Građanska alijansa
Civic Alliance – Aleanca Gytetare

CEDEM
CENTRE FOR DEMOCRACY AND HUMAN RIGHTS

THE REPORT

STATE OF CRIMINAL JUSTICE IN MONTENEGRO FROM THE ASPECT OF QUALITY OF ADJUDICATION, CONSISTENCY OF COURT DECISIONS, HARMONIZATION OF COURT PRACTICE AND TRANSPARENCY OF WORK OF COURTS

Podgorica, July 2014

Civic Aliance, Montenegro
July 2014

Publisher
Boris Raonić

Research Coordinator
Zoran Vujičić

Legal consultants on the project
Siniša Bjeković
Marija Vuksanović

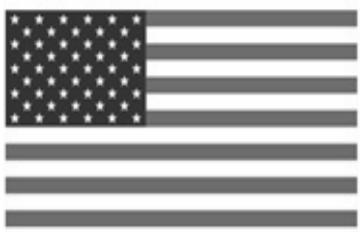
Research team
Zoran Vujičić
Milan Radović
Milena Čarapić
Mirko Kalezić

Translation and proofreading
Jelena Ristović

Design, layout and print
AP print, Podgorica

300 copies

ISBN 978-9940-9483-2-0



This report was made possible by the generous support of the American People through the U.S. State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL) within the U.S. Embassy in Podgorica, under the Criminal Justice Civil Society Program. The author's views expressed in this report do not necessarily reflect the views of the United States Embassy in Podgorica or the United States Government.

TABLE OF CONTENT

I Introduction 5
II Resume of Project implementation 7
III The rule of law as the framework goal of the project 9
IV Problematisation of court practice from the aspect of quality of verdict 11
V Informational system and availability of court practice 13
VI Strategic directions of development and reform of judiciary
in function of improving of quality of trial 15
VII Statistical data about the work of crminal departments of Montenegrin courts in 2013 19
VIII Consistency of decisions in criminal matters as the indicator
of balance of court practice 23
IX Standards of consistency in court decisions towards
the European Court of Human Rights 25
X Individualization of criminal justice and consistency in decision making process 29
XI Internal legal framework of harmonizing of court practice and
the control of verdicts in criminal matters 31
XII Perception of different process and social actors about the level of harmonization
of court practice (judges, lawyers, prosecutors, academic sector, NGO) 37
(a) Interviews of judges 37
(b) Interviews of prosecutors 39
(c) Interviews of lawyers 41
(d) Interviews in academic sector 42
(e) Standpoints of NGO sector about harmonization of court
practice and consistency in decision making process 44
(f) Standpoints of the Supreme Court of Montenegro on presented
viewpoints about harmonization of court practice and its role 46
XIII Court practice in the second instance verdicts of criminal courts 51
XIV Practice of higher courts as the second instance courts 55
XV Practice of Appelate court of Montenegro 61
XVI Conclusions and recommendations 71

I Introduction

In regards to its mission, Civic Alliance has been pursuing control of work of public institutions, and through its Rule of Law program we have been continuously monitoring the work of court system in past four years. This report represents the continuation of monitoring of work of courts, where we made the step forward.

This research and final report is the result of the work of the 8 members' team of Civic Alliance. Methods that were used through our work were questionnaires, interviews, and substantive and legal analyses. We also used Law on free access to information as the source, and analysis of official reports about the work of courts. The project was supported within the Criminal Justice Civil Society Program (CJCSP).

Implementation of the project lasted from 1 August 2013 until May 2014. The research covered the practice of higher courts in Podgorica and Bijelo Polje and the practice of Appellate court. The practice of basic courts was covered directly, as higher courts acted after their decisions on complaints. The research covered legal analysis and results obtained through field work research. We monitored unification of court practice through final verdicts in relevant cases. Questionnaires with judges, prosecutors, lawyers, professors of criminal law, relevant NGOs were also conducted. We monitored transparency of publication of final verdicts via web portal www.sudovi.me and through Law on free access to information.

CA is grateful to all the people who contributed to successful implementation of the research.

II Resume of Project implementation

Implementation of project activities was based on several elements, in attempt to find the answer on issues related to harmonization of court practice, consistency of court decisions, efficiency and transparency of proceedings as basic postulates for judicial standpoints in appraisal of above mentioned issues. In its primary role, this project focused on criminal cases only.

In 2013, out of 2.354 criminal "K" cases in Basic courts that were resolved after appeals, 71,25% of cases were confirmed, 7,33% were revised, 20,68% were rejected, and 0,57% partly rejected. Comparison of this data with the previous year shows slight rise of confirmed first instance court decisions in 2013 (for two percents more than in 2012, when the percentage of confirmed decisions was 69,51%).

As per Higher courts, in terms of quality of adjudication in first instance criminal cases, after rendered legal remedies, the statistics noted 66,67% of confirmed decisions, 13,25% abolished, 13,25% revised while 5,22% first instance decisions were partly abolished. When it comes to cases of special departments, 54,05% first instance decisions was confirmed, 2,7% were revised, 13,51% were abolished and 27,03% cases were confirmed/ abolished/revised.

in terms of direct introduction with the practice of second instance courts as relevant, verdicts/decisions of higher courts (with the accent on Higher court in Podgorica as significantly larger and with bigger caseload) and Appellate Court of Montenegro. Through project analysis, 14 decisions of Appellate Court were processed as well as 21 decisions of higher courts made from 2012 until 2014, in different crime areas and with the heterogenic structure of crime offenders. The purpose of this was to formulate overall process grounds, whose elements contain structurally different criminal acts (corruptive, against life and body, against gender freedom, property crimes, etc.). Speaking about the type of court decisions, it is important to mention that out of the overall number of decisions of Appellate court, 4 were related to revision (others were abolished), while higher courts registered 4 revisions in comparison with the overall number of analyzed cases. Two analyzed decisions of Appellate Court that ended in revision were related to so call *special cases.*

In comparison to all processed cases, it can be concluded that that the reason for majority of abolished sentences is formulated or derives from serious violation of the rules of crime proceeding from Article 386, paragraph 1, item 8, of Criminal Procedure Code that prescribes that inter alia exists only *"if the judgment is incomprehensible, internally contradictory or contradicted to the statement of reasons of the judgment, if the judgment failed to state any reasons or failed to state reasons relating to the relevant facts or if*

these reasons are entirely unclear or contradictory to a considerable degree or if there is a significant factual contradiction between what has been stated in the statement of reasons of the judgment on the contents of certain documents or records on statements made in the proceedings and the documents or records themselves".

It is interesting that the same shortcomings have been identified in hierarchically different court instances, i.e. with higher courts in comparison to basic courts, and Appellate court in comparison with higher courts as the first instance, this has been indicated as the key procedural shortcoming.

Interviewing of different process and social actors who directly implement law, monitor its implementation or are in some other manner related to result of criminal proceeding about the level of unification of court practice, displays huge concern.

Judges, lawyers, prosecutors, representatives of academic community and NGOs who monitor this area and who were interviewed as well, said in 50% of responses that disharmonized court practice existed. In comparison with all answers and analysis of response of Supreme Court on this topic, it can be concluded that there is still competitiveness within judiciary, and even more towards it by the external stakeholders.

Informative system and transparency through portal www.sudovi.me shows that updating of information on final verdicts was at the low level, especially in some courts at the North of Montenegro (for example Higher court in Bijelo Polje). Within monitoring period, it was not possible to receive final verdict unless having all case elements as requested by search engine.

Transparency through targeted search of final verdicts according to Law on free access to information, after demanding final verdicts from Appellate court and two higher courts for previous year related to crime, or criminal acts such as murder, rape, crimes with elements of organized crime and corruption, showed Appellate and Higher Court in Podgorica respect law and deliver responses timely. Response from Higher Court in Bijelo Polje was negative with violation of Law on free access to information, which was verified, through complaint procedure, by the second instance body - Agency for the protection of data and Law on free access to information.[1]

1 Su.V.Br.228/14

III The rule of law as the framework goal of the Project

Basis of all the project goals is the supreme principle of the rule of law, where also act principles for whose implementation is responsible judicial power, but especially those principles that are related to the organization and functioning of judiciary. Although there are numerous theoretical and practical disputes about the essence of the principle of rule of law, it is obvious that specific structural elements are clear and visible, which materialize one of the most important principles of philosophy of law and the science of law. In that regards, fundamental principles of rule of law should be legality and congenial general legal principles such as nullum crimen sine lege, nulla poena sine lege. This means that the law should be adopted under prescribed procedure with its establishment in basic/general legal norm or invitation to highest legal act of the country.

Rationality is next characteristic of law in the system that embraces the principle of rule of law. Meaning of the term *rationality* is reflected in natural relationship between the legal norm and its goal, which appears in the first plan in interpreting of legal norm. This principle is also reflected in claims that the goal has to be clear, or that legal norm has no dilemma about its goals. Speaking about goal, following requirement has direct relationship with it. Norm has to be directed towards achieving of objectively possible goal, otherwise its purpose becomes an issue.

Legal security is one of fundamental requirements of rule of law. It makes more requirements towards creator of legal system where some of them are contained in mentioned elements and the key one that makes anticipation of legal norm, is mostly connected to prohibition of retroactive impact of law.

Consistency of interpretation and implementation of law is the next element in structure of rule of law. Legal systems access to this question in different manners. In some, precedent is regarded as the supreme instrument of consistency when it comes to this issue. Continental law withdraws consistency from accuracy of legal norms and efficiency of court institutions. In comparative law two legal concepts approaches – Anglo-Saxons and Continental, where both of them surely take into account changed social circumstances as the moderator of court practice and interpretation of law. Montenegrin constitutional and legal order establishes only this type of access / in accordance with this, international court practice fulfills internal legal order, and as the result of the Constitution that gives the primacy to international law in comparison to national legislation, courts are additionally obliged to harmonize consistency of its practice to international and internal duty in law implementation.

Natural justice and due process are also connected systems that tend not only to be implemented, but this implementation has to be materialized and visible. Such access provides a kind of control of judicial power whose one principle – principle of publicity makes one of pillars of process justice and the rule of law. Presumption of innocence is in the domain of this element.

Stability of legal order does not imply its statics or stagnation. On the other hand, essential difference for the rule of law is often amending of law that inevitably influence on consistency of law and its implementation. This is especially related to amending of law during the proceeding for the protection of subjective rights, which was assessed by the European Court as the contrary to convention standards depending of the situation and the status of party that has been invited on protection of right.
Finally, equality before the law is being taken as the universal value that does not need anything else except what has already been said in this text, except the fact that this institute pervades all grounds of the rule of law, whether written or unwritten rules as the general legal principles or Common law.

Mentioned principles sublimed in unique concept of the rule of law are not of theoretical nature and they have direct impact on political and legal matters of development of a country. Experiences of some countries explicitly spoke about this in the process of the EU accession when failures in "inconsequent court practice and practice in higher courts lead in legal uncertainty, weaken legal system, which often lead to mild court decisions and often suspended sentences with problematic repercussions especially in terms of cases of corruption".[2]

The Report on progress in accession of Montenegro to the European Union for 2013, indicates on positive steps that were made in the domain of creating of presumptions for undisturbed functioning of judicial institutions, but at the same time reminds on specific internal and external problems that burdens the work of judiciary. So, the Parliament adopted the Law on amnesty that resulted in releasing, reducing or abolishing of sanctions for 380 convicted committers of criminal acts. It is concerning that this law on amnesty was adopted without previous estimation of risk and impacts, which puts in risk that this practice can result in impunity and neutralization of efforts in area of fight against corruption and organized crime".

This document addresses part of problems to the need for future plans for improvement of human resources, increasing the level of responsibility and transparency of procedures within the highest institutions of judicial authority, and improving of IT equipment of judicial institutions for the purpose of improving the functioning and better transparency of work of judiciary. When it comes to this sector, it is important to mention that specific differences in the level of quality of functioning of information system were noted.

2 Report on access of Romania to the EU, 2008

IV Challenging court practice from the aspect of quality of adjudication

Matter of quality of work of courts and judges separately is still based on external impression about work of courts as a whole. Internal aspect related to the work of each judge individually, after long absence of publishing the work of judges, stays as a whole internal matter of judicial power that is resolved in the progressing proceeding and election of judges. In the meantime, public only sporadically receives information about the work of several judges and as the rule, there are no good statements if and when assessment of work of judges individually comes in issue.

Additional quality that occurs at the time of assessing of work of judges is lack of efficient analysis in different areas of criminal justice and punishing policy in judiciary. Answers on abolishing reasons that is constituent part of this project is partial and could not make crucial move in resolving of large number of dilemmas. Such pessimistic and a little relative access is the consequence of legislative presumptions and limited potential of verdict as the instrument of materialization of justice, which leads to conclusion that it is still difficult to indicate on key reasons of such a high number of abolished first instance and considerably smaller number of second instance decisions without deeper insight into case files.

From the aspect of determining towards harmonization of court practice, criminal proceeding is significantly different in comparison with civic proceeding, due to the process inputs and fairness of adjudication and guarantees of quality of court verdict, especially if the character of individually specified justice is taken into account.

Besides, hierarchy of courts in Montenegro is defined in that manner that depending from the competency some of them – organizationally and functionally – at the same time institutionally have the role of the first instance court, and in other cases can functionally act as the second instance courts. Of course, it is important to bear in mind that punishment, and special social characteristics of some forms of criminality separating line of competency within the same courts, but process elements are more or less the same, equally as the manner of conducting of the proceeding. However, complexity of the proceeding in specific types of crimes should be taken into account, especially in complex cases that are related to organized crime, corruption, terrorism and war crimes, so, in access to these cases cannot be a priori be used so simple and one-sided conclusions. Most of the elements of court proceeding, including the material law, are still relative novelty in Montenegrin judiciary, from the aspect of court practice, on both matter of complexity and process and legal specificity.[3]

3 International and legal standards, cross border elements of the proceeding, international judicial cooperation, new systems of hearing and protection of witnesses, status and protection of persons damaged by the crime, manner of collecting and assessing of evidence, their legality and process validity, new information technologies, etc.

It is indicative that this analysis does not deal with the first instance verdicts as in that case should cover the segments of work of other public bodies, primarily prosecution office and police. Quality of their work makes the special aspect of criminal justice that is very often mentioning, but much less analyzed as the condition of efficiency of courts. Of course, such conclusion does not imply resolving of problem but warns on some other elements of court proceedings that challenge relations between public bodies and not relations between courts, which was one of goals of this project.

Practice of the first instance courts or its harmonization is considered from the aspect of "approvability" and number of final verdicts, and therefore it contrasts from the starting impression or the project task based on assumption that the first instance courts have a key or the most important role in harmonization of jurisprudence of national courts. Moreover, statistical data denies such standpoint in almost 30% of cases (including revised decision), while in so called special cases that percentage drastically increased on almost 50%. Although the fact about smaller number of verdicts is known, its importance, argumentation and importance of the case make the whole situation significantly different from other cases.

V IT system and availability of the court practice

Monitoring of portal www.sudovi.me, especially from September 2013 until January 2014, showed that promptness of publishing of final verdicts was at the low level especially in some courts at the north of Montenegro (for example, Higher Court in Bijelo Polje). Also, it was not possible to find final verdict in monitored period, unless you know all elements from the detailed search. After January 2014, situation significantly improved and so did the promptness, so it is enough to know only the number of verdict so anyone can find it. However, in some courts, updating of information about verdicts on the web site is still problem, but this is not the case in Higher Court in Podgorica and Appellate Court that are prompt in this matter. Seams that the website www.sudovi.me should publish detailed directions for the use of part named Decisions, so that each citizen with average IT literacy can find and use information they need.

Campaign on the bases of Law on free access to information was implemented in the frame of the project, after demanding of final verdicts from Appellate Court and two Higher Courts from previous year related to the criminal matter or crimes such as murder, rape and crimes with the elements of organized crime and corruption. Timely responses were received from Appellate and Higher Courts in Podgorica. Response from the Higher Court in Bijelo Polje was negative[4] with explanation that anonymization of verdict could reveled who was it all about. Explanation of decision of Higher Court in Bijelo Polje took the same legal standpoint of Supreme Court Su.VI no.60/11 from 6 July 2011, where the paragraph 3 said they would not allow access to information when it is demanded individual, clearly defined decision. However, on the same grounds and in the same legal standpoint of Administrative department of the Supreme Court of Montenegro (Su. VI no.60/11 from 6 July 2011) stood: "If the access to information is demanded by Law on free access to information, by delivering of final court decisions that were not published on the web page of the court in the frame of the programme "Court practice", the court that has jurisdiction is obliged to allow the access to information by delivering of demanded decisions after anonimization of data in accordance with the Rulebook about anonimization of data in court decisions".

4 Su.V.Br.228/14

VI Strategic directions of development and reform of judiciary in the function of improving the quality of trials

Efficient judiciary reform surely represents one of the priority legal, political and social tasks Montenegro should fulfill on its road to full membership in the European Union. Activities in this field were initiated in 2000, through the *Project of the reform of judicial system*, and were mostly directed towards institutional organization of judicial system, reorganization of relations between judicial institutions and harmonization with Article 6 of *European Convention on protection of human rights and fundamental freedoms*, in a view of protection of guarantees of right to fair trial.

Collectively and individually, those reform initiatives summed intensive legislative and organizational changes, based on strategic documents in judicial area. Bearing in mind legal history of Montenegro, primarily strong impact of executive power and political parties that was less open in comparison with other socialist systems, it can be said that consistency of reforms and its previous scopes were largely conditioned by historic, legal and political heritage, but also by consequences of democratic and social transition. Besides, intensity of reforms was under conditions and dynamics of legislative amending, bearing in mind the fact that constitutional and legislative norms were often adopted for a short time, but also administrative capacities for their implementation and their adopting by professionals and laic public.

Starting points that were the basis of the reform efforts were related to organizational structure and functionality of judiciary, especially on strengthening of independence of judiciary; improvement of transparency of work of courts; decreasing of number of backlog cases; rationalization of court network and establishing of judicial information system (PRIS). Strategy of judiciary reform 2007-2012 with the Action Plan for its implementation was the initial act, whose programme continues for the period 2014-2018.

A number of legislative changes that define specific areas of organization and work of judiciary were adopted, primarily in relation to the manner of electing and valuing of criteria for electing and dismissing of bearers of judicial functions, persistence of the function and functional immunity. These provisions were priority in legislative reforms, bearing in mind that the process of selecting of staff in judiciary was exposed to specific impact of arbitrary, partly caused by failures in provisions about election of judges. Changes on institutional plan were initiated with the aim to strengthen guarantees on independence of judiciary. Court and Prosecutorial Council were established in 2008, which was drafted as independent and autonomous bodies that should provide independence and autonomy of courts and judges. New Rulebooks about the work of Court and Prosecutorial Council were adopted, and Commissions for monitoring of implementation of ethic codex were established by judges and public prosecutors and disciplinary commissions within Court and Prosecutorial Council. These Commissions implement procedures for election of bearers of judicial functions and also defining of their disciplinary

responsibilities. Web portal of courts www.sudovi.me started to work officially on 28 October 2011, which contains web pages of all courts and Judicial Council. Decisions of courts are available on this web portal.

Constitutional changes from 2013 decisively moved the center of judicial reforms towards providing of better guarantees for independence of judiciary, with the aim to prevent and eliminate any irregular impact on bearers of functions in judiciary and to strengthen confidence of public in work of judicial bodies, in accordance with European standards of the rule of law and recommendations of Venetian Commission of the Council of Europe. According to constitutional amendments, amending of set of judicial laws were accessed, for the purpose of efficient implementation of new constitutional framework. Action Plan for access of Montenegro to the EU, was adopted in June 2013, related to Chapter 23 that operationalized conclusions and recommendations from the report of the European Commission about the progress of Montenegro and the Report about analytical review of harmonization of legislation with the EU legislation, in Chapters 23 (judiciary and fundamental rights) and 24 (justice, freedom, and security). Draft of the Strategy of Judiciary Reform 2014-2018 has been prepared, and it was planned to delegate implementation of the Strategy and the Action Plan to the Council for implementation of Strategy for Judiciary Reform that will be composed of representatives of judicial institutions and nongovernmental organizations included in the process of monitoring of reform of judicial system.

Respecting the fact that real effects of reform cannot be observed only through formal indicators of independence and impartiality of judiciary, achieved systemic result can be considered as partial, considering that there are failures in some spheres of judiciary reform, as it was stated in Draft of the Strategy of Judiciary Reform 2014-2018. According to the analysis of effects of implementation of Strategy of Judiciary Reform 2007-2012, key failures were reflected in absence of unique, transparent, and election of bearers of judicial function based on merits, absence of system for periodical assessment that should be basis for improvement, large number of non-enforced court sentences, and limited external and internal financial independence of judicial power.[5] Basic reform directions are therefore directed towards independence of judiciary system, guarantees of impartiality and quality of justice, and improvement of professionalism, responsibility and efficiency of judicial institutions.

Proposal of Strategy of Judiciary Reform 2014-2018, envisages strategic guidelines and operational measures that should contribute to accomplishing of these goals and at the end they result in better confidence of citizens in judiciary, because dissatisfactory level of confidence of public in work of courts was assessed as one of the key matters that should be addressed through future reform efforts, with the aim to consolidate rule of law and achieve sustainable results in judiciary reform.

5 Draft of the Strategy of Judiciary Reform 2014-2018, December 2013, page 4, available on web portal http://www.pravda.gov.me/biblioteka/strategije

Matter of perception of judiciary as an independent and impartial from the aspect of citizens is often conditioned with unreal expectations related to course and result of court proceeding, and the quality and objectivity of media reporting about court proceedings, especially those whose actors are civil servants and state employees, and also bearers of judicial functions. Although it is difficult to abstain from arbitrary appraisal of "evidences on impartiality, independence and level of authority of court as an institution", the level of public trust in the work of judicial bodies derives from, among many other things, inconsistent and sometimes even paradoxical court practice. This is reflected in legal qualifications that are opposed to the facts and different court decisions, made in cases of same factual and legal substance. Lack of unified court practice, despite proclaimed freedom of judge' opinion, which is being increasingly substituted with "reasonable judge's opinion" – characteristic for adversary trials, can additionaly decrease trust of the citizens and have negative effect to their perception of overall legal security, especially in criminal cases.

Namely, if the registry of legal standpoints clearly registers legal standpoints adopted by court decisions, at collegiums, assemblies, departments, counselings, and working meetings, the matter of availability of court practice and information important for court practice is still recognized as the priority of the reform. Although principle legal standpoints and opinions of the Supreme Court of Montenegro and final decisions of regular courts, or Administrative court, are published on web portal of courts, after anonymization, this practice still is not harmonized at the level of all courts, and even at the level of all cases, especially cases on which public is justifiably interested in and believes they should be timely published.

Therefore, harmonization of national court practice and its harmonization with the practice of European Court of Human Rights and Court of Justice of the EU, is defined as one of strategic guidelines in the Proposal of Strategy of Judiciary Reform 2014-2018. This strategic guideline is followed by the measures related to provision of better availability of court practice to professional and wider public; strengthening of mechanisms of monitoring, analyzing and availability of practice of European Court of Human Rights and European Court of Justice; and improvement of capacities of bearers of judicial functions and judicial institutions in area of implementation of legal acquis of the EU.

In that regards, strengthening of capacities of court practice departments within Higher Courts is very important, and Department of the Supreme Court for monitoring of practice of the European Court of Human Rights that was established in 2012, with the aim to collect decisions important for court practice, their classification, analysis, updating, and keeping in central information data base that contains short content of all decisions of the Supreme Court and decisions of other courts important for court practice.

Relations between regular court instances should not be neglected, but also dilemmas about the supremacy of the Supreme or Constitutional Court, caused by normative and factual fusion of their competencies, bearing in mind importance of these matters for harmonization of court practice and perception of judiciary as an independent and impartial.

VII Statistical data about work of criminal departments of Montenegrin courts in 2013[6]

Basically, results of work of Montenegrin courts can be viewed in annual reports on work. On that grounds can be concluded that in the criminal matter occurred decreasing number of average monthly flow of cases in 2013, for almost 20% in comparison with previous year. At the same time, umber of solved cases in 2013 was smaller than in 2012, when 5.596 cases were resolved. On the other hand, number of solved cases in 2013 was smaller than in 2012 for 0,64%.[7]

In comparison with the overall number of crime cases in work before the Basic Courts in Montenegro (7.306), 36,22% of crime cases were unresolved at the end of reporting year-2013, according to court statistics.

Crime cases in the proceeding against minors were conducted in 231 cases that were in work in 2013, before Basic Courts in Montenegro, and at the end of the year, 25,11% of cases stayed unresolved.

Average duration of court proceeding in crime cases that were resolved during 2013 was slightly more than half of a year, where the highest number of cases was resolved for a three months period until one year. More than a year lasted 15,54% proceedings that were resolved in 2013.

When it comes to so called "minor cases", duration of proceeding in cases resolved during 2013 was averagely three months and a half, but only in 5,81% cases proceedings lasted more than a year.

In 2013, out of 2.354 "K" cases in Basic Courts that were resolving after appeals, 71,25% of cases were confirmed, 7,33% were revised, and 20,68% were abolished and 0,57% partly abolished. When compared with previous year, slight increase of the first instance court decisions in 2013 can be noted (for almost two numerically expressed percent more than in 2012, when percent of confirmed decisions was 69,51%).

In a view of pronounced sentences, it can be concluded that in Montenegrin Basic Courts were mostly pronounced suspended sentences (58,83%), 33,14% of imprisonment sentences, 7,42% of fines, and 0,64% alternative sanctions of community sentence. Basic Courts in Cetinje, Kotor, Herceg Novi and Podgorica pronounced 24 community sentences. Largest number of these sentences was imposed before Basic Court in Cetinje – 19.

6 Source: Judicial Council, Annual Report, 2013

7 Statistics is related to "pure criminal cases" that are registered in the report under the sign "K" according to Court Rulebook

Speaking about alternative sanctions of community sentence, it should be mentioned that they were rarely imposed, and that until the beginning of 2014 the problem was lack of concluded agreements and contracts with institutions where these sanctions would be carried out. Also, through the twinning project "Support to the reform of system of enforcement of sanctions in Montenegro", and in cooperation with experts from the Kingdom of Netherlands and Germany, work on defining of Proposal for the Law on enforcement of suspended sentences and community sentence that is currently in Parliamentary procedure, was finished. This Law is related to enforcement of suspended sentence, suspended sentence with protecting surveillance, and community sentence imposed in criminal and misdemeanor proceeding, and also surveillance of suspended sentenced persons. According to this Proposal, community sentence is enforced over legal entity that deals with public interest activity (humanitarian, social, public utility, health, agriculture, ecological, or similar activities) or nonprofit organizations whose activities are related to humanitarian, ecological, and similar activities.

In purpose of enforcement of community sentence, according to Proposal of Law, Ministry of Justice of Montenegro can make agreement with bodies of public administration and bodies of local self-government when it comes to activities that are under surveillance of these bodies, and can also make agreement with legal entities or organizations, which contains general rules about enforcement of community sentence and common rights and duties. For each individually defined case of enforcement of community sentence, according to agreement, Ministry of Justice concludes special contract with legal entity, or organization where convicted person is sent to serve the sentence, and with convicted person as well.

In comparison with previously imposed alternative sanctions of community sentence, and according to data we have received from direct conversation with the line Ministry, seams that the system becomes operational with improved activities of judicial institutions on finding adequate institutional solutions for enforcement of alternative sanctions in communication with local self-governments at the territory of territorial jurisdiction of courts where they were imposed. So far, agreements have been concluded with the Capital city Podgorica, old royal capital Cetinje, and three more municipalities (Danilovgrad, Kotor, and Herceg Novi). Individual contracts were signed with two more sentenced persons and two institutions (one person serves community sentence in Public Enterprise "Gradsko zelenilo" in Podgorica) while signing of contract on enforcement of community sentence in under procedure for 12 more persons.

In the frame of the line Ministry of Justice, special unit has been established – Body for parole within Directorate for enforcement of criminal sanctions that will monitor this area.

According to noted court practice and after final decision of Basic Courts, weapon, technical equipment, cigarettes and tobacco were mostly deprived in relation with enforcement of crimes.

Summary of results of criminal proceedings shows that in the structure of criminal acts that were in trial before Basic Courts, the most dominant were crimes against property and payment operations, and slightly less against security of public traffic and crimes against life and body.

Higher Courts in Montenegro had inflow of 222 "K" cases during 2013, which was 17 cases less than a year earlier. Average monthly inflow was 18,5 of cases which was 1,41 less than in 2012. During 2013, 251 cases were resolved, meaning 13 cases less or 4,93% less than in 2012. Number of unresolved cases at the end of the year was reduced for 29 cases in comparison with 2012, when 175 cases were unresolved at the end of 2012. Overall number of unresolved "K" cases at the end og the year was 65,77% of the overall inflow, whereas in 2012 the inflow was 73,22%.

Under procedure before Higher Courts were 18 "minor" cases. Out of this number, 11 were resolved, which was decrease for six cases in comparison with previous year.

Annual inflow of cases after appeal before higher courts in 2013 was 2.754, which was 185 cases less than in 2012. Overall number of resolved second instance crime cases after appeals in 2013 was 2.789 or 122 cases less than in 2012, or 4,19%. Number of unresolved cases after appeals at the end of the year was reduced for 35 cases in comparison with 2012 when this number was 113.

Duration of proceedings after appeals in resolved rime cases was averagely three months in more than 90% of cases, but only in one case proceeding lasted more than one year.

Situation is slightly different in so called "special cases" that are related to corruption, terrorism, organized crime and war crimes, which (bearing in mind their complexity) lasted averagely more than one year and three months, and there were 71 cases in work before special departments of Higher Courts. Out of this number, 52 cases were resolved, while 19 cases or 26,76% of cases stayed unresolved at the end of 2013. Number of unresolved cases in this report in 2013 was 52 cases, which is 10 cases more than in 2012, or 23,80%.

In regards to quality of adjudication in criminal first instance cases after reported legal remedies, statistics noted 66,67% of confirmed decisions, 13,25% abolished, 13,25% revised while 5,22% of first instance decisions were partly abolished. When it comes to cases of special departments, 54,05% of first instance decisions were confirmed, 2,7% were revised, 13,51% were abolished and 27,03% cases were partly confirmed/abolished/revised.

In comparison with imposed sanctions, out of 590 accused persons, Higher Courts sentenced 276 persons in crime cases, imposed nine suspended sentences and 267 imprisonment sentences. In cases such as corruption, terrorism, organized crime and war crimes, out of 253 accused persons, 94 were convicted – three suspended sentences, and 91 imprisonment sentences. Weapon and munitions, narcotics and money were dominant in the structure of deprived means from criminal acts after non-final and final decisions of Higher Courts.

VIII Consistency of decisions in crime matters as indicator of harmonization of court practice

Harmonization of court practice and number of abolished verdicts, which should not be neglected, do not have to be in direct relation, but can be presumed that can be cause and consequence to each other very often. Such assumption as the general, at the level of all cases and reports in work of all courts but especially in the first instance phase of the proceeding for which are mostly related failures in adjudication, or that are mostly subjected to correction in the following phases of court proceeding by regular and extraordinary remedies. In new time, Constitutional Court has specific function in achieving of harmonization of court practice, which acts in cases after final verdicts, when there is doubt that this decision violated some human right of freedom guaranteed by the Constitution and international legal standards.

In that regards, several important principles should bear in mind, where some of them are not equally applicable for all areas of court jurisdiction. Although obvious individualization of each case is present in all court matters, seams that it is the most important in the domain of criminal justice. However, this phenomenon cannot be approached, nor it can be analyzed from one aspect that would be only related to final decision, or merit adjudication of criminal matter. In case of such access, we would receive only statistical indicator about the number of decisions when the accused one was pronounced guilty or released of responsibility, and nothing else. Requirements of criminal justice are directed towards much wider spectrum of criminal case and they range from general fairness of a trial, to respect of rights of charged persons, protection of victims of criminal acts but especially vulnerable groups, significance, legality, or availability of evidence in criminal proceeding on matter of argument substrate and the manner of collecting of evidence material, overall assessment of evidence, and finally legal implementation of rules that often goes out of the limits of trial or court proceeding. One should always bear in mind the limits of decision making process in criminal proceeding, which are based on free assessment of evidence (which is not unlimited), both on the matter of formal side and the matter of content of evidence material.

Even indicators that might be used in assessment of harmonization of court decisions are neither strict nor uniform, and are not based on rules of criminal proceeding and material crime law in internal legal order. It has already been said that provisions of international treaties, or court and quasi court practice of supervisory bodies occur in some specific situations as the relevant assisting source of adjudication, not only as the part of material, but as the part of the process law when it goes back in rights of parties in the proceeding. Besides, unclear definitions such as “efficient sanctions and sanctions that have preventive function” do not provide precise answer on question of level of criminal responsibility and applying of privileged circumstances during implementation of sanctions on given case.

IX Standards of consistency in court decisions towards European Court of Human Rights

Review of some decisions of European Court of Human Rights was carried out at the time of preparation of this report, which could be the starting point for making of appropriate conclusions. However, even in cases of this reputable international court civic judiciary is dominant, or cases that are mostly related to civil matters.

When it comes to Montenegro, that is surely case *Tomić and others against Montenegro*, from 17 April 2012 (the case where violation of right to fair trial has not be found), where European Court of Human Rights clearly indicated that consistency in decisions of national courts existed and that was based on statistical data about the number of decisions harmonized at the highest court instance in Montenegro – Supreme Court. In the given case, European Court dealt with consistency only on basis of submitted statistical data, confirming the thesis that "it was not up to this Court to examine how national courts interpreted national law. Similarly, the Court has not the function to compare different decisions of national courts, even if obviously similar proceedings come in issue; the Court has to respect independence of these courts (quotation: *Nejdet Şahin* and Perihan *Şahin against Turkey* (GC) no. 13279/05, 49-50, 20 October 2011 and other quoted sources).

It has also been considered that specific differences in interpreting could be adopted as inherent characteristic of each judicial system that are, as well as Montenegrin, based on network of firt instance and appeal courts that have jurisdiction at the specific territory (*mutatis mutandis, Tudor Tudor against Romania, no.21911/03, paragraph 29, 24 March 2009*). However, deep and long-term differences in practice of the highest national court can be opposite to the principle of legal security, the principle that has been implicated in the Convention and that represents one of the basic elements of the rule of law (Beian against Romania no.1, 2007)"[8]

Criteria for assessment whether opposite decisions of national supreme courts represent violation of conditions of fair trial from Article 6, Paragraph 1 of the Convention, are composed of defining if the court practice of the Supreme Court has "deep and long-term differences", or if the national law envisages mechanisms for overcoming these discrepancies, if that mechanism has been used, and if that was the case, what were the consequences (*Nejdet Şahin and Perihan Şahin protiv Turske, Paragraph 53*). Finally, the practice of this Court adopted that it cannot be considered …when two disputes are treated in different manners, it results in confronting court practice when it is justified with differences in arguments related to situations on which is all about (*mutatis mutandis Erol Uçar against Turkey, 29 September 2009*).

8 European Court of Human Rights, Tomic and others against Montenegro, from 17 April 2012, paragraph 53

Seams that this practice can result in conclusion that consistency has been determined as the whole or almost as a whole on the basis of statistical indicators, not referring to the merits of decision on concrete cases. In this manner, European Court confirmed the rule that it does not appear in the capacity of the fourth instance and nor its function is to correct legality in decision making process of national courts. Besides, this Court clearly highlights the principle of "confidence in national courts" through respect of their independence in decision making process. However, when carefully read paragraphs 56 and 57 of decision of European Court, it is obvious that inconsistency existed in decisions of national courts on different levels of jurisdiction, so, it can be noticed that statistical criteria was determinant in defining of the matter – if "deep and long-term differences" were noted in decision making process in practice of national courts. The goal of this conclusion is not intended to ignore the practice of European Court but to seriously impose considering of the topic, when we speak about the practice of national courts in criminal cases, or their harmonized considering in criminal matters, which was the task of this project.

Unlike mentioned case, in the case of Rakic and others against Serbia (violation of right to fair trial due to inconsistency of court practice was found was found in verdict from 5 October 2010) European Court hypothetically concludes that "it seems that even the practice of the Supreme Court of Serbia after 2008, did not become consistent in this matter…thus, it could not be justifiably claimed that, notwithstanding the fact that Supreme Court had never considered complaint of persons who filed applications in the third instance, their lawsuits were resolved in merits and in the manner consistent to established court practice (quotation Iordan Iordanov and others against Bulgaria, verdict from 2 July 2009).

The court similarly considered in the case Vincic and others against Serbia (verdict from 1 December 2009 where was also found violation of right to fair trial due to inconsistency of court practice), when the reaction of the Supreme Court of the Republic Serbia failed after the request of the first instance court to make the legal standpoint, or legal understanding on implementation of law in number of cases where different practice had been noted, including the decisions of the second instance courts after the appeal. Appears that even in this case dominated statistical criteria, with due explanation that lacked adequate legal mechanism that would be on disposal to parties in exercising the principle of equality before the law, so that they as parties in civil procedure would require from the highest court instance taking of the standpoint of the highest courts in the country (paragraph 50 of the verdict).

In case *Tudor Tudor versus Romania* (sentence from 24. March 2009), ECHR concluded that Romanian court practice is characterized with inconsistency in legislation and court practice in cases of restitution, causing the general climate of legal insecurity (p 27 of sentence). With such conclusion on inconsistency in sentences of lower instance courts, ECHR found no legal mechanism on national level, which would allow for Supreme Court to unify the court practice of lower instance courts (p 29 of sentence). Subsequently, public defender's request to High

Cassation court was not in the function of conflict resolution and inconsistency in interpretation of law by lower instance courts – but the only legal mean available towards unifying the court practice on highest court level. Besides, time of implementation of law on restitution in Romania of 7 years, resulted with favorable position of previous users, which resulted with nothing else but inconsistency of court practice (p 30 of sentence).

Finally, in the case Zivic against Serbia (verdict from 13 September 2011) European Court found that the violation of right to fair trail occurred. The Court stated that it already considered practically the same circumstances in above mentioned case *Rakic,* where it defined, between other things, violation of Article 6 of the Convention.

Confirming that specific discrepancies in interpretation may be accepted as the constituent part of each judicial system that, as Serbian, is based on the network of appellate courts that have jurisdiction over specific territory, and tat in cases of submitters of applications opposite interpretations arise from the same court jurisdiction, i.e. jurisdiction of the District Court in Belgrade and imply inconsistent adjudication in regards to cases filed by a number of persons in the same situations (see Vincic and others against Serbia, paragraph 56 and also mutatis mutandis, Tudor Tudor against Romania, Paragraph 29). All this causes permanent uncertainty that, in return, had to reduce the confidence of public in judiciary. Ultimately, "appears that even the practice of Supreme Court of Serbia has not become consistent in this matter, until the second half of 2008 in best case, although this consistency has obviously never been provided in accordance with Article 40 of Law on defining of courts of RS".

Election of mentioned practice of European Court for Human Rights was not done only due to language and geographic distance, but because of law tradition and organization of judicial apparatus in the country. In that regards, this should remind on similar systems with similar or the same legal heritage and legal practice. Of course, it should be highlighted that legal order in the meantime became free of ideological and protection of interest of country, evolving towards protection of fundamental values such as human rights and principle of justice in court proceeding.

X Individualization of criminal justice and consistency in decision making process

"Tension" between individualization of criminal justice and consistency of court decisions is reflected in possible difference between verdicts based on circumstances of each case and difference based on comparison of similar cases. This "conflict" is often or mostly resolved via principle of court discretion in decision making process and thus, encourages more responsibility of court to implement abstract legal rules on life case, or situation that really happened. Is we decide on radical option of unlimited court discretion, it might be said this is the only case that gives vital guarantee that law and justice would find the way to the goal through overall spectrum of different circumstances related to the case and circumstances on the side of possible committer of criminal act. In such circumstances, court discretion, individual criminal justice and fair court decision in each concrete case, are in direct relation. However, within this spectrum, limitations of formal and material nature, obviously exist, which makes the proceeding and justice less simple and more subjected to specific social and legal norms.

Speaking about individualization of justice and bearing in mind specific legal rules and norms of the proceeding, it should be said that besides mentioned elements, decision making process often relies on the synthesis of instinctive and intuitive capacities of criminal case judge. Notwithstanding whether the case is trialed before the Council lay judges or before individual judge, synthesis of capability of each judge individually and the Council as the collegial form of deciding, leads to equable, proportional and deliberate decision that materializes justice. For that reason stands the conclusion about individualization of each case (no matter how similar it is with some others). According to this there is always the point that separates it from other similar cases, even within those cases, where in the same or similar roles in the proceeding, occur persons similar for their mental profile, moral characteristics, their views, social origin or relations with people and environment. Such distinction of cases is not only of logical and moral nature, but, is transferred as the norm in legal regulations/standards/laws which define its limits, level and finally criminal and legal responsibility.

Of course, limits of individualization of criminal matter cannot be so broadly placed to surpass the character of criminal justice, nor to disregard fundamental principles of order (constitutionality, legality, equality before the law, fairness of the proceeding, equality of legal means and similar) in conditions of continental legal tradition.

XI Internal legal framework of harmonization of court practice and control of verdicts in criminal matters

Legal order in Montenegro is based on the Constitution, confirmed and published international treaties and national legislation. Sequence of quoting legal sources derives from the constitutional norm that proclaims primacy of international law when an relation has to be regulated differently than national legislation.

Constitutional framework of division of power at the same time defines the status of Supreme Court of Montenegro as the highest court in the country, which also gives it constitutional obligation of equalization of court practice in Montenegro, via implementation of principles from the same Article 124 of the Constitution that inter alia "Constitutional court provides unique implementation of laws by national courts". This principle is grounded on material and legal corpus of human rights and freedoms from the Constitutions and contracts, including invulnerability of rights and freedoms, right to fair trial, equality before the law, prohibition of discrimination, right to legal aid, right to physical and psychological integrity of personality, etc.

Parallel with these constitutional competencies of the Supreme Court of Montenegro co-exists the obligation of the Constitutional court of Montenegro, to protect human rights and freedoms via deciding on "constitutional appeal due to violation of human rights and freedom guaranteed by the Constitution, after exhaustion of all effective legal means". These competencies are prescribed by Article 44 of Law on Constitutional Court that says: "If in proceedings pending before a court is raised the issue of compatibility of the law with the Constitution and ratified and published international treaties or of other regulations with the Constitution and law, the court shall stay the proceedings and initiate proceedings for review of constitutionality or legality of that act before the Constitutional Court". Logical conclusion from this provision says that Constitutional Court of Montenegro under specific conditions has competencies even in exercising of criminal justice, under this constitutional jurisdiction and according to competencies to act after final verdicts that violated human rights and fundamental freedoms guaranteed by the Constitution and/or confirmed and published international treaties. Furthermore, that means that there is constitutional possibility that in final, practice of the court of general jurisdiction can/should/has to influence the legal opinion of the Constitutional court.

Addition to complex situation are provisions of Law on Courts[9] that also authorizes courts to act in limits of their jurisdiction, whereas the Supreme Court has been given the jurisdiction to provide "unique implementation of Law and other regulations, on which depends equality of legal entities before the Law and respect of other rights and freedoms guaranteed by the Constitution and international treaties".

9 The Law was published in Official Gazette of the Republic Montenegro, no.5/2002, 49/2004, and Official Gazette of the Republic Montenegro, no. 22/2008, 39/2011, 46/2013, 48/2013.

On this ground, each court is authorized to request change of principle legal opinion or change of the existing one. Principle legal opinion is provided on specific legal issue that appeared in the practice of the Supreme Court or lower instance courts, on which depends unique implementation of the Constitution, and laws at the territory of Montenegro. Manner of keeping the registry and publishing of principle legal opinions and opinions are defined by the Rulebook on work of General assembly of the Supreme Court (Article 28 of Law on Courts).

Finally, Article 424 of Criminal Procedure Code of Montenegro prescribes that "the criminal proceedings completed by a final judgment may be reopened in favor of the accused person if inter alia the European Court of Human Rights or another court established by a ratified international treaty finds that human rights and freedoms have been violated in the course of the criminal proceedings and that the judgment is based on such violations, provided that the reopening of the proceedings can remedy such violation". This norm clearly indicates on obligation of courts of general jurisdiction to know and implement the law on international treaties (and not only the ones on human rights), so it is difficult to imply where starts and where ends the limits of the real jurisdiction of two courts – Supreme and Constitutional, at least when so called instance jurisdiction in creation of court practice comes in issue, whether it is formal or essential. Of court, it should be mentioned that the question occurs in both dimensions of criminal matter – process and material.

The essence of the mentioned legal framework can be directed towards consistency of court decisions in relation with implementation of process standards and material law when it regulates some relations differently than national legislation or if it amends it in accordance with international standards. This is the case with implementation of standards in proceedings related to war crimes, where legal norms are based on international war and humanitarian law, but not only on national regulations. Typical examples are cumulative elements of criminal acts of war crimes, for which the incrimination and establishing responsibility – must invoke the infringement of international law. Also criminal act must be committed during the wartime or occupation alongside verified linkage between the acts of perpetrator and armed conflict, was or occupation as well as that perpetrator ordered or committed the criminal act. Besides, according to the court practice of International Criminal Court for former Yugoslavia, violation of international humanitarian law has to be difficult, or, has to cause hard consequences for the life or health of victim.

Article 385 of Criminal Proceeding Code[10] says that a judgment may be contested on the grounds of:

10 (Official Gazette of Montenegro, no.57/09, 49/10)

1) substantive violation of the criminal proceedings provisions,
2) violation of the Criminal Code,
3) the state of the facts being erroneously or incompletely established,
4) the decision on criminal sanctions, forfeiture of property gain, costs of criminal proceedings, claims under property law.

In comparison with limits of reviewing of the first instance crime verdict in all cases, Article 398 prescribes that a second instance court shall review the part of the decision contested by the appeal, but it shall always review by virtue of an office the following points:

1) As to whether there has been a violation of the provisions of the criminal proceedings set forth in Article 386, paragraph 1 of the present Code,
2) As to whether the Criminal Code has been violated to the detriment of the defendant as referred to in Article 387 of the present Code. If an appeal filed to the benefit of the defendant does not contain the data referred to in Article 385 of the present Code and the statement of reasons of the appeal, the second instance court shall limit its review to the violations stated in paragraph 1, Items 1 and 2 of this Article, and to the review of the decision on punishment, security measures and the forfeiture of property gain referred to in Article 389 of the present Code.

The following constitute a substantive violation of the provisions of criminal procedure:

1) if the court was improperly composed or if a judge who did not participate in the main hearing or who was disqualified by a final decision participated in rendering of a judgment;
2) if the main hearing was held in the absence of a person whose presence at the main hearing was mandatory under law;
3) if the court violated the provisions of the criminal proceedings related as to whether a charge of an authorized prosecutor or the approval of competent authority existed,
4) if the decision was rendered by the court which could not have rendered the decision due to the lack of subject matter jurisdiction,
5) if the charge has been exceeded as referred to in Article 369, paragraph 1 of the present Code,
6) if the judgment violates the provision of Article 400 of the present Code,
7) if the judgment is grounded on evidence on which according to this Code it cannot be grounded, unless it is obvious, with regard to other evidence, that the same decision could have been rendered without that evidence,
8) if the judgment is incomprehensible, internally contradictory or contradicted to the statement of reasons of the judgment, if the judgment failed to state any reasons or failed to state reasons relating to the relevant facts or if these reasons are entirely unclear or contradictory to a considerable degree or if there is a significant factual

contradiction between what has been stated in the statement of reasons of the judgment on the contents of certain documents or records on statements made in the proceedings and the documents or records themselves.

According to Paragraph 2 of Article 386 of Criminal Procedure Code, there is also a substantive violation of the provisions of the criminal proceedings if the court, in the preparation of the main hearing or in the course 123 of the main hearing or while rendering the decision fails to apply or incorrectly applies any of the provisions of the present Code, provided that this affected the lawful and proper rendering of the judgment.

Finally, according to Article 388, the judgment may be contested on the grounds of erroneous or incomplete establishment of facts when the court has established a relevant fact erroneously or has failed to establish such a fact at all. It shall be taken that the state of facts has been incompletely established when new facts or new evidence so indicate.

If an appeal has been filed only in favor of the defendant the decision may not be modified to the detriment of the defendant with regard to a legal qualification of the criminal offence and criminal sanction. Extended Effect of an Appeal from Article 401 of the Code stated the fact that an appeal filed in favor of the defendant due to the state of the facts being erroneously or incompletely established or due to the violation of the Criminal Code shall be deemed to contain an appeal against the decision concerning the criminal sanction and forfeiture of the property gain. Benefit of Coherence (*Beneficium Cohaesionis)* defines the rule of the proceeding by which the second instance court, upon anybody's appeal, finds that the grounds on which the decision was rendered in favor of the defendant, are also of benefit to any of the co-defendants who did not file an appeal or did not file an appeal along the same lines, it shall proceed by virtue of an office as if such an appeal has been filed.

Deciding on the appeal, the second instance court may dismiss an appeal as belated or inadmissible; reject an appeal as unfounded and confirm the first instance decision; vacate the first instance decision and remand the case to the first instance court for retrial; modify the first instance decision. The second instance court shall decide a single decision on all the appeals that have been filed against the same decision.

A second instance court shall, when honoring an appeal or by virtue of an office, vacate the first instance decision by a ruling and remand the case for retrial if it establishes a substantial violation of provisions of the criminal proceedings, save in cases referred to in Article 409, paragraph 1 of the present Code or if it considers that, for reasons of the state of the facts being erroneously or incompletely established, a new main hearing should be held before the first instance court. A

second instance court may order that a new main hearing before the first instance court be held before a completely different Panel (Article 407 of the Criminal Procedure Code).

In the statement of reasons in its decision or in its ruling, the second instance court shall assess the allegations in the appeal and cite the violations of law which it took into account. When the first instance decision is vacated due to substantial violations of provisions of the criminal proceedings, the statement of reasons shall indicate which provisions have been violated and what these violations consist of. When the first instance decision is vacated for the reasons of the state of the facts being erroneously or incompletely established, the failures in establishing the state of the facts shall be stated as well as why new evidence and facts are important for rendering a correct decision, and omissions of the parties[11] that influenced the first instance decision may also be indicated.

The second instance court is authorized to when honoring an appeal or by virtue of an office, revise the first instance decision by a decision if it establishes that the decisive facts have been correctly ascertained in the first instance, and that in view of the state of the facts established, a different decision must be rendered when the law is properly applied, and, according to the state of the facts, also in the case of violations referred to in the present Code. Depending on circumstances, the same will be done for serious procedural errors related to violation of regulations of criminal proceeding, in a view of existence of charges of the competent prosecutor or approval of competent body, lack of competencies of court that made the decision, exceeding of charges in a view of identity of verdict and charge, and if the verdict violated provision of Article 400 of the Criminal Proceeding Code (in the part of legal qualification of criminal act and criminal sanction to the detriment of accused person in case he/she appeals).

Current legal basis and process mechanisms are largely based on typical criminal and legal postulates on which should be added or highlighted international standards as inseparable part of process and material law.

11 Prosecutor, charged person, injured party as (subsidiary) prosecutor and private prosecutor

XII Perception of different process and social actors about the level of harmonization of court practice (judges, lawyers, prosecutors, academic sector, NGOs)

Focusing on specific branches of judiciary in general, given the importance of establishing of internal relations and understanding of harmonization of court practice as undisputable goal of court and all other powers, surveying of different, let's call them interest – groups, as the part of activities of This project, gave very interesting results. In order to avoid any reference to bias or even to come into details of organization and functioning of judiciary, without serious analysis of dilemmas of court practice, in this presentation we will use as much as possible, collected source material. It is mostly based on neutral and anonymous survey. Through this survey, actors was given the possibility to respond about some matters important for harmonization of court practice and its impact on efficiency of courts and the quality of adjudication, in free and personal interpretation, released from rigid formalism and the conflict of interest.

a) Survey of judges

Surveying of judges was conducted among judges dealing with criminal matters, with the aim to collect data relevant for the project in the best manner. Questionnaire was filled by judges Basic Courts in Rozaje, Pljevlja, Zabljak, Kolasin, Niksic, Bijelo Polje, Herveg Novi, Plav, Kotor, Bar, Podgorica, Ulcinj, Danilovgrad; Higher Courts in Podgorica and Bijelo Polje, or Appellate Court of Montenegro. Questionnaire filled 52 judges. Essence of the questionnaire was to give judges the opportunity to express their opinion, but with no intention to constrain them with offered answers, or to allow them to express themselves properly.

On general question if in Montenegro existed the problem of disharmonized court practice and up to what extent it can influence on predictability of the result of a trial and legal security of citizens, only 9,6% of judges stated there was no problem of disharmonized court practice, 58% directly said that the problem existed, almost 25% said that this largely, importantly and up to certain extent influenced on result of trial, while 6% of judges believed there was a problem but only in the part of sanction policy.

On question: "Do you believe that the initiating and decision making procedure about legal issue, for which specific legal opinion is taken, is adequately regulated by the Court Rulebook or which regulations should be importantly changed in that regards (Law on Courts, Court Rulebook, and the Rulebook on work of general assembly of the Supreme Court), in order to improve implementation of mechanisms of harmonization of court practice", almost 65% of judges said it was adequately regulated by current laws, or Court Rulebook. Almost 27% of judges said it was important to change Law on Courts and Court Rulebook, in order to improve implementation

of mechanisms for harmonization of court practice, while 2% of judges said it was important to regulate more direct contact between court instances of different levels.
On question "Do you believe that Supreme Court, through its jurisdiction "beside trail", by taking and publishing legal opinions of principle importance, sufficiently impacts on harmonization of court practice and do the high court instances react timely", 55% of surveyed judges provided answers with different variations – that the Supreme Court could be more efficient, and that reacting of higher instances was not timely (30% provided this answer directly). In comparison with opposite opinion, 39% surveyed judges said that reaction was timely.

Since Unit for monitoring of court practice of European Court of Human Rights and the Court of Justice of the EU, has been established within Supreme Court in 2012, answer that even 48% of surveyed judges were not introduced with or was insufficiently introduced with the work of this Unit seemed surprising, while 52% of them said they were introduced with the work of this Unit.

Expressing the standpoint whether taking the legal opinion at the sessions of judges and sessions of units of larger courts with more councils, was efficient mechanism of harmonization of court practice or if the courts were sufficiently devoted to harmonization of court practice, and how many legal standpoints took the court where judges worked last year; almost 64% of judges said it was efficient mechanism but courts were insufficiently devoted to this. Almost 19% of judges said it was efficient mechanism while 17% believed it was not efficient and added that courts were nit devoted to this.

Answering the question "At the time of direct decision making process, up to which extent do you guide principle legal opinion adopted by the Supreme Court, and other instance courts, except with the law; and can you state the number of verdicts where you based your legal ratio inter alia on principle standpoints and opinions", judges largely said if it was necessary they based their legal ratio on principal legal standpoints and opinions of higher instance courts. Only 2% said they did not used them until nowadays.

Specific question about areas of criminal material law where existed the most urgent need for legal standpoints and opinions, provided responses without comments (almost 33%); while 6% of judges said it was in the area of organized crime, corruption, terrorism and war crimes; almost 6% mentioned the need for amending of regulations related to juvenile's cases, almost 4% in relation to crimes related to financial transactions and commercial activities, while in regards to other un(specified) number of criminal offences it was approximately 2% per each.

Presumption of implementation of rules of international law in court proceedings was confirmed in answers of 55,7% of questioned, in answers of 14,9% sometimes, 13,5% did not have opportunity to implement it, insufficient implementation noticed 5,8% surveyed and 7,7% did not provide answer.

Sources of international law that are mostly used in work of judges are international conventions and protocols (63,74%), European Convention for the Protection of Human Rights stated 12% and almost 4% of surveyed judges did not use international law as the basis for trials and adjudication. Almost 11,5% of surveyed judges had no comment.

One of the strategic directives of the Draft of Strategy of the Reform of Judiciary 2014-2018, is harmonization of national court practice and practice of European Court of Human Rights. On question about availability of practice of European courts and whether they used verdicts of these courts in their work, 42% of judges did not use or they use jurisprudence very little, and that its availability could be better. Almost 55% of them were introduced with the standards of European courts and more or less used its practice.

Exercising of function of the Supreme Court on harmonizing court practice implies appropriate informative and technical support, which was, according to assessment of current mechanisms, efficient for almost 54% of judges, 4% believed it was efficient but could be improved, while 43% said it was inefficient.

Availability of informative base of legal documents and court practice, and data base with legal literature resulted with the most heterogenic answers of bearers of court functions. Dominant answers said it was good (25%), 21,2% said it was insufficient, 19,2% said it was satisfying while other answers were focused on need for improvement of the current situation.

On question how was assessed availability of legal standpoints through publishing of Bulletin of the Supreme Court of Montenegro, and up to which extent editorial policy presents real structure and need for selected cases and practice, more than 70% of judges had positive answer and slightly more than 10% invited on additional and more often publishing of this very important bibliographic document.

b) **Survey in prosecutorial organization**

Survey was implemented by prosecutors from Basic Prosecutor Office from Podgorica, Berane, Kotor, Cetinje, Herceg Novi, Niksic, Bar, Kolasin. Twelve prosecutors answered on this survey. We have to emphasize that this was the first time when Prosecutor Office took active participation in project activity, providing constructive contribution to its goals, through answers on this survey.

On question if in Montenegro existed the problem of disharmonized court practice and up to which extent it could impact on predictability of result of trial and legal security of citizens, only two respondents said that the problem of disharmonized court practice did not exist but concluded that disharmonized court practice could impact on predictability of results of trial and legal security of citizens in protection of their rights in trial. Other respondents said that the problem

of disharmonized court practice existed in Montenegro and that it could impact on predictability of results of trial, and therefore on legal security of citizens. Only one prosecutor said that the problem existed but did not impact on predictability of result of trial of legal security.

More than half of respondents said that the procedures where legal standpoint has been taken were adequately regulated by Court Rulebook, and added nothing should be changed. Only two respondents said it was inadequate and it should be changed, while one respondent did not provide answer.

Supreme Court of Montenegro as the supreme authority that contributes to harmonization of court practice through legal standpoints, does not do this timely, and this was opinion of 41,1% of respondents. On the other hand, 58,3% prosecutors believed that legal standpoints were timely and that Supreme Court in this regards promptly monitors this problematic.

More than a half of respondents or 58,3% of prosecutors was introduced with the work of Unit of the Supreme Court competent for the monitoring of court practice of European Court of Human Rights and the Court of Justice of the EU. Remaining respondents stated they were not familiar with the existence of this Unit within the Supreme Court.

On question if standpoints and opinions at the sessions of judges and councils represented appropriate mechanism for harmonization of court practice and if court bodies were devoted to this, 41,7% of surveyed prosecutors said that such standpoints and opinions were effective. Other respondents said they were not effective and that judges were not devoted to them, and in order to achieve such a role, legal standpoints expressed through court practice as a whole, should have obligatory character, or they should be applied.

Besides the law, principle legal standpoints adopted by Supreme Court and other courts serve as the guidance for 11 surveyed prosecutors, while one prosecutor did not provide answer to this question. However, there were some differences in terms of guidance, whereas four respondents did not mention they largely used principle standpoints as guidance, adopted by Supreme Court and other competent courts.

They mostly agreed that the need for legal standpoints and opinions in the domain of criminal act violation of official position, was highlighted. Besides, it was also emphasized the need for the same type of acting in area of violent behavior, and extended criminal act theft.

Respondents also stated it was necessary to amend Chapters XXIII and XXIV of the Criminal Code or the area endangering safety and depriving of liberty while one respondent said there was principal need for legal standpoints and opinions in this area.

Rules of international law used 83,3% respondents in their work, while 16,7% of them would rely on this system of rules, but until then they did not feel the need for their use. While providing positive answers, prosecutors largely said they used international conventions and Law on International Legal Aid in criminal matters, or bilateral agreements as the source of international law in domain of their functional and real competencies. All surveyed prosecutors stated that verdicts of European Court of Human Rights were available, but only four of them said they used it in practice.

On question whether information system and information mechanisms for search of court practice were adequately efficient, 58,3% of respondents answered positively. Remaining respondent believed oppositely. More than a half of respondents considered information base of legal documents and court practice, and data base of legal literature, as incomplete, unavailable, while others positively assessed their availability.

As per accessibility of legal standpoints through publishing of Bulletin of the Supreme Court of Montenegro, dilemmas about its content and its realistic structure, needs and importance of the process institutes, opinions were divided. Respondents who believed it was insufficiently accessible poorly assessed its accessibility. They believe that was because the Bulleting was not delivered to Prosecutors' Office, and because its publishing was not updated.

c) **Survey of lawyers**

On questions of this survey responded 37 lawyers. We have to emphasize that, although questions were submitted to almost all lawyers at the list of the Bar Association of Montenegro, large number of them did not want to participate, which remained as the issue of concern.

On question whether they believed that in Montenegro existed the problem of disharmonized court practice and up to which extent it can influence on predictability of a trial and legal security of citizens, half of respondents or 50% of them agreed that the problem of disharmonized court practice was really emphasized and that influenced on equality and legal security of citizens. Only 5% of respondents believed that the problem of disharmonized court practice did not exist or that it did not have to influence on legal security of citizens, saying that court practice did not represent source of law here and in our legal system. Others, or 45% agreed that disharmonized court practice existed but it did not influence on predictability of trial and legal security of citizens.

More than a half of questioned lawyers, or 60% agreed that normative framework of harmonization of court practice was good and that it should not be changed, however, it was less visible in court practice itself. Respondents who accented the problem in normative framework made 32% of respondents, while other respondents did not provide their opinions.

Respondents mostly agreed that taking legal opinions and standpoints at the sessions of judges and sessions of units of larger courts, represented effective mechanism of harmonizing of court practice. However, 73,7% of respondents said that courts were insufficiently devoted to that goal, while 21,1% said that courts were devoted to harmonization of court practice while taking legal standpoints and opinions. Only 5,3% respondents believed that legal standpoints and opinions of courts were not effective mechanism of harmonization of court practice.

According to data received by the survey, lawyers were not satisfied with the principle standpoints and opinions of the Supreme Court of Montenegro in a view of their suitability or impact on court proceeding. Out of the overall number of respondents, 52,6% said that guidelines were not quite clear and untimely for the work of lower court instances, while 10,5% of lawyers did not answer to this question. Monitoring of harmonization of court practice was inefficient, said answers of 71,1% of surveyed lawyers, while only 10,9% said that monitoring of harmonized court practice was quite efficient for the needs of appropriate trial and quality of adjudication. Other respondents did not comment on this matter.

Practice of the European Court of Human Rights and the EU Court of Justice, as the source of direct implementation of national law was available, according to opinion of 55,3% of respondents, while 31,6% surveyed lawyers believed that court practice was unavailable. Others said they did not have enough experience in implementation of court practice of the European Court and the EU Court Justice. Lawyers said they had experience in their practice when court practice was disharmonized, in both criminal and civil matter.

Most surveyed lawyers dealing with criminal matter said that legal standpoints and opinions should be made in the area of sanctioning policy, organized crime, crimes related to financial transactions and commercial, but principal opinions and standpoints were also important for innovations in criminal legislation, or new criminal acts.

Surveyed lawyers saw bearers of judicial functions as key obstacles. In that regards, they believe that it was important to provide better coordination and cooperation between courts of higher instances with hierarchically lower courts, indicate on lack of joint and parallel education of bearers of judicial functions of all instances, and providing of their impartiality. Besides, a lot of them said there was still the problem of political impact at the time of electing of bearers of judicial functions, which directly brings in issue the professionalism of staff elected by that principle.

d) **Survey in academic sector**

Main goal of this survey was to include as more different academic institutions and educational staff as possible, notwithstanding organizational profile (private/state) or the manner of organizing. However, the survey responded only educational stuff at the Faculty of Law of the University of

Montenegro. Aiming at comprehensive and complete response on dilemmas that court practice opens and consistency in deciding, it is important to receive the input from theoretical aspect when this topic comes in issue.

On question if they believed if in Montenegro existed disharmonized court practice and up to which extent it could impact on predictability of result of trial, or legal security of citizens, opinions were divided and standpoints differently present the existence of the problem of disharmonized court practice. Opinions were divided even in terms of normative framework related to harmonization of court practice, its quality and effectiveness, and eventual need for innovation of regulations (Law on Courts, Court Rulebook, Rulebook on work of general assembly of the Supreme Court) with the aim to improve and efficiently implement mechanisms of harmonizing court practice. Principle standpoint that the legal framework was good, but that should be improved, was expressed through the survey.

Taking of legal standpoints and opinions at the assemblies of judges and assemblies of units of larger courts with more councils, represents effective mechanism of harmonizing court practice, according to assessments of academic sector, but open question was up to which extent and in which manner were they implemented in this matter, we will emphasize an characteristic answer that indicated that "*Supreme Court was not possible to remove all differences in interpretation and implementation of law in Montenegro, although importance of largest number of legal standpoints and opinions of this Court is undisputable in terms of regular work of lower courts*".

In the domain of harmonization of court practice, answers indicated that "*court practice was disharmonized at the national level, among others, in proceedings against journalists when competent courts made different decisions in identical factual and legal cases, while incompatibility in relations to international standards existed in cases of war crimes*". Besides this, there are dilemmas in the theory of criminal law related to new concept of legal delusion as the basis for exclusion of guilt, then real delusion, as very important and at the same time very complex matter of causality in criminal law. In regards to concrete area of material criminal law where exists the most emphasized need for legal standpoints and opinions, responses are related to concretization of important elements of criminal act such as act, consequence, cause, acquisition, guilt, punishment.

Key obstacles for exercising harmonized court practice are insufficient pool for specific knowledge from criminal-legal and crime matter in number of judges. In case if number of cases of disharmonized interpretation and implementation of law would be high in future, introduction of some mechanism of harmonizing court practice and implementation of law from comparative legislation should be considered. This is related to mechanisms that showed as efficient corrective of disharmonized court practice which, besides other alternatives presumes establishing of professional bodies of collegial type with clearly projected tasks.

Such solution or at least option is based on current Law on courts which says in Article 100a the following: "The president of court may engage a person who possesses required expertise or set up a team of experts or an expert working body in order to clarify specific issues arising in the course of work of the court, as well as to clarify issues and take positions falling within the scope of work of court divisions and sessions of judges, to assist judges in expert preparation of cases for trial and drafting of judgments, to study and monitor case law and other issues relevant to the efficient work of courts and judges".

e) **Standpoints of NGO sector on harmonization of court practice and consistency in deciding**

Relevant nongovernmental organizations in Montenegro we contacted on basis of previously expressed and active activities in area of monitoring of judiciary, make very important element for understanding of current situation. They agree there was disharmonized court practice referring to verdicts of European Court of Human Rights, ad in cases related to criminal acts abuse of narcotics. Also, Montenegrin judiciary, according to their opinion, always had problem with harmonization of court practice, and mechanism of adopting of principle standpoints and opinions of Supreme Court of Montenegro was insufficient on some matters, ineffective, and nonobligatory in all dimensions. The problem complicates the fact that Montenegrin judges today are obliged to apply norms of international law, which they are still not able to do on uniquely harmonized and good manner.

Legal framework does not prevent harmonization of court practice. One of problems is relation of Constitutional and regular courts, which has not been fully defined. Also, mechanisms for monitoring of court practice are not always developed in the overall Montenegrin legal system. Attempts definitely exist but still do not provide full effect. Assemblies of Councils are one of possibilities that are insufficiently used. Conversant stated problems such as inertia, slowness, and generality that characterize the relation of the country in harmonizing the norm with the needs of its effective implementation in practice. In that regards, Supreme Court of Montenegro should receive additional competencies on the plan of harmonization of court practice, while publishing of verdicts should be widened on possibility for seeing of all decisions in trails before courts in Montenegro, which would provide better monitoring and comparative analysis of court decisions.

Principal legal standpoints and opinions are good road for harmonization of court practice, but much better is making of court decisions of a needed quality, with clear explanation and taken standpoint, especially at higher court instances. According to NGO sector, what causes concern is that judges sometimes blindly keep the standpoints of higher court instances (emphasized through verdicts and standpoints of higher courts) failing to show minimum of creativity in interpreting the law and applying the norm. Judges do not want their verdicts to be abolished, nor they want to risk and interpret legal issues, but they keep to situations when the verdict or

opinion of higher court instance was the only orientation and the measure of good implementation of law.

Although defining of legal standpoints is of great importance, they cannot be and are not the only guarantee of harmonization of court practice. Montenegrin legal system does not know precedent, so specific differences will always occur at the time of adopting of merit decisions.

Principal standpoints and opinions of the Supreme Court can provide clear and timely directives for the work of lower court instances and that is confirmed in areas where such standpoints have been adopted. On the other hand, Montenegro has large number of legal texts and amending at the annual level, which, in addition to monitoring of international standards and large number of cases per judge, objectively creates the situation where procedural and material and legal failures are realistic possibility.

On question how they assessed accessibility of practice of European Court and the EU Court of Justice, representatives of civil sector said it was relatively available. Accessibility of practice of European courts should be at higher level, especially in the part of practice of European Court of Justice, which was less available or less "attractive" in the previous period. Although situation was much better than in previous periods, the system has not reached needed level. More serious problem is education and ability of judges to harmonize practice within their activities with the practice of the Court in Strasbourg, especially in lower instances where doubts are present as such "avangard" access might result in abolishing decision. Seemingly, this will take more time and continuing and constructive activities of civil sector, (NGOs and media which also need education) for the purpose of improving the situation in this area.

At the same time, it is important to establish data base adapted to schedule and the system of functioning in courts in Montenegro, and habits of judges and prosecutors, if court practice and legal standpoints of European courts would be available at one place and in translation on national language(s). Finally, the practice is available at internet portals through popular and professional publications, which can be solid basis for further work on harmonization of court practice in Montenegro. Besides, there are cases when civil sector provides appropriate material to judicial institution, which gives clear instruction about strengthening of cooperation of these two social factors.

Representatives of civil sector noted they identified cases when court practice was disharmonized. They stated as the problem practice which was related to processing and sanctioning policy of court in relation to criminal acts abuse of narcotics. Thus, for example, in one case before Higher Court in Podgorica, one person was sentenced to two years imprisonment for possessing 0,08 gr of heroin (that was intended for sale), while Appellate Court, acting by the appeal on verdict of Higher Court in Podgorica, made decision by which the accused person was pronounced guilty and punished to three years imprisonment sentence for 3 kg of cocaine. Some respondents said there were several levels and causes of disharmonized court practice.

One would be adopting of decisions in different time periods with different perception of social justification of sanctions or social danger of the act. The second one is different interpretation of legal standards within harmonizing of national practice with the practice of the European Court of Human Rights, while the third one is related to the criteria of reasonable doubts while defining the existing of elements of corruptive criminal acts.

It is especially indicated on several diametrically opposite understandings and interpretations of the Supreme Court and Constitutional court in cases where the basis was protection of human rights and freedoms, or concrete freedoms and security of personality.

In comparison with concretization of a problem, or in which areas of material law exists the most emphasized need for legal standpoints and opinions, respondents gave different answers. Among other things, they indicated that process elements of criminal justice such as acceptability of evidence, and problems of defining circumstances and privileged forms of criminal offenses, measuring of sanctions on basis of special circumstances of the concrete criminal act. Marking off specific forms and criminal acts such as attempt of murder, corruptive criminal acts, connecting of criminal acts of corruption and organized crime were noticed as areas where was also emphasized the need for legal opinions and opinions.

In defining towards key obstacles for exercising of harmonized court practice and strengthening of confidence of citizens in judicial system, indicates on still insufficient level of knowing of relevant international standards, disharmonized work of different court councils, too much insisting on rigid rules of proceeding versus creativity of high instance courts that act in appeal proceeding. This is primarily related to higher level of revision of verdicts than it is the case now. In that regards, higher courts, whom the practice of Supreme Court is naturally closer, would contribute to harmonization of court practice at the level of basic courts, by revising of verdicts and indicating on already defined legal standpoints. Besides, better transparency and full depolitization that provides essential independence of judges, importantly defines the quality of staff resources and professionalism in exercising of function. When it comes to unit of court practice as effective mechanism of harmonizing of court practice, then it really has to be this, not formal confirmation of harmonizing in implementation of law by courts.

f) **Standpoints of Supreme Court of Montenegro towards impressions on harmonization of practice and its role**

Bearing in mind importance of assessment of previous activities in judiciary that are in function of harmonizing of court practice, the project team and representatives of judicial institutions considered it was very important and useful to receive at the same time inputs of Supreme Court in comparison with expressed views. For that reason, in the frame of this document are provided standpoints of the highest court instance as a whole of, with the aim to indicate on some current and until nowadays completed activities important for harmonization of court

practice and efficiency of court proceeding.

Supreme Court of Montenegro considers that objections of lower instance courts, related to insufficient promptness of this institution in a view of taking and publishing principle legal standpoints and opinions, baseless.

Reasons that make the basis for such conclusion stand in the fact that Supreme Court in 2013 received only nine requirements for taking of principal legal standpoints and opinions, such as:

- Four requirements from Appellate Court of Montenegro (filed on 20 February 2013, 22 March 2013, 22 March 2013 and 4 June 2013, Supreme Court acted on the same ones on 20 May 2013, 19 April 2013, 13 March 2013, and 24 June 2013).
- One requirement from Higher Courts in Podgorica and Bijelo Polje (filed on 4 March 2013 and 19 April 2013, acted on 17 October 2013 and 19 April 2013); and
- One requirement from Basic Courts in Danilovgrad, Plav and Berane (filed on 12 September 2013, 18 March 2013, and 11 March 2013, acted on 13 September 2013, 10 May 2013, and 19 April 2013).

Turns out that disputable matters in practice of low instance courts, primarily basic courts were inert in the view of sending of requirements to Supreme Court and in a view of candidating of disputable practical issues for the purpose of planning of activities in the frame of Center for education of bearers of judicial functions, through which are organized seminars and other forms of specialization and trainings for judges. Within clearly defined legal basis and legitimating for taking the principle legal standpoint or opinion, lack of activity of low instance courts in that direction contributes to the problem of disharmonized court practice.

Principle legal standpoints of the Supreme Court are publishing regularly in its Bulletin and on the web portal www.sudovi.me and are available to judges, and other professional, laic, national and international public. Therefore, negative perception of prosecutors (41,1%) who claim that legal standpoints were nit timely, causes concern, although Supreme Court acts for a very short time after submitting of requirements for resolving of disputable matters that require taking of principle legal standpoint.

Practice of European Court of Human Rights in Strasbourg is available to all the people without limitations on web portal of the Supreme Court, where can be found all translated verdicts of the European Court of Human Rights against Montenegro, and even selected decisions against other countries and publications of the Court in Strasbourg. Also, via searching of HUDOC data base could be found all decisions of the European Court, so there are no objections that the practice of that court is not available to national judges. Informing, personal relationship with the job, wish for continuous professional development, and learning about European standards are of essential importance for each judge, as all the above mentioned leads to very easy search of decisions of the Court in Strasbourg.

Although large number of verdicts for all relevant legal issues could be found by simple searching of the Internet, HUDIC data base and portal of the Supreme Court, even lack of knowledge of English or French language cannot be the barrier for proactive access to judges, as there is large number of decisions that are translated or published on Montenegrin of one of South-Slovenian languages. So, lack of applying or ignorance about the practice of the European Court of Human Rights, and lack of knowledge on the use of Internet, is not the burden of the Supreme Court, but only the burden for judges, who act in cases.

Legal documents are also at disposal to judges (the use of INGPRO and the edition of "Official Gazette"), but also court practice of the Supreme Court (court decisions published on portal with the possibility of fast and detailed search, Bulletins), and also courts of regional and European states (by using of Internet as available to all Montenegrin judges and administration).

Bulleting of the Supreme Court of Montenegro is publishing twice a year, in the form of publication Book I and Book II for specific judicial year, so the objection of judges that Bulletin is irregularly published is unjustified. Bulletin is delivered to all courts in Montenegro and in the region, and relevant national judicial and other institutions (Constitutional Court of Montenegro, Ministry of Justice, Supreme Prosecutor's Office, Chamber of Lawyers, Notary Chamber of Montenegro, Mediation Center, Agency for Peaceful Resolving of Disputes, Faculty of Law, National Library, nongovernmental organizations, etc).

All Bulletins of the Supreme Court, starting from 2001 until the Bulletin 2013 – Book II, can be foud at the webpage of the Supreme Court, o there are no objections of the Prosecution Office that the Bulletin is not delivered or that is not available, or notices of lawyers that the Bulletin is insufficiently transparent. Obviously, lack of information within prosecutorial organization about delivering of Bulletin of the Supreme Court, and lack of visiting of the web page of the highest instance, speaks in favor of the fact that prosecutors and lawyers were not proactive in searching of practical examples, for which is obvious that are accessible to everyone though easy search Internet option.

In the part of responses of professors of the Faculty of Law that court practice was disharmonized in proceedings against journalists, we emphasize that the General Assembly of the Supreme Court of Montenegro, according to Article 28 of Law on courts (Official Gazette of the Republic Montenegro, no.5/02, 49/04 and Official Gazette of the Republic Montenegro no. 28/08) at the assembly that took place on 29 March 2011, made Principle Legal standpoint that was obligatory for all national courts that act in cases of compensation of non-pecuniary damage, where journalists/media were prosecuted.

"If it finds there is ground of responsibility of journalists and media, the court measures the level of fair compensation due to violation of right of personality (reputation, honor, and similar) taking care about all circumstances of the concrete case, but especially of the following: importance of damaged property and consequences that arose from it, duration of mental suffering, goal to

which serve compensation of non-pecuniary damage, but also, the amount of compensation, which should be in accordance with the practice of the European Court of Human Rights, and that the compensation should not be in the amount that might discourage journalists and media in performing their role in preservation of democratic values of the society."

Assessing the area "Freedom of expression", the European Commission stated in the Progress Report on Montenegro 2013, that courts in Montenegro generally respect the practice of the European Court of Human Rights, and that the trainings of judges on standards of convention practice are organized through activities of Center for education of bearers of judicial functions.

In the part objections on "incompatibility in comparison with international standards that existed in war crime cases", we emphasize that the European Commission stated in the Progress Report on Montenegro for 2013 in the area on war crime cases, that decisions of courts should be in line with international humanitarian law, that they reflect the practice of International Criminal Court for former Yugoslavia, and that national legislation is fully implemented in these courts, without stating that courts did not do that, until that time. Matters of absence of command responsibility, co-execution, assisting and mongering, European Commission related to accusations for war crimes and in that regards for competencies of Public Prosecutor's Office, as the body that is responsible for pursuing of committers of crime offences.

For objections on disharmonized court practice, we would like to highlight that different acting of courts on the same factual and legal basis, or in measuring of sanction is not the standard but incidental appearance. Harmonization of court practice is one of the goals and obligations of the Supreme Court that arises from Constitutional and legal competences and strategic documents in judiciary reforms. Court Practice Units exist in higher courts and in the Supreme Court of Montenegro, while in Appellate Court functions the Unit of Court Practice for the crime report, which were established with the aim to prevent making of two different decisions by one court in one legal and factual matter, so situation in judiciary was significantly improved in this part.

It is useless to comment a statement of a lawyer that judges differently act in cases due to importance of parties or political representation. This is because judges are not members of political parties and because none charge or complaint of a lawyer delivered to the Cabinet of the President of the Supreme Court or to the Office for filing reports about corruption in courts did not contain such statements, so the statement can be justified by the absence of objectivity of a lawyer, especially in situations of losing of cases. Also, such or similar objection was not mentioned even in problems which presented representatives of the Chamber of Lawyers of Montenegro in December 2013, at the meeting in the Supreme Court. Problems were related to observances of lawyers in everyday contact/work with judges.

There is also Unit for monitoring of court practice of the European Court of Human Rights within Supreme Court. All Montenegrin judges were informed about its establishing. Existence and

composition of the Unit is available on the web page of the Supreme Court, so it is surprising that surveyed judges (51%) were not introduced about this, which indicates on absence of their activity, and therefore their personal readiness to apply practice of this international body.

In the part objections of professors about that the problem of education of judges on the practice of Court in Strasbourg, we emphasize that such education is continuously conducted via Center for education of bearers of judicial function and trainings organized by different international and nongovernmental organizations. In the Progress Report on Montenegro for 2013, European Commission assessed the area "Freedom of expression" and stated that in relation to jurisprudence of the European Court of Human Rights trainings for judges have been continuously organized through Center for Education of bearers of judicial function. In that regards, interactive cooperation of the Supreme Court and European Court of Human Rights that was established in 2011, continued. During 2013, 32 Montenegrin judges attended trainings in Court in Strasbourg related to its practice and implementation of European Convention on Protection of Human Rights. Montenegrin judges met with internal organization of Court in Strasbourg, with the processing of case and enforcement of court decisions with the focus on court practice in comparison with Montenegro, work of Venetian Commission, and activities of the European Committee for the Prevention of Torture. Judges from Strasbourg traditionally attend Days of Montenegrin Judiciary on 29-30 October, where they have lectures and exchange experiences with national judges with special review on freedom of expression.

After a judge from Basic Court in Podgorica, a judge from Basic Court in Niksic was sent to work in Registry of the European Court of Human Rights. Therefore, Montenegro lined up as one of the rare member countries of the Council of Europe, which sent a judge in the Registry, not a graduated lawyer due to logistical support.

Surprisingly, surveyed lawyers concluded that it was "sad that the Strategy was needed (Startegy for judiciary reform 2014-2018) for judges to do their job" as the Strategy defines and elaborates goals of the overall judiciary, as this document is the standard in practice of European countries and envisages the plan of development of both judicial and prosecutorial work, and professions that are in wider sense judicial (lawyers, notaries, bailiffs, mediators, court experts, and court interpreters).

Obviously, this was lack of knowledge of lawyers about actual events, goal and directives, judiciary reforms, and European processes. This is because the Strategy does not define and regulate individual work of judges, so "trial according to the law" does not imply implementation of the Strategy in the concrete cases but only obligation to implement the Constitution of Montenegro, material and process laws, and international conventions and standards in law area.

Standpoints of the Supreme Court are largely published as the integral text under the number Su.V. no.476/13 from 28 April 2014 and was subdued to minimal editorial/technical arrangement for the needs of publishing of this document.

XIII Court practice in the second instance verdicts of criminal courts

During general assessing of situation in criminal and legal matter, we concluded that its largest part was grounded on corrective decisions of appeal courts, where reasons for large number of abolished decisions should be taken into account, as well as individualized access of criminal justice to each concrete case. In the purpose of direct introducing with the practice of the second instance courts as the relevant one, verdicts/decisions (with accent on Higher Court in Podgorica as significantly larger and case-loaded) of Higher and Appellate Court of Montenegro were used. So, the analysis processed 14 decisions of Appellate Court, 21 decision of Higher Courts adopted within the period from 2012 until 2014, in different crime areas and with heterogenic structure of crime perpetrators. I that manner, the attempt was to achieve comprehensive procedural base, whose elements contain structurally different criminal acts (corruptive, against life and body, against freedom of gender, property delicts, etc.) speaking about the type of court decision, it is important to mention that out of the overall number of decisions of Appellate Court, four were related to revision (others were abolishing), while four revisions were registered in higher courts in comparison with the overall number of analyzed cases. Two analyzed decisions of Appellate Court that ended in revision, were related to so called *special cases*.

In the structure of analyzed decisions of higher courts, criminal acts against life and body were included, from Article 151 of the Criminal Code[12] - heavy bodily harm in basic form and criminal offense light bodily injury in qualified form (Article 152, paragraph 2 of the Criminal Code); criminal offenses from the group against freedoms and rights of a person and citizen, unlawful deprivation of liberty in basic form (Article 162, Paragraph 1 of the Criminal Code); from the group of criminal acts against marriage and family – criminal offense not giving maintenance from Article 221 of the Criminal Code; criminal offense theft from Article 239 of the Criminal Code that belongs to the group of criminal offenses against the property and deceiving from article 244 of the Criminal Code in qualified for from Paragraph 3; from the group of criminal acts against payment operations and business were covered criminal offenses evading tax payment and contributions in qualified form (Article 264, Paragraph 3) or violation of job position in company from Article 272 of the Criminal Code; causing of danger (Article 327 of the Criminal Code) within the group of criminal offenses against security of public traffic from Article 348 from Criminal Code that belongs to the group of crimes against security of traffic; criminal offenses against constitutional order and security of Montenegro are contained criminal offenses from Article 373 of Criminal Code – preparing the committing of criminal act against constitutional order and security of Montenegro; criminal act false representation of person from Article 383 of the Criminal Code (group of criminal acts against public bodies).

12 "Official Gazette of the Republic Montenegro", no.70/03, from 25 December 2003, 13/04 from 26 February 2004, 47/06 from 25 July 2006, "Official Gazette", no.40/08, 25/10, 32/11

Mostly presented criminal acts in analysis of decisions of higher courts are those from the group against a person acting in an official capacity with corruptive elements –Article 416 of Criminal Code related to violation of official status and criminal act of unconscientious performance in office from Article 417of Criminal Code. Some verdicts mentioned acts followed by creating of false documents from Article 412 of the Criminal Code.

When it comes to analyzed decisions of Appellate Court, then the most represented criminal act was the one from Article 300 of the Criminal Code related to unlawful production, processing and selling of narcotics from the group of criminal acts against the health of people, and criminal acts related to legal instruments (falsifying of documents Article 412, violation of official status from Article 416, unconscientious work in service from Article 417 and fraud from Article 420 of Criminal Code and giving bribe from Article 423 of Criminal Code). Besides this, the analysis included decisions in cases with criminal acts against public order and peace – creating of crime organization from Article 401a of Criminal Code or unlawful keeping of weapons and explosion from Article 403 of the Criminal Code. In comparison with the rest of the analysis of decisions of Appellate Court, the accent is on covering of acts from the group against sexual freedom – rape, from Article 204 of Criminal Code, criminal acts from the group against life and body – murder from Article 143 and grave types of murder from Article 144 of Criminal Code, participation in fight from Article 153 of Criminal Code with other serious criminal acts and criminal acts from the group against property – theft from Article 239 of Criminal Code and petty theft, fraud, and deception from Article 246 of Criminal Code in relation to serious crimes.

In comparison with the second instance decisions of Appellate Court, three verdicts related to the first instance competence of special units of higher courts were analyzed. Finally, it should be mentioned that the method of electing of verdicts was based on so called model of accidental sample. This contributes additionally in the matter of any verdict in analyzing or previous conviction of a team attained through media, with no closer insight into all circumstances of the given case. Also, it should be emphasized that logically, insight into case files logically failed as the most relevant additional element that would determine eventually stronger standpoint (not laic or any type of biased comment) about the case and decision in the concrete case.

There is one more warning at the end, and is related to the phase of proceeding and final court decision, as this analysis does not exclude the possibility that in sequel proceeding upon legal remedies were changes in result of analyzed criminal matter or retrial occurred after abolished verdict or decision of court that acted the last in the given case.

Process status of party in given cases after appeals gives impression that parties in criminal proceeding equally use legal remedies or that both prosecutor and accused person, or damaged person as private prosecutor, equally use this right and competency.

As closer data from case files lacks, factual and legal substrate from the court decision was used in analysis, whether this is related only to dispositive itself and its explanation. Some cases in its description indicate on existence of criminality with quite simple factual and legal basis.

However, the fact that importance of circumstances under which the offense was committed, is related to subjective experience and rights of damaged that arise from it, within the given case; does not give us right to make the conclusion about “”smaller social danger of the act”, which is often experienced though the prism of threatening sanction.

XIV Practice of higher courts as the second instance

In one of cases before higher courts as the second instance (Decision of Higher Court in Bijelo Polje Kz.no.129/13 from 17 May 2013 related to criminal act false representation), according to assessment of appeal court, the competent first instance court missed "to define existing of reasons related to capacity of damaged person in the proceeding, by private appeal, and also to determine the capacity of competent prosecutor that the court should have to assess during previous analysis of indictment, while in the given phase – after main hearing, the first instance court could not adopt such decision, as the possibility for adoption of this decision in the form of order, exists only until appointment of main hearing, according to Article 453 of the Criminal Proceeding Code.

In these circumstances, appeal court finds the consequence that annulled decision adopted from committed serious violation of provisions of criminal proceeding from Article 386, Paragraph 1, Item 8 of the Criminal Proceeding Code, which as a consequence had illegality of annulling of decision, necessary abolishing of the same one and retrial. On that occasion, the court will "remove violation on which second instance court indicated, present previous evidence material, and other evidence if the importance for it occurs, in order to define facts fully and regularly, make careful assessment of all evidences, after which it could be able to adopt appropriate and legal decision". From explanation can be concluded that the reason for abolishing of verdict was incomplete and incorrectly defined factual situation, while the explanation itself refers to circumstances from Article 386, Paragraph 1, Item 8 of the Criminal Proceeding Code that "if the judgment is incomprehensible, internally contradictory or contradicted to the statement of reasons of the judgment, if the judgment failed to state any reasons or failed to state reasons relating to the relevant facts or if these reasons are entirely unclear or contradictory to a considerable degree". Acting after the appeal in case Kz. No. 332/13 in relation to criminal act violation of position in company from Article 272, Paragraph 1 of the Criminal Code, Higher Court in Bijelo Polje abolishes the verdict of Basic Court in the same town, according to false implementation of rule in determining the law which is the most gentle for committer. It is obvious from the annulled verdict that the first instance court qualified the committed act according to the aw that was afterwards adopted, but did not provide answers why that law was gentle than the previous one for the committer, for which reason was determined lack of reasons on determined facts that represent serious violation of Provisions from Article 386, Paragraph 1, Item 8 of the Criminal Procedure Code.

In two cases after the appeal resolved before Higher Court in Bijelo Polje, the first instance decision was revised in one part related to decision on punishment (Kz. 293/13 for the criminal act serious bodily injures from Article 151 of Criminal Code)while in the second case was revised

in a view of legal basis when indictment of damaged person was rejected, as acts that are the case of indictment are not criminal offenses (Kz.458/13 related to violation of position where person acts in official capacity and unconscientious business activity).

The second instance decision of Kz.no.422/13, of Higher Court in Bijelo Polje which abolishes the first instance verdict of Basic Court in Berane, to accused person for criminal act falsifying of documents (Article 412, Paragraph 1 and 2 of Criminal Code), was based on committed violation of provisions of criminal proceeding from Article 386, Paragraph 1, Item 8 of the Criminal Procedure Code, which resulted in incompletely defined factual situation, so in that very moment the conclusion of a court about lack of evidence that the accused person committed the criminal offence occurred too early. For that reason was the verdict was abolished and the case was returned to the first instance court on retrial.

The next two cases of higher courts processed for crimes of light (Podgorica, Kz.no.1565/13[13] after the verdict of Basic Court in Niksic) or serious bodily injuries (Bijelo Polje, Kz.no.28/14 after the verdict of Basic Court in the same town), are related to abolishing decisions based on misunderstanding and lack of clearness of verdict, and paradox explanation in comparison with the disposition of the verdict (which in both cases implied important violation of provisions of criminal procedure from Article 386, Paragraph 1, Item 8), as decision of Higher Court in Podgorica did not mention provision of the Criminal Procedure Code on which was related violation of the rule, which is in some manner the standard implemented in all monitored decisions.

Somehow atypical in comparison with other processed verdicts was the decision of Higher Court in Podgoric, in case Kz. No. 1736-3, by which was confirmed the verdict of Basic Court in Kotor related to an accused person, and in comparison to another accused person the verdict was abolished and put on retrial. According to assessment of the second instance court, reasons for abolishing were contained in Provision of Article 386, Paragraph 1, Item 8 of the Criminal Procedure Code, on which the court takes care according to acting in official capacity and are reflected in disposition which becomes unclear and contradictor, which makes the explanation unclear. This procedure included pursuing for crimes such as tax evasion and other contributions from Article 264, Paragraph 3, in relation to Paragraph 1 of Criminal Code.

In the second instance case of Higher Court in Podgorica (Kz. No.1724/13 in relation to criminal act of violent behavior from Article 399 of the Criminal Code, in relation to criminal act unlawful

13 Due to easier monitoring of court practice and/or possible doubts that appear on that occasion, and are related to monitoring of cases in the next phases of the procedure, should be emphasized that the case receives new number after eventual abolishing and retrial.

deprivation of liberty from Article 162, Paragraph 1 of the Criminal Code) decision on abolishing is explained by incorrectly defined facts, which makes the disposition of abolishing verdict less understandable, opposite to reasons of verdict that are unclear and opposite to statements about the reasons of verdict that are unclear and opposite to statements about reasons of verdict on content of documents or minute about statements given at the proceeding. In that sense, in access that required defining of important violation of rules of the proceeding from Article 386, Paragraph 1, Item 8 of Criminal Procedure Code, the second instance court referred to the practice of Supreme Court of Montenegro, Kzz.no.4/13 from 17 June 2013, referring to incorrect assessment of evidence material by the first instance court.

Acting on appeal of accused person, acting in official capacity, Higher Court in Podgorica abolished the verdict of Basic Court in Bar, and after the decision Kz.no.1778/13, it ordered retrial in criminal matter related to criminal act causing general danger from Article 327, Paragraph 1 of Criminal Code. Explanation on abolishing decision contains assessment on important violation from Article 386, Paragraph 1, Item 8 of the Criminal Procedure Code, which courts takes into account. These violations are based on absence of reasons for facts, and for that reason appeal court was not possible to examine the merit verdict.

Deciding argument, which the first instance court did not take into account, or gave reasons for this, is reflected in lack of defining arguments if the criminal act caused the risk only for the concrete property – vehicle or the danger threatened to other property in near the place of execution, or where the fire was set, which makes the criminal act for which accused person was under the trial.

In appeal case Kz.no.1550/13 of Higher Court in Podgorica, for criminal act light bodily injuries from Article 152, Paragraph 2 in relation to Paragraph 1 of Criminal Code, was abolished the verdict of Basic Court in Podgorica, and was returned on retrial and repeated deciding. Abolishing reasons are based on violation of rules from the procedure from Article 386, Paragraph 1, Item 8, of Criminal Procedure Code, as the verdict did not contain reasons on deciding facts, while reasons the verdict contains are fully unclear and contradictor.

Decision of Higher Court in Podgorica Kz.no.1505/13, in relation to prolonged criminal act theft from Article 239, Paragraph 1, in relation to Article 49 of Criminal Code, verdict of Basic Court in Podgorica was abolished with explanation that the same one contained disposition that is contradictor and thus makes serious violation of the procedure from Article 386, Paragraph 1, Item of the Criminal Procedure Code. In explanation of decision the first instance court gives reasons that indicate on criminal act whose element was based on collection of property of small value. In that case, this is smaller theft. However, factual description presents the value of stolen things that is higher than the limit prescribed by the privileged form, or criminal act small theft.
In the case of Higher Court in Podgorica, Kz.no.942/13, related to criminal act failing to give maintenance from Article 221, Paragraph 1 of Criminal Code, abolishing reasons are based

on failures in a view of equality of legal means, rules on evidence burden and defining of facts based only on evidence that arose in favor of one party in the proceeding, and the statement of a damaged person. In the concrete case, defense of accused person avoids criminal and legal responsibility, without conducted process actions that would not only be at the top of demonstrating the guilt, but for the purpose of protection of process rights of accused person. In relation to this, the second instance court finds violation of the rule from Article 386, Paragraph 1, Item 8 of Criminal Procedure Code.

In relation to the same criminal offense in decision Kz.no.57/2013, Higher Court in Podgorica, by the first instance verdict of Basic Court in Podgorica, finds that the verdict of acquittal was based on failures in a view of important violation of the rule of proceeding from Article 386, Paragraph 1, Item 8 of Crimina Procedure Code, as disposition of verdict was opposite to its reasons. Such assessment is based on statement of accused and damaged person who agreeably confirm that accused person did not pay alimentation for some time. Therefore, it is not clear which period that was and why the situation happened, or by which criteria first instance court determined there was no guilt in this criminal matter.

Higher Court in Podgorica acted by the appeal in case Kz.no.79/2013, due to prolonged criminal act - fraud from Article 244, Paragraph 3, in relation to Paragraph 1, related to Article 49 of Criminal Code. In relation to this, verdict of Basic Court in Kotor was abolished against both accused persons, with explanation that violation of the rule of procedure from Article 386, Paragraph 1, Item 8 of Criminal Procedure Code, was based on “lack of valid reasons on crucial facts”. In concrete case, lack of valid reasons was noticed due to obvious failure done by the professional person in relation to calculation of real value of the vehicle in the part of calculation of costs of amortization. Mistake was not corrected, it was repeated, said the explanation of abolished verdict.

Article 49 of Criminal Code defines that criminal offence comprises several same or criminal offences of the kind committed in temporal continuity by the same offender and they represent a whole *per se* due to the existence of at least two of the following circumstances: the same injured party, the same object of an offence, use of the same situation or the same permanent relationship, the same places or spaces on which the offence was committed or the single intent of the perpetrator. The criminal offences against a person can represent a continued criminal offence only provided that they were committed against the same person. If a continued criminal offence comprises less and more serious forms of the same offence, the most serious form out of the committed offences shall be considered the continued criminal offence.

.

For continued criminal offence the court may pronounce more severe punishment than the prescribed one if extended criminal offence is made of at least criminal offenses that fulfill above mentioned conditions. However, more severe punishment must not exceed double measure of

prescribed punishment, neither twenty years imprisonment. Criminal offense that is not covered by extended criminal offense in final court verdict represents special criminal offense, or comes in group of specific extended criminal offense.

Verdict of Basic Court in Bar, was revised by decision of Higher Court in Podgorica, Kz.no.20/2013, in relation to criminal offense grave offenses against traffic safety from Article 348, Paragraph 4, in relation to Article 339, Paragraph 3, related to Paragraph 1 of Criminal Code. By revised verdict was rejected requirement for rehabilitation of convicted person, considering that the first instance verdict violated Criminal Code due to incorrectly defined facts. The court, in fact, incorrectly defined the time of expiration of probation period, when convicted person could not execute criminal offense, due to suspended sentence, nor the same pronounced suspended sentence was revoked. Thus, the first instance court incorrectly defined that all conditions for rehabilitation of that convicted person were fulfilled, according to Article 491, Paragraph 1 of the Criminal Code.

Decision of Basic Court in Cetinje was abolished by decision of Higher Court in Podgorica, Kz.no.10/2013, in relation to the case that was conducted due to criminal offense violation of position that covers the person acting in official capacity from Article 416, Paragraph 1 of the Criminal Code. Reasons for abolishing were based on incompletely defined factual situation, as the evidence was not delivered in the form of reading of defense of accused person who died in the meantime, so, the statement of accused person on that ground and in the same case, in relation with key circumstances related to her criminal and legal responsibility, failed to take place.

In that manner violation of rules of criminal procedure was committed, and resulted in lack of first instance verdict in a view of incompletely and irregularly defined factual situation.

Through revision was finished the second instance proceeding in the case of Higher Court in Podgorica, Kz.no.30/13, in a view of the punishment pronounced by Basic Court in Niksic, for continued criminal offense of a responsible person in a company or other economic entity, from Article 272, Paragraph 2 of the Criminal Code. Namely, the second instance court defines that Basic Court I Niksic regularly determined the facts, which was not denied by the appeal of prosecutor. However, at the time of determining the punishment, he gave a lot of importance to favorable circumstances in favour of accused person, which in addition to the manner in which offense was committed and the fact that it was about the offender in execution of the same criminal offenses, requires the need for pronouncing more severe punishment, as the second instance court did.

Finally, from the practice of higher courts was processed the case of Higher Court in Podgorica, Kz.no.2001/2012, where the verdict of Basic Court in Ulcinj was abolished, for extended criminal offense violation of position that covers the person acting in official capacity from Article 416,

Paragraph 1 of Criminal Code, finding that the appeal was reasonable. The second instance court determines important violation of provisions of criminal proceeding grounded on lack of reasons on facts. The reasons that were given were not understandable (Article 386, Paragraph 1, Item 8 of the Criminal Procedure Code). Namely, the explanation of the first instance court said that the fact about the origin of funds that were spent for elevator and instruments for laboratory was of great importance in the concrete case, where lack of understanding of statements from explanation of the first instance verdict was reflected, and the fact that it did not present important element of criminal offense for which accused persons were charged, which was indicated in the appeal. For existence of concrete criminal offense it is important to define subjective relations of accused persons towards executed criminal offense during the proceeding, and in accordance with this to make conclusion about the guilt of accused persons, beside the existence of objective elements of criminal offense.

The first instance court could make final conclusion about the guilt of accused ones after defining of both subjective and objective elements of criminal offense for which were charged by indictment. In this regard, statement of the appeal indicating that means collected from donation were not personal funds of accused ones was reasonable, and this fact did not release them from obligation to act according to the Law on public procurement of Montenegro.

XV Practice of Appellate Court of Montenegro

Processed cases in appeal procedure before Appellate Court of Montenegro were related to division on proceedings in areas of regular criminal justice and cases that are often called *special* and are the under the competence of higher courts and Appellate Court. In comparison with higher courts as the first instance ones, it should be emphasized that this has matter with relatively new organizational model which in Montenegro formally became effective by Law on amendments of Law on Courts ("Official Gazette of Montenegro, no.22/08"). In the frame of legislative initiative amending of Law took place and was prescribed establishing of special units for trials in cases such as organized crime, corruption, terrorism, and war crimes, in higher courts. In accordance with this law were established two specialized units for trials in criminal offenses such as organized crime, corruption, terrorism, and war crimes such as Specialized Unit in Higher Court Podgorica that started to work in 1 September 2008, and Specialized Unit in Higher Court in Bijelo Polje that started to work on 11 September 2008. In the frame of its real competence, these courts judge in the first instance in criminal proceeding for criminal offenses such as organized crime, notwithstanding how high prescribed punishment is and criminal proceeding for criminal acts with elements of corruption: such as violation of equality in doing business, violation of monopolistic status, causing bankruptcy, causing false bankruptcy, unlawful impact, false balance, violation of evaluation, revealing of business secret, revealing and using of stock market secret, bribe receiving, giving bribe, violation of official status, violation of status in company, fraud in service and violation of competences in business for which eight years imprisonment sentence has been prescribed and more severe punishment. Also, in the frame of its real competence, these courts act in cases of terrorism and war crimes.

Corruptive criminal offenses are covered by real competence of higher and basic courts. In the frame of Appellate Courts has been established criminal unit where, besides other competencies, is being decided on appeals against first instance courts of higher courts in cases for crimes of organized crime and corruption.

Article 401 of Criminal Code ("Official Gazette of the Republic Montenegro", no.70/03, 47/06 and "Official Gazette of Republic Montenegro" no. 40/08, 64/11, ad 40/13) prescribes that who organizes a group or other association with a view to commit criminal offences punishable by imprisonment of one year or more, shall be liable to imprisonment for a term not exceeding three years. Besides this, this provision of Criminal Code contains qualified forms of mentioned criminal offense, and mitigating circumstances that are related to behaviour of organizer and member of after associating, and before undertaking of activities of prescribed criminal offense.

Criminal Code of Montenegro in Article 401a provides the definition of creating of criminal organization by connecting activities: criminal organizing with the aim to execute criminal offenses for which may be pronounced four years imprisonment sentence of severe punishment.

Under *organized crime* Article 22 of Criminal Procedure Code implies the existence of grounds for suspicion that a criminal offence punishable under law by an imprisonment sentence of four years or a more severe sentence is a result of the action of three or more persons joined into a criminal organization, i.e. criminal group, acting with the aim of committing serious criminal offences in order to obtain illegal proceeds or power, in case when at least three of the following conditions have been met:

- that every member of the criminal organization, i.e. criminal group has had an assignment or a role defined in advance or obviously definable;
- that actions of the criminal organization, i. e. criminal group have been planned for a longer period of time or for an unlimited period;
- that activities of the criminal organization, i. e. group have been based on the implementation of certain rules of internal control and discipline of its members;
- that activities of the criminal organization, i.e. criminal group have been planned and performed in international proportions;
- that activities of the criminal organization, i.e. criminal group include the application of violence or intimidation or that there is readiness for their application;
- that activities of the criminal organization, i.e. criminal group include economic or business structures;
- that activities of the criminal organization, i.e. criminal group include the use of money laundering or unlawfully acquired gain;
- that there is an influence of the criminal organization, i.e. criminal group or its part upon the political authorities, media, legislative, executive or judiciary authorities or other important social or economic factors.

The Strategy of fight against corruption and organized crime in Montenegro that was adopted for a period 2010-2014, recognized specific forms of organized crime: violation of narcotics, weapons, illegal migrations, motor vehicles smuggling, and other types of goods, money laundering, and high technology crime. Bearing in mind development of this phenomena and ability of frequent changes and directions of crime impacts, this Strategy left an “open question” on the list of forms so it could eventually correct directions of activities and register new actual and potential risks in fight against these characteristics, at the level of Action Plans.

Other cases that are under jurisdiction of Appellate Court as the second instance court include acting in criminal matters after appeals against first instance decisions of higher courts.

In one of processed cases of Appellate Court as the second instance court in the domain of real jurisdiction on so called special cases, the case Kz.no.33/13 was based on responsibility of more persons involved in execution of criminal offenses or criminal organizing (Article 401

of Criminal Code), and criminal offense unlawfully production and selling and offering for sale of narcotics (Article 300 of Criminal Code), appeal of defenders in comparison with a number of accused ones was rejected. Where the appeal were adopted, verdict of the first instance court was only revised only in relation to the level of punishment, while rejected appeals were only related to denying of fullness and regularity of determining of facts, which, according to assessment of the second instance court was regularly done according to evidence collected at the first hearing, and their comprehensive assessment by the first instance court.

Besides, on the basis of regularly and fully determined factual situation and according to assessment of the appeal court, the first instance court regularly implemented provisions of Criminal Code that was not violated on damage of accused persons. Explaining the reasons for revising, the second instance court finds that the first instance court regularly assessed previous judgments of one accused person as the criminal offenses were not of the same type, but in others reasons that were related to their good behavior. However, reasons for revision are in the fact that the first instance court did not give appropriate importance to mitigating circumstances on the side of accused ones.

General sentencing rules, laid out in Article 42 of Criminal Procedure Code, prescribe that court would render the perpetrator of criminal act – the sentence within the legal boundaries, having in mind the purpose of sanctioning as well as circumstances affecting the sanction being bigger or smaller. More specifically, this refers to: level of guilt, motives for which the crime has been committed, intensity of harm over protected good, circumstances under which the crime has been committed, earlier life of perpetrator, his/hers conduct after the crime has been committed and especially his/hers relationship towards the victim and other circumstances related to the perpetrator.

Circumstances of the criminal offence cannot be taken as aggravating or mitigating, unless it exceeds the qualifying measure of existence of criminal act or specific form of criminal act or there two or more of such circumstances, hence only one is eligible for qualification of more or less serious criminal offence.

When meting out a punishment to an offender for a criminal offence which s/he has committed after sentence served, sentence forgiven or expired or acquitted after the deadline for revocation of probation or after court admonition has been pronounced (Article 43 of Criminal Code), the court can take this circumstance as aggravating one and it will particularly assess the seriousness of a previously committed criminal offence, whether the former offence is of the same kind as the latest one, whether both offences were committed out of the same motives, circumstances in which the offences were committed and how much time has passed from the earlier conviction or pronounced, forgiven or expired sentence, from acquittal from punishment, from expiry of the

deadline for revocation of earlier probation or from pronounced judicial admonition.
Art 45 of CC prescribes that the court can impose to the perpetrator of criminal offence the penalty below the limit prescribed by law or more lenient type of punishment whenever:

1) the law prescribes that an offender's punishment can be reduced;
2) the law prescribes that an offender can be acquitted of sentence, whereas the court does not acquit him/her;
3) it is established that there are particularly mitigating circumstances and determines that the purpose of punishment is achievable with reduced punishment, as well.

Boundaries for reduction of the sentence are prescribed by the Art 46 CC for situations where following conditions are met:

1) if the lowest prescribed punishment for the criminal offence is a prison sentence of minimum five years, the sentence can be reduced to the two-year imprisonment;
2) if the lowest prescribed punishment for the criminal offence is a prison sentence of minimum three years, the sentence can be reduced to the one-year imprisonment;
3) if the lowest prescribed punishment for the criminal offence is a prison sentence of two years, the sentence can be reduced to the six-month imprisonment;
4) if the lowest prescribed punishment for the criminal offence is a prison sentence of one year, the sentence can be reduced to the three-month imprisonment;
5) if the lowest prescribed punishment for the criminal offence is a prison sentence less then one year, the sentence can be reduced to the thirty-day imprisonment;
6) if the prescribed punishment for the criminal offence does not specify the minimum sentence, the prison sentence can be replaced by a fine;
7) if the prescribed punishment for the criminal offence is the fine with prescribed minimum amount, the fine can be reduced to the amount of €600.

On next case, related to the passive bribery (Article 423, Paragraph 1 of Criminal Code), verdict of Higher court in Podgorica (Kžs.br. 87/2012) has been modified by finding the defendant guilty of committing the disallowed action – allowing the entrance to the country to a foreign citizen without passport and requested financial present in return. First instance court acquitted the defendant. This case is characterized with substantially different statements, given in various stages of proceeding, where the certain factual elements confidently indicate on specific facts of relevance for adjudication. This specifically applies to precise detailing in statements made during the investigation phase, which in logical sequence provide for real picture of event and facts stemming from it, and which served the court for a merit based sentence

In criminal proceeding related to criminal offence of abuse of official status from Article 416, Paragraph 3 in regards to Paragraph 1 of Criminal Code, criminal offence of embezzlement

from Art.420, p. 1, criminal offence of unconscientious performance of office from Article 417, Paragraph 3 in regards to Paragraph 1 and 2 of Criminal Code for which the indictment involved multiple individuals. Appellate court with its decision No. 94/2012 rejected the unfounded appeals of prosecutor in regards several defendants, whereas the appeal was accepted in regards to 1 defendant, for which the first instance sentence was abolished and sent back for re-trial.

Reasons for abolishing were founded on inaccurate factual basis, deriving from contradicting statements of witnesses. Namely, certain facts were not considered, nor there was coherence between statements of some witnesses with formal evidences obtained during the investigation. For those reasons, second instance court stated that elaboration of first instance verdict had no reasons in "presented facts which should confirm the decisive argument" on accountability of defendant as responsible individual, in which capacity his doings or failure to pursue oversight – did he committed the criminal offence for which he is suspected. Following such rationale, second instance court pointed out to procedural actions that should be taken in re-trial, in order to verify whether the existing and potentially new evidences allow for legal appraisal of factual situation and whether it has features of criminal offence for which the defendant is suspected.

Appellate court in its decision of Kž.br.258/2012 accepted the complaint of state prosecutor in regards to decision of Bijelo Polje Higher court on providing the court expertize in case related to criminal offence of grave murder from Article 144, Paragraph 1 in regards to Article 20 of Criminal Code, and thus abolished the sentence. It should be underlined that such decision did not refer to the merit of the outcome of criminal proceeding, but it doubtfully affected its dynamics and potential further course. Through abolishing decision, the court medical-biochemical expert's report has been removed from court files, since the order for its engagement came from the police and not from respective investigating judge, which was the procedural requirement.

In Kz.no.322/13, Appellate Court adopted appeal in relation to an accused person, abolished the verdict and put the case on retrial, resolving the appeal of Higher Prosecutor's Office from Podgorica and defense attorney, against the verdict of Higher Court in Podgorica K.no.215/11 from 14 June 2013. Qualifying reasons for abolishing as significant violations of rules of the proceeding from Article 386, Paragraph 1, Item 8 of Criminal Procedure Code, the second instance court emphasized unreasonable verdict and lack of reasons on arguments, as the ones that were delivered were unclear and contradictor to the content of evidence in the first instance procedure. Besides, according to the statement of appeal court, the first instance court exceeded charges and therefore violated provisions of criminal procedure from Article 386, Paragraph 1, Item 5 of Criminal Procedure Code. In addition, the first instance court found that the court of appeals exceeded the charges and thereby committed a substantial violation of the criminal procedure provisions from Article 386, Paragraph 1, Item 5 of Criminal Procedure Code. Acting in this manner, the first instance court announced accused guilty for what he was

not charged. For that reason, giving in the factual description essential elements of the crime - beatings and the involvement of unknown persons as perpetrators, prosecution was exceeded, no matter the case was minor criminal offense than the one he was charged, and no matter if it was from the same chapter of the Criminal Code, which regulates crimes against life and body. In such a situation, the first instance court did not respect the rule from Article 369, Paragraph 1 of the Criminal Procedure Code, "the judgment shall refer only to the defendant and to the offence the defendant is charged with as specified in the indictment that has been brought, amended or extended at the main hearing (from the explanation of the second instance verdict for criminal offense participating in fight from Article.144, Item 8 of Criminal Code).

Appellate Court upheld the prosecutor's appeal against the decision of High Court in Bijelo Polje in the case Kž.no.314/13, in relation to charges for murder from Article 143 of the Criminal Code, in conjunction with the criminal offense illegal possession of weapon and explosives from Article 403, Paragraph 1 of the Criminal Code. By the first instance verdict, the accused person was found guilty for having committed the criminal offense in exceeding of self-defense. Upon findings of the Appellate Court, the conclusion of the first instance court that the accused committed the actions by exceeding of self-defense, in the manner described by facts in the statement of the first instance verdict was incomprehensible, and the given the reasons were unclear. This primarily referred to conclusions and reasons of the first instance verdict by which the first instance court gave arguments on conclusion by which the defendant in the concrete situation committed the criminal offense by exceeding the self-defense, "because the first instance court failed to assess evidence in more comprehensive and detailed manner, particularly behavior of damaged person after the first part of the event, its movement and action the person undertook, and finally the conclusion whether these actions, or actions of damaged person - the attack on the accused person that would justify actions in self-defense.

According to findings of the court of appeals, grounds of the state prosecutor's appeal was reflected in the absence of other unresolved relevant facts, regarding the acting of the accused and the victim, in which consisted attack of damaged after that first event, whether such conduction of damaged was threatened the accused person, and whether the defense undertaken by firing a shot from a pistol in the chest of injured party was urgently needed to avoid unlawful attack from the victim. Essentially, it stayed unclear which were the facts that determined the first instance court to make the conclusion that the accused person in the concrete case acted in exceeding of self-defense. For that reason, which is why the denied verdict did not contain valid reasons, and those that were given were contrary to the evidence presented at the main trial, which defined the violation of the rule of criminal procedure from Article 386, Paragraph 1, Item 8 of Criminal Procedure Code.

In the following two cases on the appeal resolved by the Appellate Court (Kž.no 263/13 and 124/2013) the first instance verdicts for criminal offense murder from Article 144, Paragraph 1, Item 3, in conjunction with the criminal offense illegal possession of weapons and explosives from Article 403 Paragraph 1 of the Criminal Code, and in the second case the crime of aggravated murder from Article 144, Paragraph 1, Item 1, were revised the judgments of the Higher Court in Podgorica, in terms of the sentence imposed, and the rest of the judgment remained unchanged.

In the case Kž.no 263/13 the second instance court found that the appeal of the Higher State Prosecutor was founded and that despite the expression of regrets of the accused person for committing aggravated murder, and the fact that at the time of execution of murder he was less accountable, so the same person need to impose more serious sentence. Reasons for this attitude of the Appellate Court were in the fact that the accused person killed the victim for no good reason, who, as the first instance court defined, gave no reason for this. Besides this, the fact that the accused person fired several shots at the victim from automatic rifle, could not be ignored, so the victim had no chance to survive, which indicates on extreme insensitivity and cold-bloodedness of the accused, so, by the modified verdict the accused person was punished for serious murder on imprisonment sentence of 17 years and 10 months, and for the criminal offense - illegal possession of weapon and explosives the accused person was punished to three months imprisonment, which implied a single sentence of 18 years in prison, by the application of provisions of the Criminal Code, finding that the same one was appropriate to the gravity of the offense, circumstances under which the offense was committed, the level of criminal responsibility of the accused one and his personality, and finally the purpose of punishment.

In the second case (Kž.no 124/2013), the Appellate Court directed towards the circumstances that the defendant committed the crime as a young adult person, which was important for sentencing within the prescribed limits. It seems unacceptable the assessment of the first instance court, considering the seriousness of the offense that the youth of the accused person could not affect imposing of a more lenient prison sentence than the maximal punishment. What was also relevant for the decision on sentence were finding and opinion of the expert of the Commission of experts that the accused person was the one who “expressed remorse for the offense committed”, which the accused during the proceedings demonstrated from the beginning of his defense. Such attitude towards the act could not be considered as the remorse expresses verbally, as the first instance court found. As in his earlier life, until he committed crime, behavior and conducting of the accused person was exemplary and positive, the assessment of these circumstances failed to occur but the ones were important for the sentencing. Contrary to the assessment of the first instance court that none of

the mitigating circumstances did not affect imposing of the lighter imprisonment sentence from the maximum sentence, the second instance court found that the appeal statement were founded, and that mitigating circumstances were influential on determining of sentence, or that they justify imposing of imprisonment sentence in a shorter period of time than the maximum, regardless of the proper conclusion of the first instance court that the defendant committed a serious crime, when he killed a minor 16 years old girl, because of unrequited love.

After the decision of the Appellate court Kž.no. 295/2013 in the criminal case based on a grave offense against the safety of public transport under Article 348, Paragraph 2 in relation to Article 339, Paragraph 1 of the Criminal Code, verdict of the Higher Court in Podgorica was abolished and the case was returned to the first instance court for retrial. In the proceeding before the adoption of abolished verdict, were not fully carried out all the necessary evidence in order to clarify the relevant facts important for making a lawful and proper verdict, and because of incomplete facts, the first instance verdict was revoked.

By decision of the first instance court was supported the request for retrial filed by the lawyers of accused person, previously completed by a final judgment of that court, by which the accused was found guilty for the criminal offense and was sentenced.
The reason for retrial said that there was new evidence - findings and opinions, which in itself can lead to the release of the accused or to his conviction on a more lenient criminal law, especially through the fact that from the present findings and opinions arises opposite to findings and opinions of experts for public transport. On this basis was concluded that the traffic accident occurred only as a result of the failure in the traffic that was committed by the accused.

In retrial the first instance court ordered new traffic expertise, and afterwards, at the main hearing read the statement and opinion of the expert commission, as the new evidence. At the retrial was also conducted hearing of representatives of the commission. In the reasons for abolishing of verdict, the first instance court accepted as a whole the expertise, confirming the findings and opinion of the experts for traffic and concluded that the basic failure in the traffic was committed by defendant.

At the main hearing in retrial, as stated in reasons of abolished verdict, the first instance court rejected the agreeable proposal of defense and representatives of the injured family to read in the supplement the evidence, the findings and opinion in favor of the accused, because the expertise that was carried out of the criminal proceedings, in any other proceedings, including litigation, cannot be used as the proof, even if it would be done by eminent experts or institutions. At the same time, the first instance court rejected their proposal to conduct the reconstruction of the traffic accident, because the traffic expertise and detailed and comprehensive statement of the traffic expert at main trial, fully revealed the facts of the case, as any other action would lead to delays in the criminal procedure.

However, since retrial of the proceeding was allowed because the new evidence - traffic expertise can itself lead to acquittal of the accused person or to his conviction according to more lenient law, the first instance court will be obliged to supplement the presentation of evidence and present it as new evidence, after which the new evidence would be brought in connection with other evidence, especially with the traffic expertise.

In apparent contradictions in the final opinion of the institution for traffic expertise about the primary failure of participants in the concrete traffic accident, which is crucial fact on which depends appropriate assessment of the existence of the offense and the guilt of the accused, which proved to be of necessity for harmonization of their findings and opinions by the Commission representative from mentioned traffic institutions, and depending on this, the court will decide whether it will carry out other evidence which the court deems as necessary, "all in order to clarify the relevant facts." Under these circumstances, concerning the lack of decisive facts, violation of the rules of procedure from Article 386, Paragraph 1, Item 8 of Criminal Procedure Code, was established.

In the following presentation are given three abolishing decisions of the Appellate Court (Kž.no 42/2013, Kž.no 515/12, Kž.no. 80/13) that were made after the appeals on verdicts of Higher Court in Bijelo Polje, and are related to the ordinary and qualified form of a criminal offense of unauthorized production, possession and distribution of narcotics under Article 300 of the Criminal Code. The last of these mentioned decisions was based on the allegation for existing of other crimes (the crime of theft in an extended period from Article 239, Paragraph 1 in connection with Article 49, Paragraph 1 of Criminal Code, in complicity, and the crime of petty theft from Article 246, Paragraph 1 in conjunction with Article 23 of Criminal Code).

In all three cases, the first instance verdict were abolished, of which the first two after the appeal of State Prosecutor, and the one in the case Kž.no. 80/13 after the appeal of the convicted.

In the case Kž.no. 42/2013 the first instance court, according to the findings of Appellate Court, failed to provide in explanation of its decision, reasons related to release of the accused person that was done according to the Criminal Code which was in force at the time when abolished sentence was valid, or the Criminal Code that was adopted after the validity of mentioned verdict. In this case, the first instance court could establish new facts from the new evidence and bring them in connection with the facts defined by the presented evidence regarding the essential elements of the criminal offense of unauthorized production, possession and distribution of narcotics from Article 300, Paragraph 2 of the Criminal Code that was in force before, and it was about bringing unauthorized substances or preparations which are declared as narcotics in Montenegro, and not in relation with features, which are not in composition of this offense in the previous Criminal Code, or that became part of the criminal offense of unauthorized production, possession and distribution of narcotics under Article 300, Paragraph 2 of afterwards amended Criminal Code. Under circumstances of such incomprehensibility, the first instance verdict could not be examined, which committed serious

violation of criminal procedure from Article 386, Paragraph 1, Item 8 of Criminal Procedure Code, for which the first instance verdict had to be abolished by the appeal of Prosecutor.

In another case (Kž.no 515/12), the first instance court, according to assessment of Appellate Court, gave unclear reasons for which it accepted the defense of the accused and presented ambiguous conclusion after the completion of the evidence, in order to determine the facts. Under such circumstances, the second instance court found that sufficient and strong reasons on decisive facts failed to occur, on which the first instance court based its decision, in which it provide more critical defense of the accused, and bring it in connection with the statements of the witnesses heard. Infringement of essential procedural rules on which was based abolishing of the first instance verdict was contained in Article 386, Paragraph 1, Item 8 of Criminal Procedure Code.

In the last of the case from the group of offenses against health of people, Appellate Court based repealing reasons in decision Kž.no. 80/13 on essential violation of provisions of the criminal proceedings from Article 386, Paragraph 1, Item 8 of Criminal Procedure Code, as well as for incorrectlz determined facts pursuant to Article 385 of Criminal Procedure Code. The first instance court in the abolished decision had committed a serious breach of provisions of the criminal proceeding because it was obliged to state why the conditions for determination of a single sentence by final judgments were not fulfilled. Appellate Court finds that explanation of the first instance decisions did not contain reasons concerning the decisive facts and while relevant facts were not understandable.

The selection of decision of Appellate Court, decision in the case Kžm.no 1/13 (decision of Council for juveniles) was processed, by which was abolished decision of the Higher Court in Podgorica on termination of proceedings against a juvenile, prosecuted for the criminal offense of rape from Article 204, Paragraph 4 in relation to Paragraph 1 of the Criminal Code.

Grounds of the appeal of Public Prosecutor is based on the fact that the first instance court incorrectly determined the fact, which the first instance decision makes unlawful and represents the reason for its abolition. Wrong factual findings of the first instance court that there was insufficient evidence, whose assessment would, both individually and mutual respect, lead to conclusion whether the juvenile committed the offense for which he was charged and was that the result of incorrect assessment of evidence presented at the first instance trial, and the first instance court according to assessment of the appeal court, did not appreciate of what importance for the proper factual findings testimony of the victim and its father as a legal representative, who himself was an eyewitness to the incident.
Appellate Court found that the first instance court did not carefully assessed the statements of mentioned witnesses, especially because the witnesses indicated in details described the incident, and whose statements were identical in terms of relevant facts in relation to the incident. Confirming an essential violation of rules of criminal proceedings, the second instance court indicated on the need for the implementation of the evidence presented, which was followed by a comprehensive evaluation of the evidence presented in the proper determination of the facts that would be the basis for adequate application of Criminal Code and adoption of proper and lawful decision.

XVI Conclusions and recommendations

In respect to all processed cases is concluded that the largest number of abolishing reasons was formulated or arose from considerable violation of the rules of criminal procedure related to Article 386, Paragraph 1, Item 8 of Criminal Procedure Code, which prescribes that it inter alia exists "if the judgment is incomprehensible, internally contradictory or contradicted to the statement of reasons of the judgment, if the judgment failed to state any reasons or failed to state reasons relating to the relevant facts or if these reasons are entirely unclear or contradictory to a considerable degree or if there is a significant factual contradiction between what has been stated in the statement of reasons of the judgment on the contents of certain documents or records on statements made in the proceedings and the documents or records themselves".

In theory and practice, this process presumption is explained from several aspects. Thus, the lack of decisive facts leads to a situation when there is lack of facts that have certain level of importance in relation to the particular case and a particular criminal matter (Škulić, 2009). These are primarily facts concerning the crime itself, ie. its objective characteristics, as well as issues related to the subjective dimension, ie. existence of guilt. Besides, the relevant facts are related to evidence and presentation of evidence, as well as all other important procedural issues. These matters consist of conditions for pursuing and adjudication on the merits, as for example the issue of fulfilling of conditions for the rehabilitation, the fact of existence of the judgment, from the same legal and factual events, and ultimately, the question of election of criminal sanctions, which achieves the purpose of punishment. Thus, the Supreme Court of Montenegro, in the judgment Kž.Ibr.49/11 from 12 September 2011 finds that in case of absence of complete and thorough evaluation of the defense of the accused and the evidence presented at trial, exists serious violation of provisions of criminal procedure from Article 386, Paragraph 1, Item 8 of Criminal Procedure Code, as the verdict has no reasons on crucial facts. It is obvious that this attitude opens wide field of estimations of court of what has to be considered as complete and conscientious defense, but it certainly is not the standard without limits. In addition to this, it is up to court to determine the limits of acceptability of such competencies, through the principle of rationalization of procedure and preservation of rights of parties.

When it comes to discrepancy between what is stated in the reasons of judgment about the contents of documents or records on statements given during the procedure and the processing material on which they are based, it is important to bear in mind the authenticity of such evidence, when they are included in the case file. Thus, the Supreme Court in the case Kz.no. 60/11 finds that serious violation of provisions of criminal procedure from Article 386, Paragraph 1, Item 8 Criminal Procedure Code is violated, if disposition of the verdict imposed for accused suspended sentence which defined six months imprisonment sentence, and the reasons of verdict stated that the defendant received three months suspended sentence. In addition, the contradiction that makes serious violation of the procedure has to be of essential nature, which means that there must be a serious contradiction in specific matter.

Unclear and incomprehensible verdict, as a procedural presumption from Article 386, Paragraph 1, Item 8 of Criminal Procedure Code, exists if there are unclear reasons that determine the court with regard to determining facts, or if the reasons of verdict are as such that they do not have support in the evidence presented (Decision of the Supreme Court of Montenegro in the Kz.I no.63/11 from 07 November 2011).

Interestingly, the same deficiencies were identified in different hierarchical judicial instances, and that the higher courts in relation to basic courts and Appellate Court in relation to higher courts as first instance, in most cases pointed out on this process failure. Theory and practice, or at least what we have found in an attempt to determine the reasons for the abolition of the verdict, give most obvious examples and flaws that in some cases, almost trivializes the problem (eg, verdict that in disposition contains one criminal offense, but the explanation gives reasons that clearly indicate on the existence of another criminal offense or explicitly refers to the second offense explicitly and is incomprehensible, and the reasons are contradictory to the very disposition of the verdict). It is obvious that in most cases it becomes much more subtle matrix that requires special theoretical and practical knowledge and skills and ability of judges.

However, as many times so far, we indicate that this process does not begin with the election of the judicial function, but represents continuous task of all institutions that educate the staff on judiciary - from universities, through informal forms of training and development, until daily activities of the Centre for education of bearers of judicial functions and its partners.

In response to the question what made the verdict unclear, and reasons contradictory, it has to be started from confirmed verdicts or the first instance ones that contains obvious (understandable, and at first glance clear) attitudes for which the decision was not abolished or is encouraged by some legal remedies in later stage. The method used on this occasion could not answer to such questions simply because it requires much greater involvement of many stakeholders in the justice system who have information about these cases. Partial experience of civil society helps in identifying of dilemmas, but cannot cause the problem, nor it can solve it in the basis of volunteer approach and proving of unequal practice or inefficiency of court. Such work has to be done under the auspices of institutions of judicial power, just as much the judicial authority has to draw attention to the serious disturbance indicators of consistency in the decisions of the courts.

Although we are quite sure that (if we can conclude this) the success of this project partly tied to transparency, and availability of decisions on the portals of the courts, we still believe that the efficiency and promptness of search have to be improved, but also harmonization of work of portals of all courts in the state.

Although the second instance courts in a relatively small number of cases referred to violation of rules of the procedure in relation to incompletely and / or incorrect factual situation, it is obvious

that there is a basis, but that it was consumed by other violations of the rules of procedure which is usually characterizes irregularities in the first instance decisions.

In several cases was observed the violation of rules of procedure, which partly arises from the incorrect application of material law in a particular case. This is supported by the decision when some of the institutes of material were incorrectly applied to the circumstances of the actual case, which was the reason for the abolition or revoking of the first instance decision. However, it must be admitted that explicitly expressed violations that are reflected in the misapplication of material law (referred to as the abolishing reason) almost entirely lacked.

Monitoring of the duration of proceeding is more complicated work and it requires continuity that lasts much longer than the financial year for which the label bears the case on appeal or abolished court decision. Conclusions about the relative efficiency of courts arises from the court statistics and perceptions based on previous experience of the project team. Of course, this does not mean that there are no exceptions that disprove this conclusion, especially when the media reports and observations of the participants of the proceedings on individual cases of war crimes and organized crime are taken into account.

Consistency of decision-making can be the issue, but it is hard to find the strongest cases of inequality the processed decisions. It is obvious that direct interest (interest in the subject) gives the best input for the assessment of consistency of decisions in criminal matters.

However, what makes the task significantly more difficult in monitoring of exercising of criminal justice, is its individualization, which we have often concluded by the limiting of criticism of work of criminal courts. Also, it would be logical to indicate on individual responsibility for flagrant cases through individualization of the contribution of each judge. In doing so, we have to bear in mind the fact that the court has limited capacity of decision-making through examination of indictments and movements within the limits of charges, which suggests on the need for more complex access and examining of quality of indictments (not only court decisions), if we want to get the real indicators of the efficiency of courts and harmonization of access to criminal cases.

In some cases were again expressed deficiencies in the area of expertise, and the court rightly indicated in one of processed cases on the need of using all sources of information in favor of the principle *in dubio pro reo* in the prosecution, and such an approach relates to the Anglo-Saxon concept *due process* in criminal matters, confirming the principle that is the basis of criminal proceedings is achieving of the goals of criminal justice, not the rigid process determining of guilt as a bureaucratic task of the judiciary (which, as the principle may be based in the work of the prosecution).

The final conclusion certainly cannot ignore the fact that the holder/holders of judicial function is/are "master/s" of criminal proceedings within the limits of their powers. This conclusion is not unilateral drawing of lessons from this material, but well-known fact about misunderstanding or lack of information within and outside the judicial power in relation to judicial power, where, as usual all the burden is shifted to it. Of course it is illusory to expect general agreement even on the issue of impressions on common work, but on this occasion and from the surveys conducted and feedback on the occasion, huge needs for often communication on professional matter is noted, as well as on all issues that burdens and functioning of courts - within the court power and in communication with other public bodies. That does not mean losing of the position of neutrality and independence, but rather an additional effort to strengthen access to criminal justice and accomplishing of its objectives.

In some countries and judicial systems was noted the practice that special collegial bodies or expert missions and institutions deal with certain issues of harmonization and efficiency of work of judicial institutions, which on the basis of analysis and comparison make appropriate recommendations and inputs for improvements in certain areas. Of course, these forms of action cannot be a substitute for legal and constitutional powers of some public authorities, but as a possibility they certainly are not *a priori* for rejection.

Without neglecting the importance of statistics that can sometimes reduce performance results (eg, the model by which the quality and success, or the transience of court decisions is measured only in relation to those against which the appeals were filed, not all decisions made by the court in appropriate formation).

We agree that the Supreme Court should play a key role in the harmonization of court practice and, as such, the court has to be pro-active, not only untouchable supreme authority. However, it is obvious that agility of lower courts largely determines the activity of the Supreme Court, which may not be the detector of all uncertainties and dilemmas in application of criminal law, both material and process. The relationship of superiority in this case is not a measure of success, and it has to be specified the role of sessions of judges and other forms of harmonizing of practice, before the Supreme Court replaces its function by "serial production" of principal legal standpoints and opinions for an indefinite number of cases. Montenegrin courts and judges, especially those who said they knew or that the way of acquiring the practice of international courts (not just the European Court of Human Rights) was familiar to them, have to go a step forward, and the same apply to this case. In this manner will fail the need of the national Supreme Court to declare itself. This is particularly related to international criminal courts and several cases of war crimes, as well as other courts that have the same legal substance as Montenegrin courts for material legal basis for sentencing.