Mandates of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE:
AL BIH 1/2020

17 February 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on extrajudicial, summary or arbitrary executions and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 36/7, 36/6, 35/15 and 34/19.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **alleged imposition of the statute of limitations –known as *zastara*- to wartime victims seeking reparations through the judicial system, as well as the imposition of court fees to victims whose claims have been barred due to the imposition of the aforementioned statute**.

According to the information received:

Bosnia and Herzegovina declared its independence in 1992 and was subsumed in an armed conflict between 1992 and 1995, when the General Agreement for Peace in Bosnia and Herzegovina was signed. During that period, numerous war crimes were committed mainly against civilian population: murder, enforced disappearances, rape, torture and forced displacement, among others. In the aftermath of the conflict, and according to the peace agreement, the country was separated into two autonomous regions: the Federation of Bosnia and Herzegovina and the Republika Srpska. While the two regions have their own administrative and judicial organs, including separate Supreme Courts, the Constitutional Court of Bosnia and Herzegovina has jurisdiction over both of them.

As Bosnia and Herzegovina did not implement a national reparations program, victims turned to the criminal and civil courts, both of which provide for the awarding of compensation based on wartime damages. However, several factors prevented victims from accessing the courts to present their claims, or significantly delayed this process, including: the collapse or functional accessibility of the courts and other public institutions during the immediate post-conflict period; the lack of information about the availability of these mechanisms; the displacement of victims forced to escape during the war; the political instability and hostile political environment; and victim's fear of

identification and retaliation, and of social stigma in the case of victims of sexual violence.

In addition, criminal prosecutions have faced specific challenges, including the difficulty to identify perpetrators and obtain evidence, and the volume of caseload faced by courts. As a result, civil claims have been the only viable option for many victims. In this context, a 2003 judgment from the Constitutional Court (S. P. and others v. Brčko, AP 289/03, 13 October) declared that *zastara* –local name for statutes of limitations- could not be applied to civil claims related to the armed conflict. The Court established that in these cases, *zastara* violates the right to fair trial, guaranteed in article 6 of the European Convention of Human Rights.

Despite this ruling, courts from Republika Srpska continued rejecting civil claims basing its arguments on articles 376 and 377 of the Bosnia and Herzegovina Law on Civil Obligations. Article 376 establishes that "a claim for damages shall become statute-barred three years after the injured party knew about the damage and the identity of the person who caused it" or "five years after the damage occurred". According to this provision, victims could present a suit until 1999/2001, since the declaration of cessation of hostilities was signed on 19 June 1996. At the same time, article 377 provides that a civil claim is statute barred at the same time as the criminal prosecution. First instance courts interpreted this rule as requiring civil claims to be preceded by a criminal conviction to avoid the expiry of the statute of limitations. It is alleged that by applying the five year statute of limitations, first instance judges did not consider the post conflict scenario that prevailed in Bosnia and Herzegovina in the aftermath of war, ignoring victim's obstacles to continue with their lives.

In 2013, the Constitutional Court changed its position and established that civil suits which were not accompanied by a claim in a criminal court would be subject to the provisions of *zastara* (Hamza Rekic vs. Republika Srpska, AP-3111/09, 23 December). To this end, the Court referred to a case before the European Court of Human Rights related to insurances and applied it by analogy to civil claims for wartime reparations. As a consequence of this ruling, the number of civil claims for reparations reduced drastically.

Deepening this problem, some courts — especially in Republika Srpska— have required victims to pay court fees in the cases where their claims were dismissed. In some cases, judges have ordered the seizure of victims' property and assets as a form of payment.

In March 2018, the Constitutional Court overturned this ruling and established that such economic impositions over wartime victims was unconstitutional (S.A. v. Republika Srpska, AP 1101/17, 22 March). Nonetheless, first instance tribunals continue to apply fees to victims.

We express serious concern at the alleged imposition of the statute of limitations – *zastara*- to the legal claims submitted by victims who are seeking redress for the human rights violations suffered during the armed conflict. This is particularly concerning in a context where lawsuits have been the only procedure available to victims in order to obtain reparations, given the absence of a national reparations programme for wartime victims. We are further concerned that subjecting victims to the ordinary statute of limitations does not take into consideration either the nature of the gross human rights violations they suffered nor the post conflict context that hampered victim's ability to submit legal redress claims, including the aforementioned structural obstacles as well as the time needed for victims to overcome the psychosocial consequences of the harm suffered before feeling able to begin a lawsuit.

We express further concern at the imposition of court fees to victims whose claims have been barred due to the imposition of *zastara* and at the seizure of victims´ assets to pay for these fees, which place an unjust economic burden on victims and operate as a dissuasive factor among victims with scarce economic resources, affecting their equal and effective access to justice and re-traumatizing them.

We express further concern that despite the 2018 Constitutional Court ruling, some first instance courts continue to apply *zastara* and impose court fees to victims, leading to inconsistencies in the exercise of victim's rights to reparations in the country.

In connection with the above alleged facts and concerns, we would like to remind your Excellency's Government of its obligations to ensure the right to access to justice, as guaranteed by various international human rights instruments, in particular the International Covenant on Civil and Political Rights.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

2. Please provide information concerning the current judicial standard in Bosnia and Herzegovina in relation to the application of *zastara* to wartime victims after the Constitutional Court ruling from 2018 (S.A. v. Republika Srpska, AP 1101/17, 22 March). Please provide information about the application of this principle especially in first instance courts from Republika Srpska.

3. Please indicate what measures have been considered in the judicial system in order to guarantee that the Constitutional Court standards established in the aforementioned case are followed by lower courts across the country.

4. Please provide information related to cases where courts fees were imposed to wartime victims and cases were seizure of assets or property were ordered and its status.

5. Please indicate if the government authorities have undertaken the design and promotion of a national reparations program for victims who suffered human rights violations during wartime and if, in this regard, any consultation with victims was carried out.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting website. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

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

Fabian Salvioli
Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

Luciano Hazan
Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions

Nils Melzer
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Annex
Reference to international human rights law

In connection with above alleged facts and concerns, and without prejudging the accuracy of these allegations, we would like to bring to the attention of your Excellency's Government to international instruments in relation to the rights of victims to remedy. With this regard, article 2.3.a. of the Covenant on Civil and Political Rights (CCPR), which was ratified by Bosnia and Herzegovina in 1995, states that States will undertake measures to ensure that persons whose rights or freedoms recognized in the Covenant are violated shall have an effective remedy.[1] In the same vein, under article 14, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment — ratified by Bosnia and Herzegovina in 1993— requires States to ensure within its legal systems the enforceable right for victims to adequate compensation and to obtain redress, including the means for as full rehabilitation as possible.[2]

As regards to article 14, the Committee against Torture, created by the aforementioned Convention, has determined that States must enact legislation and petition mechanisms for victims, as well as judicial mechanisms determining the right and access to reparations, ensuring that such mechanisms are effective and accessible to all victims.[3] Furthermore, States should refrain from imposing statutes of limitation that obstacle victims to obtain compensation and rehabilitation, as "for many victims, passage of time does not attenuate the harm and in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those who have not received redress."[4]

We draw your Excellency's Government's attention to the concluding observations remarked by the Human Rights Committee and the Committee against Torture with regard to the specific case of Bosnia and Herzegovina. The Human Rights Committee has expressed concern in relation to the ruling of the Constitutional Court that supports the application of the statute of limitations to compensation claims for non-material damage.[5] Therefore, it recommends the State to take urgent measures to enact norms and to develop practical measures to ensure that survivors have access to effective remedies.[6] The Committee also expressed concerned that the majority of victims are required to claim compensation in civil proceedings without adequate protection.[7] At the same time, the Committee against Torture stated that Bosnia and Herzegovina should "take all the necessary measures to enable victims of torture and ill-treatment (…) to

---

1 Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

3 Committee against Torture. General comment No. 3 (2012). 13 December 2012, CAT/C/GC/. Par. 5.

4 Ibídem, par. 40.

5 Human Rights Committee. Concluding observations on the third periodic report of Bosnia and Herzegovina. 13 April 2017, CCPR/C/BIH/CO/3. Par 17-18.

6 Ibid. Par. 18.

7 Ibid. Par. 17.

exercise their right to redress".[8] Amongst these measures, Bosnia and Herzegovina should guarantee that "authorities at the entity level remove restrictive and discriminatory provisions from their legislation and policies relation to redress for civilian victims of war".[9]

In the regional system, Bosnia and Herzegovina is State Party of the European Convention of Human Rights, which in its article 13 states that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". [10] The European Court of Human Rights has stated that "the remedy must be effective in practice as well as in law".[11] The Court also established that victims of arbitrary arrest and rape under detention are eligible for remedies, including compensation.[12]

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted in the resolution 60/147 by the General Assembly on 16 December 2005 (hereinafter, "The Principles on the Right to a Remedy") , determines that "remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to (...) an equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; [and] access to relevant information concerning violations and reparation mechanisms" (A/RES/60/147, principle VII). At the same time, according to Principle 31 of the United Nations Updated Set of principles for the protection and promotion of human rights through action to combat impunity (hereinafter, the "Set of Principles on Impunity") victims shall have access to an effective, prompt and readily available remedy, which can be obtain as criminal, civil, administrative or disciplinary proceeding (E/CN.4/2005/102/Add.1).

In relation to the right of access to court, according to the aforementioned article 14 of the International Covenant on Civil and Political Rights, the Human Rights Committee has understood that "a situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence."[13] In the same line of reasoning, the Principles on the Right to a Remedy established that "States should (...) [t]ake measures to minimize the inconvenience to victims and their representatives,

---

8 Committee against Torture. Concluding observations on the sixth periodic report of Bosnia and Herzegovina. 22December 2017, CAT/C/BIH/CO/6. Par. 19.

9 Ibid, par. 19.c.

10 European Convention of Human Rights, adopted on 4 November 1950. 4 November 1950, ratified by Bosnia and Herzegovina in 2002.

11 European Court of Human Rights. Anguelova v. Bulgaria, application n° 38361/97, par. 161.

12 European Court of Human Rights. Aydin v. Turkey, Application no. 57/1996/676/866, par. 103; Husayn (Abu Zubaydah) v. Poland, application No. 7511/13, par. 544-545.

13 Human Rights Committee. General Comment 32. Article 14: Right to equality before courts and tribunals and to a fair trial. 23 August 2007, CCPR/C/GC/32, par. 9.

protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation (...) (A/RES/60/147, principle VIII).

Furthermore, we would like to draw your attention to the statute of limitations. The Committee against Torture has established that such practice should not be imposed in cases of gross human rights violations, like torture.[14] At the same, the European Court of Human Rights has determined that any restriction to court must be justified in a legitimate aim and must be proportional between that aims the means used.[15] Furthermore, the Principles on the Right to a Remedy are clear on this issue, declaring that "statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive" (A/RES/60/147, principle IV). The Set of Principles on Impunity established that prescription of criminal cases shall not be applied if no effective remedy is available. The same rule applies to cases of crimes that are considered imprescriptible under international law. In the scenario a prescription applies, it shall not have effects against civil or administrative claims presented by victims who are seeking reparations for the harm suffered (E/CN.4/2005/102/Add.1, principle 23).

As stipulated by article 17 of the Declaration on the Protection of all Persons from Enforced Disappearance, we also wish to reaffirm that acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.[16] Moreover, the Working Group on Enforced or Involuntary Disappearances has observed that as civil responsibility of the State is generated by the seriousness of the crime of enforced disappearance, the passing of time should not be an obstacle for the progress of civil demands through the application of statutes of limitation.[17]

We also refer to article 19 of the Declaration, which mandates that the victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.

Concerning the court fees imposed to victims, the aforementioned article 14 of the International Covenant on Civil and Political Rights states that "all persons shall be equal before the court and tribunals". In this sense, the imposition of fees to victims affects

[14] Committee against Torture. Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Turkey. 20 January 2011, CAT/C/TUR/CO/3, par. 24.

[15] European Court of Human Rights. Steel and Morris v. United Kingdom, application n° 68416/01, par. 62.

[16] Declaration on the Protection of all Persons from Enforced Disappearance, adopted by General Assembly resolution 47/133 of 18 December 1992

[17] Report on Reparations and Enforced Disappearances, 28 January 2013, A/HRC/22/45, para.58

disproportionately on persons with scarce economic resources. Moreover, the Human Rights Committee has established that "the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14, paragraph 1.10 In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them."[18] The European Court of Human Rights has determined that excessive court fees might undermine the provision of article 6 of the European Convention on Human Rights, as limiting the access to courts to people who cannot afford the payment of those fees.[19] It stressed that there must be a proper balance between "the interest of the State in collecting court fees for dealing with claims and, on the other hand, the interest of the applicant in vindicating his claim through the courts."[20] In this regard, the Principles on the Right to a Remedy determined that the State has the duty to "[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice" (A/RES/60/147, principle II) and to treat victims "with humanity and respect for their dignity and human rights" (A/RES/60/147, principle VI).

[18] Human Rights Committee. General Comment 32. Article 14: Right to equality before courts and tribunals and to a fair trial. 23 August 2007, CCPR/C/GC/32, par. 11.

[19] European Court of Human Rights. Kreuz v. Poland, application n° 28249/95, par. 60-67.

[20] Ibid, par. 60-67.