

**UNITED NATIONS Human Rights Council**

**Universal Periodic Review mechanism**

**Podgorica, 14 July 2008**

**Information on the state of law and practice regarding Human Rights in Montenegro within 5 pg. space limit. We are ready to provide additional clarifications.**

**LAW**

**Constitution**

1. The new, October 2007 Constitution, failed to attain the level of human rights guarantees previously provided by the Charter of Human and Minority Rights of Serbia and Montenegro and provide for effective guarantees of independence of judiciary, as was promised to the Council of Europe.<sup>1</sup> The Constitution omits: the right of *habeas corpus*, prohibition of imprisonment due to non-fulfillment of contractual obligations, prohibition of inhuman and degrading punishment, express guarantee of the right to life, full guarantees of the right to defense and fair trial in compliance with the European Convention of Human Rights, right to an *effective* legal remedy in case of breach of human rights, while it *guarantees* the right to compensation of damage caused by publication of incorrect information, in variance with the European standard of freedom of expression and the national Law on Obligations.<sup>2</sup>
2. Direct implementation of international human rights standards in Montenegro is provided, although with an unjustifiable restriction, as ratified international treaties and generally accepted principles of international law shall be applied directly only “in case of conflict with domestic legislation”. The primacy of international standards has been provided in respect to “legislation” and not “law”, which would comprise the Constitution and by-laws, and thus misunderstanding should be expected concerning obligatory implementation of international standards in the practice of courts and other state institutions. As an explicit instruction that ratified international human rights treaties should be applied in compliance with the practice of international bodies in charge of their interpretation has been omitted from the text of the Constitution adds to the expectancy of the problem of implementation of international human rights standards.
3. Although special rights of identity protection and prohibition of assimilation “to minority nations and other minority, national and ethnic communities” have been guaranteed, the Constitution fails to define which one is to be regarded a minority nation or national minority in Montenegro.<sup>3</sup>
4. NGOs particularly criticized the removal from the Constitution of a formerly existing right of 6.000 citizens to file a legislative initiative to the Parliament. Citizens may now use such initiative only through an MP, which renders this right meaningless.

**Anti-discrimination legislation**

5. A general anti-discrimination act has not yet been adopted, providing for a thorough mechanism for prevention and protection, including redress in cases of prohibited discrimination. A very good draft was developed by the Government with the assistance of the UNHCHR mission in Montenegro back in 2005 and there seems to be no reasonable explanation for the draft not being adopted ever since. On a positive side, the Constitution prohibits „any direct and indirect discrimination on any ground“ and provides for affirmative action (positive discrimination) favoring vulnerable groups in unequal position on any grounds (art. 8).

<sup>1</sup> PACE, Opinion No. 261 (2007) Accession of the Republic of Montenegro to the Council of Europe

<sup>2</sup> For more details, see the *HRA Comments on the Guarantees of Human Rights and the Independence of the Judiciary in the new Constitution of Montenegro*, on [http://www.hraction.org/wp-content/uploads/hra\\_opinion\\_november\\_2007.pdf](http://www.hraction.org/wp-content/uploads/hra_opinion_november_2007.pdf).

<sup>3</sup> The Preamble contains the statement that members of nations and national minorities who live in Montenegro are „Montenegrins, Serbs, Bosniaks, Albanians, Moslems, Croats and others“.

6. Some particular anti-discrimination laws have been adopted such as Act on the Use of the Shepard and Assistance Dogs and Gender Anti-Discrimination Act. However, an important Act for the Employment of Persons with Disabilities awaits adoption ever since 2005 when the draft Act had been adopted by the Government. Also, Draft Law on the Protection of Persons with Disabilities from Discrimination approved by the Government in 2007 still awaits adoption. The adopted Gender Anti-Discrimination Act is more of a programmatic nature, with no firm obligations and sanctions for its breach.
7. Regarding rights of women, a specific legislation on domestic violence has been under governmental consideration since 2005.<sup>4</sup> The Governmental Draft Labor Act needs to be amended regarding anti-discriminatory treatment of women and men especially regarding the use of right to “maternity” leave; equal pay guarantees; protection of pregnant women (a employer should not be allowed to require proof of not being pregnant before applying for a job); prohibition and protection from sexual harassment and mobbing in the workplace, etc.
8. Convention on the Rights of Persons with Disabilities, signed in 2007, has still not been ratified and its ratification has been planned for the last quarter of 2008.

### Freedom of Expression

9. Although the Criminal Code has been amended not to include prison sentence for defamation, there is still theoretical possibility for a person not paying the penalty to go to prison (although the law provides for the penalty to be paid in instalments, however, a situation may arise that someone may not succeed to pay the penalty starting from 5.000 to 14.000 euros maximum, in the state where an average salary is 338 euros, according to the Statistical Office of the Montenegro (Monstat).
10. The Criminal Code of Montenegro still prescribes as crimes Violation of the reputation of Serbia and Montenegro (S&M) and of a member state (Art. 198), Violation of the reputation of nations, national and ethnic groups of (S&M) (Art. 199), Violation of the reputation of a foreign state or an international organization (Art. 200). Violation of the reputation of (S&M) and of a member state and of a foreign state or international organization include offending flags, coat of arms and national anthems of states and international organizations.
11. Both the Constitution, Criminal Code and Code of Obligations should be amended to incorporate all international standards of freedom of expression in relation to defamation, especially standards developed by the jurisprudence of the European Court of Human Rights in relation to difference between societal status of plaintiffs – state bodies, politicians, public figures, etc. The Constitution (art. 49, para. 3) proclaims a right to award of damages for incorrect publication of an information, which is not in accordance with both the national Code of Obligations and international standards of freedom of information. The Constitution emphasises the right to protection of „honor, reputation and dignity“ but, although it does protect freedom of media and prohibits censorship, fails to emphasize that freedom of expression encompasses the right to receive information and ideas in accordance with the formulation of freedom of expression from art. 19, para. 2 ICCPR and art. 10, para. 1 ECHR.
12. There is no limit in Montenegro for award of damages for defamation, causing dubious sums awarded, for example, to the PM for suffering defamation (20.000 euros), as opposed to the victims of war crimes for suffering death of kin (18.000 euros)<sup>5</sup>. Code of Obligations or a special act should limit damages that may be awarded for defamation. On the other hand, such a limit for imaterial damages was set by the Act for Protection of the Right to a Trial within Reasonable Time for a breach of that right by the state to 5,000 euros, although the European Court of Human Rights has been awarding imaterial damages up to 15,000 euros for violation of the same right (see, for example, *V.A.M. v. Serbia*, 2007).
13. Draft Electronic Communications Act diminishes the autonomy of the currently existing Agency for Radio-Difusion, competent for deciding on allocation of frequencies to media. The Draft Act currently awaiting adoption in the Parliament, transforms the currently independent Agency to a Governmental body.
14. According to recent press reports (*Vijesti*, July 14, 2008) the Government also intends to amend the mechanism for appointment of members of the Council of the national radio-television to allow the parliamentary majority, i.e. the ruling political coalition to appoint the Council deciding on the editorial policy of this public service institution. Unlike the current setting, where the Council members are appointed by various civil society organisations and the Parliament only controls respect of the procedure, such amendments would ensure political control over editorial policy of the national radio

<sup>4</sup> A draft working version of the Law against Family Violence has been prepared. NGOs Women’s Shelter and SOS for Women and Children Victims of Violence delivered critical comments to the Ministry of Justice.

<sup>5</sup> Those two judgments have not yet been made final. However, there have been final judgments awarding compensation for damages up to 15.500 euros and 12.000 euros against journalists, for defamation generally interpreted, according to our assessment, at variance with international standards of freedom of expression (cases of *Kusturica v. Nikolaidis&Monitor* and *Colovic v. Koprivica*).

and television and would not safeguard the right of Montenegrin public to receive impartial and thorough information.

15. There is still no act providing for transparency and prohibiting concentration of ownership in media, although the European Parliament has explicitly called upon Montenegro to adopt such law in its resolution of 13 December 2007.

#### **Criminal Procedure Code (CPC)**

16. In violation of the right to privacy, Article 230 of the CPC provides the police with the authority to require telecommunication companies to provide information on identity of telephone and mobile phone numbers which have established contact and the duration of such contact (so called „metering“) without a warrant issued by the court and without any other mechanism of control of the use of such authority. It also provides the police with the authority to take away a PC for a check-up, without a warrant or any other control mechanism over the scope and manner of exercise of such authority. In the meantime, the Government has formulated an Action Plan for Combating Corruption that explicitly allows the police to conclude direct agreements with telecommunication companies to guarantee them direct access to their databases and the police has confirmed in a letter to the NGO MANS that they have indeed already concluded such an agreement with „M-tel“ company for mobile telephone communications. HRA is about to file an initiative for a constitutional review of that article, as well as the concluded agreements. The new Draft Criminal Procedure Code does not provide for such police authority without a court order, but also does not explicitly mention the practice of „metering“ and if the current law and concluded agreements on the subject are not challenged, they would most likely continue to be enforced even under the new Code, if and one the one is adopted.
17. The Draft Criminal Code has deficiencies regarding right to defence from the very moment of someone being „criminally charged“ in terms of the ECHR art. 6, as it provides for the assistance of the lawyer from the moment of the first interrogation, although that may never happen and a person may be detained before that for hours, etc. HRA has prepared an extensive commentary on all draft articles we found disputable (the document is attached to this communication).

#### **Draft Constitutional Court Act**

18. The Draft Constitutional Court Act does not ensure satisfactory appliance of international human rights treaties, since the Constitutional Court is only required to „considers the principles of the European Convention on Human Rights (Art. 68). HRA has written to the Government asking to strengthen the obligation of the Constitutional Court to, in line with international obligations of Montenegro, specify in this Act the need for direct application of all international human rights treaties, as well as their interpretation by the bodies competent to supervise their implementation.
19. In order to ensure an effective human rights protection by the Constitutional Court, the Court should also be empowered to award compensation of damage when determining violation of a human right (as it was provided by Constitutional Court Act from 1993, but omitted from the draft).
20. Appointment of the Constitutional Court judges and chief justice, prescribed by the Constitution, remains problematic as to their independence, as they are appointed by parliamentary majority vote on the proposal of the president of Montenegro, which enables decisive influence of the ruling political coalition on the appointments.

## **2. PRACTICE**

- 2.1 In its second year since establishment as an independent, internationally recognized state, Montenegro progresses on its way to European integration. However, a special concern in view of respect for human rights in Montenegro is a climate of impunity surrounding controversial murders, war crimes, torture incidents, threats and physical assaults on NGO activists and journalists.<sup>6</sup> There has been some progress towards improvement of the position of members of vulnerable social groups, but without satisfactory pace and effective results.<sup>7</sup>

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<sup>6</sup> See Balkan Human Rights Networks' Regional Human Rights Report 2007, Montenegro, by Tea Gorjanc Prelevic and Aleksandar Zekovic (about to be published), Chapter III.2, Judiciary – courts and the state prosecutor.

<sup>7</sup> Ibid., Chapter III.3.

- 2.2 Elementary education has still not been provided for significant population of Roma children and not enough has been done to suppress a regular and massive school drop-off. Education in other minority languages apart from Albanian has not yet been provided. Children and students with disabilities still suffer exclusion from officially proclaimed inclusive education at all levels.
- 2.3 In addition to the judiciary, Constitutional Court and the police, national human rights institutions exist in terms of Ombudsman, parliamentary committees for Human Rights, gender equality, defense and security, and the Council for the Civilian Control of the Police. Although the abilities and impact of those institutions vary, from the police and judiciary on rather negative side of the scale and the Ombudsman on a positive one, none deserved a title of an uncompromised promoter of human rights. Reform of the judiciary is on its way, judges are no longer to be appointed by the Parliament but by a Judicial Council. However, the appointment of prosecutors and Constitutional Court judges still waits to be disburdened from decisive majority vote of politicians. Judiciary is inefficient and largely ineffective in protection of human rights, as the focus is still profoundly not pointed to that perspective and as many observe, impartiality and professionalism of members of judiciary are still exceptional.
- 2.4 As women outnumber men, 10% of population lives with some form of a disability, 3% of inhabitants are Roma, app. 25,000 are refugees and IDPs, the state provided strategies for improvement of status of those vulnerable groups that remain profoundly discriminated. Sexual minorities remain publicly non-visible, out of fear from maltreatment.
- 2.5 There has been a significant downfall of respect for freedom of expression in Montenegro. In addition to the remaining above mentioned deficiencies of legal texts, the Government now intends to amend positive examples of legislation enabling exclusion of political influence from the editorial policies of the public service institution Radio and Television Montenegro and the allotting of frequencies for electronic media in order to regain control. Moreover, in 2006, 2007 and 2008 there have been several physical attacks on journalists that remain uninvestigated (attack on Jevrem Brkovic when his bodyguard Srdjan Vojcic was murdered; beatings of Tufik Softic, Zeljko Ivanovic and Mladen Stojovic), as well as the gravest example of such practice – 2004 murder of Dusko Jovanovic, editor of the opposition oriented daily Dan, for which only one person has been indicted as a co-assassin and acquitted in first instance for insufficient evidence. Although the High Court has quashed that judgment and ordered a retrial, legal representatives of the victim's family have publicly recognized serious flaws in the investigation, suspecting that it would ever lead to those who ordered the assassination. Moreover, the courts have issued final judgments in disrespect, according to our opinion, of the international and particularly European standards of freedom of expression and information, particularly in respect of defamation, distinction between value judgments and factual statements, etc.
- 2.6 Police and Judiciary remain ignorant of Human Rights perspective of their performance, although the laws proclaim protection of human rights as their primary duty. They are generally unaware of international standards from the jurisprudence of the ECHR and particularly of the Human Rights Committee, etc. For example, the Constitutional Court had no knowledge of the CAT decision against FRY (particularly the Republic of Montenegro in the important case of Hajrizi Dzemajl v. FRY), not to mention the general practice of the HRC and other bodies competent to interpret the ICCPR and other international HR treaties to which Montenegro has been a party.
- 2.7 The investigations into a number of war crimes dating back to the '90s were finally initiated in 2007 after years of pressures coming from the civil society and international organizations.<sup>8</sup> By the year's end, there were still no indictments. The investigation into the war crime of deportation of more than 80 Bosnian refugees from Montenegro to the Bosnian Serbs Army in May 1992 lasted for more than two years with no results, in spite of its being one of the best documented crimes in the region.<sup>9</sup> The order initiating investigation filed by the prosecution in October 2005 under the public pressure and complaints of victims' families did not include the masterminds or contain written evidence. Instead, it proposed the hearing of sixteen dead victims. Although the prosecution is well aware of the fact that most evidence has been destroyed by the Parliament and the Ministry of the Interior, this has not been investigated to date.
- 2.8 There is no information on the opening up of the investigation into war crimes committed during Dubrovnik attacks in 1991-1992 when the shelling of this city resulted in over 80 civilian casualties, over 400 injured persons, over 11,000 damaged buildings, a large number of which was under UNESCO protection at the time.<sup>10</sup> The attack was the responsibility of the Yugoslav Army, the territorial defence forces of the Republic of Montenegro, the Ministry of the Interior of the Republic of Montenegro, and volunteer units composed mostly from Montenegrin citizens. War crimes committed during the attack resulted only in the conviction of the General P. Strugar by the ICTY to eight years in prison.

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<sup>8</sup> This refers to Morinj Camp where both civilians and prisoners of war were abused in the Dubrovnik war zone 1991-1992, the ethnic cleansing of the Moslem village of Bukovica in the municipality of Pljevlja, the killings of Albanian refugees by the Yugoslav Army on the territory of Montenegro in the Kaludjerski Laz area. See more details on these crimes in the HRA report on war crime investigations in Montenegro.

<sup>9</sup> Scanned written evidence available at: [http://www.prelevic.com/deportation\\_written\\_evidence.htm](http://www.prelevic.com/deportation_written_evidence.htm)

<sup>10</sup> The Final UN Expert Commission Report, Annex XI, 28 December 1994, presented to the Security Council, "Open Society Archives" <http://www.osa.ceu.hu>.

- 2.9 In relation to its cooperation with the UN on the issue of enforced disappearance of persons, the WGED has 15 outstanding cases against Montenegro.
- 2.10 By the year's end, the state prosecutor had not investigated publicly pronounced allegations of former Ministry of the Interior officer S. Muratbasic against his superiors for having forced him to instruct citizens how to vote before the parliamentary elections in 2006.<sup>11</sup>
- 2.11 In the case of continuous death threats to human rights researcher A. Zekovic in April 2007, the state prosecutor failed to conduct an effective investigation in spite of Zekovic filing criminal report against unidentified perpetrators. This was followed by the media publicizing the name of the police officer whose voice was identified by citizens from the recorded threats broadcast by the radio.<sup>12</sup> The state prosecutor's office claimed not to have had any information on the identity of the stated police officer,<sup>13</sup> while, the US Department of state later also announced the name in its 2007 report from March 2008.
- 2.12 The state prosecutor's office was inefficient and ineffective in acting on torture reports. In the case of 1995 torching of the Roma settlement in Danilovgrad, where the Committee against Torture found the violation of the Convention against Torture by the state and ordered, in addition to the payment of just compensation, an effective investigation of responsible police officers. The investigation was not conducted.<sup>14</sup> There was no investigation into mass beating of prisoners in Spuz Prison by special units of the Interior Ministry on 1 September 2005<sup>15</sup> in spite of explicitly expressed interest of the EU in the effective conduct of this investigation.<sup>16</sup> As for the criminal charges for police torture filed on 14 September 2006 by ethnic Albanians charged with terrorism (police operation "Eagle's Flight"), the prosecution opened an investigation against five police officers as late as 26 October 2007.<sup>17</sup> Media reports led to a conclusion that in this case the police did not cooperate efficiently with the prosecutor's office.<sup>18</sup> At year's end, the persons who reported torture have not yet been informed that an investigation had been initiated.<sup>19</sup> The only investigation that has been initiated, was on the basis of reports of maltreatment of the father of one of the indictees, who died in the meantime. This is especially problematic as the criminal trial for terrorism is coming to its end whereas the torture allegations have not been processed.
- 2.13 From September 2006 until the end of 2007, 29 cases of ill-treatment by police officers were reported that had not resulted in indictments by the year's end. Criminal proceedings against police officers for the extortion of evidence and ill-treatment and torture are instituted relatively rarely. Verdicts are reached in a small number of reported cases only to be followed by admonitions, suspended sentences and fines. Disciplinary procedure for misuse of office and exceeding official powers referred to in the *Law on Civil Servants and Employees*, conducted by the Interior Ministry, is seen in practice as a more lenient alternative to criminal procedure although these procedures are of different nature and should be conducted in parallel.
- 2.14 In cases of manifest violations of absolutely protected human rights, which implicate responsibility of state officers, the state prosecutor, either did not act at all or did not act timely and effectively, which points to an unjustified tolerance of rights violations, promotes impunity, and contributes to public distrust in the rule of law in Montenegro.

Tea Gorjanc Prelevic, LL.M.

Program editor

<sup>11</sup> See also the Report of the Youth Initiative for Human Rights (YIHR), Human Rights in Montenegro – 2007: <http://yibr.org/uploads/reports/bhs/24.pdf>.

<sup>12</sup> Archive of the dailies *Dan*, *Vijesti*, and *Republika*, April and May 2007; A.S.Z. archive.

<sup>13</sup> Response of the SSP to the HRA's request for information (Tu. No. 654/07, 12/17/2007).

<sup>14</sup> CAT decision in the case *Hajrizi Dzemajl v FRY*, <http://www1.umn.edu/humanrts/cat/decisions/161-2000.html>, or *Danilovgrad Case*, Humanitarian Law Centre, Belgrade, 2003.

<sup>15</sup> According to the SSP information of 12/17/2007 (Tu br. 654/07), the files were with the Basic State Prosecutor as of December 2005 (*Dan*, 12/11/2005) who in the meantime submitted to the investigating judge the proposal for investigative measures to be taken against (just) one responsible person in the Police Directorate of Montenegro for the alleged commission of crime 'Negligence in Office', as defined in Art. 417(1) Criminal code, with the investigation still underway.

<sup>16</sup> EC stressed that "police ill-treatment in the prison in Spuz needs to be fully and transparently investigated", *European Commission Serbia and Montenegro 2005 Progress Report*, 11/9/2005, p. 18.

<sup>17</sup> "List is not final", *Vijesti Daily*, 26 October 2007

<sup>18</sup> *Ibid.*

<sup>19</sup> They were not informed as well as until 1 May 2008 (HRA archive).