



**Guidebook on  
Treating Migrants**

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## **Guidebook on Treating Migrants**

### **Publisher:**

Centre for Democracy and Human Rights - CEDEM  
Bulevar Džorža Vašingtona 51, 3/48  
81 000, Podgorica, Montenegro  
Tel/fax: +382 20 234-114; +382 20 234-368  
e-mail: [info@cedem.me](mailto:info@cedem.me)  
[www.cedem.me](http://www.cedem.me)

### **Editor:**

Nenad Koprivica, Executive Director

### **Author:**

Miroslava Jelačić

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## USING THE GUIDEBOOK

Should one put briefly aside the aspirations of the Republic of Montenegro (hereinafter referred to as MNE), as well as those of other Western Balkan countries for the fulfilment of conditions for the full membership in the European Union (hereinafter referred to as the EU), which also comprises reaching the standards in the area of migrations, one can unambiguously see the need for an arranged migration management system, which is important for a country per se. The lack of an adequate system leads to legal uncertainty: possibility for the incidence of serious legal consequences, violations of rights, and most often also the impossibility of ensuring the protection of fundamental human rights of migrants, which leads a country to the risk of potential violations of generally recognized standard and responsibilities before the European Court of Human Rights and other supervisory bodies. On the other side, it poses a great security threat to a country, and not infrequently such migration flows are followed by various forms of organized transnational crime, as well. Many countries have experienced the difficulties in establishing the system which will be able to respond to a migratory flow in an effective and efficient way. The underlying idea is the finding of balance between the interest of a state to exercise its sovereign right, to control its borders and to take care of security, and concurrent observance of international standards for the protection of fundamental human rights.

This guidebook was intended as an instrument which is to offer basic information to the individuals who establish the first contact with migrants and take part in offering them assistance and, in the context of the increased influx of migrants into the territory of the Republic of Montenegro, to contribute to the understanding of the complexity of the treatment of migrants being brought by the migration flow. Another objective is to develop the “sensitivity” of the acting authorities/individuals in order for migrants to have full enjoyment of rights and appropriate protection ensured, as well as to encourage for some of the offered models and measures to gradually become part of regular practice of treating migrants, thus ensuring for migrants’ needs to be recognized and for appropriate response to be found. The manual consists of two parts: the first one contains concise overview of the most important sources of right, universal and regional European system, with special view of the EU directives and regulations which make Joint European Asylum System, as well as of the current Montenegrin legislative framework. Also, there will be a brief overview of the novelties contained in the Draft Law on Asylum of Montenegro the adoption of which is expected shortly. Furthermore, the first part contains the glossary and the explanation of some of the fundamental rights and principles of the treatment of migrants.

The second part focuses on the treatment on the occasion of the first contact with migrants, offering the overview of key procedures/standards for efficient primary identification, as well as brief instructions for treatment and recognition of different categories of migrants.

The guidebook is intended for all persons who get in touch with migrants, in the broadest possible sense: border police, members of other law enforcement services, persons engaged in the system of social welfare, healthcare workers, civil servants entrusted with offering them assistance, civil servants from local self-government level, as well as for the representatives of civil society organizations.

Which category of migrants we are talking about and what characterizes them?

According to current indicators, several categories of migrants are most frequently identified: refugees, asylum seekers, irregular migrants, smuggled migrants and unaccompanied children. Also, in the context of such movements, vulnerable categories of migrants like women, human trafficking victims and families with children are very often additionally emphasized.

With regards to characteristics, the majority of migrants do not possess personal documents; their identity is established on the basis of their statements and they come into a territory in one of the illegal ways, most often using the services of smugglers. They differ by the reasons of their leaving the country of origin: fear of persecution, war conflicts, social (custom) norms, as well as of poor economic and social conditions in their countries. Irrespective of the reasons, they travel together and use the same routes and movement modi. While on the road, the transit countries treat them differently. Their experiences from travels testify to the fact that very often they find themselves in the situations of extreme vulnerability, exposed to various traumatic experiences, abuse and neglect and to the risk of becoming part of criminal networks.

Should all migrants be treated equally?

There are certain rights, protection mechanisms that are prescribed and implemented independent of the classification of migrants into certain categories. The imperative for a state is to ensure for every migrant to enjoy fundamental human rights and freedoms, since the conventions from the area of human rights determine the rules for all individuals found in the territory of one state, including migrants.

Only later on should one take into consideration the reasons for which and the manner in which certain individuals have come into the territory of a country, since the stated circumstances condition their different position, protection needs, as well as the rights and obligations, and different legal framework which applies to them. Differences among the reasons for migration are not always clear and easily noticeable and the limits set by the internal legal order with regards to the treatment of different categories of migrants call for special caution.

## I GLOSSARY<sup>1</sup>

**Asylum**—asylum is the right to stay and protection of a foreign national who has his/her refugee status or other form of protection—additional or temporary protection granted on the basis of the decision of the authority which deliberated about the asylum application.

**Economic migrant:** every individual who left his/her country of origin voluntarily solely out of economic reasons in order to improve material living conditions.

**Human trafficking victim:** every person who experienced exploitation with the purpose of human trafficking, or there is realistic and justified suspicion that he/she could have been exploited with the purpose of human trafficking.

**Non-refoulement:** one of the fundamental principles of international law which lays down one of the strongest limitations of the sovereign right of a state to control the entry of persons into its territory and the right to expel a foreign national. It prohibits the states to expel an individual to another state where he/she would be exposed to real threat of persecution on the grounds of his/her race, sex, religion, nationality and belonging to certain social group, i.e. to the state where there is a risk of that individual being subjected to torture, inhuman or degrading treatment or punishment. It applies to the expulsion of every person irrespective of their immigration status, although the duty to observe this principle has special significance in respect of the protection of refugees.

**Country of origin:** is a country the citizenship of which is held by a foreign national. If a foreign national holds several citizenships, he/she is then considered a citizen of each of these countries. In case of a stateless person, the country of origin shall be considered the country of his/her last domicile.

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<sup>1</sup> Basic notions used in the Guidebook are given in alphabetic order. For some notions, certain conceptual adjustments were made to current migratory trend noted down in the territory of Montenegro. The author remind that in a different context the definitions might be different.

**Transit country:** is every country which a third country citizen or a stateless person passes through on his/her journey to a destination country.

**Destination country:** is a country in which a migrant expressed his/her intention of applying for an asylum, having in mind that from the migrant's point of view the notion of destination country stands for the desired destination country.

**Irregular migrations:** movements which take place outside legally prescribed procedures for the entry, exit or stay in the territory of certain country.

**Irregular migrant:** every individual who entered the territory of Montenegro in an illegal way, as well as a person who entered the country legally but who did not leave the territory of Montenegro following the termination of the grounds for the legal stay and within a deadline specified by the decision of a competent authority.

**Refugee** is a foreign national or a stateless person who, for justified fear of persecution on the grounds of his/her race, religion, nationality, belonging to certain social group or political opinion, is not in the country of origin, or permanent residence and who is unable or due to fear does not wish to place himself/herself under the protection of that country.

**Smuggled migrant:** an individual who voluntarily, and in one of the illegal ways, crosses state borders (stays in a territory) with the assistance of a person or a group that made it possible to him/her, with the intention of acquiring financial or other material benefit, either indirectly or directly.

**Stateless person:** person who is not considered as a national by any state under the operation of its law.

**Person with additional protection granted:** a foreign national who does not meet the requirements for the recognition of refugee status but in relation to whom there are serious reasons to believe that in case of his/her return to his/her country of origin, or in case of a stateless person to the country of his/her last domicile, he/she would be exposed to torture, inhuman or degrading treatment, or that his/her life, safety and freedom would be threatened by the violence of general proportions caused by foreign aggression or internal armed conflicts or mass violation of human rights.

A foreign national does not file a special request for exercising his/her rights to additional protection. Instead, the deliberating authority examines concurrently both the circumstances for the recognition of refugee status and the ones relevant for the granting of subsidiary protection.

**Persons with temporary protection granted:** foreign nationals who came in large numbers from the country in which their life, safety or freedom are endangered by the violence of general proportions, external aggression, internal armed conflicts, mass violations of human rights or other circumstances which seriously harm public order when, due to mass arrival it is not possible to carry out individual procedure for the acquisition of the right to asylum.

**Unaccompanied minor** is a foreign national below the age of 18, who remained without parents or guardians before or after their arrival to Montenegro, until placed under guardianship;

**Mixed migrations:** movements in which the individuals motivated by various reasons and circumstances move together, either within or across international borders. Usually, attention is paid to mixed migratory movements across international borders, namely irregular/illegal movements of various categories like refugees, asylum seekers, economic migrants, human trafficking victims, smuggled migrants and other vulnerable categories, including women, children and unaccompanied minors. These persons do not possess valid documents or do not meet the requirements for entering legally into the territory of the state they transit.

**Migrations:** movement of an individual or a group of individuals, either across state borders or within the territory of one country. It is population movement irrespective of its length and reasons that make them move; it includes the migration of refugees, displaced persons, economic migrants, persons who move for other purposes, including for family reunion.

**Best interest of the child:** constitutes one of four fundamental principles of the Convention on the Rights of the Child. According to the Convention, in all the activities that concern children, irrespective of these being undertaken by public or private social welfare institutions, courts, administrative bodies or legislative authorities, the best interest of the child shall be of utmost importance.

- **Assessment of the best interest:** formal procedure with specific procedural safeguards and requirements which is conducted in the situations when it is necessary for a decision maker to mete out all relevant factors of importance for certain child case, giving appropriate “weight” to the rights and obligations acknowledged in the Convention on the Rights of the Child and other instruments for the protection of human rights, so that a comprehensive decision can protect child’s rights in the best possible way.

**Shelter for foreign nationals:** closed-type institution in which foreign nationals are accommodated, on the basis of the decision of the police. These are the individuals whose identity cannot be established or foreign nationals who may not be immediately forcefully expelled.

**Human Rights Based Approach HRBA:** designates the principle which strives to directly empower all target groups (beneficiaries of the rights, but also those within the competences of whom is to ensure the enjoyment of the same) so as to ensure the exercising of fundamental human rights.

**Detention:** for the purpose of this guidebook, detention means every deprivation and restriction of the freedom of movement within an enclosed area which a migrant may not leave of his/her own accord, including, but not limited solely to penitentiaries, correctional institutions, shelter for foreign nationals, other areas where migrants are detained or kept within.

**Asylum seeker** is a foreign national or a stateless person who files the request for asylum in the territory of Montenegro from the day of submission to the passing of the final decision.

**Asylum centre** is an open-type building where accommodation and elementary living conditions are provided to the individuals who requested the asylum.

## **II Relevant sources of law**

In the context of the treatment of migrants, it is equally important to have the knowledge of and to apply both international and regional human rights protection systems, as well as national legislation.

When speaking about international legal framework, the starting basis quite certainly is the universal human rights protection system established under the auspices of the most important universal international organization, the United Nations. Furthermore, besides the universal system, the European regional protection system is equally important for Montenegro. The latter functions within the framework of three regional organizations: EU, Council of Europe and Organization for Security and Cooperation in Europe (OSCE). The EU and the Council of Europe stand out because of their importance and contribution to the improvement and protection of migrants' rights.

The Constitution of Montenegro, as a legal act of the highest order, contains a whole series of provisions of importance for the protection of migrants' rights. In the Article 44 of the Constitution, which guarantees the right to asylum, contains two important safeguards for the treatment of migrants. In the first place, it is the right to seek asylum, where it is prescribed that "a foreign national who is justifiably afraid of persecution on the grounds of his/her race, language, religion or belonging to some nation or a group or because of political convictions is entitled to seek asylum in Montenegro". Then, the paragraphs 2 and 3 guarantee another exceptionally important postulate of international law, and it is non-refoulement.<sup>2</sup> According to these provisions, a foreign national may not be expelled from Montenegro to where on the ground of race, religion, language or nationality, he/she runs a risk of being sentenced to death, torture, inhuman degrading treatment, persecution or serious violation of the rights guaranteed by the Constitution. Besides, a foreign national may be expelled from Montenegro solely on the basis of the decision of a competent authority and in a prescribed procedure. The Constitution of Montenegro contains a series of other relevant provisions, of which, by their importance, the ones that stand out are those dealing with the protection from discrimination (the Article 8 prohibits every direct or indirect discrimination, on any ground whatsoever), protection of special – minority rights, then the protection of the mother and child, as well as those concerning the rights of the child.

Furthermore, it should be mentioned that the Article 9 of the Constitution regulates the status of ratified international treaties and generally accepted rules of international law in the national law, prescribing the supremacy of the ratified and published international treaties in relation to the national legislation. In addition to that, this constitutional provision obliges national institutions to apply these treaties directly when they regulate some situation differently from national legislation.

Having in mind that the most important conventions in the area of the protection of human rights offer indirect protection to migrants and restrict significantly the actions of the state, especially through the interpretations given by their supervisory bodies (like the UN contracting bodies and those of the European Court of Human Rights), this provision should produce significant consequences for the internal law.<sup>3</sup> This also means that the courts and other public authorities may directly apply the provisions of the international law, but in practice this is often not the case due to the imprecision of these provisions. For that reason, it is necessary to introduce the majority of international norms in the internal system in the form of legal provisions.

Besides relevant provisions of the Constitutions and specialized universal and regional norms and standards, every category of migrants is subject to the laws and strategies by means of which the state defines priority goals, their position and methods of exercising the guaranteed rights.

Within the past several years the Government of Montenegro has adopted a significant number of strategic documents, laws and bylaws with the view of defining and managing legal migrations and fight against the illegal ones.

For the needs of the Guidebook, in the Annex I, we list the most important universal and regional instruments, as well as internal regulations relevant for comprising the content, quality and scope of protection of certain rights, and/or for the treatment of migrants and asylum seekers in Montenegro.<sup>4</sup>

When talking about current regulations in Montenegro, besides the one the provisions of which are explicitly related to migrants (some of the categories of migrants), the provisions of the regulations which regulate different areas, like health-care, social welfare, administrative law, education etc., being applied in a subsidiary manner, and/or those the application of which is very often referred to by the “fundamental regulations” that regulate some of migration issues, are also relevant for the treatment of migrants.

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<sup>2</sup> More details on non-refoulement can be found in the section entitled “Principles of treating migrants and migrants’ fundamental rights”.

<sup>3</sup> Ključni izazovi u oblasti migracija i azila: Pregled standarda, zakonodavstva i prakse, Centar za demokratiju i ljudska prava - Key Challenges in the Area of Migrations and Asylum – Overview of Standards, Legislation and Practice, Centre for Democracy and Human Rights (CEDEM), Copy Center, Podgorica, 2013.

<sup>4</sup> Due to the limited size, the universal and European human rights protection system in the Guidebook will serve primarily as the basis for the formulation of recommendations, which should contribute to the improvement of asylum seekers and migrants’ protection. More details can be found in: Ključni izazovi u oblasti migracija i azila: Pregled standarda, zakonodavstva i prakse, Centar za demokratiju i ljudska prava - Key Challenges in the Area of Migrations and Asylum – Overview of Standards, Legislation and Practice, Centre for Democracy and Human Rights (CEDEM), Copy Center, Podgorica, 2013.

## **Reform of the Common European Asylum System CEAS and Montenegrin EU accession process**

The first step towards formulating the common asylum system was made back in 1985 when five EEC member states signed the Schengen Agreement.<sup>5</sup> Since then, a whole series of documents of different legal strength define the direction for the development of common asylum policy, with the areas being envisaged in which the most important documents are to be passed so as to be able to formulate and implement the same.<sup>6</sup>

The notion of “Common Asylum System” consists of the following:

- Identical status of refugees/asylum seekers
- Identical status of the beneficiaries of subsidiary protection
- System for granting temporary protection
- Refugee status or subsidiary protection granting and termination procedures
- Criteria and mechanisms for determining the country responsible to examine the applications
- Reception standards

When speaking about the secondary acts of the EU (regulations, directives<sup>7</sup> and decisions), we can distinguish the so called two stages of development of the Common European Asylum System. The first stage, which comprised harmonized rules with minimum standards, ended in 2006.<sup>8</sup> Their application indicated the need for improvement and harmonization. The negotiations aimed at adopting the acts and the commencement of the so called second stage, lasted for almost five years and, finally, during June 2013 the whole process was completed and the conditions were created for the commencement of the new stage in the development of the Common European Asylum System. Transposition process in the member states should be completed by the second half of 2015.

<sup>5</sup> Pravo na azil: međunarodni i domaći standardi - Right to asylum: international and national standards, Dr. Ivana Krstić and Dr. Marko Davinić, Beograd: Dosijestudio, 2013, 214.

<sup>6</sup> More details in: Pravo na azil: međunarodni i domaći standardi - Right to asylum: international and national standards, Dr. Ivana Krstić and Dr. Marko Davinić, Beograd: Dosije, 214-299

<sup>7</sup> It is important to have in mind that a regulation is a binding piece of legislation, which must be fully applied in the entire European Union, while a directive represents a piece of legislation which determines the goal to be achieved by all EU member states, only every country determines by itself how it is going to achieve that.

<sup>8</sup> Directives and regulations that were passed and applied during the so called first stage: Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (so called Qualification Directive); Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced, persons and on measures promoting a balance of efforts between

**Qualification DIRECTIVE 2011/95/EU of the European Parliament and the Council**

prescribes the grounds and conditions for granting and terminating international protection, as well as the guaranteed rights and obligations following the granting of the status. The novelty is the introduction of the notion of international protection which includes both refugee status and subsidiary protection. Furthermore, grounds are specified for the granting of international protection and conditions are created for a more efficient procedure. Also, it approaches to a significant degree, and even mostly harmonizes the scope of rights accessible to the persons who had their refugee status granted, as well as those of the persons who had their subsidiary protection awarded. Finally, on the occasion of the adoption of the decision upon a filed asylum application, as well as during the application of the rules and the content of the guaranteed protection, the provisions of the Directive take largely into account the best interests of children and the aspects of gender equality.<sup>10</sup>

**REGULATION 604/2013 of the European Parliament and the Council - Dublin III<sup>11</sup>**

following the system established by Dublin II (determining a country responsible to resolve an asylum application filed in a member state), the newly adopted Regulation brings a series of provisions aimed at improving the efficiency of the entire procedure, and, which even more important, strengthening the position of an asylum applicant (for instance, guarantees for minors, extending the possibilities for family reunion, mandatory hearing, etc.).

**REGULATION 603/2013 of the European Parliament and the Council on the establishment of EURODAC system II<sup>12</sup>**

– the innovations in the amendments of the Regulation on the establishment of the EURODAC system for determining the identity of asylum seekers and for determining the country which is to be responsible for the handling of asylum applications, refer to the shortening of deadlines for the sending of fingerprints to and from the member states and to the improvement of data protection.

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Member States in receiving such persons (Temporary Protection Directive); Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Reception Directive); Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Directive on Asylum Procedure); Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin Regulation); Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (Eurodac Regulation);

<sup>9</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9, 20/12/2011

**DIRECTIVE 2013/33/EU of the European Parliament and the Council on Reception Conditions**<sup>13</sup> - basic purpose of the amendments was to equalize the practice of the countries in respect of the reception of asylum seekers. In addition to that, the Directive gives detailed rules in relation to detention of asylum seekers, including the guarantees for particularly vulnerable groups among asylum seekers, unaccompanied minors, in particular. Precise list of the grounds for detention was established in order to avoid the possibility of arbitrary detention, as well as the guarantees with regards to the protection of the rights accessible to the detained asylum seekers. Finally, the Directive also envisages the possibility of access to labour market to asylum seekers under certain conditions.

**DIRECTIVE 2013/33/EU of the European Parliament and the Council on asylum procedure**<sup>14</sup> –the novelties primarily go in the direction of greater unification of the very procedure through more precise defining of the conditions and manners in which the procedure is to be conducted, and by that towards the narrowing down of the space for the member states to retain their own rules. Also, with the adoption of the prescribed standards, the procedures in the member states should be more efficient and shorter. Additionally, the Directive also envisages better training for decision makers, more precise rules with regards to the protection before the courts, but also special guarantees related to the conducting of the procedure for the persons in need of special assistance—because of old age, disability, illness, sexual orientation etc.

When speaking about the asylum system in Montenegro, the European Union has undoubtedly made a crucial impact on defining and adopting national regulations in the area of asylum.<sup>15</sup> In the first stage, legally and institutionally regulated area of asylum was of importance for fulfilling the necessary requirements for the liberalization of visa regime. New stage in the relationships with the EU, the candidate status of the country and the negotiation process, with regards to legal framework, means the incorporation of the spirit and wording of EU legislation into the legislation of a candidate country – adopt or amend national legislation in the manner which will secure for the requirements laid down by the *Acquis Communautaire* to be fully transposed into the domestic legislation.

It is exactly with the view of achieving the EU standards in the area of asylum that the Draft Law on Asylum was prepared. It would fully harmonize the internal legal framework with the newly adopted directives and regulations. The Draft brings a series of novelties, both in respect of terminology, the manner in which the procedure will be carried out of deciding upon an asylum application, but also with regards to the rights accessible to asylum seekers and who had international protection granted, as well as to the high standards of additional protection of particularly vulnerable categories of asylum seekers, minors and unaccompanied minors in the first place.

### III PRINCIPLES OF TREATING MIGRANTS AND FUNDAMENTAL RIGHTS OF MIGRANTS

*All rights and freedoms guaranteed by international (and/or regional) customary or contractual law can be of importance to migrants, but some of them stand out by their significance. Therefore, the stated treatment principles and fundamental rights should be considered as exempli causa, and depending on the circumstances of each individual case other guaranteed rights need to be taken into consideration, as well as the accepted treatment standards contained in the stated sources of international law which constitute human rights protection “foundation stone”.*

#### 1) Right to protection of fundamental human rights

Basic principle of treatment applied by the competent authorities towards all persons under Montenegrin jurisdiction is securing full observance of fundamental human rights and freedoms. Human rights are most often defined as the ones inherent to a human being—thus, irrespective of the will of a state.

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<sup>10</sup> More details: *Pravo na azil: međunarodni i domaći standardi* – Right to Asylum: International and National Standards, Dr. Ivana Krstić and Dr. Marko Davinić, Beograd: Dosije, 285

<sup>11</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

<sup>12</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)

<sup>13</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

<sup>14</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection

<sup>15</sup> In October 2007, Montenegro signed the Stabilization and Association Agreement (SAA) with the EU, which entered into force in May 2010, after it had been ratified by all contracting parties. With this Agreement, Montenegro committed itself to harmonizing its legislation in relevant sectors with Community legislation, and to its efficient enforcement. The Article 82 of the SAA reads that the cooperation in the area of asylum will be particularly focussed on the implementation of the national legislation in order to achieve the standards from the Convention on the Status of Refugees and the Protocol on the Status of Refugees, for the purpose of ensuring the observance of non-refoulement, as well as other rights of asylum seekers and refugees.

However, one should bear in mind that the enjoyment of these rights is restricted to the degree in which it is necessary to protect the rights of other individuals and the general interest of a state and its society. Therefore, the allowed restrictions of human rights are recognized.

High contracting parties to all international treaties that guarantee rights and freedoms are authorized to restrict the same in exactly specified situations, and even to temporarily suspend some of them. Certain rights are of absolute character and, generally speaking, may not be restricted except in the cases in which the utilization of the same rights and freedoms is imposed by the others. The lists of rights that may not be restricted are found in different international documents. So, the shortest list of absolute rights is found in the European Convention on Human Rights. It refers to: right to life, prohibition of torture, inhuman or degrading treatment, prohibition of slavery or servitude, prohibition of retrial of persons already convicted or acquitted for the same criminal act.<sup>17</sup>

On the other hand, the enjoyment of "other" human rights may be restricted by a state by means of a law and exactly specified circumstances, solely if such restriction is necessary and in accordance with the generally recognized rights of international law.<sup>18</sup>

Montenegro, as a signatory to the conventions that guarantee human rights, is obliged to ensure the observance of the same, thus in case a foreign national (migrant) during his/her stay in its territory is deprived of some of the guaranteed fundamental human rights and freedoms, or if the same are violated, he/she must be entitled to institute appropriate procedure before a competent authority for the protection of the same. Equally so, in case a committee or another implementation supervision body has been established for certain instrument, and Montenegro signed and ratified the document acknowledging the competence, he/she must be offered a possibility to approach contracting/supervisory bodies, for the purpose of exercising his/her rights.

<sup>16</sup> Međunarodna ljudska prava – International human rights, Milan Paunović, Boris Krivokapić, Ivana Krstić, Pravni fakultet Univerziteta, Centar za izdavaštvo, Beograd, 2010.21.

<sup>17</sup> Ljudska prava – priručnik za nastavnike -Human Rights-Teachers' Manual, Marija Rudić, Beogradski centar za ljudska prava, Beograd, 2001

## 2) Principle of equality and prohibition of discrimination

The principle of equality and the prohibition of discrimination are “two sides of the same coin” and it is the “core of the entire concept of human rights”. This principle is confirmed by the Articles 1 and 2 of the Universal Declaration. The Article 1 underlines that “human beings are born free and equal in dignity and rights, while the Article 2, paragraph 1 proclaims the second side of this principle – “everyone is entitled to all rights and freedoms proclaimed in this declaration, irrespective of any difference with regards to race, colour of the skin, sex, language, religion, political or other opinion, national or social origin, property, birth or other circumstances”.<sup>19</sup>

In practice, the principle of equality is most often expressed through prohibiting discrimination. Discrimination is unjustified, illegal or otherwise prohibited distinction among people, on the grounds of their personal traits, with regards to the rights they have and the manner of exercising the same. In plain words, the essence of discrimination is in unequal treatment of the equal, and in equal treatment of the unequal. The prohibition of discrimination for a state means that it is to observe and ensure all human rights to every individual in its territory without any discrimination on the grounds of race, skin colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The prohibition of discrimination is envisaged in a large number of international legal documents, both in general way and on specific grounds.

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<sup>18</sup>The first type of restriction of human rights refers to declaring null and void certain rights and freedoms in emergency situations. For instance, in the situation of war danger, large scale insurrection or other threats to people and the state caused by natural disasters or catastrophes, most of the rights and freedoms guaranteed by international treaties may be abolished, but only temporarily, i.e. until such circumstances exist. The measures used to abolish these rights must be the most necessary ones, the only remaining necessary measures by means of which the existing threat is eliminated, and they must be in accordance with the commitments of the state with regards to international law. The second type are the so called incorporated restrictions. As opposed to declaring certain rights and freedoms null and void, some of these are permanently restricted. Special form of permitted restrictions of human rights constitute optional restrictions, by means of which the state is authorized to restrict the exercising of certain rights and freedoms in the general social interest. These restrictions must be prescribed in the law and be necessary in democratic society with the purpose of the protection of fundamental values of every state, like national security, public health, morale or freedoms and rights of other persons.

<sup>19</sup> Međunarodna ljudska prava – International Human Rights, Milan Paunović, Boris Krivokapić, Ivana Krstić, Pravni fakultet Univerziteta, Centar za izdavaštvo, Beograd, 2010, 61.

One should have in mind that not every distinction is to be considered discriminatory. In order to be able to characterize the making of a distinction or unequal treatment as discriminatory, such treatment and/or failure to do so needs to be unjustified.

3) **Non - refoulement** (migrants' right not to be returned to the territory of the country where they will be executed, exposed to persecution, torture, inhuman or degrading treatment or punishment).

Generally speaking, non-refoulement imposes the duty of not returning an individual, either directly or indirectly, to the state or territory where there he/she runs a risk of being exposed to the violation of human rights. This can be the country of origin or of his/her last domicile, but also any other country where such risk exists. The purpose of non-refoulement is preventive in its nature and aimed at avoiding the violation of human rights. Non-refoulement is contained in numerous instruments of international law.<sup>20</sup> Traditionally, when speaking about non-refoulement, the first to be considered are the provisions of the UN Convention on the Status of Refugees (Article 33), according to which the states must not return a refugee to a territory where his/her life or freedom would be endangered because of his/her race, religion, citizenship, affiliation to a social group or his/her political convictions. Furthermore, explicit provision is contained in the UN Convention against Torture where the Article 3 prescribes that "no member state shall expel, return, or extradite a person to another state if there are serious reasons to believe that he/she might be exposed to torture". When talking about regional standards, under the auspices of the Council of Europe, the European Court of Human Rights developed detailed interpretation and determination of the principle of non-refoulement, based on the general prohibition of torture, contained in the Article 3 of the ECHR ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment").

<sup>20</sup> International Legal Standards for the Protection from Refoulement, Kees Wouters, Antwerp, Oxford, Portland, 2009,

It is positive that the Law on Asylum, in its Article 6 provides for the prohibition of refoulement, but at the same time one must not neglect the fact that the Law on Foreigners does not contain a provision that would regulate the prohibition of refoulement, although the scope of this principle, observed from the aspect of international human rights law, surpasses the refugee law and the duty to respect the prohibition of refoulement, in the way prescribed by the UN Convention on the Status of Refugees. In the situations when the question of the observance of the principle of non-refoulement is raised, in relation to a foreign national who has not applied for asylum, the sole solution is direct reference to the Constitution of Montenegro or to some of the international documents which envisage the duty of observing this principle.

#### **4) Right to apply for and enjoy asylum**

Starting from the Universal Declaration on Human Rights<sup>21</sup>, every individual is entitled to apply for and enjoy in other countries the asylum against persecution. The importance of this act with regards to the protection of the right to asylum is reflected in the fact that it represents the first instrument of international law which guarantees the right to asylum and that the scope of this right encompasses the right to apply for asylum. The only persons deprived of enjoying the right are those being prosecuted for the criminal acts of non-political nature, or those whose actions are contrary to the objectives and principles of the UN.<sup>22</sup>

The most important international instrument in the area of refugee law which clearly defines the notion of refugees and prescribes the scope of their rights and obligations is the UN Convention on the Status of Refugees (1951) with the Protocol from 1967. Although this convention does not envisage explicitly the right to asylum, it starts off from the assumption that every high contracting party will offer protection to a person who meets the requirements for the granting of the refugee status.

#### **5) Best interest of the child**

The best interest of the child constitutes one of four fundamental principles of the Convention on the Rights of the Child, as the most important catalogue of children's rights. The Article 3 of the Convention specifies that in all the activities that concern children, regardless of whether

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<sup>21</sup> Although the stated act was passed in the form of a resolution, it enjoys universal value nowadays and constitutes a source of international common law.

<sup>22</sup> Article 14 of the Universal Declaration on Human Rights from 1948.

they are undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child will be of primary importance.

The best interest is determined by every individual who comes in touch with the child, starting from individual circumstances of every specific case, like age, level of maturity, the fact whether he/she is in the company of his/her parents or not, current psycho-physical condition and other circumstances which might be of importance for the general wellbeing of the child. It is equally important in this procedure to make sure for the opinion of the child to be taken into consideration in accordance with his/her age and degree of maturity.

## **6) Right to voluntary return to the country of origin and/or last domicile**

In the area of international human rights law the concept of voluntary return comprises the right of every person to ask to be returned to the territory of the country of his/her origin or indeed the country of his/her last domicile in case of a stateless. This right can be exercised solely if the return is based on freely expressed will of a foreign national. Every form of coercion by the state excludes voluntariness and entails the duty of observing the principle of non-refoulement.

The right to voluntary return comprises the duty of the state to undertake all the measures in order for the return of a migrant to the country of his/her origin, and/or the country of the last domicile to be conducted in a safe and dignified way with full respect of his/her personality.

In case the state should establish that with the return to the territory of the country of origin and/or the country of the last domicile a foreign national would be exposed to the fear from persecution because of his/her race, sex, language, religion, belonging to certain social group or political opinion, or that there is a risk of his/her being exposed to torture, inhuman, degrading treatment or punishment, it is obliged to warn the foreign national about the established circumstances.

## **7) Prohibition of arbitrary detention**

The Universal Declaration on Human Rights (Article 9) and the International Covenant on Civil and Political Rights (Article 9 paragraph 1) prescribe that no one is to be subjected to arbitrary arrest, detention or expulsion.

Every deprivation of liberty must have its legal basis in the law which is to be precise enough in order for the risk of arbitrariness to be avoided. It is important to understand that the deprivation of liberty can be arbitrary even when it is in accordance with the national law. In such situations, in order to determine if there is arbitrariness, it should be examined if the deprivation of liberty is justified, and/or if it is backed by a legitimate objective which could have been achieved by means of less intrusive measures<sup>23</sup> and which could not have been achieved by means of a less restrictive measure in a specific case.

European Court of Human Rights assumed a stance that in order to avoid arbitrariness, detention must be conducted in good faith, deprivation of liberty is to be closely linked to the grounds for the deprivation of liberty, that the place and conditions of detention are to be appropriate, as well as that the length of detention is to be reasonable in view of the purpose to be achieved.<sup>24</sup>

According to international human rights law the detention of asylum seekers and (irregular) migrants, both at the entrance to the country and in the expulsion procedure, must not be arbitrary and must be carried out in accordance with the law. With regards to immigration control, international standards envisage that detention should be perceived as exception, and not as a rule, and it should be “perceived” as a measure of last resort and applied in situations when less restrictive alternative measures, like the duty of regular reporting to competent authorities, the duty of non-departing from one’s place of residence, will not achieve the purpose for which they are pronounced in a specific case. When deciding on the necessity of detention, one should take into account the expedience of this measure and its proportionality to the objectives expected to be achieved. In case it is estimated that such measure is necessary, it should be applied without any discrimination, with the shortest possible duration, i.e. the length of detention must not exceed reasonably expected time necessary for achieving the purpose of detention.

Beside these standards of protection from arbitrary detention, one should have in mind that the Convention on the Status of Refugees, as well as the Law on Asylum of Montenegro envisage the principle of the prohibition of punishment as well, i.e. the prohibition of applying criminal sanctions towards an individual, who lodged asylum application, for illegal entry or residence in the territory of certain country.

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<sup>23</sup> Pravo na azil: međunarodni i domaći standardi– Right to Asylum-International and National Standards, Dr. Ivana Krstić and Dr. Marko Davinić, Beograd: Dosije studio, 2013,155

<sup>24</sup> Saadi v. United Kingdom, ECtHR, op. cit., fn. 625, para. 74. For more details: Migration and International Human Rights Law, Practitioner Guide No. 6, International Commission of Jurists, Geneva, 2011.

## **8) Right of foreign national to challenge deportation decision**

Departing from the right to effective remedy as one of the fundamental human rights envisaged in the Article 13 of the ECHR, and from the procedural protection with regards to the expulsion of a foreign national envisaged by the Article 10 of the Protocol 7, the foreign national who has been denied the residence or who had the measure of expulsion from the territory pronounced against him/her must be offered an opportunity to challenge such decision, to express the counter arguments and to use legal aid in that procedure.

The observance of this right is particularly important from the point of view of the principle of non-refoulement. By lodging a remedy against the deportation decision a foreign national is able to institute the examination into the existence of the elements for the application of this principle. Given that competent bodies are obliged to establish all the facts and circumstances within the procedure instituted upon a remedy being lodged, which facts and circumstances are significant for decision making, they are obliged to examine the details of the allegations expressed by the foreign national. This re-examination of the deportation decision ensures the observance of the principle of non-refoulement.

On the other hand, when expelling a foreign national from one's territory attention must also be paid to the prohibition of collective expulsion guaranteed by the Article 4 of the Protocol 4 of the ECHR. The prohibition of collective expulsion comprises every measure related to foreign nationals' leaving a country, as a group, except if such measure has not been undertaken on the grounds of rational and objective examination of individual case of each individual in that group.

## **9) Right to health protection and access to the system of healthcare and social welfare**

The right to health care and social welfare falls under the group of economic, social and cultural rights guaranteed by the Universal Declaration on Human Rights, International Covenant on Economic, Social and Cultural Rights (1966) and numerous other international sources like, but not limited to: Convention on the Elimination of all Forms of Racial Discrimination (1979), Convention on the Rights of the Child (1989), International Convention on the Rights of Migrant Workers and their Family Members (1990)<sup>25</sup> etc.

With regards to exercising these rights the duty of the state consists in undertaking measures according to the maximum of available opportunities in order to ensure their gradual full enjoyment. On the other hand, the minimum of enjoyment that a state must provide at any moment comprises the following:

- Access to the system of healthcare and social welfare to every person in the state of social need or in the situation when he/she is faced with the circumstances which deprive him/her of the ability to fully exercise his/her rights provided for by the International Covenant on Economic, Social and Cultural Rights;<sup>26</sup>
- Indiscriminate access to the system of healthcare and social welfare;
- securing urgent care, and/or providing urgent medical aid and services of an urgent intervention in order to ensure security in life threatening situations, or those that endanger health and development of an individual.

## **PART II**

### **ESTABLISHING THE FIRST CONTACT WITH MIGRANTS AND THEIR CLASSIFICATION**

The first contact with migrants is established either at the border or after a person enters a territory. It is important to underline that although a migrant has technically not entered the territory of the state, during his/her stay in the transit area of an airport he/she is subject to the regulations in force in the Republic of Montenegro.

In the Article 6 paragraph 1 item 2 of the Law on Foreigners it is stated that: ...”keeping foreign nationals within the airport transit area, anchorage or...is not considered the entry into Montenegro, in the sense of this law”...

The stated provisions of the Law on Foreigners can serve as a particular reminder of the stance of the European Court of Human Rights with regards to the jurisdiction of the state over transit zones, which should undoubtedly be the starting basis for the treatment in the transit area. In *Amour v. France*, although French competent authorities flagged the argument that if a person has technically not entered into the territory of the state, his/her stay in the transit international area does not make him/her subject to the jurisdiction of that state, as well as that he/she is not subject to the Article 1 of the ECHR, the Court took the stance that “irrespective of the terms “international area”, they do not have extraterritorial status, and that despite national regulations which provide for different interpretation ... by staying in the transit area a person is subject to French law.”<sup>27</sup>

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<sup>26</sup> General Comment No. 19: The right to social security (Art. 9 of the Covenant)

When deciding on the right to enter Montenegro, Border Police is obliged to bear in mind that it is the duty of the state to enable access to the territory to certain categories of migrants (in the first place to refugees, asylum seekers, unaccompanied children, human trafficking victims), as well as that the entry must not be denied in case the denial would in concrete case lead to the violation of the principle of non-refoulement.

At the border, quite necessarily and most often after entering the territory, it is with police officers that migrants establish the first contact. In case a non-police officer establishes the first contact with a migrant, he/she is obliged to notify without delay the representatives of the Ministry of Interior in charge of the area in which the migrant was found.

**On the occasion of the first contact it is important to see to the urgent needs of the migrant in the first place, and then proceed with his/her identification procedure.** It is necessary to conduct such procedure consistently both at the border crossing point, including the airport transit area, and anywhere else within the territory of Montenegro. It is a priority to pay attention first of all to the psycho-physical condition a migrant is in, establish whether it is necessary to provide urgent medical assistance and the satisfaction of basic necessities. **The provision of medical assistance and the satisfaction of basic necessities must be given a priority in relation to migration issues. All persons who establish the first contact with migrants are obliged to act accordingly.**

#### Communication with migrants

In case the person who establishes the contact does not speak a single language in which he/she could communicate with the migrant, in ideal circumstances, a trained interpreter will be present during the first interview (speaking a language that the migrant understands, or the language the understanding of which by the migrant can be justifiably assumed—country of origin, official languages in that country, the language which the migrant stated as his/her mother tongue etc.). It is also necessary to hire an interpreter for sign language, as well as to provide the material in Braille alphabet and other accessible formats. In case it is not possible to ensure the presence of an interpreter, some of the alternative methods of securing interpretation can be resorted to: interpretation via telephone, standardized questionnaire and methodology of conducting the so called identification interview and familiarization of migrants with the rights through prepared information brochures on their rights and obligations.

<sup>27</sup> Ammur v. France, application no. 19776/92, judgment dated 25th June 1996. Para. 52

*The persons found in a group, only exceptionally, as the measure of the last resort, can be used as interpreters, but only for the collection of basic pieces of information which are necessary for the satisfaction of the urgent needs, while the identification procedure must be conducted using the methodologies which guarantee the independence and impartiality of the procedure.*

Police officers, as well as other civil servants who undertake actions within the framework of their competences are obliged to notify the person that they act towards about the actions to be undertaken, as well as on the rights and obligations during their stay in the territory of Montenegro. This notification can be given either orally during the interview with the migrant or in writing on a specially prepared form that the migrant can understand and subsequently sign. It is important that the information is reliable and thorough and that the migrant is not misled with regards to his/her status, measures to be taken towards him/her, accessible rights, as well as his/her obligations during his/her stay in the territory of Montenegro.

#### Identification procedure

The identification procedure comprises the profiling of migrants/checking of his/her identity and establishing all the data which are of importance for his/her referral to further procedure in accordance to the category he/she has been placed into. It is conducted by the representatives of the Ministry of Interior competent for the territory in which the migrant was found, by collecting personal data on the basis of the inspection of the passport or some other identification document, and in case the foreign national does not hold any document on the basis of his/her statement, as well as other data of importance for making the decision on further procedure (reasons and manner of entering the country, basis for stay, presence of a family member, countries that the migrant had passed through on his/her journey until entering Montenegrin territory, destination country etc.)

Besides recording the data that the migrant gave about himself/herself and about the circumstances of his/her arrival, particularly important are verbal and non-verbal indicators which can point out to the category of migrants and his/her belonging to some of particularly vulnerable categories – for instance, victim or perpetrator of a criminal act of human trafficking, and/or of smuggling migrants – so called, symptomatic personal appearance. The essential elements of the symptomatic personal appearance are psychological and physiological components of human personality, i.e. body reaction to stressful situations and fear. They are manifested as accelerated breathing, paleness, increased sweating, drying mouth, muscular stiffness, shaking, nervousness, rolling eyes, enlarged pupils, frequent movement of arms and legs, characteristic changes of voice colour, and similar.

When conducting the identification procedure it is important to bear in mind the specificity of their position and choose adequate approach which will enable the collecting of relevant information necessary for identification: friendly and secure environment, premises adapted for interviews, presence of only persons with important role in the procedure, conduct the interview in a neutral way, preferably conducted by same sex person.

When speaking about the categories of migrants, it is important to bear in mind the following:

1. Irrespective of whether the migrant has entered into the territory in a legal or illegal way, under certain circumstances such person can also be an irregular migrant, but also an asylum seeker;
2. One individual can in one moment be placed in the category of irregular migrants, and after fulfilling certain conditions he/she can be moved to the category of asylum seekers;
3. Particularly vulnerable categories of migrants can be identified as asylum seekers, but also as irregular migrants;
4. In case a particularly vulnerable category is identified, they should be subjected to a specially adjusted procedure, and not to the procedure which is normally applied in case of irregular migrants or asylum seekers.

### **Irregular migrants**

When acting towards irregular migrants, one most often tends to neglect the fact that in relation to this category there is also the need to observe and safeguard fundamental human rights. This means that it is necessary, above all, to enable the satisfaction of all urgent needs, and then also that in relation to these persons too there is a duty of issuing notifications on the status, further actions and measures to be undertaken towards them, as well as of the rights and obligations which result from the status, during their stay in the territory of Montenegro. In addition to that, all procedural guarantees must be observed, which are also guaranteed by the current regulations to other persons who are charged with a misdemeanour and/or criminal act.

From the angle of the procedure being conducted for illegal stay in the territory of Montenegro, it is particularly important that the ignorance and lack of knowledge of the party is not to the detriment of the rights of irregular migrants, that through interpreter the party be enabled to use his/her language during the procedure, that the opportunity be offered for the party to give the statement on all the facts and circumstances he/she is charged with, as well as to express all the facts and circumstances that are in his/her favour. Special attention must be paid to determining the veracity of all the facts of importance for the passing of the judgment, and especially to the observance of the non-refoulement principle and the principle of impunity for illegal entry or stay, in case the need for asylum is recognized.

Also, no person who is the object of sanctions, irregular migrants included, shall be placed in unequal position because of race, skin colour, sex, language, religion, political and other beliefs, national or social origin, financial standing, education, social status or other personal trait. In accordance to that, migrants must be treated identically and the same corpus of rights which is guaranteed to other persons, who are the object of sanctions being pronounced against them, must be available to them.

### **Affirmative recognition duty**

#### **- Of the need for asylum**

Having in mind that besides a direct way of expressing the need to request asylum, a migrant can express his/her intention by means of various conclusive actions, yet it might remain unnoticed due to the difficulties in communication and his/her specific psychological condition. It is important for civil servants, in case of doubt as to whether a person seeks asylum, to try to inform the foreign national of the possibility to ask for the protection from Montenegro. Particular attention should be paid to the persons coming from the countries in which there is some kind of internal or international armed conflict, as well as from the countries that have already been recognized as the countries of origin of a large number of persons seeking international protection.

Information on the countries which are recognized as the countries of origin to a large number of persons seeking asylum can be found on the Internet page of the UNHCR and other international organizations, only such information can also be given by the Asylum Office, UNHCR Office to Montenegro and CSO active in the asylum system.

## **-Of the need for special protection**

Every person who gets in contact with migrants is also obliged to pay special attention to the circumstances due to which a person can be classified as a particularly vulnerable category of migrants. In the context of vulnerable categories there are certain indicators and recommendations for treatment which the persons who establish the first contact must pay attention to and take them into account while making a decision in a given case. We would to remind you that the stated indicators do not represent an exhaustive list and that the presence of the stated indicators should be viewed as a signal for greater attention to be paid and to direct further actions.

**Smuggled migrant:** In case a migrant is found in an illegal transfer together with a smuggler, the police officer should treat him/her in the same way as other migrants. It is very important not to subject him/her to criminal prosecution for the fact that he/she is the subject matter of smuggling.<sup>28</sup> In such situation, the authority which established the first contact is obliged to ensure personal security and human treatment of the migrant, as well as the access to appropriate protection mechanisms. Furthermore, he/she needs to be advised on the risks and consequences of the irregular status and on the possibility of lodging asylum application. In the context of asylum seeking, it is important to bear in mind that the fact that a person is smuggled must in no way imperil the right of the same to apply for asylum.<sup>29</sup> Secondly, the lodging of asylum application by the person who smuggled migrants in no way undermines his/her criminal liability in case this person did that for the acquisition of financial or material gain. Also, it should be borne in mind that the smuggled migrants can appear in the role of witnesses, during the investigation of criminal prosecution of the smugglers.

**Women:** In case of a female migrant, during the identification procedure due attention should be paid that the procedure be conducted by the same sex person, as well as that in case of a woman travelling in the company of her husband or another adult, it is necessary to inform her of the possibility for the interview with her to be carried out independently, without the presence of her travelling companions.

**Minors (unaccompanied):** Since in Montenegro there is no formal procedure for determining migrant's age, it is determined on the basis of the data contained in personal documents, and if these are missing then on the basis of his/her statement. In case of a doubt in relation to the age, the authority which establishes the contact with the migrant is obliged to treat him/her as a minor.

<sup>28</sup> Article 5 of the Protocol against Smuggling of Migrants by land, sea and air

<sup>29</sup> Article 19 of the Protocol against Smuggling of Migrants by land, sea and air, UNODC Training Manual, Module 6 "Protection and Assistance", [http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/In-Depth\\_Training\\_Manual\\_SOM\\_en\\_wide\\_use.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/In-Depth_Training_Manual_SOM_en_wide_use.pdf)

In case it has been concluded that the person is a minor, it should be determined if it is accompanied by his/her parents or guardians, and if accompanied by other persons, what is their mutual relation, and/or what is the nature of that relation and whether it might have negative effects on the minor. When undertaking the measures and actions towards a minor, it is necessary for a responsible official to act cautiously, taking into account the maturity, other personal traits and protect the privacy of the minor, and all of it in order for the measures and actions being undertaken not to have harmful effect on his/her development.

If it has been established that a person is an unaccompanied minor, and/or when there is a doubt in relation to the nature that the minor has with the persons in his/her company, it is necessary to suspend further procedure and notify without delay the competent guardianship authority or other authorized persons specially trained for the treatment of minors.

When a minor is found in a group, with regards to the appointment of a temporary guardian there can be a dilemma whether it is in the best interest of the child to appoint some of the person that the child is travelling with, who are not his/her parents or guardians, or to appoint a person on behalf of the guardianship authority. Although, at first glance, it might seem better for a minor if his/her interest are entrusted to a person from his/her company and not the one which the minor is yet to establish a trustful relation, such attitude is not adequate in all situations. Often, a minor can be found in a group in which there is a smuggler, as well as the persons who are ready to expose the minor to various forms of exploitation, thus their appointment for a guardian and subsequent permission for the minor to continue travelling with them would expose the minor to additional risks to a considerable degree. All other actions that must be undertaken towards a minor are suspended until the (appointment) arrival of his/her guardian. On the occasion of every interview being carried out with a minor migrant particular attention must be paid for his/her opinion to be heard and to pay due attention to it in accordance with his/her age and maturity, being guided by the best interest of the child.

The Law on Foreigners in its Article 51 provides for the possibility of approval of the temporary residence for humanitarian reasons for the period of three months up to one year, as it recognizes juvenile foreign nationals, who are deserted or victims of organized crime, as one of the categories for which there is a possibility of approving such status.

The stated article, can undoubtedly have great significance for the protection of the rights of unaccompanied minors who do not apply for asylum in Montenegro.

**Victims of trafficking in human beings:** Any doubt that in a given case it concerns a victim, calls for the contacting of specialized services for countering human trafficking which will perform the so called official identification of the victim and take him/her over for the purpose of his/her further referral. The stated indicators should be viewed solely as framework ones, which calls for special caution during the procedure in case it has been noticed that: personal documents of the migrant are held by other persons / person has no control over his/her personal documents, the accompanying adult has no documents to prove his/her relation to the child, nor has he/she got the child's documents, the person has no money on him/her, wallet or other valuables, instead his/her property is held by the person who appears to have control over him/her, another person is always present or tries to be present during the contact with the given individual, does not allow him/her to leave or insist on their staying together, the person shows non-verbal signs of asking for assistance (wishes to say something and is not allowed to, gives signs by nodding, by moving the eyes etc.), the person speaks as though he/she has learnt by heart what he/she is supposed to say, behaves as though he/she got the instructions from someone, one person speaks permanently on behalf of a group of adult persons and he/she has all the information, while the members of the group mostly keep silent, the person shows injuries typical of different forms of control (bruises from tightening, bruises around joints, etc.), a group of children or women travels with several adults who they are not related to. The presence or absence of these indicators does not indicate the existence or non-existence of human trafficking and the list of indicators is not exhaustive, on the contrary, depending on the situation other indicators might show up.

**Family:** In case a migrant is found in the company of family members, one must bear in mind the observance of the duty of preserving family unity. According to generally recognized rules of international law and ratified international treaties, as well as national regulations which regulate the protection of right to family life, the notion of family covers: spouses, extra-marital partners, their juvenile children born in marriage or outside it, adopted minors or fostered minors, parents, adoptive parents and other relatives in case there are particularly important personal or other humanitarian reasons. During the identification procedure it is recommendable for the interview to be conducted with every family member individually, unless it can be claimed with great deal of certainty that not a single factor has been noticed that would point out to the existence of certain forms of illicit behaviour, like abuse, human trafficking, violence etc. In case among family members there are minor children, as a rule the collection of data from them is carried out in the presence of their parents, adoptive parents or guardians.

The exception from the above rule, i.e. conducting the interview within the framework of the family, happens when the authorized persons, who are trained to work with minors, assess that the presence of parents, adoptive parents or guardians is not in the best interest of the child, in which case mandatory is the presence of an expert from the guardianship authority.

### **Is this classification final?**

The classification of migrants made following the completed identification procedure cannot be considered final in every individual case. During the stay of a migrant in the territory there can be circumstances which lead to the change of his/her status and to the transfer from one category to another (the individual whose intention to seek asylum has been recognized can decide voluntarily during his/her stay in the territory to withdraw from asylum procedure and, in case he/she has no other grounds for his/her stay, move to the category of irregular migrants).

On the other side, sometimes a longer contact is needed in order to be able to recognize certain indicators or factors because of which a migrant can be classified under certain category, since it will not be possible to determine these during the first contact. Migrants often conscientiously avoid any cooperation with security authorities. It is also possible that due to severely impaired physical or mental health they are unable to cooperate (for instance, a female migrant who came to the territory of the Republic of Serbia in company and who stated in the first contact that she was in the company of her husband and that she was of age, but after being referred to asylum procedure, during the interview with the representatives of competent authorities, she stated the facts indicating that her companion is not her husband, but a relative of hers, and that she is 16 years old).

It is therefore of decisive importance for every person who might get in touch with a migrant to be familiar with basic indicators/factors which are of importance for the classification of migrants, and/or identification of vulnerable groups among them, also with typical situations which migrants can find themselves in, as well as with the established institutional and non-institutional mechanisms for their treatment.

***The failure to make accurate identification of individuals can be the cause of violation of their human rights. It is thus recommended, in the situations when the category of migrants or affiliation to a particularly vulnerable category has not been unambiguously established, to treat an individual as a category enjoying the highest degree of protection. This will eliminate the possibility of causing irreparable damage to the persons who for various reasons have not been classified appropriately.***

## ANNEX I

### RELEVANT SOURCES OF LAW

#### 1. UNIVERSAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS

##### 1.1. International common law

- Universal Human Rights Declaration (1948);
- Declaration on Territorial Asylum (1967);
- Declaration on the Human Rights of Individuals Who are not the Nationals of the Country in Which they Live (1985);

##### 1.2. International Contract Law

- International Covenant on Civil and Political rights (1966);
- International Covenant on Economic, Social and Cultural Rights (1966);
- UN Convention on the Rights of the Child (1989);
- UN Convention on the Status of Refugees (1951.);
- UN Convention against Torture and other Cruel, Inhuman or Degrading Treatments and Punishments (1984);
- Convention on the elimination of All Forms of Discrimination against Women (1979);
- International Convention on the Elimination of All Forms of Racial Discrimination (1965);
- Convention on the Rights of the Persons with Disabilities (2006);
- International Convention for the Protection of All Persons from Enforced Disappearance (2006);
- Protocol on the Status of Refugees (1967);

#### Council of Europe

- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950);
- Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence
- European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment (1987),
- Council of Europe Convention on Action against Trafficking in Human Beings (2005),
- Revised European Social Charter (1996)

### III Current regulations in Montenegro

- Constitution of Montenegro (OG MNE nos: 01/07, 38/13)
- Law on Asylum (OG RMNE no.45/06, OG MNE nos. 73/10, 40/11);
- Law on Border Control(OG MNE nos. 72/09, 40/11, 39/13);
- Law on Interior Affairs(OG MNE nos.44/12, 36/13, 01/15);
- Law on Registers of Residence and Domicile (OG MNE no.46/15);
- Law on Free Legal Aid (OG MNE nos.20/11, 30/15);
- Criminal Code (OG RMNE nos.70/03, 13/04, 47/06, OG MNE nos. 40/08, 25/10,31/11, 64/11, 40/13, 56/13, 14/15, 42/15);
- Criminal Procedure Code (OG MNE nos.57/09, 49/10, 47/14, 02/15, 35/15);
- Law on Misdemeanours(OG MNE nod.01/11, 06/11, 39/11, 32/14);
- Law on Foreigners (OG MNE nos.56/14, 28/15);
- Decree on Visa Regime(OG MNE nos.18/09, 24/14, 30/14,10/15);
- Degree on the Content and Manner of Keeping Records in the Area of Asylum (OG MNE no. 09/08 of 8th February 2008);
- Decree on Monetary Aid for Asylum Seeker, Person whose Refugee Status has been Recognized and Personwhose Additional Protection has been Granted (OG MNE no. 56/08)
- Regulation on Forms, Detailed Conditions and Manner of Issuing the Permit for Temporary Residence and the Permit for Temporary Residence and Work (OG MNE no. 15/15)
- Regulation on Visas and Visa Forms (OG MNE no.36/15);
- Regulation on the Procedure and Manner of Taking Photograph, Finger prints, Signatures and Other Data from Asylum Seeker (OG MNE no. 04/07 of 6th November 2007);
- Regulation on Asylum Application Formsand on the Verbal ofOrally Lodged Asylum Application (OG MNE no. 04/07 of 6th November 2007);
- Regulation on the Manner of Exercising Medical Care by Asylum Seeker, 14596+-9Person whose Refugee Status has been Recognized and Person whose Additional Protection has been Granted and Person whose Temporary Protection has been Granted (OG MNE no. 31/10);
- Decision on the Appearance and Content of the Forms and the Manner of Issuing Personal Documents to Asylum Seeker,Person whose Refugee Status has been Recognized and Personwhose Additional Protection has been Granted and Person whose Temporary Protection has been Granted (OG MNE no. 13/09 of 19th February 2009);
- Readmission Agreement between the Republic of Montenegro and the European Community;

- Readmission Agreement between the Republic of Montenegro and the European Community;
- Readmission Agreement between the Government of Montenegro and the Government of the republic of Croatia;
- Readmission Agreement between the Government of Montenegro and the Council of Ministers of Bosnia and Herzegovina;
- Readmission Agreement between the Government of Montenegro and the Council of Ministers of the Republic of Albania;
- Readmission Agreement between the Government of Montenegro and the Government of the Kingdom of Norway;
- Readmission Agreement between Montenegro and the Swiss Confederation;
- Readmission Agreement between the Government of Montenegro and the Government of the republic of Kosovo;
- Readmission Agreement between the Government of Montenegro and the Government of the Republic of Macedonia;
- Readmission Agreement between the Government of Montenegro and the Government of the Republic of Moldova;
- Readmission Agreement between the Government of Montenegro and the Government of the Republic of Serbia;
- Readmission Agreement between the Government of Montenegro and the Government of the Republic of Turkey;
- Strategy for Integrated Management of Migrations in Montenegro for the period 2011 - 2016, with the Action Plan for the Implementation of the Strategy for 2013 and 2014;
- Strategy for the Reintegration of Persons Returned on the Basis of Readmission Agreements for the period 2011-2015;
- Integrated Border Management Strategy for the period 2013 – 2016.

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