

Bosnia and Herzegovina

Update to the General Allegation Concerning Bosnia and Herzegovina submitted to the Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non-recurrence and to the Working Group on Enforced or Involuntary Disappearances

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**

**TRIAL**

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OCTOBER 2014

## Update Note Concerning the Release and Re-trial of Individuals Convicted for War Crimes and Genocide Following the Judgment of the European Court of Human Rights on the Case *Maktouf and Damjanović v. Bosnia-Herzegovina*

1. On 11 February 2014, TRIAL (Track Impunity Always), Women's International League for Peace and Freedom, The Association of Genocide Victims and Witnesses and The Association Movement of Mothers of Srebrenica and Žepa Enclaves have submitted to the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence a General Allegation on the Situation in Bosnia and Herzegovina (BiH).<sup>1</sup> A copy of the same General Allegation was also transmitted to the Working Group on Enforced or Involuntary Disappearances (WGEID).
2. The General Allegation described in detail a number of worrying issues, among others, related to the **automatic application** in BiH of the judgment of 18 July 2013 of the Grand Chamber of the European Court of Human Rights (ECtHR) on the case *Maktouf and Damjanović v. Bosnia and Herzegovina* (applications No. 2312/98 and 34179/08), as well as to the **release of defendants pending re-trial and its impact in terms of security and re-victimization**.<sup>2</sup>
3. On 1 April 2014 the WGEID and the Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non-recurrence sent a joint communication to the government of BiH concerning the effect of the decision of the Constitutional Court in 2013 to order the quashing of the verdicts in the cases of 10 individuals convicted of war crimes against civilians and genocide as a result of an automatic application of an ECtHR decision.<sup>3</sup>
4. In the communication sent from the Special Procedures to the government of BiH three major concerns were expressed, i.e.: 1) the apparent automatic application of the ECtHR judgment in at least a dozen cases in BiH in contravention of the actual ruling of the same judgment; 2) the release of the defendants, guilty of genocide and war crimes against civilians, without remand pending re-trial, and its impact on the protection of victims from violence, re-victimization and intimidation; and 3) the lack of a comprehensive transitional justice strategy to complement the criminal justice process in the country. At the time of writing, to the knowledge of the subscribing associations, **the government of BiH did not submit any formal reply to the WGEID and the Special Rapporteur**.<sup>4</sup>

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<sup>1</sup> For the integral version of the general allegation, see [http://www.trial-ch.org/fileadmin/user\\_upload/documents/CAJ/BH/TRIAL\\_BiH\\_GA\\_SRTJ\\_Feb2014.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/CAJ/BH/TRIAL_BiH_GA_SRTJ_Feb2014.pdf).

<sup>2</sup> *Ibid.*, paras. 50-98. On these matters, see also De Sanctis F., *Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes*, in *Journal of International Criminal Justice*, Vol. 12 (4), 2014, pp. 847-870.

<sup>3</sup> Working Group on Enforced or Involuntary Disappearances (WGEID), *Intersessional Report*, doc. A/HRC/WGEID/103/1 of 25 July 2014, para. 43.

<sup>4</sup> In this sense see *Communications Report of Special Procedures to the Human Rights Council*, doc. A/HRC/27/72 of 20 August 2014 (Case BiH 2/2014).

5. With respect to the above-mentioned general allegation, the WGEID observed that “[...] **enforced disappearance is a continuous crime, which can be punished on the basis of ex post legislation without violating the principle of non-retroactivity, for as long as the fate or the whereabouts of the disappeared person has not been clarified**”.<sup>5</sup>
6. Furthermore, the WGEID recently published its follow-up report on the mission to BiH and it expressed serious concern because of “[...] *the series of decisions rendered by the Constitutional Court, following the judgement Maktouf and Damjanovic by the European Court of Human Rights of 18 July 2013*. To this regard, the Working Group would like to refer Bosnia and Herzegovina to its joint communication dated 1 April 2014, together with the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. **The Working Group would like to reiterate that it is concerned with what seems to be a misinterpretation of the ECtHR judgment, with serious consequences. It also reiterates its concern that the defendants have been released without remand pending trial, posing challenges with regard to the protection of victims from violence, re-victimization and intimidation**”.<sup>6</sup>
7. Notwithstanding the concerns expressed by the WGEID and the Special Rapporteur, not only the situation has not improved, but there has been a **recent worrying development related to the release pending re-trial of a defendant**. In this light, the associations that co-signed the general allegation submitted in February 2014, considered it necessary to submit this update note.
8. Firstly, it must be highlighted that the automatic application of the ECtHR judgment on the case *Maktouf and Damjanović*, the Constitutional Court of BiH decided on a series of applications lodged by convicted war criminals, quashing so far nine decisions against them and ordering the Court of BiH to issue under an urgent procedure new decisions in line with Art. 7, para. 1, of the European Convention of Human Rights (ECHR). Following those decisions, the Court of BiH has so far **reopened the proceedings and ordered new trials to take place to the benefit of sixteen convicted persons**,<sup>7</sup> and it **ordered their release without remand pending re-trial** since the legal validity of their previous conviction had been annulled by the decision of the Constitutional Court of BiH.
9. Notably, one of the decisions upheld the appeal filed by Mr. Novak Đukić who had been sentenced on 12 June 2009 to 25 years in prison for having committed war crimes against civilians in Tuzla on 25 May 1995. Mr. Đukić, former Commander of the Ozren Tactical Group of the Republika Srpska Army, was found guilty of having ordered an artillery squad to shell Tuzla from cannons on 25 May 1995.

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<sup>5</sup> WGEID, *Intersessional Report*, *supra* note 3, para. 44 (emphasis added). The same was affirmed also in WGEID, *Annual Report*, doc. A/HRC/24/49 of 4 August 2014, para. 66.

<sup>6</sup> WGEID, *Follow-up Report on the Mission to Bosnia and Herzegovina*, doc. A/HRC/27/49/Add.2 of 8 September 2014, para. 37 (emphasis added).

<sup>7</sup> Mr. Goran Damjanović, Mr. Zoran Damjanović, Mr. Slobodan Jakovljević, Mr. Aleksandar Radovanović, Mr. Branislav Medan, Mr. Brane Džinić, Mr. Milenko Trifunović, Mr. Petar Mitrović, Mr. Milorad Savić, Mr. Mirko (Špire) Pekez, Mr. Mirko (Mile) Pekez, Mr. Nikola Andrun, Mr. Trinko Pinčić, Mr. Novak Đukić, Mr. Ivanović Željko, and Mr. Šefik Alić.

Several artillery projectiles hit the downtown area, known as Kapija, killing 71 people and injuring another 150.

10. On 23 January 2014, the Constitutional Court of BiH held that in the case of Mr. Novak Đukić the 2003 Criminal Code was wrongfully applied instead of the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY), thus finding a violation of Art. 7, para. 1, of the ECHR with respect to the applicant. The Constitutional Court of BiH annulled the verdict of 12 June 2009 and ordered the BiH Court to issue under an urgent procedure a new decision in line with Art. 7, para. 1, of the ECHR.
11. Survivors and family members of victims of the shelling in Tuzla reacted with great frustration and disappointment vis-à-vis the justice system in BiH, publicly affirming that in the case of Mr. Novak Đukić, his release would be a form to escape from justice and there would have been a **serious and imminent risk of flight**.<sup>8</sup>
12. On 14 February 2014 the Appeals Division of the Court of BiH suspended the prison sentence in relation to the defendant and ordered his immediate release.
13. On 11 April 2014, in the reopened proceedings against Mr. Novak Đukić, the Appeals Chamber of the Court of BiH found the accused guilty of war crimes against civilians in violation of Art. 142, para. 1, of the SFRY Criminal Code and reduced his sentence from 25 to 20 years in prison.
14. According to information available at the official website of the BiH Court, the accused has “duly responded and attended all hearings of the Appellate session, which is when he was particularly warned by the Panel that he was under the obligation to inform the court about any intended change of address”.<sup>9</sup>
15. Since the delivery of the verdict, media have repeatedly been reporting about **Mr. Novak Đukić having fled from BiH to Serbia**. His lawyer has been answering through media to public allegations that he travelled to Serbia just for purposes of medical treatment.
16. At the beginning of September 2014, the media reported about the defence of Mr. Novak Đukić having staged a reconstruction of the attack in a bid to prove his innocence. According to Mr. Đukić’s defence, they planned to submit the results of the reconstruction to the Court of BiH along with a request for further retrial. But the Court of BiH has already rejected such request, and has ordered Mr. Đukić to go to Foča prison on 22 September in order to serve his sentence.<sup>10</sup>

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<sup>8</sup> See, among others., Radio Free Europe, 24 January 2014, <http://www.slobodnaevropa.org/content/obitelji-djece-sa-kapije-ako-djukic-izadje-bice-to-izigrana-pravda/25241292.html>.

<sup>9</sup> See <http://www.sudbih.gov.ba/index.php?id=3314&jezik=e>.

<sup>10</sup> See <http://www.justice-report.com/en/articles/court-will-wait-for-djukic-until-september-22>.

17. On 23 September 2014, a leading daily newspaper, *Oslobodjenje*, published an article about the fact that Mr. Novak Đukić's lawyer, Mr. Duško Tomić, confirmed to *Oslobodjenje* that **Mr. Đukić does not intend to return to BiH to serve his prison sentence**. The lawyer further explained that, **in case BiH authorities request Mr. Đukić's extradition, he will be shielded by his Serbian citizenship**. On the other hand, in case Serbia recognizes the verdict issued on 11 April 2014 by the Court of BiH, the lawyer announced that he intends to seek a retrial in Serbia, and not before the BiH judiciary bodies, as it had been announced earlier.<sup>11</sup>
18. Moreover, on 26 September 2014, the media reported about the fact that Mr. Novak Đukić did not receive the call to appear to serve his sentence for crimes at Tuzlanska kapija on 22 September 2014, because of a mistake allegedly committed by the Basic Court in Banja Luka. As a consequence, a new order to serve his sentence should be issued by the Court's police.<sup>12</sup> Such mistakes and lack of diligence in dealing with issues related to war crimes seriously hamper the rule of law concept in BiH and are perceived as a mockery in the face of the survivors and family members of victims of crimes committed by Mr. Novak Đukić.
19. On 9 October 2014 the Court of BiH announced<sup>13</sup> that it intends to issue an international arrest warrant against Mr. Novak Đukić, as well as to submit a plea for the execution of the sentence to Serbian authorities, while the legal representative of the latter confirms that his client does not intend to return to BiH.<sup>14</sup>
20. The **automatic application** of the principles affirmed by the ECtHR also to the case of Mr. Đukić, and his **subsequent flight to Serbia** are the source of deep concern and they confirm the subsistence of serious flaws in the rule of law.
21. For the reasons explained above, the associations submitting the present note respectfully request the Special Rapporteur and the WGEID to:
- call on BiH to **answer without any further delay to their previous joint communication**;
  - request BiH to **provide an explanation concerning the recent flight of Mr. Đukić and the measures it intends to adopt to ensure that he serves his sentence and those responsible for having facilitated his escape are duly investigated, prosecuted and sanctioned**;
  - reiterate the **recommendation to BiH to:**
    - a) **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,**

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<sup>11</sup> See *Oslobodjenje*, *Novak Đukić ne vraća se u BiH* (Novak Đukić is not coming back to BiH), 23 September 2014.

<sup>12</sup> <http://www.justice-report.com/en/articles/djukic-did-not-receive-call-for-court-s-mistake>.

<sup>13</sup> <http://www.sudbih.gov.ba/?id=3465&jezik=e>.

<sup>14</sup> <http://www.justice-report.com/en/articles/bosnia-seeks-fugitive-tuzla-massacre-convict#sthash.Oi9AqJpf.dpuf>.

**adequately punished in accordance with international standards and in a manner proportional to the gravity of their crimes;**

- b) 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 Criminal Code must be judged anew and, if re-trial actually occurs, the gravity of the crimes concerned is duly taken into account;
- c) 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; and
- d) Take all necessary measures to **secure, wherever required, the continued detention of the persons convicted for war crimes and genocide pending re-trial 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.

We remain at full disposal of the Special Rapporteur and the WGEID for any clarification or further information and we take this opportunity to acknowledge again in advance the kind attention and to commend the Special Rapporteur and the WGEID, as well as their Secretariat for their ongoing 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 Present Document

### 1) TRIAL (Track Impunity Always)

Founded in 2002 TRIAL is an association under Swiss law based in Geneva putting the law at the service of victims of international crimes (genocide, crimes against humanity, war crimes, torture and enforced 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 Swiss and foreign 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 143 international proceedings, the first 25 of which have all been won by the organization. In addition, 40 reports were submitted to the United Nations and 15 criminal complaints filed in Switzerland, which have led to various investigations and a trial.

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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 organization 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; and
- 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. Its 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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