



人权理事会

第十六届会议

议程项目 3

增进和保护所有人权——公民权利、政治权利、
经济、社会和文化权利，包括发展权

强迫或非自愿失踪问题工作组报告

增编

对波斯尼亚和黑塞哥维那的访问*

内容提要

应波斯尼亚和黑塞哥维那政府的邀请，强迫或非自愿失踪问题工作组于 2010 年 6 月 14 日至 21 日对该国进行了访问。这次访问的目的是了解波斯尼亚和黑塞哥维那为解决强迫失踪/和失踪人员案件而做出的努力，并审查汲取的教训和良好做法。

战争结束 15 年之后，工作组确认波斯尼亚和黑塞哥维那在寻找和辨认失踪人员、赔偿受害者和起诉这一邪恶罪行方面所取得的巨大进展。然而，要实现真相权、司法权以及赔偿失踪人员及其家属的权利，仍有许多工作要做。

工作组的主要建议包括根据《失踪人员法》的规定，设立失踪人员中央记录局以及支助失踪人员家属基金。刑法中应增列一项独立存在的罪行。应对失踪人员研究所和负责挖掘和罪行起诉的检察官提供更多的支助。应制订一项赔偿强迫失踪受害者亲属全国方案以及加强保护和援助受害人和证人的方案。

* 本访问报告的内容提要以所有正式语文分发。报告附于内容提要之后，仅以原文分发。

Annex

Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Bosnia and Herzegovina (14 to 21 June 2010)

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I. Introduction

1. At the invitation of the Government of Bosnia and Herzegovina, the Working Group on Enforced or Involuntary Disappearances visited the country from 14 to 21 June 2010. The Working Group was represented by two members: its Chair-Rapporteur, Jeremy Sarkin, and Olivier de Frouville. The purpose of the visit was to learn about the country's efforts to address cases of enforced disappearances/missing persons, and examine lessons learned and good practices in dealing with cases of enforced disappearances/missing persons, the fight against impunity, and other issues, including truth, justice and reparations for victims.
2. The delegation held meetings with the Minister of Human Rights and Refugees and other high-level representatives of the Government, the Parliament and the judiciary at the State and entity levels, many non-governmental organizations, associations of families of missing persons, relatives of missing persons and other civil society actors all over Bosnia and Herzegovina, and representatives of the international community. The Working Group travelled to Sarajevo, Vogošća, Srebrenica, Tuzla, Banja Luka, KotorVaroš, Prijedor and Mostar. It visited various facilities for the identification of remains, exhumation sites, former detention camps and the Potočari memorial centre in Srebrenica. It also attended a commemoration event held by families of victims. At the end of the visit, a press conference was held in Sarajevo.
3. The delegation was impressed by how much has been done by the country to deal with the issues relating to missing or disappeared persons.
4. The Working Group expresses its gratitude and recognition to the Government of Bosnia and Herzegovina for inviting the Working Group to visit the country and for its positive cooperation before and during the visit.
5. The delegation would also like to thank the United Nations Resident Coordinator and the United Nations Development Programme (UNDP) in Bosnia and Herzegovina for the logistical and organizational support provided in connection with the mission. The Working Group was also deeply impressed by the level of professionalism and commitment of members of the civil society, and expresses its thanks to those NGOs and families of victims with which it met.

II. General observations

A. General context

6. Bosnia and Herzegovina declared its independence from the Socialist Federal Republic of Yugoslavia on 3 March 1992, after a referendum held on 1 March. This was followed by a three and a half years of armed conflict which ended when the General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto (Dayton Peace Agreement) was signed. The Dayton Peace Agreement also set up the constitutional framework of Bosnia and Herzegovina in its Annex 4 while addressing the issue of human rights protection in its Annex 6.
7. Bosnia and Herzegovina consists of two entities – the Federation of Bosnia and Herzegovina and the Republika Srpska – each with its own Government, President, Parliament and various administrative bodies. In addition, the Brčko District is a self-governing administrative unit. It is a federal democratic republic with a bicameral parliament consisting of the House of Representatives (42 members, of which two thirds are from the Federation and one third are from the Republika Srpska) and the House of

Peoples (15 members, of which two thirds are from the Federation and five are from the Republika Srpska). The three-member Presidency, which consists of one Bosniak and one Croat appointed directly from the Federation and one Serb, appointed directly from the Republika Srpska, rotates every eight months. The Presidency appoints the Chairperson of the Council of Ministers, who in turn appoints other ministers, subject to the approval of the House of Representatives.

8. The judicial system in Bosnia and Herzegovina is multi-layered and decentralized. At the State level, the Constitutional Court of Bosnia and Herzegovina is composed of nine members. Four judges are selected by the House of Representatives of the Federation, two by the National Assembly of the Republika Srpska, and three by the President of the European Court of Human Rights after consultation with the Presidency. It has exclusive jurisdiction over constitutional disputes that arise between two entities or between Bosnia and Herzegovina and one or both entities. The Constitutional Court also has appellate jurisdiction over issues related to the Constitution arising out of a judgment from another court in the country, and jurisdiction over issues referred to it by another court concerning compatibility with the Constitution, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its associated protocols, laws of Bosnia and Herzegovina, or international law pertinent to a court decision. Its decisions are final and binding.

9. The Court of Bosnia and Herzegovina is composed of 54 judges: 48 national and 6 international. It is divided into criminal, administrative, and appeals divisions and has jurisdiction only over specific types of crimes such as war crimes, financial crimes and crimes against the State. The Court operates at the same level as the Supreme Courts of the Federation and the Republika Srpska. At the entity level, in the Federation there are a Constitutional Court, a Supreme Court, 10 cantonal courts, and municipal courts. In the Republika Srpska there is a Constitutional Court, a Supreme Court, district courts and basic courts. In addition, Brčko District has its own courts.

10. At the State level, there is the Prosecutor's Office of Bosnia and Herzegovina. At the entity level, the Federation of Bosnia and Herzegovina has the Federal Prosecutor's Office and 10 Cantonal Prosecutor's Offices; the Republika Srpska has the Republic Prosecutor's Office and five District Prosecutor's Offices; and the Brčko District has the Public Prosecutor's Office.

B. Constitutional and legal framework

1. Constitution

11. Article II, paragraph 1, of the Constitution of Bosnia and Herzegovina stipulates that Bosnia and Herzegovina and both entities "ensure the highest level of internationally recognized human rights and fundamental freedoms".¹ Annex 6 of the Dayton Peace Agreement stipulates that the international human rights instruments, as enumerated in annex I to the national Constitution, are directly applicable in the national system. Additionally, the constitutions of the entities, the Statute of the Brčko District and the constitutions of the 10 cantons in the Federation establish the priority of human rights. There is a reference to persons "unaccounted for" in Annex 7, article V of the Dayton Peace Agreement, which stipulates that "[t]he Parties shall provide information through the tracing mechanisms of the ICRC [International Committee of the Red Cross] on all persons

¹ The General Framework Agreement: Annex 4 (Constitution of Bosnia and Herzegovina).

unaccounted for. The Parties shall also cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for”.

2. Criminal code

12. Enforced disappearance is not yet integrated as an autonomous crime in the criminal legislation of Bosnia and Herzegovina. Enforced disappearance appears as a crime against humanity only in article 172 of the Criminal Code of Bosnia and Herzegovina, when committed “as part of a widespread or systematic attack directed against any civilian population”.² The Code provides that those found guilty shall face at least 10 years or long-term imprisonment. The Criminal Code specifies that “[e]nforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with an aim of removing them from the protection of the law for a prolonged period of time”.³

13. The crime of enforced disappearance is not codified in the three criminal codes of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District. The Working Group was informed that the Ministry of Justice has set up a team to harmonize the criminal legislation at State and entity levels.

3. Law on Missing Persons

14. On 17 November 2004, the Law on Missing Persons⁴ entered into force. It deals with issues related to tracing missing persons from/in Bosnia and Herzegovina who disappeared between 30 April 1991 and 14 February 1996. It is aimed at, inter alia, improving the tracing process, defining what a missing person is, setting up central records and realizing social and other rights of family members of missing persons. The Law provides that State authorities are under a continuing obligation to trace and identify missing persons and that families have the right to know the fate, place of residence or, if dead, circumstances and cause of death, location of burial and to receive the mortal remains of the missing relatives. The process of tracing a missing person terminates when the person is identified.

15. Article 7 of the Law on Missing Persons provides for the establishment of the Missing Persons Institute (MPI), an independent institution in charge of tracing missing persons and accelerating their identification process. This includes finding the missing, exhuming graves, examining and identifying human remains and safekeeping them until they are to be handed to the victims’ families. It was co-founded in 2005 by the Council of Ministers of Bosnia and Herzegovina and the International Commission on Missing Persons (ICMP).

16. In its article 21, the Law also provides for the establishment of the Central Records of Missing Persons in Bosnia and Herzegovina (CEN), to be set up and maintained by the MPI. The purpose of CEN is to unify all the information available on missing persons at local or entity levels kept by authorities, non-governmental organizations, families of missing persons, Tracing Offices of the organizations of the Red Cross in Bosnia and Herzegovina and international organizations. However, the delegation was informed by MPI that they are still working on its establishment. Article 15 of the Law provides for the

² Art. 172, para. 1 The Criminal Code was adopted by the Bosnia and Herzegovina Parliamentary Assembly in 2003 and published in the *Official Gazette* of Bosnia and Herzegovina 37/03.

³ Art. 172, para. 2 (h).

⁴ *Official Gazette* of Bosnia and Herzegovina No. 50/04.

establishment of the Fund for Support to the Families of Missing Persons, which has not been set up yet.

4. Ratification of international human rights instruments

17. Bosnia and Herzegovina is party to the seven major United Nations human rights instruments.

18. Bosnia and Herzegovina signed the [International Convention for the Protection of All Persons from Enforced Disappearance](#) on 6 February 2007. The delegation was informed by the Ministry for Foreign Affairs that the Government was taking all necessary steps towards ratification and that it hoped to conclude the process shortly.

C. Issue of disappeared persons in Bosnia and Herzegovina and the special process on missing persons in the territory of the former Yugoslavia

19. The Working Group on Enforced or Involuntary Disappearances in the past did have a role in dealing with cases of persons who disappeared in the former Republic of Yugoslavia, including Bosnia and Herzegovina. The Commission on Human Rights established the special process on missing persons in the territory of the former Yugoslavia in 1994 and appointed a Working Group member to carry out this task. That person resigned in 1997 and the Commission on Human Rights requested the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia and other institutions to continue this task. At its fifty-first session, the Working Group on Enforced or Involuntary Disappearances considered the issue of the follow-up of cases of enforced disappearances in the Former Yugoslavia:

“[I]n view of the Commission’s request to the Special Rapporteur, the Working Group decided (...) that for the time being cases of disappearance which occurred in the Republic of Croatia and in Bosnia and Herzegovina until the date of entry into force of the Dayton Peace Agreement on 14 December 1995 will not be dealt with by the Working Group (...) and, consequently, the Group will not report to the Commission on Human Rights on these cases. With respect to cases (...) which occurred (...) after 14 December 1995, the Working Group will examine these cases in accordance with its methods of work.” (E/CN.4/1998/43, para. 22).

20. Taking into account in particular the fact that the Special Rapporteur had resigned more than ten years previously, the Working Group is grateful that Bosnia and Herzegovina extended an invitation to visit the country.

III. The right to the truth

21. Bosnia and Herzegovina suffered severe and massive human rights violations. It is estimated that more than 100,000 people were killed. More than two million people were displaced. Tens of thousands of people went missing/disappeared. The number of missing persons is a highly politicized and controversial issue. There are disagreements about the number of people who went missing. Nevertheless, the Working Group learned from various institutions that they largely agree that between 28,000 and 30,000 persons disappeared in Bosnia and Herzegovina during the conflict. Of these missing persons, it is estimated that about two thirds (about 20 000) have been accounted for, while about one third (about 8 000 to 10 000) remain missing.

22. The delegation was told about the difficulties involved in identifying remains because the perpetrators tried to hide their crimes by moving and hiding remains,

sometimes a few times. By 2010, official identifications had been made for 6,500 of the more than 8,000 persons who were recognized as having disappeared from Srebrenica. Nevertheless, some groups argue that a number of persons have not been reported missing for various reasons. Other groups argue that the number of cases has been overreported. Thus, the truth about the past is important to dispel the myths, attitudes and perceptions about who was killed, from which group civilian casualties occurred and who carried out these attacks.

23. All groups allege discrimination in the way they and their communities are dealt with even on the question of missing persons. The right to non-discrimination should be promoted and protected in any activities in Bosnia and Herzegovina, and all persons should be treated equally, wherever they live and whatever their ethnic origin. Legislation and processes to promote equality and prevent discrimination should be a priority.

24. As noted in paragraph 16 above, the Central Records of the Missing Persons provided for in the Law on Missing Persons has not yet been completed. This should be done as soon as possible and be made public with the listing of the ethnic origin of those classified as missing. This will promote transparency, accuracy and certainty about who went missing. It will reduce the politicization of these issues. The CEN will help to reduce prejudices, promote the truth about what occurred, and ensure that a true history of the conflict is revealed. For this reason an accurate CEN is critical for the country.

25. The Working Group notes that the major demand of family members is still for the truth about the fate of their missing loved ones. As far as finding missing persons, there have been major developments and advances. A great deal of effort has been made and a great deal of success has been achieved in the quest to determine the fate and the whereabouts of the missing persons. Steps taken include the actions of ICMP, the enactment of the Law on Missing Persons of 2004; the establishment of the Missing Persons Institute (MPI); and the significant number of exhumations and identifications carried out.

26. Before the MPI came into existence, various institutions dealt with these issues, but at the local level. In 1997 the Office of the High Representative launched a Joint Exhumation Process that allowed for the former warring parties to search for their missing on each others' territories. The role of coordinating the Joint Exhumation Process was later given to ICMP, which was established in 1996. The principal function of ICMP is to ensure that States work to find and identify those who have gone missing during armed conflict or because of human rights violations. It has its headquarters in Sarajevo. The role of ICMP in Bosnia and Herzegovina has been crucial.

27. Besides its role in the establishment of the MPI, ICMP has played a huge role in finding and identifying those who were found during the exhumation process. The Working Group had a number of meetings with ICMP. The delegation visited an exhumation site and saw the processes that were being performed to identify the remains with the assistance of ICMP. The delegation was shown a number of ICMP facilities where human remains were being kept and processes of identification were being undertaken. ICMP has 88,000 blood references from family members of those who went missing. For an identification to be made, a 99.95 per cent match is needed. As a result of all the scientific work by ICMP, including DNA matching, the identification process is very accurate. The Working Group was impressed by the professionalism, quality and importance of the work done by ICMP. It should remain actively engaged with this work in Bosnia and Herzegovina in the future.

28. ICMP was not the only international institution involved in dealing with the question of missing persons. Others that have played a role include the United Nations, the Office of the High Representative, the Organization for Security and Cooperation in Europe, the International Committee of the Red Cross (ICRC), the European Union and others. These

organizations should continue to work on the problem of enforced disappearances and missing persons in Bosnia and Herzegovina. Clarifying most cases of missing persons should be a part of the dialogue between Bosnia and Herzegovina and the European Union.

29. The MPI is mandated to investigate individual and mass graves, to exhume and identify bodily remains and to establish an accurate register of missing and identified persons. The MPI management consists of a Steering Board; a Board of Directors (executive body); a Supervisory Board in charge of financial operations and an Advisory Board which gives space to families to raise concerns regarding the work of the MPI. Family members are part of the various associations of the missing that exist in the country. Representatives of these associations sit on the Advisory Board of the MPI. Through this process families are able to monitor the activities of the MPI. Families can also use other tracing services, such as ICRC.

30. A split exists with regard to the structures that exist in the country to deal with missing persons, with a separate system in the Republika Srpska. The MPI looks for missing people all over Bosnia and Herzegovina. The Working Group was impressed by the Institute and its high level of commitment, its tripartite structure, the consensual atmosphere among its three directors, and the level of participation of families of the disappeared through an advisory board and direct contact. The MPI should be supported and strengthened; in particular, its independence should be guaranteed. More resources should be given to the Institute. All available technology necessary to detect and exhume graves should be provided. The Council of Ministers should also strengthen the independence and autonomy of MPI by detailing these issues in the law. The vacant post of the management board of the Institute should also be filled. At the same time more political and financial support is needed by the MPI. The Institute needs to be supported to a greater extent by the Republika Srpska authorities.

31. With regard to the process of finding and exhuming graves, the law is quite complicated and subject to problems. The process of exhumations is perceived by the families to be slow. The delegation was told that some perpetrators who know about mass graves are asking for money from families in order to reveal where the burial sites are. This needs to be dealt with by the authorities as it could have severe implications in the future.

32. When a grave site is identified for an exhumation to take place a court order must be obtained. This has not always been easy, and determining which court and which prosecutor has jurisdiction has been a complicating factor. Cantonal and district prosecutors are not always willing to accept an order coming from the Bosnia and Herzegovina prosecutor's office. The Working Group was pleased to learn that, following its visit, on 31 August 2010, the State Prosecutor announced that from 1 January 2011, all exhumations and identifications would fall under the jurisdiction of the State Prosecutor's Office. This is a positive step and the Working Group looks forward to its implementation.

33. The number of prosecutors working on exhumations and war crimes prosecutions has been extremely low. They also have few resources and staff. Additional staff should be appointed to accelerate the process.

34. Meetings should be held periodically to ensure the establishment and maintenance of a fruitful dialogue between authorities and the relatives of disappeared people and, eventually, to enforce the right of the latter to know the truth and to rebuild the confidence of civil society towards institutions and establishing mutual trust.

35. Those working on exhumations need more assistance and equipment. To speed up the process more forensic pathologists are needed. Currently there are very few full-time pathologists; therefore some private pathologists are used, which is neither cost-effective nor the best way to get results. A forensic centre could be established. The conditions under

which those who perform the exhumations work are often inadequate; more resources should be assigned for this work.

36. Families are not going to be satisfied until they can bury their loved ones with dignity and proper religious rites. Nevertheless, the process to determine the location of mass graves is becoming more difficult with the passage of time. Between 8,000 and 10,000 people are still missing. It is now perpetrators who largely have the information on where graves can be found. Thus, it is important to bring perpetrators to justice to try to enhance the truth discovery process. To encourage more people to reveal information concerning grave sites, witness protection programmes should be strengthened. Witness support and protection should also be provided to families of missing persons who are at times threatened, intimidated and sometimes blackmailed. Plea agreements may assist the discovery of truth recovery as information that is unknown may be revealed. When plea bargains occurs with a person suspected of having information on missing persons, providing that information should be part of the agreement. But there is also in some places a lack of cooperation from the local authorities where there could be mass graves. Other countries could also assist in the information gathering process. More could be done in countries in the region. More assistance could be rendered where prosecutions are occurring, for example by other countries ensuring the provision of evidence, etc. These countries could also conduct their own trials but not for political reasons.

37. Besides the processes to find those missing there have been various processes to determine the truth of what occurred in Bosnia and Herzegovina. None of these processes allowed victims to testify in public.

38. The idea of having one overarching truth discovery process has been debated for many years. According to a UNDP opinion poll in 2010, about two thirds of people interviewed did not know what a truth commission was. However, among those who knew about such a process, 90 per cent stressed the importance of having a truth commission in Bosnia and Herzegovina. Some fear that a truth commission process could undermine the process to hold perpetrators accountable. While the International Criminal Tribunal for the Former Yugoslavia has convicted a number of persons, it will close its doors shortly. It has been estimated that thousands of perpetrators have not been indicted. National justice will continue. Victims could benefit from a truth process, but not as a substitute for justice. This could include a truth mechanism (possibly a national truth and reconciliation commission). There could also be localized commissions of inquiry. International organizations should give their full support to such activities. The Bosnia and Herzegovina National Strategy for Transitional Justice should be fully supported and funded. It is crucial that a transitional justice strategy should cover non-judicial mechanisms – truth-telling, reparations and institutional reforms.

IV. The right to reparation

39. Bosnia and Herzegovina does have some programmes to provide those affected by the conflict with compensation. These programmes are however mainly concerned with the provision of individual monthly payments to the families of those killed or missing as well as victims of sexual violence. There is also a restitution programme for those who lost property during the war. There is therefore the need for an all-inclusive and thorough reparations programme. However, many people seemingly did not know about those laws. Victims claim that even public servants who are meant to administer these programmes are not knowledgeable about them, find them complicated to administer, or need approval from elsewhere for such measures to be given. For this and other reasons many claim that these processes are extremely difficult to access. Many victims who seemingly should be entitled to reparations are not receiving such assistance for a variety of reasons. Many allege that

there is a lack of information about such programmes and others allege discrimination in the provision of such services. They argue that in some areas while the law in theory does not discriminate between the ethnic groups anymore, implementation is designed to exclude certain ethnic groups from such services.

40. The State, in cooperation with entity authorities, should take steps, including the amendment of legislation, to ensure that all relatives of disappeared people have access to social benefits and other measures of social support irrespective of where they live. Such legislation should be adopted on the State level in order to avoid the continuation of the current situation in which there exists discrimination in access to and levels of social benefits depending on the entity.

41. More assistance should also be given to associations of families of disappeared at the State level, without any discrimination as to ethnic origin. Measures should be taken in order to ensure that members of families of disappeared persons are entitled to social benefits and other measures of social support irrespective of where they live, including health care, special education programmes and psychological assistance.

42. The only instrument related to compensation at the State level in Bosnia and Herzegovina is the Law on Missing Persons. The Law provides that family members of missing persons “who were supported by the missing person and who are in need of support, are entitled to monthly financial support”. A person is not entitled to support if they receive any other support such as rights based on social welfare, pension-disability insurance, veteran disability insurance, income from work, individual performance of economic or independent activity and other income that can be considered support in accordance with the Bosnia and Herzegovina legislation.

43. The Law on Missing Persons provides for reparation by the creation of a State-level fund called the Fund for Support to the Families of Missing Persons. This would allow reparation and assistance to associations of families. However, the fund has not been established, even though the Constitutional Court on a number of occasions ordered the establishment of the fund.⁵ Its establishment has been held up by two issues: the failure to agree on the location of the fund and the amount of money each entity should contribute to the fund. The entities have different views on which entity should pay a greater share. This stalemate has dire effects for victims and should be resolved as soon as possible. Establishing the fund should be a priority.

44. The Working Group recalls that reparations are not only financial in nature. Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance (1992) establishes 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 rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation”. A national programme on reparations for relatives of victims of enforced disappearance that includes compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition should be established. Reparation programmes should take into account a gender perspective, considering that most of family relatives of missing persons are women.

45. As the Working Group noted in its general comment (1997) on article 19 of the Declaration, States are obligated to adopt legislative and other measures in order to enable the victims to claim compensation before the courts or special administrative bodies

⁵ Many orders of the Constitutional Court are not implemented. Such orders should be implemented, and failure to comply with them should be prosecuted as provided by the law of Bosnia and Herzegovina.

empowered to grant compensation. Victims and their families are also entitled to compensation for the suffering during the time of disappearance and in the event of the death of the victim dependants are entitled to compensation (E/CN.4/1998/43, para. 72). Compensation shall be “adequate”, i.e. proportionate to the gravity of the human rights violation (e.g. the period of disappearance, the conditions of detention, etc.) and to the suffering of the victim and the family. Monetary compensation must be given for any damage resulting from an enforced disappearance such as physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation and costs required for legal or expert assistance (ibid., para. 73). States also have an obligation to provide for a presumption of death procedure or a similar process which entitles dependants to compensation (ibid., para. 74). In addition to the right to monetary compensation, the right to obtain redress for acts of enforced disappearance also includes “the means for as complete a rehabilitation as possible”, which includes medical and psychological care, legal and social rehabilitation, rehabilitation for any physical or mental damage, guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to one’s place of residence and similar forms of restitution, satisfaction and reparation which may remove the consequences of the enforced disappearance (ibid., para. 75).

46. A problem raised by some is that in the past for a family to receive a State pension under the law, the missing person had to be declared dead. Many families have done this even though the fate or whereabouts of the person is unknown. This has been the cause of much emotional hardship. Receiving reparations should not be contingent on getting a death certificate. The Law on Missing Persons changes this and now obtaining such a certificate is not necessary. However, the Law states that “three years after the date of the coming into force of the Law, persons registered as missing in the period from 30 April 1991 to 14 February 1996 whose disappearance has been verified within the CEN Bosnia and Herzegovina, shall be considered dead and this fact shall be officially entered in the Register of Death”. While the CEN is not yet operating, when it is this provision will be problematic as it declares people dead possibly against the wishes of their loved ones. It must be remembered that an enforced disappearance is a continuous crime until the person’s fate or whereabouts is determined. It should therefore be clarified what the impact of this provision will be for families and for investigations and prosecutions.

47. To commemorate the issue of missing persons, without choosing a day that is acceptable to one community only, 30 August (International Day of the Disappeared) should be declared as the national day for commemorating the memory of all missing persons in Bosnia and Herzegovina. This would commemorate victims of enforced disappearance without ethnic distinction. This day is already commemorated by some in the country, including for example, the Parliament of Bosnia and Herzegovina. Other steps to promote reconciliation in the country also should occur. More apologies from more actors are necessary. Apologies must be part of a process to ensure reconciliation. In addition more should be done on the issues of preventing future cases of enforced disappearances.

48. At present the issue of memorials has caused much controversy and unhappiness. There are many problems associated with them. For example, at times relatives who wish to attend burial ceremonies or visit graves in other parts of the country are prevented from doing so or harassed when they do. The issue should be dealt with by the national authorities. Families of those killed should be allowed to visit the sites where their loved ones were killed, without being opposed, denied access or provoked by others. Obviously, this should not be done in a provocative way. Political leaders should be promoting tolerance and the security forces should provide access and security to places where families wish to visit on important dates. A national law on the issue of memorials should be enacted. Such a law should set out the criteria and the process for establishing memorials, as victims across the country complained that memorials they wished to erect were

disallowed by local authorities controlled by those from other ethnic groups. It was also argued that some monuments and memorials were erected in places in order to intimidate victims from other ethnic groups. In some places memorials were erected by the municipality without any consultation. At the same time some municipalities reportedly would not fund memorials for the other side and they would not even allow those groups to use their own money to erect a memorial. Therefore Bosnia and Herzegovina should adopt measures to achieve satisfaction, such as the setting up of memorial sites and monuments. It should adopt a comprehensive legal framework to regulate the subject with a view to avoiding re-victimization and further violations of the right to dignity.

V. The right to justice

49. The realization of the right to justice in Bosnia and Herzegovina takes place in an exceptional context. The international framework set up during and after the war greatly favoured the prosecution and punishment of perpetrators of enforced disappearances and, more generally, of international crimes. Despite tremendous efforts, impunity remains a problem in the country. In many communities perpetrators live side by side with their victims. This is due to the huge number of alleged perpetrators, believed to be in the thousands, making it almost impossible to try them all in a short period of time.

50. The prosecution of crimes began at the international level, but the national institutions have been more and more involved in the process.

51. At the international level, the International Criminal Tribunal for the Former Yugoslavia was the first international tribunal with jurisdiction over serious international crimes to be set up after the experiences of Nuremberg and Tokyo. The Tribunal has prosecuted a number of perpetrators, mainly high-level officials. However the number of prosecutions remains limited: 161 persons have been indicted and, as of today, 125 trials have been completed. Among those, 12 accused have been acquitted while 62 were found guilty. The Statute of the Tribunal does not contain the crime of enforced disappearance. This likely explains why there have been no convictions for this crime, although enforced disappearance has been mentioned in at least two judgements of the Tribunal, once as a crime against humanity (“other inhuman acts”)⁶ and once as an act of genocide (“causing serious mental harm to a member of the group”)⁷.

52. The International Criminal Tribunal for the Former Yugoslavia could not try all perpetrators in the former Yugoslavia but has had to concentrate on the “main perpetrators”, that is to say those who bore the “greatest responsibility for the crimes committed”. In 2003 the Tribunal presented to the Security Council a Completion Strategy, which planned to close the tribunal in a number of years and to defer progressively the responsibility of further cases to national tribunals, in particular the tribunals of the countries of the former Yugoslavia.

53. At the national level, measures were taken to create appropriate normative and institutional frameworks. New criminal codes were adopted: in the Federation (1998), in the Republika Srpska (2000), in the Brčko District (2001) and at the State level (2003). In those codes, war crimes previously codified by the Criminal Code of the former Yugoslavia

⁶ See the judgement of the Trial Chamber in Kupreškić and others, para. 566. And also Kvočka and others Trial Judgement, para. 208, citing Kupreškić.

⁷ And, in the context of the genocide in Srebrenica: Blagojević and Jokić Trial Judgement, 17 January 2005, para. 653.

were included. To these were added new international crimes, the definition of which was inspired from the Rome Statute of the International Criminal Court.

54. Enforced disappearances are considered crimes only at the State level. The Criminal Code of Bosnia and Herzegovina, adopted in 2003, provides for the punishment of crimes against humanity, through a text which is inspired from the Rome Statute and thus includes, among particular crimes, the crime of enforced disappearance (art. 172, para. 1-i). The Court of Bosnia and Herzegovina provided the Working Group with a list of 10 judgements (trial chamber or appeal chamber) where the accused was convicted on the basis of this provision, for having committed the crime of enforced disappearance. While welcoming these developments, the Working Group must however reiterate the reservations it already expressed elsewhere (see its general comment on the definition of enforced disappearances⁸) on the specific definition of enforced disappearances resulting from the Rome Statute. The Working Group recommends that the Court of Bosnia and Herzegovina interpret this definition in line with the more adequate definition provided for in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (2006); or that the Bosnia and Herzegovina Parliament amend the Criminal Code to that effect. Furthermore, the Working Group recommends that, in accordance with the Declaration and the Convention, the Code be amended to include enforced disappearances as an autonomous crime, so that it can be punished in situations where it cannot be qualified as a crime against humanity.

55. In Bosnia and Herzegovina, article 118, para. 2 of the Criminal Code provides that “an amnesty for the criminal offences prescribed under this Code, may be granted by the Parliamentary Assembly of Bosnia and Herzegovina by virtue of a law”. The Working Group notes that the Criminal Code does not set any exception to the power of the Parliament to grant amnesty. The Working Group recalls that the first paragraph of article 18 of the Declaration on the Protection of All Persons from Enforced Disappearances states: “Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.” In its general comment (2005) on article 18 of the Declaration, the Working Group insisted that “States should refrain from making or enacting amnesty laws that would exempt the perpetrators of enforced disappearance from criminal proceedings and sanctions, and also prevent the proper application and implementation of other provisions of the Declaration” (para. 1). More recently, in its general comment (2010) on the right to the truth in relation to enforced disappearances, the Working Group expressed its opinion that no “limitation [to the right to justice] may occur when the enforced disappearance amounts to a crime against humanity” (para. 8). Accordingly, the Working Group recommends that the Code be amended to remove the possibility of granting amnesty for serious crimes of international law, including the crime of enforced disappearance, in accordance with international customary law and in line with article 18 of the Declaration.

56. At the local level (Federation, Republika Srpska, Brčko District), the criminal codes do not include crimes against humanity and thus the specific crime of enforced disappearance. Even if the law were to be amended, the jurisprudence of local courts would prevent them from convicting the accused on the basis of this crime, as they refuse to apply the 2003 criminal codes to crimes perpetrated in the period 1992-1995. They instead apply the Code of the former Yugoslavia. This position remains, despite the fact that the issue was dealt with in the *Maktouf* case, first by the War Crimes Chamber appellate panel of the Court of Bosnia and Herzegovina (judgement of 4 April 2006), and then by the

⁸ Available from http://www2.ohchr.org/english/issues/disappear/docs/disappearance_gc.doc.

Constitutional Court. In its judgement, the Court found that the retroactive application of the Bosnia and Herzegovina Criminal Code was permissible under article 7, paragraph 2, of the European Convention on Human Rights because those acts, at the time when they were committed, were already criminal according to the “general principles of law recognized by civilized nations” (judgement of 30 March 2007).

57. The Working Group concurs with this position and would also like to underline the fact that an enforced disappearance is a continuous crime and thus can be punished on the basis of an *ex post* legislation without violating the principle of non-retroactivity, for as long as the fate or the whereabouts of the disappeared person has not been clarified (see the Working Group’s general comment (2010) on enforced disappearances as a continuous crime). The Working Group thus recommends that the criminal codes at the entity and district levels be harmonized with the Criminal Code at the State level, so that they provide for the repression of enforced disappearances both as a crime against humanity and as an autonomous crime and sets the appropriate penalties. These penalties should correspond to the level of those applied for the most serious crimes. The Working Group also recommends that the local courts change their position on the issue of the non-retroactivity of the new criminal codes, as far as international crimes are concerned.

58. On the institutional side, the Completion Strategy for the International Criminal Tribunal for the Former Yugoslavia triggered the signature of a memorandum of understanding between the Office of the High Representative and the Tribunal to create a special prosecutor’s office and a special chamber within the Court of Bosnia and Herzegovina, having jurisdiction to prosecute and try serious crimes of international law. The War Crimes Chamber acquired jurisdiction over cases transferred to it by the Tribunal under Rule 11 bis of its rules of procedures, and also over all the cases of war crimes which were at that time before local courts, i.e. cantonal courts from the Federation and district courts from the Republika Srpska, as well as the district court of Brčko District.

59. In 2008, however, a National War Crimes Prosecution Strategy was adopted, which established a new logic of subsidiarity in favour of local courts: the rule being that the more complex cases (“highly sensitive cases”) would be kept under the jurisdiction of the Court of Bosnia and Herzegovina, while less complex cases (“sensitive cases”) would be deferred to the jurisdiction of local courts. A number of cases are thus tried before local courts, and the number of those cases should logically increase in the future.

60. The Court of Bosnia and Herzegovina and the Bosnia and Herzegovina Office of the Prosecutor were created as “hybrid” institutions composed partly of international judges and international prosecutors. However, the plan is that the international component should come to an end in the near future. The Working Group heard from different stakeholders that the presence of international judges was considered an important asset in the functioning of the Court and recommends that this component be kept for as long as necessary to ensure that justice is delivered and is seen to be delivered in an impartial manner.

61. Most of the local courts are not well prepared to prosecute and try perpetrators of international crimes. For instance, entity and district courts have no adequate courtrooms or technological equipment that would allow an efficient protection of witnesses during trial. There are no special prosecutors at the local level in charge of “war crimes”. The capacities of cantonal and districts courts to try war criminals should be strengthened so as to enable them to try most of the cases in the future in appropriate conditions.

62. The procedure criminal codes at all levels were amended, shifting the approach from civil law to common law, with the abolishment of investigative judges and the creation of an independent prosecutor and the introduction of the guilty plea. This new procedure was questioned because of the use of plea bargaining, which might be used to obtain evidence –

for instance to locate mass graves – but also to reduce drastically the sentence incurred. Plea bargaining should be used cautiously in cases of serious crimes, in particular enforced disappearances. The conditions under the plea should include, when appropriate, the obligation to cooperate in uncovering the truth about the fate and whereabouts of disappeared persons, and in particular through the discovery of mass graves.

63. Various concerns were expressed by the families of the disappeared. In particular, it was alleged that the contact between the families and prosecutors were poor or non-existent, and that it was difficult to get information about their cases. Some families believe that their cases had not been taken up at all, even though they had provided the evidence necessary to trigger an immediate prosecution. In Prijedor, the Working Group met with a victim who had lost 33 members of his family in 1992, including his wife and children, while he was working abroad. This victim submitted his case several times to the Prosecutor to no avail, even though the identity of some of the perpetrators is known to him. In despair, he submitted his case to the European Court of Human Rights.

64. The justice system in Bosnia and Herzegovina should give more attention to the victims. An effective public system of free legal aid should be established to enable relatives of disappeared persons to receive legal support if they cannot afford it. Offices of the prosecutors and courts at all levels should have consistent rules in dealing with the public in general and with families of the disappeared in particular. In particular, families of victims should be more regularly given information on the process of investigation, the results of those investigations and whether trials might be forthcoming. Moreover, the Working Group recommends that special personnel be appointed to meet with families and inform them, on a regular basis, of progress made in their cases.

65. There were also concerns that the witnesses and victims were not well protected against reprisals or intimidations and that the psycho-sociological assistance provided to them was insufficient. A person with whom the Working Group met told about his experience as a witness: he complained that he was threatened on the telephone before his appearance before the Court. According to this person, witness protection is almost non-existent: “It is reduced to a single phone call to the witness prior to the court proceeding ... During and after trial, witnesses never hear back from the programme.”

66. Legislation has been adopted to tackle these problems: the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses, adopted at the level of Bosnia and Herzegovina, the entities and Brčko District, and the Law on Witness Protection Programmes, adopted at the State level only. The Working Group deems that more remains to be done to implement these laws.

67. The Working Group was informed that programmes of support, including psychological support, have been initiated at the State level and in some places at the local level, very often in cooperation with local NGOs. However, such programmes need to be strengthened and systematized.

68. More should be done to protect and offer assistance to victims and witnesses, in particular women. In particular, the programme for the protection of witnesses should be improved and expanded at the State level, and similar programmes should be created at the local level. In the same spirit, programmes of psychological assistance should be generalized and strengthened where they already exist. Psychological support to victims and witnesses should not be restricted to a short period of time before the person appears before the court. It is well known that such support is crucial prior to the testimony, during the trial, but also for a certain period of time after the trial. Such programmes should also include a gender perspective and give special attention to the specific trauma suffered by members of the family of a disappeared person.

69. In many cases perpetrators continue to hold office, often in the same communities where victims and their families live. At times the perpetrators still hold high-level offices. This constitutes a permanent threat and intimidation for the victims. Measures of vetting should be improved and/or systematized. When such measures have been taken in the past, it is not clear whether those identified as perpetrators have been dismissed from public offices, including the police force and public companies.

VI. Conclusions and recommendations

70. Fifteen years after the end of the war, the Working Group on Enforced or Involuntary Disappearances acknowledges the immense progress made by Bosnia and Herzegovina in the search and identification of the disappeared, reparations for victims and the prosecution of this heinous crime. However, taking into account the huge proportion of the problem, the Working Group is also aware that much remains to be done to achieve the rights to the truth, the right to justice and the right to reparation for the disappeared and their families.

71. In the context currently prevailing in Bosnia and Herzegovina, the Working Group identified a central issue in the claim by all victims and all groups in the society to be treated equally and without any discrimination of any kind.

It is recommended that the right to non-discrimination be promoted and protected in any activities, and that all persons in Bosnia and Herzegovina should be treated equally, wherever they live and whatever their ethnic origin. Legislation and processes to promote equality and prevent discrimination should be a priority.

72. The Working Group notes that Bosnia and Herzegovina was reviewed under the universal periodic review procedure in February 2010. However, few recommendations concern the issue of enforced disappearances and missing persons in Bosnia and Herzegovina.

It is recommended that the Human Rights Council should follow up on the implementation of the recommendations made by the Working Group in the present report, in particular on the occasion of the review of Bosnia and Herzegovina during the second cycle of the universal periodic review.

A. The right to the truth

73. The Working Group recalls that “[t]he right to the truth in relation to enforced disappearances means the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrator(s)” (general comment on the right to the truth in relation to enforced disappearances, para. 1).

74. The Working Group acknowledges that, with regard to finding missing persons, there have been major developments and advances. A great deal of effort has been made and a great deal of success has been achieved in the quest to determine the fate and the whereabouts of the missing persons. Steps taken include the actions of the International Commission on Missing Persons (ICMP), the enactment of the Law on Missing Persons of 2004; the establishment of the Missing Persons Institute (MPI); and the significant number of exhumations and identifications carried out.

75. The Working Group however notes that there are also several shortcomings. In particular, while the Law on Missing Persons provides for the Central Records of Missing Persons (CEN), this has not yet been completed.

The Working Group recommends that this should be done as soon as possible and be made public with the listing of the ethnic origin of those classified as missing.

76. The Working Group notes that the role of ICMP in Bosnia and Herzegovina has been crucial. It has been a key part in the discovery and identification of the missing.

ICMP should remain actively engaged with this work in Bosnia and Herzegovina in the future.

77. Other institutions that have played a role include the United Nations, the Office of the High Representative, the Organization for Security and Cooperation in Europe, the International Committee of the Red Cross, the European Union and others. These organizations should continue to work on the problem of enforced disappearances and missing persons in Bosnia and Herzegovina. In this connection:

(a) Other institutions should continue to assist Bosnia and Herzegovina and the families of the disappeared to realize the right to truth, the right to justice and the right to reparation;

(b) In particular, clarifying most cases of missing persons should be a priority in the dialogue between Bosnia and Herzegovina and the European Union.

78. Domestically, the MPI plays a major role in the search of the disappeared. The Working Group recommends that:

(a) The MPI be supported and strengthened. In particular, its independence should be guaranteed;

(b) More resources be put at the disposal of the MPI to allow it do its work;

(c) All available technology necessary to detect graves and to exhume them be provided to the institution;

(d) The Council of Ministers also strengthen the independence and autonomy of MPI by detailing these issues in the law;

(e) More independence and autonomy be given to the MPI by amending the relevant legislation;

(f) The vacant posts of the management board of the MPI be filled;

(g) The MPI be provided with more political and financial support;

(h) MPI be supported to a greater extent by the Republika Srpska authorities.

79. The number of prosecutors working on exhumations and war crimes prosecutions is extremely low. They also have few resources and staff. In this connection:

(a) Additional staff should be appointed to accelerate the process;

(b) Those working on exhumations should be provided with needed assistance and equipment;

(c) To speed up the process, needed additional forensic pathologists should be provided;

(d) More resources should be given to the people working in this area to enable them to complete these gruelling tasks.

80. Plea agreements may assist the discovery of truth recovery as information that is unknown may be revealed.

When plea bargains occur with a person suspected of having information on missing persons, providing such information should be part of the agreement.

81. Other countries could assist in the information gathering process to locate further grave sites. In this connection:

(a) More could be done in other countries in the region to investigate cases perpetrated by people who now live on their territory;

(b) More assistance could be rendered where prosecutions are occurring, for example by other countries ensuring the provision of evidence, etc.;

(c) Such countries could also conduct their own trials, but not for political reasons.

82. Other processes to arrive at the truth should be explored. This could include a truth mechanism (possibly a national truth and reconciliation commission or other more localized bodies of inquiries), but not as a substitute for justice. In this connection:

(a) The Bosnia and Herzegovina National Strategy for Transitional Justice should be fully supported and funded;

(b) It is crucial that a transitional justice strategy should cover non-judicial mechanisms – truth-telling, reparations and institutional reforms.

B. The right to reparation

83. As far as reparations are concerned, a lot remains to be done to provide integral reparation to the disappeared and their families.

84. The Working Group recommends that:

(a) The Fund for Support to the Families of Missing Persons provided for by the Law on Missing Persons be established as a matter of priority;

(b) The State, in cooperation with entity authorities, take steps, including the amendment of legislation, to ensure that all relatives of disappeared people have access to social benefits and other measures of social support irrespective of where they live. Such legislation should be adopted on the State level in order to avoid the continuation of the current situation in which there exists discrimination in access to and levels of social benefits depending on the entity;

(c) More assistance be given to associations of families of disappeared persons at the State level, without any discrimination as to ethnic origin. Measures should be taken in order to ensure that members of families of disappeared persons are entitled to social benefits and other measures of social support irrespective of where they live, including health care, special education programmes and psychological assistance;

(d) A national programme on reparations for relatives of victims of enforced disappearance that includes compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition be established. Reparation programmes should take into

account a gender perspective, considering that most family relatives of missing persons are women;

(e) To commemorate the issue of missing persons, without choosing a day that is acceptable to one community only, 30 August (International Day of the Disappeared) be declared as the national day for commemorating the memory of all missing persons in Bosnia and Herzegovina;

(f) More apologies from more actors are needed. They must however be part of a process that is necessary to ensure reconciliation. In addition more should be done on the issue of preventing future cases of enforced disappearances;

(g) A national law on the issue of memorials be enacted. This law on memorials should set out the criteria and the process to establish such memorials.

85. The Law on Missing Persons stipulates that all persons registered in the CEN Bosnia and Herzegovina shall be considered dead. While the CEN is not yet operating, when it is, this provision will be problematic, as it declares people dead possibly against the wishes of their loved ones. It must be remembered that an enforced disappearance is a continuous crime until the person's fate or whereabouts is determined.

It should therefore be clarified what the impact of this provision will be for families and for investigations and prosecutions.

C. The right to justice

86. While great progress has been made to bring domestic legislation into conformity with international law, there are still gaps and problems, in particular on the issue of enforced disappearances.

87. Domestic criminal legislation still needs to be improved. In particular, the Working Group recommends that:

(a) The Court of Bosnia and Herzegovina interpret the definition of enforced disappearances as a crime against humanity, contained in article 172, paragraph 1-i of the Bosnia and Herzegovina Criminal Code, in line with the more adequate definition provided for in article 2 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance; or for the Bosnia and Herzegovina Parliament to amend the Criminal Code to that effect;

(b) In accordance with the Declaration and the Convention, the Code be amended to include enforced disappearances as an autonomous crime, so that it can be punished in situations where it cannot be qualified as a crime against humanity;

(c) The Criminal Code be amended to remove the possibility of granting amnesty for serious international crimes;

(d) The criminal codes at the entity and district levels be harmonized with the Criminal Code at the State level, so that they provide for the repression of enforced disappearances both as a crime against humanity and as an autonomous crime and sets the appropriate penalties. The penalties should correspond to the level of those applied for the most serious crimes;

(e) The local courts change their position on the issue of the non-retroactivity of the new criminal codes, as far as international crimes are concerned.

88. On the institutional side, the Working Group heard from different stakeholders that the presence of international judges was considered an important asset in the functioning of the Court.

The Working Group therefore recommends that this component be kept for as long as necessary to ensure that justice is delivered and is seen to be delivered in an impartial manner.

89. At the local level, the Working Group is aware that most of the local courts are not well prepared to prosecute and try perpetrators of international crimes.

The capacities of cantonal and districts courts to try war criminals should be strengthened so as to enable them to try most of the cases in the future in appropriate conditions.

90. The Working Group met with several victims who expressed various concerns and who sometimes felt left aside by the official institutions. The Working Group deems that the justice system in Bosnia and Herzegovina should give more attention to the victims. In this connection:

(a) An effective public system of free legal aid should be established to enable relatives of disappeared persons to receive legal support if they cannot afford it;

(b) Offices of the prosecutors and courts at all levels should have consistent rules in dealing with the public in general and with families of the disappeared in particular. In particular, families of victims should be more regularly given information on the process of investigation, the results of those investigations and whether trials might be forthcoming;

(c) Special personnel should be appointed to meet with families and inform them, on a regular basis, of progress made in their cases;

(d) Greater training for all public servants working on issues related to enforced disappearance should be held to allow them to be better informed on the issues and to provide the victims with a better service;

(e) More should be done to protect and offer assistance to victims and witnesses, in particular women. In particular, the programme for the protection of witnesses should be improved and expanded at the State level, and similar programmes should be created at the local level;

(f) Programmes of psychological assistance should be generalized and strengthened where they already exist. Such programmes should also include a gender perspective and give special attention to the specific trauma suffered by members of the family of a disappeared person;

(g) Measures of vetting should be improved and/or systematized. Whereas such measures have been taken in the past, it is not clear whether those identified as perpetrators have been dismissed from public offices, including police forces. Similar vetting procedures should be organized to bar perpetrators from holding high-level offices in public companies.

91. The Working Group invites the Government of Bosnia and Herzegovina, within 90 days from the date of the presentation of the present report at the sixteenth session of the Human Rights Council to provide the Working Group with a timetable showing the steps it intends to take to implement these recommendations.