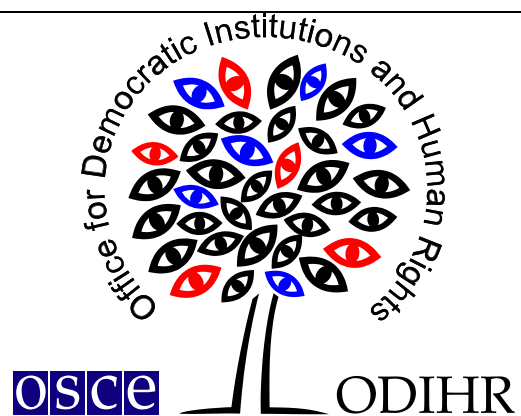


Warsaw, 1 October 2010

Opinion-Nr.: GEN– MNE/166/2010
(AT)

www.legislationonline.org



COMMENTS
ON THE
DRAFT LAW ON THE PROTECTOR OF HUMAN
RIGHTS AND FREEDOMS OF MONTENEGRO

based on an official English translation of the draft Law

TABLE OF CONTENTS

- 1. INTRODUCTION**
- 2. SCOPE OF REVIEW**
- 3. EXECUTIVE SUMMARY**
- 4. ANALYSIS AND RECOMMENDATIONS**
 - 4.1. Relevant International Standards**
 - 4.2. General Comments on the draft Law**
 - 4.2.1 *The Human Rights Protector and Deputies***
 - 4.2.1.1. The Election of the Human Rights Protector*
 - 4.2.1.2. The Deputies of the Human Rights Protector*
 - 4.2.1.3. Immunity*
 - 4.2.1.4. Termination of Office*
 - 4.2.2 *Procedural Issues***
 - 4.2.2.1. Jurisdiction*
 - 4.2.2.2. Confidentiality*
 - 4.2.2.3. Complaints Procedures*
 - 4.2.3. *Other Issues***
 - 4.3. The Human Rights Protector as an Anti-Discrimination Body**
 - 4.4. The Human Rights Protector as a National Preventive Mechanism under the OPCAT**
 - 4.5. Transitional Provisions**

Annex 1: Draft Law on the Protector of Human Rights and Freedoms of Montenegro

Annex 2: Law on the Prohibition of Discrimination (Excerpt)¹

¹ The Excerpt of the Law on the Prohibition of Discrimination was based on a draft of the Law, as the final version of the Law was not available in English when these Comments were issued. Discrepancies in the numbering and contents of the Excerpt may result.

1. INTRODUCTION

1. On 26 August 2010, the OSCE Mission to Montenegro requested the ODIHR to review the draft Law on the Protector of Human Rights and Freedoms of Montenegro (hereinafter “the draft Law”). ODIHR was asked to provide comments regarding the draft Law’s compliance with international legislative standards, bearing in mind the Protector of Human Rights and Freedoms’ additional functions as anti-discrimination body under the recently adopted Law on the Prohibition of Discrimination and as national preventive mechanism under the UN Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “OPCAT”).² These Comments are provided in response to the above request.
2. The draft Law is the product of an inter-ministerial working group led by the Ministry of Human and Minority Rights of Montenegro. This working group also included several representatives of the office of the Human Rights Protector. Draft Amendments to the Law on the Protector of Human Rights and Freedoms were circulated in May 2009 and reviewed by, inter alia, the Council of Europe’s European Commission for Democracy Through Law (hereinafter “the Venice Commission”), the Association for the Prevention of Torture (hereinafter “the APT”) and the University of Bristol’s Centre for the Implementation of Human Rights.

2. SCOPE OF REVIEW

3. The scope of the Comments covers only the above-mentioned draft Law, which was submitted for review, while taking into account relevant provisions of the current Law on the Protector of Human Rights and Freedoms of Montenegro³, as well as of the Law on the Prohibition of Discrimination⁴ and the Constitution of Montenegro⁵. The Comments do not constitute a full and comprehensive review of the question of human rights protection through the Protector of Human Rights and Fundamental Freedoms (hereinafter “the Human Rights Protector” or “the Protector”) in light of all available framework legislation governing the issue in Montenegro. The ensuing recommendations are based on international standards and practices governing National Human Rights Institutions (hereinafter “NHRIs”), as found in the United Nations Principles relating to the status of national institutions

² UN Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.

³ Law on the Protector of Human Rights and Freedoms, adopted in July 2003. The cited provisions of this Law were based on a draft version of the Law, as the final adopted version was not yet available in English when this Opinion was issued. Discrepancies in numbering and contents of the cited provisions may result.

⁴ Law on Prohibition of Discrimination, adopted on 29 July 2010

⁵ The Constitution of Montenegro, adopted on 19 October 2007.

(hereinafter “the Paris Principles”)⁶, as well as international standards on anti-discrimination bodies and national preventive mechanisms under the OPCAT. The Comments also reflect the contents of previous OSCE/ODIHR Comments on the then draft Law on the Prohibition of Discrimination.

4. The Comments are based on an official translation of the draft Law. Nevertheless, errors from translation may result.
5. In view of the above, the OSCE/ODIHR would like to make mention that these Comments are without prejudice to any written or oral recommendations and comments to the draft Law and related legislation that the OSCE/ODIHR may make in the future.

3. EXECUTIVE SUMMARY

6. In order to ensure the compliance of the draft Law with international standards, it is recommended as follows:

3.1 Key Recommendations

- A. To retain Articles 2 and 3 of the current Law on the Protector of Human Rights and Freedoms in the draft Law; [par 21]
- B. To include in the draft Law a provision on election of the Human Rights Protector and an obligation for the President of Montenegro to conduct consultations with various public and non-governmental actors prior to proposing a candidate for Human Rights Protector to the Parliament; [pars 28-29]
- C. To expand the immunity granted to the Protector and his/her deputies to cover prosecution, arrest, detention, civil and criminal lawsuits and to ensure that this immunity also extends to his/her staff; [par 39]
- D. To provide the Human Rights Protector with the additional mandate to monitor and identify patterns of human rights violations, with a view to influencing government policies and practices to enhance human rights protection; [par 46]
- E. To include relevant provisions in the draft Law reflecting the Human Rights Protector’s special competences under the Law on Prohibition of Discrimination, in particular the mandate to review complaints against legal and natural persons, and to initiate court and conciliation proceedings; [pars 73-75]
- F. To review Article 29 of the draft Law in its entirety, in particular with a view to clarifying the mandate and composition of the working body and its relationship to the Human Rights Protector; [par 89]
- G. To provide sufficient funding to ensure that the Human Rights Protector will have sufficient and well-trained staff and facilities to properly exercise his/her functions as a human rights protection mechanism, anti-discrimination body and national preventive mechanism under the OPCAT; [par 94]

⁶ Defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris 7-9 October 1991, adopted by Human Rights Commission Resolution 1992/54, 1992 and General Assembly Resolution 48/134, 1993.

3.2 Additional Recommendations

- H. To clarify Article 1 by specifying that the Human Rights Protector protects individuals from all past, present and future human rights violations and takes proper preventive measures in this respect; [pars 19-20)
- I. To amend Article 3 to clarify that all work and procedures of the Protector will be open and transparent, except where the human rights of individuals or groups require otherwise; [par 22]
- J. To refer in each relevant provision of the draft Law to both masculine and feminine terms or pronouns; [par 23]
- K. To specify in the draft Law that proceedings for selecting and proposing a new Human Rights Protector shall begin six months before the expiry of the current Protector's term of office; [par 30]
- L. To include in the draft Law the term of office of the Protector as laid down in the Constitution and indicate whether he/she may be re-elected for one further term of office; [par 31]
- M. To amend Article 11 so that any person with a university degree and with 15 years of relevant work experience is eligible for the position of Human Rights Protector; [par 32]
- N. To debate the added value of a large number of deputy Protectors and include, following discussions with the Human Rights Protector, a specific number of deputies in Article 8 of the draft Law; [pars 34-35]
- O. To include in the draft Law a provision specifying that even if a new Protector is elected, the deputies shall serve their full term of office; [par 36]
- P. To amend Article 16 as follows:
 - 1. Ensure that it obliges the Protector to designate a Principal Deputy Protector for exceptional circumstances; [par 37] and
 - 2. Clarify that once his/her term of office expires, the Protector shall, if possible, remain in office until a new Human Rights Protector is elected; [par 38]
- Q. To enhance Article 12 so that it specifies that the immunity of the Human Rights Protector, his/her deputies and staff shall also apply after the end of their terms of office/work periods; [par 40]
- R. To clarify Article 17 as follows:
 - 1. Ensure that the termination of office of the Protector in case of mental incapacity shall be based on a medical certificate and court decision; [par 41]
 - 2. Provide the Protector with the chance to give up inconsistent activities and functions following an official warning of the Parliament, instead of the immediate termination of office stipulate in this provision; [par 42] and
 - 3. Include the dismissal from office as a reason for termination of office. [par 44]
- S. To narrow the scope of Article 18 so that dismissal is only possible in cases involving more serious crimes sanctioned by or leading to imprisonment; [par 43]

- T. To rename the title of Chapter III to cover not only the Protector's jurisdiction and powers, but also his/her responsibilities; [par 45]
- U. To delete the requirement of victim's consent for the initiation of proceedings on the Protector's own initiative from the wording of Article 21 par 4 and amend Article 38 par 2 to permit the Protector to investigate anonymous complaints upon his/her own initiative; [pars 48-49]
- V. To enhance Article 13 to ensure that confidential information is kept in a secure place and that all personal information on individuals be kept under the strictest confidence; [par 51]
- W. To review Article 32 and revise it or merge it with Article 13; [par. 54]
- X. To amend Article 21 par 2 so that all individuals, not only citizens, may initiate proceedings before the Protector; [par. 55]
- Y. To amend Article 33 as follows:
 - 1. Expand Article 33 par 4 by including therein the requirement that representatives of complainants shall submit signed authorization letters from the persons whom they are representing; [par 56] and
 - 2. Enhance Article 33 par 6 so that persons deprived of their liberty may seek regular visits of the Protector and communicate with him/her using all possible forms of communication. [par 57]
- Z. To amend Article 34 so that complainants shall only name the respondent authority in their complaints if these are known to them; [par 58]
- AA. To include in Article 40 the requirement that complainants and respondent authorities shall be notified without delay; [par 59]
- BB. To enhance the obligation of authorities to cooperate with the Protector under Articles 41 and 42 by including therein the duty to meet the Protector upon his/her request and without delay; [par 60]
- CC. To review Article 60 and indicate which type of procedure would precede the imposition of fines under this provision, and which body would be competent to impose such fines; [par 62]
- DD. To differentiate in Article 44 between individual complaints and cases indicating a pattern of human rights violations; [par 63]
- EE. To specify the recipients of the Protector's opinions in Article 46 and require all opinions to be published, while taking into account existing confidentiality requirements; [par 65]
- FF. To include the following in Article 50:
 - 1. Information on results of the Protector's interventions and achievements; [par 66]
 - 2. The obligation of the Protector to present the annual report to the Parliament and of the Parliament to discuss it during a special session. [par 67]
- GG. To include in Article 54 the requirement that neither the government nor any budgeting association may change, modify or affect the budget proposed by the Protector; [par 70]
- HH. To include in Chapter III the duties of the Protector related to records and statistics of discrimination cases under the Law on Prohibition of Discrimination; [par 76]

- II. To ensure that the public information and awareness-raising duties of the Protector laid down in the Law on the Prohibition of Discrimination are reflected in the draft Law and consider including duties for all human rights in the draft Law; [par 77]
- JJ. To clarify the nature of the “officer authorized by the Protector” in Article 28 and distinguish between visits in the course of complaints procedures and preventive regular visits intended by the OPCAT; [pars 81-81]
- KK. To include in Article 28 a non-exhaustive exemplary list of places of detention to be visited under the OPCAT and designate the responsible government and executive authorities in this provision; [par 83]
- LL. To include the requirement of conducting a regular dialogue between authorities and the national preventive mechanism in Article 29 par 5, and the requirement to include the report on the Protector’s activities as a national preventive mechanism in a separate section of the annual report in the draft Law; [pars 90-91] and
- MM. To include in Article 63 a provision stating that the Human Rights Protector shall continue to exercise his functions until the expiry of his/her term of office once this draft Law has been adopted. [par 92]

4. ANALYSIS AND RECOMMENDATIONS

4.1 Relevant International Standards

- 7. The Human Rights Protector of Montenegro is responsible for protecting and promoting human rights in Montenegro and thus constitutes a National Human Rights Institution within the meaning of the United Nations Principles relating to the status of national institutions, commonly known as the Paris Principles.⁷ Due to the different nature, mandate and competences of National Human Rights Institutions all over the world, the Paris Principles do not contain specific international standards governing such institutions, but rather the basic necessary elements for a functioning National Human Rights Institution, which may be a Human Rights Protector or Ombudsperson, or a human rights commission. The basic elements of such institutions include ensuring their independence, in particular financial independence, as well as the human rights institution’s involvement in all matters pertaining to human rights. The latter element also extends to individual human rights complaints.
- 8. According to the Law on the Prohibition of Discrimination of Montenegro⁸, the Human Rights Protector shall also, in addition to his/her general competencies, function as an anti-discrimination body. This is reflected in Article 1 of the draft Law, which states that the Protector of Human Rights shall “take [...] measures for protection from discrimination”, as well as in Article 31, which describes the Human Rights Protector as “the institutional mechanism for protection against discrimination”.

⁷ See footnote 5

⁸ See footnote 3

9. The Council of Europe's European Commission against Racism and Intolerance (hereinafter "ECRI") dedicated its General Policy Recommendation No. 2⁹ to the creation of such anti-discrimination bodies. The Appendix to General Policy Recommendation No. 2 specifies that such specialized bodies shall work towards the elimination of various forms of discrimination set out in the preamble and promote equality of opportunity and good relations between persons belonging to all the different groups in society. Furthermore, specialized bodies shall, as far as possible, monitor the content and effect of legislation and executive acts with respect to combating racism, xenophobia, antisemitism and intolerance and, if necessary, make proposals for possible modifications of such legislation. They shall also advise legislative and executive authorities on how to improve regulations and practice in this respect, provide aid and assistance to victims, have recourse to courts, as appropriate and necessary, as well as hear and consider complaints and petitions on specific cases and seek settlements, either through amicable conciliation or, within the limits prescribed by law, through binding and enforceable decisions.
10. In this context, specialized bodies within the meaning of General Policy Recommendation No. 2 shall have the powers to obtain evidence and information. Relevant further competences include, *inter alia*, promoting and contributing to the training of certain key groups, promoting the awareness of the general public to issues of discrimination, and producing and publishing pertinent information and documents.
11. Finally, the composition of specialized bodies shall reflect society at large and its diversity. These bodies shall be independent from the State and it should be ensured that they operate in a way which is clearly politically independent. They shall have access to governments and shall receive sufficient information from governments to enable them to carry out their functions.
12. Equality bodies are also expressly mentioned in the EU's equality directives, namely the Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation¹⁰, the Directive on the principle of equal treatment between men and women in the access to and supply of goods and services¹¹ and the Directive implementing the principle of equal treatment between persons irrespective of racial and ethnic origin.¹² These bodies mainly focus on the promotion of equal treatment, but also on the analysis, monitoring and support of equal treatment,¹³ and should provide independent assistance to

⁹ ECRI General Policy Recommendation No. 2 on Specialised Bodies to Combat Racism, Xenophobia, Antisemitism and Intolerance at National Level, adopted on 13 June 1997

¹⁰ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, Article 20.

¹¹ Council Directive 2004/113/EC of 13 December 2004 on the principle of equal treatment between men and women in the access to and supply of goods and services, Chapter III.

¹² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin, Chapter III.

¹³ While Council Directive 2000/43/EC focuses only on the promotion of equality, the other two directives (2004/113/EC and 2006/54/EC) also include analysis, monitoring and support of equal treatment in the competences of the equality bodies.

alleged victims of discrimination, conduct independent surveys concerning discrimination and public independent reports and recommendations on discrimination issues.

13. In addition to its role as a non-discrimination body, the Human Rights Protector is also responsible under Article 1 of the draft Law to take measures “to prevent torture and other forms of inhuman and degrading treatment and punishment”. This signifies that the Human Rights Protector is also a national preventive mechanism under the OPCAT. According to Part IV of the OPCAT, preventive mechanisms shall prevent torture at a domestic level. Minimum powers granted to national preventive mechanisms under Article 19 of the OPCAT include the regular examination of the treatment of persons deprived of their liberty in any places under state jurisdiction and control where persons are or may be deprived of their liberty, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment. Article 19 of the OPCAT also provides national preventive mechanisms with the power to make recommendations to relevant authorities with the aim of improving treatment of persons deprived of their liberty, and to prevent torture and cruel, inhuman and degrading treatment or punishment, and also to submit proposals and observations concerning existing or draft legislation.
14. Under Article 20 of the OPCAT, States Parties to this Protocol undertake to provide national preventive mechanisms with access to information concerning the number of persons deprived of their liberty and their treatment and conditions of detention, as well as the number of places of detention and their location. State Parties are also obliged to provide access to all places of detention, their installations and facilities, and the opportunity for private interviews with persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information. Further rights granted to national preventive mechanisms include the liberty to choose the places to visit and the persons to interview and the right to have contacts with the OPCAT Subcommittee on Prevention. Article 21 forbids any sanctions against persons or organizations for having communicated information to the national preventive mechanism.
15. The ensuing Comments will be based on certain principles expounded in the Paris Principles, international anti-discrimination instruments and relevant provisions of the OPCAT. Furthermore, they will be grounded on basic rule of law principles on legality, transparency and foreseeability of laws.

4.2. General Comments on the draft Law

16. Overall, the draft Law reflects international standards with regard to national human rights institutions. In particular the financial independence of the Human Rights Protector (Article 5 of the draft Law), the authorities’ obligation to support the Human Rights Protector (Article 43 of the draft Law), the Protector’s accountability towards the public (Article 50 of the draft Law) and the overall procedure for complaints before this body are positive features of the draft Law that strengthen the institution as such.

17. At the same time, certain aspects related to the mandate and responsibilities of the Human Rights Protector and the procedure before him/her could be enhanced or specified more clearly in the draft Law. The following sections will go into further detail in this regard.

4.2.1. The Human Rights Protector and his/her Deputies

18. Article 1 of the draft Law serves as an introduction to the Human Rights Protector. According to this provision, the Human Rights Protector protects human rights and freedoms when these are violated, takes measures to prevent torture and other forms of inhuman or degrading treatment and punishment and measures for the protection from discrimination.
19. Article 1 thus appears to imply that the Human Rights Protector is mainly focused on protecting individuals from human rights violations when they are happening or have already happened. Preventive measures may only be taken in the interests of preventing torture and inhuman or degrading treatment, or protection from discrimination, but not with regard to all potential human rights violations. This differentiation by types of human rights violations appears to run counter to the general concept of the Human Rights Protector, as well as to other provisions of the draft Law. Especially Article 23 of the draft Law, which allows the Human Rights Protector to participate in law making procedures touching on persons' human rights and freedoms, speaks of a preventive role of the Human Rights Protector with regard to all human rights violations. It is thus recommended to clarify Article 1 by specifying that the Human Rights Protector protects individuals from all human rights violations, whether past, present or future and takes proper measures to prevent such violations from happening.
20. Furthermore, Article 1 states that the Human Rights Protector also deals with "general issues of importance to the protection and promotion of human rights" and cooperates with other human rights organizations. This formulation is unclear as it remains difficult to assess which issues are important and which are not. It is recommended to clarify and simplify this part of Article 1 by stating that the Human Rights Protector will take all necessary measures to actively protect and promote all human rights.
21. In addition to Article 1, it is noted that while the current Law on the Protector of Human Rights and Freedoms contains special provisions on the autonomy and independence of the Human Rights Protector (Article 2) and on his/her constitutionality and legality (Article 3), these provisions have been removed from the current draft Law. The principles laid down in these articles form the basis of the Human Rights Protector's work. In particular the independence of this body is vital for its effectiveness and strength as a national human rights institution. It is thus recommended to retain Articles 2 and 3 of the current Law in the draft Law.¹⁴

¹⁴ In this context, see the Comments of the Association for the Prevention of Torture (hereinafter "APT") on the Draft Law on Amendments to the Law on the Protector of Human Rights and Freedoms (2009) and Law on the Protector of Human Rights and Freedoms (2003) of 29 June 2009, p. 1.

22. Article 3 of this draft Law speaks of the transparency of the Human Rights Protector's work, which is ensured through publication of annual and special reports and "in any other manner determined by the Protector". This last part of Article 3 could lead to the impression that beyond the publication of reports, the Human Rights Protector will determine whether to be transparent (and accountable) regarding certain issues or proceedings or not. Given the Human Rights Protector's role as an independent but accountable institution, it is paramount that this office be as transparent as possible in all aspects of its work. The only limitation to complete openness and transparency should be the confidentiality of its work and the human rights and safety of persons requesting the Human Rights Protector's assistance. It is recommended to amend Article 3 to the effect that all work and procedures of the Human Rights Protector shall be transparent and open, except in cases where the human rights of individuals or groups of individuals require otherwise.
23. Also, while Article 6 specifies that all masculine terms used in this law for individuals shall include feminine terms as well, it is noted that this does not reflect a specifically gender-sensitive approach. Given the importance of the Protector and his/her special significance for human rights and equal treatment, it is recommended to refer in each provision to both the masculine and feminine term of a word.

4.2.1.1. Election of the Human Rights Protector

24. Chapter II of the draft Law focuses on the election to and termination of office, including dismissal from office, of the Human Rights Protector and his/her deputies.
25. While the current Law on the Protector of Human Rights and Freedoms includes a provision on the election of the Human Rights Protector (Article 8), this has also been removed from the current draft Law. Instead, Article 7 of the draft Law merely states that the Human Rights Protector is proposed and elected in accordance with the Constitution.
26. The Constitution itself describes the Human Rights Protector under Article 81, while the procedure for electing him/her is found in different articles outlining the responsibilities of the parliament and president. Article 95 par 5 states that the President is responsible for proposing a candidate for Human Rights Protector to the parliament, which has the mandate to appoint and dismiss from duty the Human Rights Protector (Article 82 par 14 of the Constitution). Article 91 par 2 stipulates that the Human Rights Protector is elected by the majority of the total number of members of parliament.
27. In this context, it is noted that Article 8 of the current Law on the Protector of Human Rights and Freedoms outlines the election of the Protector, which takes place upon proposal of the competent working bodies of the Assembly (Parliament). Prior to proposing a candidate, this competent working body is held to consult with scientific and specialized institutions and organs, as well as with representatives of the non-governmental sector dealing with human rights and freedoms.

28. While parts of the current Article 8 could be improved, it is necessary for the procedure for proposing and electing a Human Rights Protector to be included in the Law on the Protector. The Constitution establishes principles on which detailed primary legislation should be based, in this way bringing to life the Constitution. The specific Law on the Human Rights Protector aims at being a more detailed piece of legislation, including all relevant aspects of the work of the Protector, including his/her mandate, election, dismissal and procedure. This is necessary in the interests of the legality and foreseeability of laws – users of the draft Law cannot be expected to research different articles of the Constitution to obtain information on the process of proposing and electing the Human Rights Protector. It is thus recommended to include a provision on electing the Human Rights Protector in the draft Law.
29. Due to the Constitution's nature as a framework and basis for domestic laws, it is also not very specific – that is, the above mentioned provisions of the Constitution do not specify how the President selects the Human Rights Protector candidate that he/she then proposes to the parliament. In this context, it should also be noted that the current practice of consultations with different parts of society in Montenegro is a more pluralistic approach, which, in the interests of a transparent democracy, is preferable to a procedure where the proposal of a candidate is left up to one individual, namely the President.¹⁵ This procedure could be improved by requiring the President to go through a consultative process prior to proposing a candidate for Human Rights Protector. In this context, it is recommended to specify that the President shall conduct consultations with various public and non-governmental organs prior to submitting his/her proposal to the parliament.¹⁶
30. At the same time, it is noted that the draft Law does not specify when procedures for electing a new Human Rights Protector should begin. In order to maintain continuity in the running of the office, it is recommended to specify in the draft Law that the procedure for selecting and proposing a new Human Rights Protector should begin at least six months before the expiry of his/her term of office.
31. Also, while the term of office of the deputies is contained in the draft Law, the term of office of the Human Protector is not. For the sake of completion and clarity of this draft Law, it is recommended to have the draft Law reflect the term of office of the Human Rights Protector (6 years) laid down in Article 81 of the Constitution. The draft Law should also specify whether the Human

¹⁵ In this context, see Opinion No. 540/2009 on [the 2009] draft Amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro of the Council of Europe's European Commission for Democracy through Law (hereinafter "Venice Commission") of 13 October 2009, pars 11-12, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009). In the above paragraphs, the Venice Commission stresses that the Human Rights Protector must be "seen to be independent" and that the perception of the Protector as the "President's candidate" needs to be avoided. See also the APT Comments on the 2009 draft Law and the 2003 Law on the Human Rights Protector cited in footnote 3, p. 2.

¹⁶ In this context, it should be noted that the Sub-Committee on Accreditation of the International Coordination Committee of National Institutions for the Protection and Promotion of Human Rights recommends a transparent, inclusive and pluralistic approach to the selection and appointment procedures of heads of NHRIs and stresses the inclusion of civil society actors in this process. See, instead of others, the Report and Recommendations of the Sub-Committee's session in Geneva of 16-18 November 2009, pars 2.2.1, 3.1.1, 4.3, and Annex II B).

Rights Protector may be re-elected for a further period after the expiration of his/her term of office or not.

32. Article 11 of the draft Law specifies that the Human Rights Protector may be any citizen of Montenegro with a university degree in social sciences and 15 years of experience. Requiring a Human Rights Protector to have a degree in social sciences appears to be very limiting – while it is understandable that someone holding such a high office should have an academic degree, it is unclear why only a social sciences degree will make this person eligible for this position. It is therefore recommended to amend Article 11 so that any person with a university degree may become Human Rights Protector. In this context, it may also be worthwhile to specify that he/she shall have 15 years of relevant years of experience – meaning experience that will make him/her qualified to hold the office of Human Rights Protector.

4.2.1.2. The Deputies of the Human Rights Protector

33. According to Article 8, the Human Rights Protector shall have at least four Deputy Protectors. The Protector proposes the number of deputies to the Parliament, which will then decide on the number of deputies.
34. In this context, both the number of Deputy Protectors and the manner of determining their number give rise to certain concerns. With a staff (technical service) of 16 persons (including the secretary)¹⁷ serving a population of 600-700,000 residents of Montenegro, it is unclear why at least four deputies are needed and whether this may not make the Protector's office quite "top-heavy". Even if there will be a clear delineation of responsibilities between the deputies, it is still very probable that such a large amount of Deputy Protectors could prove burdensome in practice. It is recommended to review the actual competencies and tasks of future deputy protectors and debate the added value of such a large amount of deputies.
35. Moreover, it is presumed that keeping the number of deputies flexible may lead to more flexibility in the budgeting procedure and working procedure of the Protector's office. However, it could also raise certain issues with regard to the independence of this office, since the decision of the number of leading staff of the office is left up to the Parliament – the Human Rights Protector merely has the assurance that the number of deputies will not go below four. Also, specifying the exact number of deputies in the draft Law would enhance clarity and foreseeability of the draft Law. It is thus recommended that the lawmakers decide, in cooperation with the Human Rights Protector, exactly how many deputies will be needed, and include this number in the draft Law.
36. The term of office of deputy protectors is laid down in Article 10 and amounts to six years. In the interests of maintaining the office's institutional memory and of ensuring smooth work flows throughout, it is recommended to include in the draft Law a provision specifying that the deputies of the Human Rights Protector shall remain in office for their full term of six years even if a new

¹⁷ These statistics were found on the website of the Human Rights Protector of Montenegro: http://www.ombudsman.co.me/eng/o_zastitniku.htm.

Human Rights Protector is elected, to ensure that the entire leadership of the office does not change at the same time.

37. Article 16 specifies that in the Protector may designate which deputy may replace him/her in case of absence or impediment to perform office. This raises the question of which deputy should replace the Protector in case the Protector is temporarily, either due to illness or because of an inability to communicate, unable to designate a deputy to replace him/her. It is recommended that the draft Law oblige the Protector to designate a principal deputy who may take over in such unexpected cases.
38. Further, par 2 of Article 16 foresees that in case of termination of office of the Protector, the longest performing Deputy shall perform the office of the Protector until the appointment of a new Protector. In cases where the termination of office is merely due to the expiration of the Protector's term of office, and in order to maintain continuity in the work of the office, it may be preferable to have the Protector continue to run the office until a new Protector is elected (provided he/she is able to do so).¹⁸ Especially in situations where there are delays in appointing a new Protector, this solution would be preferable to a situation where a deputy is obliged to fulfill both his/her own functions and those of the Human Rights Protector for a possibly lengthy period. It is recommended to amend Article 16 accordingly.

4.2.1.3. Immunity

39. Article 12 of the draft Law specifies that the "Protector and Deputy cannot be held responsible for the opinion or recommendation made by the exercise of his office". This appears to restrict the immunity usually accorded to public officials only to opinions and recommendations, but does not appear to cover other actions such as decisions, nor does it cover luggage, correspondence and other means of communication of the Human Rights Protector or deputies. As far as this is possible within the applicable legal framework in Montenegro, it is recommended to expand the immunity of the Human Rights Protector to ensure that he/she and his/her deputies are exempt from prosecution, arrest, detention and civil and criminal lawsuit for activities and/or decisions that are within the scope of responsibilities of the Human Rights Protector. Such extended immunity should be accompanied by provisions specifying under which conditions such immunity may be waived by the parliament (usually in exceptional cases involving serious crimes). The immunity should also cover luggage, correspondence and all other means of communication. Unless such immunity is also part of the regulations of civil servants and state employees, it is further recommended to expand this immunity to staff of the Human Rights Protector's Technical Service (staff) under Article 57 of the draft Law.¹⁹

¹⁸ See the Venice Commission's Opinion on [the 2009] draft Amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro, cited in footnote 13, par 16.

¹⁹ See the Venice Commission's Opinion on [the 2009] draft Amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro, cited in footnote 13, par 29.

40. Moreover, it is noted that Article 12 does not specify how long the Human Rights Protector and his/her deputies shall enjoy immunity. It is not clear whether this immunity only applies to them while they are in office or also once they have completed their term of office. If unresolved, this could lead to a situation where a Human Rights Protector or deputy could be threatened with future lawsuits while in office, which may have negative effects on the independent functioning of the entire Office. It is thus recommended to specify that the immunity of the Human Rights Protector, his/her deputies and staff, should apply even after the expiry of their terms of office or work periods.

4.2.1.4. Termination of office

41. According to Article 17 of the draft Law, the office of Human Rights Protector or deputy shall terminate in case of, *inter alia*, death, expiration of the term of office, resignation, but also if he/she has permanently “lost the ability to hold the office”. This reason for termination of office is quite vague— that is, it is not clear whether this involves cases where the Protector is mentally incapacitated or whether it also includes other cases where he/she is considered unable to continue his/her work. Also, Article 17 does not specify which body may determine whether the Protector is still able to perform his/her functions or not. It is recommended to specify the meaning of this part of Article 17. Should this meaning be that the Human Rights Protector’s term of office will terminate should he/she be considered mentally incapacitated or otherwise mentally unfit to perform his/her tasks, then the finding of his/her incapacity should be based on a medical certificate and a court decision.
42. Another reason for terminating the Protector’s or deputy’s term of office is if he/she holds representative or other public office or exercises professional activity incompatible with that office. With regard to the last-mentioned activity, it may be somewhat harsh to immediately dismiss a Protector of deputy – it is conceivable that the Protector or deputy in question may themselves not be aware of the fact that certain activities are in violation of their mandate. It would be preferable if the law would give the Protector/deputies the chance to give up the inconsistent activity or other function following an official warning from the parliament. In case this warning is disregarded, the parliament would still have every right to establish termination of office under Article 17 par 4 of the draft Law. It is recommended to amend Article 17 accordingly.
43. According to Article 18, the Protector may be dismissed from office by the parliament if he/she is convicted of a criminal offence that makes him/her unworthy of holding the office. The scope of this part of Article 18 is quite wide and may thus also include minor offences that occurred out of negligence. For this reason, it may be useful to narrow the scope of Article 18 par 1 (1) to include only more serious criminal convictions sanctioned by or leading to prison sentences. It is recommended to amend Article 18 par 1 (1) accordingly.
44. Furthermore, for the sake of completion, it is recommended to include dismissal from office as a reason for termination of office under Article 17.

4.2.2. Procedural Issues

4.2.2.1. Jurisdiction

45. Prior to looking at the procedure before the Human Rights Protector itself, it is important to look at the jurisdiction of the Protector. In order to support the public accountability of the Protector in the draft Law and to specify that he/she has the responsibility to act according to his/her jurisdiction, it is recommended to rename the title of Chapter III to cover not only the Protector's jurisdiction and powers, but also his/her responsibilities.
46. In this context, it is noted that the jurisdiction of the Protector is limited to investigating individual complaints, participating in law making processes and in certain court or administrative procedures. In addition to such more reactive tasks in the field of individual human rights complaints, it would be beneficial if the Human Rights Protector would also be held to monitor and identify patterns of human rights violations, with a view to influencing government policies and practices to enhance human rights protection. Article 21 par 4 should be expanded to ensure that the Protector may initiate investigations if he/she obtains information that is not related to an individual complaint, but reflects an alleged pattern of potential human rights violations. It is recommended to enhance the Protector's jurisdiction and responsibilities to this effect.
47. In addition to the general jurisdiction to investigate complaints concerning human rights violations in Article 21 of the draft Law, Article 21 par. 3 stipulates that the Human Rights Protector may investigate violations of human rights and freedoms on his own initiative. This is possible when, based on reliable information, he/she finds out that human rights and freedoms have been violated by an act, action or failure to act of authorities. Paragraph 4 of the same provision states that such action on his/her own initiative requires the consent of the victim or the victim's legal representative.
48. Clearly, it is not desirable for the Human Rights Protector to act on cases on his/her own initiative if the person whose rights were violated opposes such action. In certain cases, victims of human rights violations may fear reprisals for having complained about a violation. However, it may at times be difficult or inappropriate to obtain such consent, e.g. if the individual concerned has changed address or is otherwise difficult to reach, or if he/she, for personal or emotional reasons, refuses to give such consent. In such cases, potentially serious human rights violations could then not be addressed by the Human Rights Protector due to the absence of the affected person's consent. In an attempt to balance the interests of the individual and the interests of the public in having serious human rights violations investigated and dealt with, it is recommended to delete the requirement of prior victim's consent from Article 21 par. 4. To protect the victims of human rights violations in such situations, the Human Rights Protector should be obliged to conceal or suppress the identity of individuals whose rights have been violated (in addition to the general confidentiality obligation imposed by Article 13).
49. If Article 21 par 4 is amended, Article 38 par 2 foreseeing the rejection of a complaint in case of its anonymity should likewise be amended – if reliable information points to the commission of a human rights violation, the Human

Rights Protector should be able to investigate all complaints, also anonymous ones, upon his/her own initiative. The same holds true in cases where information received points to a pattern of potential human rights violations (see par. 46 *supra*).

4.2.2.2. Confidentiality

50. Another issue linked to the procedure before the Human Rights Protector is the issue of confidentiality laid down in Articles 13 and 32 of the draft Law. Article 13 states that confidential and personal information which the Protector and deputies came to during the performance of their office shall be kept. Article 32, on the other hand, states that a person who files a complaint or participates in an investigation led by the Protector shall not be held liable or brought into a less favourable position due to this.
51. With regard to Article 13, it is essential that this provision also specifies that confidential and personal information must be kept in a secure place and that any personal information on an individual submitting a complaint to the office of the Protector shall be kept under strictest confidentiality unless this is waived by the individual. This would coincide with Article 34 par 2, which states that in their application, individuals shall indicate whether they agree to have their name disclosed during procedures. It is recommended to expand Article 13 accordingly.
52. Article 32 is vague in that it excludes liability or disadvantages caused by a procedure before the Human Rights Protector. The purpose of this provision is unclear – possibly it signifies that the Human Rights Protector should maintain confidentiality also with regard to actions of the individual which could cause liability under other legislation (perhaps of a criminal nature). This would, however, exceed the competences of a Human Rights Protector, who, while protecting the human rights of individuals, should not hamper or prevent criminal or other liability proceedings.
53. If, on the other hand, Article 32 intends to prevent negative publicity of individuals who have asked the Human Rights Protector for assistance, then such negative publicity could also be prevented by maintaining the confidentiality of these individuals' personal information, as required by Article 13.
54. As the meaning and added value of Article 32 remain unclear, it is recommended to review this provision and subsequently revise it or merge it with Article 13 of the draft Law.

4.2.2.3. Complaints Procedure

55. Procedures before the Human Rights Protector usually start with the submission of an individual human rights complaint (Article 33 of the draft Law). While Article 33 states that anyone may file a complaint, Article 21 par 2 of the draft Law on investigation of violations of human rights and freedoms provides that investigations before the Protector shall initiate upon complaints of citizens. It is recommended to amend Article 21 par 2 so that all

individuals, not only citizens of Montenegro, may initiate proceedings before the Protector, as laid down in Article 33 of the draft Law.

56. Article 33 par 4 states that an individual may also submit a complaint by proxy, legal representative, representative, as well as through a human rights organization. In order to ensure that these permissible representatives are really acting on behalf of the complainant, it is recommended to expand Article 34 on the complaint with the requirement that representatives shall submit signed authorization letters of the persons whom they are representing before the Human Rights Protector.
57. According to Article 33 par. 6, persons deprived of their liberty shall have the right to file a complaint with the Protector in a sealed envelope. It would greatly strengthen the rights of these persons if they would have the right to seek regular visits of the Protector without constraint.²⁰ These persons' rights would be further strengthened if the possibilities of communication were expanded to include all other means of communication, such as electronic or telephone communication. It is recommended to enhance Article 33 par 6 accordingly.²¹
58. While Article 34 states that complainants shall indicate the name of the authority to whose work it refers, it is noted that in some cases, the complainant may not know which authority is responsible for the alleged human rights violation. It is recommended to specify in Article 34 that the authority shall only be named if it is known to the complainant.
59. Once the Protector has assessed that the complaint meets the requirements for taking action, he/she shall notify the complainant and the head of the defending authority (Article 40 par 1). In order to ensure proper administration on the side of the Human Rights Protector, it is recommended to include in Article 40 the requirement that the notification of both parties shall take place without delay.²²
60. Articles 41 and 42 specify that all authorities are obliged to cooperate with the Human Rights Protector. In addition to providing comments on human rights complaints, access to files, documents and data, the required cooperation should also include a duty to meet with the Human Rights Protector, his deputies or authorized staff upon request and without delay.²³ Such a duty already exists for the President, President of Parliament, members of the government, and mayors. It would help the Human Rights Protector and his office in their work and enhance his/her position if this duty to meet were expanded to all authorities.
61. It is much welcomed that in cases where a public official was the cause of a human rights violation, the Human Rights Protector may submit to the competent authority the initiative to commence disciplinary proceedings

²⁰ See the Venice Commission's Opinion on [the 2009] draft Amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro, cited in footnote 13, par 18.

²¹ Ibid, par 19.

²² See the Venice Commission's Opinion on [the 2009] draft Amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro, cited in footnote 13, par 22.

²³ See the Venice Commission's Opinion on [the 2009] draft Amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro, cited in footnote 13, par 21.

against the official in question, or procedure for dismissal (Article 49 of the draft Law). He/she may also submit a request for the initiation of misdemeanor procedures for violations of human rights or of the Law on Prohibition of Discrimination.

62. In this context, it is worthwhile to review Article 60, which stipulates that fines may also be imposed on responsible officials of public authorities in case the authority in question did not comply with a request of the Protector within a prescribed deadline or if a person fails to appear as witness or expert upon request of the Protector under Article 45. Imposing fines on a responsible person within an authority for a failure to cooperate would appear to be a disproportionate measure if this sanction were not preceded by a proper administrative or disciplinary procedure. Article 60 should also specify which body is competent to impose sanctions - it would be preferable if the competent administrative, disciplinary or court authority would have this competence, following a proper procedure. It is thus recommended to indicate in Article 60 which type of procedure would precede the imposition of fines and which body would be competent to do so.
63. Article 44 provides reasons for which the Protector may suspend the investigation. In this provision, the lawmakers should differentiate between individual complaints and cases indicating that there may be a pattern of human rights violations. In the latter case, cases discontinued should still be analyzed for their possible relevance for the finding and statistical evaluation of such patterns. It is recommended to include this exception in the wording of Article 44.
64. After completion of the investigation procedure, Article 46 provides that the Protector shall give a final opinion on the matter, without however, specifying who or which body shall be the recipient of this opinion (Article 46). Presumably, the opinion will be sent to the complainant and the respondent public authority. At the same time, it would be advisable to also have it sent to the competent government ministry, and in certain cases to the parliament, and any other stakeholders who could have an interest in the case.
65. It is thus recommended to include in Article 46 the recipients of the opinion, as well as the requirement that as far as possible, and without violating the confidentiality requirement under Article 13, such opinions should be public. This is necessary both as a measure of enhancing the office's transparency, and also as a manner of raising awareness among the public of the office and human rights protection in general.

4.2.3. Other Issues

66. According to Article 50 of the draft Law, the Human Rights Protector shall submit the annual work report to the Parliament. This report should, next to statistical evidence of the work of the Protector and recommendations on human rights issues, also include information on the results of interventions of the Protector and achievements in this context. It is recommended to enhance Article 50 accordingly.

67. In order to ensure recognition and debates on the main issues, Article 50 should further specify that the Protector should present the annual report to the parliament and that this presentation should be followed by a parliamentary debate on the main issues of concern included in the report. Article 50 should be amended to include an obligatory parliamentary debate on the annual work report and its main topics.
68. Article 54 deals with the financial resources for the work of the Human Rights Protector. According to the Paris Principles, adequate funding is indispensable for any national human rights institution to ensure complete independence from the Government. Such institutions should not be subject to financial control, as this may also interfere with their independence²⁴.
69. It is welcomed that the financial resources of the Protector are provided in a separate budget allocation and that the Protector shall propose the annual allocation of the budget for his/her work. Also, it is positive that the Human Rights Protector has the right to participate in the parliamentary session at which the budget proposal is discussed.
70. However, it is unclear why the Protector proposes his annual budget allocation to the Government. In this context, it is important to note that any interference in the Institution's budgetary planning through the executive could have inappropriate effects on the independence of the Human Rights Protector and his/her office. To avoid misunderstandings on this very important point, it is recommended to include in Article 54 an addition stating that, neither the government nor any other budgetary association has the right to change or in any way modify or affect the budget proposed by the Human Rights Protector. This may only occur at a later state, following the discussion on the budget allocation before the Parliament.

4.3. The Human Rights Protector as an Anti-Discrimination Body

71. In the Montenegro Law on Prohibition of Discrimination²⁵, Chapter III deals with the competences of the Protector of Human Rights and Freedoms under this law. Article 20 specifies that, in addition to the competences prescribed in a separate law (namely the Law on the Protector of Human Rights and Freedoms), the Protector shall also be competent to provide information on his/her rights and duties and on possible court protection to complainants considering themselves discriminated by natural or legal persons. According to this same provision, the Protector is also competent to conduct conciliation proceedings between the parties with a view to concluding an extra-judicial settlement. Further competences include informing the public and conducting awareness-raising regarding important discrimination issues, research in the field of discrimination, keeping separate records of discrimination cases, and collecting and analyzing statistical data on discrimination cases.
72. According to Article 20 of the Law on Prohibition of Discrimination, persons who consider themselves discriminated against by a public authority, or by a legal or natural person, may complain about this to the Human Rights

²⁴ Paris Principles, Composition and guarantees of independence and pluralism, par. 2

²⁵ See footnote 3

Protector. Such complaints may also be submitted to the Protector by organizations or individuals dealing with the protection of human rights, upon consent of the alleged victim of discrimination. Cases of discrimination and action taken in this regard shall be reported to the Parliament, complete with recommendations and proposals for measures to eliminate discrimination (Article 22). Reporting takes place either in a separate section of the annual report or in a separate report to the Parliament, if the Protector evaluates that this is warranted by “exceptionally important reasons”.

73. While Article 1 of the draft Law provides that the Human Rights Protector shall take measures for the protection from discrimination, the draft Law does not take into account the additional competences provided to the Protector by the Law on Prohibition of Discrimination,²⁶ in particular the Human Rights Protector’s special competence to review discrimination complaints against not only public authorities, but also against private bodies, or persons. This special competence needs to be mentioned in the draft Law, and special provisions on this competence’s practical results should be included in the draft Law. It is recommended to include relevant provisions in the draft Law.
74. One way to take this additional competence into account in the draft Law could be to include therein a separate section specifying that in cases qualified by the Protector as discrimination cases, the Protector may investigate complaints against public authorities, legal and natural persons. This section should specify that in such cases, the respondent legal or natural persons should have the same obligation to cooperate as public authorities do under Articles 41 and 42. Opinions of the Protector with recommendations should be submitted in the way proposed under pars 64-65 *supra*. In discrimination cases, respondent legal or natural persons could also submit a report on actions taken to execute the Protector’s recommendations, as required under Article 47 of the draft Law. In case of failure to do so, the Protector should be permitted to initiate court proceedings under Article 23 of the Law on Prohibition of Discrimination, upon consent of the victim of discrimination.
75. The conciliation proceedings leading to extra-judicial settlements mentioned in Article 20 par 2 of the Law on Prohibition of Discrimination should also be included in Chapter III of the draft Law. In order to enhance the efficiency of the Protector, it may be worthwhile to consider adding the power to conduct conciliation proceedings to the general competences of the Protector regarding all cases, not only cases involving discrimination complaints. It is recommended to include such conciliation proceedings in Chapter III of the draft Law, at least for discrimination cases, but ideally for all cases.
76. The additional duties related to records on discrimination cases, as well as the collection and analysis of statistics regarding such cases, should also be

²⁶ This was already noted in previous OSCE/ODIHR comments on draft anti-discrimination legislation in Montenegro. See OSCE/ODIHR Comments on the draft Anti-Discrimination Law in Montenegro, no. NDISCR– MNG /135/2009 (TND), of 9 July 2009, par 35, as well as OSCE/ODIHR Comments on the draft Law on Prohibition of Discrimination in Montenegro, no. NDISCR– MNG/150/2010 (TND), of 27 January 2010, par 40. All OSCE/ODIHR comments and opinions may be found on the website www.legislationline.org.

included in the Chapter III of the draft Law, to ensure that all competences of the Human Rights Protector are contained in one law. In case these additional competences are not mentioned specifically in the draft Law, the draft Law should at least contain specific references to additional competences of the Human Rights Protector laid down in the Law on Prohibition of Discrimination.

77. Furthermore, the public information and awareness-raising duties of the Protector with regard to discrimination issues should also be reflected in the draft Law, which focuses more on complaints procedures and legal initiatives than on awareness-raising activities. Here again, it may be worthwhile to consider similar awareness-raising duties for all human rights issues, not only discrimination. It is recommended to include these points into the draft Law.

4.4. The Human Rights Protector as a National Preventive Mechanism under the OPCAT

78. The draft Law contains special powers for the Human Rights Protector to help him/her implement his/her duties under the OPCAT. While Article 28 focuses on the Protector's authorization to monitor detention facilities and visit and talk to persons deprived of their liberty, Article 29 of the draft Law focuses on the prevention of torture, and in this context mainly on a working body established by the Human Rights Protector to help him/her understand the situation of persons deprived of their liberty and other persons with limited movement.
79. It is important to reiterate here that the aim of the OPCAT is to establish national preventive mechanisms that carry out a system of regular visits to all places where persons are or may be deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.²⁷
80. Based on Article 28, the Protector, his deputies or an officer authorized by the Protector have the right to monitor facilities where persons are deprived of their liberty, as well as visit such persons without prior notification or approval, and talk to them in the absence of officials or other persons.
81. First of all, it is important to clarify in Article 28 who the "officer authorized by the Protector" would be. Since the Protector is the national preventive mechanism, any authorized officer should be part of the Protector's office (Technical Service). Further, Article 28 states that the Protector, deputies or authorized person may, without prior notification, "undertake a checkout of all facilities in prisons and other places where persons deprived of their liberty are held, or may be held". The above persons may also, without prior notification and approval, visit persons deprived of their liberty and verify the respect of their rights, and have the right to talk to persons deprived of their liberty, in person or with an interpreter, as well as to other persons who he/she believes may provide significant information, without the presence of an official or other person. It is recommended to clarify this in Article 28.

²⁷ See Article 1 of the OPCAT, fully cited in footnote 1.

82. The above rights do not completely reflect the powers granted to the national preventive mechanism by the OPCAT, since the regularity of the visits “system of regular visits”) intended by Article 1 of the OPCAT is not mentioned in Article 28.²⁸ Also, Article 28 should distinguish between visits to persons deprived of their liberty in the course of the investigation of complaints and the preventive, general and regular visits intended by the OPCAT. This distinction is vital with regard to the Human Rights Protector’s role under the OPCAT, since this role does not focus so much on the individual situation of specific individuals deprived of their liberty. Instead, it focuses on the systemic and permanent prevention of torture and inhuman treatment in places where persons are deprived of their liberty through constant monitoring and dialogue with competent authorities. It is recommended to introduce this distinction into the wording of Article 28.
83. Additionally, it would be beneficial if Article 28 would provide a non-exhaustive list of examples of places where persons are or may be deprived of their liberty (places of detention according to Article 4 of the OPCAT²⁹), to stress that not only prisons or detention centres are covered by the OPCAT, but all places where people are temporarily or permanently deprived of their liberty, including, for instance, hospitals or psychiatric institutes, or indeed airports, or border terminals. It would also be helpful to designate the responsible government or executive bodies that are obliged to cooperate with the Human Rights Protector in the manner intended by Article 20 of the OPCAT. For the sake of clarity, it is recommended to expand Article 28 to cover these issues as well.
84. Article 29 par 1 of the draft Law stresses the Protector’s role as an institutional mechanism for the prevention of torture and other forms of inhuman treatment and punishment. Here, it is recommended to include the proper terminology from the OPCAT, namely “inhuman or degrading treatment or punishment”.
85. Article 29 also foresees the establishment of a working body by the Protector, made up of experts in medicine, social welfare, human rights and other related areas, which shall assist the Protector in his tasks under the OPCAT. Along with the representatives of the Protector, members of this working body shall occasionally or regularly visit places of detention, based on the decision of the authority or its initiative, or with its consent or approval, check the respect of the rights of persons deprived of their liberty, and prepare a report on that. Based on these reports, the Protector shall give opinions, suggestions and recommendations. The working method of the working body shall be determined in the procedure of the Protector.
86. The wording of Article 29 does not clarify the nature or exact mandate of the working body established hereunder or its relationship to the Protector. The aim of the working body to “help the Protector understand the situation of persons deprived of their liberty” also appears to fall short of this body’s

²⁸ See the Review of the draft Law on Amendments to the Law on the Protector of Human Rights of May 2009 by the University of Bristol’s Centre for the Implementation of Human Rights, par 6.

²⁹ According to Article 4 of the OPCAT, this shall cover “any place under [a state’s] jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention)”.

potential. In order to make proper use of the cross-cutting and interdisciplinary experience in the working body (also including, e.g., medical and psychological practitioners, or non-governmental organizations with experience in monitoring prison and detention facilities), this group of persons should provide expertise to serve the diverse range of places of detention visited by the Protector. Medical or psychological practitioners will thus be able to help the Protector assess whether torture has taken place, even more specialized practitioners would be needed for psychiatric wards or places where the victims could be children.

87. The process for selecting members of the working body is also not clear, nor is its composition. Article 29 does not specify whether this body may include state representatives or non-governmental organizations, or whether there will be gender and proportionate ethnic balance within this group, as required by Article 18 par 2 of the OPCAT for experts of the national preventive mechanism.³⁰ It would be advisable to not include state representatives in the working body, since this may jeopardize the perceived independence of the Protector (and thus of the experts whom he/she liaises with) required by Article 18 of the OPCAT. Practical issues such as technical and logistical support for the working body, as well as remuneration for its members are paramount to its survival and effectiveness and need to be discussed before the working body is constituted.
88. Further, the members of the working group should be permitted the same access to facilities as the Protector, his deputies and authorized officers – the working group will not be able to fully assist the Protector in his/her tasks if its members' right of access depends on the consent or approval of public authorities. As indicated in Article 29 par 3, members of the working group shall visit places of detention together with representatives of the Human Rights Protector. The Protector's reports should then be based on the impressions of both his/her staff and members of the working body.
89. It is recommended to review Article 29 in its entirety and clarify such issues as the mandate and composition of this body, as well as its relationship to the Protector. Selection procedures for its members and the obligation to provide appropriate support and funding should also be included in this provision of the draft Law.
90. Article 29 par 5 requires authorities, organizations or institutions to take actions and measures in accordance with the proposals and recommendations of the Protector, without delay and within the deadline provided. However, it does not make mention of the dialogue between authorities and the national preventive mechanism on proper implementation measures foreseen in Article 22 of the OPCAT.³¹ It is recommended to amend Article 29 par 5 to include such dialogue, to ensure that this provision corresponds to the requirements of the OPCAT.

³⁰ See also the APT Comments on the 2009 draft Law and the 2003 Law on the Human Rights Protector cited in footnote 12, p. 7, where similar concerns were raised.

³¹ Ibid., p. 7. See also the University of Bristol's Review of the 2009 draft Law, cited fully in footnote 25, par 6.

91. Finally, also to bring the relevant provisions of the draft Law in line with the requirements of the OPCAT, it is recommended to include in the draft Law the requirement to report on the Protector's activities as a national preventive mechanism in a separate section of the annual report under Article 50 of the draft Law.³²

4.5. Transitional Provisions

92. Article 63 of the draft Law stipulates that the Deputy elected before the entry into force of the Law, shall continue to exercise his/her duties until the expiry of his/her term of office. It is presumed that this applies to all existing deputies. At the same time, it is noted that the Human Rights Protector is not mentioned in this provision. Terminating the Human Rights Protector's term of office due to the enactment of new legislation would severely interrupt the work of the Human Rights Protector's office at a time when the implementation of new legislation may already lead to delays in this office's work. In order to ensure the proper functioning of the Human Rights Protector and his/her office, it is recommended to include in Article 63 a provision stating that not only the deputies, but also the Human Rights Protector, shall continue to exercise his/her functions until the termination of his/her term of office.
93. Finally, it should be stressed that in particular due to the Human Rights Protector's additional competences as anti-discrimination body and national preventive mechanism of the OPCAT, sufficient funds should be allocated to ensure that the Technical Service will have the capacity to deal with these additional functions. These funds should also include additional staff, as well as appropriate facilities and adequate training for such staff.
94. In this context, it should be noted that the issue of sufficient funding cannot be stressed enough. The international obligations and commitments of Montenegro cannot be implemented merely by changing the law – they will also need to be implemented in a practical sense as well. Adding to the competences of the Human Rights Protector without providing additional staff, facilities and training would prevent a proper implementation of the law. It is strongly recommended to avoid this by allocating the proper funds to its realization.

[END OF TEXT]

³² See the APT Comments on the 2009 draft Law and the 2003 Law on the Human Rights Protector cited in footnote 12, p. 8, citing a recent recommendation to this effect of the Chair of the OPCAT's Subcommittee on Prevention.

Annex 1:



**GOVERNMENT OF MONTENEGRO
Ministry of Human and
Minority Rights**

Proposal

LAW

**ON THE PROTECTOR OF HUMAN RIGHTS AND
FREEDOMS OF MONTENEGRO**

Podgorica, July 2010

I GENERAL PROVISIONS

The Protector of Human Rights and Freedoms

Article 1

The Protector of Human Rights and Freedoms of Montenegro (hereinafter referred to as: the Protector) shall take measures to protect human rights and freedoms guaranteed by the Constitution, laws, ratified international human rights treaties and generally accepted rules of international law when these are violated by the act, action or failure to act of the state authorities, the state government authorities, the authorities of local self-government and local government, public services and other holders of public power (hereinafter referred to as: authorities), as well as measures to prevent torture and other forms of inhuman or degrading treatment and punishment and measures for protection from discrimination.

Protector also deals with general issues of importance to the protection and promotion of human rights and cooperates with organizations and institutions dealing with human rights and freedoms.

The Protector has no powers concerning the work of courts, except in cases defined by this Law.

Accessibility

Article 2

The Protector can be addressed by anyone who believes that his rights and freedoms have been violated by the act, action or failure to act of the authority.

The Protector shall also act on his own initiative.

The procedures before the Protector shall be free of charge.

Transparency

Article 3

The work of the Protector is public, unless this Law provides otherwise.

Transparency of the work of the Protector is ensured through submission and publication of annual and special reports and in any other manner determined by the Protector.

Seat

Article 4

The seat of the Protector shall be in Podgorica.

The Protector may organise the Days of the Protector outside the seat.

Resources and conditions for the work

Article 5

The resources and conditions for the work of the Protector shall be provided by the state in the amount and extent necessary for the effective and efficient exercise of his functions.

The use of gender-sensitive language

Article 6

Terms used in this law for individuals in masculine include the same terms in feminine.

II ELECTION, TERMINATION OF OFFICE AND DISMISSAL

Election

Article 7

The Protector shall be proposed and elected in accordance with the Constitution.

Deputy Protector

Article 8

The Protector shall have at least four Deputy Protectors (hereinafter referred to as: the Deputy).

The decision on the number of Deputies shall be delivered by the Parliament of Montenegro (hereinafter referred to as: the Parliament), on the proposal of the Protector.

The Deputy performs duties within the competence of the Protector in accordance with the internal arrangement of duties that provides specialization especially for the protection of the rights of persons deprived of their liberty, protection of the rights of minorities and other minority ethnic communities, protection of child rights, protection of the rights of persons with disabilities, equality of men and women and the protection from discrimination.

Election of Deputies

Article 9

The Deputies shall be appointed by the Parliament on the proposal of the Protector, by the majority vote out of the total number of the Members of Parliament.

When proposing candidates for the Deputy, the Protector shall have the duty to take care of proportional representation of the members of minorities and other minority ethnic communities and balanced representation of men and women.

Term of office of Deputies

Article 10

The Deputy shall be elected for a period of six years and may be re-elected after the expiration of the term of office.

Eligibility

Article 11

As the Protector may be elected a person who is a citizen of Montenegro, with university degree in social science and at least 15 years of experience, with high moral and professional authority and notable experience in the field of human rights and freedoms.

As the Deputy Protector may be elected a person who is a citizen of Montenegro, with university degree in social science and at least 10 years of experience, with high moral and professional authority and notable experience in the field of human rights and freedoms.

Immunity

Article 12

The Protector and the Deputy cannot be held responsible for the opinion or recommendation made by the exercise of their office.

Confidentiality

Article 13

The Protector and the Deputy shall be obliged to keep the confidential and personal information which they came to during the performance of their office, in accordance with the law.

The obligation referred to in paragraph 1 above shall remain in force even after termination of office or dismissal.

Incompatibility of office

Article 14

The Protector and the Deputy may not hold representative and other public office, nor may perform other professional activity.

The Protector and the Deputy may not be members or associates of political organizations, nor can take part in political activities.

Limitations referred to in paragraph 1 of this Article shall not apply to scientific, educational and artistic activities, as well as the activities protected with copyright.

Oath

Article 15

Before taking office, the Protector and the Deputy shall take an oath that reads: "I swear to perform my duty in accordance with the Constitution and law, protect human rights and freedoms and abide by the principles of justice and fairness in exercise of my duties."

The Protector shall take the oath before the Parliament, while the Deputy shall take the oath before the President of the Parliament.

Replacement of the Protector

Article 16

In the case of absence or impediment to perform office, the Protector shall be replaced by the Deputy designated by him.

In the event of termination of office of the Protector, until the appointment of a new one, the office of the Protector shall be performed by the longest performing Deputy on this function.

Termination of office

Article 17

The office of Protector or Deputy shall terminate for any of the reasons below:

- 1) death,
- 2) expiration of the term of office,
- 3) resignation,
- 4) age retirement conditions have been met
- 5) if permanently loses the ability to hold the office,
- 6) if becomes a member or associate of political organization,
- 7) loss of citizenship,

8) if holds representative and any other public office, or exercises professional activity incompatible with that office.

When a reason for the termination of office occurs, the competent working body of the Parliament shall inform the Parliament about it.

When a reason for the termination of office of the Deputy occurs, the Protector shall inform the Parliament about it.

The Parliament, with its act, shall establish termination of office of the Protector and the Deputy and about the termination of office of the Protector shall notify the President of Montenegro.

Dismissal of the Protector

Article 18

The Protector shall be dismissed from office if:

- 1) is convicted of a criminal offence that makes him unworthy of holding the office;
- 2) he holds his office in incompetent and negligent manner.

The procedure for dismissal of the Protector shall be initiated in the Parliament by one third of the Members of Parliament, whereas the decision on dismissal shall be passed by a majority vote of all Members of Parliament.

Preliminary procedure for establishing the incompetent and negligent manner of holding the office of the Protector shall be conducted by the competent working body of the Parliament, which shall give to the Protector the opportunity to comment.

Upon the completion of the preliminary procedure, the competent working body of the Parliament shall submit to the Parliament a substantiated proposal of the decision on the initiative with the comments of the Protector.

To the Protector shall be offered an opportunity to comment on the proposal referred to in paragraph 4 of this article at the session of the Parliament.

Dismissal of the Deputy

Article 19

The Deputy shall be dismissed from office for the same reasons prescribed for the dismissal of the Protector.

The Deputy shall be dismissed upon submission of a substantiated proposal of the Protector, by a majority vote of all Members of Parliament.

Before deciding on the proposal referred to in paragraph 2 of this Article, the Parliament shall allow the Deputy to comment on the proposal.

The decision on dismissal

Article 20

The Protector or the Deputy shall be dismissed from office as of the day the decision on the dismissal is passed.

III JURISDICTION AND POWERS

Investigation of violation of human rights and freedoms

Article 21

The Protector shall investigate violations of human rights and freedoms when they are committed by the act, action or failure to act of the authorities and take activities for their remedy in accordance with this Law.

The procedure of investigation of violations of human rights and freedoms the Protector shall initiate upon the complaints of citizens or on his own initiative.

Protector shall investigate violations of human rights and freedom on his own initiative when based on reliable information finds out that human rights and freedoms are violated by the act, action or failure to act of the authorities.

To act on his own initiative requires the consent of the victim, and if the victim is a minor or a person who is deprived of business capacity, consent is obtained from his legal representative.

Special authorisation for court procedures

Article 22

The Protector is authorized to act on complaints relating to court procedures in progress only in the case of prolonged procedure, abuse of procedural authorisations or failure to execute court decisions.

Participation in law making process

Article 23

The Protector may give the initiative for the delivery of laws or amendment of laws, other regulations and general laws, especially for the purpose of harmonisation with internationally recognized standards in area of human rights and freedoms.

Subjects delivering regulations and acts referred to in paragraph 1 of this Article, are obliged to comment the initiative of the Protector within a deadline determined by the Protector.

The Protector shall give opinions on draft law or law proposal, other regulation or general act, if considers it necessary for the protection and promotion of human rights and freedoms.

Initiating the Constitutional Court procedure

Article 24

The Protector may initiate procedure before the Constitutional Court of Montenegro to review the constitutionality of laws or the constitutionality and legality of other regulations and general acts relating to human rights and freedoms.

Opinion during the procedure

Article 25

The Protector can provide an opinion on the protection and promotion of human rights and freedoms at the request of the authority that decides on these rights, regardless of the type or level of the procedure in progress before this body.

Non-competency of the Protector

Article 26

Protector has no powers in relation to the work of the Parliament of Montenegro and the President of Montenegro.

The Protector is not authorized to change, suspend or annul the acts of the authorities, to represent parties in the dispute, nor to lodge legal remedies on their behalf.

Duty to Meet the Protector

Article 27

The President of Montenegro, the President of the Parliament, the President and members of the Government of Montenegro, Municipal Mayor, the Mayor of the Capital City and the Mayor of the Old Capital, shall receive the Protector on his request, without delay and not later than five days from the request.

IV SPECIAL POWERS OF THE PROTECTOR

Authorization for the protection of persons deprived of their liberty

Article 28

The Protector, the Deputy as well as the officer authorized by the Protector has the right to:

- without prior notification, undertake a checkout of all facilities in prisons and other places where persons deprived of their liberty are held, or may be held;
- without prior notification and approval, visit persons deprived of their liberty and verify the respect of their rights;
- without presence of official or other person, talk to persons deprived of their liberty, in person or with an interpreter, as well as to other person for who he believes that may provide significant information.

Prevention of torture

Article 29

The Protector is the institutional mechanism for prevention of torture and other forms of inhuman treatment and punishment.

In order to take measures referred to in paragraph 1 of this Article in accordance with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Protector shall constitute working body formed from among experts in medicine, social welfare, protection of human rights and freedoms and other related areas of importance for the understanding of the situation of persons deprived of their liberty and other persons with limited movement.

Members of the working body referred to in paragraph 2 of this Article, along with representatives of the Protector, shall on occasional or regular basis perform visit to the places where persons deprived of their liberty and other persons with limited movement are held, based on the decision of the authority or its initiative, or with its consent or approval, check respect of their rights and make a report about that.

On the basis of reports referred to in paragraph 3 of this Article, the Protector shall give opinions, suggestions and recommendations.

The authority, organization or institution is obliged to, without delay, within provided deadline take actions and measures in accordance with the proposals and recommendations of the Protector.

Method of constitution and work of the working body referred to in paragraph 2 of this Article and other issues of relevance to the work of this body shall be regulated by the Rules of Procedure of the Protector.

Cooperation with the Subcommittee

Article 30

The Protector shall cooperate directly with the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Protection from discrimination

Article 31

The Protector is the institutional mechanism for protection against discrimination.

The Protector shall act and take measures for protection from discrimination, in accordance with this Law and special Law that regulates the prohibition of discrimination.

V PROCEDURE

Confidentiality

Article 32

A person, who files a complaint or participates in any way in the investigation undertaken by the Protector, may not be held liable nor, on this basis, brought into a less favorable position.

Filing a complaint

Article 33

Anyone who believes that by the act, action or failure to act of the authorities his human rights and freedoms are violated, may address the Protector with a complaint.

If in question is a violation of the rights of the child, the complaint referred to in paragraph 1 of this Article may be filed on behalf of the child by his parent or guardian or legal representative.

If the right of the child is violated by a person referred to in paragraph 2 of this Article, the complaint may be filed by the organization or authority dealing with the protection of child rights.

The person referred to in paragraph 1 of this Article may address the Protector by proxy, legal representative, representative, as well as by organization dealing with human rights.

A complaint can also be filed orally on the record in the office of the Protector.

A person deprived of liberty shall have the right to file a complaint with the Protector in a sealed envelope.

The administration of the authority, organization and institution in which resides a person deprived of liberty is obliged to immediately forward to the Protector the unopened and unread complaints and other documents belonging to that person.

Complaint

Article 34

The complaint shall contain the title of the authority to whose work it refers to, the description of the violation of human rights and freedoms, the facts and evidence to support the complaint, information about the legal remedies used so far, name and address of the complainant as well as an indication of whether the applicant agrees that his name can be disclosed during the procedure.

Amending the complaint

Article 35

If the complaint does not contain all necessary information or is incomprehensive, the Protector may require the complainant to amend it within a specified period of time.

Deadline for filing the complaint

Article 36

The complaint shall be filed within six months from the day of cognition about the violation of human rights and freedoms, or within one year from the occurred violation.

Exceptionally, the Protector may act after the expiration of the deadline set forth in paragraph 1 of this Article, if he assesses that the importance of the case requires that.

Exhaustion of legal remedies

Article 37

The Protector may, in the process of investigation of the complaint, refer the complainant to exhaust other legal remedies to remedy the violation he is indicating, if it considers that the violation can be remedied only with those remedies or the remedy of the violation would be more efficient.

Decision not to act upon the complaint

Article 38

The Protector shall not act upon the complaint if:

- 1) is not competent for taking the action;
- 2) the complaint is anonymous;
- 3) it is submitted after the expiration of the prescribed deadline, except for cases referred to in Article 36 paragraph 2 of the present Law;
- 4) it does not contain the necessary information, and if the complainant fails to amend it within the prescribed deadline;
- 5) if the complainant withdraws the complaint before starting the investigation procedure;
- 6) if the complainant fails to act in accordance with Article 37 of this Law;
- 7) the complaint is re-filed, but does not contain new evidence;
- 8) if there is an obvious abuse of the right to file the complaint.

Notification

Article 39

The Protector shall notify the complainant as to the reasons for not taking the action upon the complaint and shall advise him about the possibility of possible achievement of the protection of his rights before the other authority.

Comments on complaint

Article 40

When the Protector assesses that the complaint meets the requirements for taking the action, it shall notify the complainant and the head or the chief of the authority on which the act, action or failure to act the complaint refers to.

In the notification to the head or the chief of the authority, the Protector shall stipulate the content of the complaint.

The head or the chief of the authority is obliged to comment the allegations of the complainant within a deadline set forth by the Protector, which cannot be shorter than eight days.

If the Protector assesses that the comments of the person referred to in paragraph 3 of this Article does not contain all the necessary information, may request additional data, information and copies of documents.

Other duties of the authority

Article 41

The authority is obliged to make available to the Protector on his request, all data and information within its jurisdiction, regardless of the level of confidentiality and to allow free access to all premises.

The authority is obliged to allow to the Protector on his request, direct access to official files, documents, data, and to submit copies of requested files and documents, in accordance with the regulations governing the confidentiality and protection of personal data and rules on handling official files and documents.

Failure to act on the Protector's request

Article 42

Should the authority fails to comply with the request of the Protector within the specified deadline, it shall, without delay, inform the Protector of the reasons for failing to act upon the request.

Failure to act upon the request of the Protector shall be considered an obstruction of his work, of which the Protector may inform the immediate superior authority, the Parliament or the public.

Mandatory cooperation

Article 43

All authorities are obliged to provide the Protector with adequate assistance, upon his request.

Suspension of investigation

Article 44

The Protector shall not continue with the investigation of a complaint if

- 1) finds that the court procedure was initiated after the complaint had been filed with the Protector;
- 2) the complainant does not cooperate in the procedure;
- 3) the complainant withdraws the complaint;
- 4) the authority remedies the committed violation in the meantime;
- 5) after filing the complaint the complainant dies, unless the heirs request the procedure to continue.

Experts and witnesses

Article 45

For the purpose of investigation, the Protector may call any person possessing appropriate knowledge or information about allegations of the complaint to appear as a witness, or engage an expert or a person possessing adequate knowledge.

The persons referred to in paragraph 1 of this Article are obliged to respond to a request.

The persons referred to in paragraph 1 of this Article shall have the right to remuneration or reimbursement of expenses, in accordance with the regulations governing the award and payment of costs in court procedures, which are paid from the budget of the Protector.

Final Opinion

Article 46

After the completion of the investigation procedure of the complaint or on its own initiative, the Protector shall give the final opinion.

The final opinion shall contain a finding on whether, how and to what extent a violation of human rights and freedoms occurred.

When the Protector finds that violation of human rights and freedoms occurred, the final opinion shall contain a recommendation as to what needs to be done in order to remedy that violation, as well as the deadline for authority to take action.

Acting upon recommendation

Article 47

The authority on whose work the recommendation refers is obliged to submit to the Protector, within the deadline the later stipulates, a report on actions taken for execution of the recommendations given in the final opinion.

If the authority fails to comply with the recommendation, the Protector may address the immediate higher authority, the public or submit a special report about that.

Notification on completion of the procedure

Article 48

Protector shall notify the complainant on the completion of the procedure.

Procedure for determination of liability

Article 49

The Protector may submit to the competent authority the initiative to commence a disciplinary procedure or to commence a procedure for dismissal against the person whose work or failure act resulted in violation of human rights and freedom.

The Protector may submit a request for commencement of misdemeanour procedure to the competent authority for the conduct of misdemeanour procedure, for violations prescribed in this Law and the Law on the Prohibition of Discrimination.

VI REPORTS OF THE PROTECTOR

Annual work report

Article 50

The Protector shall submit the annual work report to the Parliament.

The annual work report shall include in particular: a general statistical review of cases in which he acted, the statistical review by the areas of work, evaluation of the state of human rights and freedoms in Montenegro, recommendations and measures proposed by the Protector for improvement of the human rights and elimination of perceived failures.

The annual work report for the previous year shall be submitted not later than 31 March of the current year.

Upon request of the Parliament, the Government of Montenegro (hereinafter referred to as: the Government) is obliged to give its statement about the annual work report of the Protector.

The annual report shall be accessible to the public.

Special Report

Article 51

The Protector may submit to the Parliament a special report, if assesses that exceptionally important reasons require such action.

The special report referred to in paragraph 1 of this Article shall be accessible to the public.

VII RIGHTS OF THE PROTECTOR

Salary

Article 52

The Protector shall be entitled to salary, function allowances and other income in the amount determined for the President of the Constitutional Court of Montenegro.

The Deputy shall be entitled to salary, office allowances and other income in the amount determined for the judge of the Constitutional Court of Montenegro.

Other Rights

Article 53

The Protector and the Deputy, after the cessation of the function, enjoy other rights in accordance with the regulations where these issues are regulated for the holders of judicial and constitutional-judicial functions.

VIII FINANCING OF THE PROTECTOR

Financial Resources for the Work of the Protector

Article 54

The financial resources for the work of the Protector shall be provided in a separate allocation of the Budget of Montenegro.

The Protector shall propose to the Government the annual allocation of the budget for the work of the Protector.

Participation of the Protector in the work of the Parliament

Article 55

The Protector has the right to participate in the work of the Parliament session where the budget proposal is discussed.

IX TECHNICAL SERVICE

Setting up the Technical Service

Article 56

To perform expert and administrative tasks, the Protector shall establish the Technical Service, which work is managed by the Secretary General.

The organization, tasks, and the manner of working of the Technical Service of the Protector shall be regulated by the act of the Protector, to which the competent working body of the Parliament shall give the preliminary opinion.

By the act referred to in paragraph 2 of this Article Protector may create departments for specific areas of human rights and freedoms.

Other rights and obligations

Article 57

Employees are obliged to, during the employment and after the cessation of the employment in the institution, keep confidential and personal data they have found out during the performance of their duties.

The rights, duties and responsibilities of the Secretary General, advisors and other employees, which are not regulated by this Law, shall be regulated in accordance with regulations on civil servants and state employees.

X ACTS OF THE PROTECTOR

Rules of procedure

Article 58

The Protector shall deliver the Rules of Procedure regulating in details the manner of work and procedure.

The Rules of Procedure shall be published in “Official Gazette of Montenegro”.

Official identity card

Article 59

The Protector, Deputies and advisors of the Protector selected by the Protector shall have the official identity card, which issuing, form and content shall be determined by the Rules of Procedure of the Protector.

XI PENAL PROVISIONS

Offences

Article 60

A fine amounting from ten up to twenty minimal wages in Montenegro shall be for the offence imposed on:

- 1) a responsible person in authority who do not comply with the request of the Protector within prescribed deadline (Article 41 and 42);
- 2) a person who fails to appear on the call from the Protector (Article 45).

XII TRANSITIONAL AND FINAL PROVISIONS

Procedures formerly initiated

Article 61

Procedures initiated until the day of entry into force of this Law shall continue in accordance with this Law.

Deadline for the delivery of secondary legislation

Article 62

Acts referred to in Articles 58 and 59 of this Law shall be passed within six months from the date of its entry into force.

Until the delivery of the acts referred to in paragraph 1 of this Article, shall apply the acts that were in force until the adoption of this Law.

The exercise of the office of previously elected officials

Article 63

The Deputy, elected before the entry into force of this Law, shall continue to exercise the office until the expiry of the period for which he was elected.

Termination of applicability of the previous Law

Article 64

On the day of entry into force of this Law, shall terminate the application of the Law on Protector of Human Rights and Freedoms ("Official Gazette of the Republic of Montenegro" No. 41/03).

Entry into force of the Law

Article 65

The present law shall enter into force eight days from the date of its publication in the "Official Gazette of Montenegro"..

Annex 2:



**GOVERNMENT OF MONTENEGRO
Ministry of Human and
Minority Rights**

**LAW
ON PROHIBITION OF DISCRIMINATION**

[Excerpt]

[...]

III PROTECTOR OF HUMAN RIGHTS AND FREEDOMS

Competency of the Protector

Article 20

In addition to the competencies prescribed by the separate law, the Protector of Human Rights and Freedoms (hereinafter referred to as the Protector) shall be also competent to:

- 1) provide required information to the complainant who considers to be discriminated by the natural or legal person, about his/her rights and duties, as well as about possibilities of court protection;
- 2) conduct the conciliation proceeding, with the consent of the person allegedly discriminated against, between that person and authority or other legal and natural person he/she considers to have performed discrimination, with the possibility of concluding a settlement out of trial, in accordance with the law regulating the mediation proceeding;
- 3) inform the public about the important issues of discrimination;
- 4) if necessary, carry out the researches in the field of discrimination;
- 5) keep separate records of submitted complaints with regard to discrimination;
- 6) collect and analyse statistical data on cases of discrimination;
- 7) undertake actions to raise awareness on issues related to discrimination.

Submitting complaint

Article 21

Anyone who considers to be discriminated against by an act, action or failure to act made by an authority and other legal and natural persons, may address the Protector with a complaint.

The complaint referred to in paragraph 1 of this Article can be submitted to the Protector also by organisations or individuals dealing with the protection of human rights, with the consent of the person or the group of persons discriminated against.

Acting upon the complaints referred to in paragraphs 1 and 2 of this Article, shall be conducted in compliance with regulations setting up the manner of operation of the Protector, unless this law provides otherwise.

Reports of the Protector

Article 22

The Protector, in a separate part of the annual report, shall inform the Parliament of Montenegro on observed cases of discrimination and action undertaken and shall give recommendations and propose measures for elimination of discrimination.

The Protector may submit a separate report about observed cases of discrimination to the Parliament of Montenegro, if evaluates that that is required by exceptionally important reasons.

[...]