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Report of the Working Group on Enforced or Involuntary Disappearances

Addendum

Mission to Montenegro[*, **]

Summary

At the invitation of the Government of Montenegro, the Working Group on Enforced or Involuntary Disappearances visited the country from 27 to 30 June 2014.

The Working Group wishes to thank the Government of Montenegro for its invitation to visit the country and for its cooperation before and during the visit.

The visit to Montenegro took place in the context of an official regional visit during which the Working Group also visited Croatia and Serbia, including Kosovo.[1] Given the amount of time that has passed since the enforced disappearances occurred and the advanced age of many witnesses, relatives and perpetrators, there is an urgent need for everyone involved in the search for missing persons in the region to set as an immediate priority the establishment of the truth, particularly the determination of the fate and whereabouts of all the disappeared.

[*] The summary of the present report is circulated in all official languages. The report itself, contained in the annex, is circulated in the language of submission only.

[**] Late submission.

[1] All references to Kosovo in the present document should be understood to be in compliance with Security Council resolution 1244 (1999).

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The Working Group is concerned that regional cooperation is marred with mutual mistrust. It calls on everyone involved to contribute to fostering a trusting environment to promote regional cooperation, inter-ethnic reconciliation and social cohesion. The Working Group stresses that successful cooperation requires clear and strong political commitment from the highest levels of all parties involved.

The Working Group calls on the Government of Montenegro to establish enforced disappearance as a separate offence; to ensure efficient prosecution of war crimes in line with international standards; to adopt all measures necessary to combat impunity; and to set up comprehensive reparation programmes.

Annex

[English only]

Report of the Working Group on Enforced or Involuntary Disappearances on its visit to Montenegro (27-30 June 2014)

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I. Introduction

1. At the invitation of the Government of Montenegro, the Working Group on Enforced or Involuntary Disappearances visited the country from 27 to 30 June 2014. The Working Group was represented by three members: Ariel Dulitzky, Jasminka Dzumhur and Osman El Hajjé. During the visit, the Working Group held meetings with high-level authorities, including those in charge of the implementation of international human rights standards in Montenegro, as well as with civil society groups.

2. The purpose of the visit was to examine matters related to enforced disappearances and missing persons in Montenegro, focusing in particular on truth, justice, reparation and memory for victims. While the mandate of the Working Group is to deal with issues related to enforced disappearance, the issues of enforced disappearance and missing persons are clearly interlinked in this particular context. The Working Group makes reference in the present report to victims of enforced disappearance and missing persons, and remains aware of the legal and factual differences between them.

3. The Working Group wishes to thank the Government of Montenegro for its invitation to visit the country. The delegation would particularly like to thank the Ministry of Foreign Affairs for its support for the visit. The Working Group would also like to thank the United Nations country team in Montenegro, especially the Resident Coordinator, for coordinating the joint efforts of various United Nations specialized agencies in providing logistical support to the visit.

4. During the visit, the Working Group held meetings with the Minister of Human Rights, the President of the Criminal Department of the Supreme Court and the Secretary of the Supreme Court, the State Secretary for Political Affairs at the Ministry of Foreign Affairs and European Integration, the Secretary of the Ministry of Labour and Social Welfare and the Director of the Directorate for Social and Child Protection, the Secretary and the Senior Advisor of the Ministry of Health, the Deputy Minister of Defence, the Deputy Minister of Justice, the Director of the Police Directorate and the Protector of Human Rights and Freedoms and the Secretary of that institution. The Working Group held a number of meetings with representatives of all sectors of civil society, including non-governmental organizations, activists and lawyers.

5. The invitations extended by the Government to the Working Group and other special procedures of the Human Rights Council and the level of support provided by the Government before and during the visit of the Working Group are testimonies of the commitment of Montenegro to cooperating with international human rights mechanisms and taking human rights issues seriously. The Working Group received all the documents it had requested, including the legislation and statistical data mentioned during the meetings with official authorities. The Working Group welcomes the openness demonstrated by Montenegro and encourages it to invite other special procedures mandate holders to visit the country in the near future.

II. Regional context

6. The visit to Montenegro took place in the context of an official 16-day regional visit during which the Working Group also visited Croatia and Serbia, including Kosovo. While the present report addresses matters mainly concerning Montenegro — for which the numbers of enforced disappearances and missing persons are certainly much lower than in other countries in the region — the issue of enforced disappearances and missing persons in the Western Balkans cannot be examined without taking into account the general regional

perspective.[2] The Working Group visited Bosnia and Herzegovina in 2010 (see A/HRC/16/48/Add.1). According to the International Committee of the Red Cross (ICRC), to date, the fate or whereabouts of over 23,000 persons missing as a result of the Balkan conflicts has been established. However, ICRC has indicated that over 11,000 persons are still missing in the region and that there are unidentified remains belonging to hundreds of bodies in the morgues throughout the region.[3] The Working Group identified some common issues and challenges relating to missing persons and disappearances in the region.

7. Despite impressive results in the past, progress in the search for missing persons in the region has slowed down significantly in recent years, and many families are extremely frustrated by that. It is becoming urgent to ensure that the process of identifying mass grave locations and burial places speeds up as soon as possible, primarily because memories are fading and individuals, places and events are more difficult to identify. Furthermore, some of the witnesses have died or are likely to die in the next few years. Additionally, and even more importantly, some relatives of missing persons are reaching the end of their lives and risk dying without ever knowing the truth about the fate or whereabouts of their loved ones.

8. The conflicts in the former Yugoslavia broke one country into several independent entities. That resulted in specific challenges, primarily obstacles to the prosecution of war crimes in the region, since the prosecution of war criminals may create tensions among States and entities.

9. In the absence of a legal framework for regional cooperation, searching for the disappeared and missing persons, conducting investigations and bringing those responsible for war crimes to justice become critically challenging, particularly because many victims, witnesses and perpetrators are living in the territories of different States and the scenes of the crimes are located in different countries. Often, the presence of an alleged perpetrator in another country where there is no willingness or legal grounds to prosecute leads to insurmountable obstacles to achieving accountability. Insufficient witness protection and the lack of incentives to encourage people to provide more information have also contributed to the slow progress of investigations.

10. Progress is also hampered by the fact that information and evidence that are available are often not shared across borders in the search and identification of the missing, as well as in the investigation, prosecution and conviction of war criminals. There is no centralized regional database of missing persons, not even a list of all missing persons in the region. Several representatives of organizations of families of the disappeared expressed frustration at the ongoing and slow-paced discussions on the creation of a common list of the disappeared. The Working Group notes in this respect that a meeting among governmental institutions in charge of the issue of missing persons in the Western Balkans was held in May 2015 to discuss the establishment of a joint list of missing persons in the territories of the former Yugoslavia.

11. Furthermore, some archives that may contain information on the fate and whereabouts of the missing are not fully accessible.

12. A common gap at the regional level is the absence in existing legal systems of an autonomous crime of enforced disappearance and the absence of an encompassing framework for compensation and reparation for victims and their relatives.

[2] For reports on the work of the Working Group in the region during the conflict, see E/CN.4/1994/26/Add.1; E/CN.4/1995/37; E/CN.4/1996/36; and E/CN.4/1997/55.

[3] See www.icrc.org/eng/resources/documents/interview/2013/08-28-disappeared-missing-western-balkans-milner.htm.

13. Another challenge in the Western Balkans is that between 3,000 and 5,000 of the bodies that have been exhumed have not yet been identified. Even after DNA analysis and cross-checking with the DNA database, which contains blood samples from over 97 per cent of the relatives of the victims, no match has been found in those cases. There are several possible explanations for that. It may be that, owing to the traditional methods that were used until the year 2000, there were misidentifications. Some estimates suggest that up to 30 per cent of identifications made using traditional methods may be erroneous. In order to verify the identifications that were made using traditional methods, all the bodies identified using those methods would have to be exhumed and bone samples taken for DNA testing. However, that would be an extremely difficult and painful process for the family members. It is also possible that some of the exhumed bodies are those of persons whose deaths were unrelated to the conflict. That could be the case if, for example, the bodies of victims of the conflict were buried in graveyards and their bones intermingled with those of other bodies over time. In addition, there is the possibility that the DNA samples match the blood samples from relatives of missing persons from other countries in the region, given the above-mentioned lack of a joint regional DNA database.

14. The International Commission on Missing Persons has actively promoted the signing of a declaration on missing persons. The Working Group was pleased to learn that, on 29 August 2014, Bosnia and Herzegovina, Croatia, Montenegro and Serbia signed the Declaration on the Role of the State in Addressing the Issue of Persons Missing as a Consequence of Armed Conflict and Human Rights Abuses.[4] The Working Group welcomes this initiative, which highlights the primary responsibility of States in addressing the issue of missing persons, with the aim of guaranteeing the rights of victims. The Declaration also stresses the need for cooperation between Governments and with international and other organizations in the process of establishing the whereabouts of missing persons. The authorities in Kosovo informed the Working Group that they had expressed their willingness to become a signatory to the Declaration, to no avail. The Working Group recognizes the importance of involving the authorities in Kosovo, through appropriate means, in regional cooperation activities to address the issue of missing persons.

15. The Working Group recognizes the important work that ICRC has carried out in the Balkans in the past 20 years, including facilitating negotiations and cooperation between concerned parties. Binational initiatives, many of which were facilitated, promoted and led by ICRC, are welcome developments that should be strengthened and expanded.

16. The International Commission on Missing Persons and ICRC have carried out important work in helping States to establish the whereabouts and identity of those who went missing during armed conflicts in the region, and in coordinating joint exhumations. They also played an essential role in the process of DNA analysis and collection of blood samples from family members of missing persons, which is a key precursor to the identification of the bodies that were recovered during the exhumation processes. Moreover, the Commission has facilitated cooperation between associations of families of disappeared persons from the region and is providing permanent support to the Regional Coordination of Missing Persons' Family Associations from the former Yugoslavia, which is an umbrella group of associations of families of disappeared persons from countries in the region.

17. The Working Group notes that some initiatives have been taken for regional cooperation in the search for the disappeared and in the area of transitional justice,

[4] See www.ic-mp.org/wp-content/uploads/2014/08/signed-declaration-2.pdf.

including the planned establishment of a regional truth commission (known as RECOM), as a non-political regional network of civil society organizations and individuals.

III. General situation concerning enforced disappearances and missing persons in Montenegro

18. In the period between 1945 and 1992, Montenegro was a constituent republic of the former Socialist Federal Republic of Yugoslavia. In April 1992, Montenegro and the Republic of Serbia formed a new federal State, namely the Federal Republic of Yugoslavia. In 2003, the Federal Republic of Yugoslavia was officially reconstituted as a loose union known as the State Union of Serbia and Montenegro. The Constitutional Charter of the State Union of Serbia and Montenegro, adopted on 4 February 2003, provided that the process of secession required a minimum of three years from ratification of the Charter before one of the member States could declare independence. On 21 May 2006, Montenegro held a referendum on independence in which 55.5 per cent of the voters opted for independence.

19. Montenegro is party to the core United Nations human rights treaties and the Rome Statute of the International Criminal Court, which establishes that the enforced disappearance of persons amounts to a crime against humanity. At the time that most of the relevant events took place, Montenegro was either part of the Socialist Federal Republic of Yugoslavia or the Federal Republic of Yugoslavia, thus all the treaties, particularly those related to international humanitarian law, were applicable in Montenegro.

20. The Working Group welcomes the ratification by Montenegro of the International Convention for the Protection of All Persons from Enforced Disappearance and the submission of its initial report in accordance with article 29 of the Convention (CED/C/MNE/1). The Working Group is pleased to learn that the State party has recognized the competence of the Committee in respect of individual and inter-State communications, pursuant to articles 31 and 32 of the Convention.

21. The Working Group recognizes the support given by the Government of Montenegro to various regional initiatives in the area of transitional justice. In particular, it welcomes the facts that the parliament of Montenegro supported the setting up of a regional truth commission to establish the facts of war crimes committed in the former Yugoslavia and that the former Prime Minister of Montenegro was the first in the region to sign the petition for the establishment of the commission. The Working Group is also pleased to learn that, on 29 April 2014, Bosnia and Herzegovina and Montenegro signed the Protocol on Cooperation in Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. Montenegro has already signed similar agreements with Croatia and Serbia.

22. As mentioned above, the Working Group also welcomes the signing, in Mostar, Bosnia and Herzegovina, on 29 August 2014 by the President of Montenegro together with leaders of Bosnia and Herzegovina, Croatia and Serbia of the Declaration on the Role of the State in Addressing the Issue of Persons Missing as a Consequence of Armed Conflict and Human Rights Abuses. By signing this document, Montenegro confirmed its commitment to finding a solution to this humanitarian and human rights issue and recognized its obligation to ensure lasting peace and improve cooperation and reconciliation in the region. The Working Group encourages regional dialogues and calls for a continuation of the joint regional effort to establish the fate and whereabouts of missing persons.

IV. Legal framework

23. This section examines the parts of the current legal framework of Montenegro that are most relevant to the mandate of the Working Group. The Working Group notes that, prior to the independence of Montenegro, all the pertinent laws of the Socialist Federal Republic of Yugoslavia and the Federal Republic of Yugoslavia were applicable in the country.

24. The Constitution of Montenegro[5] established an independent and sovereign State, with a republican form of rule. The Constitution guarantees human rights and freedoms to everyone, without discrimination on any ground. It provides that all ratified and published international agreements and generally accepted rules of international law have supremacy over national legislation. According to the Constitution, ratified international treaties form an integral part of national legislation and are directly applicable when they differ from national legislation. The Constitution provides that everyone has the right to equal protection and access to legal remedy. Guaranteed human rights and freedoms may be limited only by law, within the scope permitted by the Constitution and to such an extent as is necessary to attain the purpose for which the limitation is allowed in an open and democratic society. During a proclaimed state of war or emergency, the exercise of certain human rights and freedoms may be limited to the extent necessary. The Constitution provides that limitations may not be introduced on the grounds of sex, national origin, race, religion, language, ethnic or social origin, political or other beliefs, financial standing or any other personal status. No limitations may be imposed on the rights to life, legal remedy and legal aid; dignity and respect of the person; fair and public trial and the principle of legality; the presumption of innocence; defence; compensation for damage for illegal or ungrounded deprivation of liberty and ungrounded conviction; freedom of thought, conscience and religion; and marriage.

25. The Working Group notes that the Criminal Code of Montenegro[6] prescribes several criminal acts related to disappearances, including criminal offences of unlawful deprivation of liberty (art. 162), abduction (art. 164) and coercion (art. 165). The Criminal Code also prescribes a group of criminal offences against humanity and other values protected under international law (arts. 426-449 (a)) including genocide, crimes against humanity, war crimes against civilian population, war crimes against the wounded and the sick, war crimes against prisoners of war, organization of and instigation to genocide and war crimes and failure to take measures to prevent the commission of crimes against humanity and other values protected by international law.

26. According to article 427 of the Criminal Code of Montenegro, the ordering or committing, as a part of a wider or systematic attack against the civil population, detention or abduction of persons followed by a refusal to acknowledge those acts in order to deny legal protection, constitutes a crime against humanity. An order to commit or direct commission of illegal deprivation of liberty and imprisonment during time of war, armed conflict or occupation constitutes a war crime against the civilian population, as established by article 428 of the Criminal Code.

27. An analysis of the provisions of the Criminal Code of Montenegro shows that enforced disappearance is not yet recognized as an autonomous crime outside the context of a widespread and systematic attack against the civilian population, when enforced disappearance constitutes a crime against humanity. The Working Group emphasizes that criminalizing enforced disappearance under domestic legislation can serve as an important

[5] Official Gazette of Montenegro Nos.1/2007 and 38/2013.

[6] Official Gazette of Montenegro Nos. 70/03, 13/04, 47/06, 40/08, 25/10, 32/11 and 40/13.

safeguard against impunity, as well as a meaningful preventive measure to ensure the non-occurrence of enforced disappearance. The Working Group is concerned that a State that does not criminalize enforced disappearance in its domestic law may also fail to meet other obligations under international law.

28. The Working Group notes that article 129 of the Criminal Code provides that prosecution and enforcement of penalty for certain criminal offences are not subject to a statute of limitations. Those criminal offences include genocide, crimes against humanity, war crimes against the civilian population, failure to take measures to prevent crimes against humanity and other values protected under international law. The Code of Criminal Procedure[7] aims to ensure full procedural protection of the human rights and fundamental freedoms guaranteed by the Constitution and international instruments and to strike a balance between the two requirements that must be met by every proceeding — the efficiency of criminal procedure on the one hand and the best possible protection of human rights and freedoms on the other.

29. The Code of Criminal Procedure contains specific provisions regulating the protection of witnesses, including special measures and means to provide protection to witnesses in criminal procedures. The provisions contain articles on the protection of witnesses from intimidation and on special procedures for the participation of and for hearing protected witnesses.[8] Those measures can be used as important tools in the prosecution of crimes against humanity.

30. In addition, the Working Group notes that the Law on Witness Protection[9] regulates conditions and procedures for providing out-of-court protection and assistance to a witness, when reasonable fear exists that testifying for the purpose of bringing evidence about a criminal offence would expose the witness to severe danger to his or her life, health, corporal inviolability, freedom or property, where other measures do not suffice.

31. The Working Group also notes that provisions in the Law on the Enforcement of Criminal Sanctions[10] and relevant by-laws, and the Law on Internal Affairs,[11] guarantee equal treatment and respect for the personality and dignity of each person, with full implementation of the principles of the rule of law.

V. Right to the truth

32. The Working Group notes that, although the conflicts in the region were not waged on the territory of Montenegro, being part of the Federal Republic of Yugoslavia from April 1992, its engagement in the regional conflicts resulted in cases of enforced disappearances. In Montenegro, 72 individuals were originally registered as missing as a result of the conflicts in the former Yugoslavia. Of those 72, the remains of 11 persons have been found, while the fate and whereabouts of the other 61 were still unknown. According to the information that the Working Group collected during the visit, of those 61 individuals, 43 went missing in Kosovo, 12 in Bosnia and Herzegovina, 6 of them related to the Strpci case, and 6 in Croatia. After its visit, the Working Group was informed by the Government that the Commission on Missing Persons of Montenegro, in cooperation with other associations dealing with the same issue in neighbouring countries, had resolved the cases

[7] Official Gazette of Montenegro Nos. 57/2009 and 49/2010.
[8] Article 120-124 of the Code of Criminal Procedure.
[9] Official Gazette of Montenegro No. 65/04.
[10] Official Gazette of Montenegro No. 17/11.
[11] Ibid.

and handed over of the remains of 14 persons who, at the time of their disappearances, had been citizens of Montenegro, or whose disappearance had been reported by individuals who were citizens of Montenegro at the time the disappearance was reported. Since July 2014, the remains of 3 persons whose families live in Montenegro and were listed as missing persons in neighbouring States have also been handed over.

33. During its visit, the Working Group learned that in 2011, the Government of Montenegro established the Commission on Missing Persons. After its visit, the Working Group was informed that, on 18 December 2014, Montenegro decided to terminate the mandate of the Commission. On 6 February 2015, pursuant to a decision of the Minister of Labour and Social Welfare, a new Commission on Missing Persons was established. The Commission that existed between 2011 and 2014 had been responsible for studying and preparing proposals to address the issue of persons who had gone missing from the territory of Montenegro during the armed conflicts in the former Yugoslavia and for fulfilling the obligations arising out of international treaties and agreements relating to resolving the issue of missing persons. The Commission had also been obliged to coordinate the work of the relevant bodies and organizations in the process of the search for, exhumation and identification of missing persons, and to cooperate with the competent authorities and associations of missing persons' families in order to resolve their status.

34. The Working Group noted that the Commission's mandate was limited to addressing the issue of persons who had gone missing from the territory of Montenegro in the armed conflicts in the former Yugoslavia. Such a vague mandate could lead to the exclusion of some missing persons in the work of the Commission.

35. The members of the Commission were representatives of the Ministry of Justice, the Ministry of Labour and Social Welfare, the Ministry of the Interior, the Ministry of Foreign Affairs and European Integration, the Ministry of Defence, the Institute for Refugees and the Red Cross of Montenegro. The Working Group was informed that the new Commission, which was established in February 2015, would include a representative of the Ministry for Human and Minority Rights. In April 2012, the previous Commission signed an agreement on mutual cooperation in the process of locating missing persons with the Commission on Missing Persons of Serbia. No such agreements have been signed with Bosnia and Herzegovina, Croatia or Kosovo. During the Working Group's visit, the members of the previous Commission expressed their readiness to sign cooperation agreements with relevant bodies from neighbouring countries. The Working Group stresses that cooperation with other parties in the region in the process of gathering information would help speed up the search for missing persons, including the identification of bodies and of the locations of previously unknown graves.

36. During its visit, the Working Group noted with concern that the previous Commission did not take a proactive approach to searching for missing persons and served mainly as a coordinating body. Its main role had been to facilitate the handover of remains of missing persons that had been exhumed and identified by other parties in the region, and to support the families of missing persons in the burial process. Depending on the circumstances, the Commission held meetings infrequently, approximately twice a year. One priority of the new Commission should be the signing of cooperation agreements with the authorities in Bosnia and Herzegovina, Croatia and Kosovo that are in charge of searching for disappeared persons. After its visit, the Working Group was pleased to learn that procedures are under way for the signing of an agreement on cooperation with the Commission on Missing Persons of Kosovo.

37. The families of missing persons have the right to the truth, which includes knowing the fate and whereabouts of their loved ones. This is an absolute right enshrined in the International Convention for the Protection of All Persons from Enforced Disappearance, to which Montenegro is a party. The Working Group recalls in this respect its general

comment on the right to the truth in relation to enforced disappearances, which states that "the right to the truth is both a collective and an individual right. Each victim has the right to know the truth about violations that affected him or her, but the truth also has to be told at the level of society".[12]

38. The Working Group notes with appreciation that the Law on Free Access to Information came into force in 2013. That law could facilitate the realization of the right to the truth of families of missing persons by enabling citizens of Montenegro to request access to information held in any form by public bodies. However, the Working Group was concerned to learn that the implementation of the law in the period between August 2013 and July 2014 was far from satisfactory. Challenges are posed particularly in the implementation of article 12 of the law, which defines proactive access to information and obliges institutions to disclose information of public interest on its web pages.

39. The Working Group is also concerned that the Office of the Prosecutor has not taken effective measures to maintain transparent and permanent communication with citizens. The Working Group received allegations that the Office of the Prosecutor failed to meet its obligations to disclose information and documents of public interests. Also, information provided on the website of the Office of the Prosecutor is outdated. The Working Group also received information on the inadequate implementation of the Law on Free Access to Information by courts. It was reported to the Working Group that the courts have refused requests for information related to final court decisions.

40. The Working Group emphasizes the importance of ensuring openness and transparency concerning judicial decisions and the consistent application of the Law on Free Access to Information, which allows refusal of access to information only when it is so required by public interest. Information held by public entities is of significant value to society. Ensuring free access to information can contribute to the promotion of transparency and accountability. The Working Group states in its general comment on the right to the truth in relation to enforced disappearance that the right to know the truth refers to "the right to know the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrator(s)".[13]

41. The Working Group welcomes the fact that, after its visit to Montenegro, a memorandum of understanding was signed between the Agency for Personal Data Protection and Free Access to Information and the Centre for Democratic Transition to promote the Law on Free Access to Information and raise awareness about the rights and obligations arising from that Law. The Working Group also welcomes the fact that a similar memorandum has been signed between the Office of the Supreme State Prosecutor and the Centre for Democratic Transition, with the goal of establishing cooperation and joint activities to enhance transparency, to improve public relations and to conduct training sessions.

VI. Right to justice

42. The Working Group welcomes the fact that Montenegro has established the necessary legal and institutional framework to prosecute war crimes at the national level, including the establishment of the Department for the Suppression of Organized Crime, Corruption, Terrorism and War Crimes under the authority of the Supreme State

[12] See A/HRC/16/48, para. 39.
[13] Ibid.

Prosecutor. After its visit, the Working Group was informed that a Special Division in the High Court of Podgorica had been established pursuant to the Law on Courts,[14] which entered into force on 20 March 2015. The Special Division is competent to handle war crime cases irrespective of the rules on territorial jurisdiction. At the same time, the Special Division within the High Court in Bijelo Polje ceased to exist pursuant to the entry into force of the Law on Courts.

43. However, an overview of the prosecution of war crimes in the country demonstrates that Montenegro has not complied with its obligations under international law to bring justice to victims of war crimes committed during the armed conflicts in the 1990s. Although compensation has been paid to some of the families of victims, most of the perpetrators of war crimes continue to enjoy impunity. During its visit, the Working Group received information on six war crime cases that have been prosecuted and tried in Montenegro. They are known as Morinj, deportation of refugees, Kaluđerski Laz, Bukovica, Štrpci and Klapuh.

44. The Working Group notes that there has been a long delay between the commission of the crimes and legal proceedings in most of the war crime cases. While war crimes charges have been brought in a number of cases, the majority of the persons accused of war crimes have been acquitted by court decisions and very few were convicted in the 1990s. There have not been any convictions in recent years. The Working Group notes with concern that no one has been convicted on the basis of command responsibility. None of the perpetrators who ordered the crimes have been held accountable. Some of the few direct perpetrators who were convicted received sentences shorter than the statutory minimum, based on mitigating factors that would not merit such treatment in the practice of the International Tribunal for the Former Yugoslavia.[15]

45. In the case concerning the deportation of refugees, some victims allegedly disappeared after being deported from Montenegro. After the visit, the Working Group was informed that in that case, the procedure for requesting the protection of legality was ongoing before the Supreme Court. The Working Group notes with deep concern that the courts in Montenegro applied a restrictive interpretation of domestic law and international humanitarian law in relation to war crime prosecution. The Working Group is particularly concerned that the interpretation applied by the courts in Montenegro neglects the standard established by the International Tribunal for the Former Yugoslavia in relation to the definition of war crimes. In this regard, the Working Group encourages the courts in Montenegro to take into account the jurisprudence of the International Tribunal for the Former Yugoslavia and other relevant international tribunals. In addition, the Working Group considers that this practice is in violation of article 9 of the Constitution of Montenegro, which states that ratified and published international treaties and generally accepted rules of international law are an integral part of the Montenegrin legal system, have supremacy over domestic legislation and are directly applicable where they differ from domestic legislation.

[14] Official Gazette of Montenegro No. 11/15.

[15] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1999 is a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990s. Those indicted by the Tribunal include heads of State, prime ministers, army chiefs-of-staff, interior ministers and many other high- and mid-level political, military and police leaders from various parties to the conflicts. Its indictments address crimes committed from 1991 to 2001 against members of various ethnic groups in Bosnia and Herzegovina, Croatia, Serbia, the former Yugoslav Republic of Macedonia and Kosovo. See www.icty.org/sections/AbouttheICTY.

46. It is reported that persons who have been accused of war crimes, were in detention and were later acquitted could file a compensation claim. While the Working Group acknowledges the importance of protecting the legal rights of all individuals, it stresses that it is crucial for the authorities of Montenegro to uphold social justice and protect the dignity of the victims and their families.

47. As mentioned above, the effective prosecution of those responsible for war crimes committed during the conflicts on the territory of the former Yugoslavia, owing to their interdependence, requires that the prosecutors of the countries in the region cooperate. The Working Group welcomes the fact that the Prosecutor of Montenegro has signed the Protocol on Cooperation in Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide with the Prosecutors of Bosnia and Herzegovina, Croatia and Serbia.[16]

48. The Working Group also notes that a number of capacity-building activities were organized by international organizations in 2011 with the aim of strengthening the capacity of Montenegrin judges and prosecutors to investigate, prosecute and try war crimes cases effectively. Nevertheless the Working Group notes that there is still a lack of expertise in this area among judges and prosecutors. The Working Group observes that the lack of accountability and the widespread impunity for certain serious violations of international human rights law and international humanitarian law in Montenegro have a negative impact on truth, justice and reconciliation.

VII. Right to reparation

49. Montenegro has not adopted a specific law on missing persons that comprehensively regulates the status and rights of missing persons and their families. The Working Group notes that article 142, point 11, of the Code of Criminal Procedure defines a victim as a person to whom physical or mental pain or suffering, or damage to their property, was caused or whose human rights and freedoms were violated by means of an illegal act prescribed in the law as a criminal offence. It was brought to the attention of the Working Group that the same definition of a victim is also contained in the newly adopted law on compensation for damage to the victims of violent criminal offences.[17] Montenegrin legislation provides a narrow and very limited definition of victim, and only in the context of criminal proceedings. That definition does not grant victim status when criminal proceedings against a perpetrator have not been initiated. The Working Group recalls the definition of victim of enforced disappearance and the victim's rights prescribed in article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance.

50. Montenegro ratified the European Convention on the Compensation of Victims of Violent Crimes in 2010. That Convention obliges Montenegro to grant compensation to victims of intentional violent crimes that were committed on its territory. The Working Group notes that Montenegro has not fully realized that obligation yet.

51. The right to compensation for damage suffered as a result of unlawful actions is guaranteed by article 38 of the Constitution of Montenegro, according to which a person deprived of liberty in an illegal or ungrounded manner or convicted without grounds shall

[16] The Protocol was signed with the Prosecutor of the Republic of Croatia on 28 July 2006, with the Special Prosecutor for War Crimes of the Republic Serbia on 31 October 2007 and with the Prosecutor of Bosnia and Herzegovina in April 2014.

[17] Official Gazette of Montenegro No. 35/2015.

have the right to compensation for damage from the State. That right, guaranteed by the Constitution, can only be achieved through civil procedure. The Law on Contracts and Torts provides that the right to compensation can be realized by bringing claims to civil courts. In order to receive a pension or compensation, relatives of missing persons have to initiate proceedings to declare the missing person dead. The victims can also appear in criminal cases as injured parties and request compensation from a defendant in accordance with the Code of Criminal Procedure.

52. The Law on Social and Child Welfare guarantees some rights to the families of missing persons under the same social scheme that is applicable to every citizen of Montenegro based on personal or family circumstances. Those rights include basic material benefits and social services, child protection, including allowances for care and assistance, health care, funeral expenses and one-time financial assistance. In order to be eligible for those benefits, applicants must be citizens of Montenegro residing in Montenegro. That precludes family members of persons who disappeared on the territory of Montenegro from enjoying their social rights if they are citizens of other countries and if they do not reside in Montenegro. The Working Group notes that there is no a specific legal regulation that recognizes disappeared persons' relatives as victims and regulates their rights.

53. During its visit, the Working Group noted that the Law on Health Care did not recognize the family members of missing persons as health rights holders. The Working Group was informed that amendments to the Law were being reviewed by the parliament. After its visit, the Working Group was pleased to learn that amendments had been made to the Law, article 17 of which now stipulates that funds are provided for the health care of the family members of victims of enforced or involuntary disappearance. The Working Group welcomes the amendment, which recognizes the special status and needs in the area of health care of family members of missing persons.

54. The Working Group stresses that in 2008, the Government of Montenegro recognized State responsibility in the case of the deportation of Muslim refugees from Herceg Novi and paid compensation totalling €4,135,000 to 193 victims. The Working Group highlights that this creates an important precedent for the whole region, not only owing to the significant amount paid, but more importantly, it is an implicit recognition of State responsibility. However, the Working Group notes that the Government has not showed any willingness to conclude a settlement in the subsequent claims filed in 2010 by other victims of the same deportation case. It is unclear what criteria are used by the Government to enter into settlement agreements with victims.

55. The Working Group notes that compensation in other cases has been paid only after judicial decisions. With regard to the victims in the Morinj and the Kaluđerski Laz cases, in February 2013, the court in Podgorica decided to grant compensation to seven victims. However, more than 100 other victims in those cases are still awaiting decisions from civil courts, the proceedings of which have been suspended until the final judgements in the relevant domestic criminal proceedings have been adopted. The Working Group notes that in those cases, final binding criminal judgements were adopted in 2014 and in the Kaluđjerski Laz case, the defendants were acquitted. Concerning other compensation cases, domestic courts have rendered four judgements granting compensation to the families of victims in the Strpci case. In 11 other cases, the compensation claims have been dismissed as unfounded, while in 13 cases the plaintiffs withdrew their claims. With regard to reparation in the Bukovica case, in 20 civil cases a lower court decided that reparation would be awarded in the form of compensation, but the High Court overturned that decision on appeal.

56. The Working Group emphasizes that classic court proceedings cannot be the only path to reparation because they are too cumbersome for individual victims and do not address the whole range of measures. The Working Group notes that, although some of the

victims of the conflicts have received compensation for the serious suffering they endured as a result of crimes committed during the conflicts, many of them are still awaiting adequate and effective reparation. The lack of recognition of the victims in cases of missing persons in Montenegro limits them from enjoying their rights. Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance indicates that "victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible". The lack of recognition of the victims in cases of missing persons also falls short of the requirements specified by the Working Group in its general comment on article 19 of the Declaration, according to which the right to redress of victims of an act of enforced disappearance and their family places States "under an obligation to adopt legislative and other measures in order to enable the victims to claim compensation before the courts or special administrative bodies empowered to grant compensation".[18] As stated in its 2013 annual report, the Working Group considers that the term "redress" in article 19 of the Declaration includes essentially the concept of "reparation", even though it encompasses that of "effective remedy" as well.[19]

57. The Working Group notes that Montenegro lacks a comprehensive framework to guarantee reparation for victims. Such a framework should include recognition, compensation, rehabilitation, memorials, guarantees and other forms of reparation as defined by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

58. The Working Group welcomes the construction of a memorial to the victims of the civil war between 1991 and 1995. This is a significant symbolic measure for the realization of the right to the truth and memory about what happened in the past.

National institutional framework of human rights

59. The Constitution of Montenegro provides for the establishment of a Protector of Human Rights and Freedoms (Ombudsperson). Article 81 of the Constitution provides that the Protector of Human Rights and Freedoms of Montenegro is an independent and autonomous authority who takes measures to protect human rights and freedoms. The Protector exercises his or her duties on the basis of the Constitution, the law and ratified international agreements, observing also the principles of justice and fairness. The Protector is also the national preventive mechanism, established in accordance with the Optional Protocol to the Convention against Torture, and the national mechanism for protection against discrimination under the Law on Prohibition of Discrimination. The Protector is elected by a majority of votes of all members of the parliament, based on nomination by the President of Montenegro who is obliged to consult civil society. The Working Group notes that the Law on the Protector of Human Rights and Freedoms of Montenegro, as amended in 2014, does not comply with the Opinion issued thereon by the Council of Europe Directorate General of Human Rights and Rule of Law on 27 November 2013. The opinion suggested that the Protector should be elected by a qualified majority of the parliament. In that regard, the Working Group notes that the Constitution of Montenegro provides for the appointment of the Protector by a majority vote of all members of the parliament. The Working Group stresses that a broad consensus in the parliament would strengthen the

[18] See E/CN.4/1998/43, para. 72.
[19] See A/HRC/22/45, para. 48.

Protector's independence, impartiality and legitimacy and ensure public confidence in the institution.

60. The Protector examines human rights violations based on complaints received from citizens or ex officio. The Working Group notes that the mandate of the Protector should be developed in order to enable him or her to take a proactive role in the protection of victims' rights, particularly in cases in which serious human rights violations have allegedly occurred or the rights of vulnerable persons have allegedly been violated.

VIII. Conclusions and recommendations

61. **Considering the amount of time that has passed since the disappearances occurred in the Western Balkans and the very advanced age of many relatives and witnesses, there is an urgent need for everyone involved in the process of searching for missing persons to set as an immediate priority the establishment of the truth, particularly the determination of the fate and whereabouts of all the disappeared. The issue of disappearances should be considered a humanitarian as well as a human rights issue on the agenda of political processes.**

62. **The Working Group acknowledges the current working-level cooperation that takes place between forensic experts, prosecutors and judges across the region. Successful cooperation requires clear and strong political commitment from the highest levels of all parties involved. Currently, regional cooperation is marred ny mutual mistrust, which results, inter alia, in delays in exhumations. Therefore, building trust between concerned parties is of high importance; they must all contribute to that process by putting ill-will behind them and fostering a trusting environment that will promote regional cooperation. In the meantime, mature political conduct and determined political leadership are required in order to foster the inter-ethnic reconciliation and social cohesion that could eventually help to establish the truth in the region.**

63. **The Working Group reiterates its gratitude to the Government of Montenegro for the invitation and sincere cooperation it demonstrated with the Working Group throughout the visit. During the visit, the Working Group was deeply saddened by the unbelievable suffering that the relatives of missing persons endured and have continued to endure for so many years. In the hope of being able to contribute some elements of a solution, the Working Group reiterates its offer of future cooperation and dialogue with all stakeholders.**

A. Regional recommendations to Governments and authorities

64. **Act with due urgency and speed in the matter of enforced disappearances, as required by the Declaration on the Protection of All Persons from Enforced Disappearance and other international obligations.**

65. **Disclose all information on mass graves and make that information accessible to all countries and authorities in the region.**

66. **Ensure high-level commitment to clarifying the fate and whereabouts of all missing persons, bringing all perpetrators to justice and ensuring full reparation for all victims.**

67. **Reinvigorate efforts to establish a common regional list of the disappeared.**

68. **Speed up the process of tracing missing persons through strengthened cooperation with institutions engaged in tracing disappeared persons in neighbouring countries, especially between prosecutors and judicial institutions. Such cooperation must include the exchange of relevant evidence.**

69. **Everyone involved must support the search for missing persons by providing relevant information and documentation at the national and regional level.**

70. **Continue the regional dialogue on missing persons and initiatives aimed at finding solutions to properly solve the issue.**

71. **Implement fully the Declaration on the Role of the State in Addressing the Issue of Persons Missing as a Consequence of Armed Conflict and Human Rights Abuses, signed by Bosnia and Herzegovina, Croatia, Montenegro and Serbia.**

72. **Offer more in-service training to judges and prosecutors on the Declaration on the Protection of All Persons from Enforced Disappearance and other international instruments.**

73. **Immediately open archives that are relevant to cases of enforced disappearances in order to facilitate the localization of undiscovered gravesites and to speed up the search for missing persons.**

B. Recommendations to Montenegro

74. **Establish enforced disappearance as a separate offence in accordance with the definition contained in the Declaration on the Protection of All Persons from Enforced Disappearance. The offence of enforced disappearance should be punishable by appropriate penalties that take into account its extreme seriousness.**

75. **Ensure efficient prosecution of war crimes in line with international standards. The authorities of Montenegro should ensure that war crime cases are processed in an independent, impartial, efficient and professional manner that complies fully with international human rights law and international humanitarian law.**

76. **Adopt all the measures necessary to combat impunity for violations of human rights.**

77. **Ensure that the judiciary, in particularly the higher courts, including the Constitutional Court and Supreme Court of Montenegro, take into account the jurisprudence established by the International Tribunal for the Former Yugoslavia and other international tribunals in relation to war crime prosecution and respect relevant standards established by international law and the Declaration on the Protection of All Persons from Enforced Disappearance.**

78. **Provide systematic training in international criminal law and international humanitarian law for Montenegrin prosecutors and judges.**

79. **Ensure that all victims of war crimes are provided with effective access to justice and adequate reparation. In this respect, the status of families of missing persons should be recognized by law and their rights should be guaranteed in a non-discriminatory manner.**

80. **Establish an effective public system of free legal aid to allow relatives of missing persons to obtain legal assistance if they cannot afford it.**

81. **Set up a programme of comprehensive reparation that includes not only compensation but also restitution, rehabilitation, satisfaction, including restoration of**

dignity and reputation, and guarantees of non-repetition. A gender-sensitive approach should be taken when designing and implementing reparation programmes.

82. **Continue regional dialogues and contribute to a joint regional effort to establish the fate and whereabouts of missing persons.**

83. **Increase transparency by ensuring that the government authorities and the judiciary disclose information of public interest on their web pages in accordance with article 12 of the Law on Free Access to Information. The authorities of Montenegro should continue activities aimed at ensuring free access to information.**

84. **Include a representative from the Prosecutor's Office in the Commission on Missing Persons. The Commission should hold meetings more frequently and work in a more proactive manner in order to contribute actively to the search for missing persons.**

85. **The Commission on Missing Persons should sign protocols of cooperation with its counterparts in Bosnia and Herzegovina, Croatia and Kosovo.**

86. **Ensure the integrity and independence of the Protector of Human Rights and Freedoms as a national human rights institution that complies fully with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles). The Office of the Protector should be provided with sufficient resources. The Working Group recalls that the election of an ombudsperson should be carried out in accordance with the Paris Principles.**

87. **The Working Group invites the Government of Montenegro, within 90 days from the date of presentation of the present report to the Human Rights Council, to submit a timetable showing the steps it will take to implement the recommendations of the Working Group, the dates by which each measure will be taken and the dates by which it plans to finalize the implementation of the recommendations.**