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TORTURE

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1. INTRODUCTION

Amnesty International is presenting this submission to the United Nations (UN) Committee against Torture (the Committee) ahead of its examination of Bosnia and Herzegovina's (BiH) sixth periodic report on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention). The document highlights Amnesty International's concerns in relation to a number of questions on the Committee's List of Issues (LOI) to be taken up in connection with this consideration of the BiH State Report.¹

These concerns relate to human rights violations linked to the legacy of the 1992-1995 conflict in BiH. This submission sets out on-going concerns in relation to Articles 1, 4, 12 and 13 of the Convention in the context of slow delivery of justice for the crimes under international law and the continued failure of the authorities to provide full and effective reparation, including compensation, to victims of war-related torture, and specifically, to the victims of wartime sexual violence.²

Amnesty International welcomes considerable advances made over the past year to improve the number and quality of prosecution of cases of wartime sexual violence, strengthen witness protection and support in courts and prosecutor's offices across BiH, develop institutional networks for victims and witnesses³, and improve the capacity of service providers working with the victims. However, despite the recent progress in the number of cases tried, the overall pace of prosecutions remains very slow and the courts and prosecutors' offices continue to struggle to address the huge backlog of cases.⁴ The authorities in BiH have not done enough to ensure that all victims of war crimes of sexual violence can access compensation for the harms suffered. These failures are evident in the obstacles victims face in effectively claiming and collecting compensation from convicted perpetrators or the state in judicial proceedings and in inadequate legal assistance provided to survivors seeking compensation through the courts. Finally, the few positive measures related to the provision of special allowances and support for the victims, remain fragmented and differ vastly from jurisdiction to jurisdiction perpetuating the sense of legal uncertainty. The current situation whereby the rights of victims of wartime torture, including victims of wartime sexual violence, are regulated

¹ The Committee's list of issues to be taken up in connection with the review of BiH's sixth periodic report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment can be found at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fBiH%2fQ%2f6&Lang=en. The state party report is available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fBiH%2f6&Lang=en

² Amnesty International has conducted research missions in BiH with specific focus on the survivors of conflict-related sexual violence since 2009, and most recently in the period between 2015- 2017, with the aim of gathering information on the status of the survivors and their access to reparations and services. During these missions, the organization met with relevant local and international stakeholders, representatives of the international community present in the country, representatives of civil society, victims' associations and survivors of sexual violence. See Amnesty International's publications, including *We Need Support, not Pity: Last Chance for Justice for Bosnia's Wartime Rape Survivors*, AI Index: EUR 63/6679/2017, 12 September 2017, available at:

<https://www.amnesty.org/en/documents/eur63/6679/2017/en/>, *Bosnia and Herzegovina: Old crimes, same suffering: no justice for survivors of wartime rape in Northeast Bosnia and Herzegovina*, AI Index: EUR 63/002/2012, 29 March 2012, available at: <https://www.amnesty.org/en/documents/EUR63/006/2009/en/> and *Whose Justice? The women of Bosnia and Herzegovina are still waiting*, AI Index: EUR 63/006/2009, 30 September 2009, available at: <https://www.amnesty.org/en/documents/EUR63/006/2009/en/>

³ With assistance of donors, most notably European Union and United Kingdom, witness protection capacity and support expanded significantly over the past several years. This included the establishment of physical infrastructure, advanced technical capabilities in courtrooms, the hiring and training of dedicated witness protection staff and the provision of psychosocial assistance to witnesses before, during and after the trials. Under the project implemented by Vive žene, a local NGO, an association of NGOs has supported local Social Welfare Centres in setting up networks for psychological and social support mechanisms for witnesses in cases of conflict-related sexual violence. Today, 15 such protocols have been agreed, covering the entire territory of BiH and enabling the NGOs to provide perhaps the most tangible support to the survivors, including helping them overcome psychological trauma, organizing referrals to medical and social services and legal aid and acting as a liaison between survivors and prosecutors' offices. In addition to providing support to the victims, these organisations train authorities and others who come in contact with survivors in order to imbue the services with a trauma- and gender-sensitive approach to dealing with vulnerable persons. For more detail, see Amnesty International, "We need support, not pity," p. 27-29.

⁴ Since 2004, when the War Crimes Chamber of the Court of BiH was established, a total of 123 such cases have been completed and 134 perpetrators convicted of sexual violence crimes. The years 2015 and 2016 saw the highest completion rates on record, with 20 and 19 completed cases, respectively. While encouraging overall, these numbers still represent less than 1% of the total estimated 20,000 victims of war crimes of sexual violence and a fraction of the potential cases. At the time of writing, nearly 260 war crimes cases were pending before different courts in BiH, while over 900 cases were still in the pre-investigation stage. At the current rate, it may take decades to clear the existing backlog of cases. For a more comprehensive study of progress concerning the prosecutions, see Organisation for Security and Cooperation in Europe (OSCE) Mission in BiH, *Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH between 2014 and 2016*, June 2017 (hereinafter: OSCE, *Towards Justice for Survivors*).

at the level of entities and the Brčko District⁵ is inherently discriminatory, with civilian victims of war's status and access to social benefits and support being dependent on their place of residence, rather than universally guaranteed by the state.

Amnesty International notes with concern that the complicated and dysfunctional constitutional structure, as well as the persistent inability and unwillingness of the authorities to agree, even within their own separate jurisdictions, on the adoption of crucial measures in line with BiH's international obligations, continue to prevent the survivors from realizing their rights 22 years after the conflict. However, as seen in the recommendations, there are concrete measures the authorities can take to significantly improve the situation of wartime sexual violence survivors and bring BiH more in line with its international law obligations.

2. INVESTIGATION AND PROSECUTION OF WAR CRIMES: ARTS. 1, 4, 12 & 13 (QUESTIONS 2 AND 22 (B) ON THE LOI)

2.1 PROSECUTION OF WAR CRIMES UNDER THE OLD CRIMINAL CODE

Amnesty International welcomes the adoption of amendments to the BiH Criminal Code to include a definition of crimes of sexual violence as underlying offences of war crimes against civilians and crimes against humanity, which are in line with the international criminal standards and jurisprudence of international courts and tribunals⁶ and with the previous recommendations of the Committee.⁷ The amendments removed the earlier condition of force, i.e., the requirement to prove the perpetration of the crime through the use of force or threat of use of force, which limited the means by which sexual acts could

⁵ The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), which brought an end to the three and a half year long conflict, left Bosnia and Herzegovina with one of the most complex power-sharing arrangements and governance systems in the world. The Dayton Peace Agreement established a new constitutional structure and divided BiH into two semi-autonomous entities: the Federation of BiH (FBiH), predominantly populated by Bosnian Muslims (Bosniaks) and Croats, and the Republika Srpska (RS), with a Serb majority. Brčko District in Northern Bosnia was granted a special status. Under a separate peace agreement, the FBiH was further decentralised into ten cantons.

⁶ The amendments brought this section of the BiH Criminal Code into compliance with Article 7 of the Statute of the International Criminal Court (ICC) and with the practice of the International Criminal Tribunal for Former Yugoslavia (ICTY).

⁷ See UN Committee against Torture, Concluding observations on the combined second to fifth periodic report of Bosnia and Herzegovina, Para. 9, CAT/C/BiH/CO/2-5, 20, January 2011.

be rendered non-consensual to the circumstances that involved direct use of force or threat of use of force.⁸ Instead, the amended law favours the concept of coercive circumstances as elaborated by the jurisprudence of the International Criminal Court (ICC), International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). This was an important change as the inclusion of the condition of force had limited the means by which sexual acts could be declared non-consensual and, until recently, had had a significant adverse effect on the proceedings in cases of sexual violence.

However, Amnesty International is concerned that the entity-level courts, Brčko District Court, and increasingly the Court of BiH, continue to rely on the Criminal Code of the former Socialist Federal Republic of Yugoslavia (SFRY Criminal Code) in prosecuting crimes committed during the conflict. Unlike the more progressive BiH Criminal Code, the SFRY Criminal Code has serious gaps when applied to crimes under international law. Most notably, it does not criminalize crimes against humanity and does not recognize the mode of liability of command and other superiors' responsibility, in contradiction with international standards. While rape is defined as a war crime, the full array of crimes of sexual violence recognized in international law (including sexual slavery and forced pregnancy) is not defined in the SFRY Criminal Code.⁹ This has serious consequences for the adjudication of cases involving rape and other war crimes of sexual violence, as many such acts have been committed in the context of widespread attacks against the civilian population and could, therefore, constitute crimes against humanity. These deficiencies in the SFRY Criminal Code make it an unsuitable normative framework to address sexual violence in armed conflicts.¹⁰

Despite the deficiencies, the SFRY Criminal Code continues to be applied by the courts in the entities and Brčko District, and in recent years, increasingly by the Court of BiH as well.¹¹ This has become of greater concern since the 2013 ruling by the European Court for Human Rights (ECtHR) in the case *Maktouf and Damjanović v. Bosnia and Herzegovina*.¹² The ECtHR ruling found that the application of the sentencing provision of the BiH Criminal Code in *Maktouf and Damjanović* constituted a violation of Article 7 of the European Convention of Human Rights (ECHR), which prohibits the retroactive application of criminal law if it is to the disadvantage of the accused. The ruling stated that the court in BiH ought to have used the more lenient sentencing provisions of the SFRY Criminal Code¹³ when sentencing the defendants who were charged with war crimes and received penalties that were within the lower range of punishment foreseen under the BiH Criminal Code.¹⁴

Although the ECtHR ruling did not provide a further view as to whether the sentencing provisions of the BiH Criminal Code, especially those in the higher range, i.e., 15 years or above, are compatible with Article 7, courts in BiH have interpreted it as requiring that the more lenient SFRY Criminal Code be applied to cases of war crimes and genocide.¹⁵ While cases of crimes against humanity, including some cases of wartime sexual violence, have continued to be tried under the BiH Criminal Code, the BiH Constitutional Court's interpretation of ECtHR ruling affected trials and sentencing in all other genocide and war crimes proceedings before Court of BiH. In at least 23 instances, this has led to the reopening of cases with final

⁸ Law on Changes and Amendments to the Criminal Code of BiH of 19 May 2015, Official Gazette no. 40/15. See Articles 9 and 10 on relevant changes to the Articles 172 (crimes against humanity) and 173 (war crimes against civilians) defining underlying offences of sexual violence.

⁹ Under provisions for war crimes provided by SFRY Criminal Code of 1976, sexual violence can be prosecuted as torture, inhumane treatment or the causing of great suffering or serious injury to bodily integrity or health. See chapter XVI of the SFRY Criminal Code, entitled "Criminal Acts against Humanity and International Law." Also, see Organization for Security and Cooperation in EUROPE (OSCE), "Combating Impunity for Conflict-related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges, An Analysis of Criminal Proceedings before the Courts of the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District between 2004-2014", Sarajevo, June 2015. In April 2017, UN Human Rights Committee expressed concern about the practice of courts in BiH to prosecute the crimes committed in conflict under the SFRY Criminal Code, and instructed BiH to "ensure that judicial authorities in all entities pursue efforts aimed at harmonising jurisprudence on crimes committed during the conflict, and apply the law in a manner consistent with the applicable international legal standards." See UN Human Rights Committee, Concluding observations on the third periodic report of Bosnia and Herzegovina, paras. 15-16, CCPR/C/BiH/CO/3, April 2017.

¹⁰ Amnesty International, *Submission to UN Human Rights Committee*, March 2017 (Index: EUR 63/5554/2017). Also, see "Whose Justice?", p. 30.

¹¹ While, following the ECtHR ruling, the Court of BiH decided to apply the SFRY Criminal Code to all cases of genocide and war crimes, some cases involving crimes against humanity – which are not covered by the SFRY Criminal Code – continue to be tried under the BiH Criminal Code.

¹² *Maktouf & Damjanović v. Bosnia & Herzegovina* (2312/08 and 34179/08), European Court Grand Chamber (2013).

¹³ Article 142 of the SFRY Criminal Code codifies rape only as a crime against the civilian population and foresees a minimal sentence of five years of imprisonment. As a comparison, Article 173 of the BiH Criminal Code foresees a minimum of ten years of imprisonment for the same crime.

¹⁴ The principle of non-retroactivity under Article 7 of ECHR prohibits the retrospective application of criminal law where it is to an accused's disadvantage. For more discussion on the effects of the *Maktouf & Damjanović v. Bosnia & Herzegovina* decision on the proceedings, see OSCE Mission to BiH, *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina (Entity Courts, 2004-2014)*, June 2015, p. 17-18.

¹⁵ See OSCE, *Towards Justice for Survivors*, p. 13 and Korner, Joanna, Processing of War Crimes at the State Level in Bosnia and Herzegovina, June 2016, p.29, available at: <http://www.osce.org/mission-to-bosnia-and-herzegovina/247436>.

and binding decisions and a reduction of the sentences handed down to perpetrators of crimes of sexual violence.¹⁶

Beyond the impact on sentencing practices¹⁷, in several cases, the courts have also interpreted the ECtHR ruling as requiring the re-qualification of acts in order to apply the SFRY Criminal Code.¹⁸ Amnesty International considers that the ECtHR ruling addresses only the sentencing practice and, therefore, does not preclude the courts in BiH from using the definitions of crimes under the BiH Criminal Code. Article 7 of the ECHR and Article 15 of the International Covenant on Civil and Political Rights (ICCPR) allow for the trial and punishment of any person for any act, which, at the time of its commission, was criminal under international law, even if appropriate domestic legislation was not in force at the time of the commission of the act.¹⁹ The view of the courts in BiH that the criminal code in force at the time of the conflict should typically apply has resulted in a situation where some serious crimes under international law, including crimes of sexual violence, are not adequately classified and tried.

Amnesty International calls on the authorities in BiH to:

- Ensure that the BiH Criminal Code is used for the legal qualification of crimes committed under international law, as this Code codifies the conduct which was already criminal under international law at the time when the crimes were committed (1992-1995).

¹⁶ See OSCE Mission, *Towards Justice for Survivors*, p. 13-14. See also Association of NGOs, *Follow up Report of the Implementation by BiH of the Recommendations issued by the UN Committee on Elimination of Discrimination against Women*, July 2015, para. 13.

¹⁷ In 2016, the UN Committee on Enforced Disappearances (CED) expressed concern that the BiH Constitutional Court was quashing verdicts following the ruling of the ECtHR without undertaking an assessment of the particular circumstances of each individual case. In 2016, the Committee said it was 'gravely concerned that the reopening of war crimes and genocide cases has led to a drastic reduction of sentences, including for perpetrators of enforced disappearances, and that convicted criminals were released pending retrial, which has resulted in fear, insecurity and re-victimisation of some individuals and a lack of trust in the justice system. See UN Committee on Enforced Disappearances, *Concluding Observations on the report submitted by Bosnia and Herzegovina under article 29, paragraph 1 of the Convention*, October 2016, para. 4.

¹⁸ OSCE, *Towards Justice for Survivors*, p. 13. For examples of specific cases, see *Ibro Macić*, Court of BiH, Fit Instance Verdict, 17 April 2015, paras.41-48; *Josip Tolić*, Court of BiH, Fit Instance Verdict, 20 March 2015, para. 78; *Zaim Laličić*, Court of BiH, First Instance Verdict, 25 May 2015, paras. 36-43; *Bosiljko Marković and Ostoja Marković*, Court of BiH, Fit Instance Verdict, 24 June 2015, paras. 57-60.

¹⁹ Article 7(1) European Convention on Human Rights, Article 15 of International Covenant for Cultural and Political Rights. According to Article 7(1) of the European Convention on Human Rights:

'1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.' Article 7(1) of ECHR cove two legal principles: *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law), both related to the issue of legality. The fit principle asks the question as to whether the conduct was criminal at the time it was committed, while the second asks the question as to whether the punishment imposed to punish the crime was lawful. The case of *Maktouf and Damjanović v. Bosnia and Herzegovina* dealt with the *nulla poena sine lege* principle (sentencing part). It had no bearing on the question as to whether the conduct itself was criminal and therefore whether the 2003 Criminal Code of Bosnia and Herzegovina should be applied to the prosecution of crimes under international law. The jurisprudence of the European Court of Human Rights (see: *Streletz, Kessler and Krenz v. Germany*, Nos. 34044/96, 35532/97 and 44801/98, 22 March 2001 [Grand Chamber], and *Kolk and Kislyiy v. Estonia*, Nos. 23052/04 and 24018/04, 17 January 2006) is very clear and consistent on the fact that the application of domestic criminal legislation subsequent to the commission of crimes under international does not violate Article 7(1) provided that the conduct was already criminal under international law at the time when it occurred. See also: Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging. Case STL-11-01/I, Adopted 16 February 2011, Special Tribunal for Lebanon, paras. 132-133.

3. FAILURE TO PROVIDE ADEQUATE REPARATION: ART. 14 (QUESTIONS 25 & 26 ON THE LOI)

3.1 LEGAL AND POLICY FRAMEWORK

Despite several efforts to do so, the authorities have failed to adopt key policy and legal documents that sought to put in place a system to address the rights of civilian victims of war, including victims of wartime sexual violence, in a manner consistent with international standard and practice. In 2012 and 2013, the BiH Ministry of Human Rights and Refugees and the BiH Ministry of Justice, with the assistance of the International Community, launched an extensive statewide programme to improve the status of civilian victims of war. The programme consisted of the Draft National Strategy for Transitional Justice, a Programme for Survivors of Conflict-related Sexual Violence and the Draft BiH Law on Protection of Victims of Torture. Collectively, the documents were designed to provide a framework for non-judicial forms of justice, including a sustainable platform to establish facts, provide redress to the victims, protect collective memory and restore trust in institutions of governance. The Draft Law on Protection of Victims of Torture²⁰ was meant to enable persons who were subjected to torture and other ill-treatment during the war to seek and obtain special status and enjoy a specific set of rights. The three documents presented the most substantial and meaningful effort by BiH authorities to recognise the suffering of the victims and provide them with support to rebuild their lives.²¹

However, the above programme never gained sufficient political support for adoption at the state level and, consequently, failed before entering the formal adoption procedure. In the absence of a formal reparation scheme, victims today have to rely on a complex existing system of social allowances and individual

²⁰ Although the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) does not explicitly refer to rape and sexual violence in its definition of torture under Article 1, rape has been recognised as a form of torture through a number of rulings of international courts. In the light of the frequent occurrences of rape and sexual violence during the war in former Yugoslavia and Rwanda, both the International Criminal Tribunal for Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) have ruled that sexual violence can constitute torture, persecution, enslavements, and inhumane acts as crimes against humanity. Furthermore, in *Aydin v. Turkey* (57/1996/676/866), 2006, ECtHR ruled that rape may constitute torture under the Art. 3 of ECHR. Finally, the UN Committee against Torture published two decisions that include statements that rape can amount to torture under Art. 1 of the Convention against Torture, including in *C.T. and K.M v. Sweden* (279/2005), CAT/C/37/D/279/2005 (2007), and *V.L. v. Switzerland* (262/2005), CAT/C/37/D/262/2005 (2007).

²¹ In its Concluding observations on the combined second to fifth periodic reports of BiH in 2011, the UN Committee against Torture recommended that the BiH authorities “adopt the draft law on the rights of victims of war and civilian victims of war and the strategy for transitional justice without delay in order to fully protect the rights of victims, including the provision of compensation and as full a rehabilitation as possible, with the aim of obtaining physical and psychological recovery and their social integration.” See UN Committee against Torture, Concluding observations on the combined second to fifth periodic report of Bosnia and Herzegovina, Para. 18, CAT/C/BiH/CO/2-5, 20, January 2011. Similar recommendations were adopted by UN Committee on the Elimination of Discrimination against Women (CEDAW) in 2013. See UN CEDAW Concluding observations of the combined fourth and fifth periodic reports of Bosnia and Herzegovina, Para 10, CEDAW/C/BiH/CO/4-5, 30 July 2013.

proceedings, in criminal and civil courts, in order to obtain some form of reparation, including compensation as detailed in the latest Amnesty International report.²²

3.1.1 DRAFT BIH LAW ON THE RIGHTS OF VICTIMS OF TORTURE

The BiH draft law on the rights of victims of torture has not been adopted at the time of this submission. The previous three attempts to pass the draft legislation were unsuccessful, as the versions presented failed to obtain the required political support in the BiH Council of Ministers. Apart from the current political deadlock that afflicts all initiatives at the state level, entity representatives from Republika Srpska are not participating in the latest efforts of the Ministry of Human Rights and Refugees to develop a BiH-wide draft law through an inter-ministerial working group.²³ It is unclear if the version of the draft law developed without entity representatives will have the necessary political support to be passed and implemented.

In November 2016, the Republika Srpska government presented its own pre-draft law on victims of wartime torture. While the pre-draft purported to address the status and benefits available to the survivors, some of the proposed solutions were overly restrictive or vague and excluded many survivors and their families from the coverage. Similar to Republika Srpska's Law on Protection of Civilian Victims of War, which is currently in force, the pre-draft law on the protection of victims of wartime torture included strict cut-off deadlines for applying, which would automatically exclude most survivors. In addition, it stipulated that people who were members of enemy military forces or who assisted 'the enemy' could not establish the rights to payment and other allowances.²⁴ Given the complex nature of the 1992-1995 conflict and the difficulty of ascertaining with precision the status and allegiances of survivors and their families, this provision could be widely interpreted to exclude many victims of non-Serb ethnicity and is potentially discriminatory.²⁵

The Republika Srpska Ministry of Labour and Veterans' Affairs had considered and incorporated many comments on the bill submitted by civil society and UN agencies and the updated, yet still unofficial, version of the bill, is considerably improved.²⁶ However, a number of proposals still in the text, including the provisions prohibiting persons broadly associated with 'enemy forces' from obtaining the rights of civilian victims of war, remain in contravention of international law and potentially discriminate against victims of other ethnicities and should be removed. Once completed and agreed among government institutions, the draft law was scheduled to be sent into the parliamentary procedure and adopted in the third quarter of 2017.²⁷ At the time of writing, it was unclear if the Republika Srpska government would be able to comply with its internal deadline for adoption.

The framework law at the level of BiH is an outstanding obligation of BiH vis-à-vis the UN Convention against Torture and is meant to provide all victims of torture and civilian victims of war with equal status and access to rights and protection regardless of where they live in BiH. While Amnesty International considers that the framework legislation guaranteeing rights to survivors and their families at the level of the state would be optimal to ensure equal access to right for the victims living in all parts of the state, the adoption of the legislation in Republika Srpska in line with the international law and standard, in the interim, would significantly improve the status of the victims living in this entity who are currently denied their rights.

3.1.2 NATIONAL STRATEGY FOR TRANSITIONAL JUSTICE

BiH has failed to adopt the Draft National Strategy on Transitional Justice, which was drafted in 2011/2012 by the Ministry of Human Rights and Refugees and Ministry of Justice. The draft Strategy was meant to provide a comprehensive platform to provide truth and justice and ensure effective institutional access to reparations and other forms of support for civilian victims of war, including survivors of sexual violence, regardless of their place of residence. The text of the Strategy failed to obtain support for adoption in 2012 after the authorities of Republika Srpska expressed reservations about segments of the document.²⁸ Although BiH Ministry of Justice and the European Union Delegation in BiH recently expressed intention to

²² Amnesty International, *We Need Support, not Pity: Last Chance for Justice for Bosnia's Wartime Rape Survivors*.

²³ Interviews with BiH Ministry of Justice, Sarajevo, November 2016 and September 2017.

²⁴ Art. 6 of the RS Predraft Law on Protection of Victims of Wartime Torture, November 2016.

²⁵ Local legal provider Vaša Prava considers this provision discriminatory on the grounds of ethnicity. See Vaša Prava, 'Analysis of Legislation in Bosnia and Herzegovina on the grounds of anti-discriminatory provisions', Sarajevo, 2007.

²⁶ RS Ministry of Labour and Veterans' Affairs shared an updated version with Amnesty International.

²⁷ Interview with RS Ministry of Labor and Veteran's Affairs, 29 March and 13 September 2017, Banja Luka.

²⁸ UN Committee against Torture, State party report to the Committee against Torture on the sixth periodic report, Para. 214, CAT/C/BiH/6, 17 May 2016.

reinvigorate the process, at the time of the writing, there were no indications that the political commitment necessary for the adoption of this policy document was forthcoming.²⁹

3.1.3 PROGRAMME FOR VICTIMS OF SEXUAL VIOLENCE IN CONFLICT

BiH authorities failed to adopt the Programme for Victims of Sexual Violence in Conflict. The aim of the Programme, which was jointly launched in 2011 by the Ministry of Human Rights and Refugees and UN Population Fund (UNPFA), was to ensure an inclusive and systematic approach to improving the lives of victims. The programme consisted of four key elements: (i) the harmonisation of legal framework with international standards, (ii) access to free legal aid and adequate protective measures for victim-witnesses at the war crimes proceedings, (iii) strengthening the capacities of service providers, and (iv) building partnerships between governmental and non-governmental sector.³⁰ Apart from the solutions proposed for improving the social and economic situation of the survivors and reducing the stigma they face in society, the Programme defined the basis for realizing survivors' rights to social welfare and healthcare at the local level and provided concrete measures for their economic empowerment.

The programme document was completed in 2012 and sent to the entities for formal opinions. However, failing to receive positive response on the content from the Republika Srpska government, the Ministry of Human Rights and Refugees never submitted it to the BiH Council of Ministers for adoption.³¹ UN agencies in BiH are implementing several segments of the programme, including those related to witness support, psychosocial assistance and empowerment, but Amnesty International notes with concern the lack of concrete effort by the authorities in BiH to secure the necessary political support and resources to take over these programs in the future.

3.2 COMPENSATION

3.2.1 ADMINISTRATIVE COMPENSATION

BiH lacks a comprehensive statewide rights-based framework for redress for civilian victims of war, and the victims of wartime sexual violence have to rely on separate and often considerably different laws at the level of entities and Brčko District to access their rights. In the absence of an all-inclusive administrative reparation scheme, the only way to obtain a form of administrative compensation³² for the harms suffered through sexual violence is to obtain a status of civilian victim of war in the entity of residence or Brčko District. However, in many parts of the country, especially in the Republika Srpska victims are still unable to enjoy their rights to reparation. In addition to facing numerous legal barriers to access social benefits available to civilian victims of war and military war veterans, the survivors of wartime sexual violence living in different parts of BiH are entitled to vastly different welfare packages and, in some cases - as in the Republika Srpska - completely excluded from the system.³³

The existing Law on Protection of Civilian Victims of War in Republika Srpska does not recognize survivors of wartime sexual violence as a separate category of civilian victims of war.³⁴ The law established a strict cut-off deadline of December 2007 for the applications, which resulted in many survivors failing to gain status and eligibility for a monthly pension and other benefits available to civilian victims, including free healthcare,

²⁹ Interviews with BiH Ministry of Justice, civil society organizations and international organizations conducted during research missions, Sarajevo, September and November 2016 and June and September 2017.

³⁰ UN Population Fund, Bosnia and Herzegovina, 'Combating sexual violence in conflict', 2012, available at <http://ba.unfpa.org/publications/combating-sexual-violence-conflict>.

³¹ UN Human Rights Committee, TRIAL & Association of civil society organizations: Written information for the Adoption of the List of Issues by the Human Rights Committee with regard to Bosnia and Herzegovina, Para. 64, CCPR/C/BiH/3, July 2015.

³² The allowances available to the victims of wartime sexual violence are a hybrid of measures of reparation and social/disability benefit, rather than a measure of redress solely related to the violation.

³³ The findings were confirmed through Amnesty International-conducted research missions to BiH in November 2014, May 2015, July and November 2016 intended to gather updated information on the status of the survivors of conflict-related sexual violence and their access to reparations and services. Amnesty International conducted interviews with associations of survivors, international organizations and other stakeholders.

Also, see Medica Zenica, "Manual on the rights of women survivors of rape and sexual violence", Zenica, 2014, available at: <http://medicazenica.org/download/Medica%20Zenica%20-%20Prirucnik%20o%20socioekonomskim%20pravima%20prezivjelih.pdf>

³⁴ Law on protection of civilian victims of war of RS (*Zakon o zaštiti civilnih žrtava rata RS-a*), Official Gazette of Republika Srpska, nos. 25/93, 32/94, 37/07, 60/07.

rehabilitation and psychological support. Furthermore, in order to qualify for the status and related benefits in Republika Srpska, a person has to demonstrate bodily damage of at least 60%. This requirement excludes the remaining survivors of conflict-related rape who are often unable to provide medical proof of physical disability and predominantly suffer from medical conditions that are not physical in nature. Amnesty International welcomes the on-going efforts in the Republika Srpska to adopt a law on protection of victims of wartime torture and urges the authorities to ensure that the new law provides full range of adequate protections to the victims of wartime sexual violence and does not include criteria that would limit the access or preclude the victims from obtaining the status of civilian victims of war and associated allowances.

In comparison, the Law on the Basis of the Social Protection, Protection of Civilian Victims of War and Families with Children in the Federation provides better protection to the survivors of sexual violence.³⁵ It recognizes the survivors as a separate category and requires them only to prove that they suffered sexual violence during the war, but not proof of bodily damage. The amendments to the law adopted in 2016 introduced an independent expert commission with a mandate to issue certificates to the survivors. The commission became fully operational in March 2017 and has already processed close to 30 applications.³⁶ The Commission includes experts and professionals that have been vetted by associations of survivors and its membership is a rare positive example of an inclusive and consultative process with civil society and victims.³⁷

The 2015 Amendments to the Decision on the Protection of Civilian Victims of War in Brčko District introduced progressive requirements to allow victims of conflict-related sexual violence to apply for and obtain the status of civilian victim of war.³⁸ Unlike the earlier version that was in force until 2015, the amended Decision recognises psychological injury as a ground for the status, but requires a certificate that the victim suffered sexual violence and a medical proof of permanent psychological harm, which needs to be issued by an Independent Expert Commission for Assessing the Status of Victims.³⁹ While in theory there are fewer obstacles for accessing the status of civilian victims of war and related benefits, in practice the victims of conflict-related sexual violence living in Brčko District are not able to obtain the status of civilian victims of war or the accompanying allowances. Since the adoption of the Decision, the authorities in the Brčko District have failed to make the Independent Expert Commission operational, practically blocking access to any new applicants.

The vastly varied legislation regulating the status of survivors of wartime sexual violence and, as is the case in Republika Srpska at the moment, restrictive deadlines and criteria, as well as excessive documentation requirements, only a small fraction of the estimated 20,000 victims have ever managed to gain the status of the civilian victim of war: a little over 800 in the Federation and 24 in the Brčko District. The authorities in Republika Srpska do not keep segregated data for different categories of civilian victims of war and it unclear how many, if any, victims of wartime sexual violence managed to access the special status and the accompanying allowances.⁴⁰

3.2.2 COMPENSATION IN CRIMINAL PROCEEDINGS

Amnesty International welcomes the recent decisions of courts in BiH to start awarding financial compensations to victims of wartime sexual violence in criminal proceedings.⁴¹ To date, courts in BiH have ruled in eight cases, including four at the second instance, to order convicted perpetrators to pay compensation to the victims of conflict-related sexual violence.⁴² While this has broken the practice⁴³ whereby survivors had been automatically instructed to seek compensation in separate civil proceedings at

³⁵ Law on the basis of social protection, protection of civilian victims of war and families with children of FBiH, (*Zakon o osnovama socijalne zaštite, zaštite civilnih žrtava rata i zaštite porodice s djecom FBiH*), Official Gazette of FBiH nos. 36/99, 54/04, 39/06, 10/16.

³⁶ Interviews with the Federation of BiH Ministry of Labor and Social Policy, 10 November 2016, 4 April and 12 September 2017, Sarajevo.

³⁷ Amnesty International research and interviews with civil society and survivors conducted between March-September 2017.

³⁸ The original Decision recognised the status of the survivor of sexual violence only if they could prove that a perpetrator has been found and convicted in their case, in addition to the proof of physical damage, a combination of conditions that in practice excluded the vast majority of the victims. See Decision on the Protection of Civilian Victims of War of Brčko District, *Official Gazette of Brčko District*, 33/2012 and 15/2015.

³⁹ Art. 2 of the Decision on the Protection of Civilian Victims of War of Brčko District.

⁴⁰ Interviews with Federation Ministry of Labor and Social Policy, November 2016 and RS Ministry of Labor and Veterans' Affairs 2015.

⁴¹ The two decisions before BiH court were confirmed in second instance. See *BiH v. Marković Bosiljko*, Case no. S1 1 K 012024 15 KRZ, 29 February 2016 and *BiH v. Slavko Savić*, Case no. S1 1 K 017213 15 KRZ, 24 November 2015.

⁴² Email correspondence with TRIAL Int., June 2017. Examples of cases confirmed in the second instance are: *BiH v. Marković Bosiljko*, Case no. S1 1 K 012024 15 KRZ, 29 February 2016, and *BiH v. Slavko Savić*, Case no. S1 1 K 017213 15 KRZ, 24 November 2015.

⁴³ See Trial, 'Enforcement of damage compensation claims of victims of war in criminal proceedings in Bosnia and Herzegovina: Situation, challenges and perspectives', 2015, available at: http://trial.ba/wp-content/uploads/2015/10/ENG_Ostvarivanje-zahijeva-za-naknadu-%C5%A1tete-%C5%Bertava-ratnih-zlo%C4%8Dina-u-okviru-krivi%C4%8Dnih-postupaka-u-Bosni-i-Hercegovini-%E2%80%93-stanje-problemi-i-pepektive-.pdf.

the entity and district level exposing them to additional fees and lower standards of witness protection, not one of the court decisions has been implemented or compensation paid to the victims. Perpetrators often lack funds, making it impossible for courts to enforce such decisions.⁴⁴ BiH does not have a victim compensation fund or alternative mechanism to compensate survivors of criminal acts in cases when convicted perpetrators are not able to pay damages, leaving the victims without the ability to effectively enforce their right to this form of compensation.

3.2.3 COMPENSATION IN CIVIL PROCEEDINGS

The majority of the victims continue to be required to pursue compensation claims in separate civil proceedings before local courts that lack adequate witness protection standards and capacities.⁴⁵ Separate civil proceedings compromise the privacy of witnesses and often expose victims to unnecessary re-traumatization when they have, yet again, to provide their testimonies. While pursuing claims before civil courts, victims bear the burden of proof, need to hire a lawyer and are responsible for the payment of court fees in instances when their claims are dismissed.⁴⁶ Some level of legal support is available to survivors in criminal proceedings, however, such assistance is not readily accessible in civil courts due to the systemic shortages in the provision of legal aid at many levels in BiH. Given the low socio-economic status of the survivors, these costs, which are significantly higher than the income they receive, serve as an additional deterrent to filing compensation claims.⁴⁷

Civil litigation often results in the dismissal of claims based on the application of statute of limitations or a narrow interpretation of evidentiary requirements resulting in survivors being forced to pay high court fees or face administrative seizure of their assets.⁴⁸ From 2014 to 2016, the BiH Constitutional Court issued several decisions⁴⁹ declaring that, if directed at the state or entities, the claims for pecuniary damages that are a result of war crimes, were subject to the statute of limitations, even though, according to international and national law, war crimes are imprescriptible.⁵⁰ This view resulted in widespread dismissals of compensation claims filed by the survivors before courts in all parts of the country⁵¹ in civil proceedings.⁵²

Amnesty International considers that the BiH Constitutional Court's position stands in the way of survivors' ability to realise their rights to reparation.⁵³ As the statute of limitations does not apply to crimes under international law, such as genocide, crimes against humanity and war crimes, they should not apply to

⁴⁴ In interviews with Amnesty International, associations of survivors and lawyer representing them stressed that in many instances the alleged perpetrators moved their assets, i.e., signed them over to family members, since the end of the war or early on in the proceedings. The courts have overall failed to implement the measures to identify and secure the assets belonging to perpetrators and enable later enforcement of the compensation decisions.

⁴⁵ TRIAL, "Enforcement of damage compensation claims of victims of war in criminal proceedings in Bosnia and Herzegovina, Situation, Challenges and Perspectives", Sarajevo 2016, and, TRIAL, "Compensating survivors in criminal proceedings: Perspectives from the field, December 2016", available at: https://trialinternational.org/wp-content/uploads/2016/11/TRIAL-International_compensation-publication_EN_web.pdf

⁴⁶ This mainly covers adverse costs, while there is still a possibility of getting exempted from the obligation to pay taxes. The principal cost is the fees, which could be as high as 3,000 BAM (1,500 EUR) and are to be paid to the Attorney Office of Republika Srpska in application of the principle that the losing party is responsible for the cost of proceedings.

⁴⁷ TRIAL, "Compensating survivors", UN Human Rights Committee, TRIAL & Association of civil society organizations: Written information for the Adoption of the List of Issues by the Human Rights Committee with regard to Bosnia and Herzegovina, Para 98, CCPR/C/BiH/3, July 2015. Also, Amnesty International's interview with Nedžla Šehić, the lawyer representing victims in the cases involving compensation claims for the crimes of sexual violence committed during the war, 8 November, 2016, Sarajevo.

⁴⁸ Amnesty International documented several cases of victims who had to face court police attempting to confiscate their personal property in order to recover the court costs following the negative outcome of civil litigation. Also, interview with Jasmin Mešković, president of the BiH Association of Camp Inmates, 11 November 2016 and 28 March 2017, Sarajevo.

⁴⁹ See for example BiH Constitutional Court Decision of 10 November 2015, referenced at:

<http://www.pravosudje.ba/vstv/faces/vijesti.jspx?id=58140>, and Decision of 21 September 2016, available at:

<http://www.pravosudje.ba/vstv/faces/vijesti.jspx?id=63824>, as well as *Mustafa Karahasanović & Others v. Republika Srpska*, (AP-4128), BiH Constitutional Court, 28 March 2014.

⁵⁰ See International Committee of the Red Cross, Customary International Humanitarian Law, Rule 160 ('Statutes of limitation may not apply to war crimes'). See also Article 29, Rome Statute of the International Criminal Court ('The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations'). Moreover, according to the laws on civil obligations across BiH, the statute of limitations for pecuniary damages related to criminal acts is directly proportionate to the statute of limitation imposed to these acts, which makes the Constitutional Court views additionally difficult to understand or justify. Finally, BiH Constitutional Court appears to interpret the term 'responsible person' as denoting only persons directly responsible for the crime, i.e., perpetrators, but not also the persons or entities who have objective responsibility, such as the state or the entities.

⁵¹ Prior to these decisions, the practice between the courts in RS and FBiH was different; the courts in RS had held this view for years prior to the BiH Constitutional Court decisions, while the courts in FBiH changed their practice only after the position of the BiH Constitutional Court changed in 2015.

⁵² Interview with lawyer Nedžla Šehić, 8 November 2016. Also, see TRIAL Int., 'Compensating survivors in criminal proceedings: perspectives from the field', p. 39.

⁵³ The UN Human Rights Committee also expressed concern about the opinions of the BiH Constitutional Court, which 'limit the ability of victims to effectively claim compensation'.⁵³ In 2017, the Committee urged BiH to 'urgently adopt legislative and practical measures to ensure that survivors of torture and sexual violence have access to effective remedies'. See UN Human Rights Committee, *Concluding observations on the third periodic report of Bosnia and Herzegovina*, CCPR/C/BiH/CO/3, para. 17-18.

criminal or civil proceedings in which victims of crimes against humanity seek full reparation.⁵⁴ Due to the long-term physical and psychological effects of torture on the victims, statutes of limitations should not apply in these cases, as they deprive the victims of their right to redress, compensation and rehabilitation.⁵⁵

The option of pursuing compensation claims for torture and other ill-treatment before civil courts is an important mechanism for redress, and the authorities should ensure that the victims can exercise this right without undue or prohibitive hindrance. Many victims of sexual violence are not able to identify the perpetrators, or the perpetrators may be missing or residing in other states and not available to courts in BiH. In such instances, civil claims against the state/entities may be their only means to secure some form of redress.

Finally, as is the practice in some European Union member states, BiH should endeavour to award the compensation directly to the victims in case perpetrators are unable or unwilling to do so and then seek to obtain reimbursement from the perpetrator.⁵⁶ The absence of statewide legislation on administrative reparation, the inability of the authorities to enforce court decisions on compensation and BiH Constitutional Court's position on statutory limitations leave many victims without an enforceable right to a remedy, which is contrary to international law.⁵⁷

4. RECOMMENDATION

AMNESTY INTERNATIONAL RECOMMENDS THAT THE AUTHORITIES IN BIH:

- Put in place a comprehensive statewide rights-based framework for redress for civilian victims of war, including survivors of wartime sexual violence. This would include the adoption of the Draft Strategy for Transitional Justice and Programme for Victims of Sexual Violence in Conflict. These measures do not need to infringe upon constitutional competencies of the entities, but must ensure that lower-levels of authorities remove restrictive and discriminatory provisions in their legislation, policies and practice and adopt harmonised solutions that are in line with BiH's obligations under international law;
- Develop and adopt a BiH Framework Law on Protection of Victims of Torture that defines criteria for obtaining the status of the victim of wartime torture, including victims of conflict-related sexual violence, and provide a set of specific rights and entitlements that are guaranteed to victims on the entire territory of BiH. While the entities remain responsible for the provision of social support services, this legislation should include a set of overarching principles and prescribe specific rights, ensure equality of treatment of victims regardless of their place of residence or ethnicity and provide guarantees for appropriate medical and psychological care;
- Remove legal and practical obstacles to enforcing decisions on compensation and put in place measures to ensure that the right to receive compensation in civil and criminal proceedings is an enforceable right in practice.

⁵⁴ See Amnesty International, *International Law Commission: Second Report on Crimes against Humanity, Positive Aspects and Concerns*, (IOR 40/3606/2016), May 2016. Also, see Amnesty International, *No impunity for enforced disappearances, Checklist for effective implementation of the International Convention for the Protection of All Persons from Enforced Disappearance* (IOR 51/006/2011), November 2011, p. 18.

⁵⁵ UN Committee against Torture, *General Comment no. 3 on the implementation of Art. 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/GC/3, November 2012, para. 40.

⁵⁶ See Victims Support Europe, *Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe*, 2013, p. 46. Also, according to the UN Committee against Torture, in situations where civil proceedings are not able to provide adequate redress to victims, it is the responsibility of the state to implement an accessible mechanism, such as a national fund, to provide redress. See UN CAT, *General Comment no. 3*, para. 29.

⁵⁷ Art. 14 of the UN Convention against Torture states that 'each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'. Also, see UN Committee against Torture, *General Comment no. 3 on the implementation of Art. 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/GC/3, November 2012, paras. 38-39: The states have to ensure that the victims have not only de jure, but also de facto access to timely and efficient mechanism to exercise their right to compensation and remedy of violation and must endeavor to eliminate all forms of formal and informal barriers that could prevent access. The failure of any member state to implement the ruling that ordered reparation to victims of torture represents a significant limitation of and an obstacle to the victims' right to compensation.

- Continue the practice of awarding compensation for damages for wartime sexual violence in criminal proceedings before state and entity-level courts. This should not exclude the possibility of being able to seek and receive compensation in civil proceedings irrespectively of the criminal conviction of the alleged perpetrators;
- Put in place measures to ensure that the courts and prosecutor's offices identify early in the proceedings the property belonging to those suspected of criminal responsibility, in order to take protective measures for the purpose of a potential forfeiture - and having due regard to the strength of the evidence and the rights of the parties concerned;
- Reconsider the Constitutional Court's position that the statute of limitations applies to compensation claims related to crimes under international law, as statute of limitations should not apply to any proceedings related to these crimes or civil tort claims;
- Establish a victim compensation fund for the survivors of wartime sexual violence, in particular to address the cases where convicted perpetrators are not able to pay the damages;
- Ensure that adequate resources and capacity are dedicated to free legal aid agencies at all levels in order to provide civilian victims of war, and especially survivors of wartime sexual violence, with effective access to free legal aid and fair access to justice regardless of their place of residence;
- Put in place measures to free victims of wartime sexual violence from bearing the burden of the cost of civil proceedings in damage compensation claims when these costs would obstruct their access to courts;

AMNESTY INTERNATIONAL RECOMMENDS THAT THE AUTHORITIES OF REPUBLKA SRPSKA:

- Ensure that the draft Law on Civilian Victims of Wartime Torture does not include any provisions that would restrict its application or exclude victims of conflict-related sexual violence, including those of non-Serb ethnicity, from the ability to obtain the status of civilian victims of war and accompanying social and welfare benefits. Specifically, this law should not include cut-off deadlines for applying for the status.
- Ensure that responsible ministries collect and maintain data of all civilian victims of war and torture, including victims of wartime sexual violence, separated by relevant categories, including the basis for the status, gender, age, category, and residence.

AMNESTY INTERNATIONAL RECOMMENDS THAT THE BRČKO DISTRICT AUTHORITIES:

- Make operational the Expert Commission issuing certificates to the victims without further delay to ensure that they are fully staffed and operational and ready to consider the backlog of applications. The members of the Commission should be appointed in consultations with the associations of victims and survivors in a more inclusive process.



**AMNESTY INTERNATIONAL
IS A GLOBAL MOVEMENT
FOR HUMAN RIGHTS.
WHEN INJUSTICE HAPPENS
TO ONE PERSON, IT
MATTERS TO US ALL.**

BOSNIA AND HERZEGOVINA

SUBMISSION TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE

62ND SESSION, 6 NOVEMBER- 6 DECEMBER 2017

Amnesty International is presenting this submission to the United Nations (UN) Committee against Torture (the Committee) ahead of its review of Bosnia and Herzegovina's (BiH) sixth periodic report on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention). The document highlights Amnesty International's concerns in relation to a number of questions on the Committee's List of Issues (LOI) to be taken up in connection with this consideration of the BiH State Report.

These concerns relate to human rights violations linked to the legacy of the 1992-1995 conflict in BiH, and they include the continued failure of the authorities to adopt and implement a legal and policy framework to enable full and effective access to justice and reparations for survivors of crimes of sexual violence committed during the war.