POLICY REPORT

KEY CHALLENGES IN THE AREA OF MIGRATIONS AND ASYLUM IN MONTENEGRO

- Overview of standards, legislation and practice -

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This publication is a part of the project entitled Supporting Montenegrin Asylum and Migrations System, implemented by the Centre for Democracy and Human Rights (CEDEM) in partnership with the Civic Alliance and the support of the German Embassy in Montenegro.
The substantives in the texts, written in masculine form, refer equally to the feminine one.
The content of the Report constitutes sole responsibility of authors and it does not necessarily reflect the views of the German Embassy in Montenegro.

Podgorica, December 2013

List of abbreviations

ECHR– European Convention on Human Rights and Fundamental Freedoms
ICCPR – International Covenant on Civil and Political Rights
ICESCR –International Covenant on Economic, Social and Cultural Rights
SAA – Stabilization and Association Agreement
UN – United Nations
UNHCR - United Nations High Commissioner for Refugees
IOM – International Organization for Migration
OSCE – Organization for Security and Cooperation in Europe
ECRI - EuropeanCommissionagainst Racism and Intolerance
ECRE– European Council on Refugees and Exiles
MoI – Ministry of Interior
MFAEI – Ministry of Foreign Affairs and European Integrations
DCR – Directorate for the Care of Refugees
FRONTEX – European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
IBM – Integrated Border Management
EURODAC - European fingerprint database for identifying asylum seekers and irregular border-crossers
MARRI - Migration, Asylum, Refugees Regional Initiative
SOLID – Solidarity and Migration Flows Management
CIREFI - Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration
SEECP – South-East European Cooperation Process

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FOREWORD

In the conditions of economic recession, great social tensions, numerous international and internal conflicts, and the consequences of globalization that are reflected in relatively unlimited flow of information and increased intensity of transport communications, dynamic migratory movements become more and more prominent, be those irregular, ethnic or labour migrations, or even the elite migration personified in the so called ***brain drain***. It is, therefore, very risky to specify all the situations which moving human beings find themselves in, and to conclude that there is no other form of migratory movement, which has not been identified: refugees and internally displaced persons, asylum seekers economic migrants, children in irregular migrations, human trafficking victims, economically abused children for the needs of the work in the streets, and in recent times–at least when it concerns Western Balkan countries–children returnees in the process of the implementation of readmission agreements.

Irregular migrations most certainly constitute the greatest challenge, both for the region and for the European Union, taking into account the fact that in recent years Western Balkans have been facing ever increasing number of irregular migrants, especially with regards to the secondary transit of these persons from Asia and Africa to EU member states. Complex migration related challenges require integrated regional andinterstate approach, based on building border security systems and international law, especially on human rights protection standards. Montenegro is also facing the increasing pressure of irregular migrations and challenges in establishing asylum system, which condition the need for the development of migratory policy,strengthening of border control and continuous exchange of information and experiences among key system actors. From the viewpoint of the support to social inclusion and integration of foreign nationals with asylum status in local environment, informing the public on the commitments Montenegro is to fulfil with regards to further harmonization of its legislation and practice with European Acquis in this area constitutes a special challenge.

This publication has been prepared within the framework of the project ***Support to Development of Montenegrin System of Asylum and Migrations Management,*** which was implemented by CEDEM, in partnership with Civic Alliance. It is intended for decision makers and to the representatives of public authorities, judiciary and law practitioners, aimed at contributing the development of integration policies in accordance with EU standards and Schengen Acquis through the analysis of political context of migration processes, legislative framework mapping andexamining stakeholders' views. Besides, the aim of the Report is to contribute to the raising of awareness on the importance of enhanced coordination among relevant actors and the steps the country undertakes in that direction, but also to better understanding of key challenges in the system of asylum and migrations.

We take the opportunity to express our gratitude to the German Embassy to Montenegro which supported the implementation of the project and the publishing of this publication. Also, we owe our gratitude to the representativesof public authorities, especially to the Ministry of Interior and Mr.BojanBugarin, as well as to the Administration for the Care of Refugees, INTERPOL and IOM offices to Montenegro and to the colleagues from other civil society organizationswhich contributed considerably to project implementation through interviews and responses to our questionnaires.

I INTRODUCTION

The nature of irregular migration flows in Western Balkan region, thus also in Montenegro, has changed considerably in recent years, primarily through the increase in the number of irregular migrants from non-regional countries of origin, like Afghanistan, Pakistan, Palestine, Syria andNorth-African countries. In the majority of regional countries, migrants' movements become more and more organized. Besides, in Western Balkan countries there are frequent malpractices in relation to asylum , in the sense that considerable number of asylum seekers remain in hiding prior to the outcome of the asylum procedure. International organizations, UNHCR in the first place, endeavour actively to ensure respect for asylum[1] seekers;however the recognition rate of refugee status continues to be quite low in the entire region. In 2011, refugee status was granted to 17 persons in the entire Western Balkan region, including Croatia.

The border between Greece and Turkey is an area used by a considerable number of illegal migrants from Asia and Africawho attempt to come to European Union, at which these migrants pass through Western Balkan countries. Most frequent routes used by illegal migrants transiting through Western Balkans originate in the Republic of Macedonia and encompass all regional countries. The main route passes through Serbia (Preševo-Niš-Novi-Sad-Subotica), leading to Hungary, while others go through Albania, Montenegro and Bosnia and Herzegovina, leading to Croatia. In this context, the phenomenon of illegal migrations affects all regional countries, and it becomes evident that the established institutional and administrative structures in some regional countries are not sufficient to come to grips with this issue.

The increase in the number of non-regional irregular migrantscrossing Western Balkan countriesis in correlation with the increase in the number and scope of criminal organizations which facilitate the movements of these migrants. This fact has reduced to a significant degree the ability of relevant entities to manage these flows. It is obvious that the spreading of the outside boundaries of the European Union, as the consequence of the accession of Croatia to the community of European states, will lead to the worsening of the current situation.

The border between Greece and Turkey has recently been strengthened with the assistance of FRONTEX, by deploying additional 1.800 officers along the riverEvros, at the beginning of August 2012, which resulted in considerable reduction of the number of migrants who crossed the border[2]. However, long-term impact of such measures and the possibility of having long-term control over migration flows, especially in relation to migrants who come to Greek mainland through neighbouring islands is yet to be measured and evaluated.

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1 "So far, the data have confirmed the fact that the largest number of false asylum seekers, who abuse the right to asylum in order to spend certain time in Montenegro, until they find ways to make illegal enter in the EU. The Interpol has recognized illegal migrations as one of the priorities, and the activities being undertaken are directed towards the strengthening of border police capacities and of the controls being conducted at border crossing points, in order to prevent human smuggling and illegal migration. It is evident that the success in these activities cannot be based on the activities of individual countries, but on team, coordinated approach to this issue. Montenegrin activities will fall on barren soil unless appropriate activities are undertaken in other countries which are on the route of illegal migrants leading to Montenegro", excerpt from the answer of Montenegro INTERPOL office.

2 Frontex Annual Risk Analysis 2013, 18 April 2013, page 22
(http://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2013.pdf)

Furthermore, 2012 saw a worrying trend of the increase in the number of Syrian citizens who were passing through the region of Western Balkans in their endeavour to come to EU member states. For the period July-September 2012, FRONTEX reported thatthe detection of illegal border crossings in the territories of the EU member statescommitted by Syrian citizens had doubled, in comparison to the preceding quarter.

However, although the strengthening of the border between Turkey and Greece led to the fall of a number of Syrian citizens who were being detected, this reduction is still less prominent in relation to migrants from other countries. Namely, the very fact of the strengthening of border control does not look promising in terms of the interruption of the flow of Syrian citizens, as well as the migrants from other countries who strive to get to the territory of the European Union[3].

It is worthwhile repeating that the majority of illegal migrants who enter Western Balkan territory from Greece and pass through the region intending to re-enter the EU. Taking into consideration the fact that Western Balkan countries are currently unable to cope with this issue in an efficient and sustainable manner, the measures being undertaken rarely result in the repatriation of illegal migrants. One could say that even the most developed national systemsare not capable of coping with the current situation caused by the evolving illegal migrationflows within Western Balkan region. In order to gain specific results and ensure their sustainability, the solution is to be sought in integrated national action which should ensure the balancebetween the request for border security and control of migration flows, and the duty of the state to offer protection to the individuals who are in need of the same in accordance with international norms, but also in the enhanced coordination of regional cooperation. The reason for this is that the strengthening of mechanisms for resolving the issues of illegal migrationsin a country without a harmonized and coordinated regional approachwill most likely result in "waterbed" effect, by which the pressure of illegal migrations is just shifted to neighbouring countries.

The drafting of this Report was motivated exactly by the need to objectively perceive the advantages and deficiencies of Montenegrin asylum and migration management system, but also to identify and analyse key challenges in efficient migration management andincorporation of European standardsinto national legislation and practice, within the framework of Montenegrin EU accession process. The Report is primarily focused onhorizontal andvertical harmonization of Montenegrin policieswith European directives in the area of asylum, protection of refugees, position of foreign nationals,conclusion and implementation of readmission agreements, then border control and suppression of illegal migrations. Besides, the Report alsocomprisesthe analysis of institutional mechanisms and proceduresfor the implementation of these policies in relation to EU standardsin the procedures to review the justification of asylum request, then reception, accommodation and protection of asylum seekers, with particular focus on children and minors.Finally, having in mind further dynamicsof the harmonization of national legislation with the standards of the ***AcquisCommunautaire***, the Report also contains the recommendations for further development of Montenegrin system of asylum and migration management. Taking into consideration the scope and the complexity of the subject matter, the Report does not deal with detailed analysis

3 "In the period 2010-2011, there was a considerable inflow of illegal migrants or persons with false documents from the territory of Kosovo and Albania, but various agreements between these countries and the EU contributed to these people becoming part of the legal regime, so that the intensity of illegal border crossings experienced dramatic fall after that": Interview with Vladimir Vojinović, representative of Nikšić Border Security Department – Plužine Border Police Station, on 25th September 2013.

of the practice related to exercising access to education, healthcare and economic-social rights.

The Report is based on the analysis of domestic legislative and strategic framework and practice in the area of asylum and illegal migrations in relation to international norms and European contained in the negotiation Chapter 24–Justice, ***freedom and security.*** Besides ***desk-study*** analysis of the existing legal and political acts, the report is also based on accessible statistical data, reports of international organizations and competent public authorities, as well as on the views of the stakeholdersand the responses to research questions obtained through semi-structured interviews with the representatives of the Border Police, Asylum Office, Directorate for the Care of Refugees, international organizations and civil society organizations in Montenegro.

II OVERVIEW OF INTERNATIONAL ANDREGIONAL NORMS ANDSTANDARDS IN THE AREA OF ASYLUM AND IRREGULAR MIGRATIONS

The growing trend of globalization and interdependence of various factors in creating the opportunities for the free flow of goods and people, as well asthe pronounced progress in the area of information technologyconstitute the benefit of world economy. However, this process is often followed by negative side-effects which are particularly related to serious financial crises, lack of security, poverty and equality among and within social communities, leading unavoidably to the risk of uncontrolled, thus also uncertain, migratory movements which considerable number of individuals belonging to the most unprotected and most disadvantaged categories of migratory population, participate in. Migrating, these individuals face numerous obstacles, starting from the fact that, most often, they are perceived and treated as victims of circumstances, and not as persons opting for migration guided by the desire for better and more certain future. The fact that migratory routes can take them to illegal spheres in which personal uncertainty turns into the position of potential victim of smuggling and human trafficking, renders their position even more difficult. This is why the protection of rights and psychological and physical integrity of each and every migrant is requested as a necessary activity of international community and of national states, irrespective of the situation he/she is in. In order to accomplish these objectives, as well as the undertaken international commitments, the states must put forwardlegal and political instruments for the development of immigration policy anddelivering effective assistance to the population and individuals at risk.

International legal order is at the highest degree of its development in the history of our civilization, which causes for huge number of international legal standards to be passed with legally binding, declarative or recommended content. In order to make this order as effective as possible, international community uses wide range of measures andopportunities to turn legal norms into a real system for the protection of groups at risk. International standardspassed within the framework of international organizationsare quite numerous and heterogeneous. This means that not only can specific instruments like the UN Convention relating to the Status of Refugees or the UN Convention on the Rights of the Child be used in exercising rights and protecting migrants, but also all other universal documents on human rightswhich, by nature of things, belong to all human beings. Even at the EU level, there is a developed system of directives, within the framework of the ***Acquis***, as well as subvention mechanisms, like Refugee Fund, Integration Fundandthe general

programmeentitled ***Solidarity and Management of Migration Flows - SOLID***[4].

Besides international bodies and organizations, public administration system, with all its prerogatives of power, including the monopoly of coercion, represents an important factor inthe fulfilment of international commitments. States are obliged to accept refugees in their territories, which comprises the prohibition to reject refugees at the borderswithout conducting the procedure for granting refugee status, as well asstate action towards the persons who claim asylum, taking into consideration living conditions in the centres for the reception of asylum seekers; accessibility of legal aidand information,especially at the borders;length of procedure, then access to education, employment and healthcare[5]. Political will to undertake measures for the protection of sociallyvulnerable sub-categoriesin migrationsis reflected exactly through the development of these protection proceduresand measuresand their implementation.

2.1. Global and regional trendsas assessed by international agencies

According to the UNHCR data[6] for 2012, the trendsaccompanying asylum phenomenon indicate that in 44 industrialized countriesin the world, 479.300 asylum requests were lodged, which is 8 % increase compared to previous year, and at the same timethe second highest level reached in the number ofreceived asylum requests in the last decade. At the same time, in 38European countries covered by this report, 355.000 asylum requests were lodged, making 9 % increase as compared to previous year.

Out of all European regions,the greatest relative growth of the received asylum requests is noted in Nordic countries. Five countries of this region received the total of62.900 asylum requests during 2012, which is 38 % more than in 2011. The main destination country, according to these data was Sweden with 43.900 requests, making it 70 % of the total number of requests lodged in Nordic countries.The European Union member states (27) noted 296.700 new asylum requests in 2012, which is 7 % increase in relation to 2011 (277.800). These 27 EU member states together register83 % of the total number of requests lodged in Europe.

In Southern Europe,the number of newly registered asylum seekers has gone down by 27 % (48.600 asylum seekers), which is the second lowest level recorded in the last six years. Such trend is attributed to the reduction in the number of arrivalsvia seaways and to the change of circumstances in Northern Africa, which resulted in the reduction of the number of requests in 2012,which has been halved as compared to 2011.

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4 http://ec.europa.eu/dgs/home-aff airs/financing/fundings/index_en.htm – budget overview for internal matters (10th October 2012)

5 According to the UNHCR, the reception of asylum seekers at the level of each individual state should ensure the respect for human dignity and applicable international human rights protection standards; access to governmental and nongovernmental bodies for the satisfaction of living necessities (food, clothing, accommodation, healthcare); respect for gender and age of asylum seeker, especially children (i.e. children separated from their parents or unaccompanied children) in reception procedures; taking into consideration the needs of the victims of sexual violence, traumas and torture, as well as other vulnerable categories of asylum seekers; respect for the principles of family unity, especially in relation to accommodation and assurance of access to UNHCR. Taken from the document: Razvojsustavaazila u Hrvatskoj (Asylum System Development in Croatia), GorankaLalić Novak, Društvenoveleučilište u Zagrebu, 2010.

6 UNHCR - Asylum Trends 2012 - Levels and Trends in Industrialized Countries

In North America,the number of asylum seekers has been slightly increasedin 2012 (by 3 %), with the remark that the United States of America (USA) noted record influx of requests (83.400) showing the increase in 10 %as compared to previous year. Concurrently, the USA is the greatest recipient of asylum seekers of all the countries covered by this analysis, while the Federal Republic of Germany (64.500 requests), France (54.900), Sweden (43.900) and the United Kingdom of Great Britain and Northern Ireland (27.400) are ranked among the top five countries. The stated countriesreceived the total of 57 % requests in relation to all 44 countries covered by the Report (38 European and 6 non-European countries)[7].

As regards the countries of origin, Afghanistan tops the list of asylum seekers with the largest number of requests lodged in 2012 (36.600),followed by Syrian Arabic Republic (24.800), Serbia (and Kosovo according to the UN Resolution1244; 24,300), China (24.100)and Pakistan (23.200). In relation to asylum seekers' regions of origin,a bit less than a half come from Asia (46%), Africa (25%), then Europe (17%) andAmerican continents (8%).

For the first time since 2001,FR Germanyis the country with the greatest influx of asylum seekers in Europe, due to the fact that in relation to 2011 it notes the growth by 41 %, which is explained, amongst other things, by the great influx of international protection seekers from the Balkan region, especially from Serbia and Kosovo (10.400), Macedonia (4.500) and Bosnia and Herzegovina (2.000). There are indications that among them there is a large number of Romani[8] people , while almost every fifth asylum seeker in Germany is from Kosovo.

The United Nationsassess that at the global level, approximately 30 to 40 million irregular or non-documented migrants, which makes 15 to 20 % of all world migrants. It is assessed that their numbers in the European Unionrangebetween 1.9 to 3.8 million, while their numbers in the USA reaches 10.3 million[9]. Also, it is believed that every fifth migrant staying in the territory of the EU or USA came to these territories through illicit channels or by exceeding the time of their legal stay approved by their visas. These data must certainly be taken with reserve,since there is general consent that statistics can in no way be taken as reliable, due to the fact that a large number of irregular migrants are unregistered and are outside the flows controlled by the states and international organizations. Furthermore, this renders impossible closer classification and definition of the status of certain migratory groups, especially having in mind that often the same means of transport and routes are used by"regular" migratory groups.

Although there is no generally accepted and unified definition, for the needs of one of the reports dedicated to migratory groups and trends related to this population, a migrant is defined as an individual outside the territory of the state who he/she is a citizen of or which he/she nationally belongs to, and that he/she is in the territory of another state; oras a person who does not enjoy legally recognized rights acknowledged by the receiving state to the refugee status holders, right

7 The data in this report are based upon the indicators available up to 8th March 2013. Besides the EU member states, the Report covers Albania, Bosnia and Herzegovina, Croatia, Iceland, Lichtenstein, Montenegro, Norway, Serbia (and Kosovo according to the UN Resolution 1244/), Switzerland, Macedonia, Turkey, Australia, Canada, Japan, New Zealand, Republic of Korea and the USA. The Report is based on the first instance stages of asylum procedures.

8 The Report points out to the information of the German Federal Office for Migrations and Refugees which registers that 92 % of applicants come from Serbia and Kosovo of Romani origin (page 9).

9 UN DESA, Population Division, Trends in Total Migrant Stock: The 2003 Revision, www.un.org/esa/population/publications/migstock/2003TrendsMigstock.pdf.

of permanent stay or similar status; or as a person who does not enjoy legal protection of their fundamental rights on the basis of diplomatic agreements and special visa or other arrangements. This definition refers to all the persons who meet the stated criteria, irrespective of the way in which they crossed the border line, or to the fact whether their stay in a transit country or destination country is legal. An irregular (non-documented) migrant is a person who does not have legal basis for his/her stay in a transit country orthe country of his/her stay, who entered the territory without a permit, or who entered a country legally but lost the right to remain there[10]. As it can be seen, even this report does not use the term"illegal" migrant,since both legally and ethically behaviour can be illegal, but not a person guilty of such behaviour. The entry into a country in an irregular way or the stay in irregular status is not typical criminal activity,but the violation of administrative regulations or in worst case misdemeanour, instead of a criminal act. If the term"illegal migrant" was to be used it would always led to the conclusion that they are in every situation involved in criminal activities, which often is not the case.

After the meeting of the Transatlantic Council for Migrations in Washington[11] , in November 2010,the report was compiled with the topic"Return of Trust in Migration and Border Management" which is partly dedicated to theproblem of irregularmigrations, which points out to the concern caused by illegalmigration flows andnegativefeelings of the public in relation to immigrants. In this report there are eight reasons for persons to be classified as irregular migrants:

- Illegal crossing of a state border;
- Entry into a territory with false documents;
- Entry with valid documents, but with false content;
- Stay in a country after the expiry of the visa;
- Loss of status after the stay has not been extended because of the non-existence of conditions for further stay or because of the violation of the conditions of stay;
- Birth in irregular status;
- Hiding during asylum procedures or not leaving the country following the negative decision upon asylum application;
- Failure of a state to enforce repatriation decision for legal or practical reasons (tolerate irregular status).

2.2. International standards (UN)

UN Universal Declarationon Human Rights promotes unique concept of human rights and freedoms, which amongst other things prescribes equality and non-discrimination. Besides that, the Universal Declaration prescribes that no difference shall be made on the ground of political, legal or international status of the country or the territory which some individual belongs to, be it independent, under a patronage, non-self-governed or such that its sovereignty is restricted in any other way.The Universal Declarationencompasses the concept of interdependent and mutual rights and freedoms which also cover the prohibition of arbitrary deprivation of liberty, right o life, freedom and security o person, prohibition of slavery and slave trade, prohibition of torture, right to legal subjectivity, right to effective legal remedy, freedom of movement and settlement, right

10 Regular Migration, Migrant Smuggling and Human Rights: Towards Coherence - International Council on Human Rights Policy, 2010

11 Body composed upon the initiative of the reputable institution – Migration Policy Institute from Washington, winner of Carnegie Foundation for Peace in the World award

to asylum, right to citizenship, right to appropriate living standard which ensures health and family wellbeing and the wellbeing of family members, as well as other rights which protect integrity and dignity of human being. Although the provisions of the Universal Declaration do not have legally binding character, thanks to the norms of international common law and to the instruments in which the interpretation of international treaties is linked to the spirit and objectives of the Universal Declaration, this first written international catalogue of human rights continues to inspire not only the legislators, but also those who law interpreters and those who practice law.

International Covenant on Civil and Political Rights (ICCPR) in its Article 2 prescribes for Covenant members to be obliged to respect and guarantee to all the individuals in their territories and who fall under their jurisdiction, the rights recognized therein irrespective of race, colour, sex, language, belief, political or other opinion, national or social background, financial status, birth or any other circumstance. The Covenant in it Article 7 prescribes the prohibition of torture or cruel, inhumane or degrading punishment or treatment.

The Article of the Covenant prescribes that no one is to be kept in slavery, and that any form of slavery and slave trade is prohibited, while the Article 9 prescribes the right to freedom and security of person which means that no one shall be arbitrarily arrested or detained. According to the guarantees of this covenant, every person staying legally in the territory of some state is entitled to move freely and to be free to choose the place of residence, and the right to leave any country including one's own. These rights can be restrictedsolely if they are envisaged by law and if they are necessary for the protection of national security, public order, public health or morals or rights and freedom of other persons and if they are in line with other rights recognized by this covenant. Likewise, no one shall be arbitrarily deprived on one's right to enter one's own country.

Article 13 of the Covenant prohibits the expulsion of foreign nationals with legal stay in the territory of a member state, with restriction that this can be done solely for the purpose of the enforcement of a decision passed on the basis of law, except if this is not contrary to the necessary reasons of national security, and if a foreign national is able to present reasons against his/her expulsion. The next condition to restrict the prohibition to expel foreign nationals is for the case to be considered by competent authorities, with the right of this individual to have his/her representative.

Besides, the Covenant also prescribes equality before courts and tribunalswith the standard for every person to be entitled for his/her case to be heard fairly and publicly before competent, independent and impartial court, established on the basis of law, which decides on justification of all charges brought against him/her in criminal matters or ondenying his/her civil rights and obligations. In the context of these rights,the Covenant guarantees everyone's right for his/her legal subjectivity to be acknowledged in every place (Article 16).

Human Rights Committee as the supervisory of this covenant at its Twenty-seventh session (in 1986) passed ***General Commentary no. 15 – Position of Foreign Nationals according to the Covenant,*** which stipulates that every member state shall guarantee the rights from the Covenant ''to all the individuals located in its territory and under its jurisdiction". In general terms, this Commentary serves as a reminder that the rights guaranteed by the Covenant are applied to everyone, irrespective of reciprocity and his/her citizenship, as well as the fact that he/she does not hold the citizenship of any country.

The principle of the prohibition of discrimination also refers to the respect for the rights of foreign nationals guaranteed by the Covenant, as envisaged by its Article 2. This guarantee refers both to foreign nationals and to the nationals. Exceptionally, certain rights recognized by the Covenant are expressly guaranteed solely to the nationals (as the ones in the Article 25), while the Article 13 is related only to foreign nationals. However, the experience of the Committee in considering the conditions of human rights in member state shows that in certain number of countries foreign nationals are denied the rights which they should enjoy, according to the Covenant,orin which these rights are subject to restrictions which cannot always be justified, according to the provisions of the Covenant.

The Committee also reminds that legislation, case law in particular, should play an important part in ensuring foreign nationals' rights, especially when their rights are not safeguarded by the constitution or legal acts, in the way that their rights will be extended to those as well, just as required by the Covenant.

According to this commentary, the Covenant does not acknowledge the right to foreign nationals to enter and stay in the territory of a member state. In principle, a member state is the one which makes a decision whom to let into its territory. However, in certain circumstances even a foreign national can enjoy the protection of the Covenant,even in relation to the entry and the stay in the territory of certain country, for instance when the issues are raised like the prohibition of discrimination, prohibition of inhumane treatment and respect for family life. The entry approval can be issued under certain conditions linked to movement, stay and employment. The state can also lay down general conditions for a transiting foreign national. However, as soon as a foreign National is granted the entry into the territory of a member state, he/she enjoys the protection of the rights guaranteed by the Covenant.

From the moment a foreign national enters the territory of a state, his/her freedom of movement within that territory and his/her right to leave the same may be restricted solely in accordance with the Article 12, paragraph 3 of the Covenant[12]. Different position between foreign nationals and citizens in that respect or between different categories of foreign nationals needs to be justified according to the stated Article 12, paragraph 3. Since such restriction must be, ***inter alia,*** in accordance with other rights guaranteed by the Covenant, a high contracting party may not prevent his/her return to the country of origin by keeping him/her and by deporting him/her to a third country.

The Article13 of the Covenant is applicable to all the undertaken procedures with the objective of forced departure of a foreign national, irrespective of the fact whether domestic law classifies these procedures as expulsion or otherwise. In case such procedures involve arrest, the guarantees of the Covenant related to the deprivation of liberty are also applied (Articles 9 and 10of the Covenant). In case the purpose of the arrest is the extradition ofan individual, even other provisions of national and international law can be applied. In regular circumstances, an expelled foreign national must be allowed to leave the territory of that particularly country and go to any other country which wishes to receive him/her. The rights from the Article 13 protect only the foreign nationals who stay legally in the territory of a high contracting party. This means that domestic law related to

12 If such restrictions are necessary for the sake of the protection of national security, public order, public health or morals or rights and freedoms of other persons and if they are in line with other rights acknowledged by this Covenant.

the conditions for the entry and stay of a foreign nationalmust be taken into consideration in determining the scope of this protection, and that the individuals who made illegal entry into the territory or foreign nationals staying there longer than the law or permit allow them to, are not protected by the provisions of the Covenant. However, if the legality of entry and stay of a foreign national is controversial, every decision which would at that moment lead to him/her being expelled or deported would have to be passed in accordance with the Article 13. It is up to the competent authorities of the high contracting party to apply and interpret domestic law in good faithwhile performing their duties, respecting concurrently the conditions laid down by the Covenant, like the equality before law, for instance.

The Article 13 directly governs solely the procedure, but not the essential grounds for expulsion. However, by allowing solely the expulsions conducted "on the grounds of a decision passed according to the law";the obvious purpose of this article is to prevent arbitrary expulsions. On the other hand, pursuant to this article,every foreign national has the right to individual decision on his/her case, thus the guarantees of the Article 13will not be fulfilled by the laws and decisions envisaging collective or mass expulsions. This understanding, according to the opinion of the Committee, is confirmed by further rules related to the rights of foreign nationals to express the reasons against his/her expulsion and the right for the decision to be considered before a competent or other authorityempowered by a competent body. A foreign national must be given every possibility and means to use the legal remedy against expulsion, so that this right must in all circumstances of one's case be effective. The principle of the Article 13 related to the appeal against expulsion and the right for the decision to be reviewed by competent authorities,may be deviated from solely when it is required by "higher reasons of national security". There may be no discrimination in the application of the Article 13 among different categories of foreign nationals.

International Covenant on Economic, Social and Cultural Rights (ICESCR), and its Committee as a supervisory body,emphasizes in its General Commentary number 2 the need for closer cooperation among UN bodies. This Committee envisages, as a general principle,the inseparability and interdependence of two groups of human rights. This means that the efforts invested in the improvement of one group of rights should take fully into consideration the second group of rights. The UN agenciesinvolved in the improvement of economic, social andcultural rights should do their best in order for their activities to be fully harmonized with the enjoyment of civil and political rights. In the context of inaction, international agencies should avoid the participation in the projects which are, for instance, based on forced labourwhich is contrary to international standards or projects, which improve or encourage the discrimination of individuals or groups, contrary to the provisions of the Covenant, and involve mass expulsion or displacement of people without ensuring the necessary protection and compensation. In the context of action, this means that the agencies should, wherever this is possible, support the projects and the approaches which contributenot only to economic growth or other broadly defined objectives, but also encourage the enjoyment of the full scope of human rights.

Additionally, the Covenant, in its Article10,imposes the duty of the member states to undertake the measures of assistance and protection to families and family members,to the maximum possible extent, without discriminationespecially when the same are not able to perform their vital functions independently. In that sense,children must be particularly protected from economic and social exploitation. The same document, its Article11 prescribes the duty of the sates to ensure

the right of every personto appropriate standard of living, both for him/her and his/her family, which comprises appropriate diet, dressing and housing, as well as the improvement of living conditions. This provision of the Covenantgreatly corresponds to the fact that the neglecting of this duty or the impossibility to fulfil the same,is one of the principal drivers of migrations in the world nowadays. Within the framework of the General Commentary no. 4, the UN Committee for Economic, Social and Cultural Rightsconsidered the problem of housing,emphasizing that despite the fact that international community often reaffirms the importance of full observance of the right to appropriate housing, there is a worryingly deep gap between the standards laid down in the Article 11,paragraph 1 of the Covenant and the situation which prevails in many parts of the world. Besides the problems expressed in certain developing countries, which are faced with huge financial and other difficulties, the Committee thinks that even some of economically most developed societiesalso have significant problems with homelessness and inadequate housing.

The UN Convention on the Rights of the Child, together with its two protocols[13], by many things, constitutes a characteristic document in the area of human rights. Notably, it can be said that it is in facta specific example of coexistence and unity, interdependence andreciprocity among various dimensions of human rights placed in the general context ofa unique international treaty. The fact that the very Convention in certain areas underlines the duty of the stateto protect promptly fundamental values of the child, while in others the responsibility of the state addresses to the greatest degree of exercise of the rights,depending on its financial and material possibilities. However, by careful analysis of Convention provisions and especially by reading the general commentaries, by which the Committee for the Rights of the Child provides the Convention with deeper content, one comes to the conclusion that the boundary among different types and dimensions of human rights is sometimes not easily found. This in itself indicates that the state may not take easily any of its duties imposed by the ratification of this convention. This conclusion also results from the Article4of the Conventionwhich prescribes the duty of the state to undertake all appropriate legislative, administrative and other measures for the application of the rights recognized by the Convention.

Key elements of this international instrument are the prohibition of discrimination (Article 2);best interest of the child (Article 3);right to life, survival and development (Article 6); and the right to participation as an expression of the possibility for the child to express his/her opinion and for the same to be respected, including the rights given in judicial and administrative procedures (Article 12).

The duty to apply the principle of non-discriminationrequires from the statesto work actively onthe identification of target groups and individual childrenthat special measures will be related to, and all of it in the function of preventing the occurrence of discrimination and the elimination of the same, including the duty to collect and classify data[14].

13 Optional protocol with the UN Convention on the Rights of the Child, on the sale of children, child prostitution and pornography, Resolution of UN General Assembly A/RES/54/263 of 25th May 2000 which came into force on 18th January 2002; Optional protocol with the UN Convention on the Rights of the Child, on the participation of children in armed conflicts, Resolution of UN General Assembly A/RES/54/263 of 25th May 2000, which came into force on 12th February 2002.

14 General Commentary of the Committee for the Rights of the Child number 5 (2003): General measures for the implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44, paragraph 6)

Resolving the issue of discrimination can be directed to legislative amendments, administrative measures, financial support, as well as to educational measures,with the purpose of changing the views of social environment. The Human Rights Committeeunderlined the importance of underlining special measures aimed at the reduction or elimination of conditions which cause discrimination.

The principle of the best interest of the child requires active measures of the state, not rejecting the possibilityfor action of any public or any other body with public authorities, including public administration, legislative and judicial bodies. Basic requirement is reflected in the application of the principle of the best interest of the child by systemically assessing in which way could the decisions, measures and activities affect or could affect the rights and the interests of the child.

In relation to the right of the child to life,acquired through birth, the duty of a member state is to ensure to the greatest possible extentthe survival and development of the child, as one of the fundamental principles of the Convention. The Committee requires the interpretation of the term "development" in the broadest possible sense of the wordasa "holistic approach, which comprises entire development of the child, i.e. physical, mental, spiritual, moral, psychologicaland social".

The right of the childto freely express its views on all the issues related to his/her own life, as well as the duty to dedicate due attention to the opinion of the childis a principlewhich "underlines the role of the child as an active participant in the improvement, protection and monitoring of his/her human rights, which principle is applied equally to all the measures undertaken by the member states aimed at the fulfilment of the commitments towards the UN Convention on the Rights of the Child".

Special provisions of the Convention refer to the protection of the child from:
- Physical and mental violence, abuse and neglect (Article 19);
- All form of sexual exploitation and sexual abuse (Article 34);
- Abduction and child trafficking (Article 35);
- All other forms of exploitationprejudicial to any aspects of the child's welfare(Article 36);
- Inhumane and degrading treatments and punishments (Article 37).

The Article 39 of the Conventionestablishes the duty of the stateto ensure special measures of support for the physical and psychological recovery of the child – victims of violence, as well as his/her social reintegration.

The General Commentary no. 6 of the UN Committee for the Rights of the Child[15] points out to special attention to the category of unaccompanied children on the move, and the children separated from their families who are or who can end up outside their countries of origin. By passing this commentary, the Committee members clearly expressed the motif which is reflected in identifying numerous obstacles in the protection of this category of children, especially from the greater risks they are exposed to: sexual exploitation and abuse, recruitment and child labour (including the work in foster families). In addition, these children are often discriminated against and have difficult access to nutrition, shelter, housing, healthcare and education. Unaccompanied

15 UN Committee on the Rights of the child, Thirty-ninth session, 17 May – 3 June 2005, General Comment no. 6 (2005)

children, especially female ones, are faced with special risks related to gender motivated violence, including domestic violence. In such circumstances,by inertia this category of children are banned from entering into a countryorget detained by border or immigration authorities, while in some casesentry is granted, but immigration procedures are conducted in a way which is unsuitable to their age, or still contrary to the principle of gender sensitivity.

Certain countries prohibitthe separation of children with granted refugee status, while in othersfamily reunion is allowed, but in the way which is too restrictive, which makes this possibility unsustainable in practice, while many of these children resolve their status only temporarily, i.e. it is terminated when they turn 18.

This comment clearly underlines that it is related to unaccompanied children outside their countries of origin, or in case they are stateless and outside their usual place of residence. Therefore, the Commentary covers all such children, irrespective of their residential statusor the reason for which they crossed the border, and notwithstanding the fact whether they are unaccompanied or separated from their families. However, the Committee clearly emphasizes that children within internationally recognized borders face similar challenges, i.e. those children who crossed no such border, because of which the remarks and the content of this commentaryare greatly applicable to internally displaced persons. For these reasons,the Committee expressly emphasizes the invitation to the states to apply within their internal measurescertain solutions related to protection, care and treatmentof unaccompanied children or the children separated from their families and displaced within the borders of their country or the country of usual domicile/residence. Country of origin is the country of child's citizenship, while for stateless children it will be the country of usual domicile/residence.

With regards to the definition of the child from the Article 1of the UN Convention on the Rights of the Child[16] , the Committee gives certain definitions in its commentary,thus the term unaccompanied children (who are also called unaccompanied minors) refers to the children separated from both parents or other relativeswho failed to take care of them, and who are legally or customarily obliged to do that. Separated children are the ones separated from both parents, or from their previous legal or customary guardian, but not necessarily from other relatives. This can, therefore, include the children accompanied by other adult family members, or relatives.

The duties of the member states to protect this vulnerable groupextend within their borders and includealso the children under their jurisdiction whoattempt to enter their territories. Therefore, the enjoyment of the rights guaranteed by the Convention on the rights of the Childis not restricted by the child's civil status (citizenship), unless this is expressly prescribed by some other provision of the Convention. In such situation, rights must equally be guaranteed to all children, including asylum seekers, refugees and migrant children, irrespective of their citizenship, immigrant status or lack ofcitizenship (statelessness). Concurrently, the duty to respect the rights of this category of children extends to all branches of power (legislative, judicial and executive) and theirsubject matter jurisdiction. The duties can be positively and negatively set, or the states are requested to refrain from the measures by which rights and freedoms are breached, equally so as they are requested to be active in preventing factors leading to risky situations and the separation of children from

16 Article 1 of the Convention: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

their families as their natural environment. The responsibility of the state is not restricted solely to the protection of and the assistance offered to the children migrating as unaccompanied or who are separated from their families, but it consists of separation prevention measures, or of the activitieson the identification of unaccompanied children or on the prevention of their separation from their families at the earliest stage. Where ***the best interest of the child*** requires so, the state is obliged to enablethe separated and the unaccompanied children to unite with their families as soon as possible.

The General Commentary no. 6 imbues fundamental principles:prohibition of discrimination (Article 2 of the Convention), principle of the best interest of the child asthe primary one in searching for short-term and long-term solutions (Article 3), right to life, survival and development (Article 6), right to freely express one's opinion (Article 12), respect for the principle of the prohibition of repatriation and the principle of confidentiality.

In determining the content of the principle ofthe best interest of the child, the Commentary points out to the need of a comprehensive approach to establishing the child's identity, including the fact of his/her citizenship, education, ethnicity, cultural and linguistic identity, and the specificities of the needs and risks of protection. In situations when a child is granted the entry into the territory of a state, so called ***initial assessment process*** is taken as basic methodological approach. It should be carried out by qualified professionals trained for the application of the principle of age and gender sensitivity through special interviewing techniques, in a friendly and safe atmosphere.

The next step is the appointment of a competent guardian in the function of securing procedural guarantees and the protection of the best interest of the unaccompanied child or the one separated from one's family, by which would also the procedures for related to migrations (asylum) be conditioned with prior appointment of a guardian. In the cases of judicial and administrative proceduresconcerning the exercising of the right to asylum,the stated category of children must, besides a guardian, also a qualified representative. Respect for the best interest of the child also requires appropriate accommodation, which enables adequate care and protective treatment of his/her physical and mental health and periodic review of the treatment and other facts related to it.

In determining the best interest of the child, the UNHCR[17] concluded that it concerns the key principlebefore any child oriented activity is undertaken within the framework of the mandate of this international agency for the protection of refugees and their rights. Essentially,it is not the matter of special formal procedure, but of the need for systemic approach to numerous circumstances which characterize the situation as of the moment when a child is identified as separated or unaccompanied, until the moment appropriate durable solution is found. The treatmentis carried out in combination of several elementsby which protection system is established upon the arrival of a child in a destination country, through the initial checks and identification, quick registration, establishing status (including the establishment of guardianship measures and the appointment of a guardian), documenting, fact finding, verification, family reunion and finally resolving the status. In relation to the measures which fall within the domain of the UNHCR monitoring, three elements are of particular importance: finding a durable solution for unaccompanied and separated refugee

17 UNHCR Guidelines on Determining the Best Interests of the Child; Geneva, 2008, United Nations High Commissioner for Refugees, p. 22

children; interim guardianship measures for this category; possible separation of children from their parents against their will.

With regards to the beginning of the establishing of the best interest of the child in the situation of migrations of unaccompanied children and those separated from their parents, it is possible to apply the principlefrom the Commentary no. 6 of the Committee for the Rights of the Child, which acknowledges that the measures on permanent solution to the problem should be undertaken without delay. This means, in concrete terms, that the best interest of the child starts being established at the earliest stage of migratory cycle. The search for facts and for the child's relations, as one of the key elements of the process,must be taken into consideration when talking about time limits of this stage of migratory movements.

Additionally, the UN Convention on the Rights of the Childcontains the provisionswhich can refer to the protection of the rights of the child on the move, depending on the situation and the specificity of every specific case. These are primarily the provisions on the protection of children from all forms of physical or mental violence, injury or abuse, neglect ornegligent treatment, maltreatment or exploitation, including sexual abusewhile in the care of parent(s), legal guardian(s) or any other person who has the care of the child (Article 19), duty to take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties(Article 22). Then the guaranteesfor the protection of the child from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. (Article 32), the guarantees for the protection of the child from all forms of sexual exploitation and sexual abuse (Article 34), measuresto prevent the abduction of, the sale of or traffic in children for any purpose or in any form (Article 35), ensure that no child be subjected to torture or other cruel, inhuman or degrading treatment or punishment (Article 37), observance of the rules of international humanitarian law applicable to the states in armed conflicts which are relevant to the child(Article 38), promotion of physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts (Article 39), and finally special rights of the child in conflict with law (Article 40).

The UN Convention relating to the Status of Refugees - CRSR (1951), so called Refugee Convention, as amended by New York Protocol of 31st January 1967, contains the following key principles: prohibition of repatriation and expulsion[18] , non-discrimination, confidentiality and data protection, family unity, non-punishment for illegal entry or stay, protection of persons with disabilities, the provisions related to sex, respect for legal order, legal protection and cooperation with the UNHCR. The Convention prescribes equality in the conditionswhen there is the system of rationing which entire population is subjected to, by which general distribution is regulated of the products which

18 Article 33 of the Convention envisages the prohibition of expulsion and rejection (non-refoulement), according to which No Contracting State shall expel or return forcefully ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion

are in short supply, in which case refugees shall be accorded the same treatment as nationals (Article 20). As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances(Article 21).

Also, in relation to primary education, the Contracting Stateshave the duty to apply the same procedure towards refugees as they do towards their nationals, while in relation other levels of education, and especially in relation to the access to higher education, acknowledging certificates of higher education, diplomas and university certificates issued abroad, payment of taxes and feesandgranting higher education scholarships,they shall apply the procedure which is not less favourable to the one applied towards foreign nationals in general under the same circumstances.

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) marks torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

In its General commentary no. 3[19],the UN Committee against Tortureunderlines the obligations of the statesunder the Article 14of the Convention toensure in their legal systems that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. A victim is considered to be every person who either individually or collectively suffered a damage, including physical or mentalsuffering, emotional pain, economic loss or essential endangering of his/her fundamental rights through action or inactionwhich constitutes an act of torture in accordance with the Convention. Such person is to be considered a victimnotwithstanding the fact whether the perpetrator has been identified, deprived of liberty, prosecuted orconvictedand irrespective of any family or other relationship between the victim and the perpetrator. The term victimalso involves the next-of-kin and the victim's dependents (for instance, the persons that the victim was obliged to support), as well as the persons who suffered pain in their attempt to offer assistance to the victims of tortureor to prevent victimization. The term"survivors"can in certain cases refer to the individuals who suffered damage on the basis of torture.

The Committee affirms that the provision of means for as full rehabilitation as possible for anyone who has suffered harm as a result of violence should be holistic and include medical and psychological care as well as legal procedures and social welfare services.

In the paragraph 36 of the Comment, the Committee underlines the importance of appropriate procedures being made available to address the needs of children victims of torture, taking into account the best interests of the child and the child's right to express his or her views freely in all matters affecting him or her, including judicial and administrative proceedings, and of the views

19 UN Committee against torture CAT/C/GC/3, General comment No. 3, 13 December 2012

of the child being given due weight in accordance with the age and maturity of the child. In that sense, States parties should ensure the application of child-sensitive measures for reparation which foster the health and dignity of the child.

Within the framework of monitoring and reporting measures, the Committee particularly emphasizes the duty of monitoring special protection measures applied by the states in relation to vulnerable groups, including women and children.

Global movements and migration dynamicscondition the exposure of certain disadvantaged groupsto the impact of various forms of criminality. Transnational crime has long adopted the forms of organized criminal activities, which resulted in adequate responseof international community through legally binding instruments. The phenomenon of migratory groups at risk and the exposure to criminal spheres has been encompassed by the UN Convention against Transnational Organized Crime and additional protocols, notably the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted in Palermo in December 2000.

There are two determining reasons which conditioned the adoption of a special protocol related to suppression and punishment of trafficking in persons. Firstly,the degree of development and organization ofcriminal structuresat international levelrequires a comprehensive international approach in the countries of origin, transit and destination. This certainly includes preventive measures, equally so as the punishment of those involved in this activity. Besides that, special attention is to be directed to the protection of victims of such trade and their internationally recognized human rights.

Secondly, despite the existence of aseries of international instruments which containrules and practical measures for combatting exploitation of human beings, women and children in particular, there used to be no universal instrument that would deal with all aspects of human trafficking. The initiative and the resolution of the UN General Assembly 53/111 of 9th December 1998 was directed along those lines,which resulted in the establishment of the Open Intergovernmental ad hocCommitteewith the purpose of drafting a comprehensive international convention against transnational organized crime and creation of a platform for drafting an international instrument related to the issues of trafficking in women and children.

Threebasic elements/objectivesthat make the structure of this protocol are:

(a) prevention and fight against trafficking in persons, with special attention paid to women and children;

(b) protection and assistance to the victims of such trade, with full respect for their hu man rights; and

(c) fostering cooperation among signatory countriesin order for these objectives to be accomplished.

The terminology used in this Protocol in reference to children defines human trafficking asthe recruitment, transportation, transfer, harbouring or receipt of the child, for the purpose of exploitation, even if it does notencompass any of the meansset forth in sub-paragraph (a) of the

Article 3 of the Protocol[20]. According to the UN Convention on the Rights of the Child, this protocol takes that the child is every person under the age of eighteen. The scopeof this protocol is related to prevention, investigation and prosecution of criminal acts with the elements contained in the Article 3of this document(see the footnote), in cases in which such acts are international by their nature and include some organized criminal group, as well as to the protection of victims of these criminal acts. Additionally, it is the obligation of the state forattempt, complicity and organization or issuing orders to other persons to commit these criminal acts, to be classified as a special form of criminal acts in the national legislation.

Besides other measures envisaged by this protocol, every contracting state is obliged to consider the adoption of legal or other appropriate measuresallowing, in certain cases, the victims of illegal human trafficking to remain in its territory temporarily or permanently, having in mind humanitarianreasonsand the situation victim is in.

The Protocol against Smuggling of Migrants by Land, Sea and Air, which constitutes the addition to the UN Convention against Transnational Organized Crime(UNTOC), is based on the need for strengthening international cooperation in the area of migrations and development, in order forthe causes for migrations to be considered, especially the ones related to the phenomenon of poverty and the need for cooperation through inter-regional, regional and sub-regional mechanisms. This protocol establishes the definitions of"smuggling of migrants" (procurement in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident; "illegal entry" (crossing borders without complying with the necessary requirements for legal entry into the receiving State)and "fraudulent travel or identity document" (That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or that has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or that is being used by a person other than the rightful holder).

According to this protocol, the states are requested to adopt such legal and other measures necessary for the incrimination of criminal acts (committed at the international level with the purpose of acquiring financial or material benefit in direct or indirect manner): smuggling of migrants; when committed with the purpose of enabling the smuggling of migrants; production of fraudulent travel or identity document, oracquisition, procurement or possession of such document; and making it possible for a person who is not a citizen ora person with permanent residence to remain in the country concernedwithout complying with the necessary requirements for legal stay in the country. Just like with the preceding protocol, this one also requires from the statessanctioning special forms ofcriminal act related to attempt, complicity, organizingor giving ordersfor the committal of the stated criminal acts.

Besides the stated instruments,the UN Economic and Social Council drafted **Recommended**

20 **Sub-paragraph a) of the Article 3 of the Protocol** reads: "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Principles and Guidelines on Human Rights and Human Trafficking (2002)[21], which contain numerous guidelines for actions of the national states. These principles emphasize, first of all,putting the victims of human rights in the focus of all the efforts being undertaken in the area of preventionand the fight against human trafficking, as well as in the area of protection, assistance and compensation to human trafficking victims. It results that the states must act with all due attention towards the prevention of human trafficking; carry out effective and efficient investigation and prosecute human traffickers, as well as offer the assistance and protection to human trafficking victims.

Preventive action means strategic activities of the states directed towards the fight against demand which is the basic cause of human trafficking, thus also the actions on the factorswhich increase the susceptibility tohuman trafficking, likeinequality, poverty and all forms of discrimination.

A human trafficking victim may not be apprehended, charged, nor shall it be put on trial forillegal entry or stay in transit or destination country, or for their involvement in illegal activities, in case such involvement is a direct consequence of his/her victimhood. In addition to that, states are obliged tomake sure for human trafficking victimsto be protectedfrom further exploitation and damage, and to establish access to adequate physical and psychological care. Such protection and caremay not be conditioned by the ability and readiness of the victim to cooperate in judicial proceedings. Victim must be extended legal and other assistanceduring entire criminal, civil or other procedureinstituted against the individuals charged with human trafficking. In that sense,states are also obliged to extend protection and to secureinterim residence permitsto victims and witnesses throughout judicial proceedings.

States are obliged to make sure for human trafficking along with the criminal acts having this feature and the associated behaviour to be treated in nationallaws and extradition agreements as the acts susceptible to extradition, according to the provisions of international law. Effective and proportionate punitive measuresmust be applied both to individuals and legal entities considered guilty of human traffickingorof its component acts related offences. Under certain circumstances states should leave the possibility of freezing and confiscatingthe assets of individuals and legal entities involved in human trafficking, and to the extent possible confiscated assets should be usedfor support and compensation to human trafficking victims. Additionally, states must make sure for all persons who have been trafficked to have access to effective legal remedy.

Pursuant to the guideline 2 of these Principles, when identifying trafficking victimsand traffickers it is emphasized that human trafficking means more than organized movement of persons with the purpose of acquiring profit. Additional essential factor which differentiates human trafficking from the smuggling of immigrants is the presence of force, coercion orfraud throughout or in some part of the process, where such fraud, force or coercion is used for the purpose of exploitation. While additional elements, which differentiate between human trafficking and human smuggling,can sometimes be obvious, in many cases they are hard to prove without effective investigation. Failure in proper identification of human trafficking victims usually constitutes the cause for further violation of his/her human rights. Therefore, it is the duty of the states to ensure such identification and its implementation.

21 Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, (E/2002/68/Add.1)

The lack of specialized and/or appropriate national human trafficking legislationhas been identified as one of the greatest obstacles in the fight against trafficking in human beings, because of which urgent need has been indicated for the harmonization of legal definitions, procedures and cooperation at national and regional levels in accordance with international standards. Drafting adequate legal framework,in accordance with appropriate international documents and standards, makes a key instrument in the prevention of human trafficking and exploitation as its consequence. With such framework,basic assumption is adequate response of the law enforcement authoritiesto the issue of human trafficking, which largely depends on the cooperation of human trafficking victims and other witnesses in these procedures.

2.3. Council of Europe

Under the auspices of the Council of Europe, large scale campaign has been undertaken on regulating human rights and freedoms in which way it is possible to perceive the status and the protection of the persons involved in migratory movements. Besides that, the Council of Europe has developed powerful institutional mechanismsof monitoring contractual obligations and human rights monitoring in various areas.

Key instrument for the protection of human rights and freedoms – European Convention for the Protection of Hunan Rights and Fundamental Freedoms (1950), has evolved through the case law of the European Court of Human Rightsand has served as an authoritative and referential mechanism in the control of discharging contractual obligations. Concurrently, the impact of the Court's jurisprudencewithin the process of European integrations, has conditioned a very dynamic evolution of human rights protection standards, which in numerous situations goes beyond the initial substantive legal concept of the ECHR,encroaching upon all areas of social life, including the status of vulnerable groups. Although the very text of the European Conventiondoes not contain special provision on the protection of migrants, or asylum seekers, the jurisprudence of the European Court has adopted the concept of the protection of vulnerable groups through the guarantees of the right to life, protection from torture, freedom and security of person, fair trial, right to protection of private and family life, and the prohibition of discrimination, thus indisputably giving to these categories a new input in the prevention of the violations of human rights and freedoms. However, it should be noted that the ECHR, as well as the European Court of Human Rights, searching for the efficient model of protection of migratory groups,do not deal with all aspects of the protection of migrants, but only with those allowed by the nature of the endangered right and the mandate within the framework of the Council of Europe, pertaining primarily to the prohibition of expulsion, restriction of freedom to asylum seekers, family unity, and the effects of the appeal to the decision on rejecting the asylum application.

The European Court of Human Rights has constantly repeated in its case law that there is no special right to asylum being safeguarded in the European Convention on Human Rights. However, starting from 1960 both the Commission[22] and the European Court of Human Rights deliberate on the regular basis the cases of extradition, expulsion or deportation of certain individualswho could potentially be victims of torture or similar treatment in the countries of their return, which falls within

22 Triage body of the European Convention on Human Rights which stopped working in 1998.

a domain of absolutely protected right contained in the Article 3 of the European Convention. Thus, the European Court reasons that a state may not be absolved from the responsibility in case it undertakes an activity by which, as a direct consequence, some individual will be exposed to actual risk of torture, inhuman or degrading treatment and punishment, contrary to Convention standard[23].

In relation to other rights safeguarded by the Convention, the European Court has dealt with the issue of children and migrations through the concept of family life and proceduralsafeguards, and the right to efficient and effective legal remedy which is in the function of the prevention of expulsion[24]. The specificity of the cases related to asylum seekers and to the status of unaccompanied children is reflected in the case ***Mubilanzila Mayeka and Kaniki Mitunga v. Belgium***[25], in which the decision on deportation of a juvenile, which was passed and enforced by Belgian authorities, as well as her repatriation to the Democratic Republic of Congo as unaccompanied child,were assessed as the violation of the rights from the Article 3 related to inhuman and degrading treatment;Article 5related to the freedom of movement (since the juvenile had had her movement restricted during the asylum procedurehaving been placed in the airport police premises for the period of two months, which is contrary to the standards of the Convention on the Rights of the Child);as well as the Article 8 related to the respect for one's family life and family reunion, or her mother.

Similarly, in the case ***Rahimi v. Greece***[26] the violation was found of the guaranteeagainst inhuman and cruel treatment of a juvenile who had been detained in a centre on the island of Lesbos, with the risk of being expelled, having arrived illegally to Greek territory as an immigrant from Afghanistan. The violation was related both to the fact of accommodation conditions and to the fact that Greek authorities had failed to provide proper care to him,having in mind the fact that this had been an unaccompanied child. Also, the European Court found the violation of the freedom of movement and the security of person (Article 5, paragraphs 1 and 4 of the European Convention), since no concept of the best interest of the child had been applied on the occasion of placing him in the centre, and that no possibility had been considered of a less rigid measure. Also, this juvenile had not had at his disposal an efficient legal remedy as the consequence of the fact that no contact with a lawyer had been ensured, or at least an understandable brochure with information on his rights.

Likewise, in the case ***Muskhadzhiyeva and others v. Belgium***[27] the European Court found the violation of the Article 3 of the European Convention on Human Rights, due to illegal detention of children and inhuman conditions in detention facilities, for longer than one month in the premises ill-equipped for the stay of children.

Besides the stated Convention,within the framework of the law being developed under the auspices of the Council of Europe,the issue of the status of migrant children is dealt with other instruments like the European Social Charter, Convention on the Protection of Children from Sexual Exploitation

23 Judgements: Soering v. United Kingdom of Great Britain (1989), Cruz Varas v. Sweden (1991), Nasri v. France (1995), etc.

24 N. Mole, Asylum and the European Convention on Human Rights, CoE Publishing, Strasbourg 2003, p. 25/26.

25 European Court of Human Rights judgement in the caseMubilanzilaMayeka and KanikiMitunga v. Belgium dated 12th October 2006

26 European Court of Human Rights judgement in the caseRahimi v. Greece of 5th April 2011

27 European Court of Human Rights judgement in the case Muskhadzhiyeva and others v. Belgium of 19th January 2010

and Sexual Abuse, European Conventionon theExerciseof Children's Right, European Convention on Nationality, Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, Conventionon Actionagainst Traffickingin Human Beingsandthe European Convention on the Repatriation of Minors. Montenegro has ratified all the above treaties except for the European Convention on the Repatriation of Minors,and based on that fact is obliged to fulfil all the commitments resulting from the stated treaties.

Basic objectives of the convention on the Protection of Children from Sexual Exploitation and Sexual Abuse areprevention and fight against sexual exploitation and sexual abuse of children, protection of the rights of children–victims of sexual exploitation and sexual abuse, as well as the improvement of national and international cooperation in the fight against sexual exploitation and sexual abuse of children. The Convention imposes to the Contracting Parties to undertake the necessary legislative or other measuresaimed at protecting children and at preventing all forms of sexual exploitation and abuse. In exercising its goals,the Convention particularly emphasizes the role of the state, media and civil society.

In exercising the rights of migratory groups,the Council of Europe passed a whole series of resolutions, directives and recommendations:

- Resolution of the Parliamentary Assembly 28 (1953) on the Promotion of a European Policy for Assisting Refugees;
- Recommendation of the Parliamentary Assembly 434 (1965) onthe Granting of the Right to Asylum to European Refugees;
- Resolution of the Committee of Ministers 14 (1967) onAsylum to Persons in Danger of Persecution;
- Recommendation of the Parliamentary Assembly no. 773 (1976) onde factoRefugees;
- Recommendation of the Parliamentary Assembly no. 817 (1977) on the Right to Asylum;
- Recommendation of the Committee of Ministers no. R (81) 16 on the Harmonization of National Procedures Relating to Asylum;
- Recommendation of the Parliamentary Assembly no. 1016 (1985) onLiving and Working Conditions of refugees and Asylum Seekers;
- Recommendation of the Parliamentary Assembly no. 1211 (1993) on Clandestine Migration: Traffickers and Employers of Clandestine Migrants;
- Recommendation of the Parliamentary Assembly no. 1236 (1994) on the Right to Asylum;
- Recommendation of the Committee of Ministers no. R (98) 13 onthe Right of Rejected Asylum Seekers to an Effective Remedy against Decisions on Expulsion in the context of the Article 3 of ECHR;
- Recommendation of the Committee of Ministers no. R (99) 12 on the Return of Rejected Asylum-Seekers;
- Recommendation of the Parliamentary Assembly no. 1440 (2000) on Restrictions on asylum in the member states of the Council of Europe and the European Union.

2.4. EU and human rights in migrations

In the general context of the protection of human rights and freedoms,the European Unionpromotes in its establishing treatiesthe concept of general valueslike the respect for human dignity, freedom, democracy, equality, rule of law and respect for human rights, including the rights of minority

members. These values are common to all member states in the society in which pluralism, non-discrimination, tolerance, justice, solidarityand equality of women and menprevail (Article 2of the EU Treaty). Also, the EUoffers to its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime (Article 3 of the Treaty).

In the exercise and protection of the concept of human rights, the Union attributes special significance to the Charter on ***Fundamental Rights*** which, althoughnot contained in the establishing treaties, has the same legal strength as the treaties. Fundamental rights, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedomsand the ones which derive from common constitutional traditions of the member states, constitute general principles of the EU law and make common legal heritage of the Union and its member states.

The Article 78of the Treaty on the Functioning of the European Unionprescribes for the Union to developcommon immigration policy the objective of which is to ensure efficient management of all stages of migratory flows, fair treatment of the citizens of the third countrieswith legal residence in the member states, as well as prevention and improvement of the measures for the fight against illegal migrations and human trafficking. The Union develops common asylum policy, subsidiary protection and interim protection, the purpose of which is to offer appropriate status to every third country citizen in need of international protection and to ensure respect for the principle of the prohibition of forced removal or return of immigrant (non-refoulement). That policy must be in line with the ***Geneva Convention*** (1951) and the Protocol (1967) on the ***Status of Refugees***, and with other appropriate treaties like the ECHR, the UN Convention on the Rights of the Childandthe UN Convention against tortureand other Inhuman and Degrading Treatment and Punishment.

In achieving these objectives, the European Parliament and the European Council, in regular legislative processmeasures are established with regards to:

- Conditions for entry and stay, as well as to standards on the basis of which the member states issue visas for long stay and residence permits, including family reunion;
- Establishing the rights of third country citizens with legal residence in the EU member states, which includes the conditions related to the freedom of movement and residence in other member states;
- Illegalimmigration and unlawful residence, including removal and repatriationof persons with illegal residence;
- Fight against human trafficking, especially women and children.

In relation to third country citizenswho do not meet, or not any more,the conditions for entry, presence or stay in the territory of some member state, the Union is authorized to conclude the agreements on readmission to the country of origin or to the country which the third country citizens have come from.

Within the framework of judicial cooperation in criminal matters,The European Parliament and the Council may, as the bodies of the Union, establish by means of directives adopted in accordance with the ordinary legislative procedure, minimum rules concerning the definition of criminal

offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Human trafficking and sexual exploitation of women and children, amongst others, fall within these forms of crime (Article 83of the Treaty on the Functioning of the European Union).

The Union Charter on Fundamental Rights within its Chapter II entitled Freedoms, in the Article 18 prescribes the right to asylum as guaranteed with due respect for the rules of the Geneva Convention from 1951 and the Protocol from 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community and the Treaty on the Functioning of the European Union. The Article 19 of the Charter establishes protection in the event of removal, expulsion or extradition of some individual, at which Collective expulsions are prohibited and no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

The measures and policies of the EU relating to asylum were adopted within the framework of special policies, including some of the most important EU directives, like ***Dablin II Regulation***[28] which establishes a hierarchy of criteria for identifying the Member State responsible for the examination of asylum claims in the EU lodged by third country nationals. This regulation establishes the principle that only one member country is responsible for the examination of asylum claims, in order to avoid sending asylum applicants from one country to another, and to preclude, at the same time, greater number of asylum claims to be lodged by one person.

Besides this instrument,other important ones are: ***Directive on Minimum Standards for giving temporary protection*** in case of mass influx of displaced persons and the measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof[29], thenthe so called ***Qualification Directive***[30], Directive on asylum procedures by means of which refugee status is gained or lost (***Asylum Procedures Directive***)[31], Directive on defining the facilitation of unauthorized entry, transit and residence, which regulates the area ofirregular entry, transit and residence of foreign nationals, as well as a series of measures directed towards the fight against facilitation of unauthorized border crossing and suppression of networks which encourage

28 Council Regulation (EC) No. 343/2003.Nota bene:Dublin Regulation relies on the assumption that in every individual asylum claim only one Member State, which granted the applicant the entry and stay into its territory, can and must be responsible for the entire claim examination procedure. (ThatMember State is responsible for examining the application according to its national law and is obliged to take back its applicants who are irregularly in another Member State): Taken from:Azil i Migracije: Usklađenosthrvatskogzakonodavstva i praksesaevropskompravnomstečevinom (Asylum And Migrations: Harmonization of Croatian Legislation and Practice with EU Acquis), Centarzamirovnestudije, Zagreb, 2010, p. 40.

29 ***Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.*** Nota bene: this directive is related to the refugees from the area of armed conflicts or manifestation of violence, as well as to the persons at risk of general violation of their human rights, as well as to those who have already been victims of such violations. In these cases, the Directive does not foresee individual examination of protection requests, and the persons under temporary protection are entitled to lodge asylum claims at any time.

30 ***Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted***

31 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member states for granting and withdrawing refugee status

human trafficking and sexual exploitation of children[32], and theDirective on the Conditions for the Reception of Asylum Seekers (***Reception Conditions Directive***)[33] which prescribes minimum standards for a dignified and high quality reception of asylum seekers in the member stateswith the purpose of a balanced development of the common asylum system andthe creation of an efficient reception system and procedures, but also reduction of opportunities for the abuse of the concept of asylum.

Besides the above instruments,legal sources which are in the function of resolving the problem of illegal migration within the framework of the EU are also thereadmission agreementswhich are related to resolving the status of the individuals (including minors) who stay in the territory of the Union Member States without permits. These procedures are based upon the recommendations passed in 1994/1995[34].

2.5. Montenegro and international legal order

The Security Council passed the Resolution on Admission of the Republic of Montenegro to membership in the United Nations at the session held on 22nd June 2006. The UN General Assembly decided on its session held on 28th June 2006 decided to grant the admission of Montenegro by its ***Resolution A/RES/60/264***, by which Montenegro officially became 192nd UN member state. The UN membershipmeant the start of the process of determining the list of agreements and conventions that Montenegro had acceded to on the basis of succession. By depositing the Succession Statement with the UN Secretary General as a depository, on 23rd October 2006, Montenegro acceded to key treaties in the area of human rights, including the Convention Relating to the Status of Refugees, Convention on the Rights of the Child, Convention against Torture, as well as the Convention againstTransnational Organized Crime and Additional Protocols. It should be noted that even prior to the formal membership in international organizations, both the Government and the Parliament of Montenegrofully committed themselves to the preservation of the achieved level of human rights and freedoms, which will be formally confirmed by the adoption of the Constitution and the Constitutional Lawfor its implementation[35]. The procedure of concluding and fulfilling international treatiesis regulated by the Law on Conclusion and Fulfilment of International Treaties[36].

On 11th May 2007, Montenegro becamerightful member of the Council of Europe. On that occasion, Montenegro signed the Statute of this organization and the Convention onthe Avoidance of Statelessness. On the basis of the declaration on undertaking commitments, Montenegro had its successor status acknowledged in 49 conventions andprotocols of the Council of Europe, while the Parliament of Montenegro was to ratify 9 conventions and protocols.

32 Council Directive2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

33 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

34 Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country; Council Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements.

35 Article 5 of the valid Constitutional Law for the implementation of the Constitution of Montenegro prescribes that the provisions of international treaties on human rights and freedoms, which Montenegro acceded to prior to 3rd June 2006, shall apply on legal matters arisen after the signing.

36 OG MNE no. 77/08

In October 2007, Montenegro signed the ***Stabilization and Association Agreement (SSA)***[37] , as well as the ***Interim Agreement on Trade and Related Matters***. The Stabilization and Association Agreement came into force inMay 2010, having been ratified by all signatory countries. The goals of this association are reflected,inter alia,on supporting the efforts on fostering democracy and the rule of law, on the contribution to political, economic and institutional stability in Montenegro, as well as onto the stabilization in theregion and securing appropriate framework for political dialogue and development of close political relations between high contracting parties. One of the fundamental principles of the Agreement isrespect for democratic principlesand human rights proclaimed by the Universal Declaration on Human Rights, guaranteed by the European Convention on Human Rights anddefined by the ***Helsinki Final Act and Paris Charter for New Europe***, as well as the respect for the principles of international law.From the viewpoint of the nature of this agreement and its form (high contracting parties, commitments, manner of dispute resolution, ratification), it can be concluded that this is a typical international agreement and that Montenegro is obliged to respect the same, pursuant to the principle of delivery in good faith.

The Article 6 of this agreement, Montenegro committed itself to continue fostering cooperation and good neighbourly relations with other regional countries, including the development of projects of common interest, especially the ones related to border management and fight against organized crime, corruption, money laundering, illegal migration and illegal trade, illegal human trafficking in particular, small arms and drugs. This commitment constitutes a key factor in the development of relationships and cooperation among high contracting parties and in achieving regional stability[38].

The Article 82 of the Agreement confirms that high contracting parties will cooperate in the area of visas, border control, asylum and migration, and that they will establish the framework for cooperation in these areas, including regional cooperation,bearing in mind and using thoroughly the existing initiatives in this area, where this is possible. For the purpose of preventing illegal migration,Montenegro and the EU member statesagreed that they would accept again all their citizens residing illegally in the territory of Montenegro or indeed in the territory of some Member State, by concluding readmission agreement, including the duty of readmission of the citizens of other countries and stateless persons (Article 83). The Article 86establishes mutual rights and obligations relating to prevention and suppression of organized crime and other illegal activities, especially with regards to suppression and prevention of criminal and illegal activities, like smuggling and trafficking in human beings.

With the opening of accession negotiationsbetween Montenegro and the European Union in 2012,this areareceived special status within the framework of the Chapter 24. This chapter considers the issues of freedom, security and justice, including the issues of migrations, borders, asylum, visa policy, police cooperation and other areas of action related to migratory movements. Following the bilateral screening meeting, held in Brussels in May 2012,Report was compiled containing summary information obtained during this process. The Report indicates that Montenegro is ready to fully the

37 SSA between Montenegro and European Union was signed in October 2007, and came into force in May 2010.

38 In the Chapter VII of the Agreement, entitled Justice, Freedom and Security, special significance is envisaged of the consolidation of the rule of law; fostering the institutions on all levels in the area of administration and law enforcement in general; court administration, strengthening the independence of judiciary in particular and the improvement of its efficiency; improvement of the work of the police and other law enforcement bodies, then securing adequate training and fight against corruption and organized crime.

EUAcquis in the area of justice, freedom and security, and that significant parts of the Acquis in this area have already been incorporated in the national legislation. However, Montenegrin authorities admit that significant efforts are needed in order for the legal framework to be harmonized with the EU Acquisand for the application of standards to be ensured in the areas likeSchengen, Visa information system, police cooperation and judicial cooperation in criminal matters.

III NORMATIVE AND INSTITUTIONAL FRAMEWORK

Following the renewal of independence in 2006, Montenegrostarted the process of building relevant normative infrastructure, necessary fora regulated and comprehensive management of various migration aspects. The asylum system was establishedwithin the framework of fulfilling the conditionsforobtaining visa-free regimefor Schengen area countries, with the adoption of the Law on Asylum[39] which came into force on 25th July 2006, and started being implemented on 25th January 2007[40]. Visa liberalization road mapencompassed the establishment of mechanisms forthe efficientmanagement of border crossing pointsand for keeping records on migration flows.

The formulation of the overall migration policy of Montenegro, which was intensified following the establishment of the civilian border supervision system in 2003 and the adoption of the Integrated Border Management Strategy (23rd February 2006) and the Action Planfor its implementation (7th December 2006), was essentially determined by:

- Geopolitical position of Montenegro which islocated on the route of traditional migration flows in the European continent that goes East – West and South – North;
- The fact that from the point of view of demography, Montenegro falls among small countries, which makes it particularly vulnerable with regards to uncontrolled migrations;
- The fact that successive development of certain economic branches in Montenegro conditioned the need for the engagement of the missing labour, which is absorbed from abroad, mostly from regional countries;
- Dissolution of the former SFRYandwar developments in the region caused huge movements of population and consequently the arrival of a large number of refugees and internally displaced persons in Montenegro;
- Liberalization of visa regime with the European Union, obtaining candidate statusfor the EU membership and the beginning of accession negotiations, which will have as its consequence the recognition of Montenegro as a state of final destination, and no so much asa transit area, especially after the accession of Croatia to the EU.

3.1. Legal framework

The Constitution of Montenegro, in its Article9, regulates the status of ratified international treaties and generally accepted rules of international law, i.e. general international customs, in internal law, by prescribing the primacy of the ratified and published international treaties over national

39 OG RMNE, no. 45/06

40 Prior to the adoption of the Law on Asylum, these issues had been being dealt with in accordance with the Law on the Movement and Residence of Aliens, and the decisions had been being passed by the Federal Ministry of Interior. High Commissioner for Refugees (UNHCR) had been being conducted its own asylum procedure in two instances since 1976, while SFRY/FRY/SMNE had been being tolerated asylum seekers' stay in its territory throughout the UNHCR procedure.

legislation[41]. This constitutional provision obliges national institutionsto directly apply these treaties when they regulate certain situation differentlythan national legislation. This provision was meant to produce significant consequences for internal law, but it also constituted and still constitutes a strong challenge for national judiciary, since it implies compulsory knowledge of international jurisprudence and quazi-jurisprudence. However, the Law on Constitutional Court of Montenegro raises doubts in relation to direct effect of international treaty in the proceedings before national courts, in the way that in its Article44 it is prescribed for a national court, when in doubt about the discord between a national law and international law,shall suspend the proceedings until the Constitutional Court makes a meritorious decision on that matter, which would in such case be legally binding for national courts. This raises doubts about the principle of direct application of international treaties, since it is implied that national courts are not obliged to know and apply international standards without the "assistance" of the Constitutional Court.

The Constitution of Montenegro also contains a series of other relevant provisions, important ones of which are those dealing with the protection from discrimination, protection of special-minority rights, and the right to asylum. The Constitution of Montenegro, in its Article 8, prohibits any direct or indirect discrimination, on any ground whatsoever. The Article 44 of the Constitution prescribes for a ***"foreign national who has a justified fear from persecution because of his/her race, language, religion orbelonging to certain nation or group, or because of his/her political convictionsto be able to request asylum in Montenegro"***. According to this provision the foreigner may not be expelled from Montenegroin cases where he/she is under threat of death penalty, torture, inhuman humiliation, persecution or serious violations of constitutionally guaranteed rights because of race, religion, language or national background. In addition, a foreign national may be expelled from Montenegro solely on the basis of the decision of a competent bodyfollowing a legally prescribed procedure.

Besides the Constitution, the following regulations constitute the legal framework:

- **Law on Foreign Nationals***,* which regulates the conditions for entry, movement and stay of foreign nationals in the territory of Montenegro.

- **Decree on Visa Regime**, which gives itemized list of the countries the citizens of which are obliged to procure entry, transit and residence visa for the territory of Montenegro, which prescribes the length of stay of the foreign nationals in Montenegro;

- **Regulation on the manner of granting temporary residence and domicile and of issuing travel and other documents to aliens,** which prescribes detailed manner for the issuance of approvals for the temporary residence anddomicile of foreign nationals in Montenegro, as well as for the issuance of travel documents to foreign nationals;

- **Regulation on visas and visa forms,** which regulates the manner and condition for the issuance of visas, for the extension of visa validity, and the manner of cancelling and reducing visa validity period;

41 The Decision and Declaration of Independence of the Republic of Montenegro prescribes that the Republic of Montenegro shall apply and adhere to international treaties and agreements that the State Union of Serbia and Montenegro was party to and which are related to Montenegro and are in conformity with its legal order.

- **Law on asylum**[42], which regulates asylum granting principles, conditions and procedures;acknowledging refugee status and granting additional and temporary protection;decision making bodies;rights and obligations of asylum seekers, whose refugee status has been granted and who have had additional and temporary protection approved;as well as the reasons for the termination and abolishment of refugee status and additional protection as well as the termination of temporary protection in Montenegro.

- **Regulation on the procedure and manner of taking photographs, finger prints and other data from asylum seeker;**

- **Regulation on asylum application formsand on the minutes of orally lodged asylum request;**

- **Decree on the content and the manner of record keeping in the area of asylum;**

- **Decision on the appearance and the content of the forms and on the manner of issuing documents to asylum seeker, person with refugee status granted, person with additional protection granted and persons with temporary protection approved;**

- **Decree on monetary assistance for asylum seeker, for person with refugee status granted and person with additional protection approved;**

- **Regulation on the manner of exercising healthcare by asylum seeker, person with refugee status granted, person with additional protection approved and person with temporary protection approved;**

- **Law on Border Control,** regulating the exercising of border control which encompasses the supervision of the state border, border checks and state border security risk assessment, prevention and detection of criminal acts and offences and discovering and apprehending their perpetrators, prevention of illegal migrations and detection of other activities and actions which endanger public security;

- **Law on employment and work of aliens,** regulating conditions for the work and employment of foreign nationals, as well as of the persons with their protection granted under the asylum system in Montenegro;

- **Law on Home Affairs,** which, amongst other things, regulates the powers and the duties of the employees of the Ministry of Interior;

- **Law on Domicile and Residence Registers**, which establishes and regulates the manner of keeping the register of domicile and the register of residence of Montenegrin citizens and foreign nationals;

- **Law on free legal aid,** which regulates the rights of stateless person with legal residence in

42 The passing of the new Law on Asylum, as well as of the bylaws for its full implementation, is planned for the end of 2015, according to the Action Plan for the Chapter 24.

Montenegro and those of an asylum seeker to free, legal aid in Montenegro;

- **Criminal Code,** which defines criminal acts of criminal association by means of which the creation of criminal organizations and groups, or organizers and members of such associations is incriminated;

- **Criminal Procedure Code,** which establishes the rulesthe purpose of which is to enable fair conducting of criminal proceduresand that no innocent person be convicted, with criminal sanction being pronounced to the perpetrator of a criminal deed under the conditions prescribed by the Criminal Code;

- **Law on Misdemeanour,** which regulates the conditions of misdemeanour responsibility, conditions for prescribing and enforcing misdemeanour sanctions, the system of sanctions, misdemeanour procedure, enforcement procedureandthe organization and work of misdemeanour bodies.

After the year 2006, Montenegro embarked upon the process ofregulating bilateral matters of return and reception of persons residing illegally in another country, through the conclusion of readmission agreements. The very notion of readmission stands for an act of the state by which return is accepted of an individual (own national, third country national or a stateless person), who has been detected as aperson having made an illegal entry, or having been present or resided illegally in another country. Readmission agreements represent the agreements on establishing mutual obligations of contracting parties, as well as detailed administrative and operative procedures, for the purpose of facilitatingmore humane and organized return and transit of persons who do not meet, or not any more, the conditions for entry, presence or stay in the territory of the country which issues the readmission request. The same are related not only to the nationals of the country which the request is serviced to, but to any individual who has made illegal entry into the country servicing the request, after his/her stay or transit through the country which the request is serviced to.

The following laws have been passed so far on the ratification of readmission agreements[43] :

- **Readmission Agreement between the Republic of Montenegro andthe European Community**, signed on 18th September 2007;

- **Readmission Agreement between the Government of Montenegro and the Government of the Republic of Croatia**, signed on 24th September 2008;

- **Readmission Agreement between the Government of Montenegro and the Council of Ministers of Bosnia and Herzegovina,** signed on 1st December 2008;

- ***Readmission Agreement between the Government of Montenegro and the Council of Ministers of the Republic of Albania,*** signed on 16th November 2009;

- **Readmission Agreement betweenthe Government of Montenegroand the Government**

43 It is important to mention that Montenegro has got the duty to harmonize bilateral agreements it will conclude with third countries, with EU standards.

of the Kingdom of Norway, signed on 16th December 2009;

- **Readmission Agreement betweenMontenegro and SwissConfederation**, signed on4th March 2011;

- **Readmission Agreement between the Government of Montenegro and the Government of the Republic of Kosovo,** signed on29th June 2011;

- **Readmission Agreement betweenthe Government of Montenegro and the Government of the Republic of Macedonia**, signed on 16th March 2012;

- **Readmission Agreement between the Government of Montenegro and the Government of Republic of Moldova**, signed on 17th May 2012;

- **Readmission Agreement between the Government of Montenegro and the Government of the Republic of Serbia,** signed on 12th April 2013;

- **Readmission Agreement between the Government of Montenegro and the Government of the Republic of Turkey,** signed on 18th April 2013.

3.2.Institutional framework

- **Ministry of Interior**[44] ,within the framework of which the following authorities are competent for the area of asylumand illegal migration:

- **Asylum Directorate**, which receives asylum applications, conducts the procedure and makes the decisions upon asylum request, makes decisions on the termination andabolishment of asylum, conducts procedureand makes decisions on the status of the individuals who already have the status, issuesdocuments for proving identity and for travelling abroad, legal status andrights in line with regulations, keeps the record on the situation in the country of origin, conducts the procedure for grantingand abolishing both the additional and temporary protection and carries out other activities in the area of asylum. According to the existing Regulation on the organization and job systematizationin the Ministry of Interior[45], the Directorate is to have six employees. Five positions have been filled so far.

- **Border Police Department,** which performs border control (supervision of the state border, border checksand state border security threat assessment); issues visa issuing approvals upon the requests of diplomatic-consular missions of Montenegro; exceptionally, it issues visas at border crossing points; cancels residence up to 90 daysand temporary residence; cancelsresidence to an alien on the basis ofa visa issued for a longer stay (D visa); sets the deadline for an alien staying illegally in the country to leave Montenegro; enforces the measuresof forceful removal

44 Decree on the organization and manner of work of public administration ("OG MNE", no. 5/12 and 25/12), amongst other things, prescribes the tasks from the competence of the Ministry of Interior, including state border security and integrated border management.

45 Regulation on internal organization and job systematization of the Ministry of interior no. 051/13-28226/2 of 17th May 2013.

of foreign nationals; orders the placing of a foreign national into a shelter; orders mandatory stay of a foreign national who may not be immediately forcefully removed; decides on the termination of the mandatory stay etc.

Within the framework of Border Police Department, the following sections have been systematized:

- State border supervision division,
- Border checks division,
- Division for Foreigners and Suppression of Irregular Migration,
- Division for operative work and risk analysis.

Also, within the frame work of the Border Police Department there are border security sections and station, as well as marine police border security sections.The existing Regulation on organization and job systematization in the Ministry of Interior, envisages six police officers within the Division for Foreigners and Suppression of Irregular Migration.

- **The Reception Centre for Foreigners**, which is organized as an organizational unit of theDivision for Foreigners and Suppression of Irregular Migration. The Centre has got 35 positions systematized.It was constructed with the support of the European Union and the International Organization for Migrations (IOM). The building of the Shelterwith the capacity to receive 46 persons, with separate parts for men and women, got its occupancy permit,but in order to make it operational there is a need to provide missing equipment, like specialized vehicles, IT and other equipment necessary for the efficient functioning of the Shelter.

- **Administration for the Care of Refugees** is the authority which carries out the tasks related to the accommodation of asylum seekers, persons with refugee status granted, with additional and temporary protection approved in the centre for the accommodation of asylum seekers or other accommodation facility; accommodation and care of asylum seekers and those with granted asylum status with special needs; offering assistance in the exercise of right to social welfare, healthcare, education, humanitarian assistance, legal aid, work and other legally prescribed rights to asylum seekers and to the ones who have had their asylum applications granted.

- **Centre for Accommodation of Asylum Seekers** constitutes a special organizational unit of the Directorate for the Care of Refugees. The Centre is located atSpuž, at the Municipality of Danilovgrad, at Grbe Cadastre Region, with the capacity of accommodating 65 individuals[46], with separate passage for men and women and special rooms for the accommodation of families and vulnerable migrant groups. The opening of the Centre has been planned for the end of 2013. The Regulation on Internal Organization and Job Systematization of the Ministry of Labour and Social Welfare, the ministry within the structure of which there is the Directorate for the Care of Refugees, and by that also the Centre, envisages 40 job posts in the Centre. The construction of the Centre was partly financed from the state budget, than from the UNHCR and the European Union.

46 To the question: Do you think that the capacities of the Centre for asylum seekers are sufficient, having in mind the growing trend in the numbers of asylum seekers, and whether according to your information, there is a plan for the construction of a similar building?, the DCR gave the following answer: We think that the Centre for asylum seekers will have insufficient capacities in the forthcoming period. With the purpose of overcoming this problem, there are on-going activities on drafting the assessment for the possible enlargement of the Centre from 65 to 100 places, as envisaged by the Action Plan for the Chapter 24 – Justice, Freedom and Security.

3.3. Strategic framework

As a result of the need for establishing and intensifying the practice of comprehensive planning of the activities and drafting documents which constitute the framework for managing different migration flows, the following strategic documents have been passed within the framework of the process of European integrations of Montenegro:

- **Integrated Migration Management Strategyin Montenegro for the period 2011-2016, with the Action Plan for the implementation of the Strategy for 2013 and 2014**, the objective of which is the establishment of the legal, regulatory and institutionalframework which offers the possibility for effective implementation of migration movement control policy in accordance with the rules and standards of the ***Acquis Communitaire***, i.e. creation of assumptions for sustainable migration management structure in the country, giving thus contribution to regional and overall stability in line with the rules and standards of the EU[47].

- **Strategy for the reintegrationof persons returned on the basis of readmission agreements for the period 2011-2015, with the Action Plan for the implementation of the Strategy for 2013 and 2014,** the objective of which is the creation of prerequisites for adequate approach to the process of return and reintegration at all levels,through continuous strengthening of inter-institutional, inter-sectorial and international cooperation, establishing of the efficient system in the process of return and reintegration, as well as building and strengthening institutional capacities for the purpose of offering adequate response to all the challenges which returnees are faced with in the reintegration process.

- **Integrated Border Management Strategy for the period 2013-2016, with the Action Plan for the implementation of the Strategy for 2013,** which encompasses a large number of short-term, mid-term and long-term objectives forcoordination andimprovement of cooperation within and among all services and agencieswhich control and supervise state borders, as well as the improvement of their International cooperation for the purpose of creating open borders for the movement of people and the circulation of goods,but at the same timecontrolled and secure borders, closed for all criminal or any other activity which might threaten the stability of the country and the region.

IV IMPLEMENTATION OF REGULATIONS AND ESTABLISHED MIGRATION POLICIES

Analysing the issue of irregular migrations, it can be concluded that the most significant number of irregular migrants come to Montenegro from the territory of Greece, through which illegal migrants, mostly without documents, come to the territories of Albania, Macedonia, Serbia and Kosovo, and

47 By means of the Decision of the Government of Montenegro ("OG MNE", no. 5/07 of 12th November 2007) Inter-sectorial Committee was established as a coordination mechanism for the implementation of the Integrated Border Management Strategy and the Action Plana for the implementation of the same, with the objective of the improvement of the quality of work, efficiency and harmonization of the procedures with EU standards, as well as reaching the necessary level of border security and synchronization of border procedures. The Inter-sectorial Committee is composed of the representatives of the Ministry of Interior, Police Directorate, Customs Directorate and Veterinary and Phyto-sanitary Directorates. For the purpose of the implementation of the tasks, the Inter-sectorial Committee can establish standing or ad hoc expert working teams with the objective of performing specific tasks in the area of integrated border management.

then transit through other countries, Montenegro included.Consequently, high level of concern has been detected, not only in Montenegro, but also in other regional countries, because of the growing trend in the number of irregular migrants from the area of Middle East, Asia and Northern Africa.

Main routes used by illegal migrants to reach Montenegro are:
- Turkey, Greece, Albania, Montenegro and farther to the EU;
- Turkey, Greece, Albania, Kosovo, Montenegro and farther to the EU;

To a lesser extent, the following routes are also used:
- Turkey, Greece, Macedonia, Serbia, Montenegro and farther to the EU;
- Turkey, Greece, Macedonia, Kosovo, Montenegro and farther to the EU;

In order to enter Montenegro, illegal migrants most often use the area of the green border in the vicinity of the border crossing points with the Republic of Albania- »Sukobin« and »Božaj«, and to a lesser degree the vicinity of the border crossing point with Kosovo - »Kula«. Migrants most often usevast terrains, knowing that they are not covered by technical devices and a sufficient number of border patrols. Such persons mostly appear at the green border, avoiding and bypassing border crossing points. When persons are caught at the green border, about to enter Montenegro from Albania and Kosovo, border police officersdo not allow them to enter Montenegro, but return them to where they have tried to enter Montenegro from illegally. Appropriate measures are undertaken towards the persons found in the territory of Montenegroand in accordance with the readmission agreement request is lodged within 72 hours to the competent bodies of Albania or Kosovo for theirreturn according to a summary procedure.

Pursuant to the job systematization and personnel and material resources, and on the basis of risk analyses which are carried out on a regular basis, state border supervision is performed with the engagement of foot and motorized patrols, observation posts and with the use of the equipment for the observation of certain parts of the green and blue border. Currently, the Border Police Departmentis capable of deploying maximum up to two patrols - observation postsfrom the structure of one of its branch offices, for the tasks of supervision, irrespective of the length of the border andthe issue which has been recognized as the zoneof responsibility which is within the competence of certain organizational unit at the local level.

For the sake of comparison, according to the ***Schengen standard***, for the border whichis defined as the risk levelOnealong 30 km, five patrol units or minimum 10 officers must be provided for supervision tasks. According to this standard, for the part of the border betweenMontenegro and the Republic of Albaniaabout 60 km in length, which is classified as the risk level One with regards to the phenomenon of illegal migrations, it would be necessary to organize the supervision with at least 10 patrol units. Due to the lack of employees, the Border Police Departmentperforms this task with maximum two patrol units[48].

48 "There are regular patrols, as well as extraordinary ones, but there is also the practice of engaging civilians, 7-8 civil servants, which has proved to be very efficient, since immigrants avoid "uniforms and official vehicles": Interview with SpasojePetrušić, Podgorica Border Security Department – Tuzi Border Police Station (border crossing length: 55.5 km), 26th September 2013.

The Border Police act in accordance with the Law on Internal Affairs, Law on Aliens and the Law amending the Law on Border Controlwhich came into force on 15th August 2013[49] . Providedconditions have been met set forth by the Law on Aliens and the Law on Border Controlwith regards to the misdemeanour responsibility of natural personsforthe illicit stay or illegal entry into the country, the members of the police undertake measurestowards these individuals and bring them before a competent misdemeanour body. In relation to that,it is very important for every authority, including the misdemeanour ones, to be trained to act in asylum and migration cases and to recognize migrants' intentions to seek asylum, in order to enable effective access to the right to asylumand to prevent the violation of the principle of non-punishment for illegal entry or stay of persons who express the intention to apply for asylum, envisaged by the Convention Relating to theStatus of Refugees[50] and the Article 10 of the Law on Asylum.

According to the data of the Division for Foreign Nationals and Suppression of Illegal Migrations[51], in 2012 75 cases were recorded ofthe attempts to cross the border using false documents, while in the first eight months of 2013 21 false documents have been identified. In 2012,608 illegal entries were prevented, and 503 in 2013[52]. In contrast to the year 2008, when 2606 visas were issued at border crossing points, only 8 visas have been issued in 2013.

Summary of the results achieved by the Border Police Department in the area of the prevention of illegal migrations[53]:

	2012	**5 months of 2013**
Illegal residence	523	289
Prohibition to enter Montenegro	1.449	380
Cancellation of residence and prohibition of entry	124	70
Deadline to leave Montenegro	302	155
Forced removal	31	19

49 ("OG MNE", nos. 72/09, 39/13)

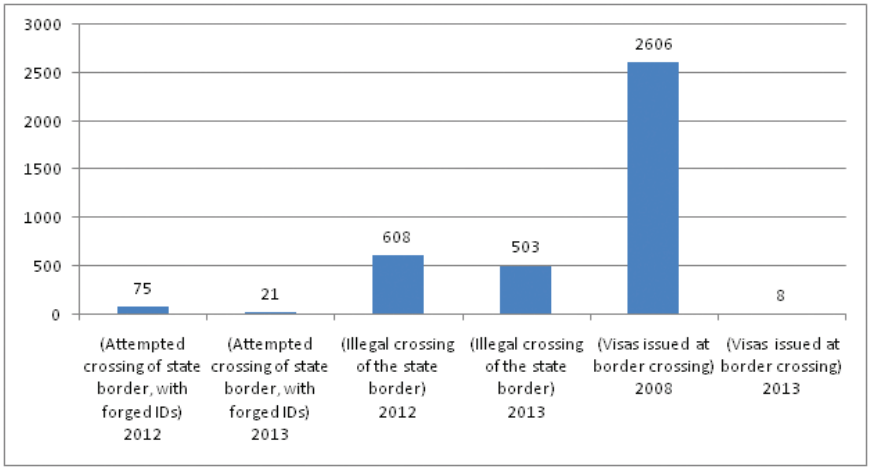
50 The Convention in its Article 31 envisages for the high contracting parties not to apply criminal sanctions towards refugees for their illegal entry or stay if they come directly from the territory where their life or freedom were endangered in the sense of the Article 1 of the Convention; the same applies if they enter or reside in the territory without authorization, under the condition that they register with the authorities without delay and explain the reasons, recognized as valid, of their illegal entry or presence. Temporary benefit by invoking the Article 31 must be guaranteed to all the persons applying for refugee status, until it is established, or not, that they are not refugees according to the Geneva Convention from 1951: The Rights of Refugees Under International Law, James C. Hathaway, Cambridge University Press, 2005.

51 Interview with DraganStevanović, Head of the Division for Foreign Nationals and Suppression of Illegal Migrations, 27th September 2013.

52 Through strengthened activities, the Border Police Department managed to return to Albanian Police certain number of individuals found illegally along the border with the Republic of Albania, in summary readmission procedure. Irregular migrants, who were not accepted in the summary readmission procedure, underwent misdemeanour procedure and sentenced to imprisonment, after which these persons usually apply for asylum.

„In the cases in which misdemeanour responsibility is established (unauthorized residence or illegal entry); this is majority of the cases in which the perpetrators were fined, but possessed no money – and sent to prison. The longest imprisonment term was 15 days. After 15 days these persons are taken over by Podgorica Detention and Rehabilitation Centre": Interview with the representatives of Nikšić Border Security Section – Plužine Border Police Station, 25th September 2013.

53 According to the data of the Border Police Department, most attempts of illegal crossing of the state border in 2012 came from the citizens of Algiers (95), Albania (87), Pakistan (71), Kosovo (63), Syria (39) and Morocco (31).



Necessary infrastructural components have been installed at almost every border crossing pointfor border checks of a larger number of travellers, as well as for the control of transportation means and the flow of goods[54]. The Border Police use in their work centralized data register for unhindered checks of persons, vehicles and documents,containing the following elements: ***searches, infostream, border andon-duty.*** On the basis of the existing applications, personal checks are performed on the occasion of border control, especially in relation to the fact whether persons are searched for on the basis of the national or INTERPOL-database. It is through the applications that data exchange is carried out within the framework of the police service.

On the occasion of the meeting with irregular migrants / asylum seekers, at the border or inside Montenegrin territory, police officers carry out migrants'identification procedure, which is of decisive importance for establishing the fact whether a person wishes to request international protection. Also, in the identification procedure age is established (in the context of special procedure towards minors), as well as whether an individual travels alone or accompanied; if accompanied, what is their mutual relationship, and what is the nature of their relationship, especially in the context of possible human trafficking, due to the fact that illegal migrants very often travel in the company of their smugglers.

During border checks, border police officers use the following equipment: CO2; reading electronic data from the chip with the purpose of detecting false documents, and the system of video-surveillance which enables the monitoring of the movement of vehicles and persons, both at the BCPs or within an area outside the BCPs. Automatic ID document readers are connected to state-of-the-art computers and possess the rules for the checking of travel documents, as well as fingerprint scannerswhich are connected to the Forensic Centre at Danilovgrad. Document readers have also got document reading programme with MRZ (***Machine Readable Passport Zone***) code installed,and readers of biometric documents with chips, so that the same can be compared to the data on the document, thus detect false documents, i.e. false travel documents.

54 "Border crossing point - BijeloPolje Railway Station does not have adequate infrastructure for the control of passengers and goods in international transport, but there are plans for the reconstruction of the same": Interview with DuškoĐokić, Inspector for Aliens in BijeloPolje, 30th September 2013.

During document and person checks, police officers have at their disposal "police" application programmewhich is connected to the national andINTERPOL database for the checks of the persons who are prohibited to enter the country, persons who are subject to strengthened surveillance measures;persons from the INTERPOLwanted list, and the persons from the national wanted lists. On the basis of the "search" and "automatic checks" applications,central database is searched for certain persons and vehicles wanted lists. In case some person or vehicle is wanted on the basis of the national orINTERPOL database, on the occasion of registering that person or vehicle in the "border" application, computer will signalize it by displaying a red flagand red letters"PO", after which detailed checks are carried out[55]. All employees have been trained to work with the existing equipment.

In managing Montenegrin marine border which stretches 12 nautical miles from the coast (so called, coastal waters), employees are guided by the principle of the safe passage of merchant ships, which means that the same are not stopped and searched. Contrary to the land border, marine border is not particularly exposed to the risk of the phenomenon of irregular migrants[56], mostly because there are observation posts at every BCP, andbecause every vessel at sea is easily noticed and visible. As regards the equipment, the employees have at their disposal ships, boats, electronic detection devices (radars and video surveillance)and binoculars. All employees have been trained to work with the existing equipment. However, technical capacities of the Border Police Department for the supervision of the blue borderhave not yet reached the satisfactory level, thus it is necessary to invest additional efforts in order for this problem to be overcome. Namely, the Department disposes with one mobile unit, at which the frequency of patrolsis determined in accordance with the assessment of security situation: for instance, patrols along the coast are more frequent in summertime. Border Police employeesfor the supervision of the blue bordermostly do not have machine database readers, whileout of search tools they have only got telephones and computers. Furthermore,although the employees often attend trainings in the premises of the Police Academy, these mostly focus on marine border management, equipment handling, rules of navigation and marine surveillance, and less to the trainings in the area of asylum and the procedures with migrants[57].

As regards the cooperation with other authorities, besides direct cooperation with the representatives of customs, healthcare-sanitary, phyto-sanitary and veterinary services at BCPs,

55 The "border" programme by means of which Border Police officers carry out the checking of documents and persons through the national and INTERPOL database, automatically displays "hit" alarm for either a person or a document. This is manifested solely by a light signal (red lamp); there is no sound warning.

56 "We have not had a single case of asylum claim at any of the BCPs under the jurisdiction of Tivat Border Police Station and Herceg Novi Marine Border Police Station. Contrary to the year 2009, in which there were 39 identified cases of illegal crossings, in 2013 there were no illegal crossings of the "blue border". As regards minors, the only recorded case in the last years happened in 2009 (unaccompanied children: 3, accompanied children 2):Interview with PredragSamardžić, deputy commander of Herceg Novi Marine Border Police Station, Herceg Novi Marine Border Police – Zelenika Floating Unit, 30th September 2013. Tivat Border Police includes the following stations: Tivat Airport, Port of Kotor and Porto Montenegro and it has at its disposal 48 employees.

57 The representatives of Herceg Novi Marine Border Police – Zelenika Floating Unit have not had a single training in the area of asylum and migrations, while the representatives of Tivat Border Police attended the following trainings: Asylum, migrations, shelter for aliens, work and functioning of the shelter for aliens, asylum centres (2), fight against trafficking in human beings (9), illegal migrations, fight against illegal migrations (1), fight against illegal migrations, readmission and readmission agreements (1), human trafficking and safe house for women (3), asylum seeking at the border crossing points and procedures with asylum seekers (1), sexual abuse of children in tourist resorts (1): Interviews with the representatives of Herceg Novi Marine Border Police and Tivat Border Police on 30th September 2013.

Border Police officers also cooperate in their work with local misdemeanour bodies (in cases in which misdemeanour responsibility is established for the unauthorized stay in the country or illegal entry into the same); competent public prosecution office (in case there are elements of criminal responsibility, Border Police informcriminal police department,which takes over the caseand establishes further communication with prosecution) and centres for social work (in case of underage foreign nationalsunaccompanied by their parents orguardians, the members of the police are obliged to inform the local centre for social work without delay, which then appoints a temporary guardian to the minor[58].

Besides that, Montenegrin Border Police cooperates intensively with border police services of the neighbouring countries, mainly through data exchange, joint patrols[59] and cross border meetings. With the purpose of encouraging further development of regional cooperation in this area, it is necessary to strengthen the cooperation with police authorities in Kosovo andAlbania, especially in relation to the implementation of readmission agreements, then consider the opportunities forjoint exercises and trainings at the topic of asylum and migration managementand defining joint standard procedures for field cooperation.

Montenegro also signed the Working Agreement with FRONTEX in 2009, aimed at improving operative cooperation with the border police services of the member states of the EU with respect to the prevention and control of irregular migrations and human trafficking.There is on-goingprocedure of appointing Montenegrin officials at FRONTEX coordination officeslocated at the EU outer borders. The cooperation with FRONTEX can be further improved through the acquisition of observer status in the relevant bodies for the supervision of migratory trends (CIREFI) and risk analyses (Risk Analysis Unit), and the participation in joint operations coordinated by FRONTEX, as it was suggested in OSCE recommendations[60].

Since 2nd October 2006, Montenegro has been a MARRI[61] member, which is an initiative aimed at contributing to a controlled and free movement of people in the interest of security and prosperity. MARRI encompasses the issues of asylum, migrations, joint border management, visa regime and consular cooperation, as well as the issue of the return/settling of refugees/displaced persons.

On the basis of the above data, the following problems can be identified as the ones hindering the work of Montenegro Border Policein relation to the prevention and suppression of irregular migrations:

- Insufficient number of employees for the performance of border control tasks;
- Non-existence of a unified system for electronic border surveillance;

58 Family Law ("OG RMNE", no. 1/2007), Article 9.

59 There are examples of successful joint actions, like recent identification of 12 persons charged with the criminal act "trafficking in human beings" and processed in the Republic of Serbia. Besides that, the cooperation with Croatian Police is also quite good: there is established practice of joint patrols involving Herceg Novi Border Police and Dubrovnik Border Police 3 times a month (2 + 2 police officers).

60 Excerpts from the Report of the International Organization for Migrations (IOM) and the OSCE mission: taken over from the Report on the Implementation of the Integrated Border Management of Montenegro for the period 2006 – 2012, Podgorica, January 2013, p. 13/14.

61 MARRI was established in 2003 by merging Regional Return Initiative – RRI and Migration and Asylum Initiative – MAI. Since July 2004, this initiative has been under regional ownership, as a part of the South-East Europe Cooperation Process (SEECP).Montenegro formally became the 11th member of theSEECP at its summit held in Zagreb on 10th and 11th May 2007.

- Lack of motor vehicles, vessels and technical equipment for the performance of border control tasks[62];
- Lack of financial means for securing interpreters for rare language groups;
- Hindered ascertaining of identityof irregular migrantsdue to the fact that they mostly come without identification documents;
- Lack of diplomatic-consular missionsin the countries which irregular migrants mainly come from;
- Hinderedreturn of migrants to their home countriesdue the lack of financial means, and small number of voluntary returns[63] ;
- Lack of special facility for the accommodation of minor irregular migrants;
- Failure of police authorities of the Republic of Kosovo and the Republic of Albaniato comply with readmission agreements.

Certain problems,related to border equipment and infrastructure,have also been recognized in the report of the IOM Evaluation and Monitoring Team[64], in which it is emphasized that "impressive results and progress have been achieved in the implementation of the concept of integrated border management (IBM), but that there is space for further work and improvement in the area of information exchange, risk analysis and cross-border cooperation". It has been concluded that the "IBM concept is not fully accepted and understoodat the local level and that there is space for further strengthening of administrative and operativecapacities". Besides that, there is a need to improve infrastructure and equipment at border crossing points; future development and implementation of the IBM conceptshould be based uponcoordinated regional approach; joint risk analysis centres should be established and memorandumof understanding are to be signed with airline companies, in order to achieve direct access to their computer systems, passenger listsin order to make risk analyses prior to the arrival of passengers; by the introduction of video surveillance system risk analysis and selectivity is to be improved.

According to the assessments of the OSCE Mission "Police Reform in Montenegro 2006-2010, Analysis and Recommendations", key challengesin this area are related to the adoption of contemporary methods of work of the Border Police and capacity building for the Schengen Zone integration. In relation to that, the OSCE recommends the avoidance of frequent rotations of the Border Police employees; development of the programmes of mandatory "knowledge refreshment trainings" by the Police Academy; further development of specialist and advanced training for the monitoring of the priority EU accession areasand Schengen space, improvement of surveillance systems for the control of the implementation of the Integrated Border Management Strategy and the adoption of the national strategy for the accession to the Schengen area.

62 "Technical conditions are limited, especially with regards to vehicles. There is a need for vehicles with on-board cameras, in order to be able to carry out mobile controls": Interview with AdmirŠutković, commander of Berane Border Security Section – Rožaje Border Police Station, 30th September 2013.

63 The exception is the year 2013 in which, according to the data provided by the Division for Foreigners andSuppression of Illegal Migrations, 6 cases of voluntary return have been recorded: Interview with the Head of Division, DraganStevanović, 27th September 2013.

64 Excerpts from the report of the IOM and OSCE Missions: taken over from the Report on the Implementation of the Integrated Border Management Strategy of Montenegro for the Period 2006 – 2012, Podgorica, January 2013, p. 13/14.

4.1. Irregular migrants' return procedure

The policy for the return of foreign nationals with illegal stay in Montenegro is based on ratified international readmission agreements and the Law on Foreigners. When a foreigner, staying illegally in Montenegro, cannot return on the basis of a readmission agreementthe return is carried out in accordance with the Law on Foreigners.

The Law on Foreigners envisages for a foreign national staying illegally in the country, or the one who has had security measure of expulsion pronounced, or the protection measure of removal from the territory of Montenegro, or whose stay in Montenegro has been terminated, must leave its territory immediately or within a specified deadline. The Police issue a decision stipulating a deadline within which a foreigner is obliged to leave the territory of Montenegro, and if requiredit can also stipulate the border crossing point of exit, as well as the duty of reporting to the on-duty border officer. This decision may be appealed against to the Ministry of Interior, within three days as of the day of the receipt of the decision. The Ministry is obliged to decide upon the appeal within eight days as of the day of the receipt of the appeal. The appeal does not delay the enforcement of the decision. In the cases of misdemeanour responsibility, for the offences prescribed by this law, an alien may be pronounced protection measure of removal. On the occasion of deliberation to pronounce the protection measure of removal the following are taken into consideration: duration of the stay, personal, family, economic and other circumstances, deadline within which the alien is to leave Montenegro, which may not be longer than 30 days and the time of prohibition to enter Montenegro. The foreigner who fails to leave Montenegro within the stipulated deadline shall be forcefully removed.

The foreigner must not be forcefully removed to the country in which his/her life or freedom would be endangered because of his/her race, religion or nationality, affiliation to a special social group or political opinion or in which he/she could be subjected to torture, inhuman and degrading treatment and punishment.

The Law on Foreignersprescribes that a foreigner, who cannot be immediately forcefully removed or whose identity has not been determined, shall have his/her freedom of movement restricted by the placement inthe Reception Centre for Foreignersor other appropriate accommodation for persons with special needs. The placement into the Centreis limited to 90 days and it may be extended for another 90 daysif the procedure of establishing identity or data collecting is on-going, ifspecial security reasons require so or ifhe/she intentionally obstructs forceful removal. Due to the fact that this Centre has not yet been opened, the accommodation of illegal migrantsis securedin alternative accommodation facilities, or specifically in a residential building in Podgorica, with the capacity of six to eight persons.

On the occasion of forceful removal, attention is paid to special needs of foreign nationals, especially with regards to minors, persons totally or partially deprived of business capacity, children separated from their parents or guardians, persons with disabilities, elderly persons, pregnant women, single parents with underage children, as well as the persons who used to be exposed to torture, rape or other severe forms of psychological, physical or sexual violence. Police are obligedto treat these persons in accordance with international treaties and regulations which regulate the position of persons with special needs.

The costs incurred on the occasion of forceful removal are borne by a foreigner. If a foreigner has no means to compensate the costs incurred, these will be compensated from: natural persons or legal entity which undertook the obligation to bear the costs of his/her stay; transporter who brought to the border crossing point a foreigner who did not meet the requirements for the entry, movement or stay in the territory of Montenegro; employer who employed an alien contrary to the provisions of the law which regulates the work and employment of foreigners. The costs which cannot be covered in one of the above ways,are covered from the Budget of Montenegro.

4.2. Implementation of readmission agreements

Readmission agreements with the neighbouring countries specify the duty of receiving persons in summary procedures without formalities, but with prior announcement. In concrete terms, these are the tasks within the competence of the Police Directorate – Border Police Department. Competent authorities of the contracting parties are obliged to receive a third country citizen or a stateless person in case such person is deprived of liberty in the territory of the other contracting party within seventy-two (72) hours after the illegal crossing of the state border. In this way, the return/reception procedure has been simplified, since there is no procedure for determining citizenship status and there are no deadlines which are prescribed for the response in the regular readmission procedure (this deadline is usually set to 15 days).

As regards the implementation of the readmission agreements concluded with the neighbouring countries, in 2011 the Ministry of Interior of Montenegro, pursuant to the Agreement between the Government of Montenegro and the Council of Ministers of the Republic of Albania, in the regular readmission procedure, sent the total of 12 letters rogatory for the reception of 39 persons. Within the framework of the summary readmission procedure, the total of 52 persons were returned to the republic of Albania, 28 of whom at the joint border crossing point of »Sukobin-Murićani« and 24 at"Božaj" BCP. In the majority of cases these were foreign nationals from African and Asian counties.

With regards to the implementation of the readmission agreement in 2012, within the framework of the summary readmission procedure, the total of 60 persons were returned to the Republic of Albania, 56 of whom at the joint »Sukobin-Murićani« BCP and four at"Božaj" BCP. In the majority of cases these were foreign nationals from African and Asian countries. For the first seven months of 2013, 5 persons have been returned to the Republic of Albania.

Within the framework of the summary readmission procedure with Bosnia and Herzegovina, during 2012, the total of 66 persons were returned from this country to Montenegro, 62 of whom at»ŠćepanPolje« BCPand four at »Sitnica« BCP. In most cases these were the citizens of African and Asian countries. For the first seven months of 2013, 9 persons have been returned to Montenegro from Bosnia and Herzegovina[65].

Within theframework of the summary readmission procedure with the Republic of Croatia, during

65 "Cooperation with Bosnia and Herzegovina functions in accordance with the legal framework regional cooperation and in the spirit of good neighbourly relations; the meetings are held on the monthly basis, and there are border patrols too: 4 times a month, two on our and two on the territory of Bosnia and Herzegovina. There is a principle that patrols be composed of two "domestic" police officers and one "guest": Interview with Vladimir Vojinović, Nikšić Border Security Section – Plužine Border Police Station, 25th September 2013.

2012, the total of 214 persons were returned from this country to Montenegro, all of them at »Debelibrijeg« BCP. In most cases these were foreign nationals from African and Asian countries. For the first eight months of 2013, 68 persons have been returned to Montenegro from the republic of Croatia.

As for the Readmission Agreement with Kosovo, it can be concluded that there are certain problems in its implementation. One should underline the datum that as of the signing of the readmission Agreement, not a single request sent from Montenegro to Kosovo for the return of the persons who had made illegal entry to Montenegro from the territory of Kosovo[66]. The implementation of the Readmission Agreement with Kosovo is affected by the length of the border, which mostly stretches along high mountain massifs from 1500-200 m above sea levelandthrough woodland which is covered in thick snow cover in wither period–which in turn are suitable for the movement on foot and avoiding border crossing points and patrols in the field–as well as big distance between the BCPs of Montenegro and those of Kosovo (about 11 km from «Kula» BCP to «Kulina» BCP in Kosovo).Therefore, it is necessary to work on intensifying cooperation between competent bodies of the two countries, especially through organizing and holding meetingsof the Committeeforthe Monitoring of the Implementation of the Agreement.

In relation to **regular procedure**, in the implementation of readmission agreements,in 2012 the Ministry of Interior received the total of 190 readmission applicationsrelated to the reception of the total of 397 persons. Out of the received applications, 135 applications were resolved positively for the reception of 261 persons, while 55 applications were resolved negatively, i.e.approval was not granted for the acceptance of 136 persons. It should be said that most of the persons returned to Montenegrointhe regular readmission procedureare Montenegrin citizens, whilea smaller number of persons are not Montenegrin citizens, who used to have or still have their residence in Montenegro.

The statistics related to the countries from which applications were filed looks as follows:

- Germany–115 applications received for the reception of 260 persons, of which 81 received positive response for the reception of 160 persons, and 34 were resolved negatively for the reception of 100 persons;
- Switzerland–11 applications received for the reception of 12 persons, out of that number six applications received positive response for the reception of seven persons, and five applications for the reception of 5 persons received negative response;
- Sweden - 18 applications received for the reception of 49 persons, of which number 16 applications for the reception of 43 persons received positive responses, while two applications for the reception of six persons received negative response;
- Belgium–nine applications received for the reception of nine persons, out of which seven received positive response for the reception of seven persons, and two applications received negative response for the reception of two persons;
- Luxemburg –five applications received for the reception of 11 persons, of which three received positive response for the reception of five persons, and two applications for the reception of six persons received negative response;

66 "Not a single case of readmission with Kosovo has been carried out, while the implementation of the readmission agreement with Albania shows certain progress ": Interview with the Head of Division, DraganStevanović, 27th September 2013.

- The Netherlands –six applications received for the reception of six persons, all of which were resolved positively;
- Denmark–four applications received for the reception of four persons, all of which were resolved positively;
- Austria –three applications received for the reception of three persons, all of which were resolved positively;
- Hungary–three applications received for the reception of three persons, all of which were resolved positively;
- France–two applications received for the reception of eight persons, both of which were resolved positively;
- Slovenia –one application received for the reception of one person and the same was resolved positively;
- Other countries–13 applications received for the reception of 31 persons, of that number, eight applications for the reception of 25 persons received positive response, while five applications for the reception of six persons received negative response.

In 2012, the Ministry sent no readmission application to the competent authorities of the EU member states, or to other countries with which readmission agreements were signed.

With regards to the regular procedurein the implementation of readmission agreements, for the first seven months of 2013, the Ministry of Interiorreceived the total of 125 readmission applicationsconcerning the reception of the total of 287 persons. Out of the received applications, 86 applications were resolved positively, i.e. the reception was granted of 198 persons, while 39 applications were resolved negatively, i.e. approval was not granted for the reception of 89 persons.

Expressed by the countries from which applications were received, statisticsis the following:
- Germany - 95 applications received for the reception of 223 persons, out of which 62 received positive response for the reception of 157 persons, and 33 applications for the reception of 66 persons received negative response;
- Sweden–12 applications received for the reception of 27 persons, of which number 10 applications received positive response for the reception of 20 persons, and two applications for the reception of seven persons received negative response;
- Luxemburg –four applications received for the reception of seven persons, all of which were resolved positively;
- Switzerland – three applications received for the reception of 10 persons, of which number one application for the reception of four persons received positive response, and, two applications for the reception of six persons received negative response;
- The Netherlands – two applications received for the reception of three persons, both of which were resolved positively;
- Belgium – one application received for the reception of one person, which was resolved positively;
- Denmark – two applications received for the reception of two persons and both were resolved positively;
- Slovenia – one application received for the reception of one person and the same was resolved positively;
- Bosnia and Herzegovina –five applications received for the reception of 13 persons, three of

which were resolved positively for the reception of three persons, while two applications for the reception of 10 persons were resolved negatively.

In this period, the Ministry of Interiorsent three readmission applicationsrelated to the return of four persons: one application was sent to Bulgaria,two to Bosnia and Herzegovina. All three applications were resolved positively and these persons were returned to the said countries.

V ASYLUM SYSTEM

The asylum system in Montenegro is regulated by the Law on Asylum.Asylum is granted to foreign nationals who need international protectionin accordance with the Convention relating to the Status of Refugees from 1951, Protocol relating to the Status of refugees from 1967, European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 and other ratified international treaties and common rules of international law[67]. Basic principles incorporated in the Law on Asylum are the following: prohibition of return and expulsion, non-discrimination, confidentiality and data protection, family unification, non-punishment for illegal entry and stay, protection of persons with special needs, provisions related to sex, respect for legal order, legal protection, and cooperation with the UNHCR.

Refugee status is acknowledged to a foreign national if, upon his/her asylum application, it is established that his/her fear of persecution is justified on the grounds of his/her race, religion, nationality, affiliation to certain social group or political opinion in the country of origin and that because of that he/she cannot or does not wish to use the protection of the country of origin. Refugee status will not be granted to a foreign national who enjoys the protection or assistance of some body or institution of the United Nations, except for the UNHCR, and except in the case when such protection or assistance is interrupted for any reason, and the status of the foreign national has not been resolved, unless the procedure upon the asylum application has been terminated(Article 36, paragraphs 1 – 3).

Additional (subsidiary) protection, as additional protection of refugees in accordance with human rights treaties, is granted to a foreign national who does not meet the requirements for the acknowledgement of refugee status, but who would, in case of his/her return to the country of origin or another country, besubjected to torture or inhuman or degrading treatment or punishmentorwhose life, security or freedom would be endangered by the violence of general magnitude, external aggression, internal conflicts, mass violations of human rights or other circumstanceswhich seriously endanger life, security or freedom.

Temporary protection is an urgent or exceptional measure by means of which foreign nationals are ensured protection in case of mass, sudden or unexpected arrival from the country in which their life, security or freedomare endangered by large scale violence, external aggression, internal conflicts, mass violations of human rights or other circumstances which seriously threaten life, security and freedom, and due to the mass arrival it is not possible to conduct the procedure uponindividual applicationsfor determining refugee status. Temporary protection lasts for one

67 The Law on Asylum contains the statement that the Convention relating to the Status of Refugees and the Protocol constitute the basis of the legal system for the management of refugee protection, amended by human rights documents.

year, and it can be extended for six months, and not longer than one year. Person whose temporary protection has been granted is entitled to file asylum application during orupon the expiry of the temporary protection (Article 62, paragraph 1).

Following the adoption of the Law on Asylum, special organizational unit was establishedwithin the Ministry of Interior – Asylum office[68], now ***Asylum Directorate***. The procedure upon the appeals lodged against the decisions of the first instance body is conducted by the ***State Commission for Resolving Asylum-Related Complaints,*** which was established by the Decision of the Government of Montenegroin November 2007, composed of the Chair and four memberswho are judges of the Administrative Court of Montenegro or expert associates in that court. Against the second instance administrative decision of the State Commission for Resolving Asylum-Related Complaints may be lodged before the Constitutional Court (there has been one such case so far, but no decision has been reached).

5.1. Asylum protection procedures in Montenegro

A – Filing asylum application

Intention to file an asylum application may be declared by an alien at a border crossing.

Application forasylum is submitted to the Asylum Office, in the language known to the asylum seeker (language in official use in Montenegro, language of the country of origin or other language known to this person).

Non-competent body having received a foreigner's asylum application has the obligation to register such application and without further delay inform the Asylum Office accordingly.

Formal application versus declared intention at border crossing
The Article 24 of the Law on Asylum clearly regulates: "A foreigner may declare, at a border crossing, his or her intention to submit an asylum application, after which he or she shall be permitted to enter Montenegro and provided accommodation. An asylum seeker shall be enabled as soon as possible to submit his or her asylum application and to receive confirmation of the submitted application. An asylum application shall be submitted to the Asylum Office, in the written form or orally on the record, in a language that is in official use in Montenegro. If the asylum seeker does not speak the language in official use, he or she may submit the application in the language of his or her country of origin, or in a language with which he or she is familiar." Undoubtedly, these provisions indicate that the Law on Asylum recognizes the category of "declared intention", and a person becomes asylum seeker from the moment he/she states intention to seek the protection of Montenegro, rather than the moment of formal submission of the asylum application to the Ministry of the Interior.

68 In June 2007, after the establishment of the Asylum Office, the UNHCR Office in Podgorica, the Ministry of Interior and Public Administration and the Directorate for the Care of Refugees, signed the Memorandum of Cooperation and Temporary Assistance in the Implementation of the Law on Asylum, with the purpose of establishing cooperation in conducting asylum applications assessment procedures, and the care of asylum seekers, refugees and persons whose additional protection has been granted.The Memorandum established the duty of the UNHCR to conduct the procedure and interviews with asylum seekers until the end of 2007, while the Ministry, i.e. the Asylum Office is to make decision on the basis of the written recommendation of UNHCR officials: Taken over from the Report on the Readiness of Montenegro to Liberalize Visa Regime, Podgorica, August 2008, p. 21.

Asylum seeker is given the possibility to submit asylum application in the shortest time possible, and issued confirmation of the submitted application (Article 24). Article 25 of the Law prescribes that "the competent body shall provide accommodation for asylum seekers in the Centre for Accommodation of Asylum Seekers or in another of the competent body's facilities for collective accommodation." These provisions clearly define that the person having clearly declared their intention to obtain asylum in Montenegro has the right to accommodation in the centre for asylum seekers or in some other collective accommodation facility, particularly on weekends and state holidays, until they are enabled to submit formal application to the Asylum Office.

B – Procedure to establish refugee status

Employee of the Asylum Office, the body tasked with processing applications, who has been addressed by an alien wishing to file asylum application, performs the following:

- presents to the asylum seeker their rights and obligations,
- provides interpreter and legal representative to the asylum seeker,
- fills in the asylum application form,
- takes photographs, fingerprints and signature,
- makes copies of identity papers and other documents which are relevant for the procedure,
- issues confirmation of the filed asylum application,
- contacts asylum seeker / schedules interview,
- conducts interview (one or more),
- gathers information on the country of origin,
- prepares and adopts decision,
- complaint procedure (establishing facts and information on the country of origin).

Interpreter and legal representative

By providing an interpreter, the Asylum Office provides an asylum seeker with the opportunity to take part in and follow the course of the procedure in the language they indicate they understand. In addition, the Law on Asylum explicitly provides for the right of an asylum seeker to establish contact with authorised staff of UNHCR and non-governmental organisations, for the purpose of obtaining legal assistance in all stages of the procedure (Article 23). This person is delivered written notification, in the language they understand, of their right to free legal assistance and of the manner of communication with NGOs[69] in order to obtain legal aid for the submission of asylum application, during the interview, as well as for the preparation of written submissions.

Asylum application form

In the presence of interpreter, legal representative and UNHCR Podgorica Office representative, asylum seeker is enabled to file an asylum application containing appropriate data about the person, origin, reasons to seek asylum, as well as other data important for initiation and carrying out of the procedure.

Taking photographs and fingerprints and signing

For the purpose of establishing identity of an asylum seeker, they are photographed and fingerprinted, and their signature is taken, without delay, not later than three days from the submission of the asylum application.

69 NGO Legal Centre, executive partner to UNHCR in Montenegro: http://www.pravnicentarcrnagora.com/en

Documents relevant for the procedure
The Asylum Office employee makes copies of identity papers and of all other documents which may serve as a proof to establish facts in the procedure.

Confirmation of submitted application
Following the submission of the asylum application, asylum seeker is issued confirmation of submitted application.

Interview summons
With a view to making a decision in respect of asylum application, a manager of the procedure conducts one or more interviews with an asylum seeker. Written information about the date, time and place of the giving of asylum seeker's statement is provided to the asylum seeker (in the language they understand), their representative, UNHCR representative and interpreter. If an asylum seeker fails to respond to their interview summons, a second summons is served. If this person fails to respond to the repeated summons, the procedure is terminated by virtue of a decision.

Giving statement (interview)
Interview is one of the more complex activities in the asylum procedure, where a manager of the procedure has the duty to establish and examine all relevant facts and circumstances, in particular those pertaining to the information about the country of origin; and to assess general credibility of the asylum seeker and prepare, along with the assessment of validity of proof, an appropriate and lawful decision in respect of establishment of refugee status or other form of protection[70]. The person who undertakes the procedure is obliged to take into account the cultural origin of the asylum seeker and pay special attention to the conditions of the asylum seekers, in particular of those who have suffered violence, torture or trauma. Additionally, his/her special duty is to warn an asylum seeker of their obligation to present all the circumstances and facts pertaining to asylum seeking in Montenegro, where the asylum seeker must be given the opportunity to present in detail, clarify and support with all available evidence the facts and circumstances relevant for asylum decision- making. The interview is conducted under such conditions so as to secure the secrecy of the procedure, respect the principle of the exclusion of public, confidentiality and data protection. The statement can be audio recorded, provided that the asylum seeker is informed of such activity. Minutes are taken during each interview, containing essential information about the application, in the form presented by the asylum applicant.

C- Information about the country of origin

In the process of collection and use of information about the countries of origin, the Asylum Office applies the following principles:
- relevance in respect of motive for asylum
- objectivity
- reliability of source
- accurate and updated information
- transparency.

70 Considering that the detection of migrants who have crossed the border and entered the country in places other than border crossings poses a special challenge, there is a concern that many persons transiting Montenegro do not file asylum applications or respond to invitation to interview.

Under the Law on Asylum, the Asylum Office employees may collect information and data about the situation in the country of origin of the asylum seeker or of the person granted asylum (Country of Origin Information - COI) from various sources, including the UNHCR. These officers use Internet to verify the political background of their sources, compare information to those of other sources and check the mandate of the organisation which has offered the information. The websites of *Human Rights Watch, Amnesty International, Helsinki Committee for Human Rights and UNHCR* are most commonly used. In addition, the officers may collect certain information on the countries of origin through the Ministry of Foreign Affairs and European Integration of Montenegro.

D – Decisions on application

Decisions on asylum applications are adopted not later than 90 days from the day of the submission of application, except in the case of a manifestly ungrounded application where the time limit for adoption of decision is reduced from 90 to 15 days. On the other hand, applications filed by minors and persons with special needs referred to in Article 11 of the Law, are given the priority, therefore these decisions are adopted within 30 days.

Once the facts are established and evidence is offered, adopted decision may be:

- a decision to approve application and recognize refugee status or accord subsidiary protection
- a decision to reject asylum application (nonexistence of justified fear of persecution, manifestly unfounded application...)[71]

Manifestly unfounded asylum application

According to the Article 41 of the Law, an asylum application is considered manifestly unfounded if there are no grounds for fear that the person will be persecuted in their country of origin, or if the application is based on deliberate fraud or misuse of the asylum procedure. An asylum seeker is considered to have no valid grounds for the application due to fear of persecution if:

1. his/her application is based on economic reasons or better living conditions;
2. theapplication completely lacks data to indicate that they would be exposed to fear of persecution in their country of origin or if their statement does not include the circumstances or details of personal persecution;
3. the application obviously lacks credibility, and their statement is inconsistent, contradictory or realistically impossible;
4. fear of persecution may not be generally considered to exist due to overall political circumstances, legal situation or enforcement of laws in their country of origin or third country, unless they prove this country is not safe for them;
5. this person was previously banned from entering Montenegro, in compliance with laws, and the reasons for which the ban was imposed have not changed.

71 The Asylum Office must provide possibility for an asylum seeker to give statement in respect of the circumstances excluding reasons for rejection/refusal of asylum application for each individual case. In practice this means that each person filing an asylum application should have the possibility to demonstrate that a country may or may not be considered safe in one specific case, in the light of the fact that a country can be safe only for a certain group of persons (eg. for members of one national community). See the European Court judgment in the M.S.S versus Belgium and Greece case.

Minor asylum seekers

The Law on Asylum Article 11 prescribes that in the asylum procedure consideration will be given to the special needs of minors, persons completely or partially deprived of legal capacity, unaccompanied minors, persons with mental or physical disability, the elderly, pregnant women, single parents with minor children, persons having been subjected to torture, rape or other serious forms of mental, physical or sexual violence and other vulnerable persons. Besides, persons of age who are deprived of legal capacity also enjoy the right to care and protection, in accordance with the law.

According to Article 28 of the Law on Asylum, following the establishment of identity, of the fact that a minor is unaccompanied, or that a person of age is deprived of legal capacity, these persons are provided with a guardian, in accordance with the law. The Centre for Social Work appoints guardians for these persons by means of an urgent procedure. Asylum applications of these persons are given priority in decision making and these decisions are adopted within 30 days from the day of submission of the application. In the course of procedure, consideration is given to accommodation, mental and physical condition and best interest of minors, and measures are taken to trace the members of their family. In 2013, there were 26 minors accompanied by one or both parents and 4 unaccompanied minors who have been provided with guardians by the Centre for Social Work.

Provisions of the Law on Asylum relating to sex

In all stages of the procedure, an asylum seeker is treated in such manner as to respect their sex. In addition, asylum seekers have the right to communicate with officials and interpreters of the same sex. Females accompanied by males are notified of their right to file their personal asylum applications (Article 12).

Restriction of freedom of movement in the country

Article 31 of the Law on Asylum stipulates: "An asylum seeker may, on an exceptional basis, and by means of decision of the competent body, be restricted from movement outside of the Centre or other facility for collective accommodation or outside of a designated area, for up to 15 days, if: 1) their identity needs to be established; 2) this person has destroyed their travel or personal documents or they possess false documents with the intention of misleading the competent bodies; 3) it is necessary to do so for the purpose of protection of safety of the community." The same Article additionally prescribes that "unaccompanied person under the age of 16 will not be restricted in movement, unless it is the only possibility". An appeal against the decision referred to in this Article may be lodged within 8 days from the day of receipt of the decision. The appeal does not have suspense effect. According to the Article 21 of the Law on Asylum, the competent body is administration body tasked with activities related to the care of refugees (Directorate for the Care of Refugees).

Rights of persons in the asylum system

Apart from the right to interpreter and free legal assistance, an asylum seeker also has the right to: residence and freedom of movement;

- identification document proving their identity, legal status, right to residence and other rights prescribed by the Law on Asylum;
- free primary and secondary education in state-founded schools;

- health protection, subject to special regulations;
- family unity;
- work within the Centre or other facility for collective accommodation;
- social protection and humanitarian assistance;
- freedom of religion;

The Law on Asylum also prescribes that:
an asylum seeker is provided by the competent body with accommodation in the Centre for accommodation of asylum seekers or in other facility for collective accommodation of the competent body,

- a person with special needs is provided with special accommodation and care.

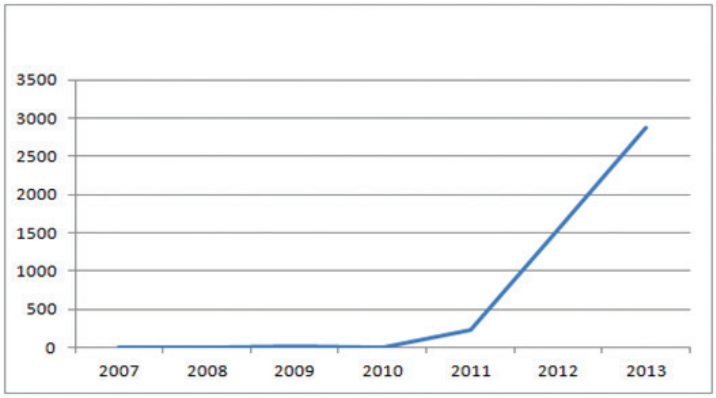
Under the Decree on organisation and method of operation of state administration, the Directorate for the Care of Refugees is tasked with administration affairs relating to the care of persons in the asylum system, that is, the provision of assistance in exercise of the right to accommodation, education, health protection, social protection and of other rights provided for by the Law on Asylum. In 2011, total of 240 asylum seekers were provided with care, and in 2012 their number amounted to 1.203.

5.2. Statistical indicators

Breakdown of statistical data related to the implementation of the Law on Asylum:

YEAR	NUMBER OF FILED APPLICATIONS	ACCORDED PROTECTION
2007.	3	1 (REFUGEE STATUS)
2008.	7	1 (SUBSIDIARY PROTECTION)
2009.	20	-
2010.	9	-
2011.	239	3 (SUBSIDIARY PROTECTION)
2012.	1529	1 (SUBSIDIARY PROTECTION)
1 (REFUGEE STATUS)		
2013.	2879	
TOTAL	**4686**	**7**

Graphic 1: Increasing trend in the number of asylum seekers:

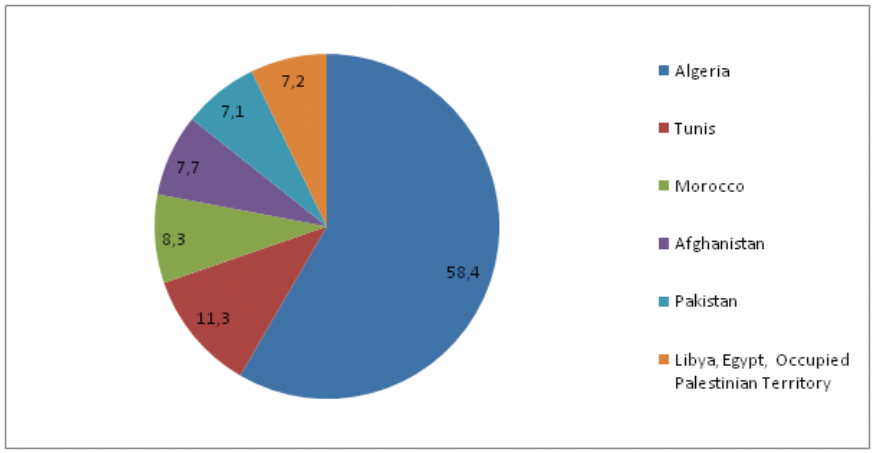


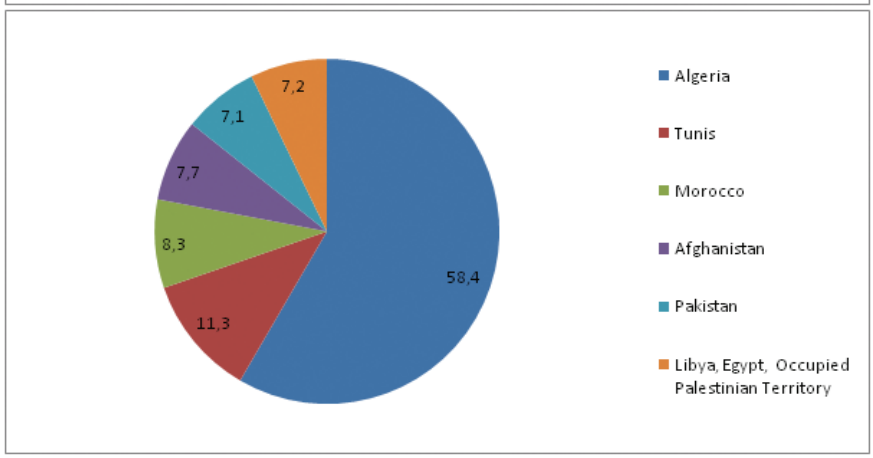
In 2012, the total of 1529 asylum application were filed; 673 appeals were lodged against decisions of the Ministry of the Interior, all of these were rejected as unfounded by the State Appeals Commission. The refugee status was granted to one person in 2007, it was revoked in 2010. One subsidiary protection was accorded and revoked in 2011. At the moment, there are 4 subsidiary protections in force, and 1 person with the status of refugee.

In 2013, asylum was sought by 70 women, 26 minors accompanied by one or both parents and 4 unaccompanied minors. Interestingly, the first child of asylum seekers in Montenegro was born in Podgorica Clinical Centre on 09 August 2013.

Of the applications filed in 2013, 342 are in the process of being resolved, the rest have been completed in the first instance, and out of these, 272 were decided on the merits of claim, 1602 were decisions on termination (due to failure of asylum seekers to respond to repeated summons) and 52 decisions were on rejection of application, because these were persons who have filed their applications for the second time in Montenegro (on their first entry into Montenegro, their applications were rejected by virtue of decision and the circumstances which serve as the basis for their repeated applications have not changed from the moment they submitted their first application to the Ministry of the Interior).

Graphic 2 and 3: Breakdown of 2012 data on asylum seekers' countries of origin:





5.3. Compliance between Montenegrin laws and practice and international and EU standards in the field of asylum and irregular migrations

According to the content of the Montenegro Screening Report for Chapter 24[72], Montenegrin regulations in the field of irregular migrations are largely harmonized with the acquis[73]. Montenegro has underlined full compliance of its legislation with the Directive 2002/90/EC defining the facilitation of illegal entry, transit and residence and with the Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence. It is also stated that some legislative amendments are needed to address the issue of sanctioning of employers of third-country nationals who are staying illegally in Montenegro.

With regard to asylum, Montenegro's legal framework is only partly compatible with the acquis,therefore the following areas should be harmonized with the EU legislation:

- persecution offences;
- reasons for exclusion[74];
- the definition of actors of persecution;
- ensuring the right to social and child protection;
- health protection;
- the definition of "safe country of origin", "first country of asylum", "safe third country[75]", "inadmissible application", and "border procedure"[76], in light of the fact that the Law on Asylum provides only the definition of the country of origin;
- transfer of the residence of persons enjoying temporary protection from one Member State to another;
- the right to financial aid;
- the right to work;
- reduction or withdrawal of reception conditions;
- accommodation of persons with special needs;
- the right to appeal with regard to residence and freedom of movement, as well as against negative decisions relating to the granting of benefits;

72 http://www.google.me/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fwww.mvpei.gov.me%2FResourceManager%2FFileDownload.aspx%3Frid%3D139505%26rType%3D2%26file%3Dlzvjestaj_o_skriningu_za_poglavlje_24.pdf&ei=loCDUuP_BIaPtAaAwYDoAQ&usg=AFQjCNG6KQHfdP5WmedApYKSLwQISIescg&bvm=bv.56343320,d.Yms.

73 According to the Screening Report for Chapter 24, Montenegro, as concerns legal migration, has only partially compatible legal framework on family reunification, status of third-country nationals who are long-term residents, researchers and students, with the EU acquis. According to Montenegrin authorities, national legislation is not compatible with the Blue Card directives (Council Directive 50 (2009) on the conditions of entry and residence of third-country nationals who fulfil the conditions for highly qualified employment) and the single permit on EU level. The Blue Card is not valid for persons who have sought asylum or who have been granted asylum.

74 The Law on Asylum does not define the concept of serious non-political act committed before international protection is sought.

75 In the systems that recognize the concept of a safe third country, the list of safe third countries is established and regularly updated by the Government, following the international principles of protection of refugees and guidelines of the European Council on Refugees Exiles (ECRE).

76 With regard to instructions for actions and distribution of responsibilities of state bodies in an asylum procedure, for those situations that have not been fully regulated by laws and by-laws.

The first and so far only report of ECRI[77], published on 21 February 2012, states that Montenegro has been greatly exposed to immigration and that proper asylum system is not yet in place as well as that Montenegro is more of a transit country, than a country of destination for asylum seekers. However, considering the EU integration of Montenegro and consequently increased number of asylum seekers, the ECRI states that competent authorities should start activities to harmonise legislation and practice with EU ***acquis*** in this field.

The exercise of rights of persons in the asylum system is in practice affected by numerous challenges relating to the establishment of origin, identity and personal properties of asylum seekers, but also those relating to translation and interpretation, capacities to assess the grounds for granting the refugee status or international protection, as well as those concerning financial conditions and capacities of bodies tasked with reception and integration of these persons.[78]

With regard to treatment on borders, although the Government is obliged to undoubtedly establish the identity of an asylum seeker, verify whether the person has already applied for asylum in Montenegro or some other country, as well as to compare data with those of the police and other state bodies, in the asylum system in Montenegro there is no **electronic database**, which should contain biometric data on asylum seekers and ensure a permanent and effective contact between the border police and institutions in charge of the asylum. Apart from higher precision in identification of migrants, this would also allow for the prevention of repeated ungrounded asylum applications, influencing the effectiveness and efficiency of the entire asylum procedure.

The lack of formal prescribed procedure, methodology and mechanisms for **establishment of identity and age of migrants,** additionally hinders access to the procedure and exercise of rights of minor migrants, as well as of other irregular migrants /potential asylum seekers. If a person does not possess any identification document, which is most often the case, their age is determined on the basis of their statement. In this context, additional efforts are needed to implement the Council Regulation (EC) 2725/2000 concerning the establishment of EURODAC – for the comparison of fingerprints.

As concerns the practice of provision of **free legal assistance**, asylum seekers are given the possibility to communicate with UNHCR and nongovernmental organizations from the moment of filing of their asylum application until the adoption of final decision, in order to obtain free legal assistance. The Asylum Office provides these persons with the opportunity to file asylum applications, give statements on the facts and circumstances important for adoption of the decision, and be served documents in the language they have indicated they understand. Additionally, these persons are notified of the conditions and asylum procedure, rights and obligations and method of accession to the UNHCR and non-governmental organizations providing free legal assistance, verbally and by means of the asylum procedure information brochure (***"Information for asylum seekers in Montenegro "***) which is available at all border crossings. Under the Law on Asylum, free legal assistance is provided by the Legal Centre. Although stateless persons and asylum seekers have the right to free legal assistance provided by legal aid services within basic courts, the court

77 url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CGEQFjAH&url=http%3A%2F%2Fwww.minmanj.gov.me%2FResourceManager%2FFileDownload.aspx%3Frld%3D100788%26rType%3D2&ei=OuqDUpLZHMzLswav64G4DA&usg=AFQjCNFRZP2wCW-kk670WpXKmft1V8QSWA&bvm=bv.56343320,d.Yms

78 Research on free legal aid system in Montenegro, Civic Alliance, Podgorica, October 2013: http://www.cedem.me/sr/aktivnosti/518-istraivanje-sistema-besplatne-pravne-pomoi-u-crnoj-gori.html.

data indicate that this right, given by the Law on Legal Aid, from the moment of its entering into force (01 January 2012) has been exercised by only one person (stateless); none of the asylum seekers have used this institute stipulated by the said Law .

With regard to the establishment of an independent judicial appellate body and the **provision of an efficient legal remedy** for examination of applications for international protection, though the Law on Asylum provides for a two-instance decision procedure on asylum applications, and though asylum seekers are entitled to lodge their appeals before a second instance body, the State Commission for Resolving Asylum-Related Complaints, according to ECRI, is not an independent body. Furthermore, the decisions of this Commission are final, i.e. there is no **judicial review**. ECRI notes with concern that those asylum seekers whose applications have been rejected have no **effective legal remedy** before court in line with the Council Directive 2005/85/EC, and recommends that Montenegrin authorities take steps to ensure that asylum seekers may complain against asylum decisions before an independent and impartial tribunal, including the right to appeal in cases of decisions on return and expulsion of persons whose asylum procedure has been terminated or whose asylum application has been rejected.

As concerns the right of asylum seekers to take part in the procedure and monitor the procedure in the language they indicated they understand, there are also some serious challenges relating to the provision of **sufficient number of interpreters,** particularly for rare language groups. The Asylum Office currently employs one permanent interpreter (with knowledge of French, English, Arabic and Berber language), financed by UNHCR, which is very useful, given that the majority of asylum applications (80%) come from the Maghreb countries. Additionally, the Asylum Office, when needed, engages interpreters included in the list court interpreters for Russian, Greek, Albanian and other languages, who are paid by the Ministry of the Interior. However, at the moment there are no interpreters for rare language groups, such as Pashto, Urdu or Farsi, spoken in Afghanistan, Pakistan, Bangladesh and Iran, which makes communication even more difficult. Apart from that, the presence of interpreters and representatives of other state bodies, and non-governmental organizations providing legal assistance, is rarely ensured during the initial contact with the border police. In practice, this significantly hinders the perception of those facts which may be important in the assessment of whether there is an intention to claim the asylum. This is very important because the treatment of these persons and the regulations that should apply are different, depending on whether the person has been recognized as an irregular migrant or asylum seeker, or a person enjoying international protection, particularly because the grounds for asylum application may in the first instance be assessed by the Asylum Office, rather than the border police.

In light of the fact that communication with parties (asylum seekers) has been significantly hindered due to language barrier, there is a need for permanent and structural solutions to the problem of lack of interpreters, in line with the Directive 2005/85/EC on procedures for granting asylum and the Directive 2003/9/EC relating to the submission of applications and the procedure in the language known by the asylum seekers, free legal aid, assistance with lodging of appeals and the right to appeal. In this context, there is also a need for **continuous trainings** of police officers in charge of persons in the asylum system, in order to raise their awareness of the international humanitarian law standards of treatment.

With regard to **material reception conditions**, under Article 14 of the ***Directive on reception 2003/9/EC***, the state is obliged to ensure adequate housing for asylum seekers: reception premises during the examination of an asylum application made at the border, reception centres guaranteeing adequate standards of living or private houses, flats or hotels adapted to asylum seekers, taking into account the maintaining of family relations and the right to communicate with members of family, legal representatives and representatives of UNHCR and nongovernmental organizations for the purpose of their accession to legal aid. As the housing of minors is concerned, the state is obliged to provide a joint housing arrangement for minor asylum seekers or housing with their parents or adult family members who are responsible for them.

Given that the Centre for Asylum Seekers is not yet operational, and the Directorate for the Care of Refugees has no other facility for collective accommodation, the accommodation of persons in the asylum system has so far been provided in rented facilities in the suburb of Podgorica (rent of individual housing facilities, motels and resorts of open type). However, this type of care has proven to be extremely inadequate because of daily organizational, financial, technical, security and other issues[79]. Asylum seekers who are placed in temporary alternative facilities have only one meal a day and no access to effective healthcare. There is no separate facility for accommodation of minor asylum seekers, particularly female minors, or programmes of protection and psycho-social assistance. ECRI has also recommended that the authorities complete the building of the reception centre as soon as possible and ensure that it has all the necessary facilities and staff to function correctly. Apart from that, some pieces of secondary legislation relevant for efficient functioning of the Reception centre for Foreigners and the Centre for Accommodation of Asylum seekers have not been adopted yet, such as the Rulebook on registration of these persons, Rulebook on placement in the Centre, Rulebook on house rules. In addition, there is a need to plan funds for the functioning of these centres, and to ensure these funds are in the budget of Montenegro.

A particular challenge is related to the fact that the existing accommodation system will not be able to deal with the increase in the number of asylum seekers, particularly with the situation that implies increase in the number of asylum application once Montenegro joins the European Union[80]. There is also a reasonable concern that, due to expected increase in the number of irregular migrants in the coming period, the Reception Centre for Foreigners – with the capacity to accommodate 46 persons, will not be able to meet all the accommodation needs, and the same applies to the Reception Centre for Asylum Seekers. Besides, given that the Reception Centre and the Asylum Centre are located one next to another, there is a possibility that persons placed in the **Reception Centre for Foreigners**, who are restricted in movement, seek asylum in Montenegro and enjoy freedom of movement, once they learn of such possibility.

Therefore some serious improvements are needed in the current **alternative accommodation systems**, particularly with regard to food and effective access to at least primary healthcare, in line

79 According to the Action Plan for Chapter 24, additional alternative accommodation facilities for asylum seekers will be provided in the period July 2013 – December 2016 (rent of privately owned facilities) – 150 persons, and some additional accommodation facilities for asylum seekers will be prepared in the IV quarter of 2016– approximately for 150 persons.

80 "The temporary reception solutions require alignment with minimum standards, especially with regard to healthcare; risks remain regarding exposure of the persons hosted there to smugglers and to illegal activities": Montenegro Progress Report, October 2013, page 62,
http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/mn_rapport_2013_en.pdf

with the ***Directive 2003/9/EC*** laying down minimum standards for the reception of asylum seekers. To this end, it is necessary to immediately start planning additional alternative accommodation arrangements for asylum seekers, which will meet at least the minimum standards of reception.

With regard to the **right to work and employment,** persons recognized as refugees, and persons with granted subsidiary protection exercise their right to work on the same terms as those prescribed for aliens with authorized permanent residence; they exercise the right to disability insurance, health protection and other employment relation rights as Montenegrin nationals. [81]Persons with accorded temporary protection should also be given the possibility to enter into employment and get involved in adult education. However, the Law on Asylum associates this right of asylum seekers and persons under temporary protection only with the work "within the Centre or other collective accommodation facility" (Article 29, paragraph 1, item 9), and/or the work "in the facilities for organized accommodation" (Article 60, paragraph 1, item 6), which is not in line with Articles 13 and 89 of the Directive on temporary protection 2001/55/EC. The Law does not recognize provisions relating to the possibility to access vocational education and to employment, under the Directive 2003/9/EC. The previously mentioned ECRI report also states that the Law on Asylum does not provide for the right of asylum seekers to work other than within the reception centre. ECRI considers that asylum seekers should be permitted access to the labour market within the shortest possible time period after submitting their asylum applications in order to avoid becoming dependent on state benefits, to prevent labour exploitations and to improve their prospects of social integration.

Additionally, although the Law on Asylum guarantees the **right toprimary and secondary education** (but not the access to high education) in schools funded by the state to asylum seekers, persons enjoying subsidiary or temporary protection and persons recognized as refugees, there is an issue of capacities and possibilities for this right to be exercised. This issue is not regulated in more detail by the secondary legislation, and there are no developed individual or collective programmes to include these persons in Montenegrin educational institutions[82], or programmes of learning of official language used in this context. On the other hand, Article 64, paragraph 2 of the Law on Asylum stipulates that the manner of exercise of rights within their competence is defined by ministries tasked with social protection, education and health. So far, only two procedures for exercise of rights have been regulated in more detail: the right to access healthcare, by means of previously mentioned Rulebook on the manner of exercise of right to health, and the right to social protection, by means of the Decree on financial aid to a person seeking asylum.

Even ECRI states in their report that, although the right to asylum is guaranteed by the Constitution

81 According to the Law on Employment and Work of Aliens ("Official Gazette of Montenegro", 22/08 and 32/11), an alien may be employed and work in Montenegro provided that they hold a working permit, are authorized permanent or temporary residence, and have entered into labour agreement or agreement on performance of activities/provision of services. The working permit is issued by the Employment office of Montenegro. The Law on Asylum of the Republic of Croatia prescribes that "an alien under temporary protection may work in the Republic of Croatia with or without working or business permit", and that "an alien under temporary protection has the right to primary and secondary education and retraining and additional training for a higher level job under the same terms as Croatian nationals" www.zakon.hr/z/314/Zakon-o-azilu.

82 See the Ordinance on the manner of implementing the programme and tests of knowledge of asylum seekers asylum holders, foreign citizens under temporary protection and foreign citizens under subsidiary protection, for the purpose of joining the education system of the Republic of Croatia ("NarodneNovine" no. 89/08) and the Programme of Croatian language, history and culture for asylum seekers and asylum holders ("NarodneNovine" no. 129/09).

and regulated by the Law on Asylum, this Law cannot be fully implemented because of other national laws, regulations and instructions have not yet been harmonized with it, and asylum seekers face numerous difficulties accessing some basic rights and services guaranteed by law. In this context, ECRI recommends that all secondary legislation necessary for the implementation of the Law on Asylum is adopted as soon as possible so that asylum seekers can have full access to their rights.

With regard to **access to health protection** of asylum seekers, The Rulebook on the manner of exercise of health protection entitles these persons to healthcare in public health institutions in the territory of Montenegro. Dental services are provided in those health institutions that have entered into relevant agreement with the Health Insurance Fund of Montenegro. Persons granted subsidiary protection, as well as persons granted temporary protection enjoy the right to a free emergency health care, based on the confirmation of subsidiary or temporary protection, and medical records are kept of such events, in the form of a medical card and a health condition report. Montenegrin legislation in this area is partly aligned with the ***Directive on reception 2003/9/EC***, according to which emergency primary care and necessary treatments are provided, as well as special care and treatment of persons with special needs; it is necessary to regulate rights in health protection for own nationals. Besides, it is necessary to ensure that mandatory medical examinations are conducted during the reception of asylum seekers in the interest of these persons and public health as well, but also to ensure other medical examinations whenever necessary for the protection of health of these persons, along with a daily medical service established within the Centre for asylum seekers and allocation of necessary funds for such activities in the budget of Montenegro.

As concerns **family unity,** in line with theDirective on family reunification 2003/86/EC, the Law on Asylum prescribes that in the asylum procedure measures will be taken to safeguard family unity, subject to consent of asylum seekers, yet, there are no criteria that should be taken into account while deciding on re-joining of a family. According to the Law, this right is given to persons with recognized refugee status, and those under subsidiary protection (Articles 47 and 60), unless there are reasons for exclusion of a family member.[83] Person granted temporary protection may be approved to re-join their family, provided that it is only possible in the territory of Montenegro. This right may be exercised by a minor who has not started their own family and a spouse of the person granted temporary protection, at their request. The Law further defines persons to be considered family members in this context (parents, guardians, minors and spouses), however, these are not their relatives, or other persons if they lived in the same household with the asylum seeker, person granted temporary or subsidiary protection or person with recognized refugee status, except in justifiable cases when reunification with other family members may be approved (Article 47, paragraph 6). There is no provision to regulate the situation of family reunification when its members enjoy temporary protection in different countries.

With regard to voluntary return and measures taken after cessation of temporary protection,

83 Article 36 prescribes that "refugee status shall not be recognized in the case of an alien with respect to whom there are reasonable grounds to believe: 1)that they have committed a crime against peace, a war crime, or a crime against humanity, within the meaning of the international instruments that contain provisions on such crimes; 2)that they have committed a serious crime under international law, outside Montenegro and prior to arrival in Montenegro; 3) that they are guilty of acts contrary to the goals and principles of United Nations, as well as to persons already enjoying protection or assistance of an organ or agency of the United Nations, other than the High Commissioner's Office".

Montenegro currently has **no programme for voluntary return** of irregular migrants to their countries of origin. The Memorandum of Understanding was signed with IOM three years ago. However, no progress has been achieved since then, mostly because of the lack of available resources. Besides, the Law on Asylum does not recognize research visits to the places of possible return, as one of the mechanisms to determine and verify relevant facts, with consideration to the principles of security and preservation of personal dignity and integrity, be it a voluntary return or a forced return on the basis of cessation or expiry of temporary protection. The decisions on length or cessation of temporary protection should be based on the fact that the situation in the country of origin allows safe and permanent return and respect for human rights and fundamental freedoms in line with the ***Directive on temporary protection 2001/55/EC*** (especially in cases where it is not possible to resolve issues of return of persons under temporary protection for as long as two years).

VI CONCLUSIONS

By establishing a strategic framework and normative and institutional infrastructure, Montenegro has set its future direction in a relatively short time period with respect to a comprehensive management of migration flows, achievement and implementation of the principle of effective migration policy which needs to be based on the principles of respect for human rights and freedoms, and principles of legality and efficiency, as well as to the state's responsibility for legal immigration and regulation of issues of naturalization and integration of migrants.

The suppression of illegal migration constitutes a significant challenge for successful implementation of the migration policy, therefore, it is one of the priorities in future activities of competent bodies, which require more intensive cooperation and exchange of information, on national, regional and international level. It is important to emphasise that illegal migration in Montenegro still has a **transit nature,** and involves mostly economic migrants. The entry of the Republic of Croatia in the EU will considerably influence the position of Montenegro in this area, considering the fact that irregular migrants will be looking for the shortest road to the EU, thus it is realistic to expect that in the coming period there will be an increase in the number of illegal migrants in Montenegro.

There is a particular concern in regards to the fact that the **profile of asylum seekers** has greatly changed, so these are no longer only economic migrants, but also categories of persons that have been defined as classic examples of refugees under the Convention relating to the Status of Refugees and the Law on Asylum. These persons come from countries affected by war, civil conflicts and riots, countries with non-democratic and authoritarian regimes, countries in which customary law involves the practice of physical and mental abuse, particularly female genital mutilation, countries with tribal conflicts, etc.

From an overall perspective, the legal system of Montenegro is partly aligned with the EU acquis, in the areas covered by negotiating chapter 24 – Justice, Freedom and Security. Until it acquires a full-fledged membership, Montenegro plans to undertake normative activities in order to achieve **alignment with EU acquisin** the segments which are currently not aligned, with a special emphasis on amendments to the Law on Foreigners and the Criminal Code.

However, the mere existence of national regulations and ratified international agreements guaranteeing the respect for basic rights of person the asylum system, is not, per se, sufficient to provide proper practical application of convention standards. In this context and parallel to normative activities, Montenegro needs to take measures to achieve an adequate level of **institutional and administrative preparedness** for fulfilment of EU membership obligations, particularly because the increase in migration pressure is already present.

In order to achieve full alignment of national legislation and practice with international and regional standards in the field of asylum and irregular migration, special attention should be paid to strengthening capacities and technical equipment, as well as to **better cooperation and coordination of key stakeholders** inthe system, to ensure the development of integrated asylum system. These priorities are emphasized by all entities involved in the project implementation – Asylum Office, Border Police Sector, Administration for the Care of Refugees, INTERPOL Office in Podgorica, non-governmental organisations.

Having in mind the **low recognition rate** (only 7 cases of granted asylum compared to **4686** filed applications), some of the key priorities would relate to the strengthening of capacities needed for determination of the origin of asylum seekers, assessment of reasons for granting refugee status or international protection, treatment of persons in the asylum system, as well as to the need that potential holders of the right to asylum are better informed. In particular, there is a need for further strengthening of capacities and role of the **Asylum Office**, and the **Administration for the Care of Refugees**, as this body, that is the Ministry of Labour and Social Welfare, is tasked with management of the Centre for Asylum Seekers. It is necessary to establish a stronger mechanism of monitoring of departures of asylum seekers who intend to leave the country voluntarily. It is necessary to continue improving infrastructure and technical conditions for the work of border police and other competent bodies.

Some serious improvements are needed in respect of the provision of **interpreting services and effective legal remedy**, having in mind the severity of consequences which may occur due to improper interpretation, particularly those concerning the violation of international obligation of non-punishment of asylum seekers for illegal entry and/or stay and withdrawal of right to asylum to persons enjoying international protection.

Adequate reception conditions for asylum seekers during the examination of grounds for their asylum application are an essential part of each asylum system and these are vital for integration in the country after recognition of status, or for a dignified return, if the decision is made in respect of their application that international protection should not be granted[84]. This segment of the system requires most substantial improvements in order to create conditions for the soonest possible opening and functioning of the **Centre for Accommodation of Asylum Seekers and the Reception Centre for Foreigners**, with special regard to the conditions for adequate treatment, reception, accommodation, protection and rehabilitation of unaccompanied minor migrants and persons without legal capacity, as well as of other vulnerable groups. The provision of access of asylum seekers to **socio-economic rights, education** and proper **healthcare** also requires some significant improvements in both normative and institutional sense.

84 ECRE - Comments on the Amended Commission Proposal to recast the Reception Conditions Directive (COM (2011) 320 final), September 2011: Taken from the publication: Challenges of forced migrations in Serbia – second perspective of asylum and readmission issues, Group 484, Belgrade, January 2013, page 40.

Finally, in consideration of the changes to the profile of asylum seekers, and the dynamics of Montenegro's accession to the European Union, it is necessary to begin the activities aimed at developing of the programme of naturalization and integration of persons with recognized asylum status, because there are reasons to expect the increase in the number of those migrants for whom Montenegro will be not only a transit country, but also a final destination.

VII RECOMMENDATIONS

Normative framework

- To update those segments of the Law on Asylum which are not aligned with the EU acquiswithin the deadlines defined in the Action Plan for Chapter 24 and in consultations with representatives of civil sector and UNHCR. To ensure adequate mechanisms of protection in respect of access to the territory and rights in the asylum system, particularly the guarantees for fair and effective procedures and access to socio-economic rights and healthcare.
- To precisely define actions preceding formal filing of asylum application.
- To provide judicial protection of asylum seekers by prescribing the right to initiate administrative litigation against a second instance decision on asylum application.

Treatment of asylum seekers

- Persons seeking asylum at the border must not be prohibited from entering or have their request rejected only on the basis of conversation with the border police members. Following the example of the countries in the region, it would be desirable to set up a monitoring mechanism which would be implemented by non-state bodies, the so-called border monitoring.
- To ensure proper conditions for reception and initial treatment of persons at border crossings (by providing detention facilities where these persons could be given food, and separate offices where they could give statements; by providing first aid to these persons, etc.).
- To develop means and capacities to recognize persons who have the intention to file asylum applications, yet they have not clearly indicated such intention (using the so-called screening interview conducted by the border police, ensuring the presence of interpreter and NGO dealing with provision of legal aid at the border, standardizing form for statements of witnesses, etc.).
- It is necessary to upgrade capacities for accommodation of foreigners and asylum seekers by urgent action to make the Reception Centre for Foreigners and the Centre for Accommodation of Asylum Seekers fully operational, in order to prevent asylum seekers from staying in the open or in inadequate conditions, but also to ensure regular financing of these centres, as well as the necessary equipment and human resources. As an ad hoc measure, it is necessary to ensure minimum accommodation, food and health conditions in the Centre for Accommodation of Asylum Seekers, until it becomes fully operational.
- To create conditions for adequate reception of minor foreign nationals, particularly females, while always respecting the best interest of children and the provisions of the Convention on the Rights of the Child and other international standards, as well as their age, sex and special needs, in order to provide them with care and to trace the other members of their families.
- To ensure and implement proper integration programmes and programmes of protection and rehabilitation of minor asylum seekers – particularly the unaccompanied ones – adjusted to the age and needs of these persons.

- To ensure the presence of independent and competent interpreters during the identification procedure, whenever possible, and during the procedure, particularly when it is certain that the person involved is a minor, unaccompanied by a parent, guardian or other person responsible for them.
- To ensure funds for asylum seekers' access to healthcare, by means of adequate state budget planning and execution.
- To ensure that migrants are informed of their rights in the language they understand – primarily of the possibility to apply for asylum already at the border, and in all stages of the asylum procedure. To develop and distribute a simplified version of the brochure for asylum seekers, which will contain answers only to the most relevant questions and the contact details of competent bodies.
- Having in mind that these persons are transported by official vehicles and taxi-service vehicles, it would be necessary to provide some basic information to taxi drivers regarding the treatment of asylum seekers, which could prevent potential abuse of these persons.

Education and strengthening of financial, technical and human resources

- To provide organized transport of asylum seekers to the Asylum Office, or to the facilities for reception of asylum seekers, and ensure the necessary number of vehicles.
- To fill the positions defined by job schemes of the Asylum Office, Border Police, Centre for Accommodation of Asylum Seekers and Administration for the Care of Refugees.
- To conduct regular trainings of the border police members on the Schengen Agreement and EU standards and practices in the field of asylum and irregular migration.
- To carry out an analysis of the activities that should be taken to establish an asylum information system, concurrent to the EU information system in this field(DublinNet and EURODAC).
- To set up databases which are harmonized with EURODAC and the Dublin Convention.
- To ensure sufficient number of mobile patrols and mobile devices for detection of illegal state border crossings.
- To continue activities to improve technical equipment of all border crossings (installation of technical equipment for a complete surveillance of border crossings, development of applications which will enable profiling of travellers and simpler implementation of risk analysis, provision of equipment for control search of goods and vehicles and recognition of register plates at all border crossings).
- To conduct regular joint education of police officers who are in charge of work with asylum seekers, particularly of border police members, airport officers and representatives of misdemeanour bodies, Asylum Office, State Commission and Administration for the Care of Refugees, in order to improve the knowledge of international humanitarian law and the recognition of the need for asylum protection. It is necessary to organize special trainings on the risks of chain effect of non-refoulement principles in regards of transferring potential bona fide refugees to neighbouring countries.[85]

85 This risk is particularly present in regards to persons coming from the Syrian territory affected by conflict, for which there is an associated risk of persecution in the case of return, and who are coming to Montenegro from the direction of Kosovo, considering that these persons must be given a fair and effective access to asylum procedure by Kosovo authorities once they are handed over to them.

Strengthening regional cooperation

- To improve cooperation with neighbouring countries by means of agreements on borders and intensification of activities to implement the readmission agreements, particularly as concerns the readmission agreement with Kosovo.
- To consider entering into an agreement on blockage of ancillary roads, and signing of a protocol on urgent searches between neighbouring countries.
- To develop joint training programmes with border services of neighbouring countries and to include representatives of these services in joint trainings, in order to establish a joint system of knowledge and values in the field of asylum and prevention of irregular migrations;

Cooperation with civil sector

- To strengthen cooperation with non-governmental organizations dealing with anti-trafficking and migrants' rights protection, regarding exchange of information and experience and strengthening of capacities of NGOs providing free legal assistance.
- To ensure timely access for NGOs at border crossings, and not only after arrival to the Asylum Office or to the facilities for accommodation of asylum seekers. To consider the possibilities for introduction of NGO telephone lines to provide information and advice to asylum seekers in the territory of Montenegro.
- The role of civil society is very important from the aspect of both the support to integration and naturalization of persons granted asylum and the reception of asylum seekers during the asylum procedure. In this context, it is necessary to involve civil society in the design and implementation of campaigns and research activities aimed at providing information to general public about the obligations taken over by Montenegro in respect of asylum system, and to regularly conduct surveys and monitor public opinion in order to prevent social tensions and conflicts which may occur in relation to the stay of migrants originating from significantly different cultures and civilisations.

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