

# REPUBLIC OF SERBIA AND MONTENEGRO<sup>1</sup>

## I. INTRODUCTION

### 1. Legal Framework

#### 1.1. The Constitution

The Republic of Serbia and Montenegro has a total population of about 10.5 million people. The majority of inhabitants are Serbs with considerable groups of Albanians (mainly in Kosovo), Montenegrins (mainly in Montenegro) as well as Bulgarians, Croats, Hungarians, Macedonians, Moslems, Romanis, Romanians, Slovaks, Turks, Wallachians and others.

Following an agreement between the two republics in late November 2002, the Federal Republic of Yugoslavia became the Republic of Serbia and Montenegro and the Constitutional Charter, i.e. the new Constitution for the Republic of Serbia and Montenegro, was adopted on 4 February 2003.<sup>2</sup> It envisages that both states are free to leave the Republic on the basis of a public referendum upon the expiry of a three-year period.<sup>3</sup> On 28 February 2003, the Chamber of the Republics adopted a Charter on Human and Minority Rights and Civil Freedoms, which forms an integral part of the Constitutional Charter.<sup>4</sup> The Charter on Human Rights stipulates that human dignity is inviolable and that everyone has the obligation to respect the human rights of others.<sup>5</sup> It provides for an extensive list of civil, political,<sup>6</sup> social, cultural, economic<sup>7</sup> and minority rights.<sup>8</sup> Article 9 of the Charter on Human Rights grants a right to effective judicial protection if the human rights guaranteed by the

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<sup>1</sup> The report was drafted while the FR Yugoslavia still existed. Following the constitutional changes which brought the Union of Serbia and Montenegro into being, the laws of the FR Yugoslavia remain in force for the time being but are expected to be repealed or amended in due course. The report does not consider the particularities of the situation in Kosovo which is subject to a specific regime under UN administration.

<sup>2</sup> The FRY came into existence on 27 April 1992 as a result of the break up of the former Yugoslavia. According to its Constitution of 27 April 1992, two Republics were established, Serbia (with two autonomous provinces, Kosovo and Vojvodina), and Montenegro. Both had their own Constitutions.

<sup>3</sup> Article 60 of the Constitutional Charter.

<sup>4</sup> Article 8 of the Constitutional Charter.

<sup>5</sup> Article 1 and 2 of the Charter on Human Rights.

<sup>6</sup> Prohibition of Discrimination (Article 3); Right to Life (Article 11); Inviolability of Physical and Mental Integrity (Article 12); Prohibition of Slavery, Servitude and Forced Labour (Article 13); Right to Liberty and Security (Article 14); Additional Guarantees in Case of Deprivation of Liberty for Criminal Offence or Misdemeanour (Article 15); Procedural rights in criminal proceedings (Article 16); Right to a Fair Trial (Article 17); Presumption of Innocence (Article 19); Ban on Retroactivity, Punishment only according to law (Article 20); Ne bis in idem (Article 21); Right to Property (Article 23); Right to Privacy and Family Life (Article 24); Right to Marriage (Article 25); Freedom of Thought, Conscience and Religion (Article 26); Religious Communities (Article 27); Conscientious Objection (Article 28); Freedom of Thought and Expression (Article 29); Freedom of the Media (Article 30); Freedom of Assembly (Article 31); Freedom of Association (Article 32); The Right to Free Elections (Article 33); The Right to Freedom of Movement (Article 37); The Right to Asylum in the State Union of Serbia and Montenegro (Article 38).

<sup>7</sup> The Right to Work (Article 40); The Right to Strike (Article 41); The Right to Social Security (Article 42); The Right to Education (Article 43); The Right to Health Care (Article 44); Freedom of Scientific and Artistic Creation (Article 45).

<sup>8</sup> Chapter III.

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Charter are violated or denied, and the right to have the consequences of such human rights violations eliminated. The Charter on Human Rights also provides a right to a legal remedy against a decision affecting rights, obligations or lawful interests and the right to petition.<sup>9</sup> A person convicted of a penal offence without grounds shall have the right to rehabilitation and compensation by the state.<sup>10</sup>

The Court of Serbia and Montenegro envisaged under the Constitutional Charter shall have, *inter alia*, the jurisdiction to:

- rule on petitions of citizens if no other recourse has been provided for, in the event of the institutions of Serbia and Montenegro have violated their rights or freedoms guaranteed by the Constitutional Charter;
- rule on whether the Constitutions of the member states are in conformity with the Constitutional Charter;
- rule on whether the laws of Serbia and Montenegro are in conformity with the Constitutional Charter; and
- rule on whether the laws of the member states are in conformity with the Constitutional Charter.<sup>11</sup>

This Court also has the power to repeal legislation found to be contrary to the Constitutional Charter and the laws of Serbia and Montenegro.<sup>12</sup>

The Constitutional Charter provides that the Charter, laws and jurisdiction of Serbia and Montenegro and the Constitutions, laws and jurisdiction of the member states must be harmonised.<sup>13</sup> As a general rule, laws and other regulations of the bodies of the Republic of Serbia and Montenegro shall have no retroactive effect unless exceptionally provided for where a public interest is ascertained in the procedure of their adoption.<sup>14</sup>

The judicial system on the Federal level in the FRY consisted of courts of general jurisdiction, the federal military courts and the Federal Constitutional Court. The military courts applied the same procedures and regulations as the courts of general jurisdiction.<sup>15</sup> They are competent to try offences committed by military personnel, prisoners of war and civilians in the Yugoslav Army.<sup>16</sup> All these courts, including the Federal Republic Court<sup>17</sup> will either be replaced or restructured now that the Constitutional Charter has been adopted.

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<sup>9</sup> Articles 18 and 34 of the Charter on Human Rights respectively.

<sup>10</sup> Article 22 of the Charter on Human Rights.

<sup>11</sup> See Article 46 of the Constitutional Charter. See for the composition of the Court, Article 47 of the Charter.

<sup>12</sup> Article 48 of the Constitutional Charter.

<sup>13</sup> Article 51 of the Constitutional Charter.

<sup>14</sup> Article 53 of the Constitutional Charter.

<sup>15</sup> Act on Military Courts, 1995.

<sup>16</sup> Initial Reports of States parties due in 1992: Yugoslavia, UN Doc. CAT/C/16/Add.7, 6 April 1998, para. 24-31.

<sup>17</sup> See Bernhardt, *supra*. commenting on the constitutional courts as guardians of human rights, para.91: "... we have the impression that until now the constitutional courts have played no significant role in the protection of democracy and human rights."

Each of the two Republics has its own court system.<sup>18</sup> First instance courts (municipal courts in Serbia and basic courts in Montenegro) are competent in civil and labour relations and other cases. They are also competent to try criminal offences that carry a fine or imprisonment of up to 10 years. For the most serious offences, the accused is tried by a three-member panel, consisting of a judge and two lay-assessors. District (Serbia) or higher (Montenegro) courts have appellate jurisdiction but may also try in first instance the most serious offences carrying a punishment of more than 10 years imprisonment. The Supreme Courts of both Republics are the courts of last resort and in certain cases they are competent to decide constitutional claims.

The independence of judges is guaranteed in the three Constitutions and the Courts law.<sup>19</sup>

## 1.2. Incorporation and status of international law in domestic law

The Federal Republic of Yugoslavia, the predecessor of the Republic of Serbia and Montenegro, has ratified the following relevant international treaties:<sup>20</sup>

- CEDAW (26 February 1982)
- CRC (3 January 1991)
- Convention against Torture (ratified 1991, entered into force 27 April 1992, recognised competence of Committee under Article 21 and 22)
- Refugee Convention (12 March 2001)
- ICCPR (12 March 2001)
- CERD (12 March 2001)
- Both Optional Protocols to ICCPR (6 September 2001)
- Rome Statute of the International Criminal Court (6 September 2001)
- Geneva Conventions 1949 and both protocols (16 October 2001)

Article 16 of the Constitutional Charter provides that: "ratified international agreements and the generally accepted rules of international law shall have precedence over the law of Serbia and Montenegro and over the law of the member states." Moreover, according to Article 10: "provisions of international treaties on human and minority rights and civil liberties applicable on the territory of Serbia and Montenegro shall apply directly." This is reflected in the Charter on Human Rights, according to which human rights guaranteed by generally accepted rules of international law, as well as by international treaties in force in the State Union, shall be guaranteed by the Charter and directly exercised.<sup>21</sup> Consequently, duly ratified international treaties form a constituent part of the internal legal order and as such can be immediately enforced. Moreover, the Charter on Human Rights stipulates that human rights guaranteed by it shall be interpreted in accordance with international human rights guarantees in force, taking into account precedents of international

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<sup>18</sup> See e.g. the Law on Courts of Serbia, of 1 January 2002.

<sup>19</sup> See e.g. Article 47 of the Constitutional Charter.

<sup>20</sup> Date of ratification or succession.

<sup>21</sup> Article 7 of the Charter on Human Rights. Article 8 of the Charter strengthens this general provision by providing that internationally recognised human rights shall not be restricted on the pretext that they are not guaranteed by the Charter or are guaranteed to a lesser extent.

bodies supervising their implementation.<sup>22</sup> The UN Convention against Torture can be applied directly in administrative, judicial and other proceedings.<sup>23</sup>

## **2. Practice of Torture: Context, Occurrence, Responses**

### **2.1. The practice of torture**

Secessionist movements in the Constituent Republics of the former Socialist Republic of Yugoslavia, beginning in the late 1980s, triggered an armed conflict in various parts of the territory. The ensuing war resulted in the break-up of the Socialist Republic of Yugoslavia and serious violations of human rights and humanitarian law on a massive scale.<sup>24</sup> In 1998, under the then President Slobodan Milošević, Yugoslav armed forces and law-enforcement personnel embarked on a campaign of persecution of the Kosovar Albanians, which was marked by widespread human rights violations.<sup>25</sup> After NATO's military intervention in 1999, Kosovo was placed under UN administration. In a series of events in September and October 2000, the regime of Slobodan Milošević was toppled and Vojislav Kostunica was sworn in as the new President of FRY.

During the Milošević regime, torture was reportedly systematic and widespread, particularly by armed forces and paramilitary groups operating in Croatia and Bosnia and Herzegovina during the conflict, and in the persecution of Kosovar Albanians from 1998 to 2000. The main perpetrators have been members of the army, paramilitary groups, police and prison guards as well as private citizens colluding with officials. Since October 2000, the reported incidences of torture and other ill-treatment have decreased considerably although cases of police brutality continue to be reported in both Serbia and Montenegro. Moreover, the prison conditions in Serbia and Montenegro have been repeatedly described as poor and not being in conformity with international standards.<sup>26</sup> It is particularly members of the Roma minority, refugees and internally displaced persons who are victims of torture. Torture and ill-treatment are primarily employed to extract confessions, statements or other information.

### **2.2. Domestic Responses**

The Milošević government consistently denied allegations of torture and other serious human rights violations. The new federal government has since October 2000 taken several steps to address past human rights abuses. It transferred, albeit under intense international pressure, Milošević and others to stand trial before the ICTY. Moreover, in some cases, perpetrators of war crimes have been tried before

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<sup>22</sup> Article 10 of the Charter on Human Rights.

<sup>23</sup> See on the situation under the 1992 FRY Constitution, Initial Reports of States parties due in 1992: Yugoslavia, UN Doc. CAT/C/16/Add.7, 6 April 1998, para.22.

<sup>24</sup> See the reports by the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia, in particular his final report UN Doc. E/CN.4/96/9, 22 August 1995.

<sup>25</sup> See the reports by the Special Rapporteur on human rights in the former Yugoslavia throughout 1998 and 1999.

<sup>26</sup> See on this paragraph International Helsinki Federation for Human Rights, Human Rights in the OSCE Region: The Balkans, the Caucasus, Europe, Central Asia and North America, Report 2002 (Events of 2001), pp. 371 et seq.; Amnesty International, Federal Republic of Yugoslavia: Continuing Concerns, AI Index: EUR 70/57/00, 6 December 2000, pp. 2 -3 and the annual reports by the Humanitarian Law Centre, a Belgrade based NGO, see [www.hlc.org.yu](http://www.hlc.org.yu).

domestic courts.<sup>27</sup> President Kostunica established a Truth and Reconciliation Commission in March 2001. Its proclaimed aim is to encourage and organise research on, *inter alia*, the wars and conflicts in the territory of the former Yugoslavia as well as human rights abuses and breaches of international public, humanitarian and wartime laws.

The new government has ratified or succeeded to several human rights treaties and humanitarian law instruments. However, even though several reform initiatives are under way, neither the federal government nor the republican governments have so far recognised a crime of torture when amending the Federal Criminal Code in 2001. Moreover, no substantial reforms have been undertaken relating to the composition, supervision and accountability of the police forces.<sup>28</sup> The present government has also been criticised for its failure to cooperate fully with the ICTY and to stem police brutality as well as stop the discrimination of the Roma community.<sup>29</sup>

It remains to be seen whether the human rights commitment spelled out in the 2003 Constitutional Charter will be effectively put into practice by Serbia and Montenegro and its member states. In an important institutional change, a Minister for Human and Minority Rights will be part of the Council of Ministers provided for by the Constitutional Charter. Its task is to monitor the exercise of human and minority rights and the co-ordination with relevant bodies of the member states in efforts to ensure the implementation and respect of international conventions on the protection of human and minority rights.<sup>30</sup>

### 2.3. International Responses

The United Nations, the European Union, NATO and individual states responded to the war in Yugoslavia by adopting a variety of measures, ranging from condemnations, economic sanctions, military action to the setting up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violation of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991 (ICTY).<sup>31</sup> The tribunal has since its inception in 1993 issued a number of judgments in which it found citizens of the former Yugoslavia guilty of genocide, war crimes and crimes against humanity, including torture.<sup>32</sup> The growing persecution of Kosovar Albanian civilians against the background of escalating armed actions between Yugoslav armed forces (JNA) and paramilitary groups on the one side and the Kosovo Liberation Army on the other prompted the UN Security Council in 1998 to impose an arms embargo and NATO members to take

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<sup>27</sup> Judgement of the Prokuplje court on 7 July 2002, see *Neue Zürcher Zeitung, Erstes Urteil in Serbien wegen Kriegsverbrechen in Kosovo* (First judgment in Serbia on war crimes in Kosovo), 8 July 2002. See also Amnesty International, FRY: War crimes verdict in Montenegro-Amnesty International calls for all those responsible for Strpci abductions and murders to be brought to justice, AI Index: EUR 70/009/2002, 12 September 2002.

<sup>28</sup> See overview of reforms in Bernhardt/Pekkanen, *supra*, para. 261-267.

<sup>29</sup> See Amnesty International, *supra*, and reports by the Humanitarian Law Centre, *supra*.

<sup>30</sup> Article 45 of the Constitutional Charter.

<sup>31</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Doc. S/25704 of 3 May 1993), S/RES 827, 25 May 1993, Annex.

<sup>32</sup> See e.g. *The Prosecutor v. Anto Furundzija*, 10 December 1998, Trial Chamber II case No IT-95-17/1T, paras. 155, 157.

military action against the FR Yugoslavia from March to June 1999. The crimes committed by individuals during this period are also subject to the jurisdiction of the ICTY. After the withdrawal by the JNA, Kosovo was placed under international administration in accordance with UN Security Council Resolution 1244 (1999). Following the surrender of Slobodan Milošević in 2001 to the ICTY, the international community has provided considerable financial support to the new government to rebuild the country and reform the system, including improvement of the protection of human rights.

The human rights violations of the former regime have been documented and condemned throughout the years, especially during the war, by the Special Rapporteur on Human Rights on the former territory of Yugoslavia,<sup>33</sup> amongst others.

The Committee against Torture stated in 1998 that it "is extremely concerned over the numerous accounts of the use of torture by the State police forces ..."<sup>34</sup> The Committee against Torture has also considered two cases relating to Yugoslavia in its jurisprudence. In the case of Milan Ristic, who died as a result of torture committed by three policemen in 1995, the Committee found that "the State party has violated its obligations under articles 12 and 13 of the Convention to investigate promptly and effectively allegations of torture or severe police brutality."<sup>35</sup> In the case of Hajrizi Dzemajil, the Committee held that the burning and destruction of houses belonging to a Roma community by a mob in the presence of police officers who did not intervene and the lack of subsequent prosecutions constituted a violation of Articles 16, 12, 13 and the obligation to grant redress and compensation to the victims of such acts.<sup>36</sup>

The Special Rapporteur and the Special Representative of the Commission on Human Rights, while welcoming changes since October 2000, expressed concern about continuing allegations of ill-treatment and slow progress in dealing with human rights violations of the previous regime.<sup>37</sup>

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<sup>33</sup> *Supra*.

<sup>34</sup> Concluding observations of the Committee against Torture: Yugoslavia, UN Doc. A/54/44, paras.35-52, 16 November 1998, para.47. Para. 48 reads: "The Committee is also gravely concerned over the lack of sufficient investigation, prosecution and punishment by the competent authorities (article 12 of the Convention) of suspected torturers or those breaching article 16 of the Convention, as well as with the insufficient reaction to the complaints of such abused persons, resulting in the de facto impunity of the perpetrators of acts of torture. *De jure* impunity of the perpetrators of torture and other cruel, inhuman or degrading treatment or punishment results *inter alia*, from amnesties, suspended sentences and reinstatement of discharged officers that have been granted by the authorities. Neither the report nor the oral statement of the Yugoslav delegation said anything about the Yugoslav Governments efforts concerning the rehabilitation of the torture victims, the amount of compensation they receive and the actual extent of redress afforded them."

<sup>35</sup> Communication No. 113/1998: Yugoslavia, UN Doc. CAT/C/26/D/113/1998, 11 May 2001, para.9.8. The Committee held further that, in the absence of proper criminal investigation, it was not possible to determine whether the rights to compensation of the alleged victim or his family have been violated. *Ibid.*, para.9.9.

<sup>36</sup> As article 16 does not refer to article 14 of the Convention, such obligation was held to flow directly from article 16 itself, see Communication No. 161/2000: Yugoslavia, UN Doc. CAT/C/29/D/161/2000, 21 November 2002, para.9.6: "The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complainants to obtain redress and to provide them with fair and adequate compensation."

<sup>37</sup> See Report of Mr. Jiri Dienstbier, Special Rapporteur of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, UN Doc. E/CN.4/2001/47, 29 January 2001, paras.82 and 83, and UN Doc. E/CN.4/2001/47/Add.1, 22 March 2001, paras. 24-26. See also Report of Mr. José Cutilero, Special Representative of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina and the Federal Republic of Yugoslavia, Addendum, Update, covering the period December 2001- February 2002, UN Doc. E/CN.4/2002/41/Add.1, 20 March 2002, paras.19-23.

## **II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW**

Torture is expressly prohibited in Article 12 (2) of the Charter on Human Rights: "No one shall be subjected to torture, inhuman or degrading treatment or punishment." Article 12 (1) provides that everyone shall have the right to inviolability of physical and mental integrity and Article 12 (3) reads: " No one shall be subjected to medical and scientific experiment without his/her free consent."<sup>38</sup>

Neither the criminal code nor the criminal procedure code contains any express prohibition of torture. There are however provisions which prohibit the use of violence and the forceful extraction of confessions.<sup>39</sup> Consequently, there is no express definition of torture in the present legislation of the Republic or the two states.<sup>40</sup> Whereas the Charter of Human Rights permits no derogation from the prohibition of torture in times of emergency,<sup>41</sup> the Serbian Constitution gives the President of the Republic the power to enact provisions derogating from any fundamental rights, including the prohibition of torture, in times of war.<sup>42</sup>

## **III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE**

### **1. The substantive law: Criminal offences and punishment**

The Criminal Code of the Federal Republic of Yugoslavia, which applies to officials acting in a federal capacity, does not contain a specific crime of torture.<sup>43</sup> However, it characterises the extortion of statements<sup>44</sup> and maltreatment during performance of official duty<sup>45</sup> as criminal offences. Both are punishable by imprisonment from three months to three years. The minimum term for the aggravated extraction of statements is one year imprisonment. Acts of torture might also be covered by the criminal offence of unlawful deprivation of freedom<sup>46</sup>, which carries a punishment of imprisonment ranging from three months to five years (at least three years in aggravated cases), abuse of office<sup>47</sup> and dereliction of duty.<sup>48</sup>

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<sup>38</sup> See for the express prohibition of torture in the Constitution of the FR Yugoslavia, 1992 Article 25 *ibid.* and the similar Article 26 of the Serbian Constitution.

<sup>39</sup> See Article 10 of Law on Criminal Procedure: "Any extortion of a confession or statement from an accused person or any person involved in the proceedings shall be forbidden and punishable."

Article 201, para.1, *ibid.*: "During detention, neither the personality nor the dignity of an accused may be offended." Article 12, Criminal Procedure Act, Republic of Serbia, March 2002: "It is forbidden and punishable to employ any kind of violence on a person who is deprived of liberty or whose liberty is restricted, as well as to extort a confession or any other statement from the defendant or any other person participating in the proceedings.

<sup>40</sup> According to information provided by the Ministry of Internal Affairs of the Republic of Serbia, the prohibition of torture is particularly emphasised in the draft of the Internal Affairs Law (Law on the Police), which was to be adopted by the National Assembly of the Republic of Serbia in late 2002.

<sup>41</sup> Article 6 Charter on Human Rights.

<sup>42</sup> Article 83 (7).

<sup>43</sup> The Criminal Code of the Federal Republic of Yugoslavia was still in force at the time of writing but is subject to changes following the creation of the new Republic of Serbia and Montenegro.

<sup>44</sup> Article 190 Federal Criminal Code.

<sup>45</sup> Article 191 Federal Criminal Code.

<sup>46</sup> Article 189 Federal Criminal Code.

<sup>47</sup> Article 174 Federal Criminal Code.

Criminal offences of infliction of bodily harm, murder and rape are punishable according to the respective state criminal codes. Torture is also a component of war crimes committed against the civilian population,<sup>49</sup> the wounded and sick<sup>50</sup> and prisoners of war,<sup>51</sup> each of which carries a punishment of a minimum of five years imprisonment up to the death penalty.<sup>52</sup>

According to the Federal Criminal Code, complicity, incitement and aiding and abetting are punishable as prescribed for the commission of the act, although the punishment might be reduced for aiding.<sup>53</sup> An attempt shall be punished only for those criminal acts for which there is, according to statute, a sentence of five years imprisonment or a more severe penalty.<sup>54</sup> With regard to other criminal acts, an attempt is punishable only when so provided by statute. Thus, attempts of the offences stipulated in Articles 190 and 191 are not punishable.

The Criminal Codes of the states of Serbia and Montenegro, which apply to any person other than officials in federal bodies acting in an official capacity in the territory of the respective state and to offences committed in the respective territory that are not covered by the Federal Criminal Code,<sup>55</sup> contain similar offences.<sup>56</sup> However, they differ in so far as neither contains any offence of infliction of severe physical or psychological pain or coercion by a public official.<sup>57</sup>

In addition to criminal punishment, the internal affairs acts of the states of Serbia and Montenegro envisage disciplinary sanctions against perpetrators of torture.<sup>58</sup>

## 2. The Procedural Law

### 2.1. Immunities

There are no amnesty laws for acts of torture or other forms of ill-treatment.

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<sup>48</sup> Article 182 Federal Criminal Code.

<sup>49</sup> Article 142 Federal Criminal Code.

<sup>50</sup> Article 143 Federal Criminal Code.

<sup>51</sup> Article 144 Federal Criminal Code.

<sup>52</sup> See also Article 146 Federal Criminal Code that makes unlawful killing and wounding and Article 150 Federal Criminal Code which makes cruel treatment a criminal offence respectively.

<sup>53</sup> See Articles 22-24 Federal Criminal Code.

<sup>54</sup> Article 19 Federal Criminal Code.

<sup>55</sup> The Federal Criminal Code contains offences affecting the Federal Republic as such, including offences relating to the army and war crimes but not any of the "ordinary" crimes.

<sup>56</sup> Criminal Code of Serbia (1977)/Criminal Code of Montenegro (1993): Art. 63/ 45 Unlawful deprivation of freedom; Art. 65/47 Extortion of statements; Art 66/48 Ill-treatment in the line of duty; Art 107/90 Abuse of office to carry out intercourse or indecent assault. Both codes make the infliction of bodily injuries, rape, homicide and murder criminal offences.

<sup>57</sup> See Article 66 Serbian Code and similar Article 48 Montenegrin Code: "An official who in the performance of duty abuses another, insults him or generally treats him in a manner that violates his human dignity, shall be punished with a term of imprisonment of three years months to three years."

<sup>58</sup> In the Republic of Serbia, disciplinary measures may be based on The Law on Internal Affairs and the Law on Labour Relations in the State Institutions, which regulate the rights, duties and responsibilities of those employed in state institutions, and provide for a range of disciplinary measures, including suspension and dismissal from office for serious breaches, which can be imposed regardless of any criminal proceedings against the person concerned. Disciplinary proceedings are governed by the Decree on Disciplinary Responsibility within the Ministry of Internal Affairs. See in particular Article 50 of the Law on Internal Affairs.

## 2.2. Statutes of Limitation

The prosecution of those crimes, which proscribe acts amounting to torture, such as maltreatment in the office, are subject to statutes of limitations. The applicable time limit depends on the punishment prescribed for the crime in question, the maximum time limit being 25 years for criminal acts that carry the death penalty or imprisonment for a term of 20 years.<sup>59</sup> Genocide and war crimes are not subject to a statute of limitations.<sup>60</sup> The crimes most relevant in the context of torture, i.e. those defined in Article 190 and 191 of the Federal Criminal Code, cannot be prosecuted after a lapse of three years according to Article 95 (4) of the Federal Criminal Code.

## 2.3. Investigations into torture

A victim of a crime may lodge a complaint with the public prosecutor orally or in writing or to other authorities that shall accept it and immediately forward it to the competent state prosecutor.<sup>61</sup>

The investigating judge carries out investigations and in so doing, may entrust the police, which is empowered by law to take certain measures in pre-investigatory proceedings, with taking certain actions in the course of investigations.<sup>62</sup> The Public Prosecutor may request an investigation and direct preliminary criminal proceedings and is charged with prosecuting alleged offenders.<sup>63</sup> There are no specific bodies or units charged with investigating complaints of torture.

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<sup>59</sup> See Article 95 Federal Criminal Code: The formula is as follows: A time limit of 25 years for capital punishment or imprisonment of 20 years; 15 years for imprisonment exceeding 10 years; 10 years for imprisonment exceeding 5 years; 5 years for imprisonment exceeding 3 years; 3 years for imprisonment exceeding 1 year; 2 years for imprisonment not exceeding one year or a fine. See Article 96 on the running and interruption of the period of limitation for criminal prosecution.

<sup>60</sup> Art. 100 Federal Criminal Code.

<sup>61</sup> Article 224 FRY Criminal Procedure Code. The procedure followed by federal institutions and by the states, depending on whether the crime in question falls under the federal or the state criminal codes, are largely similar. See also recently adopted Criminal Procedure Act, Republic of Serbia, March 2002 and the Criminal Procedure Code of the Republic of Montenegro.

<sup>62</sup> Articles 246 (3,4), as well as Article 260 of the FRY Criminal Procedure Code (FRY CPC), stipulate that the investigating judge may entrust certain actions to the police: "In the manner prescribed by this Act, the investigating judge may entrust to the police authorities the execution of an order for a search of a dwelling or a person or an order for the temporary seizure of objects. Upon request of the investigating judge or with his approval, law enforcement may photograph a suspect or take his/her fingerprints, if this is necessary for the purpose of criminal proceedings." "If an investigating judge needs assistance of the police (technical assistance in the field of criminology and similar) or another government agency in connection with the conduct of an investigation, they have a duty to provide that assistance at his request. Upon request of an investigating judge, a firm or other legal entity has a duty to provide assistance in performing an investigating action that may not be postponed." (Art 260 FRY CPC).

<sup>63</sup> Art. 46 of the FRY CPC establishes basic duties of the state prosecutor: "(1) The prosecution of perpetrators of criminal acts is the basic right and basic duty of the public prosecutor; (2) The public prosecutor has the following powers concerning criminal acts which are prosecuted *ex officio*: 1) to conduct pre-trial proceedings; 2) to request that an investigation be conducted and direct preliminary criminal proceedings in accordance with the present Code; 3) to bring and represent an indictment or to make a motion to indict before the court having jurisdiction thereof; 4) To file appeals against court decisions that have not come into effect and to file extraordinary legal remedies against the court decisions that have come into effect; 5) to take other measures specified by this Code; ... (3) In order to enable functions referred to in paragraph 2 subparagraph 1 of this Article to be exercised, all authorities taking part in pre-trial proceedings are bound to inform the competent state prosecutor about all actions that were undertaken. Police and other state authorities competent to discover the commission of criminal offences are bound to proceed upon any request of the competent public prosecutor; (4) If a police authority or other state authority has failed to proceed upon the request of the public prosecutor referred to in paragraph 3 of this Article, the public prosecutor shall inform a head of this authority, and if necessary, a competent minister, the government or a competent parliamentary body thereof."

Investigations are to be instituted against a person when there is probable cause to believe that he has committed a criminal offence.<sup>64</sup>

The Public Prosecutor is required to prosecute allegations of crimes *ex officio* unless the allegations relate to criminal offences that are prosecuted by private lawsuits through a private prosecutor.<sup>65</sup> The Public Prosecutor has the power to request the investigating judge to carry out investigations.<sup>66</sup> If the investigating judge disagrees with the prosecutor's request to open an investigation, he/she can submit the matter to a chamber of three judges, which decides whether a prosecution should be instituted. Both the suspect and the prosecutor, but not the victim, may appeal the chamber's decision to a higher court. The decision of the investigating judge, prosecutor or chamber on whether to institute an investigation has to be based on an assessment as to whether probable cause exists. When deciding to institute an investigation, the investigating judge may entrust police officers with carrying out the investigation.<sup>67</sup>

The investigating judge might take several measures, such as taking the suspect into custody.<sup>68</sup> As far as the availability and gathering of medical evidence is concerned, according to the Serbian Law on Execution of Penal Sanctions (1998), a medical examination is mandatory upon admission and release from prison, and the investigating judge may request the relevant records.

The investigation might be dismissed following a declaration of withdrawal by the public prosecutor on the basis of a decision of the investigating judge. The victim and the suspect are entitled to appeal against such a decision.<sup>69</sup> Upon conclusion of the investigation, the decision of whether to indict the suspect rests with the public prosecutor.<sup>70</sup>

There is no right of appeal against a decision not to indict the suspect but a victim has the right to bring a private prosecution.<sup>71</sup> The victim must initiate proceedings within eight days of receiving written notice from the prosecutor of the decision to dismiss a complaint, or from the date of the court decision to drop proceedings already initiated.<sup>72</sup> In case the injured party does not receive such a notice, he/she may commence a private prosecution within a strict time limit of three months from the day when the public prosecutor rejected the charge or from the day when the decision to suspend proceedings was rendered.<sup>73</sup> As a private prosecution for an offence defined as prosecuted by the state is contingent upon the procedure just outlined, simple inaction by the prosecutor has the effect of preventing the victim from having recourse to such a prosecution.

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<sup>64</sup> Art. 241 (1) FRY CPC.

<sup>65</sup> Article 19 FRY CPC.

<sup>66</sup> Article 46 FRY CPC.

<sup>67</sup> Article 246 and 260 FRY CPC.

<sup>68</sup> See Art.142 (2) FRY CPC.

<sup>69</sup> Article 254 (3); (4) FRY CPC.

<sup>70</sup> Art. 265 FRY CPC.

<sup>71</sup> Article 61 (1) in conjunction with Article 265 FRY CPC.

<sup>72</sup> Article 61 (1) FRY CPC.

<sup>73</sup> Article 61 (4) FRY CPC.

A victim of a crime has certain procedural rights during investigations and trial, such as the right to submit relevant evidence. Victims and witnesses are by law entitled to special protection during investigations. A victim also has the right to launch a private prosecution as described above, but carries the risk of bearing the costs of an unsuccessful prosecution.

## 2.4. Trials

A trial of alleged perpetrators of torture will normally take place before the municipal court that has territorial jurisdiction or military courts.<sup>74</sup> The nature of trial proceedings is inquisitorial. The guilt of the accused has to be proved beyond reasonable doubt and the court is free to assess the evidence available whereby the presiding judge is competent to decide on the admissibility of evidence.<sup>75</sup>

The court may either acquit the accused or impose a sanction in form of imprisonment, a suspended sentence, security measures or correctional measures.<sup>76</sup>

## 3. Practice

The FR Yugoslavia released the following official figures regarding complaints about torture and ill-treatment for the period from 1992 to 1997: 492 charges of unlawful arrest leading to 177 indictments and resulting in 109 sentences; 199 charges of extortion of statement leading to 69 indictments and resulting in 25 sentences; 1548 charges of abuse in the line of duty leading to 479 indictments and resulting in 238 sentences.<sup>77</sup> These figures do not allow for an assessment of the practice in the indicated period as they do neither clarify what specific acts the charges referred to nor what kind of sentence was imposed.

The figures provided by the Serbian Ministry of Internal Affairs for the same period are more instructive. According to these, there have been 16 criminal charges against 20 officers, a reasonable suspicion of 11 offences of abuse in the line of duty, 3 offences of unlawful arrest, 2 offences of rape/indecent assault by abusing their official position, 2 offences of extortion of a statement. In 7 cases, there was a finding of coercion during interrogation, resulting in the death of three people and serious bodily injuries inflicted on another three people. 12 persons were convicted for these offences and sentenced to imprisonment ranging from 80 days to 6 years. Moreover, disciplinary measures were taken against 17 officers.<sup>78</sup>

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<sup>74</sup> Art. 9 (1.1) Act on Military Courts: "Military courts: 1) try criminal offences committed by members of the armed forces and, in cases envisaged by the present Act, criminal offences committed by other persons."

<sup>75</sup> See Art. 18 FRY CPC.

<sup>76</sup> See for the scope of available sanctions Article 5 Federal Criminal Code and for the sentencing powers of judges, Chapter IV, Articles 51 et seq.

<sup>77</sup> See Fourth periodic reports of States parties due in 1993: Yugoslavia, UN Doc.CCPR/C/YUG/99/4, 28 June 1999, paras.148.

<sup>78</sup> Employment was terminated in 3 cases. 3 officials were fined and 5 transferred. 1 official was released from disciplinary responsibility. All officers were suspended from the Ministry until their case was settled.

## REPARATION FOR TORTURE: SERBIA AND MONTENEGRO

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In the same period, 600 criminal charges were brought against 917 authorised officers by way of private prosecution for the following offences: 618 for abuse in the line of duty; 67 for extortion of statements; 27 for unlawful deprivation of freedom, including two allegation of abuse of office to have sexual intercourse or commit indecent assault. The Public Prosecution rejected most cases as unfounded.<sup>79</sup>

In the period from 1 January 1997 to 15 August 2002, Serbian citizens lodged 3,509 complaints related to improper and illegal conduct of police officers to the Serbian authorities, mostly relating to the improper use of physical force.<sup>80</sup> As of 18 September 2002, 2,096 (59,7%) of these complaints were held to be groundless, 418 (11,9%) were held to be reasonable and 995 were still pending. In the period indicated, 292 criminal charges in total were brought against 360 officers of the Ministry of Internal Affairs<sup>81</sup>: 233 charges concerned maltreatment (Article 66 Criminal Code Serbia); 42 extracting confession by force (Article 65 Criminal Code Serbia); 15 illegal arrest (Article 63 Criminal Code Serbia); 2 inflicting actual bodily harm (Article 54 Criminal Code Serbia). The public prosecutor's office dropped 185 criminal charges (63,3%), and indicted 26 officers in the said period while 43 cases were pending.<sup>82</sup> There have been a total of 23 convictions, resulting in 19 suspended sentences, 3 temporal sentences and one release.

Disciplinary proceedings in relation to the 3,509 complaints were brought against 154 employees of the MIA, resulting in one dismissal, the temporary degradation of 7 officers, the imposition of a fine against 99 officers and suspension from work until the end of the disciplinary procedure in 13 cases. 6 officers decided to resign on their own will, 18 officers were acquitted from responsibility and disciplinary proceedings were pending against 23 officers. Violation charges were brought against 6 officers and 151 officers had to report and were officially warned for misconduct.

According to the MIFA, as a general practice, when a criminal proceeding has been initiated against an MIA employee for an offence concerning misuse or violation of authorisation amounting to a penal offence, disciplinary proceedings for serious breach of duties are brought and the concerned person is suspended until the proceedings are completed. In case of a conviction, the employee would face a term of notice.<sup>83</sup>

While there have been a considerable number of complaints and investigations into allegations of torture throughout the last two years, many victims of torture, in particular those belonging to vulnerable groups, such as refugees, internally displaced persons or Roma, are often reluctant to file complaints out of fear of reprisals and harassment by the police or a mistaken belief that torture normal part of police investigations. Officials who have been charged with crimes related to torture and ill-treatment have often reacted by bringing counter-charges against the complainants, commonly for obstructing the police in the performance of their duty.

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<sup>79</sup> See Fourth ICCPR report, *supra*, paras.151-155.

<sup>80</sup> Information provided by Ministry of Internal Affairs (MIA), Serbia. 3,304 complaints were registered in the Ministry and 205 in the Municipal Prosecutor's Office (MPO).

<sup>81</sup> Of which 2 were registered in the MIA, 284 registered in MPO's office and 6 brought by the MIA.

<sup>82</sup> In 10 cases no decision had been reached as of September 2002, investigation had been instigated in 23 cases, in 5 cases there had been a mistrial and 1 case resulted in the court issuing an official warning to the offender.

<sup>83</sup> The MIFA noted that it has been established that there were no acts with elements of torture but only individual acts of authorization violation.

The police have in several cases failed to provide information about the identity of the perpetrators and other crucial pieces of evidence, thereby deadlocking the cases in question. The action taken by investigating judges has often been limited to requesting information from the police authorities only without taking into consideration any other evidence that might be available. In cases where investigations have been undertaken, they have either been unduly prolonged or have often been half-hearted.<sup>84</sup>

The public prosecutors have routinely dismissed complaints about torture as unfounded. The Prosecutor's Office has also repeatedly failed to take any action at all or notify the complainant of the dismissal of the complaint. Since there is no time limit for the Prosecution in deciding whether to undertake a prosecution, and since the institution of a private prosecution in such cases is directly dependant on the said notification of the complainant, the inaction on the part of the Prosecutor's Office prevents torture victims from using the remedies envisaged by law.

Trial judges have hardly followed up complaints by criminal suspects who complained that their confessions had been extracted by means of torture, even though the latter is illegal,<sup>85</sup> by calling for or instituting independent proceedings against the alleged torturers. Moreover, the independence and impartiality of judges was reportedly not respected by the Milošević regime throughout the 1990s.<sup>86</sup>

While there is no overall figure of torture cases available, it is indicative that of 20 complaints filed by the Humanitarian Law Centre from 1996 to the end of 2000, first-instance decisions had only been handed down in two cases.<sup>87</sup> In the case of torture of 'Dragan,' who had his jaw fractured as a result of torture, the responsible police officers were found guilty of civil injury and infliction of serious bodily harm and sentenced to eight months in jail suspended for one year by the Srboran Section of the Vrbas Municipal Court on 27 March 2002.<sup>88</sup> In another trial relating to the torture, the Sabac Municipal Court found the perpetrators guilty of civil injury and infliction of slight bodily harm and sentenced them to 45 days imprisonment. In several other cases decided in 2001 and 2002, perpetrators of torture were convicted and sentenced to short terms of imprisonment, some of which were suspended.

These case examples appear to bear out the widely held perceptions that trials against officials accused of torture tend to take an exceedingly long time. Moreover judges have apparently not taken all available evidence into account and, as evidenced by the figures cited above, the majority of trials have not resulted in a conviction. In case of a conviction, the sentences imposed have usually been, with a few notable exceptions, less than a year imprisonment, and have in addition been suspended in several cases.

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<sup>84</sup> See Written Comments of the Humanitarian Law Center concerning FR Yugoslavia For Consideration by the United Nations Committee against Torture at its 27<sup>th</sup> Session, 12-23 November, 2001, 6 November 2001, Articles 11 and 12.

<sup>85</sup> See Article 12: "The use of force against a suspect who has been detained or whose freedom has been restricted, as well as any forcible extraction of confessions or any other statement from an accused or another person participating in proceedings shall be prohibited and punishable" and articles 18, 89 CPC.

<sup>86</sup> Bernhardt/Pekkanen, *supra*, para.103-109; 117. See also the recommendations regarding the reform of the judicial system contained in the section on the conclusion on the judicial system of the Bernhardt/Pekkanen Report, para.131.

<sup>87</sup> See overview of cases at [www.hlc.org.yu](http://www.hlc.org.yu).

<sup>88</sup> Decision No. II K-13/01.

Moreover, there have only been two trials relating to war crimes committed in former Yugoslavia.<sup>89</sup>

#### **IV. CLAIMING REPARATION FOR TORTURE**

##### **1. Available Remedies**

###### **1.1. Constitutional Law**

While the Charter on Human Rights does not expressly use the word compensation or reparation when stipulating a right to judicial protection and elimination of consequences of human rights violations, the latter implies a right to reparation for torture.<sup>90</sup> The only express right to rehabilitation and compensation is provided for wrongful conviction.<sup>91</sup> The victim of a human rights violation, including torture, may have recourse to the Court of Serbia and Montenegro if all other remedies have been exhausted, in which case the Court can grant appropriate relief.

###### **1.2. Civil Law**

A torture survivor has a right to claim damages under civil law. The culpable causing of harm to another person entails liability of the perpetrators.<sup>92</sup> The State is vicariously liable for damages caused by its employees. But the law on obligations does not specify whether the individual perpetrator or the state is primarily liable. The Law on Obligations entitles the torture survivor and relatives of torture victims to pecuniary damages<sup>93</sup> (cost of medical treatment, loss of earnings, annuities) and non-pecuniary damages<sup>94</sup> (physical pain, mental pain caused by the reduction of vital activities, disfigurement, injury to reputation, honor, personal rights and liberties, the death of a close person, the fear suffered). With regard to the determination of moral damages, the law stipulates that: "When deciding on a claim for non-pecuniary

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<sup>89</sup> One relating to an incident in Strpci (located in the border area of FR Yugoslavia and Bosnia-Herzegovina) and the other relating to the killing of two Kosovo Albanian civilians. See *supra* and Human Rights Watch, *supra*.

<sup>90</sup> See Article 9 Charter on Human Rights: "Everyone has the right to effective judicial protection if the human rights guaranteed by this Charter is violated or denied, and the right to have the consequences of such human rights violation eliminated." Article 123 of the Constitution of the FR Yugoslavia stated that: "Everyone shall be entitled to compensation for damages sustained as a result of unlawful or improper actions of an official of a State agency or organization which exercises public powers, in conformity with the law. The State shall be obliged to pay compensation. The injured party shall have the right, in accordance with the law, to demand compensation directly from the individual responsible for the damage." See also a similar provision in the Serbian Constitution, Article 25.

<sup>91</sup> Article 22 Charter on Human Rights.

<sup>92</sup> Art. 154, FRY Law on Obligations: "Whoever causes harm to another shall pay compensation for that harm unless he proves that it occurred without fault of his own. Liability for harm caused by objects or activities which pose a hazard for the environment shall exist regardless of fault. Liability without fault shall exist also in other cases envisaged by law."

<sup>93</sup> Art. 195, FRY Law on Obligations: "Whoever inflicts bodily injury to or impairs the health of another shall pay compensation for the costs of his medical treatment and other costs, and for loss of earnings in the period of incapacitation for work during medical treatment. If the injured party suffers loss of earnings due to a full or partial incapacity to work, or his needs are durably increased, or the possibilities of his further advancement are lost or reduced, the person liable shall pay him a fixed annuity in compensation for the loss suffered."

<sup>94</sup> Art. 200, FRY Law on Obligations: "In considering claims for physical pain suffered, for mental pain caused by a reduction of vital activities, disfigurement, injury to reputation, honor, or personal rights and liberties, the death of a close person, and fear, the Court, if it finds that the circumstance of the case, in particular the level of pain and fear suffered and its duration, warrant it, shall award just monetary compensation, regardless of the amount of pecuniary damages or absence of the same."

damages and its amount, the Court shall take into account the import of the good damaged and the purpose of the compensation, as well that it does not facilitate goals incompatible with its nature and social intention."<sup>95</sup> Aggravated or punitive damages are neither provided for by law nor have they been recognised in jurisprudence.

A torture survivor must file a claim for compensation with the competent court, usually the municipal civil court in the district where the torture took place or in the district where the alleged perpetrator of torture resides.<sup>96</sup> The lawsuit may be brought against the perpetrator of torture or the responsible state, i.e. either the Republic of Serbia and Montenegro or the individual states of Serbia or Montenegro respectively, or both. A time limit of three years applies, beginning on the day of the commission of the act of torture. If the torture survivor files a compensation claim for unlawful detention with the Ministry of Justice, he or she may file a case only if the Ministry fails to respond to the claim within the time period prescribed by law or offers compensation which is lower than what was requested by the victim.

The plaintiff need not wait for final disposition of the criminal proceedings since civil liability is broader than criminal liability, i.e. the former is not contingent on proven criminal liability. However, courts follow the practice of adjourning civil proceedings pending final disposition of the related criminal case.<sup>97</sup> Moreover, the burden of proof is on the plaintiff, who must, when filing the suit, state what evidence he/she will ask the court to consider and explain which allegations he/she has made will be corroborated by this evidence. This effectively means that the plaintiff must bear the expenses of the lawsuit, i.e. the court fees and experts fees etc., since the court will not proceed until these are paid.<sup>98</sup> The law envisages the possibility for an indigent party to be exempt from paying the costs of the proceedings<sup>99</sup>.

The enforcement of judgments is governed by the law on execution procedure, 2000. Once the compensation for torture is awarded in favour of the plaintiff, the debtor has 15 days to pay. If the debtor fails to pay within this period, the plaintiff is entitled to seek a writ of execution from the municipal court. If the court finds the motion for a writ in order, it issues the writ, which may be appealed by both parties. The court may order the seizure and sale of as much of the debtor's movable and immovable property or other assets as is necessary to satisfy the judgment as well as the transfer of funds from his bank account.<sup>100</sup> Certain items as well as a certain amount of income are exempt from execution.<sup>101</sup> If the action for compensation has

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<sup>95</sup> Art. 200, FRY Law on Obligations.

<sup>96</sup> Article 52, FRY Law on Obligations.

<sup>97</sup> In Šijačk, the Srbobran Section of the Vrbas Municipal Court on 27 September 2001 (No.II P-176/2001) adjourned the civil proceedings until a final ruling on criminal case No. II K-13/01.

<sup>98</sup> Art. 152, Civil Procedure Code: "Each party shall bear all costs and expenses incurred by its actions."

<sup>99</sup> Art. 153 (1) of the Civil Procedure Code states that when a party proposes presentation of evidence, it shall, upon order of a court, deposit a sum necessary to meet the expenses incurred in connection with presentation of evidence; Art. 172 (1), Civil Procedure Code, states that indigent parties shall be exempt from paying the costs of the proceeding if such payment would be detrimental to his or his family's subsistence."

<sup>100</sup> Art. 28, FRY Law on Execution Procedure.

<sup>101</sup> Art. 65 (1), Art. 87 (1,2), FRY Law on Execution Procedure: "The following shall be exempt: 1) clothing, footwear, underwear and other personal items, bedding, utensils, such furniture as is needed by the debtor and the members of his household, oven, and refrigerator; 2) three-month supply of food and fuel needed by the debtor and the members of his household; 3) cash sum of a debtor who has a regular monthly income up to the monthly amount exempted by law and commensurate to the time when the next monthly income is due; 4) orders, medals and other decorations and awards, personal correspondence, manuscripts and other personal writings of the debtor, and family

been instituted against the state, the plaintiff designates the state in his motion for a writ of execution. In this case, the state's bank account is blocked and the sum awarded transferred from it to the account of the creditor. The creditor may also receive the amount in cash. This is the most effective way to secure execution since there are always sufficient funds in the state's accounts to satisfy a judgment, and additional procedures such as making an inventory of a debtor's property and assets, their evaluation and sale are not required.

### 1.3. Criminal Law

A torture survivor may also claim compensation in the course of criminal proceedings. However, such a claim will only be considered if it is not held to unduly prolong the proceedings in question.<sup>102</sup> Such a claim may be for losses suffered, restitution of property or annulment of a legal transaction.<sup>103</sup>

The claim for compensation as part of criminal proceedings is to be filed before the end of the trial in the competent municipal court. The court rules on the claim in the judgment finding the accused guilty, and may award it in entirety or in part; in the latter case it instructs the party to seek the remainder in civil proceedings. If the criminal proceedings do not provide the court with sufficient grounds for a decision on the claim, either in entirety or in part, or if they are terminated for any other reasons without a finding of the guilt of the accused, the court instructs the party to seek compensation in civil proceedings.<sup>104</sup>

## 2. The practice

There are no statistics available regarding the overall number of claims for reparation for torture.<sup>105</sup> In the period from January 2001 until September 2002, 260 compensation claims were brought against the Republic of Serbia before the competent courts for illegal conduct of its officials. In 27 of these cases, final judgment was entered awarding compensation.<sup>106</sup>

While a considerable number of cases have been brought, victims of torture face considerable obstacles when contemplating legal action. In several instances, torture

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pictures; 5) prosthetic and other devices essential for the vital functioning of an invalid or disabled person. Garnishment of wages or pensions or other income may be up to one-half of the wage, pension or other income. If the debtor is receiving the guaranteed wage in accordance with the law and collective contract, garnishment may be up to one-third of the wage."

<sup>102</sup> Art. 201 (1,2), FRY CPC: "(1) A compensation claim that has arisen because of the committing of a criminal offense shall be deliberated on the motion of the authorized persons in criminal proceedings if this would not considerably prolong those proceedings." Similar provisions are contained in the criminal procedure codes of the republics, see e.g. Criminal Procedure Act, Republic of Serbia, Chapter XV, Articles 201 et seq.

<sup>103</sup> Art. 201, (2) FRY CPC: "A compensation claim may pertain to reimbursement of damage, restitution of property, or annulment of particular legal transaction."

<sup>104</sup> Art. 206, FRY CPC.

<sup>105</sup> The Humanitarian Law Centre has assisted in bringing numerous torture related cases. Thus, its attorneys filed 38 Legal Actions against the Republic of Serbia in the period from January to 24 September 2000 alone, seeking 9, 440 000 Dinars compensation for 51 persons for violation of their human dignity and freedoms through unlawful police. The plaintiffs, mainly young people, were, according to HLC, unlawfully detained, questioned about their political opinions, fingerprinted and physically and mentally abused.

<sup>106</sup> No break-down as to the conduct in question is available but it is understood that the majority of them relate to the unauthorised use of force, mainly by the application of constraint devices. The figures have been provided by the Ministry of Internal Affairs, Republic of Serbia.

survivors taking legal actions were threatened and harassed for doing so. Moreover, civil suits tend to be costly and drawn out. Moreover, as courts tend to suspend civil proceedings pending a final decision in related criminal cases, even though such decision is not obligatory by law, the likelihood of a successful claim is further diminished if linked to criminal cases given the relatively low rate of convictions.

The information received from various sources demonstrates that there have only been a relatively small number of successful cases.

Some recent cases include the following:<sup>107</sup>

- On 7 October 1999, the First Municipal Court in Belgrade awarded damages to members of the Pilipovic family for the death of Nenad Pilipovic who had died on 16 June 1996 as a result of physical abuse by two policemen, Milos Coranov and Branislav Djukic, who were sentenced to six and five years imprisonment respectively by the District Court in Novi Sad in 1996.
- On 27 August 2001, the Municipal Court in Vrsac awarded Georg Tani 15,000 dinars (250 Euros) damages for injury to his reputation, honour and dignity against the Republic of Serbia. Tani had filed a lawsuit in 2000, seeking 80,000 dinars (approximately 1,300 Euros) damages for the infliction of slight bodily harm, forcible extraction of a statement and civil injury by two police officers.<sup>108</sup> The decision of the Municipal Court was upheld by the Pančevo District Court on 1 December 2001.
- On 8 November 2001, the Municipal Court in Becej, Vojvodina, ordered the Republic of Serbia to pay Boris Negeli, an activist of the Otpor Movement, 300,000 Dinar (approximately 4,998 Euros) for the violation of his dignity and personal rights through unlawful police conduct.<sup>109</sup>
- On 25 December 2001, the First Municipal Court ordered the Republic of Serbia to pay Jovan Modic 100,000 Dinars (approximately 1,666 Euros) for mental suffering.<sup>110</sup>
- On March 7 2002, the Belgrade District Court upheld a decision of the Municipal Court on appeal in which the latter had awarded 50,000 Dinar (approximately 833 Euros) compensation to Ljuban Mrdjenovic. He was one of 644 refugees from Croatia and Bosnia-Herzegovina who filed suits seeking compensation for the violation of their human rights and dignity by means of unlawful detention, ill-treatment and forceful conscription to the combat zone by police and paramilitaries in 1995 and 1996.

## **V. GOVERNMENT REPARATION MEASURES**

The Yugoslav government has not officially acknowledged or condemned the existence and scale of human rights violations, including torture. Neither the federal

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<sup>107</sup> Source of information: Humanitarian Law Centre, see [www.hlc.org.yu](http://www.hlc.org.yu).

<sup>108</sup> Acting for Tani, an HLC attorney on 25 December 2000 filed a complaint against the officers, charging them with infliction of slight bodily harm, forcible extraction of a statement, and civil injury, all of which are defined by law as criminal offenses. Almost a year later, on 3 December 2001, the public prosecutor indicted Officers Igor Janjč and Nenad Atanasković. There was only one count of the indictment - extraction of a statement. The trial is still under way.

<sup>109</sup> The panel stated: "The Court has decided to award the damages sought as Boris Negeli .. taken in, detained, mistreated, interrogated, photographed and fingerprinted solely because he exercised his freedom of expression"

<sup>110</sup> Modic had, as a then 12 year old, witnessed in 1996 how two policemen brutally beat his uncle Nenad Philipovic who died of his injuries.

government nor the governments of the two republics provide financial or other support for rehabilitation programmes. Such programmes are organized and financed only by NGOs.<sup>111</sup> There are at present no initiatives to set up a scheme or similar mechanisms to provide reparation for the victims of past or present human rights violations. The Truth and Reconciliation Commission established by President Kostunica on 29 March 2001, is not mandated to recommend or award any form of reparation for past violations of human rights or humanitarian law.<sup>112</sup>

## VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

### 1. Prosecution of acts of torture committed in third countries

#### 1.1. The Law

##### 1.1.1. Criminal Law

As a general rule, Yugoslav criminal law in force at the time of writing applies to anyone who has committed a criminal act on the territory of Serbia and Montenegro.<sup>113</sup> There are basically three articles that allow the prosecution of persons for crimes committed abroad. Article 105 FRY Criminal Code (articles mentioned in this section are those of the Criminal Code) stipulates that the *primary real principle* is applied to persons who commit the act of counterfeiting currency or acts against the constitutional order or security of FRY in a third country. Article 106 sets out the active personality principle. Accordingly, Yugoslav law applies to a Yugoslav citizen who has committed a criminal act abroad, provided he is found on the territory of the FR Yugoslavia or has been extradited to the FR Yugoslavia.

Article 107 (1) enshrines the passive personality principle according to which Yugoslav law is applied to foreign nationals who commit a criminal offence against a Yugoslav citizen in a third country in those cases where the foreign national is apprehended in Yugoslav territory or is extradited to this country.<sup>114</sup> In the cases referred to in Articles 106 and 107, prosecution shall, pursuant to Article 108 (2), not be instituted in the FR Yugoslavia if the perpetrator has completely served the sentence to which he/she has been sentenced abroad; if the perpetrator has been acquitted by a legally binding foreign judgment, or if his/her punishment has been barred by lapse of time, amnestied or pardoned abroad or if the criminal act in question may, according to the applicable foreign law, only be prosecuted upon request by the damaged party and such a request has not been filed. In all other cases relating to the active and passive personality principle, prosecution shall be instituted only if the act committed is also punishable in the FR Yugoslavia and, if the

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<sup>111</sup> Such as the Centre for Rehabilitation of Torture Victims in Belgrade.

<sup>112</sup> See for a critique of the mandate of the Commission the letter of April 15, 2001 by Professor Vojin Dimitrijevic, Director of the Belgrade Centre for Human Rights, to President Kostunica, [www.bgcentar.org.yu](http://www.bgcentar.org.yu).

<sup>113</sup> Article 104 Federal Criminal Code. All subsequent references to Yugoslav citizens and the territory of the FR Yugoslavia are to be read as to apply to citizens of the Republic of Serbia and Montenegro and the territory of Serbia and Montenegro.

<sup>114</sup> Art. 107, Federal Criminal Code: "(1) Yugoslav Criminal law applies also to a foreign national who has committed a criminal act against Yugoslavia or its citizen outside territory of the FRY, when the acts in question do not belong to the group of acts referred to in article 105 of this law, provided that a foreign national is found on the territory of the FRY or has been extradited to the FRY."

criminal act is not punishable under the law of the country of commission, prosecution may be instituted only upon the approval of the competent Public Prosecutor.

Article 107 (2) provides for the exercise of universal jurisdiction for all crimes carrying a term of imprisonment of five years or more where the perpetrator is present on the territory of the Republic and is not extradited to a foreign country.<sup>115</sup> Thus, most criminal offences applicable in lieu of torture do not fall within the ambit of Article 107 Criminal Code. The prosecution in such cases is subject to the approval on the part of the Federal Public Prosecutor, which is regardless of the law of the country in which the criminal act has been committed in those cases where, at the time of the commission, the act in question was considered a criminal act in accordance with the general legal principles recognized by the international community.

Foreign diplomats are immune from proceedings according to the rules laid down in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations which Yugoslavia has ratified and is binding on the Republic of Serbia and Montenegro. In the event of any doubt as to the status of such persons, the court will consult the Federal Ministry of Foreign Affairs.<sup>116</sup>

### 1.1.2. Extradition Law

Extradition is governed by the Federal Criminal Procedure Code which contains a chapter entitled "Procedure for Extradition of Accused and Convicted Persons." Article 539 FRY CPC lays down the general principle that the accused or convicted persons may be extradited in accordance with international treaties or, if there is no treaty or the particular matter is not regulated by international treaty, extradition will be pursuant to Yugoslav legislation. According to Article 540 (1) FRY CPC, the requirements for extradition shall be: (1) that the person whose extradition is requested is not a Yugoslav citizen; (2) that the act for whose commission extradition is requested has not been committed in the territory of the Federal Republic of Yugoslavia, against it or its citizen; (3) that the act for whose commission extradition is requested is a criminal offence under both national law and the law of the country in which it was committed; (4) that the statute of limitations for criminal prosecution or execution of criminal sanctions has not expired under national law, or that the criminal offence is not subject to an amnesty; (5) that the foreign national whose extradition is requested has not already been convicted or acquitted of the same offence by a national court, except if criminal proceedings are to be held *de novo* in accordance with the provisions of the present Code; or if criminal proceedings have not been instituted against the foreign national for the same offence against the Federal Republic of Yugoslavia; or if proceedings have been instituted for an offence committed against a Yugoslav citizen and bail has been posted enabling the injured party to realize his claim; (6) that the person whose extradition is sought has been positively identified; (7) that there is sufficient

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<sup>115</sup> "(2) Yugoslav criminal law applies to a foreign national who commits a criminal act against a country or another foreign national in a third country, for which this law provides imprisonment for a term of five years or a heavier penalty, provided that the perpetrator is found on the territory of the FRY and is not extradited to a foreign country. Unless it is stipulated otherwise in this Code, in such a case the court may not impose a heavier punishment than the one prescribed."

<sup>116</sup> Art. 219, FRY CPC.

evidence to believe that the foreign national whose extradition is sought has committed the specified criminal offence or has been convicted of it.

If the designated court establishes that the requirements for extradition have been met, the case is forwarded to the Federal Justice Minister who decides whether or not the person will be extradited.

On 11 April 2002 a law on transfer of indictees to the ICTY was adopted.

## **1.2. The Practice**

There are no known cases in which perpetrators of torture have been tried in the FR Yugoslavia or the Republic of Serbia and Montenegro on the basis of the exercise of universal jurisdiction. However, in a case that caused considerable political controversy concerning the modality of transfer, the former President Milosevic was transferred to the ICTY in The Hague in 2001. Several other indicted persons have also been transferred to the Hague or have given themselves up voluntarily while others still remain at large.

## **2. Claiming reparation for acts of torture committed in third countries**

### **2.1. The Law**

The Law on Resolving Conflicts with Regulations of Other Countries ("Law on Resolving Conflicts") governs legal disputes having a foreign element. According to Article 46 of this statute, a national court may have jurisdiction in cases of torture if one or more of the following preconditions are present: the defendant is domiciled in the FRY (Republic of Serbia and Montenegro); the defendant has his seat in the FRY, or if the defendant is a resident in the FRY. If the court has jurisdiction, it will in tort cases apply the legislation of the territory in which the action took place or the place where the consequences occurred, depending on which is more favourable for the plaintiff, unless otherwise regulated.

A victim of torture committed abroad may also claim compensation as part of criminal proceedings instituted on the basis of universal jurisdiction.

Foreign diplomats are immune from proceedings according to the rules laid down in the Vienna Convention on Diplomatic Relations.

The Law on Resolving Conflicts is silent on the question of legal action taken against foreign States.

### **2.2. The Practice**

There are no known cases in which victims of torture from third countries have filed suits for damages against the perpetrators of torture or foreign States for acts of torture committed abroad before courts in the FR Yugoslavia or the Republic of Serbia and Montenegro.