BOSNIA-HERZEGOVINA

General Allegation on the situation in Bosnia and Herzegovina to the Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non-recurrence

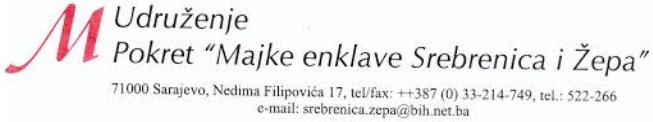
Submitted by

TRIAL (*Track Impunity Always*)

Women's International League for Peace and Freedom

The Association of Genocide Victims and Witnesses

The Association Movement of Mothers of Srebrenica and Žepa Enclaves



February 2014

1. Background

1. The Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence ("the Special Rapporteur") is mandated to "deal with situations in which there have been gross violations of human rights and serious violations of international humanitarian law"[1] through the implementation of a comprehensive approach to the four elements of the mandate in order to help "ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law in accordance with international human rights law".[2]

2. The Human Rights Council Resolution 18/7 establishing the Special Rapporteur refers to the Secretary-General's 'report on the rule of law and transitional justice in conflict and post-conflict societies' which describes transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[3] The report also enumerates the main components of a transitional justice strategy as being criminal justice, truth-telling, reparations and vetting.

3. Transitional justice figured as a core element of the framework for strengthening the rule of law proposed by the Secretary-General of the United Nations.[4] The Human Rights Council recently emphasised the relevance of transitional justice to the strengthening of the rule of law by stressing the "need for the international community to assist and support countries that were emerging from conflict or undergoing democratisation, as they might face special challenges in addressing legacies of human rights violations during their transition and in moving towards democratic governance and the rule of law".[5]

4. In order to implement its mandate, the Special Rapporteur is requested to, among others, gather relevant information on national situations; develop a regular dialogue and cooperate with, among others, Governments and non-governmental organisations; make recommendations concerning judicial and non-judicial measures when designing and implementing strategies for addressing gross violations of human rights and serious violations of international humanitarian law; and provide technical assistance or advisory services on the issues pertaining to the mandate.[6]

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1 Human Rights Council Resolution 18/7, UN doc. A/HRC/RES/18/7, 13 October 2011.

2 *Ibid.*

3 Report of the Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Society*, UN doc. S/2004/616, 23 August 2004, para. 8.

4 Report of the Secretary General, *Strengthening and Coordinating United Nations Rule of Law activities*, UN doc. A/66/133, 8 August 2011, para. 32.

5 Human Rights Council Resolution 19/36 on Human Rights, Democracy and the Rule of Law, UN doc. A/HRC/RES/19/36, 19 April 2012, para. 9.

6 Human Rights Council Resolution 18/7, *supra* note 1.

5. In light of the fact that "in most situations in which the mandate will be relevant, [...] the aftermath of the violations and of conflict mainly affect women and children [...]"[7] and that "women and children are indeed the majority of victims of certain types of violations [...]",[8] the Special Rapporteur is requested to integrate a gender perspective throughout the work of the mandate.

6. Human Rights Council Resolution 18/7 makes reference to a number of applicable international instruments regarding the mandate, among which the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity ("UN Impunity Principles")[9] and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("UN Basic Principles on the Right to a Remedy"),[10] adopted and proclaimed by the General Assembly in 2005.

7. The war in BiH from 1992 to 1995 left a legacy of horrific crimes and gross human rights violations that were committed mainly against civilians.

8. Bosnia and Herzegovina (BiH) is a State party to several international human rights treaties that are relevant to the mandate, among which the International Covenant on Civil and Political Rights;[11] the First Optional Protocol to the International Covenant on Civil and Political Rights;[12] the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;[13] the Convention on the Rights of the Child;[14] the Convention on the Elimination of All Forms of Discrimination against Women;[15]the International Convention for the Protection of All Persons from Enforced Disappearance;[16]and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[17] Further, BiH is party to the 1949 Geneva Conventions,[18] to the two 1977

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7 First Annual Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff to the Human Rights Council, UN doc. A/HRC/21/46, 9 August 2012, para. 58.

8 *Ibid*.

9 Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN doc. E/CN.4/2005/102/Add.1, 8 February 2005 ('UN Impunity Principles').

10 United Nations General Assembly Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN doc. A/RES/60/147, 21 March 2006 ('UN Basic Principles on the Right to a Remedy').

11 On 1 September 1993 BiH succeeded the former Yugoslavia, which ratified the treaty on 2 June 1971.

12 BiH ratified this treaty on 1 March 1995.

13 On 1 September 1993, BiH succeeded the former Yugoslavia, which ratified the treaty on 10 September 1991.

14 On 1 September 1993, BiH succeeded the former Yugoslavia, which ratified the treaty on 3 January 1991.

15 On 1 September 1993, it succeeded the former Yugoslavia, which ratified the treaty on 26 February 1982.

16 BiH ratified this treaty on 30 March 2012.

17 BiH ratified this treaty on 12 July 2002.

18 On 31 December 1992, BiH succeeded the former Yugoslavia.

Additional Protocols thereto,[19] to the Convention on the Prevention and Punishment of the Crime of Genocide[20] and to the Rome Statute on the establishment of an International Criminal Court.[21]

1.1 General Context concerning the Gross Violations of Human Rights and Serious Breaches of International Humanitarian Law during the War in BiH

9. On 6 March 1992, BiH, formerly one of the six federal States constituting the Socialist Federal Republic of Yugoslavia (SFRY), declared independence. One month later, on 6 April 1992, the European Community recognised BiH as an independent State. It was officially admitted as a member of the United Nations on 22 May 1992 and of the Council of Europe on 24 April 2002.

10. Its struggle for independence was marked by an armed conflict between various factions from within and outside BiH and was primarily fought between the Bosnian governmental forces on one side, and the Bosnian Serb forces (VRS) and the Yugoslav National Army (Jugoslovenska *Narodna Armija* - JNA) on the other. Also the Croatian Defence Council (HVO) took part to the hostilities. It must be stressed that while at the beginning of the conflict the army of BiH and the HVO fought together against the VRS and the JNA, from the spring of 1993 the army of BiH and the HVO engaged in an armed conflict between them. On 23 February 1994 the government of BiH and the HVO signed a general cease-fire agreement which took effect one day later. On 18 March 1994, representatives of the governments of BiH and the Republic of Croatia signed the Washington Agreement on the creation of the Federation of Bosnia and Herzegovina between the government of BiH and the Bosnian Croats. The conflict was characterised by atrocities: civilians were killed, concentration camps were set up, more than two millions of human beings were forced to internally displace or to seek refuge abroad, thousands of people disappeared without leaving a trace, and thousands of people were subjected to rape or otherwise sexually abused.

11. On 14 December 1995 the General Framework Agreement for Peace in BiH (also known as the "Dayton Peace Agreement") put an end to the hostilities. Based on the Dayton Peace Agreement, BiH consists of two semi-autonomous entities, the Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS). A special status was granted to the Brčko District in Northern Bosnia. All three "constitutive peoples" (Bosnian Muslims, Bosnian Croats and Bosnian Serbs) are represented in all public institutions of both entities and the Brčko District, in proportion to the ethnic composition of the population recorded in the 1991 census. Both entities within BiH have their own parliaments, governments and judiciaries. The Brčko District is also in charge of its own internal affairs, including the justice system. The FBiH is

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19 On 31 December 1992, BiH succeeded the former Yugoslavia.

20 On 29 December 1992, BiH succeeded the former Yugoslavia.

21 It is noteworthy that, under Annex 6 of the Dayton Peace Agreement ("Human Rights") BiH, RS and FBiH are under an obligation to secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in various international treaties listed in the Appendix to Annex 6, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and the 1949 Geneva Convention on the Protection of the Victims of War and the two 1977 Additional Protocols thereto.

further decentralised into ten cantons all of which organise their judiciaries independently. The judicial system of RS is centralised.

12. The Dayton Peace Agreement lacked a comprehensive approach and strategy in the area of transitional justice. Besides the trials carried out before the International Tribunal for the Former Yugoslavia (ICTY) [22], Bosnian national authorities have failed to implement an all-encompassing transitional justice strategy and, as a result, the efforts undertaken in this respect have been incomplete and not in line with international standards.

13. In light of several recent worrying developments, the associations subscribing the present general allegation wish to underline the ongoing violations by BiH of its international obligations with respect to the four elements of the mandate with a particular focus on the violations of the fundamental rights of thousands of men and women affected by the serious crimes committed during the conflict, who are still waiting for truth, justice and redress. In light of the above, the associations subscribing this general allegation decided to focus on some of the main subjects relevant from the victims' perspective. Nevertheless, the omission of other subjects from the present allegation does not imply by any means that the subscribing associations believe that BiH fully complies with its international obligations concerning the judicial and non-judicial measures implemented in order to redress the legacy of past human rights abuses.

2. Transitional Justice Strategy in BiH

14. The Secretary-General's 'report on the rule of law and transitional justice in conflict and post-conflict societies' stipulates that the different mechanisms of transitional justice should be thought of as parts of a whole: "Where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof".[23] In his first annual report, the Special Rapporteur underlined the importance of adopting a comprehensive approach to address gross violations of human rights and serious violations of international humanitarian law.[24]

15. In BiH, the process of drafting and adopting a holistic Transitional Justice Strategy started in 2010. Between 2010 and 2011 the United Nations Development Programme (UNDP) has been providing technical, administrative and logistical support to an experts' working group charged with the drafting of a National Strategy on Transitional Justice. Both the working document of the strategy and the related action plan for its implementation were finalised in late 2011 in the form of a draft due to the absence of

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22 On 25 May 1993, Resolution 827 of the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague as a reaction to the threat to peace and international security posed by the grave violations of humanitarian law perpetrated in the territory of former Yugoslavia since 1991. The ICTY was mandated to prosecute and punish persons responsible for serious violations of international humanitarian law committed in the territory of Former Yugoslavia during the conflicts. Trials carried out before the ICTY will not be further analyzed and considered in this report. On this subject see, inter alia, Amnesty International, *Whose Justice: The Women of Bosnia and Herzegovina Are Still Waiting*, 30 September 2009, pp. 12-17.

23 Report of the Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Society*, *supra* note 3, para. 26.

24 First Annual Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, *supra* note 7, para. 60.

representatives of Republika Srpska from the endeavour.The draft Transitional Justice Strategy was submitted to the different Entities to obtain their opinions.[25]It contains policies and measures related to all the four elements of the mandate.

16. 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.[26] 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).The draft Transitional Justice Strategy, which was expected to be presented for adoption to the Parliamentary Assembly during the summer of 2012, has not, at the time of writing, been presented.

17. 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, which is spearheaded by the Ministry of Human Rights, with the participation of the judiciary, other authorities, and in collaboration with civil society representatives. [...] 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 organise 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"*.[27]

18. Although UNDP still supports a dialogue between government institutions,[28] at February 2014 the Entities have not yet made public their opinions and the process seems to be paralysed. The lack of response by the Entities on the draft National Strategy on Transitional Justice makes it impossible for this piece of legislation to be presented to the StateParliament.

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25 A copy of the draft Transitional Justice Strategy was submitted by TRIAL to the Special Rapporteur via e-mail on 17 May 2013.

26 See Balkan Investigative Reporting Network, Bosnian State Strategy for Victims Presented, 20 June 2012, http://www.balkaninsight.com/en/article/bosnian-state-strategy-for-victims-presented.

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

28 From 9 to 12 December 2013, with the support of UNDP, the Joint Committee on Human Rights, Rights of the Child, Youth, Immigration, Refugees, Asylum and Ethics of the Parliamentary Assembly of BiH organized a study visit to the German Parliament to exchange on best practices related to transitional justice strategy and methods of dealing with the past.

19. All in all, it would seem that the adoption of the Transitional Justice Strategy is not a priority for BiH authorities due to the fact that the situation of paralysis since the summer of 2012 is to be explained mainly by the lack of political will at the Entity level. On the contrary, for victims of the war that have been waiting for justice and redress over the past 20 years, the Strategy represents a top priority that cannot be eluded any further because the passing of time only deepens the sense of frustration and exclusion felt by members of associations of victims and their relatives who have put many hopes and expectations in this endeavour.

3. Truth

20. Human Rights Council Resolution 18/7 makes explicit reference to the International Convention for the Protection of All Persons from Enforced Disappearance and its Article 24, paragraph 2, which sets out the right of victims to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person and State party obligations to take appropriate measures in this regard.

21. Principle VII of the UN Basic Principles on the Right to a Remedy broadens the scope of the right to truth by stipulating that "remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:[...] (c) Access to relevant information concerning violations and reparation mechanisms."[29] Therefore, "victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimisation and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations".[30]

22. Principle 2 of the UN Impunity Principles elaborates on the 'inalienable right to the truth' affirming that "every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations".[31] Principle 4 specifies that "irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate".

23. In his 2013 Annual Report to the Human Rights Council, the Special Rapporteur affirmed that "the right to truth entitles the victim, his or her relatives and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation, the fate and whereabouts of the victim and, where appropriate, the process by which the alleged violation was officially authorised. With this legal framework in mind, in the aftermath of repression or conflict, the right to truth should be

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29 UN Basic Principles on the Right to a Remedy', *supra* note 10, principle VII.

30 *Ibid*, principle X.

31 UN Impunity Principles, *supra* note 9, principle 2.

understood to require States to establish institutions, mechanisms and procedures that are enabled to lead to the revelation of the truth, which is seen as a process to seek information and facts about what has actually taken place, to contribute to the fight against impunity, to the reinstatement of the rule of law, and ultimately to reconciliation".[32]

3.1 The Absence of Institutional Fact-finding and Truth-telling Mechanisms for Human Rights Violations and Crimes under International Law Committed in 1992-1995

24. In order to give effect to the right to know the truth, "societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence."[33]

25. In the context of BiH, almost two decades after the end of the conflict there has not been any comprehensive description of the human rights abuses committed or explanation of the causes that led to the widespread violence and violations.

26. The Dayton Peace Agreement made explicit reference to the establishment of a commission of inquiry with the mandate to engage in the process of "fact-finding and other necessary studies into the causes, conduct and consequences of the recent conflict on as broad and objective a basis as possible, and to issue a report thereon, to be made available to all interested countries and organisations".[34] However, so far, there has not been a clearly defined and comprehensive approach to creating an institutional truth and reconciliation commission in BiH.

27. In the past there have been a few attempts to put in place a national fact-finding and truth-telling process. Two initiatives were launched to form a truth and reconciliation commission[35] but with no concrete results. There has been no in-depth national debate on the utility of a truth commission, civil society has not been adequately consulted and past and current governments have been unwilling to

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32 First Annual Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, *supra* note 7, para. 20. See also Human Rights Commission, Resolution 2005/66 on the Right to Truth, UN doc. E/CN.4/RES/2005/66, 20 April 2005.

33 UN Impunity Principles, *supra* note 9, principle 5.

34 Excerpt from the Side Letters to the Dayton Peace Agreement, which can be found in 35 International Legal Materials 75, 160-162.

35 In February 2000, after a conference held in Sarajevo where about 120 NGOs gathered and agreed on coordinating their efforts, the non-governmental organization Association of Citizens Truth and Reconciliation (ATR) launched an initiative to achieve the establishment of the Truth and Reconciliation Commission (TRC) of BiH. A draft law was presented in 2002 but it was never adopted. A second initiative was launched in 2005 by the NGOs Dayton Project and the United States Institute for Peace and supported by several national political parties but it didn't succeed either.

support such initiatives.[36]

28. Three *ad hoc* investigative commissions have actually been established to address crimes committed in particular locations. First, in December 2003, the government of Republika Srpska, in response to a decision by the Human Rights Chamber, created the Commission for Investigation of the Events in and around Srebrenica between July 10 and 19, 1995.[37]The commission was active for six months from January to June 2004 and submitted a final report in June 2004.[38]Second, in 2006, the Council of Ministers, in response to demands by Serb parties in the Parliamentary Assembly that the suffering of Bosnian Serbs in Sarajevo be investigated, created a Commission for Investigating the Truth Regarding Sufferings of the Serbs, Croats, Bosniaks, Jews and Others in Sarajevo in the period between 1992 and 1995 but the latter failed to produce its report. Third, the Truth and Reconciliation Commission of the Municipal Assembly of Bijeljina was created in mid-2008. The Commission submitted its report to the Municipal Assembly for consideration, but the report was not adopted.[39] All in all these initiatives did not yield any visible long-term results for the BiH society and they were heavily criticised for the lack of involvement of the associations of victims in their creation and operation.

29. As far as the right to know the truth is concerned, the draft Transitional Justice Strategy would provide, for, among other measures, the establishment of an institutional fact-finding and truth-telling mechanism to investigate human rights violations in the period 1992-1995 which would be complementary to existing judicial and non-judicial mechanisms.[40] It is important to underline that, even in the event of the adoption of the Strategy, fact-finding processes, although crucial for the establishment of the truth, can never replace access to justice and redress for victims of gross human rights violations and their relatives, as confirmed by international experts.[41] In the words of the Special Rapporteur on Torture,

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36 Working Group on Enforced or Involuntary Disappearances (WGEID), *Report on the Mission to BiH*, UN doc. A/HRC/16/48/Add.1 of 16 December 2010, para. 38: "*The idea of having one overarching truth discovery process has been debated for many years. According to a UNDP opinion poll in 2010, about two thirds of people interviewed did not know what a truth commission was. However, among those who knew about such a process, 90 per cent stressed the importance of having a truth commission in Bosnia and Herzegovina. Some fear that a truth commission process could undermine the process to hold perpetrators accountable. While the International Criminal Tribunal for the Former Yugoslavia has convicted a number of persons, it will close its doors shortly. It has been estimated that thousands of perpetrators have not been indicted. National justice will continue. Victims could benefit from a truth process, but not as a substitute for justice. This could include a truth mechanism (possibly a national truth and reconciliation commission). There could also be localized commissions of inquiry. International organizations should give their full support to such activities. [...]*".

37 International Center for Transitional Justice, Bosnia and Herzegovina: Selected Developments in Transitional Justice, October 2004, http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Serbia-Developments-2004-English_0.pdf, p. 9.

38 The report is available at http://trial-ch.org/fileadmin/user_upload/documents/trialwatch/Srebrenica_Report2004.pdf.

39 L. Stan, N. Nedelsky, *Encyclopedia of Transitional Justice*, Volume 2, Cambridge University Press, 2013, pp. 65-67.

40 Transitional Justice Strategy for Bosnia and Herzegovina, 2012- 2016, Working Document, Sarajevo, March 2013, p. 47-51.

41 Second Annual Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff to the Human Rights Council, UN doc. A/HRC/24/42, 28 August 2013, para. 26. On the subject the Commissioner for Human Rights of the Council of Europe, Report by Thomas Hammarberg following his visit to BiH on 27-30 November 2010 ("Report Hammarberg"), doc. CommDH(2011)11 of 29 March 2011, pointed out that "*genuine inter-ethnic reconciliation in the former Yugoslavia, including Bosnia and Herzegovina, cannot be achieved without justice. Justice is not only retributive, in the sense that it is aimed to punish through fair proceedings those who have committed gross human rights violations and serious violations of humanitarian law. It is also, or above all, preventive, aiming to ensure that all people in the region come to terms with the past, and live in peace in a cohesive, pluralist democratic society. Justice means, moreover, provision of adequate, effective and proportionate reparation to comfort and heal the wounds of all victims of the war without any distinction*" (para. 125).

"commissions of inquiry should therefore be considered complementary to other mechanisms, including criminal investigations and prosecution of perpetrators, the provision of reparations to victims, and extensive reforms to institutions, including the vetting of public officials. [...]".[42]

3.2 Truth-seeking for Relatives of Missing Persons

30. The only institutional fact-finding mechanism active in BiH is related to the issue of missing persons. The Missing Persons Institute (MPI) of BiH was set up on 17 November 2004 by the Law on Missing Persons (LMP, Official Gazette of BiH No. 50/04) to investigate on the fate of the thousands of missing persons during the armed conflict, improve the process of tracing missing persons and expedite identifications of mortal remains of missing persons. However, the MPI was eventually established and became fully operational only from 1 January 2008.

31. Despite the recommendations from international mechanisms,[43] the MPI is experiencing troubles with regard to the appointment of the members of its different managing bodies.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;[44] 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).[45] The members of these associations also participate in the work of the Steering Board, but without the right to vote.

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

33. 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

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42 Special Rapporteur on Torture, *Annual Report for 2011*, UN doc. A/HRC/19/61, 18 January 2012, paras. 69 and 70.

43 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*, *supra* note 36, para. 78 (f). For the whole set of recommendations issued see para. 78.

44 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.

45 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, 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. Moreover, the association *Izvor* expresses serious concerns with regard to the transparency of the process followed to appoint the members of the Advisory Board.

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 MPI[46] and stressed that this undermines the overall credibility of the institution.

34. Moreover, almost 10 years after the entry into force of the LMP, and despite reiterated recommendations by international human rights mechanisms,[47] several provisions of the law remain dead letter. In particular, Art. 21 of the Law on Missing Persons provides for the creation of the Central Record of Missing Persons (CEN), intended to include all records that were kept at local or Entity levels, by associations of families of missing persons and other associations of citizens, Tracing Offices of the organisations of the Red Cross in BiH, as well as international organisations. Art. 22, para. 4, of the LMP 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". This means that the process of verifying and entering data in the CEN *should have been completed by 1 January 2009*.

35. But in reality **at February 2014 (five years later) the CEN has not been completed yet.** The process is slowed down by the insufficient support of government institutions at all levels. Despite the deadlines clearly set by the LMP, representatives of the MPI allege that "it is impossible to predict the date of finalisation of the verification". This situation is a source of deep distress and frustration for relatives of missing persons.

36. In this respect the draft Transitional Justice Strategy aims at strengthening and improving the process of tracing missing persons by, on the one hand, "ensuring the full operation and efficacy of the Institute and its financial stability",[48] and, on the other hand, by "speeding up the process of tracing missing persons as a response primarily to the needs of the families of victims but also to the country's legal and international commitments".[49]

3.3 The "Anonymization" of Documents Concerning Crimes Committed During the War

37. Among the measures of reparation foreseen by UN Basic Principles on the Right to a Remedy, Principle IX provides for the "verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the

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46 In this sense, it must be recalled that Art. 5 of the LMP 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).

47 CAT, Concluding Observations on BiH, *supra* note 43, 19 November of 2010, para. 24 (c); and WGEID, *Report on the Mission to BiH*, *supra* note 36, paras. 24 and 75.

48 Transitional Justice Strategy for Bosnia and Herzegovina, 2012-2016, *supra* note 40, p. 40.

49 *Ibid*.

occurrence of further violations".[50]

38. In the context of the prosecution and punishment of those responsible for war crimes or crimes against humanity committed during the war, a worrying trend hampering access to truth has recently emerged because of a new policy of anonymization implemented by the Court of BiH. In March 2012 the Court of BiH amended its rulebook on public access to information under the Court's Control and Community Outreach. 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 and the like). As a consequence, currently documents issued by the Court are censored and also the Prosecutor's Office of BiH does not provide complete information on the indictments of war crimes. The same anonymization policy has been adopted by all Entity-level and local judicial bodies.

39. This situation has already been the subject of harsh criticism[51] 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 as well as their right to know the truth may be further hampered.**

40. 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".

41. On 18 July 2013, the High Judicial and Prosecutorial Council[52] (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. 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 working**

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50 UN Basic Principles on the Right to a Remedy, *supra* note 10, principle IX.

51 Balkan Investigative Reporting Network, Anonymization "Threat" to Bosnian Justice Criticized, 25 December 2012, 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".

52 The HJPC is a national institution responsible for many aspects of the judicial system BiH. It is responsible for all judicial appointments, the training and the discipline of judges and prosecutors. It is also responsible for advising other levels of government about judicial budgets and administration.

group should issue these guidelines in March 2014. The Court of BiH should afterwards adapt its rules of procedure.

4. Justice

42. The obligation to ensure respect of international human rights law and international humanitarian law includes the duty to investigate violations of the respective bodies of law effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.[53]

43. Principle 19 of the UN Impunity Principles affirms that "States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished".[54]

44. The duty to sanction crimes under international law derives from the fact that the prohibition of most of these crimes, i.e. genocide, torture, rape and sexual violence (when committed as a form of torture and/ or a form of genocide), represents *jus cogens* norms.[55] Indeed, one of the legal consequences of the recognition of these norms as peremptory norms is the ensuing **duty to punish these crimes with appropriate penalty**,[56] that is penalty proportional to the gravity of the crime. This obligation stems also from several international treaties. For instance, the 1949 Geneva Conventions prescribe that "the High Contracting Parties undertake to enact any legislation necessary to provide *effective penal sanctions* for persons committing, or ordering to be committed, any of the grave breaches of the present Convention".[57]Art. V of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide specifies that "the Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to *provide effective penalties for persons guilty of genocid*e[...]".Similarly, Art. 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment affirms that "each State Party shall make these offences *punishable by appropriate penalties which take into account their grave nature*".

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53 UN Basic Principles on the Right to a Remedy, *supra* note 10, principle II.

54 UN Impunity Principles, *supra* note 9, principle 19.

55 ICTY, Prosecutor v. Anto Furundzija, case No. IT-95-17/1-T10, Trial Chamber Judgment, 10 December 1998, paras. 155-157; ICJ, Case concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain), 5 February 1970, I.C.J. Rep. 1970, paras. 33-34; ICJ, Case concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Yugoslavia), Order of 8 April 1993, I.C.J. Rep. 1993, para 49 ;ICTY, Prosecutor v. Zoran Kupreškić et al., case No. IT-95-16, Trial Chamber Judgment, 14 January 2000, para. 520.

56 See E.H. Guisse, L. Joinet, Progress Report on the Question of Impunity of Perpetrators of Human Rights Violations, UN Commission on Human Rights, Sub- Commission on the Prevention and Protection of All Minorities, 45th Sess., Item 10(a), UN doc. E/CN.4/Sub.2/1993/6, 1993; N. Roht-Arriaza, Impunity and Human Rights in International Law and Practice 14, 1995; D. F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,* 100 Yale Law Journal 2537, 2542 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law,* 78 California Law Review 449, 1990.

57 Arts. 49, 50, 129 and 146 of the four 12 August 1949 Geneva Conventions.

4.1 National War Crimes Prosecution Strategy

45. Without minimising the important role the ICTY has been playing in the prosecution of crimes under international law in BiH, the main responsibility to investigate, judge and sanction those responsible for the grave violations committed during the conflict lies within the national judicial system of BiH.[58]

46. On 29 December 2008, the Council of Ministers of BiH adopted the National Strategy for War Crimes Processing in order to expedite the investigation and prosecution of crimes under international law by tackling the backlog of cases pending before the BiH justice system and developing a clear and efficient mechanism for the transfer of less complex cases to the Entities in order to allow the Court of BiH and BiH Prosecutor's Office to focus on the most complex cases. The National Strategy established, among other things, that the most complex crimes (i.e. mass crimes) will be dealt with as a matter of priority within 7 years (i.e. end of 2015) and the prosecution of other crimes will be dealt with within 15 years from the adoption of the strategy (i.e. end of 2023).

47. Although expressing appreciation for the adoption of the National Strategy and the steps undertaken so far to combat impunity for the crimes perpetrated during the war, various international institutions and human rights mechanisms have consistently denounced the existence of a number of pitfalls and the slow pace of implementation of the mentioned strategy.[59]

48. 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*".[60] **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 RS rendered 17, the courts in the FBiH rendered 16, and those in Brčko District rendered four 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. Nevertheless, **in order to be effective and sustainable, this requires additional human resources (esteemed by the HJPC in the number of 28 new prosecutors). On 20 and 21 November 2013, 13 additional prosecutors have been appointed to work on war crimes cases.**

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58 UN Impunity Principles, *supra* note 9, principle 20.

59 See in particular Organization for Security and Cooperation in Europe (OSCE) – Mission in BiH, Delivering Justice in BiH – An overview of War Crimes Processing from 2005 to 2010, May 2011, http://www.oscebih.org/documents/osce_bih_doc_2011051909500706eng.pdf. See also European Commission, 2011 Progress Report on BiH, doc. SEC(2011) 1206 of 12 October 2011, pp. 12-13; CAT, Concluding Observations on BiH, *supra* note 43 para. 12; Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), Concluding Observations on BiH, UN doc. CEDAW/C/BIH/CO/4-5 of 19 July 2013, para. 9.a. In particular, with regard to trials concerning people accused of rape or other forms of sexual violence committed during the war, it results that at 2012 those convicted before the Court of BiH are little more than 30. This number is alarmingly low, especially considering that the estimated number of persons raped or otherwise sexually abused during the war ranges between 20,000 and 50,000.

60 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

49. Associations of victims of gross human rights violations 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 and by the latest developments with regard to prosecution of international criminals as discussed in the next sections.

4.2 The Release and Re-trial of International Criminals Following the July 2013 European Court of Human Rights *Maktouf and Damjanović v. Bosnia-Herzegovina* Judgment

50. On 18 July 2013, the Grand Chamber of the European Court of Human Rights (ECtHR) issued its judgment in the case *Maktouf and Damjanović v. Bosnia and Herzegovina* (applications no. 2312/98 and 34179/08). The two applicants were convicted by the Court of BiH of war crimes committed against civilians during the 1992-1995 war. In particular, the first applicant (Mr. Maktouf) was convicted by the State Court in July 2005 of aiding and abetting the taking of two civilian hostages as a war crime against civilians[61] and sentenced to five years' imprisonment under the 2003 Criminal Code of BiH ("the 2003 CC"). In April 2006, an appeals chamber of the court confirmed his conviction and the sentence after a fresh hearing with the participation of two international judges. The second applicant (Mr. Goran Damjanović), who had taken a prominent part in the beating of captured Bosniaks in Sarajevo in 1992, was convicted in June 2007 of torture as a war crime against civilians[62] and sentenced to 11 years' imprisonment under the 2003 CC. After they were sentenced by the Court of BiH, they both appealed before the Constitutional Court alleging the violation of Art. 7 of the ECHR. The Constitutional Court dismissed Maktouf's appeal claiming that, on the one hand, the more favourable criminal code was the Criminal Code of BiH (because the death penalty was prescribed for those crimes) and that, on the other hand, the case at stake fell within the exception foreseen in paragraph 2 of Art. 7 of the ECHR for crimes in violation of the 'general principles of law recognized by civilized nations' (Decision AP 1785/06 of 30 March 2007).

51. In their applications to the ECtHR, both men claimed a violation of Art. 7 of the ECHR in connection with their convictions and complained that the State Court had retroactively applied to them a more stringent criminal law, the 2003 Criminal Code, than that which had been applicable at the time of the commission of the offences, namely the 1976 Criminal Code of the SFRY ("SFRY CC") and that they had received heavier sentences as a result. The SFRY CC was in force throughout the 1992-1995 conflict. Under this code, war crimes and genocide could be punished with imprisonment from a minimum of 5 years (1 year in case of extraordinary mitigating circumstances) to a maximum of 15 years or, in the most serious cases, with the death penalty, which could be commuted to 20 years imprisonment. Notably, the SFRY CC did not codify crimes against humanity. This code has been and is still generally applied by courts at

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61 Art. 173(1)(e) read with Art. (Accessory) of the 2003 CC.

62 Art. 173(1) (c) of the 2003 CC.

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. In 2003 this legal framework changed as the Office of the High Representative imposed a Criminal Code at the State level which punishes war crimes, genocide and crimes against humanity with imprisonment from a minimum of 10 years (5 years in case of extraordinary mitigating circumstances) to a maximum of 45 years. This code has been applied in the overwhelming majority of cases processed by the Court of BiH. Since the beginning, however, the lawfulness of its application has been a matter of intense legal discussion and controversy at the political level.[63]

52. The Grand Chamber underlined that it was not its task to review *in abstracto* whether the retroactive application of the 2003 CC in war crimes cases 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.[64] The Grand Chamber 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 laws is the same.[65] The Grand Chamber considered that the applicants had received sentences fitting within the lower range of punishment foreseen under the BiH Criminal Code[66] 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."(emphasis added)[67]

53. The Grand Chamber therefore concluded that in these specific cases, "there exists a real possibility that the retroactive application of the 2003 CC operated to the applicants' disadvantage"[68] since the applicants could have received lower sentences had the sentencing provisions of the SFRY CC been applied,[69] 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".[70] However, the Court emphasised that its conclusion did not indicate that lower sentences ought to have been imposed, but

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63 See, for instance, OSCE – Mission in BiH, Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina, August 2008, http://www.oscebih.org/documents/osce_bih_doc_20101223115043 93eng.pdf.

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

65 *Ibid.*, para. 67.

66 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 Code for war crimes.

67 European Court of Human Rights, *Maktouf and Damjanović v. Bosnia and Herzegovina*, *supra* note 64, para. 69.

68 *Ibid.*, para. 70.

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

70 European Court of Human Rights, *Maktouf and Damjanović v. Bosnia and Herzegovina, supra* note 64, para 70.

simply that in those concrete cases the sentencing provisions of the SFRY CC should have been applied.

54. In a press release issued on 18 July 2013 regarding the ECtHR judgment, 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 CC is not in contravention of the Convention".[71] It further noted that it "[...]will in future cases, on a 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 CC in eight war crimes cases in total.

55. On 27 September 2013 the Constitutional Court of BiH decided on an appeal filed by Mr. Zoran Damjanović, the brother of one of the applicants before Strasbourg (AP 325/08). The Court applied *mutatis mutandis* the reasoning of the ECtHR 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 CC, to impose a death penalty", the Court found a violation of Art. 7, para.1, of the ECHR 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 since the legal validity of their previous conviction had been annulled by the CC decision.

56. On 8 October 2013, the Court of BiH accepted a request for enabling the renewal of the court 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).

57. 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 ECHR.[72] 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

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

72 Decisions no. AP-116-09, AP-503-09, AP-2498-09, AP-4065-09, AP-4100-09, AP-4126-09, 22 October 2013.

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).

58. 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 CC and therefore it was the Court's task to determine which law was more lenient for the applicants with regards to maximum sentences. The Constitutional Court of BiH acknowledged that according to the SFRY CC a sentence between 15 years, 20 years or the death penalty, could have been pronounced. Nevertheless, it emphasised 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".[73] The Constitutional Court of BiH then noted that, in line with Art. 38, para. 2, of the SFRY CC, "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 CC) with the sentence of a long-term imprisonment of 45 years (as a maximum sentence for the criminal offence prescribed by the 2003 CC), the Constitutional Court of BiH finds that in this concrete case, it is without any doubt the SFRY CC that is the more favourable code for the applicant".[74] Accordingly, the Constitutional Court of BiH found a violation of Art. 7, para.1, of the ECHR 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 ECHR.

59. 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 CC and applicable at the time of the delivery of the relevant criminal verdict with the sentences meted out pursuant to the 2003 CC, 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 ECHR 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 ECHR.

60. 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 CC; therefore the Court concluded that the SFRY CC 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 ECHR. 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 ECHR.

61. On 12 November 2013, at the end of the sixth Plenary Meeting of the "Structured Dialogue on Justice

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

74 *Ibid*., para. 48.

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.[75]

62. 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. Their release was motivated by the fact that the legal validity of their previous conviction had been annulled by the CC decision on 22 October 2013.

63. 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.[76]

64. 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.

65. 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 ECHR. 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.

66. 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 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

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75 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

76 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.

Human Rights and Ministry of Security and the Ministry of Internal Affairs of RS.[77]

67. 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. The Appellate Chamber determined that Article 5 of the ECHR 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 ECHR and the direct application of Art. 5.[78] 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.

68. On 5 December 2013 the Committee of Ministers of the Council of Europe, responsible for monitoring the implementation of decisions of the ECtHR, discussed the Action Plan submitted by BiH in order to implement the judgment of the ECtHR 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 ECtHR 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;
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> 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. 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*

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77 Annex 1.

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

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."

69. 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 CC (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.[79]

70. 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 CC and reduced his sentence to 20 years in prison.

71. 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 found the accused guilty of the criminal offence of crimes against civilians in violation of Art. 142, para.1, of the SFRY CC (murder, causing grave suffering and looting) read in conjunction with Art. 22 (co-perpetration) and reduced their sentences to 10 years for Mr. Mirko Pekez and to 15 years for Mr. Milorad Savić.

72. 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 CC and reducing his sentence to six years in prison.[80]

73. On 23 January 2014, the Constitutional Court of BiH upheld the appeal filed by Mr. Novak Đukić who was sentenced in 2010 to 25 years in prison for having committed war crimes against civilians in Tuzla on 25 May 1995. The Court determined that the 2003 CC was wrongfully applied in his case instead of the former SFRY CC, thus finding a violation of Art. 7, para.1, of the ECHR 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 ECHR.

74. 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 CC (torture, participation in torture, inhumane treatment) read in conjunction with Art. 22 (co-perpetration).

75. There are several controversial legal issues that underlie the recent judicial developments following the ECtHR *Maktouf and Damjanović* judgment and these developments have a particularly troubling impact on the way justice for the most heinous crimes committed during the war is perceived, especially by

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

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

victims and their families.

76. First, the **sweeping application by the BiH Constitutional Court of the conclusions reached in the *Maktouf and Damjanović* judgment to crimes that "involve *the loss of lives",*** that is the gravest instances of war crimes and genocide, **is highly questionable** since the ECtHR was clear in justifying its reasoning and conclusions by referring to the nature of the crimes committed by the applicants on that specific case.[81]

77. The evaluation of the ECtHR hinged upon the fact that under the SFRY CC "*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*".[82] However, in the case of the ten convicts on whose cases the Constitutional Court of BiH pronounced itself on 22 October 2013,[83] 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" at the time of commission of the crimes and to the wording and the objective of Art. 7, para.1, of the ECHR.

78. First of all for the gravest war crimes and genocide the death penalty was foreseen under the SFRY CC[84] and was still applicable at the time of the commission of the crimes.

79. Secondly, the relevant part of Art. 7, para.1, of the ECHR prescribes that *"Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed".* In this light, when evaluating the applicable penalties in order to assess whether or not there has been a violation of the principle of legality, the relevant yardstick has to be the penalty that was applicable when the person committed the criminal offence, in this case death penalty under the SFRY Criminal Code.[85] The object and purpose of the principle of legality as embodied in Art. 7 of the ECHR 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 behavior 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 Former Yugoslavia knew that he could receive a death-penalty sentence. The 2003 CC shall therefore be considered more lenient as far as the punishment for the gravest instances of war crimes and genocide is concerned.

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81 See above para. 52.

82 European Court of Human Rights, *Maktouf and Damjanović v. Bosnia and Herzegovina, supra* note 64, para. 69.

83 See above para. 57.

84 As confirmed by the ECtHR in para. 69 of the *Maktouf and Damjanović* judgment: "the Court notes that only the most serious instances of war crimes were punishable by the death penalty pursuant to the 1976 Code".

85 Therefore the BiH Constitutional Court applied an incorrect standard in its 22 October 2013 decisions when it compared the 2003 Criminal Code with the penalties that could be potentially meted out under the SFRY Criminal Code at the time of the delivery of the criminal verdict (that is the SFRY Criminal Code without the death penalty).

80. Being the definition of war crimes and genocide in the SFRY CC, which was applicable at the time the offences were committed, the same as the one foreseen in the 2003 CC 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 ECHR, as meting out a sentence up to the 45 years under the 2003 CC can clearly not be considered less favorable 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.[86]

81. Moreover, 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 sentencing applicable to such crimes.[87] In this light, the application of the SFRY CC, 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 sanctions that are proportional to the gravity of these crimes[88]. The retroactive application of the 2003 CC therefore fulfills the *jus cogens* obligation of the State to adequately punish the perpetrators of the most serious instances of international crimes.[89]

82. 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 CC)[90] and those applicable for war crimes and genocide under the SFRY CC. This would result in an unequal and illogical sentencing regime which discriminates against those convicted for crimes against humanity[91] and that could have extremely serious consequences in terms of prosecution strategies and the outcome of future trials.

83. Another **extremely controversial** issue related to the decisions taken by BiH judicial authorities after the *Maktouf and Damjanović* judgment is **the BiH Constitutional Court decision to quash the criminal verdicts of the convicted perpetrators therefore rendering their judgment legally void and paving the way to their release pending retrial by the State Court.**

84. Whereas the ECtHR clearly pointed out in its judgment that the "lawfulness of the applicants' convictions

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86 See above para. 68.

87 See, for instance, the Committee on Enforced Disappearances, Concluding Observations on Uruguay, UN doc. CED/C/URY/CO/1, 8 May 2013, paras. 11-12; J.H. Burgers, H. Danelius, "The United Nations Conventions against Torture – A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", Martinus Nijhoff Publishers, 1988, p. 129.

88 This was confirmed by the OSCE in "Delivering Justice in BiH", *supra* note 59, p. 72 and by the Human Rights Committee in its Concluding Observations on Bosnia-Herzegovina, UN doc. CCPR/C/BIH/CO/2, 13 November 2012, para. 7.

89 This is all the more confirmed by the fact that the SFRY CC does not codify crimes against humanity, a notion that already existed at the time of the commission of the crimes in international law. An application of the SFRY CC would therefore lead to a clear violation of the principle of legality in this respect.

90 In this respect see the European Court of Human Rights, *Šimšić v. Bosnia-Herzegovina,* Chamber judgment, 10 April 2012, confirmed by the European Court of Human Rights, *Maktouf and Damjanović v. Bosnia and Herzegovina*, *supra* note 64, para. 55.

91 EJIL:Talk!, F. De Sanctis, *The Impact of the ECtHR's Judgment in Maktouf-Damjanović on Accountability and Punishment for War Crimes in Bosnia-Herzegovina*, 12 November 2013, http://www.ejiltalk.org/the-impact-of-the-ecthrs-judgment-in-maktouf-damjanovic-on-accountability-and-punishment-for-war-crimes-crimes-in-bosnia-herzegovina/.

is [...] not an issue in the instant case",[92] meaning that the only issue to be reconsidered was the sentencing of the perpetrators and not the question of guilt, in its decisions on 27 September 2013, 22 October 2013, 5 November 2013 and 23 January 2014 the BiH Constitutional Court quashed entirely the criminal verdicts issued against the perpetrators. This finding rendered the relevant criminal judgments legally void. The Constitutional Court then ordered the State Court to take a new decision on these cases in accordance with Art. 7 of the ECHR without specifying whether the new decision should deal only with the sentencing part or should also examine the guilt of the defendants.[93]

85. The Constitutional Court issued its decisions in line with Art. 64.1 of its Rules of Procedure. Yet, keeping in mind that the Rules of Procedure represent an internal toolbox that has no legislative or higher status but is, on the contrary, meant to adapt to the needs and circumstances of the cases in front of the Constitutional Court, the latter could have been flexible enough to apply the procedural possibility of partially annul the relevant criminal judgments only insofar as the sentencing part was concerned[94] without any infringement of national legislation or violation of the rights of the defendants.

86. The subsequent release of the perpetrators pending retrial[95] 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 order[96] and brought about an unnecessary flight risk for the convicted perpetrators.

87. 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

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92 European Court of Human Rights, *Maktouf and Damjanović v. Bosnia and Herzegovina*, *supra* note 64, para. 67.

93 In this respect, when considering these cases in the new reopened criminal proceedings, the State Court consistently followed the indications contained in the ECtHR judgment and did not question the guilt of the released perpetrators but only dealt with the calculation of the new sentence under the SFRY CC.

94 The current Rules of Constitutional Court prescribe for such a possibility in Art. 63.2 insofar as the abstract control of constitutionality of a piece of legislation is concerned: "In a decision establishing incompatibility under Article VI.3 (a) and VI.3 (c) of the Constitution, the Constitutional Court may quash the general act or some of its provisions, partially or entirely". The Constitutional Court could have analogously applied the possibility to partially quash a certain legal act also to its appellate jurisdiction.

95 The decision by the State Court to release the perpetrators pending retrial derived from the fact that the legal ground of their detention, that is the previous criminal verdict against them, had been entirely quashed by the Constitutional Court decision.

96 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 ECtHR, *I.A. v. France*, 28213/95, 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 (...)*".

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.[97]

88. 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."

89. In this light, 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 of public order etc […]".[98]

90. The disregard shown with respect to the protection of victims of international crimes from violence, re-victimization and intimidation[99] 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 fulfillment 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.

Duty to Prevent Violence and Intimidation against Women

The duty to prevent human rights violations, read together with specific human rights such as, among others, the right to liberty and security of the person, implies a duty on States to prevent violence and intimidation. Whereas this duty holds true for every individual, when it comes to the right of women, States have an "aggravated" responsibility and must adopt special measures taking into account the status of women under international law. The **duty of States to prevent acts of violence against women, besides being embodied in several international treaties,[93] has reached the level of a customary norm applicable to all States**.

On 20 January 2006, in his third report to the Commission on Human Rights of the UN Economic and Social Council the Special Rapporteur on Violence against Women considered that there is a rule of customary international law that "obliges States to prevent and respond to acts of violence against women with due diligence". (UN doc. E/CN.4/2006/61 para. 29)In its Recommendation Rec (2002)5 of 30 April 2002 on the protection of women against violence, the Committee of Ministers of the Council of Europe recommended, in particular, that member States should ensure where necessary that **measures are taken to protect victims effectively against threats and possible acts of revenge**. The Committee of Ministers also recommended that Member states should envisage the possibility of **taking measures in order, *inter alia*, to enable the judiciary to adopt interim measures aimed at protecting victims, to ban the perpetrator from contacting, communicating with or approaching the victim, or residing in or entering defined areas**.

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97 See Annex 1.

98 See above para. 68.

99 See, in particular, the table on "Preventing violence and intimidation against women".

Art. 7 of the 1994 the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women spell out the duties of States to prevent, punish and eradicate violence against women by, *inter alia*, applying due diligence to prevent, investigate and impose penalties for violence against women; including in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary; and adopting legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property.

In the case *S.V.P. v Bulgaria* (views of December 2010), the Committee on the Elimination of Discrimination against Women (CEDAW) decided on a case of sexual violence where the perpetrator received only a three-year suspended sentence out of a plea-bargaining agreement. After the crime was committed, the perpetrator continued to live in the close vicinity of the victim's home, in the neighbouring apartment block. The victim had repeatedly expressed her fear of further aggression from him. The author (the victim's mother) submitted that the legislation in Bulgaria provided no protection for the victims of sexual crimes after the end of the criminal proceedings. The author also maintained that the State party failed to adopt adequate legislative and policy measures to guarantee the author's daughter's rights against the risk of further violence by the perpetrator, as he continued to live in the neighbouring apartment block. In this respect, the CEDAW observed that the existing legislation did not appear to contain any mechanisms for protection of victims of sexual violence from re-victimization, since after the end of the criminal proceedings the perpetrators are released back into society and that there is no legal mechanism, such as a protection and/or restriction order, to ensure the protection of the victim. The Committee considered the lack of such provisions resulted in violation of the rights of the author's daughter under Art. 2, paras. (a), (b), (e), (f) and (g); read together withArts. 3 and 5, para. 1,of the 1979 Convention on the Elimination of All Forms of Discrimination against Women and recommended Bulgaria to **amend the criminal legislation to ensure effective protection from re-victimization of the victims of sexual violence after the perpetrators are released from custody, including through the possibility of obtaining protection and/or restriction orders against perpetrators**.

In *Opuz v. Turkey* (judgment of 9 June 2009), the ECtHR considered a situation where a person had physically hit and attacked the applicant and her mother several times and condemned the fact that the State did not act with due diligence to prevent further harm and violence. The person eventually ended up killing the applicant's mother. In this respect, the ECtHR considered that "*in the light of the State's positive obligation to take preventive operational measures to protect an individual whose life is at risk, it might have been expected that the authorities, faced with a suspect known to have a criminal record of perpetrating violent attacks, would take special measures consonant with the gravity of the situation with a view to protecting the applicant's mother*" (para. 147 of the judgment). Moreover, once released from prison due to the expiry of the maximum term of pre-trial detention, the perpetrator continued issuing threats against the physical integrity of the applicant. In this respect the "*the Court notes with grave concern that the violence suffered by the applicant had not come to an end and that the authorities had continued to display inaction. In this connection, the Court points out that, immediately after his release from prison, H.O. again issued threats against the physical integrity of the applicant. Despite the applicant's petition of 15 April 2008 requesting the prosecuting authorities to take measures for her protection, nothing was done until after the Court requested the Government to provide information about the measures that have been taken by their authorities […]*" (para. 173 of the judgment).

91. A further element of concern is represented by the **decisions by the State Court of BiH to reject the requests for custody pending retrial** on the basis of the fact that the BiH Code of Criminal Procedure does not provide for grounds for custody in such a situation[100] and **the decision not to resort to other restriction orders or prohibiting measures in these cases**.

92. First of all, **Art. 132 of the BiH Code of Criminal Procedure provides grounds for pre-trial custody:**

> "(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."

93. In the case at hand, not only is there "a *grounded suspicion that a person has committed a criminal offense",* but there is a certainty that the person has committed a criminal offence since the legality of the conviction is not questioned. Therefore Art. 132 of the BiH Code of Criminal Procedure should all the more be applicable.

94. In addition, Art. 333 of the BiH Code of Criminal Procedure clarifies the rules applicable to 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".

95. Moreover, even in those cases where the maximum length of the pre-trial detention as provided for in Arts. 135 and 137 of the Code of Criminal Procedure had already expired,[101] **the State Court could have resorted to Art. 126 of the Code of Criminal Procedure to order restricting or prohibiting**

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100 According to the press release issued in this respect by the Court of BiH, http://www.sudbih.gov.ba/index.php?id=3003&jezik=e: "*The BiH Criminal Procedure Code does not have explicit provisions to regulate the matter of the possibility to order custody in a situation when an accused person's serving his prison sentence or long-term prison sentence has been terminated, nor does it have any provisions that would serve as grounds for the deprivation of liberty at this stage of the proceedings*".

101 According to the BiH Code of Criminal Procedure that is up to 3 years in total.

measures that took into account the specificities of the crimes and the situation.[102]

96. These developments acquire an even more alarming nuance if we consider that on 12 November 2013 two delegates of the Parliamentary Assembly of BiH House of Peoples proposed a set of amendments to the BiH Code of Criminal Procedure whose aim is to enable the automatic renewal of criminal proceedings for all persons convicted by the State Court of BiH whose rights have allegedly been violated in a manner similar to the reasoning and conclusions of the *Maktouf and Damjanović* case. Under the current criminal procedural rules[103], this possibility for renewal exists only in individual criminal cases for which there have been decisions brought by the BiH Constitutional Court or the ECtHR whereby the violation of the rights and freedoms of the accused have been determined. According to its proponents, the amendment would protect the interests of persons who have not exhausted legal remedies after having been convicted by the BiH Court because they didn't question the case-law established by the Constitutional Court of BiH or because they could not afford further proceedings due to their difficult material situation.

97. The Constitutional-Legal Committee considered the draft law for the first time at the end of November and did not approve it. 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 reaching a political agreement on it. The House of Representatives rejected the Committee's negative opinion, and the Committee was mandated to issue a new opinion. The Committee issued a negative opinion on the draft law again. During the 62nd session of the House of Representatives held on 23 January 2013, it was decided that the negative opinion of the Committee will be again considered by the Collegium with a view to reaching a political agreement on it. The report of the Collegium on efforts to reach an agreement will be discussed at the 63rd session of the House of Representatives to be held on 10 February 2014.

98. The above-mentioned initiative directly contradicts the reasoning of the ECtHR in the *Maktouf and Damjanović* case, in particular its refusal of an abstract review of the legality of the retroactive application of the 2003 CC and the necessity to assess these issues on a case-by-case basis, taking into consideration the specific circumstances of each situation. The proposed legislative amendments would allow for an automatic possibility of renewal of trials for all persons convicted by the State Court of BiH under the 2003 CC,[104] regardless of whether or not they have tried to exhaust domestic and international legal remedies by claiming that their rights have indeed been violated in the concrete

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102 Article 126b (2) of the BiH Code of Criminal Procedure provides that: "When deciding on custody, the Court may impose the house arrest, travel ban and other prohibiting measures **ex officio, instead of ordering or prolonging the custody**." Art.126b (5) specifies that: "The prohibiting measures may last as long as they are needed, but not later than the date on which the verdict becomes legally binding if a person was not pronounced the sentence of imprisonment and at the latest until the person has been committed to serve the sentence if a person was pronounced the sentence of imprisonment. Travel ban may also last until the pronounced fine is paid in full and/or the property claim and/or confiscation of material gain enforced in full".

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

104 Unofficial estimates of the number of cases that could be reopened in this respect vary from 50 to more than 100.

circumstances of the case. Furthermore, a wave of such automatic retrials could actually paralyse the Court of BiH that is already coping with a considerable backlog of cases and may result in further delays in the implementation of the War Crimes National Strategy.

4.3 Law on Pardon

99. At the end of November 2013, the BiH Ministry of Justice proposed legislative amendments that would allow pardon for persons convicted of war crimes after serving three-fifths of their sentence. The current Law on Pardon[105] 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".

100. 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.[106]Five 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 meanwhile to harmonise 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.

5. Reparations

101. It is undisputed under international law that any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying an obligation on the part of the State to provide for reparations and the possibility for the victim to seek redress from the perpetrator.[107] In particular, the right to a remedy for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to adequate, effective and prompt reparation for the harm suffered.[108] In exercising this right, victims shall be afforded protection against intimidation and reprisals.[109]

102. As to the scope of the right to reparation, the latter shall cover all injuries suffered by victims and it shall

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105 Official Gazette of BiH No. 93/05.

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

107 UN Impunity Principles, *supra* note 9, principle 31. The leading reference on this subject is the judgment rendered by the Permanent Court of International Justice on 26 July 1927 on the case concerning the Factory at Chorzów, where it is established that: "It is a principle of international law that the breach of an engagement involves an obligation to make a reparation in an adequate form".

108 UN Basic Principles on the Right to a Remedy, *supra* note 10, principle VII.

109 UN Impunity Principles, *supra* note 9, principle 32.

include measures of restitution, compensation, rehabilitation and satisfaction as provided by international law.[110]Reparations may also be provided "through programmes, based upon legislative or administrative measures, funded by national or international sources, addressed to individuals and to communities. Victims and other sectors of civil society should play a meaningful role in the design and implementation of such programmes. Concerted efforts should be made to ensure that women and minority groups participate in public consultations aimed at developing, implementing, and assessing reparations programmes".[111]

103. The existence of an obligation for the State to provide reparations for gross human rights violations is also enshrined in the domestic law of BiH.[112] However, so far, there has not been a comprehensive approach to reparations for all victims of war throughout the territory of BiH, which results in unequal treatment of different categories of victims and in the complete absence of compensation to some groups of victims. There is no comprehensive programme nor a State law designed to guarantee adequate compensation and integral reparation to civilian victims of war. In general, these notions are unduly identified with that of social assistance.[113] The lack of a comprehensive programme of reparations for victims and their families has been denounced by many international human rights mechanisms that have repeatedly recommended to BiH to amend its legislation and fulfil its international obligations.[114] Over the past years a number of legislative initiatives have been launched, sometimes involving representatives of civil society, in order to bring BiH legal framework in line with international standards and to finally guarantee the victims' rights to justice and redress. Despite several pledges by BiH authorities that the mentioned initiatives were about to be approved and implemented, to date none of them has in fact seen the light of the day.

104. In this respect the draft Transitional Justice Strategy sets out to ensure full protection of the right to compensation of all victims of violations of international human rights law and international humanitarian law by improve the existing system of reparations to all victims of war in BiH.[115]

5.1 Problems related to Claiming Compensation from Perpetrators in Criminal Proceedings

105. According to the BiH domestic legal framework, there is a possibility to claim compensation from the perpetrator in criminal proceedings for damage (claims under property law) suffered as result of the

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110 *Ibid*., principle 34.

111 *Ibid*., principle 32.

112 Based on Annex 6 of the Dayton Peace Agreement, the ECHR and its Protocols as well as the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel Inhuman and Degrading Treatment are directly applicable in BiH and so is the right to a remedy enshrined by them.

113 See, among others, Popić, Panjeta, Compensation, *Transitional Justice and Conditional International Credit in Bosnia and Herzegovina*, Sarajevo, 2010, pp. 13-18.

114 CAT, *Concluding Observations on BiH, supra* note 43, 19 November 2010, para. 18 ; WGEID, *Report on the Mission to BiH, supra* note 36, paras. 39-48 and 83-85; Special Representative of the Secretary-General on Sexual Violence in Conflict, *Report on the Mission to BiH,* 1 February 2011, para. 6; Report Hammarberg, *supra* note 41, paras. 147-148.

115 Transitional Justice Strategy for Bosnia and Herzegovina, 2012-2016, *supra* note 40, p. 73.

crimes committed. It is a complex procedure which has not proved effective for war victims.

106. Art. 195 of the BiH Code of Criminal Procedure establishes that *"1) A petition to pursue a claim under property law in criminal proceedings shall be filed with the Court. 2) The petition may be submitted no later than the end of the main trial or sentencing hearing before the Court. 3) The person authorized to submit the petition must state his claim specifically and must submit evidence. 4) If the authorized person has not filed the petition to pursue his claim under property law in criminal proceedings before the indictment is confirmed, he shall be informed that he may file that petition by the end of the main trial or sentencing hearing. If a criminal offence has caused damage to the property of the State of Bosnia and Herzegovina, and no petition has been filed, the Court shall so inform the body referred to in Article 194, Paragraph 2 of this Code. 5) If the authorized person does not file the claim under property law until the end of the main trial or if he requests a transfer to civil action, and the data concerning the criminal proceedings provide a reliable grounds for a complete or partial resolution of the claim under property law, the Court shall decide in the convicting verdict to pronounce on the accused the measure of forfeiture of property gain"*.

107. Art. 198, para.2, adds that: "*in a verdict pronouncing the accused guilty, the Court may award the injured party the entire claim under property law or may award part of the claim under property law and refer him to a civil action for the remainder. If the data of criminal proceedings do not provide a reliable basis for either a complete or partial award, the Court shall instruct the injured party that he may take civil action to pursue his entire claim under property law*".

108. It results therefore that the Court has the option to award part of a claim to the injured parties or to refer them to civil actions. To the knowledge of the organisations submitting the present general allegation, there has not been a single case where compensation has been awarded, and this proves true not only before the State Court of BiH, but also before tribunals at the Entity-level. The explanation usually provided by prosecutors and judges is that it would take too much additional time to prove and decide upon such claims. **Injured parties have instead been instructed that they may take civil action to pursue their entire claims under property law.**

109. Problems concerning the existing procedure in BiH may be summarised as follows: in the majority of cases, victims are not aware of their right to apply for compensation from perpetrators and of the functioning of the procedure to enforce such right; victims who give their testimony in the course of a trial are not automatically included among those who are notified about the delivery of a decision that refers them to civil action for compensation; although the State Court would be entitled to award compensation to the injured party, this is a discretionary choice depending on the initiative of the competent prosecutor which, so far, has not been taken, rather favouring referral to civil action; victims would need a lawyer to represent them in civil claims for compensation and, in almost the totality of cases, they cannot afford it, while free legal aid is not granted to them by the State.

5.2 Problems related to Claiming Compensation in Civil Proceedings

110. In the absence of a collective administrative mechanism that would enable victims of war to obtain adequate compensation for their sufferings, many of them have initiated civil proceedings against the Entities objectively responsible for the damages caused[116] as well as, in some cases, against the State of BiH itself. They have, however, faced many obstacles and hindrances in their endeavour, also in light of the absence of a harmonised judicial practice on the matter within BiH.

111. While in the FBiH compensation claims for damage suffered during the war have been awarded given that no statute of limitations is applicable to those claims in the same manner as to the criminal prosecution of those crimes, RS authorities regularly reject these claims as being time-barred. The reasoning behind this position is that statutes of limitations are not applicable only in case the claim is directed against the perpetrator of the crime, but not if the claim is directed against the legal Entities responsible for such damage under the principle of objective responsibility, i.e. RS, FBiH and the State of BiH. Furthermore, the standard practice in RSis that claiming compensation would only be possible in case criminal proceedings had previously been conducted and led to a final finding of criminal responsibility for the commission of a crime.

112. Such reasoning puts an excessive and insurmountable burden on victims of war and contravenes international standards on the matter.[117] In particular, applying such strict deadlines would mean that their last chance for filing such claims had expired in 1999 or 2001[118], when the criminal prosecution of war crimes had not even effectively started in BiH, let alone finalised, which makes such condition unrealistic. Even in 2014, two decades after the commission of atrocities, there remain more than 1000 war crimes to be prosecuted[119], meaning that State bodies are already violating the victims' human rights to see justice being served. By this negative practice, victims are additionally "punished" for the State's failure to fulfill its positive obligations. Finally, under international standards, it is precisely the State (or, in the case of BiH, also the responsible Entities) that has an obligation to provide victims of gross human rights violations with adequate compensation.[120]

5.3 The "Programme for Improvement of the Status of Survivors of Conflict related Sexual Violence"

113. As far as victims of conflict-related sexual violence are concerned, the drafting and adoption of the"Programme for Improvement of the Status of Survivors of Conflict related Sexual Violence", coordinated by the United Nations Population Fund ("UNPFA") and the BiH Ministry of Human Rights and Refugees, was launched at the end of 2010. The finalisation of the draft programme was initially

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116 RS or the FBiH, depending primarily on the question on which territory the crime occurred and under the responsibility of which Army.

117 See *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, doc. A/HRC/4/33 od 15.01. 2007., para. 63.; Committee against Torture, *General Comment No. 3*, doc. CAT/C/GC/3 of 16.11.2012, paras. 2, 6 and 26.; UN Basic Principles on the Right to a Remedy, *supra* note 10, principles 6-7.

118 The deadlines applied are 3 years since the date the injured person got to know of the existence of the damage and 5 years since the date the damage occurred. In practice, they are calculated from the date of 19.06.1996, as the date when RS Parliament pronounced the cessation of war and "imminent-danger-of-war situation".

119 See http://www.oscebih.org/documents/osce_bih_doc_20130325125315 94eng.pdf.

120 See above para. 98.

expected by the end of 2011 and was then repeatedly postponed.

114. In the 2013 report on her visit to BiH the Special Rapporteur on Violence against Women affirmed that "the programme will focus on issues including the implementing of rehabilitation programs, the right to compensation, and the social integration of victims. The development of the program is important to provide clarity *vis à vis* the scope and nature of transitional justice mechanisms and their differentiation from provisions related to social security. The prevailing confusion as regards these concepts has negatively affected the way authorities have responded to wartime victims. It is hoped that this programme will also foster social integration and better understanding within communities. *While the Programme was originally conceived to focus on women, it was later modified to recognize the existence of male victims of war-time rape. As with the Transitional Justice Strategy State level authorities and NGO's have been very supportive of the initiative, yet Entity level governments have shown less support. This is particularly the case for the Republika Srspka which has reportedly still not delegated members to the program's working groups. The program has been debated in public and in Parliamentary committees, but still has no endorsement. It is argued that financial implications may be the main obstacle".*[121] The Special Rapporteur recommended BiH to "finalize and launch the Programme for Victims of Wartime Rape, Sexual Abuse and Torture, and their Families 2013-2016 and ensure allocation of necessary financial and human resources for its implementation. The programme should be implemented with the full participation of relevant entity-level authorities and in consultation with civil society and victims' organizations".[122]

115. At February 2014, the draft programme has not yet been submitted to Council of Ministers of BiH for approval and it remains at the Entities' level. The programme was submitted for feedback opinions to Entity governments, but the government of RS failed to formulate its opinion so far,[123] thus paralysing the whole process.[124] Anew, this situation casts serious doubts on the level of priority attributed by BiH authorities to this legislative initiative and discloses a discrepancy between the expectations of victims of rape or other forms of sexual violence during the war and the attitude demonstrated towards them by the State. It would now seem that BiH is planning a "modular implementation" of the Programme, but this would largely depend on the financial support of external donors and it is not clear how it could be put in place without the support of one of the entity governments and without formal approval.

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

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121 Special Rapporteur on Violence against Women, Report on the Mission to BiH, *supra* note 27, paras. 62-63.

122 Ibid., para. 105 (j).

123 Some opinions were actually given, namely: the government of Brčko District sent a positive opinion; the Legislative Office of BiH gave its positive opinion; the Gender Centre of RS expressed "support to the programme", as well as the Gender Centre of the Federation of BiH.

124 In the meantime, the Ministry for Human Rights and Refugees, in cooperation with UNFPA, continued to promote the draft of the programme in local communities. In partnership with the Una Sana Canton and Bosansko podrinjski Canton, namely with their Cantonal Ministries of Social Work and Health, they agreed to implement pilot projects of the programme relating to the provision of direct support to victims. In this regard, they held consultative discussions with key stakeholders in Bihać and Goražde and introduced them with the idea for the establishment of the Protocol on cooperation. When official agreement on the mentioned Protocol will be reached, assistance will be delivered in these pilot areas in accordance with the programme.

116. With regard to social allowances for families of missing persons, Art. 15 of the LMP prescribed 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*". The same was provided for the organisation of issues related to the work of the Fund. Given that the LMP 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.

117. Despite reiterated recommendations issued from international human rights mechanisms,[125] at February 2014 the Fund does not exist yet and BiH authorities do not show any willingness to address this matter. The non-establishment of the Fund causes serious damage to relatives of missing people who are denied their right to obtain financial support. 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 realised 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 recognised 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.[126]

118. Even when it will be eventually set up, the Fund is conceived to provide relatives of missing people with measures of social assistance that do not correspond and cannot replace compensation for the damage suffered and certainly do not amount to integral reparation. The right to accede to the financial support granted by the Fund is dependent on many restrictive conditions set by the L MP – like the fact that the relative would lose the right to the support in case he/she gets employed, finishes education, gets married, etc.[127] The consequence would be that a very small number of relatives will benefit from it.It is important to underline that the notion of "social assistance" shall be clearly differentiated from those of "redress" or "integral reparation", to which relatives of missing persons are entitled for the harm suffered and independently from their economic situation or their ability to work.

5.5 The Declaration of Death of a Victim as a Pre-condition to Obtaining Compensation for Relatives of Missing Persons

119. Moreover, several international human rights bodies have repeatedly expressed their concerns regarding the practice of obliging relatives of disappeared persons to declare their loved ones dead in order to obtain compensation or social allowances. Recently, in a case concerning BiH, the UN Human Rights Committee found a violation of Arts. 2, 6, 7 and 9 of the Covenant with regard to the obligation

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125 See, among others, CAT, Concluding Observations on BiH, *supra* note 43, para. 24 (b); and WGEID, Report on the Mission to BiH, *supra* note 36, para. 84 (a).

126 See, among others, CCBH, decision no. AP-129/04 of 27 May 2005, para 67, and decision no. AP-228/04 of 13 July 2005.

127 See Arts. 14 and 18 of the LMP, Official Gazette of BiH No. 50/04.

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".[128]

120. 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 and is currently being examined. The ministries have not yet provided their opinion on the proposal.

121. It must be further highlighted that, besides the above-mentioned legislation, Art. 27 of the LMP 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 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,[129] 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 direct death, without taking into account its continuous nature**.

5.6 The Draft Law on the Rights of Victims of Torture and Civilian Victims of War

122. Since 2006 BiH has been affirming before international mechanisms that the adoption of a Law on the Rights of Victims of Torture was "imminent". Yet, this piece of legislation has not been enacted and international human rights mechanisms 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 Torture".[130]

123. At the end of November 2011 the BiH Ministry of Human Rights and Refugees re-launched a debate concerning the adoption of the Law on the Rights of Victims of Torture. A first draft was circulated in February 2012 and both members of the civil society and of the government were given the opportunity to comment. Unfortunately, the representatives of the government of RS, despite being invited, have not

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

129 WGEID, *Report on the Mission to BiH*, *supra* note 36, paras. 46 and 85.

130 Special Rapporteur on Violence against Women, Report on the Mission to BiH, *supra* note 27, para. 105 (b).

taken part to any meeting to discuss the draft law.[131]

124. 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 was no readiness from the side of the Entities to adopt the law. In September 2013 one of the delegates in the House of Representatives of the Parliamentary Assembly sent a notification to the Houses of Representatives and the Ministry of Human Rights and Refugees in BiH affirming that some members of the Parliamentary Assembly have accepted the role of proposing the draft law. On 4 December 2013 the Constitutional-Legal Commission of the House of Representatives of the Parliamentary Assembly of BiH accepted the draft, and on 30 December, the Constitutional-Legal Commission of the House of Peoples did the same. The Joint Commission on Human Rights did, however, not approve the draft during its 28th session held on 21 January 2014, and it was mandated during the 62nd House of Representatives session 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, after which the House of Representatives will discuss it during its 63rd session on the same date.

125. Even if the Commission and the House of Representatives will approve the draft, the law should still undergo two further readings before both Chambers of the Parliamentary Assembly. The adoption and enforcement of the Law on the Victims of Torture therefore seems all but imminent.

126. Victims of gross human rights violations, including victims of rape or other forms of sexual violence during the war, are definitely exacerbated by this situation, particularly when the majority of them have to face harsh living conditions and economic restraints, as well as serious psychological traumas. The callous inactivity of BiH authorities in the face of the acute suffering of victims of torture during the war, who have been waiting for a law to eventually realise their fundamental rights, is not only a flagrant breach of BiH's international obligations, but discloses an obstinate disregard of recommendations repeatedly put forward by international human rights mechanisms, and is perceived by thousands of victims as a mockery.

6. Guarantees of Non-recurrence

127. Under international law States have the obligation to take measures to prevent gross human rights violations in the future so as to ensure that victims do not have to further endure violations of their rights. To this end, "States must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions. Adequate representation of women and minority groups in public institutions is essential to the achievement of these aims. Institutional reforms aimed at preventing a recurrence of violations should be developed through a process of broad public

131 It is noteworthy that in RS associations of civil society tried twice (in 2007 and 2008) to promote a draft law for RS on former camp detainees and torture victims. The draft laws were tabled before the National Assembly, but both proposals were rejected. Pressures in this sense were allegedly exercised by associations of war veterans in RS and groups representing the Bosniak ethnic group living in RS.

consultations, including the participation of victims and other sectors of civil society".[132] Such reforms should include the repeal of laws that contribute to or authorise violations of human rights or humanitarian law and enactment of legislative and other measures necessary to ensure respect for human rights and humanitarian law, including measures that safeguard democratic institutions and processes.

6.1 The Draft Law on Free Legal Aid

128. 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 piece of legislation on this issue was December 2013. However, **no new draft has been presented. 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 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. As recently pointed out by the Special Rapporteur on the Independence of Judges and Lawyers "*States 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*".[133] As noted in the European Commission Progress Report for 2013: "The system of free legal aid [in BiH] 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".[134] The adoption of a law on free legal aid is a priority that cannot be postponed anymore.

6.2 Vetting for public office holders

129. Article 1.6 of the Election Law of BiH[135] provides for restrictions of the right to run for public elections for persons who are serving a sentence imposed by the ICTY, persons who are under indictment by the ICTY and who refused to appear before the ICTY.[136] Moreover, Article 1.7 adds that persons who are serving a sentence imposed by a Bosnian court for serious violations of humanitarian law or who failed to appear before domestic courts (provided that the ICTY previously approved the court's file) are also

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132 UN Impunity Principles, *supra* note 9, principle 35.

133 Special Rapporteur on Independence of Judges and Lawyers, *Legal Aid, a Right in Itself!*, 2013, UN doc. A/HRC/23/43 of 15 March 2013.

134 European Commission, Progress *Report for 2013 Bosnia and Herzegovina*, doc. SWD(2013)415final, 16 October 2013, p. 13. See also Special Rapporteur on Violence against Women, *Report on the Mission to BiH*, *supra* note 27, para. 27.

135 " Official Gazette" of Bosnia and Herzegovina No. 23/01.

136 Article 1.6 of the BiH Election Law: "No person who is serving a sentence imposed by the International Tribunal for the former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may register to vote or stand as a candidate (the candidate for the purpose of this Law refers to persons of both genders) or hold any appointive, elective or other public office in the territory of Bosnia and Herzegovina. [...]"

disqualified from standing for public office.[137] The fact that the disqualification is prescribed for those who "are serving a sentence" implies that the restriction of their rights to run for public office is coterminous with the length of their sentence but as soon as the persons is released, he or she can run for office again.

130. During the October 2012 local elections in BiH several persons who had been sentenced for war crimes both before the ICTY and the national justice system did run for public office. For instance, Blagoje Simić – who was sentenced by the ICTY in 2003 for crimes against humanity committed in Bosanski Šamac to 17 (then reduced to 15) years of imprisonment, served two thirds of his sentence and was released in 2011- was candidate for the Municipal Council of Bosanski Šamac and he was elected. Simo Zarić – who was sentenced in 2003 sentenced by the ICTY for crimes against humanity committed in Bosanski Šamac to 6 years imprisonment, served two thirds of sentence and was released in 2004 - was candidate for the Municipal Council of Bosanski Šamac but was not elected. Branko Grujić – sentenced by the High Court in Belgrade in 2010 (sentence confirmed in appeal in 2012) for war crimes against civilians committed in Zvornik to 6 years imprisonment and served his sentence) - was candidate for the Municipal Council of Zvornik and he was elected.

131. Taking into account the more lenient sentences meted out by the Court of BiH in many cases concerning war crimes and genocide under the SFRY CC[138] and the possibility of early release granted after two thirds of the sentence,[139] the current system of vetting for public office holders in BiH raises concerns as to its effectiveness and suitability in guaranteeing that public institutions function in the best interest of citizens and ensures protection of their rights.

6.3 The Inadequacy of Criminal Legislation on Torture, Enforced Disappearance and Rape

132. Currently, the BiH criminal legal framework on sexual violence, torture and enforced disappearance both at the national and the Entity level is inadequate. **Torture, enforced disappearance, rape or other forms of sexual violence are either not codified at all or, when they are, domestic provisions do not meet international standards. On the one hand, this situation fosters impunity over past crimes and, on the other hand, it jeopardises the prevention of future violations**.

133. In January 2011 the Committee against Torture expressed its concerns "that the State party has still not incorporated into domestic law the crime of torture as defined in article 1 of the Convention [against Torture] and has not criminalised torture inflicted by or at the instigation of or with the consent or

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137 Article 1.7 of the BiH Election Law: "No person who is serving a sentence imposed by a Court of Bosnia and Herzegovina, a Court of the Republika Srpska or a Court of the Federation of Bosnia and Herzegovina and the Court of the District of Brcko or has failed to comply with an order to appear before a Court of Bosnia and Herzegovina, a Court of the Republika Srpska or a Court of the Federation of Bosnia and Herzegovina and the Court of the District of Brcko for serious violations of humanitarian law where the International Criminal Tribunal for the Former Yugoslavia has reviewed the file prior to arrest and found that it meets international legal standards may register to vote or stand as a candidate or hold any appointive, elective or other public office in the territory of Bosnia and Herzegovina".

138 See above para. 51.

139 This possibility is granted by Article 28 of the ICTY Statute and is being considered also at the domestic level as discussed above paras. 96-97.

acquiescence of a public official or other person acting in an official capacity".[140] Accordingly, it urged BiH "to speed up the process of the incorporation of the crime of torture, as defined in the Convention, into the State party laws as well as the harmonisation of the legal definition of torture in the Republika Srpska and Brcko District with the Criminal Code of Bosnia and Herzegovina".[141]

134. On its part, after having conducted its mission to BiH, the WGEID[142] analysed the existing criminal legal framework on enforced disappearance and it recommended that "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".[143]

135. In July 2013 the CEDAW expressed deep concern about "The inadequate definition, both at the State and Entity levels, of acts of sexual violence as war crimes and crime against humanity, in particular the elements of the crime of rape, which are not in line with international standards, the large number of cases at district/cantonal levels, in which rape continues to be prosecuted as an ordinary crime, without taking into account the dimension of the armed conflict, and the parallel applicability of different Criminal Codes resulting in inconsistent jurisprudence and lenient sentencing practices"[144] and it recommended to BiH to "amend all relevant Criminal Codes to include a definition of wartime sexual violence in line with international standards, including a specific definition of rape as a war crime and as a crime against humanity, in order to adequately reflect the gravity of the crimes committed and intensify its efforts to harmonise the jurisprudence and sentencing practices of its courts throughout the State party, by establishing effective cooperation mechanisms between prosecutors and courts competent to deal with war crimes at all levels of the State party".[145]

136. 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 Parliamentary Assembly of BiH. This draft included some remarkable amendments. First of all it introduced an amendment to Art. 190 in order to reproduce a definition of torture in accordance with Art. 1 of the Convention on Torture.[146] Secondly, it codified enforced disappearance also when not committed as part of a widespread or systematic attack against civilian population.[147] Finally, it modified the definition of sexual violence as a

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140 Committee against Torture, Concluding Observations on BiH, *supra* note 43, para. 8.

141 *Ibid*.

142 WGEID, Report on the Mission on BiH, *supra* note 36, 16 December 2010, paras. 12-13.

143 *Ibid*., paras. 54-55 and 87(b)-87(c).

144 CEDAW, Concluding Observations on BiH, *supra* note 59, para. 9.b.

145 *Ibid*., para. 10.b.

146 On the contrary, the sanctions envisaged (deprivation of liberty for a minimum of 6 years, while the maximum sentence is not fixed) do not seem to fully take into account the extreme seriousness of the crime.

147 The sanction envisaged for the perpetrator would be the deprivation of liberty for a minimum of eight 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.

crime against humanity and as a war crime removing from the definition the condition of "coercing another by force or by threat of immediate attack" and bringing it in line with international standards.

137. Despite the fact that the majority of the above-mentioned amendments shall certainly be welcomed and would represent significant steps forward, **the proposed amendments to the Criminal Code of BiH have not been 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 approved**. **Finally, the amendment of the Criminal Code of BiH would in any case not be enough to make up for the existing loopholes in the Entity codes, which shall therefore be amended as well.**

7. Conclusions and Recommendations

138. In general, it is the view of the subscribing associations that BiH is not in compliance with its international obligations related to the different elements of transitional justice as embodied in, among others, the UN Impunity Principles and the UN Basic Principles on the Right of a Remedy. The lack of consistent steps forward and the non fulfilment of long-due promises increase the frustration among those whose rights have been affected by the conflict and who feel that the State is indulging into lulls until they die, avoiding to provide any meaningful answer to their quest for truth,justice and reparations.

139. The subscribing associations are persuaded that a country visit of the distinguished Special Rapporteur to BiH would provide him with a first-hand account of the situation concerning the full range of processes and mechanisms associated with the four elements of the mandate and would greatly contribute to prioritise transitional justice issues on the domestic agenda through its recommendations and the provision of technical assistance. Therefore, we would request the Special Rapporteur to solicit an invitation to carry out such visit to the government of BiH, bearing in mind that on 7 May 2010 BiH issued a standing invitation to all UN thematic procedures, thereby announcing that it will always accept requests to visit.

140. Moreover, for the reasons explained above, the associations submitting the present document respectfully request the Special Rapporteur to recommend BiH to:

- Adopt a comprehensive approach to the four elements of the mandate by ensuring that the National Strategy for Transitional Justice is adopted and implemented without further delay and its provisions are in line with international standards, in particular keeping in mind that fact-finding processes cannot replace access to justice and redress for victims of gross human rights violations and their relatives;
- Establish an institutional fact-finding and truth-telling mechanism to investigate human rights violations committed throughout BiH in the period 1992-1995 which is in line with international standards on the creation and functioning of truth commissions and complementary to existing and future judicial and non-judicial mechanisms; ensure that civil society play a primary role in the design and implementation of the truth-telling mechanism.
- 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 LMP 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 anonymization policy adopted by the State 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 fulfill their right to know the truth;
- 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 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 ECtHR 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;
- Ensure that the sentencing regime for crimes under international law complies with the principles of justice, parity and fairness in punishment and that there is no extreme disparity between the sentences applicable to crimes against humanity and those applicable to war crimes and genocide;
- 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. 126, 132, and 333 of the BiH Code of Criminal Procedure;
- Examine the proposed legislative amendments that would allow for an automatic possibility of renewal of trials for all persons convicted by the BiH Court under the 2003 CC with extreme caution as it clearly contravenes the judgment of the ECtHR in the *Maktouf and Damjanović* case and it could actually paralyse the Court of BiH that is already coping with a considerable backlog

of cases;

- Guarantee that crimes under international law, such as genocide, war crimes and crimes against humanity are not subject to pardon, or at the very least ensure that pardon for persons convicted of such crimes would not amount to an exemption of sanction;
- Implement without delay a national programme of measures of reparation for victims of gross human rights violations during the war that encompasses compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. The notions of "measures of compensation" and "provision of social assistance" shall be clearly distinguished;
- Ensure that victims of gross human rights violations during the war are adequately informed about their right to claim compensation from individual perpetrators; guarantee that prosecutors act upon compensation claims in the context of criminal proceedings and that criminal courts in BiH avail themselves of their power to award compensation to war victims instead of systematically referring them to civil actions;
- Guarantee that claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations in any event;
- Ensure that the Programme for Improvement of the Status of Survivors of Conflict related Sexual Violence is referred for approval to the Council of Ministers of BiH without further delay. Representatives of the Entities must express their opinion on the programme and show their genuine support without further delay. Measures envisaged by the programme shall have a transformative aim, in the sense that they must allow women to ameliorate or at least consolidate their position in society;
- Ensure that the Fund for the Support of Families of Missing Personsis 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 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;
- 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 the draft law on free legal aid is 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;

- Improve the system of vetting of public office holders at all levels of government in order to ensure the integrity and legitimacy of public institutions and promote the effective protection of democratic values and human rights and the prevention of crimes from recurring;
- Ensure that the Criminal Code of BiH is amended and that the punishment for the offence of torture is commensurate to the gravity of the crime. Ensure that the criminal codes at the Entity level integrate the crime of torture as defined under Art. 1 of the Convention against Torture, criminalising also the incitement, instigation, superior orders or instructions, consent, acquiescence and concealment of acts of torture. Entities shall also integrate torture as a crime against humanity and as a war crime in accordance with international standards;
- Ensure that the criminal codes at the Entity level are harmonised 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;
- Proceed without delay to amend the criminal codes at the State and Entity level to include a definition of sexual violence in accordance with international standards and jurisprudence related to prosecution of war crimes of sexual violence and to remove the condition of "force or threat of immediate attack".

141. We remain at full disposal of the Special Rapporteur for any clarification or further information and we take this opportunity to acknowledge in advance the kind attention and to commend the Special Rapporteur and his Secretariat for their commitment and indispensable work.

On behalf of

Women's International League for Peace and Freedom

The Association of Genocide Victims and Witnesses

The Association Movement of Mothers of Srebrenica and Žepa Enclaves

Philip Grant

TRIAL Director

The Associations submitting the General Allegation

1) TRIAL (Track Impunity Always)

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.

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2) Women's International League for Peace and Freedom

The Women's International League for Peace and Freedom (WILPF) is an international non-governmental organisation founded in 1915 to bring together women from around the world who are united in working for peace by non-violent means and promoting political, economic and social justice for all. WILPF has national sections covering every continent, an International Secretariat based in Geneva, and a New York office focused on the work of the United Nations.

WILPF's mission is to end and prevent war, ensure that women are represented at all levels in the peace-building process, defend the human rights of women, and promote social, economic and political justice.

To achieve this mission, WILPF conducts programs in three areas: Disarmament, Human Rights, and Women, Peace and Security. The WILPF International Secretariat works alongside our global network of sections, conducting peace-building activities at every level, from the grassroots to the highest decision-making bodies at the United Nations.

WILPF envisions a world free from violence and armed conflict in which human rights are protected and women and men are equally empowered and involved in positions of leadership at the local, national and international levels.

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3) The Association of Genocide Victims and Witnesses

The Association of Genocide Victims and Witnesses has been founded on 11 July 2010 as a voluntary, multinational, non-partisan and non-governmental association of citizens. The association has been established with the idea to assist

in the resolving and proving the truth about the aggression on Bosnia and Herzegovina in 1992 to 1995, but also assist all victims of torture. The aims of the association are:

- promoting and protection of cultural, spiritual, national, property and other rights of the members of the association,

- valorising and enhancing universal human rights and fundamental civil freedoms of the association's members in their political, legal, social, humanitarian, health and scientific sphere of action,

- standing for equality and equity of the constitutional peoples and citizens of Bosnia and Herzegovina,

- protecting and preserving the basic values of the spiritual, cultural and national identity of the Association's members in line with standards established by international conventions as well as the BiH Constitution and laws of the BiH Federation,

- protecting the association's members from vengeance and revenge for their witnessing in criminal procedures against war crimes suspects, especially the crime of genocide,

- providing financial and material assistance to victims and witnesses of torture, as well as their families.

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4) The Association Movement of Mothers of Srebrenica and Žepa Enclaves

The Association Movement of Mothers of Srebrenica and Žepa Enclaves is one of the BiH non-governmental organizations that gathers survivors and family-members of persons killed and disappeared in 1995, after the fall of the protected zone of Srebrenica. The Association has been founded in 1996 with headquarters in Sarajevo and it gathers members from most cities in BiH who have changed their place of residence after the Srebrenica genocide. It's activities are: take part in exhumations; help its members realize their socio-economic rights; cooperate with other organizations which work with families of fallen soldiers and demobilized soldiers; protect women and children and help them obtain their rights.

Among others, the Association is a winner of the Victor Gollanz price awarded by the Society for Threatened Peoples, the Golden Pledge of Peace of the Linus Pauling International League of Humanists etc.

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Annex

1. Letter sent by the Association Movement of “Mothers of Encalves of Srebernica and Žepa” 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 RS on 29 November 2013 (translation in English).

Annex 1

Respected,

I am writing to you in the name of the members of the Association with the request to protect us because our lives are in danger. The returnees among us, who live in Srebrenica and surrounding places, continuously live in fear, fearing for their physical and psychological safety. During the period when we testified against the perpetrators of genocide (who were in the end found guilty) we received numerous treats and we continue to receive threats every time we speak publicly. We were psychically attacked when we made an attempt to commemorate the anniversary of Kravica and other places where our loved ones were killed. Also, the returnees in Eastern Bosnia were attacked during the celebrations of the Eid.

Just when we taught that our loved ones, at least those that we buried, can rest in peace when the perpetrators were put behind the bars, we are re-traumatized by these latest events. The mere thought that we are going to be called to testify again and to once again go back and face the persons who killed our loved once is unbearable. The women, mothers, our organization gather have physical consequences due to the re-traumatization that were also influenced with the knowledge that the perpetrators were released. Since the perpetrators were released we visit the graves of our loved ones with fear as even prior to this in many cases we asked the police to protect us, but instead they also attacked us on the 13 July 2013. With the annulment of the verdicts and release of the perpetrators we wander whether the state is able to provide us with the protection against the war criminals and alike and whether the state is able to ensure the guaranty of non-repetition.

It is significant that the genocide convicts were greeted with celebrations in Skelani with the rockets shot. The president of the Municipality Assembly of Srebrenica, Radomir Pavlović, organized the welcome in Skelani using the official car and the petrol. We use this opportunity to ask you to also request the official records from the police from Skelani about this event.

In addition to the physical protection we request the protection from the continuous re-traumatization that was increased with the release of the convicted for genocide.

We would also like to note here that the release of the convicted for genocide has the effect on other victims, potential witnesses, who are now in dilemma whether to testify,

Respectfully,

The Association Movement of “Mothers of Encalves of Srebernica and Žepa”