Montenegro
The right to redress and reparation for the families of the "disappeared"

Amnesty International is concerned about the failure, to date, of the Montenegrin authorities to ensure reparation, including redress and compensation, to the surviving victims and relatives of the deceased victims of human rights violations which took place in 1992.

Specifically, the organization is concerned at the failure of the Montenegrin authorities to ensure the prompt initiation of an independent, impartial investigation into the "disappearances" and to bring to justice those responsible for the arrest and subsequent enforced disappearance of some 83 Bosnian Muslim (Bosniak) civilians, apparently "deported" from Montenegro to the then-Republic of Bosnia and Herzegovina in 1992. Amnesty International is also concerned at the subsequent failure of the authorities to ensure adequate redress and reparations to the survivors and relatives of the "disappeared". In addition Amnesty International is concerned at the apparent lack of institutional independence generally shown by the State Prosecutor and the judicial authorities in relation to civil and criminal proceedings related to these enforced disappearances.

Amnesty International considers these 83 persons to be "disappeared". The organization considers that an enforced disappearance has occurred whenever there are reasonable grounds to believe that a person has been deprived or their liberty (including by arrest, detention or abduction) by state agents or with the consent, acquiescence, authorization or support of the state , and the authorities deny that the victim is in custody, or conceal or refuse to disclose any other information on the person's whereabouts or fate, placing the person outside the protection of the law.

Enforced disappearances are a clear and flagrant violation of fundamental human rights, enshrined in a number of international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

It is well settled in international law that enforced disappearances violate the right to life (Article 6 of the ICCPR and Article 2 of the ECHR), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7 of the ICCPR and Article 3 of the ECHR), and the right to liberty and security of person and the prohibition of arbitrary detention (Article 9 of the ICCPR and Article 5 of the ECHR). Furthermore enforced disappearances deprive the "disappeared" person of their right to recognition as a person before the law (Article 16 of the ICCPR) and to be afforded equal protection by the law (Article 26 of the ICCPR), and to the right to a fair trial (Article 14 of the ICCPR and Article 6 of the ECHR). In addition an enforced disappearance violates the right of the victim and their family to respect for family life (Article 17 of the ICCPR and Article 8 of the ECHR), and states have been held accountable for the suffering caused to family members

amounting violations of the prohibition against torture and other ill-treatment. As enforced disappearances can violate several human rights simultaneously, they have been referred to as "multiple" or "cumulative" human rights violations.

Amnesty International welcomes the fact that finally in October 2005, 13 years after the events outlined above, the Montenegrin State Prosecutor took steps to initiate investigations into six former law enforcement officers suspected of participation in the "deportation" of the Bosnian Muslim civilians. The organization regrets, however, that the investigative judge did not issue witness summons, including to the relatives of the disappeared living in Bosnia and Herzegovina (BiH) until over a year later, in November 2006.

Amnesty International notes the response it received on 24 November, from Vesna Medenica, Supreme State Prosecutor on behalf of Miraš Radović Minister of Justice, to its letter sent the Minister of Justice on 29 March 2006. In her letter the Supreme State Prosecutor reports measures taken by the Higher State Prosecutor in January and August 2005 urging the Investigative Judge of the Higher Court of Podgorica to open an investigation. The organization also notes that in September 2006, the Higher State Prosecutor also wrote to the President of the Supreme Court of the Republic of Montenegro emphasising "the importance of an efficient procedure in this case, the importance of respecting the legal deadlines of Montenegro's legislature as well as emphasis on his readiness to fight against war crimes".

The organization welcomes these measures. In this context, Amnesty International notes that those who have been summoned as witnesses have made applications that they be allowed to testify in courts in BiH. The organization understands that these applications have not yet been approved by the court. In the interests of justice, and bearing in mind the previous failures of the authorities in Serbia and Montenegro to provide adequate witness protection for witnesses in proceedings in the Sjeverin trial during 2003, [1] Amnesty International urges the authorities to take measures in cooperation with courts in BiH to ensure that witnesses may provide their testimony by a video link.[2]

[1] See Amnesty International, *Serbia and Montenegro: A wasted year. The continuing failure to fulfil key human rights commitments made to the Council of Europe,* AI Index EUR 70/005/2005, p. 8.

[2] For such provisions elsewhere, see for example, *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance,* (ICC-PRES/01-01-06), http://www.icc-cpi.int/library/about/officialjournal/ICC-PRES-01-01-06_English.pdf. The understanding in Article 14 is that it would cover the use of EU videoconferencing facilities or, where they did not exist, hosting ICC facilities. Such provisions have also been used in domestic courts throughout the region, for example, for repatriated witness in cases of trafficking.

With respect to the civil proceedings for reparations, Amnesty International reminds the Montenegrin authorities that under Section A (2) of the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,* "A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".[3] The duty to provide reparations for victims of human rights violations is therefore not dependent on prosecution, although prosecution of the perpetrator may be considered an integral part of the right to redress.

Amnesty International is therefore concerned that the majority of the victims of this crime, including the surviving relatives of the victims of enforced disappearances, have not yet received reparation, and that the previous decision of the court to stay these proceedings has had the effect of further delaying their rights to redress guaranteed under international and regional standards and in the decisions of the European Court of Human Rights.

The right to an effective remedy, guaranteed under Article 2 (3) of the ICCPR-- to which Serbia and Montenegro (SCG), as a successor state to the Federal Republic of Yugoslavia (FRY), was a party and Montenegro is now a party-- requires states parties to:

"(a) [To] ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) [To]ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) [To] ensure that the competent authorities shall enforce such remedies when granted."

Further, although FRY was not at the time party to the ECHR, because of the continuing nature of this crime – which remains unresolved until the fate and whereabouts of the "disappeared" have been determined –and because SCG was a party until June 2006, Amnesty International considers that the provisions of the ECHR are also applicable.

In this particular case, the organization notes that the European Court of Human Rights has ruled that the respondent's failure to investigate cases of missing persons resulted in a continuing violation of the prohibition against torture and other ill-treatment set out in Article 3 of the ECHR and that "the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attained a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3",

[3] Adopted by General Assembly resolution 40/34 of 29 November 1985.

(*Cyprus v Turkey*, Judgment of the European Court of Human Rights, 10 May 2001, paragraphs 136 and 156-158).

Amnesty International further notes that the obligation of the authorities initiate a prompt, independent, thorough and impartial investigation and to ensure a remedy in such cases, are inherent in the obligations to afford redress and to respect and protect the rights to life and the prohibition of torture and other ill-treatment under the ICCPR and ECHR.

Between 19 May 1992 and 27 May 1992 some 83 Bosniak civilians, who had fled the armed conflict in BiH, were arrested in Montenegro by members of the Montenegrin police. They were subsequently transferred, in late May, into the hands of members of the then *de facto* authorities in the Republika Srpska (RS) in BiH, including to the Republika Srpska Army (Vojska Republike Srpkse, VRS) and to the RS police. With the exception of eight survivors, the 21 men who are believed to have been killed at the "KP Dom" prison camp in Foča in BiH and some six persons whose mortal remains were exhumed and identified at Sremska Mitrovica and Miljevina (see below), the fate and whereabouts of at least 34 persons, following their arrest, remains unknown.[4]

In a written reply to a Parliamentary Question dated 24 November 1992, the then-Minister of the Interior of Montenegro, Nikola Pejaković, stated that the deportation of some 69 men, whose names were listed for deportation from Montenegro in a document written by Montenegrin Ministry of Interior officials, was conducted after consultation with the Office of the State Prosecutor of Montenegro. According to this letter, these men were arrested and detained by the Ministry of Interior on the request of the RS authorities on suspicion of their involvement in serious crimes either during or just before the war in Bosnia and Herzegovina. The decision to hand these 69 men over to the RS military and law enforcement authorities was made by the prosecutor citing his inability "to prosecute the accused due to the difficulties in obtaining relevant material evidence and witness testimonies", and who subsequently authorised their "extradition", without any formal proceedings, access to a court, to a lawyer or to their families, and even though no arrangements for extradition were in force at that time.

Amnesty International is aware that, at that time, the Montenegrin authorities mistakenly did not consider these 83 persons to be refugees as understood within the meaning of the 1951 UN Convention relating to the Status of Refugees. However, it has been subsequently held, including in judgments of the Intentional Criminal Tribunal for the former Yugoslavia (Tribunal) in the *Tadić case*, that the Serbian (Montenegrin) border with Bosnia and Herzegovina was an internationally recognized border in 19 April 1992. The organization

[4] Amnesty International notes that the authorities have also failed to respond to requests filed in 2004 by the family of Malik Meholjić seeking information on his fate and whereabouts. Malik Meholjić, a pre-war mayor of Srebrenica, reportedly "disappeared" on 15 May 1992 from the police station in Bar. This case (no. 10000023) was communicated to the Government of Montenegro by the UN Working Group on Enforced and Involuntary Disappearances; it remains designated as "outstanding".

also notes that the State Prosecutor of Montenegro (in a motion discussed further below) has subsequently considered these persons to have been refugees as defined by the 1951 Refugee Convention.

According to a reply by the Montenegrin authorities to a relative of one of the "disappeared" persons, these persons were deported "in order to be exchanged in Bosnia for apprehended Serb territorial fighters" (Letter to Danijela Stupar Titorić, August 1992).

According to the judgement of the Tribunal in the case of *Krnjelac* (Case No: IT-97-25-T, 15 March 2002, paragraphs 190-1), 21 of these persons were transported from the police station at Herceg-Novi in Montenegro and taken to the "KP Dom" prison camp in Foča in present-day Bosnia and Herzegovina, then under the control of the *de facto* Bosnian Serb authorities. On their arrival at "KP Dom" on 25 May 1992, the men were met by a group of 10 individuals in uniform who beat them as they got off the bus. It is believed that the majority of these 21 men were subsequently unlawfully killed at "KP Dom" in Foča.[5]

The bodies of four out of the 23 men "deported" by bus from Herceg-Novi on 28 May 1992, who were reportedly to be transferred to the Srebrenica police, were subsequently discovered in a river at Sremska Mitrovica, having been buried there in 1992. The bodies of these men were subsequently exhumed, and forensic examinations concluded that they had been shot. The identity of four of these men was confirmed by DNA analysis in 2005, but the remaining 19 bodies have not yet been found. The fate and whereabouts of over 35 of the remaining "deported" persons remains unknown although, according to the deportation order, they were to be handed over to police officials in Čajniče, Srebrenica, Foča and Trebinje, in Bosnian-Serb occupied territory.

A letter made available to Amnesty International indicates that the enforced disappearances were reportedly stopped following an intervention by the Office of the United Nations High Commissioner for Refugees (UNHCR). This letter was sent by the UNHCR office in Stockholm, Sweden to the family of one of the "deported" men, Muhamed Pilavdžić, who was arrested and deported from Herceg-Novi into the custody of the Srebrenica police force in Bosnian Serb-occupied territory on 27 May 1992, stating that they had been aware of the deportations and that they had intervened to stop them.

Since 2004, lawyers acting for the families of the disappeared men and for the survivors have filed some 36 cases with the Podgorica court seeking reparations. Because of the long delays in scheduling the hearings, lawyers acting for the families first applied to the Basic (First Instance) Court, and subsequently filed an additional application at the newly formed Office for the Claims of Citizens on Performance of the Courts, at the Supreme Court of Montenegro. Hearings at Podgorica Basic Court were subsequently scheduled for late in 2005: the first case was due to be heard on 20 October 2005.

[5] In November 2006 the bodies of two of the men "deported" from Herceg-Novi to Foča were exhumed at the Miljevina mass grave near Foča, and subsequently identified.

On 18 October 2005, two days before the first civil hearing was due to take place, the Montenegrin State Prosecutor filed a request with the Criminal Department of the High Court to authorize the opening of a criminal investigation against six men suspected of war crimes against the civilian population, namely participation in the "deportation" (Kt. Br, 263/05, dated 18 October 2005). This motion to initiate a criminal investigation was not approved by the High Court until 18 February 2006, some four months later.

Amnesty International understands that proceedings in three civil cases for reparation due to be heard were then delayed on the grounds that the Office of the State Prosecutor, acting for the state of Montenegro, (the defendant in these civil proceedings), had requested a stay in those proceedings under Article 280 of the Montenegrin Civil Procedures Act. The stay had been requested until such time as individual criminal responsibility has been determined in the above criminal investigation, on the basis that it could not be determined whether a war crime had been committed until individual criminal responsibility had been established in criminal proceedings.

In only one of these four civil cases, did the judge reject the request of the State Prosecutor to delay proceedings. Proceedings were stayed in the three other cases until, between five and seven months later, the Civil Department of the High Court quashed the decisions to stay.

Following the court's decision on 28 June 2006, in proceedings at Podgorica District Court, the court acknowledged that Sanin Krdžalija, a professional musician then aged 22, had been unlawfully deported to Foča in 1992 in violation of the 1951 Refugee Convention. His mother and sister were awarded damages for the emotional pain caused by his death. However, their application for reparations for their suffering due the failure of the authorities to open an investigation into the "disappearance" – which the European Court of Human Rights has held may amount to inhuman and degrading treatment under Article 3 of the ECHR – was dismissed.

Similarly on 18 September 2006 Podgorica District Court issued a decision awarding damages to the relatives of Suad Karačić, a 26-year old waiter, who was deported and killed at Foča. On 17 November, the wife and four children of Izet Tufekčić, originally from Višegrad in BiH, were awarded €120,000 for the emotional pain caused by the death of their relative. In both cases applications for reparations for their suffering due the failure of the authorities to open an investigation into the "disappearance" were dismissed.

Amnesty International understands that, in each of the six cases which have been heard to date, the state of Montenegro has subsequently appealed against the decision, on grounds including that there had been no causal link between the actions of the Montenegrin police in detaining the "disappeared" and handing them over to the de facto military and police authorities of the Republika Srpska, and their subsequent deaths.

Amnesty International reminds the authorities that but for their action, those persons might still be alive, and that in handing over such persons to the de facto RS authorities, the actions of the Montenegrin police ensured the concealment of their whereabouts, placed them outside the protection of the law and constituted an act of enforced disappearance, a crime under international law. The actions of the Montengrin authorities, in authorising their enforced disappearance also constituted *refoulement*, in violation of international law.

According to international human rights law, at all stages of their arrest and unlawful detention to his transfer out of the country, Montenegrin officials are responsible for the violations suffered, and may be considered complicit in the alleged violations by the RS authorities.

Amnesty International also notes with concern that on 15 September 2006 Podgorica District Court dismissed the claim for compensation brought by the relatives of Safet Buljubasić, who had been "deported" and "disappeared", on grounds that the claim was time-barred.[6] In doing so, the court reasoned that the statute of limitations for ordinary damages (compensation claims arising from any kind of damage, not necessarily caused by a criminal act ranging from three to five years) should be applied to the compensation claim.

The court began calculating this period of time from 1998, when in the context of his wife's making a claim to recuperate Safet Buljubašić's pension for the benefit of their three children, Safet Buljubačić's death was proclaimed at the Municipal Court in Goražde (Decision 185/98, 18 August 1998). Amnesty International notes that this is inconsistent with at least four other decisions by the same court, and indeed with the opinion of the Basic State Prosecutor at Podgorica District court (as set out in the letter received by Amnesty International from the Montenegrin authorities, see above).

Amnesty International regrets this ruling by the Podgorica District Court which it considers is inconsistent with the principle that there should be no statue of limitations with respect to international crimes including enforced disappearance; but even when a statute of limitation is applied, it shall not be effective in relation to actions brought by victims, including relatives, seeking reparation.[7]

[6] According to evidence presented to the court, Safet Buljubasić, a mechanic (born 1950), his wife and three daughters had in April 1992 fled from Goražde, BiH, and had sought shelter at Baosići camp in Montenegro. On 26 May 1992 he was arrested, and according to evidence - including the then Minister of Interior's answer to a parliamentary inquiry in 1993 in which he was listed among 37 persons being "deported" to Srebrenica - was delivered to the *defacto* Bosnian Serb authorities on 27 May 1992.

[7] Principle 23 of the Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102 and Add.1)**,** which reads, " Prescription - of prosecution or penalty - in criminal cases shall not run for such period as no effective remedy is available. Prescription shall not apply to crimes under international law that are by their nature imprescriptible. When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.

Amnesty International is concerned that the State Prosecutor had used the criminal investigation to call on the civil court to stay civil proceedings for reparations. The organization considers there are no reasons in law for the two sets of proceedings to be connected or for progress in civil proceedings to be impeded by a delay in bringing criminal prosecutions.

Principle 11 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law (hereafter, "the UN Basic Principles", adopted by the UN General Assembly, 60th session, 24 October 2005), places an obligation on states to provide victims with the right to a remedy, including, "(a) Equal and effective access to justice; (b) Adequate effective and prompt reparation for harm suffered". Principle 8 makes it clear that "the term 'victim' also includes the immediate family or dependents of the direct victim".

Amnesty International notes that the civil cases for reparations before the courts have been brought against the government of Montenegro, and not against the six suspects under investigation. The organization also notes that, under the Montenegrin law and the UN Basic Principles quoted above, there is no requirement that individual criminal responsibility must be determined before civil proceedings for reparations may be heard. In the event that individuals are found in criminal proceedings to be responsible for these violations, then they may be ordered, to compensate the state Principle 15 of the UN Basic Principles states: "in [such] cases where a person or legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to a victim or compensate the State if the State has already provided reparation to the victim" [emphasis added].

Given that at the time of each of the first civil hearings, the criminal investigation had not yet started, and given the length of proceedings in other war crimes cases in Montenegro, Amnesty International is seriously concerned that the initiation of a criminal investigation may have been used as a pretext to delay the progress of proceedings in the civil courts for reparations for the victims of the 1992 deportations and their families.

As noted above, the government of Montenegro has an obligation to provide the surviving victims and the families of the deceased with full reparation for the enforced disappearance of their family members and for the suffering arising there from, including compensation, rehabilitation, satisfaction and guarantees of non-repetition. The organization notes that still 14 years on, the families of the deceased have still not been fully informed of the fate of their loved ones; in some cases the bodies of their relatives have only recently been exhumed, and in others the fate and whereabouts remains unknown.

The organization notes that in the civil proceedings which have taken place to date, the court has failed to recognize the continuing pain and suffering of the relatives of the disappeared which derive from the failure of the Montenegrin authorities over 14 years to take measures, including through criminal investigations, to inform the families of the fate or whereabouts of the disappeared. As already noted, this has been held to be a violation of the

rights of the relatives of the disappeared by the European Court of Human Rights. Amnesty International notes that the jurisprudence of the ECHR in cases of enforced disappearances has been applied by the Bosnia and Herzegovina Human Rights Chamber. [8]

An inherent characteristic of an enforced disappearance is the continuing nature of this violation, which persists as long as the fate and whereabouts of the victims have not been established and as long as no one has been brought to justice. The UN Draft Declaration on Disappearances states expressly in Article 17: "1. Acts constituting enforced disappearances shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified." [9]

Legislation in Montenegro allows for the possibility of bringing civil suits for damages against both public officials and non-state actors for violations of national law, while international standards indicate that the state is also obliged to offer reparation, including compensation, to victims of serious crimes, including human rights violations. These obligations have been reiterated in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. The definition of reparation in this document includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Recommendations

Amnesty International urges the Ministry of Justice to ensure that the victims and the relatives of the deceased are provided with prompt and unrestricted access to reparations through the national courts, or through administrative systems established for this purpose.

Amnesty International also calls on the Ministry of Justice to ensure that criminal proceedings against all those suspected of involvement in, or complicity with the 1992 "deportations" – including officials at all levels of government – are conducted promptly, thoroughly and effectively, so that the perpetrators may be brought swiftly to justice.

Amnesty International urges the authorities to make the necessary arrangements with the authorities in BiH to ensure that persons summonsed to appear as witnesses in proceedings

[8] See for example: Case No. CH/99/3196, *Avdo and Esma Palić against the Republika Srpska* (Decision on admissibility and merits, 11 January 2001); Case No. CH/99/2150, *Dordjo Unković against the Federation of Bosnia and Herzegovina* (Decision on admissibility and merits, 9 November 2001).

[9] See also Article 8 (1) (b), International Convention for the Protection of Persons from Enforced Disappearances, (A/C.3/61/L.17), adopted by the General Assembly Third Committee, 27 October 2006.

against those suspected of responsibility for these enforced disappearances be allowed to be heard via a video-link from a suitable court in BiH.