



Provisional version

Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

Honouring of obligations and commitments by Montenegro

Draft report

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A. Draft resolution

1. Since joining the Council of Europe in 2007, Montenegro has made substantial progress in implementing post-accession commitments and statutory obligations. To date, it has signed and ratified 67 Council of Europe conventions, thus completing a great number, although not all, formal commitments. It actively co-operates with the Council of Europe and regularly asks the advice of the European Commission for Democracy through Law (Venice Commission) in the course of preparation of legislation.

2. The Parliamentary Assembly refers to the reports of its Ad Hoc Committees on the observation of the 2008 Presidential election and 2009 Parliamentary elections and welcomes the fact that these elections met almost all international standards. It notes, however, that further democratic developments are necessary, in particular, with respect to strengthening public confidence in the electoral process, eliminating the blurring of state and party structures, as well as harmonisation of the electoral framework with Council of Europe standards.

3. The Assembly welcomes the progress Montenegro has achieved in the process of European integration. It notes that, on 15 December 2008, Montenegro formally submitted an application for membership in the European Union. It follows closely the process of preparation by the European Commission of the Opinion on Montenegro's application and expects the European Commission to make full use of the reports of the Assembly and of the Council of Europe monitoring bodies in the preparation of this Opinion. The Assembly furthermore congratulates Montenegro for clear progress in fulfilling the visa liberalisation benchmarks set by the European Commission, which culminated in the introduction, as of 19 December 2009, of the visa free regime for Montenegro.

4. The Assembly congratulates Montenegro for establishing and maintaining good neighbourly relations with the countries of the region. Montenegro is a reliable and constructive partner which plays a stabilising role in the region.

5. As far as the implementation of post-accession commitments is concerned, the Assembly welcomes the fact that Montenegro has complied with a number of undertakings which were due to be completed within the first two years of membership. In particular, in October 2007, Montenegro adopted a new constitution which received a generally positive assessment of the Venice Commission. Furthermore, a number of important laws were adopted in order to implement the constitutional provisions and harmonise domestic legislation with Council of Europe standards. However, there have been set-backs as well, and not all of the deadlines originally foreseen for the adoption of the legislation relating to the implementation of the post-accession commitments were respected. Moreover, some important commitments have not been honoured yet and the implementation of the some of the laws adopted needs to be carefully monitored.

6. In the light of these considerations, the Assembly calls upon the Montenegrin authorities to maintain the current reform dynamic in order to catch up with the deadlines and complete the implementation of the remaining post-accession commitments. In particular,
7. As regards the signing and ratification of Council of Europe conventions, the Assembly:
 - 7.1. notes the fact that, to date, Montenegro has signed and ratified 67 Council of Europe conventions, thus almost fulfilling the formal post-accession commitments, while regretting that, at times, the deadlines originally foreseen have not been respected;
 - 7.2. encourages the authorities promptly to complete the process of ratification of the following Conventions from the list of post-accession commitments:
 - 7.2.1. the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (CETS 200);
 - 7.2.2. the European Convention on the Exercise of Children's Rights (CETS 160);
 - 7.2.3. the Protocol amending the European Convention on the Suppression of Terrorism (CETS 190);
 - 7.2.4. the European Convention on the International Validity of Criminal Judgments (CETS 070);
 - 7.2.5. the Convention on the Compensation of Victims of Violent Crimes (CETS 116);
 - 7.2.6. the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (CETS 106).
 - 7.3. Moreover, the Assembly calls on the Montenegrin authorities promptly to sign and ratify the following Conventions from the list of post-accession commitments:
 - 7.3.1. the European Convention on Nationality (CETS 166);
 - 7.3.2. the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (CETS 082).
8. As regards the constitutional reform, the Assembly:
 - 8.1. welcomes the adoption, on 19 October 2007, of the new Constitution which received a generally positive assessment of the Venice Commission. It notes that the seven minimum principles prescribed by the Assembly Opinion 261(2007) appear to have been satisfactorily reflected in the Constitution;
 - 8.2. considers that the Assembly recommendations relating to the constitutional reform, in particular, with respect to the direct applicability in domestic law of international conventions, the right to an effective remedy, the mandate, appointment procedure and guarantees of independence of the Ombudsperson, the transitional application of existing laws pending the adoption of new ones, the definition of the state of emergency and the legal effects thereof, as well as the definition of local self-government, have been reflected in the Constitution;
 - 8.3. at the same time, the Assembly notes that, in the opinion of the Venice Commission, the wording of some provisions of the Constitution, especially, those dealing with human and minority rights, could be further improved and brought closer to the wording of the European Convention for the Protection of Human Rights and Fundamental Freedoms;
 - 8.4. therefore, the Assembly calls upon the Montenegrin authorities to continue working with the Venice Commission with a view to ensuring that the provisions of the Constitution are translated into ordinary legislation as well as applied in a way as to give full effect to the standards of human rights protection guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.
9. As regards democratic institutions and the domestic legal system, the Assembly:
 - 9.1. notes that, over the past two years, the Montenegrin authorities have adopted a large number of laws with the aim of building a new modern legal system complying with the new Constitution and Council of Europe standards;
 - 9.2. welcomes the fact that this legislative work was carried out in close co-operation with the Venice Commission, while regretting that not all of the experts' recommendations were taken onboard;

9.3. notes that the capacity of the Parliament should be further strengthened in order to enable the MPs to play an active role in the legislative process, as well as ensure parliamentary oversight over the implementation of adopted laws;

9.4. regrets that, contrary to a specific commitment, the Montenegrin authorities have failed so far to adopt a new law governing the elections of the Members of Parliament and that the last parliamentary elections of 29 March 2009 were held in accordance with the old election law, which does not comply with Council of Europe standards;

9.5. welcomes the adoption, in July 2008, of the law on the financing of political parties, while regretting that the financing of parties and election campaigns still lacks transparency;

9.6. welcomes the adoption, in February 2008, by the Joint Central-Local Government Commission of the Action Plan on Local Self-Government Reform and encourages the authorities to continue the implementation of a comprehensive decentralisation reform;

9.7. welcomes the introduction of a new system of funding of the public service broadcaster, with the aim of ensuring its sustainability, efficiency and independence;

9.8. therefore, the Assembly calls upon the Montenegrin authorities to:

9.8.1. promptly adopt a new law governing the elections of the Members of Parliament, in close co-operation with the Venice Commission;

9.8.2. amend the law on the financing of political parties, in the light of the recommendations of election observers, and increase transparency in the funding of political parties and election campaigns;

9.8.3. strengthen the capacity of the Parliament, in particular, by making adequate resources and premises available to it, as well as by using the Assembly's expertise as well as funding opportunities offered, in particular, within the framework of the European Union's Instrument for Pre-Accession (IPA);

9.8.4. strengthen mechanisms of parliamentary oversight over the activities of the Government, in particular, with respect to the implementation of laws adopted by Parliament, as well as strengthen the financial independence of Parliament;

9.8.5. continue the comprehensive local government reform, with a view to devolving sectoral responsibilities to the municipalities, strengthening their financial basis, building up their capacities, as well as improving public ethics at local level.

10. As regards the Rule of Law, the Assembly:

10.1. welcomes the adoption of the laws on courts, the high judicial council and the prosecutor's office, which were drafted in co-operation with the Venice Commission;

10.2. welcomes the adoption and implementation by the Montenegrin authorities of the Judicial Reform Strategy and Action Plan, while regretting the fact that the funds allocated to the functioning of the judiciary still represent a rather small share of the State budget;

10.3. welcomes the adoption of the law on the protection of the right to a fair trial within reasonable time the implementation of which appears to have contributed to reducing the backlog of cases in domestic courts;

10.4. welcomes the adoption of the new Criminal Procedure Code and Civil Procedure Code, which provide for the possibility of the re-examination or re-opening of a case at domestic level, following a decision by the European Court of Human Rights;

10.5. regrets, however, that the domestic judges are not provided systematically with translations of the judgments of the European Court of Human Rights and notes that a sustainable system of initial and in-service training in the Convention case law should be introduced;

10.6. welcomes the good co-operation of the Montenegrin authorities with GRECO and MONEYVAL and the progress they are making in fighting corruption, organised crime and money laundering, while noting that the public perception of the judiciary and prosecutor's office could still be improved, in particular, as regards corruption risks;

10.7. therefore, the Assembly calls upon the Montenegrin authorities to:

10.7.1. continue the reform of the judiciary and prosecutor's office with a view to guaranteeing the full independence and professionalism, and thereby improve the public perception of the judiciary and of the prosecutors;

10.7.2. further strengthen the financial situation of the courts of law;

10.7.3. further strengthen the existing mechanisms of initial and in-service training of judges in the case law of the European Court of Human Rights, as well as provide them systematically with translations of the Court's case law;

10.7.4. continue reforms in the field of the fight against corruption and money laundering, in line with the recommendations of GRECO and MONEYVAL.

11. As regards Human Rights, the Assembly:

11.1. welcomes the constitutional guarantees of the independence of the Ombudsperson, as well as the efforts of the authorities aimed at strengthening the operational capacity of the Ombudsperson's office, noting, however, that further improvements to the law on the Ombudsperson could be made, in the light of the opinion of the Venice Commission;

11.2. regrets that the constitutional provisions on affirmative action in favour of minorities have not yet been implemented in ordinary legislation, as well as that the 2006 minority rights law contains a citizenship-based definition of minority rights;

11.3. regrets that the law on the prohibition of discrimination has not yet been adopted, while noting that consultations with the Venice Commission are ongoing;

11.4. regrets that some groups of the Montenegrin society, especially the lesbian, gay, bi-sexual and transgender population (LGBT), are frequently subjected to discrimination and are targets of intimidation and physical violence;

11.5. notes that the Montenegrin media sector is diverse and vibrant, while regretting complaints from journalists about pressure which is being put on them, which hinders their right to freedom of expression;

11.6. welcomes the efforts of the Montenegrin authorities to reform the education system and provide children from the minority communities with the opportunity to study in their mother tongue as well as attend courses dealing with the culture and traditions of their communities, in the spirit of promoting tolerance and respect for others;

11.7. welcomes the adoption and implementation of the Strategy for the improvement of the condition of Roma;

11.8. welcomes the efforts of the Montenegrin authorities to ensure equality between men and women in law, in the family, society and economy, while noting that the participation of women in politics should be improved;

11.9. welcomes the co-operation between the Montenegrin authorities and the Committee for the Prevention of Torture and Inhuman and Degrading Treatment (CPT), the publication of the most recent CPT report, as well as the efforts of the authorities to improve conditions of detention;

11.10. welcomes the ratification by Montenegro of the Council of Europe Convention on Action Against Trafficking in Human Beings (CETS 197), as well as the efforts of the authorities to combat trafficking in human beings;

11.11. takes note of the adoption of the law on citizenship and invites the Montenegrin authorities to continue negotiations with neighbouring countries with a view to concluding agreements on dual citizenship;

11.12. regrets that the new asylum law does not fully comply with the requirements of the European Convention on Nationality (CETS 166);

11.13. closely follows the actions of the Montenegrin authorities aimed at re-registering displaced persons with a view to negotiating their sustainable returns or ensuring local integration of those who decide to stay in Montenegro;

11.14. therefore, the Assembly calls upon the Montenegrin authorities to:

11.14.1. take into account the opinion of the Venice Commission in finalising the law on the prohibition of discrimination and adopt this law as a matter of urgency;

11.14.2. continue working on the effective implementation of the constitutional guarantees of minority rights, by revising, where appropriate, the legislation governing minority rights;

11.14.3. take all appropriate actions to investigate all allegations of torture or ill-treatment, in particular, allegations made by persons detained by the police, as well as sanction the perpetrators;

11.14.4. investigate all allegations of violence against human rights defenders, journalists and the LGBT population; provide appropriate protection to those concerned and prosecute and punish the perpetrators of these offences; educate the population, in particular the police and youth, to accept differences;

11.14.5. implement the principles of Assembly Resolution 1577 (2007) “towards the decriminalisation of defamation”, in particular, by setting reasonable and proportionate maxima for awards for damages and interest in defamation cases so that the viability of a defendant media organ is not placed at risk;

11.14.6. fully co-operate with the CPT, in the implementation of the Committee’s recommendations;

11.14.7. pursue the educational reform in order to teach tolerance and respect for others in schools;

11.14.8. pursue the implementation of the Strategy for the improvement of the condition of Roma;

11.14.9. revise the citizenship and asylum legislation, in the light of the requirements of the European Convention on Nationality;

11.14.10. continue working on improving the situation of refugees and displaced persons by removing all discriminatory provisions in the fields of labour, education, access to property rights, legal redress and access to citizenship and health services; continue negotiations with Montenegro’s neighbours with a view to ensuring the sustainable return of displaced persons or providing local integration to those who decide to stay in Montenegro;

11.14.11. continue combating trafficking in human beings.

12. The Assembly notes the good co-operation of the Montenegrin authorities with the International Criminal Tribunal for the former Yugoslavia (ICTY) and encourages the authorities to continue close collaboration with the Tribunal, especially, as regards the search and arrests of indictees who are still at large.

13. Pending progress in the implementation of the above recommendations, the Assembly resolves to continue the monitoring procedure with respect to Montenegro.

B. Explanatory memorandum by Mr Gardetto and Mr Holovaty, co-rapporteurs

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I. Foreword

1. The Republic of Montenegro joined the Council of Europe on 11 May 2007, becoming its 47th member state. The circumstances surrounding Montenegro's application for accession to the Council of Europe were unique, as Montenegro was formerly part of the State Union of Serbia and Montenegro, which was a member of the Council of Europe from 3 April 2003 to 6 April 2006.
2. In accordance with the regular procedure, prior to accession, the Parliamentary Assembly prepared Opinion No. 261 (2007) on the accession of the Republic of Montenegro to the Council of Europe. In this Opinion, the Assembly listed the commitments which Montenegro should take upon when joining the Organisation. In accordance with paragraph 21 of the Opinion, the Assembly decided to monitor the situation in Montenegro, as from its accession, pursuant to its Resolution 1115 (1997). The Monitoring Committee, which was instructed to carry out this task, appointed us co-rapporteurs for Montenegro in June 2007.
3. This is the first report on the honouring of obligations and commitments by Montenegro. To prepare it, we have used documents produced by various Council of Europe expert and monitoring bodies, as well as the information provided to us by the Montenegrin authorities. The comments provided by the Montenegrin delegation on the preliminary draft version of the report were particularly useful in this respect.
4. In order to collect first-hand information, we paid two fact-finding visits to Montenegro, on 14-16 October 2007 and 7-9 July 2009. We are grateful to our Montenegrin colleagues for the organisation of the visits, as well as for the open and frank exchanges of views we had with them. We also wish to thank the staff of the Council of Europe Office in Podgorica for their organisational and logistical support.
5. In the preparation of this report, we have also taken note of the reports by other international partners and non-governmental organisations. In particular, we took into account the findings of the European Commission contained in its 2008 and 2009 Progress Reports.

II. Recent political developments

6. Among the most notable political developments which occurred in the last two years, the presidential and pre-term parliamentary elections are of particular importance.
7. On 6 April 2008, the incumbent President Filip Vujanovic (Vice-President of the ruling Democratic Party of Socialists), was re-elected as President of Montenegro. The election was the first presidential election to take place since Montenegro declared its independence, and it was governed by a new legal framework amended in the wake of the declaration of independence, which includes the Law on the Election of the President (December 2007) and the Law on the Register of Elections (2000). An Ad Hoc Committee of the Bureau of the Assembly observed the election and concluded that it was largely in line with European standards for free elections.¹
8. Pre-term parliamentary elections were held in Montenegro on 29 March 2009; these were the first to be held under the new Montenegrin Constitution (adopted in October 2007). On 27 January 2009, Parliament approved its own dissolution, one year before the end of its term in office, opening the way for these early elections. An Ad Hoc Committee of the Bureau of the Assembly observed the parliamentary elections and concluded that they mostly conformed to international commitments and standards. However, the Committee noted that public confidence in the electoral process needed to be further improved, as "frequent allegations of electoral fraud and a blurring of state and party structures created a negative atmosphere among many voters."² Other noted areas of concern include harmonisation and reform of the electoral framework, lack of adequate legal procedures for addressing complaints and insufficient critical reporting by most broadcast media. In addition, the Ad Hoc Committee was critical of the constitutional 2-year residency requirement for voting, which is not consistent with the principle of universal suffrage. The Committee stressed that the right to elect and be elected should be granted to all citizens.
9. The results of the elections confirmed the strong position of the ruling majority, the Coalition for a European Montenegro (Democratic Party of Socialists, Social Democratic Party, Bosniak Party and Croatian Civic Initiative), which won nearly 52% of the votes and 48 out of the 81 seats in Parliament. The other 33 seats are distributed between the Socialist People's Party (SNP, 16 seats), New Serbian Democracy (NOVA, 8 seats), Movement for Changes (PzP, 5 seats) and 4 small Albanian parties (1 seat each). Milo Djukanovic, President of the Democratic Party of Socialists and former President of Montenegro, was appointed Prime

¹ See Doc. 11567

² See Doc. 11867

Minister. This is his fifth (non-consecutive) term. In political terms, we note that, although the ruling coalition has a comfortable majority, it still needs to engage in a constructive dialogue with the opposition, which appears to hold a solid mandate in the new Parliament. This is particularly important, as the adoption of some laws (for example, amendments to the electoral legislation) require a qualified majority. Dialogue between the majority and the opposition is therefore essential and we expect both the ruling coalition and the opposition to shoulder their political responsibilities and engage in constructive co-operation.

10. The recognition by Montenegro, on 9 October 2009, of the unilateral declaration of independence by Kosovo³ was another important political development. In response to recognition, Montenegro's Ambassador to Serbia was declared persona non grata and asked to leave, although Serbia did not withdraw its Ambassador from Montenegro. A new Ambassador of Montenegro to Serbia was appointed in September 2009. This is a positive move and we expect the new Ambassador to contribute to strengthening good neighbourly relations between the two states. After the recognition of Kosovo, the Serb opposition party leaders called for a peaceful demonstration in Podgorica. However, the demonstration turned into clashes during which law enforcement officials and more than 30 people were hurt, most of them police officers. That said, this regrettable, but isolated, incident was not followed by mass protests.

11. Montenegro is moving steadily along the path of European integration. In its 2009 Progress report, the European Commission noted that Montenegro is making progress in addressing the political criteria. The Commission further stressed that the completion of its legal framework and the strengthening of the administrative and institutional capacity were ongoing and that the Constitution, on the whole, was implemented effectively. Judicial reform continues and has started to produce results. Yet, political influence on the judiciary and the prosecution persists and the fight against corruption and organised crime needs to be pursued with determination, in the opinion of the European Commission.

12. On 15 December 2008, Montenegro formally submitted an application for membership in the European Union. On 23 April 2009, the Council invited the Commission to prepare an Opinion on Montenegro's application. A special questionnaire was delivered to the Montenegrin authorities at the end of July 2009 and the Commission expects to deliver its Opinion in the course of 2010. We shall follow this process closely in the further stages of the monitoring process.

13. Montenegro has performed well in meeting the visa liberalisation benchmarks prescribed by the European Union. Montenegrin citizens were granted a visa free regime for the countries of the European Union as of 19 December 2009.

14. In terms of regional co-operation, Montenegro maintains good neighbourly relations with the countries of the region and takes an active part in regional co-operation initiatives, such as the Regional Co-operation Council (Successor to the Stability Pact for South Eastern Europe), South-East European Co-operation Process (SEECP), as well as the Central European Free Trade Agreement (CEFTA), which Montenegro chaired in 2009.

III. Co-operation with the Council of Europe and ratification of Council of Europe conventions

15. In accordance with paragraph 19.3.1. of Opinion 261 (2007) (hereinafter referred to as the Assembly Opinion), Montenegro undertook to continue to review the compatibility of its existing and future domestic legal standards with the European Convention on Human Rights (ECHR) and Council of Europe standards by drawing on the Organisation's expertise.

16. In general, Montenegro has consulted, and used the assistance of, the Council of Europe, in particular, of the Venice Commission, in the legislative reform process. Although not all of the recommendations given by Council of Europe bodies have been fully followed, a positive and co-operative working relationship has been established. We therefore conclude that Montenegro is positively complying with this commitment.

17. To date, Montenegro has signed and ratified 67 Council of Europe conventions, a number of which are listed in paragraph 19.1. of the Assembly Opinion. The deadlines fixed by the Assembly have not always been complied with strictly, but overall, there has been good progress in adhering to Council of Europe conventions.

³ All references to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

18. That said, Montenegro has yet to ratify 6 conventions from the list of its commitments, according to Opinion 261(2007). These are:

- the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (CETS 200);
- the European Convention on the Exercise of Children's Rights (CETS 160);
- the Protocol amending the European Convention on the Suppression of Terrorism (CETS 190).
- the European Convention on the International Validity of Criminal Judgments (CETS 070);
- the Convention on the Compensation of Victims of Violent Crimes (CETS 116)
- the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (CETS 106).

19. Moreover, 2 conventions from the list of commitments, according to Opinion 261(2007), have neither been signed nor ratified. These are:

- the European Convention on Nationality (CETS 166);
- the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (CETS 082).

20. Finally, contrary to paragraph 19.1.16.4. of the Assembly Opinion, Montenegro has not yet reviewed nor withdrawn the restrictive declaration contained in the instrument of ratification of the European Convention on Extradition (ETS No. 24), according to which Montenegro shall refuse extradition of its nationals. The instrument of accession containing this declaration was deposited on 30 September 2002 by the Federal Republic of Yugoslavia.

21. We invite the Montenegrin authorities to intensify their efforts in order to complete the signing and ratification of all Council of Europe conventions which are expressly listed among their accession commitments.

IV. Democratic institutions

a) Constitutional reform: implementation of the seven key principles

22. In accordance with paragraph 19.2.1. of the Assembly Opinion, Montenegro committed itself "to quickly complete constitutional reform and adopt a new constitution within one year at the most, in close co-operation with the Venice Commission and in full compliance with international standards and, in this connection, to include in the constitution [...] seven minimum principles already approved in the declaration of 8 February 2007 signed by the Prime Minister, the Speaker of Parliament and the heads of the political groups represented in the Parliament of the Republic of Montenegro."

23. The Parliament of Montenegro, by a 2/3 majority vote, adopted the new Constitution on 19 October 2007. On the same date, the Parliament adopted the Constitutional law for the implementation of the Constitution (Constitutional Law). The new Constitution came into effect on 22 October 2007.

24. The Montenegrin Parliament benefited from the assistance of the Venice Commission in drafting the Constitution. After several interim sets of comments, the final opinion of the Venice Commission on the Constitution was adopted at its 73rd plenary session, on 14-15 December 2007.⁴

25. In its opinion, the Venice Commission gave the new Constitution a "generally positive assessment". All but two of the seven key principles were fully implemented. Of those two, the first point of concern relates to the role played by the Parliament in appointing the President of the Supreme Court, which can undermine the independence of the judiciary. The second point of concern relates to the guarantee of retroactive application of the ECHR, which should be clarified and made known to the courts.

26. With respect to the appointment of the President of the Supreme Court, under Article 124 of the new Constitution, the President of the Supreme Court shall be elected "by the Parliament at the joint proposal of the President of Montenegro, the Speaker of the Parliament and the Prime Minister." Article 124 furthermore establishes that: "If the proposal for the election of the President of the Supreme Court fails to be submitted within 30 days, the President of the Supreme Court shall be elected at the proposal of the responsible working body of the Parliament." These provisions make the President of the Supreme Court a political appointee, as the candidatures should be agreed upon between the three most powerful political figures of the country.

⁴ See Doc. CDL-AD(2007)047 (hereinafter referred to as "Venice Commission's Opinion")

27. That said, the Venice Commission noted that “Montenegro has experienced very acute problems relating to the effectiveness and impartiality of the judiciary. The Montenegrin political class is firmly convinced that these difficulties can be overcome only through oversight of the judiciary by Parliament”.⁵ We also note that there appears to be a wide consensus of all political stakeholders about the need to maintain some powers of the Parliament in the appointment of the highest officials of the judiciary. This also stems from a long-lasting regional tradition of conferring on the Parliament the power to appoint judges.

28. We have no ready-made solution to suggest to our Montenegrin colleagues. We believe they should continue working on this matter, in co-operation with the Venice Commission, in order to find in future other tools to strengthen the independence of the judiciary and ensure its impartiality and immunity from undue political influence.

29. The guarantee of retroactive application of the ECHR is addressed in the Constitutional Law, which was adopted alongside the new Constitution on 19 October 2007. Article 5 of the Constitutional Law provides that “provisions of international agreements on human rights and freedoms, to which Montenegro acceded before 3 June 2006, shall be applied to legal relations that have arisen after the signature”. The Venice Commission noted that this provision should be interpreted as meaning “Provisions of international agreements on human rights and freedoms to which Montenegro was a party (as a federated entity of the State Union) before 3 June 2006 shall be applied to legal relations that have arisen after the date of ratification of those treaties by the State Union”.⁶ Only in this case, would this article fulfil one of the key principles of the constitutional reform, as set out in the Assembly Opinion.

30. During our meeting with the Presidents of the Constitutional Court, the Supreme Court and the Administrative Court, we received confirmation that this provision of the Constitutional Law is, and will be, interpreted as indicated by the Venice Commission. We also note that, in April 2009, the European Court of Human Rights delivered its first judgement against Montenegro in the case *Bijelic v. Montenegro and Serbia* (Application no. 11890/05). In this judgment, the Court clearly stated that it “considers that both the Convention and Protocol No. 1 should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004, between 3 March 2004 and 5 June 2006 as well as thereafter”.⁷ This further clarifies the applicability of the Convention in the transitional phase between the dissolution of the State Union of Serbia and Montenegro and Montenegro’s accession to the Organisation.

31. That said, we gained the impression from our discussion with senior judicial officials, as well as with human rights defenders and lawyers, that the ECHR is still very rarely referred to by the domestic courts. This may be due to the lack of knowledge of the Convention and of the case law of the Strasbourg Court among the judges. Adequate awareness-raising and training activities should be complemented by clear guidelines from higher courts to lower courts about the direct applicability of the Convention in Montenegro’s legal system.

b) Constitutional reform: other provisions to be included in the Constitution

32. In paragraph 19.2.2. of the Assembly opinion, the Assembly laid down a number of additional issues to be included in the Constitution, namely, the direct applicability in domestic law of international conventions, in particular in the field of human and minority rights; the right to an effective remedy, as foreseen in Article 13 of the ECHR, the mandate; the appointment procedure and guarantees of independence of the ombudsman, transitional provisions on the applicability of former legislation pending the adoption of new legislation, the regulations governing the state of emergency; the legal effects thereof and the supervisory powers of parliament in this respect; as well as a clear definition of local self-government based on the principles of the European Charter of Local Self-Government.

33. Practically all these issues have been satisfactorily dealt with by the Constitution. However, we would like to make two remarks. Firstly, we recall the opinion of the Venice Commission concerning the constitutional provisions governing the right to an effective remedy in that the wording of the Constitution does not fully correspond to that of Article 13 of the ECHR. In this respect, we remind our Montenegrin colleagues that the Montenegrin courts must interpret this provision in a manner that gives full effect to the requirements of Article 13 ECHR. Secondly, we have some reservations concerning the wording of the transitional provision on the applicability of former laws (in force before the declaration of independence), pending the adoption of new legislation. Article 11 of the Constitutional Law provides that the laws and regulations of the State Union of Serbia and Montenegro will continue to be in force as long as they “are not

⁵ Venice Commission’s Opinion, paragraph 81

⁶ Id. at paragraph 129

⁷ *Bijelic v. Montenegro and Serbia* (application no. 11890/05). Judgment, Strasbourg, 28 April 2009, paragraph 69

contrary to the legal order and interests of Montenegro". The opinion of the Venice Commission reiterated the concerns contained in the Eminent Lawyers' Report on the conformity of the Montenegrin legal order with Council of Europe standards, which criticised this formula for raising issues of legal certainty "to the extent that it is impossible to define clearly and unequivocally what these interests are, with the result that the formula could prevent Montenegrin authorities from applying the law and ensuring respect for international standards."⁸ At the same time, all remaining former laws should be harmonised with the new Montenegrin constitutional and legal order as quickly as possible.

c) Elections and electoral legislation

34. In accordance with paragraph 19.3.16. of the Assembly Opinion, Montenegro committed itself "to revise the electoral law and, in particular, the provision concerning the system for allocating seats to political party lists, to ensure that it does not mislead voters".

35. With respect to presidential elections, on 27 December 2007, Parliament approved a new Law on the Election of the President, which provides for direct popular election for a five-year term. Under the new law, political parties or groups of supporters have the right to nominate candidates if they can collect the signatures of at least 1,5% of all registered voters, whereas previously this nomination right was dependent on the size of an organisation's membership. Furthermore, the new law requires that each signature in support of a candidate must be made in the premises of the Municipal Election Commission in the presence of at least two members of the Commission. The new law also abolished the previous requirement of 50% voter turn out.

36. While this law definitely represents a step forward, in comparison with the previous legislation, some of its provisions are questionable. For instance, in the 2008 presidential election, the condition of a minimum number of signatures required in support of a candidate proved to be a deterrent to individual candidates and candidates representing smaller parties.⁹ Moreover, the International Election Observation Mission (in which the Assembly Ad Hoc Committee participated) observed a blurring between the government and the ruling party. This was also a recurrent criticism from opposition parties, international organisations and civil society representatives. The Assembly also expressed concern over the need for substantial improvement in the separation between state and political parties/candidates in order to comply with the Council of Europe's Code of Good Practice in Electoral Matters. Moreover, the observers observed confusion regarding the rules governing the financing of the campaigns, which highlighted, yet again, the need to adopt new legislation on political parties and campaign financing.

37. Contrary to the Assembly Opinion, the Montenegrin authorities have failed to harmonise the legislation governing parliamentary elections with the new Constitution. The elections of 29 March 2009 were held in accordance with the 1998 Law on the Election of Councillors and Representatives, which was amended several times since 1998 and, most recently in 2006. This law provides for the allocation of mandates on the basis of a proportional list system, within a single nationwide constituency, with a 3% threshold.

38. A serious flaw in the Law on the Election of Councillors and Representatives is that, while it stipulates that half of the mandates won by electoral lists must be awarded to candidates in their list order, it provides that the other half of the mandates can be allocated to remaining candidates in any order established by the party leadership. This provision has been criticised both by the OSCE/ODIHR and the Council of Europe as problematic because it restricts transparency and risks misleading voters, who cannot be sure which candidates will represent them. Another point of concern in the law is a provision stipulating that, if a MP ceases to be a member of the political party on whose list he or she has been elected, the mandate of that MP terminates (i.e. party-administered mandate).

39. Given the above, we reiterate our call to the Montenegrin authorities to adopt a new law governing the election of members of parliament as quickly as possible. During our visit in July 2009, we were told by the key political stakeholders that consultations with the Venice Commission were ongoing and that a new draft law would soon be sent to the Venice Commission for opinion. In the comments on the preliminary draft report, the Montenegrin delegation informed us of the fact that a draft law on elections was prepared by an expert working group and was due to be examined by the Parliament on 3 March 2010. Subsequently, the law would be sent to the Venice Commission for opinion. While we welcome the progress in the implementation of this commitment, we would like to call upon the authorities to consult the Venice Commission before the final adoption of the law, in order to engage in a meaningful dialogue. We will continue to follow this issue closely.

⁸ See Venice Commission's Opinion, paragraph 31; Eminent Lawyers' Report, paragraph 76

⁹ See Secretariat General Monitoring Report though April 2008. SG/Inf (2008)9final of 11 June 2008

d) *Political parties*

40. As mentioned earlier in the present report, all election observers have criticised Montenegro's elections for the blurring of state and party structures. This is a serious problem, as it directly infringes on the competitiveness of the electoral process, as the ruling party is automatically put in a more favourable position than other political actors. This is due to the fact that the ruling party, the Democratic Party of Socialists (DPS) (which is the successor of the Montenegrin branch of the Yugoslav League of Communists and has been in power for the last 18 years), inherited a large amount of property, which, at the times of Socialist rule, was registered in the name of the Montenegrin branch of the League of Communists of Yugoslavia. Until the end of 2009, the Government was paying a substantial rent to the DPS for the use of a party-owned building. We were informed that, as from January 2010, the Government building is registered as state property and no rent is being paid by the Government to DPS for the use of premises. This positive development, as well as the adoption, on 26 February 2009, of the Law on State Property and the establishment of the State Property Agency are steps in the right direction.

41. On the legislative side, in July 2008, a Law on the Financing of Political Parties was adopted. It was applied for the first time during the parliamentary elections of 29 March 2009. According to expert assessments, the funding of political parties and election campaigns continues to lack transparency, and the laws on political parties and their financing are not being sufficiently implemented. Reliable disclosure of sources of income is lacking. Although the new law is an improvement over previous legislation, it does not require periodic reporting on campaign finances throughout the campaign period, calling instead for submission of reports only after the election. Furthermore, the new law does not establish a procedure for filing complaints on violations. The responsibility for auditing campaign expenditures lies with the Ministry of Finance. However, the law only requires the auditing of private donations if the total exceeds 50,000 Euros and leaves this task to private auditors contracted by political bodies. The international observers of the 29 March elections recommended that a public body should be responsible for the auditing of all campaign funding sources and expenditures.¹⁰ We call upon our Montenegrin colleagues to implement promptly all recommendations of election observers with respect to political party financing.

e) *The work of the Parliament*

42. In accordance with paragraph 19.3.10. of the Assembly Opinion, the Montenegrin authorities committed themselves "to increase as soon as possible the parliament's budgetary means and its administrative capacity". Some progress has been achieved in the implementation of this commitment. We commend Parliament for working efficiently and expediently, in particular, on legislation relating to EU integration and visa liberalisation. However, we have the impression that, sometimes, laws are adopted too quickly, without substantial discussion in Parliament, as well as without prior dialogue with the civil society.

43. This is partially due to the fact that Parliament has no real capacity to provide MPs with expertise on technical and legal issues. Moreover, the electoral system (providing for party-administered mandates) makes MPs dependent on the good will of party leaderships, which does not stimulate their personal involvement in law-making. As a result, some tend to believe that Parliament is too often "rubber stamping" legislation and, according to some surveys and public opinion polls, amongst all public institutions, the public has the lowest level of trust and the highest level of distrust in the Parliament.¹¹ More recent research shows that the trend is improving, which is a welcome sign.¹²

44. From our meetings with the representatives of all political groups in Parliament, we gained the impression that the newly elected MPs are keen on taking a more active part in policy- and law-making. In our opinion, it is essential that Parliament implements its role fully, by constructively working with the Government on the drafting and adoption of laws, maintaining constant dialogue with civil society and exercising effectively political oversight over the activities of the Government. At the same time, the culture of constructive dialogue and co-operation should be further promoted among political groups representing the majority and the opposition. The rights of the opposition should be respected, especially because the opposition should become a constructive partner of the majority on important issues of national interest, in particular, as regards laws the adoption of which requires a qualified majority (this applies in particular to the electoral legislation, which urgently has to be brought into line with the Constitution).

¹⁰ See OSCE/ODIHR observation of 2009 parliamentary elections, final report, pages 14 and 26

¹¹ See, for example, the results of the public opinion poll published by the National Democratic Institute in November 2008

¹² See an opinion poll, published by the Centre for Democracy and Human Rights (CEDEM) before the parliamentary elections in March 2009

45. At the same time, we were informed that the Government of Montenegro was preparing a draft law which would limit the powers of Parliament to decide on its budget as well as on the use of funds within the approved budgetary envelope. Our colleagues from the Montenegrin Parliament fear that the adoption of this law could encroach on the independence of Parliament. In this context, we call upon the Government and Parliament of Montenegro to continue meaningful discussions on this draft law, in order to accommodate the concerns of MPs. Moreover, we reiterate our calls to improve the technical conditions for the work of the Parliament, by, for example, refurbishing and extending the Parliament's building.

46. Finally, we appeal to our colleagues from the Montenegrin delegation to the Assembly to take a more active part in the work of the Assembly and, in particular, in the monitoring procedure. It is regrettable that, since accession, Montenegro has never had any members in the Monitoring Committee. It is essential for the new delegation to secure at least one seat on the Committee, in order to be fully engaged in the monitoring procedure with respect to Montenegro, as well as to learn from the experience of other countries under monitoring.

f) Media pluralism

47. In accordance with the Assembly Opinion, Montenegro committed itself "to speed up reforms concerning the media in order to safeguard their independence and to ensure the implementation of the law on access to public information" (paragraph 19.3.17.) and "to provide the public service broadcasting system with the financial means to enable it to perform its functions" (paragraph 19.3.8.).

48. The media sector in Montenegro is diverse, comprising both state-owned and private media (print, electronic and broadcast). In his 2008 report, the Council of Europe Human Rights Commissioner reported that the media sector is vibrant and alive, and that media outlets regularly publicise a broad spectrum of well-grounded critical reviews.¹³ Media legislation on radio and television broadcasting, adopted in 2002, introduced a shift from state to public service and established a Radio and Television Council whose mandate includes securing the independence of former state-controlled media. There appears to be some politicisation of the Council due to shortcomings in the appointment and nomination procedure, which raise concerns about its independence.¹⁴ Candidates for the Council are nominated by various institutions, including academic bodies, NGOs, sports organisations and unions, but Parliament makes the final decisions regarding the candidates for each position. We call upon the Montenegrin authorities to change this in law and in practice, in order to establish sufficient guarantees against the politicisation of the Radio and Television Council.

49. With respect to public service broadcasting, we note that, on 17 December 2008, Parliament adopted a new Law on Public Service Broadcasting, under which a fixed amount of 1,2% of the annual budget of Montenegro is to be redirected to fund the core activities of the public service broadcaster. ARTICLE 19 was consulted on the draft law. In the view of our Montenegrin colleagues, the new funding model provides for the sustainability, efficiency and independence of the public service broadcaster. We will continue to follow this issue closely in the course of the monitoring procedure.

g) Parliamentary oversight over armed forces and security services and definition of the state of emergency

50. In accordance with paragraph 19.2.1.7. of the Assembly Opinion, Montenegro undertook to include in the Constitution provisions regulating the status of the armed forces, security forces and intelligence services of Montenegro and the means of parliamentary supervision. Moreover, according to the same paragraph, the Constitution should guarantee that the position of the commander-in-chief be held by a civilian. Furthermore, in accordance with paragraph 19.2.2.5., the Constitution should contain provisions defining a state of emergency, how a state of emergency may be declared, the legal effects thereof and the supervisory powers of parliament.

51. With respect to parliamentary oversight of the armed forces and security services, Article 130 of the Constitution establishes civil control of the armed forces and Article 131 entrusts the Security and Defence Council with national security and defence strategy and decisions regarding the inclusion of army units in international forces. The Speaker of Parliament is a member of the Security and Defence Council.

¹³ CommDH(2008)25, para. 66

¹⁴ CommDH(2008)25, para. 73

52. Article 133 of the Constitution addresses the conditions warranting a state of emergency, which is to be declared by Parliament, or, in the event that Parliament is unable to meet, by the Defence and Security Council.

53. We consider that both commitments have been satisfactorily implemented.

h) Local self-government

54. In accordance with paragraph 19.2.2.6. of the Assembly Opinion, Montenegro undertook to include in the Constitution a clear definition of local self-government based on the principles of the European Charter of Local Self-Government. Moreover, in accordance with paragraph 19.3.11., Montenegro undertook to strengthen the government structures responsible for local self-government, notably with regard to administrative supervision, and to revise the legislation and regulations governing local budgeting, equalisation schemes and the devolution of sectoral responsibilities to the municipalities.

55. Local government is regulated by Part Four of the Constitution. The constitutional provisions comply with the requirements of the European Charter of Local Self-Government.

56. The Ministry of the Interior is responsible for administrative reform and local self-government. Although efforts have been made to enhance administrative capacity of the Ministry, improvement has been slow and a number of structural problems affect the performance of public administration. Much remains to be done with respect to transparency, accountability, financial control, budget management, management of public assets, licensing procedures and appropriate allocation of resources. Politicisation of the administration exacerbates these issues.

57. On the legislative side, the Action Plan for Local Self-Government, prepared by a working group of the Joint Central-Local Government Commission, was finalised and adopted in February 2008. The draft law on territorial organisation, prepared in co-operation with the Council of Europe, was adopted by the Government of Montenegro on 3 December 2009. It was introduced in parliamentary procedure and should be adopted soon. Amendments to the Law on Local Self-Government were appraised by Council of Europe experts and the appraisals were communicated to the authorities. In general, recommendations by the Council of Europe, in some cases quite critical of the provisions originally envisaged, are being followed by the Government and are incorporated in revised drafts and bills submitted to the Parliament. We therefore believe that Montenegro is steadily moving ahead in the implementation of this commitment.

V. Rule of Law

a) Reform of the judiciary

58. In accordance with the Assembly Opinion, Montenegro undertook a series of commitments relating to the reform of the judiciary. These are:

- to recognise in the Constitution the principles that “the independence of the judiciary must be guaranteed and the imperative of avoiding any decisive role of political institutions in the procedure of appointment and dismissal of judges...” (paragraph 19.2.1.2.);
- “to speed up completion of reforms to ensure that courts [...] are professional and independent and that procedures for appointing and dismissing judges [...] respect the independence of the judiciary” (paragraph 19.3.2.);
- “to provide the constitutional court and judiciary as a whole with adequate funding” (paragraph 19.3.4.).

59. Over the past two years, some important steps have been taken to implement these commitments.

60. With respect to the guarantees of the independence of the judiciary, the Judicial Council has 10 members: 4 elected by judges, 5 elected by the Government or by the ruling party, and one elected by the opposition party in Parliament. The Venice Commission deemed the new organisation of the Judicial Council to be “balanced” and commended the Constitution for removing the appointment and dismissal of judges by Parliament. However, some experts disagree with the Venice Commission that the composition of the Judicial Council is balanced (for example, those of the SIGMA Programme¹⁵). SIGMA has expressed concern that the appointment scheme, which is based largely on political party quotas, is likely to further politicise the Judicial Council. Moreover, SIGMA also criticised the recruitment system of judges, which, it

¹⁵ See Programme on Support for Improvement in Governance and Management (SIGMA), General Administrative Law Framework, Assessment of Montenegro, May 2008

says, is highly politicised and does not guarantee merit-based, professional appointment of the 4 council members appointed by the judiciary.

61. The Law on the Judicial Council was adopted in February 2008, after consultation with the Venice Commission. The Judicial Council has the authority to elect, promote and dismiss judges and to rule on disciplinary proceedings. The criteria for appointment are objective, e.g. going through an exam, law school performance, and training and/or professional experience. The law establishes that the Judicial Council is to be governed by the principle of preventing political influence on those persons holding judicial office and enshrines constitutional principles of independence, autonomy, accountability, and professionalism of its members. The law also strengthens the Judicial Council's influence over the budget of the courts. However, the Ministry of Justice still decides on the budgetary allocations to the judiciary, although the President of the Judicial Council (who is the President of the Supreme Court) has the right to address Parliament within the framework of the parliamentary debate on the budget.

62. That said, according to the assessment made by the "Human Rights Action" NGO, the funds allocated from the State budget to the judiciary are insufficient. We were informed that the total budget of the courts for 2009 amounted to 20,4 million Euros, which represents only 1,57% of the total State budget. For 2010, the overall budget of the Judiciary has decreased in absolute terms, although the share of the Courts' budget in the total State budget has increased up to 1,76%.¹⁶ We were told that, although the judges' salaries have been significantly increased, the salaries of court staff still remain insufficient. The courts' premises appear to be inadequate. This applies, in particular, to the Podgorica Basic Court, where only one court room is allegedly available and trials are sometimes held in judges' offices.¹⁷ We will continue to follow this issue closely within the framework of the monitoring procedure.

63. In December 2007, Parliament adopted the Action Plan for Judicial Reform for 2007-2012, which defines concrete measures geared towards improving the independence, autonomy, effectiveness and public trust in the judiciary. The Commission for implementing the Action Plan was formally established in June 2008. According to the information provided to us by the Montenegrin authorities, the implementation of the Action Plan goes smoothly. As of 2008, 71% of the activities were completed. The next assessment of the implementation of the Action Plan will be made in March 2010.

64. As far as professionalism and independence of the judges is concerned, in the course of the preparation of this report, we took note of a study entitled "Integrity and Capacity Assessments of the Judiciary in Montenegro", which was produced in October 2008 by the Centre for Entrepreneurship and Economic Development (CEED) of Podgorica. This study was the result of co-operation between Montenegro's Directorate for Anti-Corruption Initiative (DACI) and the United Nations Development Program (UNDP). The report indicates that there is a prevalent lack of public confidence in the integrity of the judiciary. All stakeholders interviewed agreed that the judicial system only works for the rich and powerful. The research indicates that suspected corruption of the judicial system is the primary reason why respondents reported that they would not return to the courts to resolve future disputes. The report concluded that limited access to information facilitates corruption within the judiciary. It also highlighted the need for educational campaigns geared toward familiarising citizens with all aspects of the judicial system, including their rights as participants, and the mechanisms for filing complaints in the event of dissatisfaction with the performance of judicial actors. These findings are supported by the information provided to us by NGO activists.¹⁸ In the view of the authorities, the data collected within the framework of this research represents a wealth of useful information, which could contribute to improving the access to justice, quality of justice, independence and impartiality of the judiciary, trust in the judicial system, as well as the perception of corruption. The authorities argue that the perception figures differ significantly from the data about the direct experience of the respondents. Moreover, in the view of the authorities, the data from the survey does not reflect accurately the situation anymore, as it was collected in 2008, before the adoption of new legislation on the appointment of judges and prosecutors. Should the survey be repeated in 2011, the answers of the respondents would be quite different. We encourage the authorities to conduct a follow-up survey, in order to obtain more accurate and realistic data. We shall use this revised data in the further stages of the monitoring procedure.

¹⁶ Data provided by the Montenegrin delegation to the Assembly in the comments on the preliminary draft report.

¹⁷ See briefing paper prepared by the « Human Rights Action » NGO

¹⁸ See, for example, « Assessment of the Reform of the Appointment of Judges in Montenegro », HRA, Podgorica, 2009

b) *Domestic remedies against excessive length of proceedings in domestic courts*

65. In accordance with the Assembly Opinion, Montenegro committed itself to introducing an effective remedy with regard to the excessive length of proceedings before national courts aimed at accelerating proceedings or obtaining compensation, in conformity with Article 13 of the ECHR (paragraph 19.3.5.).

66. In this respect, we note that a Law on a Right to a Fair Trial within a Reasonable Time was enacted in December 2007. The OSCE Mission in Montenegro is providing training to the judiciary on the implementation of the law, in the light of the case law of the Strasbourg Court. The UNDP/CEED/DACI 2008 Integrity and Capacity Assessment of the Judiciary (see paragraph 63 above) report indicated some improvements in the timeliness of courts as compared to two years prior to the report. In the view of the judiciary and of the prosecutors, timeliness has improved, whereas attorneys, individuals and companies reported that there has been no change.

67. That said, the NGO representatives and independent lawyers we met during our visits asserted that the law introduced a complicated procedure, whereby a party to the proceedings is required to obtain first a decision on the request for the acceleration of the proceedings, in order to be able to file a complaint before the Supreme Court and obtain compensation. According to the information provided to us, in 2008, only 11 claims were lodged before the Supreme Court. All 11 claims were rejected on procedural grounds. At the same time, in the comments on the preliminary draft report, the Montenegrin delegation to the Assembly argued that the implementation of the law proceeded smoothly and that regular trainings were organised for presidents of courts as well as for the judges of the Supreme Court, in order to raise their awareness of the standards of the ECHR and of the case law of the Strasbourg Court on the issue of right to a fair trial within reasonable time. In terms of statistics, the authorities have informed us of the gradual reduction of the backlog of cases from previous years, which is exemplified by statistics (as of 1 January 2010, the backlog of cases was reduced by 76,19%). This is an encouraging piece of information and we will continue to follow this issue closely in the further stages of the monitoring procedure.

c) *Reform of the Public Prosecutor's Office*

68. In accordance with Assembly Opinion 261(2007), Montenegro undertook to:

- recognise in the Constitution the “the imperative of avoiding any decisive role of political institutions in the procedure of appointment and dismissal of [...] prosecutors” (paragraph 19.2.1.2.);
- guarantee in the Constitution and law that “in order to avoid conflict of interests, the role and tasks of the public prosecutor should not include both the application of legal remedies for the protection of constitutionality and legality and the representation of the republic in property and legal matters” (paragraph 19.2.1.3.);
- “speed up completion of reforms to ensure that [...] public prosecutors are professional [...] and that procedures for appointing and dismissing [...] prosecutors respect the independence of the judiciary” (paragraph 19.3.2.);

69. According to the Constitution, the prosecutor no longer has the task of protecting state interests. According to Article 134, “the State Prosecution shall be a unique and independent state authority that performs the affairs of prosecution of the perpetrators of criminal offenses and other punishable acts which are prosecuted ex officio.” This commitment appears to have been implemented satisfactorily.

70. The Law on the State Prosecutor's Office was amended in 2008, drawing on the expertise of the Venice Commission. The law stipulates that state prosecutors are appointed by Parliament, upon proposal of the best candidate by the Prosecutorial Council for a term of five years, with the possibility of re-election. The law also introduced changes with respect to State deputy prosecutors, whose tenure is now permanent upon completion of a three-year probationary period. The appointment, promotion and removal of state deputy prosecutors falls exclusively under the authority of the Prosecutorial Council. Furthermore, the law establishes criteria for the appointment and promotion of state prosecutors and deputies that are based on strictly professional grounds. That said, the election of state prosecutors by Parliament introduces a degree of political discretion, which might create a risk of undue political influence on the work of prosecutors. In future, our Montenegrin colleagues should change this appointment system in order to make the prosecutors independent from political bodies.

d) *Fight against corruption, money laundering and terrorism financing*

71. In this field, the following commitments were undertaken, in accordance with the Assembly Opinion:

- “ensure that anti-corruption legislation is urgently adopted, that GRECO’s recommendations and conclusions are implemented and that the administrative capacity in the area of anti-corruption policy is upgraded” (paragraph 19.3.7.);
- “amend the law on conflict of interest in accordance with European standards and adopt and implement laws on political parties and on their financing, ensuring transparency and accountability” (paragraph 19.3.9.).

72. The issue of political parties was dealt with in section IV. d) of this report. Therefore, in the present section, we will deal only with the issue of conflict of interests and the adoption and implementation of anti-corruption legislation, in accordance with GRECO recommendations.

73. Corruption continues to be a matter of serious concern in Montenegro and there is widespread public perception that corruption infiltrates the political sphere, legal system, and public administration. Transparency International’s 2009 Corruptions Perceptions Index (CPI) gave Montenegro a score of 3.9 on a 0-10 scale (0 being the most corrupt, 10 being the least corrupt).¹⁹

74. Social acceptance of certain forms of corruption further aggravates the problem. Montenegro is a very small country with about 630,000 inhabitants, making it particularly prone to corruption. This small and intimate population has nurtured the formation and use of personal networks and connections, a practice that has been commonplace throughout the country’s history and remains prevalent today. As GRECO noted in its 2006 report, Montenegro’s small size “encourages the development of a close-knit community culture reticent to report suspicions of corruption.”²⁰ During GRECO’s visits to Montenegro, the Ombudsman mentioned that he had received oral complaints alleging corruption, but no such complaints had been formally lodged in writing.²¹

75. A National Commission was established in February 2007 to monitor the implementation of the Action Plan of the Strategy for the Fight against Corruption and Organised Crime. The Directorate for the Anti-Corruption Initiative (DACI) is the central governmental body in charge of prevention and co-ordination of anti-corruption activities. In accordance with the Action Plan and GRECO’s recommendations, DACI began preparations to conduct a comprehensive investigation into corruption with expert support from the United Nations Convention against Corruption. The State Agency for Anti-Corruption possesses advisory, law drafting and awareness raising capacities, but lacks decision-making authority. The independence of oversight mechanisms is crucial to guarantee their effectiveness. The system of internal control and audit of the Government remains weak. The widespread perception of corruption in the judiciary is a serious threat to the legitimacy of the institution. On a positive note, call lines to both authorities and NGOs have been established for the reporting of cases of corruption.

76. Recent years have seen some other positive developments, such as the establishment of the State Audit Institution and the Public Internal Financial Control.

77. Privatisation is another issue where corruption risks are very high. It is therefore essential to ensure that public property is being disposed of in a transparent and competitive manner, in order to protect the public interest. Moreover, according to GRECO recommendations, the Law on Public Procurement should be revised in order to clarify its provisions and ensure a more transparent procedure.²² We were informed that work is ongoing on this front, in particular, in the field of the utilities sector.

78. That said, the overall results in this field appear to be positive: in December 2008, GRECO stated that the country had made significant process in the fight against corruption and had implemented two thirds of GRECO’s recommendations.²³ GRECO commended the extensive training and public information campaigns on anti-corruption that have taken place in recent years, while noting the need for continued efforts in the fight against corruption, particularly with respect to the ongoing reform of the judiciary. We expect the Montenegrin authorities to take serious action on this front.²⁴

e) *Fight against organised crime*

¹⁹ The CPI is composite index that draws on numerous sources and data. A minimum of three reliable sources of corruption-related data is required for a country to be included in the CPI. In 2009, Montenegro was ranked 69 out of the 180 countries in the index.

²⁰ Greco Eval I-II Rep (2005) 4E

²¹ Greco Eval I-II Rep (2005) 4E

²² Greco Eval I-II Rep (2005) 4E

²³ We were informed that a complementary report on the implementation of the remaining recommendations is due to be prepared in June 2010. We will use this report in the further stages of the monitoring procedure.

²⁴ Greco RC-I/II (2008) 5E

79. In accordance with the Assembly Opinion, the Montenegrin authorities committed themselves to consolidating the Office of the Prosecutor for organised crime (paragraph 19.3.8.).

80. In this respect, we note that, in 2006, GRECO recommended that Montenegro should create a special unit within the Public Prosecution Service dedicated to addressing corruption and provide this unit with the necessary financial and human resources. In December 2008²⁵, GRECO reported that this recommendation had been implemented satisfactorily. Its report stated that the powers of the Specialised Department for Combating Organised Crime were extended to encompass corruption, terrorism and war crimes. The Department is staffed with a total of 6 prosecutors (the Special Prosecutor and five deputies). GRECO commended the efforts Montenegro had undertaken to provide training to these prosecutors, as a total of 88 training sessions had been held between June 2006 and September 2008).

VI. Human Rights

a) Constitutional guarantees of human rights

81. In accordance with paragraph 19.2.2.4. of the Assembly Opinion, the constitutional guarantee of human rights was one of the key seven principles of the constitutional reform. In particular, Montenegro committed itself to ensuring that “the efficient constitutional protection of human rights” is guaranteed by the constitution, which “should provide for the direct applicability of the human and minority rights, as was recognised in the Charter on Human and Minority Rights of Serbia and Montenegro.” Moreover, “the constitutional reform therefore [had] to provide for at least the same level of protection of human rights and fundamental freedoms as the one provided for in the charter, including with respect to the rights of minorities.”

82. Human rights and fundamental freedoms are set out in Part Two of the Constitution (“Human Rights and Liberties”). Following the declaration of independence and the dissolution of the State Union, the Charter on Human and Minority Rights and Fundamental Freedoms of the State Union ceased to be applicable in Montenegro. The Charter was widely recognised as offering a very high level of human rights protection in accordance with Council of Europe standards.

83. The Venice Commission gave Part Two of the Montenegrin Commission a “generally positive assessment,” noting however that “further improvements could have been made.”²⁶ In particular, the Commission stated that it would have preferred that the provisions concerning human rights “had been prepared in a way that would have facilitated direct comparison with the provisions of the ECHR.”²⁷

84. In this connection, we would like to invite the Montenegrin authorities to engage in wide expert consultations, with the participation of the representatives of the Venice Commission and other competent Council of Europe monitoring bodies, in order to examine, article by article, Part Two of the Constitution, to eliminate possible inconsistencies and interpretation problems relating to the compatibility of the wording of the Constitution with that of the ECHR. As regards the retroactive applicability of the ECHR, we refer to paragraphs 29 to 31 above where we dealt with this matter as part of the seven key principles of the Constitution.

b) Constitutional prohibition of capital punishment

85. The prohibition of capital punishment at all times became another key principle of the Constitutional reform, in accordance with paragraph 19.2.1.5. of the Assembly Opinion. In this respect, we note that Article 26 of the Constitution reads: “The death penalty shall be prohibited in Montenegro.” Therefore, we can conclude that this commitment has been satisfactorily implemented.

86. However, we would like to express a reservation in this respect, stemming from the Opinion of the Venice Commission. In fact, the Commission noted that the new Constitution does not establish the right to life set out in Article 2 of the ECHR, which is a right that “imposes a weighty obligation on state authorities to inquire into the reasons for the loss of life.”²⁸

c) Right to an effective remedy

²⁵ Greco RC-I/II (2008) 5E

²⁶ Venice Commission’s Opinion, paragraph 14

²⁷ Id. at paragraph 13

²⁸ Venice Commission’s Opinion, paragraph 24

87. In accordance with paragraph 19.2.2.2. of the Assembly Opinion, Montenegro undertook to include in the Constitution a provision setting out the right to an effective remedy, as foreseen in Article 13 of the ECHR. The right to an effective remedy is guaranteed by Article 20 of the Constitution, which provides that “everyone shall have the right to legal remedy against the decision ruling on the right or legally based interest thereof.” The Venice Commission expressed concern that Article 20 does not fully conform with Article 13 of the ECHR, and stressed that Montenegrin courts must interpret this provision in a manner that gives full effect to the requirements of Article 13 ECHR. We join the Venice Commission in this recommendation.

d) Status of the Ombudsperson's institution

88. In accordance with Assembly Opinion 261(2007), Montenegro committed itself to:

- providing in the constitution for the mandate, appointment procedure and guarantees of independence of the ombudsman (paragraph 19.2.2.3.);
- respecting the independence of the ombudsman institution and supporting its activities, in particular by means of adequate funding, and acting on its recommendations (paragraph 19.4.1.).

89. We note that Article 81 of the Constitution establishes the Office of the Ombudsman as “an independent and autonomous authority.” Article 91 stipulates that the Ombudsman is elected by Parliament by a majority vote of the total number of members of Parliament. In the opinion of the Venice Commission, a qualified majority vote would have been preferable, in order to avoid any risk of politicisation of the appointment procedure.²⁹

90. The Ombudsman of Montenegro was established by the Law on the Protector of Human Rights and Freedoms on 10 July 2003. The Ombudsman is elected for a six-year term and may be re-elected. The Ombudsman may act on his or her own motion or upon a request. The circumstances under which the Ombudsman may look into the judiciary are specific and limited to three main areas: lengthy court proceedings, obvious abuse of courts procedures, and the non-execution of domestic court judgments.

91. Following a visit to Montenegro in 2008, the Human Rights Commissioner reported that the institutional capacity and public perception of the work of the Ombudsman has improved in recent years, although further capacity building is necessary in order for the institution to function effectively and meet the demands placed upon it.³⁰ The Human Rights Commissioner suggested amendments to the law in order to correct those shortcomings identified by the Venice Commission. In particular, the Commissioner emphasised the need for independence, impartiality, and sufficient funding, along with the need for parliamentary debate on the institution's annual report.

92. The Human Rights Commissioner expressed concern that the Ombudsman lacks authority to consider any cases of discrimination within the private sector, stressing the importance of a mechanism to address complaints of discrimination in all contexts. Furthermore, there is a concern relating to the accessibility of the office of the Ombudsman, as it is located on the outskirts of Podgorica, with limited transportation options, and is inaccessible for persons with physical disabilities.

93. Recently, the Venice Commission adopted an opinion on the draft amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro.³¹ In the opinion of the Venice Commission, the amendments are well drafted, are coherent and provide a number of improvements for the institution. The Commission welcomed the specialisation of the Ombudsman's deputies, minority representation in their appointment, the right of the Ombudsman to resume his or her previous function and the budgetary procedure. That said, the Commission noted that the attribution to the Ombudsman of the task of prevention of torture and other ill-treatment as well as the fight against discrimination would require relevant legislative amendments, as well as additional human and financial resources.

94. The Commission also formulated some specific recommendations concerning the establishment of units of the Office, donations, functional immunity, as well as the succession of office holders. In the view of the Commission, the Ombudsman - and every person acting on his or her behalf - should also have free access, at any time, to individuals deprived of their liberty.

²⁹ Id. at paragraphs 55-56

³⁰ CommDH(2008)25

³¹ CDL-AD(2009)043, adopted by the Venice Commission at its 80th Plenary Session on 9-10 October 2009

95. Finally, the Commission recommended keeping in the law some provisions on basic principles and reiterated its recommendation to introduce a qualified majority vote in the appointment procedure, which would require the adoption of a constitutional amendment.

96. We call upon our Montenegrin colleagues to implement fully the recommendations of the Venice Commission in the further stages of the legislative procedure.

e) Training and awareness-raising on the case law of the ECtHR

97. In accordance with paragraph 19.3.3. of the Assembly Opinion, Montenegro committed itself to taking the necessary steps to ensure that the case law of the European Court of Human Rights is taken into account by the domestic courts.

98. We have taken note of the fact that the Montenegrin authorities, in co-operation with the Council of Europe, organise regular trainings for judges on the case law of the Strasbourg Court. These efforts are commendable. However, we have learnt that Montenegrin courts are not provided with systematic translation of the case law of the Court. Lack of knowledge and information does not induce judges to refer to the Convention case law in their decisions. This impression was confirmed to us by independent lawyers and human rights defenders who stated that the case law of the Strasbourg Court was never referred to in domestic proceedings.

99. We call on the Montenegrin authorities to intensify efforts aiming at providing systemic training to judges on the case law of the Strasbourg Court. It is also essential to make sure that the case law is available to all judges in the Montenegrin language. We would advise our Montenegrin colleagues to make full use of the experience and already available documentation from neighbouring states, in order to save time and resources.

f) Non-discrimination

100. In accordance with paragraph 19.3.12. of the Assembly Opinion, Montenegro committed itself to urgently adopting a law on non-discrimination which guarantees that no one shall be discriminated against on any ground such as sex, race, colour, language, religion, sexual orientation, handicap, political or other opinion, national or social origin, the fact of belonging to a national minority, property, birth or other status.

101. The new Constitution contains a general clause on the prohibition of direct and indirect discrimination as well as a clause providing for affirmative action. However, we have to note that the relevant legislation has not been adopted yet. A draft law was recently prepared and appraised by the Venice Commission.

102. In its Opinion³², the Venice Commission welcomed and encouraged the intention of the Montenegrin authorities to adopt a single comprehensive anti-discrimination act. It noted a number of positive aspects of the law, in particular, the prohibition of both direct and indirect discrimination, as well as a wide range of discriminatory actions. The law introduces the concept of positive action. Human rights organisations and other relevant entities are allowed, although with certain limitations, to initiate proceedings on behalf or in support of victims of discrimination. The draft law provides for a shared burden of proof in discrimination cases.

103. That said, the Venice Commission noted that, in several respects, the draft law does not comply with European standards and recommended a number of further changes. In particular, the Commission recommended providing for the establishment of a specialised anti-discrimination body or for the granting of enforcement powers to the Ombudsman, provided that the Ombudsman institution has the necessary powers and human and financial resources to carry out this task. It also recommended introducing "effective, proportionate and dissuasive" sanctions for breaching the provisions of the law. Several other recommendations were made, including concerning the drafting technique.

104. Following the Venice Commission's opinion, a revised draft law on prohibition of discrimination was prepared. This draft law was approved by the Government of Montenegro on 3 December 2009 and is now being discussed within the framework of a public consultation. The Venice Commission produced a follow-up assessment of the law which was approved by the Commission at its 82nd plenary session (12-13 March 2010).³³ The Venice Commission commended the Montenegrin authorities for have taken on board some of the recommendations, in particular, with regard to the definition of discrimination and segregation. However,

³² CDL-AD(2009)045, adopted at the 80th Plenary Session of the Commission (9-10 October 2009)

³³ CDL-AD(2010)0..., adopted at the 82nd Plenary Session of the Commission (12-13 March 2010)

the Venice Commission noted that some recommendations, including those dealing with control over implementation of the law (either by a specialised institution or by the Ombudsperson) were not satisfactorily addressed. We call upon the authorities fully to take into account the Venice Commission's recommendations and amend the draft law accordingly.

105. We were informed that, in practice, despite the constitutional prohibition of discrimination, some groups of the Montenegrin society frequently become targets of discrimination and, even at times, intimidation and physical violence. We are seriously concerned about the situation of the lesbian, gay, bisexual and transgender community (LGBT), whose members allegedly frequently face intimidation and physical violence. During our visit, we interviewed personally a Montenegrin human rights defender, Mr Sasa Zekovic, who reported having been the target of intimidation and physical threats because of his sexual orientation. According to Mr Zekovic, there are other cases of discrimination and even violence against the LGBT community, which are either not investigated by law enforcement agencies or simply not reported by the victims, who fear disclosing information because of possible persecution based on their sexual orientation. This situation is clearly unacceptable. We urge the authorities to take all necessary steps in order to investigate all reported cases of violence against the LGBT population, including by the representatives of law enforcement agencies, as well as to bring to justice all those responsible. Moreover, we call upon the authorities to take proactive measures in order to teach law enforcement officials to handle properly cases of violence and intimidation against the LGBT population in order to build trust of the population in the law enforcement agencies. We ask that the Montenegrin authorities introduce the teaching of tolerance at all levels in school and take urgent action in awareness raising of the population on the rights of LGBT people and tolerance.

g) Equality between men and women in law, in family, society, economy and politics

106. In accordance with paragraph 19.3.13. of the Assembly Opinion, Montenegro committed itself to taking all necessary steps to ensure equality between men and women in law, in the family, society, economy and politics.

107. In this respect, we note that the Law on Gender Equality entered into force on 8 August 2007. However, the law does not clearly address the principle of equal pay and the Commissioner of Human Rights noted that the law does not provide any sanctions in the case of non-implementation, which weakens its impact and efficiency.³⁴ Despite the constitutional and legislative guarantee for women's equality, in practice Montenegro remains a patriarchal and traditional society where gender inequality is common and both direct and indirect discrimination against women occurs. Improvement is needed in the area of awareness-raising, as many women remain uninformed of their rights.

108. The Parliamentary Committee for Gender Equality and the Governmental Office for Gender Equality are two institutional bodies competent to deal with gender equality. The latter body was set up to analyse relevant issues and legislation, provide policy positions, propose measures, work with NGOs, and evaluate the compliance of domestic laws with international standards. Its effectiveness is hindered by a lack of administrative resources and the incapacity to make binding decisions. The Governmental Office was recently integrated in the structure of the Ministry of Human and Minority Rights. A new organisation chart of the Office was adopted and the recruitment of the staff is now ongoing. We hope that the Office will soon develop the necessary capacity to perform its task effectively.

109. According to the statistics provided to us by the Montenegrin authorities, as of 12 August 2009, men and women were equally represented in the civil service. Out of the total number of civil servants, 54% appear to be women. The representation of women at political level is however less encouraging: in the current Parliament, out of 81 members, only 9 are women (which represents 11%). We will continue to follow this issue closely within the framework of the monitoring procedure and hope that in the future Parliament the representation of women will be increased.

110. Domestic violence against women is another problem in Montenegro and a taboo subject. Domestic violence is a crime under Article 220 of the Criminal Code, yet instances are under-reported and rates of arrest, prosecution and conviction are extremely low. Few statistics regarding the scope of the problem are available, and Montenegro lacks sufficient facilities for aiding the victims of domestic violence. A major concern with respect to violence against women is lack of access to legal aid, which is guaranteed by law but not provided in practice. Single mothers are particularly vulnerable, as their children are treated as illegitimate unless recognised by the father, and such families are not eligible for governmental financial support. A 2008-2010 Gender Equality Action Plan intends to address some of these problems. We were

³⁴ CommDH(2008)25, section X

informed that a draft law on protection against domestic violence is currently being elaborated. We expect this draft law to improve the protection of victims of domestic violence. At the same time, we call upon the authorities to allocate substantial human and financial resources to help women and to provide emergency solutions, such as shelters for women and children in crisis situations.

h) Freedom of expression

111. As we mentioned earlier, the media sector in Montenegro is diverse and vibrant. However, although freedom of expression is protected under the new Constitution, it remains an area of concern. There is no direct media repression and many journalists and media outlets are openly involved in critical reporting about the activities of institutions and government officials. However, we were informed that journalists' freedom is at times hindered by indirect and subtle pressure that may result in self-censorship. Freedom House, in its 2009 Freedom of the Press Index, gave Montenegro a score of 37, assigning it the status of having "partly free" media.³⁵ Reporters Without Borders, in its 2008 World Press Freedom Index, ranked Montenegro 54 out of 174 countries with respect to freedom of the press.

112. Freedom House expressed concern that the new Constitution does not identify explicit restrictions on freedom of expression, although the right of reply and the right to claim damages for inaccurate media reporting are given constitutional status. Journalists criticising the Government risk criminal indictment for defamation, an offense which no longer carries prison sentences but can result in hefty fines.³⁶ Charges of criminal libel brought against journalists may carry high fines. According to human rights defenders and NGO representatives we met, fines for defamation as well as awards for compensation of moral damages appear to be high and punitive. The statistics provided to us by the authorities indicate a gradual increase in the number of cases over the last couple of years. While we do not want to take a position on the decisions taken by the courts of law in each individual case, we would like to remind the Montenegrin colleagues that in Resolution 1577(2007), the Assembly called upon the Council of Europe member states to remove from their defamation legislation any increased protection for public figures, in accordance with the case law of the European Court of Human Rights, as well as set reasonable and proportionate maxima for awards for damages and interest in defamation cases so that the viability of a defendant media organ is not placed at risk. We will continue to follow this issue closely in the further stages of the monitoring procedure.

113. We are also seriously concerned by troubling reports and instances of physical and verbal abuse of journalists, which have a chilling effect on media reporting of issues of public concern. A number of such cases were reported to us by authoritative domestic and international non-governmental organisations, including by Amnesty International. We are grateful to the Office of the Supreme Prosecutor of Montenegro for having provided to us detailed information about the cases which were reported to us. This information has helped us complete our analysis. Nevertheless, in order to prevent the repetition of similar cases in future, we reiterate our call upon the authorities to take all necessary steps in order to investigate all cases of intimidation, pressure and physical violence against journalists and bring all those responsible to justice.

i) Citizenship

114. In accordance with paragraph 19.4.6. of the Assembly Opinion, Montenegro committed itself to enacting and implementing a law on citizenship to prevent statelessness in accordance with the relevant Council of Europe instruments, addressing in particular the situation of displaced persons from Kosovo.³⁷

115. A new Law on Montenegrin Citizenship was enacted on 14 February 2008 and entered into force on 5 May 2008. This law is not in line with some principles of the European Convention on Nationality. Moreover, as mentioned earlier, Montenegro has not yet ratified the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.

116. The new law contains strict naturalisation criteria, and the United Nations High Commissioner of Refugees (UNHCR) has voiced concerns that these criteria may restrict the opportunity for persons from the Former Yugoslavia (both "Displaced Persons" and "Internally Displaced Persons") to obtain citizenship. We were informed by the Montenegro Office of the UNHCR that displaced and internally displaced persons from Bosnia and Herzegovina and Croatia, as well as from Kosovo, do not comply with naturalisation criteria

³⁵ Freedom House uses a methodology that ranks the freedom of the press in 195 countries according to numerous criteria on a scale of 0 (the best) to 100 (the worst); a country with a score falling within 0 -30 is considered to have "free" media, a country with a score of 31-60 is considered to have "partly free" media, and a country with a score of 61-100 is deemed to have "not free" media.

³⁶ See Amnesty International 2009 annual report; Human Rights Commissioner report, CommDH(2008)25, section V.

³⁷ All references to Kosovo, whether to the territory, institution or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

unless they have full access to employment or property, as they do not meet the strict requirements of the law concerning accommodation and guaranteed sources of income. This is a serious area of concern, and we call upon the Montenegrin authorities to work closely with UNHCR in order to resolve the situation of these persons.

117. According to Article 12 of the law, citizens holding Montenegrin citizenship on the day of 3 June 2006 have the right to maintain their Montenegrin citizenship. All those who have acquired citizenship of another country after this date may keep their Montenegrin citizenship until a bilateral agreement is made with the state concerned, but not longer than one year as of the day when the Constitution of Montenegro entered into force. A bilateral agreement on citizenship was concluded between Montenegro and “the former Yugoslav Republic of Macedonia”. Negotiations with Serbia are ongoing. We encourage the authorities to complete the preparation of bilateral agreements at the earliest opportunity, in order to avoid creating statelessness.

j) Minority rights

118. As far as the protection of the rights of national minorities is concerned, Montenegro took on several commitments, in accordance with the Assembly Opinion. These can be summarised as follows:

- guarantee in the Constitution the protection of minority rights at least at the same level as in the Charter of Human and Minority Rights of the State Union of Serbia and Montenegro (paragraph 19.2.1.4.);
- provide guarantees in law against discrimination, including of those belonging to national minorities (paragraph 19.3.12.);
- ensure that the laws concerning respect for human rights and minorities are rapidly implemented and that their implementation is monitored by independent institutions (paragraph 19.4.2.).

119. As mentioned earlier, the Venice Commission gave a generally positive assessment to the constitutional provisions governing human and minority rights. In particular, in the opinion of the Venice Commission, when taken together, Article 79 (“Protection of identity”) and Article 80 (“Prohibition of assimilation”) of the Constitution appear to cover the main minority rights as contained in the Framework Convention for the Protection of National Minorities.³⁸ However, the Commission expressed concern that, although the Constitution does not define “minority community” or “minority nation,” Montenegro’s Law on Minority Rights and Freedoms (hereinafter “Minority law”), adopted in 2006, contains a citizenship-based definition of a national minority, which excludes from its scope of protection any person not possessing Montenegrin citizenship. The Commission cautioned that the breadth of the minority rights “should be understood in an inclusive manner and these rights should be restricted to citizens only to the extent necessary.”³⁹ We recommend that the Montenegrin authorities should continue working with the Venice Commission on improving the Minority law, in order to make the positive constitutional guarantees fully effective.

120. Article 8 (“Prohibition of discrimination”) prohibits discrimination while providing that “special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination.” In this respect, the Montenegrin Constitution is in line with the Framework Convention for the Protection of National Minorities.

121. However, in July 2006, the Constitutional Court set aside Articles 23 and 24 of the Minority law (introducing “reserved seats” for minorities), both of which applied the principle of affirmative action. The Court considered that these articles were inconsistent with the guarantee of equality of all citizens before the law provided for in the former Constitution.

122. The new Constitution provides expressly for the “measure of affirmative action” to support national minorities. In particular, it guarantees “authentic representation” of minorities in the Parliament and in the assemblies of the local self-government units in which they represent a significant share in the population. However, this provision has not yet been implemented in law and we expect the Montenegrin authorities to introduce appropriate provisions in the amendments to the electoral legislation.

123. In July 2007, the Advisory Committee of the Framework Convention received the first report prepared by the Montenegrin authorities pursuant to article 25 of the Framework Convention for the Protection of National Minorities. The first opinion was adopted on 28 February 2008. In this opinion, the Advisory Committee noted that the deadlines for harmonisation of legislation with the new Constitution were

³⁸ Venice Commission’s Opinion, paragraph 51

³⁹ Id. at paragraph 52

“predictably difficult” to comply with, and stressed that many of the deadlines had passed without the called-for adoption or harmonisation of legislation.⁴⁰ The Committee further emphasised the need to strike a balance between the integration of minority groups and the respect and development of their specific identity, especially with respect to education and political representation.⁴¹ The Committee advised that the reforms would require the expansion of institutional structures, or the creation of new institutions altogether, and emphasised that clear instructions and appropriate budgetary allocations must be given to implement the changes.

124. Taking into account the Advisory Committee’s opinion, the Committee of Ministers adopted, on 14 January 2009, Resolution CM/ResCMN(2009)2 on the implementation of the Framework Convention for the protection of National Minorities by Montenegro. In this Resolution, the Committee of Ministers acknowledged that Montenegro has taken important steps for the protection of national minorities. It noted, however, that the adoption of more detailed legal guarantees together with the availability of adequate implementation and monitoring capacity are now needed to fully implement constitutional rights and policy documents. Legal provisions on the use of minority languages in the relations between persons belonging to national minorities and the administrative authorities need to be made more specific. Further efforts need to be made regarding the availability of minority language teaching as part of the school curriculum. Moreover, it drew the attention of the authorities to the need to implement the constitutional provision on “proportionate representation” of national minorities in public services. Several other recommendations were also addressed. We shall follow attentively the implementation by Montenegro of these recommendations and come back to this issue in our next report.

k) Protection of vulnerable groups, persons with disabilities and implementation of children’s rights

125. In accordance with paragraph 19.3.14. of the Assembly Opinion, Montenegro committed itself to taking all necessary measures, in particular in the legislative field, to implement resolutions and other instruments of the Council of Europe on the protection of children and people with disabilities and to integrate those people into society.

126. With respect to children’s rights, we note that Montenegro passed a Law on Child Protection and Social Protection in 2005. The law was accompanied by an Action Plan covering the period until 2010. Montenegro also signed the UN Convention on the Rights of the Child in October 2006, and subsequently acceded to its two optional protocols relating to the sale of children, child prostitution, child pornography and the involvement of children in armed conflict. A new Family Law, drafted with the help of the Council of Europe and UNICEF, came into force in September 2007. Although the legislative framework on the rights of children has been brought into line with international standards, issues remain with respect to implementation of the laws, which is aggravated by a lack of commitment and insufficient institutional and financial capacity. A Council for Child Rights was established to implement the relevant policies, but the functioning of the Council is poor. Work remains to be done with regard to equal access to social protection services and rights of juveniles in conflict with the law. We were also informed that inadequate attention is given to the education needs of Roma children.

127. We are concerned that, due to insufficient resources and lack of access to its office, the institution of the Ombudsman may not be an effective monitoring procedure for children’s rights in Montenegro. The Human Rights Commissioner urged the appointment of a Deputy Ombudsman especially assigned to the issue of children’s rights, as well as the establishment of a parliamentary committee tasked with consideration of children’s issues.⁴² The Deputy Ombudsperson for child rights was appointed in December 2009 and we expect him to work actively on the implementation of the adopted legislation.

128. As far as the situation of the people with disabilities is concerned, we note that the new Constitution guarantees their special protection and allows for affirmative action in this regard. However, legislative reform is still needed with respect to persons with disabilities, especially concerning laws that would ensure equal treatment in employment, access to social services, and aid to dependent persons. The current policy toward persons with mental or physical disability reflects a historical approach that consists mainly of care in large residential institutions which often fall short of existing human rights standards. The Human Rights Commissioner suggested that Montenegro could greatly benefit by becoming a member of international networks, such as the European Coalition of Community Living, which would allow it to learn from, and adopt the best practices of, other European countries that have transitioned from institutional to community based

⁴⁰ Opinion by the Advisory Committee of the Framework Convention, paragraph 12

⁴¹ Opinion by the Advisory Committee of the Framework Convention, paragraph 13

⁴² CommDH(2008)25, section XI

care and individual living.⁴³ We call upon our Montenegrin colleagues to promptly implement this recommendation.

l) Prohibition of torture, effective investigation of alleged ill-treatment by the police and prison conditions

129. In accordance with paragraph 19.4.10. of the Assembly Opinion, Montenegro committed itself to taking measures to ensure the prompt initiation of independent, impartial and effective investigations into allegations of torture or other ill-treatment, in particular allegations made by persons detained by the police, so that perpetrators of such treatment are brought to justice and the victims receive adequate redress without delay. Moreover, in accordance with paragraph 19.4.9., it undertook to improve prison conditions, in particular as regards vulnerable groups, such as juvenile offenders and those in need of psychiatric care.

130. In this respect, we regret to say that torture and ill-treatment by law enforcement agents continue to be a problem in Montenegro. This information is confirmed by the recently published report of the Committee on the Prevention of Torture and Inhuman and Degrading Treatment, following the Committee's visit to Montenegro on 15-22 September 2008⁴⁴. We take note of the information provided to us by the Montenegrin delegation to the Assembly which indicates that, with the adoption of the new legislation on police and of the new Criminal Procedure Code, which is due to enter into force on 26 August 2010, the Montenegrin legislation governing prevention of ill-treatment and torture has been improved. This is a positive development and we now expect the Montenegrin authorities to spare no effort in implementing this new legislation and taking appropriate measures to investigate all allegations of torture or ill-treatment, in particular, allegations made by persons detained by police, as well as take appropriate actions to sanction those responsible for such abuses.

131. As far as conditions of detention are concerned, reports indicate that prison facilities are dilapidated and poorly maintained, particularly for pre-trial detainees. However, some progress was made during 2008, as detention facilities in police stations in Podgorica, Budva, Bar, Herceg Novi, Niksic, Bijelo Polje, Berane, and Pljevlja underwent renovation and were equipped with air conditioning and video surveillance. Significant renovations were also completed at prison centres for convicted inmates. Prison authorities reported that funds had been allocated for a new prison facility at Bijelo Polje Prison. We welcome this progress and encourage the authorities to work further on these issues.

132. In 2008, human rights organisations, including the Red Cross and local NGOs, were given repeated access to prisons and detention facilities and to speak with the detainees in the absence of a guard. Also in 2008, representatives of the Ombudsman's Office regularly visited prisons and spoke with inmates, without giving prior notice. Unlike in previous years, in 2008, there were no reports of juveniles being held in the same cells as adults. Progress has been made with respect to juvenile justice, particularly in terms of legislative reform. We encourage the authorities to move ahead with the necessary further legislative changes and implementation of existing reforms.

m) Fight against trafficking in human beings

133. With respect to human trafficking, Montenegro is primarily a transit country for the trafficking of women and girls from Serbia, Kosovo, Bosnia and Herzegovina, Moldova, Romania, Ukraine, and Russia to Western Europe for the purposes of commercial sexual exploitation.⁴⁵ Article 444 of the Criminal Code prohibits sex and labour trafficking and stipulates penalties that are comparable to those prescribed for rape. The coercion of children into begging occurs in Montenegro and could be considered a form of trafficking under Article 444 of the Criminal code, but the Montenegrin authorities do not recognise it as such.⁴⁶ We were informed that the Montenegrin authorities are taking a number of steps to prevent the coercion of children into begging, especially, with respect to Roma children. A number of awareness-raising and training courses have been implemented for the Roma community. Since the beginning of 2006, Montenegro has funded one shelter, run by an NGO (Montenegrin's Women Lobby), which provides protection and care for victims of trafficking. In July 2008, Montenegro fulfilled its commitment to ratify the Convention on Action against Trafficking in Human Beings. We welcome progress which is being made in the implementation of this commitment.

⁴³ CommDH(2008)25, section VI

⁴⁴ CPT/Inf(2010)3 (<http://www.cpt.coe.int/documents/mne/2010-03-inf-eng.htm>)

⁴⁵ US trafficking report 2009

⁴⁶ US trafficking report 2009

n) *Status of refugees, internally displaced persons and asylum seekers*

134. In accordance with paragraph 19.4.3. of the Assembly Opinion, Montenegro committed itself to taking all necessary steps to ensure the permanent, safe and sustainable return of refugees and displaced persons, as well as to ensure compensation for refugee families who have suffered human rights violations. Moreover, in accordance with paragraph 19.4.5., Montenegro undertook to issue identity documents to refugees and displaced persons and repeal all discriminatory provisions in the fields of labour, education, access to property rights, legal redress and access to citizenship and health services. Furthermore, in accordance with paragraph 19.4.4., it committed itself to adopting all the appropriate measures to implement the asylum legislation in full compliance with the 1951 Geneva Convention and its 1967 protocol.

135. The implementation of these commitments is not progressing as well as it should.

136. Following Montenegro's independence, the persons who came to Montenegro from the former Yugoslav Republics of Croatia and Bosnia and Herzegovina as well as from Kosovo⁴⁷ were not given the status of refugee. Some of them were given the status of "displaced persons" (DPs) (those originating from the former Yugoslav Republics of Croatia and Bosnia and Herzegovina); those coming from Kosovo were declared "internally displaced persons" (IDPs). Most of these persons have identity documents, although some difficulties remain for the documentation of Roma, Ashkali and Egyptian DPs.⁴⁸ Although the new Law on Employment and Work of Foreigners, which entered into force in January 2009, does provide "avenues for fair employment of recognised refugees⁴⁹", this leaves the DPs and IDPs without the right to work. In fact, in replacing the 2003 Decree on Working Engagement of Non-Residents, the new law has even removed the only possibility for employment of DPs and IDPs which previously existed. We were informed that, in February 2009, the UNHCR Representation in Montenegro addressed its concerns over the de-facto exclusion of refugees with DP or IDP status from the right to work, under Article 17 of the new law, to the Minister of Health, Labour and Social Welfare. Following UNHCR's lobbying of the Government, the Prime Minister authorised the persons concerned to become involved in seasonal work for 2009. This is only a temporary solution which will not resolve the problem in the long-term.

137. As far as asylum is concerned, we note that Article 44 of the Constitution guarantees the right to seek asylum. A Law on Asylum was adopted in 2006 and came into effect on 25 January 2007. It stipulates that refugees, asylum seekers, and persons enjoying humanitarian protection may not be forced to return to their countries of origin if their lives or freedom may be endangered on the grounds of their race, religion, nationality, social status or political beliefs, or if there is a risk of exposure to torture or inhuman or degrading treatment.

138. Under Article 75 of this law, the authorities conducted a re-registering of people with DP and IDP status for a review of their status, in order to determine whether they would qualify for refugee status. According to the information provided to us by the Montenegrin delegation to the Assembly, some 10,950 persons from Kosovo were re-registered as "displaced persons" and some 5,769 persons originating from the former Yugoslav Republics of Croatia and Bosnia and Herzegovina were given the status of refugees.

139. We were informed that the political priority of the authorities is to promote returns. The citizenship of the persons concerned could be clarified in bilateral agreements which are currently being negotiated with Bosnia and Herzegovina and Croatia. We were informed that the authorities are engaged in consultations with the competent institutions in Kosovo⁵⁰ about the same issue. The statistics on returns since 2003, however, illustrate a declining number of voluntary returns: no return at all to Croatia for the past two years (compared to 23 returns in 2003), 2 returns so far in 2009 to Bosnia and Herzegovina (compared to 74 returns in 2003) and only 64 to Kosovo so far in 2009 (compared to 387 returns in 2003).⁵¹ It would appear that those who were keen to return have mostly already done so; for the remaining persons, the option of local integration appears to be most appropriate. We encourage the authorities to consider this option and work, in co-operation with UNHCR and other stakeholders concerned, in order either to facilitate returns or

⁴⁷ All references to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

⁴⁸ Amnesty International reports that almost 40 percent of Roma, Ashkalia, and Egyptians lack documentation such as birth certificates or citizenship certificates, with children comprising 70 per cent of those lacking documentation. AI Briefing paper prepared for the Assembly delegation, May 2009.

⁴⁹ UNHCR Background note on the protection of persons of Concern to UNHCR in Montenegro, UNHCR Representation in Montenegro, June 2009

⁵⁰ All reference to Kosovo, whether to the territory, institution or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

⁵¹ See UNHCR Background note on the protection of persons of Concern to UNHCR in Montenegro, UNHCR Representation in Montenegro, June 2009.

settle definitely the situation of the persons concerned, giving them the possibility to reside in Montenegro and enjoy fully their rights in the field of labour, education, health services, access to property, legal redress and access to citizenship.

o) Educational reform

140. In accordance with paragraph 19.4.7. of the Assembly Opinion, Montenegro committed itself to continuing educational reform in order to eliminate all types of discrimination based on ethnic origin and make arrangements to teach the principles of tolerance and respect for others and all their differences in schools.

141. Some progress has been achieved in the implementation of this commitment. During the school year 2008-2009, out of 161 elementary schools in Montenegro, classes in Albanian language were established in 12 schools. Out of 47 secondary schools, classes in the Albanian language were provided in 4 schools. The teaching process in educational groups is performed in the Albanian language in three pre-school institutions. Textbooks for all elementary school grades are printed out in the Albanian language, as well as for the first, second and third high school grades. The translation of the textbooks for the fourth high school grade is in progress. Education at all levels is provided in line with existing curricula which includes a specialised segment for minorities. The specialised segment is approved by the Minority Council and the Ministry of Education and Science may not change it. The school curriculum contains subjects dealing with the history, art, literature, and traditions of the minority communities, which encourages mutual tolerance and coexistence. We welcome the progress made by the Montenegrin authorities in the implementation of this commitment.

142. Much improvement remains to be made with respect to the education of Roma. Drop-out levels for Roma are particularly high, especially for Roma girls. Prejudice against Roma discourages some Romani children from attending school. Most Romani children receive little or no education beyond the primary school level and the efforts of the authorities to remedy this problem must be intensified. The NGO "Foundation for Providing Scholarships to Roma" reported that 50 percent of Roma children drop out after primary school. Many Romani children are disadvantaged because they speak Romani at home and education is not available to them in their native language. Teachers and teaching materials in minority languages are scarce. Pre-school enrolment rates are low in Montenegro, but particularly low for Roma. More efforts are necessary in this field. We invite the authorities to intensify efforts in order to cope with this problem and hope that the Strategy for Pre-school Education, to be adopted in 2010, will address the outstanding issues.

p) Situation of Roma

143. In accordance with paragraph 19.4.8. of the Assembly opinion, Montenegro committed itself to implementing the strategy and action plan for the integration of Roma.

144. A "Strategy for the Improvement of Roma Position in 2008" was adopted in 2008 and a coordinator to implement the strategy was appointed. The Strategy represents a set of concrete measures and activities aimed at improving the position of Roma. In 2008, the Government allocated 400,000 Euros to projects covered by the Strategy; in 2009, the budget of the Strategy amounted to 600,000 Euros. The implementation of the Strategy progresses smoothly and in 2008 the Government Statistical Office has completed the necessary research to establish a database of the Roma, Ashkali and Egyptian population. A Commission for the Monitoring of the Strategy as well as a National Co-ordinator of the Strategy were appointed. We encourage the authorities of Montenegro to continue the implementation of the Strategy.

q) Co-operation with International Criminal Tribunal for the former Yugoslavia (ICTY)

145. In accordance with paragraph 19.4.13. of the Assembly Opinion, Montenegro undertook to collaborate fully with the International Criminal Tribunal for the former Yugoslavia, especially as regards the search and arrest of the indictees who are still at large, and implement schemes to help the population understand and accept its objectives.

146. In this respect, we note that a legal framework for freezing the assets of those indicted by the ICTY is in place. Co-operation with ICTY is ongoing and no major problems in this respect have been detected in the past two years. We welcome the progress achieved in the implementation of this commitment.

VII. Conclusions and next steps

147. It is clear from our analysis that Montenegro has made substantial progress in implementing its commitments and obligations undertaken upon accession, in accordance with Assembly Opinion 261 (2007) and the Statute of the Council of Europe. This is a particularly important achievement as Montenegro was the last country to join the Organisation and upon accession has taken on a very wide range of commitments established on the basis of the most recent Council of Europe conventions and recommendations.

148. We would like to commend the Montenegrin authorities for the positive achievements as well as for the good co-operation with the Council of Europe and, in particular, the Venice Commission in the constitutional reform and legislative drafting. That said, we note that not all of the recommendations of Council of Europe expert bodies, and in particular, of the Venice Commission, are strictly followed by the authorities and that implementation of laws is sometimes not satisfactory. Moreover, further efforts are required in some areas, in particular, reform of the electoral legislation, reform of the legislation on political parties, reform of the judiciary and public prosecutor's office, training of judges in the standards and case law of the ECHR, effective implementation of minority rights as well as integration of refugees and displaced persons, where appropriate. We encourage the authorities to complete the necessary reforms as quickly as possible.

149. We recommend that the Assembly should resolve to continue its monitoring procedure with respect to Montenegro, in order to provide political support to, and stimulate further progress in, the implementation of post-accession commitments.