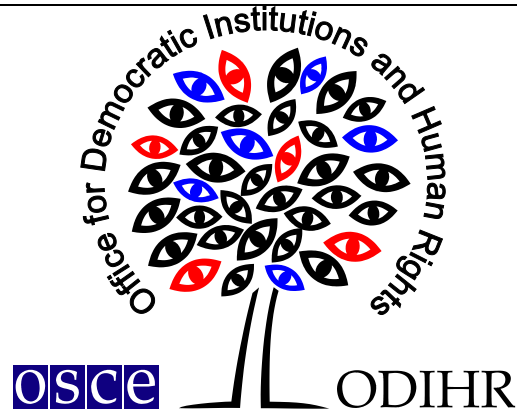


Warsaw, 10 September 2014

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**OPINION ON THE IMPACT
OF THE RATIFICATION OF THE
COUNCIL OF EUROPE CONVENTION ON
PREVENTING AND COMBATING VIOLENCE
AGAINST WOMEN AND DOMESTIC VIOLENCE
ON LEGISLATION IN MONTENEGRO**

based on official and unofficial English translations of draft and existing legislation

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Annex: Excerpts of Draft and Existing Legislation of Montenegro (provided as a separate document, available at:

http://www.legislationline.org/download/action/download/id/5606/file/251_GEND_MNG_10Sept2014_Annex_en.pdf)

I. INTRODUCTION

1. *On 7 April 2014, the Chair of the Committee for Gender Equality of the Parliament of Montenegro sent an official letter to the OSCE Mission to Montenegro requesting the review of a number of draft and existing legislative acts to assess their compliance with the Council of Europe (hereinafter “CoE”) Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter “the Istanbul Convention”).¹*
2. *On 3 May 2014, the OSCE Mission to Montenegro forwarded the letter to the Director of the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”), along with excerpts from a package of draft and current legislation to be reviewed, which are annexed to this Opinion.*
3. *On 13 May 2014, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on the impact of the ratification of the Istanbul Convention for Montenegro on Montenegrin legislation.*
4. *Following a request from the Committee for Gender Equality of the Parliament of Montenegro to prioritize the review of the Draft Law on Compensation of Damages for Victims of Criminal Acts, initially part of the above-mentioned package, the OSCE/ODIHR issued a separate opinion on this draft law. Consequently, this Opinion should be read together with the OSCE/ODIHR Opinion on the Draft Law on Compensation of Damages for Victims of Criminal Acts in Montenegro, issued on 28 July 2014.²*
5. *This Opinion on the impact of the ratification of the Istanbul Convention for Montenegro was prepared in response to the above request. The OSCE/ODIHR conducted this assessment within its mandate as established by the OSCE Action Plan for the Promotion of Gender Equality, which states that “[t]he ODIHR, in co-operation with other international organizations and relevant national bodies and institutions, will assist OSCE participating States in complying with international instruments for the promotion of gender equality and women’s rights, and in reviewing legislation to ensure appropriate legal guarantees for the promotion of gender equality in accordance with OSCE and other commitments”.³*

¹ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210 (hereinafter “the Istanbul Convention”), was ratified by Montenegro on 22 April 2013 and entered into force on 1 August 2014.

² OSCE/ODIHR Opinion on the Draft Law on Compensation of Damages for Victims of Criminal Acts in Montenegro, CRIM-MNG/253/2014, dated 28 July 2014, Montenegrin version available at http://www.legislationline.org/download/action/download/id/5495/file/253_CRIM_MNG_26%20July%202014_en.pdf and English version available at http://www.legislationline.org/download/action/download/id/5496/file/253_CRIM_MNG_26%20July%202014_mnt.pdf.

³ OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004). See also OSCE Ministerial Council Decision 15/05 on Preventing and Combating Violence against Women (2005) which calls on OSCE participating States to, amongst others, adopt and implement legislation that criminalizes gender-based violence and establishes adequate legal protection.

II. SCOPE OF REVIEW

6. This Opinion only analyzes the impact of the ratification of the Istanbul Convention on certain excerpts from draft and current legislation of Montenegro (hereinafter “Excerpts of Legislation”), submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of these excerpts to assess their compliance with other international human rights standards and OSCE human dimension commitments, unless they are directly related to the implementation of the Istanbul Convention. In particular, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the prevention of and protection from violence against women and domestic violence, and the prosecution of perpetrators in Montenegro.
7. The Opinion raises key issues and provides indications of areas of concern. In the interests of conciseness, the Opinion focuses more on those provisions from the Excerpts of Legislation that would benefit from amendments, rather than on the areas that are already compliant with the Istanbul Convention. The ensuing recommendations will refer to this Convention and its Explanatory Report⁴, but will also mention other international standards and practices related to the prevention of and protection from violence against women and domestic violence, and prosecution of perpetrators, as relevant. The Opinion will also seek to highlight, as appropriate, good practices from other OSCE participating States in this field.
8. This Opinion is based on unofficial English translations of the Excerpts of Legislation, which are attached to this document as an Annex. Errors from translation may result.
9. In view of the above, the OSCE/ODIHR would like to make mention that the Opinion is without prejudice to any written or oral recommendations and comments related to this and other related legislation and policy of Montenegro that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

10. At the outset, the OSCE/ODIHR notes positively the recent policy and legislative developments in the area of prevention and protection from violence against women and domestic violence in Montenegro. It also welcomes Montenegro’s efforts to carry out a comprehensive review of its legal and institutional framework for preventing violence against women and domestic violence, protecting victims⁵ from abuse, as well as bringing perpetrators to justice.
11. At the same time, the Excerpts of Legislation could benefit from certain revisions and additions to make them more compliant with the Istanbul Convention. In particular, in order to demonstrate Montenegro’s “zero tolerance” attitude towards violence against women and domestic violence, the legislation should be supplemented by adding provisions to ensure that such conduct is criminalized, duly investigated and prosecuted

⁴ Explanatory Report to the Istanbul Convention, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/210.htm>.

⁵ For the purpose of this opinion, the term “victim” is used in its legal sense in connection with criminal proceedings and internationally recognized “victims’ rights”. This is without prejudice to other terms such as “survivor”, which may be preferable in other specific contexts.

by public authorities, and that sentences imposed on perpetrators are commensurate with the gravity of the crimes.

12. Moreover, it is key to adopt a victim-centered approach and to supplement the Code of Criminal Procedure and other relevant legislation with provisions that protect victims' rights and ensure that victim-friendly procedural measures are in place. Additionally, certain provisions could be usefully amended in order to render them more effective, e.g., provisions relating to multi-agency co-operation for preventing and combating violence against women and domestic violence, and introducing provisions to ensure the liability of state authorities for failure to act. Finally, to ensure that these measures are operational, effective and implemented properly, adequate, stable and reliable human, financial and administrative resources should be allocated. It must also be highlighted that all these legislative measures would not be effective if not accompanied by adequate awareness-raising and public information campaigns, involving the media, education, training of professionals as well as other initiatives to eliminate discrimination and support the empowerment of women in all spheres of life, with the aim of reducing women's vulnerability to violence.
13. In order to ensure greater compliance of the Excerpts of Legislation with the Istanbul Convention, the OSCE/ODIHR recommends as follows:

1. Key Recommendations

- A. to supplement and amend the Criminal Code as follows:
 - 1) introduce the following new criminal offences along with adequate and dissuasive sanctions: "female genital mutilation", "forced sterilization", "psychological violence" seriously impairing a person's psychological integrity, "stalking", "causing another person to engage in non-consensual acts of a sexual nature with a third person", "[i]ntentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in, with the purpose of forcing this adult or child to enter into a marriage" and "solicitation, through information and communication technologies, of children for sexual purposes where the solicitation has been followed by material acts leading to a meeting"; [pars 51-54, 57, 61- 62, and 120-124]
 - 2) expressly prohibit any corporal punishment of children in a family context as well as in other settings; [par 60]
 - 3) amend the definition of "rape" provided in Article 204 of the Criminal Code by removing the reference to force or violence and refer instead to the non-voluntary nature of the sexual act; also make it explicit that spousal rape is subject to aggravated penalties; [pars 55-56]
- B. to introduce a new section in the Criminal Procedure Code that would specifically address victims' rights in a comprehensive manner, in particular as regards the following:
 - 1) measures, including the use of information and communication technologies, to limit confrontation between victims and perpetrators at all stages of the criminal proceedings, and not only during court proceedings; [pars 87, 151 and 158]
 - 2) a comprehensive duty to inform the victims about their rights and available social and legal protection services, compensation and the possibility and modalities for

- seeking protective measures, the progress of their complaint and of the investigations and judicial proceedings, and about the release or escape of the perpetrator; [pars 88-91 and 104]
- 3) introduce in Article 59 the possibility for the victim to request the review of the decision of a State Prosecutor not to continue the prosecution, at least for serious crimes and subject to certain limitations; [par 132]
 - 4) ensure that evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary; [par 150]
 - 5) supplement the section on “forensic examination” (Articles 136 to 156) to ensure that the examination should be attended and carried out only by individuals of the same sex as the suspect/defendant/witness, and only following the individual’s prior consent; in case of refusal, this may only be overcome by a court order; [pars 152-153]
 - 6) introduce child-sensitive procedural measures, including a duty for the police, prosecutors and courts to keep the child informed and seek his/her views at all stages of the investigations, prosecution and court proceedings; [par 159]
- C. to ensure that acts of domestic violence are criminalized and avoid overlaps between the Law on Domestic Violence Protection and the Criminal Code as follows:
- 1) amend Section III of the Law on Domestic Violence Protection so that acts amounting to physical, sexual and psychological violence between family members will be exclusively subject to criminal liability, as per the provisions of Title XIX of the Criminal Code on Criminal Offences against Marriage and Family; [pars 118-121]
 - 2) supplement Title XIX of the Criminal Code to cover the whole range of behaviour that may fall under the definition of domestic violence, provided that it is not already covered by other criminal offences which include the nature of the family relationship between perpetrator and victim as an aggravating circumstance; [par 124]
 - 3) ensure that criminal offences of domestic violence are subject to higher penalties than similar criminal offences committed outside of a domestic context; [pars 122-123]
- D. for the policy and law makers and all stakeholders to:
- 1) carry out a proper impact assessment of the regulatory and non-regulatory measures required for the full implementation of the Istanbul Convention, including a financial impact assessment, and ensure that adequate financial and human resources are allocated for the implementation of legislative and other measures to prevent and combat all forms of violence as per the Istanbul Convention; [pars 19-21, 63, 84, 95, 98 and 103]
 - 2) ensure that all measures are supported by broader comprehensive social and economic policies ensuring gender equality in all areas of public and private life, also aimed at strengthening women’s economic independence; [pars 25-27]

2. *Additional Recommendations*

General Comments

- E. for the policy and law makers and all stakeholders to:
- 1) ensure that budgets at the national and local levels are gender-responsive and provide adequate training in that respect; [par 22]
 - 2) ensure direct and meaningful participation of civil society and other stakeholders throughout the process of development, implementation, monitoring and evaluation of plans and legislative changes on preventing and combating violence against women and domestic violence; [pars 23-24]
 - 3) provide, as appropriate, in the Excerpts of Legislation, for gender-balanced representation for all appointments made by the Government and other public entities, including in rules and procedures for nomination and appointment, and specify the consequences for infringement of the gender balance requirement; [pars 35-37]
 - 4) supplement the Law on Social and Child Protection (Articles 127 and 128), the Law on Health Care (Article 62) and the Law on Internal Affairs to ensure that adequate training and evaluation on gender and human rights aspects is provided to all the professionals covered by these laws; [par 66]
 - 5) specify, in the Law on Domestic Violence Protection and other legislation as appropriate, that the media should assist in combating domestic violence; [par 67]
- F. to ensure that the legal and institutional gender equality and anti-discrimination framework:
- 1) is coherent, while clarifying the relationship between the different legislative acts containing anti-discrimination provisions, including with regard to complaints-handling mechanisms; [par 28]
 - 2) include references to relevant liability procedures and sanctions for all cases of discrimination, and more generally consequences of infringements of the provisions of the Law on Gender Equality and the Law on Prohibition of Discrimination, while removing from the Criminal Code the provisions criminalizing general cases of discrimination; [pars 29-31]
 - 3) monitor the application of the provision of the Family Law on equal division of joint marital property and clarify that this concept extends to intangible property, including pension and insurance benefits and other career assets; [par 32]
 - 4) ensure that a non-discrimination statement is included in the Law on Domestic Violence Protection, and that other non-discrimination statements contained in Article 7 of the Law on Social and Child Protection, Article 4 of the Law on Health Care and Article 7 of the Law on Asylum contain all grounds listed in the [amended] Law on Prohibition of Discrimination; [par 34]
- G. to strengthen co-ordination at national and local levels, including partnership with civil society organizations, as follows:
- 1) identify the entity in charge of the co-ordination, implementation, monitoring and evaluation of the policies and measures taken to implement the Istanbul Convention, including international co-operation; [par 41]

- 2) delineate more clearly the respective roles and responsibilities of central and local authorities in preventing and combating violence against women and domestic violence, and designate the body/person having the leading and co-ordinating role; [pars 42-44, 94 and 97]
 - 3) supplement, as appropriate, the Excerpts of Legislation and other pieces of legislation to expressly provide for a duty to co-operate with the entities listed in Article 5 of the Law on Domestic Violence Protection, including CSOs; [par 45]
 - 4) ensure that adequate mechanisms are in place pertaining to public-civil society partnerships and other forms of co-operation with clear rules to guarantee the objectivity and transparency of the selection procedure of CSOs, while respecting the freedom of association and ensuring state accountability for the delivery of public services; [pars 46-48 and 97]
 - 5) consider the possibility and costs associated with the introduction of a one-stop victim service system in Montenegro; [par 102]
- H. to ensure that the definitions of domestic violence and other crimes of violence against women are fully in line with international standards, as follows:
- 1) ensure the coherence of the definitions of “domestic violence” and “family members” provided in Article 3 of the Law on Domestic Violence Protection and in Articles 142 and 220 of the Criminal Code respectively by using the broadest possible coverage; [pars 49-50]
 - 2) introduce in a more systematic manner in the Criminal Code the aggravating circumstances listed in the Istanbul Convention, provided they do not already form part of the constitutive elements of the offence; [pars 120-124].
 - 3) consider whether or not to criminalize at least acts of “sexual harassment” of a particular gravity and supplement the Criminal Code to that effect, while introducing respective cross-references in the Law on Prohibition of Discrimination and the Law on Gender Equality; [par 58]
 - 4) ensure that the Criminal Code, and other legislation as appropriate, protects against all forms of violence, abuse, exploitation and harassment committed through the use of new information technologies, including the Internet; [par 59]
 - 5) review and revise as appropriate Article 223 of the Criminal Code on Incest and Article 204 par 2 of the Criminal Code to avoid overlap and ensure that the said acts are subject to adequate and dissuasive penalties; [par 61]
 - 6) introduce in the Criminal Code and other legislation as appropriate, in particular the Law on Public Peace and Order, provisions relating to the non-punishment of victims of trafficking in human beings for their involvement in unlawful activities, if the victims were compelled to do so by traffickers; [par 155]

Prevention

- I. to supplement Title X on Performing Activities in Social and Child Protection and Title XI on Business License of the Law on Social and Child Protection and relevant provisions of the Family Law and other legislation, to ensure that candidates applying for professions whose duties imply regular contacts with children are screened for possible convictions of acts of sexual exploitation or sexual abuse of children; [par 70]

- J. to clarify in the Excerpts of Legislation, or other relevant legislation, the entity that will be in charge of the development and management of the centralized database on gender-based violence, and for training staff from all government agencies involved in the collection of administrative data on violence against women and domestic violence; [pars 72-74]
- K. to consider providing in the Law on Internal Affairs and other legislation, as appropriate, for the systematic establishment of specialized investigative units to respond to reports of domestic violence; [par 65]

Protection and Support

- L. to discuss and consider amending Article 9 of the Law on Domestic Violence Protection to only provide an obligation to report where the victim is a child or an incapacitated person, and require prior consent of the adult victim; [pars 78-79]
- M. to provide in the Law on Health Care and the Law on Medical Emergency Service the development and use of screening tools for early detection of victims of domestic violence; [par 80]
- N. to broaden the scope of the duties of the police in terms of protection and support to victims in Article 14 of the Law on Domestic Violence Protection and in the Law on Internal Affairs; [par 81]
- O. to consider introducing, in the Law on Domestic Violence Protection, provisions relating to misdemeanor liability of law enforcement bodies for failure to comply with their duties, and specify in Article 16 of the Law on Internal Affairs that complaints by individuals can be filed in such cases; the Law on Internal Affairs should also provide for disciplinary, misdemeanor or criminal liability, where the police engage in acts of violence against women during the performance of their duties; [pars 82-84]
- P. ensure that the duty to inform the victims of their rights, of victims' support, and about criminal proceedings in general, also applies to other state entities such as social and health care services and victim support services and supplement relevant legislation to that effect; when involving a child victim, such information should be provided in a child-sensitive manner [pars 92, 109 and 163]
- Q. to specify that when a victim of domestic violence applies for financial support according to the Law on Social and Child Protection (Articles 22 and 23) or for social housing as per Article 8 of the Draft Social Housing Law, the incomes and assets of the spouse who is an alleged perpetrator of domestic violence shall not be taken into account to determine his/her eligibility to social benefits; [pars 96 and 100]
- R. to supplement Article 50 of the Law on Unemployment Insurance to specify that unemployment benefits should also be paid if someone was forced to leave his or her employment, for instance due to harassment by the employer or where relocation aimed at escaping domestic violence; [par 99]
- S. to supplement the provisions of the Family Law to expressly provide for the right for the victim/survivor of domestic violence to stay in the family dwelling after a divorce; [par 101]
- T. to amend the Law on Legal Aid to ensure that it also applies to administrative procedures; [par 103]

- U. to ensure that violations of the confidentiality rule and provisions relating to personal data are accompanied by adequate and dissuasive sanctions; [par 107]
- V. to amend Article 18 of the Law on Health Care to ensure that all individuals and not only citizens are entitled to confidentiality of all data related to their health; [par 108]
- W. to supplement and/or amend the provisions relating to residence status, asylum and refugee status as follows:
 - 1) amend Article 51 of the Foreigners Law so that victims of crimes of violence against women and domestic violence, can be granted temporary residence in Montenegro for humanitarian reasons; [par 111]
 - 2) supplement Article 53 of the Foreigners Law to specify that the victim of a forced marriage who lost his/her residence status in Montenegro because of an absence from Montenegro of more than 90 days, should be able to regain his/her residence status; [par 113]
 - 3) expressly state in Article 65 of the Foreigners Law that in cases where victims' residence status is connected to that of the perpetrator of domestic violence, victims being expelled should be able to obtain the suspension of expulsion proceedings against themselves to apply for a residence status on humanitarian grounds; [par 113]
 - 4) to expressly provide in the Foreigners Law that a victim of violence against women and domestic violence in Montenegro shall not be expelled until completion of the relevant proceedings for granting residence status in Montenegro; [par 114]
 - 5) to include provisions in the Law on Asylum on gender-sensitive reception and asylum procedures or expressly provide for relevant guidelines, while ensuring gender-sensitive organization of shelters for foreigners awaiting deportation (Article 67 of the Foreigners Law); [pars 115-117]

Investigation and Prosecution

- X. consider the introduction of 'fast-track' procedures for cases of domestic violence, similar to the ones provided for misdemeanor proceedings under the Law on Domestic Violence Protection; [par 131]
- Y. to amend the provisions of the Criminal Code to ensure that the rules governing the jurisdiction over crimes of violence against women and domestic violence are fully in line with Article 44 of the Istanbul Convention, as follows:
 - 1) delete the limitation stated in Article 138 par 3 (4) or alternatively, introduce a derogation at least for sexual violence including rape, forced marriage, female genital mutilation, forced abortion and forced sterilization; [par 136]
 - 2) provide a derogation to the limitation stated in Article 138 par 4 of the Criminal Code at least for sexual violence including rape, forced marriage, female genital mutilation, forced abortion and forced sterilization; [par 137]
 - 3) expressly provide a derogation to Article 137 par 2 of the Criminal Code, at least for sexual violence including rape, forced marriage, female genital mutilation, forced abortion and forced sterilization; [par 138]
 - 4) ensure that Montenegro has jurisdiction over the offences established in accordance with the Istanbul Convention, in cases where an alleged perpetrator is present on its territory and it does not extradite him or her to another Party; [par 139]

Procedural Law and Protective Measures

- Z. to consider supplementing Title 2 of the Law on Domestic Violence Protection relating to protective measures, as follows:
- 1) introduce other measures including, but not limited to, child support and custody orders, confiscation of weapons, and “forced marriage protection orders”; [pars 140-142]
 - 2) provide that the protective measures can be issued on an *ex parte* basis (i.e., even in the absence of and without representation of the respondent party), with immediate effect; [par 143]
- AA. to supplement the new Article 77b of the Criminal Code to specify that removal orders are issued irrespective of the property rights over the place of residence; [par 144]
- BB. to clarify which central body shall be in charge of collecting all information relating to protective measures issued by misdemeanor bodies according to the Law on Domestic Violence Protection and by a court according to the new provisions of the Criminal Code; [par 145]
- CC. to amend Article 38 of the Law on Domestic Violence Protection to provide that the violation of protective measures is subject to criminal liability and include a cross-reference to Article 220 of the Criminal Code; also, supplement Article 28 of the Law on Domestic Violence Protection to ensure that all protective, restrictive and removal orders include information on the consequences of their violation; [pars 147-148]
- DD. to supplement the Criminal Procedure Code, the Law on Social and Child Protection, the Family Law and the Law on Health Case, among others, to state that any decision concerning a child must be motivated, justified and explained, in light of the child’s best interests in the given case; [par 160]
- EE. to ensure in the Family Law or other relevant legislation, that when determining visitation rights, incidents of domestic violence are taken into account; [par 161]
- FF. for lawmakers and stakeholders, to review the provisions of the Family Law on annulment of a forced marriage and consider simplifying them and extending the time-limit for seeking annulment; [pars 164-165] and
- GG. to provide for a procedure whereby victims of violence against women and domestic violence may seek civil remedies for damages *against State authorities* for such authorities’ failure to take the necessary preventive or protective measures within the scope of their powers. [par 168]

IV. ANALYSIS AND RECOMMENDATIONS

14. Over the last twenty years, the notion of an obligation for States to adopt legal and other measures to eliminate violence against women has become increasingly prevalent, both at the national and international levels. This development has been encoded in a number of international instruments.

15. While the UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “CEDAW”)⁶ does not directly mention violence against women, its Article 2 stipulates that “State Parties condemn discrimination against women in all its forms”, and obliges States to eliminate, through all appropriate measures, such discrimination. The UN Committee on the Elimination of All Forms of Discrimination against Women clarified that gender-based violence constituted discrimination within the meaning of Article 1 of the CEDAW.⁷ The Committee specified that this referred to “violence that is directed against a woman because she is a woman or that affects women disproportionately”.
16. The UN General Assembly also issued a Declaration on the Elimination of Violence against Women,⁸ in which it explicitly affirmed that violence against women constituted a violation of women’s human rights and urged States to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or private persons”.
17. At the European level, since the 1990s, the CoE has intensified its activities to combat all forms of violence against women, notably with the adoption of Recommendation (2002)5 by the Committee of Ministers on the protection of women against violence.⁹ In 2011, the CoE Ad Hoc Committee on prevention and combating violence against women and domestic violence (CAHVIO), created by the Committee of Ministers, developed the Istanbul Convention. It is the first legally binding instrument in Europe to create a comprehensive legal and policy framework to protect women from acts of violence as well as prevent, prosecute and eliminate all forms of violence against women and domestic violence. More generally, the Istanbul Convention has been drafted based on the premise that a prohibition of discrimination against women and promotion of equality in all areas is needed to contend with the underlying structural disadvantages faced by women and thus prevent and combat violence against women in a more efficient and effective manner (see pars 25-27 *infra*).¹⁰
18. Building on the above-mentioned international instruments, Article 3 (a) of the Istanbul Convention defines “violence against women” as “all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”. It encompasses diverse forms of violence, occurring in various contexts, including but not limited to the family or domestic context (so-called “domestic violence”),¹¹ within the general community, in

⁶ UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Montenegro succeeded to this Convention on 23 October 2006.

⁷ See par 6 of the General Recommendation No. 19 of the Committee on the Elimination of All Forms of Discrimination Against Women, passed at the CEDAW Committee’s 11th session (1992).

⁸ UN Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104, A/48/49 (1993), available at <http://www.un.org/documents/ga/res/48/a48r104.htm>.

⁹ CoE Recommendation Rec (2002)5 of the Committee of Ministers to CoE Member States on the protection of women against violence adopted on 30 April 2002.

¹⁰ See par 38 of the 2013 Report of the UN Working Group on the issue of discrimination against women in law and in practice (A/HRC/23/50) adopted on 19 April 2013 (hereinafter “2013 Report of the UN Working Group on the issue of discrimination against women in law and in practice”), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.50_EN.pdf

¹¹ Article 3 (b) of the Istanbul Convention defines “domestic violence” as “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim”.

situations of armed conflict or other circumstances, including trafficking (see also the section on definitions, pars 49-62 *infra*). While violence against women, including domestic violence against women, is a distinctly gendered phenomenon, experienced largely by women because they are women,¹² Article 2 par 2 of the Istanbul Convention encourages State Parties to also address domestic violence against men and boys.¹³ This Opinion will also address this latter aspect. Based on the provisions of the Istanbul Convention, four main aspects can be distinguished when talking about combating violence against women and domestic violence, namely prevention, protection, prosecution, and partnership/multi-agency co-operation. These areas reflect the integrated human rights-based approach referred to as the “four P approach”.¹⁴ The following review will address these aspects in separate sections on prevention, protection and prosecution, by assessing the compliance of the Excerpts of Legislation with the Istanbul Convention, while integrating the aspect of partnership and co-operation, as appropriate.

1. General Comments

1.1. Impact Assessment and Participatory Approach

19. First, it must be highlighted that, while the Istanbul Convention often refers to the need for legislative measures, many of its provisions would require, sometimes in addition to legislative changes, the adoption of non-regulatory measures. While this Opinion mainly provides recommendations in terms of proposals for legislative amendments, certain aspects of the fight against violence against women and domestic violence may not need to be addressed in a law. Thus, policy-makers and all stakeholders should, if this has not taken place already, carry out a proper impact assessment of the regulatory and non-regulatory measures required for the full implementation of the Istanbul Convention. This will help identify which non-regulatory measures need to be adopted to supplement existing policy instruments, action plans and programmes, and/or complement or strengthen other existing initiatives, as appropriate.
20. In that respect, it is welcome that the Action Plan for Achieving Gender Equality of Montenegro (2013-2017)¹⁵ contains a section specifically addressing gender-based violence. It refers to certain interventions envisioned by the Istanbul Convention, such as the establishment of an integrated database on gender-based violence, the establishment of a free and unique 24-hour SOS hotline to report cases of domestic violence, certain measures for public information and awareness-raising, and capacity development initiatives targeting public servants. However, a systematic gap analysis, as

¹² *Op. cit.* footnote 4, par 36 (Explanatory Report to the Istanbul Convention). See also UN Women facts and figures available at <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes>, which amongst others states that “Women in urban areas are twice as likely as men to experience violence, particularly in developing countries”.

¹³ See also *op. cit.* footnote 4, pars 27 and 37 (Explanatory Report to the Istanbul Convention).

¹⁴ *Op. cit.* footnote 4, pars 63 and 116 (Explanatory Report to the Istanbul Convention).

¹⁵ See pages 82-94 of the Action Plan for Achieving Gender Equality of Montenegro (2013-2017), available at <http://www.mmp.gov.me/ResourceManager/FileDownload.aspx?rid=125912&rType=2&file=ACTION%20PLAN%20FOR%20ACHIEVING%20GENDER%20EQUALITY%202013-2017.pdf>.

- described above, would be advisable and the 2012 UN Women Handbook for National Action Plans on Violence against Women¹⁶ may serve as useful guidance in that respect.
21. While Article 18 of the Law on Domestic Violence Protection refers to the adoption of a strategy and action plan for protection from domestic violence, no mention is made of the obligation to allocate an adequate and gender-responsive budget. Should this not have taken place already, it would be advisable to conduct a full financial impact assessment to analyze the funding needed to implement all measures required for the implementation of the Istanbul Convention¹⁷; the allocation of appropriate financial and human resources for this purpose is also explicitly mentioned in Article 8 of the Istanbul Convention. This could be done by establishing legal obligations for the State and municipalities to take appropriate budgetary and administrative measures¹⁸ in the Law on Self-Government and/or other legislation as appropriate. In this context, it is reiterated that cases of domestic violence lead to quite significant costs for any state; such costs have been estimated at between 1.2 and 2 percent of a state's Gross Domestic Product,¹⁹ which does not take into account the major physical, mental, health, sexual and reproductive, and maternal health issues caused by domestic violence.²⁰ However, it is important that prevention be funded in and of itself and not from crisis response budgets, which should be kept separate.²¹
22. Any change of legislation could also have greater impact if accompanied by more gender-responsive budgeting²² at the national and local levels. This should be accompanied by adequate training to ensure that the concept of gender-responsive budgeting is fully understood by government authorities. The Law on Local Self-Government, particularly Chapter VI on Municipal Finance and Budget, could be

¹⁶ 2012 UN Women Handbook for National Action Plans on Violence against Women (hereinafter "2012 UN Women Handbook for National Action Plans on VAW"), available at <http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/7/HandbookNationalActionPlansOnVAW-en%20pdf.pdf>.

¹⁷ See Section 3.2.2. of the 2012 UN Women Handbook for Legislation on Violence against Women (hereinafter "the 2012 UN Women Handbook for Legislation on VAW"), available at http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/12/UNW_Legislation-Handbook%20pdf.pdf.

¹⁸ For instance, the legislation could mandate, as is done in some countries, that a certain percentage of the total budget of the respective government authority be specifically utilized for gender-related interventions; see *ibid.* Section 3.6.5. (2012 UN Women Handbook for National Action Plans on VAW).

¹⁹ See page 25 of the Paper "Intimate Partner Violence: Economic Costs and Implications for Growth and Development" (2013) commissioned by the World Bank Group, available at <http://www.worldbank.org/content/dam/Worldbank/document/Gender/Duvvury%20et%20al%202013%20Intimate%20Partner%20Violence%20Economic%20Costs%20and%20Implications%20for%20Growth%20and%20Development%20Jan%209%202014.pdf>. Various categories of costs are taken into consideration (e.g., costs for health and medical care, police interventions, criminal justice systems and prison costs, social services, operation and management of shelters and crisis services, indirect costs due to decrease productivity, etc.). See also the UN Women Virtual Knowledge Centre to End Violence against Women and Girls (<http://www.endvawnow.org/en/articles/301-consequences-and-costs-.html>) and the CoE Overview of Studies on the Costs of Violence against Women and Domestic Violence (26 October 2012), available at http://www.coe.int/t/dghl/standardsetting/convention-violence/Background%20info/Overview%20of%20studies%20on%20the%20costs%20of%20violence%20against%20women%20and%20domestic%20violence_INTERNET%20VERSION.pdf.

²⁰ Available from <http://www.who.int/mediacentre/factsheets/fs239/en/index.html>.

²¹ *Op. cit.* footnote 16, Section 3.4.1 (2012 UN Women Handbook for National Action Plans on VAW).

²² i.e., a gender-based assessment of budgets incorporating a gender perspective at all levels of the budgetary process and restructuring revenues and expenditures in order to promote gender equality (see page 5 of the 2009 CoE Handbook on Gender-Budgeting: Practical Implementation, available at [http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/CDEG\(2008\)15_en.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/CDEG(2008)15_en.pdf)).

- supplemented to expressly provide that budgets should be gender-responsive, and that adequate training should be provided.
23. Finally, recommendations at the international level highlight the need for direct and meaningful participation of civil society and other stakeholders throughout the process of development, implementation, monitoring and evaluation of national action plans and legislative changes on preventing and combating violence against women. This should include participation of women survivors,²³ women and men from marginalized groups, civil society organizations (hereinafter “CSOs”),²⁴ service providers, representatives from law enforcement and justice sectors, media, health sector, private sector and development partners, and government bodies, both at the highest decision-making levels and across all levels.²⁵
24. Consequently, policy and law makers in Montenegro should ensure that all the above-mentioned stakeholders are, or continue to be, fully consulted, informed, and able to submit their views, prior to the completion of the impact assessment and amendment of the national action plan and legislation, procedures and mechanisms. Public discussion and an open and inclusive debate will increase all stakeholders’ understanding of the various factors involved, enhance confidence in the adopted policy, national action plan and legislation, and most likely trigger ownership and ultimately improve implementation.

1.2. Legal and Institutional Gender Equality and Anti-Discrimination Framework and Gender Mainstreaming

25. Given the comprehensive scope of the Istanbul Convention, it is welcome that the Excerpts of Legislation include various pieces of legislation. This demonstrates the willingness to offer a holistic response to violence against women in Montenegro. Particularly, the Law on Domestic Violence Protection and the Criminal and Criminal Procedure Codes, as well as legislation pertaining to residency status and asylum, are directly related to the implementation of the Istanbul Convention. Other legislation included in the Excerpts relates to the roles and responsibilities of various actors involved in the protection and assistance to victims, to social protection in general, to marriage and family relationships and to anti-discrimination, all of which have a potential impact on preventing and combating violence against women and domestic violence.
26. Moreover, various international and regional instruments have recognized that “violence against women is both a cause and a consequence of discrimination” and that “it is

²³ For the purpose of this opinion, the term “survivor” is used where appropriate, in non-legal settings, to refer to persons who have suffered from violence while the term “victim” is used in its legal sense in connection with criminal proceedings and internationally recognized “victims’ rights”.

²⁴ For the purpose of this opinion, the term “CSO” includes “all non-market and non-state organizations outside of the family, in which people organize themselves to pursue shared interests in the public domain” (see page 7 of the 2012 OECD “Twelve Lessons for Partnering with Civil Society”, available at <http://www.oecd.org/dac/peer-reviews/12%20Lessons%20Partnering%20with%20Civil%20Society.pdf>), and thus would encompass non-governmental organizations.

²⁵ *Op. cit.* footnote 16, Section 3.3.2 (2012 UN Women Handbook for National Action Plans on VAW). See also page 44 of the 2014 UNODC Blueprint for Action: an Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women (hereinafter “2014 UNODC Blueprint for Action on VAW”), available at http://www.unodc.org/documents/justice-and-prison-reform/Strengthening_Crime_Prevention_and_Criminal_Justice_Responses_to_Violence_against_Women.pdf.

structural in nature”.²⁶ Research shows that there is a direct relationship between levels of gender inequality, adherence to gender stereotypes, and the prevalence of violence against women.²⁷ Based on Article 4 of the Istanbul Convention which requires taking the necessary legislative and other measures in the field of gender equality and anti-discrimination, any action to prevent violence against women and domestic violence should be supported by broader comprehensive social and economic policies. Guarantees of women’s rights to education, decent employment, health, an adequate standard of living, access to economic resources and participation in political and public life are all preconditions for substantive equality in law and in practice,²⁸ and the elimination of violence against women and domestic violence in the long run.

27. Therefore, any legislative reform in this field should be accompanied by initiatives to raise awareness on gender equality and support the empowerment of women in all spheres of life, with the aim to reduce women’s vulnerability to violence. Special measures to promote gender equality in the employment sector and the labor market, in political and public life, and to strengthen women’s economic independence, could also help reduce the dependence of women on perpetrators. This is all the more important since such dependence is often one of the reasons for victims’ unwillingness to report cases of domestic violence or press charges.²⁹
28. While not provided as part of the Excerpts of Legislation, the Law on Gender Equality³⁰ is directly related to the implementation of the Istanbul Convention, since it aims at eliminating discrimination based on sex and more generally providing equal opportunities for women and men. At the same time, certain provisions overlap with those found in the Law on Prohibition of Discrimination. It is thus unclear which law applies in which situations or which law will prevail in case of ambiguity or conflict. For instance, both laws provide definitions for “discrimination based on sex” and “sexual harassment”. Moreover, while the Law on Gender Equality stipulates that complaints shall be handled by the Ministry in charge for the protection of human and minority rights, the Law on Prohibition of Discrimination provides for the general competence of the Protector of Human Rights and Freedoms, an independent body, for all cases of discrimination. It would be advisable to clarify the relationships between these laws, to ensure a coherent approach to the fight against discrimination and gender inequality. This could be part of general reform efforts to address recommendations made by the Committee on the Elimination of Discrimination against Women (hereinafter “CEDAW Committee”) on improving the complaints-handling mechanism for cases of discrimination based on sex. Other recommendations focused on the adequate allocation of financial and human resources, and the adoption of proactive and

²⁶ See par 62 of the 2014 Report of the Special Rapporteur on violence against women, its causes and consequences, 28 May 2014, A/HRC/26/38, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/38.

²⁷ *Op. cit.* footnote 16, Section 3.4.1. (2012 UN Women Handbook for National Action Plans on VAW).

²⁸ See pars 53-54 of the 2013 Report of the UN Working Group on the issue of discrimination against women in law and in practice. See also examples of good practices from various countries in facilitating women’s participation in political life pages 55-56 of the Global Report for the UN Working Group on the issue of discrimination against women in law and in practice “Women in Political and Public Life” (2012), available at http://www.ohchr.org/Documents/Issues/Women/WG/PublicPoliticalLife/WG_Global.docx. See also par 79 of the 2011 Report of the UN Special Rapporteur on violence against women, its causes and consequences, on the Multiple and Intersecting Forms of Discrimination and Violence against Women, 2 May 2011, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-26.pdf>.

²⁹ *Op. cit.* footnote 4, par 118 (Explanatory Report to the Istanbul Convention).

³⁰ Available at <http://www.legislationline.org/documents/action/popup/id/3922>.

- sustained measures to overcome stereotypical attitudes about the roles and responsibilities of women and men in the family and in society.³¹
29. Furthermore, the Law on Gender Equality only provides for sanctions where an entity fails to disaggregate statistical data by gender, but not for any other violation of the provisions of the law, particularly for cases of discrimination based on sex or sexual harassment (see also comments in pars 30-31 and 58 *infra*), or for violating Article 10 pertaining to gender balanced representation in various areas of political and public life (see also comment in pars 35-37 *infra*). The Law should be amended so that it includes references to relevant liability procedures and sanctions, and more generally consequences of infringements of relevant provisions.
30. Likewise, as regards anti-discrimination measures in general, the OSCE/ODIHR, in previous opinions on amendments to the Montenegrin Law on Prohibition of Discrimination,³² has pointed out that not all cases of discrimination listed in the Law seem to lead to the imposition of sanctions.³³ While Article 4 par 2 of the Istanbul Convention expressly states that sanctions are a useful tool to ensure compliance, Articles 34 to 34b of the above Law do not provide sanctions in cases of harassment of the basis of sex or sexual harassment (Article 7), racial discrimination and discrimination based on religion or belief (Article 17), or discrimination on the basis of gender identity and sexual orientation (Article 19). The Law also does not provide for the imposition of enhanced fines for grave cases of discrimination listed under Article 20.³⁴
31. Moreover, the provisions on misdemeanour liability found in the Law on Prohibition of Discrimination may also overlap with Article 159 of the Criminal Code on Violation of Equality (see also comments in par 118-119 *infra* regarding overlaps of misdemeanour and criminal liability). In this context, it is noted that Article 159 of the Criminal Code is vaguely worded and seems to encompass discrimination on any ground. While certain offences implicitly involving discrimination are correctly addressed by the Montenegrin Criminal Code³⁵ (e.g. incitation to violence or hatred against certain groups (Article 370) and the dissemination of ideas based on racial superiority and expressions of racial hatred (Article 443)), discrimination in general should not lead to criminal liability.³⁶ Article 159 should thus be removed from the Criminal Code. At the same time, the Law on Prohibition of Discrimination should clarify sanctions incurred for the above-mentioned discriminatory acts (see also comments relating to the definition of “sexual harassment” and liability in par 58 *infra*).

³¹ See pars 13-15, 17 and 23 of the Concluding Observations of the CEDAW Committee on the 1st Report of Montenegro (2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/467/46/PDF/G1146746.pdf?OpenElement>.

³² OSCE/ODIHR Opinion on the draft Law on Amendments of the Law on Prohibition of Discrimination, NDISCR-MNG/234/2013, dated 31 July 2013 (hereinafter “2013 OSCE/ODIHR Opinion on the Draft Anti-Discrimination Law”), available at http://www.legislationline.org/download/action/download/id/4579/file/234_NDISCR_MNG_31%20July%202013_en.pdf; and OSCE/ODIHR Opinion on the Law on Prohibition of Discrimination, NDISCR-MNG/226/2013, dated 27 March 2013, available at <http://www.legislationline.org/documents/id/17887>.

³³ *ibid.* par 43 (2013 OSCE/ODIHR Opinion on the Draft Anti-Discrimination Law).

³⁴ *ibid.* par 44 (2013 OSCE/ODIHR Opinion on the Draft Anti-Discrimination Law).

³⁵ See CoE’s Commission on Intolerance and Racism (ECRI) General Policy Recommendation No. 1 on Combating Racism, Xenophobia, Antisemitism and Intolerance, adopted on 4 October 1996.

³⁶ See page 25 of the 2009 OSCE/ODIHR Practical Guide on Hate Crime Laws, available at <http://www.osce.org/odihr/36426?download=true>.

32. Regarding more specifically equality in marriage and family relations, it is positive that Article 294 par 1 of the Family Law provides that when an amicable agreement on property of spouses cannot be reached, a court shall order division of property in equal shares. Upon request of one spouse and delivery of proof of an “obviously, and significantly higher contribution” on his/her side, the court may also decide on a different division of property, while taking into account the support provided by the other spouse, e.g. in the form of household and family care (Article 294 pars 2 and 3). This latter provision is welcome, and it may be helpful to monitor its application to ensure that its aim of reaching an equal division of property is met in practice.³⁷ As recommended by the CEDAW Committee, the provisions of Part VIII of the Family Law should be supplemented to ensure that the concept of joint marital property extends to intangible property, including pension and insurance benefits and other career assets.³⁸
33. Article 4 par 2 of the Istanbul Convention states that measures to protect the rights of victims shall be secured without discrimination on any ground.³⁹ It is noted that the Law on Domestic Violence Protection does not include a non-discrimination statement, either directly or by reference to other legislation. It would be advisable to include a specific provision on protecting victims of domestic violence from discrimination, in line with the grounds listed in the [amended] Law on Prohibition of Discrimination in Montenegro.⁴⁰ This is all the more important given that certain non-discrimination grounds, e.g. sexual orientation, gender identity, age, state of health, disability, marital status, and migrant or refugee status, are of great relevance to the subject-matter of the Istanbul Convention.⁴¹
34. Other laws contained in the Excerpts of Legislation do include specific non-discrimination statements, but these should be supplemented to cover, in a coherent manner, all the grounds listed in the [amended] Law on Prohibition of Discrimination. In particular, Article 7 of the Law on Social and Child Protection, Article 4 of the Law on Health Care and Article 7 of the Law on Asylum should include, unless already covered, grounds such as gender identity, sexual orientation, gender, marital status, health status, belief, ethnic origin, migrant or refugee status. While the catch-all clause “other status” or “other personal characteristics” may allow the coverage of such grounds, it would be preferable if they were expressly stated, since this would better reflect the need for protection of certain vulnerable and marginalized groups. This is of particular significance given recent reports on continued discrimination against persons

³⁷ *Op. cit.* footnote 31, pars 36-37 (2011 Concluding Observations of the CEDAW Committee on Montenegro).

³⁸ *ibid.*

³⁹ Within the framework of the Istanbul Convention, persons made vulnerable by particular circumstances include: pregnant women and women with young children, persons with disabilities, including those with mental or cognitive impairments, persons living in rural or remote areas, substance abusers, prostitutes, persons of national or ethnic minority background, migrants – including undocumented migrants and refugees, gay men, lesbian women, bisexual and transgender persons as well as HIV-positive persons, homeless persons, children and the elderly (see par 87 of the Explanatory Report to the Istanbul Convention).

⁴⁰ The protected grounds listed under Article 2 of the Law on Prohibition of Discrimination in Montenegro are: “race, colour of skin, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender identity, sexual orientation, health conditions, disability, age, material status, marital or family status, membership in a group or assumed membership in a group, political party or other organisation as well as other personal characteristics”.

⁴¹ *Op. cit.* footnote 4, par 53 (Explanatory Report to the Istanbul Convention).

- of Roma, Ashkali and Egyptian origin, in particular those originating from Kosovo,⁴² and the persistence of violence against Roma women.⁴³
35. As regards more specifically the abolition of laws and practices that discriminate against women (Article 4 par 2 third indent of the Istanbul Convention), the CEDAW Committee has in the past noted the underrepresentation of women in various areas of political and public life.⁴⁴ To effectively prevent and combat violence against women and domestic violence, it is important to ensure gender-balanced representation within the various bodies dealing directly or indirectly with victims' assistance. Such gender balance is currently not reflected in the Excerpts of the Legislation and should be introduced, e.g. with regard to the multi-disciplinary expert team in charge of the victim assistance plan under Article 11 of the Law on Domestic Violence Protection. The same could apply for the teams in charge of visiting families where children and persons with special needs reside (Article 12 par 3 of the Law on Domestic Violence Protection).
36. Additionally, provisions relating to government-appointed members of certain bodies and appointment to certain public function should likewise be modified to include references to gender balance (e.g., Article 107 of the Law on Social and Child Protection on the appointment and composition of the Managing Board of Public Institutions in charge of Social and Child Protection; Article 61 of the Law on Health Care on the appointment of the Board of Directors of public health institutions; Article 9 of the Law on Internal Affairs on the appointment of the Police Director by the Government of Montenegro etc.). This would also ensure compliance with the United Nations Beijing Platform of Action, which urges States to take measures to ensure women's equal access to and full participation in power structures and decision-making⁴⁵ and, at the European level, the CoE Committee of Ministers' Recommendation 2003(3), calling for gender-balanced representation in all public-appointed members to public committees and posts or functions.⁴⁶
37. Furthermore, for the requirement for gender balance to reach its intended goal, it is recommended that it is introduced, as appropriate, in both the nomination process to propose candidates for the positions involving government appointees, as well as in the rules and procedures governing appointment to the above-mentioned posts by the Government.⁴⁷ Additionally, in order to be effective, such provisions should indicate the

⁴² This designation is without prejudice to positions on Kosovo's status, and is in line with UNSCR 1244/99. See par 11 of the Concluding Observations of the CERD Committee on Montenegro (13 March 2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fMNE%2fCO%2f2-3&Lang=en.

⁴³ See page 44 of the 2013 Montenegro Progress Report of the European Commission (hereinafter "2013 Montenegro Progress Report of the European Commission"), available at http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/montenegro_2013.pdf.

⁴⁴ *Op. cit.* footnote 31, pars 22-23 (2011 Concluding Observations of the CEDAW Committee on Montenegro).

⁴⁵ See Strategic Objective G.1. "Take measures to ensure women's equal access to and full participation in power structures and decision-making" of the Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), available at <http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en>.

⁴⁶ See pars 9-10 of the Appendix to the CoE Recommendation Rec(2003)3 of the Committee of Ministers to CoE Member States on the balanced participation of women and men in political and public decision-making adopted on 30 April 2002 (hereinafter "the CoE Recommendation Rec(2003)3"), available at <https://wcd.coe.int/ViewDoc.jsp?id=2229>. In this context, gender balance means that the representation of either women or men in any decision-making body in political or public life should not fall below 40% (see the preamble of the Appendix to the CoE Recommendation Rec(2003)3).

⁴⁷ For instance, in cases where public bodies or organizations nominate candidates for appointment, certain countries have introduced an obligation to always propose two nominees, a woman and a man (e.g. the example in Denmark, Appendix IV to the Explanatory Memorandum on CoE Recommendation Rec(2003)3).

consequences for infringement of the gender balance requirement, which could be, for instance, the annulment of the appointment of members from the over-represented gender.⁴⁸ This would be in line with the recommendations made by the CEDAW Committee in its 2011 Concluding Observations on Montenegro.⁴⁹

38. Regarding law enforcement bodies, an adequate number of female law enforcement officers, including at high levels of decision-making and responsibility,⁵⁰ should also be ensured⁵¹ and the Law on Internal Affairs should be supplemented to that effect.
39. Furthermore, it is noted that Montenegro has ratified the UN Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”) and its Optional Protocol.⁵² Certain provisions of the Excerpts of Legislation already include some measures aiming at protecting persons with disabilities from acts of violence, which is welcome. Given that these persons are particularly vulnerable to violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,⁵³ additional legal, social and medical services should be designed and implemented in a manner that ensures inclusion and accessibility also for women and girls with disabilities. Some specific and adequate assistance measures should also exist, including the provision of procedural and age-appropriate accommodations, and guarantees of access to justice for disabled victims of violence against women and domestic violence, in line with Articles 12 and 13 of the CRPD. The Excerpts of Legislation should address this issue in a more systematic manner.

1.3. Co-ordination at National and Local Levels, including Partnership with Civil Society Organizations

40. As regards co-ordination mechanisms for dealing with cases of violence against women and domestic violence, the practice varies greatly from country to country, ranging from a multidisciplinary structure established by legislation with a clear and broad mandate to a looser structure established through a series of protocols or memoranda of understanding amongst criminal justice stakeholders and other actors.⁵⁴ Whatever the form chosen, multi-sectoral and multi-agency co-ordination both at national and local

⁴⁸ As an example, according to the new French Law on Equality between Men and Women dated 4 August, the appointments of the members of the executive board of certain administrative bodies shall be annulled if gender balance is not respected (except for appointments of members from the under-represented gender); at the same time, the annulment of the appointments will not render null and void the decisions that may have already been adopted by said body; see

http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=84EC2437366E2DFFB5DEEEFEB386BB2B.tpdjo15v_3?cidTexte=JORFTEXT000029330832&categorieLien=id.

⁴⁹ *Op. cit.* footnote 31, pars 22-23 (2011 Concluding Observations of the CEDAW Committee on Montenegro) which suggest the introduction of “provisions on the rejection of proposals for appointments that do not comply with the principle of gender-balanced representation”.

⁵⁰ See pars 190 and 192 of Strategic objective G.1. (Take measures to ensure women’s equal access to and full participation in power structures and decision-making) of the Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), available at <http://www.un.org/womenwatch/daw/beijing/platform/decision.htm#object2>.

⁵¹ *Op. cit.* footnote 4, par 258 (Explanatory Report to the Istanbul Convention).

⁵² UN Convention on the Rights of Persons with Disabilities (hereinafter “the CRPD”), adopted by General Assembly resolution 61/106 on 13 December 2006. Montenegro ratified the CRPD and the Optional Protocol to the CRPD on 2 November 2009.

⁵³ See the Thematic Study on the Issue of Violence against Woman and Girls and Disability, Report of the Office of the UN High Commissioner for Human Rights, 30 March 2012, available at <http://www.ohchr.org/Documents/Issues/Disability/ThematicStudyViolenceAgainstWomenGirls.pdf>.

⁵⁴ *Op. cit.* footnote 25, page 93 (2014 UNODC Blueprint for Action on VAW).

levels has been highlighted as being key to facilitate prevention, protection of victims and prosecution of perpetrators.⁵⁵

41. Article 10 of the Istanbul Convention requires the identification or establishment of one or several official bodies in charge of the co-ordination, implementation, monitoring and evaluation of the policies and measures taken to implement the Istanbul Convention, including international co-operation.⁵⁶ The lawmakers and stakeholders should discuss and identify such an entity, and ensure that an adequate budget is allocated to help it carry out such a mandate. It is important to note that the profile and political strength of this entity will have a significant impact on its potential to carry out its role in an effective manner.⁵⁷
42. Currently, the legislative framework, including the Law on Local Self-Government, does not clearly delineate the respective roles and responsibilities of central and local authorities in preventing and combating violence against women and domestic violence. It may be advisable for lawmakers and stakeholders to discuss in more detail the institutional framework to be put in place to fully implement the Istanbul Convention. While this may not necessarily require legislative amendments, it is important to delineate clearly the respective roles and responsibilities at all levels, and by all actors, governmental and non-governmental.
43. At the local/community level, social work centres may set up expert teams composed of their representatives, local government representatives, service agencies, police and NGOs, in charge of designing a victim assistance plan and co-ordinating victim assistance in accordance with victim's needs and choice (Article 11 of the Domestic Violence Protection Law). This step is welcome, and overall in line with Article 51 of the Istanbul Convention, which requires that "an assessment of the lethality risk,⁵⁸ seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities".
44. At the same time, Article 11 is relatively vague in that it does not clearly state the core principles of intervention, or the respective roles and responsibilities of the different entities involved, nor does it designate the body/person meant to lead and co-ordinate these efforts. To enhance the functioning of such mechanisms, good practices in other countries show that it is important to provide, in the legislation itself, for the development of standard operating procedures or protocols for co-operation at the community level.⁵⁹ Recent examples of multi-agency co-operation and the introduction of a chain model (i.e., where the work processes of various partners involved are matched and aimed at a common goal, with the client/victim at the centre of the

⁵⁵ See e.g., *op. cit.* footnote 16, Sections 2.1.1. and 3.3.1. (2012 UN Women Handbook for National Action Plans on VAW).

⁵⁶ Article 1 par 1 (d) of the Istanbul Convention.

⁵⁷ *Op. cit.* footnote 16, Section 3.3.3.1. (2012 UN Women Handbook for National Action Plans on Violence against Women).

⁵⁸ i.e., the risk of death.

⁵⁹ See <http://www.endvawnow.org/en/articles/405-coordinated-community-response.html?next=406>. See the example of Finland and the program to support municipalities in developing coordinated responses to domestic violence, page 85 of the OSCE Compilation of Good Practices "Bringing Security Home: Combating Violence against Women in the OSCE Region" (2009) (hereinafter "2009 OSCE Compilation of Good Practices on Combating VAW"), available at <http://www.osce.org/gender/37438?download=true>.

collaboration)⁶⁰ have proven to be successful. Positive lessons learned⁶¹ may be useful in the Montenegrin context, and help improve existing co-operation mechanisms and ongoing initiatives, such as the adoption of a Code of Conduct on procedures for coordinated institutional response⁶² or inter-agency protocols on protection from domestic violence.⁶³ The 2014 UNODC Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women⁶⁴ may serve as a useful reference in that respect.

45. Additionally, certain Excerpts of Legislation (e.g., the Law on Internal Affairs, the Law on Health Care, the Law on Social and Child Protection) and other pieces of legislation could, as appropriate, be supplemented to expressly provide for a duty to co-operate with the entities listed in Article 5 of the Law on Domestic Violence Protection, including CSOs, for the purpose of identifying victims of domestic violence, or more generally victims of violence against women, and providing assistance.
46. As noted in the Explanatory Report to the Istanbul Convention, in many countries, the overwhelming majority of services for victims of domestic violence and of other forms of violence against women are run by CSOs.⁶⁵ Particularly, they often play a critical role in terms of awareness-raising, public outreach, operation of helplines, providing counseling services including legal assistance to victims,⁶⁶ operating victim crisis centers and/or shelters, capacity-development for a range of professionals, as well as more generally advocacy efforts and monitoring the implementation of laws and the effectiveness of the legal system.⁶⁷
47. While CSOs are at times referred to in the Excerpts of Legislation, there does not seem to be a systematic approach to partnering with them in these areas of work. In order to ensure effective co-operation between the state and civil society, it would be advisable,

⁶⁰ See page 31 of European Crime Prevention Network, Toolbox Series No. 4 on “Tackling Domestic Violence in the EU: Policies and Practices” (December 2013), available at <http://www.bukstipri.lt/uploads/1112.pdf>. See the Duluth Model in the United States of America, page 84 of the 2009 OSCE Compilation of Good Practices on Combating VAW.

⁶¹ See also, for instance, the example of Belgium with the designation of an independent case manager (not related to the police, justice or welfare), pages 36 and 40 of European Crime Prevention Network, Toolbox Series No. 4 on “Tackling Domestic Violence in the EU: Policies and Practices” (December 2013), available at <http://www.bukstipri.lt/uploads/1112.pdf>. See also *op. cit.* footnote 16, Section 3.3.3.1. (2012 UN Women Handbook for National Action Plans on VAW).

⁶² See par 75 of the European Parliament Report on Women’s Rights in the Balkan Accession Countries, 4 April 2013, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0136+0+DOC+XML+V0//EN>.

⁶³ Available at <http://en.sudovi.me/podaci/en/vrhs/dokumenta/66.pdf>.

⁶⁴ Available at http://www.unodc.org/documents/justice-and-prison-reform/Strengthening_Crime_Prevention_and_Criminal_Justice_Responses_to_Violence_against_Women.pdf.

⁶⁵ *Op. cit.* footnote 4, par 68 (Explanatory Report to the Istanbul Convention).

⁶⁶ In terms of early access to legal aid, see pages 29, 69 and 73 of the UNDP-UNODC Handbook on Early Access to Legal Aid in Criminal Justice Processes (2014), available at http://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf, where the roles of non-governmental organizations and civil society organizations is particularly highlighted in terms of educating community, raising awareness of legal aid and provision of legal aid services. Particularly see page 115 where it is stated that “NGOs, civil society organizations and educational institutions all have an important role to play in the organization and delivery of effective early access, in ensuring that the special needs of particular groups are adequately catered for, in sustaining and improving the provision of such access and in improving public knowledge and understanding of the right to such access”.

⁶⁷ See e.g. *op. cit.* footnote 59, pages 96 and 99 (2009 OSCE Compilation of Good Practices on Combating VAW). For instance, the Austrian experience is considered as a good practice, where intervention centers funded by the Federal Ministry of the Interior and the Ministry for Women but operated by women’s NGOs have been established in each province of the country for the purpose of coordinating police and social service activities and to take a proactive approach to assisting victims.

if this does not already exist, to set up NGO-Government partnership mechanisms either in policy documents or in relevant primary or secondary legislation, which would provide clear rules to guarantee the objectivity and transparency of the process of selecting NGOs, while not infringing on the freedom of association (see also pars 48 and 97 *infra*).⁶⁸ In any case, even if the implementation of certain support services to victims of violence is carried out by the said NGOs, this should not release States from their responsibility to protect victims, and their overall accountability for support services. This should also include, as stated in Article 8 of the Istanbul Convention, the commitment of adequate state resources and funding to CSOs/NGOs when they carry out measures or implement activities pertaining to preventing and combating violence against women and domestic violence.

48. The full and meaningful participation of all stakeholders through co-operation structures (e.g., working groups, networks, public-NGO partnership, and other co-operation mechanisms) also requires that such structures be invested with powers and resources to influence direction and decision-making, though this needs to be balanced with the need for CSOs to retain their independence and capacity to hold government accountable.⁶⁹

1.4. Definitions of Domestic Violence and Other Crimes of Violence against Women

49. Article 3 (b) of the Istanbul Convention defines “domestic violence” as “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim”. The definition of “domestic violence” contained in Article 8 of the Law on Domestic Violence Protection includes a wide array of acts committed by a family member, not only of a physical but also of a sexual, mental or economic nature as well, which is in line with the definition of Article 3 of the Istanbul Convention.
50. Article 3 of the Law on Domestic Violence Protection contains a broad definition of the notion of “family members”, by including relatives by blood, marriage or adoption, consensual (i.e., non-married) partners and also specifically referring to persons sharing the same household “irrespective of the nature of their relationship”. In this, Article 3 is overall compliant with international standards. It is worth mentioning, however, that the Explanatory Report to the Istanbul Convention expressly states that the joint residence of the perpetrator and the victim is not required for certain acts to qualify as “domestic violence”;⁷⁰ this could be reflected more clearly in Article 3 of the Law on Domestic Violence Protection. At the same time, the definitions used in the Criminal Code for “Family Members” (Article 142 (28))⁷¹ and “Domestic Violence” (Article 220) are more

⁶⁸ See e.g. the Article on Co-operation in the Area of Social Services Delivery and Mechanisms of State Financing of NGOs (Sample Models) by Radost Toftisova, Legal Advisor, ICNL – Budapest (2001), available at http://www.icnl.org/research/journal/vol3iss4/special_3.htm.

⁶⁹ *Op. cit.* footnote 16, Section 3.3.2. (2012 UN Women Handbook for National Action Plans on VAW).

⁷⁰ *Op. cit.* footnote 4, par 42 (Explanatory Report to the Istanbul Convention). See also *op. cit.* footnote 17, Section 3.4.2.2 of the 2012 UN Women Handbook for Legislation on VAW. See also, for example, the Spanish Organic Act on Integrated Protection Measures against Gender Violence (2004) which defines domestic relationships broadly to include relationships with a spouse or former spouse, non-marital relationships, non-cohabiting relationships, romantic and sexual relationships, as well as relationships between family or household members, such as ascendants, descendants, persons related by blood, persons residing together and minors or disabled individuals under guardianship or custody.

⁷¹ Article 142 (28) of the Criminal Code states that “[a] family or family community is understood to also mean former spouses, cousins and relations through full adoption in a direct line without limitation, and in a collateral line conclusively with the fourth degree, relatives through incomplete adoption, relatives through marriage conclusively with

restrictive. For instance, the definition of “family members” does not encompass partners who do not live together or former partners. As regards the definition of “domestic violence”, Article 220 of the Criminal Code seems to only address cases involving serious physical violence or those resulting in serious bodily injury, but not psychological violence (on its own), sexual acts, economic violence or stalking. To avoid uncertainty and ensure consistency, it would be advisable to align the two definitions of “family members” and “domestic violence” found in the Criminal Code and in the Law on Domestic Violence Protection respectively, ideally by using the broadest possible coverage. This would be in line with international standards, which urge States to adopt the broadest possible definitions of acts of domestic violence.⁷²

51. Article 33 of the Istanbul Convention states that “psychological violence”, namely the “intentional conduct of seriously impairing a person’s psychological integrity through coercion or threats” should be criminalized. Although State Parties may reserve the right to provide for non-criminal sanctions (Article 78 par 3), Montenegro has not done so. While some aspects of psychological violence may partially be covered by existing criminal provisions, e.g. Article 149 (instigation to suicide and assisted suicide) or Article 165 (coercion), the Criminal Code should be amended to introduce a specific criminal offence for serious cases of “psychological violence” (i.e., seriously impairing a person’s psychological integrity) under Title XIX of the Criminal Code,⁷³ as has been done in other countries.⁷⁴ Since such conduct may occur in a domestic context but also in other contexts, such as at work, in education, sports or cultural settings, the Criminal Code should include a general criminal offence of “psychological violence”, with higher penalties provided in cases of domestic violence (see par 123 *infra*).
52. Article 34 of the Istanbul Convention defines “stalking” as the “intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety” and states that such behaviour should be criminalized. Montenegro has not made any reservation in that respect. While such offence may be partially covered by certain provisions of the Criminal Code (e.g., on endangering safety or on coercion), these provisions do not necessarily capture the criminal nature of a pattern of behaviour, individual elements of which, if taken by themselves, may not always amount to criminal conduct.⁷⁵ It is therefore recommended to introduce stalking as a separate general criminal offence in the Criminal Code, with stalking committed in the context of a domestic setting subject to higher penalties (see par 123 *infra*).

the second degree, persons who live in the same household and persons that parent a child or a child on the way, even where such persons have never shared a household.”

⁷² *Op. cit.* footnote 17, Section 3.4.2.1 (2012 UN Women Handbook for Legislation on VAW).

⁷³ See pars 21-32 of the Report on Psychological Violence by the Committee on Equal Opportunities for Women and Men of the Parliamentary Assembly of the Council of Europe (2011), available at <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=12971&Language=EN>, which defines ‘psychological violence’ as “reiterated words and acts aimed at or having the consequence of causing harm or putting the victim in a position of subjugation”, which can take a wide range of forms outlined in the report; Article 33 of the Istanbul Convention defines ‘psychological violence’ as the “intentional conduct of seriously impairing a person’s psychological integrity through coercion or threats”. See also *op. cit.* footnote 25, page 39 (2014 UNODC Blueprint for Action on VAW) which defined “psychological violence” as “controlling, coercive or threatening behaviour or intentional conduct of seriously impairing a person’s psychological integrity through coercion or threats”.

⁷⁴ For specific provisions on the criminalization of psychological violence in OSCE participating States, see e.g. Article 222-33-2-1 of the French Penal Code which states that harassing one’s spouse, partner, or co-habitant by repeated acts that “degrade one’s quality of life and cause a change in one’s physical or mental state of health” is punishable by a maximum penalty of three years in prison and a €45,000 fine, if such harassment resulted in an incapacity to work for eight days or less (five years and a fine of €75,000 if the resulting incapacity to work is over eight days).

⁷⁵ *Op. cit.* footnote 4, par 185 (Explanatory Report to the Istanbul Convention).

53. As regards “economic violence”, criminalization is not required by the Istanbul Convention. While the term is not defined by key international instruments or documents, certain acts listed under Article 8 of the Law on Domestic Violence Protection (e.g., damaging or destroying joint property, denying means of subsistence, deprivation of various clothing, food, personal hygiene items) generally fall under what is understood to constitute “economic violence” in certain countries.⁷⁶
54. However, it is noted that a number of acts of violence, which should be criminalized according to the Istanbul Convention, are not currently covered by the Criminal Code. First, the Criminal Code does not criminalize forced sterilization as required by Article 39 (b) of the Istanbul Convention and should be supplemented accordingly. Second, Article 36 par 1 (c) of the Istanbul Convention provides that the intentional act of “causing another person to engage in non-consensual acts of a sexual nature with a third person” shall be criminalized.⁷⁷ As they stand, Articles 204 and 207 of the Criminal Code cover certain sexual criminal offences, but not coercion to sexual intercourse or other actions of a sexual character *with a third person*. It is recommended to supplement Title XVIII of the Criminal Code to cover such criminal acts. Third, the Istanbul Convention also requires the criminalization of “female genital mutilation” (Article 38 of the Istanbul Convention), which is not currently dealt with in the Criminal Code, and, given the particularly invasive and painful nature of this crime, should be added.⁷⁸
55. Regarding sexual violence, Article 204 of the Criminal Code defines rape as the situation where a person “forces another into a sex act or other act of equivalent nature, by using force or threatening to take life and harm the body of that or of other person”. The word “forces” may be interpreted as implying physical force and physical resistance by the victim; also, the wording of Article 204 seems to suggest that one of the constitutive elements of this criminal offence is some degree of violence, threats of violence and/or the use of force. To ensure a broad application even in the absence of physical resistance by the victim, it would be preferable if this provision would not refer to “force” but would focus instead on whether consent to the sexual act was given voluntarily as the result of the person’s free will, in light of all the circumstances (see, in this context, Article 36 par 2 of the Istanbul Convention). It must be pointed out here that the European Court of Human Rights’ (hereinafter “the ECtHR”) case law requires the penalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.⁷⁹ Certain countries go even further and require the existence of certain “coercive circumstances” instead of the proof of lack of consent; in that case, a broad list of such coercive circumstances should be provided.⁸⁰ To avoid “secondary victimization”,⁸¹ the legislation should make it clear that the

⁷⁶ See various definitions of “economic violence” or “economic abuse” at <http://www.endvawnow.org/en/articles/398-definition-of-domestic-violence.html>.

⁷⁷ *Op. cit.* footnote 4, par 190 (Explanatory Report to the Istanbul Convention).

⁷⁸ See also the United Nations General Assembly Resolution A/RES/67/146 adopted on 20 December 2012 and urging States to prohibit female genital mutilations.

⁷⁹ See *M.C. v. Bulgaria*, ECtHR judgment of 4 December 2003 (Application No 39272/98), par 166, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61521#{"itemid":\["001-61521"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61521#{).

⁸⁰ *Op. cit.* footnote 17, Section 3.4.3.1. (2012 UN Women Handbook for Legislation on VAW).

⁸¹ i.e., when the victims suffer further harm not as a direct result of the criminal act but due to the manner in which the institutions and other individuals deal with the victim (see par 1.3 of the Appendix to CoE Recommendation Rec(2006)8). Secondary victimization may be caused, for instance, by repeated exposure of the victim to the perpetrator, repeated interrogation about the same facts, the use of inappropriate language, unintentionally insensitive comments made by all those who come into contact with victims, insensitive media reporting of cases. See also pars 3.3 and 12.2 of the Appendix to CoE Recommendation Rec(2006)8 and Chapter 5 of the 2009 Report on Non-Criminal Remedies for

burden of proof is on the accused, who should prove that the victim gave his or her “freely given consent”. Moreover, it would be advisable to clarify that the sexual conduct can be carried out “with any bodily part or object”, as stated under Article 36 par 1 of the Istanbul Convention. Article 204 of the Criminal Code should be amended accordingly.

56. The Criminal Code used to address certain sexual offences separately, including rape committed between spouses (former Article 212) and it is welcome that the recent amendments to the Criminal Code in 2013 have deleted the requirement for the spouse to press charges. These amendments are in line with international good practices on legislation on domestic violence.⁸² However, as a consequence, the Criminal Code no longer expressly addresses the specific situation of spousal rape. It would be advisable to enhance Article 204 by adding that rape committed in a domestic context, including spousal rape, will be subject to aggravated penalties, to underline the special gravity of this form of rape.
57. As regards marriage-related offences, the Criminal Code covers the behaviour of “Concluding a void marriage” (Article 214) and criminal offences for public officials allowing the conclusion of unlawful marriage. The amendments to Article 214 of the Criminal Code adopted in 2013 now also expressly prohibit the conclusion of a forced marriage, which is welcome. However, Article 214 par 3 requires that prior to prosecution, the marriage must first be pronounced to be null and void, which may limit the application of the provision in practice, and put an additional burden on the victim (see pars 164-165 *infra*). Moreover, Article 37 par 2 of the Istanbul Convention provides for the criminalization of the “[i]ntentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in, with the purpose of forcing this adult or child to enter into a marriage”. This is not currently covered by the provisions of the Criminal Code and its Article 214 could be supplemented accordingly.⁸³
58. Article 40 of the Istanbul Convention provides that “sexual harassment” shall be subject to criminal or other legal sanction. This term is defined by the Laws on Prohibition of Discrimination of Montenegro and on Gender Equality, but neither law specifies any sanctions in cases of sexual harassment (see pars 29-31 *supra*). In relation to such offences, practice varies across the OSCE area; sexual harassment is generally considered to be a form of discrimination and often accompanied by provisions on harassment as criminal offences or subject to civil or administrative penalties.⁸⁴ Article 207 par 1 of the Criminal Code provides for a penalty of three months to three years of prison in cases where an official, or other person in a position of trust or domination, abuses his or her position to incite another person into a sexual act or other sexual

Crime Victims prepared by the Group of Specialists on Remedies for Crime Victims (CJ-S-VICT) nominated by the Committee of Ministers of the Council of Europe, under the aegis of the European Committee on Legal Co-operation (CDCJ), available at http://www.coe.int/t/dghl/standardsetting/victims/victims%20final_en%20with%20cover.pdf (hereinafter “2009 Report on Non-Criminal Remedies for Crime Victims”).

⁸² *Op. cit.* footnote 17, Section 3.4.3.1. (2012 UN Women Handbook for Legislation on VAW). See also e.g. Article 222-22 of the French Criminal Code which provides that rape and other acts of sexual violence constitute criminal offences “regardless of the nature of the existing relationship between the aggressor and its victim, including when they are related by marriage”.

⁸³ *Op. cit.* footnote 4, par 197 (Explanatory Report to the Istanbul Convention).

⁸⁴ See pages 27-29 of the 2012 Report on Harassment related to Sex and Sexual Harassment Law in 33 European Countries prepared by the Members of the European Network of Legal Experts in the Field of Gender Equality, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassement_en.pdf.

behaviour. While this may partially fall under the scope of “sexual harassment”, sexual harassment may also be committed by persons who are not in an “official position” or in a position of trust or authority (e.g., colleagues, fellow students). Moreover, the wording “other sexual behavior” is relatively vague. “Sexual Harassment” should cover a broader range of conduct, e.g., unwelcome sexually determined behaviour including (whether directly or by implication) physical conduct and advances; a demand or request for sexual favours; sexually coloured remarks; displaying sexually explicit pictures, posters or graffiti; and any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.⁸⁵ While Article 40 of the Istanbul Convention provides for the possibility to subject “sexual harassment” to criminal law sanctions or other legal sanctions, recommendations at the international level seem to suggest that such behaviour should be criminalized.⁸⁶ The lawmakers and stakeholders should discuss whether to at least criminalize particularly serious acts of sexual harassment and should consider supplementing the Criminal Code to that effect. The Laws on Prohibition of Discrimination and on Gender Equality should then include express cross-references to respective provisions of the Criminal Code.

59. Furthermore, lawmakers should ensure that relevant legislation protects against all forms of violence, abuse, exploitation and harassment committed through the use of new information technologies, including the Internet, and should supplement the Criminal Code and other legislation to that effect.⁸⁷
60. As regards acts of violence committed against children, it must be pointed out that one of the concerns raised by the Committee against Torture in its 2014 Concluding Observations was that the Montenegrin legal framework does not explicitly prohibit corporal punishment of children in all settings, including in the home, and that such practice is still widely applied in society and accepted as a form of discipline in Montenegro.⁸⁸ Article 8 of the Law on Social and Child Protection states that “every form of violence towards a child, an adult or old person, [including] physical, emotional and sexual abuse” committed by the employee of an institution or another service provider is prohibited, which is positive. However, it is not clear whether such prohibition also applies in other settings, for instance in the educational context. In order to send a clear zero-tolerance message and ensure compliance with regional and international standards and good practices,⁸⁹ the Criminal Code should expressly

⁸⁵ *Op. cit.* footnote 17, Section 3.4.3.2. (2012 UN Women Handbook for Legislation on VAW). See also the definition of “sexual harassment” in Article 2 of EU Gender Equality Directives (“any form of unwanted verbal, non-verbal or physical conduct of a sexual nature [which] occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”) and in par 18 of General Recommendation No. 19 of CEDAW Committee (1992) (“such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions”). See also the definitions of “sexual harassment” in criminal legislation of EU Countries in Section 2.1.8. of the Report on Harassment related to Sex and Sexual Harassment Law in 33 European Countries prepared by the Members of the European Network of Legal Experts in the Field of Gender Equality (2012), available at http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassement_en.pdf.

⁸⁶ *Op. cit.* footnote 17, Section 3.4.3.2 (2012 UN Women Handbook for Legislation on VAW).

⁸⁷ *Op. cit.* footnote 25, page 40 (2014 UNODC Blueprint for Action on VAW).

⁸⁸ See par 21 of the Concluding Observations of the UN Committee against Torture (17 June 2014) on Montenegro (hereinafter “2014 Concluding Observations of the UNCAT Committee on Montenegro”), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fCO%2fMNE%2fCO%2f2&Lang=en.

⁸⁹ See pars 2, 16 and 34 of the Committee on the Rights of the Child General Comment No. 8 (2006) on the right to protection from corporal punishment and other cruel or degrading forms of punishment which highlights “the obligation of all States parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading

prohibit corporal punishment of children in the family context, and in other settings. Sanctions for such offences should be adequate, proportionate and dissuasive, and the Law on Social and Child Protection should, in Article 8, include references to criminal legislation. The adoption of such legislation should be accompanied by adequate awareness-raising and educational campaigns about the negative impact of corporal punishment on children.

61. It must be highlighted that in the Criminal Code, a number of acts committed against children falling under Title XIX on Criminal Offences against Marriage and Family partially overlap with certain sexual offences under Title XVIII. Article 223 on Incest criminalizes “a sex act or other act of equivalent nature over a minor blood relation in the direct line of descent or over a minor brother, or sister”, which shall be punished by a prison term from six months to five years. This is similar to Article 207 par 2 under Title XVIII on Criminal Offences against Sexual Freedom, which criminalizes acts whereby certain persons in a position of authority or trust, including guardians, parents, adoptive parents, stepfather or stepmother incite a juvenile (between 14 and 18 years old) to engage in a sexual act or acts of equivalent nature, which is punishable by one to ten years. The penalty amounts to three to twelve years when committed against a child (defined as being under fourteen years old). This partial overlap of criminal offences is problematic, as the act of incest is subject to much lower penalties as offences under Article 207. Moreover, this situation creates uncertainty as to which penalty will apply for similar behaviour and may thus contradict the principle of legality (*nullum crimen, nulla poena sine lege*) which stipulates that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached.⁹⁰ Clear legislative provisions also avoid diverging interpretations by judges, investigators and law enforcement personnel. The lawmakers and stakeholders should discuss amendments to the Criminal Code to clarify the distinctions between these offences and avoid overlap.
62. Finally, the lawmakers should consider introducing a specific criminal offence relating to solicitation, through information and communication technologies, of children for sexual purposes where the solicitation has been “followed by material acts leading to a meeting”⁹¹ (Article 23 of the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, hereinafter “the Lanzarote Convention”),⁹² which currently does not appear to be covered by the Criminal Code.

forms of punishment of children” and that “explicit prohibition of corporal punishment and other cruel or degrading forms of punishment, in their civil or criminal legislation, is required in order to make it absolutely clear that it is as unlawful to hit or ‘smack’ or ‘spank’ a child as to do so to an adult, and that the criminal law on assault does apply equally to such violence, regardless of whether it is termed ‘discipline’ or ‘reasonable correction’.” Moreover, as of 2012, twenty-three CoE Member States have introduced complete bans on corporal punishment of children in their legislation (see page 18 of the Final report of the European Conference “Stepping up progress in combating violence against children”, which took place in Ankara on 27-28 November 2012, organised by the Council of Europe, UNICEF Turkey and the Government of Turkey, in collaboration with the United Nations Special Representative of the Secretary-General on Violence against Children, available at http://www.coe.int/t/dg3/children/Source/RapportAnkara_en.pdf).

⁹⁰ For examples of key issues in drafting anti-torture legislation, see the Report of the Expert Meeting organized by APT on Key Issues in Drafting Anti-Torture Legislation: Experience, Advice and Good Practices (2013) available at http://www.apr.ch/content/files_res/report-expert-meeting-on-anti-torture-legislation-en.pdf (hereinafter “2013 APT Report on Key Issues in Drafting Anti-Torture Legislation”).

⁹¹ This requires concrete actions, such as, for example, the fact of the perpetrator arriving at the meeting place (see par 160 of the Explanatory Report to the Lanzarote Convention).

2. Prevention

2.1. Awareness-raising, Capacity Development and Education

63. The Istanbul Convention contains various provisions relating to awareness-raising campaigns or programmes and dissemination of information to the public (Article 13), education measures (Article 14) as well as training of professionals dealing with victims or perpetrators (Article 15). Overall, these aspects are addressed in the Excerpts of Legislation as well as by the Action Plan for Achieving Gender Equality in Montenegro (2013-2017). It must be highlighted again that adequate and sufficient financial and human resources should be ensured to cover the related costs.
64. Article 30 of the Law on Internal Affairs provides that the exercise of police powers against juveniles involved in criminal proceedings should be applied by a police officer with special knowledge in the field of child rights and rules on procedures involving minors, and this is particularly welcome. A similar provision could be introduced in the Law on Internal Affairs to cover specifically the victims of violence against women and domestic violence; this would be in line with Article 15 of the Istanbul Convention.
65. More generally, international good practices have shown that specialization of services provided by the police, prosecution service and courts, and their training, tend to increase reporting, trust and engagement of the victims of domestic violence with the criminal justice system.⁹³ In addition to the work already undertaken in Montenegro,⁹⁴ the lawmakers and stakeholders should discuss establishing more systematically specialized investigative units to respond to reports of domestic violence, provided that sufficient funds are available. The Criminal Procedure Code and other relevant legislation could be supplemented to that effect.
66. As regards capacity development of professionals, provisions of the Law on Social and Child Protection (Articles 127 and 128), Law on Health Care (Article 62) and Law on Internal Affairs could be supplemented to ensure adequate training/evaluation on gender and human rights aspects (e.g., on equality between women and men, gender-specific needs and rights of victims, prevention and detection of cases of violence, specific needs of children, continuous training on the issue of “secondary victimization”, as well as on multi-agency co-ordination and co-operation).⁹⁵
67. Moreover, given the central role of the media in reporting on cases of domestic violence and informing public debate, the media should be mentioned specifically as a body responsible for assisting in the fight against domestic violence in the Law on Domestic Violence Protection, while also highlighting that its participation shall be qualified by the freedom of expression and media independence (see also Article 17 of the Istanbul Convention on this topic). Additional tasks could also include awareness-raising and training of journalists and other media personnel regarding domestic violence, and violence against women in general, and how to handle information and report on such

⁹³ See page 10 of the draft of the European Union Handbook of Best Police Practices on Overcoming Attrition in Domestic Violence Cases, December 2012 (hereinafter “2012 EU Handbook on Overcoming Attrition in Domestic Violence Cases”), available at <http://www.eucpn.org/download/?file=EUHndbookAttritionDomViol.pdf&type=3>.

⁹⁴ See page 5 of the 2009 Montenegrin Report on the Implementation of the Beijing Declaration and Platform for Action (Beijing+15), available at <http://www.unecce.org/fileadmin/DAM/Gender/documents/Beijing+15/Montenegro.pdf>. As of 11 August 2014, the 2014 Montenegrin Report for Beijing+20 review process has not been submitted yet.

⁹⁵ *Op. cit.* footnote 4, pars 98 to 101 (Explanatory Report to the Istanbul Convention).

cases accurately.⁹⁶ In turn, the police should also be trained on how to interact with the media and the extent of information that they are permitted to share.

2.2. Prevention of Child Abuse

68. It is worth mentioning that the child's right to be heard has particular relevance in situations of domestic violence, as it plays a preventive role against all forms of violence in the home and family.⁹⁷ Certain provisions of the Excerpts of Legislation address the specific needs of the child victim of violence, including domestic violence, which is welcome.
69. In this context, it is noted that the Lanzarote Convention requires additional awareness-raising activities on sexual exploitation and sexual abuse of children for persons having regular contacts with children and the general public (Articles 5 and 8). Other aspects of the Lanzarote Convention which need to be included in national legislation refer to the participation of children in state policies and programmes in this field (Article 9), specific data collection for the purpose of observing and evaluating the phenomenon of sexual exploitation and the sexual abuse of children, and special additional assistance and protection measures (Articles 14 and 31). All these aspects should be considered, if not already reflected in the current legislation and other policy measures.
70. More specifically, as required by Article 5 par 3 of the Lanzarote Convention, State parties should take the necessary legislative or other measures to ensure that candidates applying for professions which imply regular contacts with children, are screened, to check whether they have not been convicted of acts of sexual exploitation or the sexual abuse of children. The eligibility criteria for individuals performing activities in social and child protection, or for guardians in the Law on Social and Child Protection (Titles X and XI), and in the Family Law should include express references to this. If not already the case, other relevant legislation, for instance in the field of health and education, could be supplemented in a similar manner.
71. Moreover, while Article 73 of the Criminal Code provides for the possibility to exclude perpetrators from certain professions or activities, it would be advisable to specifically expand this ban to professions or activities involving contact with children where the offence was committed while exercising such a profession or carrying out such an activity (see Article 27 par 3 (b) of the Lanzarote Convention).

2.3. Data Collection and Research

72. Article 11 of the Istanbul Convention provides for the collection of data, covering on the one hand cases of violence against women and domestic violence, and on the other hand broader population-based surveys, which should provide information on socio-economic and cultural factors leading to violence against women and domestic violence. This should help inform the design and implementation of evidence-based policies as well as budget allocations for services provided to victims of violence against women and domestic violence. Intervention 5.3.2 of the Action Plan for Achieving Gender Equality in Montenegro (2013-2017) refers to the development of a unique integrated database on gender-based violence (with data disaggregated by gender, age, type of violence,

⁹⁶ *Op. cit.* footnote 17, Section 3.5.4. (2012 UN Women Handbook for Legislation on VAW).

⁹⁷ See par 63 of CRC Committee General Comment No. 13 on the right of the child to freedom from all forms of violence (2011).

number of charges filed, by number of indictments, by number of court verdicts and pronounced protective measures, etc.), which is in line with international recommendations.⁹⁸ However, the budget allocated may not be sufficient and the Action Plan does not clearly identify the entity responsible for the development and management of such a database in the long run.

73. Article 34 par 2 of the Law on Domestic Violence Protection specifies that the register of reported incidences of violence and related information is maintained by the bodies and institutions listed under Article 5 par 1, without allocating clear roles and responsibilities. Title XIII of the Law on Social and Child Protection contains provisions relating to data recording and Articles 36 to 49 of the Law on Internal Affairs also provide for the collection and processing of personal and other data by the police. Hence, several entities (i.e., the police, misdemeanour body, public prosecution service, social work centre or other social and child protection agency, health care institution, and other agency or institution acting as care provider) seem to have somewhat overlapping responsibilities for collecting data on violence against women and domestic violence. The Excerpts of Legislation also do not regulate the consolidation, analysis and publication of such data. It would be advisable to clarify here, or in other relevant legislation, which entity will be in charge of the development and management of the integrated database on gender-based violence mentioned in the Action Plan for Achieving Gender Equality (2013-2017), to ensure that data collection is done in a centralized and concerted manner.
74. The public entity in charge should be responsible for organizing, monitoring, controlling and giving uniform instructions, as well as for training staff from all government agencies involved in data collection on the collection of administrative data on violence against women and domestic violence.⁹⁹ In line with international and regional good practices, such data should at a minimum be disaggregated by sex, age, type of violence and should indicate the relationship between the perpetrator and the victim (current/former partner, marital status, cohabitation or not, family relationship).¹⁰⁰ Other data collected could also include information about disabilities, if any,¹⁰¹ whether there are children or other family members at risk, or whether there is a weapon in the household, as is done in other OSCE countries such as the United States.
75. In any case, the collection and processing of such personal data should respect international standards on personal data protection, particularly the conditions provided for by the EU Data Protection Directive¹⁰² and the CoE Convention for the Protection of

⁹⁸ See par 31 of the Report of the UN Secretary-General to the General Assembly on Intensification of efforts to eliminate all forms of violence against women, 2 August 2010, available at http://www.iom.int/jahia/webdav/shared/shared/mainsite/policy_and_research/un/65/A_65_208.pdf

⁹⁹ See Section 3.2. of the Recommendations on pages 21-23 of the CoE Study on Administrative data collection on domestic violence in CoE member states (2008) available at [http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/EG-VAW-DC\(2008\)Study_en.pdf](http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/EG-VAW-DC(2008)Study_en.pdf).

¹⁰⁰ *ibid.* Recommendations on pages 21-23 (2008 CoE Study on Administrative data collection on domestic violence).

¹⁰¹ See par 53 of the Thematic Study on the Issue of Violence against Woman and Girls and Disability, Report of the Office of the UN High Commissioner for Human Rights, 30 March 2012, available at <http://www.ohchr.org/Documents/Issues/Disability/ThematicStudyViolenceAgainstWomenGirls.pdf>.

¹⁰² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>. It is to be noted that EU rules regarding data protection may be subject to changes given that a revised Data Protection Package is currently being examined (see <http://eur-lex.europa.eu/procedure/EN/201285>).

Individuals with regard to Automatic Processing of Personal Data.¹⁰³ This could be ensured by expressly making a cross-reference to the applicable data protection legislation of Montenegro, provided that it is compliant with international standards.

76. It is noted that Article 121 of the Law on Social and Child Protection tasks the Institute for Social and Child Protection with “research and professional activities in the field of social and child protection”. The lawmakers and stakeholders should discuss whether such an entity could perhaps also carry out research in the field of violence against women and domestic violence, as required by Article 11 of the Istanbul Convention.

3. Protection and Support

3.1. Due Diligence and Liability of Government Entities for Failure to Report or to Act

77. Article 5 of the Istanbul Convention provides that State Parties shall refrain from engaging in any act of violence against women and that public authorities, officials, agents and other actors acting on behalf of the State shall act in conformity with this obligation. This includes the obligation to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence perpetrated by non-State actors (Article 5 par 2 of the Istanbul Convention). Moreover, in cases of child victims, the UN Economic and Social Council has also recognized that, where the safety of a child victim or witness may be at risk, appropriate counter-measures should be taken before, during and after the justice process.¹⁰⁴
78. Article 9 of the Law on Domestic Violence Protection provides a duty for health, education or other entities to report acts of violence to the police, based on which the police will immediately take action and measures to protect victims (Article 10). Article 39 of the same law provides for misdemeanor liability in case these bodies fail to comply with their obligation to report, which is overall in line with international standards.¹⁰⁵
79. However, the provision seems to imply that the duty to report to the police applies in *all* cases involving real or suspected acts of domestic violence, whether the victim is an adult, a child or an incapacitated person. While this may enhance victim safety, it may, at the same time, deter victims from accessing support services, including health care. Generally, there seems to be little evidence as to the effectiveness of such systems of mandatory reporting.¹⁰⁶ At the same time, adult victims of violence should still have the

¹⁰³ Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108), ratified by Montenegro on 6 September 2005. See also the Handbook on European data protection law jointly prepared by the European Union Agency for Fundamental Rights (FRA) and the Council of Europe (2014) available at http://www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf.

¹⁰⁴ See par 32 of the Annex to the UN Economic and Social Council (ECOSOC) Resolution 2005/20, 22 July 2005 (hereinafter “2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime”), available at http://www.un.org/en/pseataaskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf.

¹⁰⁵ See par 55 of CRC Committee General Comment No. 13 on the right of the child to freedom from all forms of violence (2011). In order to ensure proper reporting, the CRC Committee recommends that disciplinary or administrative proceedings against professionals for neglectful or inappropriate behaviour in dealing with suspected cases of child maltreatment (either internal proceedings in the context of professional bodies for breaches of codes of ethics or standards of care, or external proceedings) should be in place.

¹⁰⁶ See page 6 of the WHO Briefing on reducing violence through victim identification, care and support programmes (2009), available at http://www.who.int/violence_injury_prevention/violence/programmes.pdf.

- right to determine their own course of action. Legislation should thus distinguish between the obligation to report cases of domestic violence against children¹⁰⁷ or incapacitated persons (in both of these cases reporting should be mandatory), and reporting requirements in cases involving adult victims, which should depend on the consent of the victim.¹⁰⁸ This matter should be discussed and lawmakers and stakeholders should consider whether in practice, in Montenegro, such an obligation to report *all* cases of domestic violence may in fact also act as a deterrent for victims to seek health assistance or other support. If this is the case, amendments to Article 9 of the Law on Domestic Violence Protection are recommended.
80. Good practices suggest that the introduction of screening tools for health care providers (e.g. short screening questionnaires)¹⁰⁹ may facilitate the disclosure of intimate partner violence and thus improve victim identification levels. The Law on Health Care and the Law on Medical Emergency Service, or secondary legislation, could be supplemented to that effect.
81. As regards the role of the police in terms of protection and support to victims, Article 14 of the Law on Domestic Violence Protection requires the police to accompany the victim to collect his or her belongings, which is welcome. The provision could be further supplemented to provide that the police shall accompany the victim, upon his or her consent, to a shelter or other safe place. More generally, relevant legislation shall guarantee the security of victims, as needed, in any situation, and provide information regarding victims' rights (see pars 88-92 *infra*).
82. Regarding the liability of government entities, Article 39 of the Law on Domestic Violence Protection provides for "penalties ranging from two to ten-fold minimum salary" to be imposed on various civil servants for failure to report an incident of violence, which is positive to a certain extent. However, such provision does not cover the failure of law enforcement bodies to comply with the provisions of the Law on Domestic Violence Protection, which impose certain duties on them (e.g., duty to inform social work centres, duty to accompany victim to his/her residence), and should be supplemented accordingly.
83. Article 16 of the Law on Internal Affairs refers to the possibility to file a complaint when an individual considers that a police officer, while performing police duties, has violated some of his/her rights or inflicted damage. In light of recent ECtHR case law on the positive obligation to protect victims of domestic violence and conduct effective investigation,¹¹⁰ introducing an express provision in Article 16 pertaining to complaints by individuals for inaction, could be useful.

¹⁰⁷ *Op. cit.* footnote 31, par 49 (2011 Concluding Observations of the CEDAW Committee on Montenegro), which states that "the reporting of instances, suspicion or risk of violence should, at a minimum, be required by professionals working directly with children. When reports are made in good faith, processes must be in place to ensure the protection of the professional making the report."

¹⁰⁸ *Op. cit.* footnote 4, par 148 (Explanatory Report to the Istanbul Convention); see also *op. cit.* footnote 17, Section 3.10.6. (2012 UN Women Handbook for Legislation on VAW).

¹⁰⁹ See page 4 of the WHO Briefing on reducing violence through victim identification, care and support programmes (2009), available at http://www.who.int/violence_injury_prevention/violence/programmes.pdf.

¹¹⁰ See in particular par 56 of *Eremia v. Republic of Moldova*, ECtHR judgment of 28 May 2013 (Application No 3564/11), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119968#{"itemid":\["001-119968"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119968#{) and pars 38-39 of *T.M. and C.M. v. Republic of Moldova*, ECtHR judgment of 28 January 2014 (Application No 26608/11), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140240#{"itemid":\["001-140240"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140240#{).

84. It may also be advisable to supplement the Law on Internal Affairs to introduce disciplinary liability, misdemeanor liability, or cross-references to the related provisions of the Criminal Code, where the police engage in acts of violence against women in the course of the performance of their duties.¹¹¹ Disciplinary measures or misdemeanor liability could also be introduced for the failure to investigate cases of violence against women and domestic violence. This would be in line with Articles 5 and 29 of the Istanbul Convention, which reiterate the principle of liability of state authorities, who are under the obligation to diligently prevent, investigate and punish acts of violence.¹¹² It is recommended to accompany such measures with proper training of police and prosecutors, and with the allocation of adequate human and financial resources.

3.2. Victims'/Survivors' Rights

85. The provisions of the Istanbul Convention and international recommendations highlight the importance of adopting a victim-centered approach to strengthen crime prevention and criminal justice responses to violence against women and domestic violence.¹¹³ Such an approach aims at shifting the focus to assisting victims in their engagement with the criminal justice process, rather than holding them responsible for any “reluctance” to cooperate with the criminal justice system.¹¹⁴

86. The 2013 amendments to the Criminal Code (new par 11 of Article 142) introduced a definition of the term “victim”, i.e. “the person subject to physical or psychological suffering or pain, property damage or violation of human rights and freedoms by an unlawful act stipulated in the code as a criminal offense”. The Criminal Procedure Code uses the term “injured parties”, defined as “persons whose personal [right] or property right of some type was violated or endangered by a criminal offence”, which is relatively vague compared to the international definition of the term “victim”.¹¹⁵ Moreover, the Code provides injured parties with certain procedural rights in the course of criminal proceedings¹¹⁶, but these at times fall short of what is understood by “victims’ rights” according to international instruments.

¹¹¹ See par 124 (i) of Strategic objective D.1. (Take integrated measures to prevent and eliminate violence against women) of the Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), available at <http://www.un.org/womenwatch/daw/beijing/platform/violence.htm>.

¹¹² See par 162 of the Explanatory Report to the Istanbul Convention.

¹¹³ *Op. cit.* footnote 25, page 34 (2014 UNODC Blueprint for Action on VAW).

¹¹⁴ *ibid.* page 34 (2014 UNODC Blueprint for Action on VAW).

¹¹⁵ According to Principle 1 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985 (hereinafter “1985 UN Basic Principles of Justice for Victims of Crime”), available at <http://www.un.org/documents/ga/res/40/a40r034.htm>, “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States”. This is “regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim” (Principle 2) and “also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization” (Principle 2). Moreover, Principle 18 makes clear that the term “substantial impairment of their fundamental rights” is very broad and includes substantial impairment “through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights”.

¹¹⁶ e.g., the rights of recusal of judges (Article 40), to be informed about evidence and to offer evidence (Article 58), to become a subsidiary prosecutor (Article 59), to legal representation (Articles 63 and 64), to seek damages (Articles 114), to request certain surveillance measures (Article 166), to be served personally with the notice to file private charge or indictment as well as a summons for main hearing (Article 196), to receive a certified copy of the decision (Article 224), to be informed by the State Prosecutor about the dismissal of a criminal charge or laying-off of criminal prosecution

87. It is particularly welcome that Article 113 of the Criminal Procedure Code provides for certain measures to assist and protect victims, such as the assistance of a psychologist or another expert (par 4) and the possibility to testify at separate premises for certain victims of a sexual offence or for children (par 5). Article 121 of the Criminal Procedure Code provides for the possibility to use “technical devices for transmission of image and sound”, but this seems to only apply in the context of witness protection programmes. It would be advisable to extend the application of such measures to victims of criminal offences against marriage and family (Title XIX of the Criminal Code), including domestic violence. This would be in accordance with Article 56 par 1 (i) of the Istanbul Convention and may help reduce the risk of confrontation between victims and perpetrators. Moreover, similar protective measures should apply at all stages of the criminal proceedings, including investigations on police premises, unless such contact is necessary or useful for the proper conduct of proceedings.¹¹⁷ Amendments to relevant provisions of the Criminal Procedure Code would be desirable. The Code should also allow victims of domestic violence to choose, where possible, the gender of the police officer or other criminal justice official to whom he or she would like to speak.¹¹⁸
88. More generally, according to international standards, victims enjoy a number of rights in criminal proceedings.¹¹⁹ These involve the right to compassionate treatment, including respect for their dignity,¹²⁰ and involvement in the investigation to the extent necessary to safeguard their legitimate interests.¹²¹ Victims have the right to have their views and concerns presented and considered at appropriate stages of the proceedings, without prejudice to the accused and consistent with the relevant national criminal justice system.¹²² Victims also have the right to be informed about their rights, and about the various existing means for protection, such as witness protection programmes and other protective measures, e.g. restraining, removal and protection orders. They should also be informed about their roles and the scope, timing and progress of the criminal case.¹²³ Specifically, victims have the right to be informed of the decision to prosecute or not to

(Articles 271 and 272), to file motions to the State Prosecutor for certain evidence-gathering actions to be taken (Articles 281, 308 and 359), of presence during investigations (Article 282), to appeal the decision accepting the plea bargaining agreement (Article 302), to be notified about the time and place of the hearing (Article 310), to put questions to the defendant, witnesses and experts (Articles 342 and 350), to make comments after each testimony (Article 358), to make closing arguments and respond (Articles 361 and 364) and to appeal (Article 382).

¹¹⁷ See pars 290 and 292 of the Explanatory Report to the Istanbul Convention.

¹¹⁸ See par 16 (l) of the Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (as adopted by the UN Economic and Social Council Resolution 2010/15) available at <http://www.un.org/en/ecosoc/docs/2010/res%202010-15.pdf>.

¹¹⁹ See the 1985 UN Basic Principles of Justice for Victims of Crime; CoE Recommendation Rec(85)11 on the Position of the Victim within the Framework of Criminal Law and Procedure; CoE Recommendation Rec(87)21 on Assistance to Victims and the Prevention of Victimization; CoE Recommendation Rec(97)13 Concerning Intimidation of Witnesses and the Rights of the Defence; CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice; CoE Recommendation Rec(2006)8 on Assistance to Victims. See also the CoE Convention on the Compensation of Victims of Violent Crimes (CETS No. 116), available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=116&CM=1&CL=ENG>, ratified by Montenegro on 19 March 2010.

¹²⁰ *Op. cit.* footnote 115, Principle 4 (1985 UN Basic Principles of Justice for Victims of Crime).

¹²¹ See par 109 of *Hugh Jordan v the United Kingdom*, ECtHR judgment of 4 May 2001 (Application No 24746/94).

¹²² *Op. cit.* footnote 115, Article 6(b) (1985 UN Declaration on Victims of Crime). See also Article 21 of the Annex to the UN Economic and Social Council (ECOSOC) Resolution 2005/20, 22 July 2005 (hereinafter “2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime”), available at http://www.un.org/en/pseataskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf.

¹²³ *Op. cit.* footnote 115, Articles 5 and 6(a) (1985 UN Declaration on Victims of Crime). See also *ibid.* Article 19 (2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime).

prosecute¹²⁴, of the decision to appeal or not to appeal¹²⁵ and to have access to court documents.¹²⁶ Additional rights include measures related to access to justice, including medical and psychological assistance,¹²⁷ legal aid (i.e., legal advice, assistance and representation), and the provision of information on how to obtain full and effective reparation (i.e., restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition), as well as on the existence of a State Compensation Scheme.¹²⁸

89. The 2012 EU Directive 2012/19 establishing minimum standards on the rights, support and protection of victims of crime¹²⁹ provides more details as to the range of victims' rights that should be provided in national legislation and may provide useful guidance during discussions on revising the legal framework in Montenegro to comply with the Istanbul Convention. Particularly, due consideration should be given to Article 4 of the 2012 EU Directive,¹³⁰ pertaining to the nature of information to be provided to victims, without unnecessary delay, from their first contact with a competent authority.
90. Article 56 of the Istanbul Convention also states a series of protection measures for victims at all stages of the investigations and judicial proceedings.¹³¹ While some of them have already been cited (see pars 87-88 *supra*), Article 56 par 1 (b) provides that

¹²⁴ See pars 118 and 136 of *Kelly and Others v the United Kingdom*, ECtHR judgment of 4 May 2001 (Application No [30054/96](#)).

¹²⁵ See pars 37-42 of *Gorou v Greece*, ECtHR judgment of 20 March 2009 (Application No [12686/03](#)).

¹²⁶ See par 92 of *Öğür v Turkey*, ECtHR judgment of 20 May 1999 (Application No [21594/93](#)).

¹²⁷ *Op. cit.* footnote 115, Principle 14 (1985 UN Basic Principles of Justice for Victims of Crime).

¹²⁸ *Op. cit.* footnote 17, Section 3.8.2. (2012 UN Women Handbook for Legislation on VAW). See also *op. cit.* footnote 2 (2014 OSCE/ODIHR Opinion on Compensation of Damages for Victims of Criminal Acts in Montenegro).

¹²⁹ EU Directive 2012/29/EU adopted on 25 October 2012, the provisions of which EU Member States have to incorporate into their national laws by 16 November 2015, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=en>. See also the DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/19 (December 2013) available at http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.

¹³⁰ Article 4 of the EU Directive 2012/29/EU states that “Member States shall ensure that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive: (a) the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation; (b) the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures; (c) how and under what conditions they can obtain protection, including protection measures; (d) how and under what conditions they can access legal advice, legal aid and any other sort of advice; (e) how and under what conditions they can access compensation; (f) how and under what conditions they are entitled to interpretation and translation; (g) if they are resident in a Member State other than that where the criminal offence was committed, any special measures, procedures or arrangements, which are available to protect their interests in the Member State where the first contact with the competent authority is made; (h) the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings; (i) the contact details for communications about their case; (j) the available restorative justice services; (j) how and under what conditions expenses incurred as a result of their participation in the criminal proceedings can be reimbursed.

¹³¹ These include (a) the protection of victims, as well as that of their families and witnesses, from intimidation, retaliation and repeat victimisation; (b) the information of victims, at least in cases where the victims and the family might be in danger, about when the perpetrator escapes or is released temporarily or definitively; (c) the information of the victims of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case; (d) the possibility for victims to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered; (e) the provision of appropriate support services to victims so that their rights and interests are duly presented and taken into account; (f) the possibility to adopt measures to protect the privacy and the image of the victim; (g) the possibility to avoid, where possible, contact between victims and perpetrators within court and law enforcement agency premises; (h) the provision to victims of independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence; and (i) the possibility to testify, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.

victims should be informed when the perpetrator is released temporarily or definitely or escapes, at least in cases where the victims and his/her family might be in danger.

91. It would be advisable to introduce a new section in the Criminal Procedure Code of Montenegro that would specifically address victims' rights, or alternatively to introduce specific provisions under the respective sections of the Code in line with Article 56 of the Istanbul Convention, the provisions of the 2012 EU Directive 2012/19 and above-mentioned international and regional standards. More specifically, such provisions should oblige the police, prosecutors and courts to inform the victims/injured parties of their rights and about available social and legal protection services at their disposal (including legal aid¹³² and shelters/accommodation), the possibility and modalities for seeking compensation and protective measures,¹³³ the progress of their complaint, the charges, the general progress of the investigations and judicial proceedings, and finally, about the temporary or definite release or escape of the perpetrator, at least in cases where this puts the victims and the family in danger.
92. Other state entities such as social and health care services and victim support services, which are often the first point of contact of the victim with public authorities, should also have a similar duty to inform, since they play an important role in the process of the full and effective reparation for victims.¹³⁴ This could include information about available social and legal protection services (including legal aid¹³⁵ and shelters/accommodation), the possibility and modalities for seeking compensation and other information about legal proceedings.¹³⁶ The Laws on Health Care, on Medical Emergency Service, on Social and Child Protection and other legislation as appropriate could be supplemented to that effect.

3.3. Assistance and Support Services to Victims

93. To be effective, victim support should meet a number of fundamental criteria. It needs to be available before, during and after the criminal proceedings, and from the earliest possible time, irrespective of whether the crime has been reported.¹³⁷ Access to support should be easy, without involving excessive procedures and formalities, and victims should be assisted by well-trained professionals capable of providing prompt and well-targeted assistance.¹³⁸
94. The Excerpts of Legislation do not expressly refer to the establishment of a free nationwide 24-hour telephone helpline nor do they provide for the funding of such a service, as required by Article 24 of the Istanbul Convention. Article 63 of the Law on Social

¹³² As defined in par 8 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems adopted by General Assembly resolution 67/187 of 20 December 2010, available at http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf, which state that "the term 'legal aid' includes legal advice, assistance and representation [...] for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require".

¹³³ *Op. cit.* footnote 2, pars 51-54 (2014 OSCE/ODIHR Opinion on Compensation of Damages for Victims of Criminal Acts in Montenegro).

¹³⁴ See Article 4 of EU Directive 2012/29/EU and par 6.2 of the Appendix to CoE Recommendation Rec(2006)8.

¹³⁵ *Op. cit.* footnote 132, par 8 (2010 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems).

¹³⁶ *Op. cit.* footnote 2, pars 51-54 (2014 OSCE/ODIHR Opinion on Compensation of Damages for Victims of Criminal Acts in Montenegro).

¹³⁷ See page 25 of the Report by the Centre for European Policy Studies on Local and Regional Good Practices on Victims' Rights (2011), available at <http://cor.europa.eu/en/documentation/studies/Documents/local-regional-good-practices-victims.pdf>.

¹³⁸ *ibid.* (2011 Report by the Centre for European Policy Studies on Local and Regional Good Practices on Victims' Rights).

and Child Protection refers to SOS telephone and other services, but only in a vague manner and it is not clear how such services will be financed. The Action Plan for Achieving Gender Equality in Montenegro (2013-2017) provides for the establishment of a free and unique 24-hour SOS hotline to report cases of domestic violence, but does not clearly identify the entity responsible for administering and managing such a hotline, the modalities for funding such an initiative and the necessary budget, to ensure sustainability. While the practice varies greatly from country to country, most states require the state to finance support services for victims of violence against women, including the establishment of helplines, while providing for accreditation mechanisms for selected CSOs to run such services (see also pars 46-48 *supra*).¹³⁹ The lawmakers should consider supplementing the Excerpts of Legislation accordingly.

95. In order for the 24-hour SOS hotline to be functional, sufficient funding shall be allocated to ensure that the service will have the human, financial, material and technical capacity to provide support and crisis counselling.¹⁴⁰ The same applies for shelters, which should be set up in sufficient numbers, to provide appropriate temporary accommodation for all victims.
96. Article 12 of the Law on Domestic Violence Protection refers to victims' social care as including the "provision of material and non-material assistance, accommodation and social work services in accordance with the law governing social and child care". The Law on Social and Child Protection refers to the provision of accommodation services including "in an institution, daily centre – refuge and other types of accommodation" (Article 64) and to the provision of funding from municipalities for shelters (Article 154). However, these provisions do not take into account the particular situation of victims of domestic violence. For example, as regards the incomes and other possession and assets to be considered when requesting financial support according to the Law on Social and Child Protection (Articles 22 and 23), in light of the particular situation of victims of domestic violence, it would be advisable to specifically mention that the incomes and assets of the spouse who is an alleged perpetrator of domestic violence shall not be taken into account (see also par 100 *infra*). Articles 22 and 23 of the Law on Social and Child Protection should be supplemented to that effect.
97. Article 72 of the Law on Social and Child Protection expressly envisions the possibility for accommodation services to be provided by non-state service providers, through a public procurement procedure, a public call or public-private partnership, in accordance with applicable legislation. However, these provisions are relatively vague. It is understood that currently, Montenegro has not yet set up adequate facilities to provide assistance and protection to victims of violence, in particular psychosocial rehabilitation and an adequate number of shelter facilities funded by the State,¹⁴¹ nor has it allocated adequate funding for CSOs that assist victims.¹⁴² In some countries, for instance Norway, there is a mandatory duty provided by law for certain municipalities to provide a 24-hour shelter service for victims/survivors of domestic violence (also providing counselling and other support), utilizing loan schemes offered by the Norwegian State

¹³⁹ *Op. cit.* footnote 17, Section 3.6.1. (2012 UN Women Handbook for Legislation on VAW).

¹⁴⁰ See for example the Manual for Work on SOS Hotline for (Potential) Victims of Human Trafficking: NGO ASTRA Experience (2009), available at <http://www.astra.org.rs/eng/wp-content/uploads/2008/07/ASTRA-SOS-Manual.pdf>.

¹⁴¹ i.e. one shelter/refuge place for every 10,000 inhabitants. See par 135 of the Explanatory Report to the Istanbul Convention and *op. cit.* footnote 17, Section 3.6.1. (2012 UN Women Handbook for Legislation on VAW).

¹⁴² *Op. cit.* footnote 43, page 42 (2013 Montenegro Progress Report of the European Commission).

- Housing Bank.¹⁴³ The Montenegrin lawmakers and stakeholders should discuss and consider whether introducing such a duty for certain local government authorities would be advisable, given the national context in Montenegro.
98. As mentioned in par 21 *supra*, there is a need to carry out a proper financial assessment of victim support services which should be set up to comply with the Istanbul Convention. This should ideally include an evaluation of the costs for setting up and managing the 24-hour telephone helpline free of charge,¹⁴⁴ and ensuring one shelter/refuge place for every 10,000 inhabitants,¹⁴⁵ one women's advocacy and counseling centre for every 50,000 women¹⁴⁶ and one rape crisis centre for every 200,000 women.¹⁴⁷
99. Article 50 of the Law on Unemployment Insurance provides for certain circumstances where a former employee can still obtain unemployment benefits, even where he/she terminated his or her employment contract. In order to ensure better protection and assistance to victims of violence against women and of domestic violence, good practices from certain OSCE participating States suggest that unemployment benefits should also be paid if someone was forced to leave his or her employment due to harassment or other serious misbehaviour of the employer.¹⁴⁸ Additionally, certain unemployment insurance schemes also expressly provide that other circumstances, though unrelated to one's employment, are also accepted, for example relocation in order to escape domestic violence (see e.g., in France, Canada and most US States).¹⁴⁹ The lawmakers and stakeholders should consider supplementing the Law on Unemployment Insurance of Montenegro accordingly.
100. Other amendments to the Excerpts of Legislation could also be considered to provide better assistance to victims. For instance, Article 8 of the Draft Social Housing Law could add a reference to the fact that an applicant requesting social housing may be a victim of domestic violence and that his/her case should consequently be considered as a matter of priority. It must be noted though that access to social housing should not be a substitute to the provision of shelters which should provide immediate/emergency accommodation and other support services to victims.¹⁵⁰ Moreover, as mentioned in par 96 *supra*, given the particular situation of victims of domestic violence, it would be advisable to state that in cases where the spouse of an applicant is the alleged perpetrator

¹⁴³ *Op. cit.* footnote 16, page 48 (2012 UN Women Handbook for National Action Plans on VAW), referring to the example of the Norway Action Plan on Domestic Violence (2004-2007).

¹⁴⁴ See pars 136-137 of the Explanatory Report to the Istanbul Convention. See page 61 of the Handbook 116006 for a Good Implementation of 116006 Helplines (2012), available at http://www.apav.pt/pdf/Handbook_116006_EN.pdf, referring to the funding of a number of national helplines across the European Union, best practices and recommendations. As another example, in France, which counts a population of approximately 66 million inhabitants, for the functioning of the state-wide telephone hotline free of charge in 2012 (though not yet functioning for 24 hours), 910,000 Euros were allocated annually to the Fédération Nationale Solidarité Femmes (FNSF) which gathers 65 associations, see page 36 of the FNSF 2012 Annual Report, available at <http://pimcore.francedit.galilee.fr/website/var/assets/fnsf-ra2012complet.pdf>.

¹⁴⁵ See par 135 of the Explanatory Report to the Istanbul Convention. The shelters should provide safe emergency accommodation, qualified counselling and assistance in finding long-term accommodation.

¹⁴⁶ *Op. cit.* footnote 17, Section 3.6.1. (2012 UN Women Handbook for Legislation on VAW). They should provide proactive support and crisis intervention for complainants/survivors, including legal advice and support, as well as long-term support for complainants/survivors, and specialized services for particular groups of women.

¹⁴⁷ See par 142 of the Explanatory Report to the Istanbul Convention.

¹⁴⁸ See Sections 3.3 and 5.1. respectively on pages 14 and 31 of the 2013 International Labour Organization (ILO) Comparative review of unemployment and employment insurance experiences in Asia and worldwide, available at <http://www.social-protection.org/gimi/gess/RessourceDownload.action?ressource.ressourceId=40477>.

¹⁴⁹ *ibid.*

¹⁵⁰ See par 133 of the Explanatory Report to the Istanbul Convention.

of domestic violence, his/her income should not be taken into account when considering the income and assets of the applicant to apply for social housing.

101. The Family Law does not expressly provide for the right for the victim/survivor of domestic violence to stay in the family dwelling after divorce and it would be recommended to expressly state such right, should this be desired by the victim/survivor.¹⁵¹
102. Additionally, as noted in pars 40-48 *supra*, co-ordination is critical to providing victims' support in the most effective manner and prevent "secondary victimization". The aim should be to create an integrated, multi-faceted and cooperative system where victims/survivors are spared from having to locate the support services they need, and perpetrators have fewer opportunities to evade justice.¹⁵² A model of good practice has been recognized in the United Kingdom in the form of centres that provide immediate comprehensive and coordinated forensic, counselling and medical services to adults who have experienced rape or sexual assault in the form of "one-stop" services, thus reducing the stress of having to deal with multiple service providers and criminal investigators.¹⁵³ The drafters and stakeholders should discuss the possibility and costs associated with the introduction of such a one-stop service system in Montenegro.

3.4. Legal Aid for Victims of Violence against Women and Domestic Violence

103. The OSCE/ODIHR notes positively the adoption of the Law on Legal Aid in Montenegro, which has been implemented since January 2012.¹⁵⁴ However, several shortcomings have been identified. First, the scope is limited only to court procedures and should be extended to administrative procedures.¹⁵⁵ Second, it has been noted that the implementation of the Law on Legal Aid continues to be hampered by legal aid offices' low budgets and the lack of general public awareness on the availability of legal aid, as well as the fact that some ethnic groups face linguistic barriers.¹⁵⁶ The lawmakers and stakeholders should discuss how to address these shortcomings; as mentioned in par 21 *supra*, the allocation of adequate financial and human resources should be ensured. The 2014 UNDOC-UNDP Handbook for Policymakers and Practitioners on Early Access to Legal Aid in Criminal Justice Processes (2014) could serve as a useful basis to this discussion.¹⁵⁷

¹⁵¹ *Op. cit.* footnote 17, Section 3.13. (2012 UN Women Handbook for Legislation on VAW).

¹⁵² *Op. cit.* footnote 16, Section 3.5.2. (2012 UN Women Handbook for National Action Plans on VAW). See also the example of the UK Multi-Agency Risk Assessment meetings focusing on the safety of high-risk domestic violence victims to build a picture of the victim/survivor's situation and jointly devise a risk management plan to reduce the harms faced by the victim and their families, page 61 of the 2012 UN Women Handbook for National Action Plans on Violence against Women.

¹⁵³ *Op. cit.* footnote 59, page 83 (2009 OSCE Compilation of Good Practices on Combating VAW).

¹⁵⁴ See the 2014 Cross Country Comparison of Regional Mechanisms for Delivery of Free Legal Assistance, World Bank Multi-Donor Trust Fund for Justice Sector Support, available at <http://www.mdtfjss.org.rs/archive//file/resources/Serbia%20Free%20Legal%20Aid%20Cross%20Country%20Report%20FINAL.pdf>

¹⁵⁵ *Op. cit.* footnote 88, par 8 (2014 Concluding Observations of the UNCAT Committee on Montenegro). See also *ibid.* page 59 (2014 World Bank Cross Country Comparison of Regional Mechanisms for Delivery of Free Legal Assistance).

¹⁵⁶ *Op. cit.* footnote 43, page 44 (2013 Montenegro Progress Report of the European Commission).

¹⁵⁷ UNDOC-UNDP Handbook for Policymakers and Practitioners on Early Access to Legal Aid in Criminal Justice Processes (2014), available at http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/13-89016_eBook.pdf. See also 2013 Research Paper on Present Legal Framework and Best Practices on

104. To address the lack of public awareness and as mentioned in pars 27 and 88-92 *supra*, the Code of Criminal Procedure, the Law on Child and Social Protection, the Law on Internal Affairs, the Law on Health Care and the Law on Emergency Medical Care Services should be supplemented to include an obligation for the police, actors of the criminal justice systems, health and social care providers and other front-line responders to inform the victims and potential victims of their entitlement to legal aid, assistance and protection and of how to access such rights.¹⁵⁸
105. Additionally, due consideration should be given to Guideline No. 9 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, pertaining to the right of women to access legal aid, particularly to have female lawyers to represent female victims,¹⁵⁹ if the victim so requests and where possible.
106. Finally, children should have access to legal aid under more generous conditions than adults, and legal aid should be accessible, age-appropriate and responsive to the specific legal and social needs of children.¹⁶⁰

3.5. Confidentiality, Privacy and Data Protection

107. The Excerpts of Legislation provide for measures to ensure the confidentiality and protection of personal data, which are overall in line with the provisions of the Istanbul Convention, as well as international and regional data protection standards. However, to ensure that the respective bodies adhere to the principle of absolute confidentiality, the Excerpts of Legislation could be supplemented, as appropriate, by provisions specifying the sanctions imposed in cases of violation of the confidentiality rule.
108. It is noted that Article 18 of the Law on Health Care provides that each citizen shall be entitled to confidentiality of all data related to his/her health. Unless the result of faulty translation, such provisions should not be limited to citizens but should be applicable to all individuals.
109. In addition, child victims and witnesses, who are of a suitable age to testify, should have their privacy protected as a matter of primary importance. Information related to a child's involvement in the justice process should be protected,¹⁶¹ e.g. by maintaining confidentiality and restricting disclosure of information that could lead to the identification of a child who is a victim or witness, anonymizing the child's personal data in documents and records, and protecting children from undue exposure to the public. It would be advisable to supplement the Criminal Procedure Code accordingly (see also other child-sensitive procedural measures in pars 156-163 *infra*).

3.6. Migration, Residence Permits, Asylum and Refugee Status

110. Article 59 of the Istanbul Convention requires the State Parties to ensure that "victims whose residence status depends on that of the spouse or partner as recognized by internal law, in the event of the dissolution of the marriage or the relationship, are

"Improving Protection of Victims' Rights: Access to Legal Aid" Comparative review, available at <http://victimsrights.eu/wp-content/uploads/2013/06/Report.pdf>.

¹⁵⁸ See Principle 7 (d) of the 2010 United Nations Principles and Guidelines on Access to Legal Aid.

¹⁵⁹ See Guideline 9 (b) of the 2010 UN Principles and Guidelines on Access to Legal Aid.

¹⁶⁰ See Principles 3 par 22 and 11 par 35 of the 2010 UN Principles and Guidelines on Access to Legal Aid.

¹⁶¹ *Op. cit.* footnote 122, pars 26-28 (2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime).

granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship”.

111. Article 35 of the Foreigners Law lists the purposes for granting temporary residence, which include humanitarian reasons or other justifiable reasons prescribed by law or international treaty. Article 51 of the Foreigners Law states specifically that victims of the criminal act of human trafficking shall be granted temporary residence for humanitarian reasons. While victims of other crimes of violence against women and domestic violence may eventually be covered by Article 35 of the Foreigners Law, it would be preferable to expressly refer to such situations in Article 51, in order to avoid any uncertainty in that respect. Moreover, Article 37 of the Foreigners Law subjects the issuance of the temporary residence permit to the prior approval by the Police. Again, to avoid any uncertainty, this Article should be supplemented to specify that the approval of the Police should in principle be automatically granted in cases involving victims of the forms of violence covered by the Istanbul Convention.
112. As mentioned in the Explanatory Report to the Istanbul Convention, evidence of violence may include, among others, police records, a court conviction, a barring or protection order, medical evidence, an order of divorce, social service records or reports from women’s CSOs.¹⁶² The provisions of the Foreigners Law could include an indicative list of the kind of documents that will be accepted to grant approval for temporary residence.
113. Regarding the termination of temporary residence, Articles 53 and 65 of the Foreigners Law should be made more consistent with Article 59 of the Istanbul Convention. First, if the victim of a forced marriage lost his/her residence status in Montenegro where he or she habitually resides because of an absence from Montenegro of more than 90 days, there should be a possibility for such victims to regain their residence status on account of their having been forced to leave the country. The provisions of Article 53 of the Foreigners Law should be supplemented to that effect. Second, in cases where victims’ residence status is connected to that of the sponsor spouse or partner who is the perpetrator of domestic violence, victims being expelled should be given the possibility to obtain the suspension of expulsion proceedings against themselves to apply for a residence status on humanitarian grounds. Such possibility should be explicitly mentioned in Article 65 of the Foreigners Law.
114. More generally, to ensure greater protection and certainty, it would be advisable to supplement the Foreigners Law to expressly provide that a victim of violence against women and domestic violence shall not be expelled from Montenegro until completion of the relevant proceedings for granting residency status in Montenegro. This is without prejudice to the obligation for Montenegro to respect the principle of non-refoulement (i.e. victims of violence against women, regardless of their status or residence, should not be returned to any country where their life would be at risk or where they may be subjected to torture or inhuman or degrading treatment or punishment, including serious cases of violence against women and domestic violence). This would also be in line with the case law of the ECtHR, which provides that deportation shall be prohibited where a state would expose an individual to a real risk of loss of life under Article 2 of the ECHR or to torture or inhuman or degrading treatment or punishment under Article 3 of

¹⁶² See par 303 of the Explanatory Report to the Istanbul Convention.

- the ECHR.¹⁶³ Particularly, the ECtHR has held that victims of domestic violence may fall within the group of ‘vulnerable individuals’, along with children, and are thus entitled to special state protection.¹⁶⁴
115. Article 60 of the Istanbul Convention deals with gender-based asylum claims. It requires State Parties to take the necessary legislative or other measures to ensure that gender-based violence against women may be recognized as a form of persecution within the meaning of the 1951 Convention relating to the Status of Refugees. In addition, a gender-sensitive interpretation should be given to each of the Convention grounds. Moreover, gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection, should be in place (Article 60 par 3 of the Istanbul Convention).
116. To ensure this, States have generally taken two types of approaches. Some States have incorporated legal interpretative guidance and/or procedural safeguards within the legislation itself, while others have preferred to develop similar guidelines for decision-makers.¹⁶⁵ If such legal provisions, guidelines or other tools do not already exist, it is recommended for stakeholders in Montenegro to discuss and decide whether to include them in the Law on Asylum or whether to expressly provide for the development of such guidelines or other tools. When drafting such guidelines, the set of recommendations included in the UNHCR Guidelines on Gender-Related Persecution could provide useful guidance.¹⁶⁶
117. Finally, gender-sensitive measures for the organization of shelters for foreigners awaiting deportation, as well as accommodation for asylum seekers, should be guaranteed.¹⁶⁷ Article 67 of the Foreigners Law (Accommodation Facilities for Foreigners) and Article 25 of the Law on Asylum (Accommodation of asylum seekers) should expressly state that reception measures in shelters/accommodation should be

¹⁶³ See e.g. *N v. Sweden*, ECtHR judgment of 20 October 2010 (Application no. 23505/09) where the ECtHR, while noting that there were no specific circumstances in the present case substantiating that the applicant would be subjected to various forms of violence by family members and/or the Afghan society, recognized the cumulative reprisals risk indicated by statistic and international reports and held the deportation of the claimant to Afghanistan to be in violation of Article 3 of the ECHR.

¹⁶⁴ See pars 159-160 of *Opuz v. Turkey*, ECtHR judgment of 9 June 2009 (Application No 33401/02), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945#{"itemid":\["001-92945"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945#{).

¹⁶⁵ See page 122 of the UNHCR Guidelines for Prevention and Response – Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons (May 2003) available at <http://www.unhcr-centraleurope.org/pdf/what-we-do/caring-for-vulnerable-groups/sexual-and-gender-based-violence/unhcr-guidelines-for-prevention-and-response-to-sexual-and-gender-based-violence.html>.

¹⁶⁶ See par 36 of the Guidelines on International Protection No. 1 on Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002, available at <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/unhcr-guidelines-on-gender-related-persecution-2002.html>. Such protective measures include the following: female asylum-seekers should be interviewed separately, without the presence of male family members, in order to ensure that they have an opportunity to present their case; provision of information about the status determination process, also access to it, as well as legal advice, in a manner and language that they understand; possibility to choose interviewers and interpreters of the same sex as themselves; assurance that his/her claim will be treated in the strictest confidence and that information provided by the claimant will not be provided to members of his/her family; etc. Additionally, the environment in an interview room should be arranged in such a way as to encourage discussion, promote confidentiality and to lessen any possibility of perceived power imbalances. Moreover, mechanisms for referral to psycho-social counselling and other support services should be made available where necessary.

¹⁶⁷ See par 314 of the Explanatory Report to the Istanbul Convention.

gender-sensitive¹⁶⁸ and then provide that secondary legislation may further elaborate these aspects.

4. Investigation, Prosecution, Procedural Law and Protective Measures

4.1. Liability of the Perpetrator

118. Articles 36 and 37 of the Law on Domestic Violence Protection provide for misdemeanor liability in cases of domestic violence, with relatively mild sanctions in the forms of fines and prison terms that run from ten days up to sixty days for the most serious offences. Particularly, sexual abuse committed against a minor may be punished by a fine or a prison term of at least thirty days. While the Criminal Code includes a specific criminal offence of “Domestic Violence” and this is somewhat positive, the provisions of the Law on Domestic Violence Protection overlap with the provisions of the Criminal Code. In that respect, it is recalled that various human rights monitoring bodies¹⁶⁹ have noted that in Montenegro, perpetrators of domestic violence are often not prosecuted and sentenced commensurately with the gravity of their crimes,¹⁷⁰ and that in practice, domestic violence offences tend to be seen as “misdemeanors” by state authorities.
119. It must be pointed out that one of the main objectives of the Istanbul Convention is to lead to the introduction in domestic systems of punitive measures against perpetrators, which will trigger *criminal* law responses. The fact that the provisions of the Law on Domestic Violence Protection and of the Criminal Code overlap is contrary to the principles of legal certainty and foreseeability, whereby an individual should be able to foresee the consequences of a given action based on the provisions of the law.¹⁷¹ Moreover, if offences falling under the Law on Domestic Violence Protection and under the Criminal Code potentially contain the same essential elements, this may lead, if the perpetrator is tried under both misdemeanour and criminal proceedings, to a violation of the principle of *non bis in idem* contained in Article 4 of the Protocol No. 7 to the ECHR.¹⁷² To avoid such pitfalls, it is important that the Montenegrin legal framework addressing violence against women and domestic violence clearly delineates which cases will trigger misdemeanor liability and which ones will trigger criminal liability (as described above in par 31 *supra*), to avoid overlaps and enhance clarity.

¹⁶⁸ *ibid.* This includes e.g., the separate accommodation of single men and women; separate toilet facilities, or at a minimum, different timetables established and monitored for their use by males and females; rooms that can be locked by their occupants; adequate lighting throughout the shelter; guard protection, including female guards, trained on the gender-specific needs of residents; training of staff; code of conduct applying also to private service providers; formal arrangements for intervention and protection in instances of gender-based violence; and provision of information to women and girls on gender-based violence and available assistance services.

¹⁶⁹ *Op. cit.* footnote 31, par 18 (2011 Concluding Observations of the CEDAW Committee on Montenegro). See also *op. cit.* footnote 43, page 42 (2013 Montenegro Progress Report of the European Commission), which notes that women remain under-represented in parliament and in managerial positions.

¹⁷⁰ *Op. cit.* footnote 88, par 19 (2014 Concluding Observations of the UNCAT Committee on Montenegro). See also *op. cit.* footnote 31, pars 18-19 (2011 Concluding Observations of the CEDAW Committee on Montenegro).

¹⁷¹ See e.g. par 34 of *Rekvényi v. Hungary*, ECtHR judgment of 20 May 1999 (Application No 25390/94), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58262#{"itemid":\["001-58262"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58262#{).

¹⁷² Article 4 of the Protocol No. 7 to the ECHR states that “1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State”. See also e.g. par 31 of *Franz Fischer v. Austria*, ECtHR judgment of 29 May 2001 (Application No 37950/97), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"itemid":\["001-59475"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{).

120. As mentioned in pars 51-58 *supra*, a number of acts of domestic violence should be criminalized according to the Istanbul Convention.¹⁷³ It must be pointed out in this context that practice varies greatly in different countries with regard to the choices made by policy and law makers between using existing general criminal laws without imposing higher penalties, using general criminal laws but considering violence in the domestic context as an aggravating factor (leading to higher penalties), or introducing into the penal code a specific offence criminalizing domestic violence.¹⁷⁴ In Montenegro, certain acts (e.g., physical violence, sexual abuse, stalking, as well as conducts that would amount to psychological violence) are currently subject to misdemeanor liability according to Article 36 of the Law on Domestic Violence Protection, whereas they should lead to criminal liability as per the Istanbul Convention.
121. Consequently, Section III of the Law on Domestic Violence Protection should be amended to state that acts amounting to physical, sexual and psychological violence between family members will be exclusively subject to criminal liability, as per the provisions of Title XIX of the Criminal Code on Criminal Offences against Marriage and Family. Then, Title XIX of the Criminal Code should be supplemented to cover the whole range of behaviour that may fall under the definition of domestic violence (i.e., minor and serious bodily injury, acts of sexual violence and psychological violence that seriously impairs a person's psychological integrity) providing that they are not already covered by other criminal offences which include the nature of the family relationship between perpetrator and victim as an aggravating circumstance. Misdemeanor liability may still be provided for remaining acts, such as those amounting to economic abuse. Such amendments will avoid the uncertainty caused by the overlap of provisions of the Law on Domestic Violence Protection and of the Criminal Code, and will demonstrate Montenegro's "zero tolerance" attitude towards domestic violence offences.
122. As regards penalties, the ones indicated under Article 220 of the Criminal Code, ranging from a fine to five years' imprisonment in case of serious bodily injury or harm, and from three to twelve years in case of death, fall short or are equivalent to the penalties imposed in a non-domestic setting. For instance, the use of "gross violence to violate bodily and mental integrity of [the] family member" (Article 220 par 1) is punishable by a fine or a prison term of up to one year, which is the penalty imposed in the least serious cases of minor bodily injury (Article 152 of the Criminal Code). Moreover, Article 220 of the Criminal Code relating to violence resulting in the death of a family member may somewhat overlap with Article 151 of the Criminal Code on serious bodily injury resulting in the death of the victim, which is punishable by a prison term of between two to twelve years, similar to the sanction provided for domestic violence.
123. At the same time, Article 144 par 7 of the Criminal Code that covers aggravated homicide where the victim is a family member with a history of being abused is punishable by much higher penalties (10-40 years' imprisonment). It must be highlighted that as per international and regional recommendations, penalties should be commensurate with the gravity of the crimes and legislation should provide for harsher

¹⁷³ See Articles 33 to 43 of the Istanbul Convention requiring the criminalization of the acts of psychological violence (Article 33) if the State party has not made a reservation in that respect, stalking (Article 34) if the State party has not made a reservation in that respect, physical violence (Article 35), sexual violence, including rape (Article 36), forced marriage (Article 37), female genital mutilation (Article 38), and forced abortion and forced sterilisation (Article 39).

¹⁷⁴ See Section 1.3.3. on page 22 of the European Institute on Gender Equality on the Review of the Implementation of the Beijing Platform for Action in the EU Member States: Violence against Women Victim Support (2012), available at <http://eige.europa.eu/sites/default/files/Violence-against-Women-Victim-Support-Report.pdf>.

penalties for crimes involving domestic violence than for similar violence-related crimes in a non-domestic context.¹⁷⁵ Alternatively, as stated in Article 46 (a) of the Istanbul Convention, the existence of a domestic relationship between a perpetrator and a victim should be systematically added as an aggravating circumstance in various criminal provisions of a more general nature, unless a specific criminal offence exists and this fact already forms part of its constituent elements.

124. Additionally, other provisions of Article 46 of the Istanbul Convention list a number of circumstances that should be taken into consideration as aggravating circumstances,¹⁷⁶ for instance when committed in a domestic setting, in the presence of a child, or against a person made vulnerable by particular circumstances. The Montenegrin Criminal Code at times contains some of these aggravating circumstances for criminal offences, for instance when a crime is committed against a juvenile (between 14 and 18 years old), a child (below 14 years old), a pregnant woman or a member of the family.¹⁷⁷ Article 42 of the Criminal Code on General Rules for Fixing Punishment also refers to certain circumstances which may trigger the imposition of higher penalties. However, these provisions generally do not encompass the whole range of circumstances listed in Article 46 of the Istanbul Convention. The lawmakers and stakeholders should discuss how, given the local context, to introduce the aggravating circumstances listed in the Istanbul Convention in a more systematic manner in the Criminal Code, provided they do not already form part of the constitutive elements of the offence.
125. The UN Committee against Torture and the CEDAW Committee in their Concluding Observations on Montenegro, have noted that generally, only light sentences are imposed on perpetrators of acts of violence against women and domestic violence.¹⁷⁸ In order to ensure that perpetrators are punished with adequate penalties, the introduction of sentencing guidelines may also contribute to the normalization of sentences imposed in cases of violence against women and domestic violence.¹⁷⁹

4.2. Investigation and Prosecution

126. One of the main challenges in domestic violence cases is attrition (i.e., the phenomenon whereby domestic violence cases fail to make it through the criminal justice system and

¹⁷⁵ *Op. cit.* footnote 17, Section 3.11.1. (2012 UN Women Handbook for Legislation on VAW); see also Recommendation No. 9 from the UN Women Virtual Knowledge Centre to End Violence Against Women and Girls, available at <http://www.endvawnow.org/en/articles/445-criminal-sanctions-and-sentencing-provisions-.html> which states that “[l]egislation should specify that penalties for crimes involving domestic violence should be more severe than similar non-domestic violence-related crimes. This sends the important message that the state will treat a domestic violence crime as seriously, if not more seriously, than a crime against a stranger”.

¹⁷⁶ Article 46 of the Istanbul Convention also refers to other aggravating circumstances in the determination of the sentence, insofar as they do not already form part of the constituent elements of the offence, e.g. if the offence, or related offences, were committed repeatedly (par b); where the offence was committed against a child (par d); where the offence was committed by two or more people acting together (par e); where the offence was preceded or accompanied by extreme levels of violence (par f); where the offence was committed with the use or threat of a weapon (par g); where the offence resulted in severe physical or psychological harm for the victim (par h); where the perpetrator had previously been convicted of offences of a similar nature (par i).

¹⁷⁷ E.g. rape against a juvenile (between 14 and 18 years old) or a child (below 14 years old) (Article 204), sex act through abuse of a position of authority (Article 207), aggravated homicide when committed against a pregnant woman or against a member of the family (Article 144) etc.

¹⁷⁸ *Op. cit.* footnote 31, par 18 (2011 Concluding Observations of the CEDAW Committee on Montenegro). See also *op. cit.* footnote 88, par 19 (2014 Concluding Observations of the UNCAT Committee on Montenegro).

¹⁷⁹ See Section 3.11.1. of the 2012 UN Women Handbook on Legislation against VAW. For elements to be included in Sentencing Guidelines, see *op. cit.* footnote 25, pages 84-85 (2014 UNODC Blueprint for Action on VAW). See also Section 3.11.2. of the 2012 UN Women Handbook on Legislation against VAW.

do not result in a criminal conviction). Various human rights monitoring bodies noted the low level of reporting on violence against women and, in particular, of domestic violence in Montenegro as well as the low level of prosecution.¹⁸⁰ Attrition often stems from different causes and sources, either victim-related or system-related. Lawmakers and stakeholders should analyze the factors that would explain such low levels of reporting, since this could inform the need for potential legislative changes, as well as other policy interventions. The draft European Union Handbook of Best Police Practices on Overcoming Attrition in Domestic Violence Cases could serve as a useful tool for that purpose¹⁸¹ (see also recommendations relating to investigation and prosecution in pars 127-134 *infra*).

127. Article 5 par 2 of the Istanbul Convention provides that State Parties shall exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence perpetrated by non-State actors. This appears to be of particular importance in Montenegro, whose law enforcement bodies have been repeatedly criticized for failing to investigate and prosecute cases of violence against women and domestic violence,¹⁸² especially as regards the sexual abuse and sexual exploitation of children.¹⁸³
128. Article 55 of the Istanbul Convention provides that investigations into or prosecution of certain offences (physical violence; sexual violence, including rape; forced marriage; female genital mutilation; and forced abortion and forced sterilisation)¹⁸⁴ shall not be wholly dependent upon a complaint filed by the victim. Moreover, proceedings should continue even if the victim withdraws the complaint. As noted in the Explanatory Report to the Istanbul Convention, the aim of this provision is to enable criminal investigations and proceedings to be carried out without placing the onus of initiating such proceedings and securing convictions on the victim.¹⁸⁵
129. The Criminal Code does not require a “private charge” for any of the criminal offences falling under Title XVIII (criminal offences against sexual freedom), since former Article 212 of the Criminal Code relating to such criminal offences committed against a spouse and which used to require a “private charge” was abolished in 2013. Similarly, a “private charge” is not required for criminal offences falling under Title XIX (criminal offences against marriage and family). Consequently, according to Article 18 of the Criminal Procedure Code, this means that such criminal offences can be prosecuted *ex officio*, and that a prior complaint by the victim is not necessary to initiate proceedings. This is of particular significance in the context of violence against women and domestic violence, since the victims of such violence may be unwilling to report the crime to the police for several reasons (e.g., threat or intimidation, language barriers, reluctance to contact authorities, feelings of humiliation or shame, insecurity about immigration

¹⁸⁰ *Op. cit.* footnote 88, par 19 (2014 Concluding Observations of the UNCAT Committee on Montenegro). See also *op. cit.* footnote 31, pars 18-19 (2011 Concluding Observations of the CEDAW Committee on Montenegro).

¹⁸¹ See the 2012 European Union Handbook on Overcoming Attrition in Domestic Violence Cases.

¹⁸² *Op. cit.* footnote 88, par 19 (2014 Concluding Observations of the UNCAT Committee on Montenegro) which notes “the lack of effective investigation of reports of violence and of prosecutions”.

¹⁸³ See pages 3-4 of the Replies of Montenegro to the 1st thematic monitoring round relating to the Lanzarote Convention on “Sexual abuse of children in the circle of trust” (2014), available at http://www.coe.int/t/dghl/standardsetting/children/Montenegro_ThematicQuestionnaire_en.pdf.

¹⁸⁴ Article 78 par 2 of the Istanbul Convention provides the possibility for the States party to the Convention to make a reservation in respect of minor offences of physical violence.

¹⁸⁵ See par 279 of the Explanatory Report to the Istanbul Convention.

- status, lack of awareness of the legal framework and protective measures, among others).¹⁸⁶
130. Moreover, in order to take due account of the specific situations of women victims of violence and victims of domestic violence, Article 10 of the Law on Internal Affairs could be supplemented to expressly state that the police shall respond promptly to every request for assistance and protection in cases of violence against women and domestic violence, and assign the same priority to them as to other cases of violence, as recommended by international good practice.¹⁸⁷ Express reference to the duty to coordinate with social services to devise a victim assistance plan as per Article 11 of the Law on Domestic Violence Protection, could also be added.
131. More generally, given the importance to ensure timely and expedited judicial proceedings, the drafters may also consider, where appropriate, introducing in the Criminal Procedure Code ‘fast-track’ procedures for cases of domestic violence, similar to the ones provided for misdemeanor proceedings under the Law on Domestic Violence Protection.¹⁸⁸
132. On a related note, Article 59 of the Criminal Procedure Code states that “[w]hen a State Prosecutor establishes that there is no basis for prosecution for a criminal offence [...], s/he shall inform the injured parties thereon within eight days, instruct them that they may take over the prosecution themselves and deliver them a decision on the rejection of the criminal charge”. It must be pointed out that Article 11 of the 2012 EU Directive 2012/19¹⁸⁹ provides that victims have a right to a “review” of a decision not to prosecute. Experts consider that the possibility for the victim to pursue the prosecution as a private or subsidiary prosecutor, as is the case in Montenegro, would not be qualitatively the same as a “review”, from the perspective of victims’ interests.¹⁹⁰ Consequently, the lawmakers should consider introducing, in the Criminal Procedure Code, a possibility for such a review, for instance in the form of appeal to a higher level prosecutor, if applicable, or to a court.¹⁹¹ At the same time, such a system should not overly expand the possibility to re-open criminal cases and should respect the discretionary powers of the prosecution service. Consequently, certain limitations should be included, for example by introducing reasonable time limits for such complaints and by allowing only one such appeal. Such review should be available at least for serious crimes (to be defined by law), including crimes of violence against women and domestic violence.

¹⁸⁶ See e.g., *op. cit.* footnote 110, par 26 (*T.M. and C.M. v. Republic of Moldova*, ECtHR judgment of 28 January 2014).

¹⁸⁷ See Section 3.8.1. of the 2012 UN Women Handbook for Legislation against VAW.

¹⁸⁸ See Section 3.9.2. of the 2012 UN Women Handbook for Legislation against VAW.

¹⁸⁹ EU Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime adopted on 25 October 2012, the provisions of which the EU Member States have to implement into their national laws by 16 November 2015, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=en>. See also the DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/19 (December 2013) available at http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf. See also par 34 of CoE Committee of Minister Recommendation Rec 2000(19), which states that “[i]nterested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute”.

¹⁹⁰ See page 31 of the DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/19 (December 2013) available at http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.

¹⁹¹ For instance, in the legal system of the Netherlands, an interested party may complain to the Court of Appeal if a prosecutor decides not to prosecute (Article 12, Netherlands’ Code of Criminal Procedure).

133. Article 300 of the Criminal Procedure Code provides for the possibility to plea-bargain in the case of criminal offences punishable by a prison sentence of up to ten years. The Code seems to offer sufficient safeguards to ensure that the rights of the victim/injured party are duly considered, which is welcome. For instance, the injured party shall be informed of the public hearing which will review the plea-bargaining agreement (Article 303 (5)), the court shall *inter alia* ensure that the agreement “does not violate the rights of the injured party” (Article 303 (4)) and the injured party has a right to appeal the decision accepting the plea-bargaining agreement (Article 303 (10)). Article 272 of the Criminal Procedure Code provides for the possibility for the State Prosecutor to decide to postpone and/or suspend criminal prosecution, following a procedure of mediation in which the injured party should participate. Given the findings made by various human rights monitoring bodies, the lawmakers and stakeholders should review whether these two procedures (plea-bargaining and laying-off) are in practice not ‘imposed’ on the injured party. For instance, in cases of domestic violence, the victim may not actually be willing or able to appeal the decision accepting the plea-bargaining agreement, for fear of reprisal or due to intimidation by the perpetrator. If this is the case, the lawmakers and stakeholders should discuss whether they consider that in certain exceptionally grave cases of domestic violence, and potentially for other exceptionally grave crimes, the procedure of plea-bargaining and of postponement of criminal prosecution should not apply.
134. At the same time, it must be highlighted that legislative measures are often ineffective unless accompanied by changes in law enforcement standards, values and conduct.¹⁹² Various tools have been developed at the international level to encourage consistent police responses to incidents of domestic violence.¹⁹³ The same could be done in relation to prosecution, by developing guidelines for the exercise of prosecutorial functions, provided that they do not encroach upon the independence and autonomy of prosecution services.¹⁹⁴ This could help ensure that *ex officio* prosecution is exercised in cases regarding all forms of violence, regardless of the level of injury, as done in other countries.¹⁹⁵ Finally, apart from adequate training to sensitize law enforcement bodies and prosecution services on the importance of investigating and prosecuting cases of violence against women and domestic violence, good practices in that respect recommend the introduction of pro-arrest policies and victimless prosecution.¹⁹⁶ All these above-mentioned measures would be in line with the recent case law of the ECtHR specifying that the positive obligation of the State includes not only setting up a legal framework against domestic violence, but also conducting an effective investigation into

¹⁹² Available at https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model_Strategies_and_Practical_Measures_on_the_Elimination_of_Violence_against_Women_in_the_Field_of_Crime_Prevention_and_Criminal_Justice.pdf. See also page 3 of the 2010 UN Handbook on Effective Police Responses to VAW, available at http://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_Effective_police_responses_to_violence_against_women_English.pdf.

¹⁹³ See par 8 of the 2011 UN Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice. See also page 44 (2010 UN Handbook on Effective Police Responses to VAW), and the 2006 Model Policy for Police Responding to Domestic Violence Calls developed by the International Association of Chiefs of Police, available at www.theiacp.org/portals/0/pdfs/DomesticViolencePolicy0606.doc.

¹⁹⁴ See pars 44 and 55 of the European Commission for Democracy through Law (Venice Commission) Report on the Independence of the Judicial System – Part II: The Prosecution Service (2010), available at http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/europeanStandards_en.pdf.

¹⁹⁵ See Section 3.8.2. of the 2012 UN Women Handbook for Legislation against VAW.

¹⁹⁶ *Op. cit.* footnote 93, page 10 (2012 EU Handbook on Overcoming Attrition in Domestic Violence Cases). See also *op. cit.* footnote 192, page 44 (2010 UN Handbook on Effective Police Responses to Violence against Women). See also *op. cit.* footnote 17, Section 3.8.3. (2012 UN Women Handbook for Legislation on VAW).

alleged cases of domestic violence,¹⁹⁷ even if the victim has not necessarily suffered from physical injury, for instance in cases of psychological or economic abuse.¹⁹⁸

4.3. Jurisdiction over Offences of Violence against Women and Domestic Violence

135. Rules governing the jurisdiction (i.e., the power and authority to take legal actions and adopt decisions) over offences provided by the Istanbul Convention need to be reviewed to ensure that they are fully in line with Article 44 of the Istanbul Convention. Particularly, they should allow the investigation and prosecution of crimes of violence against women and domestic violence committed abroad by Montenegrin nationals or persons having their habitual residence in Montenegro, even if the offence is not criminalized in the other country.
136. As regards liability for acts committed abroad, Article 136 of the Criminal Code provides for the possibility to apply criminal legislation to Montenegrin nationals who commit criminal offences abroad, provided that these people are identified on the territory of Montenegro or extradited. However, Article 138 par 3 of the Criminal Code provides for some limitations regarding prosecution. First, one of the limitations relates to situations where, under the foreign legislation, the criminal offence can only be prosecuted upon request of the injured party and such request has not been filed (Article 138 par 3 (4)). This is not in line with Article 44 par 4 of the Istanbul Convention, which prohibits the subordination of the initiation of proceedings of the most serious offences (i.e., sexual violence including rape, forced marriage, female genital mutilation and forced abortion and forced sterilization) in the state of nationality or of habitual residence to the conditions of a complaint of the victim. Since Montenegro has not made any reservation in that respect, such requirement should be deleted or alternatively, Article 138 par 3 (4) of the Criminal Code should be supplemented to include a derogation, at least in relation to these above-mentioned serious criminal offences.
137. Second, another limitation provided by Article 138 par 4 of the Criminal Code relates to cases where the criminal offence in question is not punishable under the law of the country where it was committed, in which case prosecution can only be instituted upon the approval of the Supreme Public Prosecutor of Montenegro. Once again, since Montenegro has not made any reservation in that respect, the legislation should comply with Article 44 par 3 of the Istanbul Convention, which provides that the above-mentioned most serious offences committed abroad by nationals shall be subject to criminal prosecution, irrespective of the fact that they do not constitute criminal offences in the country where such acts were committed. The fact that Article 138 par 4 requires the approval of the Supreme Public Prosecutor, due to the potentially burdensome and timely process to seek such an approval, may impede any prosecution in practice. Article 138 of the Criminal Code should include a derogation from this requirement, at least for the most serious offences (i.e., sexual violence including rape, forced marriage, female genital mutilation, forced abortion and forced sterilization).
138. Moreover, Article 137 par 2 of the Criminal Code (as amended in 2013) provides for the possibility to apply Montenegrin criminal legislation to a “person who is not a citizen of Montenegro” who committed criminal offences abroad, where such offence is punishable under the law of the country where it was committed by a prison term of five

¹⁹⁷ *Op. cit.* footnote 110, par 56 (*Eremia v. Republic of Moldova*, ECtHR judgment of 28 May 2013).

¹⁹⁸ See e.g., *op. cit.* footnote 110, pars 38-39 (*T.M. and C.M. v. Republic of Moldova*, ECtHR judgment of 28 January 2014).

years or longer. Article 138 par 5 further provides for derogation from the double criminality requirement where the said conduct is considered a criminal offence under the general legal principles recognized by international law. While the above mentioned offences (i.e., sexual violence including rape, forced marriage, female genital mutilation and forced abortion and forced sterilization) may potentially fall under such derogation, it may be advisable, to ensure legal certainty, to expressly provide a derogation to Article 137 par 2 of the Criminal Code for these above-mentioned serious criminal offences (and other most serious crimes). This would be in line with Article 44 par 3 of the Istanbul Convention.

139. Finally, as per Article 44 par 5 of the Istanbul Convention, Montenegro shall have jurisdiction over the offences established in accordance with the Istanbul Convention, in cases where an alleged perpetrator is present on its territory and it does not extradite him or her to another Party. Relevant legislation should be aligned with this provision.

4.4. Restrictive, Protective Orders and Other Protective Measures

140. It is commendable that Title 2 of the Law on Domestic Violence Protection provides for “orders of protection”, which include a wide range of possible restrictions and protective measures, including the possibility to compel the perpetrator to vacate the family residence/home, irrespective of who is the owner of the premises.¹⁹⁹ The nature and scope of these measures are generally in line with the Istanbul Convention, but consideration may be given to further extending their scope,²⁰⁰ particularly as regards child support and custody orders.²⁰¹
141. Title V of the Criminal Code also provides for a range of security measures, which may be imposed by a court, including the possibility to confiscate objects (Article 75). However, in the particular context of domestic violence, the immediate confiscation of weapons by the police, on the spot, which could be subject to later confirmation by a court, would be recommended and would also be in line with relevant good practice.²⁰² Title 2 of the Law on Domestic Violence should be supplemented accordingly.
142. Other protective measures could be considered for inclusion in the Law on Domestic Violence Protection and the Law on Internal Affairs as well, as appropriate, e.g. the police could transport the victim and any children or other relatives to a shelter or assist the victim and any child or other relative in obtaining medical treatment, etc.²⁰³ The lawmakers and stakeholders may also contemplate the introduction of a “forced

¹⁹⁹ *Op. cit.* footnote 17, Section 3.10.3 (2012 UN Women Handbook for Legislation on VAW).

²⁰⁰ See par 29, Part IV, “A Framework for Model Legislation on Domestic Violence”, Report of the Special Rapporteur on violence against women, its causes and consequences (1996) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/104/75/PDF/G9610475.pdf?OpenElement>. This could include e.g., regulating the offender’s access to dependent children, compelling the offender to pay the victim’s medical bills, restricting the unilateral disposal of joint assets, prohibiting the perpetrator from using or possessing firearms or other specified weapons; granting the victim possession or use of an automobile, or other essential personal effects; granting temporary custody of children to the non-violent parent with due consideration for the safety of the children; denying visitation rights, or specifying visitation under supervision; requiring the payment of certain costs and fees.

²⁰¹ *Op. cit.* footnote 25, page 41 (2014 UNODC Blueprint for Action on VAW).

²⁰² See par 7 of the 2011 UN Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/RES/65/228, 31 March 2011, available at https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model_Strategies_and_Practical_Measures_on_the_Elimination_of_Violence_against_Women_in_the_Field_of_Crime_Prevention_and_Criminal_Justice.pdf.

²⁰³ *ibid.* (2011 UN Updated Model Strategies and Practical Measures on the Elimination of VAW).

- marriage protection order”, to prevent a person from being taken overseas to be married, or ordering his/her return, a good practice found in other countries.²⁰⁴
143. Article 28 of the Law on Domestic Violence Protection provides that removal or restraining orders may be issued immediately by the police for a maximum duration of three days. Other types of orders²⁰⁵ are issued by a misdemeanor body, including emergency orders issued within 48 hours of the receipt of petition, which may also be granted *ex officio*; this is a welcome measure to enhance protection of victims. Article 53 (third indent) of the Istanbul Convention also requires that in certain cases, these orders be issued on an *ex parte* basis (i.e., even in the absence of and without representation of the respondent party), with immediate effect. This is not explicitly provided for in Article 27 of the Law on Domestic Violence Protection (on persons eligible to request the issuance of protection orders), nor is it found in the Law on Misdemeanors or in the Criminal Code. The above legislation should be supplemented accordingly, while taking into consideration the fair trial rights of the perpetrator, including the right to be served with such orders and the right to appeal (which includes the right to be informed about possibilities of appeal).²⁰⁶
144. It must be pointed out that the newly introduced Article 77a of the Criminal Code (2013) states that courts shall issue restraining orders against perpetrators of certain criminal offences such as domestic violence, incest and other sexual offences. However, this does not expressly include limitations as to the possession and use of firearms and other regulated weapons; it would be advisable to supplement this provision to that effect.²⁰⁷ Furthermore, the new Article 77b of the Criminal Code provides the possibility for a court to issue an order of removal from an apartment or other place of residence, but does not expressly state that this shall be irrespective of property rights over the place of residence, as stipulated in Article 21 of the Law on Domestic Violence Protection. It is recommended to specify this in the Criminal Code provision as well. Also here, it is unclear how provisions of the Criminal Code will interact with the orders of protection that are issued pursuant to the provisions of the Law on Domestic Violence Protection; this should be clarified, ideally in the latter piece of legislation.
145. The newly introduced Article 77a par 4 provides that the court shall inform a special organizational unit within the Ministry of Justice about the pronouncement of a restraining order. Article 34 of the Law on Domestic Violence Protection provides that the decision granting an order of protection shall be communicated to the competent social work centre. This means that two different bodies will gather information relating to orders issued by misdemeanor bodies on the one hand, and to similar orders issued by a court on the other. It would be useful to establish a consolidated registration system or database for protection, restraining or barring orders, so that the police or criminal justice officials can quickly determine whether such an order is in force, and take

²⁰⁴ See par 38 of the Report of the Office of the UN High Commissioner for Human Rights to the Human Rights Council on Preventing and Eliminating Child, Early and Forced Marriage, A/HRC/26/22, 2 April 2014, available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-22_en.doc. See also Section 3.10.1 of the 2012 UN Women Handbook for Legislation on VAW.

²⁰⁵ i.e. order prohibiting harassment and stalking (Article 23 of the Law on Domestic Violence Protection), order for mandatory addiction treatment (Article 24 of the Law on Domestic Violence Protection) and order for mandatory psycho-social therapy (Article 25 of the Law on Domestic Violence Protection).

²⁰⁶ See par 272 of the Explanatory Report to the Istanbul Convention.

²⁰⁷ *Op. cit.* footnote 25, page 11 (2014 UNODC Blueprint for Action on VAW).

- immediate action upon infringement.²⁰⁸ It is unclear whether this exists already; the lawmakers and stakeholders should therefore discuss how to best formulate relevant provisions in the Law on Domestic Violence Protection and in the Criminal Code, and which central body should be in charge of collecting all information relating to protective measures.
146. Furthermore, the Excerpts of Legislation do not specifically contemplate the protection of relatives of the victim, other witnesses, social workers or other persons assisting the victim. The provisions of the Law on Domestic Violence Protection and of the Criminal Procedure Code could be supplemented accordingly, since these persons, due to their association with the victim, may also be in need of protection.²⁰⁹
147. Article 38 of the Law on Domestic Violence Protection provides for misdemeanor liability in the case of a violation of protection orders, which is punishable by a fine or a prison term of up to forty days. At the international level, it has been acknowledged that criminalizing the violation of restrictive or protective orders is extremely important to ensure the effectiveness of legislation.²¹⁰ In that respect, Article 220 par 5 of the Criminal Code criminalizes the violation of protection orders issued by a court or other state authority in domestic violence cases, with penalties ranging from a fine to six months in prison. While the provision is in itself positive, it overlaps with Article 38 of the Law on Domestic Violence Protection. To avoid this, it would be advisable to amend Article 38 of the Law on Domestic Violence Protection so that the violation of protection orders is subject to criminal liability as defined by the Criminal Code, and to add a cross-reference to Article 220 of the Criminal Code.
148. Moreover, the consequences of the violation of protection orders, i.e. criminal liability and related penalties, should be systematically indicated in writing in all such orders, and Article 28 of the Law on Domestic Violence Protection on the content of written police orders should be supplemented to that effect. In this way, the alleged perpetrator will be aware of the consequences of the violation of such orders. Additionally, if not already the case, adequate training of the police and the judiciary on the procedure for issuance and contents of these orders should be provided.
149. According to various international and regional human rights monitoring bodies, only a limited number of protection orders have been issued in Montenegro to date.²¹¹ While Article 39 of Law on Domestic Violence Protection envisions the liability of certain public officials for failure to report cases of domestic violence or violations of protective measures, it does not include liability of police officers for failing to issue or to request the issuance of a protection order. In its recent case law, the ECtHR has noted

²⁰⁸ See par 16 (h) of the 2011 UN Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/RES/65/228, 31 March 2011, available at https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model_Strategies_and_Practical_Measures_on_the_Elimination_of_Violence_against_Women_in_the_Field_of_Crime_Prevention_and_Criminal_Justice.pdf.

²⁰⁹ *Op. cit.* footnote 200, par 35 (1996 UN Framework for Model Legislation on Domestic Violence).

²¹⁰ See page 9 of the UN Expert Group Meeting on Good Practices in Legislation on Violence Against Women, Expert Paper by Cheryl A. Thomas on Legal Reform on Domestic Violence in Central and Eastern Europe and the Former Soviet Union, 17 June 2008, available at [http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20\(Cheryl%20Thomas\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20(Cheryl%20Thomas).pdf). See also Section 3.10.9 of the UN Women Handbook for Legislation on VAW and page 40 (2014 UNODC Blueprint for Action on VAW).

²¹¹ *Op. cit.* footnote 31, par 18 (2011 Concluding Observations of the CEDAW Committee on Montenegro). See also *op. cit.* footnote 88, par 19 (2014 Concluding Observations of the UNCAT Committee on Montenegro).

that in cases involving clear indications of abuse, the police is obliged to investigate of its own motion the need for action to prevent domestic violence, regardless of the existence of a formal application or official complaint by the victim; a failure to do so was considered to be a violation of Article 3 of the ECHR.²¹² This is supported by Article 53 of the Istanbul Convention, which similarly states that victims should be able to obtain a restraining or protection order, regardless of whether or not they choose to set in motion any other legal proceedings. The Montenegrin legal framework should be amended so as to be compliant with such requirements.

4.5. Procedural Measures and Protection from Re-victimization

150. Article 54 of the Istanbul Convention requires the adoption of legislative or other measures to ensure that in civil and criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary. The Excerpts of Legislation, including excerpts of the Criminal Procedure Code, do not seem to provide for such a limitation. Unless already outlined in other legislation, such restrictions should be expressly stated, in order to protect victims from re-victimization during the judicial process.
151. While it is welcome that the Criminal Procedure Code provides for child-sensitive protective measures (see pars 156-163 *infra*), adult victims should also benefit from certain protective measures. Article 56 of the Istanbul Convention provides for a range of measures to protect the rights and interests of victims and witnesses (see par 90 *supra*), at all stages of investigations and judicial proceedings.
152. While some of these are already part of the current legal framework,²¹³ other measures could be introduced or enhanced (see also comments relating to victims' rights in pars 85-92 *supra*).²¹⁴ For instance, it is noted that the provisions of the Criminal Procedure Code regarding "forensic examination" (Articles 136 to 156) are generally not particularly gender-sensitive and fail to address the specific situation of victims of sexual offences and child victims who may be particularly traumatized. Many countries have developed specific protocols and specialized evidence collection kits for the investigation of rape or other forms of sexual abuse.²¹⁵ More specifically, in cases of sexual offences, victims will often be required to undress as part of forensic medical examinations. It would be advisable to expressly provide that in such circumstances, the examination should be carried out and attended only by individuals of the same sex as the suspect/defendant/witness.
153. Additionally, it should be clearly stated that any such process whereby individuals are obliged to undress, and where this renders visible intimate parts of the body, should, as a rule, not be allowed unless the person to be examined expresses his/her prior consent. Article 154 par 1 of the Criminal Procedure Code states that "physical examination of

²¹² See e.g., *op. cit.* footnote 110, pars 46-48 (*T.M. and C.M. v. Republic of Moldova*, ECtHR judgment of 28 January 2014).

²¹³ See relevant provisions of the Criminal Procedure Code, e.g., the possibility to exclude the public for protecting the interests of a minor or protecting the personal or family life of the accused person or the injured party (Articles 313 to 316); the possibility for victims of a criminal offence against sexual liberty or children to testify at separate premises (Article 113); Hearing of Witness Through an Interpreter (Article 116); Protection of Witnesses (and Injured Party) from Intimidation (Article 120).

²¹⁴ E.g. ensuring that contact between victims and perpetrators at court and law enforcement agency premises is avoided where possible and enabling victims to testify in the courtroom without being present or at least without the presence of the alleged perpetrator.

²¹⁵ *Op. cit.* footnote 192, pages 55-58 (2010 UN Handbook on Effective Police Responses to VAW).

the suspect or accused person *shall* be carried out without their consent if it is necessary to determine facts relevant to the criminal procedure” and that “physical examination of [injured parties] *may* be carried out without their consent only if it is necessary to determine whether there is a certain trace or consequence of a criminal offence on their body”. In cases where the suspect/accused opposes such examinations, par 4 of this article states that they may only take place following a court order. Both provisions do not impose an actual duty to seek the victim/injured party’s (as well suspect/accused’s) consent prior to carrying out the examination. It would be advisable to change Article 154 accordingly, by clearly stating such a duty throughout (for both suspect/accused and for victims/injured parties) and that the physical examination without the consent of the victim/injured party shall be undertaken only upon the order of the court.²¹⁶ As an exception from such a general rule of authorization by a judge, the law should allow physical examinations in cases of *flagrante delicto* upon the decision of criminal investigation bodies, which should then be obliged to report on the physical examination to a pre-trial judge, within a short period of time such as 24 hours. It is also recommended to prescribe additional safeguards, for instance that searches of bodily cavities should only be performed by a doctor in a sensitive and least intrusive manner.²¹⁷ Articles 152 and 154 of the Criminal Procedure Code and other provisions as appropriate should be supplemented accordingly. Such provisions could also provide that photos of a victim’s injuries be taken only with the victim’s consent.²¹⁸

154. It is positive that Article 30 of the Law on Internal Affairs provides for special provisions pertaining to interviewing a minor, including that this should only be carried out by duly trained professionals. It would be advisable to similarly stipulate that only trained professionals should interview victims of violence against women and domestic violence, given the traumatizing nature of such offences.
155. Finally, according to Article 26 of the CoE Convention on Action against Trafficking in Human Beings,²¹⁹ State Parties shall provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, if the victims were compelled to do so by traffickers. The excerpts of the Law on Public Peace and Order submitted for review mention certain misdemeanor offences such as prostitution or begging, but do not seem to include a non-punishment clause for victims of trafficking in human beings. The Criminal Code similarly does not expressly provide for such possibility. As recommended in the 2012 Report on Montenegro of the Group of Experts on Action against Trafficking in Human Beings (hereinafter “GRETA”),²²⁰ and unless this has been addressed already, the lawmakers should take the legislative measures to provide for such a possibility. Article 10 of the 2009 UNODC Model Law

²¹⁶ See e.g. par 22 of the 2013 OSCE/ODIHR Opinion on the Draft Law on Amendments and Additions to the Criminal Procedure Code of Serbia, available at http://www.legislationline.org/download/action/download/id/4337/file/224_CRIM_SRB%20CPC%204%20March%202013_en.pdf.

²¹⁷ *Op. cit.* footnote 25, page 72 (2014 UNODC Blueprint for Action on VAW).

²¹⁸ *Op. cit.* footnote 25, page 71 (2014 UNODC Blueprint for Action on VAW).

²¹⁹ The CoE Convention on Action against Trafficking in Human Beings (CETS No. 197), available at http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197_en.asp#TopOfPage, was ratified by Montenegro on 30 July 2008.

²²⁰ See pars 185-186 of the Report of the Group of Experts on Action against Trafficking in Human Beings (hereinafter “GRETA”) concerning the implementation of the CoE Convention on Action against Human Beings by Montenegro (hereinafter “2012 GRETA Report on Montenegro”), 13 September 2012, available at http://www.coe.int/t/dghl/monitoring/trafficking/docs/Reports/GRETA_2012_9_FGR_MNE_en.pdf.

against Trafficking in Persons on “Non-liability [non-punishment] [non-prosecution] of victims of trafficking in persons”²²¹ may serve as a useful reference for the lawmakers in that respect.

4.6. Child-Sensitive Procedural Measures

156. It is positive that Article 125 of the Criminal Code specifically addresses the special situation of child victims by stating that “time barring for an offence committed against a minor shall not run until that person reaches 18 years of age”. This is in line with Article 58 of the Istanbul Convention, which allows the extension of statutes of limitations to ensure the effective initiation of legal proceedings after the victim has come of age, thereby allowing more time for child victims to overcome their trauma and decide whether to press charges.
157. Article 56 par 2 of the Istanbul Convention also provides that special protection measures taking into account the best interests of the child shall be provided where appropriate.
158. It is welcome that the Criminal Procedure Code already includes certain protective measures for children during court proceedings, for instance the possibility to exclude the public to protect the interests of a minor (Article 314) or the assistance of a psychologist (Article 113). However, the scope of measures to protect child victims and witnesses should be much broader and should cover not only the hearing before a judge, but the whole justice process, i.e. from the detection of the crime and the submission of the complaint, through investigation, prosecution, and trial to post-trial procedures.²²² In particular, the Criminal Procedure Code should include special procedures to prevent direct contact between the perpetrators and the child victim at all stages of criminal investigations, prosecution and in court proceedings, unless such contact is necessary or useful for the proper conduct of proceedings (see also par 87 *supra*).²²³
159. It is particularly important to ensure the right of children to express their views in every decision that affects them, as stated in Article 12 of the UN Convention on the Rights of the Child. The fact that a child is very young or in a particularly vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor should it reduce the weight given to a child’s views in determining his or her best interests.²²⁴ Therefore, the Criminal Procedure Code should include child-sensitive provisions specifying that the police, prosecutors and courts shall keep the child informed about the process and seek his/her

²²¹ See the UNODC Model Law against Trafficking in Persons (2009) available at http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf. Article 10 of the Model Law reads as follows: “1. A victim of trafficking in persons shall not be held criminally or administratively liable [punished] [inappropriately incarcerated, fined or otherwise penalized] for offences [unlawful acts] committed by them, to the extent that such involvement is a direct consequence of their situation as trafficked persons. 2. A victim of trafficking in persons shall not be held criminally or administratively liable for immigration offences established under national law. 3. The provisions of this article shall be without prejudice to general defences available at law to the victim. 4. The provisions of this article shall not apply where the crime is of a particularly serious nature as defined under national law”.

²²² See the Model Law on Justice in Matters involving Child Victims and Witnesses of Crime (2009) available at http://www.unicef.org/ceecis/UNDOC-UNICEF_Model_Law_on_Children.pdf.

²²³ See pars 290 and 292 of the Explanatory Report to the Istanbul Convention.

²²⁴ See par 54 of the General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (hereinafter “CRC Committee General Comment No. 14 (2013)”), available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

views regarding the way forward at all stages of the investigations, prosecution and court proceedings, as well as afterwards.

160. More generally, transparent and objective processes for all decisions made by legislators, judges or administrative authorities, which directly affect a child, including for the issuance of orders according to the Law on Domestic Violence Protection, should be in place.²²⁵ Any decision concerning a child must be motivated, justified and explained, stating explicitly all factual circumstances, elements relevant for the best-interests assessment, and how these elements have been weighed to determine the child's best interests in the given case.²²⁶ Legislation such as the Criminal Procedure Code, the Law on Social and Child Protection, the Family Law and the Law on Health Case, among others, should contain provisions to this effect. In addition, as recommended by the UN Committee on the Rights of the Child, these measures should be accompanied by adequate and systematic training and/or sensitization on children's rights of the professional groups working with and for children, including law enforcement officials, as well as judges, lawyers, health personnel, teachers, social workers, school administrators and others as required.
161. Article 62 of the Family Law of Montenegro provides that the right of the child to live with his/her parents may be limited only by a court decision, when this is to the best interest of a child and "if there are reasons for restriction or depriving of the parental right or in case of violence in the family". Article 87 of the Family Law further provides that the deprivation of parental rights may be pronounced in cases of child abuse, child exploitation, child neglect, etc. While such provisions seem to be overall in line with Article 31 of the Istanbul Convention, they do not seem to address the issue of visitation rights, which should also be limited in case of incidents of violence; it is recommended to supplement the relevant legislation to that effect.
162. The Family Law and other relevant legislation pertaining to guardianship systems should also be brought in line with international and regional recommendations and good practices, for instance by setting up an accessible individual complaint mechanism for children and guaranteeing the right of children to express their views at different stages of the vetting procedures for guardians.²²⁷ Moreover, guardians should have the duty, amongst others, to support the child in all legal procedures by informing him/her of his/her rights, ensure that a qualified legal professional represents the child, as appropriate, before courts, and monitor and communicate with such professionals.²²⁸ The relevant legislation should be supplemented accordingly.
163. Furthermore, child victims should be informed promptly, and in a child-sensitive manner about existing opportunities to obtain reparation from the offender or from the State through civil and other procedures.²²⁹ Such information should be provided by all those who are in contact with the victim, including health care services, victim support

²²⁵ *ibid.* par 87 (CRC Committee General Comment No. 14 (2013)).

²²⁶ *ibid.* pars 97-98 (CRC Committee General Comment No. 14 (2013)).

²²⁷ See page 28 of the Handbook on Guardianship for children deprived of parental care prepared by the European Union Agency for Fundamental Rights (FRA), June 2014 (hereinafter "2014 FRA Handbook on Guardianship"), available at http://fra.europa.eu/sites/default/files/fra-2014-guardianship-children_en_0.pdf.

²²⁸ *ibid.* page 99 (2014 FRA Handbook on Guardianship).

²²⁹ *Op. cit.* footnote 122, par 35 (2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime).

services, the police, law enforcement bodies and the courts,²³⁰ to his/her parents or guardians and legal representatives.²³¹ The provisions of the Criminal Procedure Code should be supplemented to that effect.

4.7. Civil Lawsuits, Compensation and Remedies

164. As regards the civil consequences of forced marriages, it is noted positively that Article 49 of the Family Law of Montenegro expressly provides that “[a] marriage may be annulled if a spouse has consented to enter into it for fear caused by force or serious threat” which is overall in line with Article 32 of the Istanbul Convention. However, it must be highlighted that the legal action required to seek annulment should not place an undue financial and administrative burden on the victim.²³² The lawmakers and stakeholders should ensure that this is not the case in practice and provide, as needed, the victim with the opportunity to seek free legal aid to obtain annulment by way of a simple and clear procedure.
165. Moreover, Article 53 of the Family Law provides that annulment cannot be sought if one year has elapsed from the day when coercion ceased, and if the spouses lived together during that time. In practice, it may be difficult for a victim to prove that coercion has not ceased and the time-limit of one year may be unduly restrictive. International good practices suggest that abolishing or extending time limits for lodging nullity petitions in order to protect victims of forced marriage is recommended, since many victims may lack the confidence to challenge their situation in the first years of marriage or may not be able to prove that coercion had not ceased, which would prevent them from petitioning for an annulment.²³³ The lawmakers and stakeholders should discuss whether such an extension of time limits for seeking annulment would be desirable given the national context in Montenegro.
166. Regarding compensation, it is particularly positive that Montenegro is considering establishing a state compensation scheme, as mentioned in Article 30 par 2 of the Istanbul Convention. In this context, OSCE/ODIHR would like to reiterate the recommendations made in its recent Opinion on the Compensation of Damages for Victims of Criminal Acts, particularly as it relates to the compensation of victims of domestic violence and other crimes of violence against women through such scheme.²³⁴
167. In addition to such compensation, victims should also be able to request compensation for damages suffered as a result of any of the offences established by the Istanbul Convention, through civil, administrative or criminal law. Article 114 of the Criminal Code refers to the possibility for an injured party to submit a claim for damages in criminal proceedings, which is positive, since this could avoid secondary victimization often caused by requiring the victim to go through several judicial processes (criminal and civil). To ensure that victims have actual access to compensation, they should be informed as early as possible about the possibility to seek compensation and about the

²³⁰ See Article 29 pars 1 and 2 of the Model Law on Justice in Matters involving Child Victims and Witnesses of Crime (2009) available at http://www.unicef.org/ceecis/UNDOC-UNICEF_Model_Law_on_Children.pdf.

²³¹ *ibid.* par 20 (2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime).

²³² See par 178 of the Explanatory Report to the Istanbul Convention.

²³³ See par 48 of the Report of the Office of the UN High Commissioner for Human Rights to the Human Rights Council on Preventing and Eliminating Child, Early and Forced Marriage, A/HRC/26/22, 2 April 2014, available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-22_en.doc.

²³⁴ *Op. cit.* footnote 2 (2014 OSCE/ODIHR Opinion on Compensation of Damages for Victims of Criminal Acts in Montenegro).

requisite procedure (see also pars 88-92 *supra*), and should also, to the extent possible, be provided with free legal assistance (see also pars 88-92 and 103-106 *supra*).

168. Finally, the existing legal framework does not seem to provide for a procedure whereby victims of violence against women and domestic violence may seek civil remedies for damages *against State authorities* for such authorities' failure to take the necessary preventive or protective measures within the scope of their powers.²³⁵ It is recommended that the Excerpts of Legislation, or other provisions as appropriate, be supplemented to expressly afford such a possibility to the victim.

[END OF TEXT]

²³⁵ See par 162 of the Explanatory Report to the Istanbul Convention.