



Humanitarian Law Center



**Victims' Right to Reparation in Serbia and the European Court of Human Rights Standards  
2014/2015 Report**

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## Summary

For societies that have experienced periods of massive human rights violations, the issue of reparations for victims is one of the most important elements for the establishment of the rule of law and creating solidarity and a human rights culture.

The Republic of Serbia was involved in all the large-scale conflicts of the 1990s, during which its forces committed mass crimes. With a large number of refugees and victims of crime from other countries who now live in Serbia, the country is faced with the biggest challenge of ensuring fair reparations for victims of crimes committed in the former Yugoslavia. According to rough estimates, there are about 20,000 people living in Serbia who, as civilians, were either direct victims of war-related violence or lost an immediate family member who did not take part in hostilities. While it is not possible to estimate with accuracy the number of victims from other countries who are entitled to claim reparations from Serbia, it definitely exceeds 20,000.

The obligation of the Republic of Serbia to provide reparations to victims of human rights and international humanitarian law violations committed in the 1990s emanates from the international human rights conventions that Serbia ratified, and from the Serbian Constitution, which provides for the state's responsibility for the harm caused by the conduct of its bodies.

Victims who wish to claim reparation may do so either through judicial proceedings against the Republic of Serbia or under the Law on the Rights of Civilian Invalids of War. The Criminal Procedure Code provides for a third mechanism, which is available to injured parties in criminal proceedings – restitution claims – but this mechanism is not used in practice at all.

This report gives an overview of the legal norms regulating the exercise of the right to reparation and their application in practice by the courts and administrative authorities in Serbia, and analyses these norms against the standards

set by the European Court of Human Rights. The key findings of the report are that the judicial and administrative authorities in Serbia are violating the right of victims to reparations, and that the rulings handed down by these bodies in reparations proceedings constitute violations of the rights guaranteed by the European Convention on Human Rights, notably the prohibition of torture, degrading and inhumane treatment, the right to life, the right to a fair trial and the prohibition of discrimination. Because of the judicial and administrative authorities' failure to comply with the European Convention on Human Rights when adjudicating on the rights of victims of gross human rights abuses, the right of victims to receive reparations in Serbia is in practice unrealizable, if not illusory.

# I. Introduction

## Factual Context

The political disintegration of the Socialist Federal Republic of Yugoslavia (SFRY) led to a number of international and internal armed conflicts in almost all its parts. The first armed conflict broke out in Slovenia and lasted through June-July 1991. The war in Croatia lasted from 1991 to 1995. The war in Bosnia and Herzegovina (BiH) began in 1992 and ended in 1995. The armed conflict in Kosovo began in early 1998 and escalated between March and June 1999, during the Nato air intervention against the Federal Republic of Yugoslavia (FRY). The armed conflict in Macedonia lasted from February to August 2001.

The armed conflicts waged on the territory of the former Yugoslavia from 1991 to 2001 claimed the lives of more than 130,000 people, with about 4.5 million people who fled their homes or became displaced, and 12,000 persons still unaccounted for.<sup>1</sup> During and in the aftermath of the conflicts in Croatia and BiH, more than half a million refugees came to Serbia. An additional 200,000 internally displaced persons from Kosovo<sup>2</sup> arrived in Serbia between 1999 and 2005. Thus Serbia became a country hosting the highest number of refugees in Europe and one of five countries worldwide affected by a protracted refugee crisis.<sup>3</sup>

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1 The countries that emerged following the breakup of the former Yugoslavia still do not have the official lists with names of persons killed in the armed conflicts. In the absence of official initiatives, non-governmental organizations have undertaken the task to explore, compare, consolidate and systematize all available data on killed and missing persons. In BiH, this task has been performed by the Sarajevo-based Research and Documentation Center (IDC). The IDC's multi-year research into the casualties of the Bosnian armed conflict resulted in a book titled "The Bosnian Book of the Dead", published in October 2012. The HLC, in cooperation with Documenta from Zagreb and the HLC Kosovo, is compiling data on the killed and disappeared during the armed conflicts in Croatia and Kosovo. Additionally, the HLC conducts a research on casualties of Serbia and Montenegro during other armed conflicts in the former Yugoslavia.

2 Source: Commissariat for Refugees of the Republic of Serbia. Available at: <http://www.kirs.gov.rs/articles/onama.php?lang=SER> (accessed 31 December 2015).

3 "Svetski dan izbeglica" (World Refugee Day), *Serbian Radio-Television*, 20 June 2015, available at: <http://www.rts.rs/page/stories/sr/story/125/Dru%C5%A1tvo/1954446/Svetski+dan+izbeglica.html> (accessed 31 December 2015).

Numerous war crimes – killings of civilians, enforced disappearances, detention of civilians in concentration camps, systematic rape and other forms of sexual violence, etc. – were the most salient feature of the conflicts in the former Yugoslavia. The crimes were planned and committed in a systemic manner, with the knowledge and participation of state institutions.

Although Serbia was not formally in a “state of war”, except during the Nato bombardment, it played an active role in the armed conflicts across the former Yugoslavia. With the help of the Serbian leadership, the ethnic Serbs in other ex-Yugoslav republics established their own political-territorial units and formed their own armed forces, with a view to carving out the territories they controlled in those republics.

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Numerous very senior political, military and police officials of Serbia have stood trial before the International Criminal Tribunal for the Former Yugoslavia (ICTY) for crimes committed by Serbian forces during the armed conflicts on the territory of the former Yugoslavia. Furthermore, in its ruling resulting from a lawsuit that BiH brought against Serbia for violating the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice faulted Serbia for not preventing the genocide in Srebrenica and not punishing the perpetrators. Thus Serbia became the only country in the world found to have violated the provisions of the Convention.<sup>4</sup>

### Political Context

Fulfilling the right to reparation in Serbia today is challenging and elusive, because a key prerequisite – the existence of a clear political will to accept and assume responsibility for past wrongs – has not yet been secured.

Public apologies by top officials and symbolic and political condemnations of

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4 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, <http://www.icj-cij.org/docket/files/91/13685.pdf> (accessed 31 December 2015).

certain crimes<sup>5</sup> aside, specific and comprehensive measures in the field of transitional justice are still absent or limited in range. A strategic approach to the investigation and prosecution of war crimes is still absent, and very few perpetrators and their superiors have been brought to justice.<sup>6</sup> Some of the individuals responsible for crimes continue to hold high positions within the security and political hierarchies. Government officials and politicians continue to openly deny human rights violations occurred in the 1990s.<sup>7</sup> The content of education materials dealing with the events from that period has not been reviewed or revised. This lack of political will to deal with the difficult legacy of crimes becomes most evident if we look at the way Serbia treats victims, that is, its failure to respect victims' right to reparations.

### Reparations: the Concept

The most relevant international document comprehensively defining the right to reparations are the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines). The initiative for drawing up this document came from the United Nations (UN) Commission on Human Rights. Several independent experts worked on the development of the Principles, after which the

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- 5 In September 2003, the Presidents of Serbia and Montenegro and Croatia, Svetozar Marović and Stjepan Mesić respectively, exchanged apologies for all the crimes committed. Serbian President Boris Tadić apologised on behalf of Serbian citizens in Sarajevo in 2004 and in Zagreb in 2007. On 10 July 2010 he visited the Potočari Memorial Centre. In a talk show *Interview 20* broadcast on Bosnian *BHT* in April 2013, Serbian President Tomislav Nikolić apologised for the crimes against Bosniaks committed by individuals in the name of Serbia and the Serbian people. The National Assembly of the Republic of Serbia adopted in March 2010 the Declaration condemning the crime in Srebrenica, and in October of the same year the Declaration condemning all crimes against members of the Serbian people and Serbian citizens.
  - 6 See: *Ten Years of War Crimes Prosecutions in Serbia – Contours of Justice* (Analysis of the prosecution of war crimes in Serbia 2004-2013), Humanitarian Law Center, Belgrade, 2014.
  - 7 “Nikolić negira genocid u Srebrenici” (Nikolic denies Srebrenica genocide), Deutsche Welle, 1 June 2012, <http://www.dw.de/nikoli%C4%87-negira-genocid-u-srebrenici/a-15993945> (accessed 31 December 2015); “Suzana Paunović: Ugljanin izmišlja torturu”, (Suzana Paunović: Ugljanin makes up stories of torture), interview, *Novosti*, 6 September 2014.



document, in the form of a resolution, was unanimously adopted by the UN General Assembly, garnering the support of all members of the organization.<sup>8</sup>

According to this Resolution, reparations include the rights to restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>9</sup>

**Restitution** should, whenever possible, restore the victim to the original situation before the violations occurred. Restitution includes different measures, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.<sup>10</sup>

**Compensation** should be provided for any financially assessable damage, as appropriate and proportional to the gravity of violation and the circumstances of each case of human rights and international humanitarian law violation. Compensation is paid for: physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, psychological and social services.<sup>11</sup>

**Rehabilitation** entails medical and psychological care as well as legal and social services.<sup>12</sup>

**Satisfaction** should include any or all of the following measures: effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth, to the extent that such disclosure does not cause further harm or threaten the safety and interests

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8 For more on the Resolution adoption process, see: [http://legal.un.org/avl/pdf/ha/ga\\_60-147/ga\\_60-147\\_ph\\_e.pdf](http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf) (accessed 31 December 2015).

9 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147 of 16 December 2005 (Basic Principles and Guidelines), points 19-23.

10 Basic Principles and Guidelines, point 19.

11 Basic Principles and Guidelines, point 20.

12 Basic Principles and Guidelines, point 21.

of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; the search for the whereabouts of the disappeared; an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; a public apology, including acknowledgement of the facts and acceptance of responsibility; judicial and administrative sanctions against persons liable for the violations; commemorations and tributes to the victims; and inclusion of an accurate account of the human rights and international humanitarian law violations in educational material.<sup>13</sup>

**Guarantees of non-repetition** include measures that can contribute to prevention of future crimes, such as: ensuring effective civilian control of military and security forces; ensuring that all proceedings abide by standards of fairness and impartiality; strengthening the independence of the judiciary; protecting legal and health-care professionals, the media and human rights defenders; providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society, and training for security forces; promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants; promoting mechanisms for preventing and monitoring social conflicts and their settlement; reviewing and reforming laws contributing to or allowing gross violations of international human rights law.<sup>14</sup>

A state has the duty to provide reparation for acts or omissions which can be attributed to the state and constitute gross violations of international human rights law or serious violations of international humanitarian law. A state also has the duty to provide reparation if the party responsible for the harm inflicted is unable or unwilling to do so.<sup>15</sup>

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13 Basic Principles and Guidelines, point 22.

14 Basic Principles and Guidelines, point 23.

15 Basic Principles and Guidelines, points 15 and 16.

## II. Domestic Legal Framework Governing the Right of Victims to Reparations

Serbia's obligation to provide reparation for victims<sup>16</sup> emanates from the international conventions in the field of human rights that Serbia has ratified and from the fundamental legal principle of liability for harm inflicted laid down in the Constitution of the Republic of Serbia.

The Constitution of the Republic of Serbia guarantees that *everyone* "shall have the right to compensation of material or non-material damage inflicted on him/her/them by the unlawful or irregular activity of a state body, entities exercising public powers, bodies of an autonomous province or local self-government"<sup>17</sup>, as well as the rights to receive assistance from the state in case of "social and existential difficulties", in accordance with the principles of "social justice, humanity and respect of human dignity"<sup>18</sup>.

The obligation to provide compensation for victims of human rights violations is laid down in numerous international human rights instruments that Serbia has ratified: the International Covenant on Civil and Political Rights<sup>19</sup>, the International Convention on the Elimination of All Forms of Racial Discrimination<sup>20</sup>, the Convention against Torture and Other Cruel, Inhumane or

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16 "...victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. ... the term 'victim' also includes the immediate family or dependents of the direct victim." (Basic Principles and Guidelines, point 8).

17 Article 35(2) of the Constitution of the Republic of Serbia ("Official Gazette of the RS", No. 98/06).

18 Article 69(1) of the Constitution of the Republic of Serbia ("Official Gazette of the RS", No. 98/06).

19 Articles 2 and 9, International Covenant on Civil and Political Rights ("Official Journal of the SFRY – International treaties", No. 7/71).

20 Article 6, International Convention on the Elimination of All Forms of Racial Discrimination ("Official Journal of the SFRY – International Treaties", No. 31/67).

Degrading Treatment or Punishment<sup>21</sup>, the Convention on the Rights of the Child<sup>22</sup>. Furthermore, a victim's right to reparation is also guaranteed by the regional mechanisms for the protection of human rights, the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>23</sup> and the European Convention on the Compensation of Victims of Violent Crimes<sup>24</sup>, which Serbia has not yet ratified, even though five years have passed since it signed it. This right is also guaranteed by the practice of the international bodies for the protection of human rights, namely the European Court of Human Rights<sup>25</sup>, the UN Committee against Torture<sup>26</sup>, the UN Human Rights Committee<sup>27</sup> and the United Nations Committee on the Elimination of Discrimination against Women<sup>28</sup>.

The Protocol I Additional to the Geneva Conventions, which has been in effect in Serbia since 1978, stipulates as follows: "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."<sup>29</sup>

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- 21 Article 14, Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment and Punishment ("Official Journal of the SFRY – International Treaties", No. 9/91).
  - 22 Article 39, Convention on the Rights of the Child ("Official Journal of the SFRY – International Treaties", Nos. 15/90 and 2/97, and "Official Journal of the FRY", No. 7/02).
  - 23 Articles 13 and 41, European Convention for the Protection of Human Rights and Fundamental Freedoms ("Official Journal of SCG – International Treaties", No. 9/03).
  - 24 Articles 2 and 4, European Convention on the Compensation of Victims of Violent Crimes.
  - 25 See, e.g., *Cyprus v. Turkey*, Application No. 25781/94, judgment of 10 May 2001.
  - 26 See, e.g., *Hajrizi Dzemail et al. v. Yugoslavia*, Comm. No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000, 2 December 2002 (*Danilovgrad* case).
  - 27 See, e.g., *María del Carmen Almeida de Quinteros et al. v. Uruguay*, UN, Com. No. 107/1981, U.N. Doc. CCPR/C/OP/2, 21 July 1983.
  - 28 See, e.g., *Şahide Goekce v. Austria*, Comm. No. 5/2005, U.N. Doc. CEDAW/C/39/D/5/2005, 6 August 2007.
  - 29 Article 91, Protocol I Additional to the Geneva Conventions of 12 August 1949 on the protection of victims of international armed conflicts ("Official Journal of the SFRY – International Treaties", No. 16/78).

The obligation to make reparations to victims of various human right abuses is also set out in declarations which constitute the so-called “soft law”.<sup>30</sup> In addition to the aforementioned Basic Principles and Guidelines (UN Resolution of 2006), in 2013 Serbia signed the Declaration of Commitment to End Sexual Violence in Conflict and thus undertook the obligation to, among other things, provide assistance and care for the victims, including health and psycho-social care.<sup>31</sup>

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985 provides for, among other things, the following rights for the victims: the right to be treated with respect; the right to have their suffering recognized; the right to compensation from the offender and the state; the right to support services, including the necessary material, medical, psychological and social assistance; the right to restitution, including payment for harm or loss suffered etc.<sup>32</sup>

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Bearing in mind that the Republic of Serbia is a candidate for EU membership and that it is required to bring its legislation into harmony with the EU *acquis* in order to make progress on this path, it is worth referring here to the 2004 Council Directive Relating to Compensation to Crime Victims<sup>33</sup> and the Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime

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30 Non-compliance with these provisions does not in itself entail sanctions, but these provisions draw their authority either from the body that adopted them (most commonly the UN) or from the fact that they reflect consensus among states regarding certain matters.

31 Declaration of Commitment to End Sexual Violence in Conflict. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274724/A\\_DECLARATION\\_OF\\_COMMITMENT\\_TO\\_END\\_SEXUAL\\_VIOLENCE\\_IN\\_CONFLICT.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274724/A_DECLARATION_OF_COMMITMENT_TO_END_SEXUAL_VIOLENCE_IN_CONFLICT.pdf) (accessed 31 December 2015).

32 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations General Assembly Resolution No. 40/34 of 29 November 1985.

33 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, recitals 6 and 7, Articles 2, 5 and 12.

of 2012<sup>34</sup>, which both guarantee the right to compensation, free legal aid, and health and psycho-social care.

### **III. Right to reparation in practice in Serbia**

#### **I. Who is entitled to reparation?**

The cross-border nature of the conflicts in the former Yugoslavia resulted, among other things, in a rather complex situation with regard to reparations for victims of war crimes. As many victims do not currently live in their pre-war places of residence, the institutions of the state in which they currently live are not those responsible for the crimes committed against them. Scores of victims of crimes committed in other countries of the former Yugoslavia now live in Serbia, as well as a significant number of foreign nationals – victims of crimes committed by forces which operated under the direct or indirect control of Serbia during their participation in the conflicts on the territory of other countries (Croatia and BiH) – and victims (from Kosovo) who subsequently became foreign nationals.

As underlined above, the international standards impose the obligation on states to ensure that victims are awarded reparation, regardless of who the offender is. To put it differently, even if the crimes were committed by the forces belonging to the opposite side in the conflict, a state is obliged to provide reparation to victims if they live on its territory. Bearing this in mind, it is possible to classify several categories of victims to whom Serbia has a duty to afford reparation under international and domestic law:

**a) Victims – foreign nationals** → persons who suffered harm at the hands of forces which were under the direct or indirect control of Serbia during

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34 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, recitals 49 and 62, Articles 4(1)(e), 9(1)(a) and 16.

the conflicts in Croatia, BiH and Kosovo. These victims are nationals of other states and a vast majority of them are already beneficiaries of some form of reparation (upon being awarded the status of a civilian victim of war in their country of residence). It is difficult to estimate with accuracy the number of person belonging to this category, but it definitely exceeds 20,000.

**b) Victims living in Serbia** → persons living in Serbia (regardless of their citizenship status at the time of the armed conflicts) who were direct victims of violent acts perpetrated by Serbian forces on the territory of Serbia, or by other armed forces on the territory of other republics of the former Yugoslavia, and members of the immediate family of the direct victim. The HLC estimates their number at roughly 20,000. They are mostly refugees and internally displaced persons, or persons who in the meantime acquired Serbian citizenship. The victims belonging to this category face major obstacles when pursuing their right to reparation.

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## **2. Reparation Mechanisms in the Republic of Serbia**

In Serbia, there are three mechanisms in place through which victims can claim reparations: administrative proceedings for the recognition of the status of a civilian victim of war; civil lawsuits seeking compensation from the Republic of Serbia; and a third mechanism, which is activated by filing a restitution claim within the pending criminal proceedings.

### **2.1 Rights Stemming from the Civilian Victim of War Status**

The status of a civilian victim of war is acquired through administrative proceedings set out in the 1996 Law on the Rights of Civilian Invalids of War.<sup>35</sup>

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35 Law on the Rights of Civilian Invalids of War ("Official Gazette of the RS", No. 52/96).

Under this law, administrative proceedings can be instituted only by victims who are Serbian citizens.<sup>36</sup>

Upon acquiring the status, victims become entitled to monthly cash benefits, subsidised public transport passes and health care. To qualify for the most important benefit – monthly cash benefit – family members of victims must meet an additional requirement of financial vulnerability.

Acquisition of the status of a civilian victim of war does not preclude the victims' right to receive material compensation, i.e. the right to bring a legal action against the Republic of Serbia. Administrative and judicial mechanisms are two completely separate avenues for pursuing reparations. They are based on different legal provisions and concern different legal concepts and fields. Judicial reparations are based upon the concept of compensation, whereas the administrative mechanism, as it is currently defined in the Law on the Rights of Civilian Invalids of War, pertains to the domain of social protection.<sup>37</sup>

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## 2.2 Compensation Lawsuits Against the Republic of Serbia

Compensation lawsuits against the Republic of Serbia are the only mechanism available to victims from other post-Yugoslav countries who wish to seek reparations. This mechanism is also the only recourse for those victims who

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36 The opinion of the Supreme Court of Serbia set out in the judgment UŽ.24/04 of 1 July 2004: "The status of a civilian invalid of war can be granted also to persons who at the time when they sustained a bodily impairment were not citizens of the RS and the FRY, if at the time of submitting the request for obtaining the status of a civilian invalid of war they possessed RS and FRY citizenship."

37 „The appellant's request to be awarded the status of a civilian invalid of war pursuant to the judgment of the First Basic Court in Belgrade because in the proceedings completed before the said court his compensation claim was granted and it was established that there existed a causal link between the harm he suffered and the use of force in the premises of the Novi Pazar SUP to extract the confession from him that he possessed illegal weapons and took part in activities against the state, cannot be accepted as evidence under Article 12 of the Law. The reason being that the said compensation for non-pecuniary damage was awarded to him *in other proceedings and under regulations other than those regulating the conditions and procedure for the recognition of the rights pertaining to the protection of civilian victims of war.*" [italics added] Decision of the Ministry of Labour and Social Policy of the Republic of Serbia No. 580-02-00166/2012-11 of 27 February 2012.



live in Serbia but who cannot acquire the status of a civilian victim of war in Serbia, owing to some serious shortcomings of the Law on the Rights of Civilian Invalids of War. According to data available to the HLC, several hundred compensation lawsuits have been brought to date against the Republic of Serbia, either through the HLC or privately retained attorneys.<sup>38</sup>

### **2.3 Restitution Claim Within Criminal Proceedings**

In the course of criminal proceedings conducted against those responsible for war crimes and other human rights violations, victims can file a claim seeking restitution from the offenders for material or non-pecuniary damage suffered. A restitution claim must be filed before the completion of the trial stage. The court is obliged to gather evidence concerning the merits of the claim and decide the amount of damages to be awarded, unless the proceedings would be substantially prolonged thereby.<sup>39</sup>

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## **3. Compliance of Domestic Reparation Mechanisms with the Standards laid down in the European Convention on Human Rights**

This section will assess the extent to which court proceedings and court decisions regarding victims compensation claims in civil lawsuits and war crimes cases and the legal framework regulating the granting of civilian victim of war status in Serbia are aligned with the standards set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) and laid down in the rich body of case-law of the European Court of Human Rights (the European Court).

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38 Since 2000 to date, the HLC has represented over 1000 victims of war crimes, torture, unlawful detention, forced conscription and other human rights violations perpetrated by Serbian forces in BiH, Croatia, Serbia and Kosovo in compensation lawsuits against the states of Serbia, Montenegro and Kosovo. No accurate information is available regarding the number of compensation lawsuit brought through privately retained attorneys.

39 Articles 252-260, Criminal Procedure Code ("Official Gazette of the RS", Nos. 72/11, 101/11, 121/12, 32/13, 45/13 and 55/14).

Serbia ratified the European Convention and its additional protocols in 2004 (as the then part of the State Union of Serbia and Montenegro).<sup>40</sup> In that year, the European Convention became part of domestic law and Serbia became subject to monitoring by the European Court regarding the implementation of the Convention. The European Court's jurisdiction extends to all matters thereto ratified by Serbia.<sup>41</sup>

Regarding the right to life and protection from torture, the European Court holds that two measures are necessary to provide sufficient redress. Firstly, the state authorities must conduct a thorough and effective investigation capable of leading to the identification and punishment of those responsible. Secondly, victims must be awarded compensation or, at least, given an opportunity to seek and obtain compensation.<sup>42</sup> The European Court underlines that a State cannot fulfil this obligation by a mere award of any compensation, but by an award of an adequate compensation.<sup>43</sup>

The obligation of Serbian institutions to comply with the standards set by the European Court emanates not only from their binding character, but also from Serbia's political commitment to EU accession. Namely, in numerous EU documents recommending Serbia the measures it should take in order to harmonize its legislation with the EU *acquis*, compliance with the European Conven-

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40 Article 1, Law on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended according to the provisions of: Protocol No. 11, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms providing certain rights which were not included in the Convention and the First Protocol to the Convention, Protocol No. 6 concerning the abolition of the death penalty, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol No. 13 to the Convention for the Protection of Human Rights concerning the abolition of the death penalty in all circumstances ("Official Journal of SCG – International Treaties", No. 9/03).

41 See Articles 33, 34 and 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

42 See, e.g., *Gafgen v. Germany*, application No. 22978/05, judgment of 1 June 2010, para. 116; *Nikolova and Velichkova v. Bulgaria*, application No. 7888/03, judgment of 20 December 2007, para. 56.

43 See, e.g., *Gafgen v. Germany*, application No. 22978/05, judgment of 1 June 2010, para. 116; *Ciorap v. Moldova*, application No. 7481/06, judgment of 31 August 2010, paras. 24-25.

tion is a key requirement. The report on the screening conducted within the framework of negotiations on chapter 23 (judiciary and fundamental rights) states that, although the general legal and institutional framework has been put in place, shortcomings persist in the practical implementation of the protection of human rights, including by judicial and administrative authorities. The report further formulates a set of recommendations for enhancing the respect for all fundamental human rights guaranteed by the European Convention.<sup>44</sup>

Despite its binding character and the strong authority of the European Convention and the European Court, Serbian state authorities do not abide by the clear standards concerning the right of victims of human rights violations to receive reparation. Both the legal framework and the practice of state authorities in this respect remain deeply inconsistent with the rights prescribed by the European Convention and the principles laid down in the jurisprudence of the European Court. As will be seen from the analyses that follow, the outdated and inadequate domestic normative framework and the bad practice of the relevant authorities – courts and administrative authorities – preclude victims from receiving reparations. In other words, because of discriminatory regulations and their restrictive interpretation in practice, for most victims of grave human rights and international humanitarian law violations the possibility of obtaining compensation from Serbia is merely “theoretical and illusory”<sup>45</sup>.

### **3.1. Brief Analysis of the Degree of Consistency of Domestic Administrative Mechanisms for the Provision of Reparations with the European Court Standards**

The administrative mechanism for the provision of reparations is based on a single, basic piece of legislation and the subsidiary application of several other regulations. The main source of the right to reparation for war victims in

44 EC’s Screening Report on Serbia, Chapter 23 – Judiciary and fundamental rights, pp. 32-33, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/140729-screening-report-chapter-23-serbia.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/140729-screening-report-chapter-23-serbia.pdf) (accessed 31 December 2015).

45 See, e.g., *El-Masri v. the Former Yugoslav Republic of Macedonia*, application No. 39630/09, judgment of 13 December 2012, para. 261.

Serbia is the Law on the Rights of Civilian Invalids of War<sup>46</sup>. This law lays down the rights of civilian victims of war and the requirements for obtaining the status of a civilian invalid of war, a family member of a civilian victim of war or a civilian invalid of war.

This legal framework is contrary not only to the provisions of the Serbian Constitution, but also to the obligation to guarantee human rights and freedoms which Serbia assumed by acceding to the European Convention. The law renders it impossible for the majority of victims of human rights abuses committed in connection with the conflicts of the 1990s to realise their right to reparation through administrative proceedings.

The Law on the Rights of Civilian Invalids of War itself, as well its interpretation and application in practice, invariably result in the violation of several rights of the victims: the right to a fair trial, stipulated in Article 6 of the European Convention, prohibition of discrimination set out in Article 14 of the European Convention, Article 1 of Protocol 12 to the European Convention, and the right to an effective remedy stipulated in Article 13 of the European Convention.

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### **3.1.1. Legal Definition of “victim” (who is “victim”?)**

The law recognizes two categories (statuses) of civilian victims of war, namely civilian invalids of war and family members of civilian victims of war. The civilian invalid of war is defined by the Law as “a person with a physical impairment of at least 50%, due to wounds or injuries that have left visible traces and were caused by ill-treatment or detention by the enemy during war or military operations, or injuries sustained from remnants of war or enemy sabotage or terrorist acts”.<sup>47</sup> The family of a war-disabled civilian, as defined by the Law, includes “family members of the deceased civilian invalid of war, provided that they lived with him/her in the same household before his/her death; family

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46 Law on the Rights of Civilian Invalids of War (“Official Gazette of the RS”, No. 52/96).

47 Article 2, Law on the Rights of Civilian Invalids of War (“Official Gazette of the RS”, No. 52/96).

members of an individual who died or was killed under the circumstances referred to in Article 2 of the Law; spouse, children (born in or out of wedlock, adopted children or stepchildren) and parents”.<sup>48</sup>

Only nationals of Serbia who cumulatively meet all the requirements set out in the law are eligible to enjoy the rights provided for in the law.

By acquiring one of these two statuses, victims become eligible to receive personal disability benefits, certain cash benefits, free health care and subsidised public transport passes.<sup>49</sup> To qualify for cash benefits paid in the form of monthly cash allowances, victims must meet some other requirements, such as financial insecurity, incapacity for work and having an income that is below a certain threshold.<sup>50</sup>

### 3.1.2. Key Aspects of Non-Compliance with the European Convention

Looking from the perspective of the European Convention, numerous categories of victims who now live in Serbia are excluded from the legal definition of “civilian victim of war”, for unlawful and inadmissible reasons.

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48 Article 3, Law on the Rights of Civilian Invalids of War (“Official Gazette of the RS”, No. 52/96).

49 Articles 7-15, 32, 39-44 and 54-59, Law on the Rights of Civilian Invalids of War (“Official Gazette of the RS”, No. 52/96).

50 As regards the scope of rights, conditions, manners of and procedures for their realisation, the Law on the Rights of Civilian Invalids of War in Articles 7 and 8 refers to the provisions regulating the rights of veterans and disabled war veterans and family members of fallen combatants and deceased disabled war veterans. As this matter was previously regulated at the federal and republic levels, Serbia has now two laws regulating this area – the Law on the Rights of Veterans, Disabled War Veterans and their Family Members (“Official Gazette of the SRS”, No. 54/89 and “Official Gazette of the RS”, No. 137/04) and the Law on Basic Rights of Veterans, Disabled War Veterans and the Families of Fallen Combatants “Official Journal of the FRY”, Nos. 24/98, 29/98 – corr. and 25/00 – decision of the FCC and “Official Gazette of the RS”, Nos. 101/05 – other law and 111/09 – other law). The requirements concerning financial insecurity, incapacity for work and income threshold are more thoroughly defined by Articles 7-15 of the Law on the Rights of Veterans, Disabled War Veterans and their Family Members.

i. Discrimination of the Victims due to Circumstances Regarding the Perpetrator

As mentioned earlier, the Law on the Rights of Civilian Invalids of War stipulates that victim status will be formally accorded only to those individuals who have suffered “*at the hands of the enemy during war or military operations, or sustained injuries from remnants of war or enemy sabotage or terrorist acts*” [italics added]. This requirement explicitly excludes from the circle of eligible beneficiaries all victims who endured violence at the hands of formations that acted in their official capacity as part of the armed forces of the Republic of Serbia, or fought on the same side with them during the war, namely the Yugoslav People’s Army (JNA), the Yugoslav Army (VJ), the Ministry of the Interior (MUP) or the Army of Republika Srpska (VRS) and their subordinate formations. Such an interpretation of the law was used in a number of proceedings for determination of civilian victim of war status. Namely, the competent administrative authorities denied claims by victims of human rights abuses committed by members of the aforementioned formations, only because those formations could not be regarded as an enemy.<sup>51</sup>

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As a result of this, some of the largest categories of victims were excluded from the law. They include: (1) several thousands of refugees from Croatia and BiH who were forcibly conscripted by the Serbian MUP, most of whom were subjected to torture and inhumane treatment, and some of whom were killed or disappeared; (2) hundreds of men, of Bosnian ethnicity from Sandžak who, during the armed conflict in BiH, were subjected to unlawful detention and torture on unfounded allegations that they collaborated with the Army of BiH and took part in activities “against the state”; (3) citizens of Bosnian ethnicity who were killed, or ill-treated, or expelled from border areas in the municipality of Priboj during the war in BiH.

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51 Decision of the Department of Social Activities of the Administration for own and delegated competencies of the City of Novi Pazar No. 585-12/13, of 26 April 2013; Decision of the Vojvodina Secretariat for Health, Social Policy and Demography No. 129-585-79/2012-02 of 29 November 2012, on appeal against the decision of the Department of Administration, Social Activities and Assembly-related affairs of the Apatin Municipal Administration No. 585-1/2012-IV/03 of 4 October 2012.

Applied in practice, the said requirement indirectly discriminates against the above listed categories of victims. An apparently neutral requirement set forth in the Law in effect denies access to the rights provided for in the Law for these categories of victims. This not only undermines the very purpose and intent of the Law – to regulate the rights of all, not only some war-disabled civilians and their family members – but also discriminates against the majority of potential beneficiaries, only because the perpetrators did not belong to what is considered to be “enemy forces”. Further, this requirement runs counter to Article 14 of the European Convention, which prohibits discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin etc. in the enjoyment of any rights guaranteed by the Convention.

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Although the states parties to the European Convention are free to regulate the rights and duties of their citizens on their own, when doing so they must not engage in discrimination. In addition to Article 14, which prohibits discrimination in the enjoyment of all other rights guaranteed by the Convention, Protocol 12 to the European Convention, which Serbia signed in 2004 simultaneously with signing the Convention, prohibits any discrimination at the domestic level in the enjoyment of any rights.<sup>52</sup>

#### ii. Discrimination of Families of Missing Persons

According to the said law, forcibly disappeared persons are not civilian victims of war. As a result, their families are not entitled to benefits available to the families of killed civilian victims of war.<sup>53</sup> To qualify for the benefits provided for in the law, the families of missing persons are required to have declared their missing family members dead through non-adversarial proceedings.<sup>54</sup> However,

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52 See page 91.

53 According to the definition contained in Article 3(2) of the Law, a family member of a person *who was killed or died* under the circumstances referred to in Article 2 of the Law is considered a family member of a civilian victim of war. Such a definition does not include persons for whom a death certificate has not been issued.

54 Law on Non-Adversarial Procedure (“Official Gazette of the SRS”, Nos. 25/82 and 48/88 and “Official Gazette of the RS”, Nos. 46/95 – other law, 18/2005 – other law, 85/2012 and 45/2013 – other law).

many families refuse to have their loved ones declared dead until their mortal remains are found and their fate is clarified – that is, until the circumstances of their enforced disappearance are established. This provision of the Law goes against the standards of the European Court, according to which, the families of forcibly disappeared persons are the victims of a violation of the prohibition of inhumane treatment.<sup>55</sup>

iii. Discrimination of Victims due to Circumstances Relating to the Time of the Commission of the Crime and the Place where it was Committed

Both administrative and judicial authorities interpret the provisions of the law as imposing a prerequisite that the act of violence against a person who claims to be a war victim must have occurred during the formally declared “state of war” (Article 2 specifies that the violation had to take place “during war” or “war operations”) and on the territory of the Republic of Serbia.<sup>56</sup> Since the FRY, as the legal predecessor of the Republic of Serbia, participated, formally speaking, in the armed conflict only in the period from 24 March to 26 June 1999<sup>57</sup>, this requirement has prevented all those victims who were subjected to violence and other human rights abuses during the conflicts of the 1990s, but at a time outside of the time period specified above, and outside Serbian territory, from exercising the rights provided for in this Law, despite having sustained injuries during the war or war-related operations.

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55 See, e.g., *Kurt v. Turkey*, application No. 15/1997/799/1002, judgment of 25 May 1998, para. 134; *Cyprus v. Turkey*, application No. 25781/94, judgment of 10 May 2001, para. 157.

56 Although the Law does not explicitly prescribe the territoriality condition, that is, sets no condition regarding where the injury took place, the Ministry of Labour, Employment, Veteran and Social Affairs and the Supreme Court of Cassation interpret the Law in a manner that only recognises injuries that occurred on the territory of the Republic of Serbia. See: Humanitarian Law Center and Documenta, *Transitional Justice in Post-Yugoslav Countries: 2007 report*, pp. 44 and 45; Decision of Priboj Municipal Administration 04 No. 580-5/2012 of 10 October 2012, 04 No. 580-4/2012 of 9 October 2012, 04 No. 580-3/2012 of 8 October 2012, 04 No. 580-2/2012 of 22 April 2013, 04 No. 580-6/2012 of 10 October 2012; judgment of the Supreme Court of Cassation Gž 83/10 of 28 January 2011, confirmed at the Civil Law Department session held on 21 March 2011.

57 Decision lifting the “state of war” (“Official Journal of the FRY”, Nos. 15/99 and 44/99).



Protocol 12 to the European Convention prohibits discrimination in the enjoyment of any rights set forth in the national legislation of the states parties. Furthermore, it prohibits any public authority from discriminating against anyone in deciding on the rights and duties of individuals or in the implementation of laws.

By linking the time requirement with the period when “a state of war” was in effect, and restricting the territoriality requirement to the territory of Serbia, although the law does not specify so, the administrative and judicial authorities in Serbia disregard the fact that a large number of victims living in the Republic of Serbia suffered injuries under circumstances which are not covered by the law, thus placing them at a disadvantage without any objective and reasonable justification. Such a practice also runs contrary to the provisions of the Constitution of the Republic of Serbia.<sup>58</sup>

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iv. Discrimination against Victims on Grounds of Disability Degree and Type of Health Consequences

The Law on the Rights of Civilian Invalids of War prescribes a threshold for according the civilian victim of war status, and only recognizes physical impairments as grounds for according the status of victim. It stipulates that only “persons who have sustained *physical impairment of at least 50%*, due to a wound or injury that left visible traces...” [italics added] are to be recognized as victims. This requirement prevents all those victims who have sustained physical impairment of less than 50%, as well as those who suffer serious psychological problems as a result of abuse endured, from exercising the right to reparations.

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58 According to Article 18(3) of the Constitution of the Republic of Serbia (“Official Gazette of the RS”, No. 98/06), provisions on human and minority rights should be construed so as to promote the values of a democratic society and pursuant to valid international standards in human and minority rights and the practice of international institutions which supervise their implementation. Article 21(3) of the Constitution prohibits all discrimination, indirect or direct, on any grounds, particularly on grounds of race, sex, ethnicity, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability.

The consequences of violence suffered are most often exclusively psychological. This is particularly true of survivors of sexual violence, torture and inhumane treatment. One of the most common psychological effects found in these victims is Post-Traumatic Stress Disorder (PTSD), which substantially limits the activities of daily living of persons who suffer from this disorder and greatly reduces their chance of leading a normal life.

This unjustified distinction between victims with physical injuries and those with mental injuries amounts to discrimination and a breach of the prohibition of discrimination set forth in Article 14 of the European Convention, as well as a breach of the Serbian Anti-Discrimination Law<sup>59</sup> and of Article 21(3) of the Constitution of the Republic of Serbia, which reads as follows: “All direct or indirect discrimination based on any grounds, particularly on grounds of [...] mental or physical disability, shall be prohibited.”

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Because of the prescribed minimum threshold of physical impairment, the victims who suffer less serious but yet significant and life-long physical effects cannot be recognised as victims. That this provision is discriminatory becomes particularly clear if one takes into account the fact that the prescribed threshold of physical impairment for war veterans is set at 20%. The “50% impairment” requirement is unduly restrictive, and it cannot be justified by any reasonable or legitimate goal. On top of that, it does not meet the standard established in the European Court’s jurisprudence.<sup>60</sup>

#### v. Denial of Victims’ Rights through Imposition of Additional Conditions Relating to Social and Financial Situation of Victims

To qualify for monthly cash benefits, victims must satisfy all three requirements prescribed by the law, namely financial insecurity, incapacity for work

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59 Law on the Prohibition of Discrimination (“Official Gazette of the RS”, No. 22/09).

60 On the European Court’s standard concerning legitimate aim as a justification for unequal treatment, see: *Belgian linguistics*, applications Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, and 2126/64, judgment of 23 July 1968, section I.B, para. 10; *Rasmussen v. Denmark*, application No. 8777/79, judgment of 28 November 1984, para. 38. See also: *Glor v. Switzerland*, application No. 13444/04, judgment of 30 April 2009, paras. 90-91, where this standard was applied to unequal treatment of persons on the basis of degree of disability.

and a means test.<sup>61</sup> To meet the financial insecurity requirement, victims are required not to have any income (from employment or self-employment) or receive any form of government assistance. Incapacity for work is determined on the basis of disability level, age or need to take care of a child. A means test assesses the amount of regular income of the entire claimant's household.

By imposing these additional conditions relating to the financial situation of victims and their families, the legislators have in effect negated the reparative nature of one of the key rights that civilian war victims acquire after having their status recognised, and have reduced it to a mere social welfare benefit. As stated above, the right to reparation is a political right which arises from violations of other fundamental human rights. As such, this right seeks to rectify the wrong done and remedy the harm suffered, not to improve the financial situation of the victim. The obligation to offer reparations emanates from the international law principle of state liability for violations of fundamental human rights. Therefore, linking this obligation towards victims to any other factors, amounts to non-compliance with this elementary and widely accepted principle. Even though the European Court does not impose any specific limitations for states in the field of social policy, this law, by equating victims of gross human rights violations with other social welfare beneficiaries, denies victims the right to an effective remedy set forth in Article 13 of the European Convention. In cases where the most important rights guaranteed by the European Convention (right to life and prohibition of torture) were violated, an effective remedy includes also an award of compensation, where appropriate.<sup>62</sup>

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61 Means test: the overall income of a household divided by the number of household members is compared with the median income in Serbia for the given year. See Article 9(3) of the Law on the Rights of Veterans, disabled War Veterans and their Family Members ("Official Gazette of the SRS", No. 54/89 and "Official Gazette of the RS", No. 137/04), which applies accordingly to civilian invalids of war.

62 On the right to an effective remedy concerning the prohibition of torture, see *Aksoy v. Turkey*, application No. 21987/93, judgment of 18 December 1996, para. 98; similarly, with regard to the right to life, see *Tanrikulu v. Turkey*, application No. 23763/94, judgment of 8 July 1999, para. 117.

#### vi. Unlawful Exclusion of Family Members from the Circle of Beneficiaries

The law specifies which family members are entitled to reparations – spouse, children (born in or out of wedlock, adopted children or stepchildren) and parents, imposing as an additional condition that they “lived with the victim in the same household before his/her death”. This condition excludes siblings, but also children and parents if they did not live in the same household with the victim. Thus, the relationship between close relatives is reduced to a mere economic community, completely ignoring the emotional dimension of family relations.

This condition is also contrary to European Court standards. In deciding whether a family member of a victim of violations of human rights (such as the right to life or prohibition of torture) is to be considered a victim in his/her own right, the European Court takes into account a number of factors, such as the degree of affinity, specifics of a family member relationship with the victim, to what extent a family member witnessed the event in question, his/her efforts to obtain information about the victim and how the authorities responded to these requests.<sup>63</sup>

Between November 2011 and March 2013, the HLC, on behalf of 14 Serbian nationals, victims of human rights abuses, initiated 12 administrative proceedings for recognition of civilian victim of war status under the Law on the Rights of Civilian Invalids of War. These proceedings will be discussed in more detail in section IV. 2. of this report.

### **3.2. Brief analysis of judicial proceedings concerning the right to reparation in Serbia and their consistency with the standards of the European Court**

In addition to the previously mentioned provisions of the Constitution of the Republic of Serbia and ratified international conventions for the protection of

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63 *Çakici v. Turkey*, application No. 23657/94, judgment of 8 July 1999, para. 98; *Kurt v. Turkey*, application No. 15/1997/799/1002, judgment of 25 May 1998, paras. 130-134; *Cyprus v. Turkey*, application No. 25781/94, judgment of 10 May 2001, para. 156.

human rights, the provisions of the Law on Contracts and Torts<sup>64</sup>(LCT) also constitute a legal basis for filing a compensation lawsuit against the state as the party responsible for human rights violations.

Under the LCT, the state as a legal person is held liable for the harm caused by members of its bodies (Article 172). Also, the state is obliged under the LCT to compensate the damage caused by acts of violence or terror, as well the damage caused in the course of public demonstrations and events, because state authorities are bound by existing regulations to prevent such harm from occurring (Article 180).

i. Courts are trying to shield the state from liability for damage

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In some cases, and contrary to their legal obligations and the European Court standards, courts have refused to take into account the evidence of the state's liability for the harm suffered. In the *Sjeverin* case<sup>65</sup>, for example, the lawsuit brought by the HLC was supported by the evidence presented in proceedings conducted before the ICTY, on the basis of which it was established that Serbia was involved in financing and arming the Army of Republika Srpska (VRS) and cooperated with the VRS (which was responsible for the abduction and murder of 16 Bosniak civilians from Sjeverin), and is therefore responsible for this crime against its own citizens. But the court considered this argument irrelevant and rejected it. Further, the court did not allow presentation of evidence demonstrating a connection between the Republic of Serbia and Republika Srpska, on the grounds that "the defendant [party] did not give consent to it". The Court of Appeal upheld this decision.

Moreover, evidence submitted by the victims is often questioned, mistrusted, and its validity and authenticity challenged by the courts. By contrast, witnesses and evidence put forward by the proxies of the state are given unreserved credence.

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64 Law on Contracts and Torts ("Official Journal of the SFRY", Nos. 29/78, 39/85, 45/89 – decision of the CCY and 57/89, "Official Journal of the FRY", No. 31/93 and "Official Journal of SCG", No. 1/03 – Constitutional Charter) (LCT).

65 See p. 38.

In the *Fehrat Suljić* case<sup>66</sup> (victim of police torture in Sandžak), the court gave full credence to the police officers who interrogated and tortured Suljić and ruled out the testimonies given by Suljić and his wife.

In the lawsuit filed by the HLC on behalf of Mušan Džebo and Enes Bogilović<sup>67</sup>, victims of torture and inhuman treatment in the Šljivovica and Mitrovo Polje detention camps, the court gave credence to the testimonies of MUP members who participated in the establishment of the camps and secured them. Also, the court dismissed all motions submitted by the HLC requesting that former inmates of these camps, Amor Mašović (the Chairman of the BiH Commission for Missing Persons), be heard. Also rejected was the motion for conducting a medical examination of the victims in order to assess the consequences for their health of the torture they endured in the camps. But at the same time, the court was willing to hear all witnesses presented by the Office of the Attorney General.

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This practice of the courts in Serbia constitutes a violation of the right to a fair trial and is in breach of Article 6 of the European Convention. According to the standards laid down by the European Court, the principle of equality of arms, as a constituent part of the right to a fair trial, involves giving each party the possibility to present its case, including the evidence they hold.<sup>68</sup> Failure to rule on a motion of a party which may have an important bearing on the outcome of the proceedings leads to a situation where it is impossible to ascertain whether the court has simply neglected to deal with the motion or intended to dismiss it and, if that were its intention, what its reasons were for so deciding. In doing so, the court violated Article 6(1).<sup>69</sup>

ii. Interpretation of the Statute of Limitation in a Way unfavourable to the Victims

The issue of the statute of limitations for compensation claims regarding hu-

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66 See p. 68.

67 See p. 80.

68 *Neumeister v. Austria*, application No.1936/63, judgment of 27 June 1968, para. 22.

69 See: *Hiro Balani v. Spain*, application No.18064/91, judgment of 9 December 1994, para. 28.

man rights violations of the 1990s is the most serious legal obstacle faced by victims asserting their right to reparation through judicial proceedings. Basically, the problem lies in the fact that courts interpret the relevant provisions of the LCT in a manner detrimental to the victims, which ultimately leads to the denial of the victims' rights to compensation.

### Relevant Legal Norms and how Courts Interpret them

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The LCT (Article 376) prescribes that the standard statute of limitations for compensation claims runs three years or five years, starting from the date when the event that caused damage took place. When it comes to human rights violations committed in connection with the wars in the former Yugoslavia, these deadlines are practically inapplicable and, if implemented strictly, the victims' right to seek compensation are deemed to have expired. In other words, victims were entitled to file them no later than 2000 or 2004, that is, during the regime of Slobodan Milošević or immediately after its fall. Given that the regime of Milošević was directly involved in the planning and implementation of systemic human rights violations and in the collapse of the judicial system and the rule of law, and for other objective reasons, very few victims opted for bringing a legal action against the state. As a consequence, the statutory time limitation expired, and thus their right to obtain material compensation became time-barred.

However, special statute of limitations should be applied to gross human rights violations. The LCT stipulates longer statutes of limitations for compensation claims in cases where a damage is caused by a criminal offence (Article 377), in which case "the claim for compensation against the person liable shall expire upon the expiration of the limitation period set forth in the statute of limitations of the criminal prosecution".<sup>70</sup> Yet, for a long time courts in Serbia have interpreted Article 377 as only allowing longer time limits against the individual that committed the offence (natural person), not in cases where compensation is sought from the state, as a legal person liable for the dam-

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70 Article 377(2), LCT.

age caused by its authorities and damage caused by acts of violence or terror (Articles 172 and 180 of the LCT). Such an interpretation is the reason why courts have rejected a large number of compensation claims as time-barred.

### Partial Change in Interpretation Following the Opinion Issued by the Constitutional Court of Serbia

In 2011, the Constitutional Court of Serbia (CCS) issued its opinion regarding this matter, which is different, to a certain extent, from the interpretation discussed above. According to this opinion, the time limits for claiming compensation for damage resulting from a criminal offence apply not only to the individual that caused the damage, but also to any responsible natural or legal person.<sup>71</sup> In other words, the longer time limits referred to in Article 377 also apply to situations where the state is involved, provided that the conditions have been met for the state to be held liable for the harm directly caused by an individual.

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This opinion of the Constitutional Court has a rather limited effect, because it restricts this opinion only to cases where criminal proceedings resulted in a final judgment establishing that a criminal offence has taken place and convicting the offender.<sup>72</sup> Given that the perpetrators of the majority of gross human rights violations in the 1990s – members of the Serbian armed forces – have not been finally adjudged guilty, the limited effect of the CCS's opinion becomes quite clear.

### Effects of the Rigid Interpretation of Limitation Provisions

In practice, this rigid interpretation of the limitation provisions by the CCS and other courts in Serbia in cases where the damage resulted from a criminal offence (Article 377 of the LCT), makes it impossible or very difficult for victims to obtain monetary compensation.

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71 Position of the Constitutional Court of the Republic of Serbia laid down in the regular session held on 7 July 2011, Su No. I-400/1/3-11.

72 *Ibid.*



The only category of victims which is able to realize their right to receive monetary compensation from Serbia, although not to the full extent, are the victims of torture and inhumane treatment who suffer life-long psychological consequences as a result of violent acts. All other victims are precluded from exercising their right to monetary compensation from Serbia, because the courts have not yet convicted those responsible for the harm they suffered. This group includes the families of the killed, the families of the disappeared, victims whose right to life was violated, victims whose right to a fair trial was violated, victims of torture and inhumane treatment who suffered material loss, and others.

### Partial Compensations Awarded

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The existing legal framework and the opinion of the courts as regards the statute of limitations make it possible only for a limited number of victims, namely those who are diagnosed with a specific impairment (permanent mental health impairment) caused by the abuse they suffered, to obtain compensation, but even they are awarded amounts that are lower than those they are entitled to under both domestic and international standards. These victims, if they are successful in judicial proceedings, are awarded compensation only for health impairment sustained, not for the impairment of other rights (the right to life and dignity and so on).

In order to obtain this partial compensation through judicial proceedings, victims must prove the following<sup>73</sup>:

- a) that the consequences of the violence are permanent (e.g. chronic post-traumatic stress disorder (PTSD));
- b) that he/she became aware of the disorder three years prior to filing a lawsuit (the standard limitation period);
- c) that as a result, his/her day-to-day life activities are reduced.

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73 Articles 195, 200 and 376, LCT.

In all lawsuits in which it has acted as a legal representative of the victims, the HLC has filed motions for an independent medical examination of victims, as the above listed conditions and circumstances can only be established by a medical expert. PTSD and the reduction of day-to-day life activities are diagnosed through medical examination, and in the process of examination the victim is made aware of the effects of abuse (and thus becomes aware of the damage). However, courts tend to take a very rigid stance towards victims who endeavour to prove the existence of the above circumstances, and interpret expert reports and the need for a medical examination rigidly.

For example, in the case of *Refik Hasani et al.*<sup>74</sup>, the court ruled that the period of time within which the victims were allowed to bring a compensation lawsuit had run out. The ruling was based on the enclosed medical documentation, on the basis of which the court found, on its own, *without ordering a medical examination of the victims*, that the victims learned that they suffered from PTSD as early as 2003 and 2004 (the compensation lawsuit was filed in 2008). Since more than three years had passed since the victims, according to the court, learned that they had PTSD, the court found that the statute of limitations on their case has run out. The ruling was upheld by the Court of Appeal.

In the case of *Behram Sahiti et al.*<sup>75</sup> (lawsuit filed in 2010), the First Basic Court in Belgrade in 2012 ruled to dismiss the lawsuit on the grounds of the statute of limitations. A court-appointed expert witness established that the plaintiffs were diagnosed with PTSD, which fully manifested itself in 2008 and 2011 (which means that the lawsuit was filed within the statutory time limit of three years). Despite the findings of the court-appointed psychiatrist, the court established that the damage, i.e. fully manifested PTSD, occurred at the moment they “returned from the war zone” (it should be noted that the victims did not take part in combat operations, but were unlawfully detained as civilians) and that, therefore, their compensation claim was time-barred.

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74 See p.54.

75 See p.59.

### iii. Court Practice is Contrary to the Standards Set by the European Court

With such rulings, courts in Serbia violate the right to a fair trial enshrined in Article 6 of the European Convention. The right to have a fair hearing, as the key element of the right to a fair trial, concerns the obligation of courts to deliver fair and reasoned judgments which will address the most important elements of the factual and legal arguments put forward by the parties, and to state their reasons for their rulings.<sup>76</sup> The decision of the court not to order a medical examination and to depart from the findings of the court-appointed expert, without giving reasons for such a decision, exceed the margin of appreciation allowed by the European Court in assessing evidence, and therefore constitute a violation of the right to a fair trial.

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Besides, the courts also violate the prohibition of discrimination guaranteed by Article 14 of the European Convention and Article 1 of Protocol 12 to the European Convention. According to the European Court's jurisprudence, discrimination is a difference in the treatment of persons in otherwise similar situations without any objective or reasonable justification.<sup>77</sup> As regards victims of gross human rights violations committed by member of the Serbian armed forces, the courts' interpretation of the statute of limitation puts them in an unfavourable position compared with another group, without any objective or reasonable justification. It should be noted that the courts interpreted the statute of limitation in a completely opposite manner in cases where former JNA members claimed damages from the state for the harm they had suffered as a result of a criminal offence.<sup>78</sup>

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76 *Ruiz Torija v. Spain*, application No. 18390/91, judgment of 9 December 1994, para. 29.

77 See, e.g. *Willis v. the United Kingdom*, application No. 36042/97, judgment of 11 June 2002, para. 48; *Okpiz v. Germany*, application No. 59140/00, judgment of 25 October 2005, para. 33.

78 According to the legal opinion of the Civil Law Department of the Supreme Court of Serbia, laid down in the session held on 27 December 1999, the damage suffered by former members of the JNA during the conflict with armed forces of other republics of the former SFRY, up until JNA's withdrawal from those republics, shall be deemed to have been the result of a criminal act of armed rebellion. Given that the time limit for criminal prosecution for the act concerned is 15 years, under this opinion the time limit for claiming compensation for damage shall be equally long.

Furthermore, victims are also deprived of the right to an effective remedy. As defined by the European Court, an effective remedy entails, in addition to investigation, the payment of compensation to the victim, or, in the event of his/her death or murder, to members of his/her family.<sup>79</sup>

#### iv. Inadequate Damages Render the Very Purpose of Reparations

##### Meaningless

The damages awarded by courts in Serbia for most serious violations of fundamental human rights committed by Serbian armed forces during and in connection to the armed conflicts in the 1990s are exceptionally low. Bearing in mind the seriousness of these human rights violations, their systemic nature and the fact that they were committed by members of state bodies whose responsibility was to protect human rights (military and police), such damages do not constitute fair redress.

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For example, the amounts of damages awarded by courts to victims of unlawful detention and torture by members of the Serbian MUP in the 1990s – Bosniaks from Sandžak and Kosovo Albanians – ranged between RSD 200,000 and 300,000 (EUR 1,500-2,700).

The award of such low compensation amounts constitutes a breach of the European Convention. Namely, the European Court holds that two measures are necessary to provide adequate redress in cases where violations of the right to life, prohibition of torture, inhumane and degrading treatment have been found: an effective investigation and an award of compensation<sup>80</sup>, and the compensation must be adequate<sup>81</sup>. According to the standards laid down by the European Court, redress cannot be regarded as adequate and therefore

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79 See, e.g. *Aksoy v. Turkey*, application No. 21987/93, judgment of 18 December 1996, para. 98; *Mahmut Kaya v. Turkey*, application No. 22535/93, judgment of 28 March 2000, paras. 121-126.

80 See, e.g. *Gafgen v. Germany*, application No. 22978/05, judgment of 1 June 2010, para. 116; *Nikolova and Velichkova v. Bulgaria*, application No. 7888/03, judgment of 20 December 2007, para. 56.

81 See, e.g. *Gafgen v. Germany*, application No. 22978/05, judgment of 1 June 2010, para. 116; *Ciorap v. Moldova*, application No. 7481/06, judgment of 31 August 2010, paras. 24-25.

a breach cannot be regarded as remedied if the compensation paid is below those sums the Court awarded in similar cases against Serbia in which it found violations of the same rights.<sup>82</sup>

The European Court, in cases concerning the violation of the right to life and the violation of the prohibition of torture, degrading and inhumane treatment, by the Republic of Serbia, awarded compensations ranging from EUR 10,000 to EUR 13,000.<sup>83</sup>

### **3.3. Brief Analysis of Restitution Claims Filed in the Course of Criminal Proceedings and the Level of Consistency of this Mechanism with the European Court Standards**

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The legal basis and the conditions for filing a restitution claim in the course of criminal proceedings, as well as persons eligible to use this mechanism, are laid down in the Criminal Procedure Code.<sup>84</sup> Despite the clear provisions contained in the Code and the long-time presence of this institute in the domestic legal system, it remains unused.

Since the prosecution of war crimes began (in 2003), this mechanism has not been used in Serbia even once. The HLC has no information as to whether restitution claims have been dealt with in other proceedings concerning other criminal offences relating to human rights violations committed in the 1990s. The reason why this mechanism is still unused probably lies in the courts' entrenched practice of rarely or never dealing with restitution claims. Instead, and without any justified reason, they instruct the victims (injured parties in criminal proceedings) to pursue their claims through civil litigation, although their claims

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82 *Ciorap v. Moldova*, application No. 7481/06, judgment of 31 August 2010, paras. 24-25.

83 *Petrović v. Serbia*, application No. 40485/08, judgment of 15 July 2014, para. 105; *Hajnal v. Serbia*, application No. 36937/06, judgment of 19 June 2012, para. 149; *Stanimirović v. Serbia*, application No. 26088/06, judgment of 18 October 2011, para. 59; *Milanović v. Serbia*, application No. 44614/07, judgment of 20 June 2011, para. 107.

84 Criminal Procedure Code ("Official Gazette of the RS", Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), Articles 252-260.

can be dealt with in the course of criminal proceedings.<sup>85</sup> By way of illustration, the court refused to adjudicate a restitution claim filed by the injured parties in the *Podujevo* case<sup>86</sup>, even though adducing evidence necessary for adjudication of the claim would not have substantially delayed the proceedings, and instructed the parties instead to file their compensation claim with a litigation court.

This mechanism for seeking and obtaining compensation within the pending criminal proceedings has two main advantages: it is expeditious and it uses court resources efficiently, as one single court considers the facts surrounding the criminal offence (human rights abuse) and decides on compensation for victims. Another advantage is that certain procedures (such as examination of witnesses) need not be repeated.

On the other hand, this mechanism only applies to cases where criminal proceedings have been initiated against the perpetrators and resulted in their conviction.

Another limiting factor is that a restitution claim cannot be submitted against a legal entity i.e. the state, which may be held liable under general grounds for liability for damage.

Denying victims this possibility to seek and obtain reparation constitutes a breach of Article 13 of the European Convention, which guarantees the right to an effective remedy for victims, and imposes the obligation on the states parties to ensure an effective domestic remedy. The European Court has repeatedly emphasized that the remedy, which in certain cases includes redress, must be sufficiently certain and available, both in theory and in practice, and effective, and provide an adequate response to a well-founded allegation of a human rights abuse.<sup>87</sup>

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85 Goran P. Ilić and others, *Komentar Zakonika o krivičnom postupku* (Commentary on the Criminal Procedure Code), Službeni glasnik, Belgrade, 2012, p. 596.

86 See p. 46.

87 *McFarlane v. Ireland*, application No. 31333/06, judgment of 10 September 2010, paras. 107-108.

## IV. Individual cases

### I. Compensation lawsuits

38 Until the 2010 reform of the judicial system, all the civil lawsuits the HLC brought against the Republic of Serbia seeking monetary compensation on behalf of victims of human rights violations in the 1990s, had been handled by the First Municipal Court in Belgrade, as a court of first instance.<sup>88</sup> Following the judicial reform, these cases were transferred to the jurisdiction of the First Basic Court in Belgrade or the High Court in Belgrade, depending on the amount claimed. The state is represented in these cases either by the Office of the State Attorney (formerly the office of the Attorney of the Republic of Serbia) or by the Directorate for Legal and Property Affairs of the Serbian Ministry of Defence. As regards procedural rules, the relevant Civil Procedure Code provisions apply.

In the period between 2006 and 2010, the HLC brought 52 lawsuits against the Republic of Serbia as the party responsible for past human rights violations, claiming compensation for 188 victims. These actions were brought on behalf of victims of unlawful detention in Kosovo in 1999 – 2000, victims of police torture in Sandžak in the 1990s, former prisoners of the detention camps for Bosniaks in Serbia – Šljivovica and Mitrovo Polje – and family members of victims of war crimes in Sjeverin and Podujevo. Except one, all these lawsuits except one concern non-pecuniary damages.

#### I.1 Sjeverin

Sjeverin is a village in the municipality of Priboj, south-west Serbia, situated in close vicinity to the border with BiH. It is inhabited mostly by Bosniaks. At the beginning of the war in BiH, residents of this and the surrounding villages

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<sup>88</sup> According to Article 40 of the new Civil Procedure Code (“Official Gazette of the RS”, No.72/2011), or Article 41 of the old Civil Procedure Code (Official Gazette of the RS, Nos. 125/2004 and 111/2009), civil lawsuits against the Republic of Serbia are filed with the court in whose territorial jurisdiction the seat of its Assembly is located.

were terrorized by members of the Bosnian Serb armed forces, who were crossing unhindered into Serbia. Murders, abductions and other human rights abuses were reported to have taken place in the area.<sup>89</sup> On 22 October 1992, members of the “Osvetnici” (Avengers) unit of the VRS stopped a bus that regularly transported residents of Sjeverin and other villages to Priboj. After checking the identity of the passengers, they took 15 men and one woman (all Bosniaks and citizens of Serbia) off the bus. The 16 people were then transported by truck to the Vilina Vlas Motel in Višegrad, where they were brutally abused, physically and mentally. Some time later, the group was taken to the banks of the Drina River, where all of them were executed. All the victims of this abduction are still listed as missing, except Medredin Hodžić, whose body was found in Lake Perućac in 2011.

In July 2005, the District Court in Belgrade sentenced Milan Lukić, Oliver Krsmanović and Dragutin Dragičević to 20 years’ imprisonment each, and Đorđe Šević to 15 years’ imprisonment, for the abduction and murder of the 16 Bosniaks.<sup>90</sup> The Supreme Court of Serbia upheld the sentence on 18 May 2006.<sup>91</sup>

### **Course of Proceedings**

In June 2007, on behalf of 25 family members of those abducted and killed in Sjeverin, the HLC filed with the First Municipal Court in Belgrade a lawsuit against the Republic of Serbia. The lawsuit sought for the victims to be awarded non-pecuniary damages by the state of Serbia, as the party that bears responsibility for the crime on several grounds:

- for providing assistance to the VRS, whose members, as part of its Višegrad Brigade, kidnapped and executed 16 Bosniaks;
- for failure to provide necessary protection to its citizens passing through the territory affected by an armed conflict, and for failure of

89 See *Human Rights 1991-95*, Humanitarian Law Center, Belgrade, 1997.

90 Judgment of the District Court in Belgrade K.1419/04 of 15 July 2005.

91 Judgment of the Supreme Court of Serbia K.Ž. I 1807/05 of 13 April 2006.



the MUP to provide security for the buses travelling on that route or prevent them from operating;

- for failure of the VJ to secure the state border.

In its lawsuit, the HLC also pointed out that Serbia was responsible under the International Covenant on Civil and Political Rights<sup>92</sup> to ensure respect for the right to life and the right to liberty and security for all individuals within its territory and subject to its jurisdiction, and ensure that persons deprived of their liberty are treated with humanity.<sup>93</sup>

The HLC sought from the Court an order that the Republic of Serbia pay a total of RSD 37.25 million in damages to the families of the abductees from Sjeverin.

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Along with the lawsuit, the HLC submitted the evidence presented before the ICTY that confirms that Serbia financed and armed the VRS and cooperated with it. That Serbia bears responsibility for this crime is corroborated by the fact that Serbian state bodies knew of the activities of armed units near its state border that were targeted against the Muslims, and were therefore responsible for protecting them as Serbian citizens of Bosnian ethnicity living in this border zone. That obligation was also laid down in the then Constitution, and prescribed in more detail by the Law on Internal Affairs, according to which the MUP had the authority to suspend or impose temporary limitations on the movement of people in certain areas “in order to protect the people who are at risk because of widespread crimes or for reasons relating to the defence of the Republic”<sup>94</sup>.

More than one year passed between the filing of the lawsuit and the first hearing, which was held in July 2008, though only after the urging of the HLC attorney. Four hearings were held during the trial, where five family members of the victims and one witness testified about their relationship with the victims.

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92 Law on Ratification of the International Covenant on Civil and Political Rights (“Official Journal of the SFRY”, No. 7/71).

93 See Articles 2, 6, 9 and 10 of the International Covenant of Civil and Political Rights.

94 Article 15, Law on Internal Affairs (“Official Gazette of the RS”, Nos. 44/91 and 79/91).

## **Judgment of the First Municipal Court**

In February 2009, the First Municipal Court handed down a judgment rejecting the lawsuit, finding the allegations contained in it to be unfounded.<sup>95</sup>

Stating the reasons for its judgment, the court said that the state of Serbia was not responsible for securing the bus in question, because such an obligation of the MUP was not stipulated in any act or by-law.

The evidence proposed by the HLC suggesting that the state of Serbia provided assistance to the VRS was considered irrelevant by the court, because the judgment rendered in the criminal proceedings on this matter established that the individuals convicted of this crime were not members of the VRS but of a paramilitary unit, and that “they committed the crime not as members of the VRS but as individuals and as a group with an autonomous will.” Furthermore, the court failed to order that the evidence indicating the existence of a connection between the state of Serbia and Republika Srpska be presented during the proceedings. In the court’s view, admitting evidence given by witnesses who had testified before the ICTY and not in the proceedings at hand, would go against the principle of immediacy. Also, the court adopted the position that presentation of such evidence requires consent from the representative of the state.

The allegations that the Serbian government violated international treaties about the protection of human rights were also rejected, because, in the court’s opinion, “the state of Serbia is obliged to ensure the implementation of these acts within the territory of the Republic of Serbia and may be held responsible only for the damage caused by acts of terror and other breaches of international treaties committed on the territory of the Republic of Serbia.”

## **Ruling of the Court of Appeal**

In April 2009, the HLC lodged an appeal with the Court of Appeal in Belgrade

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95 Judgment of the First Municipal Court in Belgrade XXXV P br. 5509/07 of 6 February 2009.

against the judgment of the First Basic Court. The Court of Appeal took more than four years to decide upon the appeal.

Because the Court of Appeal was delaying the proceedings, the HLC lodged an appeal with the Constitutional Court for infringement of the right to a trial within a reasonable time. In September 2013, the Constitutional Court ruled that the right of family members of victims to have their case heard within a reasonable time had been violated.<sup>96</sup>

In September 2013, the Court of Appeal rendered a decision overturning the appeal and upholding the decision of the trial court.<sup>97</sup>

In October 2013, the HLC lodged an appeal with the Constitutional Court and a petition for revision with the Supreme Court of Cassation. In December 2015, the latter dismissed the petition as inadmissible. The Constitutional Court has yet to rule on the HLC's appeal.

## **European Court of Human Rights Standards**

### **Right to a Fair Trial**

According to the European Court, an essential component of the right to a fair trial is the right of a party to receive a hearing where they are given the opportunity to submit evidence, be informed of the opposing party's evidence and confront it.<sup>98</sup>

The principle according to which all parties to the proceedings must be given a reasonable opportunity to present their case, including evidence, is a constituent element of the general notion of a fair trial within the meaning of

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96 In its decision Už 6652/13 of 15 October 2013, the Constitutional Court established that the proceedings before the first-instance and second-instance courts lasted six years in total, and found no justification for that, because the case itself, despite the large number of plaintiffs, was not particularly complex. The Constitutional Court held the courts responsible for delays in the proceedings and awarded EUR 600 to each of the plaintiffs in compensation as non-pecuniary damages.

97 Judgment of the Court of Appeal Gž-2044/12 of 4 September 2013.

98 *Monnel and Morris v. the United Kingdom*, applications Nos. 9562/81 and 9818/82, judgment of 2 March 1987, para. 53.

Article 6(1) of the European Convention.<sup>99</sup> The right to a fair trial also includes the obligation of courts to deliver reasonable and reasoned judgments. This right derives from a general principle guaranteed by the Convention, which is aimed at protecting individuals from arbitrariness and which obliges the court to address the most important elements of the factual and legal submissions presented to it by the parties.<sup>100</sup> In other words, all judgments must contain “reasons for judgment”, that is, a statement of the grounds on which they are based.

In the opinion of the European Court, national courts are not under a duty to give a detailed answer to every argument presented by the parties, but if an argument can have an important bearing on the outcome of the case, the court must deal with it separately in its judgment.<sup>101</sup> Failure of a court to reply to an argument that may have an important bearing on the outcome of the proceedings leads to a situation where it is impossible to ascertain whether the court has simply neglected to deal with it, or intended to dismiss it and, if that were its intention, what its reasons were for so deciding. The absence of such a reply constitutes a violation of Article 6(1).<sup>102</sup>

In the *Sjeverin* case, both the First Basic Court and the Court of Appeal, which upheld the first-instance judgment, violated the right of the family members of the abducted and killed to have a fair trial, by finding one of the key arguments put forward by the HLC to be legally irrelevant. The argument at issue concerned the connection between the Republic of Serbia and the VRS. If the

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99 See first sentence of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms: “In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ...” See also: *Ankerl v. Switzerland*, application No. 17748/91, judgment of 23 October 1996, para. 38; *Kress v. France*, application No. 39594/98, judgment of 7 June 2001, para. 74; *Gorraiz Lizarraga and others v. Spain*, application No. 62543/00, judgment of 27 April 2004, para. 56.

100 *Hiro Balani v. Spain*, application No. 18064/91, judgment of 9 December 1994, para. 27; *Novoseletskiy v. Ukraine*, application No. 47148/99, judgment of 22 February 2005, para. 111.

101 *Van de Hurk v. the Netherlands*, application No. 16034/90, judgment of 19 April 1994, para. 61.

102 *Ibid*; See also: *Hiro Balani v. Spain*, application No. 18064/91, judgment of 9 December 1994, para. 28.

court had made findings on whether the JNA (and later the VJ) financed and assisted the VRS, took part in its operations, or generally directed, coordinated and controlled them, it could have been established whether the Republic of Serbia was to be held responsible for the conduct of its bodies and for the damage resulting from it, as stipulated in the LCT.<sup>103</sup> The courts dismissed the arguments and evidence put forward by the HLC regarding this issue, without giving detailed reasons for so deciding.

### **Principle of Equality of Arms**

The principle of equality of arms requires that both parties be treated with equality by the court. That means that each party to the proceedings must be given equal opportunity to present its case, including evidence, under conditions that do not place either party at a substantial disadvantage.<sup>104</sup>

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In the lawsuits brought by the families of the abductees from Sjeverin against the state of Serbia, the said standard set by the European Court was flagrantly infringed by the courts. Specifically, equality of arms was violated by the trial court's decision not to deal with key evidence of the connection between the Republic of Serbia and the VRS, because "the defendant [The Republic of Serbia] did not consent to it". In this explanation, the court expressly stated that it considered one party to the proceedings – the defendant i.e. the Republic of Serbia – more important than the other. Moreover, such an explanation shows that the courts gave this party the prerogative, which normally belongs to the court, to decide on the need and purposefulness of presenting certain pieces of evidence. According to the domestic legislation and the principles issued by the European Court, such a decision can only be made by the court.

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103 See Article 172(1) of the LCT: "A legal entity shall be liable for the damage its body caused to third persons in the discharge of its functions or in relation to the discharge of its functions."

104 See: *Miran v. Turkey*, application No. 43980/04, judgment of 21 April 2009, para. 13; *Aksoy v. Turkey*, application No. 21987/93, judgment of 18 December 1996, para. 93.

## Prohibition of Discrimination

According to the jurisprudence of the European Court, discrimination is a difference in treatment of persons in otherwise similar situations without any objective or reasonable justification. When making an assessment whether discrimination, as it is defined by the European Court, took place, it is necessary to determine whether there are other persons who are in a similar situation, and then detect a difference in treatment, as well as the absence of any objective and reasonable justification for such treatment.<sup>105</sup>

The domestic courts discriminated against the victims from Sjeverin by giving preferential treatment to another group of victims, in a legal situation that bears important similarities to that of the families of the victims from Sjeverin. This other group of victims were male refugees of Serbian ethnicity, who came to Serbia fleeing from the wars in Republika Srpska Krajina (RSK) and Republika Srpska. Contrary to the Constitution, the Law on Refugees, and the Convention Relating to the Status of Refugees, these men were arrested without arrest warrants by the Serbian MUP, forcibly conscripted and sent to war zones, where many of them lost their lives and others sustained severe or light physical injuries.

In both cases – Sjeverin and that of the forcibly conscripted refugees – the damage occurred outside the territory of Serbia, as a result of wrongful acts of the Serbian state organs. As regards the forcibly conscripted refugees, the Supreme Court of Serbia in 2001 issued an opinion that the state of Serbia bore full responsibility for the unlawful conduct of the MUP, even in cases where harmful consequences occurred outside its territory.<sup>106</sup> The explanation of the Supreme Court of this opinion was that “fairness and the wish to provide redress to the victims require the application of the theory of

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<sup>105</sup> *Abdulaziz, Cabale and Balkandali v. the United Kingdom*, applications Nos. 9214/80, 9473/81 and 9474/81, judgment of 28 May 1996, para. 82; *Willis v. the United Kingdom*, application No. 36042/97, judgment of 11 June 2002, para. 48; *Okpiz v. Germany*, application No. 59140/00, judgment of 25 October 2005, para. 33.

<sup>106</sup> Alteration of a legal opinion, established at the meeting of the Civil Department of the Supreme Court of Serbia on 25 June 2001.

adequate causation in this case, because there is no doubt that had there not been the unlawful conduct, the damage would not have occurred”.<sup>107</sup>

Although it is clear that in the *Sjeverin* case too, the damage occurred outside Serbian territory as a result of the unlawful conduct by state bodies (failure to prohibit the operation of bus services despite the clear legal provisions and existence of circumstances that required that such a measure be undertaken), the Court of Appeal in Belgrade declined to make use of the above opinion of the Supreme Court.

46 Instead, the Court of Appeal explained its decision in extremely unclear and insufficient terms. It stated that the opinion of the Supreme Court “concerns the *actions* of the defendant’s bodies on the territory of the Republic of Serbia, as a result of which the damage occurred outside the territory of the Republic of Serbia.” [italics added] Apparently, the court drew a legally unsustainable distinction between the *actions* (the arrest and forcible conscription of the refugees) and the *omissions* (failure to protect the citizens exposed to risk because of the armed conflict in their immediate vicinity) of the state bodies. By neglecting situations where unlawful conduct took the form of omission, that is, failure of the competent bodies to act and perform their duties as prescribed by law, the Court treated the two groups of victims in a similar legal situation differently, without offering any valid reasons for so doing.

## 1.2 Podujevo

On the morning of 28 March 1999, during the armed conflict in Kosovo, members of the MUP unit “Škorpioni” (Scorpions) roused 20 members of the Bogujevci, Duriqi and Llugaliu families from a house in Podujevo/Podujevë and marched them into the courtyard of the house of the Gashi family. Shortly

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<sup>107</sup> According to the theory of adequate causation, cause is the condition which, according to our own practical experience, is generally adequate to produce a certain outcome, and is typical in the sense that it regularly, or invariably produces a certain outcome. See: Zoran Stojanović, *Krivično pravo – opšti deo* (Criminal Law – General), Službeni glasnik, Belgrade, 2000, p. 124.

after they arrived in the courtyard, a member of the “Scorpions” shot Shefkate Bogujevci. Seeing that their mother had just been shot, Shefkate’s children ran towards her. At that moment, other “Scorpions” unit members opened fire on them and other civilians who were in the courtyard, killing 14 women and children. The youngest of the victims was two years old, and the oldest, a woman, 69. Five children aged between six and 14 were seriously injured.

The War Crimes Chamber of the High Court in Belgrade delivered a final judgment in the *Podujevo* case, sentencing four members of the “Scorpions” as follows: Željko Đukić, Dragan Medić and Dragan Borojević each to 20 years in prison and Miodrag Šolaja to 14.<sup>108</sup> Saša Cvjetan was sentenced by the District Court in Belgrade to 20 years’ imprisonment for the same crime.<sup>109</sup>

### Course of Proceedings

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On 24 January 2007, on behalf of 24 family members of murdered civilians, the HLC filed a lawsuit against the Republic of Serbia seeking compensation for victims for the non-pecuniary damage caused by the death of a close family member. The lawsuit was based on the provisions of the Serbian Constitution and the LCT, which stipulate the liability of the state to award compensation to any person who has suffered material or non-material damage as a result of the unlawful acts or misconduct of a person acting on behalf of the state or of a state body. The amount claimed totalled RSD 52 million.

On 20 March 2009, the First Municipal court handed down a judgment<sup>110</sup> rejecting the compensation claim because the standard limitation period of five years following the commission of the crime had expired, and granting the motion submitted by the representative of the state invoking the statute of limitations.

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108 Judgment of the High Court in Belgrade, War Crimes Department K.Po2-44/2010 of 22 September 2010; Judgment of the Court of Appeal in Belgrade, Special Department KžI Po2 2/2011 of 11 February 2011.

109 Judgment of the District Court in Belgrade K.br.1823/04 of 17 June 2005; Judgment of the Supreme Court of Serbia Kž.I 1847/05 of 22 December 2005.

110 Judgment of the First Municipal Court in Belgrade V P.BR.491/07 of 20 March 2009.



Acting upon an appeal lodged by the HLC, the Court of Appeal in Belgrade on 10 March 2010<sup>111</sup> upheld the judgment of the trial court, stating that as the families of the killed “on 28 March 1999, the date when their family members were killed, became aware of the damage, they could have filed a lawsuit as of that day.” In the court’s view, the three-year, or the five-year time limit(s) started to run on that date, because of which their claims (submitted in January 2007) were time-barred.

Following this decision of the Court of Appeal, the HLC, on behalf of the victims, submitted a petition for revision with the Supreme Court of Cassation. On 13 April 2011<sup>112</sup>, the court decided as follows: the part of the petition concerning appellant Enver Duriqi was rejected as unfounded, and the part concerning the remaining 20 appellants was dismissed as inadmissible. This is because the Supreme Court of Cassation treated these claims individually, because of which the total value of the dispute was below the threshold prescribed for revision.<sup>113</sup>

On 17 August 2011, the HLC lodged a constitutional appeal on behalf of all the claimants – family members of the victims – alleging that their right to have a fair trial had been violated. In August 2014, the Constitutional Court issued a decision granting the appeal only in the part concerning Enver Duriqi. Namely, the Constitutional Court found that in the case of Duriqi the Supreme Court of Cassation had made an error of law in establishing that the standard limitation periods (of three and five years) applied to Duriqi, instead of limitations applicable in cases where the damage results from a crime. Following the decision of the Constitutional Court, a retrial of this case before the trial

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111 Judgment of the Court of Appeal in Belgrade GŽ-4185/10 of 10 March 2010.

112 Judgment of the Supreme Court of Cassation of the Republic of Serbia Rev 85/11 of 13 April 2011.

113 This interpretation of the conditions for filing a petition for revision is extremely restrictive and erroneous, because the damage inflicted upon the victims resulted from the same criminal offence (factual background), so the amount of the claim should have been considered in its totality, not separately, per claimant. On the other hand, the damages claimed by Enver Duriqi individually meets and exceeds the threshold set for filing a petition for revision (Enver Duriqi claims damages for the murder of his six family members).

court was ordered. At the same time, the Constitutional Court dismissed the appeals of all other appellants for some purely formal reasons.<sup>114</sup> So the HLC took the case to the European Court of Human rights, at the same time demanding that the proceedings before the First Basic Court be repeated, as the Constitutional Court had established beyond doubt that this court erred in law in dismissing all claims (including that of Enver Duriqi) as time-barred.

## **Standards of the European Court of Human Rights**

### **Right to a Fair Trial**

The interpretation of the statute of limitations adopted by the trial court, the appellate court and the Supreme Court of Cassation deprived the families of the victims of the crime in Podujevo/Podujevë of their right to have a fair trial. Namely, Article 377 of the LCT provides for longer limitation periods for claims concerning damage resulting from a criminal offence. As they did in other cases in which victims of gross human rights violations that occurred during the armed conflicts of the 1990s claimed compensation from the state of Serbia, the courts adhered to their interpretation of the statute of limitation, according to which longer time limits only applied to direct perpetrators, whereas compensation claims against the state became time-barred after the expiration of the five-year limitation period.<sup>115</sup> In the courts' opinion, the purpose of this limitation is not to deprive a wronged party of the right to seek redress, but to oblige him/her to use this right in a timely manner, instead of "neglecting it and thus leading the bearer of responsibility to believe that he/she will not use it."

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114 The Constitutional Court held that for all claimants except Enver Duriqi, the deadline for lodging the appeal with the Constitutional Court ran from the date when the Court of Appeal delivered its decision (March 2010), not from the date when the Supreme Court of Cassation ruled on their petition for revision, since, in the court's opinion, they were not entitled to seek the revision of the Court of Appeal's decision. As explained earlier, the Supreme Court of Cassation considered the claims individually and found that they do not meet the threshold prescribed for this remedy to be admissible, disregarding the fact that the lawsuit was filed on behalf of all the victims and was based on the same factual background.

115 See Article 376, LCT.

In this respect, The European Court has set a standard that allows the states to impose certain limitations with regard to lawsuits against a state. However, as this Court emphasized, the limitations applied must pursue a legitimate goal and must not restrict or reduce the right to such an extent that the very essence of the right is impaired.<sup>116</sup>

Where the families of the victims of the war crime in Podujevo/Podujevë are concerned, no legitimate aim can be identified for restricting their right to seek compensation from the Republic of Serbia, especially in view of the fact that the victims were instructed in the final judgment finding the MUP members guilty to seek compensation through civil lawsuits.

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Hence, the European Court does recognize the right of a state to impose limitations for filing civil lawsuits if such a measure is necessary because of some public-interest considerations. In the case in question, public interest can be defined as protecting the responsible party from a temporally unlimited possibility for him to be sued. However, according to the opinion of the European Court in the case *Osman v. the United Kingdom*, restriction must not be so disproportionate as to confer blanket immunity on the defendant and restrict the plaintiff's right to have a determination on the merits of his or her claim, in order to determine whether there is a competing public-interest consideration which outweighs the public-interest consideration because of which the limitation in question was imposed.<sup>117</sup> Should this be the case, the right to a fair trial would be violated.

By adopting a narrow interpretation of the statute of limitations, according to which the right of victims of the most serious human rights abuses committed during the wars in Croatia and BiH expired in 2000, and of victims from Kosovo in 2004, the courts provided immunity for the state. It was unrealistic to expect that the majority of the victims would be able to meet these dead-

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116 *Ashingdane v. the United Kingdom*, application No. 8225/78, judgment of 28 May 1985, para. 57; *Osman v. the United Kingdom*, application No. 23452/94, judgment of 28 October 1998, para. 147.

117 See: *Osman v. the United Kingdom*, application No. 23452/94, judgment of 28 October 1998, para. 150 et seq.

lines for several reasons: the conflict had only just ended, the victims feared their safety might be threatened if they sued the state, and they distrusted the judicial institutions.

Considerations of fairness towards plaintiffs have not been taken into account, and, as a result, the courts in effect have prevented the victims from claiming compensation from the state, even in cases where individuals who acted on its behalf had been found guilty in final judgments. For longer time limits to apply, the victims would have to identify the perpetrators on their own and claim compensation from them through court proceedings, which is an extremely unfair requirement.

### **Prohibition of Discrimination**

The Constitution of the Republic of Serbia, Article 14 of the European Convention and Protocol 12 to the Convention expressly guarantee equal protection of the law to all citizens. This principle of the rule of law obliges courts to apply the law equally in similar factual and legal situations.

The case-law of the European Court defines discrimination as a difference in treatment of persons in otherwise similar situations without any objective or reasonable justification.<sup>118</sup> According to another standard set by the European Court, a policy, decision or measure which has a disproportionately prejudicial effect on a particular group may be considered discriminatory, notwithstanding the fact that it is not specifically directed at that group.<sup>119</sup> Also, it is possible to lodge an application with the European Court alleging specifically that, in the enjoyment of a particular right, a certain group has been treated more favourably than other groups or categories of persons in the enjoyment of the same right the applicant was deprived of. Such an application has to identify the grounds for the difference in treatment (sex, race, colour of skin, language, religion, political or other opinion, national or social origin, association with

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118 *Willis v. the United Kingdom*, application No 36042/97, judgment of 11 June 2002, para. 48; *Okpisz v. Germany*, application No 59140/00, judgment of 25 October 2005, para. 33.

119 *D.H. v. the Czech Republic*, application No 57325/00, judgment of 13 November 2007, para. 175.

a national minority, property, birth or other status)<sup>120</sup>, and it is up to the European Court to find whether the difference in treatment is justified or not justified.<sup>121</sup>

As mentioned above, the practice of courts in Serbia is very inconsistent when it comes to deciding on to the statute of limitations for claiming compensation for a damage resulting from a criminal offence. The courts interpret the statute of limitations differently, depending on who claims compensation from the state, and on what grounds. In cases where compensation from Serbia is claimed by victims who have suffered harm at the hands of members of the Serbian armed forces, as in the *Podujevo* case, the courts reject their claims on the grounds of the statute of limitations, because they have failed to apply within the time limits applicable to the damage caused by a criminal offence. In contrast to this, in cases where members of the former JNA have claimed compensation for the damage suffered during armed clashes with the “paramilitary units” of other former Yugoslav republics, courts do acknowledge that the damage they suffered was caused by the criminal offence of armed rebellion and apply longer time limits to the liability of the state to award monetary compensation.<sup>122</sup>

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These completely opposite interpretations of legal norms in identical legal situations not only create legal uncertainty, but inevitably lead to discrimination against victims of the gross human rights violations of the 1990s. It was in just such a way that the families of the victims of the war crime in Podujevo/Podujevë were discriminated against.

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120 See Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Official Journal of SCG – International treaties”, No 9/03).

121 See: *Gaygusuz v. Austria*, application No 17371/90, judgment of 16 September 1996; *Luczak v. Poland*, application No 77782/01, judgment of 27 November 2007; *Burden v. the United Kingdom*, application No 13378/05, judgment of 29 April 2008; *Carson and others v. the United Kingdom*, application No 42184/05, judgment of 16 March 2010.

122 See: Legal opinion of the Civil Law Department of the Supreme Court of Serbia from the session held on 27 Decembar 1999; Alternation of the legal opinion of the Civil Law Department of the Supreme Court of Serbia from the session held on 25 June 2001; Decision of the Federal Court Gsz 72/98 of 24 September 1998; Judgment of the First Municipal Court in Beograde P 1363/02.

## Right to an Effective Remedy

In addition to violating the right to a fair trial and equal protection or rights, the courts, in interpreting legal provisions in a discriminatory manner, deprived the families of the victims of the war crime in Podujevo/Podujevë of the right to compensation and an effective remedy. Whenever a serious violation of rights takes place, such as an unlawful deprivation of life, torture, or unlawful deprivation of liberty, the state is obliged to provide an adequate response, including an efficient and impartial investigation into the circumstances surrounding the violation.<sup>123</sup> However, according to the interpretation of the European Court, if a family member has died, or was murdered, or tortured at the hands of employees of the state, the obligations of the state concerning the right to an effective remedy extend beyond investigation, and include also a payment of compensation to the victim or family members of the victim.<sup>124</sup>

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### 1.3 Torture of Kosovo Albanians during the 1999 Kosovo Conflict

In the course of the armed conflict in Kosovo (February 1998 - June 1999) and particularly during the Nato bombardment (March-June 1999), Serbian security forces wantonly arrested and unlawfully detained several thousand Kosovo Albanians, ostensibly on suspicion of their involvement in terrorist activities. These men were arrested in their homes, on the street, and in other public places. All of them received nearly identical treatment. They were brought to local police stations, where they were interrogated by the police about their affiliation with the Kosovo Liberation Army (KLA) and its activities, attacks on the army or police, etc. During the interrogation, police officers brutally beat them with truncheons, punched them with their fists, kicked them, and forced

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123 See: *McCann and others v. the United Kingdom*, application No 18984/91, judgment of 27 September 1995, para. 161; *Assenov and others v. Bulgaria*, application No 24760/94, judgment of 28 October 1998, para. 162.

124 *Aksoy v. Turkey*, application No 21987/93, judgment of 18 December 1996, para. 98; *Mahmut Kaya v. Turkey*, application No 22535/93, judgment of 28 March 2000, paras. 121-126.

them to sign statements confessing their guilt. Some of the arrestees were made to undergo a paraffin test<sup>125</sup>.

The Kosovo Albanian arrestees were then taken to prisons in Lipljan/Lipjan or Dubrava/Dubravë near Istok/Istog. After the withdrawal of Serbian forces from Kosovo, the unlawfully detained Kosovo Albanian men were transferred by buses to prisons in Serbia, namely in Niš, Požarevac and Sremska Mitrovica.

Most of these prisoners were never charged, but nevertheless spent nearly two years in prison. They were released following decrees of the Ministry of Justice of the Republic of Serbia. Those who were indicted were charged with criminal acts such as armed rebellion, terrorism and seditious conspiracy.<sup>126</sup> They were released from prison following the adoption of the Amnesty Law that came into effect on 2 March 2001.<sup>127</sup> They have never been issued any official document regarding the time they spent in detention.

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### 1.3.1 The case of Refik Hasani and others

Before the war, Refik Hasani, Sokol Jakupi, Agim Ibrahim and Zijadin Blakqori lived with their families in Podujevo/Podujevë or nearby villages. Fleeing the war, the four men in late March or early April left for Priština/Prishtinë, to stay in the house of some relatives.

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125 The paraffin test, also known as dyphenylamine test, or gunpowder test, is used to determine whether or not a person tested fired a weapon. The method was introduced in 1933 by Mexican forensic expert Teodoro Gonzalez. It is based on the so-called "paraffin gauntlet" made when the hands of a suspected person are dressed with gauze strips soaked in liquid paraffin or by putting sticky foils on the hands to recover the organic gunshot residue particles produced by the gunpowder charge of a bullet (nitrates and nitrites). See: Dr Aleksandar Ivanović and Dr Ivana Bjelovuk, "Pouzdanost kriminalističko-tehničkih metoda za detektovanje tragova barutnih čestica na šakama osumnjičenih" [Reliability of crime investigation techniques for detecting gunpowder residue particles on suspects' hands], *Bezbednost – časopis Ministarstva unutrašnjih poslova Republike Srbije*, br. 3/2010, Belgrade, 2010, pp. 12-13.

126 Articles 124, 125 and 136, Basic Criminal Law ("Official Journal of the SFRY", Nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 and 54/90 and "Official Journal of the FR Yugoslavia", Nos. 35/92, 37/93, and 24/94).

127 Article 1(2), Amnesty Law ("Official Journal of the FR Yugoslavia", No. 9/01).

On 19 May 1999, police carried out a large-scale house-by-house search in Priština/Prishtinë looking for weapons. Even though no weapons were found on them and no reason for their arrest existed, Hasani, Jakupi, Ibrahimimi and Blakqori were arrested, and, with their hands tied with rope, transported in a van to the police station in Muhaxher Mahala. In the station, Jakupi was beaten so badly that he briefly lost consciousness. Then he was forced to sign a previously prepared statement. Blakqori, together with other men, was held for hours in a hallway of the police station and beaten from time to time. Ibrahimimi was frisked and stripped of all the money he had.

Later that day, the four men were taken to the prison in Lipljan/Lipjan. On arriving there, the men were made to kneel and then lie down in the prison yard while being beaten with wooden bats and truncheons. The men were then placed in small cells without toilet facilities and running water. Three days later they were transferred to a sports hall in Lipljan/Lipjan and held there together with another 350 detainees.

On the night of 9-10 June, police officers tied their hands with rope and ordered them onto a bus, without telling them where they were taking them. While on the bus, they had to keep their heads bowed. They arrived in Sremska Mitrovica in the evening. Conditions in Sremska Mitrovica prison were slightly better – at least they were given food regularly, albeit in insufficient quantities.

Zijadin Brakqori and another 10 Kosovo Albanian detainees were released from the Sremska Mitrovica prison on 28 October 1999. Sokol Jakupi was released on 24 March 2000 in the presence of ICRC representatives. Refik Hasani and Agim Ibrahimimi remained in detention up until 30 June 2000. None of them were ever prosecuted.

### **Course of the Proceedings**

On 29 October 2008, the HLC filed a compensation lawsuit on behalf of Hasani, Jakupi, Ibrahimimi and Blakqori, seeking that the Republic of Serbia, as the



party held responsible for the torture committed by MUP officers, be ordered to pay the victims compensatory damages totalling RSD 2.4 million.

During four hearings held in the case, all the victims gave their testimonies. The court dismissed as “superfluous” the HLC lawyer’s motion for medical examination of the victims in order to assess the consequences of torture on the mental and physical health of Hasani, Jakupi, Ibrahimimi and Blakqori.

### **Judgment of the First Basic Court**

In June 2011, the court handed down a judgment rejecting all claims by Jakupi and others.<sup>128</sup>

In its reasoning of the decision, the Court stated it they gave credence to the victims, but that the statute of limitations had run out on their right to claim compensation, and that as the victims had become aware that they suffered from PTSD as early as 2003 or 2004, it followed that the three-year time limit started running on that date.

### **Judgment of the Court of Appeal**

In August 2012, the Court of Appeal in Belgrade reached a decision on the appeal lodged by the HLC, and upheld the judgment of the First Basic Court.<sup>129</sup> In November 2102, the HLC submitted a constitutional complaint against the judgment of the Court of Appeal. After the Constitutional Court rejected the claim in May 2005, the HLC, on behalf of Hasani and others, lodged an application with the European Court.

## **Standards of the European Court of Human Rights**

### **Right to a Fair Trial**

As explained earlier, the European Court holds that the notion of fair trial also entails the obligation of courts to deliver reasonable and reasoned judgments.

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<sup>128</sup> Judgment of the First Basic Court in Belgrade 84.P.46946/10 of 6 June 2011.

<sup>129</sup> Judgment of the Court of Appeal in Belgrade Gž. 1771/12 of 24 August 2012.

This obligation derives from a more general principle enshrined in the European Convention, which protects individuals from arbitrariness and obliges the court to give a reply concerning the essential elements of the factual and legal submissions presented to it by the parties. Furthermore, court decisions must contain a statement of the grounds on which they are based. The scope of this duty may vary according to the nature of the decision, and can be determined in the light of the circumstances of each case.<sup>130</sup>

If a decision of a first-instance court does not contain a valid explanation of the reasons for the decision, this can create obstacles for the parties who wish to effectively exercise their right to appeal. As the European Court has repeatedly stressed, court decisions, in first-instance and appellate proceedings alike, must contain an adequate statement of reasons. The absence of the statement of reasons, or of a summary statement of reasons, which was not corrected in the appeals procedure – since the court of appeal only upheld the judgment of the lower court – amounts to a violation of Article 6(1) of the Convention.<sup>131</sup>

Another function of a reasoned judgment is to demonstrate to the parties that they have been heard and that the court gave due regard to their arguments and evidence.<sup>132</sup> While the European Court does not deny or restrict the right of national courts to exercise their own discretion in assessing the evidence before them, the European Court, in determining whether or not the proceedings were fair, will also take into account the way in which the evidence was taken.<sup>133</sup>

In the case of *Hasani and the others*, both the Constitutional Court and the Court of Appeal, as a second-instance court, failed to provide clear and comprehensible answers to the arguments of the parties/appellants, which were fundamental for the determination of the merits of their claims/appeals, and

<sup>130</sup> *Ruiz Torija v. Spain*, application No. 18390/91, judgment of 9 December 1994, para. 29.

<sup>131</sup> See: *Ruiz Torija v. Spain*, application No. 18390/91, judgment of 9 December 1994, para. 30; *Hiro Balani v. Spain*, application No. 18064/91, judgment of 9 December 1994, para. 28.

<sup>132</sup> *Kuznetsov and others v. Russia*, application No. 184/02, judgment of 11 January 2007, para. 83.

<sup>133</sup> *Barberà, Messegue and Jabardo v. Spain*, applications Nos. 10588/83, 10590/83, and 10589/83, judgment of 13 June 1994, para. 16.

also failed to adequately explain why the court of first instance did not allow the plaintiffs' evidence to be presented.

Contrary to the foregoing standards of the European Court, Hasani and the others were denied the right to prove the facts on which they based their right to obtain compensation. Namely, the court's refusal to order a medical examination amounted to a failure to establish the underlying facts necessary for the adjudication of the dispute – whether the plaintiffs' condition was caused by the torture they endured while in detention, whether and to what extent the condition left consequences in the form of diminished daily living activities, what was the course of treatment and what was the moment when the condition manifested itself in its definite form.

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The court decided at its discretion which evidence to admit, by assessing, on its own, the medical documentation supplied by the plaintiffs, although such an assessment requires expertise in the subject matter. While the court, under the law, can decide, at its discretion and after conscientious and careful assessment of each piece of evidence and all evidence collectively, which facts to find proved,<sup>134</sup> it does not possess the medical expertise to be able to establish, at its discretion, the facts discussed above. In other words, the court does have the power to refuse to order medical examination, but it also has an obligation to provide reasons for so deciding. Instead of that, the First Basic Court, on the basis of perfunctory conclusions drawn from the medical documentation, ruled that evidence in the form of a medical examination would be superfluous, and thus overstepped the margin of appreciation allowed by the European Court.

In the instant case, the second-instance court merely confirmed the first-instance judgment without providing any additional explanation for so deciding and, just as in the first-instance court, determined on its own the day when the

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<sup>134</sup> Article 8 of the Civil Procedure Code ("Official Gazette of the RS", Nos. 125/04 and 11/09), which applied to this proceedings. Also, Article 8 of the Civil Procedure Code currently in force ("Official Gazette of the RS", Nos. 72/11, 49/13 – decision of the CC, 74/13 – decision of the CC and 55/14).

plaintiffs' condition manifested itself in its definite form. The second-instance court failed to specifically address the allegations set forth in the plaintiff's appeal without giving reasons for so doing, and just repeated the reasons stated in the judgment of the first-instance court instead. This silence on reasons means that the crucial arguments of one party to the case remained unaddressed<sup>135</sup>, and therefore the right of the victims to have a fair hearing was violated.

### **1.3.2 The Case of Behram Sahiti and others**

Behram Sahiti, Elmi Musliu, Enver Baleci and Faton Halilaj lived in villages outside Glogovac/Gllogoc. After Serbian police had moved into their villages on 28 May 1999, all four men were arrested and taken to a flour warehouse in Glogovac/Gllogoc. In the warehouse, police officers beat them with truncheons and metal bars, took their personal details and performed paraffin test on their hands. The following day, they were transported to the prison in Lipljan/Lipjan by bus. The conditions in this prison were inhumane: the small cells were packed with dozens of detainees who slept on a hard bare floor, and received only minimum amounts of food. Faton Halilaj was thirteen years old at the time of his arrest.

In the early hours of the morning of 10 June, Sahiti, Musliu, Baleci and Halilaj, together with other Kosovo Albanian men, were tied and transported by bus under police escort to the prison in Požarevac. Upon arriving at the prison, they were made to run a gauntlet of police officers and prison guards hitting at them with truncheons, bats and metal bars. After that, the detainees were lined up and taken to the cells. Conditions in the prison were appalling. The men shared their cells with about one hundred other inmates and slept on the floor, wrapped only in blankets. Because of the poor hygiene conditions, they were all infected with head lice and mange. As food was scarce, they suffered from constant hunger. None of them were interrogated while in detention

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<sup>135</sup> *Kuznetsov and others v. Russia*, application No. 184/02, judgment of 11 January 2007, para. 84.

in Požarevac. Following a visit by an ICRC delegation, the conditions slightly improved.

Faton Halilaj was released from prison on 19 November 1999, Behram Sahiti and Elmi Musliu in April 2000, and Enver Baleci in June 2000. They were never prosecuted. The torture and the inhumane and degrading treatment they were subjected to by MUP officers while in custody has left lasting effects on their mental health. All of them were diagnosed with PTSD, which requires lifelong treatment.

### **Course of the Proceedings**

In April 2001, the HLC, on behalf of Sahiti, Musliu, Baleci and Halilaj, filed a lawsuit against the Republic of Serbia as the party responsible for the torture performed by the MUP officers. The HLC sought that the court order Serbia to pay RSD 2.7 million to these victims in compensation for the impairment in their activities of daily living caused by the torture they endured.

Four hearings were held in the proceedings, during which the court heard all the victims and the report of a court-appointed medical witness – a psychiatrist – who established PTSD and the resulting impairment in activities of daily living in all four victims.

### **Judgment of the First Basic Court**

In a judgment handed down in July 2012, the First Basic Court dismissed the claims of victims.<sup>136</sup> In the court's view, their right to claim compensation from the Republic of Serbia became time-barred following the expiration of the standard limitation period of five years following the occurrence of the damage, i.e. in 2005. While it gave credence to the victims and admitted into evidence the findings of the medical witness, according to which the PTSD in the victims manifested itself in its definite form in 2008 and 2011, the court held that "[t]he moment when the victims became aware of the damage has rel-

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<sup>136</sup> Judgment of the First Basic Court in Belgrade 32 P broj 70585/10 of 15 June 2012.

evance [...] only if it occurred within the objective five-year limitation period, not outside of it.”

### **Decision of the Court of Appeal**

After considering an appeal submitted by the HLC lawyer, the Court of Appeal in Belgrade in September 2013 delivered a decision<sup>137</sup> quashing the first-instance judgment and referring the case back to the first-instance court to establish anew the date when the limitation period had started to run. Explaining its decision, the court stated that “in our case-law, the realization that damage exists refers not only to the day when damage was caused (the day damage occurred) but also to the circumstances regarding the end of the treatment and the realization that the lingering consequences have caused permanent damage to the plaintiff’s health and his/her general ability to perform daily functions, as a result of which his/her daily life activities are reduced.” Taking into account the findings of the expert, who established that in the victims the disorder manifested itself in its definite form in 2008 and 2011, the court ordered the lower court to establish anew when the victims became aware of the full extent of the consequences on their health.

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### **Judgment in the Retrial**

In the retrial, the first-instance court heard the medical expert, who, on the basis of his experience in treating PTSD patients, examination of the plaintiffs and the medical documentation they supplied, found that the plaintiffs became aware of the definite form of their illness at the moment of being examined. Accordingly, the court found that their claims were not time-barred and delivered a new judgment (February 2015) awarding them compensation, albeit not at the amounts claimed.<sup>138</sup>

The four victims were awarded compensation for the mental anguish they suffered and reduced activities of daily life in the following amounts: Behram Sahi-

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137 Decision of the Court of Appeal in Belgrade Gž.br.539/13 of 25 September 2013.

138 Judgment of the First Basic Court in Belgrade 64 Pbr.38854/13 of 13 February 2015.

ti and Enver Baleci each received RSD 125,000, Elmi Musliu RSD 250,000, and Faton Halilaj RSD 370,000. Explaining the difference in the amounts awarded, the court stated as follows: “the court took into consideration the degree of impairment of activities of daily living in each of the plaintiffs, their age at the time of deprivation of liberty, and the fact that they will suffer from the consequences for the rest of their lives”. As regards Faton Halilaj, the court took into account the fact that he was underage at the time of deprivation of liberty.

The HLC lawyer appealed against such low awards to the Court of Appeal in Belgrade.

## **Standards of the European Court of Human Rights**

### **Prohibition of Torture and Effective Remedy**

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According to the European Court, Article 3 of the European Convention enshrines one of the most fundamental values of democratic society.<sup>139</sup> Prohibition of torture and inhumane and degrading treatment is absolute and allows no exceptions or derogations in any circumstances.<sup>140</sup> In addition to the general prohibition for states and their agents to subject anyone to torture, this provision of the Convention, as construed by the European Court, imposes another two obligations on the states. Given the particular vulnerability of torture victims, especially in cases of willful torture by state agents<sup>141</sup>, the state is under an obligation to conduct a thorough and effective investigation capable of leading to the identification and punishment of those responsible, and where appropriate, to pay adequate compensation.<sup>142</sup>

In failing to meet the above obligations or meeting them only partially, a state violates the right to an effective remedy set forth in Article 13 of European Convention. As to the redress which is sufficient to remedy a breach of a

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139 *Aksoy v. Turkey*, application No. 21987/93, judgment of 18 December 1998, para. 62.

140 *Ireland v. the United Kingdom*, application No. 5310/71, judgment of 18 January 1978, para. 163.

141 *Gäfgen v. Germany*, application No. 22978/05, judgment of 1 June 2010, para. 116.

142 *Aksoy v. Turkey*, application No. 21987/93, judgment of 18 December 1998, para. 98.

Convention right, it is dependent on the nature of the violation.<sup>143</sup> In other words, the European Court takes into account the severity of a violation of a Convention right, as well as the victim status of an applicant, which depends on whether he/she has already obtained compensation at the domestic level, and on the amount of compensation awarded.<sup>144</sup>

In assessing the sufficiency of compensation to be awarded, the European Court is guided by its own case-law concerning the same or similar violations.<sup>145</sup> The European Court will find that a victim's right under Article 3 continues to be violated if the compensation awarded to him/her by a domestic court is far lower than that awarded by the European Court in the same or similar cases.<sup>146</sup> In the cases brought before the European Court by Serbian citizens who were subjected to police torture, this court on average awarded them damages of over EUR 7,000.<sup>147</sup>

In the case of Sahiti, Musliu, Baleci and Halilaj, the state never conducted a thorough and effective investigation capable of leading to the punishment of the police officers responsible for the torture. Moreover, by awarding damages ranging between EUR 1,000 and EUR 3,000, the state has not fulfilled its obligation to pay adequate compensation. That the compensation awarded in this case is inadequate can be inferred from the statement of the reasons for the judgment. In it the court makes no mention of the more extreme actions the police officers took against the plaintiffs (torture, inhumane and degrading treatment), but only states that the plaintiffs experienced intense fear for their lives and health because they were detained "in conditions which by no means could be considered their habitual environment", and that "in such cir-

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143 *Scordino v. Italy (No. 1)*, application No. 36813/97, judgment of 29 March 2006, para. 186.

144 *Normann v. Denmark*, application No. 44704/98, judgment of 20 December 2011; *Scordino v. Italy (No. 1)*, application No. 36813/97, judgment of 29 March 2006, para. 202; *Gäfgen v. Germany*, application No. 22978/05, judgment of 1 June 2010, para. 116.

145 *Ciorap v. Moldova*, application No. 7481/06, judgment of 31 August 2010, para. 24.

146 *Ibid.*, para. 25.

147 *Stanimirović v. Serbia*, application No. 26088/06, judgment of 18 October 2011, para. 59; *Hajnal v. Serbia*, application No. 36937/06, judgment of 19 June 2012, para. 149; *Lakatoš and others v. Serbia*, application No. 3363/08, judgment of 7 January 2014, para. 120; *Habimi and others v. Serbia*, application No. 19072/08, judgment of 3 June 2014, para. 95.



cumstances, their survival and the outcome of the detention were extremely uncertain”.

#### **1.4 Torture of Bosniaks in Sandžak**

Sandžak, a region in south-western Serbia along the Serbia-BiH border, is populated mostly by Bosniaks. Following the onset of the armed conflict in BiH, the Serbian MUP frequently and systematically searched the houses of local Bosniak residents under the pretence of searching for illegally possessed weapons.

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After searching their homes, and despite not finding any weapons, police often took the Bosniaks into custody. In local police stations, police officers used brutal methods, including physical and mental abuse, in order to force them to confess to possessing weapons or taking part in “activities against the state”. This systematic torture was documented by the HLC and Sandžak Committee for the Protection of Human Rights and Freedoms, and also by various UN bodies in their reports. The municipal assemblies of Sjenica and Tutin in 2002 and 2003 respectively, adopted a report on the widespread police repression and torture in the 1990s targeted against the Bosniaks living in these two municipalities.<sup>148</sup>

The Sandžak Committee reported a number of torture cases to the competent authorities, but the authorities in most situations did not prosecute or discipline those responsible. Many of the police officers identified by tortured Bosniaks as those who abused them are still employed by the MUP of the Republic of Serbia.

##### **1.4.1 The case of Šefćet Mehmedović**

In May 1994, Šefćet Mehmedović was summoned to the police station in

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<sup>148</sup> Conclusion of the Sjenica Municipal Assembly No. 06-3/2002-02, adopted in the session held on 14 February 2002; Conclusion of the Tutin Municipal Assembly No. 06-1/03, adopted in the session held on 14 February 2003.

Novi Pazar for what was termed an “informative interview”. When he arrived there, an inspector asked him whether he possessed any weapons and questioned him about the activities of the Party of Democratic Action (SDA) that Mehmedović belonged to. The inspector then gave him a piece of paper on which to write his statement. After a while, an inspector Mehmedović knew as Nino came in, read the statement and, dissatisfied with its content, tore it up, saying that all that Mehmedović wrote in it was a lie. He started to slap and punch him in the face. The other inspector joined in, and they both hit him on the soles of his feet and on the hands with their truncheons. They beat him for a half an hour, then ordered him to stand in a corner while they were resting, and then continued with the torture. After a while, inspector Nino handcuffed him and took him to another room, where other police officers beat him. Mehmedović was tortured from 15:00 to 21:30 hours. He was held in the police station overnight, chained to a radiator.

The following morning, inspector Nino questioned him again about arms and his involvement in activities against the state. After refusing again to confess to these accusations, Mehmedović was released and ordered to report to the police station every 3-4 days. After that, Mehmedović reported 11 more times to the station for informal questioning. Each time they tried to extract a confession from him about the possession of illegal weapons but he denied it, after which they would let him go. The police torture that Mehmedović was subjected to has seriously and permanently damaged his health. The police officers who tortured him have never been prosecuted or disciplined.

### **Course of the Proceedings**

In 2006, on behalf of Mehmedović, the HLC filed a compensation lawsuit against the Republic of Serbia seeking damages of RSD 1.4 million for the non-material harm he suffered - physical pain, fear, and diminished activities of daily living. In the first trial, the court held 10 hearings and heard four witnesses put forward by the HLC. A court-ordered medical examination of the plaintiff established that the health consequences of torture in Mehmedović acquired their definite form in 2002.

## **Judgments of the First Municipal Court and the Court of Appeal in Belgrade**

In December 2009, the First Municipal Court handed down a decision partially granting Mehmedović's claim and awarding him RSD 200,000 in damages for the psychological pain caused by diminished activities of daily life.<sup>149</sup> The court applied the standard three-year limitation period, which started running on the day of the court-ordered medical examination of the plaintiff.

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In July 2012, the Court of Appeal delivered a decision upon appeals lodged by both parties – by the HLC on behalf of the plaintiff and by the legal representative of the state. The court upheld the first-instance judgment in the part rejecting the plaintiff's claims, thereby overturning the decision to award compensation to Mehmedović, and ordered a retrial.<sup>150</sup> The court held that a causal relationship between the plaintiff's health condition and the time he spent in "police custody", had yet to be established.

### **Judgement in the Retrial**

In the retrial, the First Municipal Court held two hearings and heard again the court-appointed medical witness.

In December 2012, the court handed down a judgment rejecting the only remaining part of the claim – the damages sought for the diminished ability to perform the activities of daily living.<sup>151</sup>

In the statement of reasons, the court said that while the testimony of Šefćet Mehmedović was given full credence, the court had changed its opinion with regard to the time when the limitation period started to run. Since during the repeated hearing the expert witness specified that it was in 2002 that

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149 Judgment of the First Municipal Court in Belgrade IV P broj 10812/06 of 7 December 2009.

150 Judgment of the Court of Appeal in Belgrade Gž.br.10755/10 of 27 July 2012.

151 Judgment of the First Basic Court in Belgrade 37 Pbr. 17652/12 of 11 December 2012

Mehmedović became aware that his illness had become chronic, the court held that this year was to be used as the very moment when the limitation period began to run. Therefore, the Mehmedović lawsuit, filed in 2006, was found to be time-barred.

In January 2013, the HLC appealed against this decision to the Court of Appeal in Belgrade. At the time of writing, the Court of Appeal has not yet ruled on the appeal.

## Standards of the European Court of Human Rights

### Right to a Fair Trial

As stated earlier, according to the European Court's case law, the right guaranteed by Article 6(1) of the Convention in civil proceedings, includes three different elements: the right of access to a court to have one's civil dispute settled, fairness of court proceedings, and the right to a timely execution of the judgment in the case of a favourable outcome.

On the other hand, in the *Ashingdane v. the United Kingdom* case<sup>152</sup>, the European Court expressly stressed that the right of access to a court is not absolute and may be subject to limitations, but these must not be such as to impair the very essence of this right, and must pursue a legitimate aim.<sup>153</sup> The European Court case law considers the time-limits imposed for filing compensation lawsuits to be legitimate.<sup>154</sup>

However, another standard set by the European Court concerns the rules on limitation periods applied to compensation cases where a person suffering from a disease does not know and could not know that he/she suffered from that disease, even for a long time following the event that caused the disease. In determining when the time-limits begin to run for some more complex dis-

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152 *Ashingdane v. the United Kingdom*, application No. 8225/78, judgment of 28 May 1985.

153 *Garcia Manibardo v. Spain*, application No. 38695/97, judgment of 15 February 2000, para. 36; *Mortier v. France*, application No. 42195/98, judgment of 31 July 2001, para. 33.

154 *Howald Moor and others v. Switzerland*, applications Nos. 52067/10 and 41072/11, judgment of 11 March 2014, para. 72.

eases, the Court considered even the time-limit of ten years to be too short. In the view of the European Court, while the provisions on limitation periods do pursue a legitimate aim, namely legal certainty, the systematic application of these provisions in the cases described above deprive those individuals of the opportunity to assert their rights before the courts. The application of such periods, according to the European Court, infringes the rights of persons suffering from such diseases.<sup>155</sup>

In the instant case, the court-appointed expert – a psychiatrist – found that Mehmedović suffered from a long-term disease which led to the reduction in his activities of daily living and manifested itself in its definite form in 2002. Treatment of the consequences of the torture of Mehmedović will continue for the rest of his life, and will not cure the disease but only keep it at bay. If not treated, the disease would have progressed. In this respect, the fact that, even though he had already been receiving treatment, it was only after undergoing the court-ordered medical examination that Mehmedović learned that his daily life activities were reduced because of this disease, is crucial. For that reason, the limitation period applicable to him started running only on the date when he became aware of the full extent of the consequences to his health. Any other calculation of the limitation period in this case is contrary to the standards of the European Court.

#### **1.4.2 The case of Fehrat Suljić**

In March 1996, police officers Sulejman Hodžić and Zvonko Milunović came to Fehrat Suljić's house in the village of Dolovo and ordered him to come with them to the police station in Tutin for an "informative interview". Upon his arriving there, the officers took Suljić to a room where police officer Slaviša Kiković was present. Kiković immediately started hitting him on the chest and back. When Suljić fell to the floor, the police officers stepped on his back. After the beating, Suljić was handcuffed to a radiator. After a while, he was released.

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<sup>155</sup> *Ibid*, paras. 74-79.

The torture left lasting and serious consequences on Suljić's health. The said policemen were never prosecuted or disciplined.

### **Course of the Proceedings**

In June 2007, on behalf of Fehrat Suljić, the HLC filed a lawsuit against the Republic of Serbia as the party held responsible for the unlawful conduct of its bodies. The lawsuit sought that the court order the Republic of Serbia to pay RSD 1.1 million to Fehrat Suljić in compensation for the non-pecuniary damage he had sustained.

The First Municipal Court held seven hearings, during which it heard Fehrat Suljić and his wife, Hajrija Suljić, who testified about how Fehrat was taken to the police station and about his injuries. The court also heard Zvonko Milunović and Sulejman Hodžić, police officers at the Tutin police station. Milunović claimed that he did not know Suljić, and that Suljić's story was a complete fabrication. However, the other officer, Hodžić, said that Suljić was several times brought into the station for "informative interviews". In contradiction to Hodžić's statement, the police administration in Novi Pazar informed the court that they had no written evidence on any police actions taken with regard to Fehrat Suljić.

### **First Trial Judgment**

In October 2009, the First Municipal Court handed down a judgment partially accepting the claim of Fehrat Suljić and awarding him damages of RSD 700,000.<sup>156</sup>

Reasoning its judgment, the court stated that it gave full credence to the testimonies of Fehrat Suljić and his wife and found the testimonies of the police officers to be "illogical, unconvincing and made with the intention of avoiding being held responsible".

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<sup>156</sup> Judgment of the First Municipal Court in Belgrade XXXIII Pbr. 5508/07 of 22 October 2009.

## **Decision of the Court of Appeal**

Upon considering an appeal lodged by the representative of the state, the Court of Appeal in Belgrade in January 2001 overturned the judgment of the First Municipal Court and ordered a retrial.<sup>157</sup> Stating the reasons for the judgment, the Court of Appeal said that the first-instance court erred because, without valid medical documentation from the time the injury occurred, and relying only on the testimonies of Suljić and his wife, it was not possible to establish that Suljić was tortured by the police.

## **Judgment in the Retrial**

Following the retrial, the First Basic Court in Belgrade in September 2012 delivered a judgment rejecting Suljić's claim as ill-founded.<sup>158</sup> From the reasoning of the judgment, it is clear that in the retrial the court evaluated the testimonies of Suljić and his wife in a completely opposite manner than in the trial. Namely, in the retrial the court gave full credence to the testimonies of the police officers and found the testimonies of Suljić and his wife to be illogical and unconvincing. In October 2012, the HLC lawyer appealed against this judgment to the Court of Appeal in Belgrade.

## **Decision of the Court of Appeal**

In December 2013, the Court of Appeal in Belgrade upheld the first-instance judgment.<sup>159</sup> The HLC then lodged a constitutional appeal, invoking, among other things, the prohibition of torture enshrined in the Serbian Constitution and the European Convention. After the Constitutional Court rejected the appeal<sup>160</sup>, the HLC, on Suljić's behalf, lodged an application with the European Court of Human Rights.

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<sup>157</sup> Decision of the Court of Appeal Gž br. 12668/10 of 19 January 2011.

<sup>158</sup> Judgment of the First Basic Court in Belgrade 17 P br. 8226/11 of 13 September 2012.

<sup>159</sup> Judgment of the Court of Appeal in Belgrade Gž 7945/12 of 18 December 2013

<sup>160</sup> Decision of the Constitutional Court of the Republic of Serbia Už – 1790/2014 of 11 May 2015.

## Standards of the European Court of Human Rights

### Prohibition of Torture

The European Court considers the prohibition of torture to be one of the most fundamental values of democratic society. It is one of the few prohibitions included in the European Convention that contemplates no exception.<sup>161</sup>

### Burden of Proof and Standard of Proof in Torture Cases

The long-established case-law of the European Court has demonstrated that the standard of proof for victims to prove that they have been tortured is too high. This is why the European Court is developing a practice of taking into account all circumstances of torture. So, the Court makes important exceptions as regards the strict application of the principle of “he who alleges something must prove that allegation” in cases where only one party to the case has access to information capable of corroborating or refuting the counts in a lawsuit.<sup>162</sup> This applies to individuals who were under full control of state agents, as when in custody, and individuals whom the police or armed forces tortured during interrogation with the aim of extracting a statement from them.

The European Court holds that where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, presumptions of fact will arise in respect of injuries occurring during such detention. For that reason, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation for injuries sustained by persons who had been in good health before being taken into custody.<sup>163</sup>

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161 *Ramirez Sanchez v. France*, application No. 59540/00, judgment of 4 July 2006, para. 115.

162 *Khudoyorov v. Russia*, application No. 6847/02, judgment of 8 November 2005, paras. 112-113.

163 See: *Salman v. Turkey*, application No. 21986/93, judgment of 27 June 2000, para. 113; *Selmouni v. France*, application No. 25803/94, judgment of 28 July 2009, para. 87.



As regards the conflicting testimonies of the victims and representatives of the authorities, the European Court in the case *Aydin v. Turkey*<sup>164</sup> found that the victim's account of ill-treatment during detention were true. This finding was based on the victim's oral evidence, and medical reports made nine days after the ill-treatment had taken place, but also on the absence of police reports on persons taken into custody and interrogated for terrorism.

In the case now under consideration, the First Basic Court deviated from the standards of the European Court in disregarding the evidence given by the victim and his wife, and failing to establish causation between the informative interviews and the injuries recorded in Suljić's medical documentation. At the same time, the court gave credence to the testimonies of police officers from a police station which practiced systematic torture against Bosniaks, while in the first trial their testimonies were assessed as dubious, inconsistent and aimed at avoiding accountability. Even though the police officers did not deny that Fehrat Suljić was called for informative interviews, the court failed to deal with the causation between the informative interviews and the injuries that Suljić had to show after these interviews.

In the judgment resulting from the retrial, the court stated that the medical documentation supplied by Suljić (created in 2006 and 2008) could not suffice to prove his allegations of torture. At the same time, the court disregarded the findings of two medical witnesses, despite having heard them in the retrial. The findings of these experts were concordant and based on both the medical examination they performed and the medical documentation supplied by Suljić, and established a causal relationship between the ill-treatment in the police station and the mental health problems of Fehrat Suljić.

As stated earlier, the European Court does take into account available medical reports<sup>165</sup> and considers them sufficient evidence to corroborate an applicant's allegations that he/she was subjected to torture, especially if the authorities

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164 See: *Aydin v. Turkey*, application No. 23178/94, judgment of 25 September 1997.

165 See: *Ireland v. the United Kingdom*, application No. 5310/71, judgment of 18 January 1978, para. 161.

have not produced any other medical evidence capable of refuting these allegations.<sup>166</sup> In the case of Fehrat Suljić, the First Basic Court, acting contrary to the standards of the European Court, reversed the burden of proof by shifting it onto the victim of torture, who could not prove his allegations, although all the circumstances of his detention and the torture he was subjected to during police custody lay wholly within the exclusive knowledge of the police station in which Suljić was held in custody.

### **1.5 Torture of Bosniaks from Žepa in Šljivovica and Mitrovo Polje Camps**

Immediately following the takeover of Srebrenica on 11 July 1995, VRS troops attacked another UN-protected area in eastern Bosnia – Žepa. On 30 August 1995, Žepa was taken over by the VRS. Following the fall of Žepa, more than 800 Bosniaks, soldiers and civilians, including children, fleeing the area in fear for their lives, swam across the Drina River into Serbia. On crossing into Serbia, they were captured by VJ border officers and taken in groups to the courtyard of the elementary school in the village of Jagoštica (Bajina Bašta municipality) for registration. Throughout the registration process, the captured Bosniaks were physically abused by soldiers and police officers.

The Bosniaks were then loaded into military trucks and transported to makeshift detention camps in Šljivovica (Čajetina municipality) and Mitrovo Polje (Aleksandrovac municipality). Although the trucks had room for only about 15 people, the soldiers and police officers pushed as many as 50 men into each truck.

The camps in Šljivovica and Mitrovo Polje were guarded by MUP officers. Upon entering the camps, the Bosniaks were forced to pass through a gauntlet of police officers, after which they were taken to rooms crammed full of people. At night, police officers would randomly call out detainees, or take them out of rooms and beat them with truncheons, wooden battens and electrical

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<sup>166</sup> *Aydin v. Turkey*, application No. 23178/94, judgment of 25 September 1997, para. 73.

cords. Some of the officers stubbed out their cigarettes on detainees' bodies and forced them to drink water into which they had previously poured motor oil. Several inmates were sexually abused. The physical and mental abuse continued during daytime too. The police officers forced inmates to fight each other, to move large stones from one place to another, to run around the camp yard, to do push-ups or to stand still in the yard watching the sun until they passed out. The police officers changed detainees' names into Serb ones, and made them respond to those names and sing Chetnik songs every time they needed to use the lavatory.

MUP and DB (Serbian State Security Service) officers interrogated the detainees about their involvement in the war, all the while subjecting them to ill-treatment, especially those who confessed to having been combatants of the Army of BiH or employees of the Žepa administration. Five inmates died as a result of ill-treatment.

The detained Bosniaks were released in early 1996 through the mediation of UNHCR.

### **1.5.1 The case of Omer Čavčić and others**

Omer Čavčić was held more than five months in the camp in Šljivovica. Most of the time he was subjected to torture and humiliating treatment. Sabrija Češko spent more than eight months in Šljivovica, where he was repeatedly abused, physically and mentally. Zajko Imamović spent eight months and 10 days in detention. During the registration process, he was punched in the kidney area by a soldier and knocked unconscious. Once every two or three nights, police officers would take him out into the courtyard to beat him and hold him at gunpoint, cocking their rifles. Amir Mednolučanin was first taken to Šljivovica, and then sent on to Mitrovo Polje the next day, where he was held for six months. Guards at Mitrovo Polje repeatedly hit him with rifle butts. Munib Omanović was battered immediately after being captured. At Šljivovica, where he spent six months, he was repeatedly taken out at night for interrogation and beaten. On one occasion he was so severely injured from a beating that he ended up in

the Užice hospital. Šemso Ramić was held for more than eight months in both camps, where he was frequently subjected to police torture. Suljo Salić was imprisoned in Šljivovica for nine months, during which period he was repeatedly interrogated and ill-treated by police officers. Galib Vatreš was first sent to Šljivovica and two months later transferred to Mitrovo Polje, where he was repeatedly tortured. One police officer punched him in the mouth, knocking out two of his front teeth. He was released in March 1996.

### **Course of the Proceedings**

On 30 June 2008, the HLC, on behalf of Omer Čavčić and others, filed a lawsuit with the First Municipal Court in Belgrade against the Republic of Serbia for its responsibility for the detention of these men in the Šljivovica and Mitrovo Polje camps and the torture they were subjected to at the hands of officers of the Serbian MUP. The HLC sought that Serbia be ordered to pay the former camp inmates an amount totalling RSD 6.7 million in compensation for the fear and emotional distress sustained as a result of the infringement of their rights belonging to the person, and the emotional distress sustained as a result of the impairment of their daily living activities. Along with the lawsuit, the HLC submitted several documents issued by the ICRC certifying that the victims were held in the two camps, as well as medical records documenting the poor health of the victims.

During the 14 hearings held in the first-instance proceedings, the court heard all the victims and witness Ismet Šehić, a former Šljivovica inmate. At the proposal of the legal representative of the Republic of Serbia, the court also heard the following witnesses: Radisav Ojdanić, the then head of the Immigration Department of the Užice SUP; Velibor Milenović, medical doctor at the outpatient clinic in Aleksandrovac; Vesna Kilibarda, nurse from Užice; and Slavenko Ivezic, a police officer who was at the time in charge of placing prisoners in the camps. All four witnesses denied that inmates were physically or mentally abused in the camps, and claimed that the inmates had already been in poor health before fleeing to Serbia, where they were provided with the necessary care and medical treatment.

A forensic psychiatrist examined the victims and diagnosed them with PTSD, which in most victims manifested itself in its definite form in 2009. In the case of Suljo Salić, Munib Omanović and Galib Vatreš, the disorder manifested itself in 2007, 2006 and 2008 respectively. The degree of impairment of daily functioning as a result of PTSD in the victims varied, ranging from 10 to 20%.

### **Judgment of the First Basic Court**

On 6 November 2012, the First Basic Court in Belgrade rejected all the claims as ill-founded.<sup>167</sup> The court found the claims by Čavčić and others to be time-barred, because they were filed outside the three-year limitation period after the day they learned of the damage, and outside the five-year limitation period after the occurrence of the damage.

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When assessing the evidence before it, the court was bound in law to state which evidence was admitted and which was not. The court, however, failed to do this. The judgment makes no mention regarding whether or not the court gave credence to the findings of the forensic expert, although these were crucial for determining the date when the limitation period had started to run.

The expert witness found that all the plaintiffs suffered from impairment of daily life activities owing to PTSD, and that its consequences on their health manifested themselves in 2006, 2007 and 2008 respectively. Ignoring the expert's findings, the court established on its own that the victims must have been aware of the health consequences they suffered immediately after being released from "the reception centres". The court also stated that "the passivity of the plaintiffs [...] cannot produce any obligation for the defendant outside the limitation period".

In March 2013, the HLC appealed against this decision to the Court of Appeal in Belgrade.

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<sup>167</sup> Judgment of the First Basic Court in Belgrade 10.Pbr.46642/10 of 6 November 2012.

## Decision of the Court of Appeal

In October 2014, the Court of Appeal upheld the part of the first-instance judgment rejecting compensation for fear and infringement of personality rights. For the part concerning the compensation sought for emotional distress due to impaired daily living activities caused by PTSD, the court ordered a retrial.<sup>168</sup> The HLC lodged an appeal with the Constitutional Court regarding the part of the Court of Appeal's ruling rejecting some of the claims.

## Standards of the European Court of Human Rights

### Right to a Fair Trial

### Right of Access to a Court

As mentioned above, the European Court does not regard the right of access to a court as an absolute right and allows the states to limit it.<sup>169</sup> This rule also applies to compensation lawsuits against a state, but only insofar as the limitation does not impair the very essence of this right and pursues a legitimate aim.<sup>170</sup> While the European Court sees the legal rule on limitation periods regarding the right of access to a court to seek compensation as legitimate<sup>171</sup>, in its more recent case-law, the Court has adopted a stance that the application of the limitation rule in situations where a person does not know or could not know that he/she suffers/suffered health consequences, does infringe that person's right of access to a court.<sup>172</sup>

In the case at hand, the First Basic Court came to the conclusion that the victims had learned that they suffered from PTSD soon after their release from the camps, and therefore declared their claims time-barred, as the time

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168 Judgment of the Court of Appeal in Belgrade Gž br:3146/13 of 21 August 2014.

169 *Ashingdane v. the United Kingdom*, application No. 8225/78, judgment of 28 May 1985, para. 57.

170 *Garcia Manibardo v. Spain*, application No. 38695/97, judgment of 15 February 2000, para. 36; *Mortier v. France*, application No. 42195/98, judgment of 31 July 2001, para. 33.

171 *Howald Moor and others v. Switzerland*, applications Nos. 52067/10, 41072/11, judgment of 11 March 2014, paras. 74-79.

172 *Ibid.*

limit for lodging a claim expired three years after their release. In disregarding the fact that the disorder did not manifest itself in its definite form until much later, the Court violated the victims' right of access to a court, thus acting contrary to the standards set by the European Court.

### **Right to Adversarial Proceedings**

According to the established case-law of the European Court, the right to adversarial proceedings is an essential element of the right to a fair trial. It entails the right of both parties to the proceedings to present evidence and to comment on evidence adduced by the other party. The European Court does not restrict the right of states to lay down their own rules on the admissibility of evidence in their domestic legislations, nor does it restrict the right of domestic courts to assess the evidence before them.<sup>173</sup> Nonetheless, this does not prevent the European Court from giving consideration to the way in which evidence was taken when deciding whether the proceedings were fair.<sup>174</sup> For example, the European Court has found that there has been a violation of the right to a fair trial in situations where national courts have refused to call a witness whose evidence could have been crucial for proving the point of a party, or where the court has based its decision solely on interpretation of the law, refusing to obtain evidence that could support an applicant's allegations of unlawful treatment.<sup>175</sup>

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According to the Civil Procedure Code, when the court does not possess the necessary expertise on a matter at issue, the court must seek an expert opinion and give due consideration to that opinion. In the present case, the court neglected this obligation.<sup>176</sup> Although it granted the HLC's motion seek-

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173 See: *Schenk v. Switzerland*, application No. 10862/84, judgment of 12 July 1988, para. 46.

174 See: *Barberà, Messegué and Jabardo v. Spain*, applications Nos. 10588/83, 10590/83 and 10589/83, decision on admissibility, 11 October 1985.

175 *Tamminen v. Finland*, application No. 40847/98, judgment of 15 June 2004, paras. 39-42; *Jokšas v. Lithuania*, application No. 25330/07, judgment of 12 November 2013, para. 58.

176 See Article 259 of the Civil Procedure Code ("Official Gazette of the RS", Nos. 72/11, 49/13 – decision of the CC, 74/13 – decision of the CC and 55/14): "A court shall seek an expert opinion if determination or clarification of an issue requires an expert knowledge that the court does not possess."

ing a medical examination in order to establish a matter that was fundamental to the outcome of the case – the moment when PTSD manifested itself in its definite form in the victims – and to the calculation of the limitation period that applied to it, the court ignored the part of the expert’s findings dealing with this matter. In doing so, the court was unfair when assessing evidence adduced by a party to the proceedings and therefore violated that party’s right to adversarial proceedings.

### **Reasoned Judgment**

In order to protect the parties to the proceedings from judicial arbitrariness, courts are obligated to deliver a reasonable and reasoned judgment. This rule requires judges to conduct a proper examination of the submissions, arguments and evidence adduced by the parties.<sup>177</sup>

According to the current case-law of the European Court, national courts are not under a duty to give a detailed answer to every argument put forward, but only to those that are fundamental to the outcome of the case.<sup>178</sup> The court’s failure to give answers to these arguments impairs the fairness of the proceedings, because in the absence of these answers a judgment cannot be regarded as reasonable nor reasoned.<sup>179</sup>

In its judgment rejecting the claims by Čavčić and others, the First Basic Court failed to give reasons for not accepting the expert’s findings regarding the moment when the disorder in the plaintiffs manifested itself in its definite form. From the reasoning part of the judgment it is not clear whether the court intentionally did not give credence to the expert’s opinion or simply neglected to deal with it. Insufficient reasons given by the court regarding a matter which is decisive for the determination of the merits of a compensation claim may indicate that the court’s decision was arbitrary, and as such, amounting to a violation of the right to a fair trial.

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177 *Kraska v. Switzerland*, application No. 13942/88, judgment of 19 April 1993, para. 30.

178 *Van de Hurk v. the Netherlands*, application No. 16034/90, judgment of 19 April 1994, para. 61.

179 See: *Hiro Balani v. Spain*, application No. 18064/91, judgment of 9 December 1994.



### **1.5.2 The case of Enes Bogilović and Mušan Džebo**

Enes Bogilović and Mušan Džebo fled to Serbia on 2 August 1995 in a group of some dozen men from Žepa. Members of the VJ registered and searched them in the presence of police. The next day, they were transported in trucks to the camp in Šljivovica. There, they were made to pass through a gauntlet of about ten police officers hitting them with truncheons, after which they took them to the shacks, hitting them all the while. The torture continued during their stay in Šljivovica. At night, the men were repeatedly taken out for interrogation, during which they were hit with truncheons, tree branches and rubber hoses. On one occasion, police officers put out their cigarettes on various parts of Bogilović's body.

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Enes Bogilović was released in January 1996, and Mušan Džebo a month earlier. The torture they endured while in the camp has left serious and lasting consequences on both men's health.

#### **Course of the Proceedings**

On 23 November 2007, on behalf of Enes Bogilović and Mušan Džebo, the HLC filed a legal action with the First Municipal Court against the state of Serbia, as a party responsible for detaining the men in the camps in Šljivovica and Mitrovo Polje and the torture they were subjected to at the hands of officers of the Serbian MUP. The action sought that the court order the Serbian state institutions to pay to Bogilović and Džebo a total of RSD 2.6 million by way of compensation for the physical and emotional pain and fear they suffered as a result of the violation of their personal rights and the emotional pain caused by the resulting impairment of their activities of daily living. Along with the lawsuit, the HLC submitted to the court ICRC documents certifying that the men were detained in Šljivovica, a report by the State Commission for Missing Persons of BiH, and medical records stating Bogilović's and Džebo's respective health status.

During the first trial, the court held 10 hearings. At the hearings, the victims gave evidence about the conditions in the camp and the ill-treatment they

were subjected to by MUP officers. The court refused to hear the witnesses requested by the HLC lawyer, namely, other former camp inmates and Amor Mašović, Chairman of the BiH Commission for Missing Persons. It also rejected the HLC's motion seeking a medical examination of the victims by a forensic psychiatrist who would assess the impact of torture on the victims' health.

The court heard five witnesses of the Office of the Attorney General, namely: Vesna Kilibarda, a nurse from Užice; Radisav Ojdanić, the then head of the Immigration Department of the Užice SUP; Jovo Savić, who at the time worked at the Emergency Department of the Užice Hospital; Radomir Dogandžić, inspector in charge of border affairs and immigration at the Užice SUP; and Zoran Vučinić, epidemiologist at the Public Health Institute in Užice. These witnesses said the camp inmates had clearly been in bad health before they came to the camps, and that the conditions in Šljivovica and Mitrovo Polje were far from the best, but strongly denied all allegations of torture against the Bosniaks. They attributed the injuries sustained by the detained Bosniaks and their poor health to the conditions of war in BiH.

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### **First Trial Judgment**

The first first-instance judgment was delivered on 17 November 2010 by the First Basic Court<sup>180</sup>, which rejected all the claims by the victims as unfounded.

Giving reasons for so deciding, the court stated that it gave no credence to the testimonies of the victims, considering them untrue, especially the segments relating to the physical and mental torture in the camps. In the court's view, Šljivovica was a "reception centre for refugees, and all relevant international organizations were informed of its existence". The court further stated that it had given full credence to the testimonies of witnesses – health professionals – who had only indirect knowledge of the conditions in the camp and the way in which the detained Bosniaks were treated, and who, as they themselves said, only visited the camps in Šljivovica and Mitrovo Polje a few times. Also, the court gave credence to

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180 Judgment of the First Basic Court in Belgrade 63 P br. 46097/10 of 17 November 2010.

the testimonies of the MUP officers who participated in the setting up of the Šljivovica and Mitrovo Polje camps and guarded them.

As regards the medical records enclosed with the lawsuit, the court, on its own and without seeking expert opinion, established that the health problems suffered by the plaintiffs had nothing to do with their stay in the Šljivovica camp, and that a medical examination, if it had been performed, would have had no bearing on its decision on this matter. In so doing, the court put itself in a position to assess matters it was not competent to assess.

### **Decision of the Court of Appeal**

In February 2012, the Court of Appeal in Belgrade delivered a judgment on the appeal lodged by the HLC lawyer against the judgment of the First Basic Court<sup>181</sup>, quashing the judgment of the lower court and ordering a retrial. The Court of Appeal held that as the parties gave completely opposite accounts, and the first-instance court only heard witnesses of one of the parties, the key factual issues could not be considered to have been determined. That is why the Court of Appeal ruled to refer the case back to the first-instance court, instructing it to examine the witnesses requested by the plaintiffs and seek an expert opinion from a forensic psychiatrist.

### **Judgment in the Retrial**

In the retrial, the First Basic Court heard Ćamil Durmišević, a witness proposed by the HLC lawyer. This former camp inmate testified about the harsh conditions in the camp and the torture he, Bogilović and Džebo endured while in the camp. In June 2012, the court again ruled to reject the victims' claims<sup>182</sup>, for the same reasons as those given in the first judgment.

In June 2012, the HLC lawyer again appealed against the decision of the First Basic Court.

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181 Decision of the Court of Appeal in Belgrade GŽ-301/11 of 6 February 2012.

182 Judgment of the First Basic Court in Belgrade 63 P br. 5238/12 of 1 June 2012.

## **New Decision of the Court of Appeal**

In December 2013 the Court of Appeal in Belgrade held a hearing at which it sought forensic expert opinion. In June 2014, the Court of Appeal upheld<sup>183</sup> the part of the trial judgment rejecting Bogilović's and Džebo's compensation claims for physical pain, fear and violation of their rights belonging to the person. At the same time, the Court of Appeal reversed the judgment of the lower court rejecting compensation for emotional pain caused by the impairment of activities of daily living and awarded Bogilović and Džebo RSD 300,000 each. The HLC lodged a constitutional complaint against the part of the Court of Appeal's judgment rejecting the other claims. The representatives of the state lodged a petition for revision with the Supreme Court of Cassation, seeking a revision of the award of compensation.

## **Standards of the European Court of Human Rights**

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### **Prohibition of Torture and Right to a Remedy**

The European Court has emphasized that the use of torture is absolutely prohibited, irrespective of the behaviour or the condition of the victim or any other circumstances.<sup>184</sup> If this prohibition is violated, the states have the obligation to conduct an effective investigation and provide the victims with an effective remedy under domestic legislation.<sup>185</sup> The remedy also entails compensation for victims.<sup>186</sup>

In the present case, the state of Serbia failed in its obligation to investigate allegations of ill-treatment of the Bosniaks who fled to Serbia following the

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183 Judgment of the Court of Appeal in Belgrade Gž.br. 7271/12 of 13 June 2014.

184 See: *Ramirez Sanchez v. France*, application No. 59450/00, judgment of 4 July 2006, para. 116; *Labita v. Italy*, application No. 26772/95, judgment of 6 April 2000, para. 119.

185 See: *İlhan v. Turkey*, application No. 22277/93, judgment of 27 June 2000, para. 92.

186 *Aksoy v. Turkey*, application No. 21987/93, judgment of 18 December 1998, para. 98.

fall of Srebrenica.<sup>187</sup> Additionally, the courts in Serbia, when dealing with the cases involving torture used by members of the armed forces, apply the rules on limitation that prevent victims from asserting their rights through civil proceedings. Although the damage they sustained was caused by a criminal offence, in which cases the law prescribes longer limitation periods for filing a compensation claim, the courts adhere to the opinion that longer limitation periods apply only to direct perpetrators and not to the state or the state bodies to which the perpetrators belonged. Such practice is contrary to the standards of the European Court, according to which the state is under the duty to provide legal remedies to victims of torture whereby they may assert their right to compensation.

## 2. Administrative Reparations

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The proceedings for the realization of the rights provided for by the Law on the Rights of Civilian Invalids of War are instituted before municipal authorities responsible for veteran affairs and social protection as first-instance administrative bodies. The body competent to decide these issues in the second instance is the Ministry of Labour, Employment, Veterans Affairs and Social Security (hereinafter: the Ministry), except in the Autonomous Province (AP) of Vojvodina, where the second-instance body competent to decide these matters is the Secretariat for Health, Social Policy and Demographics of the AP of Vojvodina. Actions for the annulment of second-instance decisions can be filed with the Administrative Court.

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187 On 6 September 2011, the HLC filed a criminal complaint with the Office of the War Crimes Prosecutor (OWCP) against 52 members of the Serbian MUP and the Yugoslav Army (VJ) for a war crime against Bosniak prisoners of war committed in 1995 and 1996. The complaint was accompanied, among other things, by the statements of more than 70 former camp inmates – survivors of torture and inhumane treatment – whose appearance as witnesses the HLC requested. On 8 March 2013, the OWCP replied to the HLC stating as follows: “The OWCP finds that there are no grounds for criminal prosecution of the alleged perpetrators, because from the complaint itself, the subsequently gathered information, and other actions that have been taken, it follows that their actions contain no elements of the criminal offence of a war crime against prisoners of war, or any other criminal offence that falls within the competence of the OWCP”.

Since November 2011, the HLC has applied on behalf of 15 individuals for benefits under the Law on the Rights of Civilian Invalids of War. All but two applications were rejected. At the time of writing, six applications have been pending before the Constitutional Court of Serbia. In four cases, the HLC's claims for a judicial review of the second-instance decisions rejecting the applications have been pending before the Administrative Court. In two cases, the HLC is preparing applications to the European Court of Human Rights.

The two applications that were accepted concern the families of Serbian victims who died at the hands of members of the KLA and the Nato Alliance.

## **2.1 The case of Sjeverin and the Abduction of Sabahudin Čatović**

On the evening before 16 residents of Sjeverin and nearby villages<sup>188</sup>, were abducted, Sabahudin Čatović (the brother of Ramahudin Čatović, one of the 16 individuals abducted in Mioče) had been abducted by sofar unidentified perpetrators outside his house in Sjeverin. Sabahudin is listed by the ICRC as still missing in connection with the armed conflict in BiH.<sup>189</sup> In the first first-instance proceedings against those responsible for the abduction of Sjeverin residents, an indictment issued by the Office of the District Prosecutor in Belgrade<sup>190</sup> charged members of the "Avengers" unit with this kidnapping too, but in the retrial the count concerning the abduction of Sabahudin Čatović was severed from the indictment. However, no separate criminal proceedings have been conducted by the OWCP regarding Sabahudin's abduction.<sup>191</sup>

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### **Non-recognition of Civilian Victim of War Status**

Between July 2012 and March 2013, the HLC submitted five applications for recognition of civilian victim of war status to the Priboj Municipal Administra-

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188 See p. 38.

189 Sabahudin Čatović is listed by the ICRC under BAZ-108830-02.

190 KT-94/02 of 15 February 2002.

191 The HLC was informed of this in a letter from the Office of the Higher Public Prosecutor dated 23 May 2012.

tion, on behalf of seven family members of the victims from Sjeverin, including the parents of Sabahudin and Ramahudin Čatović. All five applications were rejected.<sup>192</sup>

In its decisions rejecting the applications, the Priboj Municipal Administration stated that the abduction of the Bosniaks was not perpetrated by “enemy forces” and that it took place on the territory of another country, for which reason, the Law on the Rights of Civilian Invalids of War cannot apply to these victims.

As regards the missing Sabahudin Čatović, the municipal administration stated that apart from copies of certificates issued by the BiH Institute for Missing Persons<sup>193</sup> and the ICRC list of missing persons on the territory of BiH, there was no other evidence of his abduction, and that under the Law on the Rights of Civilian Invalids of War only “deceased” individuals can be considered civilian victims of war, which can be proved “only by written evidence made at the time when the individual died”.

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After hearing appeals against the above decisions of the municipal administration, the Ministry upheld the opinion of the municipal authorities that the closest family members of the killed and abducted residents of Sjeverin did not meet the requirements for acquiring the status of families of civilian victims of war. The Ministry rejected the appeals, explaining that the Law applies only to cases occurring on the territory of the Republic of Serbia.

As the HLC in its appeal alleged that the victims from Sjeverin were discriminated against, and illustrated it with concrete examples where competent bodies awarded the status of civilian victim of war in cases where the injury

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192 Decisions: 04 No. 580-3 of 8 October 2012; 04 No. 580-4 of 9 October 2012; 04 No. 580-5 of 10 October 2012; 04 No. 580-6 of 10 October 2012; 04 No. 580-2 of 22 April 2013.

193 Sabahudin is listed under 01-40-CEN-37/09 of 20 March 2009.

occurred outside the territory of Serbia<sup>194</sup>, the Ministry took the opportunity to inform the HLC that following the administrative review that was carried out, all decisions awarding the status of civilian victim of war in cases where the injury occurred outside the territory of the Republic of Serbia were annulled.<sup>195</sup>

The HLC filed a claim for an administrative review of the decision of the Ministry with the Administrative Court and appeals to the Constitutional Court against the Administrative Court's decisions rejecting the HLC's claim for administrative review.<sup>196</sup>

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194 See: Decision of the Department of Veteran and Disability Affairs of the Rakovica municipality (No: 585-4/98-III) awarding war-disabled civilian status to N.K., who at the time of disappearance was a Croatian citizen and lived in Sisak (Croatia), on the basis of the fact that he sustained serious injuries in the Kerestinac prison in Croatia; Decision of the Department of Veteran and Disability Affairs of the Belgrade municipality of New Belgrade (No: II-585-13/05 of 8 July 2005) awarding war-disabled civilian status to D.N., who at the time of the occurrence of the harm was a citizen of BiH, and sustained injuries while she was incarcerated in the Čapljinica camp; Decision of the Department of Veteran and Disability Affairs of the Obrenovac municipality (I-06 No. 585-49 of 9 September 1997) recognizing the status of war-disabled civilian to A.T., refugee from BiH, who sustained an injury on 28 June 1995 in Doboj in an attack by Muslim forces; Decision of the Sector for Economy, Finance and Social Affairs of the Department of Veteran and Disability Affairs of the Rakovica municipality (No: 585-72/97-III of 22 December 1997) awarding war-disabled civilian status to J.T., who was injured by a member of the Croatian armed forces on 31 July 1995 in Knin. And according to information obtained from the Novi Sad City Administration for Social and Child Protection (letter No.: XIII-02 585-Službeno/2011 dated 18 July 2011), three individuals in the Novi Sad municipality enjoy the status of war-disabled civilian, which they acquired on the basis of injuries sustained in the 1991-1995 armed conflicts in the Republic of Croatia.

195 The HLC wrote a letter to the then Serbian Prime Minister Ivica Dačić, requesting that he declare null and void the decisions of the Ministry whereby some civilian victims of war were stripped of their rights. The letter is available at <http://www.hlc-rdc.org/?p=23628> (accessed 31 December 2015).

196 See: Decision of the Administrative Court, Kragujevac Department I-20 U. No. 8393/13 of 17 October 2014; Decision of the Administrative Court, Kragujevac Department I-20 U 9142/13 of 17 October 2014; Decision of the Administrative Court, Kragujevac Department I-1 U 8394/13 of 9 July 2015.



## 2.2 Torture of Bosniaks in Sandžak<sup>197</sup>

### Non-Recognition of Civilian Victim of War Status

Between July and November 2012, the HLC initiated five proceedings on behalf of five victims of police torture in Sandžak. In 2013, the competent bodies (the Department of General Administration and Social Affairs of the Tutin Municipality and the Department of Social Affairs of the Novi Pazar Municipal Administration) denied the status of civilian invalid of war to Munir Šabotić and Fehrat Suljić, stating that they did not qualify to enjoy the rights provided for in the Law as they did not meet the eligibility requirements set out in the Law.

Rejecting the application by Fehrat Suljić, the competent body did not specify any requirement which Suljić, in their view, failed to meet. The explanation they offered read that Suljić could not be awarded the status of war-disabled civilian because he had claimed compensation from the Republic of Serbia concerning the same event, although this requirement is not set out in the Law.<sup>198</sup>

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The Novi Pazar City Administration of rejected the claim by Šabotić because “according to the Law, an individual can acquire the status of civilian invalid of war only if the harm he sustained occurred in the course of war operations, not in peacetime”, and Šabotić had suffered harm at the hands of members of the MUP, who cannot be considered an enemy and who “did not engage in hostile sabotage activities or terrorism”.<sup>199</sup>

The Ministry of Labour, Employment and Social Policy, as the body competent to decide in the second instance, upheld the decision of the municipal bodies.

In August 2013, the HLC, on behalf of Fehrat Suljić, filed with the Administrative Court an action for an annulment of the Ministry’s decision. In October

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<sup>197</sup> See p. 64 for factual background.

<sup>198</sup> Decision of the Department of General Administration and Social Affairs of the Tutin municipality No: 585-3/2013 of 7 May 2013.

<sup>199</sup> Decision of the Department of Social Affairs of the Municipal Administration for Own and Delegated Responsibilities of the City of Novi Pazar No. 585-12/13 of 26 April 2013.

2015, the Administrative Court rejected the action<sup>200</sup>, upholding the previous decisions, providing the same explanation – that members of the MUP cannot be considered an enemy within the meaning of Article 2 of the Law. After receiving this decision, the HLC lodged a constitutional complaint on behalf of Suljić, on grounds of discrimination and violation of his rights safeguarded by the Constitution.

### **2.3 The case of Antun Silađev**

Many ethnic Croats living in Vojvodina were subjected to serious violations of their human rights during the armed conflict in Croatia.<sup>201</sup> Antun Silađev, an ethnic Croat from Vojvodina, at the time worked as a security guard in a military facility near the Bogojevac Bridge in the immediate vicinity of the Serbia-Croatia border. In late September 1991, unknown JNA soldiers entered the facility, called Silađev by his name and told him to come out. As soon as he got out, one of the soldiers shot him in the hip with his automatic rifle. When Silađev fell to the ground, the soldiers started to kick him, uttering curses and ethnic slurs. After a while, they transported him in an army vehicle to an army hangar. There, the beating continued. After being kicked in the head, Silađev fainted. When he regained consciousness, he found himself lying on a military field bed surrounded by some soldiers he had not seen earlier. Soon afterwards, the soldiers took him to the hospital in Sombor. He stayed in the hospital for 29 days, of which 12 were in intensive care.

This incident was reported to the MUP and the Secretariat for National Defence. Though a letter written by the Inter-Municipal Secretariat for Internal Affairs reads that the assailants were JNA soldiers, there has been no criminal investigation into this incident.

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200 Decision of the Administrative Court, Kragujevac Department I-3 U 13518/13 of 8 October 2015.

201 Report of the UN Special Rapporteur for Human Rights No. E/CN.4/1992/S-11/9 of 28 August 1992, paras. 122-123; "Exchange of Population – Vojvodina's Croats exchanged for Serbs from Croatia", *In Spotlight* No. 8, Humanitarian Law Center, Belgrade, December 1993.

The injuries sustained by Silađev were so severe that they have left serious and permanent effects on his health.

### **Non-Recognition of Civilian Victim of War Status**

In March 2012, the HLC filed an application for recognition of war-disabled civilian status on behalf of Silađev. Upon considering the application, the Department of General, Social and Municipal Affairs of the Apatin Municipal Administration issued a conclusion dismissing Silađev's application for disability benefits. Stating the reasons for rejection, the Department said that "Antun Silađev did not submit evidence that he had been injured by an enemy", because of which he did not meet the eligibility criteria set out in the Law.<sup>202</sup>

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Upon considering an appeal the HLC filed against the first-instance decision, the Secretariat for Health, Social Policy and Demographics of the AP of Vojvodina two times referred the case back to the Apatin Municipal Administration for reconsideration.<sup>203</sup> Following the procedure for the third time, the municipal body again delivered substantially the same decision – to reject Silađev's application for recognition of civilian victim of war status.<sup>204</sup> The Provincial Secretariat confirmed the decision.<sup>205</sup> In January 2013, the HLC filed an action with the Administrative Court seeking annulment of the above Provincial Secretariat's decision.

In October 2014, the Administrative Court dismissed the action, on the ground that "the event took place on the territory of the SRJ that was not affected by war or military operations", and therefore Silađev did not sustain bodily

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202 Conclusion of the General Administration, Social and Municipal Affairs Department of the Apatin Municipal Administration No: 585-1/2012-IV/03 of 12 March 2012.

203 Decision of the Secretariat for Health, Social Policy and Demographics of the AP of Vojvodina No. 129-585-17/2012-02 of 10 April 2012; Decision of the General Administration, Social and Municipal Affairs Department of the Apatin Municipal Administration No. 585-1/2012-IV/03 of 2 July 2012; Decision of Secretariat for Health, Social Policy and Demographics of the AP of Vojvodina No. 129-585-59/2012-02 of 14 September 2012.

204 Decision of the General Administration, Social and Municipal Affairs Department of the Apatin Municipal Administration No. 585-1/2012-IV/03 of 4 October 2012.

205 Decision of the Secretariat for Health, Social Policy and Demographics of the AP of Vojvodina No. 129-585-79/2012-02 of 29 November 2012.

injury at the hands of an enemy and during wartime.<sup>206</sup>The HLC appealed to the Constitutional Court against this decision.

## 2.4 Standards of the European Court of Human Rights

The Republic of Serbia, as a state party to the European Convention on Human Rights and Fundamental Freedoms, in 2003 ratified Protocol 12 to the Convention.<sup>207</sup> The Protocol promotes the principle of equality before the law which explicitly prohibits any form of discrimination in national legislations. Unlike Article 14 of the Convention, which prohibits discrimination only with regard to the enjoyment of the rights which are specifically set forth in the Convention, Protocol 12 broadens this prohibition to other areas as well, including relations in the public and economic spheres and social relations, and acts of public authorities.<sup>208</sup> On the other hand, the Protocol does not define discrimination but relies on the established concept of discrimination as defined in Article 14 of the Convention, and the standards laid down in the European Court's jurisprudence.

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### Prohibition of Discrimination

In the *Belgian Linguistics* case, the European Court established a discrimination test, according to which the principle of equality of treatment is violated if

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206 Judgment of the Administrative Court, Novi Sad Department No. III-11 U. 64/13 of 22 October 2014.

207 Article 1 of the Law on the Ratification of the European Convention on Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms providing for certain rights and freedoms not included in the Convention and Protocol 1 thereto, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the abolition of the death penalty, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, and Protocol No. 13 to Convention for the Protection of Human Rights and Fundamental Freedoms on the complete abolition of the death penalty ("Official Journal of SCG – International Treaties", No. 9/03).

208 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report (ETS No. 177).

there is no objective and reasonable justification for the difference of treatment, and justification has to be assessed in relation to the aim and the effects of a concrete measure.<sup>209</sup>

The states parties to the European Convention enjoy a certain “margin of appreciation” in the implementation of the Convention, because they have different legal systems and because the national authorities in the states parties are in principle in the best position to regulate the observance of rights protected by the Convention.<sup>210</sup> In this respect, the states in principle have the freedom to define reasons for different treatment of individuals under their jurisdiction. However, a standard of the European Court requires that attention must be given to the particular circumstances of the case at hand, its subject-matter and background, in order to prevent discrimination.<sup>211</sup>

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The European Court has also made it clear that if a policy or measure has a disproportionate effect on a particular group, it may be considered discriminatory, notwithstanding the fact that it is not specifically directed at that group.<sup>212</sup>

### **Discrimination in Social Security Measures**

As regards social security measures, the European Court holds that the states parties have the freedom to decide whether or not to have in place any social security schemes, or to choose the type or amount of benefits to provide under these schemes. However, if a state decides to adopt such schemes, it

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209 *Belgian Linguistics*, applications Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, judgment of 23 July 1968, Section I.B, para. 10. See also: *Rasmussen v. Denmark*, application No. 8777/79, judgment of 28 November 1984; *Hoffman v. Austria*, application No. 12875/87, judgment of 23 June 1993; *Thlimmenos v. Greece*, application No. 34369/97, judgment of 6 April 2000, para. 44.

210 *Margin of Appreciation (marge d'appréciation)* is the doctrine that derives from the subsidiarity of the European Convention as an instrument for the protection of human rights with respect to the same instruments at the national level. The first case where the European Court discussed this doctrine was *Handyside v. the United Kingdom*. The doctrine has been further developed in numerous judgments that followed.

211 *Van Raalte v. the Netherlands*, application No. 20060/92, judgment of 21 February 1997, para. 42; *Petrovic v. Austria*, application No. 20458/92, judgment of 27 March 1998, para. 38.

212 *Hugh Jordan v. the United Kingdom*, application No. 24746/94, judgment of 4 May 2001, para. 154.

must do so in a manner which is compatible with the principle of prohibition of discrimination. In other words, these schemes cannot have such an effect as to treat a group differently than other groups without any reasonable and legitimate justification.<sup>213</sup>

In its judgment in *Stec and others v. the United Kingdom*, the European Court stated that every state has the right to regulate its own economic and social policy, because the national authorities are in principle in a better position than an international judge to appreciate what is in the public interest in the fields of social or economic policy, and that the Court will generally respect their policy choices unless they are “manifestly without reasonable foundation”.<sup>214</sup>

Where the Law on the Rights of Civilian Invalids of War is concerned, its aim is to include this category of citizens in the social security schemes, and it lays down their rights to that end.<sup>215</sup> However, the very definition of the group of individuals who are eligible to assert their rights under Articles 2 and 3 of the Law contains a whole range of restrictive criteria, which are contrary to the very aim of the Law. Namely, as noted above, most of the citizens who, being survivors of war-related abuses, should receive social security benefits, are deprived of these benefits because of the rigid requirements for awarding the status of civilian victim of war.

The breakup of the SFRY was marked by international and internal armed conflicts which unleashed inter-ethnic violence, as a result of which many people lost their lives or sustained injuries under a range of different circumstances. Those who survived violence still suffer from its consequences, which manifest themselves in many very different forms. Because the limiting conditions prescribed for acquiring the status of civilian victim of war allow the enjoy-

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213 *Stec and others v. the United Kingdom*, applications Nos. 65731/01 and 65900/01, judgment of 12 April 2006, para. 53; *Stec and others v. the United Kingdom*, applications Nos. 65731/01 and 65900/01, decision on admissibility, paras. 54-55.

214 *Stec and others v. the United Kingdom*, applications Nos. 65731/01 and 65900/01, judgment of 12 April 2006, para. 52.

215 Article 1, Law on the Rights of Civilian Invalids of War („Official Gazette of the RS”, No. 52/96). See also Article 69(4) of the Constitution of the Republik of Serbia („Official Gazette of the RS”, No. 98/06).

ment of the rights provided for by the Law only to a restricted range of individuals who were subjected to violence under narrowly defined circumstances and in whom the consequences of the violence they endured manifest themselves in narrowly defined forms, a huge number of people who do not meet these conditions are, without a legitimate and reasonable justification, excluded from the circle of potential beneficiaries.

94 The decisions in the Sjeverin case and other cases where the *de facto* victims were denied civilian victim of war status because they did not suffer harm at the hands of “enemy forces”, which is a requirement laid down in the Law, demonstrate that social policy measures are made conditional upon meeting other requirements, which is incompatible with the principle of non-discrimination. Such measures cannot be justified by any reasonable and legitimate aim, especially bearing in mind that the majority of these civilians, citizens of Serbia, suffered harm at the hands of armed formations that Serbia does not consider an enemy. The same holds true for the condition which requires that the violent act the victim was subjected to must have occurred within Serbian territory, on account of which the applications of the families of the victims from Sjeverin were turned down.

According to the standards of the European Court, the state has a duty to demonstrate that imposing such a measure does fall within the scope of the permitted margin of appreciation and that the underlying public interest outweighs the personal interest of an individual adversely affected by the measure, as well as to demonstrate that there were no other means of achieving this aim.<sup>216</sup>

### **Indirect Discrimination**

In addition to direct discrimination, which entails treating an individual or a group less favourably because of some personal characteristics of that individual or group, there is also indirect discrimination. What distinguishes the latter

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216 See: *Glor v. Switzerland*, application No. 13444/04, judgment of 30 April 2009, paras. 83-98.

is that an apparently neutral, impartial provision, criterion or practice places a person or persons at a disadvantage due to their personal characteristics.<sup>217</sup>

While it is not in doubt that the decisions in the cases of Antun Silađev, Munir Šabotić, Fehrat Suljić and Sjeverin were made in accordance with the Law, they nevertheless violated the principles of equality before the law and prohibition of indirect discrimination. All these decisions are based on Article 2 of the Law, which stipulates the conditions for acquiring the status of civilian invalid of war or family member of a civilian victim of war. This Article, as has already been discussed in this analysis, excludes a large number of victims (such as the victims of abuses committed by members of Serbian forces, the families of the disappeared, et al.) from the Law, on grounds of various characteristics. Applied in practice, this provision of the Law indirectly discriminates against all these groups, places them at a disadvantage and deprives them of their rights without a justified aim and in violation of the proportionality principle.<sup>218</sup>

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217 *D.H. and others v. the Czech Republic*, application No. 57325/00, judgment of 13 November 2007, para. 184; *Opuz v. Turkey*, application No. 33401/02, judgment of 9 June 2009, para. 183; *Zarb Adami v. Malta*, application 17209/02, judgment of 20 June 2006, para. 80.

218 In assessing whether a procedure is discriminatory, the European Court applies the standard methodology for assessing whether there were differences in treatment, whether there were objective and reasonable justifications for such treatment, and whether that treatment pursued a legitimate aim. The first cases where the European Court used this test were *Rasmussen v. Denmark* and *Ünal Tekeli v. Turkey*.



## List of Abbreviations

96

<b>AP</b>	autonomous province
<b>Basic Principles and Guidelines</b>	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
<b>BiH</b>	Bosnia and Herzegovina
<b>CCS</b>	Constitutional Court of Serbia
<b>DB</b>	Serbian State Security Service
<b>EU</b>	European Union
<b>European Convention</b>	European Convention for the Protection of Human Rights and Fundamental Freedoms
<b>European Court</b>	European Court of Human Rights
<b>FRY</b>	Federal Republic of Yugoslavia
<b>HLC</b>	Humanitarian Law Center
<b>ICTY</b>	International Criminal Tribunal for the Former Yugoslavia
<b>ICRC</b>	International Committee of the Red Cross
<b>IDC</b>	Research and Documentation Center
<b>JNA</b>	Yugoslav People's Army
<b>KLA</b>	Kosovo Liberation Army
<b>LCT</b>	Law on Contracts and Torts
<b>MUP</b>	Ministry of the Interior
<b>OWCP</b>	Office of the War Crimes Prosecutor
<b>PTSD</b>	post-traumatic stress disorder
<b>RS</b>	Republic of Serbia
<b>RSK</b>	Republika Srpska Krajina
<b>SCG</b>	Serbia and Montenegro
<b>SFRY</b>	Socialist Federal Republic of Yugoslavia
<b>SRS</b>	Socialist Republic of Serbia
<b>SUP</b>	secretariat of the interior
<b>UN</b>	United Nations
<b>UNHCR</b>	The UN Refugee Agency
<b>VJ</b>	Yugoslav Army
<b>VRS</b>	Army of Republika Srpska

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