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**PROCEDURES SPECIALES DU**  
**CONSEIL DES DROITS DE L'HOMME**

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**HIGH COMMISSIONER FOR HUMAN RIGHTS**

**SPECIAL PROCEDURES OF THE**  
**HUMAN RIGHTS COUNCIL**

**Mandates of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Working Group on Enforced or Involuntary Disappearances**

REFERENCE: OL Truth (2011) G/SO 217/1  
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1 April 2014

Excellency,

We have the honour to address you in our capacity as Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances pursuant to Human Rights Council resolution 18/7 and 16/16.

In this connection, we would like to bring to your Excellency's Government's attention information we have received concerning the situation surrounding last year's decision of the Constitutional Court of Bosnia and Herzegovina (BiH) to order the quashing of the verdicts in the cases of ten individuals convicted of and serving prison sentences for war crimes against civilians and genocide. All ten individuals have reportedly been released from prison with processes for their retrial either underway or being finalized. The Bosnian Constitutional Court ordered the quashing of the verdicts, following the decision of the European Court of Human Rights (ECtHR) in the case of *Maktouf and Damjanović vs. Bosnia and Herzegovina*<sup>1</sup>. The ECtHR found that the retroactive application of the 2003 Bosnian criminal code in their cases led to higher prison sentences than would have been handed down under the Bosnian criminal code that was in force at the time of the commission of the crimes, resulting in a less favourable result and thus a breach of Article 7 of the European Convention on Human Rights and Fundamental Freedoms, (ECHR).

In our following observations we intend to highlight some concerns as to the legal developments in BiH following the domestic application of the ECtHR judgment and the impact that this may have on the broader transitional justice process in BiH and on the fight against impunity. Specifically we are concerned about the following issues:

1. The apparent automatic application of the *Maktouf and Damjanović* judgment in at least a dozen cases in BiH, with more cases to be expected;

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<sup>1</sup> ECtHR Grand Chamber Judgment in *Maktouf and Damjanović vs. Bosnia and Herzegovina* (Applications nos. 2312/08 and 34179/08) (hereinafter ECtHR Judgment in *Maktouf and Damjanović*).

2. The release of the defendants without remand pending retrial and the challenges this poses in regards to the protection of victims from violence, re-victimization and intimidation; and

3. Finally, the failure to implement a truly comprehensive transitional justice strategy to complement the criminal justice process in Bosnia, which would significantly contribute to ensuring justice for victims and for society at large, in relation to the atrocities committed during the conflict in the 1990s.

Before addressing these concerns, we would like to acknowledge that your Excellency's Government has indeed made efforts in some aspects to address the legacy of past atrocities committed during the conflict in Bosnia between 1992 and 1995. In particular, we would like to note efforts in the area of criminal justice, including the adoption of a *national war crimes strategy* in 2008. We encourage your Excellency's Government to fully implement this strategy and allocate adequate financial and human resources to guaranteeing its effective implementation. Acknowledging that dealing with past atrocities is a complex undertaking involving a multitude of challenges, we would like to highlight that designing and implementing measures of truth, justice, reparation and guarantees of non-recurrence (so called measures of transitional justice) in a comprehensive and integrated manner has the potential to significantly contribute to fulfilling the international obligations a government has in the fight against impunity, acknowledging the plight of victims, re-establishing trust between citizens and the state, as well as, in the long run, strengthening the rule of law and contributing to reconciliation.

1. *Automatic application of the Maktouf and Damjanović judgment*

First, we would like to raise our concerns about the potential negative impact that the apparently automatic application of the *Maktouf and Damjanović* judgment may have on the transitional justice process in BiH, in particular in regards to the quashing of verdicts and the release without remand of defendants in at least a dozen war crimes and genocide cases.

- In this regard, we note the six decisions of the BiH Constitutional Court of 22 October 2013 granting the appeals and quashing the convictions of ten persons previously convicted of war crimes and genocide, as listed below. In each case, the Court found a violation of Article 7 of the ECHR based on the decision in the *Maktouf and Damjanović* judgment. On 18 November 2013, the Appeals Division of the Court of BiH ordered the release of all ten defendants, pending retrial:
  - Mr. Slobodan Jakovljević (sentenced to imprisonment of 28 years for the criminal offense of Genocide);
  - Mr. Aleksandar Radovanović (sentenced to imprisonment of 32 years for the criminal offense of Genocide);

- Mr. Branislav Medan (sentenced to imprisonment of 28 years for the criminal offense of Genocide);
- Mr. Brane Džinić (sentenced to imprisonment of 32 years for the criminal offense of Genocide);
- Mr. Milenko Trifunović (sentenced to imprisonment of 33 years for the criminal offense of Genocide);
- Mr. Petar Mitrović (sentenced to imprisonment of 28 years for the criminal offense of Genocide);
- Mr. Nikola Andrun (sentenced to imprisonment of 18 years for the criminal offense of War Crimes against Civilians);
- Mr. Milorad Savić (sentenced to imprisonment of 21 years for the criminal offense of War Crimes against Civilians);
- Mr. Mirko (son of Špiro) Pekez (sentenced to imprisonment of 14 years for the criminal offense of War Crimes against Civilians); and
- Mr. Mirko (son of Mile) Pekez (sentenced to imprisonment of 29 years for the criminal offense of War Crimes against Civilians).

We understand that, in addition to these ten cases, the Court of BiH, following orders by the Constitutional Court, has also quashed verdicts in at least 3 other cases. Retrials in these cases, on the basis of the former Yugoslav criminal code from 1976, have led to new and reduced sentences.

In all of these cases, following the reasoning of the ECtHR in the *Maktouf and Damjanović* case, the Constitutional Court came to the conclusion that the 2003 Bosnian criminal code is potentially less favourable to the defendants than the former Yugoslav criminal code from 1976 and that the retroactive application of the 2003 code was, thus, a violation of Article 7.1. of the ECHR. Since the majority of war crimes and genocide cases in BiH have been decided under the 2003 code more cases of this sort are to be expected in the future.<sup>2</sup>

In this respect, and without addressing each of the aforementioned cases individually, we would like to express concern that the judgment issued by the ECtHR in the case of *Maktouf and Damjanović* seems to have triggered a kind of automatic application of its legal reasoning throughout the courts in BiH. The Courts appear to be of the view that both the convictions and the sentences of all those who have been convicted for war crimes or genocide pursuant to the provisions of the 2003 Bosnian criminal code ought to be reassessed on the basis of the potentially more lenient former Yugoslav criminal code from 1976.

Our concerns are based on both legal issues and larger questions of public perception that may risk undermining the transitional justice process in BiH.

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<sup>2</sup> Action plan - Communication from Bosnia and Herzegovina concerning the case of Maktouf and Damjanović against Bosnia and Herzegovina (Application No. 2312/08), DH-DD(2013)1161E, 25 October 2013.

As to the *legal concerns*, there are a number of legal arguments that speak against an automatic application of the *Maktouf and Damjanović* judgment in other cases in BiH, but particularly in the cases of the ten individuals listed above.

- From the outset it should be noted that the ECtHR judgment in *Maktouf and Damjanović* states in respect to the scope for review that the execution of the 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.”<sup>3</sup> The Court, thereby, suggests a strict case-by-case assessment. This was also stressed in a decision by the Council of Europe Committee of Ministers on 5 December 2013.<sup>4</sup> (emphasis added).
- Secondly, the ECtHR in its judgment in *Maktouf and Damjanović* did not rule in *abstracto* that the retroactive application of the 2003 Bosnian Criminal Code in war crimes cases was, per se, incompatible with Article 7. In its decision, it made a clear distinction between crimes of a higher and lower gravity, with *Maktouf and Damjanović* belonging to the latter.<sup>5</sup>
- Finally, and related to the latter point, the aforementioned ten cases can be clearly distinguished from the ECtHR case of *Maktouf and Damjanović*, in terms of the gravity of the crimes committed and the sentencing bracket they fall into. All ten cases concern war crimes and genocide that clearly led to the loss of lives. Under both the former Yugoslav criminal code from 1976 and the new 2003 Bosnian criminal code these cases would fall under the higher range of punishment. This was, in fact, acknowledged by the Constitutional Court in its six decisions on the ten appeals. In contrast, in the *Maktouf and Damjanović* judgment, the Grand Chamber of the ECtHR considered that the applicants had received sentences fitting within the lower range of punishment foreseen under the 2003 Bosnian criminal code 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).

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<sup>3</sup> ECtHR judgment in *Maktouf and Damjanović*, para 65.

<sup>4</sup> Decision by the Committee of Ministers of the Council of Europe in the *Maktouf and Damjanović* case, Case No.7, 1186th meeting – 5 December 2013, para. 4.

<sup>5</sup> The first applicant (Mr. Maktouf) was convicted by the BiH State Court in July 2005 of aiding and abetting the taking of two civilian hostages as a war crime against civilians and sentenced to five years’ imprisonment under the 2003 Bosnian criminal code. 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 and sentenced to 11 years’ imprisonment under the 2003 Bosnian criminal code.

The above arguments speak against the automatic application of the *Maktouf and Damjanović* judgment in respect to other cases in BiH. In addition, the Constitutional Court, prior to the ruling of the ECtHR in the *Maktouf and Damjanović* case, regularly held that the 2003 Bosnian criminal code was the more favourable criminal code because the death penalty was prescribed for serious war crimes and genocide under the former Yugoslav criminal code from 1976.<sup>6</sup>

It should be underlined that the Constitutional Court in its six decisions relating to the aforementioned ten cases did take into account the gravity of the crime and stated that these cases would fall into the higher range of punishment under both the 2003 Bosnian criminal code and the former Yugoslav criminal code from 1976. The Constitutional Court acknowledged that according to the 1976 code a sentence between 15 years, 20 years or the death penalty could have been pronounced. However, it based its judgments on the assertion that at the time of the delivery of the relevant criminal verdict, “there was no theoretical nor practical possibility to pronounce a death penalty on the applicant”.<sup>7</sup> As a consequence the Court considered that the maximum sentence that could have been imposed under the 1976 criminal code was 20 years imprisonment. By comparing the sentence of 20 years of imprisonment (as a maximum sentence for the criminal offence according to the 1976 code) with the sentence of a long-term imprisonment of 45 years (as a maximum sentence for the criminal offence prescribed by the 2003 code), the Constitutional Court found that in these cases the former Yugoslav criminal code from 1976 was the more favourable code for the applicant.<sup>8</sup>

In this respect, we would like to recall article 7.1. of the European Convention on Human Rights which states that “*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*”. This article enshrines the principle of legality, ensuring that crimes and their penalties are accessible and foreseeable. A *prima facie* reading of the article suggests that the penalty that was imposed should be compared to the actual penalty that was applicable at the time of the commission of the offense rather than at the time of the delivery of the verdict. In this light, the Constitutional Court should have compared the maximum penalty for war crimes and genocide under the 2003 code of 45 years imprisonment with the maximum penalty under the 1976 criminal code, which was the death penalty. On this reading, the maximum penalty under the 2003 code is clearly not less favourable than the 1976 code and thus, in cases such as the ten cases outlined above, where the crimes fall into the higher bracket of sentencing, the application of the 2003 Code would not amount to a breach of Article 7 of the ECHR.

Irrespective of the specific legal questions arising out of the decisions of the Constitutional Court in the above ten cases, we would like to note a complete shift in the case law of the Constitutional Court after the judgment of the ECtHR in *Maktouf and*

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<sup>6</sup> Decision AP 1785/06 of 30.3.2007

<sup>7</sup> BiH Constitutional Court, Trifunović decision - AP 4100/09, 22 October 2013, para. 47.

<sup>8</sup> Ibid, para 48.

*Damjanović* leading to the quashing of verdicts and the release of those previously convicted for war crimes and genocide. As stated above, it is our understanding that this shift in the Court's thinking goes beyond the scope of the ruling in the *Maktouf and Damjanović* case. We would, therefore, like to request more information about the scope of review by the Courts in BiH in the application of the principle identified by the ECtHR in the *Maktouf and Damjanović* judgment, particularly in light of the gravity of the crimes at hand.

With respect to enforced disappearance, the Working Group reckons that it is a continuous crime and thus can be punished on the basis of an *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 (A/HRC/16/48/Add.1, para.57. See also General Comment of the Working Group on enforced disappearance as a continuous crime, A/HRC/16/48, para.39).

In addition to the above mentioned legal questions, we are concerned about the possible impact that the recent legal developments may have on BiH society, in particular in view of the high number of verdicts that have been quashed in cases of serious crimes, such as genocide, as well as the high likelihood of similar cases in the future. As mentioned above, the fact that the majority of war crime and genocide cases have been ruled upon by the 2003 Bosnian criminal code, means it can be expected that more appeals will reach the Constitutional Court on this issue, raising similar legal issues to those outlined above.

The general public, and in particular victims groups in BiH are concerned about the impact of these developments on the fight against impunity in BiH and on the long-term reconciliation process in Bosnia. Six of the aforementioned ten cases concern cases of genocide, where the individuals had played a direct role in the genocide in Srebrenica. Should the recent developments remain unexplained to the public and continue in the same vein in the future, further misunderstandings and friction in society are likely to emerge and may undermine the transitional justice process.

We would like to clarify that with expressing our concerns about these recent developments we are not seeking to cast doubt on the importance of complying with the rule of law and human rights standards in criminal proceedings, in particular, as enshrined in the ECHR. On the contrary, we have repeatedly highlighted how important it is that transitional justice mechanisms, including criminal justice mechanisms, abide by the rule of law and human rights standards. Our concerns relate to both legal issues of interpretation and application and to issues of perception in the context of the apparent automatic application of the *Maktouf and Damjanović* judgment in a number of war crimes and genocide cases in BiH. In view of the risk that a continuation of this process is likely to pose to the transitional justice process in BiH, we would appreciate your Excellency's Government sharing the above-mentioned concerns with the relevant judicial institutions.

2. *Release of the culprits without remand pending retrial and proposed legislation on pardon*

*Second*, and related to the first point, we would like to raise our concern that the defendants named above were released and not remanded in custody, pending retrial, following the quashing of their verdicts. This concern is express in light of the gravity of the crimes they were previously convicted of. We note that such a concern has also been expressed by the Committee of Ministers of the Council of Europe in relation to ensuring adequate protection against collusion or risk of absconding or committing further crimes or disturbance of public order.<sup>9</sup>

In light of your Excellency's Government's commitment to fighting impunity, we would like to request that the relevant domestic authorities in BiH take all necessary measures to ensure, wherever required, the continued detention of those who have been previously convicted and who are awaiting a retrial by the Court of BiH, provided that their detention is compatible with the ECHR.<sup>10</sup> Arts. 126, 132, and 333 of the BiH Code of Criminal Procedure would seem to provide an adequate domestic legal framework in this respect.

Against this background, we have received information that victims have sent communications to the Bosnian authorities and international actors based in BiH, expressing fear for their lives and the safety of their families in the context of the release and return of the defendants to their communities. They stated that their physical safety and security had been put at risk by the return of those released, in particular in Srebrenica. Further concern was expressed that some of those released were received and welcomed in an official manner, including by the president of the Municipality Assembly of Srebrenica, Radomir Pavlović. We are also aware of statements about the unwillingness of witnesses to testify again at the retrials as a consequence of the aforementioned events.<sup>11</sup>

In the light of these serious reports, we would like to inquire what measures your Excellency's Government is putting in place to ensure, in particular, the protection of victims and witnesses. On the latter issue, concerns have been raised repeatedly in the past that Courts in BiH in most cases lack the necessary capacity to provide adequate psychological and physical support to victims and witnesses.<sup>12</sup> According to the information at our disposal, while some provisions for the protection of victims of international crimes exist in BiH legislation, this protection is not effective in practice. In fact, the Working Group on Enforced or Involuntary Disappearances has made relevant

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<sup>9</sup> Decision by the Committee of Ministers of the Council of Europe in the *Maktouf and Damjanović* case, Case No.7, 1186th meeting – 5 December 2013, para.5.

<sup>10</sup> *Ibid.*, para 6.

<sup>11</sup> See <http://www.justice-report.com/en/articles/resignation-of-state-constitutional-court-judges-requested>

<sup>12</sup> BiH draft transitional justice strategy, page 29; see also Report of the Working Group on Enforced or Involuntary Disappearances, Addendum Mission to Bosnia and Herzegovina, A/HRC/16/48/Add.1, 28 December 2012, VWe Conclusions and Recommendations.

recommendations in this regard. In the report of the Working Group on its visit to BiH in 2010 (A/HRC/16/48/Add.1, para.68), the Working Group recommended that “more should be done to protect and offer assistance to victims and witnesses, in particular women” and that “the programme for the protection of witnesses should be improved and expanded at the State level, and similar programmes should be created at the local level.” We would like to call on your Excellency’s Government to ensure the protection and physical well-being of victims and witnesses and to request detailed substantive information on this important matter.

In this context, we are also following with interest the ongoing discussions on introducing new legislation on pardons. According to reports we have received, at the end of November 2013 the BiH Ministry of Justice proposed legislative changes that would allow pardons for serious crimes, including war crimes, crimes against humanity and genocide. Reportedly, the new proposed law would stipulate that for “the crimes of genocide, war crimes and crimes against humanity, pardon may be granted after serving three-fifths of the sentence” (Article 3, *Limited possibility for granting pardon*). Beyond legal questions regarding the permissibility of pardons under international law for the above crimes, we would like to express our concern that the adoption of such legislation risks undermining the goal of achieving justice for past atrocities and would send a signal diminishing the gravity of those crimes. In this connection, we would like to ask your Excellency’s Government to provide us with detailed information on the proposed next steps regarding the legislative changes concerning pardons.

In addition, we would like to remind your Excellency’s Government that, as far as enforced disappearances are concerned, the Declaration on the Protection of All Persons from Enforced Disappearance establishes in article 18 (2) that “In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account”. In this respect, we would like to draw your Excellency’s Government’s attention to the Working Group’s General Comment on article 18 of the Declaration, where the limits within which pardons may be granted in accordance with the Declaration are indicated (E/CN.4/2006/56, para. 49).

3. *Lack of the implementation of a comprehensive transitional justice strategy*

The *third* and final concern we would like to highlight relates to the importance of an overall comprehensive framework on transitional justice in BiH.

Human Rights Resolution 18/7 (of which BiH is a co-sponsor), establishing the mandate of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, emphasises in *Preambular* paragraph 12 the importance of taking a comprehensive approach to address gross violations of human rights and serious violations of international humanitarian law. On various occasions, the Special Rapporteur has recalled the importance of taking a comprehensive approach in the aftermath of atrocities, including measures of truth, justice, reparation and guarantees of



non-recurrence. In his first report to the Human Rights Council he argues that apart from the limited reach of each of those measures, when taken in isolation from one another, a “comprehensive implementation of the four components of the mandate provides stronger reasons for various stakeholders, foremost amongst them, the victims, to understand the measures as efforts to achieve *justice* in the aftermath of violations than their disconnected or disaggregated implementation.”<sup>13</sup> The Special Rapporteur, therefore, calls for authorities to resist the tendency to adopt a policy of “picking and choosing” between these measures, expecting victims to ignore lack of action in one of these areas simply because action is being taken in others. Such policy clearly conflicts with international obligations that States have with respect to each of the measures under the mandate. In addition, such policy is likely to undermine the possibility that whatever measures the Government does implement will be interpreted as *justice* measures.

In this respect, we welcome the elaboration of a draft transitional justice strategy by the BiH Ministry for Human Rights and Refugees and the BiH Ministry of Justice, with the support of civil society and international organizations. The need for a comprehensive framework on dealing with the past is particularly clear in light of the concerns raised above, which show some of the limits of the use of criminal justice as the sole mechanism in addressing past atrocities. So far the transitional justice process in BiH has predominantly, with few exceptions, focused on criminal prosecutions. The draft transitional justice strategy acknowledges this by stating:

“criminal prosecution of perpetrators, as a separate mechanism of transitional justice, cannot respond to all challenges of the process of facing up to the past. The *Transitional Justice Strategy* provides unreserved support to the prosecution of the war crimes cases and the full implementation of the *National War Crimes Strategy*. Through the elaboration of the transitional justice mechanisms which it covers, the *Transitional Justice Strategy* establishes complementarity with the process of criminal prosecution of the responsible ones, with a view to setting an approach to the facing up to the past in a systematic, integrative and comprehensive way. This approach will result in delivering justice to victims and the BiH society as a whole, i.e. in creating such an institutional, legal, socio-cultural and political framework which will ensure the introduction and protection of democratic values and human rights of citizens, acknowledgement of past atrocities and general prevention of human rights abuses from recurring in the future.”<sup>14</sup>

It is our understanding that the BiH draft transitional justice strategy was finalized in 2012 and is awaiting approval by Parliament. We are, however, concerned about the reported current political stalemate preventing the adoption of the strategy by the BiH Parliamentary Assembly. Given that violations date back to the 1990s, victims continue to express frustration at the lack of notable progress in relation to truth, reparation and institutional reform, in particular, and reverse developments in relation to justice processes. This fuels a deep sense of distrust towards authorities and among citizens within the society more broadly. We, therefore, call on your Excellency’s Government to employ more concentrated efforts to ensure the immediate adoption of the strategy and its

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<sup>13</sup> A/HRC/21/46, pp 22 – 27.

<sup>14</sup> BiH draft transitional justice strategy, page 29.

implementation, in accordance with international standards. We stand ready to assist your Excellency's Government with advice in this matter.

Please accept, Excellency, the assurances of our highest consideration.

Pablo De Greiff  
Special Rapporteur on the promotion of truth, justice, reparation and  
guarantees of non-recurrence

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