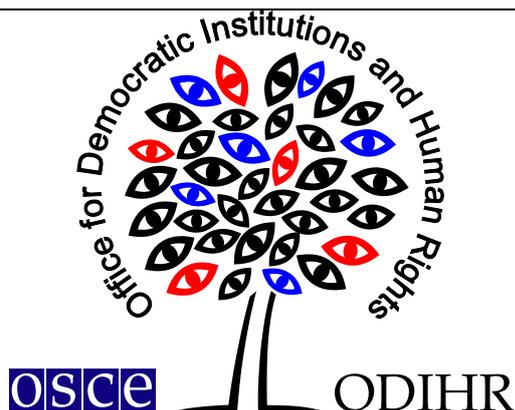


Warsaw, 26 July 2014

Opinion-Nr.: CRIM-MNE/253/2014 [AIC]

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OPINION

ON THE DRAFT LAW ON COMPENSATION OF DAMAGES FOR VICTIMS OF CRIMINAL ACTS IN MONTENEGRO

based on an unofficial English translation of the draft law

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Annex: Draft Law on Compensation of Damages for Victims of Criminal Acts in Montenegro

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 the legal framework on preventing and combatting violence against women and domestic violence in Montenegro to assess its compliance with the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter “the Istanbul Convention”).*
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.*
3. *On 18 June 2014, the OSCE Mission to Montenegro informed that the Committee for Gender Equality of the Parliament of Montenegro further requested the full review of the Draft Law on Compensation of Damages for Victims of Criminal Acts (hereinafter “the Draft Law”), initially part of the above-mentioned package, which will be examined by the Parliament of Montenegro in autumn 2014 and thus requires prioritization.*
4. *This Opinion on the Draft Law was prepared in response to the latter request and will be succeeded by a second OSCE/ODIHR Opinion on the legal framework on preventing and combatting violence against women and domestic violence in Montenegro.*

II. SCOPE OF REVIEW

5. The scope of this Opinion mainly covers the Draft Law submitted for review. The Opinion focuses on aspects relating to the establishment and functioning of a state compensation scheme/fund covered by the Draft Law. Thus limited, it does not constitute a full and comprehensive review of the entire legal and institutional framework pertaining to the full and effective reparation¹ of victims² of criminal acts in Montenegro. It must be highlighted that the upcoming OSCE/ODIHR Opinion on the legal framework on preventing and combatting violence against women and domestic violence in Montenegro will further address other aspects pertaining to the reparation of victims of violence against women and domestic violence.
6. The Opinion raises key issues and provides indications of areas of concern. In the interests of conciseness, the Opinion focuses more on problematic areas rather than on the positive aspects of the Draft Law. The ensuing recommendations are based on international standards and practices related to the compensation of victims of criminal acts, as well as on relevant OSCE commitments. The Opinion will also seek to highlight good practices from other OSCE participating States in this field. Additionally, the

¹ Full and effective reparation includes the following forms: restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition; see par 18 of UN Declaration of Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution A/RES/60/147, 16 December 2005, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

² 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.

Opinion also refers as appropriate to certain European Union (hereinafter “the EU”) legal standards, given Montenegro’s aspirations to join the EU.³

7. This Opinion is based on an unofficial translation of the Draft Law provided by the OSCE Mission to Montenegro, which has been attached to this document as an Annex. Errors from translation may result.
8. In view of the above, the OSCE/ODIHR would like to 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

9. At the outset, it should be noted that this Draft Law is overall compliant with the provisions of the Council of Europe Convention on the Compensation of Victims of Violent Crimes and the 2004 European Council Directive relating to compensation of crime victims (hereinafter “the 2004 Directive”).⁴ The authors of the Draft Law are to be commended for establishing a state compensation scheme that should ensure that victims of criminal acts receive proper compensation also in cases where perpetrators cannot be found or are not in a position to pay damages, including in cross-border situations.
10. At the same time, the Draft Law could do more to address the specific situations of certain victims, such as victims of domestic violence or of trafficking in human beings as defined in Montenegrin legislation, or victims who may be particularly vulnerable due to their age or other circumstances. In particular, the requirements for seeking compensation and the criteria to determine the level of compensation may constitute potential barriers for victims of domestic violence and trafficking victims to obtain compensation. Moreover, certain eligibility criteria such as conditions of nationality or residency status may indirectly discriminate victims of trafficking in human beings. Finally, to ensure that the state compensation scheme is operational and effective, sufficient human and administrative resources should be allocated to support the functioning of the fund and sources of funding of the State compensation scheme should be adequate, stable and reliable.
11. In order to ensure the full compliance of the Draft Law with international standards and to render certain provisions more effective, the OSCE/ODIHR thus recommends as follows:

1. Key Recommendations

- A. to supplement Article 3 of the Draft Law to expressly refer to victims of trafficking in human beings, of violence against women, including domestic violence and sexual offences, while specifying that compensation can be sought

³ Although not a member of the EU, Montenegro was officially granted candidate status for EU membership on 17 December 2010 and thus is held to ensure compliance of its legislation with EU legislation (see the 2013 Montenegro Progress Report of the European Commission available at http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/montenegro_2013.pdf).

⁴ Council Directive 2004/80/EC of 29 April 2004 relating to compensation of crime victims (hereinafter “2004 Directive”), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:261:0015:0018:en:PDF>.

regardless of the legal classification or qualification of the offence and with due consideration being given to the circumstances of the facts; [pars 34-37]

- B. to consider broadening the scope of Articles 1 and 3 of the Draft law to ensure that psychological damage alone, and/or pain and suffering could be compensated even in the absence of a physical injury and broaden the scope of compensation of dependants to cover not only the loss of legal maintenance but also non-pecuniary loss; [pars 39-40]
- C. to remove in Article 7 of the Draft Law the nationality and residency requirements to seek compensation from the state compensation fund, at minimum for victims of trafficking in human beings and of violence against women, including domestic violence; or alternatively to ensure that the notion of “residence” is given a flexible understanding; [pars 29-31]
- D. to clarify in Article 8 of the Draft Law the circumstances where the report to the police or prosecutor is not needed and consider providing a list of exemptions from reporting for specific primary victims who are highly vulnerable or known to be unlikely to report the crime to the police; [pars 55-57]
- E. to consider establishing in Article 23 of the Draft Law longer time periods for the registration of the compensation claim, particularly for specific types of crimes which are of a particularly traumatizing nature, or even for no time limit at all for certain crimes committed against children; [pars 59-61]
- F. to clarify in Article 36 of the Draft Law that compensation from the state fund is payable to the victim irrespective of the offender’s identification, arrest, prosecution or conviction; [par 70]

2. Additional Recommendations

- G. to expressly state under Section I of the Draft Law certain key principles, such as the principle of non-discrimination and the prevention of secondary victimization; [par 18]
- H. to clarify in Article 2 of the Draft Law the meaning of “dependants” and ensure that it is given a broad understanding; [par 32]
- I. to clarify Article 3 of the Draft Law to ensure that compensation can be sought based on the proof of the materiality of the offense or clarify the situations where the applicant will not be able to exercise the right to compensation; [par 48]
- J. to amend Article 13 of the Draft Law as follows:
 - 1) supplement the provision to ensure that the safety of the victims is taken into account by the state authorities; [par 58]
 - 2) exclude the application of the contributory conduct clauses in cases of domestic violence and of trafficking in human beings; [pars 64-66]
- K. to supplement the provisions regarding the composition and functioning of the Compensation Commission as follows:
 - 1) expressly state in Article 18 of the Draft Law that no more than three members of the Compensation Commission shall be of the same gender and supplement Article 19 of the Draft Law to ensure that nomination and appointment modalities comply with the gender balance requirements and specify the consequences of infringement; [pars 42-43]

- 2) clarify in Article 19 of the Draft Law whether the Government is bound by the nominations of candidates proposed by the nominating entities; [par 44]
 - 3) to specify in Article 21 of the Draft Law that the Compensation Commission is in charge of developing and adopting its Rules of Procedure; [par 44]
 - 4) to state under Article 30 of the Draft Law the content of the decision of rejection, including the reasons and legal grounds and provide for a possibility of review; [par 46]
- L. to state more clearly in Articles 21 and 38 of the Draft Law the modalities for managing and financing the state compensation scheme as follows:
- 1) clarify the institutional set-up, including support staff, for administering and managing the compensation scheme within the Ministry of Justice; [par 20]
 - 2) introduce budgetary mechanisms to ensure that the budget is adequate, stable and reliable; [par 22]
 - 3) devise a funding mechanism whereby the confiscated assets of criminal offenders are allocated to the state compensation fund and revise as appropriate the criminal and criminal procedure codes to that end; [pars 23-25]
- M. to consider in Article 17 of the Draft Law extending the duty to inform the victims to other public authorities while ensuring greater co-operation with civil society organizations and providing child-sensitive information modalities; [pars 51-53]
- N. to supplement Articles 39 to 41 of the Draft Law to ensure that adequate safeguards and mechanisms for the protection of the personal data of victims, including their anonymisation at a certain point in time, are in place and that the victims are duly informed and have given their explicit and informed consent to the data recording and storage; [pars 73-78]
- O. for the drafters and stakeholders in Montenegro to:
- 1) discuss the potential mechanisms to ensure that victims of domestic violence and child victims of crimes do receive the compensation award and dispose of it; [pars 67-69 and 72] and
 - 2) ensure that a proper impact assessment of the new legislation is carried out which covers the financial, administrative and human resources costs relating to the management of the state compensation fund and procedure of compensation, as well as the actual payment of compensation awards and the mechanism for contributing to the fund. [pars 19-20]

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards

12. This Opinion analyses the Draft Law from the viewpoint of its compatibility with relevant international human rights standards and OSCE commitments. Key general international human rights instruments applicable in Montenegro contain express provisions relating to the rights of every person to an effective remedy for acts violating human rights, namely Article 2 of the UN International Covenant on Civil and Political

Rights (hereinafter “ICCPR”)⁵ and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”)⁶.

13. The key regional instrument ratified by Montenegro specifically dealing with the compensation of victims of crimes and State compensation schemes is the Council of Europe (hereinafter “CoE”) Convention on the Compensation of Victims of Violent Crimes (hereinafter “the CoE Compensation Convention”).⁷ Some other international and regional instruments provide for a right of victims to claim compensation for specific criminal acts, namely the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children to the UN Convention against Transnational Organized Crime (hereinafter “the UN Palermo Protocol”),⁸ the CoE Convention on the Prevention of Terrorism⁹ and the CoE Convention on Action against Trafficking in Human Beings.¹⁰ Regarding the compensation of victims of acts of violence against women, Article 2 (c) of the UN Convention on All Forms of Discrimination against Women¹¹ (hereinafter “CEDAW”) provides that State Parties shall establish legal protection of the rights of women on an equal basis with men. Article 4 of the UN Declaration on the Elimination of Violence against Women¹² further states that women who are subjected to violence should be informed about and provided with access to the mechanisms of justice and to just and effective remedies for the harm that they have suffered. Moreover, at the European level, Article 30 par 2 of the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter “the Istanbul Convention”) specifically provides that “[a]dequate State compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions” (Montenegro has not made any reservation with respect to this provision).¹³
14. In addition, as a candidate country to join the EU,¹⁴ Montenegro has undertaken to make its legislation compliant with the EU *acquis*. Therefore, this analysis of the Draft Law

⁵ The UN International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) on 16 December 1966 and Montenegro succeeded to it on 23 October 2006.

⁶ The CoE Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entered into force on 3 September 1953. Montenegro ratified the Convention, as well as Protocol No. 12, on 3 March 2004.

⁷ 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>, was ratified by Montenegro on 19 March 2010.

⁸ The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children to the UN Convention against Transnational Organized Crime was adopted by General Assembly resolution 55/25 of 15 November 2000 (hereinafter “the UN Palermo Protocol”), available at <http://www2.ohchr.org/english/law/protocoltraffic.htm>. Montenegro succeeded to the Convention and its Protocol on 23 October 2006.

⁹ The CoE Convention on the Prevention of Terrorism (CETS No. 196), available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&CM=1&NT=196>, was ratified by Montenegro on 12 September 2008.

¹⁰ 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.

¹¹ The UN Convention on the Elimination of All Forms of Discrimination against Women was adopted by resolution 34/180 of the General Assembly at its thirty-fourth session, 18 December 1979. Montenegro succeeded to this Convention on 23 October 2006.

¹² UN Declaration on the Elimination of Violence against Women, General Assembly Resolution A/RES/48/104, 20 December 1993, available at <http://www.un.org/documents/ga/res/48/a48r104.htm>.

¹³ The CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210), was ratified by Montenegro on 22 April 2013 and will enter into force on 1 August 2014.

¹⁴ Following the entry into force of the Stabilisation and Association Agreement with the EU on 1 May 2010, Montenegro was officially granted candidate status for EU membership on 17 December 2010. Accession negotiations between the EU and Montenegro officially started on 29 June 2012.

will take into account relevant EU legislation, particularly the 2004 Directive relating to compensation of crime victims, which sets up a system for co-operation to facilitate access to compensation to victims of crime in cross-border situations and the 2012 EU Directive establishing minimum standards on the rights, support and protection of victims of crime.¹⁵

15. The right of victims to compensation by the State is also supported by other ‘soft law’ documents such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985),¹⁶ the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹⁷ and the CoE Committee of Ministers’ Recommendation Rec(2006)8 on assistance to crime victims.¹⁸
16. In 2003, the OSCE participating States adopted the OSCE Action Plan to Combat Trafficking in Human Beings,¹⁹ which specifically recommends the establishment of a compensation fund for victims of trafficking and the use of the confiscated assets from the traffickers to help finance such a fund. The Action Plan was later supplemented by the Permanent Council Decision No. 1107 adopted in December 2013,²⁰ which, next to more general standards on prevention, prosecution and protection from trafficking in human beings, in particular states that access of victims of trafficking to the State compensation fund or other relevant mechanisms should be irrespective of their legal status or nationality. Additionally, the OSCE Ministerial Council Decision 15/05 on Preventing and Combating Violence Against Women (2005) calls on OSCE participating States to ensure that all female victims of violence will be provided with full, equal and timely access to justice and effective remedies.

2. General Comments

17. At the outset, the OSCE/ODIHR would like to commend the drafters for the overall compliance of the Draft Law with the provisions of the CoE Compensation Convention and of the 2004 Directive. However, it must be noted in this context that the provisions contained in the CoE Compensation Convention were aimed at providing minimum and very general standards, but that this does not prevent individual member States from broadening the personal scope of the beneficiaries, the types and levels of compensation granted, and putting in place more generous compensation arrangements. Moreover, in the meantime, other more recent conventions have also more specifically addressed the

¹⁵ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>.

¹⁶ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution A/RES/40/34, 29 November 1985, available at <http://www.un.org/documents/ga/res/40/a40r034.htm>.

¹⁷ UN Declaration of Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution A/RES/60/147, 16 December 2005, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

¹⁸ Recommendation CM/Rec(2006)8 of the Committee of Ministers to CoE member states on assistance to crime victims, adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers’ Deputies, available at <https://wcd.coe.int/ViewDoc.jsp?id=1011109&>.

¹⁹ OSCE Ministerial Council Decision MC.DEC/2/03 on Combating Trafficking in Human Beings (OSCE Action Plan to Combat Trafficking in Human Beings), available at <http://legislationline.org/documents/action/popup/id/8407>.

²⁰ OSCE Permanent Council Decision PC.DEC/1107/Corr.1 Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later, available at <http://legislationline.org/download/action/download/id/5079/file/OSCE%202013%20Addendum%20to%20THB%20Action%20Plan.pdf>.

right of victims to claim compensation for specific criminal acts.²¹ This is all the more important given the recent ratification of the Istanbul Convention by Montenegro, which contains specific provisions on compensation for victims of violence against women, including domestic violence, as well as the need for Montenegro to bring its legal framework into compliance with international standards in terms of compensation of victims of trafficking.²² However, the financial impact of an extended scope must be kept in mind given the costs associated with the establishment and functioning of such State compensation schemes which are usually quite expensive²³ (see pars 19-25 *infra*).

18. In the context of the compensation of victims, Section I of the Draft Law on Basic Provisions could be supplemented by expressly stating certain key principles which are of particular relevance to the national context, such as the principle of non-discrimination (especially with regard to sex, gender identity, sexual orientation, race, ethnicity or nationality) to ensure that all victims of crime and/or their “dependants” (see comments on the term “dependant” in par 32 *infra*) fully enjoy equal access to compensation.²⁴ Another principle which is essential in any reparation process that would be worth mentioning as a guiding principle under Section I, would be the prevention of “secondary victimization”, 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.²⁵ In that respect, it is worth mentioning the importance of ensuring that all public personnel that comes into contact with victims, including those involved in the administration of public compensation schemes, will receive sufficient and continuous training on the issue of “secondary victimization”,²⁶ and more generally on the existence and modalities of the State compensation scheme.

²¹ See pars 13-14 of the Explanatory Report to the CoE Compensation Convention available at <http://conventions.coe.int/Treaty/EN/Reports/Html/116.htm>.

²² See pars 20-21 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>, which states in particular to “[e]xpeditiously efforts to establish a national mechanism for compensating victims of trafficking and strengthen programmes for their reintegration into society”. See also pars 164-166 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.

²³ See OSCE/ODIHR Report on Compensation for Trafficked and Exploited Persons in the OSCE Region (2008), available at <http://www.osce.org/odihr/32023>. Even if it is not appropriate to compare the budgets allocated to State compensation schemes of different OSCE participating States, given differences in salary/cost of living, population and number of claims, etc., for instance the total costs of running the UK Criminal Injuries Compensation Authority scheme in terms of administration and staff in 2004/5 was £19 million and in this period 67,000 cases were resolved for a total of £321 million spent on the compensation payments themselves.

²⁴ See Recitals (9), (15) and article 1 of the EU Directive establishing minimum standards on the rights, support and protection of victims of crime. See also par 2.2. of the Appendix to Recommendation Rec(2006)8 and page 11 of the 2013 Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe by Victim Support Europe and co-funded by the Criminal Justice Programme of the EU, available at http://victimsupporteurope.eu/activeapp/wp-content/files_mf/1385974688NewVersionVSEHandbookforImplementation.pdf.

²⁵ See par 1.3 of the Appendix to CoE Recommendation Rec(2006)8. Secondary victimization may be due for instance to 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 Chapter 5 of the 2009 Report on Non-Criminal Remedies for 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”).

²⁶ See pars 3.3 and 12.2 of the Appendix to CoE Recommendation Rec(2006)8 and *ibid.* par 181 (2009 Report on Non-Criminal Remedies for Crime Victims).

3. Financing and Management of the State Compensation Scheme

19. Should this not have taken place already, it would be advisable to conduct a full impact assessment of the planned legislation, including a gender, social and financial impact assessment. A look at the financial consequences of the new legislation should cover not only the financial, administrative and human resources costs relating to the management of the funds and procedure of compensation, but also the actual payment of compensation awards and the mechanism for contributing to the State fund.
20. First, Article 21 par 5 of the Draft Law states that the Ministry of Justice shall perform professional, administrative and technical support for the Commission for financial compensation of victims of criminal offences (hereinafter “the Compensation Commission”), which is composed of a president and four members. Such provision is relatively vague and it is not clear whether a proper assessment of the needed financial, administrative and human resources costs relating to the management of the funds, the management of confiscated assets, if applicable (see par 23 *infra*), and the procedure for payment of compensation awards has been carried out. The institutional framework for managing state compensation funds varies greatly from state to state, from an autonomous private entity with legal personality under the oversight of the State (e.g., in France) to a dedicated department of a Ministry (e.g., in the Czech Republic) to an executive agency which operates with a degree of autonomy from the Ministry of Justice (e.g., in the UK).²⁷ Given the potentially important distribution and flow of compensation funds, it is important that a clear separation exists between the entity managing the funds, and the general structure of the Ministry of Justice. It would be advisable to state more clearly in the Draft Law the institutional set-up, including support staff, for administering and managing the compensation scheme within the Ministry of Justice, as this would also have an impact on the budget allocations, financial management, as well as reporting.
21. As regards more specifically the source of funding, Article 38 of the Draft Law provides that “funds for the implementation of the Law shall be provided in the budget of Montenegro from the funds of the Ministry [of justice]”. Article 38 par 2 of the Draft Law further states that “the recovery of funds acquired without cause and the amount payable by the suspect under the Code on Criminal Procedure for the purpose of compensation of damage to victims of criminal offences in the fulfilment of obligations established by decision of the state prosecutor on deferred prosecution shall be paid to the budget of Montenegro”.
22. First, it is uncertain whether such sources of funding of the State compensation scheme can be considered to be adequate, stable and reliable, as recommended by international experts.²⁸ While the fact that the funding emanates from the budget of the Ministry of Justice is positive as the source of funding is clearly stated in the Draft Law, it cannot be excluded that the budget allocation may at times be insufficient or vary greatly from one year to the other. Regardless of whether estimates of the potential compensation amounts involved on a yearly basis are available and whether a proper financial impact

²⁷ See the European E-Justice Portal available at https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-en.do which informs about various EU Member States State compensation schemes. For the UK specifically, see <https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority> and, on the various forms of public bodies, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80075/Categories_of_public_bodies_Dec12.pdf.

²⁸ *Op. cit.* footnote 25, par 217 (2009 Report on Non-Criminal Remedies for Crime Victims).

assessment was carried out to assess an approximate budget for the administration of the fund and payment of compensation awards, the Draft Law could at least provide for certain safeguard mechanism to ensure that the budget allocation does not vary too much from one year to the other and is adequate to meet the needs of the scheme. Such mechanism could involve a procedure whereby the Compensation Commission could be in charge of preparing a budget proposal or at minimum that the Ministry of Justice should consult the Compensation Commission and obtain its opinion on the proposed budget. Article 38 of the Draft Law could be supplemented to that effect.

23. Second, if the contemplated fund indeed aims at compensating victims of trafficking in human beings, as mentioned in the 2012 Report on Montenegro of the Group of Experts on Action against Trafficking in Human Beings (hereinafter “GRETA”),²⁹ then good international practices suggest that fines or confiscated assets of traffickers should be allocated to such State compensation fund.³⁰ There are many options regarding the compensation of victims of trafficking and it would be advisable for the drafters and stakeholders to discuss them. These could take various forms e.g., to establish or contribute criminal assets to a general fund to compensate all victims of crime, including of trafficking; to establish or contribute traffickers’ assets to a general fund for compensation of all trafficked persons; to use an individual trafficker’s assets to compensate the trafficker’s own victims; to use the funds to provide services or support to trafficked persons or victims of crime generally; or any combination of the above.³¹
24. In any case, any option would most likely require amending the Criminal Code, in particular its Article 113 which lists the types of offenses for which confiscation of pecuniary gain may apply and which does not currently mention the criminal offence of trafficking in human beings, though such offence may be covered by the provisions of Article 401 of the Criminal Code on organized crime. Further amendments to specific articles relating to trafficking (Articles 444 and 445 of the Criminal Code) may also be needed since they do not expressly state, as do other offences such as money-laundering or terrorism, that “the money and property acquired as a result of the criminal act should be confiscated”. If such possibility is introduced, this will also trigger the need to allocate sufficient material and human resources capacities to manage the confiscated assets.³² Furthermore, it is also possible that Chapter XXIX of the Code of Criminal Procedure on Proceedings for Forfeiture of Property Gain and Confiscation would also need to be modified to specify that confiscated assets or the profits resulting from the sale of such assets should be allocated to the fund for compensation of damages for victims of criminal acts established by the Draft Law.
25. A combination of other sources for such a fund, aside from confiscated assets of the perpetrator, could also be contemplated, for instance through a tax imposed on insurance contracts as is done in France.³³

²⁹ *Op. cit.* footnote 22, par 162 (2012 GRETA Report on Montenegro).

³⁰ See Part III, Recommendation 1.5 of the OSCE Action Plan to Combat Trafficking in Human Beings and Part IV, Recommendations 2.1 and 2.2 of the Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings. See also *op. cit.* footnote 22, par 181 (2012 GRETA Report on Montenegro).

³¹ See page 42 of the OSCE/ODIHR Report on Compensation for Trafficked and Exploited Persons in the OSCE Region (2008), available at <http://www.osce.org/odihr/32023>.

³² See the 2013 Study by the Center for Democracy and Human Rights on Confiscation and Management of Crime Assets in Montenegrin Legislation and Practice (2013) supported by the Embassy of the United States in Montenegro, available at <http://cedem.me/en/publications/viewdownload/48-publikacije-eng/389-confiscation-and-management-of-crime-assets-in-montenegro.html>.

³³ In France, the Fund for the Compensation of Victims of Terrorism and other Offenses is not funded by the State budget but exclusively from a tax fixed by a decree of the Minister in charge of Insurance, from the amounts recovered by the Fund from the offender and from investment incomes. The tax amounted to 3.30 Euros for 2013 and is imposed for every

4. The Substantive Requirements for Seeking Compensation by the State

26. At the outset, it should be pointed out that the practice among EU member States varies greatly in terms of personal scope and nature of damages covered by state compensation schemes.³⁴
27. While the eligibility criteria and conditions to seek compensation provided by the Draft Law are overall compliant with the CoE Compensation Convention and the 2004 Directive, there remain specific challenges regarding the compensation of victims of trafficking in human beings and of violence against women, including domestic violence and sexual offences that the Draft Law currently fails to address (see pars 28-31, 34-37 and 39 *infra*). Particularly, in the case of victims of domestic violence, the victim compensation scheme as envisioned by the Draft Law seems to be largely premised on a “stranger violence model” (i.e., based on the assumption that the victim does not know and is not dependent on the perpetrator), which actually often leads to *de facto* discrimination against such victims.³⁵ These challenges should be addressed by the drafters given the concerns raised by several human rights monitoring bodies regarding the lack of compensation of victims of trafficking in human beings and of violence against women in Montenegro.³⁶

4.1. The Beneficiaries of the State Compensation Scheme

28. Article 7 of the Draft Law provides for strict eligibility criteria for seeking compensation in terms of nationality (nationals of Montenegro, the EU or a State party to the CoE Compensation Convention) or permanent residency status (in Montenegro, the EU or a State party to the CoE Compensation Convention). This may be unduly limiting, particularly as regards compensation of victims of certain criminal offences such as trafficking in human beings and crimes of violence against women.
29. While the CoE Compensation Convention allows for such limitations, its Explanatory Report recommends the extension of compensation to all foreign victims of crime without limitation.³⁷ This is all the more important in the case of victims of trafficking where restrictive eligibility criteria based on nationality or residency status have been highlighted as a special challenge.³⁸ Removing such limitations would be in line with a number of international recommendations pertaining specifically to victims of trafficking, where the need to remove nationality or residency requirements or other

property damage insurance contract (see Article L. 422-1 of the Insurance Code available at <http://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006073984&idArticle=LEGIARTI000006801956&dateTexte=&categorieLien=cid>). See also *op. cit.* footnote 25, pars 217-219 (2009 Report on Non-Criminal Remedies for Crime Victims).

³⁴ See the European E-Justice Portal available at https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-en.do which informs about various EU Member States State compensation schemes.

³⁵ See e.g., the Paper by Isabelle Barrett Meyering on Victim Compensation and Domestic Violence: a National Overview (2010), in relation to the victim compensation schemes in Australia, available at http://www.adfvc.unsw.edu.au/PDF%20files/Stakeholder%20Paper_8.pdf.

³⁶ See on compensation of victims of trafficking in person, par 20 of the 2014 Concluding Observations of the Committee against Torture on the 2nd periodic report of Montenegro, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fMNE%2fCO%2f2&Lang=en and *op. cit.* footnote 22, pars 164-166 (2012 GRETA Report on Montenegro). See also *op. cit.* footnote 22, pars 18-19 (2011 CEDAW Committee Concluding Observations on Montenegro).

³⁷ *Op. cit.* footnote 21, pars 24-25 and 27 (Explanatory Report to the CoE Compensation Convention), which notes that compensation of all foreign victims of crime has been recommended at international level.

³⁸ See *op. cit.* footnote 23, page 33 (2008 OSCE/ODIHR Report on Compensation for Trafficked and Exploited Persons).

- limitations pertaining to the legal status of the victims (for instance irregular entry or immigration status), is highlighted as particularly necessary.³⁹
30. As regards victims of violence against women, including domestic violence, in the Explanatory Report to the Istanbul Convention, it is stated that since many victims of the forms of violence covered by the Convention may not have the nationality of the state party in whose territory the crime was committed, subsidiary state compensation should extend to nationals *and* non-nationals.⁴⁰ It would be advisable to expand the scope of Article 7 of the Draft Law accordingly.
31. More specifically, the requirements pertaining to permanent residence are similarly restrictive. It must be highlighted that the Explanatory Report to the CoE Compensation Convention clarifies that the concept of permanent residence must be construed in the light of the Committee of Ministers Resolution (72) 1 on the standardisation of the legal concepts of “domicile” and of “residence”.⁴¹ Such Resolution provides in particular that residence does not depend upon the legal entitlement to reside and should be determined on the basis of the overall circumstances. It is possible that the term “permanent resident” as employed by the Draft Law will not be given such flexible understanding and that it may be construed by the public authorities as requiring “legal permanent status” in Montenegro according to applicable legislation. Consequently, it is recommended to remove the requirement of “permanent residence” or at a minimum to clarify its meaning so as to adopt a flexible understanding of the legal concepts of “residence” that is in accordance with Resolution (72) 1.
32. When the offence results in the death of the victim, Article 2 par 2 of the Draft Law provides that the right to compensation benefits the “dependants” of the victim but does not define this term. It would be advisable to either define the types of relationships to ensure clarity of the legislation or to refer to the definitions provided by other legislation, such as the definition of “family members” provided by the Law on Domestic Violence Protection or by the Criminal Code. In that respect, international experts usually recommend that a broad approach be adopted, extending the notion of beneficiary to non-economic dependants and thus considering the emotional link, which encompasses persons particularly close to the victim.⁴² Moreover, the meaning of “dependant” should be broad enough to prevent discrimination on the basis of sexual orientation, thus ensuring that unmarried same-sex couples are treated in the same way and are entitled to the same benefits as unmarried opposite-sex couples.⁴³

³⁹ See par 38 of the 2011 Report of the UN Special Rapporteur on trafficking in persons on the right to an effective remedy for trafficked persons, A/66/283, 9 August 2011, available at <http://www.ohchr.org/Documents/Issues/Trafficking/A-66-283.pdf>, which states that “[w]here State-funded compensation schemes for victims of crime exist, States should abolish eligibility criteria that have the effect of preventing trafficked persons from seeking compensation, such as nationality and long-term residence requirements” and par 8.2 of Appendix to CoE Recommendation Rec(2006)8. See also par 2.2 of Chapter IV (Protection and Assistance) of the Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later (6 December 2013) which explicitly states that access of victims of trafficking to the State compensation fund or other relevant mechanisms should be irrespective of their legal status or nationality.³⁹ See also page 167 of the OSCE/ODIHR Report on Compensation for Trafficked and Exploited Persons in the OSCE Region (2008), available at <http://www.osce.org/odihr/32023>. See also Article 28 of the UNODC Model Law Against Trafficking in Persons.

⁴⁰ See par 42 of the Explanatory Report to the Istanbul Convention.

⁴¹ Available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=587935&SecMod=1&DocId=642796&Usage=2>.

⁴² *Op. cit.* footnote 25, par 214 (2009 Report on Non-Criminal Remedies for Crime Victims).

⁴³ See par 1-3 of the Appendix to the CoE Committee of Ministers Recommendation CM/Rec(2010)5 to member states on measures to combat discrimination based on sexual orientation or gender identity adopted on 31 March 2010 available at <https://wcd.coe.int/ViewDoc.jsp?id=1606669>. See also par 68 of the UN High Commissioner for Human Rights Report

4.2. The Nature of the Criminal Acts

33. The broad language used in Article 3 of the Draft Law could potentially encompass a wide range of criminal conducts, including criminal offences of trafficking in human beings and potentially certain acts of domestic violence (Articles 219 and 220 of the Criminal Code),⁴⁴ including sexual violence.
34. However, one of the main challenges often faced by victims of domestic violence seeking compensation is that perpetrators are often not prosecuted and sentenced commensurately with the gravity of their crimes⁴⁵ and that such offences may not be prosecuted or recognised as “criminal acts” by state authorities, but are merely seen as “misdemeanours”. This means that victims of such acts would not qualify for compensation under the State compensation scheme. Some good practices in that respect, e.g. in the UK, have led to the introduction of provisions that identify domestic violence and/or sexual assault as injuries in their own right that enable the victims to seek compensation under the State compensation fund and sometimes even have less stringent evidence requirements (but with usually lower compensatory awards in which case the amount should be regularly monitored to ensure that compensation remains adequate).⁴⁶
35. In a number of states, specific offences such as sexual offences and crimes of trafficking of human beings are expressly mentioned as directly triggering a right to compensation. For instance, in France, the legislation provides for compensation based either on the extent and seriousness of the damages suffered by the victim (serious harm resulting in permanent or temporary work incapacity of more than a month) or on the nature of the criminal offence, expressly referring to rape, sexual criminal offences or human trafficking related offences.⁴⁷ It must be pointed out that any State-funded mechanism applying to trafficked victims also requires an efficient and fair identification procedure in line with international standards.⁴⁸
36. Should the specific offense of trafficking in human beings be expressly mentioned in the Draft Law, another challenge which applies in the case of compensation of victims of trafficking is that prosecutors in Montenegro do not always prosecute trafficking cases as “trafficking” (cases of trafficking in human beings are sometimes prosecuted under Article 209 on Pimping and Enabling having a Sexual Intercourse and Article 210 on Mediation in Prostitution of the Criminal Code), often bringing lesser charges against perpetrators.⁴⁹ Recommendations at the international level for improving the

to the Human Rights Council on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, A/HRC/19/41, 17 November 2011, available at http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf.

⁴⁴ Article 219 of the Criminal Code on Neglecting or Abusing a Minor and Article 220 of the Criminal Code on Violence in a Family or a Family Community.

⁴⁵ *Op. cit.* footnote 22, pars 18-19 (2011 CEDAW Committee Concluding Observations on Montenegro).

⁴⁶ *Op. cit.* footnote 35, pages 5-6 (2010 Paper on Victim Compensation and Domestic Violence in Australia).

⁴⁷ See pages 22-23 of the OSCE/ODIHR Report on Compensation for Trafficked and Exploited Persons in the OSCE Region (2008), available at <http://www.osce.org/odihr/32023>. More specifically on the conditions for seeking compensation in France, see <http://www.fondsdegarantie.fr/component/indemnisations/indemnisationsinfractions?Itemid=94> and the provisions of the Criminal Procedure Code available at <http://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000006577536&idSectionTA=LEGISCTA000006138122&cidTexte=LEGITEXT000006071154>.

⁴⁸ See e.g. Article 10 of the CoE Convention on Action against Trafficking in Human Beings. See also Section 8.2 of the Strategy of Montenegro for Combating Trafficking in Human Beings 2012-2018, available at http://legislationline.org/download/action/download/id/5069/file/Montenegro_Strategy_Combating_THB_2012-18_en.pdf.

⁴⁹ *Op. cit.* footnote 22, pars 180, 193 and 201 (2012 GRETA Report on Montenegro).

implementation of the right to compensation of victims of trafficking in human beings suggest that eligibility criteria should focus more on the circumstances of the facts rather than on the technical/legal classification or qualification of the crime.⁵⁰ It is recommended for the drafters to consider such recommendation and adapt the wording of the Draft Law accordingly.

37. In light of the above, to ensure that the Draft Law will allow victims of trafficking in human beings and of violence against women, including domestic violence, to seek compensation from the State compensation scheme, Article 3 should be supplemented to expressly refer to victims of trafficking in human beings, of violence against women, including domestic violence (as defined by the Law on Domestic Violence) and sexual offences, while specifying that compensation can be sought regardless of the legal classification or qualification of the offence by law enforcement bodies, state authorities and the courts, with due consideration being given to the circumstances of the facts. While the Istanbul Convention actually requires the criminalization of acts of domestic violence, which thus would potentially fall within the scope of the Draft Law, introducing the above-mentioned specific provision will offer a clear legal basis for these victims to seek compensation irrespective of their legal classification or qualification.
38. As regards the territorial application of the Draft Law, Article 6 of the Draft Law refers to criminal offence committed on the territory of Montenegro or on a Montenegrin vessel or aircraft. However, it does not envision the situations where several elements of the criminal offense may have been committed in different countries. In practice, such unclarity may create uncertainty for the victims as to their right to get compensated and consequently leaves space for discretion of the authority to refuse compensation. It would be advisable to clarify such issue by specifying, as stated in the Explanatory Report to the CoE Compensation Convention, that “[w]here different parts of a crime are committed in different States, compensation shall be paid by the State in which the victim or his dependants are permanently resident, provided part of the offence is committed in the territory of this State”.⁵¹

4.3. The Types of Injuries to be Compensated

39. Article 2 of the Draft Law states that “any person who has sustained damage by means of an intentional crime of violence [...] directly resulting in death, serious bodily injury or serious impairment of physical *and* mental health” shall have a right to compensation. The connector “and” seems to imply that the victims shall have incurred both physical and mental injury, and that mental injury alone would not allow the victims to seek compensation. While the scope of such article is in line with Article 2 of the CoE Compensation Convention, its Explanatory Report clarifies that the violence inflicted need not be physical but compensation may also be payable in cases of psychological violence causing serious injury or death, and damages to (only) mental health.⁵² Similarly, the Explanatory Report to the Istanbul Convention states that impairment of health may refer to serious psychological damage caused by acts of psychological violence,⁵³ without there necessarily being a physical injury. It must be pointed out that victims of domestic violence frequently experience

⁵⁰ See page 167 of the OSCE/ODIHR Report on Compensation for Trafficked and Exploited Persons in the OSCE Region (2008), available at <http://www.osce.org/odihr/32023>.

⁵¹ *Op. cit.* footnote 21, par 23 (Explanatory Report to the CoE Compensation Convention).

⁵² *Op. cit.* footnote 21, pars 18-19 (Explanatory Report to the CoE Compensation Convention).

⁵³ See par 166 of the Explanatory Report to the Istanbul Convention.

emotional/psychological distress which often constitutes a key component of the said offence or even constitutes domestic violence by itself.⁵⁴ This is all the more important given the recent ratification of the Istanbul Convention which, in its Article 33, states that psychological violence, namely the “intentional conduct of seriously impairing a person’s psychological integrity through coercion or threats” should be criminalized (Montenegro has not made any reservation with respect to this provision). It would be advisable for the drafters to consider broadening the scope of Article 1 of the Draft Law to ensure that psychological damage alone could be compensated as well, even in the absence of a physical injury.

40. Similarly, the scope of the types of injuries mentioned in Article 3 of the Draft Law is fully aligned with the CoE Compensation Convention, but the drafters may consider broadening the scope of injuries being compensated. While the practice varies greatly in different countries in that respect, the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law recommend that compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, such as (a) physical or mental harm; (b) lost opportunities, including employment, education and social benefits; (c) material damages and loss of earnings, including loss of earning potential; (d) moral damage; (e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services.⁵⁵ The CoE Recommendation 2006(8) also advises that States consider compensation for pain and suffering.⁵⁶ The drafters and stakeholders in Montenegro should discuss whether it would be reasonable to include compensation for such damages, particularly given the financial impact of such decision. It must be highlighted that in the EU, a large majority of member States include disease and mental injury in their schemes. It must also be pointed out that the majority of compensation schemes in the EU also often provide compensation to dependants both for non-pecuniary (e.g., for pain and suffering and moral damage) and pecuniary loss (losses which can be quantified in monetary terms such as loss of dependency)⁵⁷ whereas Article 11 of the Draft Law seems to suggest that the “loss of legal maintenance” i.e., only pecuniary loss, is contemplated.

5. The Modalities and Procedure for Seeking Compensation by the State

5.1. The Compensation Commission and Decision on Application

41. Regarding the composition of the Compensation Commission, it is welcome that it involves one representative of non-governmental organizations. To ensure public trust in the system, it would be advisable to organize the selection mechanism by way of a fair, professional and transparent competition, for instance by providing for a public call and publicizing the list of all admissible candidates (those who comply with the criteria)

⁵⁴ See e.g., *op. cit.* footnote 35, page 5 (2010 Paper on Victim Compensation and Domestic Violence in Australia).

⁵⁵ See par 20 of the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims. See also *op. cit.* footnote 24, page 62 (2013 Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe).

⁵⁶ See e.g., par 8.7 of Appendix to CoE Recommendation Rec(2006)8.

⁵⁷ See page 8 of the Report from the EC Commission on the application of Council Directive 2004/90/EC relating to compensation to crime victims COM(2009)170, 20 April 2009, available at http://ec.europa.eu/civiljustice/news/docs/report_compensation_crime_victim_en.pdf.

prior to nomination by the Office of the Government of Montenegro for co-operation with non-governmental organizations (Article 19 par 3 of the Draft Law).

42. Moreover, Article 7 of the CEDAW requires State Parties to ensure that women and men have equal rights to, *inter alia*, hold public office and perform all public functions at all levels of government. The Beijing Platform of Action also urges States to take measures to ensure women's equal access to and full participation in power structures and decision-making.⁵⁸ Furthermore, in its Resolution 66/130, the UN General Assembly encourages States “to appoint women to posts within all levels of their Governments”.⁵⁹ At the European level, the CoE Committee of Ministers, in its Recommendation 2003(3), calls upon Member States to provide for gender-balanced representation in all appointments made by a minister or government to public committees and in posts or functions whose holders are nominated by government and other public authorities.⁶⁰ It is noted that in this context, this means that the representation of either women or men in any decision-making body in political or public life should not fall below 40%.⁶¹ The Committee on the Elimination of Discrimination against Women (hereinafter “CEDAW Committee”) in its 2011 Concluding Observations on Montenegro noted the underrepresentation of women in various areas of political and public life and recommended to introduce “provisions on the rejection of proposals for appointments that do not comply with the principle of gender-balanced representation”.⁶² In light of the above, it is recommended to expressly state in Article 18 of the Draft Law that no more than three members of the Compensation Commission shall be of the same gender. Moreover, the rules governing the replacement of the members of the Compensation Commission by their substitutes should be drawn up in a manner that also ensures gender balance.⁶³
43. Furthermore, the introduction of such gender balance requirement would not reach its intended goal if no gender requirements are introduced in both the nomination process to propose candidates, as well as in the rules and procedures governing the appointment by the Government. Examples of how to achieve this could be for each nominating entity to propose two nominees of each gender and Article 19 could be supplemented accordingly.⁶⁴ In order to be effective, the drafters should also supplement the provisions of Article 19 of the Draft Law by stating the consequences for infringement of the gender balance requirement, for instance the annulment of the appointment of the members from the over-represented gender.⁶⁵ While it may not be necessary to outline all of the above in

⁵⁸ 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>.

⁵⁹ See par 8 of the General Assembly Resolution 66/130 adopted on 19 March 2012, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/130&Lang=E.

⁶⁰ 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>.

⁶¹ *ibid.* preamble of the Appendix to the CoE Recommendation Rec(2003)3.

⁶² See *op. cit.* footnote 22, pars 22-23 (2011 CEDAW Committee Concluding Observations on Montenegro)

⁶³ For instance, rules governing replacement should specify that the substitute shall be of the same gender as the exiting member.

⁶⁴ 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).

⁶⁵ The practice varies greatly amongst countries. As an example, according to the new French Law on Equality between Men and Women dated 23 July 2014 (currently being challenged before the Constitutional Council), 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

detail in the Draft Law, at minimum, Article 19 of the Draft Law should expressly state the overarching principle that the nomination of candidates, as well as the rules and procedures for appointment of the members and their deputies by the Government shall comply with the gender requirements stated in Article 18 of the Draft Law, and shall be further defined by secondary legislation. The Draft Law should then explicitly state which entity should be responsible to adopt such secondary legislation and within which timeframe.

44. Article 19 par 1 of the Draft Law provides that the Compensation Commission shall be appointed by the Government of Montenegro; however, it is not clear whether the Government is bound by the nominations made to the Compensation Commission or whether it can reject them. It would be advisable to clarify Article 19 of the Draft Law in that respect. Additionally, Article 21 of the Draft Law refers to the Rules of Procedure of the Compensation Commission but does not specify the entity in charge of developing and adopting them. Presumably, this is the Compensation Commission, but this mandate should be expressly stated in the draft Law and the drafters should make sure that the rules of procedures are developed prior to its first meeting.
45. Article 28 of the Draft Law describes the rules governing the decision-making process in the Compensation Commission. It is not clear, from these rules, whether a member can abstain, which may lead to a situation of deadlock. It may be advisable to supplement Article 28 by introducing an appropriate anti-deadlock mechanism, for instance one in which the President will have a casting vote.
46. Article 30 of the Draft Law provides for the content of the decision granting compensation, but does not specify the content of decisions rejecting such application. It would be advisable to supplement the Draft Law to that effect. This should include a brief explanation of the reasons why the application was rejected and on which legal ground. Moreover, such a decision of rejection should be subject to review as is the case for decisions granting compensation (Article 30 par 4 of the Draft Law).

5.2. Compensation from Other Sources

47. Article 3 par 3 of the Draft Law states that “compensation shall be paid where it is assessed in the course of procedure that victim will not be able to exercise the right to compensation of damage by means of a judicial or other procedure, or where it is necessary to pay the compensation immediately before initiating judicial or other procedure in order to timely eliminate damaging consequences for the victim”. Article 2 of the CoE Compensation Convention implies that States shall pay compensation only where compensation is not *fully* available from other sources; however, this should not preclude the payment of compensation pending decisions in other procedures, judicial or extra-judicial, to recover damages.⁶⁶
48. It is unclear from the current wording of Article 3 par 3 of the Draft Law how the inability to exercise the right to compensation of damages will be determined, in particular under what circumstances and according to which criteria, and this leaves too much discretion to the Compensation Commission in the decision to award or not compensation to the victim. In certain countries, the compensation mechanism is fully autonomous and is merely based on the proof of the materiality of the offence (i.e., proof of the material elements of the offence linked to the reprehensible conduct and to

appointments will not render null and void the decisions that may have already been adopted by said body; see <http://www.assemblee-nationale.fr/14/ta/ta0398.asp>.

⁶⁶ *Op. cit.* footnote 21, par 15 (Explanatory Report to the CoE Compensation Convention).

the result/prejudice/harm, irrespective of the criminal intent of the perpetrator) notwithstanding any criminal proceedings or any identification of the perpetrator.⁶⁷ Given the importance of ensuring that the application process is objective and transparent,⁶⁸ it would be advisable to adopt a similar approach or at a minimum, to clarify in Article 3 par 3 of the Draft Law the situations where the applicant will not be able to exercise the right to compensation (e.g., when the offender died, is unknown, has not been identified or apprehended, or where private insurance schemes do not cover the said situation).

49. It must be highlighted that the obligation upon claimants to refund the amount of compensation provided through the victim compensation fund in case they receive damages at a later stage reinforces the need for access to legal aid and representation at the outset of the process. This will help to ensure that a victim is aware of the compensation mechanism and explained how to access it, as well as can pursue the most appropriate redress option in light of his or her circumstances. This will also avoid duplication of effort and potential secondary victimization which may be caused by going through several processes.
50. Finally, to facilitate compensation from other sources, certain simplified procedures which are recognized as good practices in other countries, may also be considered by the drafters. This includes for instance the possibility of having the compensation claim submitted by the victim of a crime when filing a criminal complaint with the police (e.g., in France); the victim is thus not obliged to go to court and the risk of secondary victimization is thereby reduced.⁶⁹

5.3. Information of the Victims

51. It is welcome that Article 17 of the Draft Law provides for the duty of various state authorities, i.e., the police, prosecutors and courts to inform the victims about the right to and procedure for compensation, as this is key to guaranteeing actual access to compensation. It is recommended to extend such duty to inform to other public authorities, such as social and health care services and victim support services, as well (see Article 8 of EU Directive 2012/29/EU). Such authorities also play an important role in the process of victims obtaining full and effective reparation, and are often the first contact of the victim with the public authorities.⁷⁰
52. In order to ensure effective co-operation between the state and civil society, as encouraged for instance by the Istanbul Convention (Article 9), the Draft Law and particularly its Article 17 could also envision greater co-operation with civil society organizations in order to provide information to the victims via protected ways of communication. This is particularly important given the central role played by non-governmental organizations and civil society in supporting victims of domestic violence and of trafficking in human beings. However, it is vital for such NGOs not to divulge the identity of the victims to the public so that the communication between the police and NGOs on the one hand, and NGOs and victims on the other are kept in the strictest of confidence. This is all the more important since, as noted in the 2012 Report on Montenegro by GRETA,⁷¹ despite the existence of legal possibilities for compensation,

⁶⁷ See *op. cit.* footnote 25, pars 237 and 241 (2009 Report on Non-Criminal Remedies for Crime Victims).

⁶⁸ See *op. cit.* footnote 24, page 62 (2013 Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe).

⁶⁹ *Op. cit.* footnote 25, par 196 (2009 Report on Non-Criminal Remedies for Crime Victims).

⁷⁰ See Article 4 of EU Directive 2012/29/EU and par 6.2 of the Appendix to CoE Recommendation Rec(2006)8.

⁷¹ *Op. cit.* footnote 22, par 164 (2012 GRETA Report on Montenegro).

no such compensation has been granted to victims of trafficking in human beings to date, which points, amongst others, to a possible lack of awareness or information available to the victims in that respect and perhaps a lack of established procedures.

53. As regards child victims more specifically, the information on existing opportunities to obtain reparation from the offender or from the State through the justice process, through alternative civil proceedings or through other processes should be provided to child victims promptly and in a child sensitive manner.⁷² Moreover, such information should also be provided to their parents or guardians and legal representatives.⁷³ The court should likewise inform the child victim or his/her parents or guardian(s) and his/her lawyer(s) about the procedures for claiming compensation.⁷⁴ Article 17 of the Draft Law should be supplemented accordingly.
54. As to the language used to inform the victim, Article 17 of the Draft Law refers to written information as well as the request form being provided both in Montenegrin and in English, and this is very positive. However, Articles 22 and 33 par 3 of the Draft Law requires that the application for compensation be submitted in Montenegrin language only. To facilitate the submission of compensation requests by foreign victims, as recommended in par 29 *supra*, the drafters should consider whether to also accept applications filled out in English, all the more given that the form is also provided in English.

5.4. Procedure for Submission of the Application for Compensation

55. Article 8 of the Draft Law refers to the obligation to report a criminal offence to the police or the state prosecutor's office in order to be able to exercise the right to compensation but provides for derogation in its par 2 when "the offender cannot be prosecuted or punished". While the practice varies greatly in different countries of the OSCE area, many states do require that some form of report is made to the police or other authorities in order to be eligible to request compensation from the State compensation scheme, usually to avoid fraudulent claims.⁷⁵ However, the terminology used in par 2 is relatively vague and does not clarify the types of circumstances where the offender "cannot be prosecuted or punished" and thus when the report to the police or prosecutor will not be needed as part of the application for compensation (Article 24 of the Draft Law). For instance, this could cover situations where the offender died, is unknown, has not been apprehended, if the offenders escape conviction based on certain defences (e.g., necessity) or if particular categories of offenders may not be subject to prosecution because they are regarded as not responsible for their actions,⁷⁶ among others. For the sake of clarity, it would be advisable to expressly specify in Article 8 of the Draft Law which circumstances are envisioned here. Article 24 (fourth indent) of the Draft Law should then be supplemented to reflect the fact that in certain circumstances defined in Article 8, the police report may not be needed.

⁷² See par 35 of the Annex to the Economic and Social Council resolution 2005/20, annex (Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime), Economic and Social Council resolution 2005/20, 22 July 2005, available at

http://www.un.org/en/pseataaskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf.

⁷³ *ibid.* par 20 (2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime).

⁷⁴ 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.

⁷⁵ See in relation to the EU, *op. cit.* footnote 57, page 8 (2009 Report from the EC Commission on the application of the 2004 Directive).

⁷⁶ See e.g., *op. cit.* footnote 21, par 21 (Explanatory Report to the CoE Compensation Convention).

56. It is positive that Article 13 of the Draft Law allows the Commission to take into account “justifiable reasons because of which the victim has failed to report criminal offence to competent authorities” when deciding on the right to compensation. However, the provision is relatively vague and there is no indication as to which justifiable reasons may be invoked, thus leaving some room for discretionary interpretation. Moreover, it must be pointed out that certain victims of criminal acts, particularly victims of domestic violence and victims of trafficking in human beings, may be unwilling to press charges at a police station for several reasons (e.g., fear or intimidation, language barriers, reluctance to contact authorities, feelings of humiliation and insecurity about immigration status). The 2011 CEDAW Committee Concluding Observations on Montenegro have likewise noted that cases of violence against women and domestic violence are often under-reported.⁷⁷
57. In certain jurisdictions, the legislation expressly provides a list of exemptions from reporting for specific primary victims who are highly vulnerable or known to be unlikely to report the crime to the police. Such exemptions cover various situations e.g., victims of sexual offences; when the offence is committed by a person who is in a position of power, influence or trust in relation to the primary victim, including family relationships; or where the primary victim has an impaired capacity or is being threatened or intimidated by the person who committed the violent crime or by someone else.⁷⁸ In such circumstances, if the exception applies, it may be sufficient for the applicant to provide other evidence that the violent crime occurred such as an appropriate report from a government agency and/or a report from the victim’s counsellor, psychologist or doctor.⁷⁹ As regards victims who were children, i.e. under 18 years old at the time of commission of the offence, it is usually considered good practice to provide that failure to report an offence to the police will be regarded as reasonable in the circumstances and therefore not fatal to the claim.⁸⁰ Introducing such exemptions in Article 8 of the Draft Law would be welcome and would to a certain extent help certain particularly vulnerable victims seek compensation.
58. One additional requirement that is worth mentioning and which should be reflected under Article 13 of the Draft Law is the safety of the victims.⁸¹ This is of particular significance in the context of domestic violence, where victims are potentially known to be in regular contact with the perpetrator, and for whom the risk of retaliation and harassment may be much higher than for other victims. When deciding on compensation, and then claiming regress for compensation from the perpetrator, due consideration should be given by the state authorities to the consequences of these

⁷⁷ See *op. cit.* footnote 22, pars 18-19 (2011 CEDAW Committee Concluding Observations on Montenegro), which states in particular to “[e]xpeditious efforts to establish a national mechanism for compensating victims of trafficking and strengthen programmes for their reintegration into society”. See also *op. cit.* footnote 22, pars 164-166 (2012 GRETA Report on Montenegro).

⁷⁸ See e.g. pars 62-63 of Issues Paper No. 7 by the Law Council of Australia on Victims of Crime Compensation Schemes (4 July 2014), particularly focusing on child sexual abuses, available at [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2855 - Victims of Crime Compensation Schemes - Issues Paper 7.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2855_-_Victims_of_Crime_Compensation_Schemes_-_Issues_Paper_7.pdf). See also the section on Innovative Practices pertaining to reporting requirements, *op. cit.* footnote 35, page 8 (2010 Paper on Victim Compensation and Domestic Violence in Australia).

⁷⁹ See e.g. *op. cit.* footnote 78, pars 62-63 (2014 Paper by the Law Council of Australia on Victims of Crime Compensation Schemes). See also the section on Innovative Practices pertaining to reporting requirements, *op. cit.* footnote 35, page 8 (2010 Paper on Victim Compensation and Domestic Violence in Australia).

⁸⁰ See page 154 of the Discussion Paper of the Law Reform Commission of Western Australia on Enhancing Family and Domestic Violence Laws (December 2013), available at http://www.lrc.justice.wa.gov.au/files/P104_FDVP-DP.pdf.

⁸¹ See par 167 of the Explanatory Report to the Istanbul Convention.

measures for the safety of the victim and the authorities should plan for potential protective measures. Article 13 of the Draft Law should be supplemented to that effect.

5.5. Statute of Limitations

59. Article 23 of the Draft Law provides for a time limit of “six months from the day of the criminal offence indicated in the application”. Such short timeframe may be unduly restrictive and fails to acknowledge the victims’ potential psychological and physical distress after a serious crime, which may make it difficult for victims to assert their rights. This is all the more important in cases involving certain criminal acts where the victims are particularly vulnerable, either by virtue of their personal characteristics, of the circumstances of the crime, of their relationship to the offender and of various forms of intimidations⁸² (in particular in situations of victims of domestic violence and of trafficking in human beings). Moreover, since Montenegro has ratified the UN Convention on the Rights of Persons with Disabilities⁸³ (hereinafter “CRPD”), whose Article 13 guarantees effective access to justice for persons with disabilities, compensation for such persons should be guaranteed on an equal basis with others, which may require additional protective measures.⁸⁴
60. While it is positive that the Draft Law provides for a specific derogatory regime for children, where the time limit starts running from the day when they turn 18 years old, the fact that the time limit amounts to only six months may again be unduly restrictive, especially for child victims who may need more time to overcome their trauma, particularly in cases of sexual abuse, and take the decision to seek compensation. It must be pointed out that some countries actually provide for much longer time limits where the victim was a child at the time of the commission of the criminal offence or even for no time limit at all for certain categories of offences such as child abuses or sexual crimes.⁸⁵
61. Consequently, the drafters should consider establishing longer time periods for the registration of the compensation claim, particularly for specific types of crimes which are of a particularly traumatizing nature, such as sexual crimes, domestic violence, or hate crimes⁸⁶ or even for no time limit at all for certain crimes (e.g., sexual abuses) committed against children. Moreover, since Article 3 of the Draft Law contemplates the possibility to obtain one or more awards of compensation, Article 23 of the Draft Law should clarify that the time limitation starts running from the day of the criminal offence indicated in the application or from the last offence in case of a series of offences.
62. Regarding the right to recovery by Montenegrin authorities, Article 35 of the Draft Law provides that “[t]he right to recovery of Montenegro shall be barred by statute of limitations starting from the day on which the Protector of property and legal interests of Montenegro is notified of the payment of compensation to the victims or dependants”. It is unclear whether such right to recovery will be exercised on the basis

⁸² *Op. cit.* footnote 23, Chapter 3 (2008 OSCE/ODIHR Report on Compensation for Trafficked and Exploited Persons).

⁸³ The UN Convention on the Rights of Persons with Disabilities was adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106. Montenegro ratified this Convention on 2 November 2009.

⁸⁴ *Op. cit.* footnote 25, pars 103-104 (2009 Report on Non-Criminal Remedies for Crime Victims).

⁸⁵ *Op. cit.* footnote 25, par 116 (2009 Report on Non-Criminal Remedies for Crime Victims). See also e.g. *op. cit.* footnote 78, par 27 (2014 Paper by the Law Council of Australia on Victims of Crime Compensation Schemes).

⁸⁶ *Op. cit.* footnote 25, par 238 (2009 Report on Non-Criminal Remedies for Crime Victims). See also the section on Innovative Practices, *op. cit.* footnote 35, page 9 (2010 Paper on Victim Compensation and Domestic Violence in Australia).

of the relevant provisions of the Code of Criminal Procedure or on the basis of other, possibly civil legislation and it would be advisable to clarify this point. The Code of Criminal Procedure may also require amendments to allow the state to be subrogated in the victim's rights to seek compensation from the perpetrator. The entire matter of subrogation may be problematic, as this may mean that the original statute of limitations provided by the relevant provisions of the Code of Criminal Procedure for the committed offence is *de facto* extended or "revived" for the alleged perpetrator, as Montenegro then still has the right to compensation under Article 35, supposedly with a new statute of limitations starting from the day of the notification of the payment of compensation to the victim.⁸⁷ It would be good to take this into consideration, and engage in further discussions on how to bridge this inconsistency of legislation.

5.6. Amount of the Compensation Award

63. Articles 13 and 14 of the Draft Law provide for certain circumstances which should be taken into consideration to determine the level of compensation for damages. These include, amongst others, the victim's conduct before, during or after the criminal offence, his or her contributory conduct, the victim's co-operation with the public authorities and his/her financial situation. Certain circumstances will specifically lead to reduction or even denial of compensation, i.e., the victim's contributory conduct; or where the compensation would be contrary to public policy, principle of fairness or morale; or where the victim belongs to a criminal organisation or association. While such provisions are overall in line with the provisions of Article 8 of the CoE Compensation Convention, they fail to take into consideration the specific situation of victims of domestic violence or victims of trafficking and may constitute potential barriers for them to seek compensation.
64. In particular, Article 13 of the Draft Law refers to the "victim's conduct before, during and after the criminal offence". Though seemingly neutral, such provision may in practice discriminate against victims of domestic violence or of trafficking in human beings and also invite victim blaming attitudes in these cases. Such provisions could conceivably lead to an arbitrary evaluation of the victim's criminal and social history and conduct, and often constitute the most significant barriers that prevent victims from utilizing state compensation schemes.⁸⁸ To counter the potential discriminatory impact of contributory conduct clauses in cases of domestic violence and of trafficking in human beings, it may be advisable to expressly exclude the application of this provision in these situations, and potentially also in situations involving other crimes. Additionally, Article 13 of the Draft Law could add that the relationship between the victim and the offender should be considered when assessing whether the victim failed to take reasonable steps to mitigate the extent of their injury. This would for instance avoid situations where victims of domestic violence are prevented from seeking

⁸⁷ See the Amicus Curia Brief of the European Commission for Democracy through Law (Venice Commission) for the Constitutional Court of Georgia on the Retroactivity of Statutes of Limitation, CDL-AD(2009)012, of 16 March 2009, adopted by the Venice Commission at its 78th Plenary Session (13-14 March 2009) available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)012-e).

⁸⁸ See for victims of domestic violence page 8 of the Article "Looking a Gift Horse in the Mouth - The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims" by Njeri Mathis Rutledge, *Duke Journal of Gender Law and Policy*, Vol. 19:223 (2011), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1198&context=djglp>.

compensation, when they may not have sought medical treatment due to the special circumstances surrounding their injuries.⁸⁹

65. Article 14 of the Draft Law also adds reference to “principles of fairness and morale” which are circumstances that are not envisioned by the Convention and are relatively vague concepts⁹⁰ that could potentially be interpreted in a variety of ways; such open formulations may well be abused by the Compensation Commission and serve as a potential ground for discrimination. Similarly, the fact that the victim belongs to a criminal organisation or association, while expressly mentioned in Article 8 of the Compensation Convention, could potentially be used to deny compensation on the mere assumption or belief of such fact. Consequently, to ensure that the provision is interpreted strictly, the drafters may consider adding that such denial should be based on an actual criminal conviction.
66. Moreover, the provision does not ensure that due consideration is given to the context of family and domestic violence in determining whether an applicant co-operated with the public authorities, as required in Article 13 of the Draft Law. It is recommended to supplement Article 13 to expressly state that the Compensation Commission should consider whether the victim was being threatened or intimidated and whether the offender was in a position of power, influence or trust, in order to determine whether the victim did all that was reasonably required to be done in the circumstances.⁹¹ Additionally, it would be advisable to add other personal characteristics which should be taken into consideration, such as the age and other factors personal to the applicant.

6. Actual Payment of the Compensation Award and the Protection of Victims’ Rights

6.1. Actual Payment of the Compensation Award

67. Regarding the actual payment of the compensation award, there are specific challenges relating to certain victims of criminal acts, such as children or victims of domestic violence, often because of the relationship and/or economic dependency status towards the offender. In order to be in line with international good practice as part of a broader legal response to domestic violence, such situation should be expressly addressed in the Draft Law.⁹² This is all the more important since private insurance schemes would generally exclude compensation in such circumstances given the intentional nature of the acts by the perpetrator and/or exclusionary clauses of the insurance contracts

⁸⁹ See also the section on Innovative Practices pertaining to contributory conduct clauses, *op. cit.* footnote 35, page 8 (2010 Paper on Victim Compensation and Domestic Violence in Australia).

⁹⁰ As put forward by the Human Rights Committee in its general comment on Article 19 of the ICCPR “the concept of morals derives from many social, philosophical and religious traditions”, any limitation imposed for the “purpose of protecting morals must be based on principles not deriving from a single tradition”; see par 32 of General Comment No. 34, UN Doc. CCCPR/C/GC/34 (12 September 2011), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

⁹¹ See e.g. *op. cit.* footnote 80, page 154 (2013 Paper of the Law Reform Commission of Western Australia on Enhancing Family and Domestic Violence Laws).

⁹² See CoE Recommendation (2002)5 of the Committee of Ministers to member States on the protection of women against violence. See also Section 3.11.5 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, which recommends that legislation “[m]ake provision for the creation of a Government-sponsored compensation programme, which entitles survivors of violence against women to apply and receive a fair amount of compensation”. See par 124 Beijing Declaration and Platform for Action; the Fourth World Conference on Women adopted at the 16th plenary meeting, on 15 September 1995; <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>.

- concerning acts committed by family members. Moreover, actual payment of the compensation award may actually enable the victim of domestic violence to leave an abusive relationship.
68. The legislation should provide for mechanisms to ensure that the victim actually benefits from the compensation award. This could be achieved by expressly stating that the compensation award constitutes a “separate property” as per Article 286 of the Family Law of Montenegro and therefore should be independently managed and disposed of by the beneficiary. However, a particularly difficult situation arises where the victim of domestic violence still lives with the alleged perpetrator and where assets and bank account of a married couple are jointly administered; in such cases, the compensation may not necessarily reach the victim.
69. This is even more difficult in the case of child victims. Some countries have addressed the issue by setting up systems of social work and guardianship to ensure that the granting and expenditure of any compensation money can be monitored, including to ensure that child victims benefit from the compensation awards and are protected from parents or guardians who may not necessarily act in the child’s best interests.⁹³ Another option could also be, if possible under applicable legislation, to introduce specific provisions aiming at “freezing” the compensation amount in a trust until the time when the child reaches the age of the majority,⁹⁴ or placing it in a trust on behalf of the adult victim, thus guaranteeing that it can only be used in the best interest of the victim and not by the offender, particularly where the victim of domestic violence is still living with the offender.⁹⁵ The drafters and stakeholders should discuss the potential mechanisms to ensure that victims of domestic violence and child victims of crimes do receive the compensation award and dispose of it.
70. Article 36 of the Draft Law states that the government has the right to have the funds returned in certain circumstances, amongst others where “after the payment of compensation to the victim, the competent body establishes non-existence of criminal offence”. Such provision is relatively vague as it does not state the cases where this could occur and could potentially be interpreted by the Compensation Commission as including situations where the alleged perpetrator is found to be not guilty. It is usually acknowledged that compensation should be made available on the mere basis of the demonstration of the materiality of the offence (see par 48 *supra*) and should in no circumstances be subject to the identification of the offender or, even worse, the conviction of the offender.⁹⁶ To avoid such interpretation, Article 36 of the Draft Law should be clarified and expressly state that compensation from the state fund is payable to the victim irrespective of the offender’s identification, arrest, prosecution or conviction.⁹⁷
71. Moreover, to facilitate the recovery of funds, in some countries, the courts inform the compensating authority of awards made to the victim, thus facilitating restitution of the

⁹³ See e.g., in the case of child victim of trafficking, page 164 of the OSCE/ODIHR Report on Compensation for Trafficked and Exploited Persons in the OSCE Region (2008), available at <http://www.osce.org/odihr/32023>.

⁹⁴ *Op. cit.* footnote 25, par 229 (2009 Report on Non-Criminal Remedies for Crime Victims).

⁹⁵ See e.g., *op. cit.* footnote 80, page 153 (2013 Paper of the Law Reform Commission of Western Australia on Enhancing Family and Domestic Violence Laws).

⁹⁶ *Op. cit.* footnote 25, par 237 (2009 Report on Non-Criminal Remedies for Crime Victims).

⁹⁷ See *op. cit.* footnote 21, par 21 (Explanatory Report to the CoE Compensation Convention) and par 2.3 of the Appendix to Recommendation Rec(2006)8.

sums allowed by the compensating authority.⁹⁸ The drafters could consider introducing provisions to that effect in the Draft Law.

72. As regards recovery by Montenegro against the offender of compensation amounts paid by the state compensation scheme to the victim, it should be pointed out that some countries have introduced additional modalities/options to facilitate such recovery. For instance, if offenders, who are ordered to pay compensation to victims as part of criminal proceedings, are unwilling to pay or to establish suitable payment plans, enforcement possibilities should be made available (e.g. setting up automated direct debits whereby money is withdrawn from the offender's salary or social welfare payments before he/she receives the money, which means offenders do not actively have to pay themselves).⁹⁹

6.2. The Protection of Victims' Personal Data

73. Articles 39 to 41 of the Draft Law provide for modalities of recording and storing data regarding applicants and decisions made on applications for compensation, including personal data (e.g., names, date of birth, place of permanent residence). Such data may also qualify as being of a "sensitive nature" according to Article 8 of the Data Protection Directive¹⁰⁰ since it may concern information on health or sexual life, for instance in cases of sexual abuse.¹⁰¹ While such data will be particularly useful in terms of analysis of criminal trends, as well as for statistical and budgetary purpose, the said Articles shall be compliant with international data protection standards regarding processing of personal data, including sensitive data.¹⁰² 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, which should include adequate safeguards and protective measures.
74. More specifically, while the purpose of the data collection seems to be obvious (i.e., to follow up and monitor the recovery of funds by Montenegro as well as for statistical and budget planning purposes of the state compensation scheme), it would be advisable to expressly specify in the Draft Law such purpose for data recording and storage.¹⁰³
75. Furthermore, it is important to specify the duties and responsibilities, particularly in terms of ensuring and maintaining confidentiality as well as guaranteeing data security, of the Ministry of Justice and specifically the staff in charge of handling such data, all the more because they may contain very sensitive information (such as the fact that a

⁹⁸ See *op. cit.* footnote 21, par 40 (Explanatory Report to the CoE Compensation Convention).

⁹⁹ *Op. cit.* footnote 24, page 50 (2013 Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe).

¹⁰⁰ 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>).

¹⁰¹ See para 51 of CJEU case *Bodist Lindqvist* of 6 November 2003, C-101/01, available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-101/01> which states that the expression "data concerning health" [...] must be given a wise interpretation" - this is a fortiori applicable to "sexual life".

¹⁰² Data Protection Directive and CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108), available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=108&CM=1&DF=&CL=ENG>, was ratified by Montenegro on 6 September 2005.

¹⁰³ See Section 3.2. of 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.

named person was the victim of sexual offense or of trafficking).¹⁰⁴ Even if not all the details need to be expressly stated, at least the basic principles should be laid down in the Draft Law and secondary legislation may further elaborate these aspects.

76. Moreover, given the sensitivity of certain types of such data, the victims should explicitly and freely give their specific consent to the data processing¹⁰⁵ and should be duly informed that data will be retained by the Ministry of Justice for a specific purpose (to be specified – see par 74 *supra*). The victims should also have access to this data¹⁰⁶ and could potentially request rectification of certain personal data. This could be done for instance by adding a specific statement to this effect in the form that victims are required to fill out to seek compensation under Article 22 of the Draft Law, which could be supplemented to that effect.
77. Finally, as for the duration of the retention of personal data, Article 41 of the Draft Law provides for permanent retention. In principle, personal data should not be retained for longer than is necessary for the purposes for which the data were collected.¹⁰⁷ While nominative information is needed at first for the purpose of recovery by the State against the offender, once the funds have been recovered or once the statute of limitations for recovery has expired, the retention on a permanent basis of personal data permitting the identification of the victim (e.g., full name, date of birth and place of residence) may be considered excessive. It would be advisable to rather consider anonymisation of data at a certain point, which could then be kept for a longer period of time for statistical and budget planning purposes. Article 41 of the Draft Law should be amended to that effect.¹⁰⁸ More generally, in all cases where data is collected, such data should be disaggregated by sex.

[END OF TEXT]

¹⁰⁴ *ibid.* Section 4.2 (2014 CoE and FRA Handbook on European data protection law).

¹⁰⁵ See Article 8 par 2(a) of the Data Protection Directive.

¹⁰⁶ See Article 12 of the Data Protection Directive and Article 8 of the CoE Data Protection Convention.

¹⁰⁷ See Article 6 of the Data Protection Directive and Article 5 of the CoE Data Protection Convention.

¹⁰⁸ See also *op. cit.* footnote 103, Section 3.3.3 (2014 CoE and FRA Handbook on European data protection law).

Annex:

DRAFT LAW ON COMPENSATION OF DAMAGE FOR VICTIMS OF CRIMINAL ACTS

I. BASIC PROVISIONS

Scope

Article 1

This Law shall govern the right to a compensation of damage (hereinafter referred to as: compensation) provided by the Budget of Montenegro for the purpose of protection of and assistance to victims of violent intentional crimes.

Right to compensation

Article 2

(1) Pursuant to this Law the right to compensation shall have any person who has sustained damage by means of an intentional crime of violence (hereinafter referred to as: victim) directly resulting in death, serious bodily injury or serious impairment of physical and mental health.

(2) Where the committed criminal offence referred to in paragraph 1 hereof has resulted in death of the victim, the right to compensation shall have the persons who were dependants of the victim.

(3) Within the meaning of paragraph 1 hereof, force shall be the use of physical and mental force.

Compensation

Article 3

(1) Within the meaning of this Law, compensation shall be: compensation of costs incurred due to loss of earnings, compensation of costs of health protection (costs of medical treatment and hospitalisation) and compensation of costs of funeral, and as regards dependants, compensation for the loss of legal maintenance.

(2) Persons referred to in Article 2 of this Law may be entitled to one or more awards of compensation referred to in paragraph 1 of this Article, according to the case under consideration.

(3) Compensation shall be paid where it is assessed in the course of procedure that victim will not be able to exercise the right to compensation of damage by means of a judicial or other procedure, or where it is necessary to pay the compensation immediately before initiating judicial or other procedure in order to timely eliminate damaging consequences for the victim.

Use of gender sensitive language

Article 4

All expressions used in this Law for natural persons in their masculine form, shall denote the same expressions in feminine form.

Relevant application of the Law

Article 5

Procedural matters which are not regulated by this Law shall be governed by the general administrative procedure law.

II. CONDITIONS

Territorial principle

Article 6

Right to compensation shall be exercised if a victim has suffered from criminal offence referred to in Article 2 paragraph 1 of this Law, committed on the territory of Montenegro, aboard a Montenegrin vessel or a Montenegrin aircraft, regardless of where the vessel or the aircraft is at the time of the offence.

Nationality or permanent residence of victim

Article 7

Right to compensation shall have a victim who is:

- A national of Montenegro or a permanent resident of Montenegro;
- A national of the State party to the European Convention on compensation of victims of violent crimes (hereinafter referred to as: State party to the Convention) or a permanent resident of another State party to the Convention on whose territory the criminal offence was committed;
- A national of the European Union Member State or a permanent resident of the European Union Member State.

Obligation to report criminal offence and effect of criminal procedure

Article 8

(1) Right to compensation shall be exercised only if the offence has been reported to the police or the state prosecutor's office as a criminal offence.

(2) By way of derogation from paragraph 1 of this Article, the right to compensation may be exercised even if the offender cannot be prosecuted or punished.

III. COMPENSATION

Compensation for medical costs

Article 9

(1) A victim shall have the right to compensation of his medical costs up to the value of medical standard established by regulations governing compulsory health insurance.

(2) The compensation right referred to in paragraph 1 of this Article shall be recognised only if the victim is not entitled to compensation of costs on the basis of health insurance.

Compensation for the loss of income

Article 10

A victim shall have the right to compensation for the loss of income on account of his incapacity for work, which may not be lower than one average salary or higher than 10 average salaries in Montenegro, as established for the month preceding the month in which the level of compensation is determined.

Compensation for the loss of maintenance

Article 11

- (1) Dependants referred to in Article 2 paragraph 2 of this Law which were supported by the deceased, shall have the right to compensation on account of the loss of legal maintenance.
- (2) The amount of compensation of damage referred to in paragraph 1 of this Article shall be determined taking into consideration all the circumstances pertaining to the case, and may not exceed the amount these person would have received from the victim if he had been alive.
- (3) The compensation right referred to in paragraph 2 of this Article shall be recognised only if the dependant does not enjoy the right to a family pension.

Compensation for the costs of funeral

Article 12

The right to compensation of standard funeral costs shall have the person who has paid for said costs, unless he has been compensated for these costs on some other grounds under a separate law.

Circumstances affecting the level of compensation

Article 13

In deciding the right to compensation, special consideration shall be given to:

- victim’s conduct before, during or after the criminal offence;
- victim’s contribution to the occurrence or scope of the damage;
- existence of justifiable reasons because of which the victim has failed to report criminal offence to competent authorities;
- victim’s cooperation with the police and competent bodies in the course of discovering or prosecution of the offender;
- financial situation of the victim or dependants.

Level of compensation of damage

Article 14

- (1) Compensation of damage shall be reduced or application for compensation denied if:
 - the victim has contributed to the occurrence of damage or to making the damage larger than it would have been otherwise;
 - it is contrary to public policy, principle of fairness or morale;
 - the victim belongs to a criminal organisation, or a criminal association.
- (2) Circumstances referred to in Articles 13 and 14 of this Law shall be taken into consideration while making a decision on the right to and level of compensation of damage and while awarding compensation of damage to dependants.

Consideration of other awards

Article 15

- (1) Income received on the basis of health, pension or other insurance or on other basis shall be considered while calculating the damage, so that the compensation awarded to victim amounts to the difference between the total compensation that the victim is entitled to by virtue of this Law and his income received on other grounds.
- (2) Voluntary insurance paid by the victim or dependants shall not be calculated in the amount of compensation referred to in paragraph 1 of this Article.

Application of the Law on Obligatory Relations

Article 16

Provisions of the Law on Obligatory Relations shall be relevantly applied to the transfer and inheritance of right to compensation provided for by this Law.

IV. INFORMING THE VICTIMS OF RIGHT TO COMPENSATION

Obligation to provide information

Article 17

- (1) Police, state prosecution and courts shall provide information to persons eligible to receive compensation from Montenegro under this Law about their right to compensation and about the body they can address in order to exercise said right.
- (2) The police shall issue a confirmation of the offence being reported as a criminal offence on the request of persons referred to in paragraph 1 of this Article.
- (3) The information shall be provided orally, whenever possible in the language that the victim understands, and in writing in Montenegrin or English language.
- (4) Police, state prosecution and ministry shall provide the persons entitled to compensation with the necessary application forms and, on their request, give instructions on how to complete the forms and which documents should be appended to their application.
- (5) The ministry shall perform affairs related to the cooperation and exchange of information among the commission, police and competent bodies of other states and shall be the central body for reception and transfer of requests for mutual assistance in cross/border cases.
- (6) The ministry shall prepare an informative document in Montenegrin and English language about the right to compensation, conditions, and procedure for the exercise of such right and deliver such document to bodies referred to in paragraph 1 of this Article, and when so requested, it may deliver these documents to other legal persons who come in contact with victims while performing their duties.
- (7) The informative document and forms of application for compensation shall be published in Montenegrin and English language on the Internet pages of the ministry and of the bodies referred to in paragraph 1 of this Article.

V. COMMISSION

Article 18

Commission for financial compensation of victims of criminal offences

- (1) Commission for financial compensation of victims of criminal offences (hereinafter referred to as: Commission), comprising a president and four members, shall make decisions on the right to compensation. The President and each member of the Commission shall have their substitutes.
- (2) The President or the Deputy President of the Commission shall be a judge of the Supreme Court of Montenegro.
- (3) Commission members, or their substitutes, shall be selected from:
 - Deputies of the Supreme State Prosecutor of Montenegro;
 - representatives of nongovernmental organisations active in the field of human rights protection;
 - representatives of the ministry in charge of judiciary (hereinafter referred to as: Ministry);
 - professionals in the field of social protection.
- (4) Commission members, or their substitutes referred to in paragraph 3 indents 3 and 4 of this Article shall have at least five years of work experience in their areas of expertise.

Appointment of the Commission

Article 19

(1) The Commission shall be appointed by the Government of Montenegro, The President of the Commission, his deputy, members of the Commission and their deputies are appointed for a term of four years and may be re-appointed.

(2) The President of the Commission and his deputy shall be nominated by the President of the Supreme Court of Montenegro.

(3) Members of the Commission and their deputies shall be nominated as follows:

– Deputy Supreme State Prosecutor of Montenegro – by the Supreme State Prosecutor of Montenegro;

– representatives of nongovernmental organisations active in the field of human rights protection – by the Office of the Government of Montenegro for cooperation with nongovernmental organisations;

– representative of the Ministry – by the minister in charge of judiciary;

– professional in the field of social protection – by the minister in charge of social protection.

(4) Competent bodies shall supply the Commission of the Government of Montenegro for human resources and administration with their proposals for the appointment of the President and members of the Commission and their deputies.

Early dismissal

Article 20

(1) The President and members of the Commission and their deputies shall be dismissed by the Government of Montenegro before the term for which they are appointed has elapsed in the following cases:

– on their personal request and

– because of termination of their office on account of which they had been appointed.

(2) The request for dismissal shall be submitted to the Commission for human resources and administration.

Affairs of the Commission

Article 21

(1) Commission shall decide on applications for compensation at its sessions chaired by the President of the Commission.

(2) The Commission shall be convened by the President or his or her deputy in the absence of the President.

(3) The President and members of the Commission shall be entitled to compensation for their work in the Commission, in the amount established by the Government of Montenegro on the proposal of the minister in charge of judiciary.

(4) In the case of their absence, the President and members of the Commission shall be substituted by their deputies.

(5) The Ministry shall perform professional, administrative and technical support for the needs of the Commission.

(6) The manner of operation of the Commission shall be established by the Rules of Procedure of the Commission.

VI. COMPENSATION AWARD PROCEDURE

Submission of application

Article 22

(1) Procedure shall be initiated by a written application submitted to the Ministry in Montenegrin language.

- (2) Application shall be submitted using a form whose content is established by the Ministry.
- (3) Where an application is not submitted using the prescribed form, the Ministry shall supply the applicant with a copy of the form and invite him to submit the application using the prescribed form.

Time limits for submission of applications

Article 23

- (1) Application shall be submitted not later than six months from the day of the criminal offence indicated in the application for compensation.
- (2) Where the victim due to health condition is not able to file the application within time limits referred to in paragraph 1 of this Article, he must submit the application within three months from the day on which reasons on account of which the victim was not able to file the application cease to exist, and not later than three years from the day of the criminal offence.
- (3) Where the victim is a minor or person deprived of legal capacity, and his legal representative fails to submit the application within time limits referred to in paragraph 1 of this Article, the time limit shall start running from the day on which such person turns 18 years of age or the day on which such person regains legal capacity.

Content of application for compensation

Article 24

The application for compensation shall specify:

- personal data of the applicant, or the victim, if these persons are not the same: name and surname, date and place of birth, nationality, address of permanent or temporary residence, position at work and employer's address, identification code in accordance with regulations of the country of nationality,
- description of the criminal offence (date, place and circumstances),
- description of consequences of the criminal offence,
- date of report of the offence made by the victim to competent bodies,
- statement as to whether the victim is aware of any criminal procedure conducted against the offender, the court before which such procedure is conducted and the number of such case,
- statement about the type and level of compensation awarded to the victim on other legal grounds,
- type and level of compensation requested by the victim.

Documents to be submitted

Article 25

- (1) The following documents shall be appended to the application:
- evidence of nationality or permanent residence,
 - confirmation issued by the police referred to in Article 17 paragraph 2 of this Law about whether the offence has been reported as a criminal offence,
 - medical reports to confirm that the victim has sustained serious bodily injuries or serious impairment of health,
 - death certificate if the victim has died because of consequences of a criminal offence,
 - victim's statement about the award of compensation on other legal grounds for the types of damage provided for by this Law,
 - other documents available to the victim to prove the fulfilment of conditions set by this Law.
- (2) Certified translation shall be appended to a document submitted in foreign language.
- (3) The Ministry shall ask within 30 days the applicant to supplement his or her application with the evidence needed for decision making.

Submission of information and documents

Article 26

State administration and other bodies and natural and legal persons who possess the information and documents about the circumstances and facts of relevance for the decision making shall submit such information and documents in writing and without compensation, to the Ministry and the Commission on their request.

Costs of procedure

Article 27

(1) No fees shall be payable in the procedure for the award of compensation under this Law.

(2) The costs of translation and the costs of expert opinions shall be paid from the budget of Montenegro.

Deciding the application

Article 28

(1) The Commission may take decisions if the session is attended by the President of the Commission or his deputy and all members or their deputies. A decision on application shall be taken by majority of votes of all members.

(2) The Commission shall issue a decision on the right to compensation within three months from the receipt of a fully completed application.

Types of decisions

Article 29

The Commission shall:

- 1) reject an application as untimely or impermissible;
- 2) reject an application as improper or incomplete provided that the applicant was asked to make corrections to or supplement the application but failed to do so within the set time limits;
- 3) accept an application, wholly or partly, and establish the level of compensation, or
- 4) reject an application as unfounded.

Decision on application

Article 30

(1) A decision on application shall include:

- name and surname of the applicant, his identification code in accordance with the regulations of his country of nationality, nationality, address of permanent or temporary residence,
- legal title of the criminal offence, time and place of execution of the criminal offence on account of which the application is filed,
- types of recognised awards, their amount and time limit for their payment.

(2) A decision on the right to compensation shall be delivered to the applicant within eight days from its adoption. After the decision becomes enforceable and the compensation is paid, notification of the payment shall be delivered to the Protector of property and legal interests of Montenegro with a view to exercising the right of recovery of the state of Montenegro.

(3) In the event of domestic cross-border case referred to in Article 32 paragraph 2 of this Law, the Ministry shall deliver the decision of the Commission within eight days to the applicant and the competent body of other State party to the Convention, or to the European Union Member State, using the form prescribed by the European Commission.

(4) A decision of the Commission shall not be subject to appeal; however the applicant may initiate an administrative dispute.

Payment of compensation

Article 31

On the basis of a decision of the Commission, the Ministry shall pay the compensation within three months from the day of delivery of the decision ordering payment of the compensation.

VII. PROCEDURES IN CROSS-BORDER CASES

Cross-border cases

Article 32

(1) Cross-border cases shall be domestic and international cross-border cases.

(2) A domestic cross-border case shall be the one of a criminal offence committed in the territory of Montenegro, where the right to compensation under this Law is decided by the Commission referred to in Article 18 of this Law, and the application for compensation is submitted to a competent body in another State party to the Convention, or in the European Union Member State where the victim permanently resides.

(3) An international cross-border case shall be the one of criminal offence committed in another State party to the Convention, or the European Union Member State where the decision on the right to compensation falls under the competence of a body of such state and the application for compensation is submitted by a person with permanent residence in Montenegro.

Domestic cross-border case

Article 33

(1) Following the receipt of a request made by the competent body of another State party to the Convention, or of the European Union Member State, the Ministry shall supply such body and the applicant within 30 days with the acknowledgement of the receipt of their request, information about the contact person and, if possible, an approximate time by which the decision on the request will be made.

(2) If the Ministry receives a request from the competent body of another State party to the Convention or of the European Union Member State, filed otherwise than by using the form prescribed by the European Commission, it shall return such request to the body from which it was received.

(3) If the request and enclosed documents are submitted in some other language than Montenegrin, the Ministry shall return such documents to the applicant, or the body from which it received the request, along with an instruction on the use of Montenegrin language in accordance with Article 22 paragraph 1 of this Law.

(4) If, in a domestic cross-border case, the Commission establishes that specific actions need to be taken with a view to making the decision, such as hearing of the applicant, witnesses, experts or other persons, it may require from the competent body of another State party to the Convention, or of the European Union Member State in which the applicant filed his application for compensation to conduct such actions.

(5) The hearing which is necessary in said procedure may be conducted also by using technical equipment, including computer technology, electronic communication network and other picture and sound transmitting devices.

(6) The hearing referred to in paragraph 5 of this Article shall be conducted by the Commission.

International cross-border case

Article 34

- (1) In an international cross-border case the application for compensation is filed to the Ministry, which in the shortest possible time supplies the competent body of the state from which the applicant requires compensation of damage with the application and appendices, in the official language of said state or in other language that said state has decided to accept.
- (2) The application referred to in paragraph 1 of this Article shall be supplied using the form prescribed by the European Commission.
- (3) Where a deciding body of another state requires the hearing of applicant, witnesses, experts or other persons to be conducted in Montenegro, such hearing will be conducted by the Commission and the report drawn up following the hearing shall be submitted to the body of another state responsible for deciding upon application for compensation.
- (4) If a deciding body of another state requires hearing to be conducted with the use of technical equipment, such hearing shall be conducted in cooperation with the Ministry, provided that the person that is to be heard agrees to the hearing.

VIII. RIGHT OF RECOVERY

Reverting of victim's rights in respect of offender to Montenegro

Article 35

- (1) By payment of compensation to the victim or dependants all rights of such victims in respect of offender shall revert to Montenegro, at most to the amount of the paid compensation.
- (2) The right to recovery of Montenegro shall be barred by statute of limitations starting from the day on which the Protector of property and legal interests of Montenegro is notified of the payment of compensation to the victim or dependants.

Return of the funds acquired without cause

Article 36

Montenegro shall have the right to require recovery of the amount paid and of the costs of procedure where such right has been exercised on the basis of false data and/or the victim or dependants failed to notify competent body of the facts influencing the exercise of right under this Law, or if after the payment of compensation to the victim the competent body establishes non-existence of criminal offence.

IX. COMPENSATION DIRECTLY AWARDED BY OFFENDER

Compensation of damage made by offender

Article 37

- (1) A submission of application for compensation shall not exclude the right of victim or dependant to be compensated for their damage from the person having caused the damage by committing criminal offence (hereinafter referred to as: injurer).
- (2) When a victim or dependant is compensated for damage directly by the injurer, such compensation shall be calculated in the award he requests from Montenegro.
- (3) Where the injurer has fully compensated the damage, the application of the victim or dependant shall be denied, and if the procedure has been completed but the payment has not

been made yet, a decision shall be made not to award the compensation to the victim or dependant.

(4) Where Montenegro has paid the compensation and the victim has been fully or partly compensated for damage by the injurer, Montenegro shall have the right to recovery of funds paid directly by the injurer, payable by the victim or dependant, at most to the amount it has paid.

(5) In the event referred to in paragraph 2 of this Article, the court shall establish in its decision on the costs of the proceedings, the amount of costs paid as part of the damages belonging to the budget.

X. FINANCING OF COMPENSATIONS TO VICTIMS AND DEPENDANTS

Funds for financing of compensation

Article 38

(1) Funds for the implementation of this Law shall be provided in the budget of Montenegro from the funds of the Ministry.

(2) The recovery of funds acquired without cause and the amount payable by the suspect under the Code on Criminal Procedure for the purpose of compensation of damage to victims of criminal offences in the fulfilment of obligations established by decision of the state prosecutor on deferred prosecution shall be paid to the budget of Montenegro.

XI. RECORDS OF APPLICANTS AND DECISIONS

Record keeping

Article 39

The Ministry shall keep records of applicants and decisions made on applications for compensation filed in written and electronic form.

Content of records

Article 40

The records of applicants and decisions made on applications for compensation shall contain:

1) The following applicant data:

- name and surname,
- identification code in accordance with regulations of his country of nationality and/or birth date in case of absence of identification code,
- place of birth,
- place of permanent residence,
- nationality.

2) The following data on decisions which have been made:

- case classification code and registration number,
- date of submission of application,
- type of decision,
- criminal offence on account which application is filed,
- decision date,
- date on which decision on the right to compensation becomes enforceable,
- amount of paid compensation,
- date of payment of compensation,
- information about whether administrative dispute has been initiated,

– data about the exercise of right on the basis of Articles 36 to 38 of this Law.

Keeping data

Article 41

Data included in the records of applicants and of taken decisions referred to in Article 40 of this Law shall be kept permanently.

XII TRANSITIONAL AND FINAL PROVISIONS

Establishment of the Commission

Article 42

(1) The competent bodies referred to in Article 19 paragraphs 2 and 3 of this Law shall propose to the Commission for human resources and administration the members of the Commission and their deputies within one month from the entry into force of this Law, where the Commission for human resources and administration shall supply the Government with the list of proposed candidates for the purpose of appointment of the Commission within three months from the day of entry into force of this Law.

(2) The President of the Commission shall convene the first session within one month from the day of appointment of the Commission.

Denial of right

Article 43

A person who has the right to compensation under the Law on Obligatory Relations (“Official Gazette of Montenegro”, 47/08) shall have no right to compensation under this Law on account of liability for terrorist acts, public demonstrations and events.

Adoption of secondary legislation

Article 44

Secondary legislation for the implementation of this Law shall be passed within six months from the day of entry into force of this Law.

Application of certain provisions

Article 45

In the cross-border situations involving the European Union Member States this Law shall apply from the day of accession of Montenegro to the European Union.

Entry into force

Article 46

This Law shall enter into force on the eighth day following that of its publication in the “Official Gazette of Montenegro”, and it shall apply from the 1st of January 2013.