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Analysis of court verdicts for criminal offences with elements of organised crime

BEHIND THE STATISTICS (3): PREVENTION OR FOSTERING ORGANIZED CRIME

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BEHIND THE STATISTICS (3) – Prevention or fostering organized crime

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INTRODUCTION

Successful fight against corruption and organised crime is a priority for Montenegro in the process of European integration. However, there is not a single analysis of the actions of the judiciary in cases relating to criminal offences with elements of organised crime, only difficult-to-understand statistical data on indictments and court verdicts.

The purpose of this analysis is to objectively overview the influence of the legal and institutional framework, as well as the results of the judiciary in the fight against organised crime and to determine what is behind the official statistical data and which are the effects of the implementation of new legal provisions. This analysis contains numerous case studies which show problems in the implementation of law and in the work of the judiciary in concrete examples.

This document was made using final and non-final court verdicts published on the internet presentations of the competent courts, and those we received on the basis of the Law on Free Access to Information. A smaller part of the analysis is based on case files we managed to get to, and in several instances we used media as sources of information.

The first part of this publication contains an analysis of the legal framework relevant for the fight against organised crime, while the second part is dedicated to the problems arising in court proceedings due to the frequent changes in legal regulation. The third part of the publication explains what is actually entered into the official statistics of judiciary bodies.

A separate part of the publication overviews the effects of international cooperation on the concrete example of narcotics smuggling, and the following chapter analyses the effects of the use of secret surveillance measures. One chapter is dedicated to the practical implementation of new legal institutes, the cooperating witness and the protected witness.

A part of this publication is dedicated to the analysis of the penal policy for criminal offences with elements of organised crime. The last chapter details the problems in access to data, specifically court verdicts and case files.

SUMMARY

Analysis shows that many new legal regulations are in favour of the persons accused for money laundering and the most severe narcotics smuggling offences with elements of organised crime.

Thanks to law amendments and the long duration of proceedings, indictments against persons who were accused of severe forms of the criminal offence unauthorised production, keeping and releasing for circulation of narcotics had to be altered and they were only charged with the basic form of this offence, for which significantly more lenient sentences are prescribed.

In addition, law amendments had adverse effects on proceedings related to organised crime, because prosecutors and judges wrongly determined criminal offences the defendants were charged with, so some defendants were acquitted of any criminal responsibility, and others received significantly more lenient sentences.

Analysis of official statistics shows that some cases which contain no elements required for the existence of organised crime are classified as organised crime cases. In many cases, special prosecutors first filed organised crime charges, while later dismissing such qualifications during the proceedings, but these verdicts were still entered into the official statistics. Furthermore, many organised crime charges led to convictions for criminal offences which do not constitute organised crime, and they are still part of the official judiciary statistics in this field.

Concrete cases show that cooperation with other countries is not used in the adequate manner and that during the proceedings, key evidence gathered by institutions of other countries are challenged and dismissed in favour of domestic expert witnesses, whose findings favour persons accused of international narcotics smuggling. Trials in these cases take an unusually long time and they are prolonged thanks to the toleration of procedural abuse, which causes an inability to gather evidence through international legal aid.

The introduction of new institutes of cooperating witnesses and protected witnesses did not have any significant effects. These institutes were only applied in one case each in the period since this possibility was prescribed by law and they yielded no concrete results.

A series of examples shows that prosecutors proposed, and courts ordered the implementation of secret surveillance measures due to suspicions of organised crime, and these proceedings ended in convictions for criminal offences for which the use of these measures is not prescribed based on evidence which would not have been gathered without the implementation of said measures. Concrete cases indicate that

the state prosecution has different criteria when it comes to the use of secret surveillance measures, and that court orders do not contain all legally prescribed elements, which complicates, and in some cases outright prevents any sort of checks or controls of the legality of the violation of basic human rights.

Proceedings before Montenegrin courts last much longer, and their penal policy for international narcotics trafficking is much more lenient than the practice of courts in other countries. The duration of proceedings, law amendments in favour of accused persons and the extremely lenient penal policy of courts allow for persons in charge of criminal organisations dealing with international narcotics smuggling to be convicted to sentences more lenient than their subordinates. On the other hand, in the verdicts of persons who are mainly narcotics users and addicts, and who do not sell narcotics in an organised manner, courts impose much stricter verdicts.

Persons convicted for organised crime enjoyed additional benefits in the form of reduction of prison sentences thanks to decisions by the highest executive and judicial authorities on the application of the institute of release on parole, as well as numerous amnesty laws adopted by the Parliament of Montenegro.

Access to organised crime court verdicts and case files is limited, which greatly hampers the analysis of the work of the courts. In addition to the erasing of defendants' personal data from verdicts, courts also erase the data on countries and cities from and across which narcotics are smuggled, the lanes and names of ships and names of companies used for narcotics smuggling and money laundering. Furthermore, since courts publish only the parts of the verdicts with full force and effect, they conceal the data indicating their illegal operations by removing parts of the verdicts where second-degree courts determined violations of law. Concealing of this data additionally contributes to the mistrust in the work of the judiciary, reduces the responsibility of judicial officials and questions the existence of their will to combat organised crime.

LEGAL FRAMEWORK ANALYSIS

This chapter contains an overview and analysis of the legal framework related to the conduct of proceedings for criminal offences with elements of organised crime.

The first part of this chapter analyses the definition of organised crime and the provisions of the Criminal Procedure Code relating to protected witnesses or injured parties, cooperating witnesses, secret surveillance measures, temporary and permanent confiscation of property whose legal origin has not been proved, and financial investigation.

Legal framework analysis shows that there is a serious mismatch in provisions from procedural[1] and material[2] legislation when it comes to provisions regulating extended confiscation of property. Due to this, the provisions of material legislation[3], which are more favourable to persons accused for organised crime, must be enforced in practice. Furthermore, the legal provisions, which imply that state prosecutors arbitrarily decide when they will file for extended confiscation of property, make the role of prosecutors extremely susceptible to corruption.

The second part of this chapter analyses the criminal offences characteristic for organised crime: creating a criminal organisation; money laundering; unauthorised production, keeping and releasing for circulation of narcotics; and criminal association.

Analysis of Amendments to the Criminal Code which the Government proposed without any reasoning, and which was subsequently adopted by the Parliament, also without reasoning, shows that **the new legal regulations are in favour of persons accused for money laundering and the most severe acts of narcotics smuggling with elements of organised crime.**

Such legal regulation, as more lenient to defendants, must be applied to all proceedings in cases of organised crime, both to ongoing and new organised crime cases, regardless of whether the criminal offences were perpetrated before or after their adoption.

1. Definition of organised crime

The definition of organised crime is given in the Criminal Procedure Code of Montenegro[4], the application of which in procedures relating to these criminal offences began in September 2011[5]. The 2010 Criminal Code Amendments define organised crime in the same manner as the Criminal Procedure Code[6].

[1] Criminal Procedure Code
[2] Criminal Code
[3] Criminal Code
[4] Criminal Procedure Code, "Montenegro Official Gazette" no.57/2009 and 49/2010
[5] Criminal Procedure Code, Article 22
[6] Criminal Code, Article 401a, paragraph 6.

According to the Criminal Procedure Code and Criminal Code, in order for a criminal offence to be classified as organised crime, **the cumulative fulfilment of following conditions is implied**:

1) **The existence of grounds for suspicion** – a reasonable suspicion that a criminal offence has been perpetrated;
2) **Severity of the criminal offence** – reflected in the abstract weight expressed as punishable under law by an imprisonment sentence of four years or a more severe sentence;
3) **Organisation** – reflected in the requirement that the criminal offence has to be the result of three or more persons joined into a criminal organisation, i.e. criminal group;
4) **A specific criminal aim** of the organisation or group, reflected in the perpetration of criminal offences in order to obtain illegal proceeds or power.

In addition, the existence of organised crime occurs in cases **when at least three of the following conditions have been met**:

1) **Hierarchy structure** – every member of the organisation, i.e. criminal group has had an assignment or role defined in advance or obviously definable;
2) **Continuity in action** – the actions have been planned for a longer period of time or for an unlimited period;
3) **Internal rules** – the activities have been based on the implementation of certain rules of internal control and discipline of its members;
4) **International proportion** – the activities have been planned and performed in international proportions;
5) **Violent nature** of the organisation – the activities of the organisation include the application of violence or intimidation or there is a readiness for their application;
6) **Existence of business connections** – the activities of the organisation include economic or business structures;
7) **Unlawful legalisation of income** – the activities of the organisation include the use of laundering of money or unlawfully acquired gain;
8) **Connections to power factors** – influence of the organisation upon the political authorities, media, legislative, executive or judiciary authorities or other important social or economic factors.

1.1. Influence of law amendments on the definition of organised crime

The new Criminal Procedure Code is applied in all organised crime proceedings initiated after September 01, 2011, while the old one was applied in investigations initiated before this date and in appeal proceedings against verdicts adjudicated before the coming into force of the new Code.[7]

[7] Criminal procedure Code, Article 513.

The new Criminal Procedure Code **no longer prescribes a special type of criminal proceedings** for criminal offences of organised crime, which is a simpler and better solution than the previous one, from a technical standpoint.

The old Criminal Procedure Code **did not contain such a precise definition** of organised crime, instead there were specific provisions on proceedings for criminal offences perpetrated in an organised manner.

In addition, the old Criminal Procedure Code did not contain a requirement that it should be a criminal offence punishable under law by an imprisonment sentence of four years or a more severe sentence.

The criterion relating to the abstract **weight of the criminal offence** regarding the prescribed punishment (an imprisonment sentence of four years or a more severe sentence), has not been characteristic for our legislation until the adoption of this Code.

The previous Criminal Procedure Code does not recognise this criterion, and while defining the other terms and institutes, our legislation has so far kept to the boundaries of the prescribed punishments as three, five or ten years of imprisonment.

The limit of four years of imprisonment appears in our criminal legislation for the first time in the new Criminal Procedure Code, and it was taken from the UN Convention against Transnational Organised Crime.

The new Criminal Procedure Code also brings some changes which in practice may lead to solutions favouring persons accused for criminal offences with elements of organised crime. In relation to the condition related to the use of different structures, the new Criminal Procedure Code **no longer prescribes the use of political structures**, and only business and economic structures are mentioned.[8]

In this way, this condition will not be applicable if an organisation uses a political party as a political structure in their activities.

For example, a potential criminal organisation consisting of a number of members with determined roles who perpetrate severe criminal offences for a prolonged period of time with the aim of acquiring wealth or power, which, in addition to the above, uses a political party to perform criminal offences, would not be considered an organised crime organisation according to the present legal regulation, which is an absurdity of sorts.

Instead of considering the use of political structures, i.e. political parties, as one of the special conditions for the existence of organised crime, the new Criminal Procedure Code attempts to regulate this connection through the influence of the organisation on **"political authorities"**, as stated in Article 22, paragraph 8, item ž.

[8] Criminal Procedure Code, Article 22. Paragraph 8. item đ)

The term "political authorities" **is completely vague and imprecise from a legal standpoint**. From a strictly legal point of view, it is evident that there are only the legislative, executive and judicial authorities, so it is unclear who is to be influenced if this organised crime condition is to be fulfilled.

Therefore, the condition of influencing "political authorities" is redundant here and it certainly does not lead to a possibility for political parties to be associated with organised crime, since political parties cannot legally be considered as any form of authority, not even as "political authorities".

2. Protected witnesses

2.1. Protection in court

Protection of protected witnesses in court consists of a special manner of participation and hearing in the criminal proceedings and it is prescribed by the Criminal Procedure Code.

If reasonable concern exists that a witness would put in danger himself/herself, spouse's, close relative's or a close person's life, health, physical integrity, freedom or property of great value by giving a statement or answering certain questions, witnesses may withhold from giving identification data, answering certain questions or giving the statement altogether until their protection is secured.[9]

The ruling on the special manner of participation and hearing of protected witnesses in investigations shall be issued by the investigative judge at the motion of witnesses, the defendant, the defence counsel or the State Prosecutor, whereas at the main hearing it shall be issued by the Panel.[10] A judgment may not be based solely on the statement given by the protected witness.[11]

Special ways of participating and hearing of witnesses in the criminal procedure are: hearing of witnesses under pseudonym, hearing with assistance of technical devices [12] and the like. The investigating judge shall ban all questions which could lead to the disclosing of the identity of witnesses, and any persons who learn the details about witnesses shall keep them secret.[13]

However, **no specific sanctions in case of violating of the prohibition of disclosure of the identity of a protected witness are prescribed**, nor is there a provision prescribing that the court shall warn the persons familiar with the identity of the protected witnesses that the disclosure of such information is a criminal offence.

[9] Article 120, Criminal Procedure Code
[10] Article 122, Criminal Procedure Code
[11] Article 123, paragraph 2, Criminal Procedure Code
[12] Protective wall, voice simulators, devices for transmission of image and sound
[13] Article 121, Criminal Procedure Code

A case of disclosing of the identity of a protected witness might eventually be treated as a criminal offence of unauthorised disclosure of a secret[14] which is punishable by a fine or imprisonment not exceeding one year. Such punishments indicate that this is a minor criminal offence, which is certainly not how the disclosure of the identity of a protected witness should be deemed. This is why it is logical and necessary **to prescribe a separate criminal offence or a separate, more severe form of this criminal offence, when the disclosure of a secret is related to the identity of a protected witness**.

2.2. Protection out of court

The conditions and procedures for providing **out-of-court** protection and assistance to protected witnesses and persons close to them are regulated by the Law on Witness Protection.[15] Their protection shall be provided through the application of the Protection Programme, and may be applied only with the consent of the witnesses, i.e. persons close to them.[16]

Unlike witness protection in criminal proceedings which is applied in case of danger for the witness or a person close to him or her and which is not limited to certain criminal offences, the Law on Witness Protection stipulates that the Protection Programme shall be applied only if the criminal offence cannot be proved without the testimony of the witness or if the proving thereof in another way would be made significantly more difficult, when the following criminal offences are being proven:

- Criminal offences against the constitutional order or security of the Republic of Montenegro,
- Criminal offences against humanity and other values protected by international law,
- Criminal offences committed in an organised manner,
- Criminal offences carrying a legally prescribed punishment of 10 or more years of imprisonment.[17]

This is why it is possible in practice for a certain person to have the status of protected witness in a criminal proceeding, but that he/she cannot be protected out of court and cannot enter the Witness Protection Programme. This can discourage protected witnesses from giving full and truthful statements.

Decisions on application, termination, cessation and extension of the Protection Programme application shall be made by a Commission which shall be made up as follows: a judge of the Supreme Court of the Republic of Montenegro, a representative of the Chief State Prosecutor and the Head of the Protection Unit, director of an

[14] Article 171, Criminal Code
[15] "Official Gazette of the Republic of Montenegro" no.65/2004 and "Official Gazette of Montenegro" no.31/2014
[16] Article 2, Law on Witness Protection
[17] Article 5, Law on Witness Protection

administration body responsible for the enforcement of criminal sanctions and a psychologist named by the head of the state administration in charge of labour and social welfare.[18]

The Commission shall decide on the application of the Protection Programme at the request of the Chief State Prosecutor put forward by the following persons: the witness, competent state prosecutor, judge handling the case, the Director of the Institution for Execution of Criminal Sanctions and the Head of the Crime Police Administration.[19]

Should the Commission adopt the decision on the application of the Protection Programme, it shall authorise the Head of the Protection Unit to enter into agreement on the Protection Programme application with the witness, i.e. person close to him or her.[20] Should it be determined that the protected person still requires protection after the expiration of the period of the Protection Programme stipulated in the Agreement, the Chief State Prosecutor shall submit a request for extension of the application of the Protection Programme to the Commission.[21]

The measures by which the protection of witnesses or person close to them is provided shall be as follows:

- physical protection of person and property;
- relocation;
- concealing identity and information about ownership;
- change of identity.[22]

The Protection Programme application shall cease:

- upon the expiry of the period of application of the Protection Programme envisaged in the Agreement;
- if the protected person dies;
- in the case that the protected person, parent or guardian of the minor who is a protected person, or guardian or legal representative of the protected person completely or partially deprived of the capacity to transact business, renounces the protection;
- by way of a decision on termination of the Protection Program application.[23]

After a reasoned proposal by the Chief State Prosecutor or the Head of the Protection Unit, the Commission may pass a decision on termination of the Protection Program application:

- if the reasons justifying the Protection Programme application no longer exist,
- if the protected person does not fulfil his or her obligations under the Agreement,

[18] Article 6, Law on Witness Protection
[19] Article 14, Law on Witness Protection
[20] Article 21, Law on Witness Protection
[21] Article 24, Law on Witness Protection
[22] Article 27, Law on Witness Protection
[23] Article 42, Law on Witness Protection

- if, during the course of the Protection Programme application, criminal proceedings have been instituted against the protected person for a criminal offence that brings into question the justifiability of the Protection Programme application,
- if the protected person, without a good reason, declines to accept the employment offered by the Protection Unit or if he or she stops performing other activity for earning income,
- if a foreign country, in the territory of which the protected person has been located, requests the cessation of the Protection Program application for the reasons set forth by an international treaty or agreement;
- if the protected person enters false information into the Questionnaire.[24]

3. Cooperative witnesses

The State Prosecutor may put a motion to the court to examine as witness a member of the criminal organization, i.e. criminal group who consents to do so (hereinafter: cooperative witness) against whom criminal charges have been brought or criminal proceedings have been instituted for an organized crime offence.

A cooperative witness may not be a person for whom reasonable doubt exists that she/he is an organizer or a leader of a criminal organization i.e. criminal group.[25]

The State Prosecutor may put forth a motion to the court to examine as witness a member of the criminal organization, if it is certain that:
- their statement and evidence provided to the court **will significantly contribute** in proving the criminal offence in question and culpability of perpetrators or assist in revealing, proving and preventing other criminal offences of the criminal organization or criminal group and
- **the significance of their statement** as to proving these criminal offences and culpability of other perpetrators **prevails over the harmful consequences of the criminal offence they have been charged with**.[26]

The motion referred to in paragraph 1 of this Article may be put forth before the State Prosecutor the completion of the main hearing, and such a motion shall contain the facts and data on the basis of which the court shall issue a ruling on establishment of the status of a cooperative witness.

A cooperative witness who has made a statement before the court pursuant to the provisions of the present Code may not be prosecuted for the criminal offence of organized crime for which the proceedings are being conducted.

In that case the State Prosecutor shall dismiss the criminal charge or refrain from prosecution of the cooperative witness at the latest until the completion of the main hearing being conducted against other members of the criminal organization, i.e.

[24] Article 42, Law on Witness Protection
[25] Criminal Procedure Code, Article 125, paragraph 2 and 3
[26] Criminal Procedure Code, Article 125, paragraph 1

criminal group and the court shall render a decision by which the charges against the cooperative witness are rejected.[27]

4. Secret surveillance measures

The Criminal Procedure Code prescribes in detail the procedure of determining and application of Secret Surveillance Measures (SSM).[28]

The first condition for the application of these measures is that **evidence cannot be obtained in another manner** or its obtaining would require a disproportional risk or endanger the lives of people.

The second condition is the existence of **grounds for suspicion that a person or group of persons has perpetrated, is perpetrating or is preparing to perpetrate the following criminal offences**[29]:

1) for which a prison sentence of **ten years or a more severe penalty** may be imposed;
2) containing **elements of organized crime**;
3) containing **elements of corruption**, as follows: money laundering, causing false bankruptcy, abuse of assessment, passive bribery, active bribery, disclosure of an official secret, trading in influence, as well as abuse of authority in economy, abuse of an official position and fraud in the conduct of an official duty with a prescribed imprisonment sentence of eight years or a more serious sentence;
4) abduction, extortion, blackmail, meditation in prostitution, displaying pornographic material, usury, tax and contributions evasion, smuggling, unlawful processing, disposal and storing of dangerous substances, attack on a person acting in an official capacity during performance on an official duty, obstruction of evidences, criminal association, unlawful keeping of weapons and explosions, illegal crossing of the state border and smuggling in human beings;
5) against the security of computer data.

After a reasoned proposal by the state prosecutor, **an investigative judge may order the following measures of secret surveillance**:

1) secret surveillance and technical recording of telephone conversations or other **communication** carried out through devices for distance technical communication, as well as private conversations held in private or public premises or in the open;
2) secret photographing and video recording in private premises;
3) secret supervision and technical recording of persons and objects.[30]

In addition, **the state prosecutor may order the following measures**, after a reasoned proposal by police forces:

[27] Criminal Procedure Code, Article 129, paragraph 1 and 2
[28] Criminal Procedure Code, Articles 157.-162.
[29] Criminal Procedure Code, Article 157. Paragraph 1.
[30] Criminal Procedure Code, Article 157. Paragraph 1. Items 1.2. And 3.

1) **simulated purchase** of objects or persons and simulated giving and taking of bribe;
2) **supervision over the transportation and delivery** of objects of criminal offence;
3) **recording conversations upon previous informing** and obtaining the consent of one of interlocutors;
4) use of **undercover investigators and collaborators**.

The motion and the order for application of all secret surveillance measures shall contain: the type of measure, data on the person against whom the measure is enforced, grounds for reasonable suspicion, the manner of measure enforcement, its aim, scope and duration.[31] The motion and the order for ordering measures shall become an integral part of the criminal file.

All secret surveillance measures, except the simulated purchase of objects or persons and simulated giving and taking of bribes may last only as long as necessary, **at the longest four months, although for valid reasons they may be prolonged for three more months**.

Simulated purchase of objects or persons and simulated giving and taking of bribes may refer only to one simulated act, and all subsequent motions for the application of this measure against the same person shall contain a statement of reasons justifying the repeated application of this measure.[32]

The Criminal Procedure Code also prescribes that, **if the measures were undertaken in contravention** to the provisions of the present Code or in contravention to the order of the investigative judge, **the judgment may not be founded on the collected information**.[33]

The ratio legis of such detailed regulation regarding the appliance of secret surveillance measures is mostly aimed at strengthening the credibility of the evidence materials gathered by means of such measures, but also in allowing control (primarily by the defence) and preventing illegal and random violations of basic human rights.

4.1. Secret surveillance measures in the draft amendments to the Criminal Procedure Code

In August 2014, the Ministry of Justice submitted to the Parliament a Draft Law Amending the Criminal Procedure Code, which significantly expands the powers of law enforcement authorities when applying SSM.

This Draft **introduced another two criminal offences** for which SSM may be applied: documents counterfeiting and forgery of official documents.

[31] Criminal Procedure Code, Article 159.
[32] Criminal Procedure Code, Article 159. Paragraph 5.
[33] Criminal Procedure Code, Article 162. Paragraph 1.

It stipulates that SSM, which according to current regulation may be requested by a state prosecutor only after a proposal by a police authority, **may now also be ordered ex oficio, i.e. without a proposal by the police**.

The draft prescribes that SSM may last up to 18 months, unlike current regulation where the maximum duration is seven months. Unlike current regulation, the Draft stipulates that after the first four months, SSM may be **prolonged for another 14 months**.

This means that **after the first period which is primary and after which SSM may only be prolonged in extraordinary circumstances, the Draft provisions stipulate that SSM can be prolonged for a secondary period by a period up to three times longer**.

This provision is controversial in terms of compliance with the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms, which state that restrictions of human rights and freedoms must be reduced to **a minimum period necessary and that citizens must have the opportunity to efficiently control the application of these measures in practice**.

The Draft Criminal Procedure Code Amendments stipulates that these SSM may be **terminated** by an order, and then later **continued** towards the same person in relation to the same criminal offence. In addition, **the period of termination does not count towards the maximum duration of SSM**. A regulation of this sort prevents the control of legitimate application of SSM, and may lead to the arbitrary application of SSM for an unlimited period.

The explanation of the amendments states only that the current duration of SSM "significantly hampered the collection of evidence". It is unclear what was the basis for the estimate that longer durations would give better results in practice. If this type of logic is accepted, then eventual further amendments to the Criminal Procedure Code might prescribe that SSM may be applied for even longer periods or even indefinitely.

5. Seizure of property

The new Criminal Procedure Code of Montenegro[34] prescribes a possibility for a court to order **a temporary seizure of property** at the request of the state prosecutor. According to the Criminal Code[35], a condition for extended seizure of property is that the perpetrator is convicted for one of the following criminal offences:

- perpetrated as part of a criminal organisation[36]
- against humanity and rights guaranteed by international law,
- money laundering,
- unauthorised production, keeping and releasing for circulation of narcotics,

[34] Criminal Procedure Code, Article 90, paragraph 1
[35] Criminal Code, Article 113, paragraph 3
[36] Criminal Code, Article 401a

- against payment operations and economic transactions and against official duty, committed out of greed for which a prison sentence of eight years or a more severe penalty may be imposed.

Property may be seized from the sentenced persons, their legal successors or persons to whom the sentenced persons have transferred their property **who are not able to prove** the legality of its origin, and **grounds of suspicion** exist that the property in question was **illicitly acquired**. This means that in such cases **the burden of proof is passed on to the defendants**, or persons associated with them.

The State Prosecutor shall initiate **a financial investigation** by way of an order against the suspects or accused persons and evidence shall be collected on the property and revenues of these persons.[37]

The period when said property was gained is defined by the Criminal Code as a period before and/or after the perpetration of the criminal offence for which the perpetrator was convicted with full force and effect and for which seizure of property may be applied, until the sentence became final. In addition, the court should determine that the time context of when the property was gained and other case circumstances justify the seizure of property.[38]

The State Prosecutor shall, at the latest within one year after the finality of the judgement, submit the request for **the confiscation of property** of the convicted person, his/her legal successor or a person to whom the convicted person has transferred the property **for which there is no evidence on the legality of its origin**.[39]

The court cannot order the permanent or temporary seizure of property ex oficio. For the property to be seized, the state prosecutor must previously submit a request for seizure. **However, no legal provision prescribes an explicit obligation for prosecutors to submit such a request to the court, nor any consequences in case of the prosecutor's failure to submit such a request.**

This means that state prosecutors arbitrarily decide when to submit, and when not to submit such requests, meaning that there is a possibility for them not to submit such requests and go unpunished. Such provisions leave a **possibility for abuse by the prosecution and make the prosecutor's office extremely susceptible to corruption**.

The Criminal Procedure Code provisions on temporary seizure of property, financial investigation and permanent seizure of property for which there is no evidence on the legality of its origin have only been applied[40] after the adoption of the 2010 Criminal

[37] Criminal Procedure Code, Article 90, paragraphs 2 and 3
[38] Criminal Code, Article 113, paragraph 4
[39] Article 486, paragraph 1, Criminal Procedure Code
[40] Criminal Procedure Code, Article 516, paragraph 1

Code amendments.[41] An additional problem is the obvious **mismatch between the Criminal Code and the Criminal Procedure Code,** which is an absurdity.

In cases of extended seizure, in accordance with the provisions of the Criminal Procedure Code, the convicted persons are required to **prove the legality** of the origin of property by authentic documents or otherwise, while the Criminal Code prescribes a significantly lower standard which is undoubtedly and significantly more favourable to convicted persons – **to make it probable** that the origin of the property is legal[42]. The institute of extended seizure and the material-law conditions for its application are regulated by the Criminal Code, and the Criminal Procedure Code should regulate the procedure for its appliance, just like it regulates the procedure for appliance of all other provisions of the Criminal Code.

Therefore, in cases of collision between the two Codes in the provisions regulating the conditions for application of extended seizure of property, **priority is given to Criminal Code provisions, which are significantly more favourable for persons convicted for criminal offences with elements of organised crime.**

Four and a half years after the adoption of a legal regulation more favourable for participants in organised crime, the Government sent a draft Law on Seizure of Property Gained as Crime Proceeds to the Parliament. This Draft Law removes this mismatch and includes a stricter standard for convicted persons – an obligation to prove the legality of origin of the property.

This draft Law also increases the number of criminal offences for which seizure of property may be applied, so in addition to the earlier mentioned criminal offences, it also includes the following criminal offences:

- abduction by force and child pornography;
- certain criminal offences against property[43];
- certain criminal offences against payment operations and economic transactions – regardless of the motive and prescribed sanction[44];
- certain criminal acts against the safety of computer data[45];
- in addition to the creation of a criminal organisation, certain other criminal offences against public order[46];

[41] "Official Gazette of Montenegro" no.25/2010
[42] Criminal Code, Article 113, paragraph 2
[43] Grave theft, theft in nature of robbery, robbery, embezzlement, fraud, arranging the outcome of a competition, extortion, blackmail, usury
[44] Counterfeiting money, counterfeiting securities, counterfeiting and abuse of credit cards and cards for non-cash payment, making, acquiring and giving to another soft means for counterfeiting, tax and contribution evasion, smuggling, negligent performance in business activities, causing bankruptcy procedure, causing false bankruptcy, abuse of authority in economy, passive bribery in economy, active bribery in economy, abuse of confidential information and manipulation on a market of securities or other financial instruments
[45] Computer sabotage, computer fraud and unauthorised use of computers and computer network
[46] Criminal association, manufacture and acquisition of weapons and means intended for commission of criminal offences, participation in a group committing a crime, illegal crossing of the state border and smuggling of human beings

- certain criminal offences against official duty - regardless of the motive and prescribed sanction [47];
- certain criminal offences against humanity and rights guaranteed under international law[48].

The new provisions remove the mismatch between the Criminal and Criminal Procedure Codes in a manner more unfavourable to participants in organised crime due to the obligation to prove the legal origin of property, which should allow a more efficient seizure of property gained as crime proceeds and which increases the number of criminal offences for which measures of seizure of property may be applied. This Draft Law will only come into force after it has been adopted by the Parliament and only for proceedings initiated after the coming into force of the Law. This type of regulation mismatch and delays in the removal of these problems bring into question the political will for fighting organised crime.

6. Criminal offences characteristic for organised crime

6.1. Creating a criminal organisation

This criminal offence was introduced into Montenegrin legislation through the 2010 Criminal Code amendments, which entered into force in May 13, 2010. Having in mind that a criminal organisation is considered as an organisation the actions of which constitute criminal offences from the field of organised crime, prescribing this criminal offence was aimed at increasing legal repression against organised crime.

According to this incrimination, **an action of organising or being part of a criminal organisation is sufficient for the existence of this criminal offence**, and if an organiser or member commits another criminal offence as part of the organisation, they will also be held liable for this offence.

Therefore, unlike in previous regulation, **criminal liability exists in organising or being part of a criminal organisation**, while earlier this responsibility existed only when another criminal offence was perpetrated in the organisation. Therefore, it is undisputable that this amendment of the Criminal Code should **increase repression** towards organised crime.

[47] Abuse of official status, fraud in service, embezzlement, illegal mediation, incitement to illegal mediation, passive bribery and active bribery

[48] Trafficking in human beings, trafficking in children for adoption, submission to slavery and transportation of enslaved persons, international terrorism, public provocation to commit terrorist acts, recruitment and training for the commission of terrorist acts, use of lethal devices, destruction and damage to a nuclear facility, financing of terrorism and terrorist association. When it comes to criminal offences against humanity and rights guaranteed under international law, the number of criminal offences was reduced because now seizure of property may be applied to all criminal offences from this Chapter of the Criminal Code, while the Draft Law on Seizure of Property Gained as Crime Proceeds restricts the application of this measure to the abovementioned criminal offences.

Criminal organisations and organised crime are defined by the Criminal Code[49] **in a manner identical to the Criminal Procedure Code**[50], with the same shortcomings which exclude political parties from organised crime, as mentioned in chapter 1.1.

6.2. Money laundering

Money laundering is one of the criminal offences characteristic for participants in organised crime, and it represents their attempts to legalise proceeds acquired through crime thus concealing its criminal origins. This criminal offence was first introduced in the Montenegrin Criminal Code in 2002, and subsequently regulated by the Code from 2003.

The 2010 Criminal Code amendments changed the actions of perpetrating this criminal offence[51] and defined it through three forms: conversion or transfer of property; acquiring, holding or use of property; and concealing or misrepresentation of property. Of course, in all three forms of the action it is necessary that the property in question originates from criminal activities, regardless of which criminal offence is in question. In a similar manner, the term of money laundering was also changed and defined by Amendments to the Law on Prevention of Money Laundering from 2012.[52]

The **current Criminal Code does not contain a provision explicitly regulating that the existence of a criminal offence of money laundering does not require the existence of a conviction for a predicate offence, which is contrary to the Council of Europe Convention** on Laundering, Search, Seizure and Confiscation of Crime Proceeds from Crime and on the Financing of Terrorism ratified by Montenegro[53].

Article 9, paragraph 5 of the Convention explicitly outlined that each Party shall ensure that a prior or simultaneous conviction for the predicate offence **is not a prerequisite** for a conviction for money laundering.

In addition, Amendments to the Criminal Code stipulate **a significantly milder punishment for perpetrators of predicate criminal offences when they are also perpetrators of the criminal offence of money laundering.**

According to the **old regulation**, when the perpetrator of a predicate criminal offence laundered money, he/she could have been sanctioned by **one to eight years** of imprisonment. **Today** the same punishment for persons convicted of laundering money is also prescribed for the same perpetrator, a sentence of **between six months and five years of imprisonment**, even if he/she is not also simultaneously the perpetrator

[49] Criminal Code, Article 401a, paragraph 6.
[50] Criminal Procedure Code, Article 22.
[51] Criminal Code, Article 268, paragraph 1
[52] "Official gazette of Montenegro" no.14/2012
[53] The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on the Financing of Terrorism was ratified by Montenegro by a Law adopted in July 29, 2008. "Montenegro Official Gazette – International Treaties", no. 5/2008 from August 07, 2008

of a predicate criminal offence. This regulation was proposed by the Government and adopted by the Parliament without any official reasoning.

6.3. Unauthorised production, keeping and releasing for circulation of narcotics

This criminal offence mostly appears in practice as a criminal offence with elements of organised crime. In the 2010 Criminal Code amendments[54] the actions of perpetration of the criminal offence unauthorised production, keeping and releasing for circulation of narcotics were alternatively defined as:

1) unauthorised production, processing and sale;
2) buying, keeping and transport for the purpose of sale;
3) mediating in selling or buying and
4) any other form of unauthorised releasing for circulation of narcotics.[55]

Therefore, in order for this criminal offence to exist, the action of buying, keeping or transporting of narcotics should be performed for the purpose of sale.

The 2010 Criminal Code amendments changed the paragraphs 2 and 3 of Article 300 of the previous Code[56] which prescribed two more severe forms of this criminal offence and stricter sanctions, changing them to the benefit of persons accused for these criminal offences. In **this way, the Government and Parliament allowed concrete benefits for persons accused for the perpetration of the most severe form of this criminal offence, but also facilitated entry and use of narcotics in Montenegro.**

More persons or network

The Criminal Code amendments changed the more severe form of this criminal offence in cases in cases where it is perpetrated by more persons. Article 300, paragraph 3 earlier prescribed that perpetrators shall be punished by imprisonment of three to fifteen years, if an act was committed by more persons or if the perpetrator organised a network of dealers or mediators.

The Code amendments erased the words "**if an act was committed by more persons"** from this paragraph**,** so it stipulates that perpetrators will be punished by imprisonment of three to fifteen years, **only** if they organised **a network of dealers or mediators**.

In the reasoning of the Draft Amendments to the Criminal Code, **the Government did not state the reasons for changing this paragraph**. However, according to court practice and legal theory, the legal formulation **"more persons" relates to two or more persons**. However, **the term network implies more than two persons.** In this

[54] Article 84, Law Amending the Criminal Code ("Montenegro Official Gazette" no.25/2010 from May 05, 2010)
[55] Criminal Code, Article 300, paragraph 1
[56] "Republic of Montenegro Official Gazette" no.70/2003 from December 25, 2003

way, these law amendments needlessly **hinder the process of proving** and result in a more favourable position for persons accused of perpetrating severe forms of this criminal offence.[57]

Bringing of small quantities of drugs in Montenegro – is (not) a criminal offence!?

Paragraph 2 of Article 300 of the old Criminal Code stated that anyone **who unlawfully brings narcotics into Montenegro shall be punished** by an imprisonment sentence of two to twelve years. Such a legal regulation caused different interpretations and disputes[58] due to which the Criminal Division of the Supreme Court took the legal position[59] that this is a criminal offence even if a person brings into the country narcotics for personal use. The Supreme Court reasoned that "when regulating this offence, the legislator wanted to prevent unauthorised bringing of substances or preparations declared as narcotics into Montenegro".

However, three and a half years later, when explaining their Draft Amendments to the Criminal Code, **the Government** stated**:**

"Bringing narcotics into Montenegro (paragraph 2) is related to the basic form, i.e. it requires the existence of intent to perpetrate this form, and so **bringing smaller amounts of narcotics for personal use shall no longer represent a severe form of this criminal offence".**

However, the Government did not state that this regulation stipulates that **bringing smaller amounts of narcotics for personal use <u>is no longer a criminal offence</u>**, and not that it does not represent a severe form of this criminal offence. Therefore, since the coming into force of the Criminal Code amendments, in order for someone to be convicted for bringing narcotics into the country, it is necessary to prove that he/she brought it **with intent of releasing it into circulation**.

In addition, neither the Government as the proponent, nor the Parliament as a legislator, indicated **how the courts should determine what "smaller amounts" are**. This means that the courts will determine this standard in practice themselves and that they will determine what is a ''smaller amount'' on a case to case basis, and also whether the same quantity of different types of narcotics will be considered "small".

The criminal justice reaction towards persons using narcotics could certainly not be justified, but **such regulation surely does not contribute towards the reduction of**

[57] Further reading in chapter B) Influence of law amendments on court verdicts
[58] On the one hand is the interpretation that an action of bringing of the narcotics should be considered as a separate action, i.e. a separate more severe form of this criminal offence, as can be deducted from a linguistic interpretation of the norm. Another interpretation is that this severe form should be tied to the basic offence and that it exists only for the purpose of perpetrating the basic form of the offence, i.e. if the drug is brought into Montenegro for further circulation.
[59] Su.IV.no.813/2006 from December 18, 2006

drug use as a deviant phenomenon, nor combating this criminal offence, regardless of whether it is performed in an organised manner or not.

6.4. Criminal association

This criminal offence[60] **does not indicate the existence of organised crime by itself**, but court practice classifies it as this type of criminal offence, increasing the official statistics in this way.

The fact that this is not a criminal offence which indicates the existence of organised crime by default was indirectly confirmed by the legislator in the 2010 Criminal Code amendments, when, in addition to this criminal offence, it prescribed the criminal offence creating a criminal organisation.

According to the legal description of the offence, **organisers shall be liable for organising the criminal association, and association members shall only be liable if the association was aimed to commit crimes punishable by imprisonment of five years or more**. If an organiser or member perpetrates a criminal offence as part of the association, they will be liable both for the criminal offence in question and for the criminal offence criminal association.

This criminal offence implies the creation of a group or other type of association, a plan to perpetrate criminal offences, assigning of roles to members and general taking of measures for the functioning of the association, i.e. to perpetrate the criminal offences the association was created for. According to opinions by practice legal theory, a group and association is made up of at least three persons associating in order to perpetrate criminal offences.

These characteristics (organisation, number and role of members, aim) represent similarities with organised crime and are also the reason for the prosecution and courts **to wrongfully treat cases which are tried for this offence as organised crime cases**.

The description of the actions of this criminal offence fulfils only two out of four conditions necessary for the existence of organised crime which have to be fulfilled cumulatively[61], **and only one of the eight possible requirements**[62], of which at least three have to be fulfilled in order for the existence of organised crime to be confirmed.

However, the very outcome of these proceedings often shows that there has been no organised crime, and sometimes not even this criminal offence is present, but these

[60] Criminal Code, Article 401

[61] The conditions related to the severity of this criminal offence and special criminal aim of the group are different.

[62] The missing conditions are continuity in action, internal rules, international proportion, violent nature of the organisation, existence of business connections, unlawful legalisation of gain and connections with power factors.

court verdicts and prosecution indictments are **statistically** part of their results in the fight against organised crime.

6.5. Trafficking in human beings

The criminal offence trafficking in human beings is mostly perpetrated in a manner which makes it organised crime. This criminal offence has one of the most complex descriptions of the perpetration action in the Criminal Code[63], which significantly hinders its proving. **The existence of this criminal offence requires the taking of certain actions in a certain manner and with a certain aim.**

According to the legal description[64] **the perpetration action** includes

- recruitment,
- transport,
- transfer,
- handovers,
- sales,
- buys,
- mediation in sales,
- hiding or
- keeping another person.

This action should be committed in one of the following **means**:

- force or threat,
- deceit or keeping in delusion,
- by abusing authority, trust, relationship of dependency, difficult position of another person,
- by keeping back identification papers or by giving or receiving money or other benefit for the purpose of obtaining consent of a person having control over another.

In addition, it is necessary that the actions be taken with a certain **aim** which may be:

- exploitation of work,
- forced work,
- submission to servitude,
- commission of crimes, prostitution or other form of sexual exploitation,
- beggary,
- pornographic use,
- taking away a body part for transplantation or
- for use in armed conflicts.

[63] The basis for the legal formulation was the UN Convention against Transnational Organised Crime supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially in Women and Children

[64] Criminal Code, Article 444, paragraph 1

If this offence is perpetrated against a juvenile person, the offender shall be liable to imprisonment prescribed for that offence, even if there was no force, threat or any other of the stated methods present in the commission of the crime.[65]
The punishment for the basic form of this criminal offence **is imprisonment for a term of one to ten years**. For severe forms of this criminal offence, the Criminal Code prescribes stricter punishments:

- **imprisonment of a minimum of three years** if the offence was perpetrated against a juvenile or if the offence was perpetrated by an official in the performance of official duties or if it intentionally endangered the life of one or more persons[66],
- **imprisonment of one to twelve years** if the offence caused serious bodily injuries to a person[67],
- **imprisonment of a minimum of ten years** if the offence caused the death of one or more persons or if the perpetrator deals with committing this criminal offence or if the offence was perpetrated in an organised manner by more persons[68]

The law also stipulates a punishment of **six months to five years in prison** for persons who **use the services of persons they know** they were the victims of trafficking in human beings, and if the victim of trafficking is a juvenile, the user of services will be punished with **three to fifteen years in prison**.

6.6. Other criminal offences

Similarly as criminal association, the prosecution and courts often classify the criminal offence illegal crossing of the state border and smuggling of human beings as organised crime without any foundation[69]. This way, proceedings for this criminal offence are initiated as organised crime proceedings, and indictments and verdicts become part of the statistics related to organised crime, even though the conditions required by law to establish organised crime are not even close to being fulfilled.

A severe form of the criminal offence Illegal crossing of the state border and smuggling of human beings exists when it **was committed by more persons in an organised manner**[70], who illegally transport other persons across the border or who enable other persons to illegally cross the border or the illegal stay or transit of such persons for gain.

Therefore, the qualifying circumstance for the severe form of this criminal offence is a certain degree of organisation, which is certainly not on the level of organised crime, in the sense of fulfilling a series of conditions precisely regulated by the Criminal Procedure Code and Criminal Code.

[65] Criminal Code, Article 444, paragraph 2
[66] Criminal Code, Article 444, paragraph 3
[67] Criminal Code, Article 444, paragraph 4
[68] Criminal Code, Article 444, paragraph 5 and 6
[69] Criminal Code, Article 405
[70] Article 405, paragraph 3, Criminal Code

In this way, the prosecution and courts use a lower degree of organisation expressed only through the participation of more persons in the perpetration of this criminal offence to unreasonably and unlawfully classify proceedings and verdicts for this criminal offence in the field of organised crime.

INFLUENCE OF LAW AMENDMENTS ON JUDICAL PROCEEDINGS

The 2010 Criminal Code amendments, which abolished the severe form of the criminal offence unauthorised production, keeping and releasing for circulation of narcotics for cases when it is perpetrated by more persons[71], **provided concrete benefits for persons accused of smuggling of narcotics.**

Concrete examples show that thanks to the amendments to this law and the long duration of proceedings, indictments against persons charged with severe forms of this criminal offence had to be altered and **they were subsequently charged only with the basic form of this offence for which a much more lenient punishment is prescribed**[72].

In addition, law amendments had an adverse effect on proceedings in cases of organised crime, because **prosecutors and judges wrongly determined criminal offences defendants were charged with.** Because of this, **some accused persons were acquitted of all criminal responsibility, and others received much more lenient sentences.** These cases impose the question: **who is to blame: ignorance or corruption in the judiciary?**

1. Law amendments help persons accused of narcotics smuggling

The 2010 Criminal Code amendments, which abolished the severe form of the criminal offence unauthorised production, keeping and releasing for circulation of narcotics for cases when it is perpetrated by more persons[73], **provided concrete benefits for persons accused of smuggling of narcotics**.

The case studies given in this chapter show that thanks to the amendments to this law and the long duration of proceedings, indictments against persons charged with severe forms of this criminal offence had to be altered and they were subsequently charged only with the basic form of this offence for which a much more lenient punishment is prescribed[74].

[71] Article 300, paragraph 3 earlier stipulated that perpetrators shall be punished by an imprisonment sentence of three to fifteen years, if the offence is perpetrated by more persons or if the perpetrator organised a network of dealers or mediators, and the words "if the act is committed by more persons" were erased in the amended Code. For further reading, refer to Chapter A) Legal Framework.

[72] A punishment of three to fifteen years in prison is prescribed for the severe form, while a punishment of two to ten years is prescribed for the basic form they had be charged with after amendments to the Criminal Code.

[73] Article 300, paragraph 3 earlier stipulated that perpetrators shall be punished by an imprisonment sentence of three to fifteen years, if the offence is perpetrated by more persons or if the perpetrator organised a network of dealers or mediators, and the words "if the act is committed by more persons" were erased in the amended Code. For further reading, refer to Chapter A) Legal Framework.

[74] A punishment of three to fifteen years in prison is prescribed for the severe form, while a punishment of two to ten years is prescribed for the basic form they had be charged with after amendments to the Criminal Code.

Case study 1

The Special Prosecution for Organised Crime issued an indictment[75] against five persons, four of which were charged with the perpetration of a severe form of the criminal offence abuse of official status and the severe form of the criminal offence unauthorised production, keeping and releasing for circulation of narcotics.

This was a case initiated for the **smuggling of around 200 kilograms of cocaine across the territory of Montenegro[76]**. The cocaine was delivered from Venezuela and discovered in the Port of Gioia Tauro in Italy on October 09, 2004, where a large amount of cocaine was seized and part of the narcotics were sent away towards Serbia across Montenegro by applying the method of "controlled delivery"[77].

The High Court in Podgorica[78] acquitted two defendants **for perpetrating a severe form of the criminal offence abuse of official status and the criminal offence unauthorised production, keeping and releasing for circulation of narcotics, determining that there is no evidence** that they perpetrated these criminal offences.

The same verdict pronounced two defendants **guilty of perpetrating a severe form of the criminal offence unauthorised production, keeping and releasing for circulation of narcotics.**

When deciding on appeals against the judgement of the High Court in Podgorica on February 03, 2009, **the Appellate Court** of Montenegro reached a verdict[79], which **upholds the part acquitting** the two persons accused for the criminal offence unauthorised production, keeping and releasing for circulation of narcotics, and **set aside the rest of the sentence and sent the case to retrial.**

However, one year later, **the Criminal Code provision** regulating this criminal offence **was amended** upon proposal by the Government of Montenegro in a manner more favourable for accused persons[80].

Due to this amendment to the Criminal Code, on the hearing held on December 23, 2010, the prosecutor **altered the legal qualification and charged the two defendants with the basic form of the criminal offence unauthorised production, keeping and releasing for circulation of narcotics, for which a much more lenient punishment is prescribed, instead of the severe form.**

[75]Kts.br.2/04 from June 17, 2005

[76] According to the indictment by the Special Prosecutor for Organised Crime, the overall quantity of cocaine the defendants smuggled was 202 kg, of which 190kg was seized by the Italian prosecution, which allowed the remainder of 12 kg continue the road as "controlled delivery".

[77] A measure of tracking and delivery of the goods subject to the criminal offence, aimed at fully clarifying a certain criminal activity of transport and delivery of goods subject to the criminal offence (in this case narcotics) and at stopping the chain of criminal activities and detect and prosecute as many participants in said activity

[78] K.no.123/05 from May 30, 2008

[79]Kž.no.569/08 from February 03, 2009

[80]For further reading on this Criminal Code amendment, refer to Chapter A) "Legal Framework"

In addition, in accordance with the 2010 Criminal Code amendments, perpetrators of the criminal offence abuse of official status may no longer be officials in a company, institution or another entity, but only public officials. Because of this, the Special Prosecutor altered the indictment, so instead of this criminal offence, the three defendants were charged with a severe form of the criminal offence tax and contribution evasion[81], two were charged with a severe form of the criminal offence negligent performance of business activities[82], and two with the criminal offence unlawful keeping of weapons and explosives.

In the reopened proceedings, the High Court acquitted the defendants for the criminal offences tax and contribution evasion and negligent performance in business activities.[83]

In relation to the criminal offence negligent performance of business activities, the Court decided that a claim by the Special Prosecutor which considers organised transport of narcotics as exceeding of limits of authority was illogical, since the defendants did not have any authorities for the transport of narcotics - cocaine, so they could not have exceeded them.

The latest verdict[84] in this case was reached by the High Court in Podgorica more than **7 years after the perpetration of the criminal offence**. This verdict convicted two defendants for the most basic form of the criminal offence unauthorised production, keeping and releasing for circulation of narcotics.

Criminal Code amendments in the provision defining the criminal offence unauthorised production, keeping and releasing for circulation of narcotics provided a significant benefit for a person accused for the smuggling of nearly three kilograms of cocaine from Montenegro across Croatia to Italy, which is illustrated by the following case study.

Case study 2

An indictment by the Special Prosecutor[85] charged this person with the perpetration of a severe form of the criminal offence unauthorised production, keeping and releasing for circulation of narcotics. This case also included the participation of more persons in

[81]For this criminal offence, a much more lenient punishment is prescribed (imprisonment of up to 6 years and a fine) in relation to the punishment prescribed for the severe form of abuse of official status they were originally charged with (imprisonment of two to ten years)
[82]For this criminal offence, the same punishment was prescribed as for the severe form abuse of official status they were originally charged with (imprisonment of two to ten years)
[83]Ks.no.6/2009 from March 09, 2011. The Court determined that the defendants did not pay value added taxes (VAT) on sold goods - coffee, but they did pay the input VAT, so the tax authority was familiar with the type and quantity of imported goods and it could check whether the goods were sold or if part of the goods was on stock. Furthermore, the Court determined that the accused founder and owner of the company was objectively unable to prepare an annual tax declaration and balance sheet for the year when he was deprived of liberty as part of this proceeding.
[84] Ks.no.30/2011 from January 23, 2012
[85] Kts.no.1/06 from March 14, 2006

the transport of cocaine, i.e. four persons, which was enough to qualify this as a severe form of this criminal offence at the time of perpetration.

However, **since the court proceedings went on for an entire six years, the new 2010 law amendments in favour of accused persons had to be applied** for severe forms of narcotics smuggling,[86] which was significantly beneficial to this person accused of smuggling three kilograms of cocaine.

The first verdict in this case was reached by the **High Court** in Podgorica five years after the submission of the indictment.[87] This verdict **convicted the defendant for a severe form of the criminal offence** unauthorised production, keeping and releasing for circulation of narcotics.

The Appellate Court of Montenegro set aside this verdict[88] stating that it was **unclear which law was applied by the first-degree court**. In its decision, the Appellate Court **indicated that the 2010 Criminal Code amendments** prescribe only the organising of a network of dealers or mediators as a qualifying circumstance for the severe form of this criminal offence, while according to the Criminal Code valid at the time of the perpetration of the offence, in addition to the organising of a network of dealers or mediators, the severe form was also prescribed when the criminal offence was perpetrated by more persons.

Due to these law amendments and this opinion by the Appellate Court, in the repeat proceedings, **the Special Prosecutor mitigated the charges** and charged the defendant only with the basic form of this criminal offence, for which **the High Court convicted him** in the new verdict.[89] Finally, **the Appellate Court made a final judgement which significantly reduced the sentence** which was already reduced by the High Court on account a more lenient qualification of the offence.[90]

It is symptomatic that **five years have passed until the first verdict was adjudicated for the severe form of the criminal offence the defendant was charged with, only for courts to conclude the proceedings in a very short period after the change of indictment in favour of the defendant**.

Only a little over six months passed between the Appellate Court setting aside the first verdict and the conclusion of the proceedings and in this period the courts adjudicated both the first-degree and second-degree verdicts. Previously, when the indictment was more severe, it took them a full five years to reach two such verdicts.

2. Problems in the implementation of amended laws: ignorance or corruption?

Law amendments had an adverse effect on proceedings in cases of organised crime, because prosecutors and judges wrongly determined criminal offences

[86]For further reading on this Criminal Code amendment, refer to Chapter A) "Legal Framework"
[87]K.no.60/2008 from May 20,2011
[88]Ksž.no.21/2011 from September 23, 2011
[89]Ks.no.22/2011 from November 30, 2011
[90]For further reading refer to Chapter G) "Penal policy"

the accused persons were charged with. Because of this, some accused persons were acquitted of all criminal responsibility, and others received much more lenient sentences. These cases impose the question: who is to blame: ignorance or corruption in the judiciary?

Case studies show that the prosecution wrongly applied a series of legal provisions in a manner which acquitted organised crime participants of any criminal liability.

Case Study 3

In one of the most significant criminal proceedings initiated in Montenegro, the first accused was Duško Šarić, brother of Darko Šarić, who was considered by police forces and judicial bodies of several countries to be the main drug lord and organiser of the smuggling of cocaine from South America into Europe[91].

In this case, the Special Prosecutor charged the defendant with the criminal offence creation of a criminal organisation. Therefore, Duško Šarić was charged for being a member of a criminal organisation organised by his brother Darko, smuggling of cocaine together with other members of the organisation and money laundering of over 21 million euro accrued by means of smuggling of cocaine in cooperation with other persons.

The High Court in Bijelo Polje pronounced Šarić guilty for the criminal offence money laundering in a prolonged period of time, and acquitted him of charges for criminal offences creating a criminal organisation and unauthorised production, keeping and releasing for circulation of narcotics, concluding that **there is no evidence that he has perpetrated these criminal offences**.[92]

However, **the Appellate Court** determined that due to the content of the Special Prosecutor indictment Šarić had to be acquitted **on grounds much more favourable** for him, i.e. with the conclusion that **the actions he has been charged with by the prosecutor do not constitute criminal offences.**

The Appellate Court of Montenegro[93], acting upon appeals on verdicts by the High Court in Bijelo Polje, **acquitted the defendant for this criminal offence because this action was not prescribed as a criminal offence at the time of the perpetration he was charged with**. This court indicated that the creation of a criminal organisation was criminalised by the 2010 Criminal Code amendments, while the indictment indicates the time of perpetration of the offence as the period between October 2007 and May 2009.

One of the main principles of criminal law is that criminal laws cannot be applied retroactively, except when they are more favourable to perpetrators of criminal

[91]Darko Šarić is currently on trial in Serbia for international smuggling of cocaine and money laundering.
[92] Ks.no. 3/11 from May 03, 2012
[93]Kžs.no.83/12 from February 08, 2013

offences. Organised crime was first defined in the Criminal Procedure Code by provisions applicable to every offence perpetrated in an organised manner, while creation of a criminal organisation was prescribed as a separate criminal offence only in the 2010 Criminal Code amendments. That is why before the defining of organised crime as a separate criminal offence in the Criminal Code, the state prosecutor referred to the Criminal Procedure Code provision in the indictments, on the grounds that an offence was perpetrated in an organised manner.

In addition, the Appellate Court also acquitted this defendant of charges for the criminal offence unauthorised production, keeping and releasing for circulation of narcotics, concluding that **the action he was charged with is not a criminal offence according to law because it does not contain important elements of existence of this criminal offence prescribed in the Criminal Code**[94]. In the appeal procedure, the Appellate Court determined that the first-degree verdict by the High Court in Bijelo Polje stated an action identical to the one the Special Prosecutor charged Šarić with, which **does not relate to** unauthorised production, processing, sale, offering for sale, purchase aimed at a sale, or an action of keeping or transporting or possession in a sale or purchase, nor any other form of releasing for circulation of narcotics, as defined by the Criminal Code[95].

The Special Prosecution team should consist of some of the most distinguished experts in the prosecution, so the possibility of existence of ignorance and incompetence on this level which could cause the defendant being charged with an action which was not prescribed as a criminal offence at the moment of perpetration should be all but ruled out. **It is not known whether disciplinary or any other procedures were initiated against the prosecutor or judge of the High Court in Bijelo Polje acting in this case.**

During the proceedings described in the following case study, **the Special Prosecutor first filed an indictment charging persons with perpetration of criminal offences with elements of organised crime, and later changed it erasing the part mentioning organised crime, on the grounds that at the time of the perpetration of the offences there were no legal grounds for this, even though at the time of perpetration of these criminal offences and during the trial, these grounds were prescribed by provisions of the Criminal Procedure Code, as was stated in the initial indictment**. Of course, this indictment and the two verdicts mentioning organised crime became part of the statistics and results in this field.

[94] Kžs.no.83/12 from February 08, 2013

[95] The Court of Appeals stated that the indictment and verdict by the High Court in Bijelo Polje describe the action perpetrated by Šarić as residing in a certain place during the trafficking of cocaine and abandoning one place two days before the discovery of perpetrators trafficking the drugs and going to another place. The Court of Appeals determined that the action taken by Šarić is described as providing certain orders to other members of the criminal organisation over the phone, but that this relates to actions taken after the perpetration of the criminal offence related to the trafficking of cocaine.

Case Study 4

The Special Prosecutor filed an indictment[96] charging two Montenegrin citizens with attempted first degree murder, first degree murder and unlawful keeping of weapons and explosives, all of which was performed in an organised manner, i.e. under the conditions the Criminal Procedure Code prescribed for organised crime. The proceedings were initiated after the state prosecutor in Karlsruhe - Germany assigned the case files to the Montenegrin prosecution.

On account of these criminal offences, attempted murder and murder, **four persons received convictions with full force and effect in Germany, two of which were sentenced to life sentences** in prison, one to seven and a half years and one to two and a half years.

During the trial, the Special Prosecutor changed the legal qualification in the indictment on the grounds that "the criminal offences in question **cannot be qualified as criminal offences perpetrated in an organised manner because as such they had to be prescribed by law before the perpetration of the criminal offence in question**". However, organised crime was prescribed as a separate criminal offence in the 2010 Criminal Code amendments through the criminal offence creating a criminal organisation, and during the perpetration of the criminal offences subject to this indictment[97], as well as during the trial, organised crime was defined by provisions of the Criminal Procedure Code[98].

Even though it was not bound by the prosecutor's legal qualification, **the High Court** in Podgorica **omitted to cite the allegations of organised crime** in its conviction[99] and convicted two defendants to imprisonment of 15 and 10 years for the criminal offences attempted murder and murder. This verdict **was upheld by the Appellate Court** of Montenegro[100]. However, had the defendants been pronounced guilty for first-degree murder perpetrated in an organised manner, as they were charged in the initial indictment, they could have been convicted to imprisonment of 40 years.

[96] Kts.no.5/06 from November 18, 2006
[97] The actions the defendants were charged with were perpetrated between September 2003 and January 09, 2004
[98] Further reading in Chapter A) "Legal Framework"
[99] Ks.no.43/09 from February 08, 2010
[100] Ksž.no.15/2010 from June 14, 2010

BOOSTING OF STATISTICS

Analysis of verdicts qualified as part of the field of organised crime shows that **cases not containing elements necessary for the existence of organised crime are treated as organised crime cases**. This way, the Special Prosecutor initiates, and courts conduct proceedings for offences which do not constitute organised crime, and indictments and verdicts in these proceedings are baselessly **classified in statistics** relating to this field.

It is evident in practice that **only a certain level of organisation and an aim of acquiring gains are considered enough** for the Special Prosecutor to classify a case as being from the field of organised crime and for courts to treat it as such, even though the Criminal Procedure Code and Criminal Code prescribe a series of necessary preconditions[101]. In this way, cases for the criminal offence **criminal association** are routinely being treated as organised crime cases, even if they do not fulfil all legal preconditions, just like the other criminal offences the defendants are charged with in addition to this offence.[102]

Analysis of verdicts also shows that the Special Prosecutor first files **organised crime** charges, and then during the proceedings he changes them and **drops such qualifications**, and the verdicts are still entered into the official statistics.

A series of examples shows that organised crime indictments end up as **convictions for criminal offences which do not represent organised crime**, and they are still classified as part of the official judiciary statistics in this field.

Practice confirms that in these cases **evidence is collected through secret surveillance measures** which could not have been ordered had it not been for unfounded organised crime indictments, which brings into question the legality in the ordering and application of these measures and the validity of evidence gathered in this way.

There are also examples where it is determined during the proceedings that some actions the state prosecutor charges the defendants with as organised crime **are not a criminal offence at all**.

Finally, even in cases where the court determines guilt and convicts the defendants for organised crime, doubts remain whether this type of organised crime was perpetrated because **the court does not provide any reasoning for conditions necessary for the existence of organised crime, other than the conditions of organisation and membership in a criminal group**.

[101] Further reading in Chapter A) "Legal Framework"

[102] The 2010 Criminal Code amendments amended the description of the criminal offence criminal association and the criminal offence was renamed (*zločinačko* renamed to *kriminalno*)

1. Official statistical data, assessment and recommendations for improvement

February 2011 saw the establishment of a Tripartite Commission for Corruption and Organised Crime Cases[103] whose members are representatives of the courts, prosecution and the police.

The task of the Tripartite Commission is to:

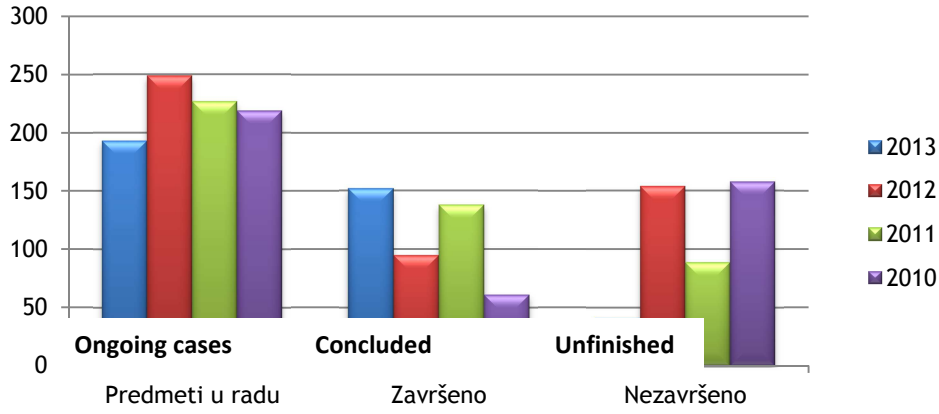
- determine a unique **methodology** of statistical parameters for the police, prosecution and courts,
- perform **statistical and analytical processing** of data on the number of criminal charges and cases in the field of corruption and organised crime which are ongoing or final, with a special emphasis on the structure of perpetrators of these offences, and fields where these offences are perpetrated,
- after applying the methodology, **report** and give **recommendations** aimed at improving the efficiency of the judiciary.

Commission reports contain statistical indicators, and analytical processing is reduced to a short description of data and extremely generalised recommendations.

Description/year	2013.	2012.	2011.	2010.
Ongoing cases	20 cases 193 persons	25 cases 249 persons	28 cases 227 persons	27 cases 219 persons
Concluded	13 cases 152 persons	15 cases 95 persons	16 cases 138 persons	12 cases 61 persons
Unfinished	7 cases 41 persons	10 cases 154 persons	12 cases 89 persons	15 cases 158 persons
Convictions	85 persons	44 persons	124 persons	45 persons
Acquittals	59 persons	22 persons	14 persons	14 persons
Verdicts set aside	12 persons	3 persons		9 persons
Other	For 2 persons, the proceedings were terminated	For 26 persons indictments were returned to the prosecutor in order to complete investigation		
Final judgements	5 cases 33 persons	3 cases 13 persons	1 cases 5 persons	7 cases 41 persons

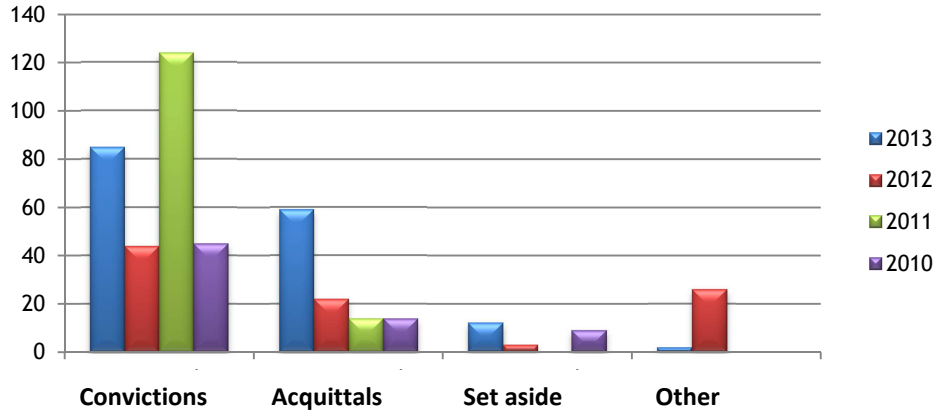
Table 1: Overview of statistical data for criminal offences from the field of organised crime 2010 - 2013
Source: Tripartite Commission Reports
*The Tripartite Commission data shows that **in 2013 more cases were concluded than in the previous years, and that fewer cases are ongoing.***

[103] The Tripartite Commission was established by a decision by the President of the National Commission for Implementation of the Strategy for the Fight against Corruption and Organised Crime no. 03-1493 from February 16, 2011



Graph 1: Data on ongoing, concluded and unfinished cases – field of organised crime 2010 - 2013 Source: Tripartite Commission Reports

Official statistics show that in 2013, fewer persons were convicted than in 2011. In addition, **in 2013, more persons were acquitted than in the three previous years combined.**



Graph 2: Data on verdicts in the field of organised crime 2010 - 2013 (by number of persons). Columns (from left to right): convictions, acquittals, cases set aside, other. Source: Tripartite Commission Reports

Even though statistical data shows that there are significant differences each year, **every Tripartite Commission Report concludes with the identical assessment: "progress was achieved** in solving of cases in the fields of corruption and organised crime".

Each report contains almost identical recommendations which are almost exclusively limited to education of staff and for a need for "technical, material

and every other form of support'' to be provided to the work of police, prosecution and courts.

- *I Report:* "It is necessary to have **quality expert witnesses** from all fields and continue **educating** all functions participating in the detecting, prosecuting and adjudicating these cases. It is especially necessary to **strengthen the capacities** of the State Prosecution with the necessary number of **associates and experts** from different fields. "
- *II Report:* "It is necessary to have **officials** who have a high level of **specialist expertise** in the detection, criminal prosecution and adjudicating of criminal offences from the fields of corruption and organised crime. In order to expand expertise in these fields, it is necessary to continue **educating** the existing staff by domestic and foreign experts. Furthermore, it is necessary to provide **technical, material and all other forms of support** for the successful performance of these activities to the officials responsible for them. "
- *III Report:* "It is necessary to have **officials** with a high level of **specialist expertise** in the detection, criminal prosecution and adjudicating of criminal offences from the fields of corruption and organised crime. In order to expand expertise in these fields, it is necessary to continue **educating** the existing staff by domestic and foreign experts. Furthermore, it is necessary to provide **technical, material and all other forms of support** for the successful performance of these activities to the officials responsible for them. "
- *IV Report:* "It is necessary to have **officials** with a high level of **specialist expertise** in the detection, criminal prosecution and adjudicating of criminal offences from the fields of corruption and organised crime. In order to expand expertise in these fields, it is necessary to continue **educating** the existing staff by domestic and foreign experts. Furthermore, it is necessary to provide **technical, material and all other forms of support** for the successful performance of these activities to the officials responsible for them. "
- *V Report:* "It is necessary to have **officials** with a high level of **specialist expertise** in the detection, criminal prosecution and adjudicating of criminal offences from the fields of corruption and organised crime. In order to expand expertise in these fields, it is necessary to continue **educating** the existing staff by domestic and foreign experts. Furthermore, it is necessary to provide **technical, material and all other forms of support** for the successful performance of these activities to the officials responsible for them. "
- *VI Report:* "It is necessary to **improve expertise** in these fields, and to continue **educating** the existing staff by domestic and foreign experts. Furthermore, it is necessary to provide **technical, material and all other forms of support** for the successful performance of these activities to the officials responsible for them. "
- *VII Report:* "It is necessary to **improve expertise** in these fields, and to continue **educating** the existing staff by domestic and foreign experts.

Furthermore, it is necessary to provide **technical, material and all other forms of support** for the successful performance of these activities to the officials responsible for them. "

2. How are statistics "boosted"?

2.1. Charged with organised crime, convicted for other offences

One of the means used for **fictive increase in statistics** of the judiciary in the field of organised crime is through **the filing of indictments for organised crime, which the prosecutors then alter without any reasoning whatsoever and omit allegations that the criminal offences were perpetrated in an organised manner.**

Courts convict these persons for other criminal offences, containing no elements of organised crime, with such proceedings fictively boosting the judicial statistics in this field.

The first two case studies relate to cases where the prosecution filed indictments for organised crime against persons whose aim was described as the perpetration of first-degree murders. In the first case, the prosecutor has abandoned organised crime allegations himself, and in the second, this indictment resulted only in the conviction of three persons for falsifying a document and unlawful keeping of weapons and explosives. However, both these cases were part of the official statistics relating to organised crime.

Case Study 5

The Special Prosecution filed an indictment[104] against two persons charged with attempted first-degree murder, first degree murder and unlawful keeping of weapons and explosives, all perpetrated in an organised manner.

In this trial **the Special Prosecutor changed the legal qualification with allegations it did not make up organised crime**, so the High Court in Podgorica convicted the defendants[105] only for criminal offences of attempted murder and murder. The verdict was upheld by the Appellate Court of Montenegro.[106]

Case Study 6

A Special Prosecution indictment[107] charged ten persons with the perpetration of criminal offences severe form of criminal association aimed at perpetrating murder for

[104] Kts.no.5/06 from November 18, 2006
[105] Ks.no.43/09
[106] Ksž.no.15/2010 from June 14, 2010
[107] Kts.no.10/08 from November 24, 2008

unscrupulous revenge in a perfidious manner, unlawful keeping of weapons and explosives and falsifying a document, all perpetrated with elements of organised crime.

The verdict of the High Court in Podgorica **acquitted all the defendants for criminal offences with elements of organised crime due to a lack of evidence**.[108] One of the defendants was convicted for the criminal offence falsifying a document, while two of the defendants were convicted for unlawful keeping of weapons and explosives. This verdict was upheld by the Appellate Court of Montenegro.[109]

The following case studies indicate that in many cases, prosecutors charge defendants with illegal crossing of a state border and smuggling of human beings as organised crime, and during the proceedings they alter the indictments, omitting allegations that the offences were perpetrated in an organised manner. However, convictions in these cases fictively boost statistics of the judiciary in the fight against organised crime.

Case Study 7

A Special Prosecution indictment[110] charged four defendants with the perpetration of the criminal offences criminal association, unlawful keeping of weapons and explosives and illegal crossing of a state border and smuggling of human beings, perpetrated in an organised manner according to the legal requirements prescribed for the existence of organised crime.

Considering the contents of the indictment filed by the Special Prosecutor for Organised Crime, this case was assigned to the Special Division of the High Court.

During the proceedings before the High Court, no evidence was presented which could indicate facts significantly different than the ones indicated at the time of the filing of the indictment. However, during the proceedings **the Special Prosecutor altered the factual description and legal qualification of the criminal offences from the indictment, leaving out allegations that the offences were perpetrated in an organised manner** in the sense of existence of conditions for organised crime.

Instead, the prosecutor charged the defendants with the criminal offences: conspiracy to commit a crime[111], illegal crossing of a state border and smuggling of human beings[112] and unlawful keeping of weapons and explosives[113]. **The High Court in Podgorica accepted the indictment amended this way and convicted the defendants for the same criminal offences they were subsequently charged with, also without determining that they make up organised crime**.[114]

[108] Ks.no.5/08 from July 23, 2010
[109] Ksž.no.14/11 from September 22, 2011
[110] Kts.no.4/07 from April 05, 2007
[111] Article 400, Criminal Code
[112] Article 405, Criminal Code
[113] Article 403, Criminal Code
[114] Ks.no.4/09 from January 28, 2010

Of course, **both the indictment and the verdict became part of the official statistics** of the judiciary in the field of organised crime because the labels of the court cases in the prosecution[115] and in the court[116] remained the same as when the proceedings were initiated, which is relevant for the official statistics.[117]

Case Study 8

A Special Prosecution indictment[118] charged nine persons with the criminal offences criminal association and illegal crossing of a state border and smuggling of human beings perpetrated in an organised manner. Two of the defendants were also charged with the perpetration of separate criminal offences counterfeiting money and unlawful keeping of weapons and explosives.

In the closing arguments, the special prosecutor dropped criminal prosecution charges against three defendants for criminal offences of organised crime, so the High Court in Podgorica reached a verdict rejecting this charge against these defendants.[119] In the same verdict, the High Court in Podgorica **acquitted the other six defendants of charges of organised crime** because it was not proved that they perpetrated these criminal offences and convicted only two defendants for counterfeiting money and unlawful keeping of weapons and explosives. The criminal offences the convicted persons were charged with were discovered in a search instigated due to criminal offences of organised crime.

Case Study 9

A Special Prosecution indictment[120] charged three defendants with perpetrating the criminal offences criminal association and illegal crossing of a state border and smuggling of human beings. **After the conclusion of evidentiary proceedings, the Special Prosecutor** altered the factual description of the indictment and the legal qualification by **omitting the criminal association charges**.

The High Court in Podgorica convicted all defendants for the severe form of the criminal offence illegal crossing of a state border and smuggling of human beings, but without elements of organised crime.[121]

[115] Kts.no. 4/07
[116] Ks.no.4/09
[117] According to Article 151, paragraph 1 of the Rules of Procedure of the State Prosecutor's Office, the case label Kts is only used by the Special Prosecutor in the register of cases for known adult offenders, while according to Article 263, line 2, paragraph 2 of the Court Rules, the label Ks. Is only used by the specialised department of the High Court for organised crime for first-degree criminal cases
[118] Kts.no.10/07 from May 25, 2009
[119] Ks.no.12/2009 from February 09, 2010
[120] Kts.no.18/08 from January 13,2009
[121] Ks.no.2/2009 from April 28, 2009

2.2. Prosecutor: organised crime; Court: no criminal offences whatsoever

Persons accused for organised crime are charged by prosecutors with actions which are not criminal offences at all, and all these cases boost the official statistics on the work of the prosecution.

Case Study 10

A verdict by the Appellate Court of Montenegro states that the Special Prosecutor charged six defendants with criminal association in addition to the criminal offences of smuggling, falsifying a document, counterfeiting money and grave theft.

As the first-degree instance**, the High Court** in Bijelo Polje **acquitted** three defendants for criminal offences of criminal association and smuggling, and another defendant for the criminal offence falsifying a document[122]. The High Court determined that **it has not been proven that the defendants perpetrated the abovementioned criminal offences**.

In the second-degree proceedings, **the Appellate Court**[123] determined that the four actions the prosecutor qualified as a criminal offence of smuggling and another action the prosecutor qualified as a criminal offence of counterfeiting money **do not constitute the perpetration of any criminal offence**.

Furthermore, in relation to the criminal offence **criminal association**, the Appellate Court determined that **both the indictment and the first-degree verdict are incomprehensible and that they do not contain the legal definition of this criminal offence**.

Therefore, according to court verdicts, in this case **the prosecutor classified five actions which do not constitute any criminal offence as organised crime, while the rest of the indictment is incomprehensible and does not match the legal definition of the criminal offence the defendants were charged with**.

However, even such an unfounded and incomprehensible indictment and the verdicts reached on account of it statistically form part of indictments and trials for criminal offences with elements of organised crime.

2.3. Organised crime and criminal offences perpetrated in an organised manner

This case study confirms that there are cases where criminal offences of criminal association[124] and illegal crossing of a state border and smuggling of human beings are classified as organised crime by both prosecutors and judges without any foundation.

[122] Ks.no.5/10 from December 15, 2010
[123] Ksž.no.27/2011 from December 06, 2011
[124] The 2010 Criminal Code amendments changed the name of this criminal offence

Case Study 11

A verdict by the High Court in Podgorica[125] convicted five defendants for the criminal offence **criminal association**[126] and the severe form of the criminal offence **illegal crossing of a state border and smuggling of human beings [127]. The court stated that all the offences were perpetrated in an organised manner**.

However, the verdict **lacks a reasoning** regarding the conclusion that the case in question **fulfilled the necessary legal requirements for the existence of organised crime**. The verdict contains **only the reasons and explanation of the criminal offences** the defendants were convicted for and the reasons indicating a severe form of the criminal offence illegal crossing of a state border and smuggling of human beings, but not the reasons for fulfilling the conditions necessary for the case to be classified as organised crime. The verdict determined that four of the defendants were **in custody for just two days**[128], while the fifth was on the run. Such a short time in custody indicates that **at the beginning of the proceedings it was already clear that this was not organised crime.**

Acting upon appeals to this verdict, **the Appellate Court** of Montenegro reversed the first instance verdict by **significantly reducing the imposed sentences**[129], but regarding organisation, this court also gave a **reasoning only in relation to the severe form of the criminal offence illegal crossing of a state border and smuggling of human beings.** In its verdict, the Appellate Court of Montenegro stated only that this offence was **perpetrated by more persons in an organised manner** and that the defendants smuggled a large number of persons, **which is not nearly enough to conclude that this offence constitutes organised crime**.

[125] Ks.no.29/2011 from March 14, 2012
[126] Article 401, Criminal Code
[127] Article 405, paragraph 3, Criminal Code
[128] Between September 11,2008 and September 13, 2008
[129] Kžs.no.38/12 from September 18, 2012

RESULTS OF INTERNATIONAL COOPERATION

Concrete cases initiated thanks to evidence collected by other states indicate that **a significant quantity of cocaine from South America is being distributed in Europe across the Montenegrin port of Bar.** According to Italian prosecutors and police officials, Montenegrin criminal groups are associated with Ndrangheta, one of the most powerful mafia organisations smuggling narcotics. However, **the competent authorities in Montenegro did not discover a single case of smuggling of cocaine from South America by themselves.**

The Montenegrin courts, prosecution and police **signed a number of agreements on cooperation with states in the region and participated in many training seminars**, but practice shows that this **has not yielded any concrete results.** On the contrary, actions taken in the trial for the smuggling of the largest amount of cocaine in the region show that **cooperation with other states is not being used adequately** and that key evidence obtained by authorities of other states is being challenged during the proceedings.

Trials in these cases **take an unusually long time and are prolonged** thanks to the toleration of procedural abuses, **which causes an inability to acquire evidence through international legal aid. Montenegrin courts do not accept expert testimonies by foreign institutions**, instead hiring local expert witnesses who assess evidence gathered in other states in a manner **favourable to the defendants**, and their findings are accepted as valid by the court**.**

In this way, the trial for the smuggling of cocaine from South America concluded with a verdict indicating that this action does not constitute organised crime, but only the most basic form of drug smuggling defined by the Criminal Code.

Case Study 12

This study analyses a case relating to the cooperation between the Montenegrin police and prosecution with their counterparts from Italy, Serbia and Interpol in preventing the smuggling of over 200 kilograms of cocaine from South America. The proceedings were initiated exclusively due to evidence gathered by security services of other states. The case was legally concluded more than seven years after the perpetration of the criminal offence, after three verdicts by the High Court and two or three verdicts by the Appellate Court[130]. Only two of the defendants were convicted to seven and a half years in prison each for the smuggling of a quantity of cocaine almost four times less than the one stated in the indictment and files by foreign investigating authorities.

[130] The website www.sudovi.me did not publish the verdict which confirms the third verdict by the Court of Appeals among verdicts made by the Court of Appeals. However, the defence counsel of Mr Cemović earlier appealed a verdict sentencing Mr Cemović to a more lenient punishment, so it is logical that he also appealed this High Court verdict and this case was concluded after three verdicts by the High Court and three verdicts by the Court of Appeals.

Investigation and indictment

According to media information, in the port of Valencia in Venezuela, 202 kilograms of cocaine were concealed in containers with asphalt covers and shipped towards Italy. The shipment was followed from the beginning and on October 09, 2004, it reached the port of Gioia Tauro. The Republic Prosecution in Parma seized 190 kilograms of cocaine discovered on the ship.

The remaining 12 kilograms continued the journey towards the Port of Bar, on the way to its final destination in the Republic of Serbia. In this way, the prosecution of Parma attempted to discover all persons participating in the smuggling of narcotics by applying the measure of "controlled delivery"[131].

For 45 days, Montenegrin criminal police inspectors monitored the cargo allegedly ordered by the company "Montplus Company" in the Port of Bar. The goods were taken by shipping agents on behalf of Belgrade businessman Momčilo Pecić, owner of the company "Card Trade". The police tracked the cargo to Novi Sad, searched the truck, found the drugs and arrested Mr Pecić. One day later, Vuksan Cemović, one of the owners of the company "Monteplus company", was arrested in Berane.[132]

Veselin Pavličić from Podgorica was arrested on suspicion of mediating between Pecić and Cemović in the smuggling of cocaine[133]. Finally, thanks to cooperation with Interpol, Vuk Vulević was also arrested[134].

At a media conference, several Italian prosecutors and inspectors stated that the members of the Montenegrin group are probably associated with Ndrangheta**,** one of the most powerful mafia organisations in Italy, which mainly deals with the smuggling of narcotics[135].

On June 03, 2005, the investigating judge concluded the investigation[136], and on June 17, the Special Prosecution filed the indictment[137] for the smuggling of 202 kilograms of cocaine.

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[131] A measure of tracking and delivery of the goods subject to the criminal offence, aimed at fully clarifying a certain criminal activity of transport and delivery of goods subject to the criminal offence (in this case narcotics) and at stopping the chain of criminal activities and detect and prosecute as many participants in said activity

[132] "Cemović could not have done it all by himself", Daily "Vijesti", December 26, 2004, *ND Vijesti*, Society

[133] "Pavličić interviewed by Special Prosecutor", Daily "Dan", February 14, 2005

[134] "Vuk captured", Daily "Vijesti", May 22, 2005

[135] Italian State Prosecutor Vincenzo Lombardo, General Riccardo Pizzini, regional commander of the financial police, Colonel Agatino Sara Fiore, commander of the financial police of the region of Reggio Calabria and police commander of Catanzaro and Major, Massimiliano Puziarelli. Ndrangheta is one of the most powerful mafia organisations. Based in Reggio Calabria, its annual turnover is over 36 billion euro, and most of this money comes from cocaine trade."Cemović boss of a drug gang", Daily "Vijesti", January 15, 2005

[136] "Cemović, Vulević, Pecić and Pavličić facing an indictment by June 21", Daily "Dan", June 04, 2005

[137] Kts.2/04

Trial

The trial was postponed seven times: because of the prosecution calendar, after a request by the defendants' defence attorneys for exemption of the presiding judge, after a request for exemption of the Special and Supreme State Prosecutors, because of illness of one and absence of another defence attorney, because of another absence of an attorney, because of the absence of the Special Prosecutor, and the reasons for the last postponement were undisclosed[138].

The defendants denied the allegations in the indictment, claiming that the cocaine was sent by mistake instead of other goods they ordered[139], while witnesses confirmed that companies owned by the defendants paid for the transport and storage of containers[140].

The judge read the letters sent by the Italian judiciary and police stating that analysis of samples was performed by the chemical laboratory of the state police in Reggio Calabria[141]. In the next hearing, discrepancies in the findings of expert witnesses from Serbia and Italy were established, so the trial chamber requested additional expert testimony[142].

Montenegrin expert witnesses then stated that two packages of bitumen leaves contained 213.51 grams of cocaine. The Special Prosecutor disputed these findings, expressing concern that these might have not been the same bitumen panels examined in Belgrade, and that the shingles were not adequately sealed.[143]

The judge stated that the Italian authorities delivered to her a record on the destruction of the bitumen plates which were soaked with around 190 kilograms of cocaine according to their findings. The plates were burned on November 22, 2007, two years after the seizure, in accordance with Italian law[144].

The defendants' attorneys stated that the quantity of drugs could not have been precisely determined without separating the cocaine from the asphalt base, which cannot be done since the evidence is destroyed. The prosecutor stated that the evidence is based on expert witness findings conducted in accordance with Europol guidelines[145].

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[138] "Vulević and Cemović in court on October 17", Daily "Dan", September 05, 2005; "Request for trial in Novi Sad", Daily "Dan", October 18, 2005; "Request for exemption of Vesna Medenica", Daily "Dan", November 30, 2005; "Vulević and Cemović do not like being photographed", Daily "Vijesti", February 11, 2006; "Courtroom", Daily "Vijesti", March 11, 2006; "Absence of prosecutor postpones trial to cocaine smugglers", Daily "Dan", November 22, 2005.

[139] "Vulević admits to smuggling of documents, but not of drugs", Daily "Dan", May 27, 2006;"He ordered carpets and not drugs ", Daily "Dan", May 30, 2006;

[140]"Goods are never delivered by accident", Daily "Vijesti", July 20, 2006 and "Cemović tried to deliver goods", Daily "Republika", July 20, 2006

[141] "Cocaine discovered by dog", Daily "Vijesti", November 13, 2007

[142] "Cocaine to be measured in Montenegro", Daily "Vijesti", February 02, 2008

[143] "Prosecution still weighing", Daily "Vijesti", May 11, 2008

[144] "Prosecution still weighing", Daily "Vijesti", May 11, 2008

[145] "Conflicting findings", Daily "Dan", May 11, 2008

Verdicts

First High Court verdict: Three years after the filing of the indictment, Cemović and Pecić were convicted to imprisonment of four years each for the smuggling of **213.51 grams of cocaine, a quantity around one thousand times less than stated in the indictment and files by Italian investigating authorities**, while Vulević and Pavličić were acquitted due to a lack of evidence[146].

The verdict stated that the findings of expert witnesses from Italy, stating that the asphalt shingles contained around 190 kilograms of cocaine, were not accepted due to the two analyses conducted by the same chemical laboratory excluding each other. The court also dismissed the findings of expert witnesses from Serbia which stated that the two asphalt shingles contained 12 kilograms of cocaine, instead accepting findings by Montenegrin expert witnesses stating that these shingles contained 213.51 grams of cocaine.

Cemović was convicted to three and a half months in prison each for unlawful keeping of a handgun and abuse of official status, so the court adjudicated a single prison sentence of imprisonment of four years and five months. Pavličić was convicted to imprisonment of three months for unlawful keeping of a weapon, and Vulević to imprisonment of six months for to falsifying of an identity document.

The verdict stated that Cemović sold around six tons of espresso coffee on the grey market and avoided to pay value added taxes in the amount of around four thousand euro. Armenko and Vulević were acquitted for charges of abuse of official status, i.e. selling the coffee on the grey market.

First Appellate Court Verdict: On February 3**,** 2009**,** the Appellate Court of Montenegro set aside the High Court verdict and returned the case for retrial[147]. This court upheld the High Court verdict only in the part relating to the acquittal of Vulević and Pavličić for charges of perpetrating the criminal offence unauthorised production, keeping and releasing for circulation of narcotics. However, these two defendants had to be tried for falsifying of documents and unlawful keeping of a weapon.

Second High Court verdict: Since Vulević and Pavličić were irrevocably acquitted of charges for the criminal offence unauthorised production, keeping and releasing for circulation of narcotics, and after amendments to the Criminal Code proposed by the Government the following year[148], Cemović and Pecić could no longer be charged with a severe form of this criminal offence, only for the basic form. This means that **smuggling of this quantity of cocaine from South America could no longer be qualified as organised crime**.

In the repeat proceedings, the Special Prosecutor altered the indictment and charged three defendants with tax and contribution evasion instead of abuse of official status, and two were charged with negligent performance of business activities.

[146] K.no.123/05 from May 30,2005
[147] Court of Appeals of Montenegro verdict Kž.no.569/08 from February 03, 2009
[148] Further reading in Chapter "Legal Framework"

The new panel of judges accepted the analysis and findings of the chemical laboratory in Italy stating that this was a **smuggling of 58.8 kilograms of cocaine**. [149] In the repeat proceedings, the court acquitted Cemović for tax and contribution evasion and negligent performance of business activities, Vulević for tax and contribution evasion, Pecić for negligent performance of business activities, and Armenko for aiding in tax and contribution evasion.

Second Appellate Court verdict: For the second time, the Appellate Court set aside[150] the High Court verdict in the part of the conviction related to the smuggling of cocaine. This verdict indicates that the High Court again had problems in clearly determining the quantity of cocaine in question. In the part where Cemović, Vulević, Pecić and Armenko were acquitted for the criminal offences negligent performance of business activities and tax and contribution evasion, the High Court verdict was upheld and it became final. **The state paid out Vulević 24 thousand euro in compensation for unlawful stay in custody**.[151]

Third High Court verdict: The latest verdict[152] in this case was adjudicated by the High Court in Podgorica **more than seven years after the perpetration of the criminal offence**. This verdict convicted Cemović and Pecić to imprisonment of seven years and six months each for the smuggling of cocaine, while Cemović was acquitted for unlawful keeping of a weapon.

The verdict indicates that the defendants smuggled **59.01351 kilograms of cocaine**, of which 58.8 kilograms were seized in Italy, and 213.51 grams were sent as "controlled delivery" towards Serbia across the Port of Bar and this quantity was seized by the Ministry of Interior Affairs of Serbia. Therefore, the court now accepted the findings of expert witnesses from Italy which determined that **60 packages contained 58.8 kilograms of cocaine**. The verdict also states that the package delivered from Serbia for expert examination in Montenegro was labelled as containing around 12 kilograms of cocaine. At the same time, the court again accepted the findings of Montenegrin expert witnesses stating that the **two "controlled delivery" packages contained only 213.51 grams of cocaine**, without seeking further explanations from Italian or Serbian authorities. This verdict became final[153].

[149] High Court in Podgorica verdict Ks.no.6/2009 from March 09, 2011
[150] Verdict Ksž.no.23/2011 from September 20, 2011
[151] Vulević was in custody from November 25, 2005. To May 30, 2008. High Court in Podgorica verdict Gž.no.3221/13 from December 03, 2013
[152] Ks.no.30/2011 from January 23, 2012
[153] Courts only publish final verdicts on their websites, and since this verdict was entirely published on the website www.sudovi.me, this, along with media articles indicates the finality of the verdict. "Cemović due citizenship", "Dan" from February 07, 2014

EFFECTS OF SECRET SURVEILLANCE MEASURES

Concrete examples indicate that **the prosecution has different criteria when it comes to the use of secret surveillance measures (SSM**). In some cases related to international smuggling of cocaine, the prosecution proposed the implementation of SSM, on the basis of which it acquired evidence some conviction verdicts were based on, while in other cases of smuggling of even larger quantities of cocaine they did not request the courts to order the application of these measures.

There are concrete examples of **court orders ordering the application of SSM which do not contain all legally required elements**, which hampers, and in some cases makes it impossible to perform any type of checks and controls of the legality of infringing of basic human rights.

A number of examples indicate that **prosecutors proposed, and courts ordered the application of SSM due to suspicions of organised crime**, with these proceedings concluding in **convictions for criminal offences for which the application of SSM is not prescribed on the basis of evidence gathered by secret surveillance measures.** This brings into question **the legality of the ordering and application of these measures, as well as the validity of evidence gathered in this manner.**

1. Different criteria by the prosecution

Concrete evidence indicates that in some cases related to international smuggling of cocaine, the prosecution proposed the implementation of SSM on the basis of which it acquired evidence some conviction verdicts were based on, while in other cases of smuggling of even larger quantities of cocaine they did not request the courts to order the application of these measures, even though the legally prescribed conditions for these measures were fulfilled.

In the case of suspected smuggling of over 200 kilograms of cocaine from Latin America, the police supervised the shipment by means of a measure of controlled delivery and tracked its transport to another state, but the prosecution did not request the wiretapping of the phones of suspects, even though these measures could have been used to gather significant evidence[154].

In another case relating to the smuggling of 14 kilograms of cocaine, which was also initiated thanks to the work of security services from other states, in addition to the measure of tracking of transport and delivery of the subject of the offence (controlled delivery), the prosecutor proposed measures of surveillance and recording of telephone conversations, and the court ordered the application of these measures.[155] This way, these measures were used to collect evidence the court used in the conviction.[156]

[154] The complete case study was outlined in Chapter D) Results of International Cooperation.
[155] SSM.no.2/08 from April 09, 2008 and SSM.no.2/08-3 from April 10, 2008
[156] Ks.no.18/09 from December 31, 2010

2. Court orders without explanation and checks of justification

The case study given in this Chapter indicates that a court order for the application of SSM does not contain all legally prescribed necessary elements, i.e. there is no reasoning for the grounds of suspicion that the persons in question committed criminal offences, there are no facts indicating the need for application of SSM, nor is an aim to be achieved by the measures indicated in it.

In this case, the court approved the application of SSM in the duration of five months without checking the reasoning for the application of these measures, which is legally required after the expiry of a four-month term. This example leads to a conclusion that police forces implemented secret surveillance measures even without court orders prior to requesting the ordering of SSM on the basis of data gathered in this way.

Case Study 13

In the criminal proceedings before the High Court in Podgorica[157] the court ordered Secret Surveillance Measures and technical recording of telephone conversations over mobile telephones at the proposal of the State Prosecutor. The first proposal by the Prosecutor[158] and the first court order[159] relate to five persons with precisely specified identification data[160], while for two persons it was stated that these were unknown persons with certain nicknames and indicated the telephone numbers to be monitored.

The orders state that there is a reasonable suspicion that a criminal organisation perpetrates and is preparing to perpetrate the criminal offences criminal association and trafficking in human beings from the field of organised crime using the numbers in question. However, the orders do not explain the facts **indicating the need for application of SSM and reasons for grounds of suspicion, nor the aim of the application of these measures, as prescribed by the Criminal Procedure Code**.[161]

The orders determined the duration of SSM, defined that the measures to be applied by the Department of Criminal Investigation, and that the officials applying it are obliged to take maximum efforts not to infringe the privacy of persons not subject to the measures, that they were required to keep records of each action, to be bound to maintain the secrecy of all data they acquired in this procedure, as well as to deliver a report on the application of measures to the Special Prosecutor and the investigating judge after the expiration of the term.

During the proceedings, the Special Prosecutor stated that SSM were ordered in this case on the basis of *"information by the police which in essence represents* ***a report on the application and gathering of evidence materials through previous application of SSM****"* and that this report was delivered to the investigative judge and

[157] Ks.no.2/2012
[158] SSM no. 6/09 from July 15, 2009
[159] SSM no. 11/09 from July 15, 2009
[160] Full name, father's name, date and place of birth, residential address and mobile telephone number
[161] Article 159, paragraphs 2 and 3, Criminal Procedure Code

prosecutor. This leads to a conclusion that SSM were ordered on the basis of material gathered by previous SSM implemented without a court order, because case files do not contain a proposal by the prosecutor or any court order on the application of these measures, nor any material evidence gathered in this manner.

The current **Criminal Procedure Code does not provide a legal basis for SSM to be initially applied to persons whose identity is unknown,** which is illustrated by the draft Criminal Procedure Code Amendments which for the first time stipulates that an order for appliance of SSM shall contain data on persons they are applied on *"if the person is known"*.[162]

The first SSM were ordered for the period of three months. On the deadline of this period, the Special Prosecutor submitted a proposal for an extension for a further two months[163] which was approved by the court.[164] This court order also lacked explanation, i.e. it did not contain a single word on reasons for grounds of suspicion and facts indicating a need to extend the SSM. Furthermore, **the court did not provide a single justifiable reason for the application of SSM beyond the four months**, even though **Criminal Procedure Code provisions prescribe a mandatory check of justification of SSM after the expiration of four months**[165].

3. Justification of use of secret surveillance measures

Several case studies indicate that courts order the implementation of SSM at the proposal of the prosecution due to suspicions of organised crime, but during the proceedings the prosecution drops these charges, or they are dropped by courts, while at the same time adjudicating convictions for other criminal offences for which the use of SSM is not prescribed on the basis of evidence gathered thanks to SSM. This brings into question both the legality of the ordering and application of these measures, as well as the validity of evidence gathered in this manner, and therefore the legality of verdicts based on this evidence.

Case Study 14

A Special Prosecution indictment[166] charged ten persons with the perpetration of the criminal offences criminal association aimed at perpetrating murder for unscrupulous

[162] Further reading in Chapter "Legal Framework"
[163] SSM. No. 6/09 from October 15, 2009
[164] SSM no. 11/09 from October 15, 2009
[165] Article 159, paragraph 5 of the Criminal Procedure Code prescribes that SSM may last only as long as necessary, at the longest four months, although for valid reasons they may be prolonged for three more months. In addition, SSM may be applied for a period shorter than four months, i.e. the measures may be extended several times within this period. However, legal regulation prescribes a mandatory check of the justification of application of SSM after the expiry of four months. Before the expiry of this period, the duration of SSM cannot be determined in advance for a period longer than four months, because Criminal Procedure Code provisions do not permit this.
[166] Kts.no.10/08 from November 24, 2008

revenge in a perfidious manner[167], unlawful keeping of weapons and explosives and falsifying a document, all perpetrated with elements of organised crime.

In this proceeding, SSM were used, both measures ordered by the state prosecutor and those ordered by the court. The legal requirements for the existence of organised crime[168] were stated both by the Special Prosecutor in the indictment and by the court in the sentence[169]. However, due to a lack of evidence, all the defendants were **acquitted for criminal offences with elements of organised crime**.[170]

The same verdict **convicted one of the defendants for the criminal offence falsifying a document, while two defendants were convicted for unlawful keeping of weapons and explosives**. The criminal offences the defendants were convicted for do not contain any element of organised crime, nor SSM may be imposed for these crimes, but they were detected due to the application of **secret surveillance measures**.

This verdict was upheld by the Appellate Court of Montenegro.[171]

Case Study 15

A Special Prosecution verdict[172] charged ten persons with the perpetration of the criminal offences criminal association aimed at perpetrating murder for unscrupulous revenge in a perfidious manner, unlawful keeping of weapons and explosives and falsifying a document, all perpetrated with elements of organised crime. All the defendants were **acquitted for criminal offences with elements of organised crime**. However, one defendant was convicted for the criminal offence falsifying a document[173] because a search of his person resulted in the discovery of a falsified identification card and driver's license.

Secret Surveillance Measures cannot be ordered for the criminal offence falsifying a document, but the conviction was adjudicated for the criminal offence falsifying a document against a defendant the SSM were applied on and who even admitted acquiring the falsified documents – identification card and driver's licence.

This defendant was under secret surveillance measures, and his arrest and search were ordered based on the data gathered by these measures. In other words, there

[167] Article 401, paragraph 4 of the Criminal Code prescribes a severe form of the criminal offence criminal association when the association is aimed at perpetrating criminal offences punishable by a prison sentence of twenty years or a prison sentence of forty years
[168] That the criminal offences the defendants were charged with are the result of organised actions of more persons aimed at acquiring gains and power by means of perpetrating severe criminal offences, which occurred for a prolonged time period, at the international level, with predefined tasks and roles, with the application of rules of internal control and discipline and with a willingness to apply violence and intimidation
[169] Ks.no.5/08 from July 23, 2010
[170] Ks.no.5/08 from July 23, 2010
[171] Ksž.no.14/11 from September 22, 2011
[172] Kts.no.10/08 from November 24, 2008
[173] Ks.no.5/08 from July 23, 2010

would have been no arrest or search had it not been for the application of SSM and investigation and indictment for organised crime, which were subsequently dropped.

COOPERATIVE WITNESSES AND PROTECTED WITNESSES

Institutes of cooperative witnesses and protected witnesses have been applied **only in one case each** since they were prescribed by law. **In both cases, this status was assigned without a clear foundation, and the witness statements were not of significance for the verdict.**

1. Cooperative witnesses

The status of first and only cooperative witness in the history of Montenegrin judiciary was bestowed upon a mediator in the smuggling of narcotics whose statement had no impact whatsoever on the conviction of the defendant against whom he testified, while his testimony did not have any relevance to determining the guilt of the main organiser of cocaine smuggling.

Case Study 16

In the case related to the smuggling of three kilograms of cocaine from Montenegro, across Croatia and Slovenia towards Italy, three separate criminal proceedings were led. The courier found in possession of the drugs was tried in Croatia, while one of the mediators and the organiser of the drugs smuggling were tried in Montenegro[174]. During the investigation against one of the mediators, Aleksandar Brajović, another mediator in the network organised for the transport of cocaine, Antonije Mračević, received the status of **cooperative witness**.[175]

However, the reasons why the Special Prosecutor proposed and the court accepted the proposal for this defendant to receive the status of cooperative witness are quite unclear. His statement indicated that he **never had any contact with the organiser of the criminal association,** Vjekoslav Lambulić, and **his evidence was used to convict only the second mediator**, Brajović, **against whom other evidence existed**.

In his defence, the defendant Brajović admitted to the perpetration of the criminal offence and described in detail his role in the takeover and handover of the cocaine discovered in Croatia. Furthermore, the verdict against Brajović[176] states that his guilt was determined from the listing of telephone conversations the court accepted as evidence in the proceedings which indicates the time of communication he has had with the cooperative witness Mračević and the organiser Lambulić.

The statement by the cooperative witness was only used by the High Court to add the smuggling of an ''unidentified quantity of cocaine'' to the charge against Brajović, an action perpetrated one month before the discovery of the three kilograms of narcotics in Croatia. In the verdict against Brajović, the High Court determined that

[174] Further reading in Chapter G) "Penal Policy"
[175] Decision by the Criminal Panel of the High Court in Podgorica Kv.no.413/05 from July 29, 2005
[176] Ks.no.4/2008 from April 16, 2009

the organiser of the smuggling of cocaine was Vjekoslav Lambulić, both for the three kilograms seized in Croatia, and for the "unidentified quantity" mentioned in the statement by the cooperative witness.

However, in the verdict against the organiser, Lambulić, the statement of this cooperative witness was not used at all and Lambulić was convicted only for the smuggling of the three kilograms of cocaine which were detected[177]. Although the court determined the same facts from the listing of telephone conversations on account of which it convicted the mediator Brajović in another proceeding for the smuggling of "an unidentified quantity" of cocaine in February 2005, in this proceeding, the court did not even mention the participation of Lambulić in this smuggling.

This indicates that **the cooperative witness did not significantly contribute towards the proving of the criminal offence and guilt of the perpetrators, he did not help in the detecting, proving and preventing of other criminal offences, nor did the significance of his statement for the proving of the criminal offence in question and culpability of other perpetrators prevail over the harmful consequences of the criminal offence he was charged with, as is the legal requirement for receiving the status of cooperative witness[178].**

2. Protected witnesses

The only case which used the statement of a protected witness indicates that the Special Prosecutor and court illegally proposed and determined the status of protected witness. The status of protected witness was received by a person of dubious credibility, and during the proceedings this person was interviewed in an illegal manner. All of this essentially favoured the defendants, because the information the protected witness provided to the Special Prosecutor was eventually removed from the case files.

Case Study 17

The first and only protected witness in the history of the Montenegrin judiciary testified in the case of murder of high-ranking police official Slavoljub Šćekić[179]. The Special Prosecutor based his indictment on the statement by the protected witness, who claimed that one of the defendants admitted he organised the murder of Šćekić to him while they were together in prison.

Soon after the testimony, **the identity of this protected witness was disclosed, and subsequently he revealed himself and terminated cooperation**[180].

[177] Ks.no.22/2011 from December 30, 2011
[178] Further reading in Chapter A) "Legal Framework"
[179] Slavoljub Šćekić, Chief of Crime Prevention in the Police Administration, was murdered in August 30, 2005 in an ambush directly outside of his home. As this case has not yet been concluded, the verdict and files are not available for analysis, so this part of the analysis uses information published in media.
[180] Source: "Human Rights in Montenegro 2010-2011", report by NGO Human Rights Action

The attorneys of the defendants claimed that this witness was unreliable, that he was convicted of rape, falsifying and fraud, as well as perpetrating several criminal offences while he enjoyed protection, the processing of which was prevented by the Special Prosecutor at the time[181]. During the trial, attorneys also claimed that the protected witness was part of paramilitary groups during the war in the former Yugoslavia.

More than nine and a half years after the perpetration of the murder, after two first-degree and two second-degree verdicts, the Supreme Court of Montenegro set aside the conviction and returned the case to the Appellate Court for a retrial. The Supreme Court indicated that the first-degree and the second-degree proceedings **were not adjudicated for criminal offences perpetrated in an organised manner, so the information the protected witness provided to the Special Prosecutor could not have been accepted, which is why this information has to be removed from the case files**[182].

This designation of protected witness status, whose testimony remained unusable and useless in the court proceedings, also opened **the question of the costs his protection required**.

[181] "Majk will not testify against Ljubo Bigović", Vijesti from December 18, 2010, "Criminal charges for fabricating evidence", Dan from December 18, 2010, "Vlaović defrauded traders as 'Stojanka's bodyguard' "
[182] Portal RTCG article: "Conviction for the murder of Slavoljub Šćekić quashed" from May 20, 2005

PENAL POLICY

The penal policy of Montenegrin courts has proven to be quite lenient when it comes to cases of international smuggling of cocaine.

On the other hand, in verdicts for smuggling of other types of narcotics against persons who are mostly users and addicted to narcotics, and who do not sell narcotics in an organised manner, courts adjudicate much stricter sanctions.

This type of penal policy **is rewarding for smugglers of larger quantities of "hard'' drugs,** because in this case they will be punished more leniently than drug addicts convicted for possession of smaller quantities of narcotics.

Concrete examples indicate that **durations of proceedings, law amendments favouring accused persons and an extremely lenient penal policy by the courts, allow for organisers of criminal organisations in the business of international smuggling of cocaine to be convicted to sentences inferior to those imposed on their subordinates**.

Proceedings before Montenegrin courts last much longer, and their penal policy for the smuggling of cocaine is much more lenient than the practice of courts in other states.

In some cases, courts consider the **quantity** of seized narcotics **as mitigating or aggravating circumstances, while in other cases these facts are not considered at all.**

The Appellate Court further reduces already lenient sentences for smuggling of cocaine. Such verdicts frequently do not contain clear explanations the court used to reduce the convictions or these verdicts are contrary to law or facts determined during the court proceedings. In this way, the Appellate Court reduces sentences to narcotics smugglers because they have "repented", even if they continue perpetrating the same criminal offences even while serving their prison terms. Sentences are also mitigated due to "family circumstances", without any explanation whatsoever, and in some cases previous convictions are not considered as aggravating circumstances as prescribed by law.

Persons convicted for organised crime enjoyed additional benefits in the form of reducing of prison terms through the appliance of the institute of parole release, thanks to decisions made by high executive and judicial authorities.

In addition, the Parliament of Montenegro adopted **numerous amnesty laws** which related to persons sentenced for organised crime, including the smuggling of narcotics, thanks to which they were **exempt from one quarter and one fifth of the imposed sanctions**.

1. Penal policy of courts in Montenegro and the region

Concrete examples indicate that durations of proceedings, law amendments favouring accused persons and an extremely lenient penal policy by the courts, allow for organisers of criminal organisations in the business of international smuggling of cocaine to be convicted to sentences inferior to those imposed on their subordinates.

Examples indicate that Montenegrin courts take much longer to adjudicate verdicts, and that their penal policy for these criminal offences is much more lenient than the practice of courts in other states.

Case Study 18

This example indicates that the organising of the smuggling of cocaine and money laundering in Montenegro is punishable by sanctions inferior to those imposed by Croatian courts to couriers transporting cocaine on the behalf of other persons.

The mediator was convicted in Montenegro, more than four and a half years after the detection of cocaine, to a prison sentence inferior to the one imposed upon the courier abroad. Another mediator evaded criminal responsibility by receiving the status of cooperating witness who "contributed" towards the conviction of the first, against whom evidence already existed.

Finally, seven years after the detection of cocaine, almost six of which he spent on the run and serving a sentence for drug smuggling in another state, the organiser of the criminal association was convicted to the most basic criminal offence and to the most lenient sentence.

- Trial and verdict to the courier

On March 15, 2005, on the border crossing Konavle, between Montenegro and Croatia, Croatian police seized **2961.66 grams of cocaine** from a vehicle[183].

The person transporting the cocaine was convicted by a verdict of the County Court **in Dubrovnik**[184] to imprisonment **of 5 years** for the criminal offence abuse of narcotics[185]. This verdict came into force on June 09, 2005, less than three months after the detection of the cocaine.

Role: **COURIER**

Convicted: in Croatia
Sentence: **5 years**
Time between detection and verdict: 3 months

[183] The cocaine was loaded in Podgorica and it was meant to be transported across Croatia and Slovenia to Italy, with a final destination in Milan.
[184] K.no.13/05-32 from May 12, 2005
[185] Article 173, paragraph 2, Criminal Law of the Republic of Croatia

- Trial and verdict of mediator of organised network of transport of cocaine

Less than two and a half months later, the Montenegrin Special Prosecutor filed an indictment for the same criminal offence[186] which charged Aleksandar Brajović from Podgorica with the severe form of the criminal offence unauthorised production, keeping and releasing for circulation of narcotics.

The circumstance qualifying the criminal offence Brajović was charged with as severe was that a network of mediators and dealers was organised. Brajović was charged with being part of a network of mediators in the transport of cocaine.

Three years and eight months after the filing of the indictment, a verdict by the High Court in Podgorica[187] convicted the mediator in the smuggling of cocaine to four and a half years in prison.

Role: **MEDIATOR**

Convicted: in Montenegro

Sentence: **4 years and 6 months**

Time between detection and verdict: 4 years and 3 months

The High Court verdict states that Brajović, as a member of a criminal association – an organised network of mediators organised by Vjekoslav Lambulić, was hired to find a courier for the transport of cocaine to Italy, and he subsequently hired a courier, Slovenian citizen Zlatko Krivec through another mediator, Antonije Mračević, to perform this task.

This verdict was upheld by the Appellate Court of Montenegro and it became **final** on December 03, 2009, **four years and three and a half months after the filing of the indictment**.

- Second mediator as cooperating witness

During the course of the investigation against Brajović, a second mediator in the network organised for the transport of cocaine, Antonije Mračević, received the status of **cooperating witness** in this case.[188]

The reasons for which the Special Prosecutor proposed and the court accepted the proposal for this defendant to receive the status of cooperating witness, are quite incomprehensible. His statement indicated that he **never had any contact with the organiser of the criminal association**, Mr. Lambulić and **his statement was only used as the basis for the conviction of the second mediator**, Mr. Brajović, **against whom other evidence existed**.[189]

[186] Kts.no.3/05 from August 22, 2005
[187] Ks.no.4/2008 from April 16, 2009
[188] Kv.no.413/05 from July 29, 2005
[189] Further reading in Chapter F) "Cooperating Witnesses and Protected Witnesses"

- Trial and verdict to organiser of network of mediators for the transport of cocaine

At the time of the filing of the indictment against Brajović, the organiser of the criminal association, Vjekoslav Lambulić, was on the run, so criminal proceedings against him were separated. According to media[190], Vjekoslav Lambulić was arrested on a warrant issued by Interpol in May 2007 in Belgrade, before being extradited to Switzerland in June 2008, where he was also sentenced to imprisonment on account of drug trafficking.

Six months after the filing of the verdict against the mediator Aleksandar Brajović, the Special Prosecutor indicted[191] Vjekoslav Lambulić charging him with the same severe form of the criminal offence unauthorised production, keeping and releasing for circulation of narcotics the mediator Brajović was charged with, with a difference in that Lambulić was designated as the organiser of the network of mediators.

Therefore, Vjekoslav Lambulić was at the top of the hierarchy of the criminal organisation aimed at transporting the cocaine to Milan, and he was designated as the sole organiser.

According to media allegations[192], Switzerland extradited Vjekoslav Lambulić to Montenegro in January 2011. After this, and **over five years after the filing of the indictment, the High Court in Podgorica adjudicated a verdict**[193] convicting Lambulić to **imprisonment of six years as the organiser** of a network of mediators aimed at the illicit transport of cocaine.

However, four months later, **the Appellate Court of Montenegro set aside this verdict**[194] and referred the case to the High Court for retrial. In its verdict, the Appellate Court stated that it was unable to identify which law was applied by the first-degree court, indicating the 2010 Criminal Code amendments, which were certainly in favour of Lambulić in this case.[195]

Although the mediator Brajović was previously convicted with full force and effect as a member of the network of mediators for the transport of cocaine, and even though the final verdict states that this network was organised by Vjekoslav Lambulić, the Appellate Court stated that the presented evidence does not indicate that Lambulić was the organiser.

Therefore, even though the same Appellate Court previously upheld the verdict stating that Vjekoslav Lambulić was the organiser of a criminal association – an organised network of mediators in its sentence, less than two years later, the

[190] "Blic" from June 21, 2008
[191] Kts.no.1/06 from March 14, 2006
[192] Among others: Independent daily "Vijesti" from January 15, 2011
[193] K.no.60/2008 from May 20, 2011
[194] Ksž.no.21/2011 from September 23, 2011
[195] For further reading on Criminal Code amendments, refer to Chapter A) Legal Framework, and on the practical application of these amendments in this case, refer to Chapter G) Penal Policy

Appellate Court stated in another verdict that there is no evidence that Lambulić was the organiser.

In doing so, the Appellate Court refers to a statement by convicted mediator Aleksandar Brajović, who testified in the proceedings against Lambulić as a witness, stating that Lambulić *"had absolutely nothing to do with the drugs in question".*

This way, the Appellate Court changed its position from the earlier decision, giving greater importance to a changed statement by a legally convicted mediator over a final verdict which already determined that Lambulić was the organiser of a network of mediators for the transport of cocaine. Having in mind that the positions from quashing verdicts by the Appellate Court are binding for the High Court, this was also the position of the High Court towards Lambulić in the retrial.

Due to this position by the Appellate Court, the Special Prosecutor mitigated the indictment in the repeat proceeding, applying **the 2010 Criminal Code amendments in favour of the defendant** and charging him only with the basic form of this criminal offence.

In the repeat trial, the High Court convicted Lambulić[196] to **five years in prison for the basic form of the criminal offence** unauthorised production, keeping and releasing for circulation of narcotics, **without considering him as the organiser** of the criminal organisation, i.e. network of mediators for the transport of cocaine.

In this way, the judiciary adjudicated two contradictory final verdicts relating to the same event. One of them convicted Brajović for the severe form of the offence as a member of the network of mediators organised by Lambulić, while the other verdict did not designate Lambulić as the organiser, so he was convicted for a less severe criminal offence than the mediator.

Furthermore, the final verdict against Brajović determined the existence of organised crime, so Brajović was convicted for organised crime which was explained by the court. The verdict against Lambulić (who was designated as the organiser in the case against Brajović) determined that it was not organised crime, only a basic criminal offence in its least severe form.

Role: **ORGANISER**

Convicted: in Montenegro

Sentence: **3 years and 6 months**

Time between detection and verdict: 7 years

Finally, after clearly indicating in its position that Lambulić was not the organiser and that a more lenient law was to be applied on his case, **the Appellate Court** of Montenegro also revised the High Court verdict applying this position, by **further reducing Lambulić's prison sentence from five to three and a half years**.[197]

In the reasoning of the new verdict in favour of Lambulić, the Appellate Court states that the High Court **did not sufficiently appreciate the mitigating circumstances**

[196] Ks.no.22/2011 from November 30, 2011
[197] Kžs.no.16/2012 from April 11, 2012

regarding his family situation, *"that he was married and a father of four children, and the related passage of time after the perpetration of the criminal offence"*.

A real absurdity is **the passage of time the Appellate Court states as a mitigating circumstance**. In this way, not only did an organiser of a criminal organisation additionally benefit from the inefficiency of the courts and their inability to conclude proceedings earlier, but he is also rewarded for his escape from justice which also caused the proceedings to be delayed.

First the length of the proceedings benefitted the organiser because meanwhile the law was amended to his benefit, and then this circumstance additionally benefitted him in the reduction of his sentence.

During the seven years of the proceedings, the organiser was **unavailable to the court for six years due to escape** and a prison sentence in another state also for the smuggling of narcotics, so this further makes it unclear how the Appellate Court could have used the passage of time as a mitigating circumstance.

This sort of penal policy, with previous positions of courts in favour of organisers of criminal associations, indicates serious doubts of corruption of courts and their control by organised crime.[198]

However, this was not the last sentence reduction for Lambulić because he fulfilled the conditions for another revision of the verdict in his favour.

2. Mitigation of sentences

2.1. Connecting of sentences

Concrete examples indicate that when connecting sentences for more criminal offences, the courts additionally mitigate already lenient sentences for cocaine smuggling.

The Criminal Procedure Code prescribes that a final judgement may be reversed without a criminal rehearing if in two or more judgements against the same sentenced person a number of sentences were imposed with final force and effect, without having applied provisions on determining a single sentence for concurrent criminal offences.[199]

According to Criminal Code provisions regulating a concurrence of criminal offences, if an offender by one action or several actions has committed several criminal offences for which s/he is tried at the same time, the court shall first assess the punishment for these offences respectively and then pronounce a single sentence.[200] If the court has determined imprisonment for criminal offences in concurrence, it shall increase the

[198] Further reading in Chapter G) "Penal Policy"
[199] Article 421, paragraph 1, item 1, Criminal Procedure Code
[200] Article 48, paragraph 1, Criminal Code

most severe punishment determined provided that **the cumulative punishment does not reach the sum of determined punishments.**[201]

Furthermore, if a convicted person is tried for a criminal offence committed before s/he starts serving prison sentence for earlier conviction, or for a criminal offence committed in the course of serving a prison sentence or juvenile imprisonment, the court shall pronounce a **single sentence for all criminal offences** by applying the provisions on concurrence of criminal offences, taking into account the sentence pronounced earlier as an already determined punishment.[202]

Case Study 19

In the period when Vjekoslav Lambulić was unavailable to the judiciary authorities of Montenegro because of flight and serving a prison sentence in another state, in addition to the proceeding for international smuggling of cocaine, the Montenegrin Special Prosecutor also initiated a criminal proceeding against him for the **severe form of the criminal offence money laundering** in the amount of 161,065 euro.[203]

Unlike the proceeding for the smuggling of cocaine, this proceeding was concluded in absentia of the defendant Lambulić, and **the High Court** in Podgorica first adjudicated a verdict[204] sentencing Mr. Lambulić to **three years in prison** for the abovementioned criminal offence.

However, less than a year later, **the Appellate Court** of Montenegro reversed this verdict in favour of Lambulić in view of the sentence and convicted him with full force and effect to **imprisonment of two years for money laundering** in the amount of 161,065.00 €.[205]

After Lambulić became available to Montenegrin judiciary authorities, at the request of his attorney, the High Court in Podgorica ordered **a retrial**[206], in order to allow Lambulić to present a defence and to be tried in his presence. In the repeat proceedings, the High Court in Podgorica adjudicated a verdict[207] which fully upheld the earlier verdict and prison sentence of **two years**.

In this way, in accordance with the Criminal Procedure Code and Criminal Code, **the conditions were fulfilled to reverse the verdict to Vjekoslav Lambulić for smuggling cocaine, having in mind that he perpetrated this criminal offence before he began serving the sentence for money laundering.**

Starting from the legal limitation stating that a single prison sentence cannot reach the sum of imposed sentences, which in Lambulić's case amounts imprisonment of five

[201] Article 48, paragraph 2, item 2, Criminal Code
[202] Article 50, paragraph 1, Criminal Code
[203] Kt.no.126/06 from April 16, 2009
[204] Ks.no.7/09 from April 29, 2009
[205] Ksž.no.18/09 from March 24, 2010
[206] Kv.no.527/11 from October 01, 2012
[207] Ks.no.20/2012 from December 18, 2012

and a half years, he was convicted to a single sentence amounting to five years and five months.[208].

In this way, a person for which one concluded court proceeding proved that he was the organiser of cocaine smuggling, and another proved that he laundered over 160 thousand euro, was convicted in two criminal proceedings for severe criminal offences to a sentence only five months longer than the one the Croatian court imposed to his courier transporting the cocaine.

2.2. "Admission'' and "repentance"

The penal policy of the High Court, and especially of the Appellate Court, has almost no effects on the fight against the criminal offences of organised narcotics smuggling. The Appellate Court adjudicates verdicts which mitigate sentences without any valid grounds and explanation, and concrete examples indicate that such a practice may even act as an incentive to cocaine smugglers.

The first case study in this Chapter shows that the Appellate Court mitigated the sentence to a person accused for smuggling of narcotics due to the admission of a criminal offence which did not have any importance for the detection of the first offence. Even though his sentence was mitigated due to "repentance", and even though incarcerated, he continued to smuggle cocaine in the same period. After this, he was again convicted to a sentence not even close to the prescribed maximum sentence.

Case Study 20

The Appellate Court reduced the sentence for smuggling of cocaine to Petar Stanojević and Mehmed Đoković from six to three and a half years in prison, and from three and a half years to two years and two months in prison.

This case related to the smuggling of more than a kilogram of cocaine, which arrived to Montenegro from Argentina, perpetrated by previously convicted persons. It remained unclear how the Appellate Court valued these circumstances, because the final verdict is not available to the public[209].

According to media reports[210], the Appellate Court reasoned the reduction of the sentence in this case was due to the fact that the defendant Petar Stanojević admitted to the offence and repented.

[208] Kvs.no.51/13 from September 02, 2013
[209] Although this is a concluded case, the web page www.sudovi.me did not publish the verdict of the High Court in Podgorica, or the verdict by the Court of Appeals in Podgorica
[210] Among others: Independent daily "Vijesti" from April 26, 2012, article: "Sentence reduced: he repented and will not deal drugs again"

However, **the defendant's admission in this case did not have any significance in the detection of the criminal offence**, so it is unclear how and for what reasons the Appellate Court regarded it as a mitigating circumstance.

One month after the Appellate Court reduced the sentence to defendant Đoković, another sentence by the High Court in Podgorica convicted him[211] to imprisonment of five years and eight months for criminal offences criminal association and unauthorised production, keeping and releasing for circulation of narcotics.

In this verdict, the High Court determined that Đoković **organised the smuggling of several kilograms of cocaine from Peru while being incarcerated,** at a time when he served a prison sentence for the same type of offence. According to the verdict, Đoković used his prison leaves to organise the smuggling of cocaine.

In the verdict, the High Court stated it especially considered as an aggravating circumstance the previous convictions of the defendant for the same criminal offence, but it is unclear how it determined the duration of the single sentence **for both criminal offences, which is not even near the prescribed maximum for any of these individual criminal offences**.

At the time of the perpetration of the offence, the Criminal Code of Montenegro prescribed imprisonment for a term of **one year to eight years** for organisers of a criminal association aimed at committing crimes punishable by imprisonment of five years or more[212], and between **two to ten years** for the basic form of the criminal offence unauthorised production, keeping and releasing for circulation of narcotics [213]. These are the two offences the High Court **convicted** Đoković **for** to **five years and eight months**.

It is also unclear **how the High Court valued the circumstance that the defendant perpetrated the criminal offence while serving a prison term for an identical criminal offence, which was significantly reduced on account of "repentance"** and how significant this circumstance was for the sentencing.

2.3. Wrongful determination of aggravating circumstances

In some cases, the Appellate Court takes into account the quantities of smuggled narcotics as a mitigating circumstance, while in other cases it does not take these facts into account.

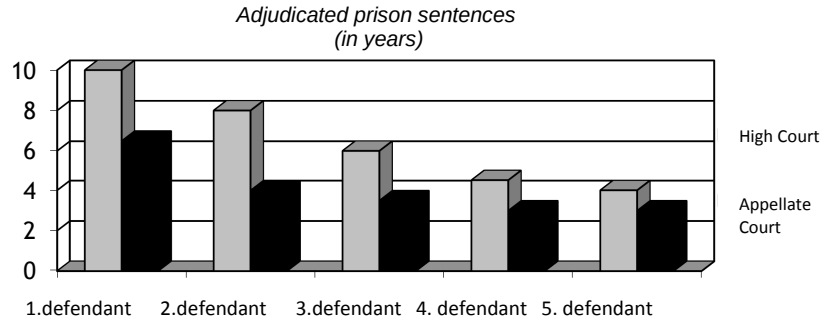
The first two case studies outlined in this Chapter indicate that this court reduced sentences to narcotics smugglers because they were too strict in relation to the quantity of drugs in question, as well as on account of the duration of court proceedings, without detailed explanation and reference to aggravating circumstances.

[211] Ks.no.7/12 from May 28, 2012
[212] Article 401, paragraph 2, Criminal Code of Montenegro
[213] Article 300, paragraph 1, Criminal Code of Montenegro

On the other hand, the following case outlined in this Chapter indicates that the same court did not consider a larger quantity of narcotics as an aggravated circumstance. At the same time, in this example the Appellate Court reduced the sentence to a person convicted for the smuggling of cocaine reasoning that his earlier convictions were wrongly considered as an aggravating circumstance.

Case Study 21

A verdict by the High Court in Podgorica[214] convicted five defendants for the sale of 450g of heroin and 10 kg of marijuana to a total of 32 years and 6 months in prison, and the Appellate Court[215] reduced these sentences to 20 years, without any additional explanation.



Graph1: Comparison of adjudicated prison sentences (in years) of the High (grey column) and Appellate Court (black column) by defendant

The High Court determined that the defendant convicted to the longest prison sentence first arranged the sale of heroine, and later the sale of marijuana – skunk **at a time when he was serving a prison sentence**.

The Appellate Court stated that the sentences were too strict having in mind the weight of the criminal offences, passage of time after the perpetration of the criminal offences, and especially the weight of the drugs in question. However, in its reasoning, the Appellate Court does not explain in detail why it considered the sentences too strict, how the passage of two years after the perpetration of the offence represented a reason for the reduction of the sentence, nor why the overall quantity of narcotics represented a reason for the sentences to be deemed as too strict.

Furthermore, the Appellate Court does not provide a single word on the assessment of other circumstances the law prescribes as significant for sentencing, such as: degree of guilt, motives for the perpetration of the offence, the degree of endangerment or injury of protected goods, circumstances under which the offence was perpetrated, earlier life of the defendants or behaviour after the perpetration of the offence. Therefore, the Appellate Court also did not consider the fact that the defendant

[214] Ks.no.4/11 from April 13,2011
[215] Ksž.no.18/11 from September 29, 2011

arranged the sale of narcotics while serving a prison sentence as an aggravating circumstance.

Case Study 22

A Special Prosecution indictment[216] charged the brothers Ramiz and Esad Muković with the perpetration of the criminal offences unauthorised production, keeping and releasing for circulation of narcotics and abuse of official status, all of which was perpetrated in an organised manner.

This case related to the smuggling of **14 kilograms of cocaine from Ecuador**, concealed in a shipment of fruit pulp[217] the defendants ordered through their company. The cocaine was detected in the Port of Rijeka - Croatia, and part of the cocaine in the amount of one kilogram was sent towards Montenegro as "controlled delivery".

In the first verdict[218] in this case, the High Court in Bijelo Polje pronounced the defendants guilty for the criminal offence unauthorised production, keeping and releasing for circulation of narcotics perpetrated in an organised manner and convicted them to imprisonment of **nine and six years respectively**. This court **failed to adjudicate on charges for criminal offences criminal association and abuse of official status**.

The Appellate Court of Montenegro set aside the High Court verdict[219] **and sent the case for retrial** because the first-degree court did not adjudicate on the liability of the defendants for other offences they were charged with, which represents a significant violation of criminal proceedings.

In the repeated proceedings, the Special Prosecutor altered the indictment and dropped the charges for the criminal offence abuse of official status. **The second verdict by the High Court** in Bijelo Polje[220] convicted the Muković brothers to imprisonment of **eight years and eight months and seven years and eight months respectively** for the criminal offences criminal association and unauthorised production, keeping and releasing for circulation of narcotics perpetrated in an organised manner.

When deciding upon appeals by the defendants' attorneys, the Appellate Court of Montenegro reversed the judgement of the High Court[221] by **reducing the defendants' sentences by two years and two months each, i.e. to imprisonment of six years and six months**, and **five years and six months,** respectively.

[216] KTS.no.2/08 from August 19, 2008
[217] Frozen fruit pulp (pressed minced fruit) frozen at a temperature below -10 degrees Celsius prevents detection by x-ray or by dogs
[218] Ks.no.2/08 from January 30, 2009
[219] Decision Ksž.no.7/09 from November 04, 2009
[220] Ks.no.18/09 from December 31, 2010
[221] Verdict Ksž.no.26/11 from November 08, 2011

The Appellate Court stated that the first-degree court correctly identified all circumstances influencing the type and length of the convictions, but that the **convictions were too lengthy having in mind the severity of the perpetrated criminal offences, passage of time after the perpetration and especially the quantity of drugs.**

The Appellate Court **did not provide reasons and explanation** of why it considers the severity of the criminal offences criminal association and organised smuggling of cocaine from South America into Europe sufficient to justify the adjudicated sentences.

The defendants were arrested in April 2008, i.e. three and a half years before the adjudication of the final verdict, thanks to detection by institutions from another state. Therefore, it is evident that **the fact that the proceedings before Montenegrin courts lasted a long time was considered as a mitigating circumstance when determining the sentence**.

In relation to the quantity of drugs, the Appellate Court did not state **why a quantity of 14 kilograms of cocaine represented a reason for the sentence to be reduced**, i.e. for considering the adjudicated sentences as too severe.

Case Study 23

The Appellate Court of Montenegro reduced the sentence[222] from six to five years in prison to a person convicted for the acquiring, possession and releasing into circulation of 7.811 kg of cocaine. In the reasoning of the verdict, the Appellate Court states that the two previous convictions of the defendant (to a fine and a suspended sentence) occurred 12 years earlier, which means that **legal rehabilitation** came into force, so earlier convictions were wrongly considered as an aggravating circumstance.

However, according to the Criminal Code[223], legal rehabilitation shall be granted solely to persons to whom the rehabilitation is related to prior to the conviction, who had no prior convictions or who were deemed by law to have had no prior convictions.

The same Article of the Criminal Code[224] stipulates that the period in which the convicted persons cannot commit a new criminal offence is three years after the application of a fine, or one year after the expiration of the testing period from the suspended sentence. Therefore, the two previous convictions adjudicated in a single year indicate that this person did not fulfil conditions for legal rehabilitation, so he had to be considered as a convicted person in the third case.

The first-degree court indicated the quantity of the narcotics (7.811 kilograms of cocaine) as an aggravating circumstance, but the Appellate Court concluded that there were no aggravating circumstances and reduced the sentence on this account.

[222] Kž.S.no. 12/2014 from September 09, 2014
[223] Article 119, paragraph 1
[224] Article 119, paragraph 2

2.4. Wrongful identification of mitigating circumstances

The case study given in this Chapter indicates that the Appellate Court reduces sentences pronounced for the smuggling of large quantities of narcotics, reducing them on account of "family circumstances" of defendants, without any serious explanation.

Case Study 24

Accepting appeals by attorneys[225] the Appellate Court of Montenegro reversed the verdict by the High Court in Podgorica[226] in part of the verdict sentencing six defendants for the criminal offence unauthorised production, keeping and releasing for circulation of narcotics. This case related to the smuggling of over 100 kilograms of marijuana.

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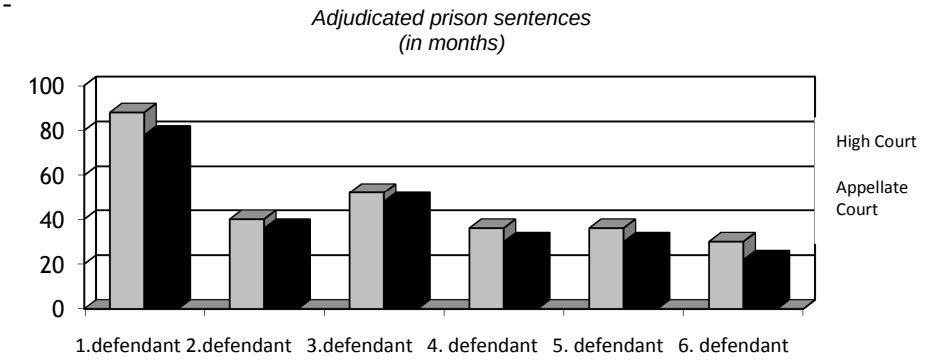


Graph 2: A comparison of adjudicated prison sentences (in months) by the High Court (grey column) and Appellate Court (black column) by defendant

In the reasoning, the Appellate Court stated that aggravating circumstances, the quantity of narcotics and the manner of perpetration of the offence, were given "exaggerated importance" and that **the High Court did not sufficiently appreciate the mitigating circumstances**. In addition, the Appellate Court stated **"family circumstances"** as a mitigating circumstance for four defendants, without any indication of the family circumstances in question and the manner in which the court considered them.

2.5. Parole release

Concrete cases indicate that thanks to decisions by the highest executive and judicial authorities, persons convicted for international smuggling of narcotics

[225] Kž-S.no.34/13 from November 29, 2013
[226] Ks.br.2/13 from 08.05.2013.

enjoyed additional benefits in the form of reduced prison sentences through the application of the institute of parole release.

The Criminal Code stipulates that a convicted person who has served two-thirds and exceptionally half of the prison sentence or of the forty-year imprisonment sentence can be released on parole if in the course of serving the prison sentence thereof s/he has improved so that it is reasonable to expect that s/he will behave well while at liberty and, particularly that s/he will refrain from committing criminal offences until the end of time the prison sentence had been imposed. At the assessment on whether to release a person on parole his/her conduct during the period of serving the sentence, performance of work tasks appropriated to his/her working abilities, as well as other circumstances indicating that the purpose of punishment has been achieved shall be taken into consideration[227].

The parole releases of convicted persons are decided upon by a Commission for Parole Release appointed by the Minister of Justice.

A concrete example indicates that the Commission for Parole Release, consisting of highest executive and judicial authorities, approved the parole release to a smuggler of 14 kilograms of cocaine from Latin America.

Case Study 25

Esad Muković, who was convicted with full force and effect for the smuggling of 14 kilograms of cocaine from Latin America, was granted a parole release, and in March 2012 he was released from custody less than four years after his arrest[228].

Parole release for Muković was approved by a Commission consisting of Minister of Justice and Government Vice President Duško Marković, Minister of Health Miodrag Radunović, Minister of Interior Affairs Raško Konjević, Minister for Human Rights Suad Numanović, Supreme Court judge Radule Kojović, Deputy High State Prosecutor Stojanka Radović, Miljan Perović, director of the Institute for the Execution of Criminal Sanctions and Dragoljub Bulatović, Advisor in the Ministry of Justice[229].

2.6. Amnesty

In addition to the undeniably lenient penal policy for organised acts of smuggling of large quantities of narcotics, persons convicted with full force and effect for this type of organised crime enjoyed another benefit in the previous years, i.e. another type of sentence reduction.

[227] Criminal Code, Article 37, paragraph 1
[228] Daily "Dan" from June 06, 2013, article "Dealer of 14 kilos of cocaine has sentence reduced by half"
[229] Portal CDM from February 28, 2013, article "Compensation for a session is 1000 euro", www.cdm.me/ekonomija/nadoknada-za-sjednicu-1000-eura

The Parliament of Montenegro adopted Laws on Amnesty in 2000[230], 2002[231], 2004[232], 2006[233], 2008[234], 2010[235] and 2013[236].

All of these laws, except the 2013 Amnesty Law, applied to persons convicted for organised crime, including the smuggling of narcotics.

In this way, persons convicted in full force and effect for organised drug smuggling **had their sentences reduced by 25%** by Laws from 2000, 2002, 2004, 2006 and 2008, while the 2010 Law **reduced 20% of their sentences**. Therefore, any person convicted for smuggling of narcotics in the period between 2000 and 2010 had to have been amnestied by one of these laws.

By adopting law amendments favouring participants in organised crime[237], the legislative authorities additionally worsened the situation in the fight against organised crime and smuggling of large quantities of narcotics.

3. Comparisons of penal policy

Concrete examples indicate that courts adjudicate verdicts which stimulate persons accused of smuggling narcotics to smuggle larger quantities of "hard" drugs, because in this case they will, absurdly, be punished more leniently.

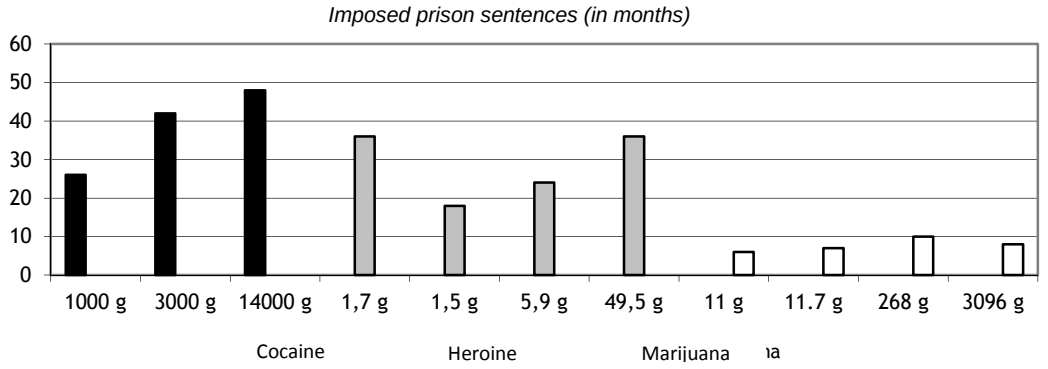
In one example, a drug addict in need of treatment convicted for the sale of a package of heroine for ten euro received a sentence ten months longer than a participant in the smuggling of a kilogram of cocaine from South America.

Type of narcotic	Quantity (in grams)	Sentence (in months)
Cocaine	14000	48
	1000	26
	3000	42
Heroine	1.7	36
	1.46	18
	5.89	24
	49.52	36
Marijuana	11	6
	11.69	7
	268	10
	3096	8

The fact that the penal policy of courts in relation to the smuggling of narcotics is strange and unintelligible is illustrated by a comparison of verdicts in cases where a very small quantity of heroin and marijuana has been found and verdicts for the smuggling of large amounts of cocaine.

[230] "Republic of Montenegro Official Gazette" no.57/2000 from December 12, 2000
[231] "Republic of Montenegro Official Gazette " no.49/2002 from September 19, 2002
[232] "Republic of Montenegro Official Gazette " no.79/2004 from December 23, 2004
[233] "Republic of Montenegro Official Gazette " no.48/2006 from July 28, 2006
[234] "Montenegro Official Gazette " no.46/2008 from August 04, 2008
[235] "Montenegro Official Gazette " no.45/2010 from August 04, 2010
[236] "Montenegro Official Gazette " no.39/2013 from August 15, 2013
[237] Further reading in Chapter A) "Legal Framework"

The attached table and graph illustrate that the penal policy in Montenegro is much stricter in the case of sales of smaller quantities of heroin and marijuana, than in cases related to the smuggling of large quantities of cocaine from abroad.



Graph 3: Penal policy for three types of narcotics – imposed prison sentences (in months) in relation to the seized quantity of narcotics (in grams) (black column – cocaine, grey – heroine, white – marijuana)

3.1. Cocaine

1000 grams = two years and two months in prison: The Appellate Court of Montenegro imposed a sentence of two years and two months in prison to a defendant for the smuggling of one kilogram of cocaine from South America into Montenegro. A second defendant in the same case was sentenced to three years in prison. These persons had **earlier convictions**, and as the main "reason" for such a short sentence the court considered an admission which had no significance in proving the offence, and repentance expressed during the trial.[238]

3000 grams = three years and six months in prison: The Appellate Court of Montenegro also adjudicated a sentence of three years and six months to an organiser of the smuggling of three kilograms of cocaine detected in Croatia, which were sent from Montenegro, across Slovenia and towards Milan, Italy. As in the previous case, the organiser of cocaine smuggling **had earlier convictions**; he even stated during the trial that he served a prison sentence of five years in Switzerland for drug smuggling, but the court found a "reason" for such a lenient sentence in the fact that the defendant has four children.[239]

14000 grams = three years: The Appellate Court of Montenegro reduced the sentence of defendant Esad Muković, charged with the smuggling of 14 kilograms of cocaine from Ecuador to **5 years and 6 months in prison** upon appeal by his attorney[240]. After this, he received a parole release[241], so in total he spent **less than four years** in prison.

[238] Further reading in Chapter G) "Penal Policy"
[239] Further reading in Chapter G) "Penal Policy"
[240] Verdict Ksž.no.26/11 from November 08, 2011

3.2. Heroine

1.7 grams = three years in prison: The verdict by the High Court in Podgorica[242] imposed a sentence of three years in prison to a defendant who is a **drug addict** for selling a package of heroine for ten euro, and the same verdict imposed a security measure of **mandatory treatment** of addiction. The court seized 1.7 grams of heroin which was found on the defendant's person.

1.46 grams = a year and a half in prison: The same court imposed a prison sentence[243] of one year and six months to a defendant who was detected using heroine with other persons, and from whom 1.46 grams of this substance was seized. Interestingly, the court established that this person was a drug addict and it has not established a single aggravating circumstance when adjudicating the verdict, and only mitigating circumstances were stated.

5.89 grams = two years in prison: The verdict by the High Court in Podgorica[244] imposed the prison sentence of two years to a defendant in whose mailbox 5.89 grams heroine were found, which the **court classified in the verdict as a quantity "of great market value"**.

49.52 grams = three years in prison: The verdict by the High Court in Podgorica [245] imposed a sentence of three years in prison to a defendant in whose vehicle 49.52 grams of heroin were found.

3.3. Marijuana

11 grams = six months in prison: The Appellate Court of Montenegro upheld[246] the verdict by the High Court in Bijelo Polje[247], which imposed a prison sentence of 6 months to a defendant who had no earlier convictions and from whom police officers seized 11.02 grams of marijuana.

11.69 grams = seven months in prison: The Appellate Court also upheld[248] a prison sentence of 7 months to a defendant who sold 11.69 grams of marijuana, as well as prison sentences of 6 months each for two defendants who purchased this quantity of marijuana, which were imposed by the High Court in Bijelo Polje[249]. The first-degree verdict was not published on the website of the High Court in Bijelo Polje, so there is no information on earlier convictions for these persons.

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[241] Daily "Dan" from June 06, 2013, article " Dealer of 14 kilos of cocaine has sentence reduced by half "
[242] K.no. 153/2011 from November 09, 2011
[243] K.no.104/11 from January 27, 2012
[244] K.no. 237/2011 from February 02, 2012
[245] K.no. 156/2011 from November 28, 2011
[246] Kž.no.41/2013 from December 13, 2013
[247] K.no.37/12 from October 26, 2012
[248] Kž.no.528/12 from February 13, 2013
[249] K.no.28/12-11 from September 19, 2012

268.03 grams = ten months in prison: The Appellate Court upheld[250] a prison sentence of 10 months for a defendant found in possession of 268.03 grams of marijuana, adjudicated by the High Court in Bijelo Polje [251]. This first-degree verdict was also not published on the website of the High Court in Bijelo Polje, so there is no information on earlier convictions for this person or on circumstances or any other facts the court stated in the verdict.

3096 grams = eight months in prison: Just one day after upholding a prison sentence of 10 months for a defendant found in possession of 268.03 grams of marijuana, a panel of the Appellate Court consisting of the same judges imposed prison sentences of 8 months each to defendants who transported 3096 grams of marijuana intended for further sales[252].

[250] Kž.no.40/2013 from February 18, 2013
[251] K.no.43/2012 from November 27, 2012
[252] Kž.no.70/2013 from February 19, 2013

ACCESS TO COURT VERDICTS AND CASE FILES

Access to court verdicts in organised crime cases is very limited. The High Courts only publish final verdicts, which prevents a serious expert analysis of their work.

In addition to concealing personal data of defendants, courts also erase other data from verdicts, which limits the scope of analysis of actions taken in this field, such as information on states and cities from which and across which drugs were smuggled, names and trajectories of ships used for drugs smuggling, names of companies used for smuggling, etc.

The concealing of this data certainly does not contribute to public trust in the work of the judiciary or to the belief that there is a will to combat this type of crime. On the contrary, the fact remains that the courts are more concerned with concealing the names of persons smuggling drugs and names of companies used to accomplish this than the public's right to know this information and the right of every person to avoid doing business with such persons and companies, while also spreading uncertainty with persons and companies who do business in a legal manner.

Furthermore, **by publishing only parts of verdicts with full force and effect, courts conceal data indicating unlawful conduct by courts** by removing parts of verdicts where second-degree courts established violations of law. In this way, courts prevent analysis of unlawful conduct of courts, which additionally contributes to a lack of trust in the work of the judiciary.

Courts have different practices regarding access to case files. While the High Court in Podgorica and Appellate Court of Montenegro denied access to such data, the High Court in Bijelo Polje submitted complete case files to us. Different actions taken by courts upon these requests further confirm that their decisions denying access to verdicts and case files from the field of organised crime do not have a legal basis.

The Agency for Personal Data Protection and Free Access to Information determined that both the High Court in Podgorica and Appellate Court of Montenegro violated the Law on Free Access to Information when denying access to court files.

The Administrative Court of Montenegro accepted the appeals by Courts against decisions by the Agency, even though it earlier rejected appeals submitted by first-degree instances against decisions by second-degree instances as unlawful, which was also the position of the Supreme Court of Montenegro. In this way, the Administrative Court contributed to the reduction of transparency of the work of the judiciary.

1. High Court in Podgorica

On the basis of the Law on Free Access to Information, MANS requested the submission of verdicts adjudicated by the High Court in Podgorica in cases of international cocaine smuggling. The High Court **submitted to us only parts of the verdicts which came into full force and effect during the proceedings**, even though these were public trials for which there was an increased interest by media and the public, and these first-degree verdicts were already verbally disclosed.

In the reasoning of these decisions[253], the President of this Court stated that the Law on Free Access to Information **requires the court to submit a verdict only if it is final, even though there is no provision of this Act[254], which even implicitly contains anything resembling this.**

After requests for submissions **of files from this and other cases related to cocaine smuggling**, the High Court President answered in an identical manner – that the **verdicts were available on the website of the court and that the reasoning of verdicts contained evidence presented during the proceedings**[255].

When acting upon our complaints, **the Agency for Personal Data Protection and Free Access to Information determined that the High Court acted unlawfully** and ordered it to deliver us copies of case files[256].

The High Court **filed an appeal to the Administrative Court of Montenegro** against the decision by the Agency[257] and informed us that **even though the appeal does not prevent the execution of the administrative decision, the body executing the decision may delay the execution for other reasons**, if this is not contrary to public interest. However, **the High Court did not state the reasons** for delaying the execution of the Agency's Decision.

The Administrative Court accepted the appeal by the High Court[258] and annulled the decision by the Agency for formal reasons[259], **even though it earlier rejected appeals submitted by first-degree instances against second-degree instance decisions**[260]. The fact that first-degree instances acting in administrative matters were

[253] E.g. High Court Decision III Su.no.95/11 from December 21, 2011
[254] "Republic of Montenegro Official Gazette" no.68/2005 from November 15, 2005 and no.44/2012 from August 09, 2012
[255] Decisions I Su.br. 144/13, 145/13, 146/13, 147/13 from October 30,2013 and 151/13 from November 04, 2013
[256] Decisions no. 5498/13 from December 30,2013, 5501/13 from December 30, 2013 and 1499/14 from February 28, 2014
[257] Decisions I Su.no.145/13, 146/13, 147/13, 148/13, 151/13, 152/13 and 153/13 from February 05, 2014
[258] Verdict U.no.187/14 from October 07, 2014
[259] In the verdict, the Administrative Court stated that the Agency was legally required to decide on merit, and not to give warrants to the first-degree instance to conditionally submit the requested files
[260] Among others: Decisions U.no. 124/05 from February 10, 2005, U.no.1857/09 from January 19, 2010, U.no.371/06 from March 28, 2006, U.no.2901/11 from October 26, 2011, U.no.2489/11 from February 03, 2012

not actively able to initiate administrative disputes for orders by second-degree instances **was also earlier determined by the Supreme Court of Montenegro**[261].

2. Appellate Court of Montenegro

MANS submitted the same requests to the Appellate Court, which adopted decisions[262] explicitly rejecting the submission of the files. In all its decisions, the Appellate Court cited the legal grounds of restricting access to information if this is **in the interest of preventing investigations and prosecution of criminal offence perpetrators**, in order to prevent the disclosure of information relating to actions taken in the pre-trial and criminal proceedings[263].

However, all cases for which MANS requested case files were **already concluded with full force and effect**. Therefore, **investigations and prosecutions of criminal offence perpetrators were concluded and could certainly not be jeopardised by inspection of files from concluded public trials**.

At the same time, in each decision, the Appellate Court stated that the position of the Supreme Court is that **access to files cannot be granted only on the basis of the Law on Free Access to Information, but also on the basis of the Criminal Procedure Code** and that copies of case files are given **only to participants in the criminal proceedings**.

However, the Criminal Procedure Code prescribes inspection, transcription or recording of certain files after the finality of the sentence **for anyone with a justifiable interest**[264]. According to the Criminal Procedure Code, denying or conditioning of this right relates to cases which are not public or due to severe violations of rights to privacy.

However, the Appellate Court did not even assess whether the interest of MANS was justifiable, all cases were fully open to the public, and no assessment stated that accepting the request by MANS would violate rights to privacy. This is why it is extremely **unclear on the basis of which law the MANS requests were denied and what is the reason for denial**.

Acting upon appeals to decisions by the Appellate Court of Montenegro, **the Agency** for Personal Data Protection and Free Access to Information **determined that the Appellate Court acted unlawfully** and ordered this court to deliver us complete copies of case files[265].

[261] Among others: Verdicts Uvp. 56/10 from April 12, 2010, Uvp. 331/11 from October 14, 2011
[262] Decisions V-SU no.50/2013 , 51/2013 and 52/2013 from November 07, 2013
[263] Article 14, paragraph 1, item 3, line 3, Law on Free Access to Information
[264] Article 203, paragraph 1, Criminal Procedure Code
[265] Decisions no. 5255/13, 5256/13 and 5257/13 from December 24, 2013

As with the previous case**, the Administrative Court of Montenegro accepted the appeals by the Appellate Court** which represents a first-degree instance and annulled the second-degree decision by the Agency[266] also for formal reasons[267].

3. High Court in Bijelo Polje

The fact that courts do not apply law equally and that they use different methods to restrict or condition inspection of case files and the public control of their work is indicated by the actions of the High Court in Bijelo Polje.

This court **accepted a request by MANS** to access the requested case files, but it **only allowed us to inspect these files within three days in the court premises[268], stating that this was a complex case containing evidence gathered by applying secret surveillance measures, so access to the files may only be available in court premises.**

Acting upon appeals by MANS, **the Agency determined that this court also acted unlawfully** and ordered it to deliver files to MANS within three days, with an obligation to protect personal data which would violate the privacy of the parties in the proceedings.[269]

Unlike its counterpart Court in Podgorica, **the High Court in Bijelo Polje did not file an appeal against the decision by the Agency and the Court President adopted new decisions[270] resulting in the delivering of complete case files to MANS, in the form of computer files.**

However, **personal data, but also other information not relating to the privacy of parties in the proceedings, such as names of cities and states across which drugs were transported, names of ships transporting the drugs and names of companies established with the aim of smuggling drugs, were all removed from the delivered files**.

In this way, even though this court allowed access to data more than other courts, it still restricted access to certain information without any valid explanation and legal basis.

[266] Decision U.no.96/14 from October 07, 2014
[267] In the verdict, the Administrative Court stated that the Agency was legally required to decide on merit, and not to give warrants to the first-degree instance to conditionally submit the requested files
[268] Decision Su. V no.901/13 from November 11, 2013 and Su. V no.925/13 from November 13, 2013
[269] Decision no.5480/13 and 5481/13 from December 30, 2013
[270] Su. V no.901/13 and 925/13 from January 14, 2014