



TRIAL
International

SEEKING JUSTICE FOR WARTIME CRIMES IN BOSNIA AND HERZEGOVINA

**General Allegation regarding the application of
statutes of limitations and court fees to victims**

SUBMITTED BY

TRIAL International

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Women in Black

“It was an additional humiliation for everyone, because they believed in a little bit of justice regardless of everything. I am angry at the country, at the prosecution offices, and at the courts. They did nothing for victims of torture, absolutely nothing.”¹

– A former camp detainee whose civil claim was dismissed on the basis of statutes of limitations

“We filed the claim hoping to receive at least some kind of satisfaction for the beatings, illegal detainment. However, the opposite happened ... We had hoped for a positive outcome, but there is no euphoria left, no satisfaction.”²

– A victim in Tuzla expressing a sense of hopelessness upon discovering that his claim was time barred

“If I knew then what I knew now, I wouldn’t have [brought a civil claim].”³

– A former camp detainee who brought a civil claim that was then dismissed

¹ Interview with former camp detainee, Lowenstein Clinic, 17 Jan. 2018. For the protection of victims, no names or identifying information are provided.

² Interview with former camp detainee, Lowenstein Clinic, 15 Jan. 2018.

³ Interview with former camp detainee, Lowenstein Clinic, 20 Jan. 2018.

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1. BACKGROUND

1.1 ALLEGATION SUMMARY

1. This General Allegation details the ongoing violation by Bosnia and Herzegovina (BiH) of its international obligations, primarily with respect to two elements of the Special Rapporteur's mandate: Justice and Reparations. Thousands of men and women in BiH are still awaiting justice and reparations for the serious crimes committed during the 1992-1995 conflict. The Allegation focuses on BiH courts' application of statutes of limitations and court fees in civil cases, arguing that BiH is failing to comply with its international obligations to redress wartime abuses.

1.2 SPECIAL RAPPORTEUR'S MANDATE

2. The UN Human Rights Council's mandate for the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence ("the Special Rapporteur") is to "deal with situations in which there have been gross violations of human rights and serious violations of international humanitarian law."⁴ The Special Rapporteur is to carry out this mandate by adopting a comprehensive approach to help "ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law in accordance with international human rights law."⁵

⁴ Human Rights Council Res. 18/7, U.N. doc. A/HRC/RES/18/7 (13 Oct. 2011).

⁵ *Id.*

3. Human Rights Council Resolution 18/7 (“Resolution 18/7”) - which established the mandate of the Special Rapporteur - draws on the Secretary General’s “report on the rule of law and transitional justice in conflict and post-conflict societies,” which defines transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”⁶ The report also enumerates the main components of a transitional justice strategy: criminal justice, truth-telling, reparations, and vetting.
4. Resolution 18/7 asks the Special Rapporteur to, among other things, gather relevant information on national situations; develop a regular dialogue and cooperate with governments, non-governmental organizations, and other entities; make recommendations concerning judicial and non-judicial measures such bodies should take when designing and implementing strategies for addressing gross violations of human rights and serious violations of international humanitarian law; and provide technical assistance or advisory services on issues pertaining to the mandate.⁷
5. Resolution 18/7 references two international instruments relevant to the mandate: the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (“UN Impunity Principles”)⁸ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International

⁶ U.N. Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-conflict Society, ¶ 8, U.N. doc. S/2004/616 (23 Aug. 2004).

⁷ Human Rights Council Res. 18/7, U.N. doc. A/HRC/RES/18/7 (13 Oct. 2011).

⁸ Diane Orentlicher (independent expert to update the set of principles to combat impunity), Addendum, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. doc. E/CN.4/2005/102/Add.1 (8 Feb. 2005) [hereinafter “UN Impunity Principles”].

Humanitarian Law (“UN Basic Principles on the Right to a Remedy”),⁹ adopted and proclaimed by the General Assembly in 2005.

6. In addition to the UN Impunity Principles and the UN Basic Principles on the Right to a Remedy, a range of international human rights treaties are pertinent to the Special Rapporteur’s mandate. Bosnia and Herzegovina is a State party to several such treaties, including the International Covenant on Civil and Political Rights (“ICCPR”);¹⁰ the First Optional Protocol to the International Covenant on Civil and Political Rights;¹¹ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;¹² the Convention on the Rights of the Child;¹³ the Convention on the Elimination of All Forms of Discrimination against Women;¹⁴ the International Convention for the Protection of All Persons from Enforced Disappearance;¹⁵ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁶ BiH is also party to the 1949 Geneva

⁹ G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. doc. A/RES/ 60/147 (21 March 2006) [hereinafter “UN Basic Principles on the Right to a Remedy”].

¹⁰ On 1 September 1993 BiH succeeded the former Yugoslavia, thereby adopting all of its treaty obligations, including its ratification of the ICCPR.

¹¹ BiH ratified this treaty on 1 March 1995.

¹² On 1 September 1993, BiH succeeded the former Yugoslavia, which ratified the treaty on 10 September 1991.

¹³ On 1 September 1993, BiH succeeded the former Yugoslavia, which ratified the treaty on 3 January 1991.

¹⁴ On 1 September 1993, BiH succeeded the former Yugoslavia, which ratified the treaty on 26 February 1982.

¹⁵ BiH ratified this treaty on 30 March 2012.

¹⁶ BiH ratified this treaty on 12 July 2002.

Conventions,¹⁷ the two 1977 Additional Protocols thereto,¹⁸ the Convention on the Prevention and Punishment of the Crime of Genocide¹⁹ and the Rome Statute on the Establishment of an International Criminal Court.²⁰

1.3 GENERAL CONTEXT CONCERNING WARTIME VIOLATIONS

7. During the war in BiH from 1992 to 1995, horrific crimes and gross human rights violations were perpetrated, primarily against civilians. On 6 March 1992, BiH, formerly one of the six federal states constituting the Socialist Federal Republic of Yugoslavia (“SFRY”), declared independence. BiH’s struggle for independence was marked by an armed conflict between various factions within and outside BiH: notably, the Bosnian governmental forces on one side, and the Bosnian Serb forces (“VRS”) and Yugoslav National Army (“JNA”) on the other. The Croatian Defence Council (“HVO”) also took part in the hostilities. All sides committed atrocities: the murder of civilians, sexual violence and torture in detention camps and elsewhere,

¹⁷ BiH ratified the Geneva Conventions on 31 December 1992.

¹⁸ BiH ratified the two 1977 Additional Protocols on 31 December 1992.

¹⁹ BiH ratified the Convention on the Prevention and Punishment of the Crime of Genocide on 27 December 2001.

²⁰ Under Annex 6 (“Human Rights”) of the Dayton Peace Agreement, Bosnia and Herzegovina, as well as its entities Republika Srpska and the Federation of Bosnia and Herzegovina, are obligated to secure to all persons within their jurisdictions the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in various international treaties listed in the Appendix to Annex 6: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1949 Geneva Convention on the Protection of Civilian Persons in Time of War; and the two 1977 Additional Protocols thereto.

the forced disappearance of thousands, and the forced displacement, internally and internationally, of more than two million people.

8. On 14 December 1995, the General Framework Agreement for Peace in BiH (also known as the “Dayton Peace Agreement”) put an end to the hostilities. Based on the Dayton Peace Agreement, BiH consists of two semi-autonomous entities, the Federation of Bosnia and Herzegovina (“FBiH”) and Republika Srpska (“RS”). The agreement granted the Brčko District in Northern BiH special status. Both entities within BiH have their own parliaments, executive institutions, and judiciaries. The Brčko District is also in charge of its internal affairs, including the justice system.
9. While the prosecution of wartime crimes is divided between the entity and state judiciaries, only the entity courts process civil wartime claims. There are five district courts in RS, ten cantonal courts in FBiH, and a first-instance court in Brčko District. A Supreme Court in each entity hears appeals of lower court decisions. The Constitutional Court of BiH (“the Constitutional Court”) has jurisdiction over the entire nation, and can hear cases raising constitutional issues, including questions concerning fundamental human rights.²¹

1.4 GENERAL CONTEXT CONCERNING REMEDIES FOR WARTIME VIOLATIONS

10. BiH has yet to implement a state-wide reparations scheme to redress the harms suffered by victims during the war. Consequently, victims have turned to the criminal and civil courts, both of which provide for the awarding of compensation based on

²¹EUROPEAN COMM’N FOR DEMOCRACY THROUGH LAW (VENICE COMM’N), The Judicial Power in Bosnia and Herzegovina (BiH) Background Paper, (9 Dec. 2011), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2011\)096rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2011)096rev-e)

wartime damages. As will be described below, however, neither option has proven reliable.

11. In the immediate aftermath of the war, courts were functionally inaccessible. Political instability and the fear of being identified/subjected to retaliation dissuaded victims of wartime crimes from pursuing remedies through the justice system.²² Moreover, due to the displacement caused by the war, many victims had fled the country. In certain cases, victims were not aware they could bring criminal or civil claims.
12. With specific regard to criminal proceedings, there continue to be significant obstacles to prosecution and, correspondingly, compensation. Some victims cannot identify individual perpetrators, particularly in cases in which women were raped in camps by rotating groups of combatants. Even where victims can make identifications, the decreasing number of surviving perpetrators as well as the declining quality of evidence hinders criminal trials.
13. Furthermore, the prosecution of war crimes has been plagued by a “backlog of several hundred cases.”²³ Reports suggest that this backlog includes more than 550 unresolved cases.²⁴ As a result, victims may be forced to wait years before a criminal

²² According to Vive Zene, an organization that provides support to survivors of wartime torture and sexual violence, many victims did not bring civil claims in the immediate aftermath of the conflict due to potential consequences such as domestic violence and retribution on the part of the perpetrator or those affiliated with the perpetrator. Additionally, with respect to sexual assault and rape, societal stigma has prevented - and continues to prevent – many victims from coming forward. Interview with two counselors at Vive Zene, Lowenstein Clinic, 15 Jan. 2018.

²³ AMNESTY INTERNATIONAL, WORLD REPORT 2017/18: THE STATE OF THE WORLD’S HUMAN RIGHTS, 96 (2018), <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>

²⁴ Dzana Brkanic, *Bosnia Hopes to Complete War Crimes Cases in 2023*, BALKANINSIGHT, (23 Feb. 2018), <http://www.balkaninsight.com/en/article/bosnia-hopes-to-complete-war-crimes-cases-in-2023-02-23-2018>

prosecution is even instigated, let alone a conviction secured. The issues enumerated above - the hostile political environment, difficulties identifying perpetrators, the loss of evidence, the death of perpetrators, and the case backlog - have left most victims with no option but to turn to the civil courts: the civil system is not facing the same backlog and victims are able to bring claims against the entities, rendering the issues of perpetrator identification and death moot. In some cases, victims may opt to sue the entities civilly as a matter of discretion; this preference stems from reasons such as individual perpetrators' inability to pay damages and/or the sentiment that it is the obligation of the entity/state to provide redress.

1.5 LEGAL INTERPRETATIONS OF ZASTARA

14. As discussed above, civil courts have long been the only viable option for many victims. Correspondingly, in 2003, the Constitutional Court held that *zastara*, otherwise known as statutes of limitations, could not be applied to civil claims for wartime damages.²⁵ The Constitutional Court explained that the application of statutes of limitations to claims for wartime damages violated Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial. The Court held that even when there was no prior criminal conviction related to the harms in question, civil claims for damages should be allowed to proceed.²⁶ Following this ruling, different organizations across BiH started providing logistical support to victims of wartime crimes, connecting them with lawyers who could bring civil claims on their behalf.

²⁵ S.P and others v. Brčko, AP 289/03 (13 Oct. 2003).

²⁶ *Id.*

15. Despite the 2003 decision, entity-level courts in RS regularly dismissed victims' claims for damages by citing Articles 376 and 377 of the BiH Law on Civil Obligations.²⁷ Article 376 imposes a three- or five-year statute of limitations on civil claims, stating: "A claim for damages shall become statute-barred three years after the injured party learned about the damage and the identity of the person who caused it" or "five years after the damage occurred."²⁸ RS courts interpreted this language strictly, barring all civil claims for wartime harms brought against the entities after 1999/2001.²⁹ Moreover, courts relied on the language concerning "the identity of the person who caused [the harm]" to require that cases be brought against individual actors, rather than entities such as RS or FBiH. This approach resulted in the denial of a substantial number of civil claims.
16. RS courts also cited Article 377 to bar civil claims. Article 377 provides that a claim for damages pursued as the result of a criminal offense "becomes statute barred at the same time as the criminal prosecution."³⁰ Lower courts interpreted this language as requiring that any wartime civil claim be preceded by a criminal conviction to avoid preclusion by statutes of limitations. This meant that victims would have had to file claims by 1999/2001 if no criminal prosecution had taken place.³¹

²⁷ Law on Civil Obligations (Official Gazette of SFRY no. 29/78, 39/85, 45/89, and 57/89, Official Gazette of RBiH no. 2/92, 13/93, and 13/94, and Official Gazette of FBiH no. 29/03 and 42/11).

²⁸ *Id.* Art. 376.

²⁹ 1999 was the subjective deadline, while 2001 was the final, or objective, deadline. Since the majority of victims had the same information and knowledge about the harm and the perpetrators in 1996 as they did in 1998 or 2000, they were bound by the shorter, subjective, time limit.

³⁰ *Id.* Art. 377.

³¹ *Id.* Art. 377.

17. As stated above, criminal convictions were impossible for many victims to obtain in the war's immediate aftermath due to the breakdown of the political and judicial systems and the very real threat of retaliation. Even today, such convictions are rare due to backlogs in prosecutions, the death of perpetrators and loss of evidence, and difficulties with identification. Accordingly, RS courts' jurisprudence ignored the reality of the postwar situation in BiH as well as the Constitutional Court's 2003 decision.
18. In FBiH, while the majority of first instance claims were successful, some courts used Articles 376 and 377 to deny civil claims. These disparities created unpredictability and inconsistency as to the standard applicable to civil claims. Still, many victims continued to seek redress in civil court because it was the only avenue available. Victims' associations described filing claims that numbered in the tens of thousands, with varying levels of success.³² The High Judicial and Prosecutorial Council reports that since 2011, more than 5,000 civil claims for compensation have been filed in BiH civil courts.³³
19. In 2013, however, the civil court option suffered a significant blow. In *Hamza Rekic vs. Republika Srpska*, the Constitutional Court changed course and ruled that all civil claims for wartime damages lacking a corresponding criminal conviction should be subjected to statutes of limitations.³⁴ In so doing, the Court relied on the European

³² For example, the organization of camp detainees in the Central Bosnia Canton informed the Lowenstein Clinic that it had filed 733 claims on behalf of individuals from 10 municipalities since 2009 and that of those claims, "few [had] been finalized, and those which [had] been finalized, were not successful." Interview with Organization of Camp Detainees, Central Bosnia Canton, Lowenstein Clinic, 17 Jan. 2018. Other victims' associations described filings in the tens of thousands, with about 4,000 claims that succeeded in the first instance and about 1,000 that succeeded in the second instance. Interview with Organization of Camp Detainees, Federation of Bosnia and Herzegovina, Lowenstein Clinic, 19 Jan. 2018.

³³ Compensation Claims Filed 2011-2015, High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

³⁴ *Hamza Rekic vs. Republika Srpska*, AP-3111/09, (23 Dec. 2013).

Court of Human Rights 2012 holding in *Banicevic v. Croatia*,³⁵ conflating the applicability of *zastara* to an insurance claim with the applicability of *zastara* to wartime damages.³⁶

20. Although the Court acknowledged that the state of war in BiH was an “insurmountable obstacle” to the filing of the claim at issue, it went on to hold that under Article 376, all claims had to be brought within five years of 19 June 1996, when the declaration of cessation of war was signed.³⁷ The Court found that the “insurmountable obstacle” vanished on the day the war ended and that the clock on *zastara* thereby immediately began ticking.³⁸ As set forth above, the political instability, atmosphere of terror, and dysfunctional judicial system that characterized the immediate aftermath of the war meant that the “insurmountable obstacle” was still very much present. Due to the Constitutional Court’s ruling, the number of civil claims brought has decreased significantly since 2013.³⁹

³⁵ *Banicevic v. Croatia*, Application no. 44252/10, Eur. Ct. H.R. (2012).

³⁶ *Id.*

³⁷ On 19 June 1996, the National Assembly of RS declared a cessation of war. Official Gazette of RS no. 15/96.

³⁸ *Hamza Rekic* overturned the 2003 *S.P. and others* decision concerning harms that claimants had suffered as the result of “crimes against humanity and international law.” In that case, the Constitutional Court found that “statutory limitations are not applicable to the prosecution of the given criminal offenses” or to related damage compensation claims. In fact, the Court stated explicitly that “the non-existence of a final conviction that resulted from criminal proceedings does not mean that the damage had not been inflicted by commission of the criminal offense.” Recognizing that victims were often unable to bring claims in the period outlined by the BiH civil code, that many perpetrators could not and would not be criminally prosecuted, and that the civil claims were for damages that resulted from war crimes, the Constitutional Court held that statutes of limitations did not bar the claims in question.

³⁹ Compensation Claims Filed 2011-2015, High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

21. Exacerbating the negative effects of the imposition of *zastara*, certain courts, particularly in RS, have required victims to pay court fees in the event of the dismissal of their claims or loss on the merits. In these cases, authorities often seize victims' assets or property as payment, re-traumatizing victims and deepening the poverty in which most live. Independent of the application of statutes of limitations, the practice of charging court fees has strongly deterred victims from bringing claims. In March 2018, the Constitutional Court of Bosnia and Herzegovina ruled that in the concrete circumstances of the case before it, imposing court fees on the victim for her dismissed claim was unconstitutional.⁴⁰ However, as discussed further in section 3, the narrowness of the Constitutional Court's decision makes it likely that entity-level courts will fail to implement the ruling's reasoning in similar cases, meaning that the application of court fees may continue.

1.6 PREPARATION OF THE GENERAL ALLEGATION

22. After many conversations with victims regarding the destructive impact of *zastara* and court fees, TRIAL International contacted the Allard K. Lowenstein International Human Rights Clinic at Yale Law School ("the Lowenstein Clinic") about preparing a General Allegation. The Lowenstein Clinic traveled to BiH to further research victims' ability to attain redress in civil and criminal courts. The Clinic conducted interviews with victims, leaders of victims' associations, civil society members, and legal actors, including lawyers and judges.

23. Based on these interviews and secondary research, the General Allegation concludes that the application of *zastara* and court fees to wartime claims contradicts BiH's international obligations to remedy its legacy of human rights abuses.

⁴⁰ It is important to note that in the majority of cases, victims who have been subjected to court fees have already missed the deadline for appealing to the Constitutional Court, with the result that this new decision will not help them.

2. JUSTICE AND REPARATIONS

2.1 THE APPLICATION OF ZASTARA TO WARTIME CLAIMS CONTRAVENES VICTIMS' RIGHT TO A REMEDY

2.1.1 International human rights and humanitarian treaties guarantee the right to a remedy

24. International human rights and humanitarian law require States to guarantee that victims have access to effective remedies. As mentioned above, Resolution 18/7, which establishes the mandate of the Special Rapporteur on Truth, Justice, Reparations, and Guarantees of Non-recurrence, references the U.N. Basic Principles on the Right to a Remedy as an international instrument applicable to the mandate. Adopted by the U.N. General Assembly as Resolution 60/147 in 2005, the Basic Principles draw on many sources of international law, including “[t]reaties to which a state is party [and] [c]ustomary international law.”⁴¹ The Basic Principles “do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of *existing legal obligations* under international human rights law and international humanitarian law.”⁴²
25. The Basic Principles stipulate that “remedies for gross violations of international human rights law and serious violations of international humanitarian law include ...

⁴¹ UN Basic Principles on the Right to a Remedy, above fn.8, principle I.

⁴² Id., preamble (emphasis added).

adequate, effective and prompt reparation for harm suffered.”⁴³ The Basic Principles also explicitly mandate 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.”⁴⁴ They further state that “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.”⁴⁵

26. Resolution 18/7 likewise cites the UN Impunity Principles an international instrument applicable to the Special Rapporteur’s mandate. The Impunity Principles clarify that statutes of limitations should not be employed to deny remedies for gross human rights abuses. Under Principle 32 of the UN Impunity Principles, victims of human rights violations “shall have access to a readily available, prompt and effective remedy ...” Principle 23 correspondingly states that prescriptions - i.e. statutes of limitations - “shall not apply to crimes under international law that are by their nature imprescriptible” and that prescriptions “shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.”

27. Human rights treaties ratified by BiH also guarantee the right to a remedy for victims of human rights violations. The International Covenant for Civil and Political Rights requires States parties to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”⁴⁶

⁴³ Id., principle VII.

⁴⁴ Id., principle IV.

⁴⁵ Id., principle VII.

⁴⁶ International Covenant on Civil and Political Rights art. 2(3)(a), adopted and opened for signature, ratification and accession 16 Dec. 1966, 999 U.N.T.S. 171, *entered into force* 23 Mar. 1976.

28. Similarly, Article 14 of the Convention against Torture (“CAT”) requires States parties to “ensure in [their] legal system[s] that the victim of an act of torture obtains redress and has as full rehabilitation as possible.”⁴⁷ Under Article 14, States parties must adopt measures such that victims, “regardless of when the violation occurred or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to remedy ...”⁴⁸
29. The Committee against Torture, established by the Convention against Torture to monitor compliance with that treaty’s provisions, has made it clear that statutes of limitations should not be used to bar redress for torture. The Committee - highlighting the continuous impact of torture - has noted that the “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.”⁴⁹ Correspondingly, the Committee has asserted that States Parties cannot use procedural hurdles to bar redress for torture: “[S]tatutes of limitations must not be enforced to prevent victims’ access to the courts for remedies.”⁵⁰ In compliance with treaties such as CAT and the ICCPR, BiH must guarantee victims the right to a remedy.

⁴⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, adopted and opened for signature, ratification and accession 10 Dec. 1984, 1465 U.N.T.S. 85, *entered into force* 26 June 1987.

⁴⁸ Comm. against Torture, General Comment No. 3 (2012), ¶ 40, U.N. Doc. CAT/C/GC/3 (19 Nov. 2012).

⁴⁹ *Id.*

⁵⁰ *Id.*

30. Human rights treaty bodies have specifically applied the aforementioned provisions to BiH, calling on the State to provide victims of war crimes with access to remedies. In its most recent concluding observations on BiH, the Human Rights Committee, the body established by the ICCPR to monitor compliance with the treaty, stated that BiH “should urgently adopt legislative and practical measures to ensure that survivors of torture and sexual violence have access to effective remedies.”⁵¹ The Committee against Torture has likewise urged BiH to “take all the necessary measures to enable victims of torture and ill-treatment, including victims of wartime sexual violence, to exercise their right to redress,” including measures to “ensure that the authorities at the entity level remove restrictive and discriminatory provisions from their legislation and policies relating to redress for civilian victims of war.”⁵²
31. Since the 2013 *Hamza Rekic* decision by the Constitutional Court, lower courts have rejected all wartime claims on the basis of *zastara*. The application of statutes of limitations to claims filed by wartime victims violates each of the above sources of international law by preventing victims from exercising their right to an effective remedy.

⁵¹ Human Rights Comm., Concluding observations on the third periodic report of Bosnia and Herzegovina, ¶ 18, U.N. Doc. CCPR/C/BIH/CO/3 (13 Apr. 2017).

⁵² Comm. against Torture, Concluding observations on the sixth periodic report of Bosnia and Herzegovina, ¶ 19, CAT/C/BIH/CO/6 (22 Dec. 2017). Additionally, international humanitarian law and international criminal law guarantee the right to a remedy for victims. The Hague Convention IV states that a “belligerent party which violates the provision of the said Regulation shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” The Protocol Additional to the Geneva Conventions and relating to the Protections of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 correspondingly asserts that a “Party to the conflict which violates the provisions of the Conventions or this Protocol shall, if the case demands, be liable to pay compensation.” Meanwhile, the Rome Statute empowers the International Criminal Court to order reparations for victims.

32. Even though victims can theoretically file claims against their perpetrators in criminal court, this option does not function in practice. As noted above, the difficulty of identifying perpetrators, the flight or death of perpetrators, and the significant backlog in criminal courts mean that civil courts are the only avenue through which many victims can seek redress for wartime harms.
33. The imposition of *zastara* eliminates this avenue, clearly contradicting BiH's responsibility under the ICCPR and the Basic Principles to provide effective redress for victims.⁵³ In cases brought by victims who have suffered torture, including sexual violence, the use of *zastara* also violates the Convention against Torture, per relevant observations by the Committee against Torture. Because of the present interpretation of *zastara* in BiH, remedies are non-existent. In the words of a former camp detainee, "there is no justice."⁵⁴

2.1.2 The European Convention on Human Rights guarantees the right to a remedy

34. The European Convention on Human Rights, to which BiH is a party, guarantees the right to an effective remedy.⁵⁵ Under the BiH Constitution, the European Convention supersedes all domestic legislation. The European Court has interpreted Article 13 of the Convention to guarantee "the availability at the national level of a remedy to

⁵³ International Covenant on Civil and Political Rights art. 2(3)(a), adopted and opened for signature, ratification and accession 16 Dec. 1966, 999 U.N.T.S. 171, *entered into force* 23 Mar. 1976.

⁵⁴ Interview with male former camp detainee, Lowenstein Clinic, 20 Jan. 2018.

⁵⁵ "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." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, adopted and signed 4 Nov. 1950, ETS 5, *entered into force* 3. Sept. 1953.

enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order.”⁵⁶ The remedy must be “effective in practice as well as in law,” and “there should be available to the victim a mechanism for establishing any liability of State officials or bodies for that breach.”⁵⁷

35. The State is in breach of Article 13 when it fails to provide an effective remedy “at the national level” for violations of rights that are guaranteed under the Convention, such as the right to freedom from torture guaranteed by Article 3 and the right to liberty and security guaranteed by Article 5. With respect to Article 3, for example, the Court has found that “the notion of an effective remedy entails, in addition to a thorough and effective investigation also required by Article 3 ... effective access for the complainant to the investigatory procedure and the payment of compensation where appropriate.”⁵⁸ The European Court has specifically concluded that rape during detention constitutes a violation of Article 3 and, where the State has failed to provide access to remedy, a violation of Article 13.⁵⁹ The Court has also found that victims of arbitrary arrest and detention have a right to remedies, including compensation, under Article 13 and Article 5.⁶⁰

⁵⁶ *Anguelova v. Bulgaria*, Application no. 3836197, Eur. Ct. H.R., para. 161 (2002).

⁵⁷ *Id.*

⁵⁸ *Assenov and Others v. Bulgaria*, Application no. 90/1997/874/1086, Eur. Ct. H.R., para. 117 (1998).

⁵⁹ *Aydin v. Turkey*, Application no. 57/1996/676/866, Eur. Ct. H.R., para. 103 (1997).

⁶⁰ See, e.g., *Husayn (Abu Zubaydah) v. Poland*, Application No. 7511/13, Eur. Ct. H.R., paras. 544-45 (2014) (finding a violation of Article 13 in conjunction with Article 5). Article 5(5) states: “Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.” European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(5), adopted and signed 4 Nov. 1950, ETS 5, *entered into force* 3 Sept. 1953.

36. The application of *zastara* by BiH courts and the corresponding failure to provide victims with a remedy for wartime violations runs counter to the spirit of the European Convention and Article 13. The war in BiH resulted in murder, physical and sexual violence, and arbitrary detention, violating a number of rights guaranteed by the European Convention, including the right to life under Article 2, the right to freedom from torture under Article 3, the right to liberty and security under Article 5, and the right to respect for private and family life under Article 8. Under Article 13 of the Convention, BiH has an obligation to provide remedies to victims of all such violations.⁶¹ By applying *zastara* to civil claims, however, courts have foreclosed the only path available to tens of thousands of victims seeking redress for human rights violations suffered during the war. It is worth noting that other regional human rights mechanisms have explicitly found violations of the right to a remedy in cases in which courts have imposed statutes of limitations on civil claims stemming from human rights abuses.⁶²

⁶¹The lower chambers of the European Court - although not the Grand Chamber - have found that the denial of Bosnian civil claims by domestic courts does not contravene the Convention because Bosnia did not sign the Convention until 2002 – after the war. However, the rejection of wartime civil claims runs counter to the spirit of the convention. Moreover, the reasoning behind such ECtHR judgments is questionable given the ongoing harm described throughout this Allegation, the outright denial of redress, and the lack of a relevant judgment from the Grand Chamber.

⁶²The Inter-American Court of Human Rights recently ruled that the imposition of statutes of limitations on civil claims for damages stemming from the Pinochet dictatorship in Chile violated the American Convention on Human Rights by denying victims effective access to reparations. The Court ordered the Chilean state to pay the victims in question individual compensation awards. *Ordenes Guerra and others v. Chile*, Series 372, Inter-American Court of Human Rights, 29 Nov. 2018.

2.2 THE APPLICATION OF ZASTARA TO WARTIME CLAIMS VIOLATES VICTIMS' RIGHT OF ACCESS TO THE COURTS

2.2.1 The Human Rights Committee has interpreted Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") to prohibit statutes of limitations when their imposition is not reasonable

37. Article 14 of the ICCPR states: "All persons shall be equal before the courts and tribunals."⁶³ The Human Rights Committee has interpreted Article 14 as ensuring that States parties do not systematically thwart access to the courts: "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."⁶⁴ Although access to justice can be obstructed in a variety of ways, the primary focus in the present Allegation is the limitation of access through the BiH judiciary's application of *zastara*.

38. In *Preiss v. Czech Republic*,⁶⁵ the Human Rights Committee addressed the imposition of a statute of limitations: "[W]hereas a statute of limitations may be objective and even reasonable in abstracto, the Committee cannot accept such a deadline for submitting restitution claims in the case of the author, since under the explicit terms of the law he was excluded from the restitution scheme from the

⁶³ International Covenant on Civil and Political Rights art. 14(1), adopted and opened for signature, ratification and accession 16 Dec. 1966, 999 U.N.T.S. 171, *entered into force* 23 Mar. 1976.

⁶⁴ Human Rights Comm., Gen Comm. 32, ¶ 9, U.N. Doc. CCPR/C/CG/32 (23 Aug. 2007); see also *Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, Eur. Ct. H.R. para. 9 (1993).

⁶⁵ Human Rights Comm., Gen Comm. 93, ¶ 9, U.N. Doc. CCPR/C/93/D/1497 (2006).

outset.”⁶⁶ As discussed above, wartime survivors in BiH are barred from redress “from the outset” under a distorted interpretation of statutes of limitations that requires claims to have been filed by 1999 or 2001.

39. It would have been dangerous and extremely difficult for victims who had just survived detention camps, torture, sexual assault, and the disappearance or murder of loved ones to file claims by 2001. The cessation of war did not immediately result in a functional state and judicial system, and bitter antipathy between parties to the conflict did not disappear with formal peace. To expect victims to bring claims in the very entities that had abused them, oftentimes in the same communities where their perpetrators and those affiliated with perpetrators were living, would be unreasonable. The requirement that claims be brought within such a truncated timeframe effectively precludes redress “from the outset.”

40. Although only courts in RS applied *zastara* in this manner prior to 2013, the Constitutional Court’s decision in *Hamza Rekic* wholly eliminated civil courts as an avenue of redress for claims against the entities. Since *Hamza Rekic*, FBiH courts have also used *zastara* to deny civil claims. The impact of *Hamza Rekic* is evidenced by the dwindling number of filed claims. In 2013, victims filed 1,233 claims for civil damages resulting from wartime violations of international human rights and humanitarian law. The number of claims filed decreased to 762 in 2014 and 298 in 2015, representing a 75% decrease.⁶⁷ This timing of this decline and victims’ statements show that the imposition of *zastara* in BiH has created “a situation in which an individual’s attempts to access the competent courts or tribunals are

⁶⁶ See *Blazek v. Czech Republic*, Communication No. 857/1999 U.N. Doc CCPR/C/72/D para. 5.9 (2001).

⁶⁷ Compensation Claims Filed 2011-2015, High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

systematically frustrated de jure,” which “runs counter to the guarantee of article 14, paragraph 1, first sentence.”⁶⁸

2.2.2 The European Court has interpreted Article 6 of the European Convention to bar statutes of limitations when their imposition is not reasonable

41. Article 6 of the European Convention on Human Rights states, in relevant part, that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” In BiH, wartime victims’ inability to bring their claims to court does not accord with the Article 6 right to a “fair and public hearing.”
42. The European Court of Human Rights has emphasized that although “Article 6(1) ‘does not state a right of access to the courts or tribunals in express terms,’” it “enunciates distinct rights that ‘stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term.’”⁶⁹ In *Banicevic*, the European Court stated:

The Court has held on many occasions that Article 6 § 1 embodies the ‘right to a court’, of which the right of access, that is, the right to institute proceedings before a court, constitutes one aspect only; however, it is an aspect that makes it in fact possible to benefit from the further

⁶⁸ Human Rights Comm., Gen Comm. 32, ¶ 9, U.N. Doc. CCPR/C/CG/32 (23 Aug. 2007); see also *Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, Eur. Ct. H.R. para. 9 (1993).

⁶⁹ *Golder v. the United Kingdom*, Application no. 4451/70, Eur. Ct. H.R. para. 28 (1975).

guarantees laid down in paragraph 1 of Article 6.⁷⁰

43. As detailed below, *zastara* impairs victims' Article 6 rights in several ways that the European Court has found to be unlawful: it does not fulfill the narrow proportionality standard nor the broader legitimate aim standard articulated by the European Court; it runs counter to the essence and substance of Article 6; and it is not compatible with the European Convention.
44. The European Court has established a twofold test for deciding whether a State has unlawfully restricted access to a court: "Where access to a court is restricted by law or in practice, the Court examines whether the restriction ... pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."⁷¹ Other judgments clarify the standard. The Court must examine whether the restriction pursues a legitimate aim and, if so, whether that aim outweighs the burdens placed on claimants. Then, the Court must also evaluate the proportionality of the restriction's (here, statutes of limitations) impact on the relevant parties vis-à-vis their access to other remedies.⁷²
45. Statutes of limitations often have legitimate aims, such as encouraging timely litigation and minimizing procedural uncertainty. The aims articulated by the Constitutional Court in *Hamza Rekic vs. Republika Srpska*,⁷³ for example, were legal definitiveness and clarity. These valid objectives are outweighed, however, by the

⁷⁰ Banicevic v. Croatia, Application no. 44252/10, Eur. Ct. H.R. para. 27 (2012).

⁷¹ Steel and Morris v. United Kingdom, Application no. 68416/01, Eur. Ct. H.R. para. 62 (2005).

⁷² In *Osu v. Italy*, the Court described the factors relevant to evaluate a challenged restriction: The restriction must "pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved (see the *Guérin v. France*)" *Osu v. Italy*, Application no. 36534/97, Eur. Ct. H.R. para. 31 (2002).

⁷³ *Hamza Rekic vs. Republika Srpska*, AP-3111/09, (23 Dec. 2013).

fact that the application of *zastara* entirely precludes victims of wartime damages from accessing the civil courts: the burden far exceeds the aim. The BiH judiciary's imposition of *zastara* thereby fails to meet the standard established by the European Court. Notably, the reason that international norms militate against the application of statutes of limitations to war crimes is that the severity of such offenses and the corresponding importance of accessible remedies outweigh other potential objectives.

46. The other, narrower test articulated by the European Court is that of proportionality. This test requires the Court to consider how a statute of limitations impacts victims' access to remedies. In BiH, the application of *zastara* to victims' claims for wartime damages is not proportional because, as discussed above, there is no other avenue through which victims can seek remedies. The imposition of *zastara* means that many victims of gross human rights violations are wholly barred from access to and redress from the courts.

47. A second standard articulated by the European Court is that the right of access must be an effective, not just formal, right. Article 6 prohibits application of a statute of limitations if such application "impairs the essence of the right to access to a court".⁷⁴ The BiH Constitutional Court's ruling on *zastara* in *Hamza Rekić* disingenuously posits that the conclusion of the war equated to an accessible and responsive justice system in which victims could safely seek compensation. In reality, the vast majority of victims were unable to file claims at that time. Given that the application of statutes of limitations has thereby prevented wartime victims across BiH from obtaining a hearing on their right to civil compensation, this approach clearly "impairs the essence of the right to access to a court", particularly since so many victims have been unable to access redress in the criminal justice system.

⁷⁴ Golder, above fn.69, para 28.

48. In *Vrbica v. Croatia*, the European Court found that statutes of limitations must be viewed in light of their compatibility with the Convention. The Court stated that:

the existence of a limitation period per se is not incompatible with the Convention. What the Court needs to ascertain in a given case is whether the nature of the time-limit in question and/or the manner in which it was applied is compatible with the Convention (see, mutatis mutandis, *Phinikaridou v. Cyprus*, no. 23890/02, § 52, ECHR 2007-XIV).⁷⁵

As currently applied by the judiciary in BiH, *zastara* effectively bars victims of human rights violations from the opportunity to access the courts and is thus not compatible with the goals of the Convention.

2.3 THE IMPOSITION OF COURT FEES ON VICTIMS CONSTITUTES AN ADDITIONAL VIOLATION OF INTERNATIONAL LAW

I felt like I was “reliving the suffering, the torture and the rapes that occurred in the camps through having to pay for these claims.”⁷⁶ - a male former camp detainee.

“I relived all of it again. I felt like I was still in a camp.”- a female former camp detainee speaking about the process of bringing a claim, having it rejected and having court fees imposed.⁷⁷

⁷⁵ *Vrbica v. Croatia*, Application no. 32540/05, Eur. Ct. H.R., para. 66 (2010) (parenthetical in original).

⁷⁶ Interview with male victim, Lowenstein Clinic, 15 Jan. 2018.

⁷⁷ Interview with female victim, Lowenstein Clinic, 15 Jan. 2018.

49. As discussed in the background section, in March 2018 the BiH Constitutional Court held in *S.A. v. Republika Srpska* that imposing court fees violated the applicant's right to a fair trial as well as her property rights.⁷⁸ The Court added that court fees represented a "disproportional and unreasonable burden" for the victim.⁷⁹
50. The narrowness of the Constitutional Court's decision means that entity-level courts in BiH are free to continue imposing court fees in many cases. Moreover, victims who are already in the midst of enforcement proceedings for payment of court fees will see no relief from this recent development. Given the ways in which the imposition of court fees violates victims' rights, it is imperative that the Special Rapporteur closely monitor the situation in BiH.

2.3.1 Imposing Court Fees on Victims Whose Claims Were Dismissed on the Basis of Zastara Violates Victims' Right of Access to Courts

The imposition of court fees on war crimes victims filing civil claims violates the ICCPR

51. The Human Rights Committee has stated that levying excessive court fees may violate Article 14 of the ICCPR, which protects an individual's right to be heard. According to the Committee, the "imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under

⁷⁸ *S.A. v. Republika Srpska*, AP 1101/17, (22 Mar. 2018).

⁷⁹ See also Daria Sito-Sucic, *Rights Groups Praise Top Bosnia Court for Scrapping Fines on War Victims*, REUTERS (3 April 2018), <https://www.reuters.com/article/us-bosnia-victims-court/rights-groups-praise-top-bosnia-court-for-scrapping-fines-on-war-victims-idUSKCN1HA1Q7>

article 14”:⁸⁰ in other words, the imposition of fees “may have a deterrent effect on the ability of persons to pursue the vindication of their rights.”⁸¹

52. As discussed above, courts in BiH – primarily in RS – have required victims to pay high court fees after rejecting their claims on the basis of statutes of limitations. As a result, these citizens, many of whom were already living on the edge of poverty, were subjected to various procedures for enforcing court-imposed fees, including State seizure of physical property and/or earnings. Such measures have had a “deterrent effect on the ability of persons to pursue the vindication of their rights.”⁸²

53. Therapists at a rehabilitative center for war victims in Tuzla described a client who “decided not to pursue a compensation claim, because he felt that it was pointless.” The man had “heard about the experience of the others, that he was going to be punished [by court fees], and that it would be even worse than his current [economic] situation.” Another victim expressed a similar sentiment: “[T]here is no justice. [If I had known how it would go,] I wouldn’t have done it.”⁸³ Some victims who had initiated the process of bringing claims dropped their cases midstream when they were alerted to the risk of court fees being imposed. In contravention of the ICCPR, the imposition of court fees has “de facto prevent[ed] their access to justice.

⁸⁰ Human Rights Comm., Gen Comm. 32, ¶ 11, U.N. Doc. CCPR/C/CG/32 (23 Aug. 2007).

⁸¹ *Id.*

⁸² *Id.*

⁸³ Interview with war crime victim, Lowenstein Clinic, 20 Jan. 2018.

The imposition of court fees on war crimes victims filing civil claims violates the European Convention on Human Rights

54. The European Court of Human Rights has held that - depending on the circumstances - the imposition of excessive court fees may violate the European Convention and, in particular, the Article 6 right of access to courts.⁸⁴ *Cindric and Beslic v. Croatia* is instructive.⁸⁵ The applicants were two Croatians whose parents had been kidnapped and murdered by unknown men during the Balkan conflict. Unable to obtain justice through the criminal courts, the plaintiffs sought civil damages for the killing of their parents, relying on Croatia's 2003 Liability Act. Although the Municipal Court granted the claim and awarded each plaintiff approximately EUR 40,000, the County Court reversed the judgment and ordered the plaintiffs to pay the state approximately EUR 6,800 in costs.
55. The plaintiffs then lodged a constitutional complaint, arguing that the Supreme Court had previously recognized a right to compensation caused by "death during the Homeland War in Croatia," citing seven judgments of the Croatian Supreme Court between 2006 and 2010. The Supreme Court, however, dismissed their complaint, and the plaintiffs sought redress at the European Court of Human Rights. They alleged that the practice of the Croatian courts "violated procedural obligations under Articles 2 and 14," left them without an effective remedy in violation of Article 13, deprived them of their right to access to a court, in violation of Article 6 § 1, and violated their right to the "peaceful enjoyment of their possessions protected under Article 1 of Protocol No. 1 to the Convention."⁸⁶

⁸⁴ See generally *Kreuz v. Polard*, Application no. 28249/95, Eur. Ct. H.R. paras. 60-67 (2001); *Podbelski and PPU Polpure v. Polard*, Application no. 39199/98, Eur. Ct. H.R. paras. 65-66 (2005); *Weissman and Others v. Romania*, Application no. 63945/00, Eur. Ct. H.R. para. 42 (2011). But see, *Reuther v. Germany*, Application no. 74789/01, Eur. Ct. H.R. (2003).

⁸⁵ *Cindric and Beslic v. Croatia*, Application no. 72152/13, Eur. Ct. H.R. (2016).

⁸⁶ *Id.*, para. 3.

56. Responding to the plaintiffs' allegations regarding the imposition of court fees, the European Court clarified the relevant standard under Article 6, noting that it had "already held that the imposition of a considerable financial burden after the conclusion of proceedings, such as an order to pay fees for the representation of the State according to the 'loser pays' rule, could well act as a restriction on the right to a court."⁸⁷
57. The "loser pays" rule refers to a system such as that of BiH, in which losing parties in civil suits are required to pay costs. As the Court noted in *Cindric and Beslic*, this type of system is not inherently problematic, as it can serve the legitimate aim of deterring frivolous lawsuits. The Court explained, however, that "a restriction affecting the right to a court will not be compatible with Article 6 § 1 unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved."⁸⁸ In other words, "the limitations applied must not restrict access [to a court] left to the individual in such a way or to such an extent that the very essence of the right is impaired."⁸⁹
58. Based on three key factors, the Court concluded that the imposition of court fees in the case was not proportional to the legitimate aim of deterring frivolous lawsuits and therefore violated Article 6 § 1. First, the Court explained that the plaintiffs' claims were not "devoid of any substance or manifestly unreasonable," as the State had previously accepted similar claims.⁹⁰ Second, the Court took into account the fact that the "opposing party ... was the Croatian State," which was represented by the

⁸⁷ Id., para. 118 (internal citations omitted).

⁸⁸ Id., para. 20.

⁸⁹ Id., para. 117.

⁹⁰ Id., para. 107.

State's Attorney's Office and thus was not entitled to private advocates' fees.⁹¹ Finally, the Court assessed the "applicants' individual financial situation."⁹² Considering all of these factors, the Court determined that ordering the plaintiffs to pay the costs of the State's representation amounted to "a disproportionate restriction of the applicant's right of access to a court"⁹³ and, as such, constituted a violation of Article 6 § 1.⁹⁴ For the reasons detailed throughout this document, the imposition of *zastara* in BiH constitutes a "disproportionate restriction of [victims'] right of access to a court", in contravention of Article 6 § 1.

Recent developments and the risk of continuing imposition of court fees

59. Despite the recent positive ruling by the BiH Constitutional Court, there is still a high risk that courts throughout BiH will continue to impose court fees. In March 2018 in *S.A. v. Republika Srpska*, the BiH Constitutional Court applied the findings of *Cindric and Beslic* to conclude that with respect to the *zastara* - based dismissal of the applicant's wartime claims, the RS court's imposition of fees under the "loser pays" rule violated the applicant's right of access to the courts.⁹⁵ Reiterating the European Court's finding that "loser pays" rules were not inherently illegitimate, the Constitutional Court focused on whether a "fair balance" had "been achieved between the general interest [of the State] and the appellant's fundamental rights" to property and access to justice.⁹⁶

⁹¹ Id., para. 108.

⁹² Id., para. 109.

⁹³ Id., para. 122.

⁹⁴ Id. para. 123.

⁹⁵ *S.A. v. Republika Srpska*, AP 1101/17, (22 Mar. 2018).

⁹⁶ Id., para. 40.

60. In *S.A. v. Republika Srpska*, the Constitutional Court explicitly referred to all three factors considered in *Cindric and Beslic*. In *S.A.*, as in *Cindric and Beslic*, the Court found that the victim brought (1) a legitimate claim against (2) the State and had been required to pay fees that were (3) disproportionate, given her income. With respect to the first factor, the Constitutional Court explained:

[T]he appellant lodged the civil action [in RS] claiming non-pecuniary damage she suffered being a victim of a war crime. It was established beyond doubt in the implemented proceeding that the appellant has the status of the detention camp survivor ... however, it was found that her claim was time-barred...[.] The Constitutional Court also notes ... that courts in [FBiH] allowed such civil actions, whereas courts in the Republika Srpska rejected them at the time ... Against this background, similar to the conclusion of the European Court in the case of *Cindrić* and others, the Constitutional Court finds that it cannot be said that the applicants' civil action against the respondent was "devoid of any substance or manifestly unreasonable" because courts in Bosnia and Herzegovina had different legal positions about the application of Article 377.⁹⁷

61. With respect to the second factor, the Court explained that, as in *Cindric and Beslic*, the applicant had sued the Entity, which was "financed from the Budget of the Republika Srpska" and, as such, "not in the same situation as an attorney" and not entitled to attorney's fees.⁹⁸ With regard to the final factor, quoting the first instance court, the Constitutional Court found that the applicant was "in a difficult financial situation, in view of the subject of the dispute and relevant value for the fee

⁹⁷ *Id.*, paras. 45-46 (citing *Cindric and Beslic*).

⁹⁸ *Id.*, para. 46.

collection,” and that “by paying the court fee, the appellant’s means of subsistence would be impaired to the extent that her social security would be in danger.”⁹⁹

62. The Constitutional Court’s decision in *S.A.* is consistent with *Cindric and Beslic* and correctly concluded that “in the concrete case ... the order [to pay court fees] constituted a disproportionate restriction of the appellant’s right of access to court” because it “impose[d a] disproportionate and excessive burden on the appellant in the given circumstances.”¹⁰⁰

63. However, the language used in the *S.A.* ruling is narrow, creating the risk that lower courts will continue imposing court fees. The judgment focuses on the “concrete case” at hand. The Court thus did not establish a general principle and took care to emphasize that the victim’s economic vulnerability contributed to the imposition of an “excessive” and disproportionate burden.¹⁰¹ The decision also highlights the fact that at the time the victim filed her claim, courts in RS and FBiH relied on different interpretations of Article 377.¹⁰² The Court’s reference to these divergent practices raises questions about whether court fees may be applied to cases filed after 2013, when, following the Constitutional Court’s decision in *Hamza Rekic*, courts in FBiH adopted the view advanced in RS. As a result of these factors, it is by no means guaranteed that courts will terminate the unlawful practice of saddling victims with court fees.

⁹⁹ *Id.*

¹⁰⁰ *Id.*, para. 55.

¹⁰¹ *S.A.*, above fn.95, para. 46.

¹⁰² *Id.* (“[T]he Constitutional Court finds that it cannot be said that the applicants’ civil action against the respondent was “devoid of any substance or manifestly unreasonable” because courts in Bosnia and Herzegovina had different legal positions about the application of Article 377 of LO to public authorities.”)

64. Furthermore, past practice indicates that regardless of the merits of the decision, its reasoning may not be followed even in cases that mirror that of the applicant in *S.A. v. Republika Srpska*. President Mirsad Ceman of the Constitutional Court recently disclosed that 91 of the Constitutional Court’s decisions had not been implemented by lower courts within the timeframe for implementation imposed by each of these decisions and that 23 had not been implemented at all.¹⁰³ Because the Constitutional Court lacks enforcement mechanisms, it can be difficult to ensure the compliance of lower-level courts.¹⁰⁴ A particularly concerning example is the RS authorities’ defiance of the Constitutional Court’s 2015 decision that Republika Srpska Day, a nationalist holiday celebrated on January 9, was unconstitutional.¹⁰⁵ Despite the decision, local authorities have continued to celebrate the holiday, including with a large parade in 2018.¹⁰⁶
65. As discussed above, should lower courts fail to broadly implement the ruling in *S.A.* and continue to impose court fees, they will violate the ICCPR and the principles established by the European Court. The imposition of court fees on victims who are unable to pay represents - as stated in *Cindric and Beslic* - a “disproportionate restriction” of the right of access to a court.

¹⁰³ Denis Dzidic, *Bosnian Constitutional Court ‘Under Pressure’ from Serb Referendum*, BALKAN INSIGHT, (30 Aug. 2016), <http://www.balkaninsight.com/en/article/bosnian-constitutional-court-under-pressure-from-serb-referendum-08-29-2016>

¹⁰⁴ *Id.*

¹⁰⁵ *Defying Court Ban, Republika Srpska Goes Ahead with ‘Statehood Day’*, RADIO FREE EUROPE: RADIO LIBRARY (9 Jan. 2018), <https://www.rferl.org/a/republika-srpska-statehood-day-defying-court-ban/28964699.html>

¹⁰⁶ *Id.*

2.3.2 Imposing Court Fees on Victims Whose Claims Were Dismissed on the Basis of Zastara Violates the State's Obligation to Minimize the Risk of Re-traumatizing Victims of Human Rights Abuses

66. In addition to violating victims' right of access to the justice system, the imposition of prohibitive court fees has violated the international obligation to avoid re-traumatizing victims of human rights abuse. This obligation has been articulated in key international instruments, including the Basic Principles and Guidelines on the Right to a Remedy,¹⁰⁷ General Committee Comment No. 3 on Article 14 of the Convention against Torture,¹⁰⁸ and the founding statutes of international criminal tribunals.¹⁰⁹
67. The U.N. Basic Principles on the Right to a Remedy state in Article VI: "The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation."¹¹⁰ Through this text, the Basic Principles establish that avoiding re-traumatization is a State obligation critical to fulfilling victims' right of access to justice and reparations.
68. The Committee against Torture has also explained that States parties to the Convention against Torture should "ensure that their domestic laws provide that a victim who has suffered violence or trauma should benefit from adequate care and

¹⁰⁷ UN Basic Principles on the Right to a Remedy, above fn. 9.

¹⁰⁸ Comm. against Torture, General Comment No. 3 (2012), ¶ 21, U.N. Doc. CAT/C/GC/3 (19 Nov. 2012).

¹⁰⁹ See fns. 113 to 118 below and accompanying text.

¹¹⁰ UN Basic Principles on the Right to a Remedy, above fn. 9, art. VI.

protection to avoid his or her re-traumatisation in the course of legal and administrative procedures designed to provide justice and reparation.”¹¹¹

69. Correspondingly, international tribunals, including the International Criminal Court (ICC), have prioritized the goal of mitigating the re-traumatization of victims. Article 68 of the ICC Charter requires that the Court “protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”¹¹² Recognizing that participation in criminal prosecutions can lead to re-traumatization, the ICC has developed a strategy to support victims, in part by drawing upon the Basic Principles.¹¹³ The ICC strategy thereby includes acknowledgement that interactions between victims and staff “must be carefully managed in order to avoid re-traumatization” and mandates the establishment of protective measures for groups of victims identified as more vulnerable.¹¹⁴

70. In addition, the International Criminal Tribunal for the former Yugoslavia (ICTY) has highlighted the importance of preventing the re-traumatization of victims, adopting several practices to achieve this goal. Article 22 of the Updated Statute for the ICTY mandates that the tribunal “provide in its rules of procedure and evidence for the protection of victims and witnesses.” In turn, the ICTY Rules of Procedure include several provisions intended to protect victims, such as allowing for written testimony instead of oral testimony,¹¹⁵ eliminating the requirement for corroboration of victim

¹¹¹ Comm. against Torture, General Comment No. 3, above fn. 108.

¹¹² Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, Article 68 (17 July 1998).

¹¹³ Report of the Court on the strategy in relation to victims, International Criminal Court, ICC-ASP/8/45, para. 6 (18-26 November 2009).

¹¹⁴ *Id.*, paras. 36-43.

¹¹⁵ Rules of Procedure and Evidence, IT/32/Rev. 46, Rule 92 *bis* (21 October 2011).

testimony in cases of sexual assault,¹¹⁶ and permitting sessions to be closed to the public.¹¹⁷ Furthermore, in individual cases, the Tribunal has consistently prioritized victims' needs when making decisions on testimony and evidence.¹¹⁸

71. As evidenced by the General Assembly's adoption of the U.N. Basic Principles on the Right to a Remedy, the aforementioned conclusions of the Committee against Torture, and international criminal tribunals' use of specific practices to prevent re-traumatization, international law has established that courts and other state actors have a duty to mitigate the re-traumatization of victims of human rights abuses.

72. By dismissing claims and requiring victims to pay high court fees, courts in BiH have disregarded that duty, causing or exacerbating the traumatization of thousands of victims. In interviews with the Lowenstein Clinic, victims explained that the practices of imposing court fees and confiscating property have created an atmosphere of terror. One male victim stated that he was living in fear that the authorities would seize his property, commenting, "We're reliving the suffering, the torture and the rapes that occurred in the camps through having to pay these claims."¹¹⁹ He added,

¹¹⁶ *Id.*, Rule 96.

¹¹⁷ *Id.*, Rule 79.

¹¹⁸ In *Prosecutor v. Dusko Tadic*, for example, the Tribunal granted a motion for witnesses to give evidence without seeing the accused in order to "minimize the possibility of re-traumatization." ICTY Case No. IT-94-1-I (Int'l Crim. Trib. for the Former Yugoslavia 2 Oct. 1995). A 2016 publication by ICTY Chief Prosecutor Serge Brammertz and his deputy, Michelle Jarvis, lists additional cases in which established practices were implemented to avoid the risk of re-traumatization, including *Prosecutor v. Momcilo Krajisnik and Biljana Plavsic*, *Prosecutor v. Mico Stanisic and Stojan Zupljanin*, *Prosecutor v. Radovan Karadzic*, and *Prosecutor v. Ratko Mladic*.

¹¹⁹ Interview with male former camp detainee, Lowenstein Clinic, 15 Jan. 2018.

“When it comes to us, we have no rights, and that is how the courts exercise their power over us. I feel betrayed by the state, the world, everyone.”¹²⁰

73. Another male victim characterized his experience with the court system as “miserable,” explaining: “I had spent so many years in courts and had to tell my story over and over again, so it was miserable.” He relayed that he had two heart attacks over the course of the process.¹²¹
74. A female victim noted that as a result of the imposition of court fees, she fears visiting her brother. He lives in the town in RS where she initiated her suit and she feels like visiting him could lead to interaction with the RS authorities, increasing the risk that her property will be seized. She was afraid, yet defiant: “I always keep my door locked. I feel helpless, but I will not pay them. If they come to seize my property, they will need to kill me.”¹²²
75. As demonstrated by victims’ comments, the practice of imposing court fees violates the Basic Principles’ call for States to “avoid [victims’] re-traumatization” during legal proceedings and does so without fulfilling any essential justice purpose. Although the Constitutional Court’s recent holding in S.A. is an important step, past decisions to impose court fees have already wrought significant damage – with no immediate remedies available to reverse prior outcomes – and there is no guarantee that lower courts will implement S.A.’s reasoning to prevent future such suffering.

¹²⁰ Id.

¹²¹ Interview with war crime victim, Lowenstein Clinic, 20 Jan. 2018.

¹²² Interview with female victim, Lowenstein Clinic, 15 Jan. 2018.

3. CONCLUSIONS AND RECOMMENDATIONS

76. The submitting organizations believe that the imposition of *zastara* on civil claims for wartime damages violates BiH's international obligation to ensure victims' right to a remedy and right to be heard. Furthermore, imposing court fees when victims' claims are dismissed on the basis of *zastara* is an unconscionable additional harm, as it violates both victims' right to be heard and international standards against re-traumatizing victims of human rights abuse.
77. The submitting organizations are thus of the conviction that a country visit to BiH by the distinguished Special Rapporteur would provide him with a first-hand understanding of the impact of *zastara*. Furthermore, such a visit would encourage domestic actors to curtail the violation of victims' rights entailed in the imposition of statutes of limitations and court fees.
78. We thereby request that the Special Rapporteur solicit an invitation from the government of BiH to carry out this visit. We note that on 7 May 2010, BiH issued a standing invitation to all UN thematic procedures, announcing that it will always accept visitation requests.
79. For the reasons explained above, the organizations submitting the present allegation respectfully ask the Special Rapporteur to recommend that BiH:
- a. Ensure that the Constitutional Court's decisions on *zastara* be re-examined for compliance with international standards and that, correspondingly, courts throughout BiH immediately cease applying statutes of limitations to compensation claims for wartime damages;
 - b. Ensure that the reasoning of the Constitutional Court's 2018 decision rejecting the imposition of court fees is broadly implemented in other wartime compensation cases at all stages of civil proceedings and that the practice of imposing court fees on victims of war crimes is brought to an end;
 - c. Renounce the existing debts of those victims in the midst of court-fee enforcement proceedings and return money to those victims who have already paid court fees based on *zastara*;

- d. Adopt a legislative amendment codifying an exception to the “loser pays” rule for victims of grave human rights abuses seeking civil redress;
- e. Establish a national reparations program for wartime victims of gross human rights violations that encompasses compensation, restitution, rehabilitation, satisfaction, and guarantees of non-repetition, as detailed in the Basic Principles.

80. We remain at the full disposal of the Special Rapporteur for any clarification or further information, and we commend the Special Rapporteur and his Secretariat for their commitment and indispensable work.

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