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Building Integrity in The Montenegrin Defence and Security Sector

Evaluation of the Policy and the use of Police Anti-Terror Unit (Saj) in Montenegro – Harmonized to International Standards, Trends and Obligations

Recommendations for internal use

Vesna Ćorić and Odd Berner Malme



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The Centre for Integrity in the Defence Sector (CIDS) promotes integrity, anti-corruption measures and good governance in the defence sector. Working with Norwegian and international partners, the centre seeks to build competence, raise awareness and provide practical means to reduce risks of corruption through improving institutions and through education and training. CIDS was established in 2012 by the Norwegian Ministry of Defence and was officially appointed as NATO's Department Head in the new discipline area established through the Building Integrity Programme in 2013.

The views expressed in this report are those of the author and do not necessarily represent the views of, and should not be attributed to, the Norwegian Ministry of Defence.

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FOREWORD

This report describes the governance situation within the Police Anti-Terror Unit of Montenegro. It furthermore recommends actions that may improve integrity and subsequently citizens' trust in the institution's way of functioning.

The report was written as part of a series of activities that together make up the CIDS lead Building Integrity project in the Western Balkans and is funded by the Norwegian Ministry of Foreign Affairs.

I would especially like to thank our associated expert, Mr. Odd Berner Malme, and his partner in this project, Ms. Vesna Ćorić, from the Institute of Comparative Law in Belgrade for their expertise and efforts that made this report possible. I hope the report will also motivate countries that face similar governance challenges to find a way how to start a new thinking, involving building trust, both within their governmental institutions and between these institutions

and their citizens. I would like to thank CIDS country project leader in Montenegro, Mr. Rajko Radevic, for his motivation and good work. Finally, I would like to thank the CIDS production coordinator, Åse Marie Fossum, for her contribution to the report.

The view expressed in the report is the sole responsibility of CIDS. They do not in any way present the views of-, nor should they be attribute to the Norwegian Ministry of Defence nor to the Norwegian Ministry of Foreign Affairs.

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Per A. Christensen
Director

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1. INTRODUCTION – State of the Play

The Norwegian project on enhancing integrity in the security sector in Montenegro is asked by the Ministry of Interior to support the work in increasing the unit's integrity and trust. The project work predominantly aims to contribute to drafting the anticipated government bylaw. In doing so, it is directed towards transforming the operational anti-terrorism unit to meet future challenges in accordance with international accepted standards, trends and human rights.

Terrorist crimes as defined in the universal instruments against terrorism fall in the category of national criminal law of international concern, meaning that a duty to bring perpetrators of terrorism to justice rests solely with national criminal justice systems.¹ Hence, without adequate domestic capacity to discharge that duty, international counterterrorism efforts will almost certainly fail.² When it comes to the development of its own national capacities, Montenegrin authorities has so far made relevant progress by adopting strategic documents dealing with the fight against terrorism followed by respective action plans. Implementation of these respective action plans gave rise to further legal and institutional developments. However, there is still a huge room of maneuver for improvements when it comes to the fight against terrorism in the police.

Most of the applicable international standards – Including but not limited to the standards of the United Nations, the Council of Europe and the European Union – are already encompassed by national strategic documents enacted by the Government of the Republic of Montenegro such as the Strategy for the Prevention and Suppression of Terrorism, Money Laundering and Terrorism Financing³ and the Countering of Violent Extremism Strategy.⁴ Accompanying action plans specify the activities that shall be undertaken in various sectors including the sector of internal affairs. The **Police Development Strategy 2016-2020, as a sector-specific strategy, does not elaborate in**

more details on the standards in this regard, but rather refers to the Strategy for the Prevention and Suppression of Terrorism, Money Laundering and Terrorism Financing. In this context the National Security Strategy which states that the police “is a leading institution in combating terrorism, proliferation of weapons of mass destruction, corruption and drugs is also relevant”, is also relevant.⁵

Furthermore, the Action Plan for Chapter 24 of the European Union Accession adopted by the Government of Montenegro – Justice, Freedom and Security – also contains relevant activities to be conducted in the fight against terrorism, ranging from 7.1 to 7.19, including *inter alia* drafting of the innovated Action Plan for Implementing the National Strategy for Prevention and Suppression of Terrorism, Money Laundering and Terrorism Financing as well as the Action Plan for implementation of the UN Security Council Resolution 1540.⁶ The Action Plan for Chapter 24 underlines that establishing a modern and comprehensive legislative framework in accordance with relevant international standards is one of the key conditions for efficient prevention and fight against terrorism.⁷

Although various measures and legislative acts have so far been adopted in line with the aforementioned strategic documents in the fight against terrorism, there are still a number of regulatory and institutional shortcomings to overcome in the future. They will be identified and addressed in this paper.⁸ In addition, the report will come up with proposals tailored to meet capacity development needs of the SAJ. To that end, introducing training on various issues is going to be proposed.

It is worth noting that values of professional policing, identified by the Presidential Task Force on the 21st century policing and trends of terrorism determined

5 National Security Strategy, "Official Journal of the Republic of Montenegro", No. 75/08, 08.12.2008, p. 5.

6 Action Plan for Chapter 24 of the EU Accession adopted by the Government of Montenegro pp. 231-232.

7 *Ibid.*, pp. 228 and 229.

8 The section of the Action Plan for Chapter 24 dealing with police cooperation is also relevant and it states that Montenegro authorities shall identify the key challenges in the implementation of the *acquis* in the field of police cooperation. Special attention and capacities are directed towards the implementation of the Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and crime with cross-border implications (Prüm Decision) and the Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union ("Swedish Initiative"). The issues of international police cooperation will not be analysed in detail in this report as there is other separate unit within the police which is in charge of international police cooperation matters.

1 However, it is noteworthy that regional human rights instruments (convention and courts, especially the ECHR) do play relevant role in shaping national anti-terrorism legal and institutional frameworks in this regard.

2 Although acts of international terrorism are regarded by the Security Council of the United Nations as a *threat to international peace and security*, most of them do not fall into the category of "core international" crimes such as genocide, war crimes and crimes against humanity. Therefore, there are no international criminal courts or tribunals with jurisdiction over these crimes. Handbook on Criminal Justice Responses to Terrorism: CRIMINAL JUSTICE HANDBOOK SERIES p. 9.

3 Strategy for the Prevention and Suppression of Terrorism, Money Laundering and Terrorism Financing, Podgorica, 16/3/2015.

4 Countering Violent Extremism Strategy, 2016 – 2018.

respectively by Europol trend report of 2017 and Global Counter Terrorism Forum (GCTF), were taken into account in the assessment of the Montenegrin anti-terrorism framework.

There are so called six pillars of professional policing which constitute the final list of recommendations with regards to six main topics identified by the Presidential Task Force on the 21st century. These specific recommendations offer the best way for law enforcement agencies to balance between achieving effective crime reduction and building public trust. These recommendations consist of building trust and legitimacy, policy development and oversight, technology and social media, community policing and crime reduction, officer training and education and officers safety and wellness.

When it comes to trends in terrorism, the Europol trend report of 2017 states that the European region is facing a range of terrorist threats of violent jihadist nature, from both networked groups and lone actors, as well does

Jihadists target individuals, smaller groups of people and larger unsuspected crowds. Furthermore, the presence of illegal weapons, especially small and light arms, mines and explosive devices constitutes a significant security issue in the Western Balkans. According to the Europol trend report of 2017, the primary terror threat to the region has been, and will continue to be, jihadist terrorism - represented by both returnees from the conflict zone in Syria and Iraq, and from home-grown radicalized and inspired individuals.

The Global Counter Terrorism Forum (GCTF) points to the complexity of protecting soft targets, as well as the shift towards attacking soft targets to include both complex attacks and simple attacks. It further elaborates on the challenges of tailoring both visible and invisible security measures and applying resources judiciously, thus decreasing the likelihood and consequences of an attack while reinforcing the confidence from the public audience.

The following text is structured into sections pursuant to shortcomings which were identified.

2. Underregulated division of competencies between police internal units in charge of combating terrorism

The analysis of current legislative framework shows that it is not clear from national acts what are the exact competencies of various police units in charge of anti-terrorism related tasks. More specifically, when it comes to the mandate of SAJ, the Rulebook on the Organization and Systematization of the Ministry of Internal Affairs⁹ contains broad, open and vague formulations on SAJ mandate such as that of “suppression of the most complex forms of terrorist activities” and “other tasks which come under its mandate”. Furthermore, it derives from this Rulebook that the SAJ does not have any investigation-related competencies.

On the other hand, the draft Instructions on SAJ takes slightly different approach when it comes to SAJ mandate enlisting broader set of its competencies including “tracking and analyzing terrorist activities giving rise to suspicion of their alleged link to terrorism” and “creating the data base of persons and phenomena linked to terrorist activities”. However, it does not clarify whether these are exclusively mandates of the SAJ or other units also have competencies in this respect.

The cooperation with other police units shall also be precisely regulated, although it already exists on the ground. It is noteworthy that, besides the SAJ, there is one more special police unit for combating serious crime – organized crime and anti-terrorism included. That is the Special Police Intervention/Riot Unit (PJP) which was established in 1998 to handle mass demonstration and riots. The backbone of the unit is peace and order. The PJP has more personnel and variety of tools as dogs and horses to its disposal. Both units are supporting the police in the fight against organized crime.

Recommendations:

- It is recommendable to improve legal provisions governing matters related to the anti-terrorism mandate of the police as to clearly determine the division of competencies and cooperation between the SAJ and other internal police units;
- As to increase capacity and strengthen of the counter-terrorism strategy it should be consider to merge overlapping and related areas of the two units.

⁹ Article 22 of the Rulebook on Internal Organization and Systematization of the Ministry of Internal Affairs.

3. Underregulated division of competencies between different authorities in charge of the fight against terrorism

In countering terrorism, the police is required to work closely with the military and intelligence services. There is a risk that this may blur the distinction between the police and the army, contribute to the militarization of the police, and weaken civilian control and oversight of the police. For that reason, States must clearly regulate cooperation and draw the line between the competencies of different authorities in counter-terrorism measures.¹⁰

For the time being the cooperation between police, military and intelligence services is not clearly regulated in Montenegro. The same applies for underregulation of the cooperation between law enforcement authorities, courts and public prosecution offices.

The positive step is taken by the Action Plan for the Implementation of the Countering Violent Extremism Strategy and the Action Plan for the Strategy for the Prevention and Suppression of Terrorism, Money Laundering and Terrorism Financing. They envisage the establishment of the efficient coordination among law

enforcement authorities, State Public Prosecution Office and courts as well as the introduction of the Agreement on Cooperation between the Ministry of Internal Affairs, Ministry of Defense and National Security Agency for the sake of exchange of data, opinions and proposals for the efficient combating terrorism and other related criminal offences. However, these measures are still not implemented. There is neither an umbrella counter-terrorism law in Montenegro, nor laws which would regulate cooperation among various state authorities mandated for the fight against terrorism. Given that it is particularly important to specify the role of the police in the fight against terrorism, including the aforementioned clear delimitation of the SAJ mandate.

Recommendations:

- Cooperation should be clearly regulated and a line should be drawn between the competencies of different authorities in counter-terrorism field.

¹⁰ Handbook on Criminal Justice Responses to Terrorism, CRIMINAL JUSTICE HANDBOOK SERIES p. 49.

4. The quality of the draft saj instruction

The need was identified during the workshop to regulate the operation of the SAJ by the specific bylaw. The given approach is also widespread in the region. However, both the existing Law on Internal Affairs as well as the current proposal/draft of the Law on Internal Affairs do not provide a clear legal ground for the adoption of the draft Instruction on the SAJ or other bylaws regulating anti-terrorism issues. Due to that, the proposal was made for the improvements of the draft Law on Internal Affairs as to provide unambiguous legal basis for the regulation of the operation of the SAJ as well as to leave more room for bylaw regulations in general.

The envisaged transparency of the draft Instruction on the SAJ does constitute a good solution as it is in line with the good governance principles in the security sector stipulating that limitations to openness and transparency should always be kept to a minimum.¹¹

Furthermore, it was pointed to some shortcomings of the draft Instruction on the SAJ including but not limited to:

- Certain sections of the draft Instruction should be regulated by other legal acts, such as provisions on selection and reception of candidates in the SAJ, movement of police officials as well as on their teaching and trainings. Although, the aforementioned issues should be regulated in a different way when it comes to the operation of the SAJ unit comparing to other police officials, these issues specific to the SAJ employees could be still regulated by the separate subsections of the "general" bylaws applicable to all police officials;
- Section pertaining to organization of the SAJ contains over-detailed provisions on the operation of SAJ teams (such as Articles 13 to 21);
- Competencies of the SAJ are not identically determined by the Rulebook on Internal Organization and Systematization of the Ministry of Interior in power and the draft Instruction on the SAJ.

¹¹ Joint Communication of the European Parliament and the Council, Elements for an EU-wide strategic framework to support security sector reform, [SWD(2016) 221 final], Strasbourg, 5.7.2016, JOIN(2016) 31 final, High Representative of the Union for Foreign Affairs and Security Policy, European Commission, p. 5.

5. The quality of legal framework pertaining to the protection of human rights in the context of combating terrorism by police

The OSCE as well as various other international organizations state that police forces shall provide comprehensive security within a framework of the rule of law and with respect for human rights. National strategies relevant in the counter-terrorism context do provide similar provisions by stipulating *inter alia* that suppression of terrorism requires an state reaction in compliance with human rights. However, the current legislation does not provide sufficient safeguards in that respect, including the existing Law on Internal Affairs, the current proposal of the Law on Internal Affairs, the draft Instruction on the SAJ and the Rulebook on the Methods of Performing Certain Police Tasks and Enforcement of Powers in Its Performance. Some of these standards pertaining to counter-terrorism activities which fall under the SAJ mandate can be introduced, *inter alia*, through the special section of the Rulebook on the Methods of Performing Certain Police Tasks and Enforcement of Powers in Its Performance.

To that end, the following human rights standards should be observed when it comes to the improvement of the existing anti-terrorism legal framework:

5.1. International Standards on Prohibition of Racial Profiling

International standards stipulate that a profiling based on stereotypical assumptions that persons of a certain “race”, national or ethnic origin or religion are particularly likely to commit crime may lead to practices that are incompatible with the principle of non-discrimination. Arrest on the basis of ethnic profiling contradicts the principle that an arrest should never be arbitrary. That rejection of arbitrariness implies that someone should not be arrested or stopped or searched, for discriminatory reasons.¹²

The Committee on the Elimination of Racial Discrimination has called on states to “ensure that any measures taken in the fight against terrorism do not discriminate, in

purpose or effect, on the grounds of race, colour, descent or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.”¹³ The European Court of Human Rights (ECtHR) also has relevant case-law in this regard,¹⁴ while the United Nations High Commissioner for Refugees holds that profiling and screening solely on the basis of religious or racial characteristics is discriminatory and inappropriate.¹⁵

Given that the draft Instruction on the SAJ prescribes the SAJ mandate in cases where the prohibition of racial profiling might be applicable (for instance, it encompasses *inter alia* the mandate related to “tracking and analyzing terrorist activities giving rise to suspicion of their alleged link to terrorism” and “creating the data base of persons and phenomena linked to terrorist activities”) it is important that respective bylaws, including the Rulebook on the Methods of Performing Certain Police Tasks and Enforcement of Powers in Its Performance are in line with the given international standards on prohibition of racial profiling. In other words, it has to be stipulated that profiling performed by police officers based on stereotypical assumptions that persons of a certain “race”, national or ethnic origin or religion are particularly likely to commit crime is incompatible with the principle of non-discrimination. The basic anti-discrimination provision contained in the Law on Internal Affairs is not sufficient in that regard.¹⁶

Recommendations:

- As to prevent racial and other unjustifiable profiling practices, it is needed that national legislation prohibiting

¹³ General recommendation XXX on discrimination against non-citizens, adopted by the Committee on the Elimination of Racial Discrimination at its sixty-fifth session (Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 18 (A/59/18), chap. VIII, para. 10). It is also noteworthy in this context that the Special Rapporteur has expressed his grave concern that law enforcement authorities in various States have adopted counter-terrorism practices that are based on terrorist profiles that include characteristics such as a person's presumed race, ethnicity, national origin or religion (handbook).

¹⁴ European Court of Human Rights, 13 December 2005, *Timishev v. Russia*, para. 42.

¹⁵ Handbook on Criminal Justice Responses to Terrorism, CRIMINAL JUSTICE HANDBOOK SERIES p. 51.

¹⁶ See Article 3 of the draft Law on Internal Affairs and Article and Articles 11 and 14 of the Law on Internal Affairs (Official Gazette of Montenegro, no. 44/2012, 36/2013 and 1/2015).

¹² Handbook on Criminal Justice Responses to Terrorism, CRIMINAL JUSTICE HANDBOOK SERIES p. 55.

racial discrimination specifically covers the activity of the police;

- The Rulebook on the Methods of Performing Certain Police Tasks and Enforcement of Powers in Its Performance shall be amended as to be in line with the given international standards on prohibition of racial profiling;
- It would be also useful to review national legal framework as to determine whether it sufficiently defines “reasonable suspicion standards” on the basis of a suspicion that is founded on objective criteria in the context of various police investigation and intervention practices;
- Police practices can be improved by providing training on prohibition of racial profiling and existing standards establishing a “reasonable suspicion”.

5.2. International Standards on Prohibition of Interference with Personal Privacy

It stems from Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR)¹⁷ that interferences with the exercise of the right to privacy are allowed in a broad range of situations which may be determined as necessary in a democratic society as long as they are prescribed and regulated by national legislation. Relevant in this regard is also Article 17 of the International Covenant on Civil and Political Rights which requires States Parties to protect persons by law against *arbitrary* or unlawful interference with their privacy. The UN Handbook further states that laws authorizing interference with personal privacy must not be implemented in a discriminatory manner.¹⁸ However, the most precise standards in the context of counter-terrorism police operations are contained in the caselaw of the ECtHR. The ECtHR case-law is of great importance when it comes to further improvement of the sector-specific legal framework of Montenegro.

Although, the mandate of the SAJ includes search of home and „stop and search“ powers, the legal framework of Montenegro does not regulate the given issues in a sufficient manner. The main principles which were shaped through the following case law of ECtHR should be incorporated into the sector-specific legal framework of Montenegro:

- Powers to stop and search were not “in accordance with the law” as they were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse;¹⁹
- Sufficient safeguards against the risk of arbitrariness in respect of the search warrants, do exist as they were issued by a national judge;²⁰
- Legislation in question did not provide sufficient safeguards to avoid abuse as long as the ordering of measures amounts to secret anti-terrorist surveillance was taking place entirely within the realm of the executive and without an assessment of whether interception of communications was strictly necessary and without any effective remedial measures, let alone judicial ones, being in place.²¹

Recommendations:

- The Rulebook on the Methods of Performing Certain Police Tasks and Enforcement of Powers in Its Performance should reflect ECtHR standards pertaining to the adequate recourse to “stop and search” powers specifically in the context of the combating the terrorism;
- Guidance for the application of “stop and search” powers as well as ordering the other interferences with the right to privacy should be provided to the SAJ personnel through trainings. In particular it is relevant to point out that it is not in line with international standards to order the aforementioned measures within the realm of the executive and without an assessment of whether they were strictly necessary and without any effective remedial measures, let alone judicial ones, being in place.

5.3. International Standards on Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment in the Context of Searches

There is an absolute prohibition of torture and other cruel, inhuman or degrading treatment. It also means that there is no law enforcement official who may invoke exceptional

¹⁹ The ECtHR found that police power in the United Kingdom to stop and search individuals without reasonable suspicion of wrongdoing under the Terrorism Act 2000 constitutes violation of Article 8 of the ECHR. The violation is found as *Gillan and Quinton v. the United Kingdom* (12 January 2010).

²⁰ *Sher and Others v. the United Kingdom* (20 October 2015). This case concerned three Pakistani applicants, whose homes were searched during their detention in the context of a counterterrorism operation. The ECtHR held that there had been no violation of Article 8 (right to home) of the ECHR as the fight against terrorism and the urgency of the situation had justified a search of the applicants’ homes pursuant to a search warrant framed in relatively broad terms. See Factsheet – Terrorism and the ECHR, November 2017, p. 24.

²¹ In the most recent case *Szabó and Vissy v. Hungary* (12 January 2016) the ECtHR held that Hungarian legislation on secret anti-terrorist surveillance was in violation of Article 8 (right to respect for private life) although the ECtHR accepted that it was a natural consequence of the forms taken by present-day terrorism that governments resort to massive monitoring of communications (the scope of the measures could include virtually anyone in Hungary).

¹⁷ See also Article 17 of the International Covenant on Civil and Political Rights.

¹⁸ Handbook on Criminal Justice Responses to Terrorism, CRIMINAL JUSTICE HANDBOOK SERIES p. 52.

circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.²² This prohibition is prescribed by Article 3 of the ECHR and Article 7 of the International Covenant. Information obtained through torture or other forms of coercion should not be accepted as evidence in court.²³

Although Article 13 of the Law on Internal Affairs do contain provisions on the given prohibition, there are some specifications and refinements which should be incorporated in Montenegrin legal framework when it comes to fight against terrorism. Having in mind the mandate of the SAJ it is particularly important that standards on the given prohibition which are applicable in context of searches are regulated. The case of *Dulaş v. Turkey* (30 January 2001) is of utmost relevance in the context of the fight against terrorism as the ECtHR found in particular case that the destruction of the applicant's home and possessions by security forces as the consequence of the search followed by setting fire to the houses, including hers, amounted to inhuman treatment contrary to Article 3 of the ECHR.²⁴

Recommendations:

- The given bylaws should reflect requirements stemming from the ECtHR case-law on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment in context of searches in the fight against terrorism.
- Guidance for the proper application of the given standards should be provided to the SAJ personnel through trainings.

²² See Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169, annex, article 5).

²³ Principle 27 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment stipulates that "non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person". A comprehensive definition of "torture" is provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 1 of the Convention against Torture: "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

²⁴ More precisely, in the given case it was committed by the gendarmes in the fight against terrorism. See. Factsheets- Terrorism and the ECHR, November 2017, p. 23.

5.4. International Standards Regarding the Right to Notification and Communication At The Time of Arrest

International instruments stipulate that every person who is arrested is entitled to be informed of his or her rights, to know what he/she is being accused of, and to consult with counsel immediately following arrest. In the case of a foreign national, the universal anti-terrorism conventions and protocols and the Vienna Convention on Consular Relations all require that the person has the right to communicate with and be visited by a representative of the State of which he or she is a national.²⁵ In the case of a stateless person, the person has the right to communicate with the International Committee of the Red Cross and be visited by a representative of the State in whose territory that person habitually resides and to be informed of his or her rights.²⁶ Although this right is enshrined in the Constitution of Montenegro, its application needs to be further specified in the anti-terrorism context.

It is noteworthy that the Human Rights Committee took a stance (concerning the right to assistance from a defence lawyer) that counter-terrorism measures that deny detainees access to counsel immediately following arrest are allowed as long as it is stipulated a short time limit for granting such access provided that it is in conformity with the requirements of Articles 9 and 14 of the International Covenant.²⁷ The introduction of a measure providing for a time limit—which must be short—for granting such access can be justified but must be in conformity with the requirements of Articles 9 and 14 of the International Covenant.

Recommendations:

- It is recommendable to review and further improve existing policies, operational procedures, and training programmes related to police practices regarding the right to notification and communication at the time of arrest. The introduction of a measure providing for a time limit—which must be short—for granting such access would be in line with the existing international standards;
- Although this right is enshrined in the Constitution of

²⁵ United Nations, Treaty Series, vol. 596, No. 8638.

²⁶ Handbook on Criminal Justice Responses to Terrorism, CRIMINAL JUSTICE HANDBOOK SERIES p. 56.

²⁷ Report of the Secretary-General on the protection of human rights and fundamental freedoms while countering terrorism (A/58/266).

Montenegro, its scope needs to be further specified in the anti-terrorism context.

5.5. International Standards regarding Application of Extraordinary Measures

Measures taken by law enforcement agencies to combat terrorism must be lawful. However, some States have engaged in extraordinary law enforcement measures that are problematic from the human rights perspective, including shooting without warning and targeted killings. These so-called “exceptional measures” have underlined the need to ensure that, in adopting measures aimed at preventing and controlling acts of terrorism, States adhere to the rule of law, including the basic principles, standards and obligations of criminal and international law that define the boundaries of permissible and legitimate State action against terrorism and the various forms of serious crime in which terrorists and other criminal groups are involved.²⁸ When it comes to so-called “targeted killings” of suspected terrorist, the Human Rights Commission has expressed concerns that sometimes it appears that it have been used in part as a deterrent or punishment, thus raising issues related to Article 6 paragraph 1 (right to life) of the International Covenant on Civil and Political Rights.²⁹

Furthermore, governments must ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments must either bring such persons to justice or cooperate to extradite them to other countries wishing to exercise jurisdiction.³⁰ This principle applies irrespective of who and where the perpetrators or the victims are, their nationalities, or where the offence was committed.³¹

A. International standards regarding prohibition of deprivation of liberty or deprivation of life of persons who provide resistance to firearms and resolving hostage situations

The mandate of the SAJ includes *inter alia* deprivation of liberty or life of persons who provide resistance to firearms and resolving hostage situations. The Law on Internal Affairs (Articles 13, 73, 74, 75, 77 and 78) contains some

provisions in that regard which are in line with international standards. However, additional regulation is needed in these fields. It should reflect both the following ECtHR case law through which have been developed relevant standards tailored for security forces counter-terrorism operations as well as other international standards:

- The violation of Article 2 of the ECHR is found because the operation of the Special Air Service soldiers could have been planned and controlled without the need to kill the suspects. In other words, the use of force in self-defence is justified only if it is “absolutely necessary” in the sense of Article 2 § 2 (right to life) of the ECHR (*McCann and Others v. the United Kingdom*, 27 September 1995);³²
- There is no violation of Article 2 (right to life – procedural limb) of the ECHR as long as the decision not to prosecute any individual officer was not due to any failings in the investigation or the State’s tolerance of or collusion in unlawful acts; but due to the fact that, following a thorough investigation, a prosecutor had considered all the facts of the case and concluded that there was insufficient evidence against any individual officer to prosecute (*Armani Da Silva v. the United Kingdom*, 30 March 2016, Grand Chamber)³³
- Although there had been no violation of Article 2 (right to life) of the ECHR concerning the decision to resolve the hostage crisis by force and the use of gas, the violation of Article 2 was made due to the inadequate planning and implementation of the rescue operation as well as due to the ineffectiveness of the investigation into the allegations of the authorities’ negligence in planning and carrying out the rescue operation as well as the lack of medical assistance to hostages (*Finogenov and Others v. Russia*, 20 December 2011)³⁴
- The violation of Article 2 (right to life) of the ECHR arises from a failure to take preventive measures by state authorities (to disrupt the terrorists meeting and preparing; insufficient steps had been taken to prevent them travelling on the day of the attack; security at the school had not been increased; and neither the school

²⁸ *Ibidem*.

²⁹ Edward J. Flynn, “Counter-terrorism and human rights: the view from the United Nations”, *European Human Rights Law Review*, No. 1, 2005, p. 34.

³⁰ The purpose of such an investigation is to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It must include an adequate autopsy, as well as the collection and analysis of all physical and documentary evidence and statements from witnesses.

³¹ Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Economic and Social Council resolution 1989/65, annex).

³² More precisely, the shooting dead of the three members of the Provisional IRA, suspected of having on them a remote-control device to be used to explode a bomb by the SAS (Special Air Service) soldiers constitutes violation of Article 2 of the ECHR. The violation is found because the operation could have been planned and controlled without the need to kill the suspects.

³³ The case relates the fatal shooting of a Brazilian national mistakenly identified by the police as a suicide bomber. The applicant, his cousin, complained that the State had not fulfilled its duty to ensure the accountability of its agents for his death because the ensuing investigation had not led to the prosecution of any individual police officer. The Court held that there had been no violation of Article 2 (right to life – investigation) of the ECHR.

³⁴ The case of *Finogenov and Others v. Russia* (20 December 2011) concerns the siege in October 2002 of the “Dubrovka” theatre in Moscow by Chechen separatists and the decision to overcome the terrorists and liberate the hostages using gas.

nor the public had been warned of the threat) although the authorities had been in possession of sufficiently specific information of a planned terrorist attack in the area, linked to an educational institution (*Tagayeva and Others v. Russia* 13 April 2017).³⁵

Apart from the the caselaw of the ECtHR it is noteworthy that the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism expressed concern about legal strategies employed by many states to extend the powers of policemen to take action against potential suicide bombers. He reiterated that the use of lethal force by law enforcement officers must be regulated within the framework of human rights law and its strict standard of necessity. The “defence of necessity” that is invoked by law enforcement officials applies only when there is an imminent danger. In several of his communications with national authorities, the Special Rapporteur on extrajudicial, summary or arbitrary executions has drawn attention to the increasing reluctance to respect the right to life as a non-derogable human right.³⁶

Recommendations:

- The legal framework, including the Rulebook on the Methods of Performing Certain Police Tasks and Enforcement of Powers in Its Performance, should be improved as to reflect the ECtHR case law applicable to security forces counter-terrorism operations relating to prohibition of deprivation of liberty or deprivation of life of persons who provide resistance to firearms and resolving hostage situations;
- Training and capacity-building of law enforcement officials in accordance with the aforementioned international standards.

B. International Standards on the Prohibition of Use of Force

The Code of Conduct for Law Enforcement Officials (CCLEO), adopted by the General Assembly in its resolution 34/169 of 17 December 1979, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF) adopted at the Eighth United Nations

Congress on the Prevention of Crime and the Treatment of Offenders stress the limited role of lethal force in law enforcement operations. There are also relevant when it comes to the setting limitations for the use of non-lethal force in law enforcement operations. Namely, the use of force will not necessarily lead to the potential violation of Article 2 (right to life) of the ECHR, but instead may affect the right to peaceful assembly or the right to freedom of expression which are protected by the ECHR as well. The aforementioned instruments are relevant, despite the fact that they constitute soft law standards, as they have been widely used by different human rights bodies to determine if the use of force was arbitrary in a particular case.

It is noteworthy that Principle 8 of the BPUFF stipulates that “[e]xceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles”. On the other hand, Article 42 of the Geneva Convention III relative to the Treatment of Prisoners of War of 1949 establishes that the use of weapons against those “who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.”

Pursuant to BPUFF and CCLEO, the following principles and requirements govern the use of force in law enforcement operations: legality (Principle 1), necessity (CCLEO, Art. 3), proportionality (BPUFF, Principle 5(a)), precaution (obligations pertaining to the planning and control phase of operations) and accountability (BPUFF, Principles 7).

States need at the national level to ensure that the use of force in law enforcement operations respects international rules and standards by, *inter alia*, applying preventive measures before resorting to the use of force as well as applying the measures after the use of force. The following preventive measures determined by the BPUFF are of key importance for the full compliance with the standards on prohibition of the use of force by the law enforcement officials:

- Enactment of a legal and administrative framework on the use of force consistent with international rules and standards (BPUFF, Principle 1);
- Selection, training and capacity-building of State officials in accordance with international rules and standards,

³⁵ *Tagayeva and Others v. Russia* (13 April 2017).

³⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2006/53, paras. 44-54).

including teaching of police ethics, human rights and alternatives to the use of force (BPUFF, Principles 19-21); and

- Providing State officials with adequate equipment, including weapons and ammunition, as well as self-defensive equipment and alternative weapons to firearms to ensure a differentiated use of force (BPUFF, Principle 2).

Recommendations:

- Improvement of a legal and administrative framework on the use of force by law enforcement officials as to become consistent with international rules and standards (BPUFF and CCLEO); and
- All SAJ operatives and law enforcement officials should be special trained in accordance with international rules and standards, including teaching police ethics, human rights and alternatives to the use of force in line with principles 19-21 of the BPUFF.

5.6. International Standards on Community Engagement

The successfulness of the police in preventing terrorism partly depends on the quality of the relationship it maintains with the local population and with the various ethnic and cultural communities involved. Various methods can be used to help the police to improve its relations with ethnic and other potentially vulnerable community groups.

They include recruiting members of underrepresented minority groups in the police and ensuring that they have equal opportunities for progression in their careers; training the police in cultural diversity and in policing a diverse society; establishing frameworks for dialogue and cooperation between the police and members of minority groups; and giving police access to interpreters and others who can facilitate communication between the police and members of minority groups.³⁷

Recommendations:

- As an example of best practices may serve legal framework of some countries which have placed the police under statutory obligation to promote equality and prevent racial discrimination in carrying out its functions.
- As a good practice example may serve cases where the police can actively engage in a dialogue with various community groups or discuss with them their role in the prevention of terrorism. It would be beneficial for community groups to have an opportunity to share with the police some of their concerns about the perceived detrimental impact of various counter-terrorism measures on their lives.
- These measures would increase intergrity, confidence and trust from the citiziens of Montenegro.

³⁷ Handbook on Criminal Justice Responses to Terrorism, Criminal Justice Handbook Series p. 63.

6. The quality of legal framework pertaining to the organizational and operational issues relevant in the context of combating terrorism by police

6.1. Organizational and operational issues including shortening the response time

The anti-terror unit is an important element in protecting visiting high-level representatives from other countries or national citizens/officials determined after assessment at risk of life. Personnel from the anti-terror unit (SAJ) should not be permanently deployed to regular close protections.

In order to effectively support local population and increase trust and confidence the operational strategy to counter-terrorism should be consecutively considered as important part of the national counter terrorism strategy. Moreover, the change in terrorist threats and attacks demand an operational strategy, which include shortening the response time to a minimum.

Recommendations:

- The Ministry of Interior and the Police Director should develop a operational police anti-terrorist strategy in line with the current threats;
- The present strategy to wait for a call as a last resort for the most complex terrorist attacks should be transformed to meet the trends to attack soft target and the people of Montenegro;
- The SAJ should have the highest priority and access to helicopters either from the MoI or from the Military;
- The SAJ should continue to deploy an operational team to the coast during the summer/tourist season as visible in preventing and combatting terrorism;
- The operational capacity of the SAJ should be at the level to establish three operational mixed teams, that independent of each other or together, can combat terrorist incidents 24/7 in the whole territory of Montenegro;
- The SAJ personnel should be trained to increase their capabilities to enter vessels to prevent and combat

terrorist attacks, hostage situations or other serious life-threatening crime;

- The ordinary uniformed police patrols should be, to a certain extent, prepared to meet the first attack from terrorists who are targeting so-called soft target and/or uniformed personnel, until specialized anti-terrorist police units arrive. The SAJ personnel should support basic and simple anti-terrorist training for the uniformed/patrolling police;
- All parts of the anti-terrorist environment in the Montenegrin police should increase capacities and capabilities in detecting and defusing explosives;
- The SAJ should have special competences and pay attention to persons who are wearing suicide bomb vests as a tool to hurt themselves, soft targets and anti-police operatives.

6.2. International Police Cooperation

The International Round Table Seminar in Budva on anti-terrorist approaches discussed the operational aspects related to a late trend to attack soft targets (publicly) by cars, explosives and other violent means, as well as organizational and legal arrangements for functioning of the Special Police Units. The seminar had participation from France, Croatia, Serbia, USA, Israel; Norway and Montenegro. The OSCE participated as an observer.

The main questions discussed by the participating nations under the seminar were:

- Do the latest trends in terrorism change the operational tactics and legal framework operated by the police anti-terrorist units?
- In the fight against terrorism how to develop measures to increase the public trust and integrity to protect the citizens and democracy?

The participating states gave briefings on their national anti-terrorism structure and challenges ahead. The strategies presented varied from prevention and patrolling to last resort strategy. The Montenegrin police participated by its Deputy Police Director and the Commander of the SAJ and senior staff.

The participating states expressed their appreciation of the round table meeting and stated that it should be made an annual event where specific and relevant anti-terrorism issues were discussed.

Neighbouring countries are an important partner in strengthening and improving tools to fight terrorism. A high level of coordination in operations and exchange of information with international and neighboring countries special units tasked with combating terrorism and organized crime is crucial.

Recommendations:

- It should be considered to introduce the international meeting in Budva as an annual event called «Budva Meeting» with the same participating states, but also to consider to expand the fora with states who are known to implement new and forward thinking strategies. It should be concentrated around specific issues important in the fight against terrorism.
- The Ministry of Interior should establish a Memorandum of Understanding (MoU) with neighbouring countries such as Croatia, Serbia, Albania, Kosovo and Bosnia and Herzegovina so as to exchange operational information related to anti-terrorism units. The annual trainings between SAJ and the related – neighbouring units should be introduced.

6.3. Leadership and critical response management

The SAJ has a duty to respond to every incident in its right way, at any time and at any level. Commanders and chief officers should implement processes which will ensure that policies and procedures are applied consistently and competently at all times. Any incident where the effectiveness of SAJ's response was lacking is likely to have a significant impact on the confidence of the public, families and/or the community.

Quality assurance processes should promote a positive approach to serious incident management and should be used to identify good practices. This can be achieved through briefings, trainings and policies directed towards improving the quality of future police responses.

Some leadership principles should be underlined:

- Encourage a culture that learns from risk;
- Produce confident and professional decision-making;
- Lead to improved service delivery and higher satisfaction in the public;
- Enhance the organization's reputation;
- Help defend individuals and units from unreasonable criticism, complaints, legal action and public inquiries.

“Table top” exercises are efficient to explore potential problems and to incorporate the lessons learned from previous incidents, and table top exercises, in a safe environment, based on various different scenarios that will allow the SAJ to explore what may happen in a given situation. Commander and chief officers are obliged to ensure that their staff is appropriately trained for their roles at any time and to ensure a proportionate use of force.

Successful anti-terror policing depends on building positive relationships with the community, as well as with partner agencies and organizations.

Recommendations:

- Commanders and chief officers should implement processes which will ensure that policies and procedures are applied consistently and competently at all times, including ensuring that their staff are appropriately trained for their roles;
- Quality assurance processes should be achieved through briefings, trainings and policies directed towards improving the quality of future police responses.

7. Recommendations

With regard to under regulated division of competences between police internal units in charge of combating terrorism:

- It is recommendable to improve provisions governing matters related to the anti-terrorism mandate of the police as to clearly determine the division of competencies and cooperation between the SAJ and other internal police units;
- As to increase capacity and strengthen of the counter-terrorism strategy it should be considered to merge overlapping and related areas of the two units.

With regard to under regulated division of competences between different authorities in charge of the fight against terrorism:

- Cooperation should be clearly regulated and the line should be drawn between the competencies of different authorities within the counter-terrorism field.

With regard to the quality of the draft SAJ instruction:

- Improvements of the draft/proposal of the Law on Internal Affairs should be made as to provide unambiguous legal basis for the regulation of the operation of the SAJ as well as to leave more room for bylaw regulations in general;
- It is recommendable to align provisions of the Rulebook on Internal Organization and Systematization of the Ministry of Interior which pertains to competencies of the SAJ with the draft Instruction on the SAJ in that respect;
- Certain sections of the draft Instruction on the SAJ should be regulated by other legal acts, such as provisions on selection and reception of candidates in the SAJ, movement of police officials as well as on their teaching and trainings. Although, the aforementioned issues should be regulated in a different way when it comes to the operation of the SAJ unit comparing to other police officials, these issues specific to the SAJ employees could still be regulated by the separate subsections of the “general” bylaws applicable to all police officials;

- It is important to modify the section of the draft SAJ Instruction pertaining to organization of the SAJ as it contains over-detailed provisions on the operation of SAJ teams (such as Articles 13 to 21).

With regard to the quality of legal framework pertaining to the protection of human rights in the context of combating terrorism by police:

- As to prevent racial and other unjustifiable profiling practices, it is needed that national legislation prohibiting racial discrimination specifically covers the activity of the police;
- The Rulebook on Methods of Performing Certain Police Tasks and Enforcement of Powers in Its Performance shall be amended as to be in line with the given international standards on prohibition of racial profiling;
- It would also be useful to review national legal framework as to determine whether it sufficiently defines “reasonable suspicion standards” on the basis of a suspicion that is founded on objective criteria in the context of various police investigation and intervention practices;
- Police practices can be improved by providing training on prohibition of racial profiling and existing standards establishing a “reasonable suspicion”;
- The Rulebook on the Methods of Performing Certain Police Tasks and Enforcement of Powers in Its Performance should reflect the ECtHR standards pertaining to the adequate recourse to “stop and search” powers specifically in the context of the combating the terrorism;
- Guidance for the application of “stop and search” powers as well as ordering the other interferences with the right to privacy should be provided to the SAJ personnel through trainings. In particular it is relevant to point out that it is not in line with international standards to order the aforementioned measures within the realm of the executive and without an assessment of whether they were strictly necessary and without any effective remedial measures, let alone judicial ones, being in place;
- The bylaws should reflect requirements stemming from the ECtHR case-law on the prohibition of torture or other cruel, inhuman or degrading treatment or

punishment in context of searches conducted in the fight against terrorism;

- Guidance for the proper application of the aforementioned standards should be provided to the SAJ personnel through trainings;
- It is recommendable to review and further improve existing policies, operational procedures, and training programmes related to police practices regarding the right to notification and communication at the time of arrest. The introduction of a measure providing for a time limit—which must be short—for granting such access would be in line with the existing international standards. Although the given right is enshrined in the Constitution of Montenegro, its scope needs to be further specified through legislation in the anti-terrorism context;
- The legal framework, including the Rulebook on the Methods of Performing Certain Police Tasks and Enforcement of Powers in Its Performance, should be improved as to reflect the ECtHR case law applicable to security forces counter-terrorism operations relating to prohibition of deprivation of liberty or deprivation of life of persons who provide resistance to firearms and resolving hostage situations;
- Training and capacity-building of law enforcement officials in accordance with the international standards pertaining to prohibition of deprivation of liberty or deprivation of life of persons who provide resistance to firearms and resolving hostage situations;
- Enactment of a legal and administrative framework on the prohibition of use of force consistent with international rules and standards (BPUFF, Principle 1);
- Selection, training and capacity-building of State officials in accordance with international rules and standards, including teaching of police ethics, human rights and alternatives to the use of force (BPUFF, Principles 19-21); and
- Providing State officials with adequate equipment, including weapons and ammunition, as well as self-defensive equipment and alternative weapons to firearms to ensure a differentiated use of force (BPUFF, Principle 2);
- Improvement of a legal and administrative framework on the use of force by law enforcement officials as to become consistent with international rules and standards stemming from the following instruments: BPUFF and CCLEO;
- All SAJ operatives and law enforcement officials should

be specially trained in accordance with international rules and standards, including teaching police ethics, human rights and alternatives to the use of force in line with principles 19-21 of the BPUFF;

- As an example of best practices may serve legal framework of some countries which have placed the police under statutory obligation to promote equality and prevent racial discrimination in carrying out its functions;
- As a good practice example may serve cases where the police can actively engage in a dialogue with various community groups or discuss with them their role in the prevention of terrorism. It would be beneficial for these community groups to have an opportunity to share with the police some of their concerns about the perceived detrimental impact of various counter-terrorism measures on their lives.

With regard to the quality of legal framework pertaining to the organizational and operational issues relevant in the context of combating terrorism by police:

- The Ministry of Interior and the Police Director should develop an operational police anti-terrorism strategy in line with current threats;
- The SAJ should have the highest priority and access to helicopters either from the Mol or the Military;
- The SAJ should deploy an operational team to Budva during the summer/tourist season as to shorten the response time;
- The operational capacity of the SAJ should be at the level to establish three operational mixed teams what independent of each other or together can combat terrorist incidents 24/7 in the whole territory of Montenegro;
- The SAJ personnel should be trained to increase their capabilities to enter vessels to prevent and combat terrorist attacks, hostage situations or other serious life-threatening crime. The SAJ personnel should support basic and simple anti-terrorist training for the uniformed/patrolling police;
- The ordinary uniformed police patrols should be, to a certain extent, prepared to meet the first attack from terrorists who are targeting so-called soft target and/or uniformed personnel, until specialized anti-terrorist police units arrive;
- All parts of the anti-terrorist environment in the

Montenegrin police should increase capacities and capabilities in detecting and defusing explosives;

- The SAJ should have special competence and attention should be given to persons who are wearing suicide bomb vest as a tool to hurt themselves, soft targets and anti-police operatives;
- It should be considered to introduce the international meeting in Budva as an annual event called «Budva Meeting» with the same participating states, but to consider to expand with states who are known to implement new and forward thinking strategies. It should be concentrated around specific issues that are important in the fight against terrorism;
- The Ministry of Interior should establish a Memorandum of Understanding (MoU) with the neighbouring countries

such as Croatia, Serbia, Albania, Kosovo and Bosnia and Herzegovina so as to exchange operational information related to anti-terrorist units. The annual trainings between SAJ and the related neighbouring units should be introduced;

- Commanders and chief officers should implement processes which will ensure that policies and procedures are applied consistently and competently at all times, including ensuring that their staff are appropriately trained for their roles;

Quality assurance processes should be achieved through briefings, trainings and policies directed towards improving the quality of future **police** responses.

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