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Accession of the Republic of Montenegro to the Council of Europe

Opinion¹
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Erik JURGENS, Netherlands, Socialist Group

I. Introduction

1. On 6 June 2006, following the declaration of independence by its Parliament on 3 June 2006, the Republic of Montenegro applied for membership of the Council of Europe.
2. On 14 June 2006, in accordance with the procedure provided for in Statutory Resolution (51) 30, the Committee of Ministers asked the Parliamentary Assembly to draw up an opinion on the application.
3. While the procedure followed is customary, the application for membership in question is not, insofar as Montenegro was a member of the Council of Europe in its capacity as a federate entity of the State Union of Serbia and Montenegro from 3 April 2003 until its declaration of independence.
4. In practice, this involves accession by a state which is new under international law but the territory of which is not new to the Council of Europe.
5. The Bureau referred the application to the Political Affairs Committee for report and to the Committee on Legal Affairs and Human Rights for opinion. In a new development, it was also referred to the Monitoring Committee for opinion, for the first time in the case of an accession procedure.
6. The rapporteur wishes to underline that he believes the reference to the Monitoring Committee for opinion was appropriate. Due to the particular nature of its status as a former federate entity of the State Union of Serbia and Montenegro, Montenegro was already the subject of an Assembly monitoring procedure.

II. Steps taken

7. The rapporteur wishes to underline from the outset that the preparation of the opinion on accession was based on co-operation with the rapporteurs of the Political Affairs Committee and the Monitoring Committee.
8. The Political Affairs Committee's rapporteur, Mr Jean-Charles Gardetto, made sure that the two co-rapporteurs were actively involved in the various stages of the process.

¹ See Doc. 11204 tabled by the Political Affairs Committee.

9. Together with the Monitoring Committee's rapporteur, I visited Montenegro on 29 and 30 November and 1 December 2006, where we met many members of the government and representatives of parliament, the judiciary and civil society.

10. We noted the various steps being taken with a view to drafting and adopting a new constitution. However, it seemed to us that the procedure could take several more months or, indeed, a year. While sharing the view of the Political Affairs Committee's rapporteur that the content of the constitution Montenegro intends adopting is decisive, we did not believe it was appropriate to make Montenegro's accession conditional only upon the prior adoption of its new constitution.

11. However, we did regard as essential a clear commitment by the Montenegrin authorities regarding certain points where the current constitution is either incomplete or incompatible with Council of Europe principles and where lack of agreement or commitment would, in our view, constitute a serious obstacle to Montenegro's accession.

12. We therefore met on 12 January 2007, on the initiative of the Political Affairs Committee's rapporteur, to draw up a list of principles which we regard as a *sine qua non* for accession by the Republic of Montenegro. This list was discussed with the delegation from the Montenegro Parliament during the part-session of the Assembly in January 2007. All of the relevant political players (government, parliament and political parties, except the Serbian list) have since then agreed to comply with these principles and have them included in the new constitution.²

13. On the basis of that commitment, we believe that it is justified to invite the Republic of Montenegro to join the Council of Europe.

III. Co-operation in drafting the opinion on accession

14. The opinion on accession adopted by the Political Affairs Committee is the result of the joint efforts of the co-rapporteurs.

15. It should be underlined here that the co-operation between the rapporteurs was good and enabled me and the Monitoring Committee's rapporteur to indicate our proposed amendments to the draft opinion while it was being drawn up. Our colleague, Mr Gardetto, took account of them and incorporated them into his draft.

16. That is why the present opinion does not propose any amendments. Having actively participated in the process and been regularly consulted during the various stages of drafting, I endorse the draft opinion presented by the Political Affairs Committee's rapporteur and offer my support.

17. I shall therefore only give some explanations concerning the points that seem most fundamental and in respect of which I made a particular contribution during the drafting of the opinion on accession.

IV. The protection of human rights

i. The European Convention on Human Rights

18. Following the notification of independence and request by Montenegro to accede to the Council of Europe, of 6 June 2006, it is important to ensure the continued application of the European Convention on Human Rights (ECHR) and its protocols with respect to Montenegro from that date until the country's accession to the Council of Europe when the Committee of Ministers will be in a position to regard the country as a Party to the ECHR and its protocols with retroactive effect as from 6 June 2006.³

² See the declaration signed to this effect on 08.02.007, appended to the Political Affairs Committee's report, Doc. 11204.

³ Cf., in this connection, the Committee of Ministers' decision to invite the Czech Republic and Slovakia to become members of the Council of Europe, adopted by the Ministers' Deputies at their 496th bis meeting on 30 June 1993.

19. In this connection, it should be noted that the Minister of Foreign Affairs of Montenegro, in his letters of 6 and 12 June 2006 addressed to the Secretary General of the Council of Europe, specified "that the Republic of Montenegro as a newly independent state would like to establish its successor status to all conventions, charters or agreements of the Council of Europe to which Serbia and Montenegro was party or member (...) which were in force in respect of its territory".⁴

20. However, as this notification does not refer specifically to the ECHR or its protocols, it is essential for the Montenegrin authorities to explicitly confirm that they consider themselves bound by them, with effect from the date of notification of 6 June 2006. This is crucial to avoid a legal vacuum in terms of the international protection of human rights and in particular with respect to the jurisdiction of the European Court of Human Rights.

21. Montenegro is therefore called on "to confirm in writing, at the latest on the date of accession that, (...), [it] considers itself bound, with effect from 6 June 2006, by" the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Protocols Nos. 1, 4, 6, 7, 12, 13 and 14 to the Convention.

22. I also suggested including in the list of commitments the adoption of legislation making it possible for victims of violations of the Convention to seek reviews of their cases in the domestic courts in appropriate circumstances. The Political Affairs Committee has incorporated this suggestion with the following wording: "to adopt a law allowing a victim of a violation of the ECHR to ask, in appropriate cases, for the re-examination or re-opening of the domestic court proceedings".

ii. Prosecution of war crimes and co-operation with the International Criminal Tribunal for the former Yugoslavia

23. The issue of co-operation with the International Criminal Tribunal for the former Yugoslavia (ICTY) is essential in the region. For more details, reference should be made to our Committee's report prepared by Mr Tony Lloyd. I am pleased that some of his conclusions have been incorporated in the opinion on accession at my proposal.

24. It is vital to emphasise the need for co-operation with the ICTY, in particular concerning the tracking down and arrest of the six persons indicted for war crimes who are still at large, some of whom are thought to be or to have been in hiding in Montenegro.

25. Moreover, the ratification of certain Council of Europe treaties would have a most positive impact on regional co-operation in the prosecution of war criminals. It is important for the signature and ratification of these texts to be included in Montenegro's accession commitments.

V. Priority reforms

26. Some points set out in the opinion on accession need to be dealt with as a matter of priority by the Montenegrin authorities in the months following accession.

27. It would seem appropriate for the Monitoring Committee initially to focus its monitoring exercise on these particular points to make sure that they are dealt with effectively and rapidly.

i. Constitutional reform

28. This must be the top priority for the Montenegrin authorities, as the 1992 constitution currently in force includes provisions which are totally at odds with Council of Europe standards (for instance, Article 21, which provides for the death penalty). A number of essential principles are also not guaranteed in the text.

29. Constitutional reform is all the more necessary since it is essential to modify Montenegro's status in the current constitution as part of the Federal Republic of Yugoslavia and not as a sovereign, independent state.

⁴ Texts are appended to the report of the Political Affairs Committee, Doc. 11204.

30. One vital aspect is the fact that the level of protection of human rights has declined significantly as a result of Montenegro's declaration of independence. The Charter on Human and Minority Rights and Fundamental Freedoms of the State Union is no longer in force in Montenegro following its declaration of independence. Yet the charter was widely recognised as a very high-quality instrument which was in line with Council of Europe standards. It should have been incorporated in the current constitution, but that did not take place. The legislative and constitutional protection of human rights and minorities in Montenegro is now therefore far from satisfactory⁵. Consequently, the fourth minimum principle accepted by the Montenegrin authorities provides that "the efficient constitutional protection of human rights must be ensured. The Constitution should provide for the direct applicability of human and minority rights, as was recognised in the Charter on Human and Minority rights of Serbia and Montenegro. The constitutional reform therefore needs to provide for at least the same level of protection of human rights and fundamental freedoms as provided for in the Charter, including the rights of minorities."

31. While the Montenegrin authorities could have chosen to make substantial amendments to the constitution in force, it is understandable that, for symbolic reasons against the background of the declaration of independence by a new state, they opted to draw up a new constitution for the new sovereign state.

32. It is vital to the country for the new constitution to be adopted swiftly, as many necessary legislative reforms, some of which are urgent, depend on it.

33. However, it should be underlined that the authorities are fully aware of this fact and that the work on preparing the draft constitution is now progressing actively.

ii. Rule of law: reform of the judicial system

34. It is important that appropriate reforms be made to the judicial system as a matter of priority.

35. As things stand at present and in the light of the provisions of the current constitution, the independence of the judicial system is not guaranteed.

36. In particular, the current procedure for appointing judges is much too closely controlled by parliament and is therefore subject to inappropriate political influence. The authorities have undertaken to remedy the situation in the new constitution (see the seven minimum principles). Without such an undertaking and with the constitution and the legislation as they stand at present, Montenegro's accession could not have been contemplated. The authorities will also have to make sure that the membership of the judicial council is balanced and does not undermine the independence of the judiciary.

37. The independence of the judiciary should also be ensured by allocating funding and resources commensurate with the relevant tasks.

38. Along with the rapporteurs of the Political Affairs and Monitoring Committees, we stressed the need to review the status and powers of the public prosecutor, where the current arrangements are dangerous. The third principle we agreed therefore provides the following: "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

⁵ For more details, see the report by the eminent lawyers on the compliance of the legal system of the Republic of Montenegro with the Council of Europe's fundamental principles, September 2006.

property and legal matters”.⁶ Moreover, in order not to undermine his or her independence, the prosecutor general should no longer be required to report to parliament.

39. Attention should also be drawn to the serious problem of the length of legal proceedings. Excessively slow legal proceedings are inappropriate, undermine legal certainty and may even lead to the denial of justice. In order to comply with the provisions of Article 13 of the European Convention on Human Rights, I suggested that the list of Montenegro's commitments should include the obligation to provide for effective remedies (for the purpose of compensation or speeding up the process) in respect of excessively lengthy legal proceedings in domestic courts. Indeed, this is a measure which should also be advocated in all Council of Europe member states, as it could have a very positive impact in relieving the workload of the European Court of Human Rights which is snowed under with applications of this kind.⁷

VI. Conclusion

40. Like the Political Affairs Committee's rapporteur, I believe that the Republic of Montenegro should be invited to join the Council of Europe.

41. I urge the Montenegrin authorities, with the assistance of the expertise of the Council of Europe and, in particular, the Venice Commission, initially to focus their efforts on the essential points highlighted in this opinion.

42. In general terms, I believe that this “re-admission” of Montenegro to the Council of Europe represents a great opportunity for the country to continue with renewed impetus the reforms undertaken between 2003 and 2006 with the Council of Europe's assistance, to complete them and to make sure that they are properly implemented.

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Reporting committee: Political Affairs Committee

Committee for opinion: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 10968, Reference No 3245 of 26 June 2006

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Secretariat of the committee: Mr Drzemczewski, Mr Schirmer, Ms Maffucci-Hugel, Ms Heurtin, Ms Schuetze-Reymann

⁶ See the declaration signed to this effect on 08.02.2007, appended to the Political Affairs Committee's report, Doc. 11204; in this connection, see also Assembly [Recommendation 1604 \(2003\)](#) on the role of the public prosecutor's office in a democratic society governed by the rule of law, which provides that “*respect for democracy and the rule of law require an effective separation of state powers, in particular between the public prosecutor (whether as an administrative agent of the executive or of the legislature) on the one hand, and the judiciary on the other*” and in which the Assembly recommends that “*the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other functions;*” see also the Venice Commission's opinions on the law on the *Prokuratura* (Prosecutor's Office) in the Russian Federation ([CDL-AD\(2005\)014](#), 13.06.2005) and on the draft law of Ukraine amending the constitutional provisions on the procuracy ([CDL-AD\(2006\)029](#), 17 October 2006).

⁷ The principle of encouraging legal procedures of this kind was underlined by the European Commission for the Efficiency of Justice (CEPEJ) in a relevant framework programme (document [CEPEJ\(2004\)19 rev 2](#)), § 84 (Line of Action 12 of the programme).