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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT AMICUS CURIAE OPINION BRIEF

In the case of

Bijelić against Montenegro and Serbia
(Application N°11890/05)

pending before
THE EUROPEAN COURT OF HUMAN RIGHTS

on the basis of comments by

Mr Anthony BRADLEY (Substitute Member, United Kingdom)
Mr Iain CAMERON (Substitute Member, Sweden)

**This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. On 1 July 2008, the Venice Commission sought leave to intervene as a third party in the proceedings of the European Court of Human Rights (hereafter 'the Court" or "ECtHR) in the case of Nadez Bijelić, Svetlana Bijelić and Ljiljana Bijelić against Montenegro and Serbia (application no. 11890/05)[1].

2. The above case raises the question of whether the Republic of Montenegro and/or the Republic of Serbia may be held responsible by the Court for breaches of the Applicants' rights under the European Convention on Human Rights (hereafter "the Convention", or ECHR) that are alleged to have occurred in Montenegro between 3 March 2004 and 5 June 2006. The interest of the Venice Commission in this matter arose from previous opinions that it had given on issues relating both to the process by which Montenegro achieved independence in June 2006 and to the present constitution of Montenegro[2].

3. On 11 July, the President of the relevant Chamber of the Second Section of the Court granted such leave.

4. The present amicus curiae brief, which does not address the substantive merits of the applicants' case, was prepared on the basis of the comments of Messrs Anthony Bradley and Iain Cameron, and was adopted by the Commission at its … Plenary Session (Venice, …).

II. Background information

5. The State Union of Serbia and Montenegro (hereafter, "the State Union") ratified the Convention on 26 December 2003 and the ratification took effect within the territories of Serbia and Montenegro on 3 January 2004. As a matter of international law, the State Union's adherence to the Convention became effective on 3 March 2004, when the instrument of ratification was communicated to the Secretary General of the Council of Europe. So long as the State Union remained in existence, the State Union was the appropriate respondent in respect of any claims under the Convention, whether these arose from acts of the authorities in Serbia, or the authorities in Montenegro, or the State Union itself.

6. On 3 June 2006 the Montenegrin Parliament adopted a Declaration of Independence. This brought to an end the existence of the State Union. On 14 June 2006, the Committee of Ministers of the Council of Europe noted that the Republic of Serbia was to continue the membership of the Council of Europe previously exercised by the State Union, and that Serbia was to continue as a party to the Convention by reason of the State Union's former adherence to the Convention.

7. With effect from 6 June 2006 the Republic of Montenegro is to be regarded as a party to the Convention and related Protocols. This was decided by the Committee of Ministers in a resolution dated 7 and 9 May 2007[3].

[1] In outline, the Applicants (Ms Bjelic and her two daughters) are Serbian nationals who are currently resident in Belgrade but were previously resident in Podgorica. Their case is that, despite definite judgments given in their favour by the courts in Montenegro in 1994, they have since then been unable to obtain possession of a flat in Podgorica, where they had formerly lived as protected tenants, and of which they subsequently became owners. At all times, the first Applicant's ex-husband has refused to leave the flat, making unlawful threats (including threats to blow up the building) as to what he would do if he and his present family were evicted. The Applicants claim that they have made repeated but fruitless complaints to state authorities in Montenegro about the continuing non-enforcement of the judgments obtained in their favour in 1994. They further claim that such non-enforcement raises substantive issues concerning their rights under Articles 6/1 and 8 of the Convention, and Article 1 of the First Protocol. The merits of those issues are, as stated already, outside the scope of this opinion.

[2] CDL-AD(2005)041, Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards; CDL-AD(2007)017, Interim Opinion on the Draft Constitution of Montenegro; CDL-AD(2007)047, Opinion on the constitution of Montenegro.

[3] Resolution CM/Res(2007)7 inviting the Republic of Montenegro to become a member of the Council of Europe, Adopted by the Committee of Ministers on 9 May 2007 at the 994bis meeting of the Ministers' Deputies

III. The constitution of the State Union of Serbia and Montenegro

8. The legal structure of the State Union was founded upon the Constitutional Charter of 2003. This Charter enshrined the principle of equality for the two member states (Article 2) and recognised a very high degree of autonomy for them both. Under the Charter, the competence of the State Union authorities was limited to matters concerning defence, international relations and the maintenance of a common market. The competence of the State Union's Minister of Human and Minority Rights was (Article 45) limited to monitoring the exercise of human rights in the two states and to coordinating "together with the competent bodies of the member states" activities for complying with international human rights conventions. The Court of the State Union was essentially limited to matters arising from the Constitutional Charter; but its jurisdiction included appeals filed by citizens claiming that an institution of the State Union had interfered with rights guaranteed by the Constitutional Charter. The Charter on Human and Minority Rights and Freedoms was adopted at the same time as the Constitutional Charter, of which it formed an integral part.[4]

9. It followed from the very limited competence of the State Union that virtually all matters of domestic government were within the respective competences of the separate governments of Serbia and Montenegro. These included the system of justice, the operation of the civil and criminal courts, the police[5], housing, social service and social assistance authorities, local self-government, and the maintenance of law and order.

10. All the complaints of the present Applicants appear to have arisen from dealings with the public authorities in Montenegro. Public authorities in Serbia had no competence to deal with their concerns. Moreover, the Applicants appear never to have sought to involve any State Union authorities in their claims. It is very doubtful whether any such attempts, if they had been made, would have had any realistic prospect of securing an effective remedy. In particular, during its brief existence, the Court of the State Union was never convened to deal with appeals on human rights matters brought by citizens of the two states. In *Matijasevic v Serbia,*[6] the Strasbourg Court outlined the history of the State Union Court and found that, although the Court had started operating in January 2005, and 200 human rights complaints had been registered with the Court, at no time did it rule on a single complaint by a citizen alleging a human rights violation; accordingly, it was held that the applicant (Matijasevic) was "not obliged to exhaust a remedy which was unavailable at the material time and had remained ineffective until the very break-up of the State Union".[7]

IV. Succession to the treaty obligations of the State Union

11. The Constitutional Charter of the State Union provided (Article 60) that after a three-year period a member state would have the right to break away from the State Union. Further, that if Montenegro broke away from the State Union following a referendum, "*the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244, would concern and apply in their entirety to Serbia as the successor*" (Article 60(4)). This provision did not in terms apply to the State Union's adherence to the European Convention on Human Rights. However, the intention was plainly that if Montenegro broke away, Serbia should be the successor to the State Union's treaty obligations. Further, by Article 60(5), a member state that broke away "*shall not inherit the right to international personality and all disputable issues shall be separately regulated between the successor state and the newly independent state*". So far as the Venice Commission is aware, no disputable issue that might be relevant for present purposes has been 'separately regulated' between Serbia and Montenegro since June 2006.

12. By decision of 14 June 2006, the Committee of Ministers of the Council of Europe accepted that Serbia was the successor state in respect of adherence to Council of Europe

[4] The Venice Commission was involved in the preparation of this Charter: see CDL(2003)010fin, Comments on the Draft Charter on Human and Minority Rights and Civil Liberties of Serbia and Montenegro.
[5] See, for instance, the Law on Police in Montenegro, Law no 28/05, of 5 May 2005
[6] Application No 23037/04, judgment of 19 September 2006.
[7] Ibidem, para. 37.

treaties. The Committee noted that Serbia would continue the membership of the Council of Europe previously exercised by the State Union, "and the obligations and commitments arising from it" and that Serbia should be regarded as a party to Council of Europe conventions to which the State Union had been a party. The effect of this was that Serbia succeeded *inter alia* to the State Union's adherence to the ECHR. This must, absent other circumstances, have included succession of responsibility to claims pending against the State Union at the time it ceased to exist in June 2006. [8]

13. The letter of 6 June 2006 from Montenegro to the Secretary-General of the Council of Europe stated that Montenegro wished to establish its status as successor to all Council of Europe treaties to which the State Union had been a party. On this basis, Montenegro would not be required to sign and ratify the European treaties *de novo* in its own name. On 14 June 2006, the Committee of Ministers decided that this method of proceeding was appropriate. This decision took immediate effect as regards 'open Conventions', namely treaties that are open to states whether or not they are members of the Council of Europe. As regards 'closed Conventions' (that is, treaties such as the European Convention on Human Rights, restricted to members of the Council of Europe), on 7-9 May 2007 the Committee of Ministers invited Montenegro to become a member state of the Council of Europe; and the Committee accepted Montenegro as a party to these conventions, with retroactive effect to the date of notification of the independence of Montenegro, namely 6 June 2006.

V. The present issue, and possible solutions

14. If the facts on which the Applicants rely had all arisen after 3 March 2004 in respect of property in Serbia rather than Montenegro, it is certain that the alleged acts or omissions on the part of authorities in Serbia before 6 June 2006 would have raised issues within the jurisdiction of the Court. The Republic of Serbia would have become respondent to the claim by succession. The jurisdiction of the Court would have continued notwithstanding the decision by Montenegro to break away from the State Union in June 2006.

15. The question to be addressed is whether, since the Applicants rely on facts that occurred in respect of property in Montenegro during the same period:

(a) the Republic of Montenegro is responsible for breaches of the Convention that may have occurred between March 2004 and June 2006; or

(b) the Republic of Serbia is responsible for such breaches; or

(c) neither state is responsible for such breaches, unless and until further steps are taken (for instance, as envisaged by under Article 60(5) of the Constitutional Charter of the State Union).

16. On the other hand, if breaches of the Applicants' Convention rights have occurred since June 2006, the responsibility of Montenegro for those breaches cannot be doubted.

17. The Venice Commission would stress that the Court has the power to determine the questions set out in para. 15 above. The Committee of Ministers admittedly has the power under Article 4 of the Statute of the Council of Europe to invite a state to join the Council. A resolution under Article 4 has "binding effect". Under Article 16 of the Statute, the Committee moreover has the power to decide by resolution "with binding effect *all matters relating to the internal organisation and arrangements of the Council of Europe*" (emphasis supplied). Nonetheless, the Court's power under Article 32 of the Convention to decide *all* issues concerning "the interpretation *and application* of the Convention" (emphasis supplied) is clear. This point is not altered by the fact that Article 54 of the Convention saves the decision-making powers of the Committee of Ministers under the Statute.[9] The present issue does not concern the "internal organisation and arrangements of the Council of Europe", but at what point in time the ECHR begins to apply to a state, i.e. "the application of the ECHR". This is an issue over

[8] As was the case in *Matijasevic v Serbia* (above); see paras 1 and 22-25 of the judgment.

[9] Article 54 provides "Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe".

which the Court has the final word, and this is confirmed by the fact that Article 32 ECHR provides the Court with *kompetenz*, *kompetenz*.[10]

VI. Earlier opinions expressed during preparation of the Constitution of Montenegro

18. In Opinion No 261 (2007) adopted in May 2007, concerning the accession of Montenegro to the Council of Europe, the Parliamentary Assembly welcomed the intention by Montenegro to honour the international treaties to which the State Union had been a party and stated (para 10) that it was particularly satisfied to note that Montenegro considered itself bound since 3 June 2006 by obligations stemming from the European Convention on Human Rights. The Parliamentary Assembly noted further that Montenegro had accepted an obligation to ensure that the constitution would include 'transitional provisions for the retroactive applicability of human rights protection to past events', including such provisions in respect of the Convention (para 19.2.1.6)

19. In its Interim Opinion on the draft Constitution of Montenegro, adopted on 1 June 2007, the Venice Commission (para 98) endorsed the need for transitional provisions on the retroactive applicability of the Convention and added, "Unless clear provision is made for this, it is probable that past infringements of human rights, however serious, will remain without a remedy under the new Constitution".

VII. The Constitution of Montenegro of October 2007 and its implementation

20. In the event, these views of the Parliamentary Assembly and the Venice Commission were not reflected in the final text of the Constitution. However, Article 158 of the Constitution authorised the adoption of a Constitutional Law for the enforcement of the Constitution, to come into effect concurrently with the Constitution. Article 5 of the Constitutional Law provided:

> *"Provisions of international agreements on human rights and freedoms, to which Montenegro acceded before 3 June 2006, shall be applied to legal relations that have arisen after its signature."*

21. In its Opinion on the Constitution of Montenegro, adopted on 14 December 2007, the Venice Commission stated that Article 5 of the Constitutional Law was 'rather obscure'. [11] Further, that as this provision had been added at the request of the Council of Europe, it could and should be interpreted as meaning:

> *"Provisions of international agreements on human rights and freedoms to which Montenegro was a party (as a federated entity of the State Union) before 3 June 2006 shall be applied to legal relations that have arisen after the date of ratification of those treaties by the State Union".*

22. The Commission observed that it was only with this meaning that Article 5 fulfilled a principal commitment owed by Montenegro to the Parliamentary Assembly (see para 17 above), and added: "the meaning of this provision should be clarified, and brought to the knowledge of the Montenegrin courts and public".

23. Before 3 June 2006, Montenegro was not an independent state, and was unable to enter into international agreements in its own name. Accordingly, Article 5 of the Constitutional Law is deprived of all meaning unless it is understood as applying to treaties affecting Montenegro which were entered into by the State Union before 3 June 2006.

24. As the UN Human Rights Committee has made clear in respect of obligations arising from the International Covenant on Civil and Political Rights, an important principle is that fundamental rights protected by international treaties 'belong to the people living in the territory of the State party.' The Human Rights Committee

> "*has consistently taken the view … that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession*". [12]

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[10] Article 32(2) provides that "In the event of dispute as to whether the Court has jurisdiction, the Court shall decide".

[11] CDL-AD(2007)047, Opinion on the constitution of Montenegro , para. 129.

[12] General Comment No 26: Continuity of obligations: 08/12/97, CCPR/C/21/Rev.1/Add. 8/ Rev.1.

VIII. *Decision of the Committee of Ministers*

25. On 9 May 2007, as already stated, the Committee of Ministers of the Council of Europe invited Montenegro to become a member state. As regards application of the Convention to Montenegro, the Committee of Ministers had '*regard to the declaration of succession of the Republic of Montenegro by the letter of 6 June 2006*' and resolved that Montenegro had been a party to the Convention '*with retroactive effect from 6 June 2006*'.

26. Does this resolution preclude Montenegro from succeeding to the obligations of the former State Union in respect of alleged violations of human rights occurring after 3 March 2004? In the Venice Commission's view, there are several reasons why it does not.

27. Firstly, when a state becomes a party to the Convention and the people within its jurisdiction come under the Convention for the first time, the state does not retroactively become responsible for 'breaches of the Convention' which occurred earlier. The reason for this is that, at the time the relevant events were alleged to have occurred, the events were not breaches of the Convention. That is not the present situation. The question here is a different one: whether, if breaches of the Convention occurred in Montenegro between March 2004 and June 2006, the Republic of Montenegro may now be held responsible for them.

28. Secondly, as already stated, the Committee of Ministers accepted that because of the earlier ratification of the Convention by the State Union in December 2003, it was not necessary for Montenegro to lodge a formal ratification of the Convention.

29. In addition, on a purely practical level, all evidence that is relevant to the merits of the present case will be held by the authorities in Montenegro and not in Serbia. If the view were to be taken that Serbia should answer now for acts and omissions of the Montenegrin authorities between March 2004 and June 2006, this would certainly not promote the speed and effectiveness of the Court's procedures.

30. In any event, if continuing breaches occurred after June 2006, responsibility for them is borne by Montenegro. It is the settled jurisprudence of the Court that a state bears responsibility for "continuing violations" of the Convention, that is, incidents which began occurring in a contracting state prior to it being bound by the Convention but which continued after this date.[13] In the present case, the Applicants are complaining about unreasonably long proceedings, and/or that the authorities have refused to ensure the Applicants' access to their property that has led to a continuing denial of the right to property (Article 1, Protocol 1) and/or respect for the home (Article 8). Similar issues were raised in the well-known Loizidou case which also had a temporal aspect.[14] If the case is seen as a continuing denial of property, then the responsibility of the Montenegrin authorities seems clear. This strengthens the conclusion that it would be an artificial and complicating factor without practical benefit if state responsibility towards the applicants were to be divided between Serbia and Montenegro.

31. Finally, although the circumstances of the creation of the Czech and Slovak Republics as separate states on 1 January 1993 were not identical, the response of the Court to the dissolution of the Czech and Slovak Federal Republic provides an important precedent for the position that the Court should now adopt. The former Republic had been a party to the Convention since 18 March 1992. On 30 June 1993, the Committee of Ministers admitted the two new states to the Council of Europe and decided that, as both states wished, they were to be regarded as succeeding to the Convention retroactively with effect from their

[13] See e.g. Papamichalopolous v. Greece, 24 June 1993, A/260-B, para. 40; Ilaşcu and others v. Moldova and Russia, No. 48787/99, 8 July 2004.

[14] Loizidou v. Turkey, No. l5138/89, 18 December 1996 See also the cases of *Yagci and Saragan v. Turkey* and *Mansur v. Turkey* Judgments of 8 June 1995, at paras 40 and 44 respectively where the Court rejected an argument by Turkey that the Court's jurisdiction was excluded regarding events which occurred after the date of the Turkish declaration accepting the Court's compulsory jurisdiction (which was, at the time, optional) but which, according to Turkey were merely extensions of acts occurring before the critical date.

independence on 1 January 1993. [15] However, the practice of the Court has been to regard the operative date in the case of breaches that arose earlier than 1 January 1993 as being 18 March 1992. As the Court said in *Konecny v Czech Republic* (16 October 2004, para 62):

> "*The Court observes that the period to be taken into consideration only began on 18 March 1992, when the recognition by the former Czech and Slovak Federal Republic, to which the Czech Republic is one of the successor States, of the right of individual petition took effect*". [16]

32. One expert commentator has argued that this position is justified by reason of the particular importance of giving effect to international obligations arising from human rights treaties, even if it may depart from general rules of international law relating to succession to treaties.[17]

IX. International law considerations – a further appraisal

33. Although the Court has stated that the Convention is a special type of treaty, to the extent it considers it appropriate, it will interpret and apply the Convention in accordance with the general rules of public international law.[18] The question thus arises whether the above solution is in some way incompatible with general international law. An argument might be made that a newly independent state begins its existence with a totally "clean slate" and cannot inherit *any* responsibility for the wrongful acts of its predecessors. However, for the reasons explained below, this is not tenable

34. The Committee of Ministers fixed the date at which Montenegro *as a state* becomes responsible under the Convention. This date is in accordance with the predominant view in international law, that the creation of a state is a question of fact.[19] As the Montenegrin declaration of independence was in June 2006, and the Montenegrin authorities were in effective control of the territory at that time, then it was in accordance with this predominant view to set the date at which Montenegro became bound by the ECHR as an independent state as June 2006, not the date at which it was formally admitted retrospectively to membership of the Council of Europe (May 2007). However, the Committee of Ministers declaration does not deal in any way with the question of the *liability of a successor state for the wrongful acts of a predecessor state*.

35. There are relatively few settled rules on state succession.[20] The area of state succession tends to be characterized by *ad hoc* solutions, motivated by pragmatic considerations.[21] The 1978 Convention on the Succession of States in respect of Treaties[22] and the1983 Convention on Succession of States in Respect to State Property, Archives and Debts[23] have relatively few parties, indicating the caution with which the majority of states regard the rules contained in these treaties.[24] The 1983 treaty is not yet in force. Serbia is listed as a party to the 1978 treaty by means of succession, the FRY having ratified the convention in 1980.[25] The treaty thus, prior

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[15] *Human Rights treaties and succession of states,* M T Kamminga, within the UNIDEM seminar, "The status of international human rights treaties", Portugal, 2005. See www.venice.coe.int/docs/2005/CDL-UD(2005)013rep-e.asp

[16] Professor Kamminga has referred to this as a 'standard formula' used by the Court in similar cases (ibid). In *Konecny*, the claim concerned delays in judicial procedure. The Court limited the responsibility of the Czech Republic to delays occurring after 18 March 1992, although it was prepared to look at the whole history of Konecny's case in deciding upon the reasonableness or otherwise of delays after 18 March 1992.

[17] Ibid.

[18] See, e.g. Loizidou (op. cit) para. 49.

[19] See e.g. Tinoco Arbitration, 1923, 1 RIAA 369.

[20] See, e.g A. Jennings and A. Watts (eds), Oppenheim's International Law, Vol. 1, Peace, 9th ed., 1996, p. 210, I. Brownlie, Principles of Public International Law, 6th ed., 2003, p. 622..

[21] As one commentator puts it: "in several respects the traditional theoretical categories of state identity, continuity and succession appear to be too rigid, outdated and no longer in line with reality, as they have failed to offer adequate explanations for numerous phenomena in practice". See Bühler, K., State Succession and Membership in International Organizations – Legal theories versus political pragmatism, Kluwer, 2001, p. 309.

[22] 1946 UNTS, p. 3

[23] Doc. A/CONF.117/14.

[24] Respectively as of 1 January 2007, 21 parties, in force 6 November 1996 and 7 parties (information from depositary, untreaty.un.org).

[25] According to the depositary Serbia is listed as succeeding to the treaty on 12 March 2001 (i.e. at the time the Union of Serbia-Montenegro existed).

to Montenegrin independence, was binding upon the State Union in 2004. But the European Court of Human Rights is obviously not bound by this treaty. Bearing in mind the Court's desire to interpret the Convention, where possible, within the wider framework of public international law, the question nonetheless arises whether the 1978 treaty can be seen as reflecting general rules of international law. The discussion surrounding the adoption of both treaties indicates that many states were skeptical of the idea that a "newly independent state" should start its life with a totally "clean state". However, even if (which is doubtful) the 1978 treaty is seen as reflecting custom in this respect, it only provides (in Article 16) that

> "A newly independent state is *not bound* to maintain in force or to become a party to, any treaty *by reason only of the fact* that at the date of the succession of states the treaty was in force in respect of the territory to which the succession of states relates" (emphasis supplied).

36. Thus, if there is a rule that a certain type of treaty continues in force by reason of its nature – and, as noted above (para. 24) strong evidence exists that this applies for a treaty for the protection of the human rights of the inhabitants of the territory – and/or if the newly independent state expressly or by implication accepts succeeding to the treaty, then the state continues to be bound. Implicit acceptance of continuation is common.[26] Certainly, state practice does not support there being a totally clean slate.

37. In any event, as explained below, the crucial issue is about the devolving of state responsibility. In this respect, no real guidance can be drawn from the 1978 treaty, because issues of state responsibility were deliberately left outside the scope of the treaty.[27]

38. The question of the devolving of state responsibility arose during proceedings brought by Bosnia-Herzegovina against the FRY before the International Court of Justice (ICJ).[28] By the time the case came to judgment, Montenegro had seceded from the State Union. The ICJ accepted that Montenegro did not continue the legal personality of the FRY (later Serbia-Montenegro). In the circumstances, the issue then became, had Montenegro consented to the jurisdiction of the ICJ in the case? As the Court found that it had not, the conclusion was that there was no jurisdiction over Montenegro in the case.[29]

39. It is submitted that only very limited guidance for the present case can be obtained from the judgment. The ICJ case concerned allegations of extraterritorial military activities by FRY forces and FRY-supported forces in another state, namely Bosnia-Herzegovina, and the conduct of the then Milosevic regime in control of FRY. There are obvious differences with the factual situation in the present case.

40. There is some authority supporting the view that responsibility for some types of breaches of international law does not devolve on a seceding state on the basis that the wrongdoing state has ceased to exist.[30] However, as Brownlie puts it, such reasoning "cannot have general application".[31] There have undoubtedly been cases and situations in which the view was taken that responsibility did devolve.[32]

(http:// untreaty.un.org /ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty2.asp#N3)

[26] As one commentator puts it, "No newly independent state can exist entirely on its own in the limbo of the clean slate in respect of treaties. The situation has never arisen, and it is unthinkable that it ever will arise in the community of nations.." E. Bello, Reflections on Succession of states in the Light of the Vienna Convention on the Succession of States in Respect of Treaties, 23 GYIL (1989) 309.

[27] See Article 39. See further the explanation in the travaux préparatoires, YBILC 1972, vol. II p. 228.

[28] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) 26 February 2007.

[29] Ibid., at paras 76-77.

[30] See e.g. Robert E. Brown Claim (Claim No. 30) (1923) 6 R.I.A.A. 120, P. Dallier et A. Pellet, *Droit international public,* 6ème édition, 1999, p.550.

[31] Op. cit at p. 632.

[32] See e.g. the Lighthouses Arbitration, 1955 ILR, pp. 90-93, where Greece was found by way of conduct to have accepted the wrongful act of a predecessor. See generally P. Dumberry, State Succession to International Responsibility, Nijhoff, 2007.

41. The Venice Commission considers that the correct approach is to judge each specific case by reference to all the factors to determine how *reasonable* it is to impose continuity of responsibility on a successor state for a specific wrongful act by a predecessor state.[33] The specific case here is activity (or rather inactivity) attributable to agencies under the complete control of an entity which later becomes the government of a new state. The Venice Commission refers in this respect to the approach of the International Law Commission in its Articles on State Responsibility.[34] Article 10 deals with conduct of an insurrectional or other movement and states (in relevant parts):

> *"1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law. 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law."*

42. The commentary to these articles[35] states that:

> *"(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual government.*
>
> *…..*
> *(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule."*

43. The International Law Commission thus provides for a general rule that responsibility devolves to a successful independence movement, while leaving it open for a successor state as regards a specific breach to show that this would be unreasonable because of an absence of real continuity between the independence movement and the new government. Applying this rule to the facts alleged by the present Applicants, it is undoubtedly reasonable to hold the newly-independent state of Montenegro responsible for all the alleged breaches of the ECHR which occurred in Montenegro between 3 March 2004 and 6 June 2006. Conversely, it would be unreasonable to hold Serbia, as the "continuing state" of the former State Union, responsible for these alleged breaches. As already explained (paragraph 9 above), the relevant public services within Montenegro were under the full control of the Montenegrin authorities. There is full continuity between these authorities and the authorities of the present state of Montenegro. If, in different factual circumstances, the European Court of Human Rights were to be satisfied beyond reasonable doubt that an alleged *specific* breach of the ECHR in Montenegrin territory was wholly due to the action, or inaction, of the *Union* authorities, the Court would be justified in holding that this responsibility would not *wholly* devolve to the Montenegrin authorities.[36]

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[33] This approach is supported by influential doctrine, see e.g. Oppenheim, op. cit. p. 210.
[34] GA Res/56/83 (2001)
[35] ILC Annual Report 2001, Ch. IV, at pp. 113-114.
[36] A parallel can be drawn in this respect to how the Court approaches the issue of attribution when it is not clear whether the perpetrators of an alleged breach of human rights are state agents. See, e.g. Ireland v. UK, 18 January 1978, A/25.

44. The correctness of this conclusion is buttressed by other arguments. First, such a solution cannot be said to be against the interests of the Montenegrin authorities (and certainly not against the interests of the people of Montenegro). As already stated, the Council of Europe institutions stressed the importance that no vacuum of protection of human rights should arise as a result of Montenegrin independence and the Montenegrin authorities demonstrated their commitment to effective supranational human rights protection by seeking, at the earliest possible stage, membership of the Council of Europe and consenting to the jurisdiction of the European Court of Human Rights. Moreover, Montenegro accepted the *kompetenz, kompetenz* of the Court (cf. the situation in the ICJ case above).[37] Secondly, as a human rights treaty, the ECHR involves not simply reciprocal rights and duties between states, but the creation of a special type of European public order for the benefit of individuals.[38] The Convention is to be interpreted so as to ensure the effective interpretation of rights.[39] To interpret the resolution of the Committee of Ministers of May 2007 in a way that created a vacuum of responsibility in Montenegro between March 2004 and June 2006 would not be to ensure the effective protection of human rights.

X. Conclusion

45. For these reasons, the Venice Commission concludes that it would both further the protection of European human rights and be in accordance with the earlier practice of the Court, if the Court were now to hold the Republic of Montenegro responsible for breaches of the Applicants' Convention rights that may have occurred in the period from 3 March 2004 until 5 June 2006.

46. In the opinion of the Commission, there are no difficulties of international or constitutional law that should lead the Court to make a different decision. Accordingly, the Commission does not consider that the outcome should be delayed until attempts were made to see whether the matter might be 'separately regulated' between the states of Serbia and Montenegro as envisaged by the Constitutional Charter of the State Union, Article 60(5). Nor is it necessary for the Committee of Ministers of the Council of Europe to be requested to vary the decision that was taken in May 2007.

[37] An analogy can be drawn to the Court's treatment of the issue of reservations in Belilos v. Switzerland, 29 April 1988, A/132 para. 60. The issue arose as to whether the Swiss conditional interpretative declaration – found to be invalid by the Court – meant that is instrument of ratification was also invalid. The Court dismissed this summarily. "it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration. Moreover, the Swiss Government recognised the Court's competence to determine the latter issue, which they argued before it."

[38] See, e.g. Loizidou (op. cit) para. 49.