiński v. Poland*, the Court found a violation of Articles 6(1) and 13 of the Convention, finding that there was no justification for the length of the criminal proceedings (14 years and one month at two levels of jurisdiction) against the applicant and that the domestic legal remedy had failed to provide him with "appropriate and sufficient redress" in terms of adequate compensation for the excessive length of the proceedings in his case.

Judgment Execution Procedure

The Government fulfilled the individual measures by paying the just satisfaction awarded to the applicants. In addition, the domestic proceedings they complained of had been concluded before the Court delivered the judgments.

As per general measures, the Polish Government has been submitting to the Committee of Ministers on a regular basis extensive information concerning the actions undertaken and planned aiming at the execution of the judgments concerning the excessive length of proceedings (see, for instance, the latest

documents DH-DD(2021)885 and DHDD(2020)359). Furthermore, the judgments in the cases of *Janulis, Zborowski, Lewandowski* and *Sławiński* have been translated into Polish and published on the website of the Ministry of Justice. The Polish translation of the above judgments is also available in the HUDOC database. Moreover, with regard to dissemination measures, information about the judgments in the above cases and descriptions of the content of the judgments were sent to the presidents of the domestic courts that ruled on the applicants' cases (Regional Court in Elbląg, District Court in Szamotuły, Regional Court in Poznań, Court of Appeal in Poznań, Regional Court in Białystok, Court of Appeal in Białystok, District Court in Toruń and Regional Court in Toruń). The information about the *Janulis* judgment was also sent to the National Prosecutor's Office.

Committee of Ministers Resolution

At the 1420th session of its Deputies on 8 December 2021, the Committee of Ministers adopted Resolution CM/ResDH(2021)404 closing the case.[225]

225 https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22001-215316%22]}.

6. Conclusions and Recommendations

6.1. Conclusions:

The following conclusions have been drawn from the Analysis:

1. The ECtHR has delivered a total of 68 judgments against Montenegro from the day the ECHR entered into force in respect of Montenegro to 31 December 2021.

2. This Analysis reviews five judgments and two decisions the ECtHR delivered in respect of Montenegro from 1 January to 31 December 2021.

3. In 2021, the ECtHR issued two decisions declaring the following applications inadmissible: *Martinović v. Montenegro* and *Knežević v. Montenegro.*

4. In the *Martinović v. Montenegro* case, the applicant lost the victim status because measures fulfilling the effective investigation standards had been undertaken at the national level: (1) the Constitutional Court of Montenegro expressly found a violation of both the substantive and procedural aspects of Article 3; (2) the applicant reached a settlement with the State and obtained a compensation of EUR 130,000 in respect of for all the existing and future damage; and, (3) the investigation resulted in identifying of two direct perpetrators of the crime, who are prosecuted for torture and inflicting serious bodily injuries, as well as in the prosecution and punishment of the commander of the relevant police unit for aiding the perpetrator after the commission of the crime. In its decision on the admissibility of the *Knežević v. Montenegro* application concerning the freedom of assembly, the ECtHR noted that the applicant had been arrested, prosecuted or convicted not for taking part in the protest, but for an official performing his duties. In the Court's view, all the measures taken by the national authorities were lawful and pursued a legitimate aim, wherefore it declared the application manifestly ill-founded.

5. In one of the five cases on which it delivered a judgment in 2021, the ECtHR did not find Montenegro in violation of the right to life. In the other four cases, it found the State in violation of the prohibition of

torture, the right to liberty and security, the right to a fair trial and the right to respect for private and family life.

6. As opposed to the periods covered by the prior Analyses, the greatest number of violations of Convention rights in judgments covered by this Analysis for the first time did not concern Article 6 of the Convention – the right to a trial within a reasonable time.

7. During the reporting period, the ECtHR found no violation of Article 2 of the Convention in one case (*Ražnatović v. Montenegro*), in which it noted that the State was not responsible for the suicide of a patient who had voluntarily been hospitalised at the Psychiatric Clinic because the relevant authorities had not known and could not have known that there was an immediate risk to her life.

8. During the reporting period, the ECtHR found a violation of the procedural aspect of Article 3 of the Convention in one case (*Baranin and Vukčević v. Montenegro*), in which it concluded that the investigation into the applicants' torture by the police had not been prompt, thorough or independent and had not afforded a sufficient degree of public scrutiny.

9. During the reporting period, the ECtHR found a violation of Article 5(1) of the Convention in one case (*Asanović v. Montenegro*) because the applicant, a practicing attorney, had been deprived of liberty based on an official police report and at the State Prosecutor's order, which made no reference to the legal grounds for his arrest. Furthermore, the relevant authorities failed to take into account the relevant provisions of the Bar Act, providing that a practicing attorney could be deprived of liberty for criminal offences related to his or her practice only pursuant to a relevant court's decision.

10. During the reporting period, the ECtHR found a violation of Article 6 of the Convention in one case (*Siništaj v. Montenegro*) because of a breach of the applicant's right to a trial within a reasonable time before the Constitutional Court of Montenegro. The Court applied the same criteria applicable to trials within a reasonable time before ordinary courts (complexity of the case, conduct of the applicant and the relevant authorities, and what is at stake for the applicant).

11. During the reporting period, the ECtHR found a violation of Article 8 of the Convention in one case (*Špadijer v. Montenegro*), because of the applicant's bullying at work, which the national courts had failed to examine in its entirety or associate it with her "whistle-blowing" activities, insisting that workplace harassment required the recurrence of the disputed action at last once a week over a period of six months.

6.2. Recommendations:

The following recommendations stem from the Analysis:

1. Given the evolution of the ECtHR's case-law, judges, state prosecutors and advisers in judicial bodies should undergo continuous professional education and continue their mutual dialogue, as well as their dialogue with experts on human rights and fundamental freedoms.

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

3. The State is under the obligation to ensure the protection of rights to individuals under its control. In cases concerning compensation of non-pecuniary damages for the death of an individual who had been under the State's control, the courts need to, *inter alia*, examine whether the relevant authorities could have or ought to have known that there was an immediate risk to life of the individual at issue. It should also be borne in mind that obligations that are unrealistic cannot be imposed on the State, since it is only required to take such measures which are "feasible" in the circumstances.

4. When ruling on the effectiveness of investigations, the courts should follow the standards the ECtHR developed in its case-law, requiring that investigations are adequate, thorough, prompt, independent, and subject to public scrutiny. In police torture cases, a violation of the procedural aspect of Article 3 of the Convention is not eliminated by the mere fact that the State has admitted that it had violated the effective investigation standards or that it awarded damages for the violation. The redress needs to be adequate and the investigation of police torture must be capable of resulting in the identification and prosecution of the perpetrators.

5. A distinction should be drawn between groundless and unlawful detention in the meaning of the title of Chapter XXXI of the Criminal Procedure Code. Detention should be considered groundless in the event the proceedings were discontinued by a final decision or ended by a final exculpatory judgment or a judgment dismissing the charges. On the other hand, the unlawfulness of detention is associated with detention ordered and extended in contravention of national and international

law and it may exist irrespective of the outcome of the proceedings - a conviction or an acquittal.

6. The same criteria for assessing the length of proceedings before ordinary courts apply to proceedings before the Constitutional Court. Due to the legal opinion of the Constitutional Court of Montenegro – that the Supreme Court of Montenegro is not entitled to rule on violations of the right to a trial within a reasonable time before the Constitutional Court – the question remains whether a legal remedy for protecting that right before the Constitutional Court exists at the national level. Furthermore, when examining cases, the Constitutional Court should take into account other considerations other than the mere chronological order in which cases are entered on the list, such as the importance of the case in political and social terms.

7. Courts need to distinguish between discrimination and ill-treatment at work (bullying). The two main factors for drawing the distinction include the motives for the treatment and the recurrence of the action. However, when examining the existence of bullying, the courts need to thoroughly examine the complaints in the light of the particular circumstances of each case and take into account the entire context. Such incidents need not occur once a week over a period of six months to amount to workplace harassment; opposite situations are possible as well.

8. The ordinary courts' decisions on non-pecuniary damage claims for violations of the right to life and the prohibition of torture, as well as other human rights violations resulting from the actions of the state authorities or their failure to fulfil their positive obligations, give rise to the following question: whether ordinary courts are entitled to decide on the claims before the Constitutional Court of Montenegro finds a violation of a human right. Therefore, the authors of this Analysis recommend that ordinary courts and the Constitutional Court of Montenegro open a dialogue on this important issue.

Supreme Court of Montenegro

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

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

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

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

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

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

The AIRE Centre

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

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