



United Nations Special Rapporteur on the independence of judges and lawyers

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Preliminary observations on the official visit to Montenegro (19-26 September 2023)

At the invitation of the Government, I visited Montenegro from 19 to 26 September. During my visit, I met with high-ranking State officials as well as judges, prosecutors, lawyers and a wide range of civil society and non-government representatives. I wish to express my gratitude to the government of Montenegro for its support in the preparation of the visit.

These are my preliminary observations and recommendations on the independence of the judiciary in Montenegro.

I have seen much to commend in my time in Montenegro. By extending an invitation to my mandate to visit the country, the government has shown its commitment to improve the situation regarding the independence of judges and lawyers. And important steps have already been taken.

In the past several years, Montenegro has embarked on a far-reaching reform of the judicial system. Its Constitution guarantees the independence of the judiciary and creates a system of institutional bodies to safeguard the separation of powers. Legislation spells out detailed rules and procedures for the selection and appointment of judges and prosecutors, as well as other essential aspects of the judicial and prosecutorial career. More recent legislative amendments have been drafted based on consultation with judges, prosecutors and others; this inclusive approach, which seeks to learn from those with experience of the functioning of the justice system, is crucial to ensuring its strength and resilience.

In addition to these positive laws, I have seen evidence of good practice. Montenegro is a place where energetic political debate flourishes, and I have been particularly struck by the country's dynamic and committed civil society sector. These NGOs work with extraordinary dedication to

protect and promote fundamental human rights; their continued involvement in law reform, and in uncovering and seeking redress for human rights abuses, should be welcomed.

Within the formal justice system, the Special Prosecutor's Office has taken a proactive approach to investigating and charging conduct falling within its remit, and demonstrated independence in its willingness to consider evidence against persons at all levels of the social and political hierarchy in Montenegro. I also note that the Protector of Human Rights and Freedoms enjoys widespread trust and respect in Montenegrin society.

And over the past week, many interlocutors have told me their experience of good and fair judges and prosecutors, who are doing everything they can to deliver truly independent and impartial justice. But these professionals risk becoming discouraged and disheartened by a system which is alleged to be impacted by corruption and nepotism, and which fails properly to evaluate, recognize and reward their hard work. Meanwhile, ordinary people often find themselves excluded, let down, and unprotected by the same system, which doesn't do enough to prioritize quality, integrity and human rights.

In this statement, I will address human rights standards relevant to judges, prosecutors, lawyers, and the need to ensure access to justice for everyone. For each of these principles, I will outline problems with the functioning of the justice system that I have been informed of, or witnessed, in Montenegro, and give my suggestions for how this situation may be improved for the benefit of all.

I begin with the imperative of judicial independence.

It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary and the prosecution service.

The establishment of the Judicial and Prosecutorial Councils represents an important step for insulating the judiciary and the prosecution service from undue political interference. However, issues arise regarding their composition and effective functioning. In accordance with international standards, these councils should include among their members a majority of judges and prosecutors elected by their peers. They may also include lay members such as lawyers, academics, and civil society representatives, but their selection and appointment should be preferably entrusted to a non-political body. I repeatedly heard concerns that the inclusion of practicing defense lawyers on the Prosecutorial Council gives the appearance of a conflict of interest, as well as presenting a risk of actual conflict. Solutions should be proposed that acknowledge this potential conflict and include consideration of whether the role of non-practising or academic lay members should be increased.

The Constitution provides that the Minister of Justice shall be a member of the Judicial Council, although the Minister is precluded from voting in disciplinary proceedings. This restriction represents an important safeguard against political interference with the judiciary. However, I note the potential for decisions about other aspects of the judicial career, including on the

transfer and promotion of judges, to have a comparable effect to disciplinary decisions. I advise that this risk of so-called “disguised sanctions” should be taken into account in rules regarding the decisions on which the Minister of Justice is permitted to take part. Many actors reported that the inclusion of an eminent lawyer proposed by civil society on the Prosecutorial Council has improved transparency and public trust in the Council. Parties should consider whether a similar practice with regard to the Judicial Council could have the same positive impact.

Decisions on the appointment of judges and prosecutors should be based solely on merit, having regard to the qualifications, skills and capacities of the candidates, as well as to their integrity, independence and impartiality.

While it is appropriate for the legislative branch to be involved in the appointment of apex judges and prosecutors, in practice, political non-action has led to multiple vacuums in key institutions. The Parliament has failed, on multiple occasions, to elect the seventh member of the Constitutional Court, the Supreme State Prosecutor, and new lay members of the Judicial Council. As a result, strategic leadership in these institutions is lacking, and planning and action for reform of the system is not possible. Members of Parliament must put the interests of their country above politics, and ensure these appointments take place without any further delay.

The effective realisation of the principles of independence and separation of powers presupposes that the judiciary and the prosecution service are provided with adequate resources to enable them to properly perform their functions. However, almost all the judges and prosecutors I spoke to were clear that they work in conditions that are manifestly underfunded. Buildings are old, too small, and in a poor state of repair. There is insufficient office space, meaning offices are crowded, and it is difficult for prosecutors to conduct interviews out of earshot of colleagues.

During my visits to courts, I was shocked to see and hear about inadequate facilities for storage of archives and evidence, including firearms and drugs. Additionally, privacy and confidentiality issues arise from the failure to ensure that archives are stored suitably, away from public view. Although various governments have outlined plans for new court buildings over the years, these have not resulted in concrete improvements. Furthermore, I was repeatedly informed that IT systems and digitalization are near-non-existent. And judges and prosecutors, in particular those dealing with corruption, organised crime and politically-sensitive cases, face significant security risks that do not appear to be taken sufficiently into account by responsible national authorities, such as the Ministry of Interior and the police.

In view of these deficiencies, I consider that additional resources should be provided to the two councils. Moreover, decisions on the allocation of funds to courts and prosecution services must be taken with the strictest respect for the principle of judicial and prosecutorial independence.

The independence of the judiciary and the prosecution service also depend on the term of office of judges and prosecutors and their conditions of service. A number of judges I met during my visit expressed concerns about the application of rules on the pension and retirement age, which—in a discriminatory manner—forced many female judges into retirement sooner than they had expected, and at an earlier date than their male counterparts. Furthermore, both judges and

prosecutors told me that their salaries were not sufficient to provide for a respectable and decent quality of life. The issue of adequate remuneration is vital, as this is one of the mechanisms by which the State can insulate judges from external influence, pressure or interference by way of bribery and corruption.

I wish to stress that work-related rights of judges, including their retirement age, and the right to an adequate salary, should be clearly regulated by law. These issues should not be left to be regulated by the general laws on public servants, having regard to judges' special status in society, and the need to protect and uphold the basic principle of judicial independence.

Attacks to the independence and impartiality of the judiciary appear to be common in Montenegro. At times, politicians and media outlets put individual judges or prosecutors under the spotlight, in an apparent attempt to influence their decision-making toward one desired result. I have seen instances where the government appears to take credit for the actions of judges and prosecutors when they are politically advantageous. On other occasions, individual judges or prosecutors, or the entire judicial system, are depicted by partisan groups as lacking independence, impartiality or autonomy.

This is not acceptable in a democratic State governed by rule of law. Any attack, threat or interference with the legitimate activities of the State institutions in charge of upholding the rule of law is an attack on the State as a whole, and undermines the capacity of these institutions to exercise their constitutional functions impartially and in accordance with the law.

The recent and well-publicized discovery of a tunnel into the basement evidence storage area of the High Court in Podgorica is emblematic of the issues I have already discussed. It provides evidence of inadequate security, dramatically inadequate infrastructure and poor court design, and the high risk of exposure of the justice system to interference by outside actors. Furthermore, the reaction to this news demonstrates the pervasive tendency by political actors to engage in public commentary on the conduct of judges and prosecutors, and take credit for prosecutorial actions. While recognizing the need to secure investigations, the public has a right to clear, accurate, coordinated information from a reliable authority, instead of receiving a morass of conflicting evidence from politicized sources.

The next matter I want to address is the requirement of judicial integrity.

Integrity is essential to the proper discharge of the judicial office. To this end, judges must ensure that their conduct is above reproach in the view of a reasonable observer. Furthermore, the behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done. Similarly, prosecutors must at all times maintain the honour and dignity of their profession.

In 2022 and 2023, Montenegro witnessed an unprecedented number of criminal cases brought by the Special Prosecutor's Office against high-profile actors in multiple branches of the judiciary, including the former President of the Supreme Court, the former President of the Commercial Court, a former Special Prosecutor, and a former prosecutor of a basic court. Indictments include

allegations of creation of a criminal organization, corruption, and abuse of office. The outcome of these cases is pending and must be left to the proper operations of the judicial system.

However, these events can have done little to affirm the faith of the people of Montenegro in the integrity of the judiciary. In these circumstances, it is vital that institutions which have been tasked with considering disciplinary allegations about judges and prosecutors are proactive, rigorous and fair, and are seen by the public to be acting in this way. I was surprised to hear of the low number of disciplinary proceedings before both the Judicial and Prosecutorial Councils. I heard that the majority of these proceedings related to what were described as minor errors in the declaration of income or assets.

In my discussions with civil society actors and NGOs, I heard many reports of complaints made to the Judicial or Prosecutorial Council regarding serious lapses of conduct by judges and prosecutors, all of which reportedly received no response. All complaints deserve to be treated appropriately, considered carefully and receive a response, whatever the outcome. Such responses must be adequately transparent and well-reasoned to permit the complainant to understand the decision taken by the Councils.

In addition to requiring the judiciary to act with integrity, international standards mandate that judges and prosecutors carry out their duties impartially. Judges must not allow personal bias or prejudice to influence their decisions, and must also appear to be impartial to a reasonable observer. With a population of about 630,000, many people in Montenegro are well known to one another. This creates particular obstacles to fulfilling the requirement of impartiality, as does the shortage of judges and prosecutors in many communities. These special circumstances make it even more important that robust complaints and disciplinary mechanisms are in place to ensure reports of actual or perceived bias are addressed in a way that helps to reinforce trust in the justice system.

But these are not the only factors relevant to increasing public trust. The people of Montenegro must also feel that their justice system delivers high-quality procedures and justifiable outcomes. Competence and diligence are prerequisites to the due performance of judicial office. A judge shall perform all judicial duties efficiently, fairly and with reasonable promptness.

Interlocutors expressed consistent concerns about the deep dysfunction of the judicial system and unjustifiably long delays in obtaining justice. I heard of the preliminary phase of some organized crime and domestic violence cases taking as long as 7 years. I was told that the statute of limitations had been permitted to expire in some cases, and that constitutional complaints can take between 4 and 5 years, putting their status as an effective remedy in question.

These delays have multiple causes. The Constitutional Court was left without a decision-making quorum between September 2022 and February 2023. The unexpected early retirement of many female judges created a deficiency in judicial numbers that is yet to be resolved. The failure to make appointments to key leadership positions has limited the capacity to take strategic decisions on the operations of the judiciary and the resolution of the backlog. And finally, we

heard that there are regional disparities in human resources, including in relation to professional support from advisors. Furthermore, I was informed that a high proportion of court judgments go unenforced. Judges must be supplied with appropriate systems that facilitate the discharge of their duties. It is incumbent upon the State and the Judicial and Prosecutorial Councils to investigate and endeavor to resolve these issues.

Beyond these systemic concerns, judges have individual responsibilities for ensuring their competence and diligence. During my visit, concerns were expressed that many judicial decisions are not fully reasoned, nor are they based on proper application of all relevant national and international law. To ensure their competence and diligence, judges should undergo evaluation according to objective criteria including whether they give fully reasoned decisions based on appropriate case law and precedent and relevant international conventions, and whether they impose penalties that are in line with the prescribed legal guidelines. Delays in the conduct of a case may be relevant if they have led to the expiry of the statute of limitations, particularly in view of the possibility that such action may be evidence of an intentional failure to progress certain cases.

In addition to competence and diligence, ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office. A judge shall be aware of, and understand, diversity in society and differences arising from various sources, avoid manifesting bias or prejudice towards any person or group and carry out judicial duties with appropriate consideration for the dignity of all persons. Similarly, prosecutors must avoid all forms of discrimination.

During my visit, several judges and prosecutors advised me that there were few or no groups who faced obstacles to attending court or accessing justice in Montenegro. This is in direct contradiction to what we were told by users of the court system, and suggests that judges are not taking steps to ensure that they are adequately informed about social diversity, nor are they carrying out their judicial duties with appropriate consideration for the differentiated needs of groups facing marginalization and discrimination.

I have spoken in detail about the independence, integrity and quality of the judiciary and prosecutorial services. But lawyers also have a vital role to play in the functioning of the justice system.

Governments must ensure lawyers can function without interference and intimidation. I heard about cases in which lawyers were harassed for doing their job, including lawyers “becoming a target” for objecting to delays or procedural errors. I also identified apparent violations of the principle that lawyers shall not be identified with their clients. During several interviews with Government officials, lawyers who have represented individuals charged with acts related to organized crime were identified with their clients. One official referred to such attorneys as “mafia lawyers,” and others made similar insinuations. Such statements have also been quoted in news stories. Lawyers also spoke of threats and actual violence as a result of their work as lawyers.

The Bar Association of Montenegro must actively monitor compliance with the Attorneys' Code of Ethics and take steps to ensure its members treat all people with equality and dignity. Given the apparently very small number of lawyers coming from vulnerable and marginalized communities in Montenegro, the Bar Association should take positive steps to encourage youth from these communities to train as lawyers, and dismantle any obstacles that may make integration into the profession difficult for such community members.

The role of lawyers in encouraging participation of marginalized groups in the justice system leads me to my final topic: the extent to which access to justice is available in Montenegro.

The right of access to justice is guaranteed in numerous treaties to which Montenegro is a party. However, advocates and survivors told me that the judicial system fails to ensure access to justice for all. Observations during the visit, as well as information provided by CSOs and judicial actors illustrated the many obstacles lining the path to justice for many individuals and communities.

Problems with physical accessibility were readily apparent: many courthouses and other legal buildings are inaccessible to users of wheelchairs and there is little provision for persons with visual impairments.

Furthermore, procedural adaptations are absent. Documents and court decisions are not available in braille, and court-certified interpreters and translators are not available for users of Romani.

Vulnerable and marginalized communities have systematically sought the help of the judicial system to guarantee their rights. I have learned of reports of excessive delays, insensitive or uninformed judges and prosecutors, and a lack of political will to make progress.

As regards the equal rights of LGBTI persons, I understand that hate crimes against persons based on their sexual orientation or gender identity have been rarely qualified as such. Prosecutors and judges allegedly classify bias crimes as ordinary assaults, failing to seek their qualification as hate crimes.

I learned that prosecutors and judges have failed to apply the law to effectively protect Roma and Egyptian girls from human trafficking. And despite numerous examples of discrimination in everyday life, I understand that the courts of Montenegro have repeatedly failed to find discrimination.

Persons with disabilities have been able to win discrimination cases and fines related to inaccessible public buildings, but there is a need for stronger commitment of officials to make needed changes to buildings, processes, and practices.

I heard that survivors of family or intimate partner violence experience systemic failures, lack of gender-sensitive support, and disparagement by judges and prosecutors. Some survivors have been made to face perpetrators in court; have had their children taken from them by their former partners despite having legal custody; and had to wait for years for court decisions that were meant to be prioritized. I learned of one shocking example of an abuser coming into the courtroom openly carrying a firearm despite having gone through security screening. I also heard that offenses are too often minimized by being classified as misdemeanors rather than crimes, and that temporary protective measures are not used with sufficient regularity. The failure to recognize the seriousness and escalating nature of these crimes has had tragic consequences; I was informed of more than one case where women have been killed in circumstances where authorities were aware that they were regularly experiencing violence from their partners.

The existence of such consistent and pervasive failures across the justice system speaks of the need for greater specialization in these complex and sensitive cases. Furthermore, the expertise and dedication of NGOs working in these sectors should be recognized and funded through the government budget for Free Legal Aid. Funding for additional services to support vulnerable court users, such as accompaniment, should also be considered.

Lastly, the collection of disaggregated data must be improved to inform activities aimed at improving access to justice or reducing discrimination, and permit changes to be tracked over time. However, this change cannot be implemented until Montenegro has a robust system of digitalization in place.

I have outlined many issues that I observed in multiple parts of the justice system. My audience may feel overwhelmed by the account I have given.

But I submit that it is clear what Montenegro has to do, and that the country is capable of meeting the challenges ahead. I was repeatedly told by interlocutors from all parts of the judiciary, prosecution and civil society that many of the laws and systems necessary to ensure independence, integrity and quality justice services are now in place. However, implementation, and the will to improve that implementation, remains deficient.

If Montenegro cannot, or will not, take appropriate steps to ensure the independent, impartial and competent functioning of the entire judicial system, then a radical accountability measure, such as vetting, must be considered.

If this radical step is taken, then the State must guarantee that the vetting process is independent, objective, temporary, and respects the right to a fair trial of all who are affected. The establishment and composition of vetting bodies must be set out in law. The membership and character of vetting bodies should be judicial and not political, and the vetting process should include an appeal tribunal in line with human rights standards.

It is for the people of Montenegro to decide whether vetting is the appropriate measure to strengthen the independence and impartiality of the judiciary and the prosecution service.

Partners in the international community should stand ready to support this process, if it is adopted, to ensure it is robust, fair, and does not result in delays that would impede vital access to justice.

In closing, I want to recognize the individuals who I met in every part of the system, and in civil society, who are sincerely working, in good faith, to provide justice and to serve their country. I salute your efforts and stand ready to offer my assistance and support, and encourage all others in Montenegro and the broader international community to do the same.