



**Follow-Up Report on the Implementation by
Bosnia and Herzegovina of the Recommendations issued
by the Working Group on Enforced or Involuntary Disappearances**

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CONTENTS

Contents	Paragraphs
Background	
1. The Failure to Implement the Law on Missing Persons	1
1.1.1 The Functioning of the Missing Persons Institute (MPI)	2-7
1.1.2 The Completion of the Central Records of Missing Persons (CEN)	8
1.1.3 The Non-establishment of the Fund for the Support of Families of Missing Persons	9-10
2. The Pace of Exhumations of Missing Persons	11-16
3. The Status of Draft Legislation Relevant for Victims of Enforced Disappearance and Their Relatives	17-19
3.1 The Draft National Strategy on Transitional Justice	20-22
3.2 The Draft Law on the Rights of Victims of Torture	23-26
3.3 The Draft Law on Free Legal Aid	27-28
4. The Obligation to Declare Missing Persons Dead in Order to Access Monthly Disability Pensions	29-33
5. The Inadequacy of Domestic Criminal Legislation on Enforced Disappearance	34-39
6. The Application of the Criminal Code of the Socialist Federal Republic of Yugoslavia instead of the 2003 Criminal Code	40-75
7. The Lack of Information on Prosecutions	76-77
8. The Provision of Psychological Support and Protection to Witnesses and Victims of War Crimes	78-88
9. The Ongoing Discrimination in Access to Disability Pensions and the Lack of A National Programme on Reparations and of A National Law on Memorials	89-96
10. Other Matters of Concern	97
10.1 The Implementation of the National War Crimes Processing Strategy	98-101
10.2 The Limitations to the Freedom of Expression and the Right of Peaceful Assembly with regard to Associations of Victims of War from the Prijedor Area	102-113
11. Conclusions and Recommendations	114-115
12. The Associations Submitting this Follow-up Report	

Background

From 14 to 21 June 2010 the Working Group on Enforced or Involuntary Disappearances (WGEID) visited Bosnia and Herzegovina (BiH).

During the visit, representatives of the associations submitting the present report met with members of the WGEID and had the chance to present the main problems faced by relatives of disappeared persons.

In **December 2010** the WGEID issued its **report on the mission to BiH** (doc. A/HRC/16/48/Add.1) that contained a number of **recommendations** to the country.

In **March 2011** TRIAL organized a 2-day event in Sarajevo, where representatives of associations of relatives of missing persons, together with representatives of institutions working on this subject, were present. During the event the recommendations of the WGEID were analyzed and discussed.¹ A document containing the “priority recommendations” was drafted and signed by associations of relatives of missing persons attending to the event and circulated among competent authorities.

In the subsequent months the associations submitting the present report met regularly with authorities and monitored the implementation of the WGEID’s recommendations.

1. The Failure to Implement the Law on Missing Persons

1. One subject of particular concern is the **ongoing non-implementation of crucial provisions of the Law on Missing Persons** (Official Gazette of BiH No. 50/04) which entered into force on 17 November 2004. This piece of legislation aims at establishing a comprehensive regime to deal with missing persons, defined as an individual “about whom his family has no information and/or is reported missing on the basis of reliable information as a consequence of the armed conflict that happened on the territory of the former SFRY” (Art. 2). The law applies to persons who went missing in the period from 30 April 1991 to 14 February 1996 and it contains provisions recognizing, among others, the right to know the fate of missing persons (Art. 3) and the obligation to provide information (Art. 4). Almost ten years after the entry into force of the Law on Missing Persons and despite reiterated recommendations by international human rights mechanisms in this sense, to date several provisions of the law remain dead letter.²

1.1.1 The Functioning of the Missing Persons Institute (MPI)

WGEID’s Recommendations (para. 78)

- The MPI be supported and strengthened. In particular, its independence should be guaranteed.
 - More resources be put at the disposal of the MPI to allow it to do its work.

¹ On such occasion, and repeatedly afterwards, the association *Izvor*, which is also subscribing this document, criticized the contents of the report issued by the WGEID, as it allegedly did not reflect the information provided by representatives of *Izvor* during the meetings held with members of the WGEID.

² Art. 24, para. 1, of the Law on Missing Persons provides that: “the BiH Ministry of Human Rights and Refugees shall oversee the enforcement of this Law”.

- All available technology necessary to detect graves and to exhume them be provided to the institution.
- The Council of Ministers also strengthen the independence and autonomy of the MPI by detailing these issues in the law.
 - More independence and autonomy be given to the MPI by amending the relevant legislation.
 - The vacant posts of the management board of the MPI be filled.
 - The MPI be provided with more political and financial support.
 - MPI be supported to a greater extent by the Republika Srpska.

Para. 76

The International Commission on Missing Persons should remain actively engaged in BiH in the future.

2. Art. 7 of the Law of Missing Persons provides for the establishment of the MPI, mandated to improve the process of tracing missing persons and expedite identifications of mortal remains of missing persons. The MPI became fully operational only from 1 January 2008. Despite the recommendations from international mechanisms, including the WGEID,³ the MPI is **experiencing troubles with regard to the appointment of the members of its different managing bodies**.
3. The MPI is composed of three management bodies, namely: a six-member Steering Board, a three-member Supervisory Board and a three-member Board of Directors. The staff reports to the Board of Directors, which reports to the Steering Board, which reports to the founders;⁴ while the Supervisory Board is a reviewing body that reports to the two other management boards and to the founders. There is also an Advisory Board, composed by representatives of associations of relatives of missing persons (so far composed by two Bosniak, two Bosnian Serb and two Bosnian Croat members).⁵ The members of these associations also participate in the work of the Steering Board, but without the right to vote.
4. On 30 June 2012 the mandate of the members of the Board of Directors expired and those currently holding the posts are doing so *ad interim* pursuant to a mandate of technical nature.⁶ A call for the election of new members was issued at the end of June 2012 and the process remains ongoing more than one year later. With regard to the members of the Steering Board, they are also holding the posts

³ Committee against Torture (CAT), *Concluding Observations on BiH*, doc. CAT/C/BIH/CO/2-5 of 19 November of 2010, para. 24 (a); and WGEID, *Report on the Mission to BiH*, doc. A/HRC/16/48/Add.1 of 16 December 2010, para. 78 (hereinafter "Report on the Mission to BiH").

⁴ The International Commission on Missing Persons and the Council of Ministers of BiH. An English version of the Agreement on Assuming the Role of Co-founders of the MPI can be found at: www.ic-mp.org/wp-content/uploads/2007/11/agreement_en.pdf.

⁵ It must be noted that, while in BiH access to power or positions should be granted to Bosniaks, Bosnian Croats, Bosnian Serbs and to "others" (including, for instance, Roma, Jews, or those who identify themselves simply as Bosnian-Herzegovinians), at present the organizational structure of the MPI includes no representation of the "others" category in its organizations structure.

⁶ The association *Izvor* holds that the fact that three persons sit in the Board of Directors, contrary to the appreciation of the WGEID, must be regarded as a negative factor, as currently most of the time would be spent in trying to reach consensus instead of taking substantive decisions.

pursuant to a mandate of technical nature.⁷ Moreover, since 2008 there are five members instead of the six prescribed by the Law on Missing Persons.

5. In general, while the fact that members of an institution may hold a technical mandate for a limited period of time is natural, the same cannot be said if over the past three years a considerable number of posts in the managing bodies of the MPI have formally been vacant or held *ad interim*. Such a situation does not contribute to the regular functioning of an institution or to the overall perception of trustworthiness when it comes to public scrutiny. Furthermore, representatives of associations of relatives of missing persons also expressed concerns because of the alleged presence of people who have political affiliations within the managing bodies of the MPI⁸ and stressed that this undermines the overall credibility of the institution.
6. Finally, it must be stressed that there have been **rumours concerning a possible reduction of the presence in BiH** of one of the two founders of the MPI, i.e. **the ICMP**. Although discarded by the latter, this news has generated a climate of concern among associations of relatives of missing persons in the country.⁹
7. However, among others, the discovery in 2013 of a mass grave in Tomašica containing a significant number of mortal remains¹⁰ prompted the ICMP to launch a 3-year project to be implemented between January 2014 and December 2016 to support the Prosecutor's Office of BiH and the MPI, providing them assistance in the forensic work related to the mentioned mass grave. According to representatives of the ICMP, while it is sure that the organization will continue providing technical assistance to BiH authorities with regard to the process of identification of mortal remains, they are indeed considering relocating the headquarters of the organization in a different country in Western Europe. At the same time, **the ICMP intends to withdraw from the agreement as co-founder of the MPI and to leave the corresponding responsibilities with the Council of Ministers of BiH.**

1.1.2 The Completion of the Central Records of Missing Persons (CEN)

WGEID's Recommendations (para. 75)

The CEN should be completed as soon as possible and be made public with the listing of the ethnic origin of those classified as missing.

8. Art. 21 of the Law on Missing Persons provides for the creation of the CEN, intended to include all

⁷ The association *Izvor* wishes to stress that, in their opinion, the elections of members of the Steering Board were not conducted in a transparent manner. *Izvor* filed a number of complaints regarding this matter, but they allegedly never received any formal reply.

⁸ In this sense, it must be recalled that Art. 5 of the Law on Missing Persons clearly establishes that "*officials with duties related to the tracing of missing persons cannot carry out this duty if they are members of steering or other boards, or executive bodies, of political parties, or if they are politically engaged representatives, and must not follow political party instructions*" (emphasis is added).

⁹ See in this sense Balkan Insight, *ICMP to Finish its Work in Bosnia and Herzegovina*, 15 June 2012, at <http://www.balkaninsight.com/en/article/icmp-finished-70-per-cent-identification-in-bosnia>.

¹⁰ *Infra* para. 12.

records that were or are kept at local or Entity levels, by associations of families of missing persons and other associations of citizens, Tracing Offices of the organizations of the Red Cross in BiH, as well as international organizations. Art. 22, para. 4, of the Law on Missing Persons prescribes that “verification and entry of previously collected data on missing persons into CEN should be completed by the competent authority *within a year* of the date of the establishment of the MPI” (emphasis added). This means that the process of verifying and entering data in the CEN *should have been completed by 1 January 2009*. Despite the repeated recommendations in this sense issued by various international human rights mechanisms,¹¹ **at February 2014 the CEN has not been completed yet**. It currently contains data of a total of 34,964 missing persons whose status needs to be additionally verified. Since November 2012, the status of more than 2,000 people has been verified.¹² Despite the deadlines clearly set by the Law on Missing Persons, representatives of the MPI allege that “it is impossible to predict the date of finalization of the verification”. This situation is clearly a source of deep distress for relatives of missing persons.¹³

1.1.3 The Non-Establishment of the Fund for the Support of Families of Missing Persons

WGEID’s Recommendation (para. 84.a)

The Fund for Support to the Families of Missing Persons provided for by the Law on Missing Persons be established as a matter of priority.

9. Art. 15 of the Law on Missing Persons prescribes the creation of a Fund for the Support of Relatives of Missing Persons (“the Fund”), intended to be a means of support for families of missing persons in BiH. Paragraph 2 of the provision indicates that a decision on the setting up of the Fund “shall be issued by the Council of Ministers of BiH *within 30 days from the date of the coming into force of the Law*” (emphasis is added). The same was provided for the organization of issues related to the work of the Fund. Given that the Law on Missing Persons entered into force on 17 November 2004, a decision on the establishment of the Fund **should have been issued by the Council of Ministers of BiH by 17 December 2004**.
10. Despite reiterated recommendations issued from international human rights mechanisms,¹⁴ **at February 2014 the Fund does not exist yet. BiH authorities do not show any willingness to address this**

¹¹ CAT, *Concluding Observations on BiH*, *supra* note 3, para. 24 (c); and WGEID, *Report on the Mission to BiH*, *supra* note 3, paras. 24 and 75.

¹² The association *Izvor* is contrary to the manner in which data are being entered in the CEN, as it does not allow determining with certainty the number of missing persons whose mortal remains are to be discovered.

¹³ The Association of Relatives of Missing Persons of the Sarajevo-Romanija Region alleges that two members of the Board of Directors of the MPI would forbid the publication of the preliminary list of missing persons entered in the CEN on the website of the MPI. In the view of this association, the publication of this list would facilitate the tracing process of missing persons.

¹⁴ See, among others, CAT, *Concluding Observations on BiH*, *supra* note 3, para. 24 (b); and WGEID, *Report on the Mission to BiH*, *supra* note 3, para. 84 (a).

matter.¹⁵ It has to be stressed that, besides being an ongoing breach of BiH's international obligations, the non-establishment of the Fund causes serious damage to relatives of missing people who are denied their right to obtain support and compensation. Associations of relatives of missing people throughout the country express their deep concern because of this situation and their loss of trust towards domestic institutions. Many of their members are dying without having ever realized the rights they are entitled to, and without having ever obtained any form of support from the Fund. Finally, it must be noted that the **non-establishment of the Fund amounts also to non-implementation of a significant number of decisions delivered by the Constitutional Court of BiH on the subject of missing people, whereby the payment of compensation to relatives recognized as victims of grave human rights violations was associated to the establishment of the Fund, which was expressly ordered by the Constitutional Court of BiH.**

2. The Pace of Exhumations of Missing Persons

WGEID's Recommendations (para. 79)

The number of prosecutors working on exhumations and war crimes prosecutions is extremely low. They also have few resources and staff. In this connection:

- Additional staff should be appointed to accelerate the process.
- Those working on exhumations should be provided with needed assistance and equipment.
- To speed up the process, need additional forensic pathologists should be provided.
- More resources should be given to the people working in this area to enable them to complete these gruelling tasks.

11. Since 1st January 2011, all exhumations and identifications of mortal remains fall under the jurisdiction of the State Prosecutor's Office. However, it is **only until March 2012 that a prosecution team comprised of a prosecutor, a legal officer and an investigator started to operate in full capacity.** The newly appointed prosecution team received a total of 183 exhumation cases in 2012, in which the exhumation orders were not enforced. Out of this number, the Prosecutor's Office of BiH filed proposals for issuing exhumation orders in 94 cases, which were all accepted by the Court of BiH. From January to June 2012 there have been 85 exhumations. This number is somehow the source of concerns, given that the Prosecutor's Office of BiH declared that in 2012 it planned to "work on approximately 350 cases

¹⁵ The association *Izvor* wishes to state that, in their view, also the Ministry of Human Rights and Refugees must be held responsible for the non-establishment of the Fund, because they did not foresee adequate mechanisms to set it up when the Law on Missing Persons was drafted. *Izvor* further stresses that there is no effective remedy that can be used to challenge the non-implementation of the provisions of the Law on Missing Persons concerning the establishment of the Fund.

of exhumation”.¹⁶

12. Between October 2012 and September 2013 the Prosecutor’s Office of BiH coordinated the process of exhumation on 108 locations across the country.¹⁷ Most notably, in September 2013 a mass grave was discovered in Tomašica, near Prijedor.¹⁸ This mass grave is likely to contain the bodies of some of the estimated 1,200 civilians still registered as missing after being held at one of the area’s notorious detention camps or after having been taken from their homes, arbitrarily killed there, and having their mortal remains transported to Tomašica. The discovery of this mass grave is the source of renewed hope for local associations of relatives of missing persons, who hope to finally be able to find the remains of their loved ones and to mourn, honour and bury them in accordance with their religious beliefs and customs. For this reason, local associations were disappointed when access to the area was restricted for their members, in order to rather facilitate the official visit to the site of Ambassador Peter Sørensen, EU Special Representative for BiH.
13. Another problematic case concerning the carrying out of exhumations has been reported by the Association of Relatives of Missing Persons of the Sarajevo-Romanija Region, according to which exhumations initiated on 22 July 2013 at a city dump in Buća potok were suspended on 30 August 2013 because the Prosecutor’s Office of BiH failed to pay the contractors in charge of the task. The operations were suspended for some months. In November 2013 in a press release circulated by the Prosecutor’s Office of BiH, it was mentioned that operations will be carried out despite bad weather conditions and that machinery of the Armed Forces of BiH will be deployed to accelerate the pace of exhumations.¹⁹
14. A source of concern for the subscribing organizations is that **the Prosecutor’s Office of BiH has meagre resources allocated for carrying out exhumations in 2014**. Apparently, only 500.000 KM (i.e. approximately 250.000 Euros) has been allocated for this purpose for the year. This amount is clearly insufficient.²⁰
15. To the knowledge of the subscribing organizations, **no additional forensic pathologists have been**

¹⁶ See in particular, Section I and II of the Court of BiH and Special Departments of the Prosecutor’s Office of BiH, *The Registry Quarterly Report – March 2012*, *supra* note 14, p. 26.

¹⁷ On the improvements in the pace of exhumations see also *EU Progress Report on BiH for 2013*, doc. SWD(2013)415 of 16 October 2013, p. 21.

¹⁸ See, *inter alia*, <http://www.dailymail.co.uk/news/article-2444015/Dozens-bodies-discovered-Bosnian-mass-grave-believed-victims-genocide-carried-Serb-forces.html> and <http://www.justice-report.com/en/articles/268-victims-remains-found-in-bosnia-mass-grave>.

¹⁹ See <http://www.tuzilastvobih.gov.ba/?id=2156&jezik=e>.

²⁰ The Association of Relatives of Missing Persons of the Sarajevo-Romanija Region wishes to express that in their view, the budget for exhumations should have been allocated to the MPI pursuant to Arts. 4 and 30 of the Law on Missing Persons and not to the Prosecutor’s Office of BiH. In their view, the pace of exhumations slowed down considerably since the Prosecutor’s Office of BiH is in charge of this task.

appointed since the visit of the WGEID to the country. One of the main problems in this area is the fact that to date **there is no Forensic Institute of BiH:** there is one for Republika Srpska, but allegedly understaffed and without the necessary professional training, and there is none for the Federation of BiH.

16. Furthermore, **relatives of missing persons continue not receiving any form of adequate psychological support during and after exhumations, remaining subjected to ongoing stress and instances of re-traumatization.**

3. **The Status of Draft Legislation Relevant for Victims of Enforced Disappearance and Their Relatives**

WGEID's Recommendations (paras. 82 and 90.a)

The Bosnia and Herzegovina National Strategy for Transitional Justice should be fully supported and funded.

An effective public system of free legal aid should be established to enable relatives of the disappeared persons to receive legal support if they cannot afford it.

17. Over the past years, a number of legislative initiatives were launched in order to bring BiH legal framework in line with international standards, pursuant to reiterated recommendations issued in this sense by international human rights mechanisms. Notably, some of these initiatives have now been **ongoing for over more than eight years, fostering first the illusions of victims of gross human rights violations, including enforced disappearance, during the war and then their frustration.** Despite pledges and assurances given by BiH in this sense, to the great disappointment of the associations subscribing the present document, **at February 2014 none of those initiatives has seen the light of the day. Time passes, BiH authorities fail to take any positive measure and indulge into lulls, while in the meantime victims of gross human rights violations continue claiming for their rights.**

18. The present document focuses on three major and long due initiatives, namely the draft National Strategy on Transitional Justice, the draft Law on the Rights of Victims of Torture, and the draft Law on Free Legal Aid.

19. In its recent concluding observations on BiH, the CEDAW recommended to BiH to “expedite the adoption of pending draft laws and programmes designed to ensure effective access to justice for all women victims of wartime sexual violence, including adequate reparation, such as the Draft Law on the Rights of Victims of Torture and Civilian War Victims, the Programme for Victims of Sexual Violence in Conflict and Torture (2013-2016) and the Draft Strategy on Transitional Justice aimed at improving access to justice; [...] expedite the adoption of the Draft Law on Legal Aid aimed at unifying the provision of free legal aid in the State party in order to facilitate access to justice for all women, in

particular those belonging to disadvantaged groups”.²¹

3.1 The Draft National Strategy on Transitional Justice

20. The process of drafting and adopting a Transitional Justice Strategy, supported by the UNDP, started in 2010. The working document containing the draft Transitional Justice Strategy was expected to be presented for adoption to the BiH Parliamentary Assembly during the summer of 2012.²²
21. In her 2013 report on the mission to BiH, the Special Rapporteur on Violence against Women referred that she was “[...] also informed of the Transitional Justice Strategy (TJS), which is spearheaded by the Ministry of Human Rights, with the participation of the judiciary, other authorities, and in collaboration with civil society representatives. In June 2012, a working document was presented by the Ministry of Human Rights and Refugees, together with the Ministry of Justice and the United Nations Development Programme. The Strategy is yet to be adopted. The Strategy is focused on non-judicial transitional justice mechanisms such as reparations, memorials, truth telling, and institutional reform. It aims to address the issue of past war-crimes, [...] The Strategy does not deal with women victims as a separate category, yet women are considered within the category of ‘civilian victims of war’. While the Strategy does not define actions specifically intended for women, it reportedly aims to ensure that the basic principles of gender equality, as well as the special needs of this category of victims are recognized and taken into consideration when developing concrete programmes. The Strategy recognizes that the war had a differentiated impact on women which has also affected their post-war situation. It also stresses women’s roles during the war, not only as victims of sexual violence, but also as witnesses, veterans, and even perpetrators. The Special Rapporteur was informed that the Transitional Justice Strategy aims to establish non-judicial mechanisms to address these concerns through fact-finding and truth-telling activities, memorialisation, reparation and compensation programs, as well as rehabilitation through, *inter alia*, psycho-social services. Civil society representatives from both Entities expressed their support for this initiative and have made efforts to contact women victims of rape, as well as associations of victims of concentration camps, in order to organize consultations. However, *while the CSO sector from the Republika Srpska has been involved in the development of the Strategy, the Entity-level authorities have not been as supportive. While they were formally involved in the development of the Strategy during the pre-drafting consultations, and as members of the Working Group, they then left the Working Group half-way through the process.* The Gender Centre in the Republika Srpska is reportedly engaging and discussing with relevant entity level Ministries and authorities to reconcile views and prompt the

²¹ Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), *Concluding Observations on BiH*, doc. CEDAW/C/BIH/CO/4-5 of 19 July 2013, paras. 10.c and 16.c.

²² On the occasion of a session held on 26 and 27 April 2012 for the Joint Parliamentary Human Rights Commission, the members of the experts’ working group presented the working document and the related action plan. The participants to the event agreed to fully support the process of dialogue on the strategy at all levels. At its 6 June 2012 session, the Joint Commission took note of the report presented in April and accepted the proposal for a public discussion on the Strategy to be organised in October 2012. However, the latter was not organised. During its session of 17 January 2013, the Joint Commission confirmed the necessity to organise the mentioned public discussion on the Strategy. But, despite these commitments, no public discussion has been held so far (i.e. more than one year later and four years since the whole exercise was launched).

participation of the Entity in this important initiative. State-level authorities are also striving to create an atmosphere for minimum consensus. According to interviewed stakeholders, some progress had been achieved and it is hoped that political divisions will be overcome to facilitate a process that would be very beneficial for women victims of war of all ethnic and religious backgrounds”.²³

22. The Special Rapporteur recommended to BiH to “*finalize the launch of a nation-wide Transitional Justice Strategy that includes: (i) Fact-finding and truth-telling activities that acknowledge the war-crimes experienced by women, regardless of their religious or ethnic background, and also recognize how shame, trauma or fear of stigmatization have restricted victims from speaking out. (ii) Memorialisation activities that foster the widespread societal recognition of the harms suffered by women during wartime, as well as the disparate and disproportionate consequences that these crimes had on them. (iii) Reparations programs that target the rehabilitation and de-victimization of survivors, as well as the improvement of their psycho-social and physical health, including by better coordinating the existing services provided by both State and civil society organizations. A clear differentiation should also be made between any reparations programs and the social welfare provisions to which women are entitled. (iv) Compensations schemes that avoid the differentiated treatment currently being received by civilian victims of war throughout the country. Such schemes should broadly include employment, housing and financial incentives for women survivors of war-time violence*”.²⁴
23. **Although UNDP is supporting a dialogue between government institutions in cooperation with civil society organizations on the draft Strategy on Transitional Justice, at February 2014 the draft has not yet been presented for adoption to the BiH Parliamentary Assembly.** At present, the Ministry of Justice of BiH is coordinating new efforts into organizing further consultations at the local and other levels with a variety of actors to gather their comments to the draft document, enter amendments and advocate for its adoption. Considering that the latter should have taken place in the summer of 2012, it would seem that the adoption of the draft Strategy on Transitional Justice is not a priority for BiH authorities. On the contrary, for victims of the war that have been waiting for justice and redress over the past 20 years, this piece of legislation is a top priority that cannot be eluded any further.

3.2 The Draft Law on the Victims of Torture

23. International human rights mechanisms affirmed that enforced disappearance amounts *per se* to a form of torture. Since 2006 (i.e. eight years ago) BiH has been affirming before international mechanisms that the adoption of a Law on the Rights of Victims of Torture was “imminent”. Yet, international human rights mechanisms, including the Human Rights Committee,²⁵ continue highlighting the importance of the adoption of such law. Among others, the Special Rapporteur on Violence against Women recommended BiH to “expedite the enactment of the Law on Civilian War Victims and Victims of

²³ Special Rapporteur on Violence against Women, *Report on the Mission to BiH*, doc. A/HRC/23/49/Add.3 of 29 April 2013, paras. 58-61 and 98-100 (emphasis added).

²⁴ *Ibid.*, para. 105 (k) (emphasis added).

²⁵ Human Rights Committee (HRC), *Concluding Observations on BiH*, doc. CCPR/C/BIH/CO/2 of 2 November 2012, para. 8.

Torture”.²⁶

24. In 2012 the BiH Ministry of Human Rights and Refugees re-launched the initiative to draft a law on the rights of victims of torture and had submitted a draft for comments to entities. On 15 March 2013 a meeting was held at the Ministry for Human Rights and Refugees of BiH where the Ministry representatives highlighted that there seems to be no readiness from the side of the entities to adopt the law. The governments of the Federation of BiH and Republika Srpska did not send feedback with regard to the draft law and its adoption. It was also said that the issue of the adoption of the law has not been included in the Action Programme for the work of the Ministry for 2013.
25. In December 2013 both the Constitutional-Legal Commission of the House of Representatives of the Parliamentary Assembly of BiH and the Constitutional-Legal Commission of the House of Peoples accepted the draft, deeming it in compliance with the Constitutional and legal system of BiH. The draft must now be subjected to the approval before the Joint Commission for Human Rights, the Rights of the Child, Young People, Immigration, Refugees, Asylum Seekers and Ethics of the BiH Parliamentary Assembly.²⁷ Even if the Commission and the House of Representatives will approve the draft, the law should still undergo two readings before both Chambers of the Parliamentary Assembly. All in all, **the adoption and enforcement of the Law on the Victims of Torture unfortunately seems all but imminent.**
26. The above-described situation is a mockery in the face of the acute suffering of thousands of victims of torture from the war across the country who have not obtained redress for the harm endured. **Since August 2012, the situation deteriorated for victims residing in Brčko District, who are experiencing significant troubles also in accessing measures of social support.** The applicable legislation contains a discriminatory provision for the realization of rights for persons who have suffered “*subsequent bodily damage because of occurred or aggravated illness, a long period of incubation, loss of both extremities and eyesight, mental harm and other damage of at least 60% caused during the war, and who have not, until the entering into force of the decision (decision adopted on 8 August 2012 entered into force eight days after it was published in the Official Gazette) had established the status of civilian victims of war*”. Accordingly, **in order to access disability pension victims need to, among other documents, prove that there is a final criminal judgment against a perpetrator in their cases.** This requirement is clearly not in line with international human rights law.

3.3. The Draft Law on Free Legal Aid

27. As recently pointed out by the Special Rapporteur on the Independence of Judges and Lawyers “*States*

²⁶ Special Rapporteur on Violence against Women, *Report on the Mission to BiH, supra* note 23, para. 105 (b).

²⁷ The Joint Commission on Human Rights did not approve the draft during its 28th session held on 21 January 2014, and it was mandated during the session of the House of Representatives held on 23 January 2014 to deliver a new opinion on the draft. The draft law was consequently put on the agenda of the 29th Joint Commission session to be held on 6 February 2014, but it anew rendered a negative opinion on the principles of the law, meaning the Commission did not approve it. The House of Representatives should have discussed it during its 63rd session on the same date, but the session has been stopped because of political disagreements on other issues, with no date announced for its continuance.

bear the primary responsibility to adopt all appropriate measures to fully realize the right to legal aid for any individual within its territory and subject to its jurisdiction".²⁸ NGOs' projects, even though positive, cannot replace the adoption of an integral State policy on the matter, supported by adequate legislation and practice. Over the past decade different international mechanisms have been calling on BiH for the adoption of a law on free legal aid. As noted in the European Commission Progress Report for 2013: "The system of free legal aid remains fragmented and unregulated in three Cantons. The adoption of a State-level Law on Free Legal Aid remains pending. Free legal aid in civil cases continues to be provided, mainly by privately-funded NGOs. Free legal aid in administrative cases remains insufficient".²⁹ Lately, the Special Rapporteur on Violence against Women emphasized that "survivors needs include services such as free legal aid advice to help them navigate the complex legal framework in the entities and apply for welfare or other benefits [...]".³⁰

28. In April 2012 a draft law on free legal aid was submitted to the BiH Council of Ministers, adopted by the latter as a proposal, and forwarded to undergo the parliamentary procedure. The draft was introduced into the BiH Parliamentary Assembly on 23 July 2012, but was eventually not approved. The deadline for the drafting of a new law was December 2013. However, **no new draft has been presented.**³¹ **This is a source of concern because the great majority of victims of gross human rights violations during the war are in dire financial conditions and cannot pay for legal assistance and representation.** Thousands of victims of gross human rights violations during the war, including relatives of disappeared people, are left without access to free legal aid and see their right to access to justice daily hindered, while their trust towards institutions is seriously jeopardized. The adoption of a law on free legal aid is a priority that cannot be postponed anymore.

4. The Obligation to Declare Missing Persons Dead in order to Access Monthly Disability Pensions

WGEID's Recommendation (para. 85)

The Law on Missing Persons stipulates that all persons registered in the CEN Bosnia and Herzegovina shall be considered dead. while the CEN is not yet operating, when it is, this provision will be problematic, as it declares people dead possibly against the wishes of their loved ones. It must be remembered that an enforced disappearance is a continuous crime until the person's fate or whereabouts is determined. It should therefore be clarified what the impact of this provision will be for families and for investigations and prosecutions.

29. The Human Rights Committee has repeatedly expressed its concern because of the practice of obliging relatives of disappeared persons to declare their loved ones dead in order to obtain compensation or social allowances. Along the same line, the WGEID stressed that "[...] *social allowances and/or*

²⁸ Special Rapporteur on Independence of Judges and Lawyers, *Legal Aid, a Right in Itself*, 2013, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13382&LangID=E>. See the integral report on this subject, doc. A/HRC/23/43 of 15 March 2013.

²⁹ European Commission, *Progress Report for 2013 BiH*, *supra* note 17, p. 13.

³⁰ Special Rapporteur on Violence against Women, *Report on the Mission to BiH*, *supra* note 23, para. 27.

³¹ In the plan of legislative activity of the Council of Ministers for 2014 it is stated that the Ministry of Justice needs to submit the draft law to the Council of Ministers before the end of February 2014. To date this has not been the case.

measures of reparation should not be made conditional on the requirement that the relatives of the disappeared person produce a death certificate".³²

30. Recently, in its views on a case concerning BiH, the Human Rights Committee found a violation of Arts. 2, 6, 7 and 9 of the International Covenant on Civil and Political Rights with regard to the obligation imposed on relatives of missing persons to obtain a death certificate in order to have access to social welfare and reparation and it recommended to BiH "the abolition of the obligation for family members to declare their missing dead to benefit from social allowances or any other forms of compensation".³³
31. On 23 September 2013 representatives of TRIAL met with members of the Commission for Human Rights and Freedoms of the Federal Parliament and called on them to amend the existing legislation (i.e. the Federal Law on Social Protection, the Protection of Civilian Victims of War and Families with Children, and the Federal Law on the Rights of Demobilized Defenders and their Families) abolishing the obligation to declare a disappeared person dead in order to have access to social allowances. The Commission expressed its willingness to consider potential amendments and requested TRIAL to present a draft text in this sense, which was done on 30 September 2013. **The draft document was forwarded for consideration to the competent federal ministries on 10 October 2013, who expressed positive feedback. The approval of amendments is currently being considered.**
32. It must be further highlighted that, besides the above-mentioned legislation, Art. 27 of the Law on Missing Persons establishes that "three years after the date of the coming into force of the law, persons registered as missing in the period from 30 April 1991 to 14 February 1996 whose disappearance has been verified within the Central Records on Missing Persons ("CEN") BiH, *shall be considered dead* and this fact shall be officially entered in the Register of Death [...]" (emphasis is added). Notwithstanding the recommendations issued by international human rights mechanisms, including the WGEID,³⁴ to the knowledge of the subscribing associations, to date **BiH authorities have not carried out any particular assessment, nor have they consulted with associations of relatives of missing persons on this subject. Accordingly, the risk remains that enforced disappearance is unduly treated as a death, without taking into account its continuous nature.**
33. In November 2013, TRIAL, in its capacity of representative before different international mechanisms of relatives of missing persons, sent a letter to inquiry on whether the Ministry of Human Rights and Refugee had the intention to undertake the above-mentioned assessment of the compatibility of Art. 27 of the Law on Missing Persons with international standards. In the same month the Ministry sent a letter

³² WGEID, *Annual Report for 2012*, doc. A/HRC/22/45 of 22 January 2013, para. 50 (emphasis is added).

³³ HRC, Case *Prutina, Zlatarac, Kozica, Čekić v. Bosnia and Herzegovina*, views of 28 March 2013, para. 11.

³⁴ WGEID, *Report on the Mission to BiH*, *supra* note 3, paras. 46 and 85.

to TRIAL, where it avoided providing any meaningful answer to the question and instead indicated that if families of missing person wish to receive information on Art. 27 of the Law on Missing Person, they should address directly the Ministry in order to obtain a reply. It is not clear why the Ministry of Human Rights and Refugees refused to provide information that should be accessible to the public, all the more being TRIAL the legal representative of a number of relatives of missing persons who have a direct interest in clarifying the meaning and implications on their fundamental rights of the legislative provision concerned. Exchanges on this subject are ongoing.

6. The Inadequacy of Domestic Criminal Legislation on Enforced Disappearance

WGEID's Recommendations (para. 87)

In accordance with the Declaration and the Convention, the Code be amended to include enforced disappearances as an autonomous crime, so that it can be punished in situations where it cannot be qualified as a crime against humanity.

The Criminal Code be amended to remove the possibility of granting amnesty for serious international crimes.

The criminal codes at the entity and district levels be harmonized with the Criminal Code at the State level, so that they provide for the repression of enforced disappearances both as a crime against humanity and as an autonomous crime and sets the appropriate penalties. The penalties should correspond to the level of those applied for the most serious crimes.

34. BiH criminal legal framework on enforced disappearance both at the national and the Entity level is inadequate. Enforced disappearance is not codified at Entity level and ad the State level provisions do not meet international standards. On the one hand, this situation fosters impunity over past crimes and, on the other, it jeopardizes the prevention of future violations. In fact, ending impunity for the perpetrators of past crimes, including enforced disappearance is a circumstance pivotal, not only to the pursuit of justice, but to effective prevention.
35. **Entity Criminal Codes have not been amended since the WGEID issued its recommendations in 2010 and they therefore remain inadequate to deal with enforced disappearance.**
36. **On 22 October 2013 a draft law on changes of the Criminal Code of BiH was approved by the Constitutional-Legal Committee of the House of Representatives of the BiH Parliamentary Assembly and contained some remarkable proposals, including the introduction of Art. 190a, with the aim of codifying enforced disappearance as a separate criminal offence also when it is not committed as part of a widespread or systematic attack against any civilian population. This inclusion would certainly be welcomed. However, it must be noted that in the proposed text, the sanction envisaged for the perpetrator is deprivation of liberty for a minimum of 8 years (while the maximum sentence is not indicated), also for superiors implicated in the commission of an enforced disappearance. It is doubtful that this formula would be proportionate to the gravity of the crime and**

meet international human rights law requirements.

37. However, in November 2013 the proposed amendments to the Criminal Code of BiH were not approved by the House of Representatives of the BiH Parliamentary Assembly. This makes it impossible to forecast when and if such amendments will eventually be presented anew in parliamentary procedure.
38. Finally, the Criminal Code of BiH has not been amended to remove the possibility of granting amnesty for serious international crimes. By contrast, at the end of November 2013, the BiH Ministry of Justice proposed legislative amendments that would allow pardon for persons convicted of war crimes, including enforced disappearance, after serving three-fifths of their sentence. The current Law on Pardon of BiH does not allow pardon for persons accused of genocide, crimes against humanity and other war crimes. However, the new proposed Art. 3 of the law would foresee that, for "the crimes of genocide, war crimes and crimes against humanity, pardon may be granted after serving three-fifths of the sentence".
39. The BiH Ministry of Justice proposed the mentioned legislative amendments to the Council of Ministers, which considered them during its 72th session held on 28 November 2013 and decided to postpone the vote on the issue. On its 75th session on 11 December 2013, although the draft law was put on the agenda, the BiH Council of Ministers declined to pronounce itself on the amendments.³⁵ Several further sessions of the Council of Ministers have been held in the meantime without the law being put on the agenda or any other information or announcement related thereto. It seems that in the Council of Ministers there are different opinions concerning the proposed change, reason why the Minister of Justice has decided to temporarily withdraw the law and try to reconcile the different viewpoints. In practice the amendments to the Law on Pardon could be any time put again on the agenda, discussed and voted upon. Associations of victims of gross human rights violations, including enforced disappearance, during the war are persuaded that the adoption of these amendments would have a disruptive effect on the BiH society and they would perceive it as a form of perverse re-victimization.
6. **The Application of the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY) instead of the 2003 Criminal Code**

WGEID's Recommendation (para. 87)

The local courts change their position on the issue of the non-retroactivity of the new criminal codes, as far as international crimes are concerned.

³⁵ See http://www.vijeceministara.gov.ba/saopstenja/sjednice/zakljucci_sa_sjednica/default.aspx?id=16210&langTag=bs-BA.

40. Over the past years, in particular district and Entity courts across the country used to **apply the SFRY Criminal Code instead of the 2003 Criminal Code. In practice this means that persons convicted of war crimes before different courts may receive widely divergent sentences, taking into account that the SFRY Criminal Code prescribes lower mandatory maximum and minimum penalties in war crimes cases than the 2003 Criminal Code.** The minimum sentences prescribed by the 2003 BiH Criminal Code for genocide, crimes against humanity, and war crimes is 10 years' imprisonment, while the maximum sentence is 45 years' imprisonment. The SFRY Criminal Code prescribes a minimum sentence of 5 years' imprisonment and a maximum sentence of 15 years' imprisonment or death, which could be commuted to 20 years' imprisonment. The SFRY Criminal Code does not codify crimes against humanity. It has been and it is still generally applied by courts at the Entity level in war crimes cases; since the death penalty is not anymore applicable in BiH after the 1995 Dayton Agreement, these courts have been imposing sentences up to 15 years for war crimes.
41. While in 2007 the Constitutional Court of BiH issued a decision – in line with the recommendations issued by a number of international institutions – on the leading case *Maktouf* (AP/1785/06 of 30 March 2007) affirming that the 2003 BiH Criminal Code must be applied, on 18 July 2013 the Grand Chamber of the European Court of Human Rights rendered a judgment on the case *Maktouf and Damjanović* finding a violation of Art. 7 of the European Convention on Human Rights (no punishment without law). The European Court upheld the complaints by the two men, previously convicted by the Court of BiH of war crimes pursuant to the 2003 BiH Criminal Code. The European Court found that, given the type of offences of which the applicants had been convicted (war crimes as opposed to crimes against humanity) and the degree of seriousness (neither of the applicants had been held criminally liable for any loss of life), Mr. Maktouf and Mr. Damjanović could have received lower sentences had the SFRY Criminal Code been applied. The Court found that since there was a real possibility that the retroactive application of the 2003 Criminal Code operated to the applicants' disadvantage, in the special circumstances of this case, they had not been afforded effective safeguards against the imposition of a heavier penalty.
42. In its judgment, the European Court of Human Rights underlined that it was not its task to review *in abstracto* whether the retroactive application of the 2003 Criminal Code in war crimes cases, including those relating to enforced disappearance, was, *per se*, incompatible with Art. 7. That matter has to be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether domestic courts had applied the law whose provisions were most favourable to

the defendant concerned.³⁶ The Court clearly pointed out that the “lawfulness of the applicants’ convictions is [...] not an issue in the instant case” since it was not disputed by the applicants “that their acts constituted criminal offences defined with sufficient accessibility and foreseeability at the time when they were committed” and the definition of war crimes in the two codes is the same.³⁷ The Court considered that the applicants had received sentences fitting within the lower range of punishment foreseen under the BiH Criminal Code³⁸ and that “only the most serious instances of war crimes were punishable by the death penalty pursuant to the 1976 Code. As neither of the applicants was held criminally liable for any loss of life, the crimes of which they were convicted clearly did not belong to that category”.³⁹

43. The Court therefore concluded that in these specific cases, “there exists a real possibility that the retroactive application of the 2003 Criminal Code operated to the applicants’ disadvantage”⁴⁰ since the applicants could have received lower sentences had the sentencing provisions of the SFRY Criminal Code been applied,⁴¹ although it admitted that it is not certain this would indeed have happened. Accordingly it found that the applicants’ rights under Art. 7 had been violated since “it cannot be said that they were afforded effective safeguards against the imposition of a heavier penalty”.⁴² However, the Court emphasized that its conclusion did not indicate that lower sentences ought to have been imposed, but simply that in those concrete cases the sentencing provisions of the SFRY Criminal Code should have been applied.
44. In a press release issued on 18 July 2013 regarding the judgment of the European Court of Human Rights, the Court of BiH stated that “it ensues from the Court’s decision that when it comes to more serious forms of war crimes, the application of the 2003 Criminal Code is not in contravention of the Convention”.⁴³ It further noted that it “[...] will in future cases, on the case-to-case basis, consider which law is more lenient to the perpetrator, bearing in mind the circumstances of each case”, as it has been doing in its previous case-law, resulting in the application of the SFRY Criminal Code in eight war crimes cases in total.
45. On 27 September 2013 the Constitutional Court of BiH decided on an appeal filed by Mr. Zoran

³⁶ European Court of Human Rights, *Maktouf and Damjanović v. Bosnia and Herzegovina*, Grand Chamber judgment, 18 July 2013, para. 65.

³⁷ *Ibid.*, para. 67.

³⁸ Mr. Maktouf received the lowest sentence provided for and Mr. Damjanović a sentence which was only slightly above the lowest level set by the 2003 Criminal Code for war crimes.

³⁹ European Court of Human Rights, *Maktouf and Damjanović v. Bosnia and Herzegovina*, *supra* note 36, para. 69.

⁴⁰ *Ibid.*, para. 70.

⁴¹ The SFRY Criminal Code being more lenient in respect of the minimum sentence.

⁴² European Court of Human Rights, *Maktouf and Damjanović v. Bosnia and Herzegovina*, *supra* note 36, para 70.

⁴³ For the full text of the press release, see: <http://www.sudbih.gov.ba/index.php?id=2860&jezik=e>.

Damjanović, the brother of one of the applicants before Strasbourg (AP 325/08). The Court applied *mutatis mutandis* the reasoning of the European Court and, given the fact that the crimes for which Mr. Zoran Damjanović was convicted “do not belong to the category of the most serious war crimes cases (loss of life) for which it was possible, under the SFRY Criminal Code, to impose a death penalty”, the Court found a violation of Art. 7, para. 1, of the European Convention with respect to Mr. Zoran Damjanović (AP 325/08), quashed the decision against him and ordered the Court of BiH to issue under an urgent procedure a new decision in line with Art. 7, para. 1, of the ECHR. Following a submission by Mr. Goran Damjanović, on 4 October 2013 the Court of BiH accepted their request to reopen the proceedings and ordered new trials to take place to the benefit of Mr. Goran and Zoran Damjanović. On 11 October 2013, after ordering their retrial, the State Court ordered the release of Mr. Goran and Zoran Damjanović.

46. On 8 October 2013, the Court of BiH accepted a request for enabling the renewal of the proceedings against Mr. Abduladhim Maktouf, who was previously sentenced for war crimes. After Mr. Maktouf completed his prison sentence, he was expelled from BiH (as he did not have BiH citizenship).
47. On 22 October 2013 the Constitutional Court of BiH adopted six decisions on the appeals filed by ten persons convicted of war crimes and genocide who had claimed a violation of Art. 7, para. 1, of the European Convention.⁴⁴ Most of the cases were pending from the appeals submitted in 2009. These decisions concern Mr. Slobodan Jakovljević (sentenced to the long-term imprisonment of 28 years for the crime of genocide) – Mr. Aleksandar Radovanović (sentenced to the long-term imprisonment of 32 years for the crime of genocide) – Mr. Branislav Medan (sentenced to the long-term imprisonment of 28 years for the crime of genocide) – Mr. Brano Džinić (sentenced to the long-term imprisonment of 32 years for the crime of genocide) – Mr. Milenko Trifunović (sentenced to the long-term imprisonment of 33 years for the crime of genocide) – Mr. Petar Mitrović (sentenced to the long-term imprisonment of 28 years for the crime of genocide) – Mr. Nikola Andrun (sentenced to the prison term of 18 years for the crime of war crimes against civilians) – Mr. Milorad Savić (sentenced to the prison term of 21 years for the crime of war crimes against civilians) – Mr. Mirko (son of Špiro) Pekez (sentenced to the prison term of 14 years for the crime of war crimes against civilians) – Mr. Mirko (son of Mile) Pekez (sentenced to the prison term of 29 years for the crime of war crimes against civilians).
48. Summarising the reasoning adopted by the Constitutional Court of BiH in the six above-mentioned cases concerning genocide, the prison sentences meted out (28, 32 or 33 years) were within the higher range of punishment foreseen in the 2003 Criminal Code and therefore it was the Court’s task to determine which law was more lenient for the applicants with regards to maximum sentences. The

⁴⁴ Decisions No. AP-116-09, AP-503-09, AP-2498-09, AP-4065-09, AP-4100-09, AP-4126-09, 22 October 2013.

Constitutional Court of BiH acknowledged that according to the SFRY Criminal Code a sentence between 15 years, 20 years or the death penalty, could have been pronounced. Nevertheless, it emphasized the fact that at the time of the delivery of the relevant criminal verdict, “there was no theoretical or practical possibility to pronounce a death penalty on the applicant”.⁴⁵ The Constitutional Court of BiH then noted that, in line with Art. 38, para. 2, of the SFRY Criminal Code, “it can be clearly concluded that the maximum sentence for the stated crime, in the situation when it is no longer possible to award a death penalty, is a sentence of 20 years of imprisonment. By comparing the sentence of 20 years of imprisonment (as a maximum sentence for the criminal offence according to the SFRY Criminal Code) with the sentence of a long-term imprisonment of 45 years (as a maximum sentence for the criminal offence prescribed by the 2003 Criminal Code), the Constitutional Court of BiH finds that in this concrete case, it is without any doubt the SFRY Criminal Code that is the more favourable code for the applicant”.⁴⁶ Accordingly the Constitutional Court of BiH found a violation of Art. 7, para. 1, of the European Court with respect to the applicants, quashed the decisions and ordered the BiH Court to issue under an urgent procedure new decisions in line with Art. 7, para. 1, of the European Convention.

49. The Constitutional Court of BiH followed a similar reasoning in its decisions concerning the four applicants convicted of war crimes. Comparing the potential sentences prescribed according to the SFRY Criminal Code and applicable at the time of the delivery of the relevant criminal verdict with the sentences meted out pursuant to the 2003 Criminal Code, the Constitutional Court of BiH held that the former was to be considered the more lenient in the four concrete cases and therefore it found a violation of Art. 7 of the European Convention with respect to the applicants, quashed the decisions and ordered the BiH State Court to issue under an urgent procedure a new decision in line with Art. 7, para. 1, of the European Convention.
50. On 5 November 2013, the Constitutional Court of BiH upheld the appeal of Mr. Zrinko Pinčić, convicted before the State Court of BiH in 2009 for war crimes against civilians (sexual violence and rape) and sentenced to 9 years in prison. The Constitutional Court of BiH considered that, in light of the mitigating circumstances, Mr. Pinčić was given a sentence below the minimum sentence of 10 years prescribed by the 2003 Criminal Code; therefore the Court concluded that the SFRY Criminal Code with its minimum sentence of 5 years was the more favourable to the applicant, thus finding a violation of Art. 7, para. 1, of the European Convention. The Constitutional Court of BiH therefore quashed the verdict and ordered the Court of BiH to issue under an urgent procedure a new decision in line with Art. 7, para. 1, of the European Convention.

⁴⁵ BiH Constitutional Court, *Trifunović* decision - AP 4100/09, 22 October 2013, para. 47.

⁴⁶ *Ibid.*, para. 48.

51. On 12 November 2013, at the end of the sixth Plenary Meeting of the “Structured Dialogue on Justice between the European Union and Bosnia and Herzegovina”, the European Commission Services recommended BiH that any measures related to the implementation of the ECtHR ruling in the *Maktouf and Damjanović* case is prepared and assessed with great caution at the domestic level.⁴⁷
52. On 18 November 2013, the Court of BiH ordered the release pending a new trial against the ten persons on which the Constitutional Court of BiH pronounced itself on 22 October 2013.
53. On 18 November 2013, survivors of genocide from Srebrenica raised their voice through the media stating that they are in fear of their lives and safety of their families and that their right to free movement has been impaired. Special concern was raised with regard to the safety of witnesses at trials on genocide and the psychological effects that the release of criminals had. There were also statements about the unwillingness of witnesses to testify at the retrials.⁴⁸
54. On 20 November 2013, the Prosecutor’s Office of BiH requested detention pending retrial for the 10 convicts released two days before. On 21 November 2013, the Court of BiH scheduled the detention hearings for the following week.
55. On 26 November 2013, in the case of Mr. Nikola Andrun, the hearing was postponed because he changed his lawyer. Mr. Nikola Andrun was not present at the hearing. On the same day another detention hearing was held in the case of Mr. Petar Mitrović. The prosecutor stated that he had no grounds for his request for detention under the BiH Criminal Procedure Code, therefore he grounded his request on Art. 5 of the European Convention. On 27 November 2013, the hearing on detention was postponed for Mr. Slobodan Jakovljević, Mr. Milenko Trifunović, Mr. Aleksandar Radovanović, Mr. Branislav Medan and Mr. Brano Džinić as the defense counsel of one of the five requested removal of the judge Azra Miletić - she and the presiding judge of this Chamber were actually in the appeals chamber in this case. On 28 November 2013, in the cases of Mr. Mirko (son of Špiro) Pekez, Mr. Mirko (son of Mile) Pekez, Mr. Milorad Savić, the Prosecutor’s Office of BiH proposed detention because of flight risks.
56. On 29 November 2013, the Appeals Division of the Court of BiH suspended the prison sentence in relation to the defendant Mr. Zrinko Pinčić and ordered his release. On the same day the Association of Mothers from Srebrenica raised its concerns and worries about the recent release of the war criminals in

⁴⁷ Delegation of the European Union to BiH, Recommendations of the Sixth Plenary Meeting of the “Structured Dialogue on Justice between the European Union and Bosnia and Herzegovina”, 14 November 2013, <http://www.delbih.ec.europa.eu/News.aspx?newsid=5975&lang=EN>.

⁴⁸ See, for instance, <http://www.justice-report.com/en/articles/resignation-of-state-constitutional-court-judges-requested>; <http://www.oslobodjenje.ba/vijesti/bih/subasic-majke-srebrenice-traze-zastitu-i-ostavku-sudija-ustavnog-suda-bih>.

a letter sent to the Office of the High Representative in BiH, the European Union Special Representative, the Embassies of the United States of America and the United Kingdom in Sarajevo, the Office of the Council of Europe, the BiH Constitutional Court, the Court of BiH, the Prosecutor's Office of BiH, the Office of the Ombudsman, the members of the Presidency of BiH, the BiH Ministry of Human Rights and Ministry of Security and the Ministry of Internal Affairs of Republika Srpska.

57. On 5 December 2013, the Appellate Chamber of the Court of BiH rejected the custody motions filed in the cases of Mr. Petar Mitrović, Mr. Slobodan Jakovljević, Mr. Aleksandar Radovanović, Mr. Branislav Medan, Mr. Brano Džinić and Mr. Milenko Trifunović explaining that liberty of a suspect or indicted could be restricted only under conditions prescribed by the law and that the BiH Code of Criminal Procedure does not contain explicit provisions regulating the possibility of ordering an indicted into custody in case the execution of the sentence is discontinued".⁴⁹ The Appellate Chamber determined that Art. 5 of the European Convention prescribes the right to liberty and security and that it was possible to restrict this right, i.e. deprive a person of liberty, only within a process prescribed under the law. The Court concluded that there is therefore a legal gap that cannot be solved to the detriment of the indicted by an extensive interpretation of provisions of the European Convention and the direct application of Art. 5. The requests for custody were rejected also in the cases related to Mr. Mirko (son of Špiro), Mr. Mirko (son of Mile) Pekez, and Mr. Milorad Savić.
58. On 5 December 2013 the Committee of Ministers of the Council of Europe, responsible for monitoring the implementation of judgments of the European Court, discussed the Action Plan submitted by BiH in order to implement the judgment on the case *Maktouf and Damjanović*. The Action Plan described the measures taken up to that date and envisaged for the next months by BiH in order to implement the judgment: in particular just compensation (awarded to the applicants in September 2013), individual measures (the reopening of the criminal proceedings following the October decision of the Court of BiH and the immediate release of the applicants) and general measures (publication and distribution of the decision, amendment of the jurisprudence by the Constitutional Court (27 September decision) and the organisation of a conference to discuss the consequences of the decision). The Committee of Ministers adopted a decision on the Action Plan submitted by BiH. The Committee: "stressed therefore that the execution of this judgment, as a part of general measures, requires domestic courts, when seized with complaints of violations of Article 7, to assess, *in the particular circumstances of each case*, which law is most favourable to the defendant including as regards the gravity of the crimes committed; 5. invited the authorities to provide further information to the Committee on how these principles are applied following the change of the case-law of the Constitutional Court in order to give effect to the present judgment.

⁴⁹ See the press release issued by the Court of BiH: <http://www.sudbih.gov.ba/index.php?id=3003&jezik=e>.

Information is particularly awaited on the scope of review to be exercised by the Court of Bosnia and Herzegovina and on *the issue of detention pending a new decision (in particular ensuring adequate protection against collusion or risk of absconding or committing further crimes or disturbance of public order etc.)*; 6. stressed in this respect the importance for the domestic authorities to *take all necessary measures to secure, wherever required, the continued detention of those convicted awaiting a new examination to be conducted by the Court of Bosnia and Herzegovina* provided that their detention is compatible with the Convention; 7. invited the authorities of Bosnia and Herzegovina to work in close cooperation with the Secretariat in order to explore possible solutions to these questions".⁵⁰

59. On 13 December 2013, in the reopened proceedings against Mr. Zoran and Goran Damjanović, the Panel of the Section I for War Crimes of the Court of BiH, handed down the first-instance verdict finding both accused guilty of the criminal offense of war crimes against civilians in violation of Art. 142, para. 1, of the SFRY Criminal Code (torture) read in conjunction with Art. 22 (co-perpetration). Mr. Goran Damjanović was sentenced to 6 years and 6 months imprisonment and Mr. Zoran Damjanović to 6 years imprisonment.⁵¹
60. On 16 December 2013, in the reopened proceedings against Mr. Mirko (son of Mile) Pekez, the Appeals Chamber of the Court of BiH found the accused guilty of the criminal offense of war crimes against civilians in violation of Art. 142, para. 1, of the SFRY Criminal Code and reduced his sentence to 20 years in prison.
61. On 18 December 2013, in the reopened proceedings against Mr. Mirko (son of Špiro) Pekez and Mr. Milorad Savić, the Appeals Chamber of the Court of BiH reduced their sentences to 10 years for Mr. Mirko Pekez and to 15 years for Mr. Milorad Savić for their responsibility in the murders of 23 Bosniak civilians in the village of Tisovac.
62. On 27 December 2013, in the reopened proceedings against Mr. Zrinko Pinčić, the Court of BiH handed down the verdict finding the defendant guilty of the criminal offense of war crimes against civilians in violation of Art. 142, para. 1, of the SFRY Criminal Code and reducing his sentence to six years in prison.⁵²
63. On 23 January 2014, the Constitutional Court of BiH upheld the appeal filed by Mr. Novak Đukić who was sentenced to 25 years in prison for having committed war crimes against civilians in Tuzla on 25

⁵⁰ See [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH\(2013\)1186/7&Language=lanFrench&Ver=original&Site=CM&BackColorInterne t=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH(2013)1186/7&Language=lanFrench&Ver=original&Site=CM&BackColorInterne t=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

⁵¹ Having served the prison-term imposed by the newly established sentence, both Mr Zoran and Goran Damjanović are now free.

⁵² Having served the prison-term imposed by the newly established sentence, Mr. Zrinko Pinčić is now free.

May 1995. The Court determined that the 2003 Criminal Code was wrongfully applied in his case instead of the former SFRY CC, thus finding a violation of Art. 7, para. 1, of the European Convention with respect to the applicant. The Constitutional Court of BiH quashed the verdict and ordered the BiH Court to issue under an urgent procedure a new decision in line with Art. 7, para. 1, of the European Convention. A few days later the State Court of BiH released Mr. Novak Đukić pending retrial.

64. On 30 January 2014, in the reopened proceedings against Mr. Nikola Andrun, the State Court of BiH reduced his sentence to 14 years in prison finding him guilty of the criminal offense of war crimes against civilians in violation of Art. 142, para. 1, of the SFRY Criminal Code (torture, participation in torture, inhumane treatment) read in conjunction with Art. 22 (co-perpetration).
65. It must be stressed that the **BiH Constitutional Court is making a sweeping use of the conclusions reached by the European Court in the *Maktouf and Damjanović* judgment to crimes that “involve the loss of lives”**, that is the gravest instances of war crimes and genocide. This is **highly questionable** since the European Court was clear in justifying its reasoning and conclusions by referring to the nature of the crimes committed by the applicants on that specific case.
66. The evaluation of the European Court hinged upon the fact that under the SFRY Criminal Code *only the most serious instances of war crimes were punishable by the death penalty*” and, “*as neither of the applicants was held criminally liable for any loss of life, the crimes of which they were convicted clearly did not belong to that category*”. However, in the case of the ten convicts on whose cases the Constitutional Court of BiH pronounced itself on 22 October 2013, the circumstances were different and they had to be assessed with particular regard to the gravity of the crimes at stake, to the law applicable to the “the most serious instances of war crimes” or “genocide” and to the wording and the objective of Art. 7, para. 1, of the European Convention. Notably, the relevant part of Art. 7, para. 1, of the European Convention prescribes that “*Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed*”. The object and purpose of this provision is to avoid arbitrary State punishment and to guarantee the preventive function of criminal law by ensuring that the crimes and their related penalties are precise, foreseeable and accessible by every person subject to State jurisdiction. Criminal behaviour can only be deterred if persons are aware of the criminalisation of a certain conduct and the penalties attached thereto prior to commission of the censured conduct. In the case at hand a person who was participating in the commission of “the most serious instances of war crimes” or acts of “genocide” during the conflict in SFRY knew that he could receive a death-penalty sentence. The 2003 Criminal Code shall therefore be considered more lenient as far as the punishment for the gravest instances of war crimes and genocide is concerned.

67. Being the definition of war crimes and genocide in the SFRY Criminal Code, which was applicable at the time the offences were committed, the same as the one foreseen in the 2003 Criminal Code that was retroactively applied, the application of the latter cannot be considered as a violation of the principles embodied in Art. 7, para. 1, of the European Convention, as dictating under the 2003 Criminal Code a sentence up to the 45 years can clearly not be considered less favourable to the defendant than the one that was applicable at the time the criminal offence was committed, i.e. the death penalty. This was also indirectly confirmed by the decision of the Committee of Ministers of the Council of Europe on 5 December 2013.
68. Furthermore, this conclusion is in line with the development of international criminal law and the fight against impunity for crimes under international law, in particular the emerging international standards on sentences applicable to such crimes. In this light, the **application of the SFRY Criminal Code**, by punishing perpetrators of multiple and serious human rights violations with sentences not exceeding 20 years, **would not allow the State Court of BiH to deliver a sentence that is proportionate to the gravity of the crimes**. The application of the 2003 Criminal Code therefore fulfils the *jus cogens* obligation of the State to adequately punish the perpetrators of the most serious instances of international crimes. Furthermore, the new line of jurisprudence adopted by the BiH Constitutional Court clashes with general principles of justice, parity and fairness in punishment as it creates a situation of manifest disparity between the sentences applicable to crimes against humanity (up to 45 years under the 2003 Criminal Code) and those applicable for war crimes and genocide under the SFRY Criminal Code. This would result in an unequal and illogical sentencing regime which discriminates against those convicted for crimes against humanity and that could have extremely serious consequences in terms of prosecution strategies and the outcome of future trials.
70. Another extremely controversial issue related to the decisions taken by BiH judicial authorities after the *Maktouf and Damjanović* judgment is the legal validity of the Court of BiH decisions to release the perpetrators and the refusal of granting custody pending retrial arguing that there is no ground in the BiH Criminal Procedure Code to grant remand in detention when a criminal verdict has been annulled.⁵³

⁵³ Art. 132 of the BiH Code of Criminal Procedure establishes that “(1) If there is a grounded suspicion that a person has committed a criminal offense, custody may be ordered against him: a) if he hides or if other circumstances exist that suggest a possibility of flight; b) if there is a justified fear to believe that he will destroy, conceal, alter or falsify evidence or clues important to the criminal proceedings or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, accessories or accomplices; c) if particular circumstances justify a fear that he will repeat the criminal offense or complete the criminal offense or commit a threatened criminal offense, and for such criminal offenses a prison sentence of five (5) years may be pronounced or more; d) if the criminal offense is punishable by a sentence of imprisonment of ten (10) years or more, where the manner of commission or the consequence of the criminal offense requires that custody be ordered for the reason of public or property security. If the criminal offense concerned is the criminal offense of the terrorism, it shall be considered that there is assumption, which could be disputed, that the safety of public and property is threatened”. In addition, Art. 332, para. 5, of the Code of Criminal

71. **The release of the perpetrators pending retrial without any possibility of obtaining restriction orders against them had the actual consequence of re-victimizing and intimidating survivors and other victims of crimes under international law.** In light of the particular gravity of the crimes committed and the public reaction to them, the release of the perpetrators caused disturbance to public order⁵⁴ and brought about an unnecessary flight risk for the convicted perpetrators.
72. The victims and survivors of the atrocities committed during the conflict who had returned to live in Srebrenica and in the surrounding areas, who have been continuously living in fear for their physical and psychological safety due to the attacks they suffered when commemorating the events, were re-traumatized by the release of the perpetrators. The mere thought that they were going to face the persons who killed their loved ones in their villages was unbearable. The mothers of the victims, in particular, had physical consequences due to the re-traumatization caused by the knowledge that the perpetrators were released. It is also very significant that the genocide convicts were welcomed and greeted with celebrations by public authorities. For instance, the president of the Municipality Assembly of Srebrenica, Mr. Radomir Pavlović, organized a welcome ceremony in Skelani using his official car.
73. Principle VI of the UN Basic Principles on the Right to a Remedy affirms that “The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation”.
74. The Committee of Ministers of the Council of Europe stressed the importance for domestic authorities to “take all necessary measures to secure, wherever required, the continued detention of those convicted awaiting a new examination to be conducted by the Court of Bosnia and Herzegovina” and to ensure “adequate protection against collusion or risk of absconding or committing further crimes or disturbance

Procedure, regulating reopening of the proceedings, explicitly refers to the application to the previously described Art. 132, by previewing that in case of a reopening of the proceedings, “execution of the penalty shall be stayed, but the Court shall, upon the proposal of the Prosecutor, order custody if the conditions exist as referred to in Art. 132 of this Code. In the same direction, Art. 333 defines the rules of reopened proceedings by stating that “the provision applicable to the preliminary proceedings shall also apply to the new reopened criminal proceeding that is being carried out on the basis of the decision to reopen the criminal proceeding”.

⁵⁴ In this sense, see Decision No. AP 3117/06 of 16.07.2007, paras. 6-8, 22-24, wherein the BiH Constitutional Court affirmed that a suspect presented a threat to public order and security since he was charged with the criminal act of crimes against humanity and crimes against civilian population, for which a long-term prison sentence is prescribed; the Court concluded that the ordering of detention was necessary for the sake of security of citizens as those crimes were committed on a large scale with the obvious goal to cause the biggest possible terror, anxiety and insecurity amongst the population; that the result of those crimes has been dozens of killed, disappeared; and that it cannot be excluded that if a person accused by the ICTY for committing those crimes, would be released, this could cause fear, disturbance and insecurity of a wider circle of people who had been in the direct vicinity during the commission of the crimes and who live in a small community with the possibility to meet the accused if he was released; see also European Court of Human Rights, Case *I.A. v. France*, judgment of 23 September 1998, para. 104: “[...] The Court accepts that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time [...]”.

of public order etc [...]”.⁵⁵

75. The disregard shown by the State Court of BiH with respect to the protection of victims of international crimes from violence, re-victimization and intimidation and the risk of flight of the perpetrators is not only troubling from the victims’ perspective but it also represents a considerable shortcoming in the fulfilment of the positive obligation of the State to investigate and punish the authors of gross human rights violations and serious breaches of international humanitarian law. This acquires even more alarming nuances, considering that on 12 November 2013 two delegates of the Parliamentary Assembly of BiH House of Peoples have proposed and forwarded for urgent procedure of adoption amendments of the BiH Law on Criminal Procedure, their aim being to enable the renewal of criminal proceedings before the Court of BiH for all persons accused whose cases have not been reviewed and decided upon by the European Court of Human Rights, but whose rights have been allegedly violated in a similar manner as in the *Maktouf and Damjanović* case. Under the current criminal procedural rules,⁵⁶ this possibility for renewal exists only in individual criminal cases for which there have been decisions brought by the BiH Constitutional Court or the European Court whereby the violation of the rights and freedoms of the accused have been determined. The explanation provided for the amendment proposal is that this would protect the interests of persons who have not exhausted legal remedies after having been convicted by the Court of BiH, because they had believed in the case-law which had been established by the Constitutional Court of BiH and because they could not afford further proceedings due to their difficult material situation, by applying the same European Court of Human Rights’ principles to their cases. The Constitutional-Legal Committee first rejected the proposal. During the 58th session of the House of Representatives held on 5 December 2013, it was decided that the negative opinion of the Committee will be considered by the Collegium (president and two vice-presidents of the House of Representatives) with a view to discussing it and reaching a political agreement on it. The House of Representative rejected the Committee’s negative opinion, and the Committee was mandated to issue a new opinion. The Committee issued another negative opinion and it was decided that the Collegium will have to analyse it again and seek political agreement on it. The report of the Collegium should be discussed in February 2014. This initiative openly contradicts the reasoning of the European Court – its refusal of an *in abstracto* review of the retroactive application of the 2003 Criminal Code, and the viewpoint of the European Court and the Constitutional Court of BiH that this matter has to be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case.

⁵⁵ See above, para. 50.

⁵⁶ Art. 327 of the BiH Code of Criminal Procedure.

7. The Lack of Information on Prosecutions

WGEID's Recommendations (para. 90)

Offices of the prosecutors and courts at all levels should have consistent rules in dealing with the public in general and with families of the disappeared in particular. Families of victims should be more regularly given information on the process of investigation, the results of those investigations and whether trials might be forthcoming.

Special personnel should be appointed to meet with families and inform them, on a regular basis, of progress made in their cases.

76. With one notable exception,⁵⁷ the associations subscribing the present document report that **communication with prosecutors' offices and access to information concerning ongoing or forthcoming trials remain extremely difficult**. In the opinion of several of the associations of victims of war subscribing this report the communication with prosecutors' offices became even worst in comparison to the problems already highlighted in the past. As a matter of fact, at the time of writing, despite the recommendations issued by international human rights mechanisms, victims of gross human rights violations during the war and their associations **are not systematically associated as closely as possible to the investigative stages, and no regular mechanism of information on the process of investigation has been established**.
77. Another problem related to the prosecution and sanction of those accused of war crimes or crimes against humanity and access to related information has emerged because of the **new policy of anonymization implemented by the Court of BiH**. In March 2012 the State Court of BiH amended its rulebook on public access to information under the Court's Control and Community Outreach.⁵⁸ Currently, documents issued by the Court are censored and the Prosecutor's Office of BiH does not provide complete information on the indictments of war crimes. Arts. 41 to 46 of the amended rulebook of the Court set forth the "*anonymization of Court decisions and other documents distributed to the public*", thereby disposing that certain data (including names and surnames of those accused, suspected of, or convicted for war crimes, their representatives, the places where the crime has happened, as well as the names of private companies, institutions and the like) are substituted or removed from Court's decisions and other forms of information (case summaries, audio-video materials

⁵⁷ The Association of Women from Prijedor *Izvor* reports being satisfied about their communication and cooperation with the Prosecutor's Office of BiH.

⁵⁸ The integral version, in English, is available at: http://www.sudbih.gov.ba/files/docs/Rulebook_on_Access_to_Info_Court_20_03_12.pdf.

and the like). This situation has already been the subject of harsh criticism⁵⁹ and is a source of further anguish for victims of crimes committed during the war, who fear that their access to investigations related to their cases or to ongoing proceedings, if any, as well as their right to know the truth may be further hampered. The anonymization policy does not seem to be in line with international standards and, in particular, with Art. 14, para. 1, of the International Covenant on Civil and Political Rights which establishes that “any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children”. On 18 July 2013, the High Judicial and Prosecutorial Council (HJPC) issued a recommendation to all tribunals and prosecutors’ offices across the country, declaring that they are not under an obligation to anonymize their legal acts, but they have to balance between private and public interests.⁶⁰ Moreover, the HJPC called for the establishment of a working group to elaborate guidelines on which tribunals and prosecutors’ offices across the country should base their policy on access to information. The Court of BiH should afterwards adapt its rules of procedure. It remains to be seen whether and how the HJPC recommendations will be implemented.

8. The Provision of Psychological Support and Protection to Witness and Victims of War Crimes

WGEID’s Recommendations (para. 90)

More should be done to protect and offer assistance to victims and witnesses, in particular women. In particular, the programme for the protection of witnesses should be improved and expanded at the State level, and similar programmes should be created at the local level.

Programmes of psychological assistance should be generalized and strengthened where they already exist. Such programmes should also include a gender perspective and give special attention to the specific trauma suffered by members of the family of a disappeared person.

78. The associations subscribing this follow-up report highlight the **insufficiency of the psychological support provided to witnesses and victims during trials. The situation is particularly critical in Republika Srpska and before district prosecutors’ offices. In Republika Srpska, the government suspended the budget line concerning support of victims and witnesses during war crimes**

⁵⁹ Balkan Investigative Reporting Network, *Anonymization “Threat” to Bosnian Justice Criticized*, 25 December 2012, at <http://www.bim.ba/en/354/10/36420/>. See also Recommendations by the European Commission after the 4th Plenary Meeting of the Structured Dialogue on Justice between the European Union and BiH (hereinafter “2013 Recommendations by the European Commission”), April 2013, available at <http://www.delbih.ec.europa.eu/News.aspx?newsid=5654&lang=EN>, recommendation No. 14, according to which the European Commission “Invites competent authorities to develop a balance between the necessary protection of personal data and the *requirement for publicity of courts’ rulings and proceedings*, especially with regard to cases of general interest to the public, such as *war crimes*, organised crime and corruption and terrorism. This can be achieved by looking at the relevant Council of Europe instruments, and the jurisprudence and practice of the European Court of Human Rights” (emphasis is added).

⁶⁰ See (in Bosnian) http://www.bhrt.ba/107.html?&L=uxtnbhdwmtm&cHash=ebf175bf61318428343df31c863fbcce&tx_ttnews%5Btt_news%5D=2452.

trials, thus worsening an already precarious situation where local Centres for Social Work were in charge of this task without having the necessary training to do so. UNDP recently obtained some funding to fill the gap, but this does not ensure sustainability on the mid and long term.

79. According to associations of victims of war crimes even when some support is provided, this is generally not done in a professional manner and by people adequately trained to this aim. Some victims and witnesses reported that they were accompanied during trials by personnel supposed to be supporting them that actually limited to asking them whether they needed something or they wanted some water. Associations of victims of war consistently denounce that the little support they may get is limited to when they are present in the courtroom, especially to testify. Several among the associations subscribing this report mentioned that the fact that there is no psychological support once the victim or witness leaves the court room is perceived by their members as if “they are forgotten again and left alone to take care of themselves and to cope with their trauma”. This situation cannot but foster the sense of marginalization and abandonment that victims of war crimes have been experiencing over the past 20 years.
80. It must be referred that in September 2013 new departments to offer support to witnesses during war crimes trials have been set up at the Cantonal Court in Novi Travnik and at the Cantonal Prosecutor’s Office in Travnik, as well as at the Cantonal Court and the Cantonal Prosecutor’s Office in Bihać. These departments have been established with the support of the UNDP. In this sense, if BiH authorities do not provide for adequate and sufficient financial and human resources to ensure future activities, the sustainability of these new departments may be at risk.
81. Over the past years **new instances of harassment and threats against witnesses at war crimes trials have been reported while, to the knowledge of the associations subscribing the present report, this kind of crimes is not being duly investigated** and those responsible are not being prosecuted and sanctioned.
82. An example that has been referred to is that of Mr. Šefik Hasanović, who testified at a war crime trial in Brčko District. Before and during the trial, between April and May 2012, Mr. Hasanović was subjected to verbal threats, followed by a car, and offered money (10,000 BAM, i.e. 5,000 Euros) to desist from testifying or to alter the contents of his testimony from a personal friend of the accused. When Mr. Hasanović refused to change his statements, the threats and harassment increased and on one occasion someone broke into his house. At present, Mr. Hasanović is under protection. Although Mr. Hasanović has duly reported these events to the police station in Brčko, to his knowledge to date no one has been prosecuted and sanctioned for the harassment he has been subjected to.

83. Witnesses testifying at a trial that is taking place before the Court of BiH against a person accused of having committed war crimes and crimes against humanity in Vogošća have also been subjected to harassment. In particular, they have been receiving threatening anonymous phone calls and messages, as well as silent calls in the middle of the night. To the knowledge of the subscribing associations, BiH authorities have not undertaken any thorough investigation on these events and no one has been prosecuted and sanctioned.
84. Another example that can be referred took place in May 2013, during the trial against Ms. Monika Karan Ilić before the District Court in Brčko. After giving his testimony, V.P.⁶¹ was approached by the husband of the accused, who hit his leg while he was leaving the court-room. This was denounced by V.P. to local authorities, which answered that this does not fall within their competence. V.P. is very scared after these events took place and has lived the whole experience as a form of re-traumatization.
85. It must be also stressed that in several cases the manner in which war crimes trials are being conducted fosters a general sense of distrust among potential witnesses, who feel discouraged and exposed to security risks without any serious protection.
86. For instance, it has been referred that the fact that those accused of war crimes and crimes against humanity are not detained while trials against them are carried out fosters fear among victims and potential witnesses. An example that has been referred is that of the trial currently taking place before the Court of BiH against Mr. Dragomir Soldat, Mr. Velimir Đurić, and Mr. Zoran Babić for crimes against humanity and war crimes committed in Prijedor in 1992. In this case the defendants are not in custody during the trial. In particular, Mr. Velimir Đurić lives in Prijedor and is often seen in the area. This situation is perceived as a source of concern and distress for witnesses in this trial.
87. It must also be highlighted that **the relevant legal framework for victims' and witnesses' protection remains inadequate**. The CEDAW recently expressed its deep concern because of "the deficiencies of witness protection measures in cases prosecuted at district and cantonal levels, where the Law on Witness Protection Programme is not applicable"⁶² and it recommended to BiH to "ensure the effective implementation of the new Law on Witness Protection Programme and establish sustainable and operational witness protection measures at district and cantonal levels".⁶³
88. While few attempts to amend the existing legal framework on witnesses' protection already failed, in

⁶¹ Due to security and privacy reasons, certain victims of gross human rights violations during the war who accepted to render their testimony for this follow-up report to the WGEID expressly requested that their identity is not disclosed to the wider public. In the present document, letters are used to designate the persons concerned. Their full names could be disclosed, upon request, to the WGEID, given that guarantees are provided that these data will not be made public in any way.

⁶² CEDAW, *Concluding Observations on BiH*, *supra* note 21, para. 9.e.

⁶³ *Ibid.*, para. 10.d.

July 2011 a working group composed of different authorities was established with the aim of putting forward another draft law. The Council of Ministers of BiH prepared a draft law on Witness Protection Programme in BiH, which was adopted by both the House of Representatives and the House of Peoples of the BiH Parliamentary Assembly in December 2013. However, due to the fact that the texts adopted by the two Chambers were not identical, the establishment of a Joint Commission with the task of adjusting the text has been announced on 16 December 2013. The Commission should have started its work on 6 February 2014, but it would seem that the session was cancelled and it is unknown when it will be rescheduled.

9. The Ongoing Discrimination in Access to Disability Pensions and the Lack of A National Programme on Reparations and of A National Law on Memorials

WGEID's Recommendations (para. 84.b, c, d, and g)

- The State, in cooperation with entity authorities, take steps, including the amendment of legislation, to ensure that all relatives of disappeared people have access to social benefits and other measures of social support irrespective of where they live. Such legislation should be adopted on the State level in order to avoid the continuation of the current situation in which there exists discrimination in access to and levels of social benefits depending on the entity;
- More assistance be given to associations of families of disappeared persons at the State level, without any discrimination as to ethnic origin. Measures should be taken in order to ensure that members of families of disappeared persons are entitled to social benefits and other measures of social support irrespective of where they live, including health care, special education programmes and psychological assistance;
- A national programme on reparations for relatives of victims of enforced disappearance that includes compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition be established. Reparation programmes should take into account a gender perspective, considering that most family relatives of missing persons are women;
- A national law on the issue of memorials be enacted. This law on memorials should set out the criteria and the process to establish such memorials.

89. First, it must be recalled that, as the WGEID itself stressed out “Everyone has the right to social security and the State has the duty to provide the family with the widest possible protection. *Measures that provide for social assistance do not, however, prejudice the obligation of the State to provide reparation to victims as a consequence of the violation of their rights*”.⁶⁴ The WGEID clarified that “the provision of social services for victims should *not be confused with their right to obtain reparation*”⁶⁵ and it added that “measures should be taken to ensure that *members of families of disappeared persons are entitled to social benefits and other measures of social support irrespective of where they live, including health*

⁶⁴ WGEID, *Annual Report for 2012*, supra note 32, para. 50 (emphasis added).

⁶⁵ *Ibid.*, para. 68 (emphasis added).

*care, special education programmes and psychological assistance”.*⁶⁶

90. Unfortunately, the situation on these matters has not changed since when the WGEID visited the country. **No national programme on measures of reparations for relatives of victims of enforced disappearance has been adopted** and, to the knowledge of the subscribing associations, there is no draft legislation in this sense. In this context, the **notions of reparations and social allowances for relatives of disappeared people continue being unduly confused in BiH.**
91. With regard to **social benefits, no State law has been adopted since 2010 nor does it seem to be forthcoming.** As spelled out above in detail, the only State institution envisaged in this field (i.e. the Fund) has not been established.⁶⁷ This subject remains regulated at the Entity level and the **discrepancies and instances of discrimination registered in 2010 by the WGEID during its visit continue affecting relatives of disappeared people.**
92. In this sense, relatives of missing persons are treated in a different manner depending on the place of residence, as **the amounts of social allowances vary between the two Entities.** A particularly problematic situation is that of **returnees to the Prijedor area: while they had right to social benefits in the Federation of BiH, upon their return they lost it.** It is noteworthy that almost all the returnees facing this situation are of Bosniak or Croatian original, meaning that the existing practice **disproportionately affects non-Serb population.** In the case of returnees, Art. 33, para. 5, of the relevant legislation in Republika Srpska establishes that “a person who has realized the right as a civilian victim of war or a family-member of a civilian victim of war under the regulations of the Federation or a surrounding country has no right to file a request for the granting of rights under this law”. This provision has often been interpreted as excluding those who decide to return in Republika Srpska from the enjoyment of any social benefits.⁶⁸ In practice, this specific interpretation of the law has prevented a considerable number of people from returning to their pre-war houses, since they realized that moving back to Republika Srpska would have brought as a consequence the loss of their monthly disability pensions which, in the majority of cases, are their only means of subsistence. It is noteworthy

⁶⁶ *Ibid.*, para. 61 (emphasis added).

⁶⁷ *Supra* paras. 9-10.

⁶⁸ The law was amended in 2006 (Official Gazette Federation BiH No. 39/06). Article 33.1 reads: "Civilian victims of war and family members of civilian victims of war with temporary residence on the territory of the Federation BiH will upon their return in their earlier places of residence in Republika Srpska or Brčko District of BiH be assured rights which they had in their temporary place of residence". After the law was amended, a big number of returnees reapplied in the Federation BiH for the granting of their lost rights. Their claims were, however, all rejected, at least in the Una-Sana Canton, because the competent Ministry of Work and Social Policy interpreted the new provision as having to be applied only to people who had these rights at the moment when the amendments entered into force and who returned thereafter to Republika Srpska, and not to the people who already had lost their rights at the moment when the changes entered into force. As the majority of people had returned in Republika Srpska in 2004, all of them were excluded from regaining social assistance in Federation BiH, while at the same time incapable of gaining this assistance in Republika Srpska.

that on 2 February 2011 the Supreme Court of Republika Srpska rendered a significant decision according to which lower courts should not automatically deny access to social benefits to those who received monthly disability pensions in the Federation of BiH and later on returned to Republika Srpska. This decision should have represented a landmark judgment that sets the criteria to be followed by lower administrative bodies and courts throughout Republika Srpska. Nevertheless, it would seem that at the time of writing such decision has not been implemented and, on the contrary, lower administrative bodies continue interpreting the law as it was done in the past. In the meantime, the Federation of BiH allowed relatives of missing persons who had in the past been awarded the right to disability pension to continue receiving it even if they moved in the meantime to Republika Srpska, after they obtain a decision from the Constitutional Court of BiH was adopted,⁶⁹ implying in its reasoning that the BiH Federation should continue providing the pensions even in case relatives of missing persons returned to Republika Srpska. No coverage is envisaged for the years when relatives did not receive any social allowance.

93. Moreover, it must be pointed out that the Law on Protection of Civilian Victims of War in Republika Srpska poses strict deadlines for those wishing to apply (notably, the final deadline expired on 31 January 2007).⁷⁰ This resulted in the exclusion of many victims from the possibility to obtain the benefits they would be entitled to. This is the case, in particular, of people living, also temporarily, outside BiH, who were **not informed about the existence of this law and therefore failed to submit their claims in due time**. On this matter, the Special Rapporteur of the Sub-Commission on the right to reparation for victims of gross violations of human rights and humanitarian law, Mr. Theo van Boven, noted that under the current state of international law, civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations in any event.⁷¹

⁶⁹ See Constitutional Court of BiH, decision No. AP 978/09 of 13 June 2012.

⁷⁰ Art. 33 of the law establishes that “a request for granting of rights on the basis of bodily harm can be submitted within 5 years after the harm was caused, i.e., since the day when the circumstances under which the harm was caused ceased to exist. The fact that the bodily harm occurred under circumstances described in Art. 2 of the Law is inevitably proved by medical documentation about a treatment which should have been obtained one year after the harm was caused, i.e. after the circumstances under which the harm was caused ceased to exist and which the applicant should attach to the request [...]”.

⁷¹ See UN doc. E/CN.4/Sub.2/1996/17 of 24 May 1996, para. 9. See also *Principles on the right to a remedy and reparation for victims of gross violations of human rights law and serious violations of humanitarian law* (“UN Principles on the Right to a Remedy”), adopted by General Assembly Resolution No. 60/147 of 16 December 2005, Principle 7, which sets forth “domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive”. In this sense, it must be reported that on 7 August 2012 the government of Brčko District adopted a regulation concerning civilian victims of war who reside in the District. The new regulation recognizes “persons who have suffered permanent mental damage due to sexual harassment and rape, as a person with a special status, to whom there is no percentage determined for the harm suffered” (Art. 2). Most notably, the regulation does not fix a deadline to apply for the recognition of the status of civilian victims of war. This new regulation entitles victims to receive monthly disability pensions, as well as vocational trainings in the form of professional rehabilitation, right to special projects of employment, right to priority housing and right to free legal aid (Art. 4).

94. A further problem is related to some **provisions of the Law on Protection of Civilian Victims of War in Republika Srpska and their interpretation by local authorities**. Art. 2 of the law defines as civilian victim of the war a person who: “1) Has suffered **bodily harm** because of harassment, rape, detention (jail, concentration camp, interment, forced labour etc.) or *who during escape from the enemy* has suffered injuries or wounds which have caused at least 60% of bodily harm as well as those persons who have been killed, died or went missing in these circumstances; 2) Has suffered at least 60% of bodily harm because of wounding or injuring caused by warfare such as: bombing, street fights, bullets, grenades from a cannon or a bazooka and similar; 3) Has suffered at least 60% of bodily harm because of wounding or injuring caused by old army materials *or as a consequence of commando actions by the enemy*”. Art. 4 of the law establishes that “rights under this law cannot be realised by persons who have been members of enemy formations or aiders of the enemy”. Given the peculiarities of the conflict in BiH, the notions of “enemy” or “enemy formations” lend themselves to misinterpretation and are certainly vague. So far, local authorities have interpreted this as being any army or soldiers other than the Republika Srpska army. **The provisions of the mentioned law and the practice of local authorities impose a disproportionate burden of proof on relatives of missing persons**, who are often **requested to demonstrate in which circumstances their loved ones** perished, while, because of the nature of enforced disappearance, they are not in a position to do so. Many relatives of missing persons were therefore precluded from having access to social allowances, adding mockery to the suffering. On the one hand, authorities do not disclose the fate and whereabouts of their loved ones; and, on the other, they would impose an unbearable burden of proof on relatives to allow the latter having access to meagre monthly pensions.
95. There is also a **substantial and unjustified discrimination between civilian victims and veterans**. Art. 9 of the Law on the Basis of the Social Protection, Protection of Civilian Victims of War and Families with Children in the Federation of BiH prescribes that the maximum monthly financial allowance **for civilian victims of war should equal 70% of the maximum allowance available to war invalids**. Also this law establishes short deadlines⁷² to apply to obtain the status of civilian victim of war and many people have been excluded.⁷³

⁷² Art. 101 of the law as amended in 2005 established that “the current users who have realized their rights as well as those who have filed requests for the realization of the rights and whose requests have not been answered under the provisions on social and children protection and the protection of civilian victims of war, which were applied on the territory of Federation until the coming into force of this Law, are obliged to apply for the granting of rights under this Law *within six months after the entering of the Law into force*. *Persons from paragraph 1 of this article, who do not file requests in the deadline prescribed in paragraph 1, will have their rights terminated*” (emphasis added).

⁷³ It results that, among civilian victims of war, those residing outside BiH, also temporarily, see their rights particularly impaired. In this sense, the Women’s Section of the Association of Concentration Camp Detainees expressed its concern for the fact that Article 76.(a) of amended version of the Law on Civilian Victims of War in Federation of BiH (Official Gazette Federation of BiH No. 39/06)

96. Despite the recommendations by the WGEID, **since 2010 no national law on the issue of memorials has been enacted**, nor does any draft on be subject seem to be under consideration. By contrast, **in November 2011 a Law on Memorials was adopted in Republika Srpska was adopted**. This law contains some controversial provisions, which have been considered discriminatory by members of Bosniak and Croatian ethnic groups. Members of these groups sitting in the Parliament of Republika Srsпка requested an assessment of this law by the Constitutional Court of Republika Srsпка, which on 28 February 2012 declared that the legislation concerned does not violate the vital interests of Bosniak and Croatian groups. According to this law, graveyards, memorials and monuments aiming at commemorating “fallen soldiers of the Serb and Montenegrin army in liberation wars until 1918, participants of the anti-fascist fight in the II world war, as well as soldiers in the Defensive-liberation war of Republika Srsпка” can be built or protected only by a number of associations (all of them being of Serb victims).

10. Other Matters of Concern

97. Besides the various issues of concern related to the recommendations issued in 2010 by the WGEID, there are other matters that the associations subscribing the present report would like to bring to the attention of the WGEID.

10.1 The Implementation of the National War Crimes Processing Strategy

98. On 29 December 2008 the Council of Ministers of BiH adopted the National War Crimes Processing Strategy which, among other things, establishes that the most complex crimes (i.e. mass crimes) will be dealt with as a matter of priority within 7 years and the prosecution of other crimes will be dealt with within 15 years from the adoption of the strategy.

99. Over the past years, several domestic mechanisms and international institutions, including the Human Rights Committee, have consistently denounced the **slow pace of implementation of the strategy**. Among others, in its recent concluding observations on BiH, the CEDAW expressed its deep concern about “the slow pace of prosecutions and very low level of conviction rates of perpetrators of sexual violence which result in pervasive impunity, despite the implementation of the 2008 National War Crimes Prosecution Strategy”⁷⁴ and it accordingly recommended BiH to “speed up the implementation of the National War Crimes Strategy and increase the number of prosecutions of war crimes cases by

establishes that “the user of rights under this Law will have those rights terminated if the user leaves BiH for more than three months, counting from the day the person left. When the person returns to BiH” he/she can reapply for the granting of the same rights”.

⁷⁴ CEDAW, *Concluding Observations on BiH*, *supra* note 21, para. 9.a.

allocating more financial resources and investigative capacities to address the large backlog of cases”.⁷⁵

100. Although over the past months moderate progress has been made in the implementation of the strategy, in its latest report the HJPC affirmed that **“prosecutor’s offices around the country are currently unable to process all the cases from the 1990s conflict that remain open”**.⁷⁶ More than 1,000 war crimes related investigations would still be ongoing across the country. During 2012, the Court of BiH rendered 32 verdicts on war crimes cases, the courts in Republika Srpska rendered 17, the courts in the Federation of BiH rendered 16, and those in Brčko District rendered 4 verdicts. According to the HJPC the implementation of the strategy has been enhanced by forwarding a significant number of cases from the State to Entity levels. At the time of writing, data concerning 2013 have not yet been made available. Nevertheless, in order to be effective and sustainable, this requires additional human resources (esteemed by the HJPC in the number of 28 new prosecutors). **In November 2013, the Prosecutor’s Office of BiH appointed 13 new prosecutors to work on war crimes cases.**
101. Associations of victims of gross human rights violations, including enforced disappearance, during the war remain **generally dissatisfied with the implementation of the strategy. Some of their members are dying without seeing justice done and this is fostering an overall sense of frustration among people who have been waiting over the past 20 years to see those responsible for crimes under international law and gross human rights violations duly prosecuted and sanctioned.** The general feeling of abandonment is further nourished by the fact that perpetrators are getting increasingly low sentences.⁷⁷

10.2 The Limitations to the Freedom of Expression and the Right of Peaceful Assembly with regard to Associations of Victims of War from the Prijedor Area

102. During 2012, associations of former camp-detainees, victims of torture, and relatives of missing persons who were subjected to gross human rights violations in the detention camp of Omarska,⁷⁸ near Prijedor, experienced violations by BiH authorities to their freedom of expression, as well as to their right to peaceful assembly.

⁷⁵ *Ibid.*, para. 10.a.

⁷⁶ For a summary (in English) of the HJPC 2012 Report see “Bosnia ‘failing’ to Prosecute War Crimes Efficiently”, 13 August 2013, at http://www.balkaninsight.com/en/article/bosnia-war-crimes-prosecutions-dubbed-not-efficient?utm_source=Balkan+Transitional+Justice+Daily+Newsletter&utm_campaign=c430046f67-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_561b9a25c3-c430046f67-309711333.

⁷⁷ *Supra* paras. 40-75.

⁷⁸ On Omarska see, *inter alia*, ICTY, Case *Prosecutor v. Miroslav Kovčeka et al.*, judgment by the Trial Chamber of 2 November 2001 (Case No. IT-98/30-1), paras. 28-44; and *Final Report to the United Nations Security Council of the United Nations Commission of Experts* established pursuant to Security Council Resolution 780 (1992), doc. S/1994/674/Add.2 (Vol. I) of 28 December 1994 (“The Prijedor Report”), available at: <http://www.ess.uwe.ac.uk/comexpert/ANX/V.htm>, Chapter VIII.A “Logor Omarska”.

103. The “Omarska” prison camp (opened in the administrative centre of the Omarska iron ore mine) was operative from 27 May 1992 to 21 August 1992. During this period between 3,000 and 5,000 civilians were imprisoned in Omarska, and were kept under inhuman conditions, physically and psychologically abused, arbitrary killed and tortured. Those who were detained at Omarska were severely beaten by the camp guards and were subjected to all sorts of inhumane treatment. In fact, many of the prisoners at Omarska were beaten to death. In July 1992, at least 15 men went missing from Omarska camp, while by the end of the same month, a large number of unidentified prisoners (of whom at least 50 were villagers from Hambarine), were killed using firearms. The inhumane treatment and the living conditions in Omarska were said to be the most horrendous. In general, those who were detained there were provided insufficient food and water, inadequate medical care and treatment, and they were subjected to overcrowding and lack of proper hygiene arrangements.⁷⁹
104. At present, the steel and mining company “Arcelor Mittal” runs the industrial complex where the former detention camp was situated. The property of the company is shared between Arcelor Mittal and Republika Srpska. In March 2012, Arcelor Mittal denied access to its premises to a group of students from Munich. On 14 April 2012 access was also denied to a delegation of former camp-detainees, two art/theory groups called respectively Four Faces of Omarska and Grupa Spomenik, and researchers from the University of London.⁸⁰ Arcelor Mittal holds that local authorities are responsible for this situation, as they are the real owners of the land where Omarska is located and are those taking decisions.⁸¹
105. These events must be read in a broader context where local authorities (and in particular Mr. Marko Pavić, the Mayor of Prijedor) are placing restrictions on the freedom of expression and association, as well as the right to peaceful assembly of local associations of victims of gross human rights violations during the conflict or their relatives. In particular, public commemorations for the 20th anniversary of mass atrocities organized by local NGOs (9 May 2012), were formally prohibited and it was announced that any transgression of such prohibition and the use of the term “genocide” when referring to the crimes committed at Omarska will be prosecuted and sanctioned.
106. The associations *Izvor* and Prijedor 92 report that local police prohibited the holding of a

⁷⁹ See ICTY, Case *Prosecutor v. Miroslav Kovčeka et al.*, *supra* note 116; Case *Prosecutor v. Predrag Banović*, judgment of the Trial Chamber of 28 October 2003 (Case No. IT-02-65/1-5); Court of Bosnia and Herzegovina, Case *Prosecutor v. Željko Mejakić, Momčilo Gruban and Duško Knežević*, judgment of 30 May 2008 (Case X-KR/06/200), available at: http://www.sudbih.gov.ba/files/docs/presude/2008/Zeljko_Mejakic_First_Instance_Verdict.pdf; and Balkan Investigative Reporting Network, *Time for Truth: Review of the Work of the War Crimes Chamber of the Court of Bosnia and Herzegovina 2005-2010*, Sarajevo, 2010, p. 81.

⁸⁰ On these events see, *inter alia*, <http://talkbosnia.net/sydneyforum/?p=1509>

⁸¹ See <http://www.arcelormittal.com/corp/news-and-media/news/2012/may/15-05-2012> and <http://www.arcelormittal.com/corp/news-and-media/news/2012/jul/02-07-2012>.

commemoration for the 20th anniversary of the suffering of women in Prijedor (23 May 2012). Allegedly, members of the associations intended to place 266 bags for exhumations in the name of 266 killed women and girls at the main city square, decorated by a single rose and the name and surname of each of the women. This performance was prohibited under the justification that it would disturb the interethnic relations and that the police had reasons to believe that there could be incidents, because of extremist groups which could threaten the non-Serb activists in Prijedor. *Izvor* formally complained against these restrictions to the Ministry of Interior which nonetheless confirmed the prohibition to hold the commemoration already imposed by the police. Accordingly, a claim was filed by *Izvor* before the District Court in Banja Luka and is currently pending.

107. To protest against these restrictions a public campaign named “Day of White Armbands” was launched: on 31 May 2012 people were invited to wear a white armband to commemorate the day on which in 1992 all non-Serb population living in Prijedor was forced to wear a white armband.⁸²
108. Prominent politicians of the *Savez nezavisnih socijaldemokrata* (SNSD)⁸³ publicly called on local authorities in Prijedor and in the rest of Republika Srpska to prevent commemorative events using police and to deny the occurrence of genocide.
109. A special session of the Municipal Assembly of Prijedor was held on 8 June 2012 and on such occasion the Mayor of Prijedor warned the representatives of associations of victims of gross human rights violations that the use of the word “genocide” during public ceremonies would “trigger consequences”. Moreover, Arcelor Mittal confirmed restrictions to the visits to Omarska, formally authorizing only those envisaged for 6 August (commemoration of the 20th anniversary of the crimes committed in the detention facility).
110. A particularly grave episode occurred in connection with the public event titled “For Equity and Right to Remembrance” (6 August), organized to commemorate the anniversary of the suffering of children in Prijedor. In the evening of 4 August 2012 the association *Izvor* organized an event to promote the book “The War is Dead, Long Live the War” by Mr. Ed Vulliamy (the British journalist who first reported about the concentration camps set up in Omarska and Trnopolje during the war). While this event was taking place or immediately afterwards (e.g. in the night between 4 and 5 August 2012) **the premises of *Izvor* in Prijedor were subjected to an attack: stones were launched and the windows of the office were broken**. In the morning of 5 August 2012, neighbours noticed the broken windows and called the police to collect the evidence. On 8 August 2012 representatives of *Izvor* submitted a formal denounce of the incident to the local police, requesting that a prompt, independent, impartial and thorough

⁸² See, *inter alia*, <http://stopgenocidedenial.org/2012/05/15/remembering-prijedor-massacre/>.

⁸³ See, *inter alia*, <http://vasicrajko.blogspot.it/search?updated-max=2012-06-17T00:13:00%2B02:00> (in the local language).

investigation is launched to identify, judge and sanction those responsible. In the view of the members of *Izvor*, these events are strictly related to the celebrations held during the first days of August to commemorate the gross human rights violations perpetrated in and around Prijedor and were meant to be a form of intimidation. At the time of writing, the identity of those responsible for the attack has not been determined and no one has been prosecuted and sanctioned.

111. Since November 2012 other similar episodes have been registered and generally it is held that Arcelor Mittal, the corporation currently owning the site where the Omarska detention camp was set up during the war, imposes severe restrictions to former camp-detainees willing to visit the site.⁸⁴ For instance, **on 9 May 2013, representatives of former-camp detainees were not allowed to commemorate the Day of Camp Detainees and to visit the site.**
112. On 31 May 2013 around 400 people, mainly young persons, gathered in Prijedor on the occasion of the **“White Arm Band Campaign”, designated to draw attention to the continued denial of crimes and discrimination of the non-Serb victims by the local government in the city of Prijedor. The mayor of Prijedor publicly and disdainfully referred to the manifestation as an “ordinary Gay Parade”,**⁸⁵ further accusing NGOs and civil society organizations to be responsible for the unemployment of young people, because with their manifestations they would cast a bad reputation on Prijedor and frighten potential investors. These discriminatory and insulting affirmations issued by a State authority cannot but foster the feeling of marginalization of victims of gross human rights violations from the war. Associations working in the area report that these incidents are also nourishing a sense of fear, in particular among returnees.
113. In this sense it must be referred that in October 2013 a global campaign was launched⁸⁶ calling on the mayor of Prijedor to publicly acknowledge and memorialize the non-Serb victims of atrocities committed in the city in the early Nineties and to avoid any further restrictions to the freedom of expression and the right of peaceful assembly. The open letter to the mayor of Prijedor has been subscribed by leading world experts on truth-seeking and memorialization, including the United Nations Special Rapporteur on Torture.

11. Conclusions and Recommendations

114. In general, it is the view of the subscribing organizations that **very little has been done by BiH to**

⁸⁴ Visitors are obliged to notify at least seven days earlier through a request with full data of the visitors and the purpose of the visit. This does not necessarily guarantee that the visit will be permitted.

⁸⁵ In this sense see <http://www.klix.ba/vijesti/bih/marko-pavic-nazvao-dan-bijelih-traka-slavljem-i-gay-paradom/130601057> (in the local language); and <http://dalje.com/en-world/prijedor-mayor-calls-commemoration-of-war-victims-gay-parade/470516> (in English).

⁸⁶ See <http://ictj.org/sites/default/files/ICTJ-Prijedor-Bosnia-Herzegovina-Letter-New-2013.pdf>.

implement the recommendations issued in 2010 by the WGEID after its mission to the country.

This is a source of frustration for relatives of missing persons and their representative organizations. When the WGEID visited BiH, for the first time after the conflict, this represented a genuine sparkle of hope for thousands of persons across the country who trusted that recommendations issued by an international human rights mechanisms would have prompted domestic authorities to uncover the truth on their loved ones and adopt effective measures to put an end to impunity and to grant redress for the harm suffered. Unfortunately, four years later this does not seem to be the case. Over the past years, many relatives of disappeared persons have died without ever learning the truth on the fate of their relatives or being able to mourn and bury them according to their beliefs and customs. Justice remains a mirage for many across the country and thousands struggle for daily survival without having ever received compensation for their suffering and losses and feeling that they will most probably never see this happening.

115. While BiH remains in breach of its international obligations, the associations subscribing this report respectfully request the WGEID to call on BiH to:

- Ensure that, within the MPI, the recourse to mandates of “technical” nature or the holding of posts *ad interim* is limited to exceptional circumstances, while all the posts of the management of the MPI are filled through a regular and transparent election process. The regular budget for 2014 must be secured as a priority. To increase the authority of the MPI, during their term of office the members of the Steering Board, of the Board of Directors and of the Supervisory Board shall not engage in any activity which is incompatible with their independence, impartiality or with the requirements of a full-time office.
- Ensure that the Law on Missing Persons is fully implemented and that the CEN is completed within the shortest delay. Failure to comply with this shall be prosecuted and sanctioned. The information contained in the CEN shall be as complete and accurate as possible.
- Ensure that the Fund is set up without any further delay and its financing is entirely secured. In any case, BiH shall ensure that, besides measures of social assistance, all relatives of missing persons are granted integral reparation and prompt, fair and adequate compensation for the harm suffered.
- Ensure that the Prosecutor’s Office of BiH receives adequate funding for exhumations operations and that additional forensic pathologists are hired. Consider the establishment of a State Forensic Institute, and in the meantime ensure that the personnel working in this area receives adequate training.
- Ensure that the process of exhumation of mortal remains is accelerated. Moreover, BiH must ensure that the Prosecutor’s Office of BiH establishes a mechanism to regularly inform relatives of missing persons, including those residing outside BiH, and their associations on the progresses made in the process of exhumation and identification of mortal remains and to answer the questions that they may

have in this regard. Finally, BiH must ensure that during and after the processes of exhumation and identification of mortal remains relatives of missing persons receive, free of charge, adequate psychosocial accompaniment, provided by teams of professionals especially trained for this work and financed by the State.

- Ensure that the National Strategy for Transitional Justice is adopted and implemented without further delay, keeping in mind that fact-finding processes, although crucial for the establishment of the truth, cannot replace access to justice and redress for victims of gross human rights violations and their relatives that must thus be guaranteed such rights independently from the adoption of the strategy concerned.
- Ensure that the obstacles for the adoption of the Law on the Rights of Victims of Torture are swiftly removed and this crucial piece of legislation is adopted and enforced without further delay. Financial resources for its implementation must be secured and the overall exercise must be coordinated with the other mentioned legislative initiatives concerning victims of the conflict in BiH in order to avoid overlapping or lacunae. To ensure the finalization of a sound draft law, all parties shall constructively participate to the endeavour and associations of victims of torture during the war must be thoroughly involved and allowed to express their opinions, needs and expectations.
- Ensure that a new draft law on free legal aid is finalized without delay and that associations of victims of gross human rights violations during the war are thoroughly involved in such process and allowed to express their opinions, needs and expectations. The draft law on free legal aid shall be promptly approved and its funding secured. BiH must ensure to set up without delay an effective public system of free legal aid enabling victims of war to receive legal support (counselling and, if need be, access to court), if they are not able to afford it.
- Ensure that domestic legislation in cases of disappearance which makes the right to compensation and social allowances dependent on declaring the victim dead is amended without further delay; and that an assessment of the compatibility with international human rights standards of Art. 27 of the Law on Missing Persons is carried out to ensure that enforced disappearance is not unduly dealt with as a direct death. Associations of relatives of missing persons shall be duly involved in such assessment.
- Ensure that the criminal codes at the Entity level are harmonized with the criminal code at the State level, in particular with the view to integrate the crime of enforced disappearance as a crime against humanity, and set appropriate penalties. The criminal codes at all levels shall be amended to integrate the autonomous crime of enforced disappearance and shall establish that the statutes of limitations for criminal proceedings on cases of enforced disappearance take into account the continuous nature of

the offence and hence commence to run from when the fate or whereabouts of the victim are established with certainty and made known to their relatives.

- Ensure that the amendments to the Law on Pardon that were proposed in November 2013 are not enacted and that persons convicted for crimes under international law, including enforced disappearance are not exempted of a sanction for their conducts.
- Ensure that those accused of crimes committed during the war, and in particular of genocide and the major instances of war crimes, are investigated, prosecuted and, if convicted, adequately punished in accordance with international standards and in proportion with the gravity of their crimes.
- Ensure that the judgment issued by the European Court of Human Rights on the case *Maktouf and Damjanović* is not interpreted as meaning that all those convicted for war crimes or genocide pursuant the provisions of 2003 CC must be judged anew but take in due account the gravity of the crimes.
- Take all necessary measures to secure, wherever required, the continued detention of the persons convicted for war crimes and genocide pending a new determination of their sentence to be conducted by the Court of BiH in order to protect victims from violence, re-victimization and intimidation, ensure adequate protection against collusion or risk of absconding or committing further crimes or disturbance of public order in line with Arts. 132, 133 and 333 of the BiH Code of Criminal Procedure.
- Ensure that victims of gross human rights violations during the war and their representative associations are given information on a regular basis on the process of investigation carried out by the prosecutor's offices, the results of those investigations and whether trials might be forthcoming. Courts at all levels shall have consistent rules in dealing with the public in general and with victims of war crimes in particular.
- Ensure that the anonymization policy adopted by the Court of BiH is amended so that the judicial determination of the facts in trials concerning war crimes, crimes against humanity and, in general, gross violations committed during the war are disclosed to the general public without restriction, allowing victims of the crimes concerned, their families and society as a whole to fulfil their right to know the truth.
- Ensure that a comprehensive programme of witness protection and psychological accompaniment is granted at all levels prior, during and after the trial takes place. Instances of threats or harassment against witnesses, victims, their families, their counsels as well as against their representative associations shall be promptly and thoroughly investigated and those responsible shall be judged and sanctioned. Witness protection and support shall be victim-oriented and supplied by experts who are

adequately trained to provide these services and are financed by the State. The draft law on witnesses' protection and support currently pending before the BiH Parliamentary Assembly must be discussed and enacted without further delay.

- Guarantee that witnesses obtain adequate material support, including safe and free of charge transportation to and from the court.
- Ensure that the notions of compensation for the harm suffered as a result of gross human rights violations is clearly distinguished from that of social allowances.
- Ensure that a national programme on reparations for relatives of victims of enforced disappearance that includes compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition is established without any further delay.
- Adopt without delay the necessary amendments to make sure that legislation concerning the access to social allowances is harmonized across the country and discrimination eliminated. Unjustified discrimination between civilian victims and veterans shall be eliminated. Relatives of disappeared persons must have access to social benefits and other measures of social support irrespective of where they live and they should not face an unbearable burden of proof or unreasonable deadlines for the submissions of their claims.
- Ensure that a national law on the issue of memorials is enacted and that Entity legislation on this subject containing discriminatory provisions is amended or repealed without delay.
- Ensure that the National Strategy for Processing War Crimes is duly implemented without any further delay and that adequate financial and human resources are allocated to guarantee that the pace of proceedings increases.
- Ensure that restrictions on freedoms of expression and peaceful assembly comply with the strict requirements of Arts. 19 and 21 of the Covenant respectively. BiH must conduct investigations regarding the legality of prohibitions to conduct commemorations in the town of Prijedor since May 2012.
- Ensure that episodes of harassment and defamation of those participating to peaceful assemblies and commemorations of war crimes are duly investigated and, where appropriate, prosecuted and sanctioned. In particular, BiH must ensure that a prompt, independent, impartial and thorough investigation is carried out to identify, judge and sanction those responsible for the attacks committed during in 2012 and 2011 respectively against the premises of the associations *Izvor* and *Prijedor 92*.

- Ensure that consultations with victims and survivors of gross human rights violations from the war and their representative associations are launched without delay with the aim of designing and building a memorial to non-Serb victims in Prijedor.

On behalf of:

Association of Families of Killed and Missing Defenders of the Homeland War from Bugojno Municipality

Association of Relatives of Missing Persons from Ilijaš Municipality

Association of Relatives of Missing Persons from Kalinovik ("Istina-Kalinovik '92")

Association of Relatives of Missing Persons of the Sarajevo-Romanija Region

Association of Relatives of Missing Persons of the Vogošća Municipality

Association Women from Prijedor – *Izvor*

Philip Grant

TRIAL Director

12. The Associations Submitting this Follow-up Report



a) TRIAL (Track Impunity Always)

TRIAL Founded in 2002 TRIAL is an association under Swiss law based in Geneva. The main objective of the association is to put the law at the service of victims of international crimes (genocide, crimes against humanity, war crimes, torture and forced disappearances). TRIAL fights against the impunity of perpetrators and instigators of the most serious crimes under international law and their accomplices. The organization defends the interests of the victims before the Swiss courts and various international human rights bodies. TRIAL also raises awareness among the authorities and the general public regarding the necessity of an efficient national and international justice system for the prosecution of crimes under international law. To date TRIAL has defended more than 350 victims in the course of 132 international proceedings, submitted 40 reports to the United Nations and filed 15 criminal complaints in Switzerland.

TRIAL has been active and present in BiH since 2008.

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b) Association of Families of Killed and Missing Defenders of the Homeland War from Bugojno Municipality

The **Association of Families of Killed and Missing Defenders of the Homeland War from Bugojno Municipality** was founded in 1995 and it has 98 members. To date, the Association is seeking for 35 missing persons (20 soldiers and 15 civilians). The association represents the relatives of missing persons of Croat origin in and around Bugojno Municipality and it is actively involved in different types of activities such as: 1) collecting information with regard to missing persons; 2) providing help and support to families of missing persons in the realization of their rights; and 3) cooperating with other associations of relatives of missing persons, with the ICMP and the MPI, with the ICRC, with government institutions and with the Prosecutor's Office.

The association actively participates to the work of the Regional Coordination of Family Associations of Relatives of Missing Persons from former Yugoslavia, and until the end of September 2011 Ms. Vanda Havranek was a member of the MPI Advisory Board.

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c) Association of Relatives of Missing Persons from Ilijaš Municipality

The **Association of Relatives of Missing Persons from Ilijaš Municipality** was founded on 6 June 2009 with its headquarters in Ilijaš. The Association represents the families of missing persons in and around this region and it is actively involved in different types of activities. In particular: 1) pointing out to families of missing persons the significance of giving their blood samples for DNA analysis; 2) collecting information with regard to missing persons; 3) helping the relatives of missing persons to fulfil their rights, and to obtain disability pensions, return of property, etc.; 4) cooperating with the MPI, the ICMP and the ICRC.

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d) Association of Relatives of Missing Persons from Kalinovik ("Istina-Kalinovik '92")

The **Association of Relatives of Missing Persons from Kalinovik** was established in August 2004 under the name "Istina-Kalinovik '92". It is a non-governmental, non-political, multiethnic and multinational association of citizens. The association gathers members of families of missing persons from Kalinovik area, as well as families of missing persons from other municipalities whose loved ones went missing on the territory of Kalinovik. The association implements many activities and among them are the following: gathering data about missing persons from Kalinovik; establishing a missing persons database; drafting a book about killed civilians at the area of municipality Kalinovik; gathering information about the process of identification of the missing people from Kalinovik.

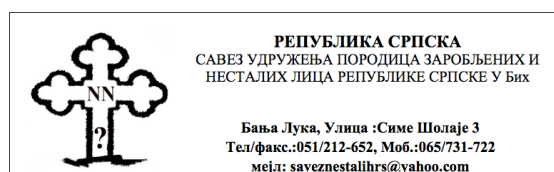
Representatives of the association participate to the work of the Regional Coordination of Family Associations of Relatives of Missing Persons from former Yugoslavia.

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e) Association of Relatives of Missing Persons of the Sarajevo-Romanija Region

The **Association of Relatives of Missing Persons of the Sarajevo-Romanija Region** was founded on 12 December

2002 with its headquarters in East Sarajevo. The association represents the victims of the war in and around this region and has about 1,500 members. Some of the association's activities are: 1) pointing out to relatives of disappeared persons the significance of giving their blood samples for DNA analysis; 2) collecting information with regard to missing persons; 3) organizing the commemoration day for the suffering of Bosnian Serbs on 20th August each year; 4) helping the relatives of missing persons to fulfil their rights (e.g. to obtain disability pensions or the return of property); 5) helping relatives of disappeared people with procedures before domestic and international human rights mechanisms; and 6) cooperating with the MPI, the ICMP and the ICRC.

The President of the association, Mr. Milan Mandić, is a member of the Regional Coordination of Missing Persons' Family Associations from the former Yugoslavia.

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f) Association of Relatives of Missing Persons of the Vogošća Municipality

The **Association of Relatives of Missing Persons of the Vogošća Municipality** was established in 2001 and its main aim is to help relatives of disappeared people to realize their rights before domestic courts and State institutions. The association represents the interests of its members before all relevant institutions and organizes the holding of a commemoration ceremony (in June each year) to mark the enforced disappearance of people from Vogošća. The association is also an active member of the Regional Coordination Board of Family Associations of Relatives of Missing Persons from BiH, the Republic of Croatia and the Republic of Serbia. As part of this engagement, the association gives its contribution in organizing conferences and lobbying for the signing of an agreement between neighbouring countries of the former Yugoslavia for the establishment and disclosure of the fate and whereabouts of missing persons. This work of the Board is supported by the ICMP. Since 2008 the association cooperates actively with the TRIAL to implement activities related to, among others, the filing of individual communications on behalf of relatives of victims of enforced disappearance to the HRC. On 28 March 2013 the latter delivered its views on the case *Prutina et al. v. Bosnia and Herzegovina*, based on three communications filed by TRIAL on behalf of members of the association. The HRC found several violations of the International Covenant on Civil and Political Rights inflicted on relatives of missing persons.

The President of the association, Ms. Ema Čekić, is also the President of the Regional Coordination of Missing Persons' Family Associations from the former Yugoslavia.

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g) Association of Women from Prijedor - Izvor

The **Association of Women from Prijedor - Izvor** was founded on 3 June 1996 with its headquarters in Prijedor, Bosanska Krajina region. The Association represents the victims of the war in and around this region. Over the past years, *Izvor* has been working on the collection of data and the documenting of facts about the people from this region who were arbitrarily killed or were subjected to enforced disappearance. A concrete result from this effort is an established database and two editions of a book "*Ni krivi ni dužni*" where 3,227 disappeared persons from Prijedor municipality have been registered. In addition to this, *Izvor* gives advice and provides help to all the victims of gross human rights violations perpetrated during the war and their relatives to realize their rights and obtain justice and reparation before domestic institutions and judicial bodies. One of the most frequent activities of *Izvor* is the support given to witnesses in war crimes trials before the State and other courts in BiH. Since 2008 *Izvor* established cooperation with the TRIAL and the two organizations are filing applications to the ECtHR and to the HRC on behalf of relatives of

disappeared people from the Bosanska Krajina region.

Izvor participated to the expert working group coordinated by the UNDP for the development of a National Strategy for Transitional Justice. The association also participated in consultation meetings convened by the UNPFA for the development of the Programme for Improvement of the Status of Survivors of Conflict related Sexual Violence.

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