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# Bosnia-Herzegovina

## Honouring the ghosts – challenging impunity for “disappearances”

*“ Forced disappearance ... is the ultimate form of corruption, an abuse of power which allows the authorities to transform law and order into something derisory and to commit infamous crimes.”*

Niall Mac Dermot (†), Secretary General of the International Commission of Jurists, speaking at the first international colloquium on forced disappearances, 1981.<sup>1</sup>

### Introduction – historical context

“Disappearances” represent perhaps the largest unresolved human rights issue in Bosnia-Herzegovina.<sup>2</sup> The number of victims and their relatives is huge. Virtually no cases have resulted in those responsible having been brought to justice and the trauma of relatives and dependants left behind has not healed. It seems that this violation, in spite of recognition of its continuing nature in international standards and case law, risks becoming an all-but-forgotten issue in the country. As is the case with other human rights violations of the recent past, the plight of the victims risks being written off as an inevitable and intractable by-product of the war, and as such no longer a priority issue in the context of the rapid result-driven stabilization and normalization process the country has been undergoing. Certainly outside Bosnia-Herzegovina, the problem is by and large ignored when the human rights situation in the country is subjected to review and discussion.<sup>3</sup>

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<sup>1</sup> As quoted by Federico Andreu-Guzman in *The draft international convention on the protection of all persons from forced disappearances*, International Commission of Jurists Review, No. 62-63/ 2001, page 73.

<sup>2</sup> Amnesty International considers that a “disappearance” has occurred whenever there are reasonable grounds to believe that a person has been taken into custody by the authorities or their agents, and the authorities deny that the victim is in custody, or refuse to disclose any other information on his or her whereabouts and fate. Since 17 July 1998, when the Rome Statute of the International Criminal Code was adopted, it has been recognized that enforced disappearances can amount to a crime against humanity when committed by individuals who are not connected with any government, and who are acting pursuant to or in furtherance of an organizational policy.

Although during the armed conflict in Bosnia-Herzegovina strictly speaking only the (Bosniak majority) Bosnian Government was the internationally recognized state government, both the *de facto* Republika Srpska (Bosnian Serb) as well as the Bosnian Croat leadership of the self-proclaimed republic of Herzeg-Bosna exclusively controlled large parts of the country through their mono-ethnic armed forces and administrative bodies. In addition the Federal Yugoslav government and army as well as their counterparts in Croatia extensively directed, financed and reinforced the armed forces of their respective ethnic kin in Bosnia-Herzegovina.

<sup>3</sup> For example the list of 91 requirements which the Council of Europe requested Bosnia-Herzegovina to meet when inviting the country to join in January 2002, makes no mention of the issue of the “disappeared”. Amnesty International has lobbied the Parliamentary Assembly of the Council of Europe (PACE) to address this issue in the wider context of the Balkans (see “Persons unaccounted for as a result of armed conflict or internal violence in the Balkans”, Doc. 9589, 14 October 2002, Motion for a recommendation, presented by Mrs Zwerver and others). Other intergovernmental and international organizations in Bosnia-Herzegovina have taken a piecemeal approach

Most “disappearances” took place in the context of armed conflict or related military operations in areas that were bordering on areas of direct fighting. Though many of the “disappeared” were members of one of the armed forces active in the conflict, civilians - including women and children – equally became victims of this violation. The fact that “disappearances” occurred in the context of a devastating and multi-sided war has made it even harder to establish the fate and whereabouts of most of these people. At the end of armed conflict in Bosnia-Herzegovina, an estimated 27,000 people from all sides to the conflict, but predominantly Bosniak (Bosnian Muslims) remained unaccounted for,<sup>4</sup> a number considered to be among the highest in the world.<sup>5</sup> Amnesty International believes that large numbers of these people were victims of targeted “disappearances” committed mainly by members of the police and armies or paramilitary armed formations.

Situations of armed conflict, similar to other emergencies or natural disasters, are as a rule characterized by overriding chaos, the suspension of law and order and large-scale population movements, which are all factors conducive to creating large numbers of missing persons. However, in the context of Bosnia-Herzegovina, it has become apparent that, alongside the problem of missing persons as a “by-product” of war, many persons “disappeared” as part of deliberate campaigns of the warring parties to remove – both directly and indirectly - members of other ethnic groups from territories under their control.

In support of this, the final report of the Expert Member of the Working Group on Enforced or Involuntary Disappearances, responsible for the Special Process (hereafter: Final Report) notes several elements characterizing the occurrence and nature of cases of missing persons in Bosnia-Herzegovina. Firstly, the Final Report found that the majority of the missing persons were civilians, in particular in cases where the Bosnian Serb forces were allegedly responsible, indicating that “... most of the missing Bosnian Muslims were not victims of armed combat but of “ethnic cleansing” operations carried out by the Bosnian Serb forces against the Muslim civilian population.”<sup>6</sup> Secondly, an analysis of the dates and places of “disappearances” shows a distinct pattern connecting different

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to the human rights (rather than humanitarian) dimension of the problem by following up on some high-profile cases, usually inconsistently.

<sup>4</sup> Report by Mr. Manfred Nowak, expert member of the UN Working Group on Enforced or Involuntary Disappearances, pursuant to paragraph 4 of the Commission Resolution 1995/35, 4 March 1996, UN DOC. E/CN.4/1996/36. para.1.

<sup>5</sup> Report by Mr Manfred Nowak, expert member of the Working Group on Enforced or Involuntary Disappearances, responsible for the special process, pursuant to Commission Resolution 1996/71, 15 January 1997, UN DOC. E/CN.4/1997R/55. Paragraph 3. A spokeswoman for the International Committee of the Red Cross put the number of remaining missing persons in Bosnia-Herzegovina at 17,000 in January 2003, compared to 8,000 in Sri Lanka, 6,000 in Peru and “probably more than 100,000” in Rwanda (*AFP*, “ICRC to host conference in February on missing people as a result of war”, 21 January 2003).

<sup>6</sup> Final Report, Chapter IV, B, Paragraph 7.

waves of “disappearances” to the larger “ethnic cleansing” operations that were conducted during the war and which were accompanied by large scale human rights violations.<sup>7</sup> Apart from this, Amnesty International has found that also in individual cases, “disappearances” were clearly linked to forcible expulsion practices, often targeting locally well known people who had political or economical influence, and sending a clear message to their families as well as other remaining members of their ethnicity to leave.<sup>8</sup> Many of the missing persons were last sighted in detention camps or in some other form of custody, that is, under the control of regular or paramilitary armed forces.

Furthermore, prosecutions of persons suspected of serious violations of international humanitarian law before the International Criminal Tribunal for the former Yugoslavia (Tribunal), have additionally demonstrated, albeit indirectly, that “disappearances” were a distinct element in attacks upon the civilian population, and as such their occurrence was intentional rather than an accidental by-product of war (see also below under Chapter IV).

In October 1995, just before a final peace settlement was reached in Bosnia-Herzegovina, Amnesty International launched a worldwide campaign on “disappearances” in former Yugoslavia to increase and mobilize international awareness of the massive occurrence of this human rights violation and to urge government authorities in the countries of former Yugoslavia to provide information on the fate and whereabouts of the tens of thousands of people who had “disappeared” during the wars.<sup>9</sup> Another objective of the campaign was to bolster support for the institution of the so-called Special Process for Missing Persons set up by the United Nations (UN) Commission for Human Rights in 1994.

Regrettably, the Special Process turned out to be a short-lived mechanism, insufficiently funded and resourced from the very beginning. The UN Expert leading the

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<sup>7</sup> Thus, the first wave of “disappearances” occurred in eastern Bosnia-Herzegovina (in the so-called Podrinje region) between April and September 1992, closely followed by another one in northwest Bosnia (primarily in and around Prijedor town) from May-August 1992; in the summers of 1992 and 1993 there were several larger incidents of “disappearances” in the Herzegovina region and the last massive occurrence was marked by the “disappearance” of over 8,000 Bosniak men and boys after the fall of Srebrenica in July 1995.

<sup>8</sup> For example the case of Nura Berbić and her mother Hasnija Demirović, Bosniak women who “disappeared” in Banja Luka in September 1995, appears to be directly linked to the persistent harassment of the Berbić family, who owned and operated a successful business in the town, in a clear attempt to force them to leave. Mr Berbić fled Banja Luka shortly afterwards (See also AI Index : EUR 63/017/2001, 3 December 2001).

<sup>9</sup> The 1995 Framework Agreement for Peace in Bosnia-Herzegovina (Dayton Peace Agreement) did not assign a specific international or national institution to facilitate the resolution of outstanding cases of “disappearances”. The Commission for Human Rights issued two Resolutions in 1994 (respectively 1994/39 and 1994/72) in which it welcomed the creation of a special procedure to resolve “disappearances”, which was to be jointly undertaken by the Office of the High Commissioner for Human Rights (OHCHR) and one member of the Working Group on Enforced and Involuntary Disappearances. In 1995, the Commission entrusted the entire mandate of the Special Process Dealing with the Problem of Missing Persons in the Territory of the Former Yugoslavia to the Expert on Missing Persons, by Resolution 1995/35.

Special Process, Manfred Nowak, who had been nominated by the UN Working Group on Enforced and Involuntary Disappearances, resigned from this function in March 1997, as he presented his final report to the Commission. The UN Expert reportedly cited lack of support from the international community, in particular with regards to the funding of the exhumation process, which at that time was in its very early stages. The Commission on Human Rights, through Resolution 1997/57, consequently transferred the UN mandate on missing persons to the Special Rapporteur on the Situation of Human Rights in Bosnia-Herzegovina, Croatia and the Federal Republic of Yugoslavia.

By and large, “disappearances” have so far been dealt with in the context of the larger problem of missing persons, that is as a humanitarian issue rather than as human rights violations and crimes.<sup>10</sup> Over the years, important breakthroughs were achieved in removing obstacles in the exhumation and identification process, in particular through the joint exhumation process (initiated by the Expert’s Group chaired by the Office of the High Representative (OHR) in 1996) which enabled the entities’ commissions to exhume mass graves across the entity borders. The majority of exhumations carried out immediately after the war were undertaken by the Tribunal for the purposes of collecting forensic evidence, though gradually the emphasis shifted to making the identification of exhumed mortal remains a higher priority in the process. Effectively from 1999, the identification process – and notably the needs and wishes of the relatives of the missing – was moved higher up the agenda of the international community, and the foundation was laid for the comprehensive DNA (deoxyribonucleic acid) analysis program now established in Bosnia-Herzegovina and other countries in the region (see under Chapter II).

### **Terminology**

AI considers that a “disappearance” has occurred whenever there are reasonable grounds to believe that a person has been taken into custody by the authorities or their agents, and the authorities deny that the victim is or was ever in custody, thus concealing his or her whereabouts or fate.<sup>11</sup> By putting the term in quotation marks, the organization intends to underline that the victim has not simply vanished, and that their fate and whereabouts are known by the current or previous authorities or their agents.

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<sup>10</sup> The recent commemoration of the day of the “Disappeared” in Bosnia-Herzegovina, on an initiative by the International Commission for Missing Persons (ICMP) marked one of the few occasions when the issue was seen in terms of a (continuing) human rights violation by some of those participating in the public event.

<sup>11</sup> Amnesty International: “*Disappearances*” and political killings – *Human rights crisis of the 1990s; A manual for action*. AI Index: ACT 33/01/94, 1994; Chapter 7. Amnesty International considers that, during the armed conflict in Bosnia-Herzegovina, the term “authorities” applied to the Government of the Republic of Bosnia-Herzegovina (headed by President Alija Izetbegović) as well as to the *de facto* authorities of the Republika Srpska (RS) and to the Herzeg-Bosna (Bosnian Croat) leadership.

The UN Declaration on the Protection of All Persons from Enforced Disappearance (hereafter: UN Declaration on Disappearances) holds that enforced disappearances occur whenever:

“... persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, thereby placing such persons outside the protection of the law.”

## **I. “Disappearances” as crimes under international and national law**

### **A. International legal framework**

*“Effective and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal”,*

Adolf Hitler<sup>12</sup>

Over and above the fact that they pose an overwhelming humanitarian problem, “disappearances” are clear and flagrant violations of fundamental human rights, enshrined in a number of international human rights instruments. It has been recognized that, generally, “disappearances” violate or threaten the right to life, the right to liberty and security of a person, and the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment. Furthermore “disappearances” can deprive the “disappeared” person (and their family) of the right to respect for family life, and violate the victim’s right to a fair trial, to recognition as a person before the law and to be afforded equal protection by the law.<sup>13</sup> As “disappearances” can violate several human rights simultaneously, they have been referred to as “multiple” or “cumulative” human rights violations.<sup>14</sup>

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<sup>12</sup> *Judgment of the International Military Tribunal for the Trial of German Major War Criminals – Nuremberg* 30 September and 1 October 1949, convicting Field Marshal Wilhelm Keitel *inter alia* for implementing Hitler’s 1 December 1941 Night and Fog Decree (*Nacht und Nebel Erlass*), which invented this crime.

<sup>13</sup> International Covenant on Civil and Political Rights (ICCPR), Articles 6, 7, 9, 10, 14, 17 and 26; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Articles 2, 4, 5, 6, 8 and 13 and the Convention on the Rights of the Child, Article 9.

<sup>14</sup> *Civil and Political Rights, Including Questions of: Disappearances and Summary Executions*, Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, E/CN.4/2002/71, 8 January 2002, at Paragraph 44.



In 1992, the UN General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearances (Declaration on Disappearances), after non-governmental organizations, including Amnesty International, had lobbied governments to adopt an international instrument to address specifically this human rights violation. This declaration provides a clear definition of which acts constitute a “disappearance” and sets out comprehensively the responsibility of states to prevent, resolve and remedy this human rights violation. In addition the declaration also confirms that both the perpetrators as well as state authorities which organize, acquiesce in or tolerate “disappearances” are liable in civil law.

The Declaration on Disappearances can be seen as the reflection of the strong wish of UN member states to prevent and combat this human rights violation.<sup>15</sup> However, it has no legally binding force. Indeed, apart from one regional convention,<sup>16</sup> no legally binding international instrument, expressly setting out state obligations to protect citizens from “disappearances”, existed on a universal level until the adoption of the Rome Statute for the International Criminal Court on 17 July 1998, which entered into force on 1 July 2002.<sup>17</sup> Thus, all “disappearances” in Bosnia-Herzegovina took place at a time when there was no binding international treaty expressly defining them as crimes.

For this reason, international human rights institutions and courts developing case law when examining individual complaints brought on behalf of victims of “disappearances” have had to rely on the provisions contained in existing human rights treaties. The Human Rights Committee – a body of independent experts which monitors states’ implementation of the ICCPR – has consistently held that Articles 6, 7 and 9 (the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and the right to liberty and security of person) were violated in determinations on individual complaints. The equivalents of these rights were used by the European Court of Human Rights in examining “disappearance” cases on the basis of the rights enshrined in the ECHR.<sup>18</sup>

In early 2001, the Commission on Human Rights instructed Manfred Nowak, a member of the UN Working Group on Enforced or Involuntary Disappearances and the expert in charge of the Special Process (see above), to “examine the existing international

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<sup>15</sup> The fact that the Declaration was adopted without a vote can also be seen as acknowledgment by member states of the seriousness of this human rights violation, or at least of their wish not to be seen as challenging the increasing trend to oppose it.

<sup>16</sup> This is the Inter-American Convention on Forced Disappearance of Persons (adopted at Belém do Pará, Brazil, on 9 June 1994), now ratified by 8 Latin American states, which provides that states parties shall adopt “... legislative measures that may be needed to define the forced disappearance of person as an offence and to impose an appropriate punishment commensurate with its extreme gravity”. (Article 3).

<sup>17</sup> Enforced disappearances are recognized as crimes against humanity in Article 7 of the Rome Statute.

<sup>18</sup> For example in the cases of *Laureano v. Peru*, Communication No. 540/1993 of 25 March, and *Kurt v. Turkey*, (15/1997/799/1002), Judgment of 25 May 1998.



criminal and human rights framework for the protection of persons from enforced or involuntary disappearance” with a view to identifying gaps which precluded full protection of persons against this violation.<sup>19</sup> The independent expert suggested three possible ways to introduce a legally binding normative instrument on “disappearances”: the creation of a separate treaty such as the draft International Convention on the Protection of All Persons from Forced Disappearance, or the creation of an optional protocol to existing international treaties namely the ICCPR or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>20</sup>

In situations of armed conflict, “disappearances” would breach provisions of international humanitarian law, relating to international and internal conflict, and laid down in the Four Geneva Conventions of 12 August 1949, and their two Additional Protocols.<sup>21</sup> Thus, the “disappearance” of a prisoner of war would in particular violate the prisoner’s right to be treated humanely, to be protected against acts of violence and not to be subjected to physical and mental torture or other forms of coercion (Articles 13 and 17). Furthermore, it violates their right to notify their family and the Central Prisoners of War Agency (the International Committee of the Red Cross, ICRC) upon capture or transfer to another camp (Article 70 of the Third Geneva Convention), the right to correspondence (Article 71) and the requirement that prisoners of war must be released at the end of hostilities (Article 118).

In many cases, prisoners of war have “disappeared” after they were removed from detention or holding facilities, which were under the control of the regular military, by unknown perpetrators, usually members of paramilitary formations. Government authorities have often exploited such circumstances in order to escape responsibility for these “disappearances”. However, the Geneva Conventions require that any transfer of prisoners of war should be carried out in a humane way and while ensuring their safety, that the detaining party (usually the military authorities) must draw up a list of all transferred prisoners before their departure, and imply that the prisoners themselves should have the opportunity to inform their next of kin of their transfer (Articles 47 and 48).<sup>22</sup>

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<sup>19</sup> Commission on Human Rights, Question on Enforced or Involuntary Disappearances, E/CN.4/RES/2001/46, adopted without a vote on 23 April 2001.

<sup>20</sup> *Civil and Political Rights, Including Questions of: Disappearances and Summary Executions*, as above, at Paragraph 97.

<sup>21</sup> All four Conventions relate to situations of international armed conflict, though Common Article 3 applies both in international and internal armed conflicts. The conflict in Bosnia-Herzegovina had both an internal and international character, as has been recognized in jurisprudence by the Tribunal for the purposes of finding that provisions contained in Geneva Conventions III and IV applied (see the cases of Tadić, Case No.: IT-94-1-T, Appeal Judgment of 15 July 1999; Blaškić, Case No.: IT-95-14-T, Judgment of 3 March 2000; and the Celebići Camp, Case No. IT-96-21, Trial Judgment of 16 November 1998).

<sup>22</sup> The ICRC Commentary on Article 46 states that : “... the Detaining power is obliged to take every possible precaution when transferring prisoners of war. The preparation of lists is an elementary to be taken by the

This is particularly relevant in the context of many of the Bosnian cases of “disappearances” which concern prisoners of war who “disappeared” after their capture. These cases have been especially hard to resolve in light of the intransigence and persistence by both former and present military authorities, who have been unwilling to provide information on the circumstances and conditions under which enemy combatants who had been taken prisoners had been handed over to third parties (see below under Chapter IV).

### **A complex and continuing crime**

An inherent characteristic of “disappearances” is that of the continuing nature of this crime. In other words the violation continues as long as the fate and whereabouts of the victims have not been established and as long as no one has been brought to justice for these crimes. The UN Declaration on Disappearances states this feature expressly in Article 17:

“1. Acts constituting enforced disappearances shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.

2. When the remedies provided for in Article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearances shall be suspended until these remedies are re-established.”<sup>23</sup>

The continuing nature of “disappearances” is also explicitly mentioned in the draft International Convention on the Protection of All Persons from Forced Disappearance (draft Convention on Disappearances), Article 5 of which states that:

“This offence is continuous and permanent as long as the fate and whereabouts of the disappeared person have not been determined with certainty.” (Article 5.1)<sup>24</sup>

This particular feature of “disappearances” as a continuous crime is important in order to counter the often used assumption that “disappearances” are crimes of the past and that therefore no one can be prosecuted on the basis of criminal provisions (adopted after the victim was last sighted) as this would then be applied retroactively.

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commander responsible of any detachment ... one may logically consider that these lists should be drawn up in several copies and should be sufficiently detailed to preclude any possible confusion or dispute at a later date. “ (NB. all four Conventions relate to situations of international armed conflict, although common Article 3 expressly applies only in internal armed conflict. The conflict in Bosnia-Herzegovina had both an internal and international character, as has been recognized in jurisprudence by the Tribunal for the purposes of finding that provisions contained in Geneva Conventions III and IV applied (see the cases of Tadić ,Case No.: IT-94-1-T, Appeal Judgment of 15 July 1999; Blaškić, Case No.: IT-95-14-T, Judgment of 3 March 2000; and the Celebići Camp, Case No. IT-96-21, Trial Judgment of 16 November 1998)).

<sup>23</sup> These remedies refer to the possibility of resolving cases of human rights violation through the domestic legal institutions.

<sup>24</sup> Federico Andreu-Guzmán, *The Draft International Convention on the Protection of All Persons from Forced Disappearance*, published in *International Commission of Jurists Review* No. 62-63/2001.

In this context both the Declaration on Disappearances, the Inter-American Convention on Forced Disappearances of Persons, the draft Convention on Disappearances, and the Rome Statute underline the necessity to define “disappearances” as a separate criminal offence. Such a step could also solve the problems connected to the complex nature of this violation and the fact that each individual case may represent a number of offences, in which various actors may have been involved at various stages, carrying criminal responsibility for various elements of the crime in total (see below under Chapter III).<sup>25</sup>

## **B. National legal framework and case law**

Bosnia-Herzegovina was provided with one of the most sophisticated and comprehensive human rights protection systems in the world by the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), which was signed by the former warring parties and the governments of Croatia and the Federal Republic of Yugoslavia on 14 December 1995 in Paris. The emphasis placed on human rights protection and promotion was largely a result of the recognition of the massive and serious human rights abuses that were committed during the war. The Dayton Peace Agreement in particular states that the rights and freedoms set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) shall apply directly in the country and take precedence over all other law, so that people can rely directly on these rights.<sup>26</sup> The Agreement provided for the establishment of a Human Rights Commission, consisting of the Human Rights Ombudsperson and the Human Rights Chamber, both of which can examine individual complaints alleging violations of the rights of the ECHR. The Human Rights Chamber - which has a mixed composition of judges comprising both domestic and international jurists - has jurisdiction analogous to the European Court of Human Rights in Strasbourg, and can issue interim injunctions and final decisions, binding upon the entities as well as on the state government.<sup>27</sup>

Both the Ombudsperson and the Human Rights Chamber have dealt with only a very small number of applications brought on behalf of victims of “disappearances” and/or their families. The Chamber has held in various cases that the fact that the

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<sup>25</sup> The Inter-American Court of Human Rights, which has dealt with numerous cases of “disappearances”, noted in the Velásquez-Rodríguez case : “The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion.” (Inter-American Court of Human Rights, Series C, Decisions and judgments, No. 4, Judgment of 19 July 1988, Secretariat of the Court, San José, Costa Rica, 1988, at Paragraph 50.

<sup>26</sup> Article II. Paragraph 2 of Annex 4, the Constitution of Bosnia and Herzegovina.

<sup>27</sup> The Human Rights Chamber can also apply the provisions contained in a number of other international human rights instruments, such as the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in as far as applicants can prove that they cannot access the rights safeguarded by these treaties on grounds of discrimination.

“disappearances” occurred prior to the official signature date of the Dayton Peace Agreement on 14 December 1995, meant that these cases were *ratione temporis* outside its competence,<sup>28</sup> even though these “disappearances” are a continuing crime until they have been resolved. The very first public hearing of the Human Rights Chamber on 6 February 1996 was held in the case of Father Tomislav Matanović and his parents, who “disappeared” in Prijedor in September 1995 – and whose case was found admissible as evidence of their detention after December 1995 was available to the Chamber. The Chamber ruled in this case that a positive obligation rested on states, who are a party to the ECHR, not only not to violate the rights enshrined in the ECHR, but also to protect everyone within their jurisdiction from violations of these rights.<sup>29</sup> Furthermore, the Chamber ruled that the respondent party – the RS authorities – had violated the ECHR by not ensuring the Matanović family the right to liberty and security of person (Article 5 of the ECHR). In a subsequent case, the Chamber also found violations of other rights of the European Convention, notably the right to life (Article 2) and the right not to be subjected to torture or to inhuman or degrading treatment or punishment (Article 3).<sup>30</sup> In both cases the Chamber ordered the Republika Srpska to carry out immediately a full investigation establishing the fate and whereabouts of the victims and with a view to bringing the perpetrators to justice. While police investigations into both cases have indeed been initiated, they have so far had limited success in terms of resulting in criminal prosecutions for those suspected of involvement in the “disappearances” (see also below under Chapter IV.B).

The Chamber and the Ombudsperson’s office have also developed the now widely recognized notion that “disappearances” can create multiple victims, given that the suffering of the families of the “disappeared” and the failure of the authorities to disclose information on the victim, may amount to torture or cruel, inhuman or degrading treatment. The Chamber has developed this principle extensively in the Palić case, where it ruled that the “fear and anguish caused to Mrs Palić by the unclarified fate of her husband constitutes inhuman and degrading treatment and thus violates her rights under Article 3 of the European Convention”.<sup>31</sup> In addition, the Chamber found in this case

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<sup>28</sup> See Case No. CH/96/15, *Ratko Grgić against the Republika Srpska* (Decision on the merits of 5 August 1997), Case No. CH/97/74, *Džemal Balić against the Republika Srpska* (Decision on the admissibility of 10 September 1998).

<sup>29</sup> Article 1 of the ECHR states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Case law of the European Court for Human Rights has interpreted this provision as entailing a positive obligation on states. The Bosnian Human Rights Chamber interpreted Annex 6 of the Dayton Peace Agreement (Chapter 1, Article 1 of which states that “The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms”), by analogy as putting a positive obligation on the Bosnian authorities to protect people against violations of the ECHR by others.

<sup>30</sup> Case No. CH/99/3196, *Avdo and Esma Palić against the Republika Srpska* (Decision on admissibility and merits, 11 January 2001).

<sup>31</sup> *Palić* decision, see footnote 31, at Paragraph 91/(5). A similar line was taken by the Ombudsperson’s decision in the case of Nura Berbić and Hasnija Demirović, where it found that the husband of Nura Berbić was the victim of

that there had been a violation of Mrs Palić's right to respect for family and private life (Article 8 of the ECHR).

The Chamber subsequently found that the Federation as the respondent party also violated Article 3 of the ECHR in a case of a "disappearance" which was eventually resolved. This concerned the murder of four members of the Bosnian Serb Golubović family in Konjic in 1992, of which three Bosniak former police officers were convicted by the Mostar Cantonal Court in July 2000.<sup>32</sup> The father of Vlasta Golubović, Dordjo Unković, who was living in Sarajevo, had lost contact with his daughter and her family early on in the war, and did not find out their fate until 1999 when he read in the press about the arrest of some of the defendants. Upon learning this, Mr Unković applied to be present at trial proceedings in the capacity of injured party, and he started doing so from May 1999. In this case, the Chamber had found that the fact that Mr Unković "lived for approximately six and one half years.... without information, official or unofficial, on the fate of his daughter and her family ..." coupled with the "lengthy delay and repeated procedural obstacles" in the criminal proceedings constituted a violation of the applicant's right not to be subjected to inhuman or degrading treatment. The Federation was ordered to pay Mr Unković non-pecuniary compensation for his mental suffering.

The very small number of cases which were found admissible by the Chamber eloquently demonstrates the lack of an adequate legal remedy for victims of "disappearances" and their families under Bosnian domestic law. Officially and legally, "disappearances" do not exist as a crime in the country and are therefore not prosecuted as such, which remains exceptionally hard to bear for those left behind in the long-term wake of this violation in Bosnia-Herzegovina. Families of larger groups of victims have repeatedly joined forces in order to call attention to this problem but their attempts have by and large failed.<sup>33</sup>

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inhuman and degrading treatment caused by the authorities' complacency and stated that he had "been left in the most complete doubt and apprehension. His anguish and distress have been aggravated by the intimidation and harassment the applicant has been subjected to on account of his persistence in trying to find out his wife's and mother-in-law's whereabouts" (Report of the Ombudsperson in Application No. 7/96, adopted on 30 September 1998, page 9).

<sup>32</sup> See Case No. CH/99/2150, *Dordjo Unković against the Federation of Bosnia and Herzegovina* (Decision on admissibility and merits, 9 November 2001).

<sup>33</sup> For examples, the relatives of some 417 Bosniak men who were last seen in Foča prison attempted to bring a private prosecution against the RS in 1999, in conjunction with an application to the Human Rights Chamber ("Fočaci tuže Republika Srpsku" *Oslobodjenje*, 24 June 1999) which reportedly failed. Currently, a collective application for damages is being prepared by an estimated 10,000 relatives of Bosniak men and boys, who are both still unaccounted for or already found in mass graves. This initiative, organized by several local organizations representing the families of the Srebrenica "disappeared" – the majority of them women in dire economic circumstances – is apparently also directed towards the Chamber. ("Srebreničanke pišu 10 hiljada tužbi", *Oslobodjenje*, 28/29 September 2002).

Bosnia-Herzegovina has as yet no domestic legislation expressly dealing with “disappearances”, under which individual perpetrators could be brought to justice for this crime, but they can be prosecuted for certain components of the crime such as abduction or illegal detention.<sup>34</sup> However, the State Criminal Code, which was presented to the Council of Ministers of the state government in July and imposed by the High Representative in January 2003, includes enforced disappearances as crimes against humanity.<sup>35</sup>

## **II. Towards resolving cases (1): The humanitarian solution - exhuming and identifying mortal remains**

One of the main ways in which cases of missing persons – including victims of “disappearances” – have been resolved since the end of armed conflict was the exhumation of mass graves, scattered in large numbers throughout the country, and the ensuing identification of bodily remains deposited in these sites.<sup>36</sup> In the years immediately following the signing of the Dayton Peace Agreement, the international community had to exert sustained pressure in order to facilitate effective cooperation between the commissions in charge of the exchange of prisoners of war and missing persons, which were also responsible for exhumations. Until well into 2001 these commissions worked exclusively on behalf of victims of their own ethnic group, whose remains were to a large extent buried in areas now controlled by their war-time opponent. In 1996 and 1997 an Expert Group, chaired by the Office of the High Representative, comprising of representatives of the International Committee of the Red Cross (ICRC), the United Nations Mission in Bosnia-Herzegovina (UNMIBH), the NATO-led Implementation Force (IFOR, from 1997 the Stabilization Force, SFOR), the International Commission on Missing Persons in the former Yugoslavia (ICMP) and officials of the three

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<sup>34</sup> Under its political constitution, Bosnia-Herzegovina consists of two separate entities, the Republika Srpska (RS) and the Federation of Bosnia and Herzegovina as well as the autonomous Brčko District; each entity, as well as the Brčko District, has its own judiciary, criminal legislation and police force, although a new law on the State Council of Ministers, imposed by the High Representative in December 2002, additionally envisages the establishment of state ministries for Interior Affairs and Justice.

<sup>35</sup> Article 172 (i).

<sup>36</sup> Some 3,000 mass grave sites were believed to exist in the country in 1996, of which some 300 were thought to contain large numbers of bodies. (see *Amnesty International, Bosnia-Herzegovina: “To bury my brothers’ bones”*, AI Index: EUR 63/15/96, July 1996). According to statistics released by the Head of the Federation and the State missing persons commissions, in late October 2002, so far over 15,000 human remains were exhumed from some 300 mass graves by his commission and by forensic teams of the International Criminal Tribunal for the former Yugoslavia, including over 7,000 Srebrenica victims, exhumed from more than 20 sites in the eastern Republika Srpska, and some 2,000 remains found in mass graves around Prijedor. The largest mass grave exhumed so far was in Kamenica in eastern RS, where, according to the Federation missing persons commission, remains were recovered which were believed to account for over 300 people, including 141 complete skeletons – all of them belonging to victims of the Srebrenica mass killings. The Head of this Commission estimates that a further 13,500 victims may be buried in some 200 additional grave sites. (See: *Oslobodjenje*, “Intervju, Amor Mašović, predsjednik Državne i predsjedavajući Federalne komisije za traženje nestalih : Ko se plaši bosanskih žrtava”, 28 October 2002)



commissions of missing persons, held intensive negotiations which led to a cross-entity exhumation process, also known as the joint exhumation process.

However, reliable and accurate information on mass grave sites appears increasingly difficult to come by. The Head of the Federation missing persons commission expressed concern in November 2002, stating that "... the commissions which are tracing missing persons have now reached the phase where they are no longer able to locate individual and mass graves without information provided by the responsible authorities [the police, the army and the judicial system]".<sup>37</sup> The ICRC similarly considers the lack of information on the location of mass graves to be a major problem, due to the failure of the authorities to cooperate with each other and exchange information.<sup>38</sup>

International humanitarian law, in particular Articles 16 and 17 of the Convention (I) for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (Ist Geneva Convention), requires that the parties to a conflict ensure that details of wounded, sick or dead persons (members of the opponent's armed forces) which may assist in their identification are recorded and, alongside information on the exact location and markings of graves, and the personal details of the persons buried in them, are exchanged at the latest at the end of hostilities.<sup>39</sup> To this end, the parties were instructed to set up official information bureaux for prisoners of war.<sup>40</sup> While each of the opposing sides in Bosnia-Herzegovina during the war established commissions for the exchange of prisoners of war and missing persons - which were, after the conflict, subsumed in the missing persons commissions - they primarily recorded details of missing persons belonging to their own side in the conflict. It is unclear to what extent, if at all, the obligations contained in Articles 16 and 17 were implemented by other bodies, particularly the military authorities.

So far, the missing persons commissions appear to have obtained information on mass grave locations mainly from non-military sources. These often include returning minority refugees stumbling upon human remains once they start reconstructing their property or working their land.<sup>41</sup> It is nevertheless clear that in many, if not most cases, the military (and civilian) authorities had detailed knowledge of grave sites, as was

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<sup>37</sup> *Oslobodjenje*, "Trebaju nam informacije policije, vojske, pravosudja", 21 November 2002.

<sup>38</sup> See ICRC Special Report, "Unknown Fate, Untold Grief", page 24, August 2002.

<sup>39</sup> Article 16, Paragraph 1 and Article 17, paragraph 4, of the Ist Geneva Convention. The Commentary to Article 17 (Prescriptions regarding the dead graves registration service) states (under Paragraph 4 – Exchange of information), that "... The Graves Registration Service is concerned, not only with the graves of those fallen in battle, but also, under Article 120 of the Third Convention, with the graves of prisoners of war who die in captivity. (section A)."

<sup>40</sup> Article 122, Convention (III) relative to the Treatment of Prisoners of War.

<sup>41</sup> For example, Bosniak returnees discovered human remains when repairing a septic tank in front of their house in Kamenica village in eastern RS, where so far seven large mass graves have been exhumed. (*Reuters*, "Mass grave horror unfolds in pretty Bosnia village", 23 October 2002).



revealed for example during the trial against General Radislav Krstić of the Bosnian Serb Army, who was found guilty of genocide in Srebrenica in August 2001.<sup>42</sup>



Exhumed human remains from Srebrenica in storage in Tuzla, October 2001. ©AI

The poor state of many of the remains recovered, and especially the fact that, for example in the case of the Srebrenica victims, most were removed from their initial burying place to secondary mass graves, meant that traditional ways of identification by and large proved insufficient. There have also been examples of deliberate obstruction by authorities in attempts to identify bodies through traditional processes.<sup>43</sup> In addition, there have been cases, where locations, believed to be mass graves sites, were desecrated or contaminated with the tacit approval of the authorities.<sup>44</sup>

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<sup>42</sup> In the Krstić case the Trial Chamber, although it was unable to conclude that General Krstić himself had been directly involved in the (re)burials of victims, noted that: “An operation of the scale required to dig up thousands of corpses and transfer them to remote locations, all within the zone of responsibility of the Drina Corps could have hardly escaped his notice.” A prosecution witness stated that the Srebrenica reburials had taken place in areas which were mostly “... designated war zones where the military has exclusive primacy based on the scope of activity that had to have occurred and one would assume primarily at night for the burial operations and the movement of the remains, the different locations and all the assets that needed to happen with that ...” (See Krstić Judgment of 2 August 2001, Case No. IT-98-33-T, Paragraphs 414-415).

<sup>43</sup> For example, according to Amor Masović, currently chairman of both the Federation and the state missing persons’ commissions, his commission had no access to dental records of Bosniak missing persons held in several towns in the RS (including Banja Luka, Bijeljina, Prijedor and Bratunac), which could significantly aid the process of identification of thousands of remains currently held in storage. (*Oslobodjenje*, “Kartone žrtava kriju Banja Luka, Bijeljina i Bratunac”, 15 September 2002.)

<sup>44</sup> This was the case for example in Sultanovići village near Zvornik in the eastern RS, where the Zvornik town authorities were using a patch of land, covering a number of mass graves, as a rubbish dump for over a year (See :

Years of pioneering work, coupled with extensive international financial assistance, expert scientific support and political lobbying, ensured that Bosnia-Herzegovina (and indeed the overall region of former Yugoslavia) now hosts a forensic identification facility of unique technological sophistication and scope. A network of five forensic laboratories (three of which are located in Bosnia-Herzegovina), which were either newly created or renovated, and envisaged to complement each other's work, has been built and equipped by the International Commission for Missing Persons (ICMP). The laboratories' primary task is to achieve the accelerated identification of mortal remains, in particular by DNA (deoxyribonucleic acid) analyses, comparing blood samples of surviving relatives with bone extracts collected from remains found in mass graves.<sup>45</sup> The ICMP-led program currently covers a reported total of 40,000 individuals, for whose identification relatives have given blood samples.<sup>46</sup>

As the DNA-identification process was gathering speed from late 2001 onwards, the number of identified cases has increased correspondingly and some 1,200 persons have now been identified. The first DNA match of a teenage victim from Srebrenica was completed in November 2001 and at the time of writing of this document,<sup>47</sup> over 580 victims from Srebrenica had been completely identified, the vast majority of them via the DNA-matching process, and were ready for burial.<sup>48</sup> However, without sustained aid from the international community, which has been decreasing the amount of international funding available for Bosnia-Herzegovina for several years now, the costly process may risk grinding to a halt very quickly.<sup>49</sup>

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*Amnesty International, Bosnia-Herzegovina: Waiting on the doorstep: minority returns to eastern RS*, page 16; AI Index: EUR 63/07/00, July 2000.). Similarly, a mass grave site in Nevesinje in southeastern Bosnia-Herzegovina, located in a deep pit, was subsequently used as a garbage dump. (See, AP, "New Mass Grave Discovered in Bosnia", 7 December 2000). Another mass grave discovered in Podvojanovići near Čajnice in eastern RS, was reportedly covered by a large pile of sawdust from a nearby sawmill owned by the local mayor's brother, who had also been one of the war-time authorities of the town (*Bosnia-Herzegovina Federation TV*, "Total of 31 bodies found so far in mass grave near wartime safe haven", 22 October 2002).

<sup>45</sup> The ICMP envisages that the former Yugoslav example will become a centre of international excellence and a world leader both in terms of quantity and quality of DNA-identification. Elements of the system as developed by ICMP have reportedly been used in order to identify victims of the 11 September 2001 attacks on the World Trade Centre in New York.

<sup>46</sup> These numbers include missing persons in Bosnia-Herzegovina (nearly 29,000), Croatia, the Federal Republic of Yugoslavia including Kosovo and the Former Yugoslav Republic of Macedonia.

<sup>47</sup> Mid-February 2003.

<sup>48</sup> In the years 1996-1999, according to ICMP, a total of 73 exhumed remains was identified through traditional methods, representing just 0.9 per cent of the total estimate of 7,500 missing from Srebrenica. Apart from identifying mortal remains the process has additionally been used to "match up" skeletal remains belonging to one person but found in more than one location so that they can be buried together.

<sup>49</sup> According to Gordon Bacon, ICMP chief of staff, the monthly cost of chemicals needed for the process alone is around \$100,000. (*New York Times*, "DNA Tests Help Some Families of Bosnia Victims, but Not Most", by Daniel Simpson, 23 December 2002)

Serious tension has also arisen over the issue of the ultimate burial of mortal remains which have now been identified, primarily in connection with the envisaged collective grave site in Potočari, where relatives would like to bury the remains of the Srebrenica victims. After years of delays and obstruction, a design for the grave site has now been approved and the first burials are envisaged to take place in March 2003. Given the repeated reports of vandalism and desecrations of graves of minorities throughout the country, and the overwhelming symbolic importance of the Srebrenica grave site and memorial, the RS authorities will have to ensure that work on the site can proceed unhindered and that the integrity of the site and memorial will be respected by everyone in the local community.<sup>50</sup> Ensuring respect for the graves of and memorials sites dedicated to victims of “disappearances” and extrajudicial executions must be an integral part of the overall process of reparation, which will be further discussed under Chapter V.<sup>51</sup>

### III. Towards resolving cases (2): Achieving justice

*“It is bad to keep having three versions of the truth. There has to be just one version, and the most authoritative one is the one established in court”-*

Suljeman Tihić – (then) deputy speaker of the RS parliament, on the occasion of the 7th anniversary of the fall of Srebrenica, 11 July 2002.<sup>52</sup>

“Disappearances” thrive on impunity and illegality. These two factors are intrinsically linked both in the commission of this violation and in its subsequent continuation. The UN Commission on Human Rights emphasized that “impunity is simultaneously one of the underlying causes of enforced disappearances and one of the major obstacles to the elucidation of cases”.<sup>53</sup> The very act of a “disappearance” requires that from its beginning

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<sup>50</sup> In accordance with Article 17 of the 1st Geneva Convention, according to which parties have to ensure that: “the dead are honourably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased, properly maintained and marked so that they may always be found.” The Commentary to Article 17 provides that “... The grave, once closed, must be respected. The obligation in this case is not purely a passive one. It implies active measures of protection” (Point 1.A of the commentary on Paragraph 3 of Article 17). Bosnia-Herzegovina Federation TV reported on 28 January 2003 that the building in which workers of the company constructing the Potočari memorial centre and cemetery were accommodated as well as the houses of two Bosniak returnees, were attacked; local police arrested two local men in connection with these crimes a day later. Work on the memorial was temporarily suspended afterwards.

<sup>51</sup> The Potočari memorial and grave site are also mentioned by Manfred Nowak, as representing a measure of satisfaction (one of the five core elements of reparation), which “pay tribute to the victims and thereby contribute to the process of building justice and peace” (In: *Civil and Political Rights, Including Questions of : Disappearances and Summary Executions*, as above, at Paragraph 88).

<sup>52</sup> “Ružno je da ostanu tri istine. Mora biti jedna istina, a najmjerodavnija je ona koja se utvrdi na sudu”, *Nezavisne novine* of 12 July 2002.

<sup>53</sup> Commission Resolution 2001/46, quoted in the report submitted by Mr. Manfred Nowak, see above, at Paragraph, 81.

those responsible are shielded from accountability and any traces of evidence or information which might lead to clarification of the person's fate and whereabouts are concealed or destroyed. As "disappearances" are usually carried out by a group of actors within the police or armed forces hierarchy operating according to a chain of command, an entire network of people, all of them bearing responsibility to some degree, needs to cover itself, making the process of documenting individual "disappearances" a challenging one for those who want to find out the truth.<sup>54</sup> The initial secrecy characterizing a "disappearance" is as a rule continued through the prolonged and persistent failure on the side of the authorities or those in control to disclose any information on the "disappeared" person to relatives, friends, human rights organizations and the public at large, or through the systematic denial of any involvement in the "disappearance", ascribing the acts to wayward or autonomous groups.

This pervading lack of authoritative and substantial information provides a fertile ground for rumours, usually concerning reported sightings of the victims, promises and offers by those claiming to be witnesses to reveal what happened to desperate relatives – often on condition of payment. In addition, what has been witnessed repeatedly in the former Yugoslavia is the "case bargaining" between authorities, suggesting they will solve one case if and when the other side has done the same; an approach which will eventually ensure that virtually no cases are solved at all.<sup>55</sup>

## A. Investigations

A crucial component in the battle against impunity for "disappearances" is the launching of investigations into cases of this human rights violation; the duty of states to investigate has been upheld time and again in international human rights law and by international bodies and conferences.<sup>56</sup> Amnesty International has recommended that governments, in all cases, ensure that reports of "disappearances" are investigated

<sup>54</sup> See Amnesty International: *Disappearances and political killings, Human rights crisis of the 1990, A manual for action*, ACT 31/01/94, February 1994, Chapter 7.

<sup>55</sup> This policy of reciprocity, which after the war gradually substituted negotiations over the exchange of prisoners of war with those over the exchange of mortal remains, still forms the basis for many of the processes related to exhumations and disclosure of information. While as a negotiating tool it has achieved results in, for example, ending the gridlock between the Federal Republic of Yugoslavia and Croatia for many years over the resolution of cases of persons who went missing during the early 1990s, the uneven ethnic distribution of the case load in Bosnia-Herzegovina (almost 98 per cent of all outstanding cases concern Bosniaks) means that even as a medium term solution few results will be forthcoming. In fact the policy, as employed during the Working Group discussions (see under Chapter VI), has been very unsuccessful in Bosnia.

<sup>56</sup> The UN Declaration on the Protection of All Persons from Enforced Disappearance provides that all complaints alleging an enforced disappearance shall be investigated promptly, thoroughly and impartially (Article 13.1). The Vienna Declaration and Programme of Action, adopted on 25 June 1993 by the World Conference on Human Rights, reaffirms that "... it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators".

promptly, impartially and effectively by a body which is independent of those allegedly responsible.<sup>57</sup>

Amnesty International has further recommended that, in order for investigations to be effective, the investigating body should be established according to four criteria:

- The body should be independent of those allegedly responsible: this applies both to individual investigators and to the investigating body as a whole;
- It should have the necessary powers and resources, in order to respond immediately to complaints and reports of “disappearances, to conduct on-site investigations, to enter and search any place believed to be connected to “disappearances”, to conduct interviews in private, to obtain and compel the production of all necessary physical evidence, including government records and medical records, to compel the attendance and cooperation of witnesses and to ensure their protection and to receive evidence from witnesses unable to attend in person, including witnesses located outside the country;
- Those carrying out the investigation and their staff should be professionally competent for the required tasks;
- They should be protected against intimidation and reprisals.<sup>58</sup>

Amnesty International also urged that every effort should be made to ensure that an investigation is conducted in an impartial, effective and prompt manner. The investigation should create the opportunity for the effective questioning of witnesses, and anyone involved or participating in the investigation should be protected from intimidation and reprisals. Any officials suspected of responsibility for the alleged “disappearance” should be suspended from active duty and must not be allowed to influence or harass relatives, witnesses or investigators during the investigation. The findings of such an investigation should be made public and, most importantly, they should lead to action.

Comprehensive and standard-setting guidelines for investigating extrajudicial killings are laid down in the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions and in the UN Manual for the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.<sup>59</sup> These guidelines set forth the best practice in human rights investigations and can be applied to many aspects of investigations of “disappearances”. Moreover, given the sad fact that – especially in Bosnia-Herzegovina – so many of the

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<sup>57</sup> Amnesty International’s 14-Point Program for the Prevention of “Disappearances”, Point 10, appended to AI : “*Disappearances*” and *political killings*, as above, page 283.

<sup>58</sup> Amnesty International: “*Disappearances*” and *political killings*, as above, Chapter 10, page 142.

<sup>59</sup> The UN Principles were adopted by the Economic and Social Council in Resolution 1989/65, on 24 May 1989 and are reproduced in the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, United Nations, New York 1991. UN Sales NO. E.91. IV.I.



“disappearances” in fact led to extrajudicial killings, both sets of guidelines would also apply directly to the investigation of “disappearances”.

What should be underlined is that an investigation into a “disappearance” is by no means concluded, and the human rights violation resolved, when the fate of the victim is “clarified”; in virtually all cases in Bosnia-Herzegovina this would be one of the findings in such investigations, confirming that the victim was killed (or discovering the mortal remains of the victims, bearing indications that they were murdered). If it is established that the victim has been killed, then the killing itself should be investigated with the aim of bringing those responsible to justice.

As will be discussed below, a very tentative start has been made with investigations and prosecutions of the suspected perpetrators in a few cases in Bosnia-Herzegovina. However those investigations failed to satisfy either the guidelines as laid down in the UN Manual or the four criteria recommended by Amnesty International. For this reason, Amnesty International believes that there is a compelling argument for the continuation of the monitoring and supervision of such investigations by international police experts as was done so far by the International Police Task Force of the United Nations Mission in Bosnia (UNMIBH/IPTF).<sup>60</sup> With this aim, the organization has lobbied policy makers at the European Union, involved in the organization of the European Union Police Mission (EUPM) which took over the supervision of the Bosnian police force from UNMIBH in January 2003. However, so far, this task as such is apparently not being prioritized by the EUPM, as its stated mission reportedly will focus on combating organized crime and corruption.<sup>61</sup>

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<sup>60</sup> Letter by AI Secretary General Irene Khan to Javier Solana, Secretary General of the Council of the European Union (TG EUR 63/2002.11) accompanied by a Memorandum, setting out AI's recommendations on the European Union Police Mission (AI Index: EUR 63/018/2002), of 21 October 2002.

<sup>61</sup> The Mission Statement for the EUPM, as outlined in Annex 1 to the EU Council of Ministers' Meeting on General Affairs, 6247/02 (presse 30-G), envisages that EU police monitors ensure that Bosnian police forces undertake criminal investigations into corruption cases and may be involved to an unspecified degree in efforts to investigate and counter “the full range of criminal activities, including organized crime and terrorism”. (Report of 2409<sup>th</sup> meeting of the General Affairs Council, Brussels 18/19 February 2002, 6247/02 (presse 30-G, page 19). Throughout this document, no mention is made of police investigations into past and present human rights violations, and the role played by the EUPM in supervising and monitoring these. Amnesty International delegates met with officials of the Civilian Crisis Management and Coordination Directorate in the General Secretariat of the Council of the European Union in November and December 2002, and raised the organization's serious concerns with regards to the lack of investigations into these past violations, many of which may amount to war crimes and crimes against humanity. Despite some indications by Council officials that a “benchmarking” process would be set up to monitor investigations into human rights abuses, the organization is not convinced that this work will be prioritized by the EUPM, nor that it will include investigations into past violations (Letter of Javier Solana to Dick Oosting, Director of the Amnesty International European Union office, 3 December 2002).

## B. Prosecutions

Investigations should be an integral part of, and contribute to the overall process of prosecuting and punishing those responsible for “disappearances”. The UN Declaration on Disappearances states that:

“Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial ... All States should take any lawful and appropriate action available to them to bring all persons presumed responsible for an act of enforced disappearance, found to be within their jurisdiction or under their control, to justice.”

Amnesty International has identified four legal concepts which relate to criminal liability for “disappearances” and extra-judicial executions, which are derived from principles of international law:<sup>62</sup>

*Universal jurisdiction* (the obligation on states to prosecute perpetrators of crimes which were committed in another country or area outside their geographical jurisdiction);

*No statute of limitations* (there should be no time limit on bringing perpetrators of “disappearances” to justice – this notion was explicitly stated in the Declaration on Disappearances when providing that a “disappearance” should be considered a continuing offence – see above);

*Superior liability* (this concept has become known as the principle of command responsibility: officials who planned, ordered, helped organize, tolerated or acquiesced in the crimes should be brought to justice alongside the people who committed the crimes);

*No defence of superior orders* (there is a right and duty to disobey an order to participate in “disappearances”).<sup>63</sup>

It is revealing to note that in the few cases that have been prosecuted so far in Bosnia-Herzegovina, the above-mentioned concepts have not or only in part been taken into account.

### ***Case study: Džidić et al***

*One such case is the prosecution for war crimes of five (later four) former Bosnian Croat military police officers before the Mostar Cantonal Court from November 2000 until their acquittal in May 2001, known as the Džidić et al*

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<sup>62</sup> See Amnesty International: “*Disappearances*” and political killings, as above, Chapter 9, pages 162-3.

<sup>63</sup> Article 6 of the Declaration on Disappearances states that “no order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it.”



case.<sup>64</sup> The suspects - who during the war were the commander and members of the Third Battalion of the military police of the HVO - had been accused of war crimes against the Bosniak civilian population and prisoners of war, detained in the Engineering Faculty at the Kemal Bjeđić University in West Mostar in 1993. Those detained in the Faculty building included 13 soldiers of the Bosnian Government Army (Armija Bosne i Hercegovine, ABiH), all but one of whom were of Bosniak origin, and who were last seen alive in the night of 10 to 11 May 1993.<sup>65</sup> Their families were represented at the trial as injured parties. The three defendants – one of whom had allegedly been the wartime commander of the military police in Mostar – refused to testify using their right to remain silent, as guaranteed in the Federation Code of Criminal Procedure. By January 2001, one of the suspects had been acquitted, and in May 2002, charges against the four other accused were dropped.<sup>66</sup>



Fahir Penava moments after his capture by HVO forces in May 1993. Fahir Penava subsequently “disappeared” along with 12 other Bosnian Government soldiers captured with him.

© Private

*During the trial, a number of prosecution witnesses, who had been detained as civilians or prisoners of war in the Engineering Faculty, described inhumane conditions of detention, and frequent and serious ill-treatment of the*

<sup>64</sup> Three of the suspects had been arrested by local police; the two others were tried *in absentia*.

<sup>65</sup> Amnesty International is campaigning for the resolution of this case through its international membership, see *Bosnia-Herzegovina : The “Disappeared” – Fahir Penava and 12 other Bosnian Army soldiers captured in Mostar*. AI Index : EUR 63/014/2002, August 2002.

<sup>66</sup> Amnesty International understands that in mid-2002, the Federation Supreme Court quashed the Mostar Cantonal Court’s verdict and has returned the case for retrial.

detainees, including by soldiers belonging to HVO (*Hrvatsko vijeće obrane* – Croatian Defence Council, the Bosnian Croat armed forces) who could enter and leave the building freely. Several witnesses recounted that, on the night of 10-11 May, a group of ABiH soldiers had been taken to a basement cell after which HVO soldiers from the Ljubuški battalion reportedly opened fire on them. One of the witnesses alleged that a hand grenade was subsequently thrown into the cell. According to the prosecution witnesses, the military police commanders, who were running the detention centre, did nothing to protect the prisoners from these abuses, or to hold to account HVO forces who had participated in them.

After reviewing the court documents relating to the trial,<sup>67</sup> and conducting interviews with the Mostar Deputy Cantonal Prosecutor, a lawyer representing the families of the “disappeared” ABiH soldiers, and the families themselves, Amnesty International has some serious concerns regarding the criminal proceedings, and the impartiality of the court in this case. In particular the conclusion of the Cantonal Court that under the Federation Criminal Code a person can only be held criminally responsible for war crimes if he had personally ordered them or personally committed them contradicts the negligence standard of superior responsibility as established in international humanitarian law.<sup>68</sup> Under this principle, a commanding officer, or a civilian superior, who has failed to prevent or punish crimes committed by his subordinates incurs criminal liability alongside the direct perpetrators of these

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<sup>67</sup> Including the indictment in the case *Prosecutor v Džidić Željko, Aničić Mate, Škutor Ivan, Poznić Erhad, Soldo Zoran*, (No. Kt. 133/99), Mostar Cantonal Prosecutor’s Office, 11 January 2000; Judgment of the Mostar Cantonal Court acquitting all accused of 18 April 2001 (No. K 1/2000); Appeal by Mostar Cantonal Prosecutor to the Federation Supreme Court (No. Kt 133/99) of 6 July 2001.

<sup>68</sup> The rule of command and superior responsibility is spelled out in two treaties which Bosnia-Herzegovina has ratified: Article 87(3) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) provides that: “The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal actions against violators thereof.” Article 28 of the Rome Statute of the International Criminal Court provides that : “In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: 1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. 2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

crimes.<sup>69</sup> The Cantonal Court's finding is also contrary to case law of the Tribunal, where several defendants were convicted solely on the basis of their command responsibility.<sup>70</sup>

In addition, the court found that one of the accused was not the commander of the HVO Military Police at the time of the events, although substantial evidence indicating that he had indeed been carrying out this function was provided to the court by the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia (Tribunal).<sup>71</sup> Instead, the court chose to rely upon two extremely brief official notes which had been submitted by the HVO-department of the Federal Defence Ministry in Mostar in 2001.

The *Džidić et al* case highlights the gaps in domestic criminal legislation which can result in perpetrators evading responsibility for their involvement in human rights violations in general, and for those which amount to war crimes (or crimes against humanity), including "disappearances" in particular.<sup>72</sup> As has been argued before, the complex nature of "disappearances" both in terms of the multiple criminal acts that these violations can involve, as well as the different layers of criminal responsibility of those who participated in its perpetration in its various stages, necessitates the introduction of concrete provisions outlawing "disappearances" in criminal legislation.

### C. The need for legal reform

One of the key provisions contained in the UN Declaration on Disappearances is the obligation of states to ensure that : "All acts of enforced disappearance shall be offences

<sup>69</sup> The Mostar Cantonal Court stated: "the criminal offence of war crimes against prisoners of war from Article 156 of the Penal Code of the Federation of Bosnia and Herzegovina (KZFBiH) (as well as the criminal offence of war crimes against the civilian population) is an "open" offence (*djelo blanketnog karaktera*), and the description of the accused's acts must be based upon rules and principles in international law which the perpetrator has violated and which are compatible with the essential elements of this criminal offence. Essential elements of the criminal offence of war crimes against the civilian population from Article 156 of the KZFBiH **do not include the failure to act or responsibility for the acts of others**, and the provisions of Article 86(2) and 87 of the Additional Protocol cannot be used as blanket principles in this case..." (emphasis added). Mostar Cantonal Court Judgment of 18 April 2001, page 20.

<sup>70</sup> See in particular *Prosecutor v. Anto Furundžija*, Case No. IT-95-17, Trial Chamber Judgment of 10 December 1998.

<sup>71</sup> All files relating to prosecutions for war crimes in the Bosnian domestic courts have to be first referred to the Tribunal under the Rules of the Road Agreement. This agreement expands on provisions made for the prosecution of war crimes under the Dayton Peace Agreement. In the *Džidić et al* case the Tribunal Prosecutor's Office had apparently also forwarded more than 30 evidentiary documents gathered by its investigators on war crimes committed in the Engineering Faculty to the Mostar court. All these documents reportedly carried the official stamp of the State Archives of the Republic of Croatia.

<sup>72</sup> It should be noted though, that the Federation Criminal Code provides for the prosecution on grounds of failure to prevent or punish abuses, by incriminating acts of negligence (Article 15) and allowing for the possibility that an offence may be committed by a failure to act when a duty to do so rested on the perpetrator (Article 30). Various other provisions further refer to acts of incitement, aiding and abetting (Articles 23-25), although these are less well defined.

under the criminal law punishable by appropriate penalties which shall take into account their extreme seriousness". (Article 4)

This requirement is repeated in the draft UN Convention on Disappearances (Article 6) and the Inter-American Convention on Forced Disappearance of Persons (Article IV). According to Amnesty International's information, so far, legislation making "disappearances" a crime under national law has been enacted only in some countries, particularly in Latin America, though very few criminal prosecutions have been initiated on such grounds.<sup>73</sup>

Amnesty International considers the introduction of provisions prohibiting "disappearances" in criminal law in all levels of jurisdiction in Bosnia-Herzegovina a crucial step in order to combat impunity for this human rights violation. The organization has repeatedly appealed to both the domestic authorities and the international community to take these measures.<sup>74</sup> Indeed, the current far-reaching process of comprehensive legal reform, including far-reaching reviews of the entity and Brčko District criminal legislation, as well as the drafting and adoption processes of the State Criminal Code, and the drafting of implementing legislation for the Rome Statute, present an excellent opportunity to introduce such provisions. As mentioned above, the State Criminal Code, while including enforced disappearances as crimes against humanity, does not include "disappearances" as individual crimes.

Amnesty International notes that the UN Declaration on Disappearances as well as the Draft Convention on Disappearances include provisions which allow for the inclusion of mitigating circumstances in "... national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance" (UN Declaration on Disappearances, Article 4(2)). The Draft Convention on Disappearances includes a similar provision, which in addition recommends leniency when a person implicated in acts of "disappearances" voluntarily gives information "... identifying those responsible for an offence of forced disappearance" (Article 5(2)). However, such forms of voluntary cooperation by

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<sup>73</sup> Examples of such countries are Mexico, Argentina, Colombia, Guatemala, El Salvador, Venezuela, Paraguay, Peru and Venezuela. Some Latin American states have also included clauses in their constitutions prohibiting the practice of "disappearances", but such provisions are not sufficient for a criminal prosecution. State parties to the Rome Statute have included the crime against humanity of enforced disappearance in their implementing legislation, including Canada, Germany and New Zealand.

<sup>74</sup> Most recently in : *Bosnia-Herzegovina : Memorandum to the High Representative on AI's concerns and recommendations regarding domestic prosecutions for human rights violations and other violations of international humanitarian law committed during the armed conflict in Bosnia-Herzegovina* (AI Index: EUR 63/009/2002, May 2002), *Bosnia-Herzegovina: AI calls for new commitments on the international day of the "disappeared"* (AI Index: EUR 63/016/2002, 31 August 2002). See also: *International Criminal Court: Checklist for Effective Implementation* (AI Index: IOR 40/011/2000, August 2000).

perpetrators should never result in absolving them from criminal responsibility for their acts

### **A question of retrospectivity**

A “disappearance” is considered to be a continuing crime under international law, regardless when the victim was abducted or arrested and last seen in the custody of lawful or *de facto* authorities. This is a determining feature of the crime of “disappearances”. Amnesty International therefore considers that national criminal provisions introduced in future should not only be used in order to prosecute those who are suspected of responsibility for “disappearances” carried out after the legislation goes into force. Such a legislative interpretation would rubber stamp the continued impunity for the thousands of cases of “disappearance” which happened during the war in Bosnia-Herzegovina and contravene the aims and objectives of international standards and case law by international and regional human rights bodies.

The criminal law principle that legislation should not be retroactive is not relevant in the case of prosecutions for “disappearances”. There is a fundamental difference between *retrospective* national legislation, which makes behaviour before the enactment of the legislation a crime under national law, which was considered criminal under international law at the time it occurred, and *retroactive* national legislation, which makes conduct before the date of enactment, that was lawful under both national and international law, a crime. The first type of legislation is consistent with the provisions of Article 15(2) of the International Covenant on Civil and Political Rights,<sup>75</sup> the second type is contrary to international law.

Amnesty International has followed this argument in cases of “disappearances” which were taken up elsewhere, notably in Mexico, which is among the few countries to have criminalized “disappearances” (in the Federal District - Mexico DF - Penal Code in 2000, and in the Federal Penal Code and Code of Penal Procedures in 2001).<sup>76</sup> However, when Mexico ratified the Inter-American Convention on Forced Disappearance of Persons in December 2001, the Mexico Government made an interpretative declaration concerning prescriptability, which limited the Convention’s application to cases which were “ordered, executed or carried out after the coming into force of the Convention”. A request to annul this declaration was presented to the Mexican Supreme Court by the Federal District governor as part of a constitutional challenge in April 2002, arguing that

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<sup>75</sup> Article 15 states: “ 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. ... 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

<sup>76</sup> See : Mexico: “Disappearances”: an ongoing crime (AI Index: AMR 41/020/2002), May 2002

it violated the Federal Penal Code, the Mexican Constitution and the Inter-American Convention on Forced Disappearance of Persons. The case reportedly remains pending before the Supreme Court.

## **IV. Ending impunity for the perpetrators – attempts so far**

### **A. The International Criminal Tribunal for the former Yugoslavia (Tribunal)**

It is a major disappointment for the international community that so far no one has been tried, convicted or sentenced by the International Criminal Tribunal for the former Yugoslavia (Tribunal) for their involvement in “disappearances” and that “disappearances” have not been explicitly included in the Tribunal’s Statute.<sup>77</sup> However, in the light of the Nuremberg Judgment, finding Field Marshall Keitel guilty for carrying out “disappearances”, these crimes could be prosecuted as the crime against humanity of “other inhumane acts” (Article 5 (i) of the Tribunal’s Statute). As the Tribunal approaches its tenth anniversary, one of its important challenges remains the thousands of “disappearances” in Bosnia-Herzegovina and other countries in the former Yugoslavia for which no one has been brought to trial.

#### ***Case study: the Foča KPDom case***

*The Tribunal Prosecutor’s office made an implicit attempt to include “disappearances” in a motion to amend its indictment in the Krnojelac case, which has become known as the Foča KPDom case.<sup>78</sup> In doing so, the prosecution argued that it wanted to demonstrate to the public that these “disappearances” formed an important element in the persecution of the non-*

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<sup>77</sup> Article 5 of the Tribunal’s Statute lists, as Crimes against Humanity :

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

<sup>78</sup> *Prosecutor against Milorad Krnojelac*, Case No. IT-97-25-1, 6 June 1997; The Penal and Correctional Institution in Foča (*Kazneno popravni Dom*) was used during the war to illegally detain thousands of Bosniaks, mainly men and most of them civilians. Hundreds of them were never seen again, after they were removed from the prison allegedly to be exchanged or taken for forced labour and it is feared that they were executed and buried in mass graves outside the town. Milorad Krnojelac, who had been the commander of the prison from April 1992 until July 1993, was convicted of crimes against humanity and war crimes on 15 March 2002 and sentenced to seven and a half years’ imprisonment. Milorad Krnojelac had been jointly charged with two other Bosnian Serbs, Mitar Rasević and Savo Todović, respectively the chief and the deputy warden at the prison – both remain at large.



Serb population in Foča.<sup>79</sup> In this case, the presiding judge decided that the motion to open the indictment was filed too late in the trial (at the end of the defence case) and that, since there was not enough evidence to attribute responsibility for the “disappearances” to the accused, there was no need to reopen the prosecution case.<sup>80</sup>

According to the head of the Bosnian State Commission on Missing Persons, when testifying at the Krnojelac trial, 266 Bosniaks were last seen in the Foča prison and had been missing since; the majority of them had “disappeared” in the period between April and late September 1992.<sup>81</sup> Other organizations also reported cases of “disappearances” where people had last been seen in the Foča prison.<sup>82</sup> The missing from this detention facility in fact constituted one of the “priority cases” which the ICRC intended to resolve through its Working Group process (see under Chapter VI below).

Ismeta Balić, the wife of Džemal Balić, who “disappeared” after having been removed from Foča prison on 18 September 1992, tried to bring an application before the Human Rights Chamber of Bosnia and Herzegovina.<sup>83</sup> She stated in her application that the Republika Srpska (RS) authorities were violating her husband’s human rights, in particular Article 5 of the ECHR, and asked that they should find and release him or otherwise inform her of his fate. The Human Rights Chamber ruled that no evidence had been presented to it, substantiating that Džemal Balić had been detained by the RS after 14 December 1995 (the date of entry into force of the Dayton Peace Agreement) and that therefore her application was inadmissible *ratione temporis*. However, the Chamber noted that it had been informed by the Field Office of the Tribunal in Sarajevo that an investigative team of the Tribunal had established that Mr Balić had been detained in Foča prison and that he had “disappeared” from there sometime between July and September 1992, and that further information on his fate might come to light during the trial of Milorad Krnojelac.

Such expected further information did not materialize during the trial of Milorad Krnojelac<sup>84</sup> and prospects of discovering the fate and whereabouts of

<sup>79</sup> Ms Hildegard Uertz-Retzlaff, for the Prosecution, transcript of trial proceedings, 25 June 2001, page 7551.

<sup>80</sup> *Ibid.* page 7553.

<sup>81</sup> Amor Masović, head of the State Commission for Missing Persons, testifying before the Tribunal on 20 March 2001.

<sup>82</sup> For example the Sandžak Helsinki Committee published lists of missing persons in Naša Borba, a Belgrade daily. In one of these, published on 5 August 1997, 13 Bosniaks, who had fled to Montenegro at the beginning of the war or who were already living there, had been handed over by the Montenegrin authorities to Bosnian Serb armed forces after which they were allegedly taken to the Foča prison. In May 1992, the Montenegrin Interior Ministry publicly admitted that it had refouled 44 persons of Bosniak nationality to Serb-held territories in eastern Bosnia, and that 21 of them had been transferred to Foča prison. At least sixteen persons of this latter group are still listed as unaccounted for by the ICRC.

<sup>83</sup> Case No. CH/97/74, *Džemal Balić against the Republika Srpska* (Decision on the admissibility of 10 September 1998).

<sup>84</sup> Džemal Balić had been referred to frequently by prosecution witnesses, testifying during the trial, all of whom had been detained in the prison themselves. They described seeing him in May 1992 after interrogations, bearing



those who “disappeared” during the war through trials at the Tribunal appear to be minimal. Eventually, the Tribunal Trial Chamber cleared Milorad Krnojelac of superior criminal responsibility for charges relating to the deportation and expulsion of large numbers of Bosniaks from the prison.<sup>85</sup> The Trial Chamber concluded that the incidents as alleged by the prosecution did take place, describing them as either transfers of prisoners to other camps, prisoner exchanges and work duty (in fact, forced labour). However, the Trial Chamber ruled that these acts did not constitute deportations or expulsions (the latter similarly being a crime not explicitly contained in Article 5), on the grounds that it had not been proven that in all cases these detainees had been transferred across a national border.<sup>86</sup>

Amnesty International understands that this interpretation of acts of deportation has been challenged in the Prosecutor’s Appeal which argues that these should not be limited to cross-border transfers and that the focus of this crime should be on the act of removal of individuals from their homes and communities. A similar interpretation was presented for acts of expulsion.<sup>87</sup> Moreover, the Prosecution asserted that the accused did bear criminal responsibility for these acts, in view of his knowledge of the discriminatory nature of the removals of Bosniak detainees from KP Dom, whether these were for the purpose of prisoner exchanges, or whether these resulted in the “disappearance” of the detainees who were removed. Therefore, according to the Prosecution argument, he incurred liability either as a co-perpetrator or as aider and abettor. The prosecution appeal underlines the position of power and the responsibility of the accused, combined with his knowledge of the risks to the detainees’ safety once he handed them over to the military authorities and many were not seen again alive. It argues that:

“[T]he KP Dom administration under the Respondent’s [eg Milorad Krnojelac’s] authority could have protected the detainees, as the new warden actually did in 1994 (such as accompanying the transport vehicles), but **chose not to.**” [emphasis added]

It is regrettable that enforced disappearances were not expressly included in the Tribunal’s Statute, which would have facilitated prosecutions for this crime against humanity. Nevertheless, as discussed above, “disappearances” have been recognized as crimes under international law for more than sixty years since they were invented by Adolf Hitler and can, therefore, be prosecuted as the crime against humanity of “other inhumane acts”.

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visible signs of severe ill-treatment and said that he were taken out of the prison around 18 September 1992 and never seen again. (Krnojelac trial transcripts of 18 January, 21 February, 12 and 19 March 2001).

<sup>85</sup> The prosecution had charged the accused with deportation and expulsion as crimes against humanity as persecution, when referring to the reports that Bosniak men had been taken away from the prison and had never been heard of since.

<sup>86</sup> Judgment in the Krnojelac case, issued on 15 March 2002, paragraphs 472-490.

<sup>87</sup> Public redacted version of Appeal Brief for the Prosecution, 22 August 2002, at section 8. *Prosecutor v. Milorad Krnojelac* (Case No. IT-97-25-A).

## B. Prosecutions before the local courts

As has been discussed under sections I and III, a small number of cases of “disappearances”, which had happened in Bosnia-Herzegovina during the war, eventually resulted in the opening of a criminal investigation and subsequent trial proceedings. One such trial was in fact conducted outside the country, before a local court in Montenegro in the Federal Republic of Yugoslavia (see section ii of this Chapter). In a few other cases, official police and judicial investigations are continuing, although these remain in a very initial stage and have so far not led to any concrete findings beyond information on the cases that was already reported by the victims’ families.<sup>88</sup>

Below a number of such cases will be discussed with the aim of highlighting different factors and circumstances which have delayed and obstructed criminal proceedings, and which will need to be tackled in order to bring perpetrators of “disappearances” to justice.

### (i) Partial justice

As has been stated above, investigations and prosecutions for “disappearances” are generally a question of political will, both on the level of those working inside the criminal justice apparatus as well as on the level of government authorities and politicians. By and large this political will has been absent in Bosnia-Herzegovina. However, whenever criminal proceedings are launched, and indeed pursued beyond the initial stages (usually due to endless insistence by the international community to push the process along at every step of the way), an intricate web of impunity surrounding this human rights violation often emerges, which is exceptionally difficult to penetrate. Many individual cases of targeted “disappearances” represent a complex web of different actors with specific roles and responsibilities resulting in a number of acts. Superior responsibility – both in terms of those who gave the order to commit the violation as well as those who condoned or acquiesced – very often goes to the top of the local military or political structure of authority.

#### *Case study: the Matanović family*

*The case of Father Matanović and his parents, which has already been referred to in Chapter I, represents one of the most high-profile national criminal*

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<sup>88</sup> According to information provided to Amnesty International by an official of the RS Ministry of the Interior in May 2002, these cases include the “disappearance” of Avdo Palić in the Žepa “safe area” in 1995, and the “disappeared” Nura Berbić and her mother Hasnija Demirović in Banja Luka in September 1995 – in both cases respectively the Human Rights Chamber and the Ombudsperson for Human Rights had ordered the RS to open investigations. In addition, Amnesty International is aware that an initial police investigation was opened into the case of Himzo Demir, the local head teacher in Višegrad who “disappeared” in May 1992.

investigations into a war-time “disappearance” so far. Father Tomislav Matanović, the Roman Catholic Prijedor parish priest, was arrested by Prijedor police on 24 August 1995. After having been detained in the police station overnight, the following day he was taken to the house of his parents Josip and Božena, and all three were then placed under house arrest. The Matanović family remained in detention, guarded at all times by local police officers until 19 September 1995, when they were taken to the Urije police station from which they subsequently “disappeared”.

Although, as mentioned above, the Human Rights Chamber ordered the RS authorities in July 1997 to start an immediate investigation into the case and to report back on any finding within three months, no serious attempts to resolve the case were made until late 2000 when, under pressure from UNMIBH, a new team of police investigators reopened the case. In September 2001, the bodies of the three victims were found in a well in a hamlet near Prijedor by Bosniak returnees. Subsequent forensic examinations revealed that they had been handcuffed and shot at close range before being dropped in the well. After the discovery of the bodies, and additional evidence linking a number of former officers in the Prijedor police force to the illegal detention of the Matanović family,<sup>89</sup> the investigating team turned the case into a murder investigation. In May 2002, RS police arrested five former police officers in Prijedor, on suspicion of their involvement in the illegal detention of the victims, which amounts to a war crime against the civilian population under criminal legislation in force at the time.<sup>90</sup> In July 2002 all five were released on bail from investigative detention.

The Matanović case marked the first decisive action of both the RS police and judiciary in a “disappearance” case. However, according to the information available to Amnesty International, while the police investigation into the murder of the Matanović family is ongoing, progress has been painstakingly slow, and the judicial proceedings have barely moved beyond the initial stages. Despite new evidence which apparently was discovered in late May 2002, and which reportedly implicated 21 additional Prijedor police officers (some of whom were still in active service at the time), investigations into the alleged criminal

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<sup>89</sup> For example, it was discovered that the Matanović family car had been transferred to the ownership of the Prijedor police in March 1996. In April 2002, Amnesty International was informed that in February and March 2002, the investigational team conducted interviews and lie-detector tests with 30 persons who had been in the Prijedor police force during the time of the “disappearance” – some of whom remained in active service in the RS police force. All of those interviewed were eliminated from the list of possible perpetrators of the killing of the Matanović family although the team recovered further evidence about the involvement of the Prijedor police in the destruction and looting of the parish presbytery. The team had meanwhile carried out ballistic examinations of 136 7,65 calibre handguns which at the time of events had been registered to the Prijedor police. (Letter from the director of the crime department of the RS Interior Ministry, Milorad Jelisavac to Amnesty International members in France of 22 April 2002).

<sup>90</sup> Prior to the arrests, the RS Public Prosecutor had referred the investigation files to the ICTY Prosecutor, according to the Rules of the Road procedures which apply to domestic war crimes prosecutions in Bosnia-Herzegovina. The Tribunal Prosecutor determined that there was sufficient evidence to proceed with a criminal prosecution as far as the allegations of illegal detention were concerned but found that additional evidence needed to be obtained to substantiate the suspect’s involvement in the murder of the Matanović family.

liability of these new suspects were apparently not conducted promptly and thoroughly.<sup>91</sup> Only in late August 2002 were new files on these additional suspects reportedly forwarded to the Rules of the Road department in the Office of the Prosecutor at the Tribunal.<sup>92</sup> In early November 2002 the Tribunal Prosecutor's Office sent the investigation files on 18 of the above-mentioned additional suspects back to the RS authorities, clearing the way for a formal judicial investigation into their alleged involvement in war crimes.<sup>93</sup> In addition, on 13 December 2002, files on another six former police officers who had allegedly been involved in the abduction and illegal detention of the Matanović family were returned to the Banja Luka District Prosecutor, authorizing the judicial authorities to proceed with criminal investigations against them.<sup>94</sup> According to information, received by Amnesty International, on 29 January 2003 the District Prosecutor filed charges against 11 men for war crimes against the civilian population (illegal detention, Article 142 (1) of the RS Criminal Code).<sup>95</sup>

Amnesty International remains concerned, based on the previous history of this case and, in the apparent absence of any sustained involvement in the case by the international community – notably the EUPM – that judicial proceedings will continue to be undermined by renewed obstruction and delays.

The Matanović case clearly demonstrates the difficulties associated with bringing to justice those responsible for *all aspects of the crime* of “disappearances”. As stated above, the eleven indicted suspects could only be connected with one element of the violation and only in as far as in the given circumstances this constituted a war crime (as the statute of limitations on the ordinary crime of illegal detention had run out). Again, this points clearly to the necessity of introducing a comprehensive criminal offence, capturing all aspects of “disappearances”, in order to achieve justice in full for the victims of this violation.

## (ii) Non-Cooperation

*"I know all the answers to my questions are here, right here in this country. But I know I will not get them here - instead I have to go via London, Washington and other places to get to the truth"*

Esma Palić, wife of Colonel Avdo Palić, who “disappeared” in the Žepa “Safe Area”

<sup>91</sup> This was apparently because some of the new suspects filed criminal complaints against the investigating police officers, alleging violations of procedures, which led to internal disciplinary procedures. The complaints were subsequently found to be without grounds.

<sup>92</sup> Local media reports quoted Alun Roberts, UNMIBH spokesman, who stated that the police report had been forwarded to the Tribunal after a delay of eight weeks.

<sup>93</sup> These suspects are alleged to have looted and destroyed the parish presbytery in Prijedor, though there was reportedly no evidence pointing to their involvement in the “disappearance”.

<sup>94</sup> SRNA, “Hague Tribunal authorizes investigation into Bosnian Serb policemen”, 13 December 2002.

<sup>95</sup> At the time of writing of this document (mid-February 2003), the indictment had reportedly not yet been confirmed by the Banja Luka District Court.

On a practical level, investigating and prosecuting “disappearances” is highly dependent on the retrieval and consolidation of information concerning all circumstances surrounding cases from a number of actors and institutions. Virtually all Bosnian cases occurred in situations of armed conflict, both during and in the aftermath of the fighting, in areas under occupation by the opposing side’s armed forces, or in places of detention. Military authorities - including regular army units, reservist formations, the military police or paramilitary groups - were intricately involved in or had knowledge of abductions and other acts associated with “disappearances” – if not bearing full or partial responsibility for many cases. The regular armed forces as well as “volunteer” paramilitary units on all sides received significant amounts of financial and material aid, as well as direct support in terms of continuous and large scale transfers of military and police personnel from the Croatian and Yugoslav Armies to the HVO and the RS Army respectively.

Investigating these cases in order to discover the fate of the “disappeared” as well as identify and prosecute those responsible is a near impossible challenge in a climate of virtually total non-cooperation by the military authorities (where they still officially exist), particularly those in the RS, Croatia and the Federal Republic of Yugoslavia (FRY).

#### Non-cooperation by the military

##### ***Case study: Colonel Avdo Palić***

*Another case which seems to have become mired while still in the initial stages of investigation concerns the “disappearance” of Colonel Avdo Palić, the war-time commander of the ABiH in the UN “safe haven” of Žepa in eastern Bosnia. On 27 July 1995 Col Palić was forcibly taken away by soldiers of the Bosnian Serb Army (*Vojske republike srpske* – VRS) from the UN Protection Forces (UNPROFOR) compound in Žepa where he had gone to negotiate the evacuation of civilians from the town which had surrendered to the VRS previously. The VRS commander, General Ratko Mladić, is said to have been present in Žepa during these negotiations, which were conducted by another senior VRS commander, General Zdravko Tolimir. Avdo Palić was reportedly taken by helicopter in the direction of General Mladić’s headquarters for eastern Bosnia in Han Pijesak.*

*Since the “disappearance”, at various times, officials in the former RS authorities have reportedly implied that Col Palić was held in some kind of detention and – given his rank and reputation<sup>96</sup> – was intended to be exchanged for captured VRS officers. The last time an unofficial exchange was proposed was in March 1996, when Hasan Muratović, who was then the Bosnian Prime*

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<sup>96</sup> According to several sources, Col. Palić was apparently held in high esteem by General Mladić, who had been his commanding officer before the war.



Minister, suggested to Momčilo Krajišnik – then the Serb member of the Bosnian presidency – that the Bosnian Serb side release Col Palić in exchange for the Bosnian government's assistance in arranging the release of a VRS General who was in the custody of the Tribunal. Mr Muratović later testified in proceedings brought by Mrs Palić before the Human Rights Chamber, stating that Mr Krajišnik's demeanour<sup>97</sup> during their meeting suggested very much that Avdo Palić was still alive at that time and held in detention for the purpose of exchange.



Colonel Avdo Palić (right) shaking hands with General Zdravko Tolimir shortly before his "disappearance" in July 1995  
© Private

Two Bosniak men who had been captured after they had escaped Srebrenica (which surrendered to the VRS just over a week before Žepa) and were trying to make their way to government-held territory, have claimed that they saw and heard Avdo Palić while they were imprisoned in an unofficial detention facility run by the VRS in a disused mill - known as Vanekov mlin - in Bijeljina. According to both, Avdo Palić was taken to this prison at some point on 10 August 1995 and he remained there after they were transferred to Batković detention camp on 1 September 1995.<sup>98</sup>

The Human Rights Chamber found multiple violations of the ECHR in the Palić case in January 2001, and ordered the RS to "carry out immediately a full investigation capable of exploring all the facts regarding Colonel Palić's fate

<sup>97</sup> Decision on admissibility and merits in Case No. CH/99/3196, *Avdo and Esma Palić against the Republika Srpska*, 11 January 2001, at paragraphs 12-13.

<sup>98</sup> Statements of Sado Ramić and Abdurahman Malkić to the Ministry of the Interior of the Republic of Bosnia and Herzegovina in Srebrenik and Tuzla of resp. 12 and 14 February 1996. Both men also testified before the Human Rights Chamber in September 2000.

from the day when he was forcibly taken away with a view to bring the perpetrators to justice".<sup>99</sup> The RS was also instructed to pay Ms Palić compensation for her mental suffering and for non-pecuniary damage in respect of her husband. The decision further set a deadline of three months for the RS authorities to report to the Chamber on measures taken to implement its decision. However, only in late 2001 did the RS authorities pay the compensation money to Mrs Palić in two instalments, after several months of pressure by the Office of the High Representative. In October 2001, the RS Minister of Defence wrote to the Human Rights Chamber, stating that after having received letters from Amnesty International members in Austria and France, inquiring into the fate of Col Palić, the Ministry had verified information on the case with the VRS.<sup>100</sup> Following this communication, the Ministry had learnt that Avdo Palić was taken to the garrison prison of Vanekov mlin in Bijeljina on 4 August 1995 and had been removed from there on 5 September 1995 by Captain Dragomir Pečanac allegedly acting on orders by the VRS Headquarters who intended for him to be exchanged.<sup>101</sup>

As far as Amnesty International is aware, the initial police investigation into the case is continuing, though the Ministry of the Interior has reportedly only recently started concrete attempts to apprehend Captain Pečanac through the FRY authorities. Given that Col Palić was last seen alive in the hands of the VRS, it is the military authorities who hold crucial information on the case. Cooperation between the police investigators of the Ministry of the Interior and the VRS command has been inadequate and slow. VRS officials reportedly only released information in minute doses, by responding in generalized terms to detailed and specific police requests for information, in particular on the transfer of Col Palić from Vanekov mlin prison. VRS officers who would be able to provide crucial eye witness testimony (General Tolimir, Captain Pečanac and other VRS officers) have reportedly been "impossible to locate",<sup>102</sup> and it is presumed that some of them may now be living in the Federal Republic of Yugoslavia.<sup>103</sup> In short, without a major effort to establish effective cooperation by the VRS – and without constant international pressure – it is clear that the investigation is not likely to produce any meaningful results.

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<sup>99</sup> Decision in Case. No CH/99/3196 (as above), at paragraph 89.

<sup>100</sup> Amnesty International membership has been campaigning on the Palić case since February 2001.

<sup>101</sup> Letter to the Human Rights Chamber by Slobodan Bilić, RS Minister of Defence, 26 October 2001. In addition, in November 2001 the RS President, Mirko Šarović wrote to Mrs Palić assuring her that he would "not give up until the Palić case had been resolved."

<sup>102</sup> Amnesty International was told by the Ministry of the Interior that, given that Tribunal investigators had also expressed interest in these individuals earlier, they had already gone into hiding before the Palić investigation started.

<sup>103</sup> Amnesty International understands that an arrest warrant for Captain Pečanac was issued by the RS authorities in early 2002. However, no international warrant has reportedly been sent to the Serbian Interior Ministry.



### Non-cooperation between and within entities

Paradoxically, in light of the pervading impunity for the massive human rights violations committed in Bosnia-Herzegovina, police and judicial bodies of both entities have in fact conducted extensive investigations into war crimes allegedly committed against their own side or ethnic group. These activities included the gathering of forensic and other criminal evidence during cross-entity exhumations, where, as a rule police crime investigators and the investigative judge of the victims' ethnic group would attend, but not judicial officials of the local court – which under domestic criminal procedure would have primary jurisdiction over the crimes.<sup>104</sup> Thus both sides have amassed a large amount of evidence against many potential war crimes suspects, the majority of whom currently are not residing on territory under their control and are unlikely to come into the jurisdiction of their courts.<sup>105</sup>

The deep rift in opinion between the two entities has particularly come to the fore since early 2002, when discussions on the future of domestic war crimes prosecutions – given the increasingly mentioned “end” date of the Tribunal in 2008 – have started to lead to concrete proposals for judicial mechanisms on the state level (see below under section iii).

In May 2002, the RS Justice Minister wrote to her counterpart in the Federation, proposing to set up an inter-entity mechanism for the exchange of information on war crimes.<sup>106</sup> In replying to this proposal, the Federation Justice Minister voiced the opinion that the Justice Ministries already had a duty to facilitate direct cooperation between the entity police and judicial bodies in relation to the gathering and exchange of information on war crimes. This duty appears to extend to both war crimes investigations and prosecutions ongoing before the Tribunal and those before the domestic courts. Moreover, the Federation minister objected to a formal judicial cooperation agreement as if the entities were two sovereign states, and argued that the matter was basically to be decided

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<sup>104</sup> To Amnesty International's knowledge, the Matanović case is the only one so far where RS police investigators attended the exhumation and autopsy of the victims as part of the criminal investigation into the “disappearance”. In other cases, local police would only be present in order to guarantee the security of the forensic investigators, judges and other officials coming from the other entity.

<sup>105</sup> According to information received by AI from the Federation and RS public prosecutor's offices in May 2002, a total of around 7,000 investigation files have been opened against individuals suspected of war crimes. The Tribunal Prosecutor has reportedly received files on 4,045 of these suspects and examined the files on about 2,500 suspects (*Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, ICTY paper, June 2002).

<sup>106</sup> “Predlog sporazuma o saradnji izmedju entitskih organa Federacije BiH i Republike Srpske u postupku prikupljanja i razmjene informacija i dokumentacionog materijala o ratnim zločinama učinjenim na području bivše SFRJ od 1991. do 1995 godine” sent by Biljana Marić, RS Justice Minister to Zvonko Marić, Federation Justice Minister, May 2002.

by the Council of Ministers as the state government.<sup>107</sup> The establishment of the High Judicial Council, a mixed body of domestic and international jurists, also led to heated debate in the RS, which saw such a move as usurping the legal competence of the RS courts.<sup>108</sup> On the other hand, it appears that officials in the Federation increasingly favour the establishment of a State Ministry of Justice, in order to facilitate the prosecution of cases such as war crimes and other violations of international law.

Obviously, tackling the vast outstanding number of cases of war crimes – and other human rights violations committed during the war – will require extensive and effective cooperation between the two entities, and must be based on a common vision and desire to achieve truth and justice for all victims of these crimes. While Amnesty International as such does not take a position on the composition and competences of the state and entity governments, the organization underlines that it is the duty of the authorities in both entities, as well as those on the state level to do all in their power to end the ongoing impunity for all human rights violations committed during the war. However, given that these are crimes under international law, their investigation and prosecution is also a duty of the international community. This duty goes beyond merely facilitating investigations and prosecutions by equipping and empowering their criminal justice systems. It additionally encompasses the – admittedly daunting – task of creating the political will alongside the process fostering maturity and understanding in society at large. Ultimately the aim of such far-reaching efforts should be the overall acknowledgment of and redress for the suffering and injustice that were inflicted in the past and that is - for many of those affected - continuing at present.

The lack of police and judicial cooperation in these cases not only occurs between entities, but has also manifested itself between the wartime opposing sides in the Federation, as was demonstrated in the trial proceedings in the *Džidić* case, which were discussed above in Chapter III. An additional complication in the particular context of this case is that of the apparent dissolution of the political and military structures that formed the Herzeg Bosna *de facto* government, which bears political responsibility for the human rights violations against the non-Croat population committed in its name.<sup>109</sup> This

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<sup>107</sup> Letter from the Federation Justice Ministry to the RS Justice Minister, referring to the proposed agreement by the RS, dated 22 May 2002.

<sup>108</sup> See for example, *BH Radio 1*, “Bosnian Serb Speaker slates High Representative for changes to constitution”, 24 May 2002. Furthermore, RS officials have consistently expressed concern with regards to a central institution undertaking domestic war crimes prosecutions, as they considered this to be the sole responsibility of the entity courts. (for example *SRNA*, “Bosnian Serb justice official advocates war crimes trials at entity level”, of 13 January 2003, quoting deputy Justice Minister, Mladen Mandić).

<sup>109</sup> The Republic of Herzeg-Bosna, covering large parts of central and south-west Bosnia-Herzegovina where the Croats formed a substantial or majority part of the population, was proclaimed in August 1993 by the then-leader of the Bosnian Croats, Mate Boban. Herzeg-Bosna never officially recognized by the international community, although the then-President of neighbouring Croatia, Franjo Tudjman, explicitly supported the *de facto* Herzeg-Bosna authorities and the Croatian Army and security forces aided and supplemented the HVO and other armed Bosnian Croat forces.

was aptly demonstrated in the *Dzidić* trial, where the Cantonal Prosecutor obtained key documentation from the Tribunal Prosecutor, including the periodic reports of the Third Battalion of the HVO military police, which confirmed the commanding position of one of the accused. However, it is currently not known whether and where the wartime archives of the HVO military police (and documentation of other bodies associated with the Bosnian Croat armed forces) are stored by the present military authorities in Mostar. Apparently, a large part of this documentation has been transferred to the state archives of neighbouring Croatia. It is therefore evident, also given the far reaching influence and involvement of the Croatian Army and political leadership during the armed conflict between the Bosniak and Croat sides in Herzegovina, that the assistance and cooperation of Croatia's authorities and judicial bodies will be necessary to ensure prompt and effective investigations and prosecutions for these violations.

#### Non-cooperation between states of the former Yugoslavia

On 9 September 2002, a court in Montenegro, in the neighbouring Federal Republic of Yugoslavia, convicted Nebojša Ranisavljević of war crimes against the civilian population for his involvement in the abduction and killing of 20 men in eastern Bosnia in 1993.<sup>110</sup> The accused, who was a member of a wartime paramilitary group operating in the eastern RS, had been arrested in 1996 but his trial did not start until May 1998.<sup>111</sup> However, trial proceedings had been delayed on countless occasions primarily as a result of the failure of the RS authorities and judiciary to comply with requests for information and judicial cooperation. The mere fact that the court came to a verdict appears to be largely thanks to the persistence of the presiding judge and the tireless efforts of local organizations such as the Humanitarian Law Centre (HLC), and the Helsinki Committee for Human Rights in Sandžak, which have relentlessly pursued the case since 1993. Lawyers, engaged by the HLC, represented the families of the victims during the proceedings.

The victims "disappeared" after having been abducted on 27 February 1993 by Bosnian Serb and Serb members of a paramilitary group at Štrpci train station. They were travelling on a train from Belgrade to Bar (Montenegro) which for about 10 kilometres ran through Serb-held Bosnian territory. The paramilitary group is reported to have been affiliated with the police force in Višegrad – which had been taken over by local Serbs – and with VRS units. Its commander, a Višegrad Serb, Milan Lukić, was indicted by the

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<sup>110</sup> The men were: Esad Kapetanović, Ilijaz Ličina, Fehim Bakija, Šećo Softić, Rifat Husović, Halil Zupčević, Senad Dječević, Jusuf Rastoder, Ismet Babačić, Tomaz Buzov, Adem Alomerović, Muhedin Hanić, Safet Preljević, Džafer Topuzović, Hasim □orić, Fikret Memović, Fevzija Zahović, Nijazim Kajević and Zvijezdan Zuličić. According to some reports, the group included a 20<sup>th</sup> victim, allegedly a black man, whose identity is still unknown. Most of the men were Muslims living in the Sandžak region in the Federal Republic of Yugoslavia.

<sup>111</sup> See: *Federal Republic of Yugoslavia: Five years on – still no justice for victims of Štrpci abductions*, AI Index: EUR 70/09/98, 26 February 1998.

Tribunal in October 1998 for crimes against humanity and war crimes in the Višegrad area during 1992-1994.<sup>112</sup> Initially, the incident led to public outcry and the Serb and Montenegrin authorities announced they would take measures immediately to find out the men's whereabouts and bring the abductors to justice.<sup>113</sup> However, official attempts to investigate the incidents were limited to the establishment of a small Montenegrin Parliamentary Commission for the Collection of Information on the Abduction of Passengers from Train no. 671 in October 1993.<sup>114</sup> Commission members complained on several occasions that Federal Yugoslav, Serbian and Montenegrin officials were refusing to assist them in their enquiries. In November 1995 the Montenegrin Parliament rejected a request by the Commission to turn it into an investigative body which would have the authority to compel state officials to hand over evidence in the case.<sup>115</sup>

In early 1996 the Commission was reportedly approached by a Serb man from Despotovac village, who had apparently served as a volunteer in another Serb paramilitary group during the war and was stationed near Višegrad at the time of the "disappearances". This man, DP<sup>116</sup> said he could give them further information on the case. The Commission, in view of its lack of investigative powers, informed the Montenegrin Interior Ministry, and in June 1996 this witness, DP, was summoned to report to the State Security Police Headquarters in Podgorica. According to DP's testimony, and a subsequent interview he gave to the Belgrade daily *Dnevni telegraf*, he had been asked by Milan Lukić a few days prior to the abduction, to participate in a train-robbery in order to acquire money for food and other supplies for paramilitary forces. Although DP turned the offer down, he later learnt that two other men from his unit (one of them he said was Nebojša Ranisavljević, who was also from Despotovac) had agreed to participate in the operation. In the afternoon of 27 February 1993, he and another man from his unit were passing the Višegrad hydro-electric power plant when they saw a man belonging to the unit shoot a number of people, whose bodies were thrown in the Drina river.

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<sup>112</sup> Milan Lukić remains at liberty, and has allegedly fled to the Federal Republic of Yugoslavia. The indictment against him was only unsealed by the Tribunal in November 2000, after all efforts to arrest him and his cousin Sredoje Lukić who was indicted with him, had proved unsuccessful.

<sup>113</sup> In March and July 1993, when meeting the victims' families, Slobodan Milošević, then President of the Republic of Serbia told them that his government was "... doing everything it could to find the abductors ..." (quoted in a special edition of the Montenegrin weekly *Monitor*, 27 February 1996), and that he would "leave no stone unturned in order to find these people [their relatives]".

<sup>114</sup> *Komisija za prikupljanje informacija u vezi sa otmicom putnika iz voza br. 671*, the Commission was formed eight months after the "disappearances" on the proposals of deputies of two opposition parties in the Montenegrin Parliament.

<sup>115</sup> The chairman of the Commission, Dragiša Buržan, reportedly stated they had come up against a "wall of silence" in their attempts to obtain information from the authorities, in particular in their approaches to the Federal President, the Ministry of Defence, the Ministry for Human Rights, and the ŽTP Railway Company Beograd. (*Monitor* of 27 February 1996).

<sup>116</sup> The full name of this person, who also testified during the Ranisavljević trial, is known to Amnesty International.

On 22 October 1996, Montenegrin police arrested Nebojša Ranisavljević, who on that same day reportedly confessed to them that he had participated in the abduction: he told the police that his approximately 25-strong unit stopped the train upon arrival in Štrpci station and, after checking their identify papers, removed several passengers of Muslim nationality, one Croat and one man of African origin. The paramilitaries, under the command of Milan Lukić, reportedly then took these people by truck to Preljevo hamlet just outside Višegrad where they searched them and took money and valuable possessions. After this the men were reportedly executed in groups of five or six by Milan Lukić and one of his men. Nebojša Ranisavljević himself shot and wounded one of the passengers who tried to escape. He claimed that the bodies of the dead were thrown into the Drina.

In March 1997, the Bijelo Polje Public Prosecutor charged Nebojša Ranisavljević with war crimes against the civilian population (Article 142 paragraph 1 of the Federal Yugoslav Criminal Code). He was finally convicted of these crimes on 10 September 2002 and sentenced to 15 years' imprisonment. His lawyer has appealed the verdict.

While it took already more than a year for Nebojša Ranisavljević's trial to start – reportedly as his lawyers contested the venue of the court, given that he was born in Serbia – the subsequent proceedings were adjourned so often and for such prolonged periods that they had to be re-opened three times.<sup>117</sup> One of the main reasons for these delays appears to have been the lack of cooperation between the Montenegrin court and the RS judicial authorities, in spite of their geographical proximity, the fact that criminal procedures were (at this point in time) virtually identical and the absence of any linguistic barriers. When the Bijelo Polje court after the second court session in 1998, sought further information from the RS authorities, their requests were reportedly ignored on three occasions. Finally the Montenegrin Justice Minister, Dragan Šoć, intervened and the Srpsko Sarajevo District Court ordered the Višegrad Higher Court to conduct an investigation on behalf of the court in Bijelo Polje.<sup>118</sup> In July 2000, the presiding judge decided to adjourn proceedings again, as further evidence had to be obtained from the RS authorities, who apparently only assisted the court after another lengthy delay. A reconstruction of the killings of the victims, requested by the court in July 2000 finally took place at the hydro-electric power plant in Višegrad on 13 May 2002 (in the presence of witness DP).

It is evident that justice remains to be done in the Štrpci case since only one of those responsible has been tried, and that the responsibility to do so extends to the

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<sup>117</sup> Under the Code of Criminal Procedure, after an adjournment of more than 30 days, proceedings have to be re-opened. See also the analysis by the Humanitarian Law Centre of the Ranisavljević trial of 27 September 2002 ("Ranisavljević Trial – A Judgment Based on the Evidence").

<sup>118</sup> "Zakazan nastavak sudjenja za zločin u Štrpcima!", *Oslobodjenje*, 23 May 2000.

authorities in the Federal Republic of Yugoslavia as well as in the RS.<sup>119</sup> Official records which had been submitted to the court by the Yugoslav Railway Company ŽTP (*Željezničko transportno preduzeće*) “Beograd”, contained minutes of meetings held in early February 1993 between ŽTP officials, local police officials and Yugoslav Army officers. The aim of these meetings was to address concerns about the security on trains running through parts of Serb-held Bosnia-Herzegovina, given that the ŽTP had learnt about imminent plans of Bosnian Serb armed forces in Rudo (near Štrpci) to abduct passengers from trains in order to use them for the exchange of prisoners.<sup>120</sup> One ŽTP official, testifying during the trial, stated that he had been assured that the General Staff of the Yugoslav Army would be informed. However, it is unclear what, if any, subsequent action was taken, and whether the Yugoslav Army contacted the VRS requesting them to refrain from removing Yugoslav passengers from the trains running through Bosnia-Herzegovina.

Amnesty International has called upon the Federal Yugoslav and RS authorities to bring to justice all those responsible for having taken part in the abduction and subsequent murder of the 20 men.<sup>121</sup> Amnesty International is concerned that the RS authorities do not appear to have any inclination to exercise their jurisdiction and investigate the case with a view to bringing the other perpetrators of these crimes to justice.<sup>122</sup> However, if full justice is to be done in this case and others,<sup>123</sup> it is imperative that police investigators

<sup>119</sup> During the war and immediately after the Štrpci “disappearances” Milan Lukić was arrested and detained several times in Serbia, apparently on grounds of illegal possession of arms. In mid-1994 he was “extradited” by the Serbian authorities to the RS, where he was reportedly “given a hero’s welcome by the local population” (according to Dragoljub Todorović, legal representative of the Štrpci relatives, in his concluding remarks, given on 27 June 2002).

<sup>120</sup> A letter by the Director of the Department of Defence Preparation of the ŽTP, Mitar Mandić to the ŽTP General Director, dated 1 February 1993, states that the former was informed on 28 January 1993 by the head of the Užice railway division, that members of the VRS in Rudo were planning to stop the Belgrade-Bar train in order to remove passengers, in the section of the track running through Bosnia-Herzegovina “probably either at the Štrpci or Goleš station”. As a result of this letter, Mr Mandić sought assistance from the Serb police and military in order to improve security along the full track of the Belgrade-Bar connection and several meetings were held to discuss this issue.

<sup>121</sup> See: *Federal Republic of Yugoslavia : War crimes verdict in Montenegro – AI calls for all those responsible for Štrpci abductions and murders to be brought to justice*, AI Index: EUR 70/009/2002, 12 September 2002.

<sup>122</sup> In an interview with an Amnesty International delegate in May 2002 the Srpsko Sarajevo district public prosecutor stated that he had no intention to request an investigation by the Višegrad investigative judge in order to open criminal proceedings before that court and claimed the case was a matter for the courts in the Federal Republic of Yugoslavia.

<sup>123</sup> Criminal proceedings were opened recently in Serbia in another war-time “disappearance” case, the circumstances of which were similar to the Štrpci case. On 20 January 2003, the Belgrade District Court started the trial of Serb men (all but one born in Bosnia-Herzegovina), Dragoljub Dragičević, Djordje Šević, Oliver Krsmanović and Milan Lukić. All four men are charged with war crimes against the civilian population for their involvement in the abduction and killing of 16 Bosniaks (including one woman) from the Sandžak region in the FRY who were travelling on a bus which briefly crossed into eastern Bosnia in October 1992. Their bodies were never found. Both Milan Lukić and Oliver Krsmanović are tried *in absentia*. Mr Krsmanović reportedly remains in Republika Srpska. On 24 January the Banja Luka daily *Nezavisn novine* reported that one of its reporters had



and judicial officials work closely together in order to investigate and prosecute all those involved for the violations of national and international humanitarian law committed in this case.<sup>124</sup>

**(iii) The need for supervision and assistance – the role of the international community**

The Matanović case, which has been discussed above in section IV, demonstrates that the international community has a constructive and essential role to play in ensuring that investigations and prosecutions into wartime “disappearances” are carried out and that they are conducted in a professional, impartial and thorough manner. From the very beginning of the initial police investigation, the Matanović case was relentlessly supervised and monitored by UNMIBH/IPTF human rights monitors. Indeed, the fact that the investigation after almost two years resulted in the opening of judicial proceedings and the detention of some of the suspected perpetrators, represents one of the most successful achievements of the UNMIBH/IPTF Human Rights Office.

The challenges faced by the local police who were investigating their former or current colleagues, in a local political and social climate characterized by increased returns of the pre-war non-Serb population which exacerbated underlying ethnic tensions, will likely continue to have an important and detrimental impact on the proceedings. In this regard, the case poses a compelling argument for the continuation of close international supervision and support of the continuing police and judicial investigations. Such investigations run a substantial risk of being undermined or compromised if left to the local authorities.

At the same time, the Matanović case underlines the fact that proceedings against those suspected of involvement in “disappearances” are the exception rather than the rule. The woefully inadequate response of the local authorities in the many other cases of outstanding “disappearances” requires far more aggressive pressure by the international community, which needs to go beyond the purely humanitarian approach favoured so far. In particular the European Union Police Mission (EUPM) – which took over the supervision of the police forces from UNMIBH/IPTF in January 2003 - and the Office of the High Representative, which has taken the lead on judicial reform and domestic war crimes prosecutions, must address the pervading impunity for “disappearances”.

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spoken to Oliver Krsmanović’s wife two days ago who confirmed he was in Višegrad. However a spokesperson for the RS Interior Minister stated that an official arrest warrant from the Serbian authorities had not yet been received. (*Nezavisne novine*, “Policija dobila nalog za provjeru”, 24 January 2003).

<sup>124</sup> The UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by the General Assembly in Resolution 3074 (XXVIII) of 3 December 1973, recognized an extensive list of obligations of all states to cooperate in the investigation and prosecution of war crimes. In particular, AI underscores the fundamental principle that states must not shield persons, suspected of crimes under international law, from justice, and that they are under the obligation to either investigate and prosecute such persons, or extradite them to states that are willing to exercise jurisdiction.

In October 2002, Amnesty International wrote to the Secretary General of the Council of the European Union, Javier Solana, recommending that the EUPM continues to oversee and monitor police investigations into human rights violations committed during the war, in view of the organization's concerns that lamentably few such investigations have been carried out so far.<sup>125</sup> Given the fact that at present the proposed organizational structure and mission statement of the EUPM do not envisage incorporating such a separate department or indeed mention any future involvement in investigating human rights violations, Amnesty International recommended in particular that a dedicated human rights unit be established within the EUPM structure. Such a department should be staffed by highly qualified and experienced police investigators and civilian human rights monitors who would work together with local police and judicial investigators to ensure that investigations were conducted professionally and in line with international standards. The ultimate aim of these efforts should be the sustained capacity and willingness in the domestic police forces to initiate such investigations as a matter of course and not only upon pressure by the international community.

In this context, it is of the highest importance that the EUPM department build upon the efforts made by the human rights office at UNMIBH so far, so that both institutional knowledge as well as more detailed information pertaining to individual cases will not be lost in the transfer period. However, Amnesty International was informed by EU officials in December 2002 that such a unit is not envisaged and that human rights work would be "mainstreamed" in the overall functioning of the mission. While welcoming the acknowledgment that human rights will be incorporated in the EUPM's daily work, Amnesty International remains seriously concerned about the lack of a consistent strategy by the international community in tackling the legacy of unresolved human rights abuses and the absence of any sense of urgency in addressing these issues.

**(iv) The State Court of Bosnia and Herzegovina and future prosecutions for crimes under international law**

As has been noted above, discussions and consultations on the establishment of a more viable mechanism for the prosecutions of crimes of international humanitarian law have intensified with the envisaged termination of the work of the *ad hoc* Tribunal. The concept of such a mechanism has also been put forward as part of the continuing judicial reform in Bosnia-Herzegovina.

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<sup>125</sup> See Amnesty International's recommendations on the European Union Police Mission – Memorandum to Javier Solana, Secretary General of the Council of the European Union, AI Index: EUR 63/018/2002. See also *Standing up for human rights in Europe and throughout the world – Amnesty International memorandum to the Greek presidency*, AI European Union office, January 2003.

A group of consultants was commissioned by the High Representative in April 2002, to examine these issues and suggest possible ways forward, which resulted in a report issued in May.<sup>126</sup> The consultants' report reiterated the need to establish a suitable court which would be able and competent to process the substantial number of cases examined by the Tribunal Prosecutor under the Rules of the Road procedure, as well as an additional number of cases investigated by the Tribunal Prosecutor's office (concerning mid- and lower-level suspects).<sup>127</sup> Of particular concern in this regard was the poor record of the domestic criminal justice systems in prosecuting persons suspected of war crimes.

In light of these factors, the consultants' report favoured the option of establishing a special Division in the State Court of Bosnia and Herzegovina to prosecute violations of international humanitarian law (IHL).<sup>128</sup> It was proposed that judges of both the trial and appeal chambers in this division, as well as the prosecutorial staff and the staff in the investigations' unit, consist of both national and international professionals, in order to ensure non-biased, impartial and independent proceedings. However, it was envisaged that the involvement of international jurists and other staff would be eventually phased out as and when the process of legal reform would be completed and the domestic court system would be deemed mature and capable enough to carry forth these tasks.

In late May 2002, Amnesty International wrote to the newly appointed High Representative, Paddy Ashdown, presenting him with a number of the organization's concerns and recommendations on the proposed mechanism for war crimes prosecutions, taking into consideration the consultants' draft proposal. While Amnesty International welcomed the proposed IHL Division of the State Court as a first step to address the widespread impunity for the tens of thousands of war crimes, crimes against humanity and genocide committed in the country, the organization urged the adoption of a more comprehensive and inclusive approach. It proposed that the international community also attach international judges, prosecutors and investigators also to the entity-level courts prosecuting war crimes, crimes against humanity and genocide (Cantonal courts in the Federation and District Courts in the RS) in order to lay the foundation for a genuinely effective court system.<sup>129</sup>

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<sup>126</sup> The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina, Consultants' report to the OHR, submitted by Peter Bach, Kjell B  rnberg, John Ralston and Almiro Rodrigues (Consultants' report).

<sup>127</sup> At present a total of 17 cases, involving 50 suspects, investigated by the Office of the Prosecutor, could be already transferred to the local judiciary. In addition, it has been suggested that some suspects, who are currently in pre-trial detention in the Netherlands, could also have their cases transferred to a local court. (Consultants' report, Section 2.)

<sup>128</sup> The Law on the establishment of the State Court of Bosnia and Herzegovina was imposed by the then High Representative, Wolfgang Petritsch on 12 November 2000. The idea of using the State Court as the most appropriate institution in this regard had already been put forward during earlier discussions between the Tribunal Prosecutor, the Office of the High Representative, the United Nations Mission and the State Council of Ministers in late 2001.

<sup>129</sup> No formal response has been received to date from the Office of the High Representative to the points raised in this Memorandum.

The option of adding international judges to the entity courts was also discussed in a subsequent report issued by the Tribunal in June 2002.<sup>130</sup> This report examined a number of options, ranging from the setting up of a new and completely international court to merely training the local judges, or sending international observers to monitor proceedings before the local courts. The option of adding international judges (to the local courts) was considered advantageous, as it would guarantee better adherence to international norms, increase the public's confidence in the judiciary and contribute to the overall process of legal reform.<sup>131</sup> Nevertheless, the solution presented by the report in its conclusion envisaged a two-tier system whereby the IHL Division of the State Court consisting of both national and international judges would try cases referred to it by the Tribunal (i.e. of violations investigated by the Office of the Prosecutor). At the same time, the Cantonal and District Courts would continue to try cases which had been examined by the Tribunal Prosecutor under the Rules of the Road procedure, in proceedings which would be attended by international observers. In exceptionally "sensitive" cases, the State Court would take over prosecutions from the local courts (upon the determination of the State Court Prosecutor, also envisaged to be an international jurist).

Given the scale of unresolved crimes under international law, Amnesty International still considers it essential, in the interests of justice, that proceedings at the Cantonal and District courts should, as far as possible, include an international component as well. In the context of prosecutions for acts associated with "disappearances", many cases will, in the initial stages, concern the investigation and trial of the "lower-level" suspects. As has been discussed earlier, it has only been with painstaking and long-term involvement of the international community that some cases have actually been investigated. Without the sustained involvement of the international community at the judicial level as well as during the police investigations, prosecuting the suspected perpetrators will almost certainly be riddled with the same difficulties that have infected domestic war crimes trials so far. Sending in international observers, whose role, as the Tribunal report itself acknowledges, could be limited to a purely passive one, would not by itself result in impartial and expedient trial proceedings. Indeed, most international organizations with a field presence in Bosnia-Herzegovina have up till now engaged extensively in such monitoring – albeit on a sometimes haphazard and intermittent basis – of trials for war crimes.<sup>132</sup>

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<sup>130</sup> *Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, June 2002.

<sup>131</sup> The option of adding international judges was also mentioned by Pierre Richard Prosper, the US Ambassador-at-Large for War Crimes Issues, during an OSCE-sponsored conference on war crimes and state responsibility for justice on 15 June 2002.

<sup>132</sup> In spite of these very labour-intensive and protracted efforts, only in a few cases have trial proceedings actually resulted in a thorough analysis being published by international monitors. The Judicial Systems Assessment Program (JSAP), which monitored the functioning of the judiciary as part of UNMIBH from late 1998 until 2000, has provided the most comprehensive reporting on some individual cases. With the aim of tackling the lack of a

Apart from these organizational issues, Amnesty International also underlined the need to incorporate the crimes of “disappearances”, extrajudicial executions, and torture, in the new State Criminal Code, in order for these grave human rights violations to be rendered eligible for criminal prosecutions when committed as individual acts (i.e. not as part of war crimes or crimes against humanity).<sup>133</sup>

## V. Reparation, including compensation, for victims and their families

*“In the case of enforced disappearance, which is a particularly serious and continuing human rights violation committed with the very intention of evading responsibility, truth and legal remedies, reparation is of the utmost importance, not only as a matter of redress for the individual victims, but also as a pre-condition for establishing truth, justice and peace in the societies affected by such practices.”*

Manfred Nowak, independent experts on enforced disappearances.<sup>134</sup>

The majority of the civilian victims of the serious human rights violations committed in Bosnia-Herzegovina during the war have never received any form of reparation for their suffering, including material or monetary compensation for damages. By and large those who have benefited from compensation and social benefits for damages suffered in the armed conflict have been war veterans and their families.<sup>135</sup> While legislation in both entities allows for the possibility of bringing civil suits for damages against both public officials and non-state actors for violations of national law, international standards indicate that the state is also obliged to offer reparation, including compensation, to victims of serious crimes, including human rights violations. These obligations have been reiterated in the revised Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian

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comprehensive and coordinated trial monitoring system, Amnesty International suggested in its memorandum to the High Representative for the setting up of an independent body with the task of monitoring and public reporting on trials conducted both by the IHL Chamber of the State Court and by Cantonal and District courts. This body would ideally follow the model of the Legal Systems Monitoring Section (LSMS) in the OSCE mission in Kosovo, which publicly reports on prosecutions for war crimes, crimes against humanity and genocide, and has access to individuals, lawyers, courts, facilities of detention and imprisonments as well as court records.

<sup>133</sup> The State Criminal Code includes enforced disappearances as a crime against humanity (Article 173(1) (i), as well as unlawful killings (Article 178) and torture and other cruel, inhuman or degrading treatment (Article 191).

<sup>134</sup> In : *Civil and Political Rights, Including Questions of : Disappearances and Summary Executions*, as above, at Paragraph 84.

<sup>135</sup> See, The International Center for Transitional Justice: *A casualty of politics: Overview of Acts and Projects of Reparation On the Territory of the Former Yugoslavia*, July 2002.

Law.<sup>136</sup> The definition of reparation in this document includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

While the Statute of the Tribunal does not make express mention of any concrete measures to be taken to address the issue of reparation for victims, Security Council Resolution 827/1993 (which adopted the Tribunal Statute) provides that “the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law” (Article 7). It is doubtful, and information is conspicuously lacking, on whether attempts were made to seek compensation through the local courts by victims in Bosnia-Herzegovina, let alone how successful these efforts were. The Rome Statute of the International Criminal Court (ICC) does authorize the ICC to *inter alia* order a convicted person to make reparations – including restitution, compensation and rehabilitation – to their victims.<sup>137</sup> However, the Rome Statute only applies to crimes committed on or after 1 July 2002.

Amnesty International raised its concern on the absence of any explicit reparation mechanisms in connection with the future activities of the IHL Division of the State Court in the above-mentioned memorandum to Lord Ashdown. The organization recalled that, though the issue was not discussed in the consultants’ report, some measures of general compensation to categories of people who were disproportionately affected by war crimes were being contemplated. Beneficiaries of such general efforts would include for instance victims of war crimes who were still displaced and unable to return to their pre-war home such as the Srebrenica survivors. As noted above, by mid-February 2003, Lord Ashdown had yet to respond to Amnesty International’s memorandum.

Amnesty International believes that the establishment of the State Court and the imminent transfer of Tribunal cases to this body create an unprecedented opportunity for both the national authorities and the international community to address this situation. The organization in this respect notes the words of the Prosecutor of the Tribunal, Carla del Ponte, in her speech to the UN Security Council on 21 November 2000:

“...It is regrettable that the Tribunal’s statute makes no provisions for victim participation during the trial, and makes only a minimum of provisions for compensation

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<sup>136</sup> These revised principles and guidelines were appended to the Final Report of the Special Rapporteur Mr. M. Cherif Bassiouni, as requested by the Commission on Human Rights in 1999. (UN Doc: E/CN.4/2000/62 at Annex). It is expected that the Commission on Human Rights at its next session (March-April 2003) will establish “... an appropriate and effective mechanism with the objective of finalizing the elaboration of the set of Basic principles and guidelines ...” drawn up by the Special Rapporteur. (See: *Civil and Political Rights: The right to a remedy and reparation for victims of violations of international human rights and humanitarian law*, Note by the High Commissioner for Human Rights; E/CN.4/2003/63, 27 December 2002).

<sup>137</sup> Article 75(2) of the Rome Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 (A/CONF.183/9).



and restitution to people whose lives have been destroyed. And yet my office is having considerable success in tracing and freezing large amounts of money in the personal accounts of the accused. Money that could very properly be applied by the courts to the compensation of the citizens who deserve it. We should therefore give victims the right to express themselves, and allow their voice to be heard during the proceedings. In the event of a conviction, that would then create a legal basis for the Judge to decide upon the confiscation of monies sequestered from the accused. The money might also go towards defraying the cost of the prosecution. I would therefore respectfully suggest to the Council that [the] present system falls short of delivering justice to the people of Rwanda and the former Yugoslavia, and I would invite you to give serious and urgent consideration to any change that would remove this lacuna in our process. ...”<sup>138</sup>

To Amnesty International’s knowledge, no further research has been conducted, exploring the suggestions made by the Tribunal Prosecutor two years ago. Therefore, the organization considers it of the greatest importance that serious attention be given to the Prosecutor’s statements and proposals. As a first step, the possibilities should be examined of establishing a Trust Fund for victims – along the lines of the Trust Fund provided under Article 79 of the Rome Statute of the International Criminal Court.<sup>139</sup> A working group, which has been asked by the Preparatory Commission of the ICC (the Working Group on Financial Regulations and Rules) to define further the Trust Fund and its work, in October 2001 sought the assistance of a number of non-governmental organizations working specifically on victims’ issues. Subsequently some guiding principles were formulated by the so-called Victims Working Group, which continues to be involved in the Preparatory Commission.<sup>140</sup>

Taking heed of these efforts, which are currently being further developed, it would be highly advantageous for those involved in the establishment of the State Court in Bosnia-Herzegovina, both at the national and the international level, to involve the expertise of local organizations and professionals with experience of assistance to victims of human rights violations and crimes under international law. The State Ministry for Human Rights and Refugees could be called upon to play a coordinating role in such

<sup>138</sup> Press Release, Office of the Prosecutor, The Hague, 24 November 2000, JL/P.I.S./542-e.

<sup>139</sup> Article 79 states that “1. A Trust Fund shall be established by decision of the Assembly of States Parties of the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.”

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.”

<sup>140</sup> For example, the UK-based organization REDRESS, which seeks reparation for torture survivors, as part of this Working Group, issued a number of principles to ensure effective functioning of the ICC Trust Fund. These principles include the management and administration of the Trust Fund and the proposed beneficiaries of the Trust Fund (See NGO principles on the establishment of the Trust Fund for Victims, in: *Amnesty International: International Criminal Court: concerns at the tenth session of the Preparatory Commission (1-12 July 2002)*, AI Index: IOR 40/010/2002, June 2002)..

initial consultations. In order to establish a genuinely equitable system for the reparation of victims, this proposed Trust Fund should obviously also extend to victims of perpetrators prosecuted by the Cantonal and District Courts.

### **A. Compensation**

No general mechanism for compensation has yet been created for use by civilians with claims against the state (or the entities) as a result of the war in Bosnia-Herzegovina (see also Chapter VI, B). This issue should specifically benefit from further attention and the present legislative provisions in force in Bosnia-Herzegovina are in need of revision. The Human Rights Chamber has found, for example, that the Federation Law on Obligations does not provide an adequate remedy for persons who suffered a violation of Article 3 of the ECHR (the right not to be subjected to torture or to inhuman or degrading treatment or punishment) at the hands of public officials.<sup>141</sup> Article 200 (1) of the Federation Law on Obligations allows for monetary compensation in civil proceedings by courts for persons who “suffered physical pain, mental suffering due to a decrease of life activity, impairment, violated reputation, honour, freedom or personal right, death of a close person, and fear, if it [the court] establishes that this is justified taking into account the circumstances of the cases and especially the intensity of the pain and fear, regardless of whether compensation for material damages exists or not”.

However, the Chamber concluded in the *Unković* case that the cause of the violation suffered was in fact the inaction of the Federation authorities to inform the applicant of the fate of his family (who had been killed by ABiH soldiers during the war) with the result that he lived in painful anxiety for several years. In that case, the Chamber also stated that it had not been informed by the Federation authorities of any other remedy in domestic law which would provide for compensation for such mental suffering.

The Law on Obligations in force in the RS apparently contains provisions similar to those in force in the Federation and would therefore be equally ineffective in terms of offering a genuine remedy for persons who suffered a violation of Article 3 of the ECHR (or other rights enshrined in the ECHR).<sup>142</sup>

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<sup>141</sup> *Djordo Unković against the Federation of Bosnia and Herzegovina*, Case no. CH/99/2150, Decision on Admissibility and Merits of 9 November 2001, at Paragraphs 80-81, and *Velimir Pržulj against the Federation of Bosnia and Herzegovina*, Case no. CH/98/1374, Decision on Admissibility and Merits of 13 January 2000, at Paragraph 119, which states: “To sue private individuals for monetary compensation cannot be considered a remedy for violations of the applicant’s right not to be subjected to inhuman or degrading treatment, where these individuals have acted in their capacity as public officials.”

<sup>142</sup> See *Rifat Bejdić against the Republika Srpska*, Case no. CH/96/27, decision on the claim for compensation of 22 July 1998.

Under both entities' legislation, it is possible for individuals to claim compensation by launching a private criminal investigation against certain violations of the Criminal Code by both non-state actors and agents of the state.<sup>143</sup> However, such actions are obviously limited to those criminal offences incorporated in domestic criminal legislation. Once again this situation reinforces the necessity to introduce criminal provisions prohibiting all acts of "disappearances" in law, with the explicit possibility for the victims (and their relatives) to file actions in court in order to obtain compensation for the suffering caused by these crimes – including by holding the state liable for these damages.<sup>144</sup>

Moreover, the scope of reparation under national legislation appears to be limited to compensation and does not extend to the other four principles of reparation: retribution, rehabilitation, satisfaction and guarantees of non-repetition.<sup>145</sup> Amnesty International urges the Bosnian authorities to take advantage of the opportunity presented by drafting implementing legislation for the Rome Statute to ensure that courts can award all five forms of reparation.

## VI. Respecting the rights of the relatives

*"Srebrenica is also a name for a post-traumatic syndrome, the syndrome displayed by the women, children and old people who did not die and who, ever since July 1995, six years now, still have no news of their husbands and sons, fathers, brothers, uncles, grandfathers. Thousands of amputated lives six years later, robbed of the affection and love of their kin now reduced to ghosts who return to haunt them day after day, night after night."*

ICTY Judge Almiro Rodrigues, announcing the verdict in the trial of Bosnian Serb General Radislav Krstić, 2 August 2001

It has long been recognized internationally, as well as in Bosnia-Herzegovina, that "disappearances" in many (if not most) cases create more than one victim. Addressing the issue of unresolved "disappearances" must therefore be done by taking account of *all* victims of this violation, including the "disappeared" person as well as his or her relatives. All measures proposed above – in particular those relating to compensation –

<sup>143</sup> Federation Code of Criminal Procedure 48, SFRY Code of Criminal Procedure (in force in the RS), Articles 52 and 53.

<sup>144</sup> For example the Draft International Convention on the Protection of All Persons from Enforced Disappearance provides that : " ... the acts referred to in article 2 and 3 [ie "disappearances", acts constituting elements of "disappearances" and "disappearances" as crimes against humanity] of this Convention shall render the State liable under civil law, and the State may bring an action against those responsible in order to recover what it has had to pay, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law." (Article 24 (4)).

<sup>145</sup> See the Final Report of the Special Rapporteur Mr. M. Cherif Bassiouni (UN Doc: E/CN.4/2000/62).

therefore are of equal (and perhaps greater) relevance to the families of the “disappeared”. This is particularly true in the context of Bosnia-Herzegovina, where the daily reality of continuing discoveries of new mass graves reinforces the fact that the majority, if not all, of those who “disappeared” were killed.



Nura Berbić (left) and her mother Hasnija Demirović (third from left) at a family gathering. Both women “disappeared” in Banja Luka on 14 August 1995. ©Private

The Human Rights Chamber and the Human Rights Ombudsperson have both explained how “disappearances” disproportionately and directly affect the relatives of the immediate victim, who in turn become victims of violations of the right not to be subjected to inhuman treatment. For example, in the case of Nura Berbić and her mother Hasnija Demirović, two Bosniak women who “disappeared” in Banja Luka on 14 August 1995, the Ombudsperson concluded that Nura Berbić’s husband was “... left in the most complete doubt and apprehension ...” and that the complacency of the RS authorities caused him to suffer inhuman and degrading treatment.<sup>146</sup> Immediately after the “disappearance”, Mr Berbić went to the Banja Luka police several times, urging them to investigate the abduction of his wife and mother-in-law. He also approached many other authorities in the city and RS *de facto* government and on 25 August 1995 handed over ownership of one of his companies to the Banja Luka municipal authorities in the hope

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<sup>146</sup> Report of the Ombudsperson adopted on 30 September 1998 in Application No. 7/96, *Hasnija Demirović, Nura Berbić and Džemil Berbić against the Republika Srpska*, at page 9.

that this would result in the release of his wife and her mother.<sup>147</sup> Mr Berbić filed a criminal complaint with the local police on 15 September, following his own attempts to investigate the case during which he learnt that two of the abductors of his wife were allegedly serving police officers, and obtained further details on the car that was used for the abduction. Although some very preliminary investigative activities were undertaken by the Banja Luka police, no further information about the fate and whereabouts of Nura Berbić and Hasnija Demirović was ever revealed to Mr Berbić.<sup>148</sup> Instead, during one of his visits to the police station in September 1995 he was himself physically attacked by a police officer, who threatened to kill him if he were to come to the station again. Mr Berbić left Banja Luka soon afterwards. The Ombudsperson's decision, that the RS authorities conduct an immediate investigation into the case, remains to be implemented four years later.

It is disturbing that Mr Berbić's experiences in trying to find out what happened to his wife and her mother are in no way unique. Many other relatives of the "disappeared" braved similarly dangerous situations – including during direct fighting in or near their home towns or by crossing the front line – in order to approach the local police, military and political leadership in desperate attempts to find and save their loved ones. Such endeavours demonstrate that frequently heard subsequent claims by former and current authorities that they had no knowledge at the time that persons had "disappeared" and/or that the perpetrators were members of armed groups operating outside their control, are false.<sup>149</sup>

## A. The right to know

The right of relatives to be informed of the fate and whereabouts of their "disappeared" loved ones has been repeatedly recognized by international human rights standards and in case law. In 1981, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended that states:

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<sup>147</sup> Prior to this, Mr Berbić had reportedly been subjected to a sustained campaign of harassment and intimidation to hand the firm (a shopping centre consisting of more than 60 shops with a monthly income from rent of over 35,000 DEM) he co-owned over to the Serb-controlled municipal authorities and leave Banja Luka.

<sup>148</sup> Mr Berbić believes that the investigation was subsequently closed. However, in May 2002 Amnesty International was informed by the RS Interior Ministry that the case was still being investigated by the local police but that no progress had been achieved primarily because of the alleged lack of resources.

<sup>149</sup> Among the efforts which have come to Amnesty International's attention are for example the attempts by the Roman Catholic Bishop of Banja Luka, Msgr. Franjo Komarica, to raise the "disappearance" of Father Matanović and his family, as well as other such cases, with the local police and the chief of military staff for the Banja Luka and Prijedor region, General Momir Talić. They also include the attempts of parents and spouses of Bosniak victims of "disappearances" in Višegrad, who were last seen alive in the infamous *Vilina vlas* hotel cum detention centre, to ask Bosnian Serb police and paramilitary commanders to find out what happened to these people.

“give attention to the need for special measures for the protection of persons including relatives, giving information related to the fate of disappeared persons.”<sup>150</sup>

Furthermore the Convention on the Rights of the Child guarantees the right of children separated from their parents, including,

“... where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both of the parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family...” (Article 9(3)).

Access to factual information on human rights violations in general has been recommended as an integral part of the victim’s right to a remedy, which by analogy extends to the victim’s relatives who are equally affected by the violation.<sup>151</sup>

In addition, international humanitarian law to some extent guarantees the right of families to be informed about the fate and whereabouts of missing relatives. Protocol I to the Four Geneva Conventions provides that families of missing persons have the right to know the fate of their relatives and that all parties concerned should work towards this aim (Article 32). It furthermore provides that “[a]s soon as circumstances permit, and at the latest from the end of active hostilities, each party to the conflict shall search for the person who had been reported missing by an adverse Party” (Article 33).<sup>152</sup>

As has been already discussed above in Chapter II, the Human Rights Chamber has held that, by not providing information on the fate and whereabouts of a “disappeared” person, the entities are contravening rights guaranteed to their citizens under the ECHR, in particular the right not to be subjected to inhuman treatment and the right to respect for family life.

The anxiety and distress caused by not knowing the fate of one’s close relatives, means that many of those left behind are unable to rebuild their lives both emotionally

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<sup>150</sup> Resolution 15(XXXIV). Question of the human rights of persons subjected to any form of detention or imprisonment, adopted on 10 September 1981 (E/CN.4/1512).

<sup>151</sup> See the Final Report of the Special Rapporteur Mr. M. Cherif Bassiouni (UN Doc: E/CN.4/2000/62) at Paragraph 11. In subsequent discussion on the Special Rapporteurs guidelines, it was noted that the right to full access to information and truth served as “an element to avoid recurrence of violations”. (*Civil and Political Rights: The right to a remedy and reparation for victims of violations of international human rights and humanitarian law, Note by the High Commissioner for Human Rights*; E/CN.4/2003/63, 27 December 2002, at Paragraph 143).

<sup>152</sup> However, these provisions do apparently not cover the search for missing persons by a party for its own nationals. (See: *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of work of the Commission: Human Rights, Mass Exoduses and Displaced Persons* (E/CN.4/1996/52/Add.2), Report of the Commission on Human Rights, Fifty-first session, 5 December 1995.



and practically. While no authoritative nation-wide studies have been undertaken into the scope and implications of war-related traumatic stress - let alone the effects of “disappearances” on their relatives - it is estimated that for a significant percentage of the population these effects still have an enduring and significant impact on their mental and physical health.<sup>153</sup>

## B. Access to social and economic rights and benefits

Quite apart from the emotional impact of the “disappearance” of a family member, concerns have been repeatedly voiced by organizations involved in the issue that, given that the majority of those left behind in the wake of this violation are women and children,<sup>154</sup> there are severe and enduring adverse effects both on their economic and social circumstances as well as their personal security.<sup>155</sup> In particular, in cases where the dependants of the “disappeared” are still internally displaced – such as with the majority of the Bosniak female population from Srebrenica of non-Serb origin – they face mounting financial problems and social exclusion.

While this paper primarily focuses on the need for the Bosnian criminal justice system to address the impunity for crimes of “disappearances”, Amnesty International recognizes the additional and overwhelming need to incorporate the issue into the overall process of enabling access to social and economic justice for relatives and victims of human rights violations committed during the armed conflict. The overarching need for reparation must be addressed by taking into consideration the particular situation of those directly affected by “disappearances”, which will require a gender-sensitive and long-term approach. There is a current drive by the international community to close down

<sup>153</sup> A special report by UNHCR/UNHCHR on the situation of displaced women in Bosnia-Herzegovina stated that there was “consensus among researchers that the majority of the population has suffered some form of psychological disturbance, ranging from slight post-traumatic stress disorder to acute psychiatric illness”. (see: *Daunting Prospects – Minority Women: Obstacles to their Return and Integration*. UNHCR/UNHCHR report, April 2000, page 16).

<sup>154</sup> According to the ICRC, out of 20,786 tracing requests for persons unaccounted for after the war in Bosnia-Herzegovina, on 30 June 2002, 17,087 cases were still pending. There are no current statistics for the gender breakdown for Bosnia-Herzegovina solely, however out of the total of 31,541 tracing requests still unresolved in former Yugoslavia (Croatia, Bosnia-Herzegovina and the Federal Republic of Yugoslavia including Kosovo) 27776 cases or 88.1% concern missing men and boys. (from *Unknown Fate, Untold Grief*, ICRC Special Report, August 2002). The special report by UNHCR/UNHCHR estimated that 92% of the missing persons in Bosnia-Herzegovina are men (see: *Daunting Prospects – Minority Women: Obstacles to their Return and Integration*).

<sup>155</sup> See : UN Study on Women, Peace and Security, United Nations 2002, Paragraphs 109-110. The International Helsinki Federation for Human Rights (IHF), for example, has also noted that displaced women in Bosnia-Herzegovina “are particularly vulnerable to prostitution and organized prostitution, both of which involve a significant risk of health problems and violence that should not be underestimated.” (IHF, *Women 2000: An investigation into the Status of Women’s Rights in Central and South-Eastern Europe and the Newly Independent States*, page 97).

programs of assistance and terminate funding of local organizations, while applying a “tick-list” strategy to addressing unresolved issues forming the legacy of the war.<sup>156</sup>



Displaced women from Srebrenica, whose relatives are among the “disappeared”.  
Collective Centre at Banovići, October 2001. © AI

Despite the increased rate of implementation of property legislation and the ever higher numbers of registered minority returns, many of the women and dependants of the “disappeared” are unlikely to return to their pre-war communities for a variety of reasons. Such factors range from fear for their personal security, compounded by the absence of a family or community network in the place of return. A major concern is the lack of financial means to rebuild destroyed housing.<sup>157</sup> Although Annex 7 to the Dayton Peace Agreement states that “[a]ll refugees and displaced persons have the right ... to have restored to them property of which they were deprived in the course of hostilities since

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<sup>156</sup> This mentality is most clearly visible in the use of statistics in demonstrating the rate of property implementation, which is evidently increasing, and which is used as the main criterion to assess the increase in minority returns. However no comprehensive, independent research has been done so far into the overall sustainability of returns, and data on integration and inclusion of minority returnees in political, social and economic life in their pre-war communities is lacking. (See also: *The Continuing Challenge Of Refugee Return in Bosnia & Herzegovina*, ICG Balkans Report 137, 13 December 2002, particularly pages 11, 22-32 and 39-40).

<sup>157</sup> See *Bosnia-Herzegovina: Waiting on the doorstep – Minority returns to eastern Republika Srpska*, (AI Index: EUR 63/07/00), July 2000, Chapter 2.2.

1991 and to be compensated for any property that cannot be restored to them.” (Chapter 1, Article 1).<sup>158</sup> However no functioning compensation mechanism was ever set up. Reconstruction of destroyed housing was funded by and large through donations and investments by the international community, which has drastically decreased this funding over the past years. In the case of the displaced population – which numbered over two million at the end of the war – the argument could have been made that this category of people should have in fact been made the primary beneficiaries of the privatization process.<sup>159</sup> This process as such, however, has been of concern to human rights monitors in the international community, as it reinforced discriminatory practices and undermined ethnic reintegration and minority returns.<sup>160</sup>

Furthermore, many of these women continue to have little trust in the unbiased functioning of the police, the judiciary, health services and the education system – most of which remain to a large degree mono-ethnic despite attempts by the international community to increase the recruitment of minority returnees to the public sector.<sup>161</sup>

A major factor in the decision not to return is the expectation of many women that they will face a drastic cut in income as they will lose the benefits associated with having missing family members, as the systems and criteria for such benefits (*invalidnine*) are tied to the ethnicity of the victim and benefits do not appear to be easily or at all transferable across entity borders. For some displaced women with missing relatives this assistance is in fact their only source of income.<sup>162</sup> In addition, even though the

<sup>158</sup> The reportedly highly increased implementation of property laws – currently at over 60 % - throughout Bosnia-Herzegovina has led to many people repossessing their pre-war accommodation which was not destroyed.

<sup>159</sup> The privatization process in Bosnia-Herzegovina was started in 1998, as part of the transition from a centrally-managed and socialist to a market-led economy, through the sale of state-run companies. Both entities adopted their own legislation and established implementation agencies. So far, it is estimated that less than half of state-owned companies throughout the country have been privatized.

<sup>160</sup> See for example the sections on Economic and Social Rights in the *Human Rights Coordination Centre quarterly reports*, of May and October 2000. In addition to human rights issues, there was also concern that in many cases, legal ownership of companies had not been properly established.

<sup>161</sup> See also: *Daunting Prospects*, as above, at Chapter III. With regards to achieving a more representative and inclusive public sector, it is envisaged that the continued implementation of the 2000 Constitutional Court’s decision (which affirmed the equal status and rights of all ethnic groups throughout the country) will deploy the parity system to ensure that minority returnees have access to positions in local government and parts of the public sector. Other targeted efforts to achieve parity include the recruitment of minority police officers fostered by UNMIBH/IPTF, and the (re)employment of minority judges and other judicial officials in a project carried out by the International Organization of Migration (IOM).

<sup>162</sup> For example, this is the case for displaced women from Srebrenica still living in collective accommodation or in pre-fab housing units constructed in 1993-5, in Tuzla Canton, and for whom the loss of such benefits (at around a monthly 400KM) presented insurmountable difficulties, given their already dire economic situation (Amnesty International interviews with displaced women in the Ježevó and Grab potok settlements, Banovići municipality, August 2002). Feedback from organizations working with displaced women implies that in practice they encounter difficulties in transferring these benefits from the location of displacement to their pre-war municipality. Given the current differences in legislation and claims procedures in the Federation (where each Canton has its own

*invalidnine* are reportedly higher than other social allowances and pensions, displaced women in this category increasingly have to resort to renting private accommodation after being evicted from housing they previously occupied.<sup>163</sup>

Moreover, in both entities, legislation regarding pensions and allowances awarded to the relatives of the missing or dead who were civilians appears to be inadequate. Concern has been expressed that many women who are in need of support are falling through the cracks of the system.<sup>164</sup>

Whether these women choose to return to their pre-war municipalities or remain in the places where they have settled since, there is a clear and overwhelming need to develop comprehensive and long-term strategies to integrate them and their families fully and permanently in society and enable them to have unimpeded access to employment, education, health care and social welfare.<sup>165</sup> Such initiatives must be conducted on a country-wide basis and not be limited to the levels of the entities, so that any proposed solutions would not disadvantage (or indirectly discriminate against) those lacking the confidence or the possibility to return to their pre-war homes. The solution could be partly provided by country-wide legislation, such as the envisaged bill on missing persons, which is reportedly being drafted by the Ministry for Human Rights and Refugees.

## VII. Non-judicial mechanisms

### ICRC working group

Under the Dayton Peace Agreement, the parties (in this context the entities and the state governments) are obliged to cooperate fully and through the tracing mechanisms of the ICRC in order to establish the fate and whereabouts of all persons unaccounted for (Annex 7, Article 5). One of the methods used to meet this aim in Bosnia-Herzegovina is

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implementing legislation) and the RS, it would be difficult to see how such transfers would happen without further agreements between the relevant entity ministries regulating the process.

<sup>163</sup> According to BOSFAM, a local non-government organization working with displaced persons in Tuzla Canton, the average amount of rent for private accommodation in that Canton as a rule claims the larger part of the *invalidnine* displaced women from Srebrenica are receiving on grounds of their missing or dead relatives.

<sup>164</sup> The existing framework on civilian war victims and their families in both entities is reportedly not consistently implemented in practice. Furthermore the amount of money awarded to widows of civilian casualties is significantly lower than that received by families of dead or missing soldiers. (*Daunting prospects*, as above, at Chapters III(2,3) and IV(9,10))

<sup>165</sup> For example, both minority returnee women and displaced women have reported that they are discriminated against in offers of employment (see *Women 2000*, as above, page 89). They are in particular concerned about the problems they face in ensuring proper education for their children: for example displaced women remaining in collective centres in remote areas, who lack the financial means to pay for transportation to the nearest school, reportedly in some cases decided to send their male children to school only. Both categories of women also lack adequate and affordable health care for themselves and their families, including psycho-social counselling services which may help them overcome severe trauma experienced during the war.

the Working Group on Missing Persons (Working Group), chaired by the ICRC, which started work in early 1996. The ICRC convened regular meetings of the Working Group between the entity commissions on missing persons, attended also by relatives of the missing and representatives of the international organizations. The Working Group primarily worked on the resolution of cases which needed inter-entity cooperation and the disclosure of the location of mass graves. It focused its efforts initially on resolving three priority cases (such as the above-mentioned Foča KP Dom case) which had been documented by the ICRC during the war, and which were envisaged to be easily resolvable.

However, as a result of the slow progress made (largely because of political obstruction by all sides, such as the refusal to disclose information unless a reciprocal amount of information was disclosed by the other side) the ICRC decided to suspend the Working Group until the authorities provided some answers. In 2000 the ICRC attempted to revitalize the process and initially successfully lobbied for the appointment of senior officials within all the key entity ministries - Justice, Defence and Interior - in order to assist investigations into "disappearances". Amnesty International understands that subsequently these efforts were again put on hold, and that renewed approaches were made to the authorities in the course of 2002.<sup>166</sup>

### **Missing Persons Institute**

The Missing Persons' Institute (MPI) was established by the ICMP and inaugurated in August 2000. It is a registered national - rather than an international - institution, though currently still governed by a Steering Committee of ICMP international commissioners.<sup>167</sup> It is envisaged that eventually the organization will be entirely run by local actors. The activities of the Missing Persons' Institute are currently focused on the exhumation and identification process which was discussed in Chapter II, and support for the families of the missing through a program of outreach and support. In addition, the Missing Persons Institute is envisaged to take over the lobbying efforts carried out so far by the ICMP in putting pressure on the authorities in Bosnia-Herzegovina as well as in the wider region to disclose information on cases of missing persons and cooperate with and contribute to the MPI's work on the exhumation and identification projects. Ultimately the MPI would take over the work of the two entity commissions on missing persons, which would be merged into one state commission, creating a country-wide body. Amnesty International understands that efforts are currently under way to appoint the national members of the Supervisory Board, which would operate under the Steering Committee and oversee the work of a Scientific Advisory Board, an Ethics Committee and an Executive Director.

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<sup>166</sup> *Unknown Fate, Untold Grief*, as above, at Chapter 3, b.

<sup>167</sup> At present these are: James V. Kimsey from the US (Chair), Queen Noor from Jordan, Uffe Elleman-Jensen from Denmark, Michael Portillo from the UK, Sahabzada Yakub-Khan from Pakistan, and Willem Kok from the Netherlands.



## Truth and reconciliation commission

Draft legislation on the establishment of a Truth and Reconciliation Commission was reportedly debated in early 2001 after some non-governmental organizations, in particular both branches of the Helsinki Committee in the Federation and the RS, and other individuals had proposed the formation of such a body. The draft law foresaw a seven-member Commission mandated to investigate the causes, nature and extent of the massive human rights violations which had been committed during the war. The members – to be appointed by the UN Security Council – should be individuals of outstanding credibility and integrity, and free of any political or national bias. The Commission was envisaged to eventually release a final report, including information on “... the number of people [who] died, who were killed, wounded, missing, tortured, raped, imprisoned without a just cause and forcefully displaced. ... and locations on graves”.<sup>168</sup>

However, already at an early stage, legal experts of the Tribunal raised many objections to the draft law, as they foresaw serious conflicts of interests, particularly as the stated objective of the Truth and Reconciliation Commission was to carry out investigations into human rights violations, which could compromise prosecutions carried out by the Tribunal. While the Tribunal has primacy over the national courts in Bosnia-Herzegovina (and other countries), no such clear provision exists with respect to truth and reconciliation commissions. Furthermore, the draft law at that point did not contain any express provisions that the Truth and Reconciliation Commission should not have the power to grant immunity or amnesty to individuals participating in proceedings.<sup>169</sup>

The Truth and Reconciliation Commission could play an integral role in the painful but necessary process of achieving recognition for the massive suffering of the entire population during the war. It may also be the only way forward in order to come to an authoritative and (more) generally accepted socio-historical account of some of the aspects of the war that continue to be disputed, much to the detriment of building common ground in order to foster reconciliation and sustain minority returns.<sup>170</sup>

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<sup>168</sup> Draft Law, Article 16.

<sup>169</sup> *The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina*, Speech by ICTY President Claude Jorda on 12 May 2001 in Sarajevo, Press Release, JL/P.I.S./591-e.

<sup>170</sup> Such a process is, for example, much needed in the context of the fall of Srebrenica and the ensuing mass killings of Bosniak men and boys, which has yet to be comprehensively and directly acknowledged by the RS current political leadership. In July 2002, the RS government bureau for the documentation of war crimes issued a report which reportedly downplayed the number of Bosniak victims and asserted that more Bosnian Serbs had been killed. Although the government subsequently distanced itself from the report (largely as a result of the ensuing outcry in the mass media and pressure by the international community) it has not made any serious attempts since to initiate a more inclusive and impartial public inquiry.



The Truth and Reconciliation Commission could, given its stated objectives, be an effective mechanism to obtain further information on cases of “disappearances” and abductions which were committed during the war, in particular with a view to confirming allegations on suspected mass grave sites. In this context, and in the spirit of fostering more local involvement in resolving cases, it may well be the most appropriate forum in which witnesses could come forward and offer information on such issues, which could lead to relatives being finally able to retrieve the remains of their “disappeared” family members.<sup>171</sup> However, Amnesty International concurs with the recommendations made by the Tribunal representatives that such information should not be given in exchange for immunity from prosecution.

## **Conclusions and recommendations**

Amnesty International believes that in order to tackle impunity for “disappearances” in Bosnia-Herzegovina immediate measures must be taken both on a legal and a practical level. Those who perpetrated this serious and continuing crime against humanity until now have escaped justice by exploiting the absence of legislation criminalizing “disappearances” and by the authorities’ feeble and inadequate, or non-existent efforts to investigate and prosecute suspected perpetrators or no such efforts at all. It is up to the authorities on all levels in Bosnia-Herzegovina to undertake the necessary legislative changes and ensure that they will be implemented in practice. It is up to the international community to support and oversee both the legislative and the operative process.

Unearthing the evidence connecting the “disappearances” of so many individuals will take a lot of political will. It will also require political and moral courage to undo the legacy of impunity, which has rested for far too long on the assumption that “disappearances” as well as other human rights violations are the inescapable by-products of war. It will take sustained efforts to unravel the chronology of events that occurred in every single case, to establish the facts constituting every wilful act of a “disappearance” and to reveal the chain of command underlying both the crime and its cover-up. Unless these steps are taken, the ghosts of the “disappeared” will continue to hover over Bosnia’s past, present and future and thousands of relatives’ lives will remain “amputated” - in the words of Judge Rodrigues. True reconciliation will never be attainable without confronting the ghosts of the past.

As with any crime, but particularly those committed during armed conflict, with time it will become harder to piece together information and evidence which can be used in court: physical evidence will be more difficult to locate, may become contaminated or

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<sup>171</sup> For example in the above mentioned cases of the 13 “disappeared” ABiH soldiers, many allegations were made, including in the local media, that their bodies were deposited in a nearby disused mine site, which covers a vast area, and has never been examined by the local (Bosnian Croat) authorities of West Mostar who have reportedly dismissed such claims.

otherwise not useable. The memory of those witnessing events may be influenced or distorted by the lapse of time or by later information, and witnesses will become more difficult to locate and less willing to testify.

Resolving outstanding “disappearances” is a prerequisite in order to achieve reconciliation and heal a fragmented society. This admittedly daunting task should be envisaged as a comprehensive and inclusive process, not subjected to arbitrary deadlines. Ultimately, the massive efforts by the international community, which established and supported the Tribunal and initiated the reform of the entire domestic judicial system, will only be meaningful when they are sustained by a generally accepted vision in Bosnian society that such steps form the beginning and not the conclusion of confronting the legacy of impunity for human rights violations.

## **Recommendations**

### **Legislative reform**

- The legislatures in the Republika Srpska, the Federation of Bosnia-Herzegovina and the Brčko District must, as a matter of urgency, enact new criminal legislation which will render all acts of “disappearances” a criminal offence. The working groups of national and international legal experts, chaired and coordinated by OHR, which drafted the State Criminal Code, should ensure that the State Criminal Code will also include individual acts of “disappearances” (alongside acts of “disappearances” which qualify as a crime against humanity);
- Legislation on witness protection must be urgently drafted and adopted by the entity legislatures (legislation on the state level was imposed by the High Representative in January 2003). In addition the entities’ criminal codes should be amended to include sanctions against those who are suspected of any form of intimidation and harassment of witnesses testifying during investigations and prosecutions of “disappearances” and other human rights violations, as well as judicial and police officials engaged in proceedings ;
- The Bosnian authorities on all levels must amend their legislation on civil proceedings for compensation (the Law on State Obligations in the Federation and the RS) in order to hold state officials liable for “disappearances” and other human rights violations. Victims of “disappearances” and their relatives must be afforded reparation, including compensation, in law.
- The principle of command responsibility must be adequately reflected in the entity and Brčko District criminal legislation, in line with international principles and the draft State Criminal Code;

- Draft legislation on the establishment of a Truth and Reconciliation Commission in Bosnia-Herzegovina should reflect as one aim of the TRC the resolution of outstanding cases of “disappearances”.

**Implementation and practice**

- Effective police and judicial investigations must be launched into all cases of outstanding “disappearances”, as a matter of urgency, in an independent, impartial and thorough manner, and through unconditional and effective cooperation between the entity and state criminal justice institutions, including police investigators and the judiciary;
- The Federation and Republika Srpska Armies, as well as the HVO component of the Federation Army must provide unconditional cooperation in investigations for “disappearances”, including full details of events relating to “disappearances” in detention facilities operated by the armed forces during the war, the whereabouts of military officers, whether in active service or retired, who are suspects of involvement in “disappearances” or who may possess information on individual cases. Should this cooperation not be forthcoming, then those responsible should be investigated and prosecuted under the negligence provisions available in the entities’ criminal codes;
- NATO-led Stability Forces (SFOR) should use their authority and influence, in view of their efforts to restructure the armies of the Federation and the RS, to ensure that the military authorities disclose information in cases of “disappearances” and cooperate unconditionally and effectively in cases where investigations have been launched by police and judicial investigators – such considerations should be part of the entry process of the Bosnian armed forces in the NATO Partnership for Peace coalition;
- In accordance with international law and standards,<sup>172</sup> the armed forces of the Federal Republic of Yugoslavia and of the Republic of Croatia must provide unconditional cooperation in investigations for “disappearances” which happened in Bosnia-Herzegovina during the war, including information on the whereabouts of military officers, whether in active service or retired, who are suspected of involvement in acts of “disappearances”; the authorities of both countries should immediately hand over any official documentation in their possession which contains information on the activities of their own armed forces or those affiliated with them which may be relevant to investigations and prosecutions for crimes under international law. In this regard, Amnesty International recommends that the HVO archive is returned to the custody of the Federation defence ministry;

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<sup>172</sup> For example UN General Assembly Resolution 3074/1973, paragraphs 3,4 and 5.

- The international community should explore the possibility of including international judges and prosecutors in Cantonal and Districts Courts, as recommended by Amnesty International in its memorandum to the High Representative, with a view to laying the foundations for a truly effective and impartial judicial system capable of investigating and prosecuting all those suspected of war crimes and other crimes under international law;
- The international community must contribute to the development in practice of effective witness protection programs in close cooperation with the Office of the Prosecutor and the Victims and witnesses' Unit at the Tribunal and with effective national witness protection programs, such as those in the USA, the UK and Italy. The EUPM in particular should prioritize the monitoring of the effectiveness of these programs, as well as using its good offices to initiate and coordinate measures, wherever appropriate, to resettle vulnerable witnesses, at risk of reprisals, in third countries;
- A working group of national and international legal and human rights experts, in consultation with local non-governmental organizations working with victims of human rights violations, should look into the possibility of establishing a Trust Fund for the reparation and compensation of victims of human rights violations, in particular victims of "disappearances" and their relatives;
- The extensive knowledge gained by UNMIBH/IPTF police experts and human rights monitors, involved in supervising criminal investigations into human rights violations (including "disappearances") should be safeguarded in the transfer of its mandate to the European Union Police Mission (EUPM). In the interests of both sustaining currently ongoing investigations and those that should be undertaken in the future, UNMIBH/IPTF should as a matter of priority ensure that the knowledge acquired both on individual cases as well as institutional expertise is documented comprehensively for future use by EUPM taking over this invaluable oversight function;
- The EUPM must give high priority to supervising and monitoring investigations by local police into cases of "disappearances" and not just limit its monitoring of human rights cases to present and post-conflict incidents;

#### **Exhumations and identifications**

- The Bosnian authorities on all levels must take an active role in seeking out and providing information on mass grave sites and protect those sites; in particular the military authorities must exchange and disclose information on the location of

individual and mass graves immediately as required by international humanitarian law;

- The international community, in particular EU countries and the US, must continue to provide money, expertise and support for the DNA identification program and in order to facilitate the establishment of the Missing Persons Institute;
- The Bosnian authorities must provide unconditional access to pre-war health and dental records that may be used in order to identify mortal remains in more traditional ways.

#### **Rights of the relatives**

- The Bosnian authorities on all levels must immediately provide families of the “disappeared” with information as to their fate and whereabouts, in line with international standards, in particular the ICCPR, the Convention on the Rights of the Child, the ECHR, and international humanitarian law;
- The Bosnian authorities on all levels must ensure that benefits granted to people, who are dependents of persons who “disappeared” during the war, can be transferred across the entity boundaries, thus enabling the relatives of the “disappeared” to return to their pre-war homes without substantial loss of earnings;
- The Bosnian authorities on all levels, as well as the international community involved in the process of minority returns should devote more attention to the problems encountered by the wives of missing persons in reclaiming property and land, and/or in gaining access to funding to rebuild destroyed property;
- The Bosnian authorities on all levels should create conditions for the dignified burial of mortal remains exhumed from mass graves in the pre-war communities where these people lived, should this be the wish of the relatives, and wherever possible, commemorate those who fell victim to “disappearances” and extra-judicial killings in appropriate ways, as part of the overall process of reparation. Such grave sites must be respected by everyone and protected against vandalism and sacrilege of all kinds.