

Committee on Enforced Disappearances

**Concluding observations on the report submitted by Bosnia and Herzegovina under article 29, paragraph 1, of the Convention\***

**ADVANCE UNEDITED VERSION**

1. The Committee on Enforced Disappearances considered the report submitted by Bosnia and Herzegovina under article 29, paragraph 1, of the Convention (CED/C/BIH/1) at its 180th and 181st meetings (CED/C/SR.180 and 181), held on 4 and 5 October 2016. At its 191<sup>st</sup> meeting, held on 12 October 2016, it adopted the following concluding observations.

**A. Introduction**

2. The Committee welcomes the report submitted by Bosnia and Herzegovina under article 29, paragraph 1, of the Convention, which was prepared in accordance with the reporting guidelines, and the information contained therein. The Committee appreciates the frank and constructive dialogue held with the delegation from the State party on the measures taken to implement the provisions of the Convention, which has dispelled several of its concerns.

3. The Committee also thanks the State party for its written replies (CED/C/BIH/Q/1/Add.1) to the list of issues (CED/C/BIH/Q/1).

**B. Positive aspects**

4. The Committee commends the State party for having ratified almost all of the United Nations core human rights instruments and their optional protocols, as well as the Rome Statute of the International Criminal Court.

5. The Committee also welcomes the fact that the State party has recognized the competence of the Committee, under articles 31 and 32 of the Convention, in respect of individual and inter-State communications.

6. The Committee also commends the State party on the measures adopted in relevant areas, including:

(a) The adoption of the Law on Missing Persons that entered into force in 2004 applicable to persons who went missing in the period from 30 April 1991 to 14 February 1996;

(b) The establishment of the Missing Persons Institute in 2008;

(c) The adoption of a National War Crimes Strategy in 2008;

(d) The adoption of the Law on Witness Protection Programme in Bosnia and Herzegovina in 2014;

\* Adopted by the Committee at its 11<sup>th</sup> session (3-14 October 2016)

(e) The signature of the various bilateral agreements and documents on cooperation with neighbouring countries in the search for missing persons and to facilitate prosecution of alleged perpetrators.

7. The Committee notes with satisfaction that the State party has extended an open invitation to all special procedures mandate holders of the Human Rights Council to visit the country. In that connection, the Committee welcomes the visit to Bosnia and Herzegovina of the Working Group on Enforced or Involuntary Disappearances in 2010, and encourages the State party to continue cooperating with that mechanism under its mandate.

### **C. Principal subjects of concern and recommendations**

8. While welcoming the measures taken by the State party in relation to enforced disappearance, including its classification as an offence in the criminal code of Bosnia and Herzegovina, the Committee considers that, at the time of adoption of the present concluding observations, the legal framework in force throughout the State party to prevent and punish enforced disappearances is not in full compliance with the obligations incumbent on the States that have ratified the Convention. The Committee encourages the State party to implement its recommendations, which have been made in a constructive and helpful spirit, with the aim of ensuring that the existing legal framework, and the way it is implemented by state, entity and district authorities, is fully consistent with the rights and obligations contained in the Convention.

### **General information**

#### **State party's Constitutional structure**

9. Conscious of the challenges posed by the State party's complex Constitutional structure, the Committee notes with concern that, both at the legislative level and in practice, the degree of compliance with the State party's obligations under the Convention varies from one level of jurisdiction to another. In this regard, the Committee notes that steps are being taken to harmonize the legislation at state, entity and district levels but it observes that, for the time being, the discrepancies between the criminal codes may create a legal uncertainty on the crimes, the definition, and the penalties associated to it, which may jeopardize the uniform application of the Convention throughout the national territory.

10. **Recalling article 41 of the Convention, the Committee recommends that the State party adopt the necessary measures to ensure that, at state, entity and district levels, legislation and practice are in full compliance with the obligations set forth in the Convention.**

### **Definition and criminalization of enforced disappearance (arts. 1-7)**

#### **Non-derogability of the prohibition of enforced disappearance**

11. The Committee notes with concern that domestic legislation does not specifically provide for the non-derogability of the prohibition of enforced disappearance under any exceptional circumstances (art. 1).

12. **The Committee recommends that the State party take the legislative measures necessary to specifically incorporate into domestic law an absolute prohibition of enforced disappearance at all levels, in line with article 1 (2) of the Convention.**



#### **The offence of enforced disappearance**

13. The Committee welcomes the amendments to the Criminal Code of Bosnia and Herzegovina adopted in May 2015, which introduce the offence of enforced disappearance as an autonomous crime in article 190(a) and takes note of the State party's information that this new provision does not cover the responsibility of officials at entity and district levels. It observes that a number of articles in the Criminal Codes at entity and district levels contain elements related to enforced disappearance, but remains concerned that these articles are not sufficient to adequately encompass all the constituent elements and modalities of enforced disappearance, as defined in articles 2 and 6 of the Convention. In this respect, the Committee considers that only the criminalization of enforced disappearance as a separate offence throughout the country would enable the State party to comply with its obligation under article 4, which is closely related to other treaty obligations concerning legislation, such as those in articles 6, 7 and 8 (arts. 2, 4-8).

14. The Committee recommends that the State party adopt the legislative measures necessary to ensure that enforced disappearance as an autonomous offence is incorporated into the Criminal codes of the Federation of Bosnia and Herzegovina, the Republika Srpska, and the Brčko District, in line with the definition contained in article 2 of the Convention. In this respect, the State party should:

- (a) Ensure that the offence carries appropriate penalties which take into account its extreme seriousness;
- (b) Guarantee that, if statute of limitations is applicable to enforced disappearance, the term is of long duration and proportionate to the extreme seriousness of the offence and, taking into account its continuing nature, commences from the moment when the offence ceases; and
- (c) Ensure that modalities provided for in article 6 of the Convention are included in all applicable laws.

#### **Aggravating and mitigating circumstances**

15. While noting that the Criminal Code of Bosnia and Herzegovina contains general principles of meting out punishment, the Committee observes that the State party has not incorporated specific provisions that would provide for mitigating and aggravating circumstances applicable to acts of enforced disappearance listed in article 7, paragraph 2(a) of the Convention (art. 7).

16. The Committee recommends that the State party take the necessary legislative measures to ensure that the Criminal Code of Bosnia and Herzegovina include mitigating and aggravating circumstances for the act of enforced disappearance, covering all the elements set out in article 7 (2) of the Convention.

#### **Criminal responsibility and judicial cooperation in relation to enforced disappearance (arts. 8-15)**

#### **Investigation of enforced disappearances committed in the context of armed conflicts in the former Yugoslavia**

17. The Committee welcomes the very high rate of locating and identifying persons reported missing as a consequence of the war and the recent steps taken to accelerate investigations. It notes, however, that the fate and whereabouts of about a third of the 30,000 persons reported missing in the State party as a consequence of the war remains unknown and notes that many of them might have been victims of enforced disappearance. In this regard, the Committee expresses concern at the slow pace of exhumations and identifications and at the insufficient budget allocated to the Prosecutor's Office of Bosnia and Herzegovina and the lack of sufficient forensic experts in the State party. The

Committee is concerned that challenges, including politicization, have slowed down the verification process of data compiled in the Central Records of Missing Persons (arts. 12 and 24).

18. The Committee recommends that the State party continue its efforts to establish the truth and determine the fate and whereabouts of all the individuals who have been reported as missing and, in the event of death, the identification of their remains. It recommends, in particular, that the State party:

(a) Provide the Prosecutor's Office of Bosnia and Herzegovina with adequate human and financial resources and appoint additional forensic experts to ensure that exhumations and identifications takes place as swiftly as possible upon the location of mortal remains; and

(b) Expedite the process of verifying data in the Central Record of Missing Persons.

#### Missing Persons Institute

19. The Committee notes with concern that the budget of the Missing Persons Institute has halved since its inception, despite the Institute gradually taking over the responsibilities of the International Commission on Missing Persons and regrets that the Institute has not been provided with all the necessary technology to efficiently detect graves and exhumate them. The Committee is also concerned that the appointment of the members of the Board of Directors has been pending since 2012 and welcomes the information shared by the State party's delegation that their appointment is imminent (arts. 12 and 24).

20. The Committee recommends that the State party provide the Missing Persons Institute with the necessary financial, human and technological resources to adequately fulfil its mandate and expedite the appointment of the members of the Board of Directors.

#### Prosecution of war crime cases

21. The Committee welcomes the efforts made at international and national levels to prosecute and punish perpetrators of war-related crimes. It is however concerned that despite these efforts a large backlog of war crimes cases remains and that the number of prosecutions and convictions of perpetrators of enforced disappearances remains extremely limited. In addition, the Committee takes note that the Constitutional Court of Bosnia and Herzegovina has not undertaken an assessment of the particular circumstances of each case, including as regards the gravity of the crimes committed, when ordering the quashing of the verdicts, following the judgement of the European Court of Human Rights in the case of *Maktouf and Damjanović*<sup>1</sup>. The Committee is gravely concerned that the reopening of war crimes and genocide cases has led to a drastic reduction of sentences, including for perpetrators of enforced disappearance, and that convicted criminals were released pending retrial, which has resulted in fear, insecurity and re-victimisation of some individuals and a lack of trust in the justice system (arts. 7, 8, 12, 24).

22. The Committee, recalls the continuous nature of the offence of enforced disappearance and recommends that the State party speed up its efforts to implement the National War Crimes Strategy and ensure that all cases of enforced disappearance that may have been committed by agents of the State party or by persons or groups of persons acting with their authorization, support or acquiescence in the context of the armed conflicts in the former Yugoslavia, are investigated thoroughly and impartially

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



without delay; and that those found responsible, including the commanders and civilian superiors, are punished in accordance with the gravity of their acts.

**Protection of persons participating in an investigation**

23. While welcoming the establishment of new departments to offer support to witnesses during war crimes trials, the Committee is concerned at:

(a) Cases of intimidation and threat against victims and witnesses of enforced disappearance;

(b) The insufficient witness protection capacity, including the absence of witness protection programmes in entities where war crime cases have been transferred; and

(c) Insufficiencies and discrepancies in the provision of assistance and psychological support across the country (art. 12).

24. The Committee recommends that the State party:

(a) Ensure that all allegations of threats or intimidation against victims and witnesses in judicial procedures relating to war crimes and enforced disappearances are promptly, thoroughly and impartially investigated; that the alleged perpetrators are prosecuted; and, if found guilty, punished with appropriate penalties;

(b) Ensure the effective implementation of existing protective measures to all persons referred to in article 12(1) of the Convention and ensure that persons testifying before district, cantonal and other lower courts receive measures of support and protection similar to those foreseen under the 2014 Law on Witness Protection Programme;

(c) Provide adequate and continuous psychological support to victims and witnesses prior, during, and after war crimes trials.

**Amnesty, pardon and immunity**

25. The Committee is concerned:

(a) That article 118, para. 2 of the Criminal Code of Bosnia and Herzegovina provides for the possibility of granting amnesty for international crimes;

(b) About legislative proposals that would allow pardon for persons convicted of the crimes of genocide, war crimes and crimes against humanity after serving three-fifths of the sentence; and

(c) That immunity from prosecution can be granted with the conclusion of plea agreement/admission of guilt in exchange of information on individual and mass graves (arts. 7, 11, 24).

26. The Committee recommends that the State party repeal any provision that may have the effect of exempting perpetrators of enforced disappearance from any criminal proceedings or sanction. It recommends in particular that the State party take the necessary legislative measures to:

(a) Remove the possibility of granting amnesty for international crimes, including enforced disappearance;

(b) Withdraw the proposal to amend the Law on Pardon of Bosnia and Herzegovina and ensure that the extreme seriousness of acts of enforced disappearance is taken into account when contemplating the possibility of granting pardon; and

- (c) Ensure that plea agreements and other avenues used to clarify cases of enforced disappearance or identify the perpetrators of an enforced disappearance do not hinder victims' access to justice and lead to impunity.

#### **Suspension from duties and vetting process**

27. While noting that police officers and civil servants of Bosnia and Herzegovina suspected of having committed an offence may be temporarily suspended from duties during the investigation, the Committee is concerned about the lack of clarity whether the existing legislation at entity and district levels provides the same guarantees and whether procedural mechanisms are in place throughout the territory to exclude any security or law enforcement forces from the investigation into an enforced disappearance when one or more of its officials are accused of committing, or having been involved in the commission of the offence (art. 12).

28. In order to strengthen the existing legal framework and ensure the adequate application of article 12, paragraph 4, of the Convention, the Committee recommends that explicit legal provisions be adopted at State, entity and district level, that expressly establish:

(a) The suspension, for the duration of the investigation, of any State agents, civilian or military, suspected of having committed an offence of enforced disappearance; and

(b) A mechanism that ensures that law enforcement or security forces whose members are suspected of having committed an enforced disappearance are not in a position to influence or hinder the course of an investigation, directly or indirectly.

#### **Measures to prevent enforced disappearances (arts. 16–23)**

##### **Non-refoulement**

29. The Committee observes that domestic law does not yet provide for an explicit prohibition against carrying out an expulsion, return, surrender or extradition where there are substantial grounds for believing that the person would be in danger of being subjected to enforced disappearance (art. 16).

30. The Committee recommends that the State party incorporate into its domestic legislation an explicit prohibition against carrying out an expulsion, return, surrender or extradition where there are substantial grounds for believing that the person would be in danger of being subjected to enforced disappearance.

##### **National Preventive Mechanism**

31. The Committee is concerned at delays in the adoption of the law establishing a National Preventive Mechanism, which is envisaged to be placed within the institution of the Ombudsman. It also notes with concern that the budgetary resources allocated to the Ombudsman office has been decreasing since 2010, in spite of an expansion of its mandate (art. 17).

32. The Committee recommends that the State party expedite the establishment of the National Preventive Mechanism, make it fully operational rapidly and provide it with sufficient human and financial resources.

##### **Training on the Convention**

33. While noting that training on human rights and other subjects that are linked to the Convention are provided to various State actors, the Committee regrets the absence of specific and regular training on the Convention (art. 23).



34. The Committee recommends that the State party ensure that all law enforcement personnel, whether civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty, including judges, prosecutors and other officials responsible for the administration of justice, receive appropriate and regular training on the provisions of the Convention, in conformity with article 23.

### **Measures to provide reparation and to protect children from enforced disappearance (arts. 24 and 25)**

#### **Definition of victim**

35. While noting the State party's assertion that the concept of "injured party" covers anyone who is directly harmed as a result of enforced disappearance, the Committee is concerned that domestic laws do not provide for a definition of victim in line with the one contained in article 24 (1) of the Convention (art. 24).

36. The State party should introduce the necessary legislative amendments in order to establish a definition of victim that conforms to that contained in article 24, paragraph 1, of the Convention.

#### **The right to receive reparation and prompt, fair and adequate compensation**

37. The Committee is concerned:

(a) At the absence of a national programme on reparation that would also include compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition;

(b) That the non-establishment of the Fund for the Support of Families of Missing Persons, which should have been created more than a decade ago according to the Law on Missing Persons, has resulted for relatives of disappeared persons in the denial of their right to obtain compensation;

(c) At the absence of a State law on access to social benefits for relatives of disappeared persons;

(d) That the notions of reparations and social allowances for victims of the war overlap and at discrepancies, based on place of residence, in the access to and levels of social benefits and other measures of social support; and

(e) That several legislations make the right to social allowances or other forms of compensation for victims of disappeared person conditional on the declaration of death of the disappeared person.

In this regard, the Committee welcomes the information provided by the State party's delegation regarding steps taken to amend article 27 of the Law on Missing Persons, which stipulates that persons registered as missing and whose disappearance has been verified within the Central Records of Missing Persons shall be considered dead and registered as such in the Register of Death (art. 24).

38. The State party should guarantee the right to reparation and to prompt, fair and adequate compensation of all persons who have suffered harm as a direct result of an enforced disappearance, regardless of when it was perpetrated and even if no criminal proceedings have been brought against the possible perpetrators or the latter have not been identified. To this effect, the Committee recommends that the State party:

(a) Adopt, as a matter of priority, a comprehensive and gender-sensitive system of reparation that is fully in line with article 24, paragraphs 4 and 5 of the Convention;

(b) Take steps to circumvent the challenges that prevent the establishment of the Fund for the Support of Families of Missing Persons;

(c) Ensure that relatives of disappeared persons have access to social benefits and other measures of social support, and that these are harmonized between the various levels of authority; and

(d) Repeal the legal obligations to declare a disappeared person dead to have access to social allowances or other forms of compensation and speed up the amendment of article 27 of the Law on Missing Persons with a view to repealing the automatic presumption of death of individuals whose disappearance has been verified in the Central Records of Missing Persons.

#### **Legislation concerning the wrongful removal of children**

39. The Committee is concerned about the lack of provisions that specifically penalize the actions relating to the wrongful removal of children referred to in article 25, paragraph 1, of the Convention. The Committee also notes with concern that the fate and whereabouts of 94 children victims of enforced disappearance in 1995 in Srebrenica has still to be ascertained (art. 25).

40. The Committee recommends that the State party adopt the necessary legislative measures to make the actions referred to in article 25, paragraph 1, of the Convention specific offences, and for such actions establish penalties commensurate with their extreme seriousness. The Committee also urges the State party to pursue its efforts to search for and identify disappeared children, in conformity with article 25, paragraph 2 of the Convention.

#### **D. Dissemination and follow-up**

41. The Committee wishes to recall the obligations undertaken by States when becoming parties to the Convention and, in this connection, urges the State party to ensure that all the measures it adopts, irrespective of their nature or the authority from which they emanate, are in full accordance with the obligations it assumed when becoming party to the Convention and other relevant international instruments. In particular, the Committee urges the State party to ensure the effective investigation of all enforced disappearances and the full satisfaction of the rights of victims, as set forth in the Convention.

42. The Committee also wishes to emphasize the particularly cruel effect of enforced disappearances on the human rights of women and children. Women who are subjected to enforced disappearance are particularly vulnerable to sexual and other forms of gender-based violence. Women who are relatives of a disappeared person are particularly likely to suffer serious social and economic disadvantages and to be subjected to violence, persecution and reprisals as a result of their efforts to locate their loved ones. Children who are victims of enforced disappearance, either because they themselves were subjected to disappearance or because they suffer the consequences of the disappearance of their relatives, are especially vulnerable to numerous human rights violations, including identity substitution. In this context, the Committee places special emphasis on the need for the State party to ensure that gender perspectives and child-sensitive approaches are used in implementing the rights and obligations set out in the Convention.

43. The State party is encouraged to disseminate widely the Convention, its report submitted under article 29 (1) of the Convention, the written replies to the list of issues drawn up by the Committee and the present concluding observations, in order to raise



awareness among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the State party and the general public. The Committee also encourages the State party to promote the participation of civil society when implementing the present concluding observations.

44. In accordance with the Committee's rules of procedure, the State party should provide, by 14 October 2017 at the latest, relevant information on its implementation of the recommendations contained in paragraphs 18, 20 and 32.

45. Under article 29 (4) of the Convention, the Committee requests the State party to submit, by no later than 14 October 2022, specific and updated information on the implementation of all its recommendations and any other new information on the fulfilment of the obligations contained in the Convention, in a document prepared in accordance with the guidelines on the form and content of reports to be submitted by States parties under article 29 of the Convention (see CED/C/2, para. 39). The Committee encourages the State party to promote and facilitate the participation of civil society in the preparation of this information.

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